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ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1986-1987

GENERAL SECRETARIAT
ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C. 20006

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INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

MEMBERS

Dr. Gilda Russomano, President

Dr. Marco Tulio Bruni Celli, First Vice President

Dr. Oliver Jackman, Second Vice President

Dr. Marco Gerardo Monroy Cabra

Dr. Luis Adolfo Siles

Dr. Bruce McColm

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INTRODUCTION

The Inter-American Commission on Human Rights (IACHR) has the honor to submit its report to the General Assembly, in compliance with the provisions of Article 52 f of the Charter of the Organization of American States.

This report contains five chapters and has been prepared in accordance with Resolution 331 (VIII-0/80) of the General Assembly and Article 63 of the new Regulations of the Commission.

Chapter I is a brief summary of the Commission's origin and juridical bases. This chapter also contains a brief account of the Commission's relationship with other organs of the inter-American system and regional and global institutions of a similar nature during 1986 and 1987.

Chapter II refers to the activities undertaken by the Commission during the period covered by this report. Emphasis is placed on the Commission's principal activities, as well as the subjects it dealt with and the most important measures taken during its various sessions. It includes the participation of the Commission in the sixteenth regular session of the General Assembly as well as the resolutions adopted by this organ in relation to the work of the Commission in the field of human rights.

Chapter III is entitled "Resolutions on Individual Cases." This chapter contains several resolutions adopted by the Commission regarding specific cases presented to it, which the Commission processed in accordance with the applicable legal provisions.

In Chapter IV the Commission has included special reports on developments in the human rights situation in Cuba, Chile, El Salvador, Guatemala, Haiti, Nicaragua and Suriname--all of which have been the subject of previous Commission reports--in order to examine the measures taken by the various governments to comply with the recommendations that the Commission has made in these earlier reports and to examine developments in the observance of human rights in these countries in the twelve months preceeding the approval of the present report.

Chapter V constitutes a study by the Commission on areas in which the States should institute measures to further the cause of human rights, in accordance with the American Declaration of the Rights and Duties of

Man and the American Convention on Human Rights. To this end, the Commission wishes to propose to the General Assembly the adoption of two new instruments--an Additional Protocol to the "Pact of San José", abolishing the death penalty and an Inter-American Convention to prevent and punish the forced disappearance of persons--that would strengthen the protection, in the Commission's view, of the most important of all of the human rights, the right to life.

CHAPTER I

LEGAL ORIGIN AND BASES OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

CHAPTER I

A. Legal Origin and Bases of the Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights was established by Resolution VI of the Fifth Meeting of Consultation of Ministers of Foreign Affairs (Santiago, Chile, 1959), Part II of which provided that the Commission would be composed of seven members chosen, in a personal capacity, from a list of candidates proposed by the governments... and would have the responsibility to "promote respect for such rights."

The then Council of the Organization approved the Statute of the Inter-American Commission on Human Rights on May 25, 1960. In conformity with it (Art. 2) the Commission was established as an autonomous entity of the Organization of American States, and human rights were understood to be those set forth in the American Declaration of Rights and Duties of Man (Bogota, 1948).

In further conformity with that statute, the Council elected the members of the Commission on June 29, 1960. It is worth pointing out that the Members of the Commission represent all the member countries of the OAS and act in its name.

The Commission's first regular session was held in Washington, D.C., between October 3 and 28, 1960. Since then the Commission has held seventy (70) regular sessions, some at its headquarters in the General Secretariat and some in different member states.

The Second Special Inter-American Conference (Rio de Janeiro, 1965) amended the Statute of the Commission, expanding and strengthening it so that it could effectively perform its functions, and further recognizing (Resolution XXII) that the Commission had "performed valuable service in carrying out its mandate." The 1960 Statute was amended as follows: i) It authorized it to pay "particular attention" to the observance of rights referred to in Articles I, II, III, IV, XVIII, XXV and XXVI of the American Declaration of the Rights and Duties of Man; ii) It authorized it to examine communications submitted to it and any other available information, to address the government of any member state "for information deemed pertinent..., and to make recommendations to it..., in order to bring about more effective observance of fundamental human rights," and, iii) It requested it to submit an annual report to the then

Inter-American Conference or the Meeting of Consultation of Ministers of Foreign Affairs, so that the progress achieved and the protection of human rights could be examined at the ministerial level. In exercising the functions set forth in its mandate, the Commission should first ascertain whether the domestic legal procedures and remedies of a member state have been duly pursued and exhausted.

Subsequently, during the Third Special Inter-American Conference (Buenos Aires, 1967), the Protocol of Amendments to the OAS Charter was signed. Among the amendments there were several important provisions referring to the Commission, in particular, and to human rights, in general, and establishing in this way a quasi-conventional structure. On the one hand, the Commission became one of the bodies through which the Organization accomplishes its purposes (Article 51 e. of the Charter), and on the other hand, it instructed the Commission to keep vigilance over the observance of human rights until the American Convention on Human Rights entered into force (Article 150, transitory).

On November 22, 1969, the Inter-American Specialized Conference on Human Rights, convoked by the OAS' Council (San Jose, Costa Rica) approved the American Convention on Human Rights which entered into force on July 18, 1978, when Grenada deposited the eleventh instrument of ratification.[1]

At its Eleventh Regular Session, the OAS General Assembly (La Paz, Bolivia, 1979) approved the new Statute of the Commission, and at its Tenth Regular Session (Washington, D.C., 1980) it amended Articles 6 and 8. Article 1 of the Statute defines the Commission as an organ of the OAS "created to promote the observance and defense of human rights and to serve as a consultative organ of the Organization in these matters", "human rights" to be understood as those defined in the American Convention on Human Rights, for the States Parties to the Convention, and those contained in the American Declaration of Rights and Duties of Man, for the other Member States. As in the previous Statute, the Commission was to be composed of seven members who represent all the member states of the OAS (Article 2). According to Article 3, members of the Commission shall be elected for a term of four (4) years by the General Assembly, and may be re-elected only once (Article 6).

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1. The State Parties are: Argentina, Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Uruguay and Venezuela. Among them, Argentina, Colombia, Costa Rica, Ecuador, Jamaica, Peru, Uruguay and Venezuela have recognized the Commission's jurisdiction to consider inter-State complaints in conformity with Article 45 of the American Convention. Argentina, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Peru, Uruguay and Venezuela have also recognized the jurisdiction of the Inter-American Court of Human Rights, in conformity with Article 62 of the Convention. OEA/Ser.A/16, No.36, Treaty Series.

According to the Statute, the Commission has functions and duties to discharge with respect to all the member states of the OAS (Article 18); with respect to the States Parties to the American Convention (Article 19); and with respect to those member states of the OAS that are not Parties to the American Convention (Article 20).[2]

B. Relations Between the IACHR and the Inter-American Court of Human Rights

During the period covered by this report, the Commission has continued its cooperative relations with the Inter-American Court of Human Rights, as set forth in Chapter II of this report, particularly in reference to the hearings related to the advisory and litigious jurisdictions of the Court over matters submitted by the Commission.

On September, 1986, and before the 68th. Regular Session, a working meeting was held in Atlanta, Georgia, of members of the Commission and the President of the Court, Dr. Thomas Buergenthal, in order to study ways of increasing cooperation between these two organs, and, in particular, between the Commission and the Institute of Human Rights which, headquartered in Costa Rica, operates under the authority of the Court.

On March, 1987, during the 69th. Regular Session of the Commission, the President and Vice-President of the Court, Drs. Thomas Buergenthal and Rafael Nieto Navia respectively, were received by the Commission as they addressed matters of interest to both organs on the protection of human rights within the inter-American system.

C. Relations with Other Specialized Organizations of the OAS

Between 1986 and 1987, the Commission continued its cooperative relations with those Specialized Organizations of the OAS related to the human rights field, such as the Inter-American Committee of Women (CIM), the Inter-American Children's Institute and the Inter-American Indian Institute, exchanging publications and working documents that, due to their nature, might be of common interest.

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2. For more information see "Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System" (OAS/Ser.L/V/II.65, doc. 6, July 1st. 1985).

D. Relations with Similar Organizations

During the period covered by this report, the Commission also continued its cooperative relations with the United Nation's organs in charge of the promotion and defense of human rights, such as the Human Rights Commission, the Human Rights Committee provided for in the Optional Protocol to the International Covenant on Civil and Political Rights and, in particular, with the Working Group on Forced Disappearances, in order to clarify some cases of the same nature reported to the Commission.

With respect to the organs of the Council of Europe, such as the European Commission and the European Court of Human Rights, the Commission continues to exchange publications and documents which are very useful for the promotion of human rights beyond the limits of our Continent.

CHAPTER II

ACTIVITIES OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

CHAPTER II

ACTIVITIES OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

A. Sessions

Since September, 1986, the Inter-American Commission on Human Rights held three regular sessions at the OAS General Secertariat, in Washington, D.C., headquarters of the Commission.

The respective inaugurations, which took place at the Salon Miranda in the main building of the Organization, were attended by the Secretary General of the OAS, Ambassador Joao Clemente Baena Soares; the Assistant Secretary General, Mr. Valerie T. McComie; the Ambassadors, Representatives of the member countries of the Organization; members of the OAS Missions and Delegations; and members of the press. Speeches were given by the Chairman of the Permanent Council, the Secretary General or the Assistant Secretary General, and the Chairman of the Commission at each of the inaugural sessions.

It is worth mentioning that the Secretary General reiterated the support of the General Secretariat, both technical and administrative, to the Commission's work. On the three occasions, the President of the Commission referred to the most relevant matters under consideration and thanked both the General Secretariat and the different Chairmen of the Permanent Council for their support of the Commission.

The following is a summary of the work done during the sessions held in the period covered by this report:

1. Sixty-Eighth Session

This session was held from September 16 to the 26, 1968, with the participation of all the members of the Commission.

At this session the Commission approved a Draft Protocol Additional to the American Convention on Human Rights, as it refers to economic, social and cultural rights, prepared under the mandate of the OAS General Assembly, to be submitted to its Sixteenth Regular Session (Guatemala, 1986).

The Commission also approved its Annual Report to the General Assembly, in which it analyzes the evolution of human rights in Cuba, Chile, El Salvador, Guatemala, Haiti, Nicaragua, Paraguay and Suriname.[1]

The Commission considered the special report presented by its Subcommission on its on-site visit to El Salvador, in order to examine the state of human rights and, in particular, that of the political detainees imprisoned in that country. The visit, which had taken place between the 11 and the 15 of August of 1986, resulted in a "friendly settlement" of several cases submitted to the Commission, and it also gave the government of El Salvador a new opportunity of exchanging points of view directly with the Commission on the most effective ways and means of protecting the fundamental human rights in that country. Additionally, the Commission held a number of interviews with members of the Catholic Church, and with representatives of private and public institutions on this matter.

The Commission also examined the situation of increased violence in Central America and its impact on the observance of human rights, in particular, as it refers to the rights to personal liberty and security; of movement and residence; and as regards justice and equality before the law. In this regard, the Commission considered, as a matter of utmost relevance, the need to accelerate the normalization and pacification of this region as an essential condition without which it will be impossible to expect any significant improvement in the respect of human rights stipulated in the American Convention in the American Declaration of the Rights and Duties of Man, in the Convention against Torture and the OAS Charter itself.

The Commission again considered, with concern, the state of human rights in Chile, where, as a result of a systematic policy of violating basic human rights, a climate of fear has emerged which deprives political parties of the most elementary guarantees for engaging in political activities, for exercising the rights of thought and expression, of association and assembly, and, what is even more serious, the rights to due process and protection against arbitrary arrests. The Commission observed that, in general, Chile is still under the same conditions and circumstances as those described in the last Report on the situation of Human Rights in Chile, approved in 1985.[1] With regard to Haiti, the Commission decided to accept the invitation to conduct an on-site investigation of the situation of human rights in that country, to take place in January, 1987.

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1. OEA/Ser.L/V/II.68, doc. 8, rev. 1, October 26, 1986. This report contains on page 201 through 211 the text of the Draft Additional Protocol to the American Convention on Economic, Social and Cultural Rights.

2. Sixty-Ninth Session

This session was held from March 16th to the 28th, 1987, with the participation of all the Members of the Commission.

During this session, the Commission elected a new board of officers composed of the following members: President, Dr. Gilda M.C.M. Russomano; First Vice President, Dr. Marco Tulio Bruni Celli; Second Vice President, Mr. Oliver T. Jackman. Dr. Russomano, who had been performing as First Vice President, is a distinguished jurist and professor of private and public international law at the Universidad Federal, Brazil, and the Rio Branco Institute of the Ministry of Foreign Affairs of Brazil. Prior thereto, from 1969-1974, she was Dean of the Law Faculty of Pelotas of the Universidad Federal of Rio Grande do Sul; and also affiliated with the Institute of Political Sociology of the same University. She is also a member of INLADI, which is headquartered in Madrid and a member of the Council of the Institute of Lawyers of Rio Grande do Sul. She received her law degree in 1956. Dr. Marco Tulio Bruni Celli is professor of political science at the Universidad Central de Venezuela; Ambassador, he has served as Venezuela's Representative to the United Nations organs in Geneva, and as Ambassador to the ILO; and as Vice Minister of the Interior. At the present time he is a member of the House of Representatives of his country. Mr. Oliver T. Jackman is a distinguished lawyer and diplomat from Barbados, former Ambassador to the United States, the OAS, Belgium and the EEC. Between 1968 and 1971 he was Permanent Representative to the United Nations, and from 1971 to 1975 he was High Commissioner in Canada. During his long diplomatic career, Mr. Jackman was also Ambassador at large for Latin America and Europe, including Costa Rica, Cuba, Mexico and Austria.

During this session, the Commission considered the state of human rights in Paraguay, and its to request to the Government to set a date for the on-site investigation in that country, which had been pending for a long time. The Commission also decided that the Secretariat should submit to the 70th session (scheduled for June 1987) a draft report on the state of human rights in that country which would cover the relevant and current aspects of the situation.

The Commission also studied the memorial presented by the Goverment of Honduras to the Inter-American Court of Human Rights on the litigious cases presented to the Court by the Commission in the course of its sixty-seventh session (April, 1986). As a result the Commission approved the counter-memorials on cases No. 7920, 7951 and 8097, which are before the Court, and transmitted them to the Inter-American Court, in conformity complying with the time-limit set by the President of the Court.[1]

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1. See Rules of Procedure of the Inter-American Court of Human Rights, Article 20, in "Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System", (OAS/Ser.L/V/II.65, doc. 6, p. 166).

The Commission also considered the state of human rights in Haiti, in the light of the on-site investigation carried out in January 1987. A more detailed account of the visit is contained in the relevant part of this chapter. The Commission instructed its Secretariat to prepare a report on the the state of human rights in that country, to be submitted to its seventy-first session.

As to the state of human rights in other American countries the Commission examined individual cases of alleged violations, and adopted resolutions and decisions on these cases or presumed the facts set forth in the complaints to be true, in accordance with Article 42 of its Regulations, if it was unable to reach a different conclusion based on "other evidence", either because the affected Governments had not submitted the pertinent information to discredit the charges or because the Government's response was insufficient, according to the Commission. Mention should be made of the cases involving the execution of juvenile offenders in South Carolina and in Texas, states of the United States, which, in the judgment of the Commission, violated the right to life and equality before the law provisions of the American Declaration of Rights and Duties of Man (Bogotá, 1948).[1]

Finally, it should be recalled that the Commission held a special meeting with the President and Vice President of the Court, Drs. Thomas Buergenthal and Rafael Nieto Navia, respectively, during which a wide exchange of views took place, on matters related to the relations that, according to the American Convention, link these two inter-American organs dedicated to the protection of human rights in the member states of the OAS, particularly as concerns the litigious jurisdiction of the Court.

The Commission also held meetings with private entities and claimants at their request.

3. Seventieth Session

This session was held from June 22 through July 2, 1987, with the participation of all the Members of the Commission.

The Commission approved, in a prelimnary form, the report on the state of human rights in Paraguay, and agreed to transmit it to the Government of that country to enable it to present its observations and comments within the time-limit specified in the Regulations. On the basis of such observations, the Commission would approve its final version of this document during its 71 session (September, 1987). On approving the report, the Commission stated, for the record, that it had not been permitted to carry out an on-site investigation which would have obviously been of enormous value in the preparation of the report.

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1. Case N° 9467 (James Roach and Jay Pinkerton).

The Commission considered the state of human rights in Haiti, and in view of the seriousness of the events that recently took place in that country, decided to address the Minister of Foreign Relations, Colonel Herard Abraham, reminding him of the obligations undertaken by the Government of Haiti on ratifying the American Convention on Human Rights. The Commission reiterated the importance of the democratization process begun on February 7, 1986, and the necessity of guaranteeing the independence of the Provisional Electoral Council. Upon agreement as concerns this matter, the Commission sent a cable to the Government of Haiti on July 1, 1987.

The Government of Suriname invited the Commission to visit that country, and it was agreed to accept the invitation, the date of which would be determined later on.

The Commission took notice of the Inter-American Court's decision on the preliminary objections in cases 7920, 7951 and 8097 (Honduras), transmitted to the Inter-American Court of Human Rights, which referred to forced disappearance of persons, and expressed satisfaction over the results both of the presentation of such cases to the Court and the performance of the Chairman, Dr. Russomano, the Executive Secretary, the advisors designated to that effect and the work done by the Commission's Secretariat on preparing the documentation required for the presentation of the cases. It is worth mentioning that the Court's resolutions uphold a substantial number of the points of view maintained by the Commission on the preliminary exceptions presented by Honduras.

As in other sessions, the Commission examined individual cases of alleged violations of human rights and adopted different decisions which have been duly transmitted to the interested governments and to the claimants, as provided by the Regulations. On taking one of these resolutions in particular, the Commission agreed to make itself available to the parties in order to arrive at a friendly settlement of the case, in conformity with Article 48, 1, f. of the American Convention.

As is customary, the Commission also held meetings with persons and entities which had requested to present their claims before the full Commission or to report on the state of human rights in some American countries.

B. Sixteenth Regular Session of the General Assembly

The General Assembly held its Sixteenth Regular Session in Guatemala City, Guatemala, between November 11 and 15, 1986.

The Commission, in compliance with dispositions contained in its Statute (Article 18, f) and in the Rules of Procedure of the General Assembly (Article 39), submitted to the General Assembly its Annual Report[1].

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1. OAS/Ser.L/V/II.68, Doc. 8, rev. 1, September 26, 1986.

The Report, which is divided into five chapters, contains the origin, bases and structure of the Commission; the activities it carried out; the resolutions on individual cases; the state of human rights in the Americas; and, finally, the areas in which measures should be taken to strengthen the respect of human rights and some recommendations of the Commission to that effect.

The then President of the Commission, Dr. Luis Adolfo Siles Salinas, presented the Annual Report to the General Assembly with an oral explanation of its subject matter and the overall problem of human rights in the Inter-American System.

As a result of its consideration of this topic, the General Assembly approved the following resolutions on human rights:[1]

AG/RES. 835 (XVI-O/86)

ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

(Resolution adopted at the ninth plenary session,
held on November 15, 1986)

THE GENERAL ASSEMBLY,

HAVING SEEN the annual report of the Inter-American Commission on Human Rights (AG/doc.2054/86); and

CONSIDERING:

That in the Charter of the Organization of American States, the member states have proclaimed that respect for the fundamental rights of the individual, without distinction as to race, nationality, creed or sex, is one of the principles of the Organization;

That the principal purpose of the Inter-American Commission on Human Rights is to promote the observance and defense of human rights, a noble task with which all the states of the region and the organs and bodies of the inter-American system should cooperate;

That the democratic system is essential to the establishment of a political society in which human rights can be fully realized;

That in its annual report, the Inter-American Commission on Human Rights notes as positive steps the return to representative democracy by several states as well as the measures adopted by certain countries to

1. Proceedings, Vol. I, Resolutions pp. 65-69 (OEA/Ser.P/XVI.0.2).

contribute significantly to observance of the rights set forth in the American Convention of the Rights and Duties of Man and in the American Convention on Human Rights;

That despite the foregoing, the report of the Commission shows the persistence of serious violations of basic rights and freedoms in certain countries, especially because of inadequate or negative measures being adopted by the governments of those countries with regard to reestablishing a representative democratic form of government,

RESOLVES:

1. To note with interest the annual report and the recommendations of the Inter-American Commission on Human Rights and to express appreciation and congratulations for the vitally important work it is doing to protect and promote human rights.

2. To urge the governments of the states mentioned in the annual report to adopt the corresponding recommendations of the Commission, in accordance with their constitutional precepts and domestic laws, in order to guarantee faithful observance of the rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.

3. To express its concern over the persistence of serious violations of fundamental rights and freedoms in several countries of the region.

4. To take note of the comments and observations made by the governments of the member states and of the information on the measures they have adopted and will continue to implement in order to strengthen human rights in their countries.

5. To note with satisfaction the decision of the governments of the member states that have invited the Commission to visit their respective countries, and to urge the governments of states that have not yet agreed to or set a date for such visits to do so as soon as possible.

6. To reiterate to those governments that have not yet reinstated the representative democratic form of government that it is urgently necessary to implement the pertinent institutional machinery to restore such a system in the shortest possible space of time, through free and open elections, by secret ballot, since democracy is the best possible guarantee for the full exercise of human rights and is a firm support for solidarity between the states of the hemisphere.

7. To recommend to the governments of the member states that they grant the necessary guarantees and facilities to nongovernmental human rights organizations so that they may continue to contribute to the promotion and defense of human rights, and to respect the freedom and integrity of the leaders of such organizations.

8. To recommend to the member states that are not Parties to the American Convention on Human Rights or Pact of San José, Costa Rica of 1969 that they ratify or accede to that instrument, and, to those states that do not recognize the competence of the Inter-American Commission on Human Rights to receive and examine interstate communications pursuant to Article 45 (3) of the Convention or accept the binding jurisdiction of the Inter-American Court of Human Rights in accordance with Article 62 (2) of the aforementioned Convention, that they do so.

9. To encourage the Inter-American Commission on Human Rights in its ongoing efforts in the defense of human rights in the region, for which purpose it has the most decided support of the democratic governments of the Organization.

AG/RES. 836 (XVI-O/86)

DRAFT ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS

(Resolution adopted at the ninth plenary session, held on November 15, 1986)

THE GENERAL ASSEMBLY,

HAVING SEEN:

The draft Additional Protocol to the American Convention on Human Rights prepared by the General Secretariat, as well as the observations of the governments of the member states on that Additional Protocol (AG/doc.1656/83);

The draft Additional Protocol to the American Convention on Human Rights as regards economic, social and cultural rights, presented by the Inter-American Commission on Human Rights and included in the annual report of that organ to the General Assembly at its sixteenth regular session (AG/doc.2054/86); and

The annual report of the Permanent Council to the General Assembly, which gives an account of the report of the Committee on Juridical and Political Affairs on the study of the draft Additional Protocol to the American Convention on Human Rights (CP/doc.1737/86), as well as the recommendations included in this latter report, and

CONSIDERING:

That both the draft Additional Protocol to the American Convention on Human Rights prepared by the General Secretariat and the draft Additional Protocol presented by the Inter-American Commission on Human Rights, and the recommendations included in the annual report of the

Permanent Council on this same subject are efforts made in pursuance of the provisions of resolutions AG/RES. 619 (XII-O/82), 778 (XV-O/85) and 781 (XV-O/85), respectively,

RESOLVES:

1. To take note of the draft Additional Protocol to the American Convention on Human Rights submitted by the Inter-American Commission on Human Rights and to thank that body for the major effort accomplished.

2. To transmit to the governments of the States Parties to the American Convention on Human Rights the draft Additional Protocol presented by the Inter-American Commission on Human Rights, in order that they may make observations and comments on it prior to March 31, 1987 and forward them to the Permanent Council so that, in light of those observations and comments and any other information it considers appropriate, it may submit proposals on the subject to the seventeenth regular session of the General Assembly.

AG/RES. 837 (XVI-O/86)

HUMAN RIGHTS AND DEMOCRACY

(Resolution adopted at the ninth plenary session, held on November 15, 1986)

WHEREAS:

The member states of this Organization, in the preamble to the Charter of the Organization of American States, stated "that the true significance of American solidarity and good neighborliness can only mean the consolidation on this Continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man";

The Inter-American Commission of Human Rights, in its annual report for the period 1985-86 presented to this regular session of the General Assembly for consideration, recommended "that it reaffirm the urgent need for the governments that have not yet reestablished representative democracy as their system of government to put in place the relevant institutional mechanisms for restoring that system in as short a period of time as possible by means of free, secret and informed elections, since democracy is the best guarantee for the observance of human rights and the basis of solidarity among the states of the hemisphere;" and

For the first time in many decades, many member states held free elections, with the result that democratic, representative and pluralist systems of government have been established, and it is the aim of the

Organization of American States to promote and consolidate representative democracy while respecting the principle of non-intervention.

THE GENERAL ASSEMBLY OF THE ORGANIZATION OF AMERICAN STATES

RESOLVES:

1. To reaffirm the inalienable right of all the peoples of the Americas freely to determine their political, economic and social system without outside interference, through a genuine democratic process and within a framework of social justice in which all sectors of the population will enjoy the guarantees necessary to participate freely and effectively through the exercise of universal suffrage.

2. To urge the governments of the Americas whose societies have problems that call for reconciliation and national unity to undertake or continue a genuine dialogue, pursuant to their respective legislations, with all political and social sectors until they reach a political solution that will put an end to conflicts and contribute decisevely to improving the human rights situation and to strenghtening the representative and pluralist democratic system.

C. Observations

During the year covered by this report, the Commission, with the consent of the respective governments, undertook on-site investigations directly related to the defense or promotion of human rights in Haiti, El Salvador and Suriname. The following are summaries corresponding to each of them.

1. Visit to the Republic of Haiti

a. Background

Haiti ratified the American Convention on Human Rights on September, 1977. On January, 1978, the Government invited the Commission to make an on-site investigation of the state of human rights. As a result of that visit, the Commission approved the "Report on the State of Human Rights in Haiti", which was transmitted to the Government on July 2, 1979, and also presented to the Eleventh Regular Session of the General Assembly of the OAS (Washington, D.C., 1980). The General Assembly, through Resolution AG/Res. 510 (X/80), adopted on November 27, 1980, recommended that the governments of the member states mentioned in this Resolution, among them Haiti, to take the necessary measures to improve their observance of human rights in their countries.

One day later, on November 28, 1980, about 100 prominent persons were subjected to arbitrary arrest, and 30 of them to summary exile, in an attempt to erradicate political opposition in Haiti.

On March, 1985, the Government of Haiti again invited the Commission to visit its country. At its 65th session, the Commission accepted the invitation, and the then Chairman, Dr. Andrés Aguilar, formalized it by a note dated July 1 of that same year, indicating the intention of realizing the visit during the early months in 1986. In preparation thereof, a member of the Secretariat, Dr. Cristina Cerna, in charge of Haiti's affairs, visited the country in December, 1985, in order to do the advance work for the Commission's visit.

The Government of Jean Claude Duvalier, President for life, fell on February 7, 1986. Three weeks earlier, on January 14, 1986, the Government had required that the visit by the Commission be postponed.

The Junta which took charge of the government of Haiti, by note of July 29, 1986, invited the Commission to visit the country in order to evaluate the state of human rights. The Commission accepted the invitation, and decided to set the date later on.

During the 68th session (September, 1986) the Commission, in agreement with the Government of Haiti, set January, 1987, as the date for the visit. Dr. Christina Cerna made a new preliminary visit to Haiti, during which a press release was issued to report on the purpose of the visit, the names of the Members of the Commission who would participate in it, the activities scheduled, and other details on the activities the Commission would carry out in the country.

b. Activities

The visit, which took place from January 20 through 23, 1987, included all the Members of the Commission: Dr. Luis A. Siles, then President; Dr. Gilda Russomano. Vice President; Dr. Marco Tulio Bruni Celli, Second Vice President; Dr. Elsa Kelly, Dr. Marco Gerardo Monroy Cabra; Dr. Oliver T. Jackman; and Mr. Bruce McColm. Also included were Dr. Edmundo Vargas Carreño, Executive Secretary, Dr. Christina Cerna, Dr. Luis Jiménez, Mrs. Diana Decker, and Miss Gabriela Restrepo, Secretariat officials, and Mr. Max Gautier, and Ms. Rose Marie Brierre, interpreters.

As mentioned before, the purpose of the visit consisted in evaluating the state of human rights beginning after the last visit paid by the Commission, that is, since August, 1978.

First, the Commission paid a visit to the President of the National Government Council, Lieutenant General Henry Namphy; to the Minister of the Interior, Col. Williams Regala; the Minister of Foreign Affairs, Col. Herard Abraham, as well as the Minister of Justice, Mr. François St. Pleur, and other government authorities.

Second, it paid a visit to the Chairman Mr. Dupleix Jean Baptiste, and Members of the Advisory Council to the Government, at its headquarters in the Legislative Palace, and to the Chairman Mr. Emile Jonaissant and the members of the Constituent Assembly.

Third, the Commission visited the detention center of "Fort Dimanche" and the National Penitentiary, both infamous centers of detention which confined political prisoners during the dictatorships of the Duvalier dynasty. The Commission interviewed detainees, in private, in order to get acquainted with the conditions in the prisons, and to verify whether detainees were mistreated and were receiving with medical and legal assistance.

The Commission also interviewed political leaders in order to be informed on the state of the democratization process in the country. Among those leaders were reverend Silvio Claude, Chairman of the Democratic-Christian Party (PDCH); Mr. Louis Dejoie, II, President of the National Industrial Agriculture Party (PAIN); Mr. Thomas Désulmé, Chief of the National Workers' Party (PNT); Mr. Gregoire Eugene, Chairman of the Social-Christian Party (PSCH); Mr. Serge Gilles, Chairman of the National Progresist-Revolutionary Party (PANAGRA); Mr. Leslie Manigat, Secretary General of RDNP; Mr. Hubert de Ronceray, President of the Party to Mobilize for National Development (MDN), and Mr. Rene Theodore, Chairman of the Unified Haitian Communist Party (PUCH).

During its visit, the Commission heard the testimony of members of the press, both written and oral, on the state of the right to freedom of thought and expression. It is worth mentioning, in particular, the testimony offered by Mr. Jean Dominique, Director of Radio "Haiti-Inter", closed down in November, 1980, who reassumed his functions when the new post-Duvalier regime government took charge. Also worth mentioning are the interviews with the Director of Radio "Soleil", of the Catholic Church, Father Hugo Triest, who had been expelled by the Duvalier Government on July, 1985, and the Director of Radio "Lumiere", of the Haitian Baptist Church. The Commission also received testimony from representatives of the written press. The Commission met with Mr. Willem Romélus, director of the newspaper Haiti Libéree, with Mr. Lucien Montas, director of the newspapers The Nouvelliste and with Mr. Franck Magloire, director of the newspaper Le Matin.

The Commission heard additional testimony from leaders in the business and labour sectors on the democratization process and its effect on the activities carried out by entities such as the Industrial Corporations Association and the Chamber of Commerce; the Autonomous Federation of Haitian Workers (CATH-CLAT); the Committee for Unity and Democracy (KID); and the Committee for the literacy campaign, which, known as "Misyon Alfa", was organized and financed by the Catholic Church.

The Commission also visited Gonaives and Cap Haitien, the second largest city after Port-au-Prince, where it interviewed religious and social authorities and leaders, such as the Bishop of Gonaives, Monsignor Emmanuel Constant; Mr. Paul Latortue; the Commissioner of the General Procurator; Mr. Hilton Benoit; and Father Yvon Joseph, Director of the Haitian Conference of Religious, with headquarters in Cap Haitien.

The testimonies offered on specific aspects of human rights in Haiti, both by the people and entities mentioned above and others, are of confidential nature, and have been processed by the Commission in conformity with its Regulations.

c. Results of the visit: Preliminary observations

On January 23, 1987, the President of the Commission, Dr. Siles Salinas, and Members of the Commission held a meeting with the Haitian press in the Villa Creole Hotel, where the President issued a press release containing the preliminary observations of the Commission as a result of its visit to Haiti. The observations can be summarized as follows:

i. The Commission congratulated the Haitian people for its courage in ousting Duvalier, and putting an end to the tyranny, though it also lamented the persecution and suffering of those who had denounced the abuses and crimes committed by the fallen regime, to whose overthrow the Commission had contributed with its Report on the state of human rights of 1978 and its subsequent Annual Reports;

ii. The Commission stated that it had seen favorable changes in the situation of human rights, in particular as regards the right to freedom of speech, and that it was satisfied with the process initiated by the National Council of Government (CNG) to carry out elections within a schedule timetable;

iii. The Commission expressed its concern over the future of this process and the danger of its course being altered by the violations of human rights still occurring in the country, in particular as regards the rights to be protected against arbitrary detention, forced disappearance of persons, and guaranteed the right to due process and the right to humane treatment during detention or arrest. The Commission also stated that in its opinion, for the process of democratization to succeed, the regime must undergo a "deduvalierization", so that human rights could be respected, which, according to reports received by the Commission, continued to be violated repeatedly.

iv. The Commission stated that it would continue to monitor closely the human rights situation in Haiti, hoping to have count on both the cooperation of the Government and that of the representative sectors of the population in order to carry out its mandate to supervise the observance of the rights stipulated in the American Convention on Human Rights.

v. The Commission said that it had received full cooperation and support from the authorities of Haiti during its visit to the country.[1]

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1. A complete report appears in OAS/Ser.L/V/II.69, doc. 11.

2. Visit to El Salvador

In conformity with the decision adopted by the Commission in its 68th session (September, 1986), Dr. Manuel Velasco in charge of El Salvador in the Secretariat, travelled to El Salvador with the consent of its Government, from February 15-19, 1987.

Dr. Velasco, in order to fulfill his functions, held interviews with:

The Commission on Human Rights of the Government of El Salvador;
The International Organizations Desk, in the Ministry of Foreign Affairs;
The Office of the Christian Juridical Assistance;
The General Fiscal Office of the Republic;
The Military Examining Magistrates;
The Magistrates of First Instance Courts (Military Examining Magistrates);
The Department of Forensic Medicine.

Dr. Velasco also made on-site investigation visits to detention centers, the Committee for the Review of Salvadorian Laws, and other institutions dedicated to the protection of human rights, such as the Legal Assistance Office, of the Archbishopric, and the Institute of Human Rights of the V.C.A.

During the 69th session (March, 1987) Dr. Velasco made an in-depth report to the full Commission on the terms and results of his visit and the steps taken in fulfilling the instructions he had received.

3. Visit to Suriname

In conformity with the decision adopted by the Commission in its 70th session (June-July,1987) to visit Suriname, in order to investigate the situation of human rights, Dr. David Padilla, Assistant Executive Secretary of the Commission, visited Paramaribo, Suriname, to do the advanced work for the visit of the Commission, scheduled for October, 1987.

During his stay in Suriname, Dr. Padilla had several interviews with Mr. Philip Akrum, Chairman of the government's Institute of Human Rights. Several other officials and members of the Board also attended, and as a result of those meetings, a draft program of activities for the Commission was prepared. They also discussed cases of alleged violations of human rights which are before the Commission.

During the visit, Dr. Padilla, on behalf of the Commission, extended invitations to individuals and entities interested in human rights, so that they could become acquainted with the Commission during its visit to Suriname. Finally, he made the necessary logistic arrangements for the visit of the Commission next October.

D. Hearings before the Inter-American Court of Human Rights

In the period covered by this Report hearings were held before the Court. One was held pursuant to the advisory jurisdiction (Art. 64.1 of the Convention) and the other was held pursuant to the contentious jurisdiction of the Court (Arts. 61-63 and 66-69 of the Convention).

In its Annual Report to the General Assembly (1985-1986) the Commission referred to the need to strengthen the judiciary in each of the member states of the OAS to ensure the availability of legal remedies to protect human rights, such as habeas corpus, and its suspension during so-called States of Emergency. The Commission decided that, given the importance of the problem, this matter should be the subject of a request for an advisory opinion from the Inter-American Court of Human Rights.[1]

Thus, the Commission, by note dated October 10, 1986, submitted the request for an advisory opinion to the Court, as concerns the interpretation of Articles 25.1 and 7.6 of the American Convention on Human Rights. The consultation was presented in conformity with Article 64, 1. of the Convention, since the Commission one of the organs mentioned in Article 51 (Chapter X) of the Charter of the OAS.

The object of the consultation was limited to the scope and validity of the habeas corpus remedy during situations of public emergency.

In its opinion dated January 30, 1987, the Court unanimously decided that "the judicial procedures stated in Articles 25.1 and 7.6 of the American Convention on Human Rights cannot be suspended in conformity with Article 27.2 of the same Convention because they constitute judicial guarantees essential for the protection of rights and freedoms which, according to the same provision, also cannot be suspended." It is worth mentioning that the scope of the remedy of habeas corpus should be considered by the states Parties to the American Convention among those rights and guarantees which, together with the procedures of protection, are "essential for the protection of human rights whose suspension is prohibited by Article 27.2 of the Convention, and which additionally serve to preserve the legality of a democratic society."[2]

2. Litigious cases

At its 67th session (April, 1986), the Commission approved resolutions No. 22/86, 23/86 and 24/86 which refer, respectively, to cases No. 7920, 7951 and 8097, versus the Republic of Honduras, which the Commission had before it, and transmitted them to the Inter-American Court

1. See the mentioned ICHR Annual Report, p. 194.
2. Advisory Opinion OC-8/87, January 30, 1987: Habeas Corpus under suspension of guarantees.

of Human Rights, in compliance with Articles 50 and 51 of the American Convention on Human Rights and exercising the authority provided in Article 61 of the said Convention.

Once the written stage before the Court was completed (Article 28 of the Rules of Procedure of the Court), that is, having been presented the memorials pertaining to the Government of Honduras on the cases in question and the observations to those Memorials made by the Commission, hearings related to the appeals took place before the Court on June 15 and 16, 1987, with the presence of the parties involved.

On June 15, the Court held a hearing on Case 7951, which affects the forced disappearance of Mr. Francisco Fairén Garbi and Ms. Yolanda Solis, both citizens of Costa Rica. On June 16, a hearing took place on the forced disappearance of the student Angel M. Velásquez Rodríguez (Case 7920) and Professor Saul Godinez Cruz (Case 8097).

Representing the Commission at the hearings were its President, Dr. Gilda Maciel Russomano, and its Executive Secretary, Dr. Edmundo Vargas Carreño. Also attending the hearings, as advisors, were Dr. José Miguel Vivanco, Dr. Juan Mendez, Dr. Claudio Grossman and Dr. Hugo Muñoz Quezada, designated by the Commission at the request of the claimants, within the terms of Article 68, 4. of its Regulations.

On June 26, 1987, the Court read the resolutions on the admissibility of the mentioned cases (preliminary exceptions).

The following is a short summary of the three resolutions of the Court:

i) On Case 9720 (Velásquez Rodríguez), and as it refers to the previous exhaustion of domestic law (Article 46. 1. a. of the Convention) the Court deemed that "provision on previous exhaustion can, in no way, result in a suspension or postponement of international action in favor of a helpless victim[1] which will render it null," deciding (unanimously) to reject this preliminary exception on the admissibility of the case presented by the Government of Honduras and to continue to deal with the case, postponing the determination of costs until it reaches a decision on the merits of the case, at which time it will also make a statement on the problem of domestic remedies.

ii) On Case 7951 (Fairen Garbi and Solis Corrales), and referring to the effectiveness of domestic remedies and their exhaustion by the claimant before resorting to international protection, the Court (concurring with its previous decision) observed that the provision "has

1. Judgement mentioned, p. 40.

certain implications which are present in the American Convention", and continues to express that: "In fact, according to it, the States Parties assume the obligation of providing effective judicial remedies to the victims of violation of human rights (Article 25), remedies which should be substantiated in conformity with the rules of due process (Article 8.1.) all of which fall within the overall obligation of the States themselves to ensure to all persons under their jurisdiction the free and full exercise of the rights recognized by the Convention (Article 1)." The Court decided unanimously to reject the preliminary exceptions presented by the Government of Honduras, and to continue the case.[1]

iii. On case 8097 (Saul Godinez Cruz) the Court unanimously decided to reject the preliminary exceptions, avoiding prejudment on the merits, "with the exception of the non exhaustion of domestic judicial remedies" which it instructed to be included in the subject matter. The Court decided to continue the case.[2]

E. Other activities

Joint Inter-American Commission/Inter-Court Mission to Various Caribbean Member States

During the period covered by this Report a joint delegation of the Commission and the Court visited four English-speaking Member States of the Organization--Jamaica, Trinidad & Tobago, St. Vincent & The Grenadines and Barbados. The purposes of the mission were to:

1. Seek additional ratifications of the American Convention on Human Rights by those States which have yet to ratify;

2. Seek the acceptance of the jurisdiction of the Inter-American Court of Human Rights, and

3. Engage in a discussion with governmental authorities and private human rights organizations regarding the Inter-American Human Rights System.

The delegation was headed by Mr. Oliver Jackman, Second Vice-President of the Commission, who was accompanied by Judge Thomas Buergenthal, former President of the Court. The Secretariat of the Commission was represented by Mr. David J. Padilla, Assistant Executive Secretary.

In Jamaica, Messrs. Jackman and Buergenthal addressed a meeting of Supreme Court Justices from the Caribbean region. In addition, they conversed with the Attorney General of Jamaica, the Hon. Oswald Harding.

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1. Judgement, p. 40.
2. Judgement, p. 41.

In Trinidad & Tobago the delegation was welcomed by Mr. A.N.R. Robinson, Prime Minister; Mr. Basdeo Panday, Minister of External Affairs, and Mr. Selwyn Richardson, Attorney General. Excellent discussions were held with these leaders on the topics mentioned above. In addition, the delegation met with leaders of the Trinidad & Tobago Law Association and attorneys active in the field of human rights.

In St. Vincent & The Granadines the delegation met with the Right Hon. James F. Mitchell, Prime Minister, who in an important gesture of support, indicated that his Government would make the necessary arrangements to accede to the American Convention.

The delegation also met with the Solicitor General, Mr. Donald Trotman as well as the leaders of the St. Vincent Human Rights Committee, the St. Vincent Bar Association and Caricare. These groups are led by Mr. Victor Cuffy, Mr. Othneil Sylvester and Sr. Rupert John, respectively.

In Barbados the delegation was received by Prime Minister, the Rifht Hon. Erskine Sandiford; Foreign Minister and Senator, the Hon. Sir James Tudor, and Attorney General, the Hon. Maurice King.

Discussions in Barbados centered on the issue of Barbados' acceptance of the Court's jurisdiction. Assurances were given that this matter will be the subject of serious and prompt study by the Government.

Likewise while in Barbados, the delegation met with representatives of the National Bar Association, the Barbados Christian Council, Human Rights Commission and Amnesty International, Barbados. The leaders of these groups respectively are: Mr. Peter D.H. Williams, Reverend David Mitchell and Mr. Gregory Castagne.

In each of the countries visited the Governments and private organizations with which the OAS delegation met demonstrated their commitment to respect for human rights. The delegation so stated in the press conferences they gave at the conclusion of each visit.

Finally, Vice-President Jackman and Judge Buergenthal appeared as guests on the CANA radio program called Crossfire which is beamed to most of the Caribbean islands.

CHAPTER III

RESOLUTIONS

RESOLUTIONS ON INDIVIDUAL CASES

In the period covered by this report, the Commission held its 68°, 69° and 70° sessions and received a large number of specific denunciations of alleged violations of the human rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.

The Commission submits to the OAS General Assembly for consideration its comments on those cases meeting the conditions required for publica- tion under its present Statute and Regulations.

To that end, the following resolutions have been ordered published in the order of years in which they were approved by the Commission and in alphabetical order of the countries referred to.

	Countries		Number
1.	Argentina	(Case 9635)	15/87
2.	Costa Rica	(Case 9788)	16/87
3.	Costa Rica	(Case Mr. Luis Bertello Masperi)	31/87
4.	Honduras	(Case 7864)	4/87
5.	Honduras	(Case 9619)	5/87
6.	Nicaragua	(Case 7788)	2/87
7.	Panama	(Case 9726)	30/86
8.	Paraguay	(Case 9642)	14/87
9.	Peru	(Case 9425)	17/87
10.	Peru	(Case 9426)	18/87
11.	Peru	(Case 9429)	19/87
12.	Peru	(Case 9449)	20/87
13.	Peru	(Case 9466)	21/87
14.	Peru	(Case 9467)	22/87
15.	Peru	(Case 9468)	23/87
16.	United States	(Case 9647)	3/87
17.	United States	(Case 9213)	

RESOLUTION N° 15/87
CASE 9635
ARGENTINA
June 30, 1987

HAVING SEEN The background of the case, to wit:

A. In a communication of October 18, 1985, Mr. Osvaldo Antonio López, an Argentine citizen, former airplane mechanic in the armed forces, currently in the Argentine Federal Prison Unit located in Bermudez, N° 2651, PCL Buenos Aires, presented to the Inter-American Commission on Human Rights a claim alleging the Argentine Government's violation of the provisions of Articles 7 (3); 8 (1) (2 g and h) and 8 (3); 9, 24, 25 (1) and 25 (26) and 1 and 2 of the American Convention on Human Rights, in view of the the facto and de jure reasons set forth in the denunciation itself, as follows:

> The complainant, a political prisoner designated as special by the Federal Prison Service, who has been illegally and arbitrarily detained since August 1977, a situation that had the semblance of normality when the military dictatorship scourged the country, which remains unchangeable. The denial of all appeals filed since the Constitutional Government came to power and the decisions of the Supreme Court of Justice that confirm this situation (copies of which are attached) constitute new violations of human rights and amount to noncompliance with the international commitments assumed by the Argentine State.
>
> The illegal and arbitrary nature of the denial of freedom stems clearly and obviously from the case filed against him before the standing Court Martial for enlisted personnel and students of the Air Force, decided upon by the Supreme Council of the Armed Forces in November 1978 and declared unappealable by the Supreme Court of Justice on April 23, 1985.

CASE RECORD

1. The proceedings began on April 29, 1976, when explosive devices were discovered in tanks of six aircraft. These devices, although they had acted, had not exploded, and therefore the aircraft were not harmed (fs. 3/4/22/42).

Thus the Government attorney proceeded to take a statement from all personnel who had acted as Technical Duty Officer and Watch Duty Officer, and all those who had been on duty the afternoon of the previous day, and the troops who were on detail at tha place (fs. 10 and 14, 17, 28 and V. 30, V. 31, 33 and V. 80, 84 and 85, 87, 102 V. 103, 106 and V. 108 and 119 to 120, 123, 125, 131, 133, 137 V. 144, 145 to 148, 150 V. to 151, 155 V. 157 V. 160 V. and 161, 163 165 V. to 166 and 170 V. They all explained the activities they had been engaged in and none had been any suspicious movements. Among those making statements was myself, who--as seen from this initial summary--was never alone during my time on duty.

2. Attached to the summary are sketches of the site showing the location of the aircraft, the expert's report and photos.

3. The aforementioned statements show that the night before the act was discovered, one of the hangar doors have been left open, and no one had been in the Technical Duty room, from which place any irregularity could have been seen, because it had been closed for several days.

Since all the statements were contested and since the explanations offered led to discovery of the act's perpetrator, the summary proceeding in reference was dismissed. Fifteen months after the act investigated, in July 1977, López was abducted at the exit of his workplace, according to a denunciation by the individual accompanying him, and this appears in the record. Also attached is a photocopy of a preventive writ of habeas corpus before the Federal Court of Cordoba. Then, eight days after being kept hooded and abducted, the complainant succeded in fleeing his place of confinement. His relatives' homes were broken into by the security forces who, in every instance, tried to pinpoint his location. Those who "because of what could happen to them in the near future" asked why he was sought, were told that it was for desertion.

Attached is a proceeding for desertion, with the explanation that López appeared voluntarily at the Córdoba Air Force Base to make a summary statement for assault with explosive devices. Then there was an unsworn statement in Moron, which was not the seat of the Court, nor was it the place of work, but rather Unit VIII. In that statement, López said he had placed the explosives under investigation, had met with individuals belonging to the People's Revolutionary Party, and had delivered cartridges to members of the organization. He had done all this due to his love for a woman Gladis Aoad, who had told him she belonged to the PRP and had introduced

him to a former fiancé, Osvaldo Oscar Rosonn. When López was confronted with Aoad, the latter denied having engaged in political conversations with the deponent, although she did say she had been his fiancé and had introduced him to the person in reference.

It should be said that the aforementioned Rosonn has been on a long list of detained and missing persons in our country for more than a year. This is not based on any record but rather on the report of CANADEP, Appendices, list of missing persons, p. 399. The prosecutor called for a deposition by all of Gladis Aoad's girl friends, her mother, and her work supervisor; and all these said they were unaware that she might be interested in politics. There are also depositions by the persons who lived with López, work-mates, persons with whom he went bowling in the area, and the bowling alley's owner, and all of them concur in stating their unawareness as to whether he might be engaged in political activities.

The statement by López is not corroborated by any other evidence and it is not consistent with the circumstances of the case, since there is no agreement as to the events investigated. When the witnesses who had worked with López the day of the event were called, they maintained their statement made a year before. In view of the contradictions existing between the confession, the statements of the witnesses, the date of the act, the impossibility that this could have been done in the manner confessed, a new statement was taken from him while he was held in strict preventive detention.

His new statements describing how he might have placed the explosive devices were also inconsistent.

Shown the sketch that had been prepared in due course, he said that "he did not agree with it," and he drew another that lent truth to the explanations given (pp. 345 to 347 vta). The drawing that had been made the day of the event shows clearly that López could not have placed the explosive devices without having been seen, due to the distance between the place in which he performed his duties and the place in which three of the affected aircraft were located, since he would have had to go to another hangar and all afternoon he had been with other persons up to the time he left the unit.

Based on this evidence, he was convicted of the following crimes: attested illicit association, theft, attack on aircraft, and desertion from the armed forces.

This conviction was upheld by the Supreme Council of the Armed Forces.

When so notified, the complainant stated expressly for the record that he wished to appeal to the Supreme Court of Justice. His defense counsel, an untrained member of the military, whom he had been unable to choose freely, did not file an appeal to that Court.

Clarification: The page numbers of the record showing the facts are not indicated and the photocopies of such record are not attached because the Supreme Council of the Armed Forces again denied my current defense counsel access to that record by providing false information on its whereabouts.

This situation was pointed out in due course to the President of the country in his capacity as Commander in Chief of the Armed Forces, Dr. Raul Alfonsin.

APPEALS FILED:

After the Constitutional Government assumed office, and now having free access to trained counsel, the following appeals were filed:

a. Remedy of appeal: The Military Code of Justice in force in the country (Law 23.049) was amended by an act of Congress in February 1984. This amendment provides, in accordance with the Argentine Constitution, that there can be no civil jurisdictions by such courts only to try violations. Since this affected the existence of the military establishment only the military codes make provisions by establishing appeal of the judgments handed down by the Supreme Court of the Armed Forces (Art. 445 bis C.J.M.), with special reference to the fact that civilians convicted by military courts file such an appeal within 60 days from the effective date of that law (Art. 13, law 23.049).

The Supreme Council of the Armed Forces denied submission of the record. When filed, the Federal Court of La Plata did not approve the appeal, as it understood that such an appeal is valid only in the case of persons having future military status. After an exceptional writ alleging arbitrary action was filed before the Supreme Court, the latter did not consider the case, alleging that it was not sufficiently well-founded. This decision was announced on April 24, 1985.

The pertinent parts of the appeal in reference are attached (photocopy).

b. Habeas Corpus: Since appeal based on the invalidity of all preceedings has not been legislated in Argentina, a writ of habeas corpus was filed.

The institution of habeas corpus has already been legally admitted as a valid action against judgements the courts martial had handed down against civilians. This jurisprudence was adopted by our legislators who, in order quickly to restore the rule of law in our country, approved law 23042, which so established it.

This appeal was rejected by the Supreme Court, after a year of processing, which alleged that it was submitted in untimely fashion, that it was based on inadequate evidence, and that at the appropriate time, in early 1979, it had not been possible to file a special appeal based on illegal action.

COMPLIANCE WITH THE REQUIREMENTS OF THE CONVENTION TO ADMIT THIS COMPLAINT:

1. The notification documents indicate that the Supreme Court's resolutions were announced on April 24, 1985. Moreover, by arbitrarily denying freedom, each moment I continue to be held means continued violation of Art. 7.3 of the American Convention on Human Rights.

b. Exhaustion of domestic remedies: Upon consideration by the Supreme Court that the judgement convicting Antonio López has the authority of res judicata and that objection thereto was filed in an untimely manner, it can be stated that domestic remedies have been exhausted, because this judgement upholds the decision on the domestic level.

An appeal for review has not been filed, since it would be based on the assumption of a valid proceeding, which was lacking in the case we denounce.

c. Reservation by the Argentine Government: The arbitrary denial of freedom the complainant suffers and the Argentine court's decision upholding an irregular proceeding constitute a violation of human rights after ratification of the American Convention on Human Rights, for which reason the irregularities of that proceeding and their consequences are not protected by the reservations made by Argentina.

HUMAN RIGHTS VIOLATIONS DENOUNCED:

Art. 7, paragraph 3. NO ONE SHALL BE SUBJECT TO ARBITRARY ARREST OR IMPRISONMENT.

Since denial of his freedom stems from an irregular proceeding by unqualified judges who acted with prejudice and were not indepedent, where the defendant did not freely choose his defense counsel (the latter was untrained, and since they also failed to fulfill their obligations, the proceeding is absolutely void. Moreover, the judgement is arbitrary because it did not analyze the evidence, the facts were wrongly depicted, and he was subjected to a law that had been repealed. Further, he was convicted of crimes whose existence was also unproved. All of this renders the arrest and imprisonment arbitrary. The verdict of the Argentine court, citing problems of form, avoids analysis of the matters of substance and is a violation of this standard through the denial of justice, because the procedural forms have been established to guarantee rights.

Article 8. RIGHT TO A FAIR TRIAL:

1. EVERY PERSON HAS THE RIGHT TO BE HEARD, WITH DUE PROCESS GUARANTEES...BY A COMPETENT, INDEPENDENT, AND IMPARTIAL JUDGE OR TRIBUNAL...

Osvaldo López was not tried by a competent court, because the military authority can only try military violations. The contrary would be to establish courts as a matter of privilege (which is prohibited by Arts. 16 and 95 of the National Constitution prohibiting the Executive Branch from assuming judicial duties). Moreover, at the time of the deponent's arrest and trial, the Armed Forces were operating jointly throughout the country, with their commading officers having assumed all public authority, systematically violating human rights.

It should be pointed out that so-called area of Triple M, or Subarea 16, which corresponded to the districts of Moreno, Merlo and Moron, were under the operational control of the Air Force, according to newspaper articles and testimony and statements on the trial to the Military Juntas. This is the area in which López was abducted and in which this case was later pursued. The Palomar Air Brigade, the Court's seat, and the III Air Brigade, based in Moron, where the complainant made a statement and later, for security reasons, was imprisoned, are places that have been denounced by various individuals as clandestine detention centers.

These statements are supported by the unsworn statement that we have invalidated in 8.2.g) as in violation of Art. 18 of the Constitution and the Convention on Human Rights. It should be indicated that other events mentioned are not in keeping with the truth of the matter.

Article 9. NO ONE SHALL BE CONVICTED FOR ANY ACT OR OMISSION THAT DID NOT CONSTITUTE A CRIMINAL OFFENSE, UNDER THE APPLICABLE LAW, AT THE TIME IT WAS COMMITTED. NOR SHALL A HEAVIER PENALTY BE IMPOSED THAN THE ONE THAT WAS APPLICABLE AT THE TIME THE CRIMINAL OFFENSE WAS COMMITTED. IF SUBSEQUENT TO THE COMMISSION OF THE OFFENSE THE LAW PROVIDES FOR THE IMPOSITION OF A LIGHTER PUNISHMENT, THE GUILTY PERSONAL SHALL BENEFIT THEREFROM.

This right was violated because, upon conviction, he was subjected to a law that had been repealed (law 21.272). In the event of there having been a valid trial, and the perpetration of the crime having been proved, the punishment established for such act (damage to aircraft) in Article 794 of the Military Code of Justice should have been applied: a shorter prison term, a month to two years, through application of the most favorable law.

It remains to be pointed out that, after his conviction, there were also changes in the prison terms under Art. 210 bis, attested illegal association, and Art. 222, disclosure of military secrets, without the penalty having been revised.

Article 24. ALL PERSONS ARE EQUAL BEFORE THE LAW. CONSEQUENTLY, THEY ARE ENTITLED, WITHOUT DISCRIMINATION, TO EQUAL PROTECTION OF THE LAW.

The Argentine court violated this right when it based its denial of justice on his status as a member of the armed forces at the time he was tried, even denying the possibility of filing a writ of habeas corpus.

Article 25. JUDICIAL PROTECTION: EVERYONE HAS THE RIGHT TO A SIMPLE AND PROMPT RECOURSE, OR ANY OTHER EFFECTIVE RECOURSE, BEFORE A COMPETENT COURT, OR TRIBUNAL FOR PROTECTION AGAINST ACTS THAT VIOLATE ONE'S FUNDAMENTAL RIGHTS RECOGNIZED BY THE CONSTITUTION OR LAWS OF THE STATE CONCERNED OR BY THIS CONVENTION, EVEN THOUGH SUCH VIOLATION MAY HAVE BEEN COMMITTED BY PERSONS ACTING IN THE COURSE OF THEIR OFFICIAL DUTIES.

The outcome of the appeals filed and the time taken to decide them is evidence of such violation.

Article 25.2.B. TO DEVELOP THE POSSIBILITIES OF JUDICIAL REMEDY

The complaint filed also reports the Argentine State's failure to comply with the rights mentioned in Art. 1 and 2 of the aforementioned Convention.

PETITION

DUE TO THE FOREGOING. I REQUEST:

1. That this denunciation be admitted and that its admissibility be declared.

2. That the presentation to the Argentine State be examined.

3. If the violations denounced persist, that this denunciation be brought before the Inter-American Court of Human Rights in due course.

B. In a note dated October 28, 1985, the Commission asked the Government of the Argentine Republic for the corresponding information, enclosing the pertinent parts of the claim. A copy of this note was transmitted to the Ambassador, Permanent Representative of the Argentine Republic to the OAS, on that same date.

C. The complainant was informed of the steps taken regarding his denunciation in a letter dated October 28, 1985.

D. In a note dated January 24, 1986, the Government of the Argentine Republic requested, in keeping with Article 34 of the Commission's Regulations, an extension of the deadline for sending the information requested.

E. In a note dated January 27, 1986, the Commission granted the Argentine Government 60 days for submission of the information requested in the aforementioned note dated October 28.

F. In a note dated March 26 (SG No. 48 (7-2-17/86), the Argentine Government answered the Commission's request. This note was supplemented by several appendices under the corresponding headings it cites. The answer reads as follows:

> The Government of the Argentine Republic has the honor to address the Executive Secretary of the Inter-American Commission on Human Rights and, with regard to the communication dated October 28, 1985 on case No. 9635 dealing with the status of the Argentine citizen, Mr. Osvaldo Antonio López, makes available to you the following reply, without prejudice to any other explanations the Commission may deem advisable to request:
>
> I. On the date the crimes Mr. Osvaldo Antonio López was accused of ocurred (April 22, 1976), he was a Corporal in the Argentine Air Force.

Taking heed of the facts and the provisions of paragraph 2, Article 108 of the Military Code of Justice in effect at that time, he was tried by the Military Tribunals in accordance with that jurisdiction's judicial procedure.

In a proceeding carried out through file "C" No. 248.558 (F.A.A.), he was tried, found guilty and finally sentenced on November 23, 1978 by the Supreme Council of the Armed Forces to 24 (twenty-four) years in prison, plus absolute disqualification for the same period, and demotion, as he was considered the perpetrator of the crimes of "damage to items" assigned to the service of the Armed Forces" (armed attack against aircraft), "illicit association," "disclosure of ntional defense secrets," and "theft," with the aggravating circumstances of falling on munitions, while on duty and to the detriment of the public treasury and with extenuating circumstances for all of the acts if their perpetrator had come forward spontaneously before the authorities became aware of the circumstances, and of the crime of "simple desertion" (Arts. 2 and 5 of law 21.272; 871 paragraphs 1 and 2 and 10, 536, 539, 515 paragraph 8 and 716 paragraph 1, 3; 718 of the Military Code of Justice, 210 bis, 210 quater, 222, 162, 12, 24, 40 and 41 of the Criminal Code).

Copies are included of all these provisions, which were in effect at the time of the sentence.

This judgement was confirmation, with relation to the punishment with few legal differences, of the decision of the first instance handed down on September 21, 1978 by the Standing Court Martial for enlisted personnel, troops and students of the Air Force.

II. After the Constitutional Government headed by Dr. Raúl Ricardo Alfonsín assumed authority, the complainant files three new appeals, as follows:

a. Appeal to the Supreme Council of the Armed Forces. This appeal was denied through a resolution of April 12, 1984. On the basis of Article 13 of law 23.049, the complainant addressed a complaint to the Federal Court of La Plata, which also rejected it on August 23, 1984. Finally, the Supreme Court, which is the final instance in our legal system, declared the special appeal filed to be inadmissible in view of the resolution of April 23, 1985, endorsing the opinion of the Attorney General, who argued that this appeal was not based on Article 15 of Law 48, which provides the legal requirements for appealing to the Supreme Court by way of special appeal.

b. Writ of habeas corpus, based on Article 1 of law 23.042, filed with the Fourth National Federal Court in Criminal and Correctional Matters.

This appeal was rejected in the first instance and also by the National Federal Court of Appeals in Criminal and Correctional Matters of the Federal Capital through a resolution of May 31, 1984.

The special appeal was also rejected by the Supreme Court on April 23, 1985. There were basically two reasons for the Court's decision: First, the accused status as a member of the armed forces on the date of the events is not covered by the provisions of Article 1 of Law 23.042, which deals exclusively with civilians. Secondly, the Court felt that the appeal based on the possible unconstitutionality of the military jurisdiction and the arbitrary nature of the Supreme Council's judgement was not filed at the proper time as required by such special appeal.

c. Finally, on August 21, 1985 and after his sentence had been reduced through Law 23.070, the complainant filed a complaint with the Supreme Council of the Armed Forces based on that law, asking that his prior time in prison be calculated in a more favorable manner, thus to obtain a further reduction in sentence. This proceeding has not yet been settled.

It should be pointed out that the original sentence of former Corporal Osvaldo Antonio López would have had him imprisoned until July 1, 2002; but, by virtue of law 23.070, approved by the current constitutional government, his term expires on February 26, 1997.

III. CONCLUSIONS OF THE LEGAL PROCEEDINGS THUS FAR

The Argentine Government understands that, in the light of the legal proceedings that have taken place in the case of former Argentine Air Force Corporal Osvaldo Antonio López, there is no evidence of noncompliance by the Argentine constitutional justice, and, therefore, by our government with any of the standards of the American Convention on Human Rights to which the petitioner makes reference in communication No. 9635.

IV. INADMISSIBILITY OF THE PETITION

As stipulated in Article 46, paragraph a) of the American Convention on Human Rights, and in keeping with the

Commission's Regulations, the Government of Argentina asks that the petition filed be declared inadmissible for the following reasons:

A. General: As is known, immediately after assuming its duties on December 10, 1983, the Argentine Constitutional Government adopted several provisions aimed at full restoration of the rule of law and unrestricted enjoyment of basic human rights and freedoms.

Among the many measures taken by that government, the following should be indicated, because they are directly related to the petition in question:

a. Law 23.040, which repeals law 22.924 enacted by the previous de facto government. It will be remembered that the latter law sought to extend amnesty to those responsible for past human rights violations.

b. Law 23.042, which makes it possible to claim personal freedom by filing a writ of habeas corpus for all civilians sentenced by military courts.

c. Law 23.070, which substantially reduced the sentences of prisoners between March 24, 1976 and December 19, 1983.

d. Law 23.077, which expressly repealed repressive standards established by the previous government and substantially reduced the sentences of others. Copies of the aforementioned laws are included as an appendix.

Specific: The Argentine Government understands that communication No. 9635 does not meet the conditions required by Article 46, paragraph a) of the American Convention on Human Rights for admission, since the petitioner has not exhausted the remedies the Argentine system provides for under domestic law.

Proof of this is that the petitioner has not yet filed an appeal for review of sentence provided for in Articles 439, paragraph 4) of the Military Code of Justice and 551, paragraph 4) of the Code of Procedure in Criminal Matters of the federal jurisdiction and regular courts of the Federal Capital and the national territories, copies of which are included herewith.

This remedy made available by both governing bodies, provides for review of the sentence in case of a less severe criminal law, under the first assumption, or one that has

reduced the sentence or declared that the act is not punishable, under the second assumption. It should be pointed out that, in addition to the provision set forth in Article 439, paragraph 4 of the Military Code of Justice, the Procedural Code of the federal jurisdiction and regular courts of the Federal Capital is applied supplementally. Moreover, both standards of procedure are correlated through the principle of application of the most favorable criminal law contained in Article 2 of the Penal Code.

The standards upon which the conviction of former Corporal Osvaldo López was based have undergone substantial changes. Thus, for example, Law 21.272, in addition to having been partially repealed (see Laws 21.463 and 22.928), was fully repealed on August 9, 1984 by Law 23.077, which in turn repealed the two other laws in reference.

In turn, Articles 162, 210 bis and 222 of the Penal Code were also amended by Law 23.077, calling for lighter punishment.

Moreover, the appeal for review of sentence filed by the petitioner under Law 23.070 is still in process, as already explained above. By virtue of the foregoing, the Argentine Government requests that communication 9635 be declared inadmissible because it does not meet the conditions of Article 46, paragraph a) of the American Convention on Human Rights and of the Regulations of the Honorable Commission, since the petitioner has not exhausted the domestic remedies provided for in the Argentine legal system.

G. In a letter dated March 31, 1986, the Commission sent the complainant the information provided by the Argentine Government, with a 45-day deadline for making his observations or comments.

H. In a cablegram dated May 10, 1986, the complainant requested an extension of the deadline. He was given a 30-day extension, which he was informed of in a letter dated May 14, 1986.

L. In a communication dated June 5, 1986, the complainant made the following observations:

I have the pleasure of sending you my observations to the Argentine Government and of attaching complementary information:

As already indicated, it is true that Osvaldo Antonio López, at the time of the events of which he was accused (April 22, 1976), was a Corporal in the Argentine Air Force.

The Argentine Government says that, in keeping with the nature of the facts and the provisions of paragraph 2 of Article 108 of the Military Code of Justice in effect at that time, he was tried by the military courts in accordance with the judicial proceedings of that jurisdiction.

In message 166, in which a bill was submitted to Parliament to amend the Military Code of Justice, the President of the Nation, accompanied by the Council of Ministers, stated the following: "The current system of competence of the military court established by Articles 108 and 109 of the Military Code of Justice, which includes the trial of common crimes committed at military sites or in the performance of duty constitutes TRUE CIVIL JURISDICTION CONTRARY TO ART. 16 OF THE CONSTITUTION. In the future, military jurisdiction must be restricted to the trial of military crimes, that is, those not included in the Penal Code, and disciplinary infractions." He adds later that "to be judged for the commission of common crimes by an administrative court consisting of peers involves both a privilege and a lack of protection, both constitutionally inadmissible, and, therefore, it is necessary to add an appeal that can be supported by both the prosecutor and the defendant. This makes it "the last analysis the judges, common to all Argentines, who judge these events in the last instance".

In addition to the unconstitutional nature of Articles 108 and 109 of the Military Code of Justice in reference, the aforementioned legislation contains several provisions that are seriously detrimental to the right of defense--legally declared several times--among which the following should be indicated:

a) Article 197, which establishes that the defense counsel must always be an active or retired official;

b) Article 98, which defines defense as an act of service;

c) Article 366, which provides that in no case shall it be permitted to advance in favor of the defendant any consideration detrimental to the respect due to a superior or to lodge against them any accusation related to facts that are not related to the case; nor shall it be allowed to criticize or unfavorably assess the activities or political or administrative acts of the government;

d) Article 367, which, in accordance with Article 664, punishes a defense counsel who lacks due respect for a superior or who makes assessments of government acts, with punishment of up to four years in prison or detention;

e) Article 364, which says that no brief other than those expressly allowed shall be admitted;

f) Article 264, which establishes that no one may attend the presentation of testimony;

g) Article 237, which authorizes that an individual giving unsworn testimony may be urged to tell the truth, etc.

But not even with these restrictions was López tried in accordance with the legal procedure of that jurisdiction, as the Argentine Government says, because the following provisions of the Military Code of Justice were also violated: Article 2, which provides that military courts may not apply punishments other than those established under law; Article 226, which provides that the government attorney shall take steps to confirm the crime and its circumstances even if the defendant confesses from the very beginning to being the perpetrator; Article 240, which provides that he may not use coercion or threats or promises of any kind against the witness; Article 252, which indicates that, after giving an unsworn statement, he will be allowed to appoint a defense counsel, all subsequent procedures being void if such appointment is hindered;

Article 290), which provides that two or more experts shall be appointed to assess the facts;

Article 300), which indicates the contents of the expert report; Art. 575), which says that no tribunal or military authority may increase or decrease punishment beyond the maximum or minimum,...nor increase it by replacing it with others;

Article 576, which provides that no offense may be suppressed with punishment nor established by the law before being committed; and if the criminal law at the time of the offense and subsequent offenses is different, the one most favorable to the acussed shall be applied, and if the punishment has already been imposed by an executory judgement, it will be replaced by the least severe one, etc.

These irregularities, together with those that were denounced in the initial brief, were the reasons for drafting a denunciation against those who took part in his trial, so that his trial would be ordered for breach of duty in accordance with the standards of Arts. 832, 833 and 179 of the Military Code of Justice (cf. document, a copy of which we attach).

The judgement handed down against members of the First Military Junta for violation of basic human rights clearly held that retired Brigadier General Orlando Ramón Agosti, as

Commander and Chief of the Air Force, gave his subordinates orders "that called for abductions, torture, the physical elimination of a vast number of individuals vaguely categorized as 'subversive,' and that such orders involved acceptance of the idea that in their area of operations other crimes were to be committed, such as robbery, abortions, rape and suppression of the civil status of minors"; and it is also confirmed that he gave the order for operations--Provincia--for the participation of Air Force personnel in the struggle against subversion. This operational order was the outcome of A DELEGATION TO THE ARMY TO ACT IN THE DISTRICTS OF MORON, MERLO, MORENO (Buenos Aires Province) FOR THE AIR FORCE, which had the main responsibility throughout the Republic for how to implement and carry out the struggle against subversion (Judgement of the Court of Appeals on Federal Criminal and Correctional Matters of the Federal Capital), December 9, 1985.

Article 468 of the Military Code of Justice provides that execution of final judgements by military tribunals must be ordered by the President in all instances in which the judgement imposes the death penalty or affects senior personnel, and by the corresponding commanders in chief in other instances.

Dr. Raul Zaffaroni holds that the order to carry out the military judgement is a legal control and that official approval by the President or the branch commander is not of discretional compliance but rather a legal control, a very restricted assessment of the principle of suitability limited to exceptional cases and transitory situations, only for the time necessary. The competent authority may in no case change the judgement for a military crime nor arbitrarily delay the official approval, thus safeguarding the constitutional authority of the Executive Branch to pardon or commute punishment (Arts. 469, paragraphs 1 and 2 of the Military Code of Justice) (Zaffaroni-Cavallero, Derecho Penal Militar, Editorial Aries, 1980, p. 523).

For the purposes of this case, the official approval was given by Brigadier Agosti through resolution 203 of May 10, 1979 (p. 503). It is obvious that the legal control applied by Brigadier General Agosti's official approval must be totally disqualified, it being left to the President of the Nation to exercise certain authority provided for in Article 469 of the Military Code of Justice.

The report on the human rights situation in Argentina by the IACHR (OEA/Ser.L/V/II.49 doc. 2011 of April 1980), on pages 223 and 224, analyzes the action taken by the military tribunals beginning March 24, 1976, which is fully applicable to the case.

In this regard, it points out that "the alleged criminals were not allowed to choose their own defense attorneys but were assigned official military defenders who are not licensed lawyers. These circumstances... constituted serious infrigements of the right to defense inherent in due process." It mentions Art. 95, which provides that in no case may the President exercise judicial functions..." With regard to the right to an impartial trial, it points out that "the Military Courts composed of officers involved in the repression of the same crimes they are judging, do not offer sufficient guarantees of impartiality. This is aggravated by the fact that in a military court, the defense is in the hands of a military officer, meaning that the defense is taken over by a person who is also part of, and has strong disciplinary ties to, the same force responsible for investigating and represssing the acts with which the accused is charged. With regard to this parody of a trial to which López was submitted, and against which all remedies allowed under domestic law have been exhausted, the Argentine Government reports that "he was tried in accordance with the judicial proceedings of this jurisdiction."

The Argentine Government recognizes that, after the Constitutional Government took office, López filed several appeals. He endeavored to be included too, in the legal order that began to be restored in our country. Let us see:

a) Law 23.049 was approved. He filed appeals based on Art. 13 against the judgement handed to him by the military tribunals. This is the appeal referred in the afore-mentioned presidential message No. 166. This appeal was denied by both the Supreme Council of the Armed Forces and by the Federal Court of Appeals of La Plata. The Supreme Court of Justice which, as the Argentine Government well points out, is the final instance of our judicial system, declared the special filing to be inadmissible, arguing that it was not based on Art. 15 of Law 48. In view of the denial of freedom López was suffering due to the unfair trial to which he had been submitted, this decision was included among those which in similar instances that high court had disqualified because "the pronouncements that hide the objective truth due to an obvious ritual excess injure the requirement that justice be suitably served as guaranteed by Art. 18 of the National Constitution," because trial formalities have been established to guarantee the basic right, never to legitimize lack of proper defense, never to confirm the arbitrary denial of freedom.

b) An appeal of habeas corpus was filed with the Fourth National Federal Court for Criminal and Correctional Matters. This appeal, which, like the previous one, would have assisted review of the arbitrary nature of the Supreme Council's

judgement, was rejected in the first instance. The resolution was confirmed by the Federal Court on May 31, 1984, and the appeal was also rejected by the Supreme Court of Justice on April 23, 1985. There were basically two grounds for the decision:

1) The military status of the accused on the date of the events which would not include him under the provisions of Law 23.042 which refers exclusively to civilians. This restrictive interpretation of habeas corpus denies the purpose of that procedure: the immediate release of anyone who may be illegally denied his freedom.

2) The opinion--with excessively strict formality--that the possible unconstitutionality of the military jurisdiction and the arbitrary nature of the judgement should have been expressed at the appropriate time, the impossibility of timely filing not having been shown. The Supreme Court omits the records in the file, since the record of notification of the judgement (fs. 448) includes the request made by López to appeal the decision, which was not done because of his lack of proper defense without access to a trained civilian lawyer and because his military "defense" counsel was not an attorney and/or did not perform his duties.

Upon the rejection of both appeals by the National Supreme Court, the domestic appeals that might have enabled reexamination of the trial were exhausted.

c) On the basis of Law 23.070, the Argentine Government reported that the sentence handed down by the Supreme Court of the Armed Forces for Osvaldo López had been reduced from July 1, 2002 to February 26, 1997. This reduction was figured at three days for every two days of prison served. Instead of this, since this was a prisoner who had been placed in "maximum security," it should have been computed at two for one, which would have taken his sentence to 1995 under the provisions of that law. In view of the violation of current legislation, on August 21, 1985, Osvaldo López filed an appeal to the Supreme Council of the Armed Forces asking that his imprisonment be calculated in accordance with the law. This is being processed and since it deals with a consequence of the proceeding, it does not affect the petition filed by Osvaldo López with the Inter-American Commission on Human Rights.

III. ADMISSIBILITY OF THE PETITION:

None of the Argentine Government's opinions are adequate for declaring the petition to be inadmissible. they are:

General: The fact that the Argentine Government has enacted a series of legal standards aimed at restoring the rule of law and the unrestricted enjoyment of human rights does not mean that they apply to the situation of López.

a) Law 23.040 repeals Law 22.924 enacted by the de facto government as a consequence of popular demand and the political prisoners themselves, which include Osvaldo López, because this law sought to extend amnesty to those responsible for the genocide that occurred in the country.

b) Law 23.042 was expressly declared by the National Supreme Court of Justice as not applicable to the case of Osvaldo López.

c) Law 23.070 reducing the sentence does not permit reexamination of the proceeding.

d) Law 23.007, which repealed Law 21.272 and amended the penalties in Articles 162, 210 bis and 222, allows for filing an appeal for review as provided for in Article 439 of the Military Code of Justice. It reads as follows: "This remedy is provided against final judgements by the Military Tribunals and its effect is to suspend execution or to interrupt fulfillment thereof; and it is appropriate, in the proper instances, to apply the most favorable penal law retroactively." Article 551 of the Code of Penal Procedures is in agreement with this provision.

Specific: By virtue of the latter standard, the only one of those cited by the Argentine Government that applies to the case of Osvaldo Antonio López, it is sought to have the Inter-American Commission on Human Rights declare the petition inadmissible because the petitioner would not have exhausted all domestic remedies under the Argentine legal system.

This opinion should be rejected, and the petition of Osvaldo López should be admitted because the appeal for review to which the Argentine Government refers deals exclusively with the consequences of the proceeding in terms of the reduction of penalties or elimination of criminal figures, but it does not deal with the invalidity of the process itself through which the sentence was reached.

It should be pointed out that at the sessions convoked by the Buenos Aires Bar Association as a contribution to the parliamentary debate on the "current legal status of political prisoners" the opinion as expressed on this topic was as follows: "4) Standing unchanged as of this date is the appeal for review

of judgements handed down under the authority of previous adjudication, even though they have been handed down by the National Supreme Court of Justice for the assumptions governed by Article 551 of the Code of Penal Procedures applicable to the federal jurisdiction. 5) None of the assumptions of Article 551 of the afore-mentioned Code provides for the possibility of filing an appeal for review in cases of violation or nonobservance of the legal guarantees established in Article 8 of Law 23.054. 6) The individual study of each case of the aforementioned political prisoners thus highlights the violation of all the cases and, to different degrees of seriousness, that of each and every legal guarantee recognized in Article 8 of the American Convention on Human Rights, or Pact of San José, Costa Rica, and this situation has been aggravated thus far by the circumstance indicated in item 5."

The Argentine Government's argument that the petition should be rejected because an appeal for review under Law 23.070 on how to calculate the sentence is still pending is not worthy of serious consideration. A state cannot claim confusion between due process, a decision as to guilt or innocence, and how to figure a sentence depriving freedom.

CONCLUSION:

I. As inferred by the Argentine Government's answer, the judicial branch has systematically refused to study the procedure whereby López is imprisoned, always raising up problems of form. Thus it confirms the illegal denial of freedom to which López is subjected, giving the authority of prior adjudication to a spurious proceeding which ended with an arbitrary decision, in this instance deviating from its own jurisprudence, which establishes that "no judicial proceeding shall be maintained if its inferences wound the community's legal and moral conscience set forth in the Constitution's standards and principles" (decisions T. 248 - 291).

II. Faced with the precise violations of the Pact of San José, Costa Rica, which were denounced, the Argentine Government is silent. This in itself must be understood as an implicit acceptance of each and every one of the irregularities, in accordance with the principle of law that establishes the consequences of silence when there is a legal obligation to answer.

III. The Government claims that the remedies under domestic jurisdiction are exhausted as though it were unaware of the differences between the proceeding and its consequences.

It conspicuously points to the existence of an appeal to reduce the sentence, but it does not apply this officially in accordance with the procedures established in articles 439 and 576 of the Military Code of Justice and 552 of the Code of Penal Procedures.

NEW FACTS: By way of supplementary information, you are informed of the following events that have occurred since the filing of this denunciation:

- López continues to be denied his freedom.

- The communication the distinguished Commission sent Osvaldo López in December 1985 never reached his attorneys because it was taken by the prison personnel.

- For six months the defense lacked access to the file prepared against López (cf. attached documentation).

- Faced with the denunciation made against those who judged López and against the person who had been appointed as his defense counsel at the time, it was decided that the military defense counsel was not an attorney and therefore could not file appeals to the Supreme Court, and that consequently they could not be approved.

- With regard to the denunciation made against those who were falsely informing his current defense counsel of the file's whereabouts, thus denying access thereto, it was decided that this was due to excusable errors.

- The petition filed by López asking that his sentence be computed in accordance with the law, notwithstanding the time that had elapsed, has not yet been decided upon.

PETITION: In view of all the foregoing, I ask the IACHR:

1. That it deem the observations called for by the Argentine Government's answer as having been made.

2. That prior to deciding upon it, an advisory opinion be requested of the Inter-American Court of Human Rights concerning the following matter: whether the appeal for review provided for in Art. 439, paragraph 4) of the Military Code of Justice against the final judgements of the Military Tribunals, whose effect is to suspend execution or to interrupt its compliance, deals exclusively with the consequences of the proceeding and therefore precludes examination of the proceeding itself, as held by the petitioner, or whether, to the contrary, it

constitutes the exception of inadmissibility of the petition sought by the Argentine Government.

3. That the Argentine Government be requested to send a certified copy of the judgement handed down by the National Federal Court of Appeals in Criminal and Correctional Matters of December 9, 1985, in the case against Jorge Rafael Videla and others, and the evidence existing against Brigadier General Agosti and/or the Argentine Air Force.

4. That the Argentine Government be asked to submit certified copies of the minutes for the second meeting of the National Chamber of Deputies held on 16/12/83.

5. That the Argentine Government be asked to submit certified photocopies of cases pursued by the Standing Court Martial for enlisted personnel, troops and students, which as of 18 December, 1985, consisted of 547 pages in three volumes (files "L" 1362/78 "C" and files 1361/78 "C" 12C of 79 pages and Letter "L" 1361/78 Cd 8 "c" with 19 pages), and in particular photocopies of decisions 8593 and 8636 of the Office of the Attorney General of the Armed Forces, of November 5, 1985 and December 26, 1985 and Number 15.761 of the Office of the Judge Advocate of the Armed Forces, of March 6, 1986, which were removed by resolution of the Supreme Council of the Armed Forces.

6. That the Argentine Government be requested to submit certified photocopies of the following files: López, Osvaldo Antonio/habeas corpus, case 4541, filed with the Fourth National Federal Court of the First Instance in Criminal and Correctional Matters, Secretariat No. 11, Moreno on complaint in file of Osvaldo López on appeal of case No. 4596 filed with the Federal Court of La Plata.

7. That the Commission employ its good offices with the Argentine Government so that the violations denounced will cease and, in the event they continue, that it employ its good offices with the Inter-American Court of Justice.

8. Since the communication that had been sent me reached my attorneys very late, that I be considered to be legally domiciled in their office at Calle Tacuarí 119 4 Piso "P" (1071) Buenos Aires, Argentina.

9. That Dr. Juan Méndez, domiciled at 739 8th Street, S.E., Washington, D.C. USA 20003, is expressly authorized to consult the file and to request copies thereof.

M. In a note dated June 17, 1986, the Commission transmitted the complainant's observations to the Government of the Argentine Republic, to present within 30 days any information or answer it might deem appropriate. A copy of this communication was conveyed to the Ambassador, Permanent Representative to the OAS on that same day. Also, in a letter dated June 17, 1986, the complainant was informed of the steps taken concerning his observations.

N. In a note dated July 17, 1986 (SG 157 (7.2.17), the Argentine Government requested an extension of the deadline set for sending its remarks and information. That note explains the reason for the request, indicating that "it is due to the fact that remedies under domestic jurisdiction described in my note DG 48 (7.2.17)/86, whose substantiation has been requested recently by the petitioner's defense attorneys, are in process."

O. In a note dated July 25, 1986, the Commission informed the Argentine Government of a thirty-day extension.

P. In a note dated September 11, 1986, (SG 210 - 7.2.17), the Argentine Government provided the following additional information:

> Without prejudice to the additional explanations the Commission may deem advisable to request, I am pleased to make the following information available to you:
>
> I. As stated in item B. (Specific) of paragraph IV (Inadmissibility of the petition), in the note dated March 26, 1986 concerning the case of Mr. Osvaldo A. López, the Argentine Government reconfirms its opinion that such communication does not meet the requirements of Article 46, paragraph a) of the American Convention on Human Rights. Proof of this is as follows:
>
> a) At the present time there is before the Supreme Council of the Armed Forces an appeal for review filed by the petitioner on August 8, 1986, as provided for in Article 439, paragraph 4) of the Military Code of Justice, in accordance with Article 551, paragraph 4) of the Code of Procedures in Criminal Matters.
>
> b) In view of presentation of the afore-mentioned appeal for review and pursuant to Article 441 of the Military Code of Justice, the Minister of Defense requested an opinion from the Judge Advocate General of the Armed Forces, who decided as follows on August 28, 1986:
>
> Bearing in mind that Law 21272 has been repealed by Article 1 of Law 23077, which prima facie would call for

application of Article 827 of the Military Code of Justice (L. A6), which establishes a lighter sentence, I believe that, in accordance with the provisions of Article 439, paragraph 4) of the latter legal body, it would be appropriate to consider the appeal in reference.

c) Subsequently, the Minister of Defense referred the files in reference to the Chairman of the Supreme Council of the Armed Forces with the following provision:

In accordance with the opinion handed down by the Judge Advocate General of the Armed Forces, I refer these records related to the appeal for review filed by former Air Force Corporal Osvaldo Antonio López concerning the judgement of the Supreme Council of the Armed Forces on November 23, 1978, requesting that it be processed on a preferential basis.

d) It must be stressed that the decision of the Supreme Council of the Armed Forces may also be appealed before the competent Federal Court and, when appropriate, before the National Supreme Court. Finally, it is pointed out that the proceedings under way allow the assumption that this situation will be cleared up shortly.

II. The Argentine Government understands and so explains in Section I that the communication on case No. 9635 concerning the status of Mr. Osvaldo Antonio López must be declared inadmissible because it does not meet the requirements of Article 46, paragraph a) of the American Convention on Human Rights and those of the Commission's Regulations.

For the preceding reasons, the Argentine Government does not go into an analysis of other aspects of the communication related to the case of Mr. Osvaldo Antonio López, as it stated already in Item III of the reply of March 26, 1986.

Moreover, the complainant, in a communication dated August 21, 1986, reported on the progress of the new developments related to his case before the civilian as well as military legal authorities. These reports are as follows:

Since it can be inferred from the Argentine Government's reply to the distinguished Commission that the remedy of review under the most favorable penal law could be a suitable mechanism for recovering my freedom, I filed such an appeal before the Federal Court of La Plata, without thereby waiving my right to review of the entire proceeding. As I had stated in my previous presentations, the mechanisms under domestic jurisdiction for this latter right have been exhausted.

According to a certified judgement, a copy of which I attach, the Federal Court of La Plata rejected this presentation, declaring itself incompetent. For this purpose, it claims that the appeal for review under the most favorable law must be filed before the Supreme Council of the Armed Forces.

Therefore the Federal Court declined its jurisdiction in favor of an administrative tribunal, which, as such, is subordinate to the Executive Branch. This resolution is in conflict with the provisions of the National Constitution that establish the representative republican form of government, prohibiting the Executive Branch from usurping judicial functions (Arts. C. N.). It is at the same time a new violation of the provisions of Art. 8. 1) of the American Convention on Human Rights.

This resolution is one further demonstration that the judges not only avoid taking up review of the erroneous proceedings conducted when a genocidal military junta usurped power in our country but that, moreover, in the case of political prisoners, such as my case, they refuse to apply current legislation that establishes the remedy of review of penalties under the most favorable law or different ways to compute penalties.

Included with this communication was a copy of the decision denying the appeal for review by the Federal Court of La Plata filed by the complainant under the terms of Art. 551, paragraph 4 of the Code of Military Procedures (C.P.M.) against the judgement of the Supreme Council of the Armed Forces dated November 23, 1978, which sentenced Mr. Osvaldo Antonio López to 24 years in prison with the additional penalties of absolute disqualification for the same length of time and demotion.

R. In a note dated September 16, the Commission transmitted this information to the complainant, requesting his observations.

S. In a communication dated October 7, 1986, the complainant set forth further observations to the Argentine Government's comments. The text reads as follows:

With reference to your letter of September 16, last, in which you informed us of the contents of the note dated September 11, 1986 from the Argentine Government, we wish to convey to you the following observations:

a) The contents of the appeals for review of the consequences of the spurious trial to which López has been submitted reaffirm the opinion that domestic channels for obtaining annulment of the decision have been exhausted.

The answer itself from the Argentine Government shows that the civilian tribunals have refused to review the case as a whole, citing reasons of form.

b) The appeal filed before the Supreme Council of the Armed Forces for review of the sentence in accordance with Art. 439 of the Military Code of Justice is subsequent to the appeal filed for the same purpose before the Federal Court of La Plata, which the latter rejected.

c) The opinion handed down by the Judge Advocate General means that this requirement only allows review of the sentence through application of a more favorable law. In the contrary sense, it does not allow review of the merits on which the sentence is based. Despite this, if the Judge Advocate's opinion were heeded, the sentence could be reduced from 24 years to 15 years, and if the system of computing two days for each day spent in prison during the military dictatorship were applied, López would recover his freedom immediately.

d) We include herewith a photocopy of the opinion of the Prosecutor of the Supreme Council of the Armed Forces, which asks that the 24-year sentence be reduced to 22 years. It also follows from this opinion that it is still believed that "it is appropriate to take, subject to the facts declared proven, a new approach in keeping with current legislation." It is obvious, as we held, that "the facts declared proven" are not going to be reviewed, and this is true to the extent that the Prosecutor is not at all engaged in the questioning the grounds for that declaration.

e) The rebuttal of the Judge Advocate General and the Prosecutor of the Supreme Council of the Armed Forces appears in a document presented by Captain (Army Retired) José Luis D'Andrea Mohr, Military Counsel, with the cooperation of Drs. Moreno and Carsen, on 30/9/86, a photocopy of which we include and ask to be included as part of this document.

f) Although the decision is subject to review, this is to be done by the Federal Court of La Plata, whose slight willingness to intervene has already been made clear to your Commission. If it were necessary to appeal to the National Supreme Court of Justice, we should now merely remark that the case of another person held for committing political crimes, Héctor Gerónimo López, for more than a year and a half has been pending decision.

g) We include for the Commission's study the article published in "El Periodista" on this case.

h) We repeat, in view of the positions taken by both parties, our request for an advisory opinion by the Inter-American Court of Human Rights as to whether the appeal pending for review of the sentence fulfills the requirement for admissibility in Art. 46, paragraph a) of the American Convention on Human Rights and concordant provisions of that Commission's Regulations.

Included with the communication in reference was a copy of the appeal for review filed by the complainant with the Supreme Council of the Armed Forces in view of the refusal of the Federal Court of La Plata, for substantive reasons, to admit this appeal. This new appeal for review also requested the designation of a military co-defense counsel, and the prisoner's immediate release was requested.

T. In a note dated March 19, 1987 (Vs.11 (7.2.17), the Government of the Argentine Republic supplied the following information concerning the case: that on March 5, 1987, the Federal Court of La Plata had allowed a special appeal to the National Supreme Court of Justice.

U. The Commission considered Case 9635 at its 69th session on the basis of the Argentine Government's information mentioned above and decided to postpone its decision thereon until a clarification had been obtained from that Government concerning the note of March 19 on the scope of the appeal for review, because there was a doubt as to whether that appeal would enable the Supreme Court of Justice to review Mr. López' trial (with regard to the substance of the matter) whereby he was sentenced, or whether the issue would be an appeal for review of the sentence through application of the most favorable law.

V. At its 69th session (March 1987), the Commission decided to address a note to the Argentine Government asking it for clarification of the matters in reference.

X. In keeping with that decision, the Commission addressed a note to the Government of the Argentine Republic on March 31, 1987.

Y. In a note dated April 30, 1987 (SG No. 137 (7.2.17)/87), the Argentine Government enclosed a copy of the judicial order issued in the López case whereby the "special appeals filed" by the defense were allowed. Included with this judicial order was a copy of the order handed down by the Appellate Court of La Plata, which provides as follows: i) to declare the appeal filed by the party inadmissible and ii) to confirm the declaration of incompetence to deal with rectification of the sentence's computation as requested by the complainant.

2. In a communication of May 4, 1987, the complainant again addressed the IACHR on occasion of the aforementioned appeal for review and stated the following:

Upon appeal by my defense counsel, it is now up to the National Supreme Court of Justice, which has had the case before it for two months, to decide. I am afraid that once again my right to freedom will be postponed. I continue in the same situation that I was in two years ago when I turned to the IACHR. On the two previous occasions, in which my proceeding reached the National Supreme Court of Justice, that Court refused to review it for various reasons. Currently, in view of the latest events in the country, I have the well-founded fear that the Court will postpone sine die decision on my case, or that, claiming the same reasons as the Federal Court of La Plata, it will refuse to intervene in the appeal before it for consideration or, at best, it will reduce my sentence as requested by the Prosecutor and order my immediate release without going into review of the proceeding itself, leaving as proven events that never occurred and that served to uphold my unjust sentence.

With regard to the Inter-American Commission on Human Rights, I formally and expressly petition that it make itself available to the parties in order to reach a friendly solution based on respect for the human rights established in the Pact of San José, specifically: the right to personal liberty (Art. 7); the right to a fair trial (Art. 8); the right to judicial protection (Art. 25) which, using the terms of this latter provision, allows me through a simple, prompt and effective recourse to protect my basic right to immediate freedom and to a fair trial, which rights are recognized by the National Constitution, the law and the American Convention and which are being violated day by day as long as I am not released and as long as the trial that led to my unjust sentence is not reviewed.

CONSIDERING:

1. That in the current stage of steps taken in the case before the Commission, both the petitioner and the Government of the Argentine Republic have had ample opportunity to express their views in order for the Commission to reach a decision on the complaint's admissibility, bearing in mind that the complainant has been deprived of his freedom for nine (9) years.

2. That, prima facie, the basic matter of importance now is to determine whether the remedies under domestic jurisdiction of the Argentine Republic have been exhausted, in order to decide on the admissibility of the denunciation, since the impediment provided for in Article 46, paragraph 1, a) of the American Convention on Human Rights, and in Article 37, paragraph 1 of the Commission's Regulations has been overcome.

3. That, actually, the arguments and terms of reference presented to the Commission by the complainant and the individuals and entities contributing to the denunciations, as well as those presented by the Argentine Government, have focused on the problem of the exhaustion of domestic remedies.

4. That, as the terms of reference presented indicated, the complainant has filed, although with unfavorable results, the remedies of appeal, complaint, special appeal for illegal action, habeas corpus and special appeal to the National Supreme Court of Justice, whereby the domestic measures that could be available to the complainant would have been exhausted.

5. That the Argentine Government disagrees, pointing out that in this case there has still been no filing of the "Appeal for Review of the penalty provided for in Articles 439, Paragraph 4, of the Military Code of Justice and 551, Paragraph 4, of the Code of Procedures in Penal Matters for the Federal Jurisdiction and the Ordinary Tribunals of the Federal Capital and of the National Territories" (Note SG-48, cit. supra, p.4), for which reason it believes that the complaint is inadmissible because it does not meet the "conditions required by Article 46, paragraph a) of the American Convention on Human Rights" (Note SG-48, p.5, cit.)

6. That with regard to presentation of the appeal for review the Argentine Government indicates, the complainant explains in his petition why such appeal would not apply, stating the following:

> b. Exhaustion of domestic remedies: Upon consideration by the Supreme Court of Justice that the judgement convicting Antonio López has the authority of prior adjudiction and that objection thereto was filed in untimely manner, domestic remedies have been exhausted, because this judgement firms up the decision from the domestic standpoint of the proceeding in which the verdict was handed down.
>
> An appeal for review, has not been filed, since it would be based on the assumption of a valid proceeding, which was lacking in the case we denounce.

7. The appeal for review to which the Argentine Government refers would deal "exclusively with the consequences of the proceeeding in terms of the reduction of penalties or elimination of criminal figures, but it does not deal with the invalidity of the process in itself through which the sentence is reached," as the complainant indicates in his observations (cit. supra, p.6).

8. That, despite the foregoing, the complainant filed with the Federal Court of La Plata an appeal for review of the sentence, without

thereby waiving his right to review of the entire proceeding, and the Federal Court of that city, in Resolution 10 of July 1986 (File 306), rejected the appeal, declaring itself incompetent based on the fact that the appeal for review through the most favourable law "must be filed with the Supreme Council of the Armed Forces," whereby, the issue would be a denial of jurisdiction in favor of an administrative tribunal which, as such, is subordinate to the Executive Branch.

9. That, in this regard, it is obvious to point out the statement by the Buenos Aires Bar Association (September 1985) on the "Current Juridical Status of Political Prisoners," to the effect that:

> 4. Standing unchanged as of this date is the appeal for review of judgements handed down under the authority of former adjudication, even though they have been handed down by the National Supreme Court of Justice for the assumptions governed by Article 551 of the Code of Penal Procedures applicable to the Federal Jurisdiction.

10. That, moreover, due to the context of the denunciation and observations presented by the complainant, assumed violations of the right to judicial guarantees which are the bases of due process are inferred. Among such assumed violations, the following are indicated:

a. The same events had been the subject of investigation by the competent military authorities themselves, and the persons involved, among them Mr. Osvaldo López, had been declared not responsible;

b. The accused was sentenced without sufficient evidence and only on the basis of a "confession" made under irregular conditions and without the presence of a defense attorney, which happened more than 15 months after the investigation mentioned in item a), after Mr. López had been abducted in July 1977 and detained in a nonprison center, as was Unit VIII (Morón), a place denounced as a clandestine detention center;

c. The judgement did not analyze the evidence. It applied a law that had been repealed (Law 21.272), and finally, the accused was given a heavier sentence for acts that were not proven beyond a reasonable doubt.

d. The accused did not have the appropriate assistance by trained counsel, and when he was notified of the judgement and put expressly on the record that he would appeal that judgement to the National Supreme Court of Justice, the untrained official attorney did not file the afore-mentioned appeal in a timely manner or at any other time, leaving the individual convicted without proper defense.

11. That the proceeding under which Mr. Osvaldo López was sentenced was conducted with complete lack of constitutional guarantees, as is

tacitly recognized by the Government of the Argentine Republic itself, in Note SG-48, cit. p.3, upon indicating that "as is known, immediately after assuming its duties on December 10, 1983, the Argentine Constitutional Government adopted several provisions aimed at full restoration of the rule of law and unrestricted enjoyment of basic human rights and freedoms."

12. That as part of the work of institutional renewal by the current Government of the Argentine Republic, measures have been proposed that are directly involved with the military legislation under which the trial of Mr. Osvaldo López was carried out. In this sense, it is necessary to emphasize what appears in the case record;

a. Law 23.040, which repeals Law 22.924 enacted by the previous de facto Government. It is brought to mind that the latter law sought to give amnesty to those responsible for the human rights violations that had occurred in the past.

b. Law 23.042, which establishes the possibility of claiming personal freedom by filing a writ of habeas corpus for all civilians sentenced by military tribunals.

c. Law 23.070, which substantially reduced the sentences of the prisoners between March 24, 1976 and December 10, 1983.

d. Law 23.977, which expressly repealed repressive standards established by the previous Government and substantially reduced the sentences of others. Included as an appendix are copies of the afore-mentioned laws.

13. That the Federal Court of La Plata, upon allowing the complainant a special appeal before the National Supreme Court of Justice, expressed to the IACHR the doubt as to whether such appeal would enable the Court to review the proceeding as regards the substance of the matter or whether the issue would be only an appeal to review the sentence, applying a more favorable law but upholding the judgement of the military tribunals whereby Mr. Osvaldo A. López was sentenced to a longer deprivation of freedom.

14. That, in the Commission's opinion, the Argentine Government's answer dated April 30, 1987, does not explain the scope of the appeal pending before the Supreme Court, as the Commission asked that Government to do in the note dated March 31, 1987.

15. That if the appeal were to review only the sentence, it would not result in redressing the juridical and moral injury stemming from a proceeding presumedly invalidated by serious irregularities which, for that reason, should be reopened so that the convicted individual would have a procedural opportunity to show his innocence or, otherwise, for his guilt to be established beyond any doubt.

16. That more than a reasonable period has elapsed for the domestic remedies the Argentine Republic established for the defense of human rights to have been exhausted and, in this instance, for the rescission of decisions or judgements involving violation of the legal guarantees provided for under the Constitution and protected by the American Convention (Art. 8) together with the right to personal liberty (Art. 7) and, moreover, every individual's right to a "simple and prompt trial, or any other effective recourse, before a competent court or tribunal for protection against acts that violate one's fundamental rights recognized by the Constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

17. That, therefore, the provisions of Article 46, paragraph 2.c) of the American Convention on Human Rights and Article 37, paragraph 2.c) of the Commission's Regulations do apply.

18. Bearing in mind the provisions of Articles 46, paragraph 1, a) of the Convention and Article 37.1) of the Commission's Regulations, despite the fact that a special appeal on the case is pending before the Supreme Court of the Argentine Republic.

19. That the Commission, in its Report on the Situation of Human Rights in Argentina (OEA/Ser.L/V/II.49, doc.19, of 11 April, 1980, pages 223 and 224), upon analyzing the performance of the military tribunals beginning March 1976, stated that "...the alleged criminals were not allowed to choose their own defense attorneys but were assigned official military defenders who were not licensed lawyers. These circumstances ... were serious infringements of the right to defense inherent in due process. These situations violate basic provisions of the Constitution. One of these is Article 18 dealing with due process... and Article 95 ... which provides the following: 'In no case may the President exercise judicial functions...'" And with regard to the right to an impartial trial, it pointed out the following: "...the Military Courts composed of officers involved in the repression of the same crimes they are judging, do not offer guarantees of sufficient impartiality. This is aggravated by the fact that in a military court, the defense is in the hands of a military officer, meaning, that the defense is taken over by a person who is also part of, and has strong disciplinary ties to, the same force responsible for investigation and repressing the acts with which the accused is charged."

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

RESOLVES:

1. To declare admissible the communication dealing with Case 9635 presented by Mr. Osvaldo Antonio López.

2. To declare that, in application of the provisions of Articles 48, paragraph 1.f) of the Convention and 45 of the Regulations, it places itself at the disposal of the parties in this case with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in the American Convention on Human Rights, in view of the fact that the positions and intentions of the parties have been sufficiently clarified and, in the Commission's opinion, the matter, due to its nature, lends itself to settlement through this procedure.

3. To convey this resolution to the Government of the Argentine Republic and to the complainant.

RESOLUTION N° 16/87
CASE 9788
COSTA RICA

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS:

HAVING SEEN the background on Case N° 9788, which is essentially the following: detention of the German citizen, Mr. Claus W. Haupt Korte, in the Republic of Costa Rica for common crimes in the rape of a female minor and fraud through the use of false documents; criminal trial and sentence by the First Superior Criminal Court of San José, Section One, N° 279 of December 3, 1981, declaring the aforementioned perpetrator responsible for the above-mentioned crimes and sentencing the guilty party to 16 years in prison,

CONSIDERING:

1. That in the light of the terms of reference provided by the claimant, it cannot be deduced or concluded that he has been the victim of any violation of the human rights provided for in the American Convention on Human Rights, in particular, of the right to the legal guarantees under Article 8 of that Convention;

2. That the Government of Costa Rica has answered satisfactorily, extensively and in timely fashion the Commission's request that it be informed of the details of this case, indicating "that the claimant's assertions are unfounded and that there is no specific evidence that in any way leads to the conclusion that Mr. Korte was judged without proper defense or that his basic rights were violated," which opinion the Commission shares on the basis of the information contained in the record.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

RESOLVES:

1. To declare inadmissible the communication to which Case N° 9788 refers, and, therefore, to close the case without further process.

2 To convey this resolution to the Government of Costa Rica and to the claimant.

RESOLUTION No. 31/86
CLAIM PRESENTED BY MR. LUIS BERTELLO MASPERI
COSTA RICA
September 23, 1986

1. HAVING SEEN, the claim submitted on June 27, 1986 by Mr. Luis Bertello Masperi, a Peruvian citizen, presently residing in Costa Rica.

2. IN VIEW OF the provisions of the Code of Private International Law (the Bustamente Code), subscribed at the Sixth International American Conference, on February 20, 1928, of which Costa Rica and Peru are member States, mentioned in the petition, and particularly Articles 351, 354 and 355 of said Code, and the provisions of Article 22 of the American Convention on Human Rights.

CONSIDERING:

1. That the offenses based on which Mr. Bertello Masperi's extradition has been requested have not been proven to be political or related thereto;

2. That neither has it been proven that any violation of any of the rights established by the American Convention on Human Rights has occurred;

3. That, finally, it has not been proven that any specific threat existed or exists against the security and physical integrity of the claimant that could put his life at risk.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

RESOLVES:

1. To declare the communication submitted by Mr. Luis Bertello Masperi inadmissible, in accordance with the provisions of Article 41, b of its Regulations.

2. To communicate this decision to the petitioner.

RESOLUTION N° 4/87
CASE 7864
HONDURAS
March 28, 1987

BACKGROUND:

1. In a communication dated June 26, 1981, the Inter-American Commission on Human Rights received a denunciation whose pertinent parts state the following:

> The Commission is hereby apprised of the present denunciation referring to the violation of the human rights of Professor Tomás Nativí and the engineer Fidel Martínez.
>
> Attached is a sworn statement containing an account of the facts denounced, specifying the place and date of the alleged violations, the names of the victims and the public authorities that have taken note of the act denounced.
>
> The state deemed guilty is the State of Honduras, for commission of violation of the human rights of the victims and for omission in executing petitions.
>
> A writ of habeas corpus has been presented to the Surpeme Court, with the authorities having denied any such arrests.
>
> We have made no denunciation of violation of human rights before any other international governmental organization. I hereby sign this statement addressed to the Inter-American Commission of Human Rights of the OAS, freely and spontaneously, swearing that the data and circumstances contained herein are true, as follows: In company of (...), with whom I was doing some administrative work, there appeared unexpectedly about 10:00 p.m. on June 10, 1981, Professor Tomás Nativí and the Engineer Fidel Martínez; they decided to stay over at the house. We continued our work, finishing it at 12:30 a.m. on June 11, 1981. Both (...) and I retired for the night in the same room and Professor Nativí and Mr. Fidel Martínez each retired to one of the other two bedrooms.
>
> At about 3:00 a.m. three shots fired from a gun equipped with a silencer were clearly heard. Immediately after the first shot there was a cry from the room of Professor Nativí followed by two more shots.
>
> A voice then ordered: "Take care of the other son of a bitch" and someone shouted "Open the door!", "Who is it?"; again the order came "Open up!", to which I replied: "Come in,

then, the door's open", and again we heard "Open the door or I'll shoot". At this threat, fearing they would shoot, I got out of bed and opened the door to find six men, five of them wearing hoods. At that same moment Professor Nativí came out of the room across the hall and said "Don't shoot; here I am." All of the men were armed with pistols equipped with silencers. The one without the hood was in charge. The five hooded men wore olive drab jackets with rolled up sleeves and an orange lining like the kind worn by soldiers in the Honduran army. The one in charge ordered two of the hooded men to take Professor Nativí outside the house to where a car with a diesel engine was waiting. It drove off with him. At the same time two of the men pushed me down on the bed and asked me about the door next to the bedroom. I told them it was a bathroom. Trying the door they found it locked. Just seconds before the shots were fired (...) had gotten up to go to the bathroom and, hearing the gunfire had locked the door. They ordered him to come out three times, the last time threatening to shoot, before he opened the door. Menacing him with a gun, they forced him down on the bed next to me and tied our hands behind us with a rope they had brought with them. Two other hooded men in the room of Mr. Martínez said: "We'll have to leave this son of a bitch here; we can't handle him," whereupon the chief ordered the two men who were just coming in to help take out the wounded body of the engineer, who was dragged outside the house wrapped in a sheet and curtains from the room. The same hooded men who had tied up (...) then tied me up too, at the orders of the chief. I could see when they took out the body of the engineer but they ordered me not to look or they'd shoot. They wrapped us up in sheets. I could hear another automobile with an engine that sounded like the first one. They locked us in the bedroom and the same voice ordered "Stay here for half an hour." After some time I was able to untie myself and to free (...) at 3:12 a.m. He left the bedroom at about 4:00 a.m. and went into Mr. Martínez's room to clean it up, ending up with half a bucket of clotted blood. He also found a flat fragment bone, I coudn't stand the sight and had to leave the room. The steady barking of a dog made us afraid that someone was watching the house, so I waited until 5:00 a.m. to call relatives. By this act I consider the right to life, liberty and personal security to have been violated, along with the right to inviolability of the home and to protection from arbitrary arrest. I believe the Honduran State to be guilty of those crimes by possible commission and by omission, since writ of habeas corpus was presented on that same day, Thursday, June 11, by a relative of Professor Nativí. The writ was not executed by the corresponding judge until Tuesday, June 16, before the National Bureau of Investigation (DNI), with negative results. Fear and suspicion kept me inside my own

house until the attempt was publicly denounced by the President of the Federation of University students of Honduras (FEUH) at a public meeting in La Merced Plaza. On Saturday, the 13th, three DNI agents came to my house in the morning. I opened the door once they had identified themselves. I believe that the statements I made to the DNI at that time were given when I was in a very highly wrought emotional state. At 4:00 p.m. the same agents returned, accompanied by a photographer who took pictures of the several rooms and other parts of the house.

A sister of Professor Nativí presented the corresponding denunciation to the DNI on the same day, Saturday, the 13th. Despite the fact that Professor Nativí had been kidnapped by several known agents of the DNI, including one called "La Cabara", and tortured from December 23 to 25 last year, 1980, the DNI had denied any participation even though on that occasion during presentation of the writ of habeas corpus, they said "They were not holding him, even though they knew that Professor Nativí was engaged in subversive activities." Now when the writ was again presented, they said, however, that "They did not know him and had never heard of him because he had no criminal record." I state that I have not lodged any petition with any other international governmental organization to which the Honduran State belongs and I urge the OAS Inter-American Commission on Human Rights to intervene with the proper authority in order to clarify this abominable and bloody act and not allow it to go unpunished.

2. In a note dated August 5, 1981, the Commission transmitted the pertinent parts of the denunciation to the Honduran Government, requesting that it supply the corresponding information, pursuant to Article 34,1, c of its Regulations.

3. The Government of Honduras, in a note dated September 11, 1981 (Official Communication No. 30-74), responded to the request made by the Commission. The data furnished by that government, in its pertinent parts, pursuant to Article 34,7 of the Regulations, were reported to the petitioner. The text reads as follows:

a) Neither the National Bureau of Investigation, as one of the units comprising this force, or any other dependency thereof has had any direct or indirect participation in the acts specified in the denunciation concerning the alleged illegal arrest of Professor Tomás Navití Gálvez and the Engineer Fidel Martínez. b) According to the statement, dwelling where Prof. Navití and Mr. Martínez were staying was broken into violently and without warning by six men, five of them wearing hoods, bearing firearms equipped with silencers at about 3:00 a.m. on June 11, 1981, and that the five hooded

men wore olive drab jackets with pushed up sleeves and an orange lining of the kind worn by soldiers of the Honduran Army. The men took them away to an undisclosed location. c) Following this episode, a sister of Professor Nativí, as stated in the denunciation, did not appear before the National Bureau of Investigations until Saturday, June 13th, that is, two days after the alleged events to report them. We do not know why these acts which damaged her interests were kept a secret or mystery. Immediately thereafter, all police units under the command of this office were alerted and instructed to investigate those criminal acts and to ascertain the wereabouts of the victims and the persons responsible. d) The General Command of the Public Safety Force, in an effort to comply faithfully with the law and its duties, which is the preservation of public order, safety and protection of persons and property and execution of resolutions, orders and provisions issued by the competent authorities, has never violated the rights and guarantees set forth in our Constitution and in the Declaration and Principles of Human Rights. Our police units have never attempted an offense against human life, personal security, freedoms, the right to protection or free movement, property, etc. We have never apprehended persons inside their homes except under legal order and in strict observance of our judicial organization, which requires that in such cases houses be entered during the day between 6:00 a.m. and 6:00 p.m. e) The fact that the criminals wore "olive drab jackets" does not mean they were members of our institution; on the contrary, in order to commit their abuses the criminals disguise themselves so as to create confusion and chaos.

4. The claimant, in a communication dated November 20, 1981, took note of the information provided by the Government of Honduras, adding, in turn, new data or additional information concerning the complaint.

5. The Commission, in a note of February 1, 1982, addressed to the Government of Honduras, forwarded the pertinent parts of that additional information and requested that, within 30 days, the Government transmit, all data pertaining to the case. The text of the additional information is as follows:

We are hereby adding the following information on the case of the agronomist Fidel Martínez, who was kidnapped by paramilitary gangs on June 11, 1981, in the Colonia El Hogar, together with his friend Professor Tomás Nativí.

1. According to reliable reports, military forces were involved in this ugly and disgraceful incident, for example, we know that the DNI agent whose last name is OSORIO made the following statement: WE ARE HOLDING FIDEL AND TOMAS. THE

OPERATION WAS CARRIED OUT BY MAJOR LAGOS AND THEY WERE TAKEN TO AN ANTI-GUERRILLA CAMP IN OLANCHO. THEY ARE GOING TO BE QUESTIONED TO FIND OUT EVERYTHING WE WANT TO KNOW ABOUT THE ACTIVITIES OF THE URP AND ITS POSSIBLE LINKS TO ARMS SMUGGLING TO EL SALVADOR. IF THAT'S WHAT THOSE SONS OF BITCHES WANT, SCREW THEM.

2. We later learned from persons well acquainted with Mr. Fidel Martínez and Professor Tomás Nativí that they saw the two of them put onto a small plane at an airport in Juticalpa and taken off to an unknown destination. The persons (...) were close by the airport at the time.

3. It has also been learned that both Mr. Fidel Martínez and Professor Tomás Nativí have been shuttled from one battalion to another so that the habeas corpus writs presented would be null and void. Recently they were detained in Trujillo and transferred to the First Infantry Battalion where they are moved back and forth from Torrión One to Torrión Two.

Furthermore, with regard to the pertinent parts of the information forwarded by the Honduran Government in a note dated September 11, 1981, we should like to make the following comments:

1. That the Honduran military authorities have on many occasions violated and continue to violate the human rights of their fellow citizens, aided by the lack of poor communications with the provinces and by the fact that the poor are afraid to denounce these violations, and;

2. That recently the modus operandi of the authorities has changed. To cite one example, they use private houses outside the city, instead of authorized jails.

6. Since the deadline set elapsed without the Honduran Government having forwarded the information requested by the Commission, the notes of February 1, 1982 were sent again mentioning possible application of the provisions of Article 42 (formerly 39) of the Regulations accepting as fact the acts denounced based on the presumption of truth contained in that provision. A second note was remitted to the Government of Honduras on May 14, 1982. Notes to the Government along the same lines were sent on October 6, 1982 and on May 25 and August 9, 1983.

7. The Government of Honduras, in a note of December 2, 1983 (No. 1547) furnished the Commission with new information on Case 7864. Attached to those data were copies of the rulings issued by the competent juridical authorities of Honduras in the case, such as a writ of

habeas corpus for Tomás Nativí and a stay of the arrest order presumably issued by the National Director of Investigations.

8. Likewise the Government of Honduras, in a note dated December 5, 1983 (No. 37/83/MPH/OEA) forwarded further information on the case which corroborated that already sent with the December 2 note.

9. The Commission, in a communication dated December 20, 1983, transmitted to the petitioner the pertinent parts of that additional information from the Government of Honduras, asking for comments or observations within a period of 45 days. The text of the pertinent parts sent with that note read as follows:

> Department of Foreign Affairs of the Republic of Honduras, Official Communication 1547, Tegucigalpa, D.C., December 21, 1983, Ref. Case 7864. To the Executive Secretary: I am pleased to forward the pertinent information on the case cited:
>
> In this connection I should inform you that on June 11, 1981, there was presented to the Supreme Court of my country a writ of habeas corpus for Mr. Tomás Nativí and a stay of the arrest order presumably issued by the National Director of Investigations; the recourse was admitted and attorney María Elvia García de Martínez appointed as executory judge thereof. On June 16 of that year she reported that she made formal application to the offices of the National Office of Investigations and that Lt. Colonel Juan López Grijalba, Director of that Office, had told her that Mr. Nativí was not detained at that unit.
>
> On June 16 of the same year, the Supreme Court of my country handed down a ruling approving the action of the executory judge and ordering that the petitioner be given 48 hours to formalize her petition in writing since the deadline was allowed to expire, and the opportunity was therefore irrevocably lost. Consequently, the Supreme Court ordered, in strict compliance with the law, that the prosecutor issue his opinion within the following 48 hours. On August 5 of the year cited, the highest court in the land handed down a judgement disallowing the habeas corpus filed.
>
> On July 4, 1983, a group of citizens filed a new habeas corpus writ for, among others, Tomás Nativí and Fidel Martínez. That recourse was accepted, with law clerk Engels Zelaya appointed as executory judge. On July 26 he reported that he had made formal application to the National Director of Investigations who told him that he did not know the whereabouts of the persons sought although every effort was being made to locate them.

On September 26 of the current year the Supreme Court issued an opinion ordering that evidence be taken for a period of eight working days; on October 10 the petitioners submitted by way of evidence an issue of the newspaper "El Tiempo". The high court admitted that proof and so informed the parties and added it to the case file, leaving pending the complainants' request that the period for presenting proofs be closed and the file placed at the disposition of the parties. In short, the habeas corpus writ referred to is pending processing. Therefore, the remedies provided under national jurisdiction as referred to in Article (46.1A) of the American Convention on Human Rights and Article 34 of the Regulations of the Inter-American Commission on Human Rights have not been exhausted.

I should also like to inform you that the State security authorities have undertaken a number of investigations without producing any specific data on the whereabouts of Professor Tomás Nativí and Mr. Fidel Martínez, who are recognized members of the People's Revolutionary Union (URP), a leftist terrorist faction operating in Honduras, according to a statement made by the National Director of Investigations.

Finally, I should add that Honduran police are still endeavoring at least to obtain information on the whereabouts of those persons, making maximum use of the services of information and cooperation established on a reciprocal basis in member countries of the International Police (INTERPOL).

In view of the foregoing, I am requesting the Inter-American Commission on Human Rights to accept the present information and to proceed pursuant to the stipulations of the juridical system in effect.

10. In a communication dated January 30, 1985, the Commission again requested that the claimant forward, within a period of 30 days, observations on the additional information made available by the Government of Honduras.

11. In a cable dated April 4, 1986 (No. 717), the Government of Honduras provided further information on the facts pertaining to this case, stating as follows:

> Despite the efforts made by the investigating committee set up for the purpose by Agreement 232 of June 14, 1984, no new evidence has been uncovered. The information obtained and taken into account does not provide solid proof that would allow for a ruling on the presumed disappearances with absolute certainty. In view of the impossibility of identifying the persons allegedly responsible, the interested

parties were publicly urged to employ such actions as might best suit them before the competent courts so that, through the procedures of law, they might there accuse the public or private persons they deem responsible. Particularly in regard to Case 7864, it should also be noted that the petitioner has not remitted the comments requested by the Commission in three consecutive years, which suggests that, pursuant to Article 32, c of the Regulations of this Commission the dossier should be filed without further action.

12. In a communication of April 28, 1986, the Commission forwarded to the claimant the pertinent parts of the new information received from the Government of Honduras.

13. The claimant, in a communication dated October 18, 1986, presented comments on the information from the Government to the effect that, having requested from the Office of the President of the Republic of Honduras (Dr. Roberto Suazo Córdoba) a certified copy of the report of the investigating committee set up by that administration clarify the status of individuals who have disappeared in Honduras the request had not been answered thus preventing the interested parties from taking any action whatsoever. The note was accompanied by a copy of the petition, which forms part of a civil process.

WHEREAS:

The information supplied by the Government of Honduras in the note dated September 11, 1981 (Official Communication 3074) ignores the fact that on June 11, 1981, following the alleged acts, a relative of Professor Tomás Nativí presented a writ of habeas corpus which was not executed by the corresponding judge until June 16 before the National Office of Investigations (DNI) with negative results; therefore there is no basis for the statement made in that official communication to the effect that denunciation of the facts was not presented until Saturday, June 13, that is, two days after the alleged events.

In fact, as indicated in the records, another denunciation of the facts was submitted to the DNI itself on Saturday, June 13, 1981.

There is a contradiction between the statement made in Official Communication No. 3074 mentioned above and the information supplied by the Government of Honduras in the note dated December 2, 1983 (Official Communication No. 1547), which records the habeas corpus writ of June 11, 1981.

Likewise, according to Official Communication 3074, not until June 16, 1981, was the habeas corpus writ executed, representing a very long delay in such a serious case as the alleged disappearance of Professor Nativí, since five days had elapsed since the filing of the recourse and six since the date of the grave acts covered by the complaint.

The habeas corpus writ presented by various citizens on July 4, 1983, two years after occurrence of the events, also produced no positive results; the competent organs of Honduras having confined themselves to processing it on a strictly procedural basis, inasmuch as the taking of evidence also failed to lead to in-depth investigation of the facts.

In the case in question, citing of the prior exhaustion of internal recourses as a reason for declaring the case to be inadmissible, as presented by the Government of Honduras in Official Communication 1547, is invalid, since the tenor of the responses of the Honduran Government to requests for information by the Commission indicates that the parties interested in ascertaining the whereabouts or situation of Professor Tomás Nativí and Mr. Fidel Martínez have exhausted without result the legal remedies to which they have resorted because of the negligence of the authorities responsible for conducting the investigations. Such authorities have confined themselves to saying that the persons in question "are recognized members of the Peoples' Revolutionary Union (URP), a leftist terrorist faction operating in Honduras," according to a statement made by the National Director of Investigations.

According to additional information presented by the claimant, military forces were involved in the disappearance of the agronomist Fidel Martínez and Professor Tomás Nativí. In this connection the petitioner notes that a DNI agent whose last name is Osorio made the following statament: "We are holding Fidel and Tomás. The operation was carried out by Major Lagos and they were taken to an anti-guerrilla camp in Olancho. They are going to be questioned to find out everything we want to know about the activities of the URP and its possible links to arms smuggling to El Salvador. If that's what those sons of bitches want, screw them."

Likewise the claimants report "persons well acquainted with Mr. Fidel Martínez and Professor Tomás Nativí saw the two of them put onto a small plane at an airport in Juticalpa and take off to an unknown destination. The persons (...) were close to the airport at the time."

Furthermore, the records contain the additional data of the claimants that "both Mr. Fidel Martínez and Professor Tomás Nativí have been shuttled from one battalion to another so that the habeas corpus writs presented should be null and void. Recently they were detained in Trujillo and then transferred to the first Infantry Battalion where they are moved back and forth from Torrión One to Torrión Two."

The information furnished by the Government of Honduras, remitted with the note dated April 7, 1987 (No. 13/86/MPH/OEA cited) offers no new evidence that could enable the Commission to deduce through other reliable means that the facts covered by the denunciation are not true. To the contrary, the ineffectiveness of the investigations by special ad-hoc committee set up (Agreement 232 of June 14, 1984) outside the

juridical system reaffirms the view that the Honduran authorities, after a long and fruitless judicial process, decided to transfer the matter to agencies or institutes unconnected with the Government, like the above-mentioned ad-hoc committee, before which the interested parties do not enjoy the right of representation or of defense in order to continue investigations that might verify the whereabouts or status of agronomist Martínez and Professor Nativí.

The claimants were also not allowed to examine or observe the report presented by that ad-hoc committee, despite their request to do so, all of which serves to confirm the foregoing.

Article 42. Presumption

> The facts reported in the petition whose pertinent parts have been transmitted to the government of the State in reference shall be presumed to be true if, during the maximum period set by the Commission under the provisions of Article 34 paragraph 5, the government has not provided the pertinent information, as long as other evidence does not lead to a different conclusion.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

RESOLVES:

1. To presume to be true the facts reported in the communication dated June 26, 1981, concerning the acts affecting the agronomist Fidel Martínez and Professor Tomás Nativí and their subsequent disappearance.

2. To point out to the Government of Honduras that the acts covered by the complaint constitute serious violations of the rights to life (Art. 4), to personal integrity (Art. 5), to liberty, and to personal security (Art. 7) under the American Convention on Human Rights, to which Honduras is a State Party and which it is internationally bound to respect.

3. To declare that the Government of Honduras is responsible for the acts that have, through commission or omission, led to disappearance of the persons covered by this denunciation, since such acts involved persons or agents who, pursuant to the denunciation and the evidence available to the Commission, operated within or by the authority of that government or with its acquiescence.

4. To recommend to the Government of Honduras that it pay to the families or heirs of the individuals who have disappeared and are presumed dead adequate indemnization, in accordance with the law, and that it report to the Commission within a period of 60 days on the status of this recommendation.

5. If during the period stipulated, the Government of Honduras should make no observations on this resolution, the Commission will include it in the Annual Report to the General Assembly of the OAS, pursuant to Article 63 g of its Regulations.

RESOLUTION No. 5/87
CASE 9619
HONDURAS
March 28, 1987

HAVING SEEN the pertinent background in this case, to wit:

1. In a cable dated September 4, 1985, the Inter-American Commission on Human Rights received the following denunciation:

> WE DENOUNCE HONDURAN ARMY ATTACK ON SALVADORAN REFUGEES COLOMONCAGUA, HONDURAS, 29 LAST AUGUST: 2 DEAD INCLUDING BABY, 50 WOUNDED, 15 APPREHENDED, 2 WOMEN RAPED AND 7 PERSONS TORTURED. 3 IN CRITICAL CONDITION AT TEGUCIGALPA HOSPITAL. WE DEMAND PUNISHMENT OF GUILTY AND ASK PRECAUTIONARY MEASURES ARTICLE 26 OF REGULATIONS ON BEHALF OF REFUGEES AND DETAINEES.

2. The Commission, in a cable dated September 6, 1985, asked the Government of Honduras to provide the corresponding information, pursuant to Article 34 (formerly 31) of its Regulations. At the same time it requested the Honduran authorities, in view of the seriousness of the accusation, to adopt the pertinent precautionary measures to ensure that the acts covered by the denunciation would be actively and rapidly investigated, as well as to safeguard the victims and preserve the existence of other evidence for the corresponding investigation. The Commission further asked the Government of Honduras to adopt timely measures to prevent a repetition of such occurrences and to ensure due respect for the principle of no return stipulated in Article 22(8) of the American Convention on Human Rights.

3. In a cable of September 6, 1985, the Commission also reported the acts denounced to the Regional Office of the United Nations High Commissioner for Refugees (UNHCR) with headquarters in Costa Rica and asked for the adoption of effective measures to ensure full guarantee of the lives and safety of the refugees in Honduran territory and, particularly, the principle of no return.

4. In a communication dated September 6, 1984, the Commission reported to the claimant on progress in the case.

5. The Government of Honduras, in a cable of September 11, 1985, reponded to the request of the Commission as follows:

CONTENTS OF DENUNCIATION FORWARDED TO COMPETENT AUTHORITIES, REPORT AVAILABLE AS SOON AS SPECIFIC DATA OBTAINED.

TRANSCRIBED BELOW IS OFFICIAL COMMUNICATION ISSUED BY NATIONAL COMMISSION ON COLOMONCAGUA REFUGEE CAMP OCCURRENCES:

OFFICIAL COMMUNIQUE

NATIONAL COMMISSION ON REFUGEES REGRETTING UNFORTUNATE INCIDENT AT COLOMONCAGUA SALVADORAN REFUGEE CAMP, DEPARTMENT OF INTIBUCA, IN VIEW OF REPERCUSSIONS OF INCIDENT IN NATIONAL AND INTERNATIONAL CIRCLES, MAKES FOLLOWING OBSERVATIONS:

1. HONDURAN GOVERNMENT MOTIVATED STRICTLY BY HUMANITARIAN CONSIDERATIONS HAS OVER PAST SIX YEARS BEEN RECEIVING REFUGEES FROM NEIGHBORING COUNTRIES WITHIN ITS TERRITORY; THE PRESENCE OF THOUSANDS OF SUCH REFUGEES CREATED BY CENTRAL AMERICAN CRISIS HAS ECONOMIC, POLITICAL, SOCIAL AND SECURITY IMPLICATIONS. THIS SITUATION AND ITS EFFECTS HAVE CAUSED HONDURAN GOVERNMENT TO TAKE SUITABLE STEPS TO PREVENT CONFLICTS AFFECTING PUBLIC TRANQUILITY.

2. DESPITE ITS DIFFICULT ECONOMIC SITUATION HONDURAS HAS OFFERED ASYLUM TO ALL CENTRAL AMERICANS FLEEING VIOLENCE IN THEIR OWN COUNTRIES WHO HAVE REACHED ITS TERRITORY THROUGH THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR) AND NATIONAL AND INTERNATIONAL NONGOVERNMENTAL HUMANITARIAN AGENCIES, EXTENDING HUMANITARIAN AID AND SUPPORTING THEIR REPRESENTATIVES IN THE SEVERAL CAMPS IN THE PERFORMANCE OF THEIR DUTIES.

3. OUR GOVERNMENT'S APPROACH, BASED ON TRUST AND GOOD WILL, IS DEMONSTRATED BY THE ABSENCE OF ANY ACTIVE PRESENCE OF HONDURAN AUTHORITIES IN THE REFUGEE CAMPS EITHER TEMPORARILY OR PERMANENTLY. THIS HAS LED TO COMMISSION OF ABUSES BY SOME REFUGEES AT VARIANCE WITH APOLITICAL POSITION AND RESPECT FOR HONDURAN LAWS WHICH MUST BE OBSERVED BY REFUGEES ENJOYING ASYLUM EXTENDED BY HONDURAS.

4. REGRETTABLE INCIDENT OF 29 AUGUST CITED ABOVE TOOK ADVANTAGE OF THIS SITUATION. ON 27 AUGUST WHEN MILITARY PATROL WAS INSPECTING AREA ADJACENT TO CAMP IT DETAINED SALVADORAN CITIZEN JOSE ANTONIO CHICAS SANCHEZ WHO WAS CARRYING AN M-16 RIFLE AND 4 CATRIDGE CLIPS. UNDER QUESTIONING CITIZEN SAID HE WAS A REFUGEE AND REPORTED THAT COMPATRIOTS INVOLVED IN SUBVERSIVE ACTIVITIES WERE INSIDE THE CAMP.

5. BASED ON INFORMATION PROVIDED BY THE DETAINEE, THE MILITARY CHIEF SENT FOR UNHCR PROTECTION OFFICER TO REPORT BUT

WHEN OFFICER COULD NOT BE FOUND DESPITE EFFORTS MADE MEN WERE ORDERED TO INSPECT THE CAMP. WHEN SOLDIERS ENTERED THE CAMP A GROUP OF REFUGEES REACTED VIOLENTLY TO THEIR PRESENCE AND ONE REFUGEE SEIZED THE GUN OF CORPORAL RAUL TREJO FLORES SHOOTING HIM IN THE LEG. LOGICALLY, IF THERE HAD BEEN NO SUCH VIOLENT REACTION AND DISRESPECT FOR AUTHORITY EVENTS CULMINATING IN THE DEATH OF THAT REFUGEE AND WOUNDING OF TWO OTHERS AS WELL AS THE ARREST OF TEN PERSONS PRESUMABLY ENGAGED IN SUBVERSIVE ACTIVITIES - NOW BEING HELD FOR INVESTIGATION AND TRIAL - WOULD NEVER HAVE OCCURRED.

6. THE GOVERNMENT, IN EXPRESSING REGRET FOR THE INCIDENT, STATES FOR THE RECORD ITS WILLINGNESS TO CONTINUE COOPERATING WITH THE HIGH COMMISSIONER IN ORDER TO PROVIDE PROTECTION AND HUMANITARIAN AID TO THE REFUGEES AND TO SOLVE ANY PROBLEM THAT MIGHT ARISE WITHIN THE FRAMEWORK OF MUTUAL COOPERATION AND OBSERVANCE BY THE REFUGEES OF THE PRINCIPLES DERIVING FROM RESPECT FOR NATIONAL SOVEREIGNTY AND INTERNATIONAL LAW. IT ALSO APPEALS TO HUMANITARIANISM AND SOLIDARITY OF GOVERNMENTS BASED ON LEGALLY REGULATED FOREIGN RELATIONS.

6. In a communication dated Spetember 12, 1985, the Commission transmitted to the claimant the pertinent parts of the information supplied by the Government of Honduras, setting a term of 45 days for presentation of comments or observations.

7. The Government of Honduras, in a note of September 18, 1985 (No. 721-DGPE-DAI/1067) forwarded additional information consisting of an Official Communiqué of the Armed Forces of Honduras (No. 57/85), which reads as follows:

THE OFFICE OF PUBLIC RELATIONS OF THE ARMED FORCES OF HONDURAS HEREBY REPORTS THE FOLLOWING TO THE NATIONAL AND INTERNATIONAL PUBLIC:

1. That on the 27th of this month members of the Tenth Infantry Battalion captured José Antonio Chicas Sánchez in the area of Colomancagua, Department of Intibucá, confiscating an M-16-A1 rifle and four (4) cartridge clips.

2. During questioning of the detainee his nationality and active militancy in the Salvadoran guerrilla group were established beyond any doubt. He further stated that he and a large group of insurgents from the neighboring country had entered Honduras in order to regroup in the refugee camp located at this site and, eventually, to undertake, acting from Honduran territory, action against the government of the neighboring country.

3. Based on that report, the authorities of the Tenth Infantry batallion decided to conduct an inspection on the

19th of the same month and year, following a report to the Office of the United Nations High Commissioner for Refugees (UNHCR) in order to ascertain whether those antisocial elements, who would be identified by Chicas Sánchez, had infiltrated the Colomoncagua Salvadoran refugee camp.

4. When the military patrol entered the refugee camp, an individual, taking Corporal Raúl Trejo Flores by surprise, seized his gun and wounded him in the leg with the weapon. Another member of the Honduran patrol reacted by shooting the aggressor to death and wounding a third party with the same bullet. The military authority then apprehended ten (10) suspected subversives, who were informed of their rights. The person wounded in the confrontation is being cared for by Honduran medical professionals.

5. It should be pointed out that on several occasions the Armed Forces of Honduras have endeavored to set up a system of supervision and vigilance to prevent antisocial elements from using the refugee camps as sanctuary for their operations and provoking just such regrettable situations as this.

6. The Armed Forces of Honduras hereby reiterate that, in fulfillment of their constitutional duty, they will not permit any foreigner to disturb the peace and order in the Republic.

8. In a communication dated October 16, 1985, the petitioner made the comments and observations transcribed below, enclosing several items of evidence corroborating the fact denounced, consisting of public documentary proof and the testimony of a witness to those facts. That text is as follows:

In response to your request, we are forwarding additional information on the case:

1. Persons killed during the military invasion of the Colomoncagua refugee camp on August 29, 1985: Saúl Manuel Romero, 23 years of age, and Gloria Noemí Blanco Argueta, two months.

2. Shot: Juan Cristo Pérez, 3; Elías Vásquez, 4; Domitila Ramo, 13; Andrea Gómez, 48; Elia Hernández, 19; Maura Ramírez, 42; Modesta Rodríguez, 61; Rutilio Argueta, 43; Santiago Gómez, 56; Santiago Hernández, 62; Candelaria Maradiaga, 56; Eduardo Mejía, 70; Juan Sáenz, 33 and Santos Vásquez, 33.

3. Beaten: Auxiliadora Vigil, 2; Julio César Salazar, 12; Arturo Vásquez, 12; Leticia Argueta, 18; María Argueta, 19;

Silvina Blanco, 34; Arelí Bonilla, 22; Florentina Chicas, 27; Gloria Maribel Flores, 58; Sebastiana Gómez, 33; Anabel Marisol Hernández, 16; Magdalena Márquez, 52; Elvira Membreño, 18; Prudencia Pérez, 58; Elba Ramírez, 24; Cresencia Sánchez, 35; Sixta Sánchez, 20; Deysi Vásquez, 21; Mercedes Ventura, 25; Lucía Vigil, 29; Rafaela Vigil, 50; Elia Remírez, 27; Modesta Ramírez, 28; María Alicia Ramos, 25; Inés Cruz, 23; Felipe Chicas, 69; Francisco Chicas, 76; Jerónimo Gómez, 80; José Guevara, 77; Aurelio Hernández, 17; Ferdinando Hernández, 66; Isidoro Hernández, 38; Santos Ortíz, 68; Esteban Umanzor, 63; Concepción Vigil, 26, and Francisco Vigil, 52.

Raped: Estela Rodríguez, 24, and Concepción Martínez.

Also attached are the denunciation lodged publicly by the Office of the Commission for the Protection of Human Rights in Honduras (CCDEH); the investigation conducted by the Office of the Archbishop of San Salvador, and on-site by the Bishop of Santa Rosa de Copán, anonymous testimony from refugees in English, and testimony from the Inter-Church Committee for Refugees of Toronto, Canada.

Sufficient evidence exists of the guilt of the Government of Honduras in those regrettable occurrences, which, unfortunately are part of the general climate of repression prevailing in that country in recent years. The status of the Salvadoran refugees is particularly difficult at this time since they are accused of belonging to or collaborating with the Salvadoran guerrillas, which makes them easier targets for government repression.

The Government of Honduras is guilty of violation of Articles 6, 7 and 9 of the Civil Political Rights Pact to which that country is a party and of the fundamental principles established by the Universal Declaration of Human Rights of the UN.

9. In a note of October 23, 1985, the Commission transmitted to the Government of Honduras the pertinent parts of the comments made by the petitioner, setting a period of 60 days from remitting all information on the case.

10. The Commission, in a letter dated October 29, 1985, to the Director of the UNHCR Office in Honduras, asked that it supply any available information on the progress of the case before the Honduran authorities. That request was made at the suggestion of the UNHCR office for the Protection of Refugees in Geneva.

11. Since the claimant, in a cable of October 30, 1985, reported that the Government of Honduras had officially announced relocation of

the refugees from the Colomoncagua camp to a place called "Mesa Grande", the Commission, fearing for their safety, requested in a cable dated November 4, 1985, to the Government of Honduras information on that reported transfer. Likewise, in a communication dated November 4, 1985, it again reported to the UNHCR office in Tegucigalpa on the situation, expressing the fear that new violations of human rights might occur.

12. The Government of Honduras, in a note on December 3, 1985 (No. 1001) replied to the observations presented by the claimant (transmitted with the October 23, 1985, note), stating as follows:

> In response to your note of October 23, 1985, and with reference to Case 9619, I should like to inform you that, having transmitted the denunciation of the events presumed to have occurred in the Colomoncagua refugee camp to the competent authorities, the latter proceeded to conduct the pertinent investigations, which, in their preliminary phase, produced the following results:
>
> 1. Mr. Saúl Manuel Romero died after having forcibly seized the rifle of one of the soldiers, with which weapon he shot Corporal Raúl Trejo Flores, wounding him in the leg.
>
> The child Noemí Blanco Arguet, a two months old, died as the result of an illness of several days duration, as confirmed by Mrs. María Moreno Márquez, a resident in the camp at the time of the incident.
>
> 2. The possibility that several residents of the camp might have been beaten cannot be ruled out, since the soldiers conducting the inspection were met by refugees wielding small-calibre weapons, knives and pointed implements, shovels and stones. Consequently they were forced to repel the physical aggression towards them exhibited by foreigners who had been given refuge by the Government of Honduras for purely humanitarian reasons.
>
> 3. According to the report made to this ministry, it is completely untrue that women in the camp were raped. Estela Rodríguez, who participated directly in the physical agression against the troops, was wounded in the ankle, prompting her to state that she would say that she had been raped. This account was confirmed by one of the refugees.
>
> The Government of Honduras wishes to reaffirm to the Inter-American Commission on Human Rights its willingness to continue to offer protection and humanitarian aid to the refugees within the framework of the principles deriving from respect for national sovereignty and international law.

13. The Commission, in a communication dated December 16, 1985, transmitted to the petitioner the information from the Government of Honduras, setting a period of 45 days for its reply.

14. Since the Government of Honduras had posed questions, in a note of November 14, 1985 (No. 936-DAI-DSPE), received subsequently to the December 3 note cited in section 12, concerning the exhaustion of internal remedies, the Commission, in a note of December 18, 1985, to the Government provided the necessary clarifications. Likewise, on December 18, 1985, it asked the petitioner for further information on the status of the case before the Honduran authorities or the progresss of their investigations. That request was renewed on January 22, 1986.

15. Since the deadline for submission by the Government of Honduras of the data requested in the October 23, 1985 note had passed, on February 10, 1986, the Commission again asked for such information to be sent.

16. The petitioner, in a communication of February 10, 1986, reponded as follows to the reply of the Government of Honduras on December 3, 1985:

> With regard to the response of the Government of Honduras dated December 3, 1985:
>
> 1. It is entirely untrue that Mr. Saúl Manuel Romero died "after having forcibly seized the rifle of one of the soldiers, with which weapon he shot Corporal Raúl Trejo Flores, wounding him in the leg." This could not be the direct cause of his death even admitting, as the Honduran Government would have us believe, that the refugee Romero offered resistance. The direct cause of his death was the physical violence committed against him by the Honduran soldiers, culminating, as we are told by the eye-witness Josefina Pugimon Colell. a Spanish-volunteer teacher, in his throat being cut. The refugee Saúl Manuel Romero, according to the attached testimony, did not resist in any way, but even if he had instinctively defended himself, by grabbing the weapon or had even used it to wound Corporal Raúl Trejo Flores in the leg, his violent death cannot be justified, as the Honduran Government maintains in its answer to the charges.
>
> With reference to the child Noemí Blanco Argueta, two months old, who, according to the Honduran Government "died as the result of an illness of several days duration, as confirmed by Mrs. María Moreno Márquez, a resident in the camp at the time of the incident," this is completely false. We cannot refute, since we do not know, the fact that the child might have been ill, but the direct and immediate cause of her death we do know, from the testimony of several refugees

and of the Spaniard Josefina Purgimon Colell. The child was kicked by a soldier who attacked her grandmother, Silvina Blanco, 39, who was carrying the baby in her arms as she fled from her attackers. Against the word of Mrs. María Moreno Márquez, cited by the Government of Honduras, we offer the testimony of the child's grandmother, recorded on the casettes we submit herewith, photographs showing the battered child and her grandmother and written testimony gathered by the Inter-Church Committee for Refugees/Inter-Church Committee for Human Rights of Canada.

As you will realize from listening carefully to the cassettes, the on-site witnesses refute the statements of the Honduran Government and describe in great detail the barbaric actions of the Honduran army. The photograph of the dead child clearly shows on the lower left part of her face the bruise caused by the kick of the Honduran soldier.

2. The Government of Honduras says that "The possibility that several residents of the camp might have been beaten cannot be ruled out, since the soldiers conducting the inspection were met by refugees wielding small-calibre weapons, knives and pointed implements, shovels and stones. Consequently they were forced to repel the physical aggression exhibited by the foreigners who had been given refuge by the Government of Honduras for purely humanitarian reasons." It would appear, following the reasoning of the Government of Honduras, that its army was attacked and reacted in legitimate self-defense to the aggression by the refugees while inspecting the camp on August 29.

The same position is inferred from the statement made in paragraph one, 1, of its response, declaring that Saúl Manuel Romero had died "after having forcibly seized the rifle of one of the soldiers".

Neither Saúl Manuel Romero nor any of the refugees in Colomoncagua showed any aggressiveness whatsoever against the soldiers. The latter were the ones who forced their way in, as described in the testimony of Josefina Purgimon Colell, who said: "At no time did I see a single refugee display the slightest force against the soldiers; at all times they confined themselves to approaching the soldiers and asking them please not to mistreat their refugee companions. The soldiers who struck and tortured the refugees had painted their faces green and black. It was my impression that they were under the influence of drugs".

But if we again assume--a completely unrealistic premise--that the refugees had physically attacked the soldiers, did the latter have the right to kill them, to repress them as they did, to apprehend ten and torture them so barbarically?

The Honduran Government should, on the other hand, confess to the Commission that it was not just a matter of "several residents" of Colomoncagua who were wounded. The Commission has already received the long list of refugees who were beaten or shot, in addition to the three killed and the ten captured and tortured. This list was drawn up by the Office of the Archbishop of San Salvador and the Bishop of Santa Rosa de Copán, Honduras. We ask the Government of Honduras to provide evidence of the weapons carried by the refugees and of the wounds inflicted by their attack. Finally, the Government of Honduras has reported its own version of the episode in that country, alleging that guerrillas of the Farabundo Marti Front for National Liberation (FMLN) of El Salvador were in the camp. From its standpoint, this is consistent with the account it is now relaying to the Inter-American Commission on Human Rights. The Office of the United Nations High Commissioner for Honduras noted in a communiqué published in the Honduran press that all of the refugees apprehended--the alleged guerrilla commandants--carried refugee documents and were under the protection of the UNHCR, thus refuting the government story. We bring this point up so that the Commission may be apprised of the malice with which the Honduran Government has sought to justify this gross violation of human rights. Moreover, these occurrences are not isolated ones, since there have been many cases of harassment and repression of Salvadoran refugees for the purpose of bringing about their forced repatriation or proposed relocation in the interior of the country for strictly military purposes.

3. Concerning the sexual violation committed by the Honduran soldiers and denied by that government in its writ, we base ourselves on the testimony given by the victim, Estela Rodríguez on one of the cassettes we are remitting.

One item of evidence collected by the Canadian Inter-Church Committee for Refugees/Inter-Church Committee for Human Rights in Latin America also bears on the matter. The report by the Office of the Archbishop of San Salvador and the Bishop of Copán indicates that both Estela Rodríguez and Concepción Martínez were raped by the Honduran soldiers.

I refer also to the information requested from us concerning the exhaustion of internal judicial remedies in the case in question.

The Vice-Chairman of the Commission for the Protection of Human Rights in Honduras, Mr. Oscar Aníbal Puerto Possas, filed a writ of habeas corpus for Ramón Mejía, Aníbal Márquez, David Torres, Albertario Sánchez, Braulio Chicas, Filadelfo Portillo, Raúl Arguenta, Leonel Rodríguez, Domingo Vigil and Carlos Hernández before the Supreme Court on September 4, 1985. Three months later, on December 9, 1985, the executory judge Samuel Cano argued "that it had not been executed because the secretary employed by him at the time had misplaced the document and he had been unaware of the fact." (See copy of the writ and footnote attached). On January 15, 1986, according to press reports, the ten men arrested by the Government of Honduras were deported to Lima, Peru. On January 22 of this year the CODEH Vice-Chairman asked for certification of judgment of the habeas corpus writ. To date we have no knowledge of any reply having been received from the Supreme Court of Honduras in that respect. As you will realize, an effort was made to exhaust internal remedies on behalf of the ten people apprehended but it was unproductive; pursuant to the provisions of Article 34, 2, d the parties concerned have been prevented from ensuring such exhaustion.

On the other hand, no attempt was made by the Commission for the Protection of Human Rights in Honduras (CODEH) to exhaust local justice in order to seek sanctions againt those responsible for the occurrences of August 29, 1985, and to fix responsibility.

The reasons for proceeding in this manner are contained in a letter of reply to our request for information on the matter signed by its Chairman, Dr. Ramón Custodio López, which we received only a few days ago.

If, in a case of habeas corpus, a recourse which is by its very nature expeditious, pursuant to the American Convention on the rights and Duties of Man, Art. 7(6) and the political constitution of that country, the papers have been "misplaced", what can be expected from an ordinary trial accusing the soldiers guilty of the violations? Which of the refugees would dare to testify against them?

This whole situation makes it impossible for internal remedies to be exhausted by the victims or by the agencies of human rights working on their behalf. Moreover, it must be noted that a widespread climate of repression is steadily being created in Honduras, leading to total disrespect for the law, especially with regard to human rights.

Therefore, given the gravity of the facts that concern us and the scope of the violations, we ask the honorable Inter-American Commission on Human Rights to:

1 Admit our petition in the case in question.

2 Pursuant to Article 40 of the Regulations, hold a hearing to inform itself more fully on the facts.

17. The Commission, in a note dated March 10, 1986, transmitted to the Government of Honduras the pertinent parts of the reply transcribed above, setting a term of 30 days for receipt of its comments or rejoinder.

18. In a cable of April 11, 1986, the Government of Honduras asked for a 30 day extension of the term for transmittal of such rejoinder.

19. The Government of Honduras, in a cable on April 7, 1985, transmitted by the Permanent Mission of Honduras to the OAS (Note No. 13 of April 7, 1985) stated that it would in due course report on the inquiries being made by the authorities based on the observations and reply of the petitioner.

20. The Commission took note of those communications during its 68th period of sessions (April 1986), having agreed not to grant the additional term of 30 days requested by the Government of Honduras on April 11, 1985. A note to that effect was sent to the Government of Honduras on April 28, 1986.

21. Since the Government of Honduras had not supplied the reports, the Commission in a note of July 28, 1986, again requested the same, noting possible application of the provision made in Article 42 of the Regulations to presume the truth of the facts denounced.

22. The Government of Honduras did not reply.

23. The petitioners, in a hearing before the Commission on September 22, 1986, during the 68th period of sessions of the Commission, stated in oral and written testimony that they had been the victims of sudden attack by the Armed Forces of Honduras at about 1:00 p.m. on August 29, 1985, at the Colomoncagua Camp involving a number of soldiers under the command of a major Ramírez, that some refugees were taken from there to the town of La Esperanza for questioning by military authorities and were subjected to all kinds of outrages, mistreatment and beatings and finally transferred to the First Infantry Battalion in Tegucigalpa. From there those worse off were sent to a medical center where they were confined for 23 days without treatment and with very little food or water, accused of being Salvadoran guerrillas.

24. In addition the claimants made the following statement during that hearing:

1. That on August 29, 1985, as the Commission is aware, the Honduran army invaded the Colomoncagua camp inhabited by Salvadoran refugees--including ourselves--in a military operation that seemed carefully planned in view of how they acted, killing three persons, one only two months of age, and beating and brutally intimidating the other refugees.

2. That on that occasion ten prisoners were taken and held incommunicado for more than four months at different detention sites in Honduras, having been cruelly subjected to both physical and mental torture, accused of being guerrillas or collaborators of Salvadoran guerrillas, which is completely untrue and ultimately deported to the Republic of Peru through the intervention of humanitarian agencies including the Red Cross and UNHCR in January of this year. Since May they have been under the protection of the Canadian Government.

3. That our families, wives, children and other relatives, are still in Honduras and we are justifiably afraid that they will suffer major reprisals since the refugee camps are the object of extremely strict and repressive treatment and vigilance.

4. That we have learned of the denunciation lodged in our behalf by the Commission for the Protection of Human Rights in Central America (CODEHUCA), with headquarters in San José, Costa Rica, which represents us in this case.

5. That we are gravely concerned by the fate of our fellow refugees currently in Honduras at different camps subject to the pressure of relocation and prevented from living a normal existence because of constant intimidation from the Honduran army.

CONSIDERING;

1. That all of the regulation provisions for processing of the case have been exhausted without the Honduran Government having provided the reports offered in the cable of April 4, 1986.

2. That the information provided by the Government of Honduras is insufficient to refute the denunciation and instead affirms commission of the acts covered by the complaint, pursuant to the contents of paragraph two, 5, to the official communiqué of the National Commission for Refugees transmitted by the Government of Honduras in the cable dated September 11, 1985, transcribed above.

3. That, based on international law and in the terms of the international commitments of Honduras, the Honduran authorities are responsible for the situation, safety and integrity of refugees exiled in their territory. Consequently, the refusal to accept that responsibility, as

inferred from the contents of the communiqué by the National Commission for Refuguees, is unacceptable especially with reference to points 3 and 4 transcribed.

4. That the Government of Honduras did not specifically report to the Commission on the course of the investigations made to clarify the facts, to wit: what authority initiated the investigation, when did it begin, what suspects were appehended and where were they detained and, finally, what is the status of the matter before the national authorities.

5. That, likewise, the information supplied subsequently in the press communiqué of the National Commission for Refugees (Note of 18/9/85-No. 721) raises serious questions, such as the following:

a. What judicial authority (civil or military) took note of the detention of the suspected Salvadoran guerrilla José Antonio Chicas Sánchez;

b. What suit was filed against that individual;

c. Copy of the interrogation of that individual, and

d. Information on whether Mr. Chicas Sánchez was assigned a competent lawyer during the interrogation and other formalities undertaken in his behalf and where he was placed on trial, the trial outcome and where he is serving his sentence.

6. That the Honduran Government has also failed to furnish information on the bloody events that occurred in Colomoncagua, of which the victims were Mr. Saúl Romero, 23, and the child Gloria Noemí Blanco Argueta, two months, both killed in the incident or the several wounded, including the following: Juan Cristo Pérez, 3; Elías Vásquez, 4; Domitila Ramo, 13; Andrea Gómez, 48; Elia Hernández, 19; Maura Ramírez, 42; Modesta Rodríguez, 61; Rutilio Arguta, 43; Santiago Gómez, 56; Santiago Hernández, 62; Candelaria Maradiaga, 56; Eduardo Mejía, 70; Juan Sánez, 33 and Santos Vásquez, 33. We do not know if a criminal trial was held to determine responsibilty in those cases or its outcome.

7. That the Commission also failed to receive information on the legal status of the persons wounded during the course of the events or regarding the case of the alleged rape of Estela Rodríguez, 24 years of age, and Concepción Martínez, whose age is not mentioned in the data received by the Commission.

8. That in the case covered by the complaint, the petitioner has not been permitted access to internal remedies or has been prevented from exhausting them, in which case the requisite provided for in Article 37 of the Regulations has been superseded.

9. That the Commission is in receipt of the testimony given by an eye-witness to the events that occurred in Colomoncagua. That witness

belongs to an international humanitarian aid unit and, because of her status, is considered to be reliable. Her testimony affirms facts that coincide in every point with the details contained in the complaint lodged with the Commission, which is valuable evidence in favor of the truth of that denunciation.

10. That, as stated in the background to this resolution, the Commission also has available other testimony and presentations by the petitioners and eyewitnesses to the acts, all of which coincide with the other evidence mentioned, according to which it can be affirmed, beyond any reasonable doubt, that the acts denounced occurred in the manner stated and that the Honduran authorities must accept a grave responsibility, especially the military leaders who ordered and those who carried out the operation of August 29, 1985, at the Colomoncagua Camp.

11. That Article 42 of the Regulations authorizes the Commission to presume the facts reported in the petition to be true, provided other evidence does not lead to a different conclusion, which is not the case in this instance.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

RESOLVES:

1. To presume the facts described in Case 9619, occurring at the Colomoncagua, Honduras, refugee camp on August 29, 1985, to be true.

2. To point out to the Government of Honduras that the facts denounced in this case constitute serious violations of human rights in general and, specifically, of those set forth in Articles 4 (1); 5 (1) and 8 (1 and 2, c and d) of the American Convention on Human Rights.

3. To request the Government of Honduras to present to the Commission within 60 days a detailed and complete report on the course of the investigations conducted concerning the events that occurred at the Colomoncagua Camp, particularly whether trials have been held to establish the criminal responsibility for such acts and what has been their outcome, taking into account the serious nature of the acts and the cases of deaths, serious wounds, assault on children and rapes committed at that place on August 29, 1985.

4. To recommend that the Government of Honduras also report to the Commission within 60 days on the measures proposed with a view to granting the victims or their heirs the adequate indemnification to which they are entitled.

5. To include the text of this resolution in the Annual Report of the Commission to the OAS General Assembly, pursuant to Article 63, g of its Regulations.

6. To transmit this resolution to the Government of Honduras and to the petitioner.

RESOLUTION N° 2/87
CASE 7788
NICARAGUA
March 27, 1987

HAVING SEEN:

1. Resolution N° 20/86 approved by the Inter-American Commission on Human Rights on April 18, 1986, attached hereto as Appendix N° 1, which it resolved:

> 1. To declare that the Government of Nicaragua has violated the right to private property set forth in Article 21 of the American Convention on Human Rights by confiscating the dividends earned on shares owned by Mr. Carlos Martínez Riguero in the Empresa Cereales de Centroamérica S.A. (CERSA).
>
> 2. To declare that the Government of Nicaragua has violated the right to private property set forth in Article 21 of the American Convention on Human Rights by nationalizing the quarry located in the "Las Brisas" subdivision belonging to Mr. Carlos Martínez Riguero and by thus far failing to honor the pecuniary obligations arising out of that measure despite the lengthy period that has elapsed.
>
> 3. To recommend to the Government of Nicaragua that it take steps to reimburse, in accordance with the law, Mr. Carlos Martínez Riguero for the amounts owed to him as unpaid dividends and for the nationalization of the quarries referred to in paragraph 2.
>
> 4. To send this resolution to the Government of Nicaragua so that it may make any observations it deems pertinent within 60 days of the date of the respective letter of transmittal.
>
> 5. To publish this resolution in the Annual Report of the Commission, for the purposes of Article 63.g of the Regulations, if the Government of Nicaragua does not make the pertinent observations within the period stipulated in the foregoing paragraph.

2. The observations made by the Government of Nicaragua through a note dated June 11, 1986, wherein it states:

> Inasmuch as the complaint described above remains in effect and in light of the provisions of the resolution that

the Honorable Commission has issued, the Government of Nicaragua sees fit to make a statement on the matter, as follows: Mr. Carlos Martínez Riguero and the assets that he claims in the complaint brought before that Commission were not affected by Decree N° 3 of June 20, 1979. With regard to the shares that he claims to have owned in the Empresa de Cereales Nicaragüenses (CERSA), these were placed under temporary government control and later released, as attested to through certification issued by the Ministry of Justice on May 8, 1980. (Please find attached a copy of said certification.) (Appendix N° 2).

Accordingly, the certification and exemption from tax liability was issued in the name of Mr. Carlos Martínez R. and Mrs. Melba Páez de Martínez, while settlements that the claimant had pending from the Nicaraguan Government for various holdings were in process. That certification is dated April 8, 1981. (Enclosed is a copy of that certification, Appendix N° 3.) In the exercise of its powers and procedures, the Government of Nicaragua enacted the Law on Nationalization of the Mining Sector and Establishment of the Corporation Nicaragüense de Desarrollo Minero - CONDEMINA, by virtue of which the quarry owned by Mr. Carlos Martínez Riguero, located in Las Brisas, was affected. The effect on that property is, therefore, the consequence of a general law. It can never be alleged that it was an individual and separate decision on the part of the Government of Nicaragua.

As for the appraisal and compensation procedure, if said procedure was not followed, it was precisely because the party concerned did not take the measures called for in the matter. (Please find enclosed signed photocopies of the Gazettes publishing the Law on Nationalization and the Establishment of CONDEMINA, Decree N° 137 and Decree N° 314) (Appendix N° 4.) Mr. Chairman, the Government of Nicaragua wishes to reiterate to the Commission that under our system of law the regular and special remedies available to all Nicaraguans seeking to settle a legal situation are immutable. Nonetheless, of his own free will, Mr. Carlos Martínez Riguero opted to leave the country without availing himself of the remedies available to him as a citizen under the laws of the country. Though he has been absent since 1981, it is utterly false that the Government of Nicaragua declared him to be <u>in absentia</u>.

3. The complainant's observations on the reply from the Government dated September 9, 1986, and which in essence states:

My observations on the documents sent by the Government and mentioned previously will appear together with the pertinent paragraphs of the Government's reply.

FIRST PARAGRAPH

"Mr. Carlos Martínez Riguero and the assets that he claims in the complaint brought before that Commission were not affected by Decree N° 3 of June 20, 1979."

MY OBSERVATIONS ON THE FIRST PARAGRAPH

Attached to correspondence I addressed to you on June 11, 1981 was a copy of "La Gaceta," the official newspaper of the Government of Nicaragua, page 5 of which contains Decree N° 3, of July 20, 1979.

Since this was nothing more than a copy of Decree N° 3, let us look at your "Report on the Situation of Human Rights in Nicaragua, 1981."

Chapter I of that report, on the existing legal system in that country, establishes the following in paragraph F, section c:

"Moreover, through Decree N° 3 of July 20, 1979, the Nicaraguan Government empowered the Attorney General to take steps to seize, requisition and confiscate all property of the Somoza family and of the military and officials who had abandoned the country since December 1977."

In turn, Decree N° 3, dated July 20, 1979, given as Supporting Document N° 9, establishes the following:

"The Attorney General is empowered to proceed forthwith to take steps to seize, requisition and confiscate all property of the Somoza family and of the military and officials who have left the country since December 1977."

In view of the foregoing, the following are pertinent excerpts from a communication I received on december 18, 1979 from another branch of the Government of Nicaragua, the original of which I included as Supporting Document N° 7 (Appendix N° 5). Through that communication, I am advised of the following:

"On November 20, the National Reconstruction Trusteeship received from the Attorney General the list of shareholders whose shares in the corporation known as CEREALES DE CENTROAMERICA, S.A. (CERSA) were confiscated:

Carlos Martínez Riguero

Said shares are being represented by this Trusteeship as of that date."

It is therefore clear that the Attorney General included me among the persons who had been divested and that my shares were also confiscated.

Further, on January 4, 1980, as shown in Supporting Document N° 11 (Appendix N° 6) of these proceedings, the Attorney General himself in charge of the confiscation, addressed correspondence to my wife, Mrs. Melba Páez de Martínez. The opening words of that communication constitute ample proof of the CONFISCATION of my shares in CERSA. That document starts as follows:

"In order to revoke the confiscation of CEREALES DE CENTROAMERICA, S.A. that you request..."

The Attorney General was empowered to seize or confiscate assets; but all the documentation referred to above shows that in the case of the undersigned, his decision was to confiscate. Beyond any question, I was the target of confiscation.

We see, then, that the claim made by the Government of Nicaragua in the FIRST PARAGRAPH of its reply to the effect that the undersigned claimant and his property were not adversely affected by Decree N° 3 of July 20, 1979, is false.

SECOND PARAGRAPH

The Government states:

"With regard to the shares that he claims to have owned in the Empresa Cereales Nicaragüenses (CERSA), these were placed under temporary government control and later released, as attested to through certification issued by the Ministry of Justice on May 8, 1980. (Please find attached a copy of that certification.)" (Appendix N° 2)

MY OBSERVATIONS ON THE SECOND PARAGRAPH

An initial observation on the second paragraph: The company from which the Government confiscated my shares and the corresponding dividents is not called "Cereales Nicaragüenses (CERSA)," but rather CEREALES DE CENTROAMERICA, S.A. (CERSA).

Let us now turn to the certification to which the Government of Nicaragua refers in this second paragraph, a copy of which it encloses. As noted above, the undersigned enclosed the original version of that certification. That "certification" states verbatim:

> "THE MINISTRY OF JUSTICE OF THE REPUBLIC OF NICARAGUA HEREBY ATTESTS that the shares belonging to Mr. Carlos Martínez Riguero in the Empresa CEREALES DE CENTROAMERICA S.A. are not affected by Decrees Nos. Three (3) and Thirty-eight (38) issued by our JUNTA OF THE GOVERNMENT OF NATIONAL RECONSTRUCTION. Those shares must therefore be released.

We see, therefore, that the Minister of Justice and the Attorney General ATTEST that those shares must be released. Further, in reference to the shares, the Minister of Foreign Affairs states that they were released.

As may be seen from the documentation in the proceedings on this CASE 7788, the shares in CERSA that were confiscated from me are worth a vast sum of money. If indeed these shares were released, it is illogical for the Government to offer as evidence a statement to the effect that "they must be released," rather than a receipt signed by the injured undersigned attesting to the fact that he had in fact received the shares that "must be released."

Apart from the matter of the "release of the shares" --which we know did not occur--, the matter of the dividends earned on those shares is still pending.

Your Resolution 20/86, which was duly transmitted to the Government of Nicaragua, resolves the following:

"To declare that the Government of Nicaragua has violated the right to private property set forth in Article 21 of the American Convention on Human Rights by confiscating the dividends earned on shares..."

You also apprised of the following:

"To recommend to the Government of Nicaragua that it take steps to reimburse, in accordance with the law, Mr. Carlos Martínez Riguero for the amounts owed to him as unpaid dividends... "

However, throughout its reply to your request for information concerning your Resolution 20/86, the Government

of Nicaragua does not make the slightest mention of the word "dividends" and merely enclosed "a statement" to the effect that "those shares must be released."

Moreover, included in the existing documentation in the files on the present CASE 7788 are a number of irrefutable documents wherein the undersigned demands the actual release of his shares in CERSA, and that the dividends earned on those shares be paid to him, however many resources the Nicaraguan Government used--the Government Junta, Ministers and Deputy Ministers of State responsible for government agencies, Judges, Courts of Appeal, Supreme Court of Justice, etc.--to definitively confiscate my shares in CERSA and the dividends those shares earned for me.

These documents, which are too numerous and lengthy to duplicate here--even partially--were enclosed with written correspondence presented to you, the Commission, on June 11, 1981 and thereafter. I request that these documents be included, in their entirety, in your resolution on the present CASE 7788, as called for under the terms of the Convention and your Regulations.

The foregoing observations on the SECOND PARAGRAPH of the reply from the Government of Nicaragua on my shares in CERSA are incontrovertible proof that no such shares "were released" despite the Government's unfounded denial in its reply.

It is equally clear from the SECOND PARAGRAPH and even from the Government's entire response that it makes not even the slightest allusion to your resolution concerning the recommendation to that Government of Nicaragua that it proceed to reimburse Mr. Carlos Martínez Riguero for the amounts owed to him in the form of unpaid dividends.

THIRD PARAGRAPH

"Consequently (en consecuencia), the certification and exemption from tax liability was issued in the name of Mr. Carlos Martínez R. and Mrs. Melba Páez de Martínez, while settlements that the claimant had pending from the Nicaraguan Government for various holdings were in process. That certification is dated April 4, 1981. (Enclosed is a copy of that certification, Appendix N° 3.)"

MY OBSERVATIONS ON THE THIRD PARAGRAPH

First, we should take a look at the word "consecuencia".

According to the Dictionary of Synonyms and Antonyms by Professor Sainz de Robles, that word is synonymous with "deduction and conclusion."

Thus, according to the Government's reply, by deduction, in conclusion, "as a consequence" of the fact that that Government had taken control of and released my shares in the CERSA Corporation, "the certification and exemption from tax liability was issued" in my name, while settlements that the claimant had pending from the Nicaraguan Government for various holdings were in process.

There cannot be the slightest connection, link or relationship of any kind whatsoever between the fact that some of my shares were seized or CONFISCATED and later released and the fact that the undersigned was exempted from any tax liability. The very "certification" in question makes no reference to CONFISCATION, seizure, release of shares, but rather to the fact that the Government must pay me for several properties.

Moreover, let us look at the copy of the "certification and exemption from tax liability" that in the THIRD PARAGRAPH the Government of Nicaragua states it sent. I should clarify at this point that that document, dated April 4, 1981, was enclosed with correspondence that I conveyed to the Commission on July 15, 1981 as Supporting Document N° 16, more than five years ago, and that has been part of the file for CASE 7788 since that time.

That document states the following verbatim:

"In view of the fact that Comrade CARLOS MARTINEZ RIGUERO has pending from the Government settlements on various holdings that were negotiated by the Ministry of Transport as well as a quarry that was nationalized, I am authorizing you to give him and his wife, Mrs. MELBA PAEZ DE MARTINEZ, creditworthiness, until such time as the government pays off that balance."

Summing up and to clarify the pertinent statements made by the Government in the document quoted above, what we have is the following: Since the undersigned claimant has pending from the Government settlement (payment of a debt, according to the Larousse Dictionary) for several holdings, the appropriate persons are authorized to extend creditworthiness (capacity to pay debts, according to Larousse) until such time as the Government makes settlement (pay off a debt, according to Larousse).

In other words, in the "Certification" that the Government encloses, according to the THIRD PARAGRAPH of its reply, IT CERTIFIES that Comrade CARLOS MARTINEZ RIGUERO has pending from the Government settlement on several properties; but in its reply to you, the Commission, the Government talks about settlements on several properties that the claimant had pending with the Government.

As can be seen, there is a world of difference between the CERTIFICATION issued by the Government and the reply you received from the Government, since the enclosed Certification clearly states that the undersigned HAS several properties pending payment by the Government.

Finally, with regard to the THIRD PARAGRAPH of the reply from the Government of Nicaragua under discussion, we see that it is not true that a certification and tax exemption was issued in my and my wife's name by virtue of the release of my shares in CERSA. We have also seen from the CERTIFICATION that the Government enclosed that it admits it must settle or pay to the undersigned claimant the amount owed to him for several properties and the quarry involved in CASE 7788.

FOURTH PARAGRAPH

The reply from the Government.

"In the exercise of its powers and procedures, the Government of Nicaragua enacted the Law on Nationalization of the Mining Sector and Establishment of the Corporation Nicaragüense de Desarrollo Minero - CONDEMINA, by virtue of which the quarry owned by Mr. Carlos Martínez Riguero, located in Las Brisas was affected."

The undersigned and the Commission know that a general law such as the law on nationalization of the means of production affects each and every company involved in the production of the nationalized branch.

In relation to the FOURTH PARAGRAPH of the Nicaraguan Government's reply, it is obvious that the Government is correct in stating that the Law on Nationalization of the Mining Sector affected the quarry owned by Mr. Carlos Martínez Riguero, located in Las Brisas.

FIFTH PARAGRAPH

"The effect on that property is, therefore, the consequence of a general law. It can never be alleged that it

was an individual and separate decision on the part of the Government of Nicaragua."

The undersigned again notes that the files on this CASE 7788 contain no document wherein the undersigned is claiming or contending or implying that the law on nationalization of the mining sector under discussion has been enacted as an individual and separate decision taken by the Government of Nicaragua against him, though this has no bearing upon the case whatsoever, which is that the Government owes me compensation for my property.

The sole purpose of my complaint in CASE 7788 is that the Government of Nicaragua comply with the provisions of the Law on Nationalization of the Mining Sector that it enacted and with the American Convention on Human Rights. As you well know, that Government accepted that Convention, taking it as national law, pledging its national honor to its observance.

Moreover, the Law on Nationalization of the Mining Sector (photocopies of which the Government states it has enclosed, duly signed by the appropriate official of the Ministry of Justicie) states in its Article 2:

"Mining companies, working mines and quarries in the country <u>are hereby nationalized</u> through <u>state acquisition</u>... The transfer of equity to state ownership shall be effected as prescribed by the Law upon publication on this Decree."

A look at the underlined parts of the above article in the foregoing paragraph reveals that they were nationalized (in other words, transferred to the community, according to the Larousse Dictionary) "through," "as a result of," "thanks to," according to that same dictionary) state acquisition ("purchase" according to that dictionary) of the mining companies.

Had the State of Nicaragua observed its own Decree or Law on Nationalization of the Mining Sector, it would have endeavored to effect that nationalization through or by means of state purchase of the property or means of production that had been nationalized.

Insofar as the Convention is concerned, your Resolution 20/86 on the present CASE 7788 under discussion CONSIDERS:

8. That Article 21 of the American Convention on Human Rights establishes:

"2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."

SIXTH PARAGRAPH

The Government states in this paragraph that:

"As for the appraisal and compensation procedure, if said procedure was not followed, it was precisely because the party concerned did not take the measures called for in the matter."

The word "measure," according to the dictionary, has the following meanings: procedure, action, step.

Note that in this paragraph of its reply, the Government of Nicaragua makes allusion to the appraisal and compensation procedure but immediately thereafter states, "if said procedure was not followed..."

Clearly, the Government is making reference only to the compensation since, if it had referred to assessment and compensation alike, it would have had to state, "if these were not followed," thereby using the plural, the proper form.

In reference to the COMPENSATION PROCEDURE referred to by the Government, we should discuss the wording of the Law on Nationalization of the Mining Sector.

Article 2 of that Law, which appears under the heading, Nationalization of the Mining Companies, has already been quoted and partially discussed in the observations on the FIFTH PARAGRAPH of the Government's reply.

We know that the undersigned was notified to turn over his quarry mining business. That notification is Appendix N° 7 in the files.

After my company had been taken over by the State, I addressed correspondence to the appropriate authorities asking them to proceed to pay the fair compensation due, noting at that time that it would have to proceed thus. That communication from the undersigned is included as Appendix N° 8.

I received a reply from the Government, which is the only one I have received in response to my aforementioned petitions. That reply has also been included in the files as Supporting Document N° 12 (Appendix N° 9). It states the following:

"The compensation, which we are sure will in no case exceed the value you reported to the appropriate authorities as being the real value, can be decreed by installments."

Since the Government has not specified the authority that would be called upon to pay the compensation, I addressed many other pieces of correspondence to the authorities involved in the enactment of the law of nationalization, to those who ordered me to hand over my company to the Government, and to those who authorized that order, etc. These communications have been included in the records as supporting documents Nos. 13, 15 and 15 (Appendix N° 10).

I have never received a reply from the various branches of government to my requests, set forth in the indicated documents--not even an indication of the authority that would be called upon to effect the compensation required under the law.

And so we see that the injured claimant addressed all those involved--the Government Junta, Ministers and Ministries, the Junta of Reconstruction, and autonomous and semiautonomous government entities--in an effort to have the State acquisition or purchase transaction concluded in the appropriate logical manner: upon enactment of the decree or law on nationalization or upon ordering that the undersigned hand over his company.

The next article, Article 3 of the Law of Nationalization of the Mining Sector, deals with the "Purchase Price"." As we have seen, in its reply the Government of Nicaragua refers to this as "appraisal," but makes no comment thereon whatsoever. It therefore does not warrant any comment in these observations on the Government's reply. I do, however, wish to point out that in writing and documents that the undersigned is again asking be incorporated into resolution 20/86 of the case or the report, that "acquisition price" was already fully established (Appendix N° 11).

Thus, in connection with the COMPENSATION procedure indicated by the Government, I shall copy below the pertinent article of the "Law on Nationalization of the Mining Sector," entitled "Form of Payment":

"Article 4. The price of the shares shall be paid in Treasury bonds earning interest at 6 1/2 percent per annum every twelve months, calculated from the date of publication of this decree, and maturing in five years."

The very ample documentation in these records, consisting of several communications or "overtures" to the Government

Junta, the Junta of Reconstruction of Managua, to CONDEMINA, and to several Ministers of State demonstrate that the measures I have taken have never met with any success. In accordance with the Law on Nationalization in question, such overtures should have been quite unnecessary, since that Law does not establish or indicate or imply that the party affected by the nationalization should make any "overture" whatsoever.

At this juncture, it must be recalled that MORE THAN TWO YEARS elapsed between the date of publication of the "Law on Nationalization of the Mining Sector" on November 3, 1979, according to the certified copy enclosed by the Government in its reply, and December 17, 1981, when I was compelled to leave the country. The pertinent authorities to whom I had written had not responded to my petitions: they made no decision on the matter; they paid no monies, Treasury bonds, or interest "payable every twelve months," despite my requests and the fact that in my communications to the Government and the authorities involved I indicated my domicile or address.

From the Law on Nationalization of the Mining Sector and the sixth paragraph of the Government's reply, it is glaringly apparent that the Law in question makes no mention of the measure or "measures called for in the matter"--as the Government states in its reply--or of any other type of measure that should or might have been used or taken by the party affected by the Law of Nationalization in question.

As regards remedies of any kind, let us first look at what the Government says in the next paragraph of its reply:

SEVENTH PARAGRAPH

"Mr. Chairman, the Government of Nicaragua wishes to reiterate to the Honorable Commission that under our system of law the regular and special remedies available to all Nicaraguans seeking to settle a legal situation are immutable."

As we know, CASE 7788 concerns my shares in CERSA, and dividends on those shares, and the nationalization of my quarry mining company.

As for my shares in CERSA, we have seen that on June 27, 1980, a voucher on the "release" of those shares was delivered to me, even though the actual shares were never given to me, nor were the dividends they earned.

As for the national quarries, we have seen that on July 16, 1980, I received a communication informing me that the

compensation could be decreed in installments. However, no mention was made of the authority that was called upon to pay the due compensation, as the undersigned had requested. What is more, thus far the Government has implicitly refused to provide that information.

From the records and from the Government's own reply, we see that the just compensation that the Law and the Convention require was never honored, either in cash or in installments.

Let us see below what the undersigned could have done in regard to what the Government appears to be saying in the seventh paragraph of its reply, which is that "under our system of law, the regular and special remedies available to all Nicaraguans seeking to settle a legal situation are immutable."

The "Law on Immunity," Decree N° 441, was published in the official newspaper, "La Gaceta," 139th issue of June 20, 1980--when the order to release my shares in CERSA, which were never released, was given, and when the compensation for my quarry had not been paid, as it still has not been paid.

The complete text of Article 1 of that "Law on Immunity" states the following:

"To grant immunity to the members of the Junta of the Government of National Reconstruction, representatives on the Council of State, Magistrates of the Supreme Court of Justice, Ministers and Deputy Ministers of State and Directors of Autonomous Agencies. Consequently, while in office those officials may not be subject to any judicial or prejudicial action before the Tribunals of the Republic."

We note from the above article that immunity was granted to, inter alia, each and every official mentioned or involved in one way or another in the documentation--decrees, laws, communications, vouchers, certifications, etc.--on both measures, the CONFISCATION of my shares in CERSA and the NATIONALIZATION of my quarry.

However, in the legal proceedings that could logically have been instituted, and had there been a possibility of "settling a legal situation," as the Government states in its reply, it would have been absolutely essential for "the members of the Junta of the Government of National Reconstruction" and the "Ministers," "Deputy Ministers" and "Directors of Agencies" involved to be brought to court in one way or another --judicial or prejudicial.

With regard to the "Law on Immunity" previously cited and to the contents of the foregoing paragraph, I am requesting that the discussion set forth on page 31 of my brief dated May 10, 1981 be considered and added to the present document of observations on the Government's reply. That discussion is further and more irrefutable proof that it was impossible for the undersigned claimant to avail himself of the remedies to which the Government of Nicaragua refers in its reply.

Under the laws that are generally invoked in many countries, there is another well-known remedy: Amparo.

I must once again refer to this remedy of Amparo.

According to the "Fundamental Statute of the Republic of Nicaragua" published in "La Gaceta," issue N° 1 of August 22, 1979, and under the provisions of Article 3 of that "Fundamental Statute," the constitutional laws in effect as of that date, including a Law on Amparo, were repealed.

As we have seen, I was advised of the CONFISCATION of my shares in CERSA on December 18, 1979 (shown as supporting document N° 7) (Appendix N° 5). The Government prepared a statement to the effect that my shares should be released on May 8, 1980, though this never occurred (shown as Supporting Document N° A4).

With enactment of the Law on Nationalization of the Mining Sector, on April 29, 1980, I received orders to hand over my quarries to the Government. This was done (see Supporting Document N° 9) (Appendix N° 7).

When I complained that nationalization should have been effected through payment of fair compensation, I was informed on May 29, 1980 that the payment of that compensation could be "decreed by installments." As the records show, despite several written attempts on my part, no payment has even been made, either in cash or in installments.

In light of the dates indicated on this page and bearing upon action taken in the cases of the CONFISCATION and the NATIONALIZATION--August 22, 1979, December 28, 1979, May 8, 1980, April 29, 1980, and May 29, 1980--I wish to note that Decree N° 417 on the "Law of Amparo" came into existence as of its publication in "La Gaceta," the official newspaper, issue N° 122 of May 31, 1980--subsequent to all of the dates noted above.

But paragraph 5 of Article 28 of this "Law on Amparo" establishes that Amparo is not admissible "against measures

ordered by the authorities or measures taken by them prior to the date on which the present Law takes effect."

Therefore, in view of the fact that the "Law on Amparo" entered into force on May 31, 1980 and that the measures ordered and taken by the authorities, as we have seen, predated the Law in question, "Amparo is not admissible."

The assertion by the Government of Nicaragua in the Seventh Paragraph of its reply that regular and special remedies are "available to all Nicaraguans seeking to settle a legal situation" is therefore inaccurate.

EIGHTH PARAGRAPH

The Government states:

"Nonetheless, of his own free will, Mr. Carlos Martínez Riguero opted to leave the country without availing himself of the remedies available to him as a citizen under the laws of the country. Though he has been absent since 1981, it is utterly false that the Government of Nicaragua declared him to be in absentia."

Let us now turn to the allegation that I opted of my own free will to leave the country.

In paragraph 7 of the Preamble of your Resolution on this CASE 7788, you state that you learned that the Government of Nicaragua: 1) had expropriated the residence of Martínez Riguero, who was forced to leave it; 2) had taken control of a portion of his property; 3) had proceeded to collect the rent on houses on the property of the undersigned, and 4) proceeded to detain him on one occasion.

In a brief dated May 17, 1982, the undersigned denounced, among the many actions perpetrated against him by the Government, those to which you, the Commission, refer in the previous paragraph. I am asking that those complaints, which were accompanied by irrefutable substantiating documents, be included in your report and/or the resolution on the present CASE 7788.

The above points, which you summarized in that seventh paragraph of the preamble of Resolution 20/86, appear in the letter, as follows:

"MAY 1981 - MINISTRY OF HOUSING - A doctor, who is a very good person and my friend, a graduate of the Patrice Lumumba

People's University, Moscow, USSR, sent to the Dirección General de Migración a certificate attesting to the fact that Carlos Martínez Riguero "has been treated, as he was in a delicate state of health, is currently under treatment and requires further laboratory tests that cannot be performed in our country for technical reasons and because the equipment is lacking. The patient must travel to the United States for that purpose."

"On April 9, 1981, a visa was issued to me by the appropriate branch of the Ministry of Foreign Affairs, and that very same day, I traveled to the United States."

"Employees or helpers, furniture, domestic animals and other persons remained in our home. But at 10:45 a.m. on May 5, 1981, less than one month after leaving to seek medical treatment, a painful notice from that Ministry was received at my home, concerning my family's home. That notice stated: 'In accordance with the provisions of Article 15 of the Tenancy Law, I am hereby giving you, Mrs. Melba de Martínez, [my wife] notice that you must make this housing available to the public for rent... Failure to do so will force this Office to seize the property to see that this order is enforced. Jorge A. Saamper B. Tenancy Office.'"

"SEPTEMBER 1980 - MINISTRY OF HOUSING. On the 8th of this month I received a communication addressed to me: 'By virtue of Decree N° 97 of September 22, 1979, proceed to hand over all documentation on the illegal subdivision 'Bajos de Acahualinca.' If you fail to comply, the forces of law and order are authorized to carry out this order.' I confirmed that the person who signed that document was in charge of the Oficina Nacional de Repartos Intervenidos."

"I have never been informed that I had a subdivision that had been placed under government control; I am not the owner of any illegal subdivision; I am not the owner of the illegal subdivision 'Bajos de Acahualinca,' and finally, the aforementioned Decree N° 97 does not authorize what was claimed in the 'order' from the Ministry of Housing."

I so informed that branch of Government in writing.

I further pointed out that my family did own a subdivision and that it was not illegal since it complied with all the requirements at the time it was authorized.

I pointed out that that partition of lands was authorized by the Decree on Urban Development issued by the Executive

Committee of the National District, Agreement N° 168 of December 27, 1939, issued by the then President of the National District--the appropriate authority at that time--Mr. Hernán Robleto and the Secretary, Dr. A. Narvaez I. There was no possible way.

A uniformed and armed detail delivered a sealed notice signed by the author of the earlier notice and from the same Ministry. It states the following: "October 13, 1980 - SANDINISTA POLICE PRECINCT STATION - Comrades: Pursuant to Decree N° 97 of September 22, 1979 (Law on Illegal Subdivisions), we are hereby requesting your assistance in retrieving documentation from Mr. Carlos Martínez, part owner of los Bajos de Acahualinca in this city, which this office placed under government control on September 23, 1979."

I need not describe the effect on my family--wife and children, the youngest of which is four years old--when they saw their home and father's study, which they were entering to play, invaded by the armed forces and their own father threatened.

When the armed forces had completed their assignment, I took the painful decision: to take my youngest children out of Nicaragua.

MARCH 1980 - MINISTRY OF HOUSING - 4 days - First payment collected by that Ministry from the first tenant of one of my properties. Receipt N° 124. This action was taken without my authorization and with no regard for the law.

28th of the month - I protested the foregoing in writing and provided proof that my properties were legal. I asked that the monies taken in by government representatives, based on a number of receipts, be returned to me.

April 21, 1980. The Ministry of Housing drew up a record to the effect that the property corresponding to the aforeindicated receipt, 'property of Mr. CARLOS MARTINEZ RIGUERO, of this city, is not under government control.

July 18, 1980. In writing, I continued to ask for my rent monies that the government was still collecting. There was not the slightest indication that it intended to deliver up said money to the undersigned.

FEBRUARY 1981 - MINISTRY OF THE INTERIOR. They arrested me on the 20th of this month, accusing me of attempted murder. They took me to prison.

Under the law, the procedures for investigation and/or punishment of a crime like this involve a considerable period of time.

I spent an indescribable, terrible night during which I was threatened (I am diabetic and hypertensive) and menaced. I signed what had to be signed with such offices and bodies.

The following day, the 21st, I was released after paying C$120.00 (for which I was given a receipt) and I was given the release form which states: "Individual was detained on charges of public drunkenness and disturbing the peace (signatures and seals of the Ministry of the Interior)."

Even with all its amendments and related decrees, Decree N° 488 issued by the Government Junta states: "ARTICLE 4. Persons committing the following offenses shall be punished by arrest and hard labor for ten days to two years:... b) Vagrancy, drunkenness with disturbance of the peace, drug addiction and prostitution."

But neither Decree N° 488 nor any other decree allows for payment of a fine or commutation of sentence or that I might be released the following day, without remaining under arrest for the 'offense' with which I was charged--for at least--ten years.

In the body of that same document referred to above, and always with all the corroborating and irrefutable documents enclosed, I have a summary account of actions perpetrated against the undersigned claimant to persecute me. I pointed out several of those perpetrated by the Ministry of Industry, the Office of the Deputy Minister of the Corporación Industrial del Pueblo, District Judges, Courts of Appeal, the Supreme Court of Justice and its very President.

In that same document, I prepared a partial list, in chronological order, of certain other acts of persecution against the undersigned, to which I attached the pertinent substantiating documentation.

The Government's assertion in this eighth paragraph to the effect that of my own free will I opted to leave my country is, therefore, absurd. As you may have sensed, this was a matter of survival.

And the Government goes on to say in this eighth paragraph that we now see that the undersigned claimant left the country "without availing himself of the remedies available to him as a citizen under the laws of the country."

But in the observations of the seventh paragraph of the Government's reply, it is clear that it was quite imposible for the undersigned to avail himself of any recourse.

In any event, with a wide range of irrefutable documents, the undersigned claimant has demonstrated that he somehow could not have availed himself of the remedies mentioned by the Government.

In the eighth paragraph, the Government of Nicaragua goes on to assert that the persecuted undersigned "has been absent since 1981."

Neither is this assertion accurate. In fact, let us look at the meaning of the word "ausencia" (absence).

The Diccionario de Derecho Procesal Civil by Eduardo Vallares considers it to be a forensic term that means:

"Legal status of a person whose whereabouts are unknown."

And you, the Commission, know very well that my whereabouts, dwelling, place of residence, abode, are not unknown.

This is so much so that when completing your "Complaint Forms" for the four complaints that I presented to you, I carefully filled in all of the respective forms, including the part requesting the following information:

"IX. Idenfication: Please indicate whether you wish your identity to remain confidential:"

I consistently answered that question as follows: "It is not necessary that my identity remain confidential."

And at the end of the "Complaint Forms," in the part where you ask for the "FULL ADDRESS OF COMPLAINANT," I have invariably supplied my full address, including the city, state, postal zone, country and telephone.

Thus, since you complied with your Regulations by forwarding my complaints to the Government of Nicaragua, it is only logical that they should know or be able to find out, through you, what my exact address is.

I am thus quite sure that if the Government of Nicaragua had asked you for my address for the purpose of looking for me to pay me for the shares in CERSA or the dividends or the plots of land in my real estate development or for the houses and income derived therefrom, etc., you would have supplied the address.

Finally, in the last part of the eighth and final paragraph of the reply from the Government of Nicaragua, it states that "Though he has been absent since 1981, it is utterly false that the Government of Nicaragua declared him to be in absentia."

The following constitutes a veiled threat to declare me in absentia in order to apply its decree whereby all of my properties would be expropriated.

First, there is nothing in the record showing that the undersigned mentioned or implied that he was declared in absentia by the Government or that you so imply.

Formal petition to the Honorable Inter-American Commission on Human Rights:

In accordance with the principles of paragraph 1 (in fine) of Article 50 of the American Convention on Human Rights and paragraph 5 of Article 47 of the Regulations of the Inter-American Commisson on Human Rights (updated as of July 1, 1985), I am asking that all of the verbal or written statements made by the parties, including this document, be included in the Report or in your resolution.

For greater facility and because these statements are so voluminous, I would suggest that mention be made only of the date stamped by the parties in those statements and the date of receipt by your Executive Secretariat.

OMISSIONS IN YOUR RESOLUTION N° 20/86

At this point, I wish to make the observation that your Resolution N° 20/86, CASE 7788 (Nicaragua), which was approved by the Commission at its 888th meeting held on April 18 of this year, suffers from certain omissions inasmuch as its condemnation of the Government of Nicaragua falls short of what it should be and since it does not make a ruling on all the issues in dispute.

For example, in operative paragraphs 1 and 3, you resolve to declare that the Government of Nicaragua has violated Article 21 of the Convention "by confiscating the dividends earned on shares" and you recommend to the Government that it proceed to reimburse the undersigned for "the amounts owed to him for unpaid dividends" but you render no decision on the shares themselves, whose value is fully determined in the records of the case, or on the compensation that the undersigned claimant is due for damages caused by the Government.

Another example is your failure to establish in the aforementioned resolution the value of the quarry that was nationalized and that was disputed with ample and specific documentation in CASE 7788.

I would request here that, inasmuch as the present notification has been given, the aforementioned omissions in your resolution be corrected.

CONSIDERING:

1. That in its observations dated June 11, 1986, the Government of Nicaragua does not provide any new evidence that invalidates the facts reported to the Commission.

2. That the claimant, Mr. Carlos Martínez Riguero, has convincingly rebutted the arguments of the Government of Nicaragua and presented satisfactory documentary evidence of the facts reported by him.

3. That therefore, in the Commission's view, Mr. Martínez Riguero has not yet received fair compensation for the assets referred to in this case: shares in the Empresa Cereales de Centroamérica S.A. (CERSA) and dividends earned on those shares, as well as the quarry located in Las Brisas.

4. That Mr. Martínez Riguero took all possible action to obtain fair compensation for his assets, without success, and that, further, he was prevented from continuing such action, given the de facto situation created by officials of the Government of Nicaragua, which gave rise to the situations provided for in Article 46.2.a and b of the American Convention on Human Rights regarding the exhaustion of remedies under domestic law.

5. That Mr. Martínez Riguero has estimated the value of the assets of which he was deprived as a result of action taken by the Government of Nicaragua, at US$63,402,651.00, according to the appraisal itemized in Appendix N° 11 of this resolution.

6. That in the present case, the friendly settlement procedure provided for in Article 48.1.f of the American Convention on Human Rights is applicable.

In view of which the Inter-American Commision on Human Rights,

RESOLVES:

1. To declare that the Government of Nicaragua has violated the right to private property set forth in Article 21 of the American Convention on Human Rights by not giving Mr. Carlos Martínez Riguero

adequate compensation for shares he owned in the Empresa Cereales de Centroamérica S.A. (CERSA) and dividends earned on those shares.

2. To declare that the Government of Nicaragua has violated the right to property set forth in Article 21 of the American Convention on Human Rights by failing to honor, thus far, the pecuniary obligations arising out of nationalization of the quarry located in the "Las Brisas" subdivision belonging to Mr. Carlos Martínez Riguero.

3. To recommend to the Government of Nicaragua that it proceed to reimburse Mr. Carlos Martínez Riguero for the amounts owed to him for his shares in the Empresa Cereales de Centroamérica S.A. (CERSA) and dividends thereon and the amount of money arising from nationalization of the quarry located in the "Las Brisas" subdivision.

4. To send this resolution to the Government of Nicaragua and to the complainant and to publish it in the Annual Report of the Commission for the purposes of Article 63.g of the Regulations if, within ninety days as of the date of its approval, the Government and the complainant have not reached a friendly settlement on the matter.

RESOLUTION N° 30/86
CASE 9726
PANAMA
September 19, 1986

HAVING SEEN:

1. The claim made by attorney WINSTON SPADAFORA FRANCO in his communication of May 7, 1986 to the Inter-American Commission on Human Rights, and the other documents attached thereto, whereby the State of Panama is formally held responsible for the violation of the right to life, personal integrity and denial of justice, regarding the torture and murder of his beheaded brother, a physician and former Vice-Minister of Health of Panama, Dr. HUGO SPADAFORA FRANCO, ocurred on September 13, 1985, in the province of Chiriqui, Republic of Panama, and of which events he accuses the following members of the Forces for Defense of the Republic of Panama: OMAR ENRIQUE VEGA MIRANDA, ELIECER RAMOS and FRANCISCO ELIECER GONZALEZ BONILLA of being the responsible agents therefor.

2. That by Note dated May 16, 1986 the Inter-American Commission on Human Rights transmitted the pertinent parts of said claim to the Government of Panama for it to furnish pertinent information, in a period of 90 days for consideration by the Commission.

3. That through Note OAS-570-86, dated August 6, 1986, of the Permanent Representative of Panama to the Organization of American States, the Government of Panama responded to the request for information by the Commission through Notes DM N° 576 dated July 21, 1986 of Dr. Jorge Abadía Arias, Minister of Foreign Affairs of the Republic of Panama, and

N° DGP-515-86 dated July 8, 1986 signed by the Attorney General, in which, among other things, it is informed of the derinite dismissal of the summary proceedings in favour of the accused VEGA MIRANDA, RAMOS Y GONZALEZ BONILLA, being this dismissl final and the domestic remedies exhausted.

CONSIDERING:

1. That the Government of Panama, in its related document of response, finds that in this case all the legal procedures established by the laws of the Republic of Panama have been exhausted, that the constitutional and legal procedures applicable to the matter have been fulfilled and that each and every one of the procedural guarantees established by its code of laws was respected; and

2. That the other requirements for admissibility have been satisfied as set forth in Articles 46 paragraphs a) to d) of the American Convention on Human Rights and 32 and 37-1 of its Regulations.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

RESOLVES:

1. To declare admissible the claim presented by the petitioner, Dr. Winston Spadafora Franco, in this case N° 9726.

2. To transmit this Resolution to the parties.

RESOLUTION N° 14/87
CASE 9642
PARAGUAY
March 28, 1987

BACKGROUND:

1. On July 9, 1983, by order of the Ministry of the Interior, the "Radio Ñandutí" station was ordered shut down for a period of 30 days.

2. On September 22, 1983, its program "SUPERONDA" was taken off the air and the radio director, Mr. Humbero Rubin, was forbidden to take part in his own programs. This measure remained in effect until November 10, 1983. Subsequently, he was also forbidden, beginning on November 5, 1984, to serve as announcer for any other radio programs.

3. On January 17, 1984, Mr. Humberto Rubin was summoned to appear before Mr. Angel Barbosa, Director of the National Telecommunications Bureau (ANTELCO), who warned him not to broadcast news about groups that were not authentic, authorized political parties.

4. As of November 13, 1984, the police began a campaign requiring identification and explanations from all persons wishing to visit the radio station.

5. By order of ANTELCO, in Resolution N° 1009 of August 9, 1985, the station was again shut down, this time for a period of 10 days.

6. Mr. Humberto Rubin was again detained on December 3, 1985, and remained in custody for several hours at the Central Police Station in the capital, Asunción, where he was warned by the Director of the Department of Public Order, Carlos Schreirer, that, unless he changed his editorial position, he would be expelled from the country.

7. The station was shut down once more at the beginning of January 1986 for a period of 15 days, accused of having contributed to creating "social dissension".

8. In April 1986, Mr. Humberto Rubin denounced the refusal of the police to provide him with protection following repeated death threats made against him, members of his immediate family and those working at his radio station. Official spokesmen had earlier accused "Radio Ñandutí" of being responsible for the street demonstrations that had occurred in recent weeks in the capital. In the early morning of April 30 a crowd of about 50 government sympathizers stoned the front of the station building, firing weapons into the air and destroying almost all the exterior window glass.

9. On May 3, 1986, another group of about five persons, armed and hooded, attacked the station, this time destroying its plant and broadcasting equipment, some of which was stolen.

10. On May 5, 1986, the station's telephones were cut off, leaving it incommunicado.

11. After that date the station began to experience power failures owing to "radio interference" that gradually became stronger and more frequent until finally more than 90% of its broadcasts were affected. It was also forbidden to broadcast information or comments criticizing the government.

12. It has been alleged that the authorities have also been pressuring a number of merchants in order to force them to withdraw their support by canceling their commercials. For example, at the end of May the official program "The Voice of Coloradism" (broadcast network wide throughout the country from Monday to Saturday) had announced the names of those advertising on Radio Ñandutí, some of whon gave in to this "blackmail" and canceled their contracts.

13. The Director of Radio Ñandutí, Mr. Humberto Rubín, announced publicly on January 14, 1987, the decision to suspend the station's

broadcasts because of the lack of guarantees by the Paraguayan authorities whom he accused of not having shown any interest in or willingness to solve the problems denounced. This had brought the company to the verge of bankruptcy, making it financially impossible to continue operations. For that reason, he declared it would cease broadcasts for a period of three months, during which time he was certain that justice would be done and it could enjoy the guarantees needed to renew operations.

WHEREAS:

1. All of the foregoing acts were denounced publicly and through the agencies responsible for protecting human rights, particularly the several competent national administrative and judicial organs.

2. The administrative and judicial authorities, either through inaction or ineffective actions, have in no case been able to identify, much less to punish, those responsible for such attacks and arbitrariness; this has placed the company in a legally defenseless position and bankrupted it, forcing it into temporary closure.

3. Article IV of the American Declaration of the Rights and Duties of Man states that: "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever."

4. American Declaration of the Rights and Duties of Man stipulates in Article XIII that "Every person has the right to take part in the cultural life at the community..." and "has the right to work, under proper conditions, and to follow his vocation freely" (Article XIV), in addition to associating with others "to promote, exercise and protect his legitimate interests of a political, economic, ...professional, labor union or other nature." (Article XXII).

5. Article XXIII of the American Declaration of the Rights and Duties of Man establishes the guarantee and usufruct of the right to property in the following words: "Every person has a right to own such private property as meets the essential need of decent living and helps to maintain the dignity of the individual and of the home."

6. In the opinion of the IACHR, with regard to freedom of the expression and dissemination of ideas the provisions contained in Article 13 of the American Convention on Human Rights are in any case definitive, maintaining that the right of expression may not be restricted by indirect methods or means, such as the abuse of Government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

7. In the view of the Commission, freedom of the expression and dissemination of ideas is one of the most solid guarantees of modern

democracy; and on that basis it has stipulated that freedom of the expression and dissemination of ideas consists of the right to transmit facts and ideas by any means of social communication; it also entitles every person to acquire information without interference of any kind.

THEREFORE, taking into acount the foregoing background and by virtue of the considerations outlined above,

THE INTER-AMERICAN COMMISION ON HUMAN RIGHTS:

RESOLVES:

1. To declare that in the present case the Government of Paraguay has, by commission or omission, violated particularly Articles IV and XXIII of the American Declaration of the Rights and Duties of Man concerning freedom of the expression and dissemination of ideas and the right to property.

2. To recommend that the Government of Paraguay make an effective and exhaustive investigation of the violations denounced and rigorously apply to those responsible therefor the most severe sanctions established for the purpose under the current penal code,

3. That the Government equitably indemnifies the company and employees of Radio Ñandutí for such losses as they may have incurred as a result of the shutdown caused by its bankruptcy owing in turn to the illegal interference occurring recently on an on-going basis and until such time as the station can renew its broadcasts in a normal and unrestricted manner.

4. To communicate this resolution to the Government of Paraguay and request it to report to the Commission, within 60 days, on the measures it has adopted and implemented to fulfill the provisions contained in this resolution.

5. To include publication of this resolution in the IACHR 1986-87 Annual Report to the General Assembly of the Organization of American States (OAS), if, within the 60 days cited above, the Government of Paraguay shall not have carried out the recommendations formulated herein.

RESOLUTION N° 17/87
CASE 9425
PERU
June 30, 1987

HAVING SEEN the background information on this case, viz:

1. The Inter-American Commission on Human Rights received the following petition in a communication dated August 29, 1984:

> We have received information claiming that JAIME AYALA SULCA HUANTA, a newspaper correspondent of the journal "La República" has disappeared after his arrest on August 2, 1984 at the Navy facilities in Huanta, Department of Ayacucho. Mr. Ayala had gone there to complain about police conduct towards his mother who had come to his house the night before. The Armed Forces Joint Command denied his detention in Huanta. There is no further information on his whereabouts. All the legal remedies possible under the prevailing State of Emergency in Peru have been exhausted. We ask the Commission to take immediate action and request the Government of Peru to acknowledge his detention, clarify his legal and personal situation and guarantee his physical integrity. Recently, in the Ayacucho region, numerous disappearances and illegal executions have occurred after arrests.

2. In a cablegram dated September 4, 1984 the Commission transmitted the pertinent parts of the petition to the Government of Peru requesting it to provide information in accordance with Article 34 (formerly 31) of the Regulations. This request was repeated in a note dated September 11, 1984, and again in a second note on January 30, 1985 which also considered the application of Article 42 (formerly 39) of the Regulations whereby the facts reported will be considered to be true.

3. In a note dated May 6, 1985 (N° 7-5-M/37), the Government of Peru submitted the following information.

> With regard to Case 9425 concerning the citizen Jaime Ayala Sulca, the District Attorney's Office has taken the corresponding actions to thoroughly investigate the petition and to determine who is responsible. The investigations commenced on August 2, 1984 as a result of the petition submitted to this District Attorney's Office by the citizen Carlos Paz Villantoy.

4. In a note dated May 12, 1985 the Commission transmitted to the petitioner the pertinent parts of the information transcribed above and requested that he send his observations or comments within a period of 45 days.

5. Since the Commission, in its note of October 11, 1985, reiterated the information to the Government of Peru on pending cases, in process, the Government of Peru, in a note dated March 26, 1986 (N° 7-5-M/44) provided additional information to the Commission on the progress of the investigation of this case by national authorities. That information was the following:

> Regarding Case 9425, on January 29 the Supreme Court of the Republic, through its second criminal court, pronounced

judgement establishing that the judicial investigation into the disappearance of Mr. Jaime Ayala Sulca should be continued in the civil courts under the ad-hoc examining magistrate of Huamanga. In this way the request to transfer the case to military courts was rejected.

6. In its communication of April 15, 1986, the Commission transmitted to the petitioner the pertinent parts of the additional information sent by the Government of Peru and requested his observations and comments pointing out to him that if they were not received within a period of 45 days, the processing of the case would be discontinued.

7. In his communication of June 6, 1986, the petitioner sent the following comments and additional information on the case:

> We know that the former Navy Commander of the Huanta Province, Lieutenant Commander Alvaro Artaza Adrianzén and Second Class Petty Officer A.P. Roman Martínez Heredia have been accused of the disappearance of Jaime Ayala Sulca, of the death of six members of the Calqui Presbyterian Church, and also of the arrest and death of 50 individuals found in common graves in Pucayacu, near Huanta, in August 1984. Nevertheless, the action against these two men was delayed by a jurisdictional conflict between the civil courts and the Navy courts.
>
> On January 24, 1986 the Supreme Court decided that the military courts would have jurisdiction over the Calqui and Pucayacu cases but that the civil courts would have jurisdiction in the proceedings against Lieutenant Commander Artaza Adrianzén for the disappearance of Jaime Ayala Sulca. It was not possible to confirm if the same decision is also applicable to the case of Petty Officer Martínez Heredia.
>
> Lieutenant Commander Artaza Adrianzén has not been seen, nor have his whereabouts been known, since February 2, almost a week after the Supreme Court decision, when a military spokesman said that he had been kidnapped. The following week a television documentary, which implied that Lieutenant Commander Artaza Adrianzén had been taken out of the country by the Peruvian Navy to avoid trial, was banned (copies of the reports related to the incident are enclosed).
>
> We have not received any information on Lieutenant Commander Artaza Adrienzén's status and therefore request the Commission to require the Government to furnish information on his present whereabouts.
>
> We have also received reports that family members of Jaime Ayala Sulca have received death threats from anonymous

callers, and have been warned not to continue to insist on the trial. The family of Attorney Augusto Zuñiga has also been threatened.

8. In a note dated June 23, 1986 the Commission transmitted the pertinent parts of this information and comments to the Government of Peru.

9. In a note dated July 30, 1986 (N° 7-5--M/128), the Government of Peru said the following:

> With respect to Case 9425 it is to be noted that the observations expressed by the petitioner to the Commission have no value at all since they furnish no legal arguments whatsoever. Also, it is worth noting that, as in the former case, domestic remedies have not been exhausted and, therefore, this petition should not be admitted.

10. In its communication of August 4, 1986, the Commission transmitted the above-mentioned reply to the petitioner.

CONSIDERING:

1. That the facts of this case meet all the requirements for admissibility set forth in the Regulations of the Commission.

2. That according to the information provided by the Government of Peru, the investigations of the disappearance of Mr. Jaime Ayala Sulca Huanta, a newspaper correspondant of the journal "La República", arrested on August 2, 1984, in Huanta, Ayacucho, have not had positive results, in spite of the long time periods which have elapsed since they were initiated (August 2, 1984) by the Public Prosecutor's Office.

3. That, moreover, during these investigations nothing whatsoever has resulted from the hearing of the case by the Trial Court of Second Instance in Huamanga, Ayacucho against the presumed guilty parties in this case, Mr. Alvaro Artaza Adrianzén and Mr. Roman Martínez Heredia, and this is inferred from the note dated May 6, 1985 (N° 7-5-M/100)sent by the Government of Peru to the Commission informing that it grants the Provincial Prosecutor in Criminal Matters authority "for the most extensive intervention and jurisdiction in the criminal proceedings against the accused".

4. That, finally, the Government of Peru provided limited information to the Commission, two years after the events occurred, barely indicating that the matter is still under investigation, the only progress being that the case shall continue "in the civil courts and under the ad-hoc examining magistrate of Huamanga", as stated in the note sent by the Government of Peru on March 26, 1986 (N° 7-5-M/44), p. 2).

5. That the petitioner, in his comments and observations on the information contained in the abovementioned note of March 26, 1986, has submitted important and substantial evidence in view of which not only are the facts of this case presumed to be true, but also that the presumed guilty parties have not been brought to trial because their whereabouts or status is unknown.

6. That in this case it is not appropriate to wait until internal remedies are exhausted, as requested by the Government of Peru (Note N° 7-5-M/128 dated July 30, 1986), because since these events occurred, sluggishness and lack of results in this investigation constitute an obvious case of unjustified delay in the administration of justice that, in fact, imply a denial of the same which would permit clarification of the facts, all of which make completely applicable the provisions of Article 37 paragraph 2 of the Commission's Regulations.

7. Moreover, in this case, by reason of the nature of the events, that is, the forced disappearance of Mr. Jaime Ayala Sulca Huanta, the Commission has not been able to apply the friendly settlement procedure provided for in Article 48, paragraph 1, f of the American Convention on Human Rights and in Article 45 of its Regulations.

8. That Article 42 of the Regulations authorizes the Commission to consider the facts stated in the petition of this case to be true as long as other evidence does not lead to a different conclusion.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

RESOLVES:

1. To presume true the facts reported in the communication of August 29, 1984, on the arbitrary arrest and disappearance of the newspaper correspondant Mr. Jaime Ayala Sulca Huanta, which took place in Huanta, Ayacucho on August 2, 1984.

2. To declare that these facts constitute an extremely serious violation of the right to life (Art. 4); to personal integrity (Art. 5) and to personal liberty (Art. 7), set forth in the American Convention on Human Rights.

3. To recommend to the Government of Peru that it conclude, as fast as possible, the investigations being carried out at the Trial Court of Huamanga, and, in particular, that it proceed to bring to trial before the provincial courts the presumed guilty parties in this case, Lieutenant Commander Alvaro Artaza Adrianzén and Second Class Petty Officer A.P. Román Martínez, in the provincial courts, in accordance with the decision of the Supreme Court of Justice of Peru in its ruling of January 24, 1986, and that the Commission be informed of the result of these investigations or of the steps taken.

4. To recommend to the Government of Peru that it punish the persons responsible with the most severe penalties established in Peruvian law, and that, also, it grant compensation to the victim's family members, according to the law.

5. To request the Government of Peru to inform the Commission, within a period of 60 days, of the decision taken regarding these recommendations. If the period established in numeral 3 of this Resolution has elapsed with no observations presented by the Government of Peru, the Commission will include this Resolution in its Annual Report to the General Assembly of the OAS, as established in Article 63, g of its Regulations.

6. To transmit this Resolution to the Government of Peru and to the petitioner.

RESOLUTION N° 18/87
CASE 9426
PERU
June 30, 1987

HAVING SEEN the background information on this case, viz:

1. In a communication dated September 4, 1984 the Inter-American Commission on Human Rights received the following complaint:

> On July 24, 1984 eighteen-year old JUAN DARIO CUYA LAINE was arrested at his home, in the Province of Ayacucho, by members of the army and the police. His mother has stated that she saw him on July 30, 1984 when visiting him at the Quicapata barracks. At that time he presented visible signs of torture. Since then his whereabouts are unknown. The officials at Quicapata, where he had been detained, now deny his arrest. According to information received the facilities at Quicapata used to be a school. We fear for the life and integrity of Juan Darío in view of the recent well known events in Ayacucho. All internal remedies have been exhausted. We urgently request the IACHR to press the Government of Peru to acknowledge the arrest of Mr. Cuya, determine his whereabouts and guarantee his safety.

2. In a cablegram dated September 5, 1984 the Commission transmitted the pertinent parts of the claim to the Government of Peru requesting it to provide information, in accordance with Article 34 (formerly 31) of the Regulations. This request was repeated in a note on September 10, 1984.

3. In a note dated December 10, 1984 (N° 7-5-M/43), the Government of Peru replied to the Commission as follows:

> Acting on the instructions of its Government, the Permanent Mission of Peru informs the Honorable Executive Secretariat that the Ministry of the Interior has reported that the Peruvian citizen, Mr. Juan Darío Cuya Laine, has not been intervened nor arrested by the Forces of Law and Order in the Emergency Zone. Moreover, it is noted that this citizen has no social-political record in the registers of the Peruvian police; and that his present whereabouts are unknown, in spite of efforts to locate him made according to the request of the Inter-American Commission on Human Rights.

4. In a letter dated January 30, 1985, the Commission made known the pertinent parts of the above-mentioned information to the petitioner, requesting that he send his observations within a period of 45 days; this request was reiterated in a letter dated May 1st, 1986 pointing out that should it not receive any information within a period of 60 days, the Commission would discontinue processing the case.

5. In his communication of May 14, 1986, the petitioner sent additional information and observations on the case, as follows:

> In its note of December 10, 1984 the Peruvian Government states that JUAN DARIO CUYA LAINE was not arrested by the security forces operating in the state of emergency zone and that he does not have a police record. The Government adds that, in spite of all efforts to locate him, his whereabouts are still unknown.
>
> We consider there to be an important discrepancy between the information provided by the Government and the two declarations sworn to before the District Attorney at Ayacucho, copies of which we are sending to the Commission.
>
> On June 25, 1984 the witness stated in a sworn statement that on June 24, 1984, and after having searched his home around 6 a.m., Juan Darío was arrested by a group of 15 Army officials. Also, the witness stated he believed Juan Dario had been taken to the "Los Cabitos" barracks and requested that he be released or transferred to the Investigations Police of Peru (PIP).
>
> On August 31, 1984 the witness stated in a new affidavit that he had learned that Juan Darío had been in police custody in a building known as "Casa Rosada" and that later he had been transferred to the army barracks at Quiscapata. The witness said he visited him at that facility on July 30, 1984

and verified that the prisoner was vomiting blood. The witness also stated that at Quiscapata he was promised Juan Darío would be released 15 days later but in fact he was never seen again. He said he later heard that Juan Darío was at the "Casa Rosada", then at "Los Cabitos" and he asked the District Attorney to look into said facilities.

6. In its communications of May 22 and 28, 1986 the Commission transmitted the pertinent parts of the observations and new information sent by the petitioner to the Government of Peru and set a period of 30 days for this Government to furnish information on the case.

7. In its communication of May 22, the Commission informed the petitioner of the above-mentioned procedure.

CONSIDERING:

1. That this case meets all the admissibility requirements set forth in the Commission's Regulations.

2. That the Government of Peru has not replied to the last request for information by the Commission, dated May 22, 1986.

3. That the information provided by the Government of Peru in its note of December 10, 1984, denying the arrest of Mr. Juan Darío Cuya Laine by security forces, contradicts the testimony given under oath by Mr. Cuya Laine's mother before the ad-hoc District Attorney of Ayacucho, on June 25, 1984, which is on file and states that on June 24, 1984, at approximately 6 a.m., some fifteen (15) heavily armed army officials, having searched the deponent's home, arrested Mr. Cuya Laine and took him, according to this testimony, to the barracks called "BIM 51, Los Cabitos", in the city of Ayacucho.

4. That, also, in a later testimony given on August 31, 1984 by Mrs. Laine, she stated that she had been informed, by "non official" channels, that her son was detained in a place called "Casa Rosada", and was then transferred to the Quiscapata barracks where she visited him and saw him "vomit blood". According to the deponent she was promised that her son would be freed in 15 days but since then she has no knowledge of his whereabouts or situation.

5. That, finally, the deponent declared that she had received information indicating that her son had been taken again to "Los Cabitos" barracks, having requested the District Attorney to visit this place in order to verify the presence and condition of her son, since she was unable to resort to any other legal remedies in order to verify the whereabouts and condition of her son.

6. That in view of the facts on file, those provided by the petitioner as well as those presented by the afore- mentioned Government, it is affirmed that the facts claimed are considered to be true and that, consequently, Mr. Juan Dario Cuya Laine was arbitrarily arrested by agents of the Government of Peru and kept in illegal detention facilities, that is, in military barracks or facilities, until his disappearance which, by his own mother's testimony, must have ocurred between the end of July and the beginning of August, 1984.

7. That in this case the petitioners exhausted the internal remedies available to them upon requesting the Ayacucho District Attorney to verify the presence and status of Mr. Juan Darío Cuya Laine, and that the judicial authorities, not having complied with the requested action nor initiated preliminary proceedings to clarify the facts, constituted an act of denial of justice, and whereby the Commission shall not apply the provisions established in Article 37, paragraph 1 of its Regulations.

8. That, furthermore, in the case that is the subject matter of this resolution, the Commission has not been able, by reason of the nature of the petition, that is, the forced disappearance of Mr. Juan Darío Cuya Laine, to apply the friendly settlement procedure provided for in Article 48, paragraph 1, f of the American Convention on Human Rights and in Article 45 of its Regulations.

9. That in accordance with the provisions set forth in Article 42 (formerly 39) of the Regulations the Commission will presume to be true the facts stated in the petition, as long as other evidence does not lead to a different conclusion.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

RESOLVES:

1. To presume true the facts claimed in the communication dated September 5, 1984 regarding the arbitrary arrest and disappearance of Mr. Juan Darío Cuya Laine, in Ayacucho, on June 24, 1984.

2. To point out to the Government of Peru that such events constitute very serious violations of the right to life (Art.4); to personal integrity (Art. 5) and to personal liberty (Art. 7) set forth in the American Convention on Human Rights.

3. To recommend to the Government of Peru that, in the shortest time possible, it order a complete investigation of the facts denounced so as to clarify events, determine the agents responsible for Mr. Cuya Laine's disappearance and to punish them.

4. To state that the relatives of Mr. Juan Darío Cuya Laine deserve a just compensation, according to law, and that, therefore, it is the responsibility of the Government of Peru to provide such compensation.

5. To request the Government of Peru to inform the Commission, within 60 days, on measures taken to implement the recommendations set forth in this resolution; and if after that period the Government of Peru has not submitted any observations, the Commission will include this Resolution in its Annual Report to the General Assembly of the OAS, in accordance with Article 63 g, of the Commission's Regulations.

6. To transmit the text of this Resolution to the Government of Peru and the petitioner.

RESOLUTION N° 19/87
CASE 9429
PERU
June 30, 1987

HAVING SEEN the background information on this case, viz:

1. In a communication dated September 6, 1984, the Inter-American Commission on Human Rights received the following complaint:

> DEPARTMENT OF AYACUCHO: It is informed of the illegal executions of: PATROCINIO QUICCHA ESPINOSA, VIRGILIO HUARANCA, OSWALDO CASTAÑEDA, FILON PALOMINO AYALA, HERACLIO PALOMINO AYALA and ESTILO AYALA.
>
> During April of 1983 we received reports that the afore-mentioned five men have been murdered by members of the Civil Guard, in Paras, Department of Ayacucho. According to the reports the men were arrested after being accused of involvement in guerrilla activities, accusations which have been denied by their families. All but Estilo Ayala, a businessman, were teachers.
>
> According to the Peruvian journal CARETAS dated August 22, 1983, Quiccha, Huaranca and Estilo Ayala were arrested by a Civil Guard patrol as they walked towards the Paras market on April 10, 1983. They were then taken behind a hill and shot. No further details on the murder of Castañeda Filón or Palomino Ayala have been received.
>
> The Peruvian Government has been asked to initiate investigations on these murders, with no reply whatsoever.
>
> This situation appears to constitute a clear violation of the Convention on Human Rights, of which Peru is a member State.

2. In a note dated October 24, 1984, the Commission requested the corresponding information from the Government of Peru, and transmitted the pertinent parts of the claim, in accordance with Article 34 (formerly 31) of its Regulations. This request was repeated in its note dated January 30, 1985.

3. In a note dated March 6, 1985 (N° 7-5-M/37), the Government of Peru provided the following information:

> Regarding case 9429, it is to be observed that Estilo Ayala, Virgilio Huaranca and Patrocinio Quiccha, identified as terrorists, died during confrontations with forces of law and order. Regarding Oswaldo Castañeda Filón, whose real name is Pablo Oswaldo Castañeda Fibio, he was killed on April 6, 1983, in Paras, Cangallo, at a social gathering with a group of friends. Preliminary investigations indicate that two presumed engineers, with the group, are the responsable agents. Regarding Heraclio Palomino Ayala, he was murdered by a terrorist group after undergoing torture in Plaza de Armas in Socco, Huamanga.

4. Through a communication dated March 19, 1985, the Commission transmitted the pertinent parts of the Peruvian Government's reply to the petitioner requesting that he make his observations or comments within 45 days. This request was repeated on May 1, 1986.

5. Through a note dated May 1, 1986, the Commission informed the Government of Peru that, in view of the information provided by the Government in the afore-mentioned note of March 6, 1985 (N° 7-5-M/37, supra), it had reiterated its request for information or comments by the petitioner.

6. In a communication dated June 6, 1986, the petitioner made the following observations and comments on the case:

> Regarding the cases of Estilo Ayala, Virgilio Huaranca and Patrocinio Quiccha Espinosa, the Peruvian Government's reply that the three "died during confrontations with forces of law and order", is the same one as transmitted in a communication on April 12, 1983. This reply does not refer at all to the information widely disseminated in Peru, in August 1983, based on interviews, description of the arrest and death of the three men, and another dressed in black, by members of the Civil Guard. This report was published by the journal CARETAS on August 22,1983; we believe it was never publicly investigated, questioned or denied by the authorities. The death of those three men was also brought up in the testimonies of the residents of Espite, near Paras, in June 1983.

Since the Government of Peru states that this case is no longer under investigation and, therefore, is considered closed, we believe that the domestic remedies are exhausted, and, therefore, the Commission should adopt new measures in order to assure that a complete investigation is carried out and that the agents responsible for these alleged illegal executions be brought to justice.

In view of the Peruvian Government's statement that the three men were identified as terrorists, it is requested that the Commission require transcripts from the police or other reports to justify this assertion, as also specific reports on the deaths of those three men. According to public information, the Director of Education of the Department of Ayacucho, Esteban García Paredes, received testimonies from the relatives of the three men officially requesting an investigation on their deaths by the Military Police Command; therefore, the Commission could require that the Government provide the information related to the actions of the Department of Education and the Military Command in this case.

Regarding the case of Heraclio Palomino Ayala, the Peruvian Government's reply apparently coincides with reports received that he was politically mistreated and later murdered by his captors. Nevertheless, the Government attributes his death to the clandestine Sendero Luminioso group, while the reports we have received indicate he was taken from his home, in the presence of his family, by Civil Guard members. It is requested that the Commission confirm if the Government's reply is based solely on reports from the Civil Guard Soccos detachment, or if the relatives of the deceased, teachers or local government officials from Socco have also provided information on this crime. The Government, therefore, should provide the Commission with transcripts of the corresponding judicial actions.

As the Commission knows, on November 23, 1983 criminal proceedings, still in process, were instituted against 26 members of the Civil Guard of Soccos for the death of 34 rural citizens. Before the investigation carried out by the Public Prosecutor's Office, these deaths were initially attributed to the Sendero Luminoso group.

Although we know that in recent years the Sendero Luminoso group has assasinated professors and other people in the emergency zone in Ayacucho, we do not believe that the investigation into the death of Heraclio Palomino Ayala has been carried out in a complete and impartial manner. In spite of the Peruvian Government's reply considering this case closed and of no further investigation, it is suggested that

the Commission continue its efforts to assure that a complete investigation is made and that the responsible agents for this death be brought to justice. It is requested that the Commission ask the Government of Peru for transcripts of the corresponding judicial actions.

Regarding the case of Oswaldo Castañeda Filón, we have received no further information since his death was reported on April 14, 1983.

7. Through a note dated June 23, 1986, the Commission transmitted to the Government of Peru the petitioner's observations, asking it to provide information on the case within 30 days.

CONSIDERING:

1. That the subject matter of this case meets the requirements for admissibility set forth in the Commission's Regulations.

2. That there exist important discrepancies between the information provided by the Government of Peru in its note of March 6, 1985 and the observations submitted by the petitioner regarding the way the events claimed took place, and specifically those events of public knowledge which the petitioner says were disseminated in Peru in August 1983, according to the records on this case.

3. That the Government of Peru has not provided, in the above-mentioned note, any proof showing that Estilo Ayala, Virgilio Huaranca and Patrocinio Quiccha (identified as a terrorist, in that note) died during "confrontations with the forces of law and order"; nor that Oswaldo Casteñeda Filón (or Pablo Oswaldo Castañeda Fibio) was killed on April 6, 1983 "at a social gathering with a group of friends", since the Commission has not received any pertinent documents related to the investigations referred to in the above-mentioned note of March 6.

4. That neither has the Government of Peru provided information verifying what actually happened to Mr. Heraclio Palomino Ayala and his alleged torture at the Plaza de Armas in Socco, Huamanga, the petitioner claiming that in this case a complete and impartial investigation has not been carried out.

5. That, in general, the data and information transmitted by the Government of Peru is insufficient to detract from the claim.

6. That in accordance with Article 42 (formerly 39) of the Regulations the Commission presumes true the facts denounced, as other evidence does not lead to a different conclusion.

7. That in this case, upon termination of the investigations, as inferred from the Note dated March 1985, the petitioner has not had

access to domestic legal remedies, in which case the Commission is therefore authorized to apply the exception set forth in Article 37, paragraph 2, b of its Regulations and proceed to study the petition.

8. That, moreover, in the case that is the subject matter of the present Resolution and in view of the nature of the events, that is, the illegal execution of PATROCINIO QUICCHA ESPINOSA, VIRGILIO HUARANCA, OSWALDO CASTAÑEDA, FILON PALOMINO AYALA, HERACLIO PALOMINO AYALA and ESTILO AYALA the Commission has not been able to apply the friendly settlement procedure provided for in Article 48, paragraph 1, f of the American Convention on Human Rights and in Article 45 of its Regulations.

9. That the process has been exhausted before the Committee and the time limit of 30 days granted to the Government of Peru in the note of June 23, 1986 has expired.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

RESOLVES:

1. To presume true the facts denounced in the communication of September 6, 1984 concerning the illegal executions of Messrs. Patrocinio Quiccha Espinosa, Virgilio Huaranca, Oswaldo Castañeda, Filón Palomino Ayala, Heraclio Palomino Ayala and Estilo Ayala.

2. To declare that the events denounced in this case constitute a serious violations of the right to life (Art. 4) and personal integrity (Art.5) of the American Convention on Human Rights.

3. To recommend to the Government of Peru that in the shortest time possible it initiate a thorough investigation of these serious facts and punish the responsible agents with the most severe penalties within the domestic legislation.

4. To declare that the relatives of the victims have a right to just compensation, according to law, and, therefore, it corresponds to the Government of Peru to grant such compensation.

5. To request the Government of Peru to inform the Commission, within 60 days, on the measures taken to implement the recommendations set forth in this resolution. If after 60 days the Government of Peru does not report on the measures taken, the Commission will include this Resolution in its Annual Report to the General Assembly of the OAS, in accordance with Article 63, g of its Regulations.

6. To transmit this Resolution to the Government of Peru and to the petitioner.

RESOLUTION N° 20/87
CASE 9449
PERU
June 30, 1987

HAVING SEEN the background information on this case, viz:

1. Through a communication dated September 6, 1984, the Inter-American Commission on Human Rights received the following petition:

> Martín Hipólito Bellido Canchari, a 14 year-old student at the school "Mariscal Cáceres", was arrested at his home, in Ayacucho, in late 1983 by hooded members of the Civil Guard. His whereabouts are unknown.
>
> In spite of actions taken before the corresponding authorities he has not been located and we fear for his life.
>
> This situation appears to constitute a clear violation of the American Convention on Human Rights, to which Peru is a State party.

2. In a note dated October 24, 1984, the Commission requested the Goverment of Peru to provide the corresponding information, in accordance with Article 34 (formerly 31) of its Regulations.

3. In a note dated March 6, 1985 (N° 7-5-M/37), the Government of Peru replied as follows:

> Regarding Case 9449, concerning Martín Hipólito Bellido Canchari, the Public Prosecutor's office is carrying out the corresponding investigation to obtain information on the events denounced in the petition. This investigation was initiated upon presentation of a claim by Mrs. Elena Canchari de Bellido.

4. In its communication of March 19, 1985, the Commission transmitted the pertinent parts of the information provided by the Government of Peru to the petitioner, pointing out that he should present his observations or comments within a period of 45 days. This request was repeated on March 1, 1986.

5. In its note of March 1, 1986, the Commission informed the Government of Peru of the abovementioned action.

6. In a communication dated June 4, 1986, the petitioner made the following observations and comments on the Peruvian Government's above-mentioned note of March 6, 1985:

The Government of Peru says that the Public Prosecutor's office is carrying out an investigation due to a formal petition presented by Martín Hipólito Bellido Canchari's mother. We suggest the Commission request information on the present status of this investigation. It is important to know if Mrs. Canchari and the other relatives or witnesses in this case have been interrogated during the investigation. Likewise, we suggest the Commission request transcripts of the communications on the case held between the Attorney's office and the Political-Military Command--the latter being held responsible for the illegal arrests--and also the replies of the Command to the petitions.

We also hope the Commission will learn whether the Public Prosecutor's office has brought suit before a criminal court since this case involves the crimes of kidnapping and murder, and also if any proceedings at all have been initiated before the courts. We wish to point out that previously, in various cases of mass executions--and specifically in the cases of the discovery of common graves in Pucayacu in August 1984 and the death of eight reporters in January of 1983--investigations have been initiated by the criminal courts but the regional political-military authorities refused to appear before the respective courts. It is also requested the Commission ask for information on measures taken in this and other similar cases in order that the Armed Forces officials responsible for arrests in Ayacucho be interrogated and give testimony in trial on these investigations and that their replies, and those of their superiors, be made known.

7. In its note of June 19, 1986 the Commission transmitted the petitioner's observations to the Government of Peru requesting it to provide information on the case within 30 days.

CONSIDERING:

1. That this case meets the admissibility requirements set forth in the Commission's Regulations.

2. That the information provided by the Government of Peru in its note of March 6, 1985 is clearly insufficient for the Commission to study the case without all the facts to formulate an opinion.

3. That more than enough time has elapsed to have obtained results and tried and punished the responsable agents of such serious charges as are the kidnapping and disappearance, in Ayacucho, of the minor Martín Hipólito Bellido Canchari.

4. That in view of the circumstances in which the events occurred, and the lack of data on their investigation, in the opinion of the Commission there is enough evidence to presume the facts to be true.

5. That in accordance to Article 42 (formerly 39) of the Regulations the Commission presumes true the facts presented by the petitioner as other evidence does not lead to a different conclusion.

6. That, moreover, in this case the Commission recognizes an unjustified delay in the administration of justice, therefore, it is not necessary for domestic remedies to have been exhausted as a previous step to studying the case, in accordance with Article 37, paragraph 1 of its Regulation.

7. That, moreover, in the case that is the subject matter of this Resolution, the Commission has not been able, by reason of the nature of the petition, that is the forced disappearance of Mr. Martin Hipólito Bellido Cauchari, to apply the friendly settlement procedure provided for in Article 48, paragraph 1, f of the American Convention on Human Rights and Article 45 of its Regulations.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

RESOLVES:

1. To presume to be true the facts stated in the petition of September 6, 1984 concerning the kidnapping and disappearance, in Ayacucho, of the minor Martín Hipólito Bellido Canchari.

2. To declare that the events denounced in this petition constitute very serious violations of the right to personal liberty (Art. 7) and the right to life (Art. 4) of the American Convention on Human Rights.

3. To recommend to the Government of Peru that it conclude, as soon as possible, the investigations in process on this case, existing accusation by the interested party; that it expedite the establishment of corresponding responsibilities and punish, with the most severe penalties, the agents responsible for the kidnapping and disappearance of the minor Bellido Canchari, and specifically proceed against the regional military authorities who could have had the minor's custody under their jurisdiction at the time.

4. To declare the victim's relatives entitled to fair compensation in accordance with the law and whereby the Government of Peru is responsable for said compensation.

5. To request the Government of Peru to inform the Commission, within 60 days, of the measures taken to implement the recommendations set forth in this Resolution. If after the established time limit the

Government of Peru has not submitted any comments, the Commission will include this Resolution in its Annual Report to the General Assembly of the OAS, in accordance with Article 63, g of its Regulations.

6. To transmit this Resolution to the Government of Peru and the petitioner.

RESOLUTION N° 21/87
CASE 9466
PERU
June 30, 1987

HAVING SEEN the background information on this case, viz:

1. In a communication dated October 1, 1984 the Commission received the following petition:

> TEODORO HUANCAHUARI disappeared on December 12, 1983 from Lucanamarca, the town where he resided in Ayacucho. Captain Edgar Acevedo López, of the district of Lucanamarca, reported to the authorities that Teodoro was detained at the army facilities in Cangallo. Actions taken by his family and local authorities have had no result. To date his location is unknown. These facts constitute a violation of the American Convention on Human Rights, of which Peru is a member State.

2. In its note of November 5, 1984 the Commission requested the Government of Peru to provide pertinent information on the petition, in accordance with Article 34 (formerly 31) of its Regulations.

3. In its note of March 6, 1985 (N° 7-5-M/37), the Government of Peru replied to the Commission with the following information:

> With reference to Case 9466, concerning Teodoro Huancahuari, on May 6, 1983 he was accused of heading the clandestine Sendero Luminoso guerrilla group in the town of Pelacucho, Huancayo, and concealing his participation in subversive activites through his post as Mayor of the district of Lucanamarca, Ayacucho.

4. In its communication of March 19, 1985, the Commission transmitted the information provided by the Government of Peru to the petitioner, requesting that he comment on it within a period of 45 days.

5. In his communication of May 3, 1985 the petitioner made the following comments:

Case No. 9466: Teodoro Huancahuari Matias:

The Government of Peru's reply on the case of Mr. Huancahuari is completely inadequate. It is affirmed without evidence or analysis that Mr. Huancahuari was accused, on May 6 of 1983, of being the head of the Sendero Luminoso guerrilla group in the city of Pelacucho, Huancayo, and participating in subversive activities as Mayor of Lucamarca, District of Ayacucho. This "reply" from the Government of Peru does not actually respond to the petition we submitted to the Inter-American Commission on Human Rights.

On October 1, 1984, we submitted a copy of the sworn statement made by Mr. Huancahuari's wife, Vicenta Evanan Huancahuari. This statement, dated February 14, 1984, was first made and presented to the Public Prosecutor's office, the Superior District Attorney's office in Ayacucho. This document basically states that Mr. Huancahuari disappeared during the month of December, 1983, by action of civil or military authorities of the Government of Peru and that repeated formal and informal actions before these authorities have not resulted in information on the whereabouts and condition of Mr. Huancahuari.

The Government of Peru's "reply" does not refer to any of the events denounced in the sworn statement submitted to the Commission. On the contrary, it refers to the tendencious accusation, made in May of 1983, against Mr. Huancahuari. Likewise, no information is provided regarding which court or which authorized official made the accusation; the charges against Mr. Huancahuari are not stated, and curiously enough, there is no transcript of the charges, which was apparently submitted to the IACHR.

Most important of all, the Peruvian Government's reply does not mention the events of December 1983 and January 1984 as claimed in the sworn statement. Supposedly, in a case concerning an individual accused of participating in "subversive activities" and arrested by public officials, the Government would mention these facts in its reply. Contrary to the above, the sworn statement contends that Mr. Huancahuari was free before he went to the offices of Investigations Police of Cangallo on December 7, 1983, to make a statement on a different matter. This took place seven months after Mr. Huancahuari was accused.

If the sworn statement is true then it is unlikely that the slanted accusation made by the Government of Peru would have occurred. Clearly, the Peruvian Government's reply is

inadmissible: "In response to the claim based on the fact that Mr. Huancahuari disappeared in 1983 by action of the civil or military officials of Peru, the Government of Peru affirms that Mr. Huancahuari was charged, in May of 1983, by an unidentified official and of unspecified crimes." This response is irrelevant and unrelated to the claim submitted to the Commission.

A minimal response by the Government of Peru would have discussed the facts set forth in the sworn statement and indicated Mr. Huancahuari's present whereabouts.

This response would have allowed the Commission to make a substantive study of Mr. Huancahuari's case, with the aim of affirming that the rights guaranteed in the American Convention on Human Rights are being respected by the Government of Peru.

6. In its note of May 8, 1985 the Commission transmitted the comments made by the petitioner to the Government of Peru granting it a period of 30 days in which to provide pertinent information. In a note of May 9, 1985 the petitioner was advised on this action.

7. In a memorandum dated June 28, 1985, the petitioner referred to having exhausted internal remedies and the applicability exceptions of this principle, recognized in Article 46, 2, a and b of the American Convention as also in the Regulations of the Commission (Article 37, 2, a and b and c), and pointed out that in the present case the interested parties had exhausted internal remedies or the actions taken had not been effective or the interested parties had been denied such actions. In said memorandum, moreover, the petitioner submitted additional information on the claim and the status of the investigations requested by the victim's relatives.

8. In a note dated September 25, 1985 (N° 7-5-M/176), the Government of Peru reported that " with reference to the specific cases submitted to the Inter-American Commission on Human Rights, the Government of Peru had ordered all the public offices involved in the claims to submit a complete report on the facts contained in the claims on alleged violations of human rights, which will be transmitted immediately to that Honorable Executive Secretariat".

9. In accordance with the above, in a note dated March 26, 1986 (N° 7-5-M/44), said Government submitted the following information on case 9466:

Concerning case 9466 we reiterate the fact that Mr. Teodoro Huancahuari was accused of acting as head of the Sendero Luminoso guerilla group in the town of Huancayo.

10. In its letter of April 16, 1986, the Commission transmitted the information provided by the Government of Peru to the petitioner requesting he submit his observations or comments within a period of 45 days.

11. In a communication dated May 30, 1986, the petitioner submitted observations and comments along with additional information, as follows:

Case No. 9466 Teodoro Huancahuari Matías

The reply of the Government of Peru in the case of Mr. Huancahuari is the same previous reply of March 6, 1983. As stated in our letter of May 3, 1985, the Government's reply is absolutely inadequate since it determines, without any evidence or further detail, that Mr. Huancahuari was prosecuted because he was the leader of the clandestine Sendero Luminoso group in the city of Huancayo. This reply by the Government of Peru does not actually respond to the information submitted to IACHR or to the questions contained in our note of May 3, 1985.

On October 1, 1984 we submitted to the IACHR a sworn statement made by Mr. Huancahuari's wife, Vicenta Evanan Huancahuari. Originally that statement made on February 14, 1984, was submitted to the Public Prosecutor's office, the Superior Court of Ayacucho. Basically the statement alleges that Mr. Huancahuari was "disappeared" by military and/or civilian officials of the Government of Peru during the month of December, 1983, and that repeated actions, both formal and informal before the authorities, did not result in information on the whereabouts or condition of Mr. Huancahuari.

Attached to the present is a sworn statement dated June 7, 1985, signed by Mr. Huancahuari's sons, that clearly shows that to date they have no knowledge whatsoever of his whereabouts.

In its response, the Government of Peru does not mention any of the alleged events in the statement submitted to the IACHR, and instead reports Mr. Huancahuari's prosecution. No information is provided as to which court or public official took those actions; the exact charges against Mr. Huancahuari are not specified, and curiously enough, apparently the IACHR was not sent transcripts of this action. We requested this information in our note of May 3, 1985, and the Government has apparently been unable to provide it.

Most important of all is the fact that the Government's reply does not refer to the events which occurred in December 1983 and January 1984 in the complaint. Presumably, an

individual processed for participating in "subversive activities" would have been arrested and detained by Government officials, but in the Government's reply it is not said that Mr. Huancahuari was free when he himself appeared before the Investigations Police of Cangallo on December 7, 1983, to make a statement on another matter. This took place seven months after Mr. Huancahuari's processing. If this statement is true, then it seems incredible that the Government of Peru should actually have convicted him. The reply given by the Government of Peru is obviously insufficient. In response to claims containing detailed data whereby Mr. Huancahuari disappeared in December of 1983 by action of civilian and/or military officials of Peru, the Government states he was convicted by unspecified officials and for unspecified crimes. The response is irrelevant to the complaint submitted to the IACHR.

With a minimal and adequate response from the Government of Peru, the facts declared in the statement could be discussed and Mr. Huancahuari's whereabouts indicated. This kind of response would allow the IACHR to initiate study of Mr. Huancahuari's case in a constructive manner, with the aim of assuring that the rights guaranteed by the American Convention on Human Rights be respected by the Government of Peru. The Government's second response, of March 26, 1986, does not meet any of these requirements.

12. In its note of June 10, 1986, the Commission transmitted the above comments to the Government of Peru, requesting it submit the pertinent information on the case within a period of 30 days. This request was reiterated in a note dated July 25, 1986 whereby it was indicated that the above-mentioned time limit of 30 days had expired.

CONSIDERING:

1. That this case meets all the admissibility requirements set forth in the Regulations of the Commission.

2. That the action and the established time limits have expired before the Commission.

3. That the information submitted by the Government of Peru in the present case of Mr. Teodoro Huancahuari, disappeared since December 12, 1983, in Lucanasmarca, Ayacucho, is insufficient, since it does not answer the Commission's request concerning the whereabouts or status of Mr. Huancahuari Matias.

4. That in the responses made by the Government of Peru, which did not include copies of the files or corroborating evidence of its

statements, it affirms that the afore-mentioned "was charged on May 6, 1983, with being the leader of the clandestine Sendero Luminoso group in the town of Pelacucho, Huancayo, and concealing his participation in subversive activities through his post as Mayor of the District of Lucanamarca, Ayacucho," which is, moreover, irrelevant to the contents of the claim submitted to the Commission.

5. That, moreover, the information submitted by the Government of Peru does not recognize or consider the sworn statement made by the victim's wife, Mrs. Vicenta Evanan Huancahuari, on February 14, 1984, submitted to the Public Prosecutor's office, the Superior District Attorney's office of Ayacucho, whereby it is declared that Mr. Huancahuari disappeared through the action of members of the armed forces or civilian government officials during the month of December of 1983, and that all efforts to determine the location of her husband have failed.

6. That, moreover, there is on file a statement dated July 7, 1985, subscribed to by Mr. Huancahuari's sons which declares they do not know the whereabouts of their father and that, having checked at the Cangallo barracks, where they were first told he could be found by Captain Edgar Acevedo López, they have not received any reply on the matter.

7. That the information provided by the Government of Peru does not furnish any information on the court or judge that processed Mr. Huancahuari; nor what specific charges were brought up, nor transcript of the sentence, date or place in which the mentioned prosecution apparently took place.

8. That, consequently, the Commission lacks sufficient data to detract from the claim and that, on the contrary, from the evidence on record the events denounced before the Commission are presumed true.

9. That in the case under consideration, the petitioners have exhausted all domestic legal remedies, that is, a petition or statement to the Public Prosecutor's office, on February, 1984--an autonomous body created by the National Constitution (Article 250) to investigate attempts made on the rights of the persons mentioned in the petitions submitted to this body--and the records show that other remedies such as that of Habeas Corpus, have not been available to the petitioners.

10. That, moreover, in the case that is the subject matter of this Resolution, the Commission has not been able, by reason of the nature of the petition, that is, the forced disappearance of Mr. Teodoro Huancahuari, to apply the friendly settlement procedure provided for in Article 48, paragraph 1, f of the American Convention on Human Rights and in Article 45 of its Regulations.

11. That Article 42 (formerly 39) of the Regulations authorizes the Commission to presume true the facts contained in the petition as long as other evidence does not lead to a different conclusion.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

RESOLVES:

1. To presume true the facts denounced in the communication of October 1, 1984, concerning the disappearance of Mr. Teodoro Huancahuari Matías, on December 12, 1983 in the location called Lucanamarca, Ayacucho.

2. To declare this constitutes a very serious violation of the right to personal liberty (Article 7) and of the right to life (Article 4) set forth in the American Convention on Human Rights.

3. To recommend to the Government of Peru that it proceed, as soon as possible, with an investigation of the case and punish the responsible agents for the disappearance of Mr. Huancahuarti Matias with the most severe penalties.

4. To declare that the relatives of the victim are entitled to fair compensation, in accordance with the law, and for which the Government of Peru is responsible.

5. To request the Government of Peru to inform the Commission, within a period of 60 days, of the measures taken to implement the recommendations set forth in this Resolution. If after this period the Government does not report on the measures taken, the Commission will include this Resolution in its Annual Report to the General Assembly of the OAS, in accordance with Article 63, paragraph g of its Regulations.

6. To transmit this Resolution to the Government of Peru and the petitioner.

RESOLUTION N° 22/87
CASE 9467
PERU
June 30, 1987

HAVING SEEN the background information on this case, viz:

1. In a communication dated October 1, 1984, the Inter-American Commission on Human Rights received the following petition:

> FELIPE HUAMAN PALOMINO, of 32 years of age, was arrested in his home in Ayacucho by members of the so called Republican Guard, dressed as civilians, on July 23, 1984. Police officials deny his detention. There is, however, information indicating his detention at the Quicapata Barracks. In spite of the actions taken his whereabouts are unknown.

This case could constitute a violation of the American Convention on Human Rights to which Peru is a State party.

2. In a note dated November 5, 1984, the Commission requested the Government of Peru to provide the pertinent information, in accordance with Article 31 of its Regulations.

3. In a note dated January 30, 1985, the Commission repeated its request for information to the Government of Peru and mentioned Article 39 of its Regulations whereby, since no reply was received, the facts of the case may be presumed true.

4. In a note dated March 6, 1985 (N° 7-5-M/37), the Government of Peru provided the following information:

With reference to case 9467, concerning Felipe Huamán Palomino, the Public Prosecutor's office is making major efforts to obtain the requested information as soon as possible.

5. In a note dated March 19, 1985, the Commission transmitted the pertinent parts of the information provided by the Government of Peru to the petitioner requesting that he submit his comments thereon within 45 days.

6. In his communications of May 3 and June 28, 1985, the petitioner furnished his observations and comments on the Government's communication to the Commission including additional complementary information on the case, summarized as follows:

a. That the Government of Peru was not actually responding to the IACHR's request for information but only offering or promising to reply once the Government Attorney's office completes its investigations;

b. That Mr. Huamán Palomino's wife had submitted to the District Attorney, in Ayacucho, on July 19, 1984, a sworn statement declaring that on July 17, 1984, a member of the Republican Guard took Mr. Huamán to the military barracks at Quicapata where Mr. Huamán disppeared; that she had requested information on her husband from the Investigations Police of Peru, the Republican Guard, at "Los Cabitos" barracks and at the police precincts in Ayacucho without results, and that the claim before the Public Prosecutor's office had not had any effect either;

c. That in this case, as in others concerning presumed disappearances, it has been communicated to the authorities that there have been obstructions when investigating on disappeared persons and that in some cases "investigators have been denied any approach or access to certain rural areas or detention centers and that these same concerns were denounced by the Executive Secretary of the Andean Commission of Jurists in a Report dated October 1984" (Ayacucho and Human Rights, Center/or Independence of Judges and Lawyers, N° 14, pp. 49-53);

d. That the competency of the Government Attorney's office to carry out investigations and verify arrests is questionable since the arrested parties were not placed or held in ordinary prisons but in special detention centers created by the military;

e. That the military authorities will not provide information to the Public Prosecutor's office, and that especially in Ayacucho those lawyers devoted to defending political prisoners have been persecuted and forced to leave after having been victims of terrorist attacks;

f. That likewise, in Huamanga and Ayacucho, the district attorneys have been threatened by security forces which explains the changing (in less than one year) of the District Attorney in Huamanga, the position being vacant at that time, and that after the massacre of 34 rural citizens denounced by the District Attorney Jorge Zegarra Dongo, in 1984 in Soccos, two armed men (presumably members of the P.I.P.) unlawfully searched his home and threatened said Attorney forcing him to resign;

g. That the same thing happened to the former District Attorney of Cangallo, Mr. Luis Altamirano, who tried to speed up the investigations in that area, in particular the case concerning the abuses committed by Colonel Armando Mellet Castillo and a General with the last name of Noel; therefore we conclude that in cases of disappearance, such as that of Mr. Felipe Huamán Palomino, competent judicial authorities are prevented from carrying out their tasks and, therefore, justice is denied to the victims and their relatives.

7. In its note of October 11, 1985 the Commission again reiterated to the Government of Peru the information offered on the results of the investigations on this case and others pending.

8. In a note dated March 26, 1986 (N° 7-5-M/44) the Government of Peru furnished the following response:

> In accordance with the domestic jurisdiction, investigations are still in process on the facts presented in Note N° 7-5-M/37, dated March 6, 1985 of this Permanent Mission.

9. In its communication of April 16, 1986 the Commission sent the above transcribed to the petitioner and requested him to submit his final observations on the case within 45 days.

10. In a communication dated May 30, 1986 the petitioner provided the following information and comments:

Case 9467 FELIPE HUAMAN PALOMINO

> In its communication of March 26, 1986 the Government of Peru has not provided any relevant information on the case of

Mr. Felipe Huamán Palomino. In its previous response, dated March 6, 1985 the Government did not respond to the facts denounced before the IACHR on October 1, 1984 concerning Mr. Felipe Huamán Palomino; it has only promised to respond once the Public Prosecutor's office completes its investigation. Nevertheless, the Government of Peru's communication of March 26, 1986 does not contain any information on the investigations carried out by the Public Prosecutor's office, as had been offered.

The Government promised to make major efforts to resolve this case. As we pointed out in our communication of May 3, 1985, Mr. Huamán's wife submitted a sworn statement nine months before to the District Attorney of Ayacucho, a necessary step in order to investigate Mr. Huamán's disappearance. A year has passed and the Public Prosecutor's office has had one year and nine months to investigate this case. The Government of Peru promised to furnish the requested information as soon as possible and has yet to do so.

11. In its note of June 12, 1986 the Commission transmitted the petitioner's observations to the Government of Peru, requesting it furnish all the information on the case within 30 days.

CONSIDERING:

1. That this case meets the admissibility requirements set forth in the Commission's Regulations.

2. That the procedure before the Commission and the regulatory time limits have elapsed.

3. That the information provided by the Government of Peru in the case of Mr. Felipe Huamán Palomino's disappearance, since July 23, 1984, in Ayacucho, is completely inadequate and dilatory with regard to the nature of the Commission's requests and the process and results of the investigations made by the competent authorities of Peru on this case.

4. That based on the observations and comments submitted by the petitioner it is affirmed that the facts claimed are true and that, moreover, the competent judicial authorities of Peru have not been able to complete their investigations in a timely and formal manner whereby it can be assumed that, in this case, the claimants were denied access to the domestic legislation remedies or that the administration of justice was unduly delayed whereby the Commission is exempt from the provisions of Article 46 a, of the American Convention on Human Rights, and Article 37, paragraph 1 of its Regulations.

5. That the information provided by the Government of Peru does not include specific data on the authority in charge of the investigations; the actions taken; when to expect the examining stage of the process to conclude (after two years) and its current status and, finally, if there are any guilty parties presumed responsible for Mr. Huamán Palomino's disappearance.

6. That, consequently, the Commission, in accordance with Article 42 of its Regulations and lacking any facts to detract from the claim, concludes the facts to be true.

7. That, moreover, in the case that is the subject matter of this Resolution the Commission has been unable, by reason of the nature of the petition, that is, the forced disappearance of Mr. Felipe Huamán Palomino, to apply the friendly settlement procedure set forth in Article 48, paragraph 1, f of the American Convention on Human Rights and in Article 45 of its Regulations.

8. That in accordance with Article 42 (formerly 39) of its Regulations the Commission presumes the facts denounced to be true, as long as other evidence does not lead to a different conclusion.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

RESOLVES:

1. To consider true the facts reported in the petition of October 1, 1984 concerning the disappearance of Mr. Felipe Huamán Palomino, in Ayacucho, on July 23, 1984.

2. To declare that this constitutes a very serious violation of the right to personal liberty (Article 7) and the right to life (Article 4), established in the American Convention on Human Rights.

3. To recommend to the Government of Peru that it carry out, as soon as possible, an investigation on the events and punish the persons responsible with the most severe penalties established in the internal legislation.

4. To declare that the relatives of the victim are entitled to fair compensation, according to law, and, therefore, that the Government of Peru grant said compensation.

5. To request the Government of Peru to report to the Commission, within 60 days, on the measures taken to implement the recommendations of this Resolution. If within that period the Government of Peru has not submitted information, the Commission will include this Resolution in its Annual Report to the General Assembly, in accordance with Article 63, paragraph g of its Regulations.

6. To transmit this Resolution to the Government of Peru and the petitioner.

RESOLUTION N° 23/87
CASE 9468
PERU
June 30, 1987

HAVING SEEN the background information on this case, viz:

1. In a communication dated October 1, 1984 the Inter-American Commission on Human Rights received the following petition:

> On July 28, 1984, Francisco García Ramos, 25 years of age, disappeared from his home in the town of Vilcashuaman, in the province of Huamanga. No official reason was given for his detention. Officials of the Investigations Department of the Police affirm that Mr. García Ramos was released on August 2, 1984 but to date he has not returned home. Officials at "Los Cabitos" Barracks denied his presence there. Mr. García Ramos was a soldier of the army in Vilcashuaman until February of 1984.
>
> These events could constitute a violation of the American Convention on Human Rights of which Peru is a member State.

2. In its note of November 5, 1984 the Commission requested the Government of Peru to provide the pertinent information, in accordance with Article 34 (formerly 31) of its Regulations.

3. In its note of January 30, 1985 the Commission repeated its request for information, pointing out it could apply the provisions of Article 42 (formerly 39) of the Regulations.

4. In a note dated March 6, 1985 (N° 7-5-M/37) the Government of Peru furnished the following information:

> With respect to Case 9468 concerning Mr. Francisco García Ramos, his reentry in the Voting Register of Peru, on October 24, 1984, has been confirmed, that is to say it was made after October 1, 1984 which is the date of the petition before the Inter-American Commission on Human Rights. In evidence we attach copy of the reentry document under the number 2824-8343 of the Voting Register of Peru.

5. In its communication dated March 19, 1985, the Commission transmitted the information provided by the Government of Peru to the petitioner requesting that he submit his observations or comments within 45 days.

6. In a communication dated May 3, 1985, the petitioner made the following comments:

> , It seems that, according to the Government of Peru's communication, because Mr. García's name appears in the Voting Register on the date of October 24, 1984, he is then alive and free. We question how it can possibly be established he is alive and free with this sole piece of evidence. As we understand it, this is unacceptable.
>
> Based on the sworn statement by Mr. García's wife submitted to the Commission, it is a fact that Mr. García was arrested by members of the Investigations Department of the Police on or about July 28, 1984. If Mr. García were free, the Government of Peru would be able to report where he was detained, for how long and the date, place and circumstances of Mr. García's release. This kind of information is pertinent in order to establish if Mr. García's arrest was carried out in accordance with the rights and guarantees established by the American Convention on Human Rights.
>
> Although the Government of Peru's communication establishes that Mr. García is no longer in detention, further information is needed for the Commission to make an appropriate decision on this case.
>
> In conclusion, we are grateful for the opportunity to comment on the Government of Peru's communication. Moreover, we will continue to search for additional information on these cases which we will immediately submit to the Commission. We thank the Commission for their concern and interest in these cases.

7. In its note of May 8, 1985 the Commission transmitted the above transcribed observations to the Government of Peru requesting it provide complete information on the case within 30 days.

8. In a letter dated June 8, 1985 the petitioner submitted an extensive communication to the IACHR on this case, with special reference to the problem of the exhaustion of the domestic remedies. The petitioner especially pointed out that in this case the domestic remedies had been exhausted since the disappeared person's wife had sent the Public Prosecutor's Office an affidavit dated August 9, 1984 stating that her husband had disappeared by action of members of the Investigations

Department of the Police on July 28, 1984, and had not been heard of again, and that she had asked about him at various facilities including "Los Cabitos" Barracks, police precincts and the actual Investigations Department of the Police without obtaining any results.

9. Moreover, in the mentioned document the petitioner said that several persons and organizations had stated that the armed forces of Peru and the police had thwarted the attempts made by the Public Prosecutor's office to investigate disappeared persons, that it was therefore useless to appeal to that Office, and that in fact the civilian authorities were subordinated to the military power.

10. In its note of October 11, 1985 the Commission again requested the Government of Peru to provide the corresponding information on the cases pending process.

11. In a note dated March 26, 1986 (N° 7-5-M/44) the Government of Peru furnished the following information:

> Regarding Case N° 9468 concerning Mr. Francisco García Ramos, his reentry in the Voting Register of Peru, made subsequently to the date of his alleged disappearance in the month of October 1984 has been proved.

12. In its communication of April 16, 1986 the Commission transmitted the information provided by the Government of Peru to the petitioner requesting he submit his observations on the same within 45 days.

13. In a communication dated May 30, 1986 the petitioner made the following comments:

> The Government's reply only reiterates the communication of March 6, 1986. In this response it is underscored that Mr. García's name appears in the Voting Register on October 24, 1984 when García was alive and free. Once again, as in our previous communications, we question whether this sole fact can establish if Mr. García is alive and free. In our view, this is not the case.
>
> According to the affidavit made by Mr. García's wife, and which we submitted to the Commission, it appears that Mr. García was arrested by members of the Investigations Department of the Police on July 28, 1984. If Mr. García is presently free, the Government of Peru should be capable of informing where he was detained, for how long, in what circumstances and by what authority. Moreover, the Government could indicate the time, place and circumstances of Mr. García's release. We wish

to note that if in fact Mr. García was released by the Government, then this information would serve to determine if Mr. García's arrest was carried out in accordance to the guarantees established by the American Convention on Human Rights.

Obviously the Government has no interest in furnishing this information which is clearly under its control. This reluctance to inform interferes with Mr. Garcías rights as set forth in the American Convention on Human Rights, rights which were violated in spite of evidence that he is now free.

In short, the Government's communication should include further pertinent information in order for the IACHR to carry out a proper study of the case. The request for this information, which has not been provided, was underscored in our communication of May 3, 1985.

14. In its communication of June 10, 1986 the Commission transmitted the comments sent by the petitioner to the Government of Peru requesting it furnish complete information on the case within 30 days.

CONSIDERING:

1. That the subject matter of this case satisfies the requirements for admissibility set forth in its Regulations.

2. That the information provided by the Government of Peru on the status of Mr. Francisco García Ramos, in its note of March 6, 1985 (N° 7-5-M/37), which was confirmed or repeated in its note of March 26, 1986 (N° 7-5-M/44), does not offer sufficient facts to detract from the petition claiming the disappearance of the afore-mentioned, also in view of the fact that the copy of the reentry in Peru's Voting Register, made on October 24, 1984, subsequently to the petition, is not endorsed by any judicial authority, is not part of the records of any investigation carried out on the case, and neither did any examining judge or official provide a transcript showing the actions taken to obtain a true and authentic, certified copy of that official document or certificate of entry.

3. That, moreover, the information given by the Government of Peru disregards the fact that Mr. García Ramos' wife submitted an affidavit on August 9, 1984 to the competent judicial authority, that is the Public Prosecutor's office, confirming her husband disappearance by action of members of the Investigations Department of the Police of Huamanga, and all the other investigations carried out during three years, and without results, by the said wife to find out the whereabouts and fate of her husband.

4. That it is obvious and unquestionable that if Mr. García had not disappeared and were free somewhere in the country or abroad, the

Government of Peru would be able to provide information on the time, place and circumstances of said release or of Mr. Garcia's past or present residence (permanent or provisional), and that, therefore, the information submitted to the Commission is incomplete and does not respond to the problem brought up in the petition, which is the disappearance of the said Mr. García Ramos since June of 1983.

5. That in the case under consideration the petitioners have exhausted all domestic remedies, as established in the records before the Public Prosecutor's office, with no results having been obtained, and whereby the provisions of Article 37, paragraph 2, a, of the Commission's Regulations are applicable.

6. That, moreover, in the case which is the subject matter of this Resolution, the Commission has not been able, by reason of the nature of the petition, that is, the forced disappearance of Mr. Francisco García Ramos, to apply the friendly settlement procedure provided for in Article 48, paragraph 1, f of the American Convention on Human Rights and in Article 45 of its Regulations.

7. That in accordance with Article 42 (formerly 39) of its Regulations the Commission considers the facts of the complaint to be true, as long as no other evidence leads to a different conclusion.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

RESOLVES:

1. To presume true the facts denounced in the communication of October 1, 1984 concerning the disappearance of Mr. Francisco García Ramos, on July 28, 1983, in Vilcashuaman, Huamanga.

2. To declare that this constitutes a very serious violation of the right to personal liberty (Article 7) and the right to life (Article 4) of the American Convention on Human Rights.

3. To recommend to the Government of Peru that it proceed, as soon as possible, to carry out an investigation on the event and punish those responsible therefor with the most severe penalties established in its domestic legislation.

4. To declare that the relatives of the victim are entitled to fair compensation, according to law, whereby the Government is responsable for said compensation.

5. To request the Government of Peru to report to the Commission, in a period of 60 days, on the measures taken to implement the recommendations set forth in this Resolution. Should the Government of Peru not respond, the Commission will include this Resolution in its

Annual Report to the General Assembly of the OAS, in accordance with Article 63, g of its Regulations.

6. To transmit the this Resolution to the Government of Peru and the petitioner.

RESOLUTION N° 3/87
CASE 9647
UNITED STATES

TABLE OF CONTENTS

I. INTRODUCTION

A. Summary of the facts and the Petitioners' complaint

1. The Petitioners are James Terry Roach and Jay Pinkerton who were sentenced to death and executed in the United States for crimes which they were adjudged to have committed, and which they perpetrated before their eighteenth birthdays.

2. The Petitioners are represented by David Weissbrodt and Mary McClymont. The American Civil Liberties Union and the International Human Rights Law Group have co-sponsored the complaint. Amnesty International also filed a petition with the Commission alleging that the imminent execution of James Terry Roach, while lawful in the United States, is a violation of international law. Eighteen organizations have communicated to the Commission their support of the complaint.

3. James Terry Roach was convicted of the rape and murder of a fourteen year old girl and the murder of her seventeen year old boyfriend. Roach committed these crimes at the age of seventeen and was sentenced to death in the General Session Court, Richland County, South Carolina on 16 December 1977. Roach petitioned the United States Supreme Court for a writ of certiorari on three separate occasions. All petitions were denied. Roach also exhausted all appeals to the state and federal courts, and on 10 January 1986 he was executed.

4. Jay Pinkerton was convicted of murder and attempted rape which he committed at the age of seventeen. The death sentence was appealed to the Texas Supreme Court which affirmed the trial court's decision. The United States Supreme Court denied Pinkerton's writ of certiorari on 7 October 1985. Pinkerton was executed on 15 May 1986.

5. On 23 February 1987, the U.S. Supreme Court announced that it would decide in its next term the case of Thompson v. Oklahoma, thereby, for the first time, taking up the issue of the execution of juvenile offenders. The constitutional issue presented is whether the execution of a juvenile offender violates the U.S. Constitution's prohibition on cruel and unusual punishment.

6. In their complaint to the Commission, the petitioners allege that the United States has violated Article I (right to life), Article VII (special protection of children), and Article XXVI (prohibition against cruel, infamous or unusual punishment) of the American Declaration of the Rights and Duties of Man by executing persons for crimes committed before their eighteenth birthday. The Petitioners allege a violation of their right to life guaranteed under the American Declaration, as informed by customary international law, which prohibits the execution of persons who committed crimes under the age of eighteen.

B. Proceedings before the Commission

7. The petition on behalf of James Terry Roach was filed with the Commission on 4 December 1985 and registered as Case N° 9647 (United States). Jay Pinkerton's petition was registered with the Commission on 8 May 1986 following the setting of the date for his execution.

8. In both the case of Roach and of Pinkerton, the Commission cabled the United States Secretary of State, George P. Shultz, and the respective Governor of the Petitioner's state, requesting a stay of execution pending the Commission's examination and decision of Case N° 9647. The Commission stated in each telegram that its request for information did not prejudge the admissibility of the case in accordance with Article 34 of the Commission's Regulations.

9. Petitioner Roach had sought provisional relief measures under Article 29 of the Commission's Regulations. On 12 December 1985, the Chairman of the Commission cabled Secretary of State, George P. Shultz, and South Carolina Governor, Richard W. Riley, requesting a stay of execution pending the Commission's examination of the case. The Chairman stated that granting such a stay of execution would "be in the spirit of major human rights instruments and the universal trend favorable to the abolition of the death penalty." The Commission also requested that the U.S. Government provide information concerning the Petitioner's complaint.

10. On 23 December 1985 the Executive Secretary of the Commission cabled the United States Government with additional information relating to the date of Roach's execution scheduled for 10 January 1986 and stressed the necessity of receiving a response by that date. The Commission also reiterated its previous request to stay the execution of the Petitioner. Another cable was sent to the Secretary of State with a stay of execution request on 6 January 1986.

11. On 9 January 1986 the U.S. State Department replied. It stated that: "Under the circumstances, with respect to the Commission's request that the execution be stayed pending consideration of the case, the United States is constrained to reply that the matter is now in the hands of authorities for the State of South Carolina and, under the U. S. federal system, there are no domestic legal grounds for executive intervention in the implementation of the sentence."

12. On 9 January 1986 the Secretary General of the Organization of American States cabled an appeal to the Governor of South Carolina to "follow the current tendency of almost all the countries in this hemisphere and to stay the execution."

13. On 9 January 1986, Governor Riley of South Carolina responded to the cables requesting a stay of execution by informing the Executive Secretary of his decision not to intervene in the case of James Terry Roach. The Governor stated that he had reviewed the case thoroughly and

believed that the case had been "fairly litigated at the trial level and that all of his appeals in the courts have been given full and fair consideration." As a result, he found "no reason to intervene in the judicial process or to grant a request for clemency."

14. On 20 February 1986, the lawyers for the Petitioners filed a brief on Case 9647 with the Commission, setting forth their legal arguments pertaining to the case.

15. On 8 April 1986, the Petitioners requested that additional information compiled by Amnesty International on comparative national laws which proscribe the execution of persons under the age of eighteen around the world be incorporated by reference into the Petitioners' brief.

16. On 26 March 1986, the United States requested an extension of time until 28 August 1986 in order to respond fully to the issues raised by the Petitioners. The Commission at its 67th Session granted the U.S. Government an extension until 1 July 1986 in order to have a draft decision on the case before its next regular session.

17. On 9 May 1986, after having been informed by the Petitioners that Jay Pinkerton was to be executed on 15 May 1986, the Commission cabled the Secretary of State and Governor Mark White of Texas requesting a stay of execution in the case of Jay Pinkerton pending the Commission's examination and decision on Case 9647.

18. The U.S. Government responded on 14 May 1986. It stated that, as in the case of James Terry Roach, "the United States considers that U.S. domestic standards with respect to application of the death penalty are fully consistent with the principles stated in the Declaration," and given the U.S. federal system "there are no domestic legal grounds (...) for executive intervention in the implementation of Mr. Pinkerton's sentence." The Governor of Texas did not respond to the Commission's request for a stay of execution.

19. On 15 July 1986, the U.S. Government submitted its brief in response to petitioners' brief.

C. The final decision

20. This final decision was drawn up by the Commission in accordance with Article 53 of the Regulations of the Inter-American Commission on Human Rights. The text of this final decision was adopted by the Commission on 27 March 1987. The following members were present:

Gilda Russomano, President
Marco Tulio Bruni Celli
Oliver H. Jackman
Elsa Kelly
Luis Adolfo Siles

This final decision is now transmitted to the parties.

Bruce McColm, a U.S. national, chose not to participate in this decision, pursuant to Article 19 of the Commission's Regulations.

Marco Gerardo Monroy Cabra was not present at the Commission on that date.

II. THE FACTS

21. The facts of the present case are not in dispute between the parties.

22. In the present case, the Petitioners allege that the United States has denied them the internationally protected right to life by condemning them to death and executing them for crimes committed while under the age of eighteen. The issue presented is: Does the absence of a federal prohibition on the execution of juveniles offenders within U.S. domestic law violate the human rights standards applicable to the United States under the inter-American system?

A. James Terry Roach

23. Petitioner Roach was seventeen years old when he committed the rape and the murder of a fourteen year old girl and the murder of her seventeen year old boyfriend. Evidence revealed that Roach was borderline mentally retarded, with an I.Q. of between 75 and 80 and that he apparently suffered from Huntington's Chorea, an incurable brain disease. The psychological and medical evidence presented at the April 1980 postconviction proceedings suggest Roach actually functioned at the mental age of twelve when the offense was committed. Roach had two codefendants. One was another youth of 16 who turned state's evidence and received life imprisonment. The other was J.C. Shaw, a twenty-two year old adult, who received the death sentence on 11 January 1985. Evidence showed Roach had been under the adult's influence when the offenses were committed.

24. Jurisdiction of the juvenile court in South Carolina is limited to those under seventeen years of age. Therefore, Roach was sentenced to death in adult criminal court in pursuance of South Carolina's death penalty statute which follows the Georgia statute upheld by the Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976). The South Carolina death penalty statute provides for a bifurcated trial which first considers the guilt or innocence of the defendant, and then upon conviction, a separate sentencing proceeding is conducted to determine whether the defendant is to be sentenced to life imprisonment or death. Roach pleaded guilty to the charges. At the sentencing hearing, the judge heard additional mitigating and aggravating evidence. At least one aggravating circumstance

must be found beyond a reasonable doubt before the death sentence may be imposed. South Carolina law has seven statutory aggravating circumstances and nine statutory mitigating circumstances. Among the mitigating factors is that, "The defendant was below the age of 18 at the time of the crime." S.C. Code, 16-3-20 (C)(b)(9).

25. In considering the mitigating factors in the Roach case, the sentencing judge found that Roach had been under the domination of an adult during the commission of the crime. The judge also found that Roach's capacity to conform his conduct to the requirements of the law was substantially impaired, and that he was under the influence of extreme mental or emotional disturbance as he and his codefendants were "shooting up" drugs and drinking beer before the offense. Another mitigating factor was that Roach had no significant history of prior criminal activity involving the use of violence against another. Roach's mental retardation, anti-social personality disorder, and the fact that he was below the age of 18 at the time of the crime, were also considered by the judge in Roach's sentencing. Roach v. Martin, 757 F.2d 1463, 1468-69 (1985).

26. Nevertheless, the sentencing judge also found beyond a reasonable doubt three statutory aggravating circumstances: murder committed while in the commission of rape, murder committed while in the commission of kidnapping, and murder committed while in the commission of robbery. S.C. Code 16-3-20 (C)(a)(1)(a), (c), (e). The judge found the evidence in the case warranted the imposition of the death penalty after weighing both mitigating and aggravating circumstances.

27. This sentence was upheld on direct appeal by the South Carolina Supreme Court. State v. Shaw (and Roach), 255 S.E. 2d 799, (1979).[1] South Carolina law provides for a mandatory review in the imposition of the death penalty. Roach was later denied post conviction relief by the state trial court and the appeal of this was denied by the State Supreme Court of South Carolina. Roach v. State, Memo Op. N° 81-MO-197 (S.C. July 17, 1981).

28. Petitioner also sought review of his case from the United States Supreme Court. He challenged as unconstitutional, among other issues, the imposition of the death penalty as being grossly disproportionate and offensive to contemporary standards of decency due to, among other factors, his age when the crime was committed. However, the Supreme Court denied the writ of certiorari. Roach v. State, 444 U.S. 1026, reh'g denied 444 U.S. 1104 (1980). He again raised the same issue of his age, as being one factor which resulted in the unconstitutionality of the imposition of the death penalty, in another petition for certiorari. This was denied on 25 January 1982. Roach v. South Carolina, 455 U.S. 927 (1982).

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1. First capital case reviewed under the current death penalty statutes.

29. Roach brought a petition for a writ of habeas corpus in the U.S. District Court of South Carolina. This request was also denied. Roach v. Martin, Civil Action N° 81-1907-14 (May 11, 1984). He appealed this denial, raising again the issue of his age as being a factor prohibiting the imposition of the death penalty. The U.S. Court of Appeals for the Fourth Circuit affirmed the district courts denial of the writ. Roach v. Martin, 757 F.2d 1463 (4th Cir. 1983). His final appeal to the United States Supreme Court was denied on 7 October 1985, and the petition for rehearing was denied on 2 December 1985. See, Roach v. Aiken, N° 85-6155 (A-531). Petitioner Roach was executed in Columbia, South Carolina on 10 January 1986.

B. Jay Pinkerton

30. Petitioner Pinkerton was found guilty of murder in the course of burglary with the intent to commit rape. The crime was committed when he was seventeen years old. Petitioner at seventeen was also beyond the age limit of the jurisdiction of Texas juvenile courts (age 17) and was tried as an adult. He was sentenced to death in accordance with the Texas capital punishment statute which had been upheld by the Supreme Court. Jurek v. Texas, 428 U.S. 262 (1976).

31. The Texas death penalty statute currently provides for the imposition of the death sentence only for capital murders. A capital murder is the intentional or knowing killing of a person accompanied by one of five listed aggravating factors. These factors focus on the identity of the victim and the dangerousness of the actor's conduct. Pinkerton was convicted of intentionally committing murder in the course of committing burglary which is one of the statutory aggravating factors defining capital murder. Tex. Code Crim. Proc. Ann., art. 19.03 (a)(2).

32. Conviction of capital murder results in either a mandatory death sentence or life imprisonment. The jury at the sentencing hearing must find beyond a reasonable doubt that (1) the actor killed intentionally or knowingly; (2) he will probably commit other crimes of violence if not executed; and (3) the killing was unreasonable in response to the provocation, if any, of the deceased. To warrant the death sentence all twelve jury members must answer each of these issues affirmatively. The Supreme Court of the United States upheld this Texas statute in Jurek v. Texas, 428 U.S. 262 (1976), finding that the second question is interpreted to allow the defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show. Id. at 272. Therefore, although the statute does not specify age, this may be taken into consideration at the sentencing hearing. Texas law prohibits the imposition of the death penalty on anyone younger than seventeen when the capital felony was committed. Texas C.C.P., 8.07(e).

33. Pinkerton's statutorily provided review was taken to the Court of Criminal Appeals where his conviction and sentence were affirmed. Subsequent federal and state appeals were denied. The United States

Supreme Court denied certiorari on 7 October 1985. Pinkerton v. McCotter, 88 L.Ed. 2d 158 (1985). Jay Pinkerton was executed by the State of Texas on 15 May 1986.

III. SUBMISSIONS OF THE PARTIES

A. The Petitioners

34. The Petitioners allegé that the imposition of the death penalty on James Terry Roach and Jay Pinkerton by United States courts for crimes committed before their eighteenth birthday violated the American Declaration of the Rights and Duties of Man. Specifically, Petitioners allege violations of Article I (right to life), Article VII (special protection of children), and Article XXVI (cruel, infamous or unusual punishment) of the American Declaration as informed by customary international law which prohibits the imposition of the death penalty for crimes committed by juveniles under eighteen.

35. The Petitioners state that the United States is subject to the jurisdiction of the Commission as a member State of the Organization of American States and is obligated, therefore, to observe the enumerated rights in the American Declaration.

36. The Petitioners' case meets the admissibility requirements of Article 37 of the Commission's Regulations as the Petitioners have exhausted all domestic remedies. United States courts, both federal and state, have failed to address Petitioners' claims that the imposition of the death penalty on juvenile offenders is constitutionally prohibited.

37. The Petitioners' complaint may be summarized as follows:

(a) Imposition of the death penalty on juveniles violates the American Declaration as informed by customary international law.

(b) The United States is legally bound by the American Declaration of the Rights and Duties of Man. The American Declaration should be interpreted according to the canons of the Vienna Convention on the Law of Treaties because the Convention represents a world-wide consensus on how international instruments should be construed.

(c) Articles 31 and 32 of the Vienna Convention set out the principal interpretative norms for treaties and other international instruments. According to Article 31 of the Vienna Convention, the terms of the American Declaration should be interpreted in accordance with their ordinary meaning and in light of the object and purpose of the instrument. Construing Articles I, VII and XXVI together and in accordance with their ordinary meaning, and in light of the object and purpose of the Declaration, these articles should be interpreted to prohibit the execution of persons who committed offenses under the age of 18.

(d) The U.S. Government is incorrect in asserting that the rights in the Declaration "must be interpreted in terms of the intentions of the member states at the time of the adoption of the Declaration, not in terms of changing norms of customary international law." This rigid and static approach to the interpretation of the Declaration is in conflict with the terms of the Declaration, the norms of the Vienna Convention, the normal approach which international bodies take to human rights instruments, the practice of the Commission, and the practice of the United States in its own domestic cases. The preamble to the American Declaration states, "The international protection of the rights of man should be the principal guide of an evolving American law...." (Emphasis added).

(e) In construing the terms of the American Declaration in light of its object and purpose, the Commission should pay particular attention to Article XXVI which forbids "cruel, infamous or unusual punishment." This is broader than the United States constitutional prohibition against cruel and unusual punishment. Juveniles are recognized as lacking in maturity and are most susceptible to various influences and psychological pressure. Killing a young person who has not had the chance to mature to adulthood is the "ultimate cruel punishment," therefore, Article XXVI should be interpreted as a prohibition against the execution of juveniles. Then, on its ordinary meaning and in light of the object and purpose of these articles, the United States is violating the American Declaration by executing juveniles.

(f) Article 31 of the Vienna Convention also looks to "relevant rules of international law" to help interpret treaties. Therefore, the Commission should take into account the customary international law norm prohibiting the execution of juvenile offenders. This prohibition has obtained the status of customary international law. Pursuant to Article 38(1)(b) of the Statute of the International Court of Justice, "international custom, as evidence of a general practice accepted as law" is one of the sources of international law. Treaties are clearly evidence of State practice, especially if accompanied by opinio juris, or claims in the treaty or the travaux préparatoires indicating that a treaty provision is a restatement of pre-existing customary laws.

(g) The major human rights instruments such as the American Convention on Human Rights (Article 4(5)), the International Covenant on Civil and Political Rights (Article 6(5)), and the Fourth Geneva Convention prohibit the imposition of the death penalty on persons under eighteen years of age.

Article 4(5) of the American Convention reads: "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women." The fourth Geneva Convention states in Article 68, in relevant part:

In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence.

As of January 1, 1986 there are 162 states parties to this Convention, including the United States. This Convention applies to periods of international armed conflict and Article 68 forbids the execution of civilians and military personnel no longer in combat, who committed offenses prior to the age of 18. If nearly all the nations of the world, including the United States, have agreed to such a norm for periods of international armed conflict, the norm protecting juvenile offenders from execution ought to apply with even greater force for periods of peace.

(h) In addition, approximately two-thirds of the nations of the world have either abolished the death penalty or have prohibited it for juveniles by adhering to these human rights instruments. Whereas the European "Convention for the Protection of Human Rights and Fundamental Freedoms" (1950), in Article 2 allowed the death penalty, an evolving abolitionist philosophy is reflected in Protocol N° 6 which states "the death penalty shall be abolished. No one shall be condemned to such penalty or executed."

Petitioners point out that the travaux préparatoires of these Conventions demonstrate that these prohibitions against juvenile executions are in fact codifications of customary international law as can be derived from the debates during the drafting of the provisions of these Conventions.

(i) As further evidence of State practice, in terms of actually carrying out the death sentence, Petitioners submit evidence, compiled by Amnesty International, to the effect that since 1979, although 80 nations of the world have executed over 11,000 persons, only six persons who committed offenses under 18 were executed by four nations, including the United States.

In the United States, the laws of various jurisdictions which permit the use of the death penalty nonetheless recognize the uniqueness of juvenile offenders and at least 21 states set a minimum age for imposition of the death penalty. Therefore, although the data is incomplete, available information shows that national laws, as well as the practice of states not to execute minors, further demonstrate the existence of a customary law norm prohibiting execution of offenders who committed capital crimes as juveniles.

(j) The Commission should not rely on the travaux préparatoires of the American Declaration as the U.S. Government argues. The United States relies for support on the deletion of language pertaining to capital punishment from the Inter American Juridical Committee's draft. The original Article I reads as follows:

> Every person has the right to life, including the fetus ("los que están por nacer") and the terminally ill, the insane, and mentally retarded.
>
> Capital punishment shall only be applied in cases in which pre-existing law has established it for exceptionally grave crimes.

The original second sentence of Article I concerning capital punishment was dropped in the subsequent and final drafts. Like the capital punishment language, the latter half of the first sentence was also deleted in subsequent and final drafts. The present version of Article I reads:

> Every human being has the right to life, liberty and the security of his person.

The deletion of the capital punishment language can no more be interpreted to infer that the drafters necessarily meant to authorize widely its use than can the deletion of the clause in the first sentence be interpreted to mean that the insane, terminally ill, or mentally retarded were no longer afforded the right to life. Instead, the deletion of the capital punishment language could be read to mean that the drafters were simply unable or unwilling to delineate each and every instance when capital punishment would be prohibited as they did not want to authorize it necessarily in every context.

(k) Finally, there is a limit on any State's ability to regulate a matter, such as capital punishment, if the result will violate international law. Domestic legislation of member states cannot validate conflict with international obligations; a state cannot invoke its contrary domestic law as justification for its failure to abide by an agreement. The United States argument that at the time of the drafting of the Declaration the death penalty was widely practiced and could not generally be considered cruel or unusual is irrelevant. Petitioners argue that "[H]uman rights instruments. . . are drafted to improve the human rights situation and not certainly to reconfirm any alleged right of nature to continue violating human rights."

(l) The petitioners request that the Commission find that the United States has violated the American Declaration, as interpreted in the light of customary international law, by having executed Petitioners Roach and Pinkerton for offenses they committed while under the age of eighteen. Petitioners also request the Commission to recommend that a moratorium be imposed on the execution of other juvenile offenders in the United States.

B. The Government

38. The U.S. Government considers that the absence of a prohibition on the execution of juvenile offenders within United States domestic law

is not inconsistent with human rights standards applicable to the United States. The Commission must look to the American Declaration for the relevant standards as the United States is not a party to the American Convention. The argument may be summarized as follows:

(a) The American Declaration is silent on the issue of capital punishment as Article I simply states, "Every human being has the right to life, liberty and the security of his person." From the drafting history of the Declaration, there is evidence that Article I was not meant to affect the legislative discretion of the American states with respect to capital punishment. A Declaration that does not expressly limit the circumstances under which the death penalty may be imposed may not be interpreted as foreclosing the reasonable discretion of the American states to determine for themselves the minimum age at which imposition of the death penalty is appropriate.

(b) The drafters considered and declined to adopt any specific standards on the issue of capital punishment. The reference to capital punishment prohibiting it except for exceptional crimes was deleted in the final draft. The debate surrounding Article I demonstrates that a standard on capital punishment could not be devised due to the diversity of State legislation in the hemisphere. Therefore, the States are able to legislate within their own discretion on the issue of capital punishment.

(c) Only Article I is at issue because if no standard on capital punishment was incorporated into the American Declaration, then a prohibition against the execution of juveniles could not be "silently subsumed" within the other rights. Article VII on the special protection and care of women and children was not contemplated to extend to juveniles convicted of serious crimes. There is no official record of the drafters' intentions but the use of the word "children" was not meant to refer to juveniles nearing their eighteenth year.

There is also no official record of the drafters' intentions with regard to the prohibition against "cruel, infamous or unusual punishment" of Article XXVI. However, at the time of the drafting the death penalty was widely practiced and therefore, could not be considered cruel or unusual.

None of the three articles of the Declaration cited by petitioners addresses the death penalty or establishes any particular age of majority. The U.S. Government believes that the Declaration is deliberately silent on the issue of capital punishment. Therefore, there purposely is no limitation on the legislative prerogative of the American States regarding the imposition of the death sentence.

(d) The Vienna Convention should not be relied on to interpret the American Declaration as the Declaration is not a treaty and it is not

binding on the United States. The U.S. Government does not agree with the Commission's holding in Case N° 2141 (United States) that the Declaration acquired binding force with the adoption of the revised OAS Charter. Res. 23/81, OAS/Ser. L/V/II.52, Doc. 48., Mar. 6, 1981. The Declaration was not drafted with the intent to create legal obligations, therefore the Commission should take special care "where the intentions of the drafters are manifest with respect to any particular article," not to overturn that meaning.

Even assuming the Vienna Convention could be applied to the Declaration, the Petitioners have not shown the "clear meaning" of Articles I, VII, or XXVI. Each is "ambiguous" with respect to the prohibition of the death penalty on juveniles. Therefore, recourse to the travaux préparatoires is necessary.

(e) The petitioners request that the Commission look to the American Convention and other international instruments to "interpret" the Declaration as encompassing the standard of Article 4(5). This requires the Commission to go far beyond its interpretative powers. Specific standards in the American Convention, such as the prohibition against the execution of those who committed crimes under eighteen years of age, are binding only on those parties to the Convention. These standards were not accepted by the United States.

(f) The three human rights instruments mentioned by petitioners are irrelevant to the Commission's consideration of the case. The United States is not a party to the International Covenant nor the American Convention, and standards cannot be imposed by "interpretation" on a State which is not a party. See, Case N° 2141 (United States). In addition, the United States delegate at the drafting of the American Convention pointed out that the United States had problems with Article 4(5)'s arbitrary age limit of 18 conflicting with its federal structure.

(g) Petitioners are also incorrect in stating that Article 4(5) of the American Convention is declaratory of customary international law. The age of majority for purposes of imposing the death penalty is not a matter of uniform state practice. Some countries desired a specific age limit while others wanted reference only to "minors" or "juveniles" during the drafting of the International Covenant's Article 6(5), demonstrating that they were not codifying an already existing binding norm. Instead, this was a specific standard intended to create uniformity where none existed.

At the same time, there is no evidence of opinio juris. Even the states which have enacted prohibitions against the execution of those who committed crimes before their eighteenth birthday did not do so out of any sense of legal obligation. Since the American Convention and the International Covenant have been enacted, any changes in state legislation cannot be viewed as evidence of a generally applicable

customary rule of law. "Relevant rules of law" must exist apart from any conventional or treaty standards. "Simply because states in the U.S. or other nations have chosen eighteen as the age of majority does not impose an obligation that other states must choose the exact same age."

(h) The U.S. Government does not acknowledge the existence of a customary international law norm which prohibits the execution of juveniles. To establish a norm of customary law there must be "extensive and virtually uniform" state practice and second, evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The rule must be recognized as a legal obligation based on the custom or practice of states. In this case, there is neither the uniformity of state practice, nor the required opinio juris to regard the standard as a binding norm of customary international law.

(i) The U.S. Government further maintains that it has dissented from such a standard. It abstained from participating in the debate and vote on the draft International Covenant, and submitted it to the U.S. Senate with reservations. The United States also opposed Article 4(5) of the American Convention, and when president Carter signed the American Convention he proposed the Senate advice and consent to ratification of the treaty be accompanied by a reservation stating that "United States adherence to Article 4 is subject to the Constitution and other law of the United States". Four Treaties Pertaining to Human Rights, Message from the President of the United States, S. Doc. N° Exec. C, D, E, 8F, at xii, 95th Cong., 2d Sess (1978).

The U.S. Government concludes its brief by stating that "There is no basis in international law for applying to the United States a standard taken from treaties to which it is not a party and which it has indicated it will not accept when it becomes a treaty."

(j) The U.S. Government requests the Commission to hold that the recent executions are not inconsistent with the American Declaration.

IV. ADMISSIBILITY

39. In denying Roach's and Pinkerton's appeals for a writ of certiorari, the U.S. Supreme Court deliberately decided not to review the issue of the constitutionality of the execution of juvenile offenders. As pointed out in Petitioners' brief, Justice Brennan in his dissent stated that the Roach case afforded "an opportunity to address the important question whether an accused may...be sentenced to death for a capital offense he committed while a juvenile." Since the U.S. Supreme Court chose not to address the question the Commission finds that the Petitioners had no further domestic remedies to exhaust.

40. In spite of the fact that the U.S. Supreme Court has not addressed the issue of the constitutionality of applying the death penalty

to juvenile offenders, it has established certain trial and sentencing standards for state death penalty cases. A review of the evolution of these Supreme Court standards is relevant here.

A. The United States Supreme Court and the death penalty

41. In the United States, since the 19th century the courts have moved away from mandatory death sentences, as such a system fails to take into account the individual and his circumstances. However, by 1972 the United States Supreme Court found that the courts had moved so far from a mandatory system that unlimited discretion had been given to the judge or jury to decide who received the death penalty. In Furman v. Georgia, 408 U.S. 238 (1972), the Court held that such unguided discretion created arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. While the Furman decision did not hold that the death penalty, per se, violates the Eighth Amendment, it, in effect, suspended executions and made federal and state death penalty statutes inoperative until new laws were drafted which would comply with the Constitution in light of Furman v. Georgia. The execution of Gary Gilmore on January 17, 1977 was the first execution since June 2, 1967. In the decade since Gilmore there have been more than 60 executions. In the decade 1976-1986 over 3,000 people have been sentenced to death in the United States. Between 1963 and 1985 the U.S. did not execute a criminal who was under the age of 18 at the time of the crime. Since then three have been executed.

After Furman many states enacted new death penalty statutes. In 1976, the Court began to examine the post-Furman statutes and in Gregg v. Georgia, 428 U.S. 153 (1976), it addresses the question avoided in Furman, namely, is the imposition of the death penalty per se unconstitutional? The Court in Gregg stated that it was not unconstitutional, and began to set out guidelines for imposition of the death penalty.

a) The U.S. Supreme Court held in Gregg v. Georgia that the Eighth Amendment, which has been interpreted in a flexible manner to accord with "evolving standards of decency," prohibits the death penalty if it is grossly disproportionate to the crime or if it is imposed arbitrarily or capriciously. The Court, however, upheld the Georgia statute in Gregg because it was carefully drafted to ensure that the sentencing authority was given adequate information and guidance. The Georgia statute provides for a bifurcated trial in which the jury first determines the defendant's guilt or innocence. At the sentencing hearing, the jury then considers any mitigating and/or aggravating circumstances in the case. Before the death penalty could be imposed the jury had to find that one or more statutory aggravating factors existed beyond a reasonable doubt and that such factors were not outweighed by mitigating factors.

b) In two companion cases, the Court upheld the death penalty statutes of Florida and Texas which provide that the judge or the jury is

given specific and detailed guidance to assist them in deciding whether to impose the death sentence or life imprisonment. Proffit v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976). Each statute guides and focuses the sentencing authority's objective consideration of the particular circumstances of the offense and the offender.

c) The standards necessary to guide the jury or judge in sentencing have focused on the nature and circumstances of the crime and the character and record of the defendant. Aggravating circumstances may include such issues as whether the murder was committed by a convict or if the murder was atrocious or heinous. Special attention has been given by the Supreme Court to the mitigating factors. In Lockett v. Ohio, 438 U.S. 586 (1978), the Court struck down the Ohio death penalty statute which only specified three factors to be considered in the mitigation of the defendant's sentence. The Court found that the Eighth and Fourteenth Amendments require that the sentencer, "not be precluded from considering as a mitigating factor, any aspect of the defendant's record or character and any of the circumstances of the offense...." Id. at 604. In that case, the sentencing judge had been precluded by the Ohio statute from considering as mitigating factors: the defendant's lack of a prior criminal record; the fact that she was twenty-one; her lack of specific intent to cause death; and her relatively minor part in the crime.

d) In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court added that the states must consider the background and mental and emotional development of the defendant as mitigating factors. The defendant in Eddings had committed a murder at the age of sixteen. The Court had granted the writ of certiorari on the question of whether, in the light of contemporary standards, the Eighth Amendment forbids the execution of a defendant who was under eighteen at the time of the offense. The Court, however, declined to address that issue. It decided the case instead in light of Lockett v. Ohio, vacating the death sentence because it had been imposed without the type of individualized consideration of mitigating factors required by the Constitution. The Court's reversal of the death sentence evidences the importance the Court attaches to mitigating evidence in determining fair and just sentencing. The trial judge had refused to take into account the defendant's unhappy childhood and unique emotional disturbances. The Court's consideration of the mitigating evidence in the case emphasized the defendant's youth, his "serious emotional problems," his severe lack of the "care, concern and paternal attention that children deserve," and his "neglectful, sometimes even violent, family background."

B. The juvenile justice system in the United States

42. The U.S. criminal justice system, since the beginning of the twentieth century, has treated children differently than adults. Reformers in the U.S. wished to abolish the harsh adult procedures and sentences applied to children who had committed crimes. The belief was that children should be treated and rehabilitated and therefore should

not be subjected to the "harshness" and "rigidity" of the adult criminal law. (See, In re Gault, 387 U.S. 1, 15-16 (1967).)

a) Every state in the United States has juvenile courts. The maximum age over which a juvenile court has jurisdiction is set by the state legislature. The age limits vary for juvenile jurisdiction, but most states set the limit between sixteen and eighteen. The focus in juvenile court is on the child's condition, not his guilt. Therefore, the purpose of a separate juvenile justice system is to rehabilitate children and to make social services available to help them. Punishment in juvenile court is not stressed; the maximum sentence which can be imposed is institutional confinement until the child reaches twenty-one years of age.

b) Sometimes a juvenile court may have jurisdiction but it may waive its right to hear a case. The case is then brought before an adult criminal court. In some states the prosecutor may have the discretion of choosing which court to file in, but in most states the juvenile judge has the discretion of deciding whether to transfer a case or not. In some cases the juvenile may benefit from being transferred to criminal court. He is entitled to all the constitutional protections of an adult, such as the right to a jury trial and perhaps the ability to post bond if the jurisdiction provides such measures. Juries may be more sympathetic to a youth in criminal court. Nevertheless, because transfer to criminal court subjects the accused juvenile to adult punishments, the transfer process has been recognized as a critically important stage in juvenile court proceedings. (See, Kent v. United States, 383 U.S. 541 (1966).)

c) There is little statutory guidance as to which children should be transferred for trial in adult criminal court. The juvenile court judge is given a great deal of discretion in determining who stays within the family court's jurisdiction. Since Kent, many states have adopted objective criteria by statute to be used in waiving juvenile jurisdiction. The two most common criteria used are the age of the youth and the nature of the offense.

d) Many states set a minimum age at which a child cannot be transferred out of juvenile court jurisdiction. The exact age limit varies from state to state, from 13 years of age in Mississippi to 16 years in California.

e) The nature of the alleged offense and the accused's prior history of criminal activity are also often used at a transfer hearing. For extremely serious crimes such as murder, rape and aggravated assault, states will rarely retain juvenile court jurisdiction. Such crimes are often used as objective criteria to determine that the child is not amenable to treatment within the juvenile system. Some states allow only for discretionary transfer if the juvenile is accused of a felony (e.g., Colorado). Other states such as Pennsylvania and Massachusetts have mandatory transfer provisions which are triggered if a child over fourteen years has allegedly committed murder.

f) Some U.S. states have no death penalty laws in force, others prohibit the death penalty for juveniles. Fourteen states as of 1985, specifically mention age as a mitigating factor in their death penalty statutes. Indiana, however, allows for the transfer of a 10 year old in certain cases to adult criminal court. Indiana does not specify age as a mitigating factor in its death penalty statute, but it may be considered under "any other circumstances appropriate for consideration." Ind. Code Ann. 35-50-2-9. Therefore, in Indiana it is possible that a ten year old could receive the death penalty and be executed.

V. OPINION OF THE COMMISSION

A. Point at issue

43. The question presented by the petitioners in the present case is whether the absence of a federal prohibition within U.S. domestic law on the execution of persons who committed serious crimes under the age of 18 is inconsistent with human rights standards applicable to the United States under the inter-American system.

Crimes in the United States fall under either state or federal jurisdiction. A defendant may be tried in federal court if he is charged with the commission of a crime under federal law, or he may appeal to a federal court from a state court under certain circumstances. A great deal of autonomy has been left to the states in prescribing the appropriate punishment for criminal conduct. However, all punishment must be in conformity with the United States Constitution as interpreted by the Supreme Court.

B. The international obligation of the United States under the American Declaration

44. The American Declaration is silent on the issue of capital punishment. Article I of the American Declaration reads as follows:

> Every human being has the right to life, liberty and the security of his person.

45. The American Convention on Human Rights, on the other hand, refers specifically to capital punishment in five of its provisions. Article 4 of the American Convention, which protects the right to life, reads as follows:

> Article 4. Right to Life
>
> 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

46. The international obligation of the United States of America, as a member of the Organization of American States (OAS), under the jurisdiction of the Inter-American Commission on Human Rights is governed by the Charter of the OAS (Bogotá, 1948), as amended by the Protocol of Buenos Aires on 27 February 1967, ratified by the United States on 23 April 1968.

47. The United States is a member State of the Organization of American States, but is not a State party to the American Convention on Human Rights, and, therefore, cannot be found to be in violation of Article 4(5) of the Convention, since as the Commission stated in Case 2141 (United States), para. 31: "it would be impossible to impose upon the United States Government or that of any other State member of the OAS, by means of 'interpretation,' an international obligation based upon a treaty that such State has not duly accepted or ratified."[1]

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1. Case 2141 (United States) Res. 23/81 of 6 March 1981 OAS/Ser.L/V/II.52, doc. 48, para. 16 (1981) in 1980-1981 Annual Report of the Inter-American Commission on Human Rights OEA/Ser.L/V/II.54, doc. 9, rev. 1 (16 October 1981) at 25 et seq., and also in OAS, Inter-American Commission on Human Rights, Ten Years of Activities, 1971-1981 (1982) at 186 et seq.

48. As a consequence of articles 3 j, 16, 51 e, 112 and 150 of the Charter, the provisions of other instruments of the OAS on human rights acquired binding force.[1] Those instruments, approved with the vote of the U.S. Government, are the following:

- American Declaration of the Rights and Duties of Man (Bogotá, 1948)

- Statute and Regulations of the IACHR

49. The Statute provides that, for the purpose of such instruments, the IACHR is the organ of the OAS entrusted with the competence to promote the observance of and respect for human rights. For the purpose of the Statute, human rights are understood to be the rights set forth in the American Declaration in relation to States not parties to the American Convention on Human Rights (San José, 1969).

C. The Petitioners' argument

50. The central violation denounced in the petition concerns a violation of the right to life, Article I of the Declaration, which states: "Every human being has the right to life..." Since the Declaration is silent on the issue of capital punishment, Petitioners, in connection with Article I, seek an affirmative response to the question: Is there a norm of customary international law which prohibits the imposition of the death penalty on persons who committed capital crimes before completing eighteen years of age?

51. The elements of a norm of customary international law are the following:[2]

a) a concordant practice by a number of states with reference to a type of situation falling within the domain of international relations;

b) a continuation or repetition of the practice over a considerable period of time;

c) a conception that the practice is required by or consistent with prevailing international law; and

d) general acquiescence in the practice by other states.

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1. See, Thomas Buergenthal "The Revised OAS Charter and the rotection of Human Rights," 69 AJIL 828 (1975) and Case 2141 (supra).

2. See, Yearbook of the International Law Commission, 1950, II, 26, para. 11.

52. The evidence of a customary rule of international law requires evidence of widespread state practice. Article 38 of the Statute of the International Court of Justice (I.C.J.) defines "international custom, as evidence of a general practice accepted as law." The customary rule, however, does not bind States which protest the norm.

In the Fisheries Case (United Kingdom v. Norway) the I.C.J. found that although the

> ...ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of law.[1]

How many states need to engage in the state practice for it to acquire the authority of a customary norm has never been definitively established, but it is clear that while a universal practice is not necessary, the practice must be common and widespread.

53. The U.S. Government, in December 1977, transmitted the American Convention on Human Rights, inter alia, to the U.S. Senate for advice and consent to ratification subject to specified reservations. As regards the issue in question, the U.S. Government proposed reservations to Articles 4 and 5 which were presented as follows:

> Article 4 deals with the right to life generally, and includes provisions on capital punishment. Many of the provisions of Article 4 are not in accord with United States law and policy, or deal with matters in which the law is unsettled. The Senate may wish to enter a reservation as follows: "United States adherence to Article 4 is subject to the Constitution and other law of the United States."
>
> [Article (5)], [p]aragraph 5 requires that minors subject to criminal proceedings are to be separated from adults and brought before specialized tribunals as speedily as possible. (...) With respect to paragraph (5), the law reserves the right to try minors as adults in certain cases and there is no present intent to revise these laws. The following statement is recommended:

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1. Fisheries Case, (UK/Norway) Judgment of December 18, 1951: I.C.J. Reports 1951, p. 116 at 131.

"The United States (...) with respect to paragraph (5), reserves the right in appropriate cases to subject minors to procedures and penalties applicable to adults."[1]

54. Since the United States has protested the norm, it would not be applicable to the United States should it be held to exist. For a norm of customary international law to be binding on a State which has protested the norm, it must have acquired the status of jus cogens.[2] Petitioners do not argue that a rule prohibiting the execution of juvenile offenders has acquired the authority of jus cogens, a peremptory norm of international law from which no derogation is permitted. The Commission, however, is not a judicial body and is not limited to considering only the submissions presented by the parties to a dispute.

D. General principles applicable to the present case

55. The concept of jus cogens is derived from ancient law concepts of a "superior order" of legal norms, which the laws of man or nations may not contravene. The norms of jus cogens have been described by publicists as comprising "international public policy." They are "rules which have been accepted, either expressly by treaty or tacitly by custom, as being necessary to protect the public interest of the society of States or to maintain the standards of public morality recognized by them."[3]

According to Ian Brownlie, the major distinguishing feature of rules of jus cogens is their "relative indelibility." Brownlie suggests certain examples of jus cogens such as: "the prohibition of aggressive war, the

1. U.S. Department of State Publication 8961, General Foreign Policy Series 310, Letters of Transmittal and Submittal, with suggested reservations, understandings, and declarations (November 1978).

2. The concept of jus cogens is included in Article 53 of the Vienna Convention on the Law of Treaties which states: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

3. See, Sir Ian Sinclair: The Vienna Convention on the Law of Treaties, Manchester U. Press, (1973) at 208.

law of genocide, the principle of racial non-discrimination, crime against humanity, and the rules prohibiting trade in slaves and piracy.[1]"

Since the acceptance of norms of jus cogens is still subject to som debate in some sectors, it might be argued that the International Court o Justice did not consider the prohibition against genocide, for example, t be a norm of jus cogens. It has been argued,[2] however, that the Worl Court has made "indirect references" to the concept of jus cogens, withou actually calling it such by name, in the advisory opinion on the Reserva- tions to the Genocide Convention case, in which the Court stated:

> ...that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.

The rule prohibiting genocide would be binding on States not parties to the Genocide Convention, even if derived only from customary interna- tional law, without having acquired the status of jus cogens, but it achieves the status of jus cogens precisely because it is the kind of rule that it would shock the conscience of mankind and the standards of public morality for a State to protest.

The International Court of Justice, in a later case, categorized the prohibition of genocide as an obligation erga omnes. Whereas the ICJ does not make reference to the concept jus cogens, it has been suggested[3] that the examples given of obligations erga omnes are examples of what the ICJ would consider to be norms of jus cogens. The following distinction between obligations of a State vis-à-vis the international community (erga omnes) and vis-à-vis another State is taken from the judgment in the Barcelona Traction case:

> In these circumstances it is logical that the Court should first address itself to what was originally presented as the subject-matter of the third preliminary objection: namely the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.

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1. See, Ian Brownlie: Principles of Public International Law, Clarendon Press, Oxford (1979) at 513.
2. See, Sinclair, op. cit, (supra) at 210.
3. Sinclair makes this argument, op. cit. at 212.

> When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.
>
> Obligations the performance of which is the subject of diplomatic protection are not of the same category.[1]

As to whether "the principles and rules concerning the basic rights of the human person" is intended to mean that all codified human rights provisions contained in international treaties are embraced by the concept of jus cogens is an issue that is both controversial and beyond the scope of the matter presented for the Commission to decide.

56. The Commission finds that in the member States of the OAS there is recognized a norm of jus cogens which prohibits the State execution of children. This norm is accepted by all the States of the inter-American system, including the United States. The response of the U.S. Government to the petition in this case affirms that "[A]ll states, moreover, have juvenile justice systems; none permits its juvenile courts to impose the death penalty."[2]

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1. Barcelona Traction, Light and Power Company, Ltd., Judgment, I.C.J.: Reports 1970, at 32.

2. Case 9647: Response of the U.S. Government dated July 15, 1986, at 2.

57. The Commission finds that this case arises, not because of doubt concerning the existence of an international norm as to the prohibition of the execution of children but because the United States disputes the allegation that there exists consensus as regards the age of majority. Specifically, what needs to be examined is the United States law and practice, as adopted by different states, to transfer adolescents charged with heinous crimes to adult criminal courts where they are tried and may be sentenced as adults.[1]

58. Since the federal Government of the United States has not preempted this issue, under the U.S. constitutional system the individual states are free to exercise their discretion as to whether or not to allow capital punishment in their states and to determine the minimum age at which a juvenile may be transferred to an adult criminal court where the death penalty may be imposed. Thirteen states and the U.S. capital have abolished the death penalty entirely.[2] As regards the other states which have enacted death penalty statutes since the Furman decision, these states have adopted death penalty statutes which either 1) prohibit the execution of persons who committed capital crimes under the age of eighteen, or 2) allow for juveniles to be transferred to adult criminal courts where they may be sentenced to the death penalty. It is the discretion and practice of this second group of states which has become the subject of our analysis. Whereas approximately ten retentionist states have now enacted legislation barring the execution of under-18 offenders, a hodge-podge of legislation characterizes the other states which allow transfer of juvenile offenders to adult courts from age 17 to as young as age 10, and some states have no specific minimum age. The Indiana state statute (supra) which allows a ten year old to be judged before an adult criminal court and potentially sentenced to death shocks this Commission.

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1. The Commission is not unaware of the serious problems posed by juvenile crime in the United States. According to FBI statistics, 1,311 juveniles were arrested for murder in the U.S. in 1985 which represents almost 10% of all homicide arrests. Most of those arrested were 16 or 17 years of age. (See, Newsweek: "Children who kill" November 24, 1986). Officials at the National Center for Juvenile Justice in Pittsburgh have reported that from 1978-1983 the fastest growing areas in juvenile crime were among younger age groups (i.e. 10 to 13 year olds) which are being referred to juvenile courts at rates of increase up to 38% for 12 year olds. (See, Peter Applebome: "Juvenile Crime: The Offenders are Younger and the Offenses More Serious" New York Times, February 3, 1987). None of the juvenile offenders currently on death row committed the crime for which s/he was sentenced to death under the age of 15. (See, Tom Seligson: "Are They Too Young to Die?" The Washington Post Magazine, October 19, 1986).

2. These include: Alaska, the District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, West Virginia and Wisconsin.

59. The juvenile justice system was established in the United States at the turn of the century as a result of reformist efforts to mitigate the harshness of the adult criminal justice system. Under common law, children under the age of seven were conclusively presumed to have no criminal capacity and for children from age seven to fourteen, the presumption was rebuttable and the child could be convicted of a crime and executed.[1] By a long series of statutory changes this age has been steadily increased, and the age of criminal incapacity is now set at 14 in most states. Consequently a child below the statutory age may be prosecuted by an adult criminal court but would not be adjudged responsible for a crime, the child would be adjudged a juvenile delinquent.

60. The Commission is convinced by the U.S. Government's argument that there does not now exist a norm of customary international law establishing 18 to be the minimum age for imposition of the death penalty. Nonetheless, in light of the increasing numbers of States which are ratifying the American Convention on Human Rights and the United Nations Covenant on Civil and Political Rights, and modifying their domestic legislation in conformity with these instruments, the norm is emerging. As mentioned above, thirteen states and the U.S. capital have abolished the death penalty entirely and nine retentionist states[2] have abolished it for offenders under the age of 18.

61. The Commission, however, does not find the age question dispositive of the issue before it, which is whether the absence of a federal prohibition within U.S. domestic law on the execution of juveniles, who committed serious crimes under the age of 18, is in violation of the American Declaration.

62. The Commission finds that the diversity of state practice in the U.S.--reflected in the fact that some states have abolished the death penalty, while others allow a potential threshold limit of applicability as low as 10 years of age--results in very different sentences for the commission of the same crime. The deprivation by the State of an offender's life should not be made subject to the fortuitous element of where the crime took place. Under the present system of laws in the United States, a hypothetical sixteen year old who commits a capital offense in Virginia may potentially be subject to the death penalty, whereas if the same individual commits the same offense on the other side

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1. The execution of juvenile offenders is not a new phenomenon. During the first thirty years of the juvenile justice system in the United States (1900-1930) seventy-seven persons were executed for crimes committed while under the age of eighteen. See, Victor L. Streib: "Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed while Under Age Eighteen" 36 Oklahoma Law Review 613 (1983).

2. These states are: California, Colorado, Connecticut, Illinois, Nebraska, New Jersey, New Mexico, Ohio, and Tennessee.

of the Memorial Bridge, in Washington, D.C., where the death penalty has been abolished for adults as well as for juveniles, the sentence will not be death.

63. For the federal Government of the United States to leave the issue of the application of the death penalty to juveniles to the discretion of state officials results in a patchwork scheme of legislation which makes the severity of the punishment dependent, not, primarily, on the nature of the crime committed, but on the location where it was committed. Ceding to state legislatures the determination of whether a juvenile may be executed is not of the same category as granting states the discretion to determine the age of majority for purposes of purchasing alcoholic beverages or consenting to matrimony. The failure of the federal government to preempt the states as regards this most fundamental right--the right to life--results in a pattern of legislative arbitrariness throughout the United States which results in the arbitrary deprivation of life and inequality before the law, contrary to Articles I and II of the American Declaration of the Rights and Duties of Man, respectively.

CONCLUSION

64. The Commission concludes, by 5 votes to 1, that the United States Government violated Article I (right to life) of the American Declaration of the Rights and Duties of Man in executing James Terry Roach and Jay Pinkerton.

65. The Commission concludes, by 5 votes to 1 that the United States Government violated Article II (right to equality before the law) of the American Declaration of the Rights and Duties of Man in executing James Terry Roach and Jay Pinkerton.

DISSENTING OPINION OF DR. MARCO GERARDO MONROY CABRA, MEMBER OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Before explaining the reasons for my dissenting opinion, I must first make some general observations. In this Case N° 9647, there is no discussion as regards the facts that are accepted by the United States Government, and which are that James Terry Roach and Jay Pinkerton were sentenced to death and executed in the United States for crimes for which they were tried and which they committed before the age of 18. However, since the United States is not a State Party to the American Convention on Human Rights, Article 20 of the Statute of the Inter-American Commission on Human Rights, approved through Resolution N° 447, applies. That resolution, which was adopted by the OAS General Assembly on October 31, 1979, establishes the following as falling within the

competence of the Commission: "b) to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights". With regard to the principle of human rights that should be applied: "2. For the purposes of the present Statute, human rights are understood to be: (a) The rights set forth in the American Convention on Human Rights, in relation to the States parties thereto; (b) The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states." This means that since the United States is not a State Party to the American Convention, the question of whether or not a human rights violation has occurred with respect to the petitioners must be examined in the light of the American Declaration of the Rights and Duties of Man. I should also note that this case was processed in accordance with Chapter III "Petitions concerning States that are not Parties to the American Convention on Human Rights" (Art. 48 through 50) of the current Regulations of the Inter-American Commission on Human Rights, approved by the Commission at its meeting on April 8, 1980 during the 49th regular session.

The task therefore is to determine whether the sentences handed down by the United States courts violated articles 1 and 2 of the American Declaration of the Rights and Duties of Man by imposing the death penalty on persons who committed capital crimes while under 18 years of age. To interpret the 1948 American Declaration of the Rights and Duties of Man, the Inter-American Commission on Human Rights referred, in its majority decision, to customary international law and to jus cogens. I must therefore refer to these aspects.

It must, however, be made clear that the aim is not to use this case to determine generally whether or not U.S. laws on the death penalty violate customary international law, since the Commission is not empowered to issue advisory opinions; rather it must only interpret the American Declaration of the Rights and Duties of Man, for which it can refer to general international law. The Commission has said that in this case "the only point at issue is whether the absence of a federal prohibition within U.S. domestic law on the execution of juveniles who committed serious crimes under the age of 18 is inconsistent with human rights standards applicable to the United States under the inter-American system"?. In my view, this is not the problem. The case consists of examining whether or not the human rights of petitioners James Terry Roach and Jay Pinkerton were violated, under the terms of the 1948 American Declaration of the Rights and Duties of Man. This is an individual case that was processed by the Commission according to the Regulations in effect for States not Parties to the American Convention on Human Rights, and therefore, there is no reason to address the matter of compatibility between U.S. federal or state legislation and general

international law. This aspect does not lie within the sphere of competence of the Commission, which could not make general observations and recommendations when ruling on a case, especially since it does not have judicial functions.

In light of the foregoing, I wish to explain the legal reasons that influenced my decision not to join in the Commission's majority decision:

1. THE US APPLICATION OF THE DEATH PENALTY TO JUVENILES DOES NOT VIOLATE THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

Article 1 of the American Declaration of the Rights and Duties of Man approved by the IX International Conference of American States held in Bogota from March 30 through May 2, 1948, and included in the Final Act of the Conference states: "Every human being has the right to life, liberty and the security of his person." This article makes no reference, either explicitly or implicitly, to prohibition of the death penalty with respect to minors. The draft of the Inter-American Juridical Committee included the following as Article 1: "Every person has the right to life. This right extends to the right to life of incurables, imbeciles and the insane.

Capital punishment may only be applied in cases in which it has been prescribed by pre-existing law for crimes of exceptional gravity." After discussion, the IX Conference decided to omit any reference to the death penalty and to change the wording proposed by the Inter-American Juridical Committee. Article 1, therefore, was drafted in its present form, making no reference to the death penalty. A close look at the preparatory work leads to the unmistakable conclusion that the States participating in the IX International Conference of American States in Bogota in 1948 did not wish to preclude the death penalty since, otherwise, they would have agreed on its prohibition and, consequently, approve the text by the Inter-American Juridical Committee, which confined its application to crimes of exceptional gravity. An interpretation of Article 1 in the light of its current meaning, while taking into account the preparatory work recorded in the Proceedings of the Conference, the specific deletion of the provision concerning the death penalty would allow one to conclude that the American Declaration of the Rights and Duties of Man did not regulate the matter of the death penalty, and of course, far less did it include any provision on the general or specific proscription of its application in the case of juveniles. One might therefore conclude, with regard to this first aspect, that if the American Declaration of the Rights and Duties of Man remained silent on the death penalty and did not approve the draft that included it, the United States can establish the death penalty without violating Article 1 or any other standard in the aforecited American Declaration of the Rights and Duties of Man.

2. IN THIS CASE, IT IS NOT POSSIBLE TO APPLY TREATIES NOT IN EFFECT FOR THE UNITED STATES

The United States is a member of the Organization of American States (OAS) since it ratified the OAS Charter amended by the 1967 Protocol of Buenos Aires when it deposited the instrument of ratification on April 23, 1968. As the Charter establishes, the Inter-American Commission on Human Rights is an organ of the OAS. The United States is bound by the Statute and the Regulations of the Inter-American Commission on Human Rights. The United States is also bound by the American Declaration of the Rights and Duties of Man, which as has been seen, does not prohibit the death penalty and remains silent on this matter. But the United States has not ratified the 1969 American Convention on Human Rights, "Pact of San José, Costa Rica", and therefore, is not bound by Article 4.5, which states: "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women."

In December of 1977, the United States Government sent the American Convention on Human Rights to the Senate for its approval and subsequent ratification. At the same time, it suggested making certain "reservations". With regard to Articles 4 and 5, it proposed the following reservations. "Article 4 deals with the right to life generally, and includes provisions on capital punishment. Many of the provisions of Article 4 are not in accord with United States law and policy, or deal with matters in which the law is still unsettled. The Senate may wish to enter a reservation as follows: 'United States adherence to Article 4 is subject to the Constitution and other law of the United States.'"

Article 5, "[P]aragraph (5) requires that minors subject to criminal proceedings are to be separated from adults and brought before specialized tribunals as speedily as possible." "With respect to paragraph 5, the law reserves the right to try minors as adults in certain cases and there is no present intent to revise these laws. The following statement is recommended: 'The United States... with respect to paragraph 5, reserves the right in appropriate cases to subject minors to procedures and penalties applicable to adults'" (United States State Department, publication 8961, General Foreign Policy Series 310, November 1978). This means that articles 4 and 5 cannot be applied to the United States, since it has stated specifically that even if it ratified the Convention, it would make reservations on those provisions.

Treaties do not engender obligations for third states without their consent. The United States Government is therefore not obliged to comply with the provisions of Article 4.5 of the American Convention on Human Rights. Also, the United States has not ratified the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by the United Nations General Assembly on

December 16, 1966 in its resolution 2200 A (XXI), and which entered into effect on March 23, 1976. Under these conditions, the United States is not obliged to comply with the provisions of Article 6.5 of that Covenant, which states: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."

The United States is only bound by the Fourth Geneva Convention, which states in its Article 68: "In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence." However, this treaty applies only in international conflicts, and therefore, cannot be applied for the execution of juveniles in the United States in times of normalcy and in the absence of an international conflict.

IN CONCLUSION - Neither the American Convention on Human Rights (Article 4 [5]), nor the International Covenant on Civil and Political Rights (Art 6 [5]), nor the Fourth Geneva Convention (Art. 68) is applicable to the pronouncement of the death penalty with respect to minors under 18 in the United States.

3. THERE IS NO EXISTING RULE IN CUSTOMARY INTERNATIONAL LAW PROHIBITING THE IMPOSITION OF THE DEATH PENALTY WITH RESPECT TO JUVENILES

Article 38 of the Statute of the International Court of Justice lists as a source of international law: "(b) international custom, as evidence of a general practice accepted as law". Max Sorensen states the following (Manual of Public International Law, St. Martin's Press, New York, 1968, page 130): "This formula has been criticized often because it reverses the logical order of events; in practice, in order to prove the existence of a customary rule, it is necessary to show that there exists a 'general practice' which conforms to the rule and which is 'accepted as law'. Custom is the direct product of the necessities of international life. It arises when states acquire the habit of adopting, with respect to a given situation, and whenever that situation recurs, a given attitude to which legal significance is attributed."

Ch. Rousseau, Professor of international law (Derecho Internacional Público Profundizado, La Ley, Buenos Aires, 1966, pages 96-97) lists three characteristics of custom: "a) It is above all the expression of a common practice, resulting from precedents, in other words, from the repetition of conclusive acts; b) Second, custom presents itself as an obligatory practice, that is to say, it must be accepted as law, as corresponding to a legal need. In the absence of this psychological element, there would be no customary rule but rather a purely nonbinding custom or practice of international courtesy; c) Finally, international custom is a practice that evolves".

A generalized and uniform practice does not suffice; of vital importance is the opinio juris. In the judgment on the North Sea Continental Shelf Case, the International Court of Justice said the following on the requirement of the subjective element and opinio juris: "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty." (I.C.J. Reports, 1969, page 44). According to Professor of international law, Eduardo Jiménez de Arechaga, (El Derecho Internacional Contemporáneo, Publishers: Tecnos, Madrid, 1980, pages 19 et seq), customary law, which finds its expression in treaties, can operate in three different ways: the text of the treaty can simply declare a customary rule that existed previously; it can give concrete expression to a rule that is developing in statu nascendi; or, the provision of a treaty can convert de lege ferenda to a subsequent state practice after a process of consolidation whereupon it converts to custom. In other cases, the custom can derive from the consensus of states in adopting United Nations General Assembly resolutions, as in the case of the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, or the 1963 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, or Resolution 1514 on the Granting of Independence to Colonial Countries and Peoples, etc.

According to Sorensen (op cit. p. 133), it is not possible to speak of a custom as general if its observance is confined to a particular group of states. This means that an essential requirement concerning custom is that it should derive from the community of States as a whole. Sorensen notes that: "A custom cannot be transformed into a rule of law if it encounters opposition of a proportion of the states comprising the international community or, as the case may be, the region or group within which it is in operation. For in such a case the requisite is not forthcoming" (op cit p. 135). This implies that the opposition of a number of states thwarts the formation of a general customary rule.

The application of the foregoing principles to Case 9647 shows, in my view, the nonexistence of a general rule of customary law prohibiting the application of the death penalty on persons who committed capital crimes under 18 years of age. This conclusion is drawn from the following analysis:

The fact that prohibition of the death penalty with respect to juveniles under 18 years of age appears in the American Convention on Human Rights (Article 4.5), in the International Covenant on Civilian and Political Rights (Article 6.5) and in the Fourth Geneva Convention (Art. 68) does not mean that these treaties have declared an existing custom or have crystalized or reflected a custom. The only thing that can be accepted is the generating effect de lege ferenda, which can lead to the development of the custom if state practice in the matter is consolidated. With regard to the prohibition of the death penalty, there is no uniformity in the laws of states, since some allow it and others prohibit it; further, some prohibit the death penalty in the case of minors, and others accept it or remain silent on the subject. It is possible that with time, the practice of States will lead to the emergence of the custom in the instant case, but at present, it is not an international custom.

The practice and the laws of states with regard to the death penalty in general and in relation to minors show variations and discrepancies. Ultimately, one sees a lack of continuity, and contrary to the Commission's mistaken view, it is not possible to find standard and constant application of it practiced with the intent of producing legal effects. There is no proof to the effect that all states worldwide feel bound by an obligatory rule of customary law prohibiting the death penalty with respect to juveniles under 18 years of age given the fact that the laws of the states are not even uniform as regards the age at which an individual is punishable.

In fact, there is no evidence of opinio juris, that is to say, demonstration of state practice that has led to nonapplication of the death penalty with respect to minors under 18 years of age, or that this has been a practice for a long time.

Moreover, one must bear in mind that not only has the United States not given its consent to the development of the so-called custom; but rather it has not been proven that uniformity exists, not even with respect to the abolition of the death penalty. In the matter of the Barcelona Traction case, the International Court of Justice said that "a body of rules could only have developed with the consent of the parties concerned. The difficulties encountered have been reflected in the evolution of the law on the subject." (I.C.J. Reports, 1970, page 48, par. 89). Nor can one speak in terms of local American custom, since the American Convention on Human Rights has only been ratified by 19 of the 32 states in the Americas, an indication that there is no standard practice in the Americas regarding the prohibition of the death penalty, and even less so with regard to juveniles. The International Covenant on Civil and Political Rights has not yet been ratified by all states worldwide, and the Fourth Geneva Convention (art. 68), which has received 162 ratifications, only applies to international armed conflicts, and consequently, cannot be considered to be a demonstration of a custom in time of peace.

IN CONCLUSION - It was not proven that a widespread and uniform practice exists on the part of states, or the opinio juris or conviction that that practice has become obligatory because of the existence of a norm prohibiting the death penalty with respect to minors under 18 years of age. This custom does not derive from state practice, or from the provisions of public treaties that have not been ratified by all states. One cannot therefore consider that there is consensus on this matter.

4. PROHIBITION OF THE DEATH PENALTY WITH RESPECT TO MINORS UNDER 18 YEARS OF AGE IS NOT A NORM OF JUS COGENS

Article 53 of the Vienna Convention on the Law of Treaties defines jus cogens as a "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

In its reference to reservations on genocide (May 28, 1951), the I.C.J. said that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." The Shucking opinion in 1934 relies on ius cogens (C.D.L. Report, 80).

The following appeared as examples of jus cogens at the Vienna Conference on the Law of Treaties: a) Treaty concerning a case of the illegitimate use of force in violation of the principles of the Charter; b) Treaty concerning the perpetration of any other criminal act in international law; and c) Treaty to prohibit the perpetration or tolerance of such acts as the slave trade, piracy and genocide in the supression of which every State is obliged to cooperate. While human rights standards constitute principles of jus cogens, as we have said in our publication on human rights (Los Derechos Humanos, Marco Gerardo Monroy Cabra, Edit. Temis, 1980), the prohibition of the death penalty with respect to juveniles under 18 years of age is not in the nature of a norm of jus cogens. Indeed, it has not been proven that uniformity exists, since not all states prohibit the death penalty and not all States prohibit the pronouncement of it with respect to minors under 18 years of age. While there is undoubtedly a tendency towards abolishing the death penalty, it cannot be said that the prohibition of the death penalty for minors under 18 years of age is a norm that has been accepted by the international community as a whole, and consequently, a norm of jus cogens has not been created. The prohibition of the death penalty with respect to minors under 18 years of age cannot be compared with the cases cited at the Vienna Conference, such as the prohibition of piracy or slavery or the white slave trade or racial discrimination or the prohibition of genocide, since in all these cases, all states prohibit them. Such is not the case here. The death penalty is still recognized by a considerable number of States. One cannot speak in terms of the existence of a norm of jus cogens in effect for the OAS member States

since the American Convention on Human Rights, which prohibits the execution of minors under 18 years of age, has only been ratified by 19 States. Also, there are reservations on the matter of the death penalty and it is not a norm that has been accepted by the 32 American states, and far less by all states worldwide. By virtue of this fact, it is therefore not a general imperative norm. One need hardly point out that there can be no " American jus cogens" or "Africani jus cogens", etc. Rather, one must be in the presence of an imperative norm that has gained acceptance in the international community "as a whole", as the Vienna Convention on the Law of Treaties states in its Article 53.

Not even in the United States is there a rule setting age 18 as the minimum age for imposition of the death penalty, and to date, the Supreme Court of Justice has not declared such application unconstitutional. The punishable age is not uniform among states since some set it at age 16, others at 17, and others at 18. This means that there is no standard legislation among states as regards the minimum punishable age or the minimum age for imposition of the death penalty.

IN CONCLUSION - It cannot be inferred from either the practice of states, or from international jurisprudence, or from doctrine, or from the laws of the states that a norm of jus cogens prohibiting the imposition of the death penalty with respect to minors under 18 years of age has come into existence. While human rights standards are of jus cogens, specifically the prohibition of the death penalty and its application to minors under 18 years of age do not constitute an imperative norm of general international law since it has not been accepted by all states that make up the international legal community.

5. THERE HAS BEEN NO VIOLATION OF ARTICLE 2 OF THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

Article 2 of the American Declaration of the Rights and Duties of Man states: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."

I do not consider the imposition of the death penalty with respect to minors under 18 years of age to constitute a violation of Article 2 of the American Declaration of the Rights and Duties of Man, because there is no federal law in the United States establishing such a prohibition and the laws of the States are not uniform in this matter. We are not discussing here the arbitrary deprivation of life because there is no federal law in the United States setting the death penalty for minors under 18 years of age; neither is there any prohibition in conventional international law applicable to the United States, nor in customary international either, as previously demonstrated.

6. INTERPRETATION OF THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN DONE BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The Commission used the Vienna Convention on the Law of Treaties in order to interpret the American Declaration of the Rights and Duties of Man, which is a mistake since the Declaration is not a public treaty, not having gone through the necessary stages for the adoption, authentication, manifestation of consent to abide by the treaty, entry into force, registry and publication of any international treaty. Also, in interpreting the Declaration, the Commission did not attribute any value to the preparatory work leading upt to the American Declaration of the Rights and Duties of Man contained in the Proceedings of the IX International Conference of American States held in Bogota in 1948. If this background had been taken into account, it would have concluded that there was a consensus to delete any reference to the death penalty from Article 1 in view of the differences that existed among the States on this matter.

The Commission interpreted Article XXVI of the Declaration prohibiting the imposition of "cruel, infamous or unusual punishment," as though this provision prohibited the execution of minors, when this conclusion cannot be drawn from the background and discussions concerning the American Declaration of the Rights and Duties of Man recorded in the Proceedings of the IX International Conference of American States in Bogota. Furthermore, given the fact that some American states applied the death penalty in 1948, it cannot be said that at that time it was considered cruel, infamous or unusual punishment.

To interpret the 1948 American Declaration of the Rights and Duties of Man, the Commission resorted to an analysis of customary international law, but it has already been ascertained that the petitioners have not proven that such a custom exists.

The American Declaration of the Rights and Duties of Man cannot be interpreted in the light of the provisions of the American Convention on Human Rights, the International Covenant on Civil and Political Rights and other treaties on human rights because these treaties are subsequent to the aforecited Declaration and are only binding for States Parties to them.

The erroneous interpretation of the 1948 American Declaration of the Rights and Duties of Man led the Commission to conclude that the Declaration prohibits the death penalty with respect to minors under 18 years of age when this conclusion cannot be drawn from either the letter or spirit of the Declaration.

In interpreting the American Declaration of the Rights and Duties of Man issued in 1948, the Commission could hardly use the practice of states as it stands in 1987, customary international law in effect today,

the current notion of jus cogens, when the truth is that when drafting that Declaration, the States were not in agreement on prohibiting the death penalty as is apparent from the fact that the pertinent reference was deleted from the Inter-American Juridical Committee's draft. The only point that the Commission should have studied was whether the rights of James Terry Roach and Jay Pinkerton had been disregarded, under the terms of the American Declaration of the Rights and Duties of Man. It was not relevant to analyze whether or not the absence of a federal law in the United States establishing that prohibition of the death penalty with respect to minors violated customary international law, because the Commission is not an international tribunal, or whether U.S. legislation is in conflict with with jus cogens, because this was not requested by the petitioners and is beyond the purview of the Commission. In this case, it could only apply the American Declaration of the Rights and Duties of Man because it is the sole international human rights instrument that is binding on the United States.

But even if one were to accept that the Commission could resort to customary international law or to jus cogens to interpret the Declaration, one cannot conclude that the United States violated articles 1 and 2 of that Declaration or any norm of general customary international law, since no violation in this regard has been proven in this case.

7. CONCLUSIONS

The following conclusions can be drawn from the foregoing: a) the imposition of the death penalty by state courts in the United States with respect to minors under 18 years of age does not violate articles 1 and 2 of the American Declaration of the Rights and Duties of Man; b) the imposition of the death penalty with respect to minors under 18 years of age does not violate customary international law since there is no custom in this matter, and c) the prohibition of the death penalty with respect to minors under 18 years of age is not a norm of jus cogens since it has not been accepted by the international community as a whole.

In accordance with the foregoing, the Inter-American Commission on Human Rights should have exonerated the United States from the charges levied against it by the petitioners.

It is thus that I substantiate my dissenting vote as regards the decision adopted by the Inter-American Commission on Human Rights.

(signed) MARCO GERARDO MONROY CABRA
Member of the
Inter-American Commission on Human Rights

The United States requested reconsideration of Case N° 9647. During the 71st period of sessions the Commission received the request for reconsideration, which it granted, and by a majority vote, decided not to modify its decision. In a separate publication, the Commission will present the text of the U.S. Government's request for reconsideration, the observations of the petitioners, the reasons of the Commission for not modifying its decision, and the separate opinion of Dr. Monroy Cabra. Ambassador Elsa D. Kelly did not participate at this meeting. Mr. Bruce McColm, pursuant to Article 19 of the Commission's Regulations, did not participate in this matter.

DECISION OF THE COMMISSION AS TO THE ADMISSIBILITY

Application N° 9213
by Disabled Peoples' International et al,
against the United States

THE FACTS:

The facts of the case as submitted by the parties may be summarized as follows:

On November 5, 1983 Disabled Peoples' International (D.P.I.) et al. filed a complaint with the Commission on behalf of the "unnamed, unnumbered residents, both living and dead, of the Richmond Hill Insane Asylum Grenada, West Indies" against the United States.

On Monday, October 24, 1983 the Richmond Hill Insane Asylum in Grenada was bombed by military aircraft of the United States of America.

The U.S. Government sought to have the petition declared inadmissible since the "unnamed, unnumbered residents" were not identified as required by the Commission's Regulations.

Representatives of D.P.I. et al. traveled to Grenada December 17-21, 1984 to correct the defects in the original petition. The D.P.I. et al. lawyers identified the following 16 persons who were killed as a result of the bombing of the asylum:

Jane Smith
Daphne Ventnor
Magdalene Crompton
Georgiana English
Reginald Julien
Wilson Williams

John Joseph
Sylvester Charles
Dudley Antoine
Desmond Williams
Charles Carter
Glen McSween
Allen Greenidge
George Gittens
Bernadette Brown
Cecil Baptiste

and the following six persons who were injured:

Joseph Ryan
George Bain
Rufus Charles
Garvis George
Kyron Callica
Dorothy Augustine

II

The applicants' complaint requests that:

Pursuant to Article 26 of the Commission's Regulations that the Commission investigate the current situation at Richmond Hill Insane Asylum in Grenada. Applicants invoke Article 26 based on the "possible irreparable damage" which may occur to persons who are still residents in the bombed-out facility.

Pursuant to Article 34(2)(c) of the Commission's Regulations that the requirement of exhaustion of domestic remedies be waived. Applicants allege that domestic U.S. remedies are not sufficient to protect the human rights of the victims.

U.S. defenses of military necessity or military error not be accepted to excuse or justify violations of the right to life, liberty and security of the person, and

1. that acts committed in violation of the OAS Charter are not subject to military necessity or military error defenses; and

2. that acts committed in violation of the Geneva Conventions of 1949 are not subject to military necessity or military error defenses.

In this connection applicants allege a violation of:

- Articles I and XI of the American Declaration of the Rights and Duties of Man ("American Declaration") given the currrent conditions at the mental institution;

- Article I of the American Declaration in so far as the aerial bombing resulted in deaths and injury;

- The Convention Relative to the Protection of Civilian Persons in Time of War (The Fourth Geneva Convention).

III

PROCEEDINGS BEFORE THE COMMISSION

The Commission forwarded the pertinent parts of the complaint to the U.S. Government on November 14, 1983, requesting information thereon within 90 days. The Commission's request for information was stated not to constitute a decision as to the admissibility of the communication.

By letter received May 7, 1984 the U.S. Government acknowledged receipt of the complaint and requested a short delay over the 90 day period for the submission of its response.

By note of September 21, 1984 the U.S. Government submitted its response to the complaint which it argued should be declared inadmissible.

IV

SUBMISSIONS OF THE PARTIES

A. The respondent Government's submissions (of September 21, 1984)

1. The legal instruments upon which petitioners rely are outside of the Commission's competence.

The U.S. Government maintains that the petition asks the Commission to determine matters outside the competence assigned to it by Article 112 of the OAS Charter and by the Commission's Statute and Regulations. The U.S. Government further maintains that the Commission is not an appropriate organ to apply the Fourth Geneva Convention to the United States because "the Geneva Conventions govern the relations between nations in times of armed conflict, a broad subject that extends beyond this Commission's mandate, i.e., examination of the enjoyment or deprivation of the 'rights set forth in the American Declaration of Rights and Duties of Man'."

The U.S. argues, in the alternative, that "putting aside the question of the Commission's competence, it is clear that the actions of the United States were entirely consistent with the Fourth Geneva Convention."

2. Petitioners' failure to exhaust domestic remedies renders the petition inadmissible.

The U.S. Government maintains that "only the Government of Grenada (...) can authorize reconstruction of the mental hospital or can determine where patients will be housed in the interim", and therefore the petitioners should seek redress from the Government of Grenada, and the exhaustion requirement should not be waived.

Further, the U.S. Government states that the victims had access to remedies against the United States. The U.S. Government established a procedure by which the U.S. made payments to persons and entities that incurred damage during October-November 1983. Any of the mental patients (or their survivors) were allegedly entitled to take advantage of this remedy.

3. The U.S. Government further maintained that the complaint should be declared inadmissible because the victims were not identified. As stated above, this defect was corrected by the Petitioners and need not be considered here.

B. The applicants' submissions (of February 8, 1985)

1. Petitioners claims are within the competence of the Commission.

Applicants maintain that since Article 112 of the OAS Charter provides that:

> There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights...

that this complaint is within the Commission's competence.

a) Alleged violations of Articles I and XI of the American Declaration

Applicants maintain that the deaths and physical injuries of helpless mental patients caused by purposeful armed attack on their hospital constitute violations of Articles I and XI of the American Declaration.

b) The Commission may be guided by general international law protections

Applicants state that their claim is based on Articles I and XI of the American Declaration but that these provisions be construed in

conformity with other relevant international rules protecting the human person, such as the Geneva Conventions.

Applicants argue that to do so is consistent with both regional and international understanding of the competence of protection systems. Applicants cite as authority: Advisory Opinion "Other Treaties" subject to the Consultative Jurisdiction of the Court, Inter-American Court of Human Rights, Ad. Op. Bo. OC-1/82 (September 24, 1982), and 1981-82 Annual Report, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.57 (1982) at 116 (application of Geneva Conventions to El Salvador).

c) The right to life is non-derogable.

Applicants maintain that the right to life is non-derogable and is a pre-emptory norm of international law (jus cogens) regardless of which treaties have been ratified by that state. Applicants note that all relevant international instruments protect civilians from derogation of this right even in states of emergency.

d) The U.S. Government may not invoke exceptions to the norm that the right to life is non-derogable.

Applicants maintain that the right to life is in fact derogated during wartime. Applicants argue that the Geneva Conventions, customary humanitarian law, general principles of civilized nations and The Hague Convention, must be consulted to ascertain whether the U.S. Government's defense states a permissible exception to the right to life.

e) Alleged continued violation of Article XI of the American Declaration.

Applicants maintain that the insane asylum was and still is in shambles and that the residents continue to suffer serious medical and health problems.

f) Article 26 of the Regulations

Applicants maintain that the petition is admissible under the emergency jurisdiction provided for by Article 26 of the Commission's Regulations.

2. Petitioners have satisfied all requirements for exhaustion of domestic remedies.

Applicants maintain that they have no domestic remedies to exhaust. They have not initiated judicial proceedings in U.S. courts because at the time the petition was filed, the dead and injured Grenadans were not members of DPI or IPI, the two organizations representing the victims.

U.S. law requires that plaintiffs have actual injuries in order to have standing to sue. Applicants assert that U.S. law would not allow a domestic suit since petitioners allege death and injuries to foreigners incurred outside the territorial borders of the U.S., and in addition, the U.S. Foreign Claims Act and the Military Claims Act both preclude claims arising from military actions.

Applicants further assert that a suit in Grenadan courts was impossible at the time of filing due to the fact that the Grenadan judicial system was in complete disarray and that the Courts were not functioning.

Applicants also point out that the victims were unable to participate in the U.S. claims process. As mental patients they were not and are not now free to come and go. U.S. Government agents did not seek out the injured asylum victims to receive their claims and the victims could not go to the U.S. Government. Applicants allege that no agent of the U.S. assisted the victims in presenting claims despite the fact that the U.S. Government knew where they were.

3. Applicants maintain the admissibilty of their complaint and request that the Commission find that the U.S. Government has violated Articles I and XI of the American Declaration and to make the appropriate recommendations. In the alternative, they request that the Commission facilitate a friendly settlement between the parties if such remedy is available to States that have not ratified the American Convention.

C. The respondent Government's second submissions (dated August 26, 1985)

The U.S. Government reiterated the positions expressed in its initial submission but included the following precisions.

1. The Petition is outside of the Commission's competence.

The U.S. Government states that "although petitioners refer "to Articles I and XI of the American Declaration, the gravamen of their petition is the contention that the United States violated the law of armed conflict, particularly the Fourth Geneva Convention, which pertains to the protection of civilians in time of war." The U.S. Government argues that "only if" the Commission concludes that the U.S. violated the law of armed conflict could the Commission find in petitioners' favor, and since the OAS member states did not consent to the Commission's jurisdiction over that subject, the petition is inadmissible. The U.S. maintains that it is a fundamental principle of international law that international tribunals do not have the competence to decide a particular dispute without the express consent of each State involved in that dispute. Repondent Government cites: Case of Monetary Gold Removed from Rome in 1943, 1954 I.C.J. Rpts., p. 32 as authority for this argument.

The U.S. Government states that the Commission has been empowered by the OAS member States with competence only over "the rights set forth in the American Declaration of the Rights and Duties of Man." The OAS member States did not grant to the Commission competence "to adjudicate matters arising under the complex and discrete body of international law that governs armed conflict," and "moreover, that body of law contains its own procedures for the resolution of alleged violations thereof, such as the enquiry procedure contained in Article 149 of the Fourth Geneva Convention."

Further, the U.S. Government dismisses the applicants' contention that the Commision has applied the law of armed conflict to El Salvador. The phrase in question cited from the 1982 Annual Report "cannot be construed as an application by the Commission of the law of armed conflict to a member State".

2. The Petition is inadmissible because petitioners did not exhaust domestic remedies.

The U.S. Government reiterated its position that it had established a procedure whereby Grenadan individuals and entities could present claims for compensation, and that "it appears that the Richmond Hill mental patients, or their survivors, could have presented precisely the sort of claim that has repeatedly been compensated under this program." According to Respondent Government, the petitioners fail to demonstrate that "they or the individuals they purport to represent should not be required to exhaust domestic remedies against the United States," and that petitioners "should not be excused from the exhaustion requirement where none of the exceptions in Article 34.2 apply."

3. The Organizational Petitioners have not Demonstrated that they Represent the Mental Patient.

The U.S. Government challenges D.P.I. and I.D.I.'s claims to represent
the cause of the dead and injured mental patients, in part, because they did not assist them or their survivors in the filing of claims against the U.S Government. The U.S. recognizes that the Commission does not require the consent of the victim in order to admit the petition. The petition, the U.S. states, complains about the bombing of the hospital and about conditions after the bombing. The U.S. responds that "to the extent that patients, their guardians, or their survivors desired compensation for injury or death resulting from the bombing, a well-publicized procedure was available (...) to the extent that they seek relief from present conditions it is futile to address such a grievance to the United States."

4. Friendly Settlement is Not Appropriate in this Case.

The U.S. Government rejects applicants proposal of a friendly settlement procedure for two reasons: 1) the American Convention does not

apply to the United States, and 2) a friendly settlement procedure would require the Commission to apply the law of armed conflict to the United States, "and would therefore exceed the Commission's competence."

D. The applicants response of February 4, 1986

1. The issue of the Commission's competence

Applicants reiterate that they bring this case under Articles I and XI of the American Declaration.

Applicants maintain that the "Commission could find a violation of the right to life and security of the person and a right to the preservation of health with no mention of aggravated violations due to the occurrence of the violations in the course of armed conflict. Both human rights and humanitarian law prohibit the acts admitted to. Petitioners raise humanitarian law both to answer possible defenses of Respondent and because Petitioners maintain that humanitarian law as a whole is subject to interpretation of the Commission where the right to life and other rights are violated by a party to armed conflict."

2. Express consent for a particular action is not required.

Applicants reiterate their position that the Commission has competence to apply international humanitarian law rules to OAS member States.

3. Petitioners exhausted domestic remedies

Applicants reiterate that at the time the U.S. claims procedure was instituted in Grenada the victims were committed mental patients at the Richmond Hill Facility "unable to leave or exercise their right to submit claims to Respondent." Applicants argue that respondent did not send a representative to visit the asylum to assist the victims in filing claims. Applicants point out that respondent knew of the status of the patients since the petition had already been filed and the respondent had been notified by the Commission. Applicants further state that they seek relief from the conditions of the facility caused by the U.S. Government's armed attack on it.

4. Petitioners request determination on the merits

Applicants urge the Commission to decide the merits of the case given that the U.S. Government is not amenable to a friendly settlement procedure.

THE LAW:

Two issues are raised by the applicants and the respondent Government:

1. Do the alleged facts constitute a prima facie violation of a human right recognized in the American Declaration by a member State of the OAS?

2. Have domestic remedies been exhausted or do any of the exceptions set forth in Article 37 of the Regulations excuse the applicants from exhausting domestic remedies?

The Inter-American Commission on Human Rights sitting in private on April 17, 1986, the following members being present:

Mr. Siles, Chairman
Mrs. Russomano
Mrs. Kelly
Mr. Jackman
Mr. Bruni Celli

DECLARED THE APPLICATION ADMISSIBLE.

Having found that:

1. Domestic remedies were not provided by the legislation of Grenada or the United States; given the ad hoc nature of the U.S. compensation program, the evident failure of the U.S. Government to contact these incapacitated victims, and the unwillingness of the U.S. Government to compensate these victims subsequent to the expiration of the ad hoc compensation program, lead the Commission to conclude that the domestic remedies could not be invoked and exhausted so as to render the provision of Article 37 (2) (a) applicable.

* Mr. Bruce McColm, an American national, pursuant to Article 19 of the Regulations, did not participate in the consideration of this matter. Mr. Monroy Cabra was absent.

CHAPTER IV

SITUATION OF HUMAN RIGHTS IN SEVERAL STATES

CHAPTER IV

STATUS OF HUMAN RIGHTS IN SEVERAL COUNTRIES

Under its mandate to promote the observance and defense of human rights, the IACHR has been reviewing the status of human rights in the countries of the hemisphere and has drawn up special reports on some of them. These reports have been prepared on the Commission's own initiative, or on instructions from an organ of the Organization of American States, and, in some cases, at the spontaneous request of the country concerned.

The Commission feels that these reports, their later dissemination, and discussion of them have helped to change the behavior of particular countries as regards their observance of human rights, and in some cases, the reports have placed on record that the behavior of a country is in accord with international commitments it has undertaken in the field of human rights.

In recent years, the Commission has drawn up reports on 14 countries, some of which, such as Chile, Cuba, Guatemala, and Nicaragua, have been the subject of several reports.

Follow-ups on these reports have usually been included in the Commission's annual reports to the General Assembly when warranted by the State's behavior in the human rights area.

The Commission's Annual Report submitted to the sixteenth regular session of the General Assembly included a chapter with sections on the status of human rights in Chile, Cuba, El Salvador, Guatemala, Haiti, Nicaragua, Paraguay and Suriname from September 1985 to September 1986.

In the Commission's view, there are reasons to warrant the reviewing all of those member countries again in this Annual Report.

In the case of Paraguay, the Government's persistent refusal to allow the Commission to visit the country and the lack of significant progress in the observance of human rights led the Commission to prepare a second report on the status of human rights in Paraguay, which updates the Commission's 1978 report. For that reason, this chapter does not include a section on Paraguay.

In order to make the information available to it as complete as possible, the Commission, on June 30, 1987, requested the eight countries mentioned to provide it with any information they deemed appropriate, but particularly information on how they had complied with the Commission's previous recommendations; on the progress they had made and any difficulties they had encountered in effective observance of human rights; and on the text of any statute enacted or case law that might have affected the observance of human rights.

Where warranted, the Governments' responses and any other information from various sources to which the Commission has had access have been taken into consideration in drafting this chapter.

The following sections will cover the status of human rights in Chile, Cuba, El Salvador, Guatemala, Haiti, Nicaragua and Suriname, since the adoption on September 25, 1986, of the previous report up to tho approval date of this report.

The Commission reiterates that the inclusion of these sections is not designed to give an overall and complete description of the status of human rights in each of the seven countries mentioned. That could only be done by drawing up general reports, such as the one on Paraguay. The Commission's intent here is rather to give an update covering the period of approximately one year since the last general reports.

The presentation in this chapter leads the Commission to offer some thoughts on the work of promoting respect for human rights in the hemisphere, a function and duty given it by the legal instruments governing it. The Commission believes it necessary to share these observations with the General Assembly through this report.

Human Rights and Elections

The Commission wishes to note first the importance of the elections that have just been held in Haiti and Suriname. It has repeatedly referred to the great importance it assigns to the exercise of political rights, which, in both cases, will constitute a fundamental step toward re-establishment of representative democracy. The Commission trusts that the governments chosen in these elections will help to strengthen the system of representative democracy and the guarantees and liberties inherent in it, in order to extend and consolidate the observance of human rights.

Along the same lines, the Commission expresses the hope that the political process now under way in Chile will lead that country to establish a truly democratic system, as defined in the legal instruments of the inter-American community. In that regard, the Commission trusts that conditions propitious for broader participation of the citizens in the scheduled election will be established, and that the exercise of civil and political rights will be respected and promoted so the right to vote

can be exercised with the required freedom and responsibility, and the results of the election will faithfully reflect the will of the people.

Human Rights and Peace. The Esquipulas II Agreement

The Commission feels it is most important to describe also the recent events in Central America, which are designed to overcome some of the most immediate causes of the restrictions on the exercise of human rights in the region. Since this situation involves characteristics that are peculiar to each country--Nicaragua, El Salvador and Guatemala--the Commission would like to comment briefly on this topic.

The simultaneous adoption of the measures called for in the Esquipulas II Presidential Agreement within 90 days of its signature--dialogue with the unarmed opposition, amnesty for armed rebels, cease fire, cessation of outside assistance to armed groups, lifting of the states of emergency and the consequent restoration of civil and political liberties --constitutes an event to which the Commission accords the greatest significance and importance.

In fact, the IACHR has consistently called attention to the urgent need to eliminate violence as an instrument of political confrontation, and to ensure unrestricted political pluralism and civil and political rights associated with the exercise of representative democracy. In doing so, it was the Commission's view that observance of human rights by the countries is essential for their internal peace and that respect for international law--of which the American legal system on human rights is a part--is essential for peace among those countries. International law, human rights and peace therefore constitute an indisoluble whole with multiple and crucial interrelationships.

The Commission is aware of the difficulties and risks facing the fragile and promising process begun on August 7 in Guatemala City. The Commission is also aware that all of those involved must contribute to the success of that process, so as to satisfy the desires of the people of Central America. Countries and individuals, institutions and groups must do their utmost to make this a first but decisive step on the road to restoring and strengthening human rights.

It is in this framework that the Commission will continue, in carrying out the duties assigned to it by the inter-American instruments governing it, to point out those factors that it considers will lead to the observance and promotion of human rights in the area. This work is all the more important insofar as it tends to provide an objective and impartial view of the status of these rights; and the seriousness of the declarations require technical consideration without any political intent.

The use of the human rights topic as an instrument of political struggle, either within the countries or by some countries against others, constitutes a serious perversion of the international legal

system on human rights. As the Commission has had occasion to state, this constitutes more of a hinderance than a help in the effective observance and promotion of human rights. Accordingly, the Commission will, as it has always done, continue to do everything in its power to carry out properly the duties given it because it regards this as its contribution to the process now under way in Central America.

CUBA

The Commission has continued to observe with special attention the status of human rights in Cuba during the period covered by this report. Its findings are presented below to update the information contained in its 1985-86 annual report, which followed the seventh report on the status of human rights in Cuba, approved in late 1983.

In proceeding thusly, the Commission is complying with its own Rules which give it competence to consider the human rights situation in Cuba. As stated in its Seventh Report on the Human Rights Situation in Cuba, that authority is "based on those elements which generally justify its competence: the person, place, time and subject matter." The Commission also believes it necessary to reiterate that insofar as it has continued to exercise its competence and has received and processed complaints against the Government of Cuba, the latter has continued to enjoy its right of defense before the Commission and the same is true with regards to special reports done by the Commission on that country.

Information received by the Commission during the period of this report shows that few changes in human rights have occurred in Cuba, as that situation has been described by the IACHR. Thus, in the field of civil and political rights, there continues to be a lack of effective resources for individuals to assert their rights vis-a-vis the State, and the absence of political choices other than the Communist Party of Cuba. In the field of economic, social and cultural rights, the description given by the IACHR in its seventh report continues to obtain in that the basic needs of the people have been substantially met.

The Commission wishes to note, however, that during the period of this report, there have continued to be difficulties resulting from the lack of the Cuban Government's cooperation with it. This has hampered the Commission's performance of its duties, such as reporting in the most impartial and objective way possible on the human rights situation in that country. The same negative impact has been produced by the lack of the Cuban Government's cooperation with the Commission in handling individual cases, in which the Commission has had to resort to secondary sources to obtain the information necessary to determine the facts.

This lack of cooperation prevents the Commission from fully performing the duties given it by the American legal instruments

governing it, and keeps it from obtaining full and direct knowledge of the human rights situation in Cuba in order to make judgments on that situation based on technical criteria. The Commission feels that with such behavior the Cuban Government is helping to increase the extreme politicization surrounding discussions on the topic of human rights in Cuba, and preventing the calm and objective consideration that should be given that subject. Notwithstanding the situation, the Commission will continue to observe the status of human rights in performing its duties to report to the other member states of the Organization.

During the period covered by this report, negotiations continued between the United States Episcopal Conference and the Government of Cuba to make progress in freeing political prisoners, including the numerous "steadfast" or "resister" prisoners (los plantados). The development of this process led to the preparation in June of this year of a list containing the names of 347 prisoners, a substantial proportion of whom had reportedly been included by the Cuban Government itself. The Government had reportedly undertaken to allow the emigration of released prisoners who wish to leave Cuba, and the United States Immigration Service was expected to begin processing around 300 applications to determine the eligibility of the applicants under the provisions of the refugee program. It is estimated that that is the number of persons who might leave the island during the rest of this year.

In this connection, the Commission notes also that the Cuban Government has asked private agencies working in the refugee field to submit, through the Cuban Interests Section (Sección de Intereses) in the United States, lists of prisoners they regard as suitable to leave Cuba under similar conditions. As a result of the initial steps taken under this new mode of operation, a list has been drawn up containing 500 new names.

Also during the period of this report, and regarding the same topic, the Commission was informed that important political prisoners had been released. For example, Ramón Bernardo Conte Hernández, who took part in the invasion of Playa Girón, was released on October 18, 1986, and Eloy Gutiérrez Menoyo was released on December 20 of that year. Information provided to the Commission indicates that there still remain 70 "steadfast" prisoners (plantados) in the so-called historic political prison, and 56 political prisoners serving terms in Cuban prisons. The lists of both categories of prisoners are in the Commission's possession.

Released prisoners have complained of the poor conditions under which they served their terms and the mistreatment to which they were subjected during their stay in Cuban jails. Information in the press on these topics shows that Cuban authorities permitted a visit of foreign journalists to the Combinado del Este jail and the Guanajay penitentiary for women. The visit lasted a full day. It should however be noted that the Government of Cuba has not permitted similar visits to human rights organizations or the International Red Cross.

This situation has made it extremely difficult to confirm the data that have been provided, during the period covered by this report, on the number of political prisoners now in Cuba. Thus, the Pro-Human Rights Committee of Cuba estimates that around 16,500 persons serving sentences for behavior connected with State security.

That figure includes those in prison for having tried to leave the country illegally. In this connection, it should be noted that during this period many attempts were made, often successfully, to leave Cuba illegally. The Government of that country has publicly stated that this situation could be eliminated once emigration relationships with the United States, which were interrupted by the Cuban Government when Radio Marti began to transmit to the island, were regularized.

Also during the period of this report, the Commission received various reports on the status of Mr. Ricardo Bofil Pagés who, as the Commission stated in its previous annual report, had taken refuge in the French Embassy after the human rights organization that he directed was raided by the police. During that operation, the following were also arrested: Domingo Delgado Castro, José Luis Alvarado Delgado, Enrique Hernández Méndez, Adolfo Rivero Caro and Elizardo Sánchez Santa Cruz.

The information received by the Commission indicates that the Government allegedly gave assurances to Mr. Bofil that caused him to leave the French Embassy. Mr. Santa Cruz declared a hunger strike between late October and early November 1986, for which reason he was transferred to the Military Hospital and was then returned to the State Security Department where he was allowed only one 15-minute visit a week. The Commission does not know the recent status of the rest of those listed.

The uncertainty of the information surrounding this case shows once again the need for the Cuban Government to collaborate with the Commission by providing information to clarify the status of human rights in that country, both with regard to the handling of individual cases and to the overall human rights situation. The Commission considers that this will help it to give the subject the serious and objective treatment that is the fundamental basis for making real progress in this field. Accordingly, the IACHR again urges the Cuban Government to provide promptly the information the Commission needs to carry out the duties given it by the legal instruments that govern it.

CHILE

The Commission has carefully observed the human rights situation in Chile since the start of the present military regime. In carrying out this function, the IACHR devoted four special reports to Chile, which were approved in 1974, 1976, 1977 and 1985. In its annual reports to the

General Assembly, the IACHR updated the information contained in those special reports. That is the purpose of this section.

The Commission has gathered much information on the most important events in Chile that have affected the human rights situation in the period covered by this report. Most of this information comes from the Chilean Government through frequent submissions of documents having to do with the observance of human rights, that the Chilean Mission to the OAS has provided. The Commission also wishes to place on record that the Chilean Government has on most occasions given prompt replies to the Commission's requests for information.

During the period of this report, Chile remained under the effects of the various types of states of emergency (estado de excepcion). Thus, the state of siege, imposed on September 7, 1986, after the attack against the President and his escort, was renewed for 30 days on December 6 of that year under Supreme Decree 1,435, in view of the "existing situation of disturbances." The renewal of the state of siege partially covered the territory of the country: In Region II, it applied only to the Province of Antofagasta, while it covered all of Regions III, IV and V and metropolitan Santiago. Region VIII was also covered, except for the province of Arauco.

During the state of siege, Supreme Decree Exempt from Constitutional Review No. 200, also of December 6, 1986, delegated to the national defense chiefs designated for each region the authority to restrict freedom of movement, suspend or restrict the freedom of assembly, suspend or restrict freedom of information and of expression, impose censorship on correspondence and communications and prohibit specified persons from leaving the country. These powers are granted to the president under Article 41 Subparagraph 2 of the Constitution.

The state of siege remained in effect until January 5, 1987, when it expired without being renewed and has been progressively lifted by region. On the expiration date of the state of siege, the curfew for metropolitan Santiago was also lifted.

During the entire period covered by this report, the state of emergency (estado de emergencia) and the state of danger of disturbance of internal peace were in effect. Under Article 40, Subparagraph 5 of the Constitution, two or more states of emergency (estado de excepción) may be in effect at the same time. This and the enforcement of temporary provision 24 means that in the period of this report President Pinochet has been authorized to arrest persons for five to twenty days, depending on the charges against them; to restrict freedom of association and the right to freedom of expression with respect to founding new organs of expression; to prohibit the entry of persons into Chile or to expel persons from it for political reasons; and to banish such persons as may be considered necessary to any settlement in the country for 90 days.

The only recourse against the measures taken by the President under the above-mentioned transitory provision is a request to him for reconsideration, and there is no recourse at all to the judiciary.

Based on the establishment of the states of emergency (estados de excepción) mentioned, the authorities responsible for their enforcement issued various provisions specifying the limitations on some of the human rights affected. Thus, on December 9, 1986, the Decree Exempt from Constitutional Review No. 6,206 was published, which provided that the communication media:

> Must refrain from publicizing in any way, and by any media, information or opinions relating to:
>
> a) conduct described as terrorist crimes by Article 1 of Law 18,324;
>
> b) the activities of the persons, organizations, movements or groups referred to in Article 8 of the Political Constitution of the Republic;
>
> c) criminal conduct described and punished by subparagraph i) of Article 6 of Law 12,927, on State Security.

Similar provisions are contained in the Decree Exempt from Constitutional Review No. 6,225 of March 9, 1987, the date on which Decree 6,226 was also published, which keeps in effect the restrictions on the foundation, circulation or publication of new publications established by Decree 3,259 of 1981. According to this legal provision, the new publications must be authorized by the Ministry of the Interior.

It is particularly important to note that the imposition of the state of siege and the state of danger of disturbance of internal peace have serious consequences, not only because of the suspensions and restrictions affecting the exercise of many rights, but also because, while they are in effect, persons cannot exercise the remedies that provide judicial protection for the elementary rights whose exercise may not be impaired under any circumstances.

In fact, Article 41, Subparagraph 3 of the Constitution provides that during the state of siege the remedies established by Article 21 of the Constitution, that is, the remedies of amparo or of habeas corpus, shall not be admissible. Article 41, Subparagraph 3 also provides that in this case, "courts of justice may not, in any case, rule on the de facto merits of any measures that may have been taken by the authorities in the performance of their duties." These are provisions that, as the Commission has pointed out, leave individuals completely defenseless against any measures taken by the Government. These rules also upset the balance of powers that characterize regimes where the rule of law

prevails, by removing from the jurisdiction of the courts situations that affect the inalienable rights of persons.

Both the defenselessness of individuals against the Government and the upsetting of the balance of powers is aggravated by the temporary Provision 24 of the Constitution that states that "no remedy shall be admissible to any provisions adopted under this provision, except reconsideration by the authority that ordered them" (the President of the Republic). Paradoxically, these are constitutional provisions that institutionalize arbitrary political power instead of providing remedies to correct it when it occurs.

The set of rules restricting the rights recognized in the Chilean Constitution is completed with the provision in Article 41, Subparagraph 7, whereby:

> Measures taken during the states of emergency (estados de excepción) that have no specified length may not be extended beyond the effective period of those states of emergency and may be enforced only when they are genuinely necessary, without prejudice to the provisions of paragraph 3 of this article. However, measures expelling persons from and prohibiting their entry into the country, which are authorized in the preceding articles, shall remain in effect despite the lifting of the state of emergency that gave rise to them so long as the authority that decreed them does not expressly rescind them.

As the above rule shows, under the Chilean Constitution and in matters of the right of residence and travel, the President of the Republic may impose sine die penalties against which no judicial remedy of any kind is admissible. The various practical effects of such negative legal provisions will be reviewed below.

The Commission then will discuss the observance in Chile during the period of this report of the principal rights established by the American Declaration of the Rights and Duties of Man.

Right to Life

Regarding the right to life, the Commission must first mention two cases that were tried by the Chilean courts.

The first involves Manuel Guerrero, José Manuel Parada and Santiago Nattino, who were abducted on the street in Santiago, the first two on March 28, 1985, and the last on March 29 of that year. They were found with their throats cut on March 30. Judge José Canovas Robles was appointed visiting magistrate to investigate the facts. In its special report on Chile of 1985, the Commission said it hoped "that the

investigation now under way will lead to the identification and punishment of the persons responsible for committing so reprehensible an act."

In the period of this report, the judicial investigation recorded two new developments. On January 22, 1987, Judge Canovas ordered a temporary stay of proceedings, despite the numerous facts mentioned in his ruling, and reached the following conclusions:

> 1. The existence of the crimes investigated has been fully proven, and 2. while there is sufficient evidence to believe that involved in these events were a uniformed group of carabineros who were part of a group known as "DICOMCAR" and who formed an illicit de facto association outside their institutional framework, this evidence, as evaluated by the higher courts, is not sufficient to accuse any particular person as the perpetrator, accomplice or accessory, and it is impossible at this point to continue with this investigation.

The Vicariate of Solidarity (Vicaría de la Solidaridad), an organization of which José Manuel Parada was an official, issued a statement on the ruling, pointing out among other things that:

> We regret that once again such a brutal crime remains unpunished because of the impossibility of identifying those responsible for it. As the ruling states, this has occurred because of the lack of cooperation from the public organizations called upon by law to provide it. This negative result is a further example of discrimination in the effectiveness of criminal investigations, depending on who the victims are and who the possible perpetrators may be.

On January 28, 1987, Carabineros of Chile issued a long statement commenting on various aspects of the temporary stay ordered by Judge Canovas and requesting that the investigation be reopened.

The attorneys of the victims' families also requested that Judge Canovas' stay be set aside and that the investigation be reopened. Accordingly, on June 25, 1987, the third section of the Santiago Court of Appeals decided by a majority vote to reopen the pretrial investigation of the facts of this case, and thereby overturned the temporary stay ordered previously.

Two and a half years after the occurrence of such reprehensible events, the courts continue to be unable to shed any light on the circumstances of this case or to determine who was responsible.

Another case on which the Commission finds it necessary to point out new developments during the period of this report is the death of Rodrigo Rojas and the serious injuries of Carmen Gloria Quintana suffered as the

results of burns on July 2, 1986, which, according to the complaint lodged with the Commission, were caused by members of a military patrol.

On January 29, 1987, the Military Prosecutor changed the previous committal decision regarding Lieutenant Pedro Fernández Dittus, and returned to the initial indictment of commiting the quasi-delict of homicide on the person of Rodrigo Rojas and the quasi-delict of inflicting severe injuries on Carmen Gloria Quintana. The offense of quasi-delict covers wrongful behavior that is subject to lesser punishment. Up to that date, Lieutenant Fernández Dittus had been tried for the crime of unnecessary violence resulting in death and injury, a criminal offense that implies wilfull misconduct. Since the indictment was changed, the Military Prosecutor released Lieutenant Fernández Dittus on bail equivalent to 25 dollars.

The representatives of the victims appealed the Military Prosecutor's decision, which was upheld by a majority of the Military Court (Corte Marcial), on March 5, 1987.

The Commission must again express its concern at the fact that after more than a year of intensive investigation, those responsible for such a reprehensible act have still not been identified. Nor can the Commission hide its consternation regarding the conditional release granted to Lieutenant Fernández Dittus under a bond that is little more than a token.

Also with regard to the right to life, the Commission must cite the 12 deaths that occurred between June 15 and 16, 1987. The official reports state that these deaths occurred in confrontations between the National Information Center (CNI) and subversives belonging to the Manuel Rodriguez Patriotic Front. Human rights organizations have expressed doubts about the circumstances of these deaths, both because of the information collected which contradicts the official version, and because of the fact that on numerous occasions, the Government has alleged that persons were killed in confrontations who later were found to have been summarily executed.

The twelve persons killed are Recaredo Ignacio Valenzuela Pohorecky, Julio Arturo Guerra Olivares, Patricio Ricardo Acosta Castro, Juan Waldemar Henríquez Araya, José Joaquín Valenzuela Levy, Esther Angélica Cabrera Hinojosa, Patricia Angélica Quiroz Nilo, Elisabeth Edelmira Escobar Mondaca, Ricardo Cristian Silva Soto, Manuel Eduardo Valencia Calderón, Ricardo Hernán Rivera Silva and Héctor Luis Figueroa Gómez. Also, according to information provided by the CNI, eight persons accused of subversive activities were taken into custody during these operations, and four members of the security organization were wounded, two of them seriously.

The preliminary comments of the Chilean Human Rights Commission on the manner in which various government institutions have operated in such circumstances are illustrative. It notes that:

The operation was carried out by the CNI independently of any other agency of public security on public order.

This shows clearly for the first time a continuing characteristic of the current constitutional system, which is the existence of a structure of political and military power that is autonomous from the civil power, and that with goals, decisions, and methods of its own that are independent of any civil control, it can act repressively, producing results such as those in this case.

In charge of this operation was Army Major Julio Corvalán, CNI chief of operations, who was also the officer who reported what happened to the press. According to the reports, he was accompanied by about 500 agents and a huge quantity of equipment, which enabled him to conduct nearly 15 mass raids in 17 hours, and in one case three simultaneous raids, with around 200 agents taking part.

The inclusion in these units of military judicial personnel shows the degree of integration that the military courts have established with the armed forces, at the same time that these courts are separated from the judiciary established in the present Constitution.

This power structure, which for its own purposes reproduces in its framework the three branches of government --it defines its own internal rules, that is, it legislates; it possesses its own judicial jurisdictions; and it has a political branch that acts autonomously--is not subject to any effective control by the civil powers, and represents the maximum synthesis of the State of National Security.

The Commission hopes that the investigations under way will promptly answer the questions that have arisen about these serious events.

Right to humane treatment

Regarding the right to human treatment, the Commission has received information about claims of torture and mistreatment during the period of this report. Thus, the Vicariate of Solidarity says there were 109 complaints lodged with Chilean courts, alleging torture during 1986 and 51 during the first half of 1987. Under the heading of unnecessary violence resulting in injury, the Vicariate of Solidarity lists 409 cases, which have given rise to complaints lodged with the courts or that have been reliably verified by that institution.

One fact of particular seriousness because of its impact on the protection of the right to humane treatment has been the repeated refusal

of the National Information Center to comply with court rulings, which in response to writs of amparo (enforcement of constitutional rights) ordered that the prisoners be given medical examinations. The CNI has also refused to comply with court orders to bring the prisoner before the court in order to verify his physical condition. The refusal of the CNI has been based on the state of siege, and gave rise to a strong communication from the full court of appeals of the Pedro Aguirre Cerda Department to the Supreme Court, which in turn addressed the President to inform him of this situation.

A positive aspect concerning the right to humane treatment, which the Commission wishes to stress, is the announcement of the signature by the Chilean Minister of Foreign Affairs on September 24, 1987 of the Inter-American Convention to Prevent and Punish Torture. The Commission hopes that the international obligations that Chile has entered into under this instrument will result in a fundamental change from its past behavior with regard to torture, which as the Commission stated in its report on the status of human rights in Chile in 1987 "has been a continuous, deliberate and systematic practice."

Right to personal liberty

Information provided to the Commission by Chilean human rights organizations indicates that in the period of this report the Chilean Government has continued to fail to comply on many occasions with legal formalities in arresting persons. Thus, there have been repeated reports about the lack of arrest warrants or identification of the arresting authorities, which places the victims' families in the anguished position of having to make enquiries about the whereabouts of the persons arrested. Repeated complaints have been made that the authorities predate arrest warrants to correct the non compliance with the legal formality mentioned.

The Commission has also been informed that the CNI has refused to permit prisoners in their detention centers to have visitors. That was the status of persons for whom writ of amparo Nos. 1.413-86, 1.423-86, 1.431-86, 1.429-86 and 1.424-86 were filed. On receiving the request for information on these cases, the CNI replied that the persons involved "are not being held incommunicado but they cannot receive visits." In practice, this anomalous situation helps to prolong the period of being held incommunicado beyond the legal time limits.

One fact that deserves special consideration in connection with the right to personal liberty is the hunger strike that was initiated by persons arrested in connection with the attack against the President of the Republic, which was then continued by the persons now being tried or serving sentences under the Weapons Control Act, the State Security Act, and the Anti-Terrorist Act. Regarding these persons, there is a controversy as to whether or not they are political prisoners. The Government denies that they are political prisoners, while those involved and human rights institutions consider that they are.

Human rights institutions have complained for some time about the poor conditions in which these persons are being held. They have pointed out the exceptional length of the proceedings to which they have been subjected, the refusal or the difficulties placed in the way of granting them some of the benefits accorded ordinary prisoners--release on parole, Sunday leave or release pending trial--deficient medical care, harassment of family members and visitors, and harsher punishments imposed on these prisoners.

This situation has become worse during the period of this report because of arrests in connection with the attack against the President of the Republic and investigations connected with the finding of stores of weapons. One group of prisoners arrested in connection with that attack, started on February 26, 1987 a hunger strike which other prisoners who were tried under the above-mentioned laws progressively joined until an estimated total of 400 were involved. The Vicariate of Solidarity stated in this connection that:

> In a public statement, the lawyers of the hunger strikers complained that their clients are constantly being pressured in various ways by those prosecuting their cases, including the categorical refusal to place on record the tortures suffered by the prisoners in the first days of their detention, when they were being held by the National Information Center; the long continuous periods of being held incommunicado, which in some cases was up to 45 consecutive days; being kept in solitary confinement, and being located in cellblocks together with common criminals, some of them highly dangerous, who could be employed to obtain information from them or even to commit offenses against their persons. Another measure making prisons conditions harsher is the reduction of visiting hours from six to three hours a week, and allowing entry into the prison of no more than five family members at a time for each prisoner. And also these visits must take place in the presence of a policeman stationed in the visiting area. In addition, the visit of any attorney other than the one that appears before the military prosecutor as the defense counsel is denied so that if any of the suspects in this case have another trial pending, they may not see their lawyer.
>
> In addition to these cases there are 14 political prisoners for whom the death penalty is asked and two sentenced to life imprisonment.
>
> Another problem affecting all persons tried for political crimes is the length of the investigations, which usually last for several years, during which time the accused are held in pre-trial detention without being eligible for release on bail.

The demands of prisoners on hunger strikes range from the release of political prisoners and trial by impartial courts--removing the prisoners from the jurisdiction of military courts, which are regarded as not guaranteeing due process--up to rescission of death sentences, dismissal of charges for illegal entry into the country, commutation of prison sentences to exile, assembly of prisoners for political reasons, elimination of restrictions on visits, and abiding by prison rules.

During the long period of the hunger strike, the following Vicars of Solidarity of the Zona Sur and Pastoral Obrera interceded in representation of the Catholic Church: Monsignori Tapia, Barriga and Baeza, as well as the United Nations Special Rapporteur, Mr. Fernando Volio. In addition, a number of incidents occurred, such as the family members of prisoners on hunger strike chaining themselves to the iron grating of the National Congress. Many prisoners developed serious health problems, and some were transferred to medical care centers. The Archbishop of Santiago issued a public statement asking the Government to consider the hunger strikers' petitions "because at least some of them appear to be reasonable and possible."

The strike lasted from February 26 to April 3, at which time it was called off "because of the visit of the Pope, who is the Messenger of Life," as they stated. According to reports, the strike was called off because the authorities had shown a positive attitude toward resolving some of the problems raised.

As to the number of arrested persons, human rights organizations report that in the year from July 1986 to June 1987, 4,558 persons were detained.

Right to a fair trial

The Commission has repeatedly stressed the great importance of an independent and effective judiciary for the protection of human rights. It has also repeatedly expressed its deep concern at the serious limitations imposed on the judiciary in Chile on the performance of its important duties. During the period of this report, the serious events that occurred in this field have helped to reaffirm the concerns voiced by the Commission on previous occasions.

For example, the uninterrupted imposition of various states of emergency (estados de excepción)--whose effects are superimposed on each other as was stated above--continued to severely restrict the actions of the judiciary. This has been more evident during the months of the state of siege, especially because of the repeated refusal of the National Information Center (CNI) to comply with court orders resulting from the remedies of amparo or habeas corpus.

The refusal of the CNI to honor the writs of amparo or of habeas corpus were based on the existence of the state of siege. Thus, in

response to the writ of amparo filed for Eduardo Barahona Arriagada and others, General Humberto Gordon, Director of tne CNI, explained his noncompliance with the order by stating that "persons detained under the authority of the State of Siege, so long as they remain in that capacity, are at the disposal of the Ministry of Interior. For that reason, the information requested on justification of the detention procedures should be requested from that Ministry."

The attitude of the CNI provoked a reaction from the Appeals Court of the Pedro Aguirre Cerda Department, which, on receiving three writs of amparo, on September 29, 1986, found there was no justification for the attitude of that security agency, so the Court decided to notify the Second Military Court (Juzgado Militar) of the situation and remit the cases to the Supreme Court. The Supreme Court, which subsequently received other ruling from the Appeals Courts of Concepcion and Valdivia reporting similar events, informed the President of the Republic of these facts. While the Supreme Court communication has not been made public, General Pinochet's response, dated October 30, 1986, stated the following:

> Having learned, through your communication, of tne decision of the full court, I wish to convey through you the deep concern the occurrence of the events described caused me, and to inform you that I have immediately given instructions to the Ministers of the Interior and of National Defense to reiterate to that service, in light of your communication and its contents, my orders to the effect that they must proceed at all times in strict compliance with the Constitution and the laws, and must take due cognizance of the facts in each case.
>
> I beg the distinguished Court through you to inform me immediately through the Minister of Justice, of any problems that may arise in this regard, so they may be promptly and properly resolved.

It should be recalled that attitudes such as the one indicated are not new. On the contrary they have been occurring regularly in both the CNI and its predecessor the DINA. A detailed review of these matters was conducted by the Commission in its report on the status of human rights in Chile in 1985. In this connection, it is important to point out how the persons and situations involved remain the same, because it is the same General Gordon, the Director of the CNI, who places a number of obstacles in the way of compliance with court orders issued under the remedy of amparo. It is also the Supreme Court that addresses the President of the Republic to inform him of this very irregular situation. It is the same General Pinochet who gives assurances that the incidents that gave rise to the problems will be resolved under the Constitution and the laws. All of these events occurred in 1982, 1984 and now, during the period covered by this report.

Another fact of particular importance occurred in Chile during the period of this report in the area of the right to a fair trial. The incident arose between the Supreme Court and Judge Carlos Cerda of the Santiago Court of Appeals, who was acting as a visiting magistrate charged with investigating the status of ten persons arrested in 1976 by the DINA who have been missing to date.

In 1985, Judge Cerda committed Miguel Estay Reyno for trial because he was regarded as an accomplice in the crime of illegitimate deprivation of liberty of two persons that had disappeared: Reinalda Pereyra Plaza and Edras Pinto Arroyo. The defense had invoked for the accused the 1978 amnesty law, which covered crimes committed between September 11, 1973 and March 10, 1978. Both the Santiago Court of Appeals and the Supreme Court had rejected this defense arguments in 1985 and 1986.

After more than three years of patient investigations, Judge Cerda committed for trial by a ruling of August 14, 1986, a total of 40 persons --38 of them members of the armed forces and of the law enforcement agencies--for the crimes of illegal association and illegitimate deprivation of liberty of two of the alleged victims. Among the accused are high ranking officers of the three branches of the armed forces. The defense appealed the decision of Judge Cerda to the Santiago Court of Appeals because it considered that the Judge had committed an error or abuse of authority because the criminal liability of the accused had been extinguished by Decree Law 2.191 on amnesty.

Reviewing all of the antecedents, the Eighth Section of the Appeals Court admitted the remedy, and ruled that amnesty was aplicable. It dismissed the case not only of the four accused for whom the remedy had been filed, but for the other 36 as well. On October 6, 1986, the Second Section of the Supreme Court upheld that ruling of the Appeals Court.

On October 7, Judge Cerda, in response to the Supreme Court ruling that ordered him to dismiss the charges against the accused, issued a ruling on which, based on substantiated legal considerations and review of the criminal law, he concluded that the order given him by the Appeals Court, considering of a general dismissal of proceedings against the accused

> because they are accorded amnesty for the crimes of which they are accused, is obviously contrary to law, because it is improper, and, consequently, compels this court to resubmit the case immediately to the higher court, under Article 226, subparagraph 2 of the Penal Code, in order to release the court from any responsibility for the possible commission of any of the offenses of prevarication described in paragraph 4 of Title V of Book II of the same statute.

For these reasons, Judge Cerda suspended compliance with what was ordered and submitted his reasons for the suspension to the Appeals Court, for which purpose an authorized photocopy of this ruling will be submitted to it.

The Supreme Court, on taking cognizance of Judge Cerda's ruling, considered that that ruling constituted a repudiation of his obligations and a "serious lack of judicial discipline, because no precept authorizes him to appeal or to dispute executable judicial judgments, much less those handed down by the Supreme Court." In addition, the Supreme Court added, the conduct of Judge Cerda as a judge of first instance constitutes a "violation of the fundamental bases of the organization and operation of the Judiciary," an offense that the Supreme Court "has the duty to impose severe disciplinary punishment."

Accordingly, the Supreme Court punished Judge Carlos Cerda Fernández with two months of suspension of duties at half pay, "which will take effect immediately."

The Commission finds it necessary, in view of the above facts, to reiterate the validity of the conclusions it set forth in its 1985 report on the status of human rights in Chile, when it pointed out that, despite the determinant negative factors that have been brought to bear on the judiciary in Chile, some of its members have shown a high sense of responsibility and independence, which gives the Commission the hope that the judiciary will resume its traditional conduct in defense of the basic values of the person and will recover the prestige that it deservedly enjoyed previously.

The Commission finds it necessary also to note the profound distortions in the area of the right to a fair trial caused by the imposition of the State of Danger of the Disturbance of Internal Peace. In fact, as the Commission has repeatedly stated, the existence of that state of emergency (estado de excepción), imposed under Transitory Provision 24 of the Constitution, gives the President of the Republic even greater power than those of the judiciary, because under that provision the President can, among other measures, deprive persons whom he considers objectionable of the right to live in Chile, and his decision may not be corrected by the judiciary.

During the period of this report, several events made clear the close relationship between the right to a fair trial and the right of residence and movement by virtue of the existence of Temporary Provision 24 of the Constitution. The Commission will relate them below.

On March 19, 1987, Mr. Clodomiro Almeyda, former Foreign Minister of the Salvador Allende Government and now President of the Socialist Party of Chile, who was prevented by the Government from returning to his country, entered the country through a mountain pass where there was no police control. On May 24, he appeared before the Second Criminal Court

of Santiago, in which he was being tried for misappropriation of funds, with the trial taking place in his absence because he was prevented from entering Chile. The judge in the case acquitted Mr. Almeyda of the charges against him, in consultation with the Court of Appeals.

After his acquittal, Mr. Almeyda was placed under arrest for illegal entry into the country, according to the Government's official report. On March 25, Mr. Almeyda was banished by the Government to Chile Chico, a locality 1800 kms from Santiago, on order of the Ministry of the Interior, under Transitory Provision 24 of the Constitution.

Later, Mr. Almeyda was accused of advocating violence and terrorism, under the Antiterrorist Act, which provides that the accused may not be released on bail until his trial has been completed. Accordingly, Mr. Almeyda remains under arrest despite the fact that on July 30, the Examining Magistrate dismissed the charges against him because an appeal by the prosecuting attorney of the Republic is still pending.

A similar situation occurred on May 12, 1987, when Mrs. Mireya Baltra, former Deputy and former Ministry of Labor of President Allende's Government, and Julieta Campusano, former Senator of the Communist Party, appeared before the Santiago Court of Appeals requesting protection of their right to live in their country. Both were released by the court and were banished administratively by the Ministry of Interior. Mrs. Campusano was banished to Punta Gorda, in the north of Chile, and Mireya Baltra to Puerto Aisen in the south. On May 15, Mrs. Campusano was transferred to the locality of Camina, which is in the highlands at a great altitude above sea level. On July 17, the Ministry of the Interior finalized the banishment of these persons.

A number of judicial actions were also taken in relation to the right of residence and movement when the Second Section of the Santiago Court of Appeals admitted on May 26, 1987 an application for amparo filed on behalf of 105 exiled persons, including Mrs. Hortensia Bussi de Allende. Judges José Canovas and Carlos Cerda voted in favor of the remedy, while Judge Alberto Novoa contended that the measure to prevent entry into the country of the exiled persons had been taken by the Executive Branch under Temporary Provision 24 of the Constitution, against which there was no remedy of any kind, except reconsideration by the authority that ordered the measure.

Judges Canovas and Cerda contended that the measure against the petitioners had been taken by the Executive Branch because they were considered "a danger to the domestic peace of the country," without any valid evidence being submitted to support that designation. In view of the Court of Appeals ruling, the Ministry of the Interior asked the Supreme Court for an order of noninnovation (orden de no innovar) and appealed the ruling that protected the exiled persons. The Supreme Court ruled in favor of the Ministry of the Interior's appeal, thereby setting aside the authorization for the exiled persons to return to Chile.

During the period between the authorization of the Appeals Court and the denial of it by the Supreme Court, the folklorist Isabel Parra succeeded in entering Chile. On June 3, her name was stricken from the list of persons prevented from residing in Chile. However, on May 28, the Supreme Court rejected the writ of amparo filed on behalf of the 105 exiled persons, because it considered that exclusion from the country was a measure vested in the Executive Branch of the country under temporary Provision 24 of the Constitution.

Right of residence and movement

In addition to the facts mentioned in the preceding paragraphs, which affect the right of residence and movement of Chilean citizens, the Commission must note that the Government of Chile has been substantially reducing the number of persons prevented from returning to the country. These measures have followed the announcement by the President of the Republic in his speech at the end of 1986, in which he offered to end the exile problem. The number of Chileans prevented from returning to their country was 3717 persons.

The Commission must note aspects relating to the measures taken by the Chilean Government on the right of residence and movement. First, it must state that while it considers reducing in the number of persons denied that right to be positive, the existence of such persons continues to be a violation of international law in the area of human rights, because if a government has charges to place against a person, they should be substantiated by a competent court so that it may impose the proper penalties for them.

Second, the Commission must note that the existence of the often mentioned temporary Provision 24 of the Constitution means that there hangs over all Chileans the possibility of punishment by exile, against which there is no remedy. An illustrative case is that of the Chilean writer Ariel Dorfman, who was residing in Chile, and when he returned to the country on August 2, 1987 after travelling abroad, he was prevented from entering by police who acted, they said, in compliance with orders of the Ministry of the Interior. Mr. Dorfman was placed on an airplane going to Buenos Aires, and while the measure was then rescinded, this shows the precariousness surrounding the exercise of a right as important as residence and movement.

Right to freedom of expression

Regarding the right to freedom of expression, it should be made clear first that the exercise of this right was subject to restrictions, which led in the last months of 1986 to the imposition of the state of siege. Under the provisions of that state of emergency, the magazines Análisis, Cauce, Apsi, Hoy, La Bicicleta and the newspaper Fortín Mapocho, were prevented from circulating. The measure against the magazine Hoy was

rescinded before the state of siege was lifted. Edict 3 of the Office of the area Chief in the state of siege banned information to the Italian news agency Ansa.

Military Edict 2 of November 18, 1986 ordered the book "Allende demócrata intransigente" (Allende intransigent democrat) seized, without giving any reason for doing so. When the state of siege was lifted, it became known that 15,000 copies of the books "La Aventura de Miguel Littín, clandestino en Chile," (The Adventures of Miguel Littín, in the Chilean Underground) of Gabriel García Márquez and "Proceso a la Izquierda" (Movement to the Left) of the Venezuelan politician Teodoro Petkoff had been incinerated. The books had been seized in customs by order of the "Area Chief in the State of Siege of the Fifth Region, under the authority granted him by the political Constitution of Chile," according to the report of the Ministry of the Interior to the Cámara del Libro. That institution considered the burning of the books as "an act unworthy of a civilized country."

In the period covered by this report, the trial against the director of the magazine Análisis, Juan Pablo Cárdenas, who was charged with defaming the President of the Republic, was concluded. Mr. Cárdenas was convicted and sentenced on January 29, 1987 to three years of night time confinement in prison, because the examining magistrate Lionel Beraud Poblete asserted that "from a mere reading of the editorials (of the magazine Análisis), one can conclude that the only thing sought by them is to undermine the credit and reputation of the present Government with the country."

The Second Summer Section of the Appeals Court ruled in favor of the appeal of the defense, set aside the verdict of the Court of First Instance, and acquitted Mr. Cárdenas because the court considered that he had not defamed General Pinochet. The Supreme Court ruled in favor of the Government's appeal and sentenced Mr. Cárdenas to 541 days in prison, to be served with night-time confinement. Mr. Cárdenas was imprisoned under this charge from July 28 to August 26, 1986.

On May 29, 1987, the First Military Prosecutor committed the director of the newspaper Fortín Mapocho, Mr. Felipe Pozo Ruiz and a journalist of that paper, Gilberto Palacios, for trial, charged with offenses detrimental to the armed forces. The charge was based on an article published in April 1986 on the conditions under which military service is performed.

Also with regard to the exercise of the right to freedom of expression, the publishing house Terranova was raided on December 29, 1986 by CNI agents, who seized works printed by the publisher and machinery owned by it. In May 1987, the Fourth Section of the Appeals Court ruled that the CNI must return the publications and machinery within five days, which was done.

The Commission must note that in the period covered by this report, La Epoca, a newspaper connected with persons of the Christian Democrat Party, began circulation in March 1987. The Commission had reported previously that the Government had authorized the paper to begin publication.

Political rights

During the period of this report, the Chilean Government enacted two laws to carring out the political timetable called for in the 1980 Constitution. These acts are Law 18.556, known as the Constitutional Organic Law on the Electoral Registration and Electoral Service System, published in the Official Gazette on October 1, 1986, and Law 18.603, the Constitutional Organic Law of Political Parties, published on March 23, 1987. Also during the period of this report, the Elections Board (Tribunal Calificador de Elecciones) was installed on April 7, 1987, while procedures began under the draft Constitutional Organic Law on Voting and Elections for the President of the Republic, Members of Parliament and Plebiscites. The Commission will comment below on these laws and the reactions to them because they are considered to be directly connected with the exercise of political rights.

a. Law 18.556 on the Voter Registration System

This law, better known as the Voter Registration Law, is intended to organize the registration procedure for future elections and to set up the electoral service. This law, which was commented on by the Constitutional Court, has 102 permanent and nine transitory articles. Based on its provisions, the voter rolls, which had been destroyed at the beginning of the military government, began to be reconstituted.

The publication of this law and its implementation produced various reactions, both with regard to the contents of some of its provisions and to its significance and impact on the development of the Chilean political system. Regarding the contents of some of its provisions, many observers pointed out the discriminatory nature of Article 39, under which, among other reasons, registration to the vote is prohibited to those who have been punished by the Constitutional Court, under Article 8 of the Constitution. As is well known, this provision bans political parties and movements that spread "doctrines that are harmful to the family, advocate violence or a conception of society or the State or of the legal system that is totalitarian in nature or based on the class struggle."

The Commission has already had occasion to address Article 8 extensively in its 1985 report on the status of human rights in Chile. At this time, it is enough to point out that the provisions of Article 39 of the Voter Registration Law put into practice in one particular aspect the discrimination contained in Article 8 of the Constitution. That discriminatory aspect is in clear-cut conflict with the stand that has been taken on human rights throughout the hemisphere, one of whose most

important contributions is the 1959 Declaration of Santiago, Chile, which states that "the systematic use of political proscription is contrary to the American democratic system."

Aspects of the practical application of the Voter Registration Law have also been cited to criticize its provisions severely. Thus, it has been pointed out that various factors might create conditions to thwart the popular will expressed in an election, such as over-long registration procedures, the cost of these procedures, the requirement of a new identification card, manual processing in the first phase of the registration, and the designation of election officials lacking the impartiality they should have for such an important mechanism.

The most important discussion, however, has occurred regarding whether or not to register on the voter rolls. This is an issue of clear implications regarding the exercise of political rights, so the Commission feels the matter should be carefully considered. Actually, substantial sectors of Chilean political life, especially those connected with the Popular Democratic Movement (MDP), whose main member is the Communist Party of Chile, have rejected voter registration because they regard this as a recourse instituted by the Government, which involves to some extent recognition of that Government. They also feel that it is virtually impossible for the Government to lose an election organized entirely by it.

Other sectors, including a broad spectrum of political and social organizations, and personalities of various ideological persuasions have felt, however, that it is essential to speed up voter registration. Some maintain this position for practical reasons and some for reasons of principle. The latter mention the fact that regardless of the nature of the election held--whether a plebiscite or regular elections--it is essential to register to vote, because the Government is encouraging registration of its supporters. In light of that fact, opponents who support registration maintain that it is preferable to have the largest number of voters registered, because they feel that the majority would oppose the government candidate. Regarding the reasons of principle in favor of voter registration is the fact that the exercise of the right to vote is an inalienable right of the person and is also a civic duty.

The Permanent Committee of the Episcopate, published on June 10, 1987 an appeal to register to vote because it is "a right and a duty of all citizens," and asked those having responsibility over other persons to provide them with conditions enabling them to register.

This appeal was reiterated by the Episcopal Conference of Chile on August 13, 1987.

The potential number of voters, taking into consideration that in Chile the voting age is 18, ranges from 7,500,000 to 8,000,000. According to data provided the Commission by the Permanent Mission of Chile to the OAS, 1,212,205 citizens had already registered by June 30, 1987.

b. Law 18.603 on Political Parties

On March 23, 1987, the Constitutional Organic Law of Political Parties was published in the Official Gazette, and a draft of it had been submitted by the Government Junta to the Constitutional Court. This court issued a ruling on this subject, which affected the fifteen articles of the draft, after which the Government Junta eliminated the provisions considered unconstitutional and remitted the text to the Executive Branch for promulgation.

The text of this law, like the Voter Registration, implements the constitutional provisions on political parties, so that it retains the serious limitations contained in Article 8 of the Constitution. Article 42, subparagraph 7 of the Law of Political Parties provides as ground for dissolution of a political party the declaration of its unconstitutionality, applying to it the provisions of Article 8. In this case, under Article 45 of this law, the party's property would be confiscated.

The Law of Political Parties also gives a compartmentalized view of society, in which "intermediary groups" must be functionally separate from the political parties. This provision, contained in Article 23 of the Constitution, is implemented by Article 18 of the Law of Political Parties, which states:

> . . . no member of the armed forces, or of the public security or law enforcement agencies, officials and employees of the various levels of the judiciary, the Elections Board (Tribunal Calificador de Elecciones), the Electoral Service, or labor or guild leaders may be members of any political party.

This same article provides that any members of a political party who become labor or trade union leaders automatically cease to be members of that party, and must swear an oath "on whether or not they were affiliated with a political party" when that happened. This sworn declaration opens the possibility to criminal charges for perjury as defined in Article 210 of the Criminal Code. The Law of Political Parties in Article 49 stipulates the penalties for those who violate Article 23 of the Constitution, that is, when political leaders take part in labor or trade union activities or when leaders of those "intermediary groups" engage in political activities.

Regarding this point, the Episcopal Conference of Chile, in a declaration entitled "In the Service of Peace," of August 13, 1987, states:

> The Episcopal Conference repeats what it has always requested of government authorities: that, for the good of peace and of reconciliation in the country, they study with representatives of the various political groups of the

government and the opposition, the desirability of amending some articles of the 1980 Constitution that appear to impede such peace and reconciliation, such as the mechanism for the succession to the Presidency; the method of later reform of the Constitution; or certain articles especially discussed, such as Article 8 and Transitory Article 24.

c. The special period in the 1980 Constitution, timeframe and procedures.

The 13th temporary Provision of the Constitution provides that the presidential term now under way will last the eight years stipulated in Article 25 of the permanent provisions. In light of the fact that the Constitution entered into force on March 11, 1981, the current presidential term extends to March 11, 1989, and President Pinochet is elegible for re-election.

The system for succession is established by temporary Provisions 27, 28 and 29. According to Provision 27, the commanders in chief of the armed forces and the Director General of the Carabineros must unanimously nominate the person who will serve as president. This temporary Provision stipulates that, to make that nomination, the commanders and the Director General must meet "at least 90 days before the date on which the term of the current president ends," that is, at least 90 days before March 11, 1989. If they cannot reach a unanimous decision, the National Security Council shall decide, this time by an absolute majority.

Temporary Provision 27 also provides that the proposal of the Government Junta or the Security Council shall be submitted to a plebiscite. Under temporary Provision 28, if the citizens approve the nomination, the president shall take office on March 11, 1989 for the eight-year term provided for by the Constitution. In this case, the president-designate shall call for general elections of deputies and senators nine months after taking office.

If the citizens reject the person nominated for president in the plebiscite, the 29th temporary Provision provides that the current presidential term will be extended automatically for one year. Ninety days before the expiration of that period, the president must call an election by direct vote of the president and of the parliament.

As can be seen, the year in question is of fundamental importance for Chile's political future as far as the exercise of political rights and the observance of human rights in general are concerned. In its 1985 report on the status of human rights in Chile, the Commission set forth its serious reservations both on the national election of January 1978 and the plebiscite of 1980. That is why the Commission regards as positive the fact that voter registration has begun and large numbers of citizens

are registering. The Commission hopes that this registration process will take place normally and that there will be no suspicions about its correctness.

Also in light of previous experience and in accordance with human rights norms, the Commission must point out that the exercise of the right to vote must be included in a context favoring the authenticity of elections in which the free expression of the will of the voters is ensured, as Article 23 of the American Convention on Human Rights states.

The Commission therefore hopes that this important period that is beginning will help to establish an atmosphere that will encourage citizens to make these important decisions. In this regard, it would be very useful for those taking part in the political process to avoid at all costs the use of violence and proscription, such as has been repeatedly requested by important sectors of Chilean society. In the Commission's view, it is essential to break the vicious circle generated by the proscription and violence that threatens to distort the Chilean political scene.

In the Commission's view also, it is of basic importance that in the period before the scheduled election, the various political groups be given every guarantee and means to have their views expressed and accurately transmitted to the voters. Accordingly, the Commission regards as positive the steps taken by the Government to allow important opposition leaders to take part again in the country's political life after their long exile.

Based on these considerations, the Commission finds it important to reproduce the appropriate parts of the Declaration of the Episcopal Conference of Chile, entitled "In the Service of Peace." This declaration, of August 13, 1987, refers to the basic conditions that, in its opinion, that should prevail in the election to decide who will succeed the current president. In this connection, the declaration states:

We believe the following statement is useful for the country:

a) We endorse and reiterate the call of our standing committee, at its meeting of June 10 of this year, to register to vote as soon as possible, in order to be able to participate in the decisions affecting the country's future.

b) In order for the results of a plebiscite or election to have any moral authority, they must meet certain basic conditions:

1. The number of those who are able to vote must be sufficient for the election to be considered as a true expression of the national will;

2. All sectors of public opinion must have an equitable access to television and other mass media and to the various forms of political publicity, so voters will be able to cast their ballots on the basis of proper information;

3. The conditions under which votes are cast must exclude any possibility of pressure;

4. Votes must be cast and counted in such a way that the absolute correctness of the election returns can be checked by all.

The Commission hopes that this appeal of the Chilean Episcopal Conference will be widely endorsed and that the difficult circumstances prevailing today in Chile will be overcome in order to achieve unrestricted observance of human rights under the representative democratic system, which, as has been repeatedly pointed out by the Commission and the General Assembly, constitutes the best guarantee for the observance of those rights.

EL SALVADOR

In recent years, the Commission has had the opportunity, through its annual reports to the General Assembly, to describe developments in El Salvador in human rights observance, with particular emphasis on the difficulties that have occurred in human rights enforcement. In its last annual report, the Commission described the change that had occurred in the relationship between the Salvadoran Government and the IACHR, which was reflected in greater cooperation by the authorities of El Salvador with the Commission's work, in re-establishing the supply of information and replies to communications that the Government had failed to remit to the IACHR, and in the invitation extended for a special IACHR Commission to visit the country in order to make an on-site investigation of several claims of alleged human rights violations, of the right to liberty and humane treatment and of the guarantees of due process, committed against a substantial number of political prisoners. The report also noted that important progress had been made in human rights in the Republic of El Salvador during the period of the report.

The progress mentioned by the Commission in the previous paragraph included the considerable decline in the disappearance of persons and also in the activities of the death squads; the reduction of indiscriminate bombing of the civilian population not directly involved in the fight; the return to El Salvador of a substantial number of persons displaced outside its territory; the almost complete pacification of the capital city of San Salvador; effective observance by the Government and the security forces of their commitments with the International Red Cross Committee to report

immediately on the arrest of persons to the office of that Committee in El Salvador, to the Archdiocese Legal Aid Office (Tutela Legal) and the Government Human Rights Commission; compliance with the agreement to allow such humanitarian and human rights institutions to supervise the treatment by security forces of persons held incommunicado, who are then subject to Decree Law 50 that permits regular visits by the representatives of such organizations to incommunicado prisoners starting with the eighth day of their detention in order to verify their whereabouts, report to their families on their detention, determine whether they have been mistreated or tortured, and report directly to the authorities on such findings.

The progress described in the previous report has for the most part been partially maintained during the period covered by this report, although in other respects violations and restrictions have been found, in some cases severe, of human rights guaranteed by the American Convention, of which El Salvador is a party.

During the period covered by this report, an event of significant importance is that beginning January 12, 1987, the state of emergency that had been maintained year after year was lifted throughout the Republic, thereby re-establishing the constitutional guarantees that had been suspended for seven and a half years. Also lifted, first because of the end of the state of emergency, and then because it was repealed, was the much criticized Decree 50, although, as will be noted, the legislation replacing it suffers from similar defects.

As a result of re-establishment of the constitutional order, Decree Law 50 or the Law on Criminal Procedures Applicable to the Suspension of Constitutional Guarantees, was automatically revoked, except for cases already being tried by military courts, regarding which, under Article 40 of that law, "when constitutional guarantees have been re-established, cases pending before military courts will continue to be tried by them in accordance with this law." Moreover, Decree Law 50, in addition to being without effect after the re-establishment of the constitutional guarantees on January 13, 1987, was definitively annuled on February 22, under Article 43, which set February 28, 1985 as the end of its period of effectiveness, but this was later extended for two more years, ending finally, as stated, on February 22, 1987.

In order to overcome the severe deficiencies of Decree Law 50, and taking into consideration the suggestions and recommendations that had been made by various human rights organizations, including the Inter-American Commission on Human Rights, the Commission to Review Salvadoran Legislation, an organization established by the present government, drafted a new bill submitted to President Duarte for consideration and for submission to the General Assembly for approval. Surprisingly, the Legislative Assembly, instead of enacting the bill proposed by that Commission, enacted on March 11 of this year Decree Law 618, known like the previous one as the "Law on Criminal Procedures

Applicable to Suspension of Constitutional Guarantees," a decree law that, instead of amending Decree Law 50, is virtually identical to it.

The IACHR deplores the enactment of a new emergency procedural law, which, like the previous one, violates elementary legal principles and guarantees as well as international human rights rules that are binding on the Republic of El Salvador. However, the Commission must state that despite the implications of this decree law as an element of intimidation and latent threat, it has not been enforced so far, so that the constitutional guarantees have not been suspended after being restored throughout the country on January 13 of this year. The Commission also deeply regrets that when the deadline for this decree law expired on September 10, it was extended to December 31, 1987.

We should also mention the confusion caused by the fact that from February 22, 1987 when Decree Law 50 finally was annuled to March 11 when Decree Law 618 was enacted, there was a gap of several days in which the military courts did not know whether to continue to hear the cases they were trying under Decree Law 50 or whether they should remit such cases to the Civil Courts responsible for trying criminal cases under the Code of Criminal Procedures.

In addition, there was confusion about the fact that when Decree Law 618 was enacted and entered into effect, but was not enforced because it only applies to cases of suspension of guarantees, some military judges who had been trying cases under Article 40 of Decree Law 50 resumed hearing those cases under Article 40 of the new Decree Law 618, which also provides that, with the re-establishment of the constitutional guarantees, proceedings that had been left pending before the military courts would continue to be tried by them under this latter law. The situation described has given rise to criticism because Decree Law 618 would be made retroactive to try alleged offenses that occurred before it was in effect. The Commission has been informed that an appeal has been made to the Supreme Court on this issue, which is still pending decision.

The Commission regrets to note that, during the period of this report, the following events seriously affected the observance of human rights in the Republic of El Salvador:

Regarding the right to life, information from reliable sources indicates that, while the number of persons affected by the state of violence and warfare that still prevails in El Salvador has declined from previous years, nonetheless, persons have continued to be seriously affected, as shown by the following statistics: arrested by government armed forces and later disappeared: 65 persons; disappeared, without it being known who detained them: 40 persons; murdered by death squads: 18 persons; murders attributed to the armed forces: 80 persons; deaths from mines and explosives, without the authorities' being able to determine the facts of these cases: 24 persons. The number of persons injured or wounded is substantial, but exact figures on them is impossible to obtain.

The Commission has not received serious complaints about indiscriminate bombing of noncombatant civilians, including persons accompanying or living with guerilla forces and giving them aid, despite the fact that there have been 27 operations of this kind, which shows that at least in this respect, the improvement regarding the right to life as recorded in the Commission's last report has continued. However, the Commission has continued to receive complaints about the explosion of bombs, which have caused casualties not only among armed forces members in action, but also among members of the civilian population, including women and children living in towns near combat areas.

Regarding the right to personal freedom, the Commission has continued to receive, although in lesser number, complaints about alleged violations of that right and the constitutional guarantee that, as noted, has not been fully re-established. In some cases, as reported, arrests have been made only to interrogate persons, who on the second or third day are released, but also in some cases such persons have been arrested again. This situation has particularly affected members of cooperatives, as indicated below.

In the area of due process judicial guarantees, the Commission has observed a substantial improvement resulting from re-establishment of constitutional guarantees, the repeal of Decree Law 50 and the nonenforcement of Decree Law 618, mentioned above, because as a result, regular civilian criminal courts have again assumed jurisdiction and competence to try offenses that were previously tried by military courts; the due process guarantees suspended for the state of emergency have been re-established; the procedural rules in the Code of Criminal Procedures have begun to be applied to persons tried for offenses against State security; detainees are no longer held incommunicado up to 15 days, and arrested persons are, according to the law, brought before the courts having jurisdiction, within 72 hours after their arrest, a provision that is complied with in most cases; complaints of mistreatment and torture of political prisoners have declined substantially, and the extrajudicial testimony no longer has value as evidence in political cases, and the rule contained in Article 496 of the Code of Criminal Procedures, which reads as follows, has been re-established:

> In the political offenses referred to in Article 151 of the Criminal Code, extrajudicial confession shall have no value as evidence.

While there has been considerable progress, as indicated above, with regard to judicial guarantees of detained persons, nonetheless the Commission has continued to receive some complaints about alleged illegal removal of cases to military courts by certain military judges, who, despite what was stated above, have tried to assume jurisdiction over some cases that should be under the exclusive jurisdiction of regular courts.

This has occurred precisely because of the fact that certain civilian criminal courts have remitted cases brought before them to other courts as though they lacked jurisdiction to continue to try such cases. This situation has been creating a veritable judicial chaos, because it continues what is referred to as "the spirit" of the emergency laws. Complaints about these cases are reported to be pending decision by the highest court of the Republic, which thus far has provided no effective resolution to the problem.

Another aspect of the legal confusion prevailing in a number of areas of national life in the Republic of El Salvador, in connection with the right to a fair trial and to due process, is the confusion resulting from the lack of legal guarantees caused by the situation of armed conflict in the country, which results from the fact that, without either legal or constitutional protection but with the acquiescence of representative institutions of the law, the government has had to release on various occasions a number of political prisoners in negotiations with the guerilla forces. When such releases have taken place, the political prisoners set free had criminal proceedings under way against them, were subject to the jurisdiction and competence of judges appointed by the law and their legal status was being determined, or they had been sentenced. These releases, which were the result of political and military negotiations, opened the doors of the Mariona prisons (for men) or the Ilopango prisons (for women), but they did not result in a law of amnesty or pardon. Therefore, the courts trying such cases did not know for sure where they stood, because they were informed by the newspapers that such and such prisoners were released but with the defendants' legal status remaining completely undefined: the detainees were free and their trials were suspended, but none of them were legally regularized, which is contrary to all existing legal rules.

The most important releases in this period included a case on February 3 of this year, in which the Salvadoran Government and the rebel forces reached an agreement to exchange Colonel Omar Napoleón Avalos who had been kidnapped and kept as an alleged prisoner of war, for a considerable number of trade unionists, members of the Nongovernmental Human Rights Commission, and FMLN militants who had been disabled in the war.

Regarding the activities of nongovernmental human rights organizations, the Commission regrets the harassment by organizations of military personnel against some human rights groups such as the Nongovernmental Human Rights Commission and the recent terrorist attack against the Mother's Committee (Las Comadres) site, where heavily armed men dressed in civilian clothes, travelling in two station wagons, exploded a bomb on May 3 at 3:00 in the afternoon, causing serious damage to the site and wounding some of the occupants. Later, on September 3, two members of the Mothers Committee, Lucía del Carmen Menjivar Vásquez and Gloria Alicia Galán García, labor unionists belonging to FMLN terrorist groups, were arrested. The first was subsequently released, and the second was tried by the Second Criminal Court for alleged subversive association.

Regarding the right to humane treatment, the Commission, as reported in its last annual report to the General Assembly, started, in cooperation with the Salvadoran Government, an investigation on the above-mentioned case 9621, dealing with the complaints of some of the political prisoners about alleged cases of mistreatment, torture and lack of judicial guarantees. Accordingly, from August 11-15, 1986, a special committee composed of the then Chairman and Vice Chairman of the IACHR, Drs. Luis Adolfo Siles Salinas and Marco Tulio Bruni Celli, accompanied by Executive Secretariat staff, made an on site visit to El Salvador, and subsequently, a special mission of the Executive Secretariat made a visit from the 15th to the 21st.

As a result of that investigation, the Special Committee submitted a report to the Commission of the whole, which after hearing the proposal for a friendly solution accepted in principle by the two parties, issued at its 69th session, of March 26, 1987, Resolution 13/87, declaring the complaint to be admissible, and formally placing itself at the service of both parties, the claimants and those against whom complaints were lodged, to reach a friendly solution of the matter based on the respect for the human rights recognized in the American Convention on Human Rights. The resolution was communicated to the parties, and the Salvadoran Government gave them 90 days to report on the matter to the Commission.

The IACHR is not yet able to provide information on the investigation that it has been conducting, regarding which it has received a reply from the Salvadoran Government. Continuing with its role as a channel for a friendly solution, it has ordered that reply made available to the claimants for the appropriate purposes.

Salvadoran Government's response

The Salvadoran Government, in reply to a note requesting information from it about the progress made in the human rights area, has sent a telegram stating the following inter alia:

> We report Decree 618 extended 31/12/87; persons arrested judged by Penal Code, Decree 618 only applies to pending trials Decree 50. Released by armed forces 2,316, dismissed by military judges, 519, exchanged 88, wounded and injured abroad 115, total 3,038. New Attorney General Roberto Girón Flores. He has established Office of Assistant Attorney General for Human Rights. Actions carried out emphasize punishment persons guilty human rights violations: he has reopened trial of Monsignor Romero, the nuns, Dutch newspapermen, etc. Prisoners detained Mariona and Illopango much better than last year. Up to August 1987, there were 518. Disappeared 1986, 161. Of those, 81 located, 80 remaining to be located. Disappeared January-July 1987, total 74, of them 20 located, 46 not located. Women (comadres) arrested accused belonging FMLN terrorist groups: Lucía del Carmen Menjivar Vásquez, released May 9/87, Gloria Alicia Galán García, remanded Second Criminal Court,

detention decreed for subversive association. The case of Jorge Salvador Ubau, kidnapped by armed civilians 1/9/87, took to unknown destination in vehicle owned by a private party, authorities are looking for him to interrogate him about the event, armed forces deny holding him. CDH, prosecutor's office have started investigations to determine his whereabouts. Public security forces are investigating abduction.

The Salvadoran cooperative movement, according to many complaints received by the Commission during the period of this report, has been hounded, harassed and persecuted by the Salvadoran Government authorities. This has resulted in a considerable number of cooperative members arrested, mistreated, wounded and, according to reports, some have even desappeared. The Commission much regrets having to deal with a topic as delicate as this, and is now engaged in processing these complaints according to its regulatory procedures.

All in all, as indicated in the Commission's last report, the main problem facing the Republic of El Salvador is the internal war that started over seven and a half years ago. This, in addition to disrupting the legal system as noted, has already caused over 63,000 deaths, severe destruction of the country's socioeconomic infrastructure, and many attacks against the life and safety of the population.

In light of this situation, the Commission has always attached special importance to and vigorously encouraged a peaceful and negotiated solution to the conflict between the Salvadoran Government and the rebel forces opposing it. As indicated in the last report, talks to that end took place first in the city of La Palma on August 15, 1984, and later in Ayaguayo on November 30 of that year. Unfortunately, these negotiations were not continued because the third round of talks was unsuccessful despite the efforts of the Catholic Church.

Accordingly, the Commission points out as a positive fact that new hopes of peace have emerged, through negotiations and dialogue under the agreement reached in the Republic of Guatemala at the recent meeting of the Presidents of the Central American countries on August 13-16 of this year.

In fact, according to the plan presented by the Costa Rican President, Dr. Oscar Arias-Sánchez, the Central American presidents have concluded an agreement establishing a 90-day period to produce a cease-fire in the countries where internal armed struggle is taking place, as in the case of El Salvador. Under the peace plan, the governments in and outside the region must refrain during that period from continuing to provide military aid to the armed groups operating in the neutral area, and in the interior of the countries amnesties are to be declared to promote the incorporation into the national political activities of those who are today part of insurrectional armed groups. The states in which some form of a state of emergency is in effect must also lift it during the 90-day period.

GUATEMALA

The Inter-American Commission on Human Rights has been devoting special attention to the status of human rights in Guatemala, and has followed very closely the events occurring in that country, which have for a number of years reflected a situation of serious and widespread violence, with the consequent violations of human rights for that country's people.

The Commission has been describing such events in its annual reports to the General Assembly, and has also prepared three special reports on developments in the human rights situation in Guatemala: the first, approved on October 13, 1981, covers the period up to the government of General Romeo Lucas García and his immediate predecessors; the second, approved on October 5, 1983, covers the period after General Efraín Ríos Montt assumed power (March 23, 1982 to August 8, 1983); and the third, approved on April 9, 1986, covers the period of the government of General Oscar Humberto Mejía Vitores (August 8, 1983 to January 16, 1986), when his administration ended and Vinicio Cerezo Arévalo became president of the Republic.

In its third and last special report on the status of human rights in Guatemala, the IACHR made special recommendations on the need to investigate and punish, to the full extent of the law, those responsible for such abominable acts as the forced disappearances of persons, illegal executions, arbitrary arrests, torture and other crimes against human rights.

These recommendations, while they were directed to the Government of General Oscar Humberto Mejía Vitores, remain in force for this current administration, because they concern the investigation and punishment of severe violations of the essential rights of human beings and of existing international human rights rules.

In its last report to the General Assembly, covering the period of September 1985 through September 1986, the IACHR stressed the progress made in human rights during the first nine months by the new Guatemalan Government, and pointed out that from the time President Vinicio Cerezo took office as the Guatemalan Chief of State, perceptible changes have occurred in the human rights situation in that country, which were reflected in a drop in political assasinations, abductions and forced disappearances of persons, as well as raids and searches of homes and the exodus of the indigenous and rural population, all of which, as indicated, constituted substantial progress in the human rights situation in that country. At the same time, the Commission indicated that, nonetheless, disappearances continued to occur, and other problems affecting the full observance of human rights in Guatemala continued, resulting mainly from signs of decentralization of the violence, which the President of the Republic appeared not to be able to control.

Likewise, the Commission voiced concern in its last report at the failure to investigate the forced disappearances of persons. Although President Vinicio Cerezo had expressed his decision not to investigate such cases directly, he had undertaken to support and back the work conducted on this problem, as a result of the complaints to the judiciary, particularly, the examining magistrate appointed by the Supreme Court to investigate cases of abductions and disappearances reported by the Mutual Support Group (GAM).

During his visit to Washington in May 1987, President Vinicio Cerezo publicly stated on this subject that regarding the problem of investigating the disappearances of persons before his government took office, he had taken the political decision not to intervene in the investigation of those abuses and that his position had always been clear that the disappearances were a thing of the past. However, he personally would guarantee the independence of the investigations of any complaint submitted to the courts in his country.

During the period of this report, the Commission has received reports on the efforts being made by President Cerezo's government to promote and defend human rights in Guatemala. For example, on January 30, 1987, Guatemala became the first country to deposit its instrument of ratification to the Inter-American Convention to Prevent and Punish Torture.

On March 16, Guatemala became the ninth country to accept the compulsory jurisdiction of the Inter-American Court of Human Rights, through a communication delivered on that date to the OAS General Secretariat by the Permanent Representative of Guatemala to the OAS.

In addition, there is the important role that President Vinicio Cerezo has been playing in the peace efforts for Central America, and the priority that he has given, within his plan of government, to consolidating democracy and representative institutions in Guatemala.

In addition, the difficulties that originally had been encountered and that had caused President Cerezo to veto and return to Congress the bill establishing the post of human rights prosecutor, because he considered that the bill gave that official too much power, were overcome. After the bill was passed, on August 17, 1987, the distinguished jurist Gonzalo Menéndez de la Riva was appointed as the first human rights prosecutor in Guatemala, and on August 19, he took the oath of office before the Congress of the Republic.

However, during the period of this report, the Commission has observed that, despite all of President Vinicio Cerezo's declared good intentions to maintain control of the human rights situation, a perceptible decline in the observance of human rights occurred immediately after the first months of his government.

No serious effort has been made by the responsible agencies to carry out the Commission's recommendation to investigate the cases of forced disappearances of persons. This has caused the families of such persons, who have joined together in the Mutual Support Group (GAM), to protest continuously through many public demonstrations to exert pressure and arouse public opinion domestically and internationally on the need to investigate the crimes committed against hundreds of persons, which are attributed to paramilitary groups and to the Guatemalan armed forces themselves in their antisubversive struggle.

The activities of the GAM will be discussed further below, but at this point the IACHR wishes to express its discouragement at this lack of investigation that has led to the failure to punish those responsible for answering for such acts, and that the families of the victims felt was designed to cover with a mantle of impunity the persons responsible for planning and carrying out the murder of many Guatemalan citizens.

The fact that disappearances of persons has started again in the period of this report is a cause of deep concern for the IACHR. The Commission has reports that from the time the present government took office to date, after an initial period of relative calm, distressing cases of the disappearances of Guatemalan citizens have begun to occur again. It has not been possible to determine the reasons for their detention or abduction, nor to obtain any information about their whereabouts, despite the fact that, in most cases, there is evidence that the Guatemalan security forces are responsible for these disappearances.

In addition, the Commission has been informed that almost all of the investigations by the families of the disappeared persons and their efforts to obtain information from the police and administrative authorities about the whereabouts of their loved ones, during the period of this report, have produced no results whatever. Nor have any positive results been obtained from judicial proceedings initiated by the families of disappeared persons before the agencies having jurisdiction over such matters, which in most cases have ruled as without justification writs for amparo and habeas corpus filed in the hope of obtaining an investigation by the judiciary of the forced disappearances of persons. This exhausts all of the valid domestic legal remedies available.

During the period of this report, the IACHR has opened 90 cases of complaints involving 117 victims of alleged human rights violations against the Republic of Guatemala. These involve violations of the right to life and in almost all of them disappearance of the persons involved, who had been previously abducted. The families of the victims in these cases have filed writs of habeas corpus, which have been dismissed by the Guatemalan judiciary.

In addition to the seriousness of the human rights situations in these cases, the IACHR is concerned that they involve a serious setback in the progress made at the beginning of President Cerezo's administration,

the resumption of methods and systems for eliminating persons in mass, and the reappearance of the dreadful death squads. In addition, the Government has displayed an apparent unwillingness to cooperate with the Commission in determining the facts of these new cases, with regard to which, the IACHR, because its requests have been disregarded, has had to again request information and reiterate its recommendations that these cases be investigated.

By a decision made by the IACHR at its 69th session in September 1986, the Guatemalan Government was asked to allow a member of the IACHR, accompanied by staff of its Secretariat, to make a short visit to that country to interview the President of the Republic and other officials of the Guatemalan Government, in order to discuss the human rights situation in that country and to learn about the investigations of recent cases of disappeared persons, whose increase, as stated, seriously concerns the Commission. The Commission trusts that that visit will take place during 1987.

Regarding the right to a fair trial and due process, the Commission had stressed in its previous report the judiciary reorganization ordered by the new government of President Cerezo to restore the judiciary's credibility, independence and autonomy. In addition, the report highlighted the establishment of a new Central Control Registry of Prisoners, which was intended to serve as an organ of consultation for any person wishing information about the status of any family member being detained. Unfortunately, the IACHR must now criticize the ineffective way the judiciary has participated in the investigation of the new cases of the forced disappearance of persons and the fact that the Central Control Registry of Prisoners has been of little use in resolving this kind of problem, despite the hopes that the Commission--which had recommended it--had placed in this registry.

In this connection, the Commission must again mention the problem of the ineffectiveness of habeas corpus remedies or orders to bring the accused before the court (exhibición personal), which, in the past, have become inoperative, as a guarantee of legal protection against illegal detentions, abductions and disappearances, to protect the right to liberty, security, humane treatment and the right to life.

The inoperativeness of the habeas corpus remedy has been shown during the period of this report by the many habeas corpus writs filed that have been dismissed by the judiciary solely on the basis of police reports that the persons detained or disappeared were not being held at any of the country's detention centers, and in other cases, on the basis of a mere visit by the judge with whom the habeas corpus writ was filed, to inspect the record books showing entries of persons into some of the prisons or detention centers in the Republic, thereby frustrating the hopes and efforts of the victims' families.

The Commission once again reiterates its recommendations in previous reports that it is essential to re-establish the legal guarantees that

make it possible to check abuses of power by the security forces, so that existing legal measures to defend human rights can be really effective in practice.

Regarding the rights to personal liberty and humane treatment, the Commission has received during the period of this report persistent reports of illegal detention and mistreatment of prisoners. Some of these cases have turned into forced disappearances of persons, as reviewed in the portion of this report dealing with the ineffectiveness of habeas corpus remedies. In this connection, the Commission is particularly concerned at the status of a number of Guatemalan union leaders, an area that has been given special consideration by the Commission. Some of these leaders have been arrested, some mistreated and others have even been murdered.

Regarding the activities of nongovernmental human rights organizations, the Commission has been informed that, in addition to the Mutual Support Group (GAM), the Guatemalan Catholic Church has initiated steps to set up a new office of this kind, similar to the Salvadoran Archdiocese Legal Aid Office (Tutela Legal), which would operate under the name of Vicariat of Christian Solidarity (Vicaría de la Solidaridad Cristiana).

Regarding the activities of the Mutual Support Group, the Commission regrets the continuous confrontations that group has had with security forces and with the head of state himself in demanding investigations of the disappearance of their family members. During the sixteenth session of the OAS General Assembly in November 1986 in Guatemala City, the Mutual Support Group demonstrated before the meeting place of the diplomatic representatives of the OAS member countries in order to voice their protest at the lack of investigation of the cases of forced disappearances of their family members. The demonstration took place in front of the National Theatre where the OAS General Assembly meeting was held, at a time when President Cerezo and 31 delegates and foreign ministers of the countries of the Americas were attending. The demonstrators demanded that the members of the Assembly intercede with President Vinicio Cerezo to urge him to set up a committee to investigate the disappearances. At that time, the then Chairman of the IACHR, Dr. Luis Adolfo Siles Salinas, met with the leaders of the group and offered to urge, as in fact he did, the President of Guatemala to comply with the recommendations in the Commission's report to the General Assembly, that investigations be made of those responsible for illegal executions, disappearances, arbitrary arrests and torture in the country, and that they be punished to the full extent of the law.

Later, President Vinicio Cerezo met with the disappeared persons' family members who are members of the Mutual Support Group. The meeting took place at the Central Plaza next to the National Palace on April 7 of this year. President Vinicio formally announced the establishment of a

Government commission to investigate the whereabouts of disappeared persons. Members of the Commission would be the following: a representative of the President of the Republic; a representative of the Ministry of Foreign Affairs; a representative of the Ministry of the Interior; a representatrive of the Human Rights Commission and a representative of the Congress of the Republic.

The Commission was charged with the following duties: report within three months about the whereabouts of the persons claimed to have disappeared; communicate the results of the investigations to each of the persons interested in getting information about the situation of their family members; and suggest alternatives to resolve the social and economic problems of the families of disappeared persons. Since the Commission designated by President Cerezo did not include nongovernment sectors, this caused the GAM to demand that some individual persons and institutions participate, in order--as they said--to make the Commission multisectoral. It should be noted that the deadline originally set for the Commission has been considerably exceeded and that the findings of its investigations are still not known.

On June 30, 1987, on the occasion of the yearly celebration of Army Day, the GAM announced that it would demonstrate publicly in large numbers. The Guatemalan Army called that announcement a new provocation by the GAM, and recalled that on September 15, 1986, during a parade of the Guatemalan Army, GAM members, headed by Mrs. Nineth de García, heckled the marching columns and joined the end of the parade carrying placards and shouting slogans. To prevent a similar disturbance, the Army posted a column of troops firing tear gas to break up the GAM demonstration.

On July 16, GAM marchers peacefully occupied the National Congress by surprise and demanded that President Vinicio Cerezo keep his promise to order that the Commission to Investigate Disappeared Persons set up last April start to work; that the GAM be received by the President of the Republic; and that persecution of GAM members cease. They also voiced their frustration at what they termed the indifference of the authorities to their demand that the Investigating Commission proposed by President Cerezo be set up, and they also declared that they considered themselves to be deceived and flouted by what they called the false promises of the chief of state. Twenty-four hours later, the GAM vacated the National Congress, after the President of the Congress and the Human Rights Commission of the Parliament delivered a letter to the GAM leaders guaranteeing that they would be received by President Cerezo to resolve all aspects of the issue of the Investigating Commission.

To attend the audience granted by President Vinicio Cerezo, which had been scheduled for Thursday, July 23 at 4:00 p.m., over 200 members of the Mutual Support Group went to the National Palace where they found that an anti-riot squad of national police had surrounded the Palace

since early in the morning. When the GAM leaders tried to enter the Palace for the interview, they were informed by an official that they would not be received by the President. At 3:00 p.m., a half hour before the interview, the GAM members were told that the President had left and that they had orders to clear the area. When the GAM refused to leave, the police forces, according to reports, proceeded to disperse them brutally with their night sticks, so that a number of GAM members--men, women and children--were so severely beaten that they had to receive medical care. As a reaction to that attack, the GAM members shortly after 4:00 p.m. took refuge in the Metropolitan Cathedral of Guatemala, where the President of the Congress arrived to reiterate his desire to serve as intermediary with the President. On the following day, a press release from the President of the Republic reported that the GAM would be received. President Cerezo did receive them on July 30 at 12:00 noon, stating that the previous meeting had not been held because allegedly the GAM did not show up at the scheduled time.

The Commission much regrets the above events and recommends that a careful investigation be made to determine whether there is a connection between these events, and also recommends that full guarantees be given for labor union activities, in order to avoid having the situation become even worse, as happened with previous governments.

In summary, the Commission notes that, despite the efforts of President Cerezo's government to consolidate the state of law and democratic institutions, serious restrictions and obstacles still persist in Guatemala regarding the observance of fundamental human rights. This situation results primarily from decentralizing the violence that has for many years characterized this country, the preponderant role still played by the armed forces, which are not subject to effective government control, and the judiciary's lack of effectiveness, despite some progress made, in serving as an instrument capable of promptly correcting human rights violations.

HAITI

Since the fall of the Duvalier regime on February 7, 1987 there has been made manifest a vehement desire on the part of vast sectors of the Haitian population to exercise their fundamental rights and freedoms, which had been denied them in the past, in particular, the right to organize, the right to run for political office and to be elected. Following the ouster of the 29 year dictatorship, the Haitian people wanted and demanded change, an improvement in their deplorable standards of living, characterized as the lowest in the hemisphere, and a participatory role in the creation of their future.

The change sought by the Haitian people was slow in coming, and the anger at the old regime turned to violence against the National Governing Council (the "C.N.G."), the new provisional military government.

This violence has been manifested at sporadic, but regular intervals, as the crucial steps toward democratization were not taken by the provisional military government until such time as demonstrations against the government had reached such levels that the very survival of the government was in question. As the Commission concluded in its last Annual Report:

> The Commission concluded that the National Governing Council, at least for the moment, has managed to quell the ongoing protest demonstrations that have plagued this Government since it assumed power having now announced the long-awaited timetable for transition to a democratically elected government. Underlying problems remain, however, in that the Council's acts have no juridical basis. The Council proposed to function as a government for a two year period without the creation of the other branches of government. It proposes to pass laws without the benefit of a legislature and to try persons accused of crimes under the Duvalier regime without an independent judiciary. Unless the transition process is democratized and allows greater participation of the general populace, it is foreseeable that such protests will continue.

The events which occurred during the period in consideration in this Report show that greater participation was not achieved and consequently the democratization process has inevitably been threatened.

The New Constitution

In order to give the State a legal structure it was considered necessary to adopt a new Constitution. The Constituent Assembly, which was mandated by the C.N.C. with the task of drafting the new Haitian Constitution, consisted of 61 members.

Elections for 41 of the 61 Seats on the Assembly were held throughout Haiti on October 19, 1986. The remaining 20 members were appointed by the C.N.G. The Ministry of Information informed that 9.2% of the Haitian electorate participated in the October elections whereas other sources reported a national voter turnout of between 1 and 5 percent.

The C.N.G. had appointed a group of nine "experts" to draft a Constitution and this Constitution was then to be reviewed by the Constituent Assembly. The C.N.G. subsequently submitted its own draft to the Assembly. The Constituent Assembly which began meeting on December 1, 1986, worked on the basis of both drafts.

The work of the Constituent Assembly proceeded on the basis of an article by article consideration and as the articles were approved they

were published on a daily basis in the press. The public was invited to debate the articles and to submit suggestions to the Constituent Assembly. The 61 member Constituent Assembly originally had been viewed with skepticism but as it demonstrated its seriousness and responsiveness to its mandate, it won popular support. On December 3, 1986 three representatives of the group of ten Haitian political parties presented the C.N.G. with a draft electoral decree recommending the creation of an independent electoral commission.

The draft Constitution included a provision for the creation of an independent electoral commission, but the March 29th referendum on the Constitution was conducted by the Ministry of the Interior, which, opposition leaders charged, remains under the control of people who were closely associated with Jean Claude Duvalier. A second criticism of the referendum procedure was the fact that the Creole version of the Constitution was not made public until March 16th, two weeks before the vote. For the 90 percent of the population that is Creole-speaking this was considered insufficent time to discuss the Constitution and to allow for an informed vote.

In spite of these apparent obstacles, on March 29, 1987 45.4 percent of the 2.8 million eligible voters cast their votes in favor of the new Constitution. The massive participation of the electorate surpassed the ten percent expected. Each voter was given two ballots as s/he entered the voting booth, a white one to cast a vote in favor and a yellow one to reject the Constitution.

In the new Constitution the Executive power is divided between a President, who is Head of State, and the Government, which is headed by the Prime Minister. The President is elected by direct vote to a five-year term. The President may not serve two consecutive terms nor a total of more than two terms. The Government is composed of the Prime Minister, the Ministers and the Secretaries of State, and conducts the policy of the nation. The President chooses the Prime Minister from among the members of the majority party in Parliament, and that choice must be ratified by the Parliament.

The Legislative power consists of a Parliament which is divided into two houses: the Senate and the House of Deputies. Each house is elected by direct suffrage: the Senate to six-year terms and the House of Deputies to four-year terms. The President is not empowered to dissolve the Legislature.

The Constitution was adopted "to guarantee the inalienable rights to life, liberty and the pursuit of happiness." In furtherance of these rights, the Constitution abolishes the death penalty and recognizes the right of every citizen to decent housing, food, social security, and free education. Moreover, the State is required to provide sufficient health care facilities to protect the health of all citizens and in addition, activities which harm the ecological balance are forbidden.

Several provisions of the Constitution concern the right to due process of law. Pursuant to the Constitution no person may be prosecuted, arrested or detained except as determined by law. Except where the perpetrator of a crime is caught in the act, the State may not arrest or detain anyone without a warrant or conduct a search or arrest by warrant during the hours between 6:00 p.m. and 6:00 a.m. Those arrested have the right to be assisted by counsel throughout the proceedings and may not be interrogated outside the presence of their attorney or a witness of their choice. The State is forbidden to use unnecessary force, psychological pressure or physical brutality during arrest, detention or interrogation. Within 48 hours of the arrest, the suspect shall be brought before a judge who shall determine the legality of the arrest. If the judge concludes that the arrest was illegal, the suspect shall immediately be released.

The Constitution also creates an Electoral Council, which is authorized to establish and enforce the laws governing the elections. The Provisional Electoral Council is to be composed of nine members selected by various public and private entities. Subsequent elections are to be supervised by the Permanent Electoral Council which will be comprised of nine members of which three each are to be appointed by the Executive Branch, the Supreme Court and the National Assembly.

The Electoral Council is to ensure that all candidates for public office possess the necessary qualifications. One of these qualifications is for the candidate not to have been connected with the Duvalier regime. The Constitution provides that until 1997 the Electoral Councils shall not certify any candidate who is "well known for having been by his excess zeal one of the architects of the dictatorship and of its maintenance," or who is "denounced by public outcry for having inflicted torture on political prisoners in connection with arrests and investigations or for having committed political assassination." This provision was the best known article of the Constitution and alone motivated many people to vote for the Constitution. For them a vote for the Constitution was a vote against the Duvalierist past and for change.

The constitutional conflict and the current crisis

Article 289 of the Constitution provides for the creation of a Provisional Electoral Council of nine members charged with drawing up and enforcing the electoral law to govern the next elections (chargé de l'execution et l'elaboration de la Loi Electorale devant régir les prochains elections). The members are to be designated as follows: 1) one for the Executive branch, 2) one for the Episcopal Conference, 3) one for the Advisory Council: 4) one for the Supreme Court; 5) one for the human rights organizations who may not be a candidate in the elections; 6) one for the Council of the University; 7) one for the Association of Journalists; 8) one for the Protestant religions; 9) one for the National Council of Cooperatives.

The Council was created following the popular referendum which approved the Constitution. On May 13, 1987 the C.N.G. issued a decree which purported to regulate the functioning of the Provisional Electoral Council (C.E.P.) This decree purported to: "create" an Electoral Council, set forth in the Constitution, and attempted to establish guidelines pursuant to which it should act. For example, the decree set forth a requirement that decisions could only be taken by a two-thirds vote of the Council instead of by simple majority, and that the decisions of the Electoral Council be subject to judicial review.

On May 21, 1987 the members of the C.E.P. were sworn in and officially assumed their functions. On that same date all nine members signed a letter to the C.N.G. criticizing the C.N.G.'s decree of May 13th and reaffirming the Council's autonomy and accountability to no other branch of Government. The fact that all nine members signed the letter was significant since it included the member designated by the C.N.G., and the member designated by the University, who was also considered a candidate of the government. As had been the case with the Constituent Assembly, the Provisional Electoral Council had assumed an esprit de corps as a result of its empowerment by the Constitution and the popular support of the population.

In its May 21, 1987 letter to the C.N.G., the C.E.P. affirmed that it had been created by the Constitution, and not by the decree of the C.N.G. Consequently, since the decree violated the spirit and the letter of the Constitution, the C.N.G.'s decree was unconstitutional and ought to be repealed. The Council stated that the Constitution mandates it to prepare the electoral law and not merely a draft of an electoral law. In its view the document to be submitted to the C.N.G. is the law which may not be modified by the C.N.G. and which is submitted to the C.N.G. solely for the formal act of promulgation.

Further, the Provisional Electoral Council stated that it alone is mandated by the Constitution to take decisions as regards the constitutional qualifications of electoral candidates and that its decisions are final and are not subject to judicial review. The Provisional Electoral Council stated that it alone is authorized to draw up its internal regulations and its method of voting since the Constitution declares it to be an independent institution. Therefore, the C.N.G. decree which requires a 2/3 majority vote in order for the C.E.P. to take a decision and states that decisions of the Provisional Electoral Council are appealable to a judicial instance would deprive the C.E.P. of its independent status. The C.N.G.'s decree, in the opinion of the Provisional Electoral Council, would place the Electoral Council at the level of a lower court in the judicial branch, which is not in conformity with the Constitution, which envisions the Electoral Council virtually as a fourth branch of government. This provision is particularly important in light of article 291 concerning former Duvalierists. According to the Provisional Electoral Council it is the C.E.P. which alone determines who fulfills the requirements to be a candidate for public office.

On May 22, 1987 the members of the Provisional Electoral Council made public this letter to the C.N.G.; and on May 30, 1987 the first half of the Council's Electoral Law was published in the press to stimulate debate and suggestions from the public. Without publication of the second half of the law or a final version of the first half, the Electoral Law was submitted by the Electoral Council to the Ministry of Justice on Friday, June 5, 1987.

On June 15, 1987 the members of the Provisional Electoral Council called a press conference to express their concern regarding the silence on the part of the C.N.G. concerning the promulgation of the electoral law submitted to the Minister of Justice on June 5, 1987, and to announce that the elections planned for July could not be carried out. The dispute over the control of the elections was well on its way to assuming crisis proportions.

On June 19, 1987 the Centrale Autonome des Travailleur Haitiens (CATH) called a strike for June 22 and 23. CATH called for the minimum wage to be increased by one hundred per cent to $6 U.S. dollars per day, a 100 percent increase, and for the C.N.G. to restrict the importation of shoes, rice, sugar and textile products, the importation of which was causing serious damage to the domestic industries.

The proposed CATH strike had no immediate connection with the electoral crisis, however that same day the C.N.G. issued its own Electoral Law which did not correspond to the Electoral Law prepared by the C.E.P. and announced that municipal elections would be held on August 23. These acts were considered a direct attack on the independence of the C.E.P.

On June 22 the transport sector completely supported CATH in its call for a strike and Port-au-Prince was virtually paralyzed. By decree dated June 23, the C.N.G. dissolved CATH, destroyed its headquarters and arrested three of its leaders. The political parties and social organizations united in repudiation of the C.N.G.'s action and the C.N.G. was called upon to repeal its decree.

On June 29 and 30, 1987 the Coordination Committee of the 57 organizations called a strike to abrogate the C.N.G.'s decree and the dissolution of CATH. Four people were killed and at least two dozen others injured in Cite Soleil in clashes between the army and anti-Government demonstrators. This second general strike again virtually paralyzed Port-au-Prince. The C.N.G.'s electoral law was criticized by opponents of the regime for placing supervision of the elections in the hands of the Ministry of the Interior, which had been in charge of the October elections and the March referendum, and it relegated the C.E.P. to the position of a "filing" office for the results of the municipal elections and the upcoming presidential and legislative elections in November.

The political and popular organizations joined forces against the C.N.G. which they charged with acting as a dictatorship. The President of the C.N.G., General Namphy, sought to allay those fears and in a televised speech he renewed a pledge to lead Haiti to democratic elections. Since Namphy did not restore the independence of the C.E.P., the political leaders called for a renewal of the strikes and the focus shifted from the independence of the C.E.P. to the larger issue of the ouster of the C.N.G.

On July 1, Port-au-Prince reportedly looked like a battlefield after two days of a general strike marked by violent clashes between soldiers and demonstrators that resulted in the death of 10 persons, 57 injured and numerous arrests. The demonstrators demanded an end to the C.N.G. On July 1, 1987 the strike was suspended and the people stocked up on supplies. On July 2, 1987 the strike resumed, demonstrators burned barricades in the streets, the city of Port-au-Prince was again paralyzed and the violence continued to escalate with numerous dead and wounded being admitted into the University hospital.

As a consequence of these events, on July 2, 1987, the C.N.G. annulled the decree whereby it had tried to seize control of the electoral process, and Information Minister Jacques Lorthe, who had taken a hard line position was forced to resign. Two people were reported shot and killed by soldiers on July 2 in a suburb of Port-au-Prince, and the clashes throughout the country were said to be less severe than during the first two days of the strike.

Following the C.N.G.'s restoration of control to the Electoral Council, the C.E.P. immediately announced that it would begin drafting a new program for conducting elections.

Jean-Claude Bajeux, a leader of the Group of 57, on behalf of these organizations stated on July 3 that the C.N.G. should reorganize itself or resign. He said that the Committee would accept a reorganized council with two civilians and one military member but as it stood it was unacceptably dominated by the armed forces. Bajeux stated that protests would continue until Lt.Gen. Namphy and Gen. Williams Regala resign. In fact, the demonstrations did continue in Port-au-Prince, during which soldiers shot straight into crowds and killed seven demonstrators.

On July 4, 1987 the Provisional Electoral Council announced that it would suspend negotiations with the C.N.G. due to the "barbaric acts" attributed to the army during the five days of demonstrations. Over the previous 11 days of political violence 22 persons had been killed by the armed forces and more than 100 wounded. The suspension of negotiations between the C.E.P. and the C.N.G. further isolated the C.N.G. as political, labor and civic organizations called for a strike until the current members of the C.N.G. resigned.

On July 7, 1987 three leaders opposed to the C.N.G. proposed, at a news conference, that a new "Provisional Council of Government" be named to be chaired by Felix Kavanagh, the Vice President of the Court of Cassation. This proposal did not attract an enthusiastic following.

On July 8, 1987 Haitians returned to work at the end of the 8 day anti-government strike. Soldiers had killed approximately 22 persons and wounded 135. The representatives of the group of 57 who had organized the strike called a press conference in which they decreed a day of mourning for July 9.

On July 12, the Coordination Committee of the group of 57 again proposed a "people's alternative" to the C.N.G., replacing the current members with representatives of the "democratic sectors" and a member of the Army general staff. The Coordinating Committee stated that Monday and Tuesday, July 13 and 14, would be days to organize for the second phase of the battle against the C.N.G. The Committee called on the people who represent the C.N.G.--the prefects, magistrates, commissioners, information agents, members of the Administrative Councils,--to resign and to come over to the side of the people.

The Provisional Electoral Council on July 14 published its Electoral Decree and set November 29 as the date for the coming presidential elections. The new decree provides in Article 88-2 for "Vigiliance Brigades" the role of which is to remain neutral but help to maintain order, prevent any coercion of voters and to assist voters in finding their polling places.

On July 15 Haiti was again totally paralyzed by a new general strike called by the group of 57 which continued to demand the resignation of the Government headed by General Namphy. Bishop Willy Romelus of Jeremie joined the strike openly calling on Namphy to resign.

On July 16 CATH resumed functioning with the same executive committee which had been attacked by the authorities on June 22.

The Coordinating Committee of the 57 organizations decided to continue for 48 hours the general strike that paralyzed Haiti on July 15, claiming that democracy is not possible as long as "macoutes" remain in power.

On July 20 and 21 approximately 5,000-10,000 students demonstrated in Port-au-Prince and in the provinces against the C.N.G., and on July 22, a number of women's organizations took to the streets to demonstrate.

On July 23, it was reported that soldiers fired automatic weapons into the air to disperse thousands of demonstrators in the fourth day of anti-government protests in Port-au-Prince and that five persons were wounded by gunfire.

For the first time the Commission received information that journalists were being shot at, beaten and that their equipment was being confiscated while they were covering street demonstrations.

On July 24 Radio Soleil reported that many peasants had been killed in machete massacres in rural Jean Rabel, located 150 miles north of Port-au-Prince, by former tonton macoutes. The number of dead was estimated at between 70 and several hundred peasants. Most of the victims were part of a group of approximately 700 Tet Ansam peasants, an organization supported by the Catholic Church in favor of land reform, who were walking towards Jean Rabel to lend support to peasants in another town whose homes had been burned by the Macoutes. On the way, they were reportedly ambushed, Thursday July 23, by a group of some 200 men, mostly macoutes, who were armed with guns, machetes and picks. The macoutes allegedly also went to the local hospital where they killed the wounded. This cycle of violence lasted from July 24-26. Of the five persons arrested following the massacre, reportedly none were macoutes. The military did arrest members of Tet Ansam, including Jean-Louis Fatine, the group's coordinator.

The Governmental Investigative Commission, comprised of six high level civil servants and a military legal advisor, on August 29, 1987, announced the results of their investigation regarding the death of the 255 persons which occurred during the conflict in the region near Jean Rabel. Pursuant to this Governmental Commission, two thousand peasant members of different Catholic community groups had killed dozens of peasants and burned their homes, citing the "unbridled intolerance of such peasants." This Governmental Commission also impugned the failure of the civilian and military authorities and underscored the responsibility "and the negligence of the local judicial authorities, the police errors and the responsibility of the State, which did not carry out its mission." It should be added that this Governmental Commission recommended, however, that a judicial investigation be carried out to investigate the public declarations of Mr. Nicole Poitevien, a landowner of the Jean Rabel region, who claimed to have had "1,042 Communists killed."

On July 24, 1987 the C.N.G., in an attempt to stop 4 weeks of violent anti-government protests and demonstrations, issued a decree requiring that demonstrators obtain a 72-hour prior authorization for a demonstration and that the organizers of the strikes be identified.

Following the Jean Rabel massacre, the group of 57 called upon its members to demonstrate against the tonton macoutes and the C.N.G. Bishop Romelus called upon the C.N.G. to resign and to turn over power to a government which respects the Constitution.

Following weeks of strikes intended to bring down the C.N.G., the Government finally promulgated the Electoral Law on August 10, 1987, and promised the CEP the finances required in its budget. November 29 was

set as the date for the presidential and legislative elections, but no date was set for municipal and communal elections. The demands for the C.N.G.'s departure continued and as of the date of the approval of this Report, it is still not known whether or not elections will be held in Haiti next November. The Commission, nevertheless, considers that there are serious difficulties as regards the holding of elections in the generalized climate of violence prevailing in Haiti.

The right to life

As regards violations of the right to life which have taken place since the approval of the Commission's last Annual Report, hundreds of persons have died at the hands of agents of the armed forces since June 29, 1987. In addition, hundreds of persons have been wounded. Information from the Governmental Investigative Commission gave the final figure of 255 dead in Jean Rabel. For its part, the Haitian press has recently reported that the appearance of cadavers on the streets of Port-au-Prince has become practically a routine occurrence. The Commission finds that Haiti is currently living under a generalized state of violence.

The climate of violence is manifested in the fact that the population of Port-au-Prince does not go out on the street after 9.00 p.m. at night. Both persons and vehicles are the subject of attack, especially in the popular neighborhoods such as Bolosse, Cité Soleil and Bel'Air in the capital. For example, on the morning of September 2, 1987 the bodies of Rony Ambroise and Frequenz Charles were found machine-gunned. An eyewitness declared that they had been taken from their homes by the police during the night, killed and their bodies dumped on the road leading to the airport. The Commission has been informed that the appearance of dead bodies on the streets of Port-au-Prince has become a daily spectacle.

This climate of violence has also affected the political panorama of the country. Whereas the elections are scheduled for November, no candidate dares to organize an electoral campaign and travel to the provinces since Louis Eugene Athis was killed during a political meeting at the beginning of August.

On August 3, 1987 Louis Eugene Athis, 46 years of age, the founder and general coordinator of the Democratic Movement for the Liberation of Haiti (MODELH) was assassinated together with two of his companions, Mr. Oscar Dorgevil and Mr. Francois Jean. Athis had travelled to Leogane, a town 20 miles west of Port-au-Prince, in order to hold a political meeting. A group of persons armed with machetes, sticks and stones, stoned and hacked them to death accusing them of being communists. An additional companion, Dominique Mercena, was beaten on the head, arms and left leg, escaped and was able to bear witness to the events. The Commission learned that the cadavers of Athis and his companions were

doused with gasoline and burned. Athis, who had founded his party in 1964 in the Dominican Republic, was an active defender of the rights of the Haitian "braceros" who travel to that country to cut cane. Athis was also one of the founders of the democratic center, which is made up of other important presidential candidates such as Dejoie, Manigat and Bazin. His killing can be interpreted as a signal directed to the politicians in Haiti and it has had the result that no candidate is currently travelling in a campaign for votes.

As regards acts of violence imputed to governmental authorities the Commission has received, in general, information from the Haitian Government, exculpating its agents from responsibility. The conviction and sentencing of the military officer Robes Metellus for the killing of a transport worker, Jules Louis, is a notable exception to the above. But it should be stated that the transport workers staged a 5 day strike in November 1986 to guarantee that Metellus was put on trial.

Other Rights and Freedoms

As regards the right to personal freedom, it should be pointed out that many arrests have been taking place in Haiti due to the growing political unrest. The Commission has received unconfirmed information that approximately 500 persons are presently in detention as a result of the disturbances during the past two months.

During the Commission's on-site visit it received testimony from members of the KID (Komite Inite Demokratik), the Committee for Democratic Unity, that Jean-Paul Duperval and Jose Sinai, both members of the KID, had been arrested on October 17 when they announced that they were going on a hunger strike to protest against the conditions in which the elections for the Constituent Assembly were to take place on October 19, 1986. Both were detained in Cassernes Dessalines and released the day after the elections.

The military government has relied on a policy of widespread, but, in general, short-term arrests to intimidate the general population, but in particular, those persons whom it considers to be "agitators" and "subversives." The armed forces will enter a home or workplace, without a warrant, search the premises and threaten the individuals present if it does not arrest them.

Some individuals, especially in the provinces, will be arrested and detained for several weeks, without a warrant, without notification of their families, wihout any minimum guarantees of due process, and will then be released without charges. Some persons are released from jail only if they have the money to buy their freedom.

The practice of arbitrary detentions is of particular concern to the Commission. As the Commission stated in a letter dated March 23, 1987 to the Minister of Foreign Affairs, Col. Herard Abraham:

> The Commission is concerned, specifically, with the extent to which fundamental human rights, violated systematically in the past, are under attack in the present and have not been redressed as regards the past. We refer to the right of every one to be free from the danger of arbitrary arrest and disappearance, the right to due process of law, the right to a fair trial and the right to liberty and freedom from mistreatment while in detention. The complaints received by the Commission as regards the "disappearances" of Charlot Jacquelin and Vladimir David have regrettably been dismissed by the governmental authorities who have failed to initiate serious inquiries as regards the fate of these two individuals. The Commission recommends that the Government of Haiti instruct the responsible authorities to undertake a credible investigation in each of these two cases.

During the Commission's on-site visit to Haiti in January 1987 it visited the detention centers Fort Dimanche and the National Penitentiary. The Commission interviewed detainees who had been beaten, received no medical care, were starving since they had received no food and had been locked up incommunicado for months at a time, having had no contact with a lawyer or judge, etc.

The Commission also interviewed female detainees in the National Penitentiary. The Commander stated that there were two detainees who had been sentenced who were presently in detention. One female detainee, when questioned about the conditions in the prison stated that she could not respond to that question because it would appear as criticism and she did not want to rot in prison. Another female detainee, the mother of seven children stated that she had spent three months in detention in Fort Dimanche for a murder that she claims she did not commit, but that she did not have the money to pay a lawyer. After Fort Dimanche she spent two months in Recherches Criminelles before being transferred to the National Penitentiary. She responded that she was not mistreated in Fort Dimanche, except that she did not receive anything to eat. It was not until she was transferred to the Penitentiary that she had been given food but the food made her sick. All the detainees stated that they receive no visits, many claim to have no clothes, and all complained about the food. Most had never been brought before a judge or gone through any semblance of judicial process. Some of the detainees claimed that they had been badly beaten.

With respect to these rights, the Commission, in its March 1987 letter to Col. Abraham stated that:

> The mistreatment of prisoners and detainees is an abominable practice which must be quickly and definitively eliminated. The testimony received from detainees in Fort Dimanche and the National Penitentiary confirms that

detention commences with a beating, sometimes to the point of requiring medical attention, that detainees do not receive such medical attention, that in, general, they receive food once a day or not at all, most detainees suffer severe weight loss, they receive no visits, have no access to counsel, are not brought before a judge, and except on very rare occasions, they do not leave their cells. The case of Jean Gibson Narcisse, whom the Commission interviewed in Fort Dimanche, is of particular concern to the Commission and we wish to receive a full report as to the medical and legal attention he has received. The Commission recommends further that the Government maintain a central registry of the names of detainees and the places where they are detained.

As regards freedom of expression, during the Commission's on-site visit to Haiti, the Commission noted the improvement in the situation of the freedom of the press. During the crisis, beginning in June 1987, however, this situation began to deteriorate.

On July 29, 1987 the Haitian Association of Journalists protested the increasing violence against the press and in the country, following the machinegun strafing of six of the principal private and religious radio stations in Port-au-Prince, specifically, Radio Antilles International, Radio Metrople, Radio Haiti-Inter, Radio Cacique, Radio Caribe, Radio Soleil (of the Catholic Church). The Association of Haitian Journalists requested the Commission to return to Haiti and to conduct an on-site investigation of these recent attacks upon the press.

As regards freedom of residence and movement, an issue of recurring concern is the attempt of the military government to deprive certain citizens, who spent many years in exile during the Duvalier dictatorship, of their political rights and of the possibility of recuperating their Haitian nationality.

The C.N.G. issued expulsion orders and has, in fact, impeded the return of one individual who claims that he had attempted to regain his Haitian nationality. The C.N.G. also attempted to impede the functioning of the Electoral Council, by disqualifying two of its members, after the work of the Council had been completed. Fortunately, this mini-crisis was swiftly resolved by the appointment of two qualified replacements.

On July 31, the C.N.G. ordered the expulsion of one of the leaders of the Group of 57, Daniel Narcisse, who has double nationality, Haitian and Canadian. The C.N.G. accused him, a "foreigner," of interfering in the internal affairs of the country and of being a subversive. Narcisse declared that he had done everything required of him by law in order to recover his Haitian nationality pursuant to the new Constitution.

As regards the right to move about freely, in spite of the fact that Haiti has not declared a state of emergency or decreed a curfew, it is necessary to point out that the Haitian people are being subjected to a state of systematic terror due to the constant acts of violence taking place. Nevertheless, as the case of the attack on the group of priests following the celebration of a mass near the town of St. Marc illustrates, this violence does not exclude from its targets religious workers, foreigners or diplomats.

In effect, on August 23, 1987 a convoy of five automobiles, which was transporting priests and nuns from the town of St. Marc, was stopped at a military checkpoint where various soldiers proceeded to inspect it. Shortly thereafter they were permitted to continue on their way to Port-au-Prince, when they were again stopped by approximately 40 armed civilians who proceeded to attack the religious in the first automobile with stones, machetes and guns. Three priests were wounded. The military authorities who were a hundred feet away refused to get involved and a Lieutenant Luberisse was identified as one of the attackers. The C.N.G. has condemned the attack, but to the present, it has not ordered an investigation of the facts nor punishment of those responsible.

CONCLUSION

In conclusion, whereas the constitutional conflict which gave rise to the present crisis has been resolved with the publication of the Electoral Law and the C.N.G.'s recognition of the Electoral Council's autonomy, the generalized climate of violence continues. This violence results, in part, due to the failure of the authorities to control the police, the armed forces, and also its apparent unwillingness or inability to disarm the former members of the Volunteeers of National Security, the so-called tonton macoutes.

As Pope John Paul II stated during his historic visit to Haiti in 1983: "Things must change here;" in fact, things began to change in Haiti when Duvalier departed for France on February 7, 1986.

The C.N.G. which replaced Duvalier and the origin of which still has not been satisfactorily explained to the Haitian people, assumed power ostensibly with the sole purpose of leading Haiti to democracy by means of free and fair elections.

The true mandate of the C.N.G., however, appeared to be the prevention of a civil war in Haiti. In the early months of its rule, the C.N.G. facilitated the departure of Duvalierist collaborators who would otherwise have been made to stand trial for their crimes or would have been killed. The failure of the C.N.G. to put the old order behind it and its efforts on its behalf cost it the resignation of its only independent civilian member. The C.N.G., one month after assuming power became, already in March 1986 a military, not a civilian-military Junta.

The brief attempts to satisfy the Haitian people's demand for justice, and "deshoukaj" ("deduvalierization") produced a few show trials but these trials fell far short of an authentic confrontation and repudiation of the criminal acts of the past. The hated organization Volunteers of National Security was "officially" disbanded but no serious attempts were made to effectively disarm these potentially dangerous, armed civilians. It should be remembered that in Duvalier's Haiti no civilian was permitted to bear arms.

In spite of its "provisional" nature, the C.N.G. delayed the announcement of an electoral timetable until June 1986, when Lt. Gen. Namphy announced that the country was on the brink of "anarchy," due to the on-going protest demonstrations against his Government.

Without a mandate from the Haitian people, the C.N.G. took it upon itself to create a Constituent Assembly whose purpose would be the preparation of a new Haitian Constitution. Not having prepared the country for such an undertaking, reportedly less than 5 percent of the population voted for the members of this important Assembly.

As a result of the freedom of the press and the political activity of the members of the media in informing the population of the progress of the work on this Constitution, a dialogue was established between the people and the Assembly and suggested guarantees to prevent a Duvalierist regime from returning to power were written into the new Constitution. When the people were informed in March 1987 that the Constitution signified a repudiation of their Duvalierist past, they voted overwhelmingly in favor of it.

The new Constitution deprived the now discredited C.N.G. with its only reason for being: the organization and control of the elections. These elections were now in the hands of the Provisional Electoral Council (CEP) an autonomous body comprised of representatives of different sectors of Haitian society.

The C.N.G. attempted to undermine the independence and authority of the CEP, and consequently brought upon itself approximately 7 weeks of nationwide strikes and demonstrations, which in the final analysis called for the C.N.G.'s resignation or reorganization.

By the use of power the C.N.G. was able to put an end to the increasingly disruptive strikes. In August, the strikes stopped; however, acts of grotesque violence, such as the hacking to death of the Presidential candidate L.E. Athis in Leogane and the massacre of hundreds of peasants in Jean Rabel, recalled the terror tactics of Francois Duvalier's henchmen. The attacks on Athis and on the group of priests at the outskirts of St. Marc, reportedly were attacks againt "Communists." Neither Athis nor the priests were communists, but this persecution of opponents to the C.N.G., labeling them Communists, is reminiscent of the tactics of Francois Duvalier's regime.

The concern expressed by the President of the Commission during the Commission's on site visit regarding the democratization process has been subsequently confirmed by recent events. At that time, the President stated that he feared that the democratization process might be derailed due to fundamental weaknesses and contradictions which had their origin in the history of the repression and the dictatorship. The task which is before the Haitian people and the Provisional Electoral Council is how to bring the electoral process back on track. Given the generalized climate of violence in Haiti since August 1987, it will not be easy to re-establish a climate of normality which will permit the holding of elections. For that reason, and recognizing that power is in the hands of the National Council of Government, the Commission calls on the C.N.G. to take all the necessary measures in order to facilitate the Provisional Electoral Council's task of organizing and carrying out the elections so that the Haitian people can elect a democratic government which will be ready to assume power on February 7, 1988.

NICARAGUA

The Commission has continued to observe with special attention developments in the human rights situation in Nicaragua during the period of this report. The following presentation covers the most important aspects of this review and updates the section that was included on this country in the annual report for the preceding period. Thus the Commission is continuing the review it began in 1981 with the publication of its report on the status of human rights in Nicaragua, which was prepared after an on site visit to the country at the invitation of the Nicaraguan Government, with its 1984 report on the results of the friendly solution procedure in the case of the Miskito Indians, and with the sections on Nicaragua in the annual reports from 1982 to date.

Before getting into the developments in the human rights situation, during the period of this report, the Commission must report that on September 3, 1987, the Nicaraguan Government extended an invitation for a Commission delegation to visit that country to review the status of several individual cases being processed. The Commission wishes to express its appreciation to the Nicaraguan Government for that invitation, which it considers to be of great importance.

a. The New Political Constitution of the Republic of Nicaragua

On January 9, 1987, the Official Gazette of Nicaragua published the new Political Constitution. This is an event of particular importance, so the Commission will deal with it first. The importance of the Constitution is that it institutionalizes the exercise of power in Nicaragua after the replacement of the previous system. It also defines human rights and the guarantees established to ensure their exercise and sets the limits on their exercise when a state of emergency is decreed.

It also includes some important issues on which the Commission reported in the past, such as the situation in the Atlantic Coast Communities.

The Political Constitution of the Republic of Nicaragua, which replaces the Statute on the Rights and Guarantees of Nicaraguans of August 21, 1979, consists of 195 permanent articles and 7 final and transitional provisions. It contains a preamble and eleven titles, which cover the basic principles governing the Nicaraguan political and legal systems; the structure of the State; the nationality of Nicaraguans; the rights, duties and guarantees of the Nicaraguan people, a title that is divided into chapters covering individual rights, political rights, social rights, the rights of the family, labor rights, and the rights of the Atlantic Coast Communities; national defense; the national economy; agrarian reform and public finances; education and culture; the organization of the State, which includes consideration of the general principles, the legislative branch, the executive branch, the judicial branch, and the electoral branch; the administrative division of the country, the supremacy of the constitution; its amendment and the constitutional laws, which are the Electoral Law, the Emergency Law, and the Law of amparo. At the end of the constitution are the transitional and final provisions.

Regarding the basic principles, set forth in Title I of the Constitution, is noteworthy: "the State guarantees the existence of political pluralism, a mixed economy and non-alignment." On the area of interest to the Commission, Article 5 continues:

> Political pluralism ensures the existence and participation of all political organizations in the economic, political and social affairs of the country, without ideological restrictions, except for those who seek a return to the past or advocate the establishment of a similar political system.
>
> The mixed economy ensures the existence of different forms of property: public, private, associative, cooperative and communal; all of these forms of priority must serve the best interests of the nation and contribute to the creation of wealth to meet the needs of the country and its inhabitants.

Title III of the Constitution deals with the right to a nationality, and it is important to note that Nicaraguan nationality can be lost only through the voluntary adoption of another nationality, provided the adoption of dual nationality is not possible. The Constitution grants all persons originally from Central America, the right to chose Nicaraguan nationality, without having to renounce their previous nationality. Nationality cannot be taken away as a punishment.

Rights are defined in detail in Articles 23 to 91 inclusive. It should be noted that, following modern trends in this field, the Nicaraguan Constitution covers civil and political rights as well as economic, social and cultural rights, and also includes a special chapter on the rights of the Atlantic coast communities.

The right to life is defined in Article 23, and it is particularly appropriate to note that the Constitution maintains the abolition of the death penalty. Personal freedom, personal security and individual access to legal redress are rights recognized in Article 25, while Article 26 covers the right to private property--personal and family--the inviolability of the home and of correspondence and respect for the honor and reputation of persons.

Article 27 sets forth the principle of equality before the law, while Article 29 recognizes the right of freedom of conscience and of religion. Article 30 deals with the right of freedom of expression, and Article 31 with the right of residence and movement, with Article 32 recognizing the principle that no one is obligated to do what is not mandated by or barred from doing what is not prohibited by law. The right to personal freedom is recognized in Article 33, which also defines the rights of imprisoned persons and the conditions under which they are to be detained.

The right to due process is defined and regulated by part of Article 34, which consists of ten subparagraphs. Article 36 recognizes the right to physical, psychological and moral integrity, and Article 37 sets forth the principle that the penalty shall not extend beyond the person accused. Article 38 refers to the nonretroactivity of criminal law, except when it favors the accused, and Article 39 establishes the principles on which the penitentiary system is based. The prohibition of slavery, involuntary servitude, and debtors' prisons is covered in Articles 40 and 41, while Article 42 deals with asylum and the limits within which that institution of international law is recognized. Article 43 refers to extradition. Article 44 recognizes the right to property.

Political rights are defined and regulated in Articles 47 to 55. A citizen becomes eligible to vote at 16 years of age (Article 47), and the right of citizens to elect and be elected in periodic elections is recognized in Article 51. Articles 132 and 146 refer to the universal, equal, direct, free and secret vote by which representatives to the National Assembly and the President and Vice President of the Republic are elected.

The right to organize, in both social associations and political parties, is also recognized in the chapter on political rights (Articles 49 and 55, respectively). Also included are the right to petition (Article 52), the right to peaceful gathering (Article 53), and the right to assemble, demonstrate and mobilize publicly (Article 54).

It should be understood that the exercise of the political rights in this brief listing are limited by the above trasncribed Article 5, according to which the principle of political pluralism does not apply to ideological movements "that seek to return to the past or advocate the establishment of a similar political system." The Commission has repeatedly pointed out that the Declaration of Santiago, Chile of 1959 is in force, which states that "the systematic use of political banishment is contrary to the American democratic system."

Articles 56 to 69 define what the Nicaraguan Constitution calls social rights, which includes the right to work, education, culture, health care, a healthy environment, social security, adequate nutrition, housing, sports, physical education, recreation and diversion. The chapter on social rights also includes some operational aspects such as the State's obligation to grant special care to those affected in fighting for the nation, the adoption of health measures, with respect to the right to health care, and the establishment of special programs for the rehabilitation, inclusion in society and job placement of the handicapped.

Article 66 refers to the right "of truthful information," and Article 67 specifies that the right to inform "is a social responsibility," which "cannot be subject to censorship, but may be subject to post facto liabilities established by law." Article 68 is connected with the articles mentioned, and indicates that "the means of mass communication are at the service of national interests," without specifying who defines those interests and to what extent the use of the mass media may conflict with those who define the "national interests."

Article 69 recognizes the right to express religious beliefs in public or in private through "worship, practices and teaching." That article provides that religious beliefs may not be invoked to evade obedience to the law.

Articles 70 to 79 deal with the rights of the family, and include various aspects relating to the family, which is recognized as the "fundamental nucleus of society." These articles include consideration of aspects such as family relations and the establishment of welfare facilities to care for minors and the elderly and to provide maternity care.

Labor rights are dealt with in Articles 80 to 88. These articles reiterate the right to work as a basic principle, and provide that the State shall strive for full employment (Article 80) and sets forth the right of workers to participate in management of their enterprises (Article 81). The Nicaraguan Constitution also covers working conditions, devoting seven subparagraphs of Article 82 to that subject. It also recognizes the right to strike (Article 83).

Article 84 prohibits child labor, while Article 85 recognizes the right of workers to cultural, scientific and technical development, as

well as the right to select their occupation and work place (Article 86). Article 87 establishes that "Full labor union freedom exists in Nicaragua," and recognizes union autonomy and respect for the legal rights or organized labor. It also recognizes the rights of workers to enter into individual contracts and collective bargaining agreements with their employers.

The title on Nicaraguan rights concludes with a chapter defining the rights of the Atlantic Coast Communities. After indicating that these communities "are an indivisible," in Articles 89 and 90, "parts of the Nicaraguan people," these articles provide that they "have the right to preserve and develop their cultural identities within the framework of national unity, to be granted their own forms of social organization and to administer their local affairs according to their traditions."

The Constitution also includes recognition by the State of "communal forms of ownership land of the Communities ..." and "the enjoyment, use and benefit of waters and forests of their communal lands." The Constitution also recognizes the right of communities "to the free expression and preservation of their languages, art and culture," with respect to which it is interesting to point out that Article 121, dealing with education, provides that these communities "have access in their region to education in their native language ..."

It should be noted that the Constitution deals in Title VII with the topic of education and culture, which is regarded as one of the economic, social and cultural rights. The topic of education and culture is also related to the transmission of values, and through that means, to the development and promotion of human rights, among the population, and with the topic of teaching by private persons or groups.

The various aspects of education and culture are dealt with by the Constitution in Articles 116 to 127. The right to access to education is established in Article 121, while the values that guide the educational process are set forth in Article 117, which states that "it is based on our national values, on knowledge of our history, of reality, of the national and universal culture, and on the continual development of science and technology; it cultivates the values of the new Nicaraguan, in accord with the principles established in this Constitution."

Private education is recognized in Article 123, and is subject to the provisions of the Constitution. Religious education is recognized in Article 124, which also establishes the principle of secular instruction. It is also important to note that Article 127 establishes the principle that "Artistic and cultural creation is completely unrestricted."

Title VIII of the Constitution covers the organization of the State. It is composed of the legislative, executive, judicial and electoral branches, which are independent of one another (Article 129). The Nicaraguan Constitution adopts a unicameral system for the legislative

branch, and establishes a National Assembly with 90 representatives elected by "universal, equal, direct, free and secret vote," as has already been pointed out. It is important to note that a representative to the National Assembly need be only 21 years of age. Representatives serve a six years term.

The significant functions of the National Assembly (Article 138) in the Commission's view include: decree amnesty and pardons, as well as commutate or reduce sentences (subparagraph 3); grant and cancel legal status to civil or religious entities (subparagraph 5); elect Supreme Court justices and regular and alternate judges of the Supreme Electoral Council, from slates of candidates proposed by the President (subparagraph 7); elect the Controller General of the Republic, also from a slate of candidates proposed by the President (subparagraph 8) and consider and acknowledge resignations or dismissals of Supreme Court justices, judges of the Supreme Electoral Council, or the Controller General of the Republic (subparagraph 10). Note also that the National Assembly has the power, under Article 150, subparagraph 9, to ratify the decree by which the President imposes a state of emergency.

The makeup and duties of the executive branch are covered by the Nicaraguan Constitution in Chapter III of Title VIII (Articles 144 to 153). Executive power is exercised by the President of the Republic, who is the chief of state, head of government and commander in chief of the defense and security forces of the nation. The executive branch also includes a vice president, who performs the duties delegated by the president, whom he replaces in case of the president's temporary or permanent absence (Article 145).

As was pointed out, the president and the vice president are elected by "universal, equal, direct, free and secret vote for a six years term" (Article 146), and must be 25 years of age. The Constitution does not mention re-election of the president.

The functions of the executive branch are mainly set forth in Article 150. The most important include the power to decree a state of emergency, with ratification by the National Assembly (subparagraph 9); and to propose slates of candidates to the National Assembly for the election of justices of the Supreme Court, judges of the Supreme Electoral Council and the Controller General of the Republic.

The judicial branch is regulated by Chapter V of Title VIII of the Constitution (Articles 158 to 167), and is composed of the Courts of Justice, whose highest body is the Supreme Court. Military jurisdiction is recognized, and its exercise is regulated by law (Article 159). Under the Constitution, the administration of justice "guarantees the principle of legality; protects and guards human rights through enforcement of the law ..."

Article 162 provides that judges shall serve six-year terms, which appears to indicate that judges are not permanent. If that is the case, the Commission finds it highly undesirable to have a judiciary that must render justice while taking into consideration that doing so may lead to their not being re-elected. As was pointed out, Supreme Court justices are elected by the National Assembly from slates of candidates submitted by the President, who in turn selects the Chief Justice of the Supreme Court (Article 163). As can be seen, this is a particularly weak and vulnerable system owing to its extreme dependence on the executive branch.

It should be noted also that Article 199 (transitional) stipulates that special courts shall continue to function "until such time as they come under the jurisdiction of the judicial branch," so that appointment of their members and their procedures shall be determined by the laws that established them. The Commission must reiterate the grave criticisms that these special courts have received owing to the lack of gurantees of the right to a fair trial and due process, which their structure and functions represent.

Title VIII concludes with Chapter VI on the electoral branch, which is regulated by Articles 168 to 174, and is responsible for the "organization, management and oversight of elections, plebiscites and referendums" (Article 168). The electoral branch is composed of the Supreme Electoral Council and other subordinate electoral bodies. This Council is composed of five officials selected by the National Assembly from a slate of candidates submitted by the President. The National Assembly designates the President of the Supreme Electoral Council.

One feature of particular importance is covered by the Nicaraguan Constitution in Title X, Chapter I, in which Articles 185 and 186 regulate the decreeing and imposition of a state of emergency. The first of these articles deals with the procedures stipulated by the Constitution to decree a state of emergency; the second lists the constitutionally recognized rights that may not be suspended.

Under Article 185, the President of the Republic may suspend rights and guarantees throughout the country or in certain regions of it "in case of war, or when demanded by the security of the nation, economic conditions, or a national disaster." This article also stipulates that a state of emergency shall be in force for a specific time, which can be extended, and leaves it up to the regular Emergency Law to stipulate the various forms of the state of emergency. As was pointed out, Article 150, subparagraph 9, gives the National Assembly the power to ratify an emergency decree "within 45 days."

Article 186 lists the rights that may not be suspended under a state of emergency. This list coincides with the one set forth in the American Convention on Human Rights in Article 27.2, except for an important feature, which has been repeatedly pointed out by the Commission: suspension of the remedy of amparo or habeas corpus.

In fact, Article 45, which institutes the remedy of exhibición personal (order to bring the accused before the court) or of amparo (enforcement of constitutional rights), is not included in the list of Article 186, and the Commission considers that this is an unfortunate omission because the Commission has repeatedly called the Governments' attention to the need for maintaining these remedies in force, even when states of emergency are imposed, because these remedies are designed to safeguard the right to humane treatment, which cannot be suspended in any way.

Taking into consideration the serious situation that occur during the states of emergency, with the suspension of the remedy of amparo or habeas corpus, the Commission submitted to the Inter-American Court of Human Rights an advisory opinion on this subject. On January 30, 1987, the Court pointed out, in an advisory opinion of particular important, that:

> From what has been said before, it follows that writs of habeas corpus and of amparo are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27.2, and they serve, moreover, to preserve legality in a democratic society.
>
> The Court must also observe that the Constitutions and legal systems of the States Parties that authorize, expressly or by implication, the suspension of the legal remedies of habeas corpus or of "amparo" in emergency situations cannot be deemed to be compatible with the international obligations imposed on these States by the Convention.

The Commission considers it necessary to point out that the Nicaraguan Constitution in Article 46 recognizes the full observance of the rights set forth in the American Convention on Human Rights, of which it is a State party, a situation that gives rise to a serious contradiction. It should be realized, in reviewing this delicate matter, that the new Constitution provides for the drafting of a constitutional law on amparo, designed to regulate the exercise of this important remedy. The Commission feels that discussion of this law, which is a constitutional law that will regulate the state of emergency, will provide an appropriate occasion to eliminate the grave contradiction between the Nicaraguan Constitution and the system of the American Convention, of suspending the remedy of amparo or habeas corpus during a state of emergency.

b. The State of Emergency

During the period of this report, the state of emergency remained in effect. It was lifted briefly when the new Constitution came into force on January 9, 1987, under which the President, in the exercise of his uthority, renewed it by Decree 245, of that date. When the President's

decree was sent to the National Assembly for ratification, it was amended to bring it in line with the system provided for in the new Constitution. The National Assembly Decree is number 250, and is dated February 23, 1987.

Pursuant to the procedure stipulated by the American Convention on Human Rights, the Foreign Minister, Víctor Hugo Tinoco, informed the Secretary General of the Organization of American States that the state of emergency would be renewed for one year starting February 28, 1987, because of "the persistent threats to the sovereignty and territorial integrity of Nicaragua . . . (as) a consequence of a war of aggression ... being waged for the purpose of overthrowing the legitimately constituted government of Nicaragua."

In view of these circumstances, the Nicaraguan Government reports that it has suspended the exercise of the right to the inviolability of the home, correspondence and communications (Article 11, paragraph 2), while paragraph 1 on respect for honor and recognition of dignity and paragraph 3 on protection against attacks, to honor and dignity remain. Also suspended is exercise of the right to freedom of expression set for in subparagraphs 1 and 2 of the article 13, which defines that right and prohibits censorship; subparagraphs 3 to 5 of that article remain. Also suspended is freedom of movement and residence set forth in Article 22, subparagraphs 1 and 2 referring to the right to move about in the country and the right to leave it; the right not to be expelled from the national territory nor to be deprived of the right to enter it (subparagraph 5) remain.

Likewise suspended is the right to personal liberty set forth in Article 7 of the Convention, while the provisions on promptly notifying detained persons of the reasons for their detention and the charges against them (subparagraph 4) and the prohibition of imprisonment for debt remain. Subparagraph 6 of Article 7 serves to maintain the exercise of the right of amparo, and the Nicaraguan Government's communication states that this remedy is suspended "only in relation to the rights and guarantees established in the provisions that have been suspended by this present state of emergency."

Finally, the communication reports on the suspension of the exercise of the right to judicial protection (Article 25 of the Convention), which serves as a basis for the remedies of amparo or habeas corpus, and points out that this suspension refers "only to those acts that threaten the security of the nation and public order." What was stated in the section reviewing the new Nicaraguan Constitution, regarding the possibility of suspending the exercise of the remedies of amparo or habeas corpus is sufficiently clear and explicit that no additional consideration of this point is required. It is enough to point out that such suspension is in conflict with the provisions of Article 27.2 of the American Convention, of which Nicaragua is a State party, and therefore that the suspension should be lifted.

The Commission dealt extensively in its last annual report with the topic of the state of emergency in Nicaragua. It is enough to point out now that the possibility of taking this type of special measure is covered in Article 27.1 of the American Convention on Human Rights, which states that it may be taken "in time of war, public danger or other emergency that threatens the independence of security of a State Party." Subparagraph 1 of this article also provides that such measures may be taken "to the extent and for the period of time strictly required by the exigencies of the situation."

Facts that are a matter of public knowledge show, in the Commission's view, that the Nicaraguan Government is facing a threat to State security and that such a threat now exists. The list of rights whose exercise is suspended, according to the communication transcribed above, is in keeping with the provisions of Article 27.2, except with regard to the suspension of the remedy of amparo or habeas corpus. In this connection, it should be pointed out that the Commission has noted in its previous annual report the statements of high officials of the Nicaraguan Government that they want to lift the state of emergency once the causes that gave rise to it have been eliminated. These causes, in the Nicaraguan Government's view, primarily originated in external support to irregular armed groups fighting to overthrow the government. The Commission must place on record that these statements have been repeated during the period of this report, and to them have been added the commitment assumed in the Esquipulas II Presidential Agreement, signed in Guatemala City on August 7, 1987.

Specifically, that article states that 90 days after signature of the document, the measures that the presidents have decided to adopt will enter into effect simultaneously: dialogue with the unarmed opposition, amnesty for armed opposition forces, cease fire, discontinuance of external aid to armed groups, lifting of the state of emergency, and consequently, restoration of civil and political liberties, as well as nonuse of the territory of the country to attack other States.

As can be seen, many aspects are connected directly with the exercise of human rights, so the IACHR will continue to observe carefully the status of these rights in Nicaragua in light of these new commitments. In this connection, the Commission must point out that the National Commission for Reconciliation has already been installed, which is presided over by Cardinal Obando y Bravo, with the Vice President of Nicaragua, Sergio Ramírez Mercado serving as Vice President of the Commission. In a measure connected with the new situation, according to Government spokesmen, the Nicaraguan Government lifted the ban on re-entry into the country of Monsignor Juan Pablo Vega, Bishop of Juigalpa, and Monsignor Bismark Carballo, spokesman of the Archiepicopal Curia of Managua.

The Commission hopes that fulfillment of the agreements will lead to a substantial improvement in the human rights situation in Nicaragua, because during the period of this report, the Commission has continued to

receive reports that during the state of emergency, and sometimes exceeding its provisions, the Government of Nicaragua has proceeded in violation of the American Convention on Human Rights, of which it is a State party. The following summarizes the reports received by the IACHR.

Right to life

During the period of this report, the Commission has received reports of summary executions attributed to members of the Sandinista Popular Army. The events reported have occurred in the battle areas and have involved persons connected with armed groups fighting against the Nicaraguan Government. These reports are being processed in accordance with the Commission's regulations, and it will in due course take the decisions it regards as appropriate.

Personal liberty and due process

One topic that has caused deep concern to the IACHR is personal liberty, which is also connected with the rights to due process, humane treatment, and the situation in the jails. The Commission has extensively covered the suspension of the remedy of amparo or habeas corpus during the state of emergency. It is enough to repeat here that the absence of this remedy causes a number of severe problems regarding the rights to liberty and personal security.

Specifically, the Commission has received repeated reports that persons suspected of ties with armed groups fighting the Nicaraguan Government have been arrested without the authorities' abiding by the requirements of the law on detentions. In numerous cases, family members are not informed of the detention or of the place where their relatives are confined, which causes them great anguish. Moreover, this non recognition of the arrest, in addition creates conditions in which law enforcement authorities are accused of committing acts of torture during the detention. The validity of such presumptions is increased by the fact that these persons may be kept for very long periods during which no independent organization that can determine the status of the prisoners has access to the prisons. This picture is completed with the lack of the remedy of habeas corpus, which makes it impossible for the judicial system itself to monitor the freedom and security of prisoners. The Commission regards this situation to be of extreme concern and hopes that steps being taken under the peace agreement will help to restore fully the exercise of these rights.

Another topic connected with the right of personal liberty is the situation in the jails. During the period of this report, a number of figures have been provided on the jail population in Nicaragua and the origin of the prisoners' deprivation of liberty. According to Government National Commission for the Promotion and Protection of Human Rights, there are 9,500 prisoners in Nicaragua, of whom 2300 are former members of

the National Guard, 1,500 are in prison for actions against State security, and the rest are common criminals.

The Nicaraguan Permanent Commission on Human Rights, an independent agency, considers that there are now "no less than 7,000 political prisoners," of whom 2,500 are serving sentences for violation of the State Security Law, 2,300 have been tried and sentenced by the Popular Anti-Somocista Courts and 2,200 are awaiting trial by those courts. The Permanent Commission estimates that there are also "from 2,300 to 2,500 former National Guardsmen," serving sentences imposed by the Special Courts of Justice.

Also during the period of this report and in connection with the right to personal freedom and the situation in the jails, the Commission has been receiving reports on a number of serious situations in the Tipitapa Prison, affecting a group of prisoners, including Elías Margarito Alemán Mejía, Adán Rugama Suazo, Jorge Ramírez Zelaya and Wilfredo Gutiérrez Guido. The Commission is processing the last of these reports on acts of violence against nine prisoners, including those named above, several of whom suffered injuries and wounds, in some cases severe.

The situation described as regards personal liberty is even more complicated because of the deterioration in the exercise of the right to a fair trial and to due process. In fact, the existence of special courts, the Popular Anti-Somocista Courts, has been a cause of continuous concern for the IACHR, which has repeatedly pointed out the serious objections to them. Organizations defending human rights have estimated that persons arrested for reasons of State security and brought before to these courts are detained an average of eight months for trial. These agencies also state that during that extensive period the prisoners have no access to counsel, and family visits are restricted. These deficiencies, together with those involving these courts' structure, makeup and dependence on the Executive Branch, cause the Commission to deplore the fact that such courts are retained under Article 199 of the new Constitution.

The various problems resulting from the situation in the area of personal liberty, due process and the situation in the jails led, during the period of this report, to the creation of the January 22 Committee of Mothers of Political Prisoners. Several leaders of this organization have reported various kinds of pressure placed on them by the Government.

Right to freedom of expression

During the period of this report, severe restrictions on freedom of expression resulting from the state of emergency have continued. This has led to continued suspension of the La Prensa newspaper and of the Church Weekly (Seminario Iglesia) of the Archiepiscopal Curia of Managua. The Commission also hopes that compliance with the Esquipulas II Presidential Agreement will make it possible to lift the state of emergency, and accordingly authorize broadcasts by Radio Católica.

Right of assembly

During the period of this report, the state of emergency has resulted in limitations on the exercise of this right. Despite that, the Commission must mention that on November 16-23, 1986, the Eucaristic Congress was held in Nicaragua, which was attended by a personal delegate of Pope John Paul II and bishops from various places in Latin America and the United States. Also attending were religious figures such as Mother Teresa of Calcutta, who received authorization to set up a convent of her religious order. The meetings of the Eucaristic Congress took place without difficulties.

It should also be noted that one week after signature of the Peace Plan, on August 15, 1987, the Democratic Coordinator held a ceremony to inaugurate its new facilities in Managua. According to information received by the Commission, the ceremony was attended by a number of prominent persons, including Lino Hernández Trigueros, Executive Secretary of the Permanent Commission on Human Rights, and Alberto Saborío Morales, President of the Bar Association of Managua and Secretary of the Conservative Party. According to the information received, those attending attempted after the inaugural ceremony to initiate a march, which was prohibited by the police because the required authorization had not been obtained.

The refusal of the police and the insistence of those in attendance to hold a demonstration reportedly led to incidents in which Hernandez Trigueros and Alberto Saborío were arrested. Both were sentenced to 30 days in jail by a police examining magistrate under existing police regulations, with the amendments introduced in 1964 by Decree 1030.

The Commission wishes to stress again the urgent need for all Nicaraguans to help tp create favorable conditions to achieve, in the shortest possible time, re-establishment of the rights and guarantees of the democratic system of government, including the right of assembly and public demonstrations.

Freedom of residence and movement

During the period of this report, people continued to be relocated from the areas of armed conflict. Thus, in March and April of this year, 400 families from the Nueva Guinea region were relocated. The Government has maintained that these are preventive measures to protect the civilian population from the fighting. Other observers point out that people are relocated to deprive irregular groups from their social support base.

The repatriation of Miskito Indians who are in Honduras continued during this period, and according to information received by the Commission, persons who had gone to Costa Rica were also returning. The repatriation of Miskito Indians has coincided with the discussion of the

New Law of Autonomy to resolve the problems that emerged in the years 1981-1984. This law comes within the framework of the general provisions of the Constitution, which were described above.

Political rights

During the period of this report, a proposal was made on February 5, 1987 by seven opposition parties: the Independent Liberal Party, the Christian Social Popular Party, the Nicaraguan Christian Social Party, the Conservative Party of Nicaragua, the Constitutionalist Liberal Party, the Social Democratic Party, and the Communist Party of Nicaragua. The proposal was addressed to President Daniel Ortega and dealt with the need to set up a National Peace Commission to achieve a cease fire, amnesty for political crimes and common crimes in connection with them, establishment of an ongoing dialogue to achieve a consensus among Nicaraguans, among other points.

The Commission notes that there are many points of contact between that proposal and the elements of the Peace Plan that was described at the beginning of this chapter. Hence, the IACHR hopes that the measures taken in the immediate future under this Peace Plan may lead to prompt re-establishment of political and civil rights connected with the exercise of representative democracy, which the Commission and the legal instruments of the Americas have regarded as the system that is the best guarantee for the observance of human rights.

SURINAME

The Commission has carried out two on-site observations in Suriname since 1983 and, as a result, has prepared two special reports on the situation of human rights in that country. The first report derived from a complaint lodged with the Commission which urged it to investigate the death of fifteen prominent Surinamese citizens who died at the hands of the military authorities of Suriname. The investigation *in situ* of this case, and the analysis of the state of human rights in general, were carried out from June 20-24, 1983. Thereafter, the Commission approved its "Report on the Situation of Human Rights in Suriname" on October 5, 1983 concluding that high government officials were responsible for the death of these 15 persons.

After conducting a second study *in loco* from June 12 to 17, 1983, the Commission approved its "Second Report on the Situation of Human Rights in Suriname" on October 2, 1985.

In the latter report, the Commission also reiterated to the Government of Suriname the fact that despite the recommendation stated in the first Report to investigate the tragic events of December 8, 1982, the investigation had not been done and the high government officials

responsible for those acts had not been sanctioned. It should be noted that that recommendation has still not been followed.

The Commission has repeatedly insisted to the Government of Suriname the need to establish "as soon as possible a system of representative democracy, which, as stated by the Commission on many occasions, is the soundest guarantee for respect of all human rights contained in the American Declaration of Rights and Duties of Man."

Since that Report was published, the Commission has continued to follow the development of events related to human rights in Suriname.

During the period covered by this Report, a number of important events have taken place related to human rights in Suriname and these will be discussed in the following section.

As indicated in last year's Annual Report during the month of July a guerrilla movement called the Jungle Commando and led by former Sgt. Ronnie Brunswijk emerged. The majority of Brunswijk's followers are Maroons (descendants of escaped African slaves) like himself.

The Surinamese Maroons, called bosnegers in Dutch or Bush Negroes in English, total about 50,000 people and comprise about 12 per cent of Suriname's overall population of some 400,000 persons. (It is estimated that approximately another 200,000 Surinamese citizens have emigrated since independence in 1975, mostly to the Netherlands.)

By November 1986 the Maroon insurrection, particularly in the eastern section of the country between Moengo and the border town of Albina, and south to Brokopondo, had escalated dramatically. Moengo and Albina have now been, by and large, abandoned by their respective inhabitants.

In November of 1986 a state of emergency was declared by the Government in Maroni, Commewijne, Brokopondo, Para, and part of Sipoliwini, covering roughly three-quarters of the country. The state of emergency prohibited the media from reporting on the fighting. The Government also restricted travel on most roads and highways and instituted a curfew from 6:00 p.m. to 5:00 a.m. as of early December.

The armed conflict in Suriname has had an impact on human rights and the Commission has sought to carefully follow it. Thus, during the second half of 1986 the Commission received complaints that Government troops had been attacking Maroon villages, and failing to distinguish between unarmed civilians and guerrillas, killed a number of non-combatants.

In addition, the Commission received reports during the same period of alleged massacres of several Maroon villages including that of Morakondre, District of Marowigne in which a number of persons reportedly died including a child (Case No. 9820). The complaint also alleged that the Army took unarmed prisoners, mainly youths of 16-17 years of age.

Another village in which a massacre allegedly took place was Moengotapoe, the home of Ronnie Brunswijk. One report on loss of life in these raids placed the figure at more than 200 dead civilians during December of 1986.

According to Government statistics there are now 120 male prisoners of war being held in the Fort Zeelandia's two brigs--one known as the Devil. Two of the prisoners are foreigners, one Italian and one Argentine. Furthermore, during the raids the Army allegedly stole 90,000 guilders (US$ 50,000) in cash and much jewelry belonging to the Maroons.

On July 6, 1987 the Government responded claiming that it was the victim of "terrorist activities" of a group whose object is to overthrow the Government. It further claimed that the Army's actions were defensive in nature and taken only after warning the civilian population to leave the area. With regard to claims of civilian deaths, the Government noted that: "Most regrettably, some of the civilian inhabitants did not leave those areas and were caught in the crossfire." On the issue of stolen personal property, the Government's written response was silent.

On December 4, 1986, public meetings were banned under the state of emergency and river transit was curtailed. Two weeks later, in response to the international concern about the situation in Suriname, the then Foreign Minister, Hendrik Herrenberg, declared that public international organizations including the IACHR were welcome to visit Suriname to assess the human rights situation in the country.

At its March, 1987 meeting the Commission, citing Minister Herrenberg's openness, asked the Government's consent to conduct an on-site visit to Suriname and on April 10, in a prompt response, the Government consented to the in loco investigation. The visit has since been scheduled for the week of October 5-9 of this year. It will be the Commission's third on-site to Suriname since 1983 and the IACHR wishes to underscore its recognition of the consent granted by the Government. The Commission attaches the greatest importance to this visit.

One of the principal consequences of the civil unrest in Suriname has been the mass exodus of Maroon and Amerindian refugees into neighboring French Guiana. It is estimated that some 9,000 Surinamese refugees are now living in several camps near St. Laurent in French Guiana. Of these about 8,000 are Maroons and 1,000 are Amerindians. (The Amerindians total about 5,000 in Suriname and comprise about 1.2 per cent of the national population.)

In light of the circumstances that led to their flight from Suriname, the Commission has asked the Government of France to allow it to visit the refugee camps in French Guiana to interview the Maroons and indians there about alleged violations of their human rights by the Surinamese Army.

In addition to the claims referred to above, the Commission also received information alleging forced starvation, cutoffs of welfare entitlements and ethnicide against the groups in question. These charges too will be investigated by the Commission both in situ and in French Guiana.

Another important consequence of the insurrection has been the exacerbation of an already bad economic situation in Suriname. The Commission considers this matter beyond the scope of the present Report. Nevertheless, the economic situation has increased racial tensions and this has clearly affected the observance of human rights.

Starting in February, 1987 high school students in and around the capital of Paramaribo began to engage in peaceful demonstrations demanding democratic reforms, complaining of the critical state of the economy and protesting the lack of teaching materials. The marches were coupled with a student strike and were met by severe police repression.

The Suriname Goverment's National Institute of Human Rights (created by Decree A-18 on March 24, 1986) investigated the events of the week of February 17-20 at the Primary Technical School where the student protests began. The National Institute report, dated March 26, 1987, lays initial responsibility at the feet of anonymous "rabble-rousers" and then goes on to conclude that:

" - the students were seriously beaten;
- in total disregard of the authority of the administration, students were barbarously abused in places where they sought shelter;
- the injuries have to characterized as 'serious abuse.'"

The National Human Rights Institute then recommended that the "Government should consider prosecuting and punishing the individuals who were responsible..." for the violations in question. The Inter-American Commission, for its part, intends to inquire regarding the Government's will to implement this recommendation during its planned on-site visit in October.

After prolonged negotiations between student leaders and the Government, classes were resumed in April, 1987. According to information received at the Commission, at least one student died during the various protests.

An aspect of the existing malaise in Suriname is the lack of information available to the citizen about what is happening in his country. The only newspaper functioning in the country, De West, still operates under Decree 310 (in force since May 7, 1984) which limits freedom of the press. The other mass circulation paper, De Ware Tijd, has had to close for lack of paper. The country's television station is owned by the Government and the several radio stations are subject to censorship.

The censorship agency of the State is the Suriname News Agency (SNA). Restrictions on internal travel make reporting on national events almost impossible. In sum, a great sense of social insecurity stemming from lack of accurate, reliable news pervades the population and rumors are rife.

Some critics of the regime such as Linus Rensch, a bush negro and University Professor, who dared to speak out have been harrassed and intimidated (Case No. 9778). Professor Rensch had his passport taken and was told he was not allowed to leave the country. He was also forbidden to teach or publish. In response to the complaint in this case the Government argued that Professor Rensch's publications were seditious and counterrevolutionary.

With regard to political rights, there has also been movement in Suriname during the period covered by this report. On March 31 the National Assembly in which the military and the three traditional political parties (Suriname National Party - NPS, Progressive Reformed Party - VHP and the Indonesian Peasants Party - KTPI) and the major independent labor organizations (C-47, DeMoederbond, PWO, and the Government Workers Union CLO) and business organizations (among others) were represented, unanimously adopted a draft national constitution. The process of negotiation and study had been underway since 1985. The constitution will be the subject of a referendum scheduled for September 30 of this year to be followed by the election of a national assembly composed of 51 members. The timetable for the elections has been moved up to November 30, 1987.

The national assembly in turn is to elect a President with broad powers.

An ambiguous and disturbing provision of the new constitution establishes that "the National Army is the military vanguard of the people of Suriname (Art. 177)." The significance of this language is all the more important in light of the preponderant role played by the Army since the coup d'etat of 1980, and in particular, the leadership part assumed by the Commander of the Armed Forces, Lt. Col. Bouterse.

During the past year Lt. Col. Bouterse has been variously quoted in the media during the last year as saying he did not intend to be a candidate for the presidency or, on other occasions, as being undecided. Nevertheless, it should be noted that his February 25th Movement, a bulwark of the present Government, converted itself formally into a political party in June, 1987 and is known as the National Democratic Party. The Party has indicated its intention of participating in the forthcoming national elections. No announcement has been made regarding who will be its candidate.

On August 3, 1987 the first large public meeting of the three old traditional parties was held in Paramaribo. One estimate put the number

of persons in attendance at 60,000 although this figure has been disputed by others. In any case the crowd was enormous, particularly in light of the relatively small population of the country as a whole.

At the rally, the leaders of the three political parties urged their followers to use the upcoming elections to restore democracy to Suriname.

This demonstration of political strength coincided with the creation of the so-called Front for Democracy and Development led by the three main political parties. The Front's leaders, feeling their hand strengthened thereafter, met with Lt. Col. Bouterse. Following the meeting, Lt. Col. Bouterse announced his resignation as Chairman of the Supreme Deliberating Council, the top policy making organ of Government. At the same time, Commander Ivan Graanoogst, the current second in command of the Army, also withdrew from the Supreme Deliberating Council.

These developments culminated in the so-called Leonsburg Agreement between the military and the political parties. The compromise worked out calls for recognition of joint responsibilities to work toward stability and national unity as a base for achieving true democracy. They also committed themselves to a continuing dialogue.

In summary, the human rights situation in Suriname, in the view of the Commission, continues in a precarious state. Freedom of the press does not exist and the state of emergency has further eroded the flow of information and restricted other rights such as that of free association. The arbitrary detention of some dissidents continues to occur and there have been instances of serious abuses and mistreatment of citizens such as the case of students during protests.

In the view of the Commission, the most serious violations of human rights during the period covered by this Report have been the treatment of the unarmed civilian Maroon and Amerindian populations in the eastern areas of the country. These have taken on truly alarming proportions.

On the other hand, there has been an important positive aspect of the human rights situation in Suriname. The willingness of the Government of Suriname to invite the International Committee of the Red Cross, the Special Rapporteur of the United Nations and the Inter-American Commission on Human Rights to visit the country constitute a highly positive step forward.

CHAPTER V

AREAS IN WHICH STEPS NEED TO BE TAKEN TOWARDS FULL OBSERVANCE OF THE HUMAN RIGHTS SET FORTH IN THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN AND THE AMERICAN CONVENTION ON HUMAN RIGHTS

AREAS IN WHICH STEPS NEED TO BE TAKEN TOWARDS FULL OBSERVANCE OF THE HUMAN RIGHTS SET FORTH IN THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN AND THE AMERICAN CONVENTION ON HUMAN RIGHTS

In its last annual reports, the Inter-American Commission on Human Rights has been submitting to the General Assembly of the Organization of American States a number of topics that it felt were especially important regarding respect for human rights. The Commission has suggested that the Assembly take specific measures to achieve greater observance of those rights in accordance with the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.

The General Assembly has endorsed many of the suggestions of the IACHR, and has passed resolutions on them, including proposed inter-American conventions recommended by the Commission. Thus, the General Assembly this year is to consider the adoption of an Additional Protocol to the American Convention on Human Rights covering economic, social and cultural rights, based on a draft prepared by the Commission at the request of the General Assembly.

While continuing to urge the adoption of its previous recommendations, the Commission this year would like to direct its recommendations to the governments of member countries to urge them to adopt two instruments that, when they enter into force, will, in the Commission's view, surely contribute to increasing the observance of the most important and fundamental of all human rights, the right to life.

As the Commission has repeatedly stated, the right to life is the foundation and cornerstone of all other human rights.[1] For that reason, it can never be suspended by any State, and under no circumstances can persons be executed to restore public order. Moreover, it is necessary to create all the circumstances required for this basic right to be fully observed.

Regarding the latter, the Commission reiterates what it has said in its prior reports in the sense that terrorism is never justified and that in every instance in which a state of emergency is involved, human rights must be respected.

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1. See, for example, the annual reports of the IACHR of 1980-1981, page 112; and 1982-83 page 10.

Terrorism committed by individuals is as worth of condemnation as terrorism committed by the State. Therefore, extra judicial executions must always be condemned and may not be justified under the rule of law which must without exception maintain a respect for human rights.

However, there are two measures frequently employed in recent years that entail a serious denial of the right to life: imposition of the death penalty by court decision and the forced or involuntary disappearance of persons. The Commission is not unaware that in the Americas other violations of the right to life have occurred; but it considers that from the standpoint of the duties that have been given to it and to the appropriate organs of the inter-American system, the adoption of the legal instruments it is recommending at this time could help to create more favorable conditions for the observance of the right to life in the American Hemisphere.

The legal instruments the Commission is recommending at this time are: 1) the adoption by the States Parties to the American Convention on Human Rights of an Additional Protocol on the abolition of the death penalty; and 2) the adoption of an inter-American convention to prevent and punish the forced disappearance of persons.

I. ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS ON THE ABOLITION OF THE DEATH PENALTY

The Inter-American Commission on Human Rights, concerned about the behavior of some States in extending the death penalty or applying it in a generalized manner, has appealed, on previous occasions, to all governments of the Americas to abolish the death penalty, in keeping with the spirit of Article 4 of the American Convention on Human Rights and in line with the universal trend toward abolition of the death penalty.[2]

As is widely known, in order to facilitate adoption by the largest number of states, the American Convention on Human Rights did not abolish the death penalty but only restricted its application. Specifically, Article 4 of the Convention in five of its six paragraphs established various limitations on the imposition of the death penalty. These limitations are as follows: 1) the death penalty may be imposed only for the most serious crimes; 2) it may be imposed only pursuant to a sentence handed down by a court of competent jurisdiction; 3) also it may be imposed only under a law providing for such punishment, enacted prior to the commission of the crime; 4) it may not be re-established in States that have abolished it; 5) in no case shall capital punishment be inflicted for political offenses or related common crimes; 6) it may not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; 7) nor may it be applied to pregnant women;

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2. See, for example, the resolution adopted at its 63rd session on October 5, 1984. (Annual Report of the IACHR 1984-85, page 11).

and 8) every person condemned to death shall have the right to appeal for amnesty, pardon or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such an appeal is pending decision by the authority of competent jurisdiction.

Although the Commission understands that in 1969, when the American Convention on Human Rights was adopted, prevailing conditions would have not permitted abolishing the death penalty through a convention, experience in the almost two decades since and the trend in the vast majority of the countries of the Americas to amend their criminal codes or even their constitutional provisions, as has occurred with Haiti and Nicaragua, in order to ban the death penalty, cause the Commission to consider that conditions are now ripe for adopting an instrument to abolish the death penalty.

In recent years, the Commission has observed that the purported purpose of capital punishment--that is, by imposing it, the State helps to save the lives of others by preventing the commission of the crimes for which the death penalty has been established--has not been achieved in practice, and on the contrary, the death penalty often has had a counterproductive effect by generating greater violence. In that regard, the Commission can only share the views set forth in numerous studies according to which it has not yet been shown that capital punishment has any impact on reducing criminality.[3]

Moreover, there are a great many ethical and legal reasons and even reasons of civic harmony, which the Commission shares, requiring the abolition of the death penalty. From the ethical standpoint, one cannot justify defending an absolute value like human life by resorting to a strict application of the talionic principle of "an eye for an eye," which in this case becomes "a life for a life." The foregoing involves a concept of law and punishment that is purely retributive, that is, one evil must be answered by another of a similar kind. In that sense, the State's right to punish certain criminal behavior cannot be absolute and must surely be limited by those rights of the human person that are inalienable, foremost among them being the right to life.

From the standpoint of criminal policy, the death penalty violates the principle of special prevention by denying the possibility of rehabilitation or reform of the offender, a rationale that constitutes one of the fundamental purposes of punishment.

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3. See, for example, Nigel Rodley, The Treatment of Prisoners under International Law; Atle Grahl-Madsen, The Death Penalty - The Moral, Ethical, and Human Rights Dimensions: The Human Rights Perspective; Tony Mifsud, S.J., "Juicio a la Pena de Muerte, Revista Mensaje, No. 381, Agosto de 1987 and Morris, "Capital Punishment: Developments 1961-1965," United Nations, 1967.

The irreparable nature of the death penalty must also be kept in mind, that is, it does not admit of judicial errors. However, as unfortunately has occurred in the past, it has in hundreds of cases been shown later that the death penalty was imposed as a result of a judicial error.

It is also necessary to point out, as the Commission has, that the death penalty has been used by totalitarian regimes and military dictators as an instrument to eliminate dissidents or even to hide those really guilty of other crimes.

Finally, the Commission considers that the right to life, as has occurred with the right to humane treatment, should be protected in the most absolute manner possible under international law.

It is now possible to state that, thanks to the fact that the international community has become mindful of how intolerable the practice of torture is under any circumstances, the right not to suffer physical torment has become absolute. Consequently, how could it be accepted that the right to life, which is at the very basis of the other human rights, does not have similar protection? In this regard, the Commission considers that the death penalty is one of the most serious offenses against a human being that can be conceived of, because it terminates the person's very existence.

The above reasons, as well as the repugnance produced by the cruel, inhumane and degrading nature of this punishment, has led most American countries to abolish the death penalty, at least for common crimes. Thus, of the 19 countries that today are parties to the American Convention on Human Rights, only four retain the death penalty. It is also significant that those countries are not parties to the Pact of San José, Costa Rica--that is, they are States that have not shown an interest in undertaking international commitments to respect human rights. With the sole exception of Brazil, which is in the process of completing its internal procedures to be party to that instrument, all of them maintain the death penalty for all types of crimes.

Of the States that are parties to the American Convention on Human Rights, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, Haiti, Honduras, Nicaragua, Panama, Uruguay and Venezuela, have abolished the death penalty for all kinds of crimes. The domestic law of Argentina, El Salvador, Mexico, and Peru does not impose the death penalty for common crimes, and maintains it only for serious military offenses committed under exceptional circumstances, such as in time of war.

This trend to abolish the death penalty can also be seen in other regions. Thus, in April 1983, several States parties to the European Convention for the Protection of Human Rights and Fundamental Liberties --which, like the American Convention, allows the death penalty, under

certain restrictions--adopted Protocol 6 to that Convention, abolishing the death penalty. Likewise, the United Nations is now considering, as a result of successive General Assembly resolutions, an Optional Protocol to the International Covenant on Civil and Political Rights, which declares the death penalty to be abolished.

All of these antecedents confirm to the Commission the desirability of proposing to the States parties to the American Convention on Human Rights that they take another step forward with respect to current Article 4 of that Convention, so that capital punishment will be banned through a new instrument.

The American Convention provides two possible ways to amend its provisions. Under Article 76, any State party to the Convention, the Commission or the Court can, through the OAS Secretary General, submit to the General Assembly proposed amendments to the Convention. Also, Article 77 empowers any State party and the Commission to submit "proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection."

Which would be best--amending Article 4 or including the Additional Protocol to the Convention--should be carefully studied.

In the Commission's view, while the amendment to the current provision governing the right to life could be the best way to take a categorical stand against the death penalty, and, from the legal standpoint, regulate one subject under a single instrument, it might have the disadvantage that those States that are now parties to the Pact of San José, Costa Rica, or that in the future might become parties to it, and that still maintain the death penalty, would have to make an express reservation to that provision, if it is authorized, or if they do not accept the possibility of making a reservation, they would be prevented from participating in the Convention, which could cause even more difficulties from the standpoint of protecting human rights. In these circumstances, it would appear preferable to have on this topic two coexisting rules established by two successive treaties, a possibility allowed by the American Convention on Human Rights and authorized by general international law, as shown in Article 30 of the 1969 Vienna Convention on the Law of Treaties.

Thus the present Article 4 will remain in effect for countries that do not become parties to the additional protocol or that ratify it in the future or that are parties to the American Convention on Human Rights but not to the Additional Protocol on the Abolition of the Death Penalty.

Since the current Article 4 of the Convention coexists with the Additional Protocol, that will make it possible for the Convention to provide that reservations may not be made to the Protocol or that they will have a very limited and specific scope.

Another important problem to consider is whether the obligation the States parties to the Additional Protocol will acquire not to impose the death penalty will be absolute, that is, that under no circumstances may the death penalty be imposed, regardless of the offense committed, or, whether some exceptions might be accepted, particularly those that would make it possible to impose the death penalty for serious military crimes committed under exceptional circumstances, such as during a foreign war, a situation that the laws of a large number of States that are now parties to the Pact of San Jose, Costa Rica, now provide for.

If what is desired is to make, as the Commission seeks, significant progress regarding the present Article 4 of the American Convention on Human Rights, and also, to enable the new protocol to have the largest number of ratifications or adhesions possible, it would appear desirable that, as established in Protocol 6 of the European Convention on Human Rights and Basic Freedoms and provided for in the draft of the United Nations Special Rapporteur on abolition of the death penalty, the States might be authorized to impose the death penalty for specified military offenses committed in wartime.

Because of the exceptional character of such authorization, any statement made by a country on becoming party to the Protocol must expressly specify how it would be an express reservation to the general rule abolishing the death penalty.

Based on the above considerations, the Commission, under the authority given it by Article 77 of the American Convention on Human Rights, proposes to the States parties to the American Convention on Human Rights meeting on the occasion of the OAS General Assembly, the following draft additional protocol to the Convention:

Article 1

The States Parties to this Protocol shall not impose the death penalty on any person under their jurisdiction. Accordingly, no one may be punished by the death penalty nor executed.

Article 2

1. Reservations may not be made to this Protocol except for the sole purpose of excluding from application of the Protocol especially severe military offenses that were committed during a foreign war.

2. A State making the reservation authorized by the previous paragraph may, at the time of deposition of its instrument of ratification or adhesion, inform the Secretary General of the Organization of American States as to what military offenses are subject to the death penalty under that country's domestic law.

Article 3

1. This Protocol shall be open to the signature and to the ratification or adhesion of any State Party to the American Convention on Human Rights.

2. Ratification of this Protocol or adhesion to it shall be made through deposit of an instrument of ratification or adhesion at the General Secretariat of the Organization of American States.

II. INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCE OF PERSONS

The second proposal that the Commission would like to make to the governments of member countries that will meet at the seventeenth regular session of the General Assembly is that they consider the possibility of adopting an Inter-American Convention on Forced Disappearance of Persons, to prevent and punish that abominable practice.

The Commission can say on the basis of experience in recent years that the policy on disappearances has become an important instrument for repression and physical suppression of dissidents in many Latin American countries, so this requires the adoption of special measures both nationally and internationally to eliminate that policy for good.

Several military dictators have used this method in recent years, especially starting in the seventies, although it is important to stress that disappearances have occurred even under some legitimate governments. The number of victims of this practice is almost impossible to determine for certain, but, in any case, it amounts to several tens of thousands. Because of the nature of this practice, the victims are not only the persons that have disappeared, but also their parents, spouses, children and other family members, who are placed in a situation of uncertainty and anguish that goes on for many years. For the same reason, disappearances open deep wounds in the social fabric of the country's community, which affects political, social and professional circles and ruptures the country's basic institutions.

The Inter-American Commission on Human Rights has been dealing extensively with this problem, and in its reports on the status of human rights in various countries, and its annual reports to the OAS General Assembly, it has repeatedly raised the topic of disappeared detainees.

In those reports, the Commission has expressed its views on this very serious violation of human rights. Thus, it has pointed out that in many cases in the various countries the government systematically denies the detention of persons, despite convincing proof from complainants to support their allegations that such persons have been deprived of their

liberty by police or military authorities, and in some cases, that these persons are or have been held at particular detention facilities.[4]

The Commission has added that this practice is cruel and inhumane, and that, as experience shows, disappearance not only constitutes an arbitrary deprivation of liberty, but also a very severe threat to the personal integrity, security, and the very life of the victim. In the Commission's view, disappearance seems to be a method used to avoid enforcing legal provisions established to defend individual freedom, physical integrity, the dignity and the very life of the person. The Commission has pointed out that this procedure in practice makes inoperative legal rules enacted in some countries to avoid unlawful detention and the use of physical and psychological coercion against detainees.[5]

The Commission has also indicated on a number of occasions the need to investigate the fate of disappeared detainees and report to their families on the status of those persons. In addition, it has recommended that central detention registries be established, that detentions be carried out only by duly identified competent authorities, and that detainees be held only in places intended for that purpose.[6]

The OAS General Assembly has in a number of resolutions[7] stressed the need for all countries where forced disappearances have occurred to put an end to that practice immediately, and has urged the governments to make the necessary efforts to determine the status of those persons. Also, endorsing a proposal of the Commission, the OAS General Assembly has declared that the forced disappearance of persons constitutes a crime against humanity.[8]

Similarly, the United Nations General Assembly has dealt repeatedly with this topic: in a resolution passed without vote on December 20, 1978,[9] urged the Human Rights Commission to consider the topic and make recommendations on it. Later, the Human Rights Commission set up a working group on forced or involuntary disappearances, whose mandate has been extended and is still in force. The United Nations has returned to

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4. Annual Report of the IACHR. 1978, page 28.
5. Annual Report of the IACHR. 1976, page 16.
6. Annual Reports of the IACHR 1980-1981, page 119, and 1981-82, page 133.
7. See especially resolutions 443 (IX-0/79); 510 (X-0/80); 543 (XI-0/81); 618 (XII-0/82); 666 (XIII-0/83); and 742 (XIV-0/84).
8. OAS General Assembly Resolutions 666 (XIII-0/83) and 742 (XIV-0/84).
9. A/RES. 33/173.

the topic of forced disappearances in resolutions passed by the last two General Assemblies.[10] The Human Rights Commission and the Economic and Social Council have expanded the working group's mandate to make it more effective. In recent years, the working group has made onsite observations and has published numerous reports on disappearances in a number of countries.

Although as a result of the efforts of family members and influential sectors in the country, as well as efforts by international human rights organizations, the forced disappearance of persons has declined considerably, this horrible practice still has not ceased and continues to occur in some countries of the Hemisphere. Even in those countries where the practice has ended, the new democratic governments have faced serious problems in endeavoring to do justice and accede to the demands of the family members. All of this explains the efforts of the international community to promote the development of international law and mechanisms for the protection of human rights, in order to adapt them to this new and perverse phenomenon.

In that regard, an Inter-American Convention to Prevent and Punish the Forced Disappearance of Persons would, in the Commission's view, make a decisive contribution to the international protection of human rights.

The Commission will not propose at this time the text of a draft convention on this important topic. It considers that before submitting a detailed draft of articles, the governments of the member States should make known their political will in order to promote this initiative.

For these reasons, the Commission will confine itself at this time to submitting some very general concepts on the topics and subjects that should be included in the planned convention if the General Assembly should decide, as the Commission hopes, to endorse that initiative.

In the Commission's opinion, the convention should stress, either in its preamble or in its first article, that its purpose is to prevent and punish the practice of forced disappearances.

The Convention, which must necessarily include the concept of forced disappearance, should describe that practice. In this regard, it should be recalled that the Commission, in previous reports and resolutions, has had occasion to go more deeply into the status of disappeared detainees, and has described them as persons who have been apprehended by armed personnel (sometimes uniformed, who usually have stated that they belonged to some kind of public authority), in significant and coincident operations both in the manner of deployment and in the form of execution,

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10. Resolution 40/147 of December 13, 1985, and Resolution 41/145, of December 4, 1986.

and that after detention, those persons have disappeared, without any report whatever of their whereabouts. In other words, forced or involuntary disappearance can be defined as the detention of a person by agents of the State or with the acquiescence of the State, without the order of a competent authority, where the detention is denied, without there being any information available on the destination or whereabouts of the detainee.

According to the above viewpoint, forced disappearance of persons should be differentiated from other human rights violations, and from other situations in which the whereabouts of a person is unknown.

For there to be a forced disappearance of a person, there must first have been an arbitrary arrest. The arrest of the person, although usually done in secret, is carried out by government agents, either uniformed or in civilian clothing, who are members of police organizations or the armed forces, or paramilitary forces acting under the operational control of the police or armed forces. This is important because such disappearances do not include kidnapping of a person by common criminals, for example, for ransom. In some cases, the perpetrators are members of paramilitary or parapolice groups. The seriousness of this type of crime is that the perpetrators enjoy immunity, because they have the tolerance or the protection of government agencies. In these cases, the perpetrators act, for all legal purposes, as agents of the State, in view of the acquiescence of the government.

The initial arrest is also arbitrary, not only because it does not satisfy the minimum legal requirements for effecting an arrest (those requirements are, of course, a legal order stating the grounds for it, or apprehension in the act, or in cases of suspension of guarantees, an administrative order reasonably based on the causes of the state of emergency); but also because the real reason for the arrest is political persecution and not investigation or prevention of crimes.

In addition, to qualify as a case of a forced disappearance, it is important to note that the confinement of the victim is denied by the authorities. The disappearance of the detainee occurs when the security forces deliberately refuse information to family members about his whereabouts and when they state positively that he is not being held. This is important because in some situations there may have been delays in establishing the whereabouts of a detainee, while the authorities are trying to locate him. In any case, this factor involves a conscious and deliberate attitude of denying a detention that is known to have taken place, in order to evade responsibility for the arrest, and for the physical integrity and life of the detainee. Sometimes, this deliberate attitude continues only for a time, and then the person "reappears," almost always having been officially detained. These situations may be described as "temporary disappearances" instead of "permanent disappearances."

Finally, an important characteristic of the phenomenon of disappearances is that the ultimate fate of the victims is execution and concealment of the body. The Commission's experience shows that a number of methods have been used to do away with the detainee-disappeared person, although the most common one is execution with a fire arm, often with several persons taking part. Similarly, various methods are used to dispose of the remains: clandestine burial; graves marked with "N.N." (no name) in cemeteries; sinking the victims to the bottoms of lakes or rivers, or dumping them into the sea from airplanes and helicopters, etc. In all cases, the purpose is to avoid having the remains found, or if they are found, to make it impossible to identify them positively. This aspect differentiates forced disappearance of persons from another equally tragic form of human rights violation, extrajudicial execution.

Until the whereabouts of the victim or the circumstances of his death can be determined, he must be considered to be a "disappeared-detainee," even when his death may be presumed because of the length of time that has elapsed or because of the similarity with other cases of the same kind in the country. The consequences of making this distinction are important because in the case of an extrajudicial execution, the government admitting that such an act has occurred, has the obligation to identify the perpetrators and try them for homicide. In the case of forced disappearance, the government should have the obligation to determine the whereabouts and fate of the detainee and inform his family, and if it is determined that the detainee has died, the government will also have the obligation to try and punish those who planned and perpetrated the crime. In the Commission's view, that obligation should be expressly stipulated in the proposed Convention.

The foregoing shows that the basic characteristic of forced disappearance of persons is that each individual case is part of a deliberate and conscious policy adopted by the government at some level of authority having the capacity not only to give this kind of order and have it carried out, but also to ensure the impunity of those who are to implement it. The definition must not, therefore, include isolated cases where the whereabouts of a detainee is unknown, particularly if it can be shown that the government involved has made efforts to investigate the case and inform family members of it and punish officials responsible for the situation.

Although forced disappearance implies a flagrant violation of basic rights and freedoms guaranteed internationally, such as the right to personal liberty and security (Article 7 of the American Convention on Human Rights); the right not to be arbitrarily arrested (idem); the right to a fair trial in criminal cases (Article 8 of the Convention and concordant articles); the right to humane treatment in detention and the right not to be subjected to torture or to cruel, inhuman or degrading treatment (Article 5) and in general, the right to life (Article 4), it will be important for the Convention drafted to define forced disappearance of persons as a specific and separate crime.

This offense, because of its extreme gravity and cruelty, should be regarded as a crime against humanity, as the OAS General Assembly resolutions cited have described it. The Commission is not unaware of the fact that describing the offense as a crime against humanity may cause some difficulties; but the Commission is convinced that without such a definition, a convention such as the one proposed would be without meaning and effectiveness. The Commission considers that the importance of defining forced disappearance as a crime against humanity lies in the effects that that label would have, particularly with regard to the failure to outlaw the crime and universal jurisdiction for prosecuting and punishing it. That scope should be expressly set forth in detail in the convention.

Another basic aspect to which the Convention should refer is the common nature that this crime should have. That is important to establish in order to permit extradition of those responsible, without their being able to argue that political motives or reasons justify their participation in the commission of such a horrendous crime.

For that very reason, it appears desirable not to include in the planned Convention a clause like Article 15 of the Inter-American Convention to Prevent and Punish Torture. In the Commission's judgement, leaving it up to the choice of the country granting asylum the definition of the nature of the crime committed by the person responsible for a forced disappearance would represent a major step backward in international protection of human rights.

Along with establishing that forced disappearances are crimes against humanity and regulating the international effects to which such a definition leads, it is also important for the proposed Convention to provide for the States that become parties to it the obligation to include in their criminal laws the offense of forced disappearance, which should be repressed in accordance with its extreme gravity.

Likewise, the Convention should establish the obligation of the State in whose territory forced disappearances have occurred to punish participation in all of its degrees--perpetrator, accomplice and accessory--in this horrible crime, and should expressly stipulate that the accused cannot plea error, duress, states of necessity or due obedience as grounds for exemption from criminal liability.

It would also appear desirable to include in the proposed convention a provision similar to Article 5 of the Inter-American Convention to Prevent and Punish Torture, stating that the existence of such circumstances as a state or threat of war, a state of emergency, the suspension of individual guarantees, internal political instability or other public emergencies or disasters may not be invoked or admitted as justification for a forced disappearance.

In the Commission's view, if the drafting of a Convention on forced disappearance of persons is accepted, the Convention should not be limited solely to describing this practice, punishing it or regulating its effects. It is just as important, in view of the experience with what has happened in several Latin American countries, to establish legal provisions to prevent the practice of forced disappearances. To that end, the Convention could include a rule stating the obligation of any State party to the Convention to take legislative, administrative and jurisdictional measures to prevent forced disappearances of persons in its territory.

Within that umbrella obligation, it would be desirable to make a specific reference to some of the preventive measures that the States would undertake to adopt to prevent forced disappearances from taking place, several of which have been recommended previously by the Commission. Thus, it would be very important to establish the prohibition of maintaining secret detention facilities; to provide that arrests may only be made by competent authorities who have the obligation to include a reference to the need for the States to bring their detention systems in line with commonly accepted international norms that are included in the United Nations "standard minimum rules for the treatment of prisoners"; to stipulate the obligation of the States to keep an up-to-date central record of all detention facilities, with a list of all persons deprived of liberty for any reason, an to notify family members when an arrest occurs. Likewise, it would be important, as the Inter-American Court of Human Rights indicated this year in Advisory Opinion No. 8 to include a provision reiterating that the habeas corpus remedy may not be suspended under any circumstance, not even under a state of emergency.

In addition, the Convention should include a provision that stipulates the obligation of the State to act promptly and effectively in cases where there are sufficient grounds to assume that a forced disappearance may have occurred. On that assumption, the Commission feels that the Convention should establish the obligation of the State to proceed promptly to investigate such complaints, and without prejudice to whatever role the executive and administrative authorities and the competent courts should play in that case, either ex-officio or at the request of one of the parties, they should initiate an expeditious procedure to ensure the life, personal security and freedom of the victim, and to that end, the courts should be given all of the powers necessary, including the power to sit in any place, even if that place is subject to military jurisdiction.

The Commission feels that the above considerations are sufficient to show the desirability of drafting an instrument that would effectively deal with this horrible practice of forced disappearances. If this proposal is accepted, the Commission, after receiving any comments and observations that the governments of the member States might make, will

continue to study this important topic and, in the light of those comments and observations, would be in a position to propose to the next session of the General Assembly a draft Inter-American Convention to Prevent and Punish Forced Disappearances.

III. RECOMMENDATIONS

Based on the above information and considerations, the Commission requests the OAS General Assembly to adopt the following decisions at its seventeenth regular session:

1. That the draft Additional Protocol to the American Convention on Human Rights on the abolition of the death penalty be transmitted to the governments of the member States to that Convention, for them to make any comments and observations they wish, and submit them to the Permanent Council so that it may in turn make any comments it deems desirable in order to enable the member States to the American Convention on Human Rights to adopt an Additional Protocol to that Convention on the abolition of the death penalty, when the eighteenth session of the General Assembly meets.

2. That the governments of member States be asked to make comments and observations on the Commission's proposal to draft an inter-American convention to prevent and punish forced disappearances, and on the possible contents of that convention; these comments should reach the Commission in time for it to be able to submit to the next General Assembly session a draft Convention on Forced Disappearances of Persons.

CORTE INTERAMERICANA DE DERECHOS HUMANOS
COUR INTERAMERICAINE DES DROITS DE L'HOMME
CÔRTE INTERAMERICANA DE DIREITOS HUMANOS
INTER-AMERICAN COURT OF HUMAN RIGHTS

SECRETARIA DE LA CORTE

APARTADO 6906-1000 SAN JOSE, COSTA RICA

CDH-CP8/89

PRESS RELEASE

The INTER-AMERICAN COURT OF HUMAN RIGHTS rendered judgment today, July 21st, 1989, on the issue of compensation in the "Godínez Cruz" case (Article 63.1 of the American Convention on Human Rights). According to the Court's decision of January 20, 1989, Honduras is obligated to pay compensation to the families of the victims.

Therefore,

THE COURT,

unanimously,

1.- Establishes the compensatory indemnification that the Government of Honduras must pay to the family of Saúl Godínez Cruz to be six hundred and fifty thousand lempiras,

unanimously,

2.- Decides that the corresponding amount for the spouse of Saúl Godínez Cruz will be one hundred sixty two thousand five hundred lempiras,

unanimously,

3.- Decides that the corresponding amount for the daughter of Saúl Godínez Cruz will be four hundred eighty seven thousand five hundred lempiras,

unanimously

4.- Orders that the form and manner of payment of the indemnification will be as specified in paragraphs 52 and 53 of this sentence,

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unanimously,

5.- Resolves that the Court will supervise the fullfillment of the ordered indemnification payment and only after it has been totally paid will this case be closed.

The Inter-American Court of Human Rights, which is an autonomous judicial institution of the OAS whose purpose is the application and interpretation of the American Convention on Human Rights. The Court has contencious and advisory jurisdiction.

The Court was established in 1979 and is composed of jurists of the highest moral authority and recognized competence in the field of human rights and are elected in an individual capacity. The judges of the Court in this case were:

Héctor Gros-Espiell (Uruguay), President;
Héctor Fix-Zamudio (Mexico), Vice-President;
Rodolfo E. Piza (Costa Rica);
Pedro Nikken (Venezuela);
Rafael Nieto-Navia (Colombia) and
Rigoberto Espinal-Irías (Honduras), ad hoc.

For additional information, please contact Manuel E. Ventura Robles, Secretary a.i., Inter-American Court of Human Rights, P. O. Box 6906-1000, San José, Costa Rica. Telephone 34-0581. Telex 2233 CORTE CR. Telefax 340584.

San José, Costa Rica
July 21, 1989.

CORTE INTERAMERICANA DE DERECHOS HUMANOS
COUR INTERAMERICAINE DES DROITS DE L'HOMME
CÔRTE INTERAMERICANA DE DIREITOS HUMANOS
INTER-AMERICAN COURT OF HUMAN RIGHTS

SECRETARIA DE LA CORTE

APARTADO 6906-1000 SAN JOSE, COSTA RICA

CDH-CP7/89

PRESS RELEASE

The INTER-AMERICAN COURT OF HUMAN RIGHTS rendered judgment today, July 21st, 1989, on the issue of compensation in the "Velásquez Rodríguez" case (Article 63.1 of the American Convention on Human Rights). According to the Court's decision of July 29, 1988, Honduras is obligated to pay compensation to the families of the victims.

Therefore,

THE COURT,

unanimously,

1.- Establishes the compensatory indemnification that the Government of Honduras must pay to the family of Angel Manfredo Velásquez Rodríguez to be seven hundred and fifty thousand lempiras,

unanimously,

2.- Decides that the corresponding amount for the spouse of Angel Manfredo Velásquez Rodríguez will be one hundred and eighty seven thousand five hundred lempiras,

unanimously,

3.- Decides that the corresponding amount for the children of Angel Manfredo Velásquez Rodríguez will be five hundred and sixty-two thousand five hundred lempiras,

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unanimously,

4.- Orders that the form and manner of payment of the indemnification will be as specified in paragraphs 57 and 58 of this sentence,

unanimously,

5.- Resolves that the Court will supervise the fullfillment of the ordered indemnification payment and only after it has been totally paid will this case be closed.

The Inter-American Court of Human Rights, which is an autonomous judicial institution of the OAS whose purpose is the application and interpretation of the American Convention on Human Rights. The Court has contencious and advisory jurisdiction.

The Court was established in 1979 and is composed of jurists of the highest moral authority and recognized competence in the field of human rights and are elected in an individual capacity. The judges of the Court in this case were:

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Rodolfo E. Piza (Costa Rica);
Pedro Nikken (Venezuela);
Rafael Nieto-Navia (Colombia) and
Rigoberto Espinal-Irías (Honduras), ad hoc.

For additional information, please contact Manuel E. Ventura Robles, Secretary a.i., Inter-American Court of Human Rights, P. O. Box 6906-1000, San José, Costa Rica. Telephone 34-0581. Telex 2233 CORTE CR. Telefax 340584.

San José, Costa Rica
July 21, 1989

CORTE INTERAMERICANA DE DERECHOS HUMANOS
COUR INTERAMERICAINE DES DROITS DE L'HOMME
CÔRTE INTERAMERICANA DE DIREITOS HUMANOS
INTER-AMERICAN COURT OF HUMAN RIGHTS

SECRETARIA DE LA CORTE

APARTADO 6806-1000 SAN JOSE, COSTA RICA

CDH-CP5/89

PRESS RELEASE

Today, Friday July 14th, 1989, in a public session, the INTER-AMERICAN COURT OF HUMAN RIGHTS delivered an advisory opinion on an issue of great importance for our hemisphere: the interpretation of Article 64 of the American Convention on Human Rights in relation to the American Declaration of the Rights and Duties of Man.

This advisory opinion was requested by the Government of Colombia which specifically asked the Court the following:

> Does Article 64 of the American Convention on Human Rights authorize the Inter-American Court of Human Rights to render advisory opinions, requested by a Member State of the OAS or an organ of the OAS, on the interpretation of the American Declaration of the Rights and Duties of Man, adopted in Bogota in 1948 by the Ninth Inter-American Conference?

Therefore,

THE COURT

By a unanimous vote

FINDS

that it has the jurisdiction to render this advisory opinion.

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By a unanimous vote

IS OF THE OPINION

That Article 64.1 of the American Convention authorizes the Court, at the request of the Member States of the OAS or any duly qualified OAS organ, to render advisory opinions interpreting the American Declaration of the Rights and Duties of Man, provided that in doing so the Court is acting within the scope and framework of its jurisdiction in relation to the Charter and Convention or other treaties concerning the protection of human rights in the American States.

This is the tenth opinion that the Court has rendered pursuent to its advisory jurisdiction which is available to the Member States and principal organs of the Organization of American States.

The Inter-American Court of Human Rights, which is an autonomous judicial institution of the OAS whose purpose is the application and interpretation of the American Convention, was established in 1979 and is composed of jurists of the highest moral authority and recognized competence in the field of human rights and are elected in an individual capacity. The judges of the Court are:

Héctor Gros-Espiell (Uruguay), President
Héctor Fix-Zamudio (Mexico), Vice-President
Thomas Buergenthal (United States)
Rafael Nieto-Navia (Colombia)
Policarpo Callejas-Bonilla (Honduras)
Orlando Tovar-Tamayo (Venezuela)
Sonia Picado-Sotela (Costa Rica)

For additional information, please contact Manuel E. Ventura Robles, Secretary a.i., Inter-American Court of Human Rights, P. O. Box 6906-1000, San Jose, Costa Rica. Telephone 34-0581. Telex 2233 CORTE CR. Telefax 340584.

San Jose, Costa Rica
July 13, 1989

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CORTE INTERAMERICANA DE DERECHOS HUMANOS
COUR INTERAMERICAINE DES DROITS DE L'HOMME
CÔRTE INTERAMERICANA DE DIREITOS HUMANOS
INTER-AMERICAN COURT OF HUMAN RIGHTS

SECRETARIA DE LA CORTE

APARTADO 6906-1000 SAN JOSE, COSTA RICA

CDH-CP2/89

PRESS RELEASE

Today, July 10, 1989, the new President, Judge Héctor Gros-Espiell and the new Vice-President, Héctor Fix-Zamudio of the INTER-AMERICAN COURT OF HUMAN RIGHTS assumed their offical duties. They were elected, during the XXI Regular Session of the Court, for a term of two years which will end on June 30, 1991.

Professor Gros-Espiell, an Uruguayan citizen, has been a Judge of the Court since 1986 and has served as Vice-President of the Court since 1987. He has been Assistant Secretary of Foreign Relations and Ambassador for Uruguay, Secretary General of the Organization for the Proscription of Nuclear Arms in Latin America and Executive Director of the Inter-American Institute of Human Rights. Presently, he is Vice-President of the International Institute of Humanitarian Law, a member of the Advisory board of the International Institute of Human Rights in Strasbourg and a judge of the Administrative Court of the International Labour Organization (ILO). A University professor for many years, he has participated in numerous conferences in many distinguished universities and academies throughout the Americas and Europe including The Hague International Academy of Law. He has published many books and articles on a wide variety of legal issues. Presently he has the rank of Assistant Secretary General of the United Nations for the Dispute over the Spanish Saharah and is a candidate to be a judge of the International Court of Justice.

Professor Fix-Zamudio has been a judge of the Court since 1986. He is a Mexican citizen and has worked for almost 20 years for the Judicial Branch of the Mexican government and, since 1964, he has been a full-time faculty member of the National Autonomous University of Mexico, where he was Head Researcher and Director of the Institute for Judicial Investigation. He is President of the Ibero-American Institute of Constitutional Law and is currently a member of the Executive Committee of the International Institute of Procedural Law. As a renowned Latin American specialist in the field of the constitutional protection of civil rights, he has been a guest lecturer at various distinguished universities and law institutes throughout the Americas and Europe. Furthermore, Judge Fix-Zamudio is widely published on various juridical themes and has been the recipient of many academic honors and distinctions.

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The other judges of the Court are: Thomas Buergenthal (United States); Rafael Nieto-Navia (Colombia); Policarpo Callejas-Bonilla (Honduras); Orlando Tovar-Tamayo (Venezuela) and Sonia Picado-Sotela (Costa Rica).

The principal function of the Inter-American Court of Human Rights, is the application and interpretation of the American Convention on Human Rights. There are 20 member states of the Organization of the American States who are part of the Convention, signed in San José, Costa Rica on November 22, 1969 for the purpose of guarantying fundamental liberties, civil and political rights.

For more information, please contact the Secretary a.i. of the Court, Manuel E. Ventura-Robles. Telephone 34-0581 or 34-0582. P. O. Box 6906-1000 San José, Costa Rica. Telex 2233 CORTE CR. Telefax 34-0584.

San José, Costa Rica
July 10, 1989

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