

INTER-AMERICAN COURT OF HUMAN RIGHTS

GENIE LACAYO CASE

JUDGMENT OF JANUARY 29, 1997

In the Genie Lacayo Case,

The Inter-American Court of Human Rights, composed of the following judges:

Héctor Fix-Zamudio, President
Hernán Salgado-Pesantes, Vice President
Rafael Nieto-Navia, Judge
Alejandro Montiel-Argüello, Judge
Máximo Pacheco-Gómez, Judge;

also present:

Manuel E. Ventura-Robles, Secretary, and
Víctor M. Rodríguez-Rescia, Interim Deputy Secretary,

delivers the following Judgment in the instant Case, pursuant to Articles 29 and 55 of the Rules of Procedure of the Inter-American Court of Human Rights (hereinafter "the Inter-American Court", "the Court" or "the Tribunal").

I

1. On January 6, 1994, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") submitted to this Court a case against the Republic of Nicaragua (hereinafter "the State", "the Government" or "Nicaragua") which originated in petition Nº 10.792.

2. The Court is competent to hear the instant Case. Nicaragua has been a State Party to the Convention since September 25, 1979, and accepted the compulsory jurisdiction of the Court on February 12, 1991, in the following terms:

I. The Government of Nicaragua recognizes as compulsory *ipso facto* and not requiring special agreement, the jurisdiction of the Inter-American Court of Human Rights, on all matters relating to the interpretation or application of the American Convention on Human Rights, "Pact of San José, Costa Rica", pursuant to Article 62(1) of the Convention.

II. The Government of Nicaragua, in stating the above, establishes that recognition of the jurisdiction of the Inter-American Court of Human Rights is indefinite and general on the condition of reciprocity, subject to the reservation that this recognition of competence applies only to cases arising out of events subsequent to, and out of acts which began to be committed after, the date of deposit of this declaration with the Secretary General of the Organization of American States.

3. On March 21, 1994, the Government submitted another acceptance of specific jurisdiction in this Case, "*only and exclusively under the precise terms of the application submitted by the Inter-American Commission on Human Rights that appear in the subtitle 'Purpose of the Application'.*"

4. In connection with these two declarations of acceptance of jurisdiction, this Court, in its Judgment on preliminary objections of January 27, 1995, established the following:

[t]he Court does not feel it necessary to state its position at this time concerning the effect of the existence of two acts of acceptance of

jurisdiction. In principle, in the Commission's "*Purpose of the Application*" there appear no demands relative to the violation of the victim's right to life or to humane treatment, events which occurred prior to Nicaragua's acceptance of jurisdiction. Consequently, the Court shall limit itself to decide, in due time, on these matters -and in any event it could not exceed the scope of this matter without the risk of adopting an *ultra petita* decision-. In adopting this position, the Court shall not be found to lack jurisdiction, since Nicaragua has expressly accepted that the Court has jurisdiction over such a matter." (*Genie Lacayo Case, Preliminary Objections*, Judgment of January 27, 1995. Series C No. 21, para. 25).

II

5. On February 15, 1991, the Commission received a petition from the Permanent Human Rights Commission of Nicaragua, transmitted it to the Government on February 27 of the same year, and requested the appropriate information for determining whether the domestic legal measures had been exhausted.

6. On March 13, 1991, the Government informed the Inter-American Commission that with respect to petition No. 10.792, a Special Commission of Inquiry of the National Assembly for the Genie Lacayo Case had sought technical advice from the Government of Venezuela. On August 27, 1991, the Venezuelan investigators delivered their conclusions, in which they stated that "*we point to members of the Escort of General Humberto Ortega-Saavedra, on guard on October 28, 1990 ... as the main suspects in the crime of homicide against the person of the minor Jean-Paul Genie-Lacayo.*" The Army High Command maintained that the report "*was the result of politically biased investigations; it is impossible in two weeks to determine the perpetrators of such a complex crime which even the Nicaraguan police had been unable to solve.*"

7. On May 29, 1991, the Government transmitted to the Commission a document which included a copy of a note signed on May 23 of the same year by the Vice Minister of the Interior, Dr. José Bernard Pallais-Arana. The note was accompanied by a report "*containing fundamental aspects of the case under consideration, describing the action taken by the police, the legal framework and the submission of the proceedings*

to the Office of the Attorney General." The note further states "*that it must be recalled that the remedy of appearing before that Honorable jurisdiction [the Commission] may be invoked only after domestic remedies have been exhausted.*" The proceeding before the Commission continued and both the Government and the petitioner kept the Commission informed of the status of the domestic investigation.

8. On March 10, 1993, the Commission issued Report No. 2/93, the final section reads as follows:

VII RECOMMENDATIONS

7.1 It recommend that the Government of Nicaragua punish the material authors, as well as their accomplices and accessories, for the crime of homicide to the detriment of Jean-Paul Genie-Lacayo.

7.2 It recommend that the Government of Nicaragua pay fair compensatory damages to the direct relatives of the victim.

7.3 It recommend that the Government of Nicaragua accept the jurisdiction of the Inter-American Court of Human Rights in the specific case on which this report is based.

7.4 It request that the Government of Nicaragua inform the Inter-American Commission of Human Rights within three months of the measures it adopts, in accordance with the recommendations in paragraphs 7.1, 7.2, and 7.3 concerning the instant case.

7.5 If after three months the case has not been resolved by the Government of Nicaragua, the Commission shall state its opinion and conclusions on the matter submitted for its consideration and it shall make a decision regarding the publication of this report, pursuant to Article 51(1) of the American Convention on Human Rights. Also, the present report shall be transmitted to the Government of Nicaragua and to the petitioners, who are not at liberty to publish it.

9. On May 21, 1993, the Government requested that the Commission review Report N° 2/93. In its request the Government pointed out, *inter alia*, that "*in the case under consideration, the domestic remedies have not been exhausted.*" In the same document it reiterated this view, stat-

ing "*that precisely because of the fact that the domestic remedies have not been exhausted and a decision on an appeal is pending ... we also do not know ... to which judicial procedure this matter must be submitted.*" This petition was dismissed by the Commission during its 84th Session. It is stated in the pertinent section of the Commission's Minutes No. 5 of October 7, 1993, that "[t]he Inter-American Commission decided to confirm Report No. 2/93 relating to the Case of Jean-Paul Genie-Lacayo and to submit it to the Inter-American Court of Human Rights."

III

10. The application was submitted to the Court on January 6, 1994, and was notified to the Government by the Secretariat of the Court (hereinafter "the Secretariat"), together with its attachments, on January 21, 1994, after the President of the Court (hereinafter "the President") had made the preliminary review. The Commission designated Michael Reisman as its Delegate before this Tribunal; Edith Márquez-Rodríguez and Milton Castillo as its Attorneys, and Oscar Herdocia, Daniel Oliva and José Miguel Vivanco as their Assistants. Subsequently, on March 20, 1996, the Inter-American Commission submitted a note in which it informed the Court that as of that date Mr. Carlos Ayala-Corao and Mr. Alvaro Tirado-Mejía would serve as its Delegates in the instant Case.

11. In its application the Commission invoked Articles 50 and 51 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Article 26 *et seq.* of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"). The Commission submitted this Case for a ruling by the Court as to whether Nicaragua had violated Articles 8 (Right to a Fair Trial), 25 (Right to Judicial Protection) and 24 (Right to Equal Treatment), all read in conjunction with Article 1(1) (Obligation to Respect Rights) of the Convention "*as a result of the judiciary's reluctance to prosecute and punish those responsible and to order the payment of reparations for the damages caused.*" The Commission also requested the Court to find that Nicaragua has violated Article 2 of the Convention by failing to adopt domestic legal provisions designed to give effect to those rights and that it has violated, on the basis of the principle of *pacta sunt servanda*, Article 51(2) of the Convention by failing to comply with the Commission's recommendations. It asked the Court to determine, pursuant to Article 63(1) of the Convention, the reparations and indemnities due to

the victim's direct relatives and to instruct the Government to identify and punish those responsible, on the basis of the investigations conducted. The Commission further requested the Court to declare that

Decrees 591 and 600 entitled "Law on the Organization of the Military Judge Advocate and Military Criminal Procedure" and "Provisional Law on Military Crimes" are incompatible with the purpose and aim of the American Convention on Human Rights [and that] the Government of Nicaragua be sentenced to pay the costs of this proceeding.

12. The application states that the petition lodged with the Secretariat of the Commission by the Permanent Human Rights Commission of Nicaragua, on February 15, 1991, at approximately 8:35 p.m. on October 28, 1990, the youth Jean-Paul Genie-Lacayo, aged 16, resident of the city of Managua, was traveling by car to his home in the Las Colinas subdivision. After stopping at a restaurant, he took the road to Masaya and between kilometers 7 and 8 he came upon a convoy of vehicles transporting military personnel who, in response to his attempts to pass them, fired on him. The victim did not die immediately but was left on the highway and died from hypovolemic shock induced by hemorrhage. According to the investigations, this young man's automobile was machine-gunned by weapons from two or more vehicles and 51 cartridge shells of AK-47 ammunition were found at the site. According to ballistic reports, nineteen bullet impacts were found on the car, all made while the car was in motion, and three shots were fired at short range once it had stopped.

13. According to the application, National Nicaraguan Police Subcommander Mauricio Aguilar-Somarriba, who, according to his parents, was in charge of the investigation of Genie-Lacayo's death, was killed by his fellow officer Lieutenant Harold Meza. The Government denied that that officer had been in charge of the investigation and dispatched to the Court a case file stating that the author of this deed, Lieutenant Meza, had been sentenced to three years in prison.

14. The application further states that the judicial action was initiated on July 23, 1991 (267 days after the events), by the Office of the Attorney General of Justice, then the only criminal action authority; on July 2, 1992 (approximately one year after submission of the petition), the Seventh Court of the Criminal District of Managua delivered a judgment

in which it decided: to recognize that "*the crime of homicide had been committed against Jean-Paul Genie-Lacayo*," to identify the alleged perpetrators and accessories and to refrain from proceeding with the case, on the ground that it belonged in the military jurisdiction, and submitted the case file to the Military Advocate; the victim's father appealed the decision on July 6, 1992; on October 27, 1992, the Court of Appeal, Region III, Criminal Chamber, delivered a judgment denying the appeal concerning the jurisdiction of the Court and upheld the ruling of lack of jurisdiction to hear the case, it being a matter for the military courts; on November 6 and 9, 1992, the victim's father and the Assistant Attorney-General each filed special applications for judicial review; on December 20, 1993, the Supreme Court of Justice handed down a ruling in which it dismissed those measures and referred the case to the Military Advocate; both the Assistant Attorney-General and the victim's father repeatedly submitted briefs claiming that the deadline for delivering a judgment had been exceeded by far.

15. The Commission maintains in its application that Government agents, acting under the cover of a public function, committed acts that resulted in a denial of justice. These acts include the disappearance of evidence, the contempt displayed by military witnesses in refusing to appear in order to testify in the Seventh Court of the Criminal District of Managua, the failure to institute internal proceedings within a reasonable time, and the application of norms incompatible with the object and purpose of the American Convention, such as Decrees 591 and 600 relating to the Law on the Organization of the Military Judge Advocate and Military Criminal Procedure and the Provisional Military Criminal Law. These acts precluded any impartial investigation that would lead to the punishment of those responsible and compensation of the victim's next of kin. The application further states that the events on which the complaint is based began on July 23, 1991, the date on which the Office of the Attorney General of Justice, then the only public criminal action authority, submitted the petition to the Judiciary. The specific acts referred to in the application are as follows:

- a. Colonel Sidney Lacayo-Guerra of the *Sandinista* Popular Army, chief of General Humberto Ortega-Saavedra's Escort, testified on September 3, 1991, before the Seventh Court of the Criminal District of Managua that the weapons' registration log, reports of movements of the convoy and their arrivals at Military Unit 003 were burned on January 1991. He explained that the

records were burned, in compliance with Order 034 of December 1, 1981, because they were not required by the police for the investigation of the case, a regulation that could only be countermanded by order of the Army Chief of Staff.

b. On October 7, 1991, the Assistant Attorney-General complained that the Police Chief of Criminal Investigations had arbitrarily and exceeding his authority ordered the T-shirt worn by the deceased on the day of the events to be burned.

c. On June 2, 1992, the Seventh Court of the Criminal District of Managua conducted an inspection of Military Unit 003 which showed that General Ortega had six black and olive green Renegade CJ-7 Jeep units and two Sahara Jeeps at his disposal until October 28, 1990. In December 1991, five of those Renegade Jeeps were sold in perfect condition and below their market value.

d. Twelve military witnesses who were at Military Unit 003 refused to testify before the court of first instance. In view of their refusal, Judge Boanerges Ojeda-Baca sent a letter on February 25, 1992, to Commander Javier López-Lowery, Chief Police Prosecutor, together with the respective summonses for them to appear.

e. The Assistant Attorney-General Alicia Duarte-Bojorge, declared that she had had great difficulty in making the following witnesses appear in court: Plutarco Fletes, Alberto Torres, Santiago Gámez, Orlando Bolaños and First Lieutenant Mendoza-Mayrena, serving at Military Unit 003; Lieutenant José Francisco Valenzuela, Lieutenant Colonel Bosco Centeno and First Lieutenant Noel Prado-Gutiérrez stationed at other military units, and Freddy Rafael Maltez and Lieutenant Emilio Rodríguez, Captain Marín-Arias, Yader Urbina, Efraín García and Lorenzo Martín-Romero from the Defense Information Department. Accordingly, she requested the Seventh Court of the Criminal District to appeal to General Joaquín Cuadra, Chief of Staff of the *Sandinista* People's Army, to order them to appear. On March 3, 1992, the judge informed General Cuadra of the order, informing him of it again on April 10, 1992. The Assistant Attorney-General requested the Seventh Court of the Criminal District to dispatch an explanatory brief to the Supreme Court of Justice informing it of the refusal of the witnesses, "*who were protected by the military arbitrament.*"

The following considerations were also mentioned in the application:

- a. That the denial of justice was linked to the lack of access to domestic remedies, inasmuch as any State Party to the Convention is obliged to facilitate access to recourse against acts that violate a person's fundamental rights and that failure to do so would constitute an exception to the rule of exhaustion of remedies. That it is clear that the injured party has not enjoyed that right and that the State was therefore responsible.
- b. That the Genie-Lacayo family had not been afforded effective remedies, that is, remedies capable of producing the results for which they were created; since the right to life was violated, the appropriate judicial remedy was the prosecution and punishment of the perpetrators and reparations to the relatives.
- c. That in this case the courts of first instance and appeal declared themselves without competence to hear the case, considering it to belong to the military jurisdiction. The arguments of both the Office of the Attorney-General and the victim's father showed that the Political Constitution of Nicaragua establishes that all persons are equal in the eyes of the law, so that application of the Law on the Organization of the Military Judge Advocate violated this precept, since a special court would be set up for any crime in which there was evidence of involvement of a member of the military.
- d. That the denial of justice or access to the courts is not the only judicial act for which the State may incur responsibility; other such acts are unwarranted delay in the administration of justice, grave irregularities in the process, and manifestly unjust or unlawful judgments.
- e. That the conclusions issued by the team of Venezuelan investigators invited by the Special Commission of Inquiry of the National Assembly to investigate the facts of the Genie Lacayo Case were considered by the Committee to "*conform entirely with its opinions, assessments and conclusions.*"
- f. That Decrees 591 and 600 created conditions conducive to the violation of the right to a fair trial, to due process and to equal

treatment by granting broad margins of discretion and leaving it to the Army's High Commanders to sanction those "involved" or to let them go unpunished, and by placing "*the soldiers of the **Sandinista** Popular Army on a different level to the rest of Nicaraguan society, with adverse effects on the rights enshrined in the American Convention.*"

16. The Government gave notification of its appointment of José Antonio Tijerino-Medrano as its Agent; it then designated Marco Gerardo Monroy-Cabra as its Adviser and Víctor Manuel Ordóñez and Carlos José Hernández-López as their Assistants. Mr. Hernández-López was appointed Alternate Agent by note of May 30, 1995. By note of January 23, 1997, it gave notification of the appointment of Julio Centeno-Gómez and Alvaro J. Sevilla-Siero as Agent and Alternate Agent.

17. By note of February 7, 1994, the President, at the request of the State, granted the Government a 90-day extension of the term prescribed in Article 29(1) of the Rules of Procedure for answering the complaint, and a 30-day extension for filing preliminary objections.

18. According to the answer to the application of May 23, 1994, the Government did not accept the Commission's statements with regard to the Government agents' alleged obstruction of the judicial process, nor did it accept that there had been undue delay in the administration of justice, nor that rules incompatible with the object and purpose of the American Convention had been applied. It further claimed that neither had legal due process been ignored nor had the principle of equality been breached. It did not accept that the acts that were the subject of the petition had begun on July 23, 1991, the date on which the Office of the Attorney-General of Justice filed the complaint with the Judiciary. It also maintained that the ordinary criminal process showed continuous and ongoing procedural activity and that justice had been promptly and fully administered.

19. On all the facts indicated by the Commission, the Government responded:

- a. That the T-shirt worn by the youth Genie-Lacayo on the day of his death was burned because it had been severely contaminated by the effects of the hematic remains with which it was impregnated and that it had already been subjected to a forensic

examination the results of which appeared in the report from the Central Forensic Laboratory on October 31, 1990. Consequently, its destruction did not constitute a disappearance of evidence, inasmuch as it had already been examined. The Government further stated that the T-shirt was burned prior to July 23, 1991, the first day of the judicial inquiry which is the subject of the petition.

b. That the sale of the military vehicles was not unlawful; they were not in perfect running order and there was no proof that they were used in the commission of the homicide. In that regard, *"the witnesses did not agree on the make of the vehicles, none of the witnesses saw the crime committed, and General Humberto Ortega's entire escort declared that the only vehicle they used was silver-colored and had not been sold."* It added that there was no evidence that the sale had been made in order to cover up any crime, and that the vehicles were sold prior to July 23, 1991.

c. That the members of General Ortega's escort had testified on a number of occasions before the police court of inquiry and, subsequently, before the Seventh Court of the Criminal District of Managua; if any of them did not do so it was because they had not been duly summoned. Examination of the docket showed that virtually all the members of the escort had twice testified, and later a third time, before the Military Judge Advocate; it was therefore inaccurate *"to state that there was disobedience on the part of military witnesses."* The reasons for the witnesses' delay in appearing was explained by the General Cuadra when on April 24, 1992, he sent a note to the judge in the case declaring that some of the soldiers summoned did not appear on the personnel and officers' files, others because they were not active soldiers or because they had been removed, for which reason he requested more detailed information so as to be able to locate them. In that letter he reiterated what the Public Relations Department of the *Sandinista* Popular Army had said

concerning the scope of the powers for summoning soldiers who have not the slightest connection with the case being investigated and which rather confirms our impression that this is a case of harassment designed to keep the case on a single line of investigation which is, coincidentally, the same as that pursued by a part of the media.

The Government also pointed out that the deadline for evidence-gathering had been extended at the request of the Attorney-General on August 16, 1991, so that justice had not been obstructed; indeed, all the time needed for collecting evidence had been available in the case.

d. That the inquiry had been exhaustive and the procedural activity in the Seventh Court of the Criminal District of Managua, the Court of Appeal, and the Supreme Court of Justice conformed to the rules in force in Nicaragua. The duration of the police inquiry and the judicial proceeding was in keeping with the complexity of the case, the large number of investigative measures, the plethora of witnesses that gave statements, and the petitions of the parties to the case.

e. That owing to the thousands of petitions heard by the Nicaraguan courts of justice, the time spent on this Case was normal for criminal cases in the country, as shown by the certification accompanying the brief on preliminary objections. That the fact that the case was heard in courts of first and second instances, had been appealed, had been the subject of a request by the Assistant Attorney-General for an extension of the legal term for inquiry proceedings to procure certain evidence, and had been the subject of debate on jurisdiction and the continuous petitions by the victim's father show that there had been neither unwarranted delay in the administration of justice nor any denial of justice.

f. That the report issued by the Venezuelan experts lacked probative value and could not have legal effects inasmuch as it had not been produced during the judicial process nor did it meet the requirement of contradiction or bilaterality, and had usurped the role of the Nicaraguan courts in indicating those possibly responsible for the death of the youth Genie-Lacayo. The State therefore did not accept that the experts (who are auxiliaries of justice) should replace the Nicaraguan courts and indicate the possible perpetrators without possessing the competence to do so.

g. That Decrees 591 and 600 were in force at the time the case was tried and Nicaragua's judicial authorities *"were obliged to apply them under pain of committing abuse of power for the denial of justice."* The decrees stipulated *"military courts for military per-*

sonnel" and no civilians had been accused in the instant Case. Those decrees did not ignore rights or judicial guarantees; the accused had their attorneys and were able to participate in all stages of the judicial proceedings. Equal treatment had not been withheld and due legal process had been observed. The case had been processed in the Office of the Military Judge Advocate from January 18, 1994, when the Secretary of the Supreme Court of Justice submitted the file. The military investigating prosecutor had been appointed on January 28 and on January 31 the case was called and both parties appeared.

20. On November 11, 1994, the Commission submitted to the Court the following documentation concerning the processing of the Genie Lacayo Case before the Military Judge Advocate of Nicaragua: Judgment of June 27, 1994, delivered by the Military Tribunal of First Instance of the Office of the General Advocate of the *Sandinista* Armed Forces; conclusions of the Military Prosecutor of Instruction; appeal filed by the accuser; a file from the Officer of the General Command of the *Sandinista* Popular Army separating Army General Humberto Ortega-Saavedra from jurisdictional duties; and an order of July 6, 1994, from the Army General Commander rejecting the appeal on the ground of inadmissibility.

21. On January 12, 1995, the Government presented a brief in which, *inter alia*, it makes a juridical analysis of the task performed by the Tripartite Commission, composed of representatives of the Government, Cardinal Miguel Obando y Bravo, and the International Support and Verification Commission (CIAV). It added that the purpose of the Tripartite Commission was not germane to the case of Jean-Paul Genie-Lacayo; it had not investigated it because it did not fall within its purview; it had, however, studied the provisions contained in Decree 591, Law on the Organization of the Military Judge Advocate and Military Criminal Procedure, and Decree 600, Provisional Military Criminal Law, and recommended the reform of the legislation.

22. The Court, in its Judgment of January 27, 1995, unanimously disposed of the preliminary objections lodged by Nicaragua in the following terms:

1. Declares that it is competent to hear the instant Case, except regarding the abstract compatibility of Decrees 591 and 600 of Nicaragua with the Inter-American Convention on Human Rights.

2. Rejects the preliminary objections interposed by the Government of Nicaragua, except for the objection relative to the non-exhaustion of internal jurisdictional remedies, which shall be resolved together with the merits of the Case.

3. Considers that the objections of the Government of Nicaragua posed in opposition to the statements in the Inter-American Commission on Human Rights' complaint concerning the mandatory nature of its recommendations are not preliminary objections but rather essential questions on the merits that shall be resolved in due time.

4. Does not consider it appropriate to award court costs and attorneys' fees.

5. Resolves to continue hearing the present Case (*Genie Lacayo Case, Preliminary Objections, supra* 4, para. 53).

23. By note of March 15, 1995, the Commission presented the list of the following witnesses who should be summoned by the Court to appear at the public hearings on the merits: Raymond Genie-Peñalba, Alicia Duarte-Bojorge, Hernaldo Zúñiga-Montenegro, Humberto Ortega-Saavedra, Joaquín Cuadra-Lacayo, Boanerges Ojeda-Baca, Sidney Lacayo-Guerra, Omar Hallesleven-Acevedo, and Carlos Hurtado-Cabrera. On March 17, 1995, the Government submitted to the Court a brief in which it objected to the appearance of witnesses Sidney Lacayo-Guerra, Omar Hallesleven-Acevedo and Carlos Hurtado-Cabrera on the ground that they did not appear on the list of witnesses submitted in the Commission's petition. On that same day it presented a further brief in which it challenged the following witnesses: Humberto Ortega-Saavedra, because of his role as accused in the investigation into the death of Jean-Paul Genie-Lacayo, and Joaquín Cuadra-Lacayo and Boanerges Ojeda-Baca, in their capacity as members of the tribunals that had heard the Case and because neither was a third party.

24. By Order of May 18, 1995, the Court decided to continue to hear the merits of the Case with the composition of the Court that had delivered the judgment on preliminary objections.

25. By Order of June 30, 1995, the President of the Court convened public hearings on November 27 and 28 of that year to hear the com-

ments of the parties on the objection to the witnesses and their appearance in the proceedings, and to take the statements of witnesses Raymond Genie-Peñalba, Alicia Duarte-Bojorge and Hernaldo Zuñiga-Montenegro.

26. On November 27, 1995, Nicaragua presented, as part of the last judicial proceedings as of that date in the Genie Lacayo Case, a brief from Mr. Raymond Genie-Peñalba in which he maintained the admissibility of the appeal in process, together with briefs from two judges of the Supreme Court of Justice of Nicaragua disqualifying themselves from hearing the Case on the ground that they had participated in it at an earlier stage.

27. On November 27, 1995, the Commission presented two notes accrediting Mr. Ariel Dulitzky as its Assistant for the hearings to be held on that day and the next. The Government's Agent objected to the accreditation as time-barred. On that same day the Court decided to reject the accreditation because "*it is important [for a party] to be informed of the names of the persons who would represent the adversary and the capacity in which they do so, if it is to adequately prepare its defense.*"

28. On November 27, 1995, the Court held a public hearing to listen to the pleadings of the Government and the Commission on the objection to the appearance, and the impugment of witnesses. On November 28, the Court decided "*to dismiss the objection filed by the Government of Nicaragua [supra 23] to the aforesaid witnesses and their appearance, reserving the right to assess the value of their statements at a later date*" and authorized the President to convene a public hearing to take their evidence.

29. The Court heard the statements of the witnesses at a public hearing on November 28, 1995.

There appeared before the Court,

for the Government of Nicaragua:

José Antonio Tijerino-Medrano, Agent
Marco Monroy-Cabra, Adviser, and
Víctor Manuel Ordóñez, Assistant;

for the Inter-American Commission on Human Rights:

Leo Valladares, Delegate,
Milton Castillo, Attorney,
Oscar Herdocia, Assistant,
Daniel Oliva, Assistant, and
José Miguel Vivanco, Assistant;

witnesses called by the Inter-American Commission on Human Rights:

Raymond Genie-Peñalba,
Alicia Duarte-Bojorge, and
Hernaldo Zúñiga-Montenegro.

30. On December 9, 1995, the President decided to convene the representatives of the Government and the Commission to a public hearing to be held from September 5, 1996, to take the statements of the following witnesses: Sidney Lacayo-Guerra, Omar Hallesleven-Acevedo, Carlos Hurtado-Cabrera, Humberto Ortega-Saavedra, Joaquín Cuadra-Lacayo and Boanerges Ojeda-Baca.

31. On December 20, 1995, the Government transmitted to the Court certification of the proceedings in the military courts on the Genie Lacayo Case between March 9, 1994, and November 28, 1995.

32. On January 20, 1996, the President decided that the Government and the Commission, after receiving the witnesses' statements, should present their closing arguments on the merits of the Case (*infra* 35).

33. On July 8, 1996, the Inter-American Court issued an Order in which it entrusted the judges present at the XX Special Session of the Court with hearing the oral evidence.

34. On August 27, 1996, the Government submitted, at the Court's request, copies of the following original texts of the Official Registry "La Gaceta": Law 181 of August 23, 1994, Code of Military Organization, Jurisdiction and Social Welfare; Law 37 of April 13, 1988, Law of Criminal Procedural Reform; Law 124 of March 8, 1991, Law of Criminal Procedural Reform; Law 164 of December 1, 1993; Law of Reforms of Criminal Instruction; Decree 521 of April 7, 1990, Establishment and Organization of the Institute of Social Welfare of the *Sandinista*

People's Army, and Decree 1130 of October 5, 1982, Law of Criminal Procedural Reform.

35. At the public hearing which began on September 5, 1996, Judges Héctor Fix-Zamudio, Hernán Salgado-Pesantes, Rafael Nieto-Navia and Alejandro Montiel-Argüello received the depositions of the witnesses who appeared in compliance with the Order of the President of the Court of December 9, 1995, and heard the conclusions of the parties on the evidence taken.

There appeared before the Court,

for the Government of Nicaragua:

José Antonio Tijerino-Medrano, Agent,
Carlos José Hernández-López, Alternate Agent,
Marco Monroy-Cabra, Adviser, and
Víctor Manuel Ordóñez, Assistant;

for the Inter-American Commission on Human Rights:

Alvaro Tirado-Mejía, Delegate,
Domingo Acevedo, Deputy Executive Secretary,
Milton Castillo, Attorney,
Bertha Santoscoy-Noro, Attorney,
Oscar Herdocia, Assistant,
Héctor Faúndez-Ledezma, Assistant,
José Miguel Vivanco, Assistant, and
Ariel E. Dulitzky, Assistant;

witnesses called by the Inter-American Commission on Human Rights:

Sidney Lacayo-Guerra, -
Omar Hallesleven-Acevedo,
Carlos Hurtado-Cabrera, and
Boanerges Ojeda-Baca.

The following witnesses called by the Commission did not appear at this hearing, despite the summons delivered by the Court:

Humberto Ortega-Saavedra, and
Joaquín Cuadra-Lacayo.

36. On September 5, 1996, the Inter-American Commission presented a brief in which it reiterated its request made at the public hearing that the Court again summon Mr. Humberto Ortega-Saavedra and Mr. Joaquín Cuadra-Lacayo. On September 6, 1996, the Government once more filed a written objection to the request. On that same day the President of the Court decided that the oral pleadings of the parties based on the evidence already collected should be heard, reserving the Commission's request to be decided on by the full Court.

37. On September 6, October 7 and November 18, 1996, the Government dispatched copies of the latest documents presented to the Supreme Court of Justice of Nicaragua in the Genie Lacayo Case, concerning the processing of the as yet unsettled appeal pending decision and its effects.

38. On October 3, 1996, the Commission presented the Court with the pleading on the evidence collected up to that time, in which it stated:

a. That there was abundant evidence that the purpose of the actions of the Nicaraguan authorities was precisely to thwart the investigation and guarantee the impunity of the authors of the crime.

b. That had there been a serious and impartial investigation, Nicaragua would have helped to dissipate any doubt as to those State agents' participation in the acts that motivated the instant Case. Nicaragua, as a State Party to the Convention, was called upon to organize its legal system to ensure its tribunals provide proper administration of justice, a goal that cannot be attained if cases are not handled with all due guarantees and within a reasonable time. It is evident that as of February 1992, when so permitted by the law, the petitioner not only cooperated in the case but also promoted it, and that it was the authorities' conduct that had prevented the case from being concluded.

c. That although Article 243 of Decree 591 governing the Army High Command's intervention in the administration of justice was not enforced, there is reasonable doubt as to the impartiality of the system; and that the military prosecutor and the military courts of first and second instances assessed the value of the evidence in accordance with the "*Sandinista* juridical conscience" established in Article 52 of the aforementioned decree.

d. That the domestic judicial process far exceeded the average time for judicial proceedings in Nicaragua in the light of the information supplied by the country's Attorney-General, and that the many cases left unresolved owing to the Judiciary's workload does not exonerate the State from its obligation to try cases expeditiously.

e. That Decree 591 did not afford the guarantees of an independent and impartial tribunal in compliance with Article 8 of the Convention and that with the application of that decree and of Decree 600 to the instant Case, the threat of violation of guaranteed rights ceased to be hypothetical and became a reality to the detriment of the rights of the Genie-Lacayo family.

39. On October 7, 1996, the Government submitted its summation to the Court, the main points of which were as follows:

a. That it had been demonstrated that domestic remedies were not exhausted, inasmuch as the criminal case was still before the Supreme Court of Justice of Nicaragua and that none of the exceptions provided for in Article 46(2) of the Convention on Human Rights were applicable.

b. That it has been demonstrated that criminal due process before the Nicaraguan judicial authorities had been respected and the father of the youth Jean-Paul Genie-Lacayo had been afforded access to all the remedies established in the criminal procedural legislation and that there had been no unwarranted delay in rendering a judgment in the case.

c. That it has been demonstrated that the duration of the case had been reasonable if the police inquiry and the action of the Attorney-General's prior to July 23, 1991, were excluded, and recalling that the dispute over jurisdiction had lasted "*from July 2, 1992, to December 20, 1993.*" That it was necessary to study the many pieces of evidence provided, the remedies and incidents proposed, the difficulty encountered in convening the members of the Supreme Court of Justice for it to rule on the appeal lodged by the father of the youth Jean-Paul Genie-Lacayo, the congestion of the criminal courts in Nicaragua, and their dearth of staff.

d. That there was no evidence to show that by taking the case to the military court it was appealing to the "*Sandinista* juridical conscience," since the text of the judgments delivered in the first and second instances shows that the evidence had been subject to a valutive analysis in accordance with the rules of healthy criticism and the law.

e. That the full Supreme Court of Justice had been fully constituted as of September 19, 1996.

f. That both the ordinary and military courts had acted independently and impartially. There was no proof of any interference or intervention on the part of the Executive Branch or the Army.

40. On January 22, 1997, the Court decided not to call on the witnesses General Humberto Ortega-Saavedra and General Joaquín Cuadra-Lacayo again to testify and declared the evidentiary phase to be at an end in order to begin to hear the merits of the Case, with a view to delivering a judgment.

41. On November 17, 1994, the International Legal Advisors Esq. and the Foundation for the Development of International Law presented an *Amicus Curiae*, on the issue of non-exhaustion of domestic remedies during the phase of preliminary objections.

IV

42. The first question to be examined in this Case is that concerning the non-exhaustion of domestic remedies, which the Government has raised as a preliminary objection and which this Court decided in its Judgment of January 27, 1995, would be resolved at the same time as the merits of the Case "*inasmuch as it relates to the judicial remedies existing in Nicaragua, and their applicability and effectiveness*" (*supra* 22).

43. The Government held that the Commission should not have admitted the petition when it was submitted on February 15, 1991, since the requirement to exhaust domestic remedies established in Article 46(1) of the Convention had not been fulfilled, the criminal case initiated as a result of the youth Genie-Lacayo's death having been in prog-

ress at that time. In support of its objection, the Government cited the proceedings in the State's criminal courts, both civil and military, and their abundant incident. It further averred that none of the circumstances provided for in Article 46(2), which would have prevented exhaustion of the remedies, had occurred, nor had there been any unwarranted delay in the administration of justice.

44. The Commission, for its part, asked for this objection be dismissed on the ground that the party invoking the exhaustion of domestic remedies is obliged to specifically identify them to the Commission, and Nicaragua had not done so; in its view, the domestic remedies had indeed been fully exhausted.

45. This Tribunal, in its Judgment on preliminary objections, considered that:

[in] the instant Case, the Commission's petition refers to Nicaragua's violation of Articles 8 (Right to a Fair Trial), 25 (Right to Judicial Protection), and 24 (Right to Equal Treatment) of the Convention, "*as a result of the Judicial Branch's reluctance to prosecute and punish those responsible and to order the payment of reparations for the damages caused*" by the death of Genie-Lacayo. The Court feels that the articles invoked by the Commission refer to the administration of justice and are closely related, as is logical, to the "*internal remedies*" whose non-exhaustion Nicaragua alleges (*Genie Lacayo Case, Preliminary Objections, supra* 4, para. 29).

46. At the same time, account should be taken of the fact that the Commission excluded from its petition the violation of young Genie-Lacayo's right to life and right to humane treatment, inasmuch as his death occurred prior to February 12, 1991, the date on which the State accepted the jurisdiction of this Court, so that the merits of the Case are limited exclusively to the consideration of breaches of procedure.

47. The exhaustion of domestic remedies in a strictly procedural case concerns the merits and these refer precisely to the Nicaraguan Judiciary's ineffectiveness in ruling on the investigation and punishment, if appropriate, of the persons responsible for the death of young Genie-Lacayo and on the reparations to which his relatives are entitled. This Court therefore dismisses it on the basis of the evidence contained in the docket.

48. However, the Commission must in all cases pay due attention to Article 46(1)(a) of the Convention whereby it is called upon to take account of the prior exhaustion of domestic remedies as an admissibility requirement which serves, *inter alia*, to determine the timeliness of the petition submitted to it (Art. 47 of the Convention), subject, of course, and if appropriate, to subsequent review by the Court, which shall be the body that rules on the matter in the last resort.

V

49. The Court shall now consider the arguments of both parties on the merits of the Case.

50. In its application to the Court and in its closing arguments, the Commission contends, in essence, that the Government had violated, to the detriment of the relatives of the young Genie-Lacayo, Articles 8, 25 and 24 of the Convention as a result of the Nicaraguan Judiciary's reluctance to prosecute and punish those responsible for Genie-Lacayo's death and to order reparation for the damages caused.

51. The Commission is of the view that the Government also infringed, in addition to Article 8(1), the provisions of Article 2 of the American Convention by failing to take such legislative or other measures as were necessary to give effect to the rights and freedoms enshrined in the Convention; that Decrees 591 and 600, in granting broad margins of discretion and entrusting the Army High Command with the punishment or otherwise of the accused, established conditions conducive to the violation of the rights to justice, to due process and to equal protection, and that those provisions placed the members of the *Sandinista* Popular Army on a different level to the rest of Nicaraguan society, thereby impairing the rights enshrined in the American Convention.

52. The Commission further stated that the Government agents committed acts that resulted in the denial of justice, including the disappearance of evidentiary documents and the contempt displayed by the military witnesses who refused to appear to testify before the Seventh Court of the Criminal District of Managua. According to the Commission, the domestic case was not processed within a reasonable time and, furthermore, norms contrary to the purpose and aim of the American Convention were applied, such as Decrees 591 and 600, containing respectively the Law on

the Organization of the Military Judge Advocate and Military Criminal Procedure, and the Provisional Military Criminal Law.

53. The Commission reiterated its view that to prosecute ordinary crimes as though they were military crimes simply because they had been committed by members of the military breached the guarantee of an independent and impartial tribunal, basing its argument on a decision of the United Nations Human Rights Committee; United Nations fundamental principles three and five concerning the Independence of the Judiciary: Article 16(4) of the Minimum Standards of Rules of Human Rights in States of Emergency (Paris, 1984), and the literature of the Inter-American Commission itself. The Commission also cited the considerations expressed by the Supreme Court of Justice of Nicaragua in its judgment of December 20, 1993, which led that jurisdiction to determine the responsibility of the persons accused of the murder of young Genie-Lacayo belonged to the military courts, supported by aforementioned Decrees 591 and 600, but adding that it did not agree with its provisions so that, in the opinion of that High Court, they should be amended by the National Assembly at its earliest convenience.

54. In its response to the application and in its closing arguments, the Government maintained in substance that the dockets of the police inquiry and the criminal case in the court's showed that there had been continuous and ongoing procedural activity, so that justice had been promptly and fully administered.

55. According to the Government, the allegation that justice had been obstructed by the refusal of twelve military witnesses to testify before the court of first instance was unacceptable, inasmuch as most of the military witnesses had given statements; if a few had not done so it was because they had not been duly summoned.

56. The Government also challenged the Commission's allegation that the delay in the proceeding had resulted in a denial of justice, arguing that the proceedings in the Seventh Court of the Criminal District of Managua, the Court of Appeal, and the Supreme Court of Justice had been conducted in conformity with the rules in force in Nicaragua. The duration of the police investigation and the judicial proceeding were in keeping with the complexity of the case, the numerous pieces of evidence collected, the vast number of testifying witnesses, and the petitions filed by the parties to the case. The Government maintained that

the Commission's claim that the fact that the case has lasted four years signified a denial of justice was unacceptable, that period being normal for criminal cases in Nicaragua.

57. According to the Government, the fact that the civil courts had declared themselves incompetent to hear a case that falls within the purview of the military courts does not imply any denial of justice, this situation having been discussed in the appeal and review before the Supreme Court of Justice, because, according to the Nicaraguan Constitution and its Code of Criminal Investigation, the trial should take place before a competent judge and pursuant to the procedures and formalities established in the law.

58. The Government states that the Commission's claim that normative provisions that run counter to the object and purpose of the Convention were applied to the detriment of the interested party is untenable, since the proceeding established in Decrees 591 and 600 on military justice does not disregard the suspects' right to a fair trial; in a word, all evidence is allowed and challenge procedures established, so that those provisions do not violate the right to equal protection and to a fair trial as set forth in the Articles 8, 25 and 24 of the Convention.

VI

59. At the hearing before the Court, witness Raymond Genie-Peñalba, father of the victim, explained at length all the representations made to the various administrative, police, judicial and military authorities in his inquiries into the death of young Genie-Lacayo. He made particular mention of some problems he had encountered throughout the process and of the effect that certain actions on the part of the Nicaraguan authorities, especially the military -such as obstruction of visits to the Military Unit involved, destruction of some records, disposal of weapons and vehicles probably used in the crime, and the absence of some witnesses- had had on the case. He gave a full account of the *raison d'être* of certain remedies applied by the plaintiff and how they were disposed of or left pending.

60. Witness Hernaldo Zúñiga-Montenegro, a Member of the Nicaraguan National Assembly and President of the Special Legislative Commission created within that collegiate body to investigate the death of

young Genie-Lacayo, made special reference to the request to the Government of Venezuela for the dispatch of experts to deliver a forensic report on the events, a copy of which was sent to the tribunal hearing the case at its express request and which he understood to have been attached to the file.

61. Assistant Attorney-General María Alicia Duarte-Bojorge informed the Court of the role played by the Office of the Attorney-General in such cases, furnishing a detailed account of her own work in this particular case. She told how, despite her request, the weapons allegedly used in the crime, the logs of the arrival and departure of military vehicles, of weapons and other monitoring logs and the vehicles themselves could not be inspected by the judge. In her view, the military authorities clearly obstructed the progress of the case and caused delays by impeding the procurement of evidence.

62. Witness Sidney Lacayo-Guerra, Chief of Army Special Military Unit 003 responsible for General Humberto Ortega's security, said that the Unit kept detailed records of movements of personnel, weapons and vehicles and that the logs corresponding to October 28, 1990, could not be produced during the inspection conducted by Judge Boanerges Ojeda because they had been burned on military orders. He also referred to the mechanisms for the sale of used vehicles, explaining the manner in which the sale of the "Renegades" allegedly involved in the case had been effected. In his view, Judge Ojeda had been afforded every facility available during his visit to the Unit. He declared that upon receipt of the first summonses for members of General Ortega's escort to testify before the judicial authorities, he had retained the services of an attorney to ensure that those summoned should be properly briefed on the events about which they were to testify and the procedure for so doing but that, in the last analysis, the witnesses had appeared of their own free will and had also presented themselves at the military court.

63. In 1990 witness Moisés Omar Hallesleven-Acevedo was Chief of Military Counterintelligence, which came under the General Staff, whose Chief at the time was Major-General Joaquín Cuadra-Lacayo, and the Army High Command, then headed by General Humberto Ortega. In his statement he referred extensively to the investigation conducted, which included the logs of movement of personnel, vehicles and weapons and the inspection of the weapons themselves, reports which had

been made orally to the police. He further declared that neither the police nor any other authority had asked him for the logs before they were burned on the orders of the Chief of Unit 003.

64. Witness Boanerges Ojeda-Baca, Seventh Judge of the Criminal District of Managua, stated that he had received the docket in mid-1991. He furnished a detailed explanation of all the incidents in the case; the evidence sought; which evidence was requested and received; the judicial inspection of Unit 003; and the difficulties he had encountered in summoning the military witnesses, which obliged him to approach even the President of the Republic herself on the matter; and other incidents which he portrayed as lack of cooperation on the Army's part. He further stated that he had given his full attention to the instant Case despite the normal heavy workload in his office. He explained that the Office of the Attorney-General had sought the opinion of the Venezuelan experts because decisions of that kind were not normally delivered at the investigation stage and that it had not been transmitted to the parties inasmuch that was a task for the civil courts. He described the legally established deadlines for the investigation and explained why they could not be met in certain cases. According to the witness, the Venezuelan experts' investigation was considered to be presumptive at the time of the decision as to whether the process should be transferred to the military courts. He explained the role of the police in the initial investigations and the procedure for obtaining evidence through the Ministry of the Interior. He added that on account of his political leanings he had been prevented from conducting a serious and professional investigation of the case and mentioned the letter he had received from Mr. Ricardo Wheelock, Chief of Public Relations of the *Sandinista* People's Army, dissuading him from continuing to summon the witnesses who had not appeared, which Mr. Wheelock considered to be an excessive act of harassment. The sender of this letter had relayed it to the media. Although the witness had requested the file relating to Sub Commander Mauricio Aguilar's murder, it had not been given to him. He referred to subsequent laws 124 and 164 whereby any person is entitled to participate, either on his own behalf or in a class action, in the proceedings on any type of crime, something which did not occur at that time. He reported that when he had in his possession the evidence required for him to judge that the alleged authors of the murder of young Genie-Lacayo could be linked to General Ortega's escort, he had decided to declare himself incompetent to continue hearing the

case and to refer it to the military courts, in accordance with the laws in force.

65. Witness Carlos Hurtado-Cabrera served as Minister of the Interior of the Republic of Nicaragua and in that capacity was responsible for the National Police. He explained to the Court the role that the Police Force, which fell within his purview, played in the investigation of misdemeanors conducted under the National Police Chief. In the Ministry the case came under the direct supervision of Vice Minister José Pallais and, in order to expedite the investigations, the Police appointed Colonel Javier López to act as liaison officer, while the Army appointed Colonel Hallesleven. He understood that the Police had the opportunity to review all the files held at Unit 003 on the basis of the oral reports supplied to it. In the witness' view, the Police acted autonomously.

66. The file contained, in addition to the witnesses' statements, copies of the files of the cases tried in the civil courts, in the military courts and in the Supreme Court of Justice.

VII

67. The Court now determines the relevant facts which it deems to have been proven or not proven, as follows:

68. It has been proven that the Nicaraguan military authorities obstructed, or failed to cooperate adequately in, the investigations conducted by the Attorney-General's Office and with the Seventh Judge of the Criminal District of Managua in which the preliminary proceedings took place; a number of problems were encountered in the procurement of evidence needed for the due processing of the case (letter of February 7, 1992, from Ricardo Wheelock, Chief of Public Relations of the *Sandinista* Popular Army; letter of April 24, 1992, from General Joaquín Cuadra-Lacayo; letter of January 21, 1992, from the Seventh Court of the Criminal District to the President of Nicaragua; notes of June 18, 1992, to the Minister of the Interior and the Chief of Public Relations of the *Sandinista* Popular Army and records of that Office of March 3 and April 7, 1992; notes from the Attorney-General of January 20, February 26, March 25, April 30, May 11, June 8 and 15, and July 1, 1992; note from Sidney Lacayo-Guerra of May 4, 1994; Record of the On-site Inspection of Unit 003 of June 2, 1992; testimony of the

Attorney-General Alicia Duarte-Bojorge, the Seventh Court of the Criminal District, Boanerges Ojeda-Baca, and Raymond Genie-Peñalba).

69. It has been proven that the judicial investigations were extensive and the evidence copious, justifying the fact that the early stages were more protracted than other cases unlike the Genie Lacayo Case (letters of August 16, 1991, and July 1, 1992, from the Attorney-General to the Seventh Court of the Criminal District, and testimony of Attorney-General Alicia Duarte-Bojorge and the Judge of the Seventh Court of the Criminal District, Boanerges Ojeda-Baca).

70. It has been proven that the victim's father was prevented by law from originally participating in the proceeding, but that he was able to do so when the law was amended. It has neither been proven that his representations were obstructed nor that they caused unnecessary delays (Decree 1130, Law of Criminal Procedural Reform, Law 37, Law of Criminal Procedural Reform, Law 124, Law of Criminal Procedural Reform, document of September 4, 1991, from the Seventh Court of the Criminal District of Managua; letter of September 19, 1991, from the Attorney-General; briefs containing Mr. Raymond Genie-Peñalba representations; accusation of July 6, 1992; briefs containing the injuries suffered; appeal of July 6, 1992; application for judicial review of November 9, 1992; incident of disqualification of February 25, 1994; appeal of disqualification of June 20, 1994; incident of substantial nullity of February 7, 1994; incidents of annulment of notification of June 28, 1994; of appeal of July 1, 1994, and of judicial review of August 29, 1994; and briefs on the various incidents of the proceeding -in the civil and military courts- concerning expert appraisals, inspections, evidence, summonses of witnesses; and testimony of Attorney-General Alicia Duarte-Bojorge; the Seventh Judge of the Criminal District, Boanerges Ojeda-Baca, and Raymond Genie-Peñalba).

71. It has been proven that the Supreme Court of Justice of Nicaragua, despite the considerable time that has elapsed and the various requests from the parties for a ruling, has not settled the application for judicial review (Application for judicial review filed by Mr. Raymond Genie-Peñalba on August 29, 1994; incident of abandonment of the application for judicial review submitted by the defense of September 8, 1994; briefs from the defense of August 7, 1995, and August 21, 1996; briefs from Raymond Genie-Peñalba of September 28 and October 24, 1994, June 7 and October 3, 1995, and February 2, May 29, July 28, and

November 4, 1996; brief from Magistrate Alba Luz Ramos-Vanegas of June 12, 1996, and testimony of Raymond Genie-Peñalba).

72. It has been proven that the application of Decrees 591 and 600 concerning military trials in Nicaragua did not violate the principle of equality, did not provoke *capitis diminutio* of Mr. Raymond Genie-Peñalba, nor did it diminish the independence or impartiality of the military tribunals, inasmuch as Article 243 of Decree 591, which provides that the Supreme Court of Justice handling the pending application for judicial review be constituted with four additional members from the military appointed by the *Sandinista* Popular Army's High Command and the Senior Official of the Ministry of the Interior, was not applied in this case. It has not been proven that the principle of predominance of the "*Sandinista* juridical conscience" was applied in the rulings of the military courts. (judgment of June 27, 1994, of the Military Tribunal of First Instance of the Armed Forces' Military Advocate; Judgment of August 19, 1994 of the Army High Command constituted as a Tribunal of Second Instance; and closing arguments of the Government and the Commission).

73. It has not been proven that Mr. Raymond Genie-Peñalba exercised the simple and prompt recourse referred to in Article 25 of the American Convention.

VIII

74. Article 8 of the American Convention which concerns the right to a fair trial establishes the main lines of what is known as "due process of law" or "the right to legal defense," which consist of the right of every person to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other measure.

75. In order to establish violation of Article 8, it is necessary, first of all, to establish whether the accusing party's procedural rights were respected in the trial to determine those responsible for the death of young Genie-Lacayo.

76. There is abundant evidence in the Case file to show that certain military authorities either obstructed or refused to collaborate adequately in the investigations by the Office of the Attorney-General and with the judge of first instance (*supra* 68). The situation reached the point where that court was constrained to contact the President of the Republic by letter of January 21, 1992, -which appears in the Case file,- to intercede with the military authorities for them to afford the facilities needed for the inspection of Military Unit 003, and that unit's weapons, vehicles and weapons log (*supra* 68). In accordance with the foregoing, the judge in charge of the case until he declared himself incompetent encountered problems, generated by the authorities, in collecting the evidence he considered necessary for the proper trial of the case, which constitutes a violation of Article 8(1) of the Convention (*supra* 68).

77. Article 8(1) of the Convention also refers to reasonable time. This is not an easy concept to define. In defining it, one may invoke the points raised of the European Court of Human Rights in various decisions in which this concept was analyzed, this article of the American Convention being equivalent in principle to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. According to the European Court, three points must be taken into account in determining a reasonable time within which the trial must be conducted: a) the complexity of the matter; b) the judicial activity of the interested party; and c) the behavior of the judicial authorities (See, *inter alia*, Eur. Court H.R., *Motta* judgment of 19 February 1991, Series A no. 195-A, para. 30; Eur. Court H.R., *Ruiz-Mateos case v. Spain* judgment of 23 June 1993, Series A no. 262, para. 30).

78. With regard to the first point, it is clear that the matter under consideration is somewhat complex, since the investigations were very extensive and the evidence copious, owing to the wide impact of the death of young Genie-Lacayo (*supra* 69). All of this could justify the fact that the trial, which also involved many incidents and instances, lasted longer than others with different characteristics.

79. As regards the second point, which refers to the procedural activity of the interested party, there is no record that Mr. Raymond Genie-Peñalba, the victim's father, behaved in a manner incompatible with his role as private accuser or that he obstructed the process, because he did no more than apply the impugment measures recognized in the legislation (*supra* 70).

80. With reference to the third point, that is, the behavior of the Nicaraguan judicial authorities, this Court finds that there were no excessive delays at the various stages of the proceedings, with the exception of the phase which is yet to be settled (*supra* 71), that is, the application for judicial review before the Supreme Court of Justice filed by the accusing party on August 29, 1994, admitted by that Tribunal on August 31 and which, notwithstanding the various requests from the parties, has still not been disposed of. Even considering the complexity of the case, as well as the excuses, impediments and substitution of judges of the Supreme Court of Justice, the two years that have elapsed since the application for judicial review was admitted is not reasonable; this Tribunal therefore deems it to violate Article 8(1) of the Convention. It will do so in the operative part relating to Article 1(1), which contains the general obligation to respect the Convention.

81. In addition to the examination of possible delays at the various stages of the proceeding, in determining what constitutes a reasonable time throughout the entire process, the European Court has employed what it refers to as a "*global analysis of the proceeding*" (*Motta, supra* 77, para. 24; Eur. Court H.R., *Vernillo* judgment of 20 February 1991, Series A no. 198 and Eur. Court H.R., *Unión Alimentaria Sanders SA* judgment of 7 July 1989, Series A, no. 157). Even without taking into account the police investigation and the time spent by the Office of the Attorney-General of the Republic of Nicaragua in bringing the case before the court of first instance, that is, between July 23, 1991, on which date the court issued the order to initiate the proceeding, and the present time at which a firm judgment has still not been rendered, more than five years have elapsed; the Court deems this period to exceed the limits of reasonableness prescribed in Article 8(1) of the Convention.

82. Faced with the arguments adduced by the Commission and the Government concerning Decrees 591 and 600, the Court, in its Judgment of January 27, 1995, on preliminary objections in this matter, determined that it could not examine the abstract compatibility of those decrees and the American Convention, but reserved the power to examine the merits of the case and the effects of their application on the human rights protected by the Convention (*Genie Lacayo Case, Preliminary Objections, supra* 4, para. 51).

83. The analysis of the proceedings has led the Court to determine

(*supra* 72), that it is clear that Decrees 591 and 600 concerning trials in the military courts were applied in this Case; it is therefore appropriate to examine whether the provisions applied conform to the precepts of the Convention.

84. That conformity must be examined exclusively insofar as it concerns the procedural rights of Mr. Raymond Genie-Peñalba, who is the injured party in this matter, but not in relation to the defendants in the respective domestic case, inasmuch as it is not being heard by this Court; the fact that it involves a military court does not *per se* signify that the human rights guaranteed the accusing party by the Convention are being violated.

85. The evidence given in this matter shows that Mr. Raymond Genie-Peñalba was able to participate in the military proceeding, submit evidence, avail himself of the appropriate remedies and, lastly, apply for judicial review before the Supreme Court of Justice of Nicaragua, whose remit it is to rule on the merits of the criminal case and determine, as appropriate, whether specific procedural rights were violated. Consequently, the interested party cannot claim that the application of the decrees on military trials have restricted his procedural rights protected by the Convention (*supra* 72).

86. With regard to the argument that the decrees breach Article 8(1) of the Convention in that they affected the impartiality and independence of the military tribunals that heard the case, because of both their composition -especially in the second instance, in which senior army officers were involved- and the possible use of ideological elements such as that of the "*Sandinista* juridical conscience", established in Article 52 of Decree 591 on evaluation of evidence, and Article 4(9) of Decree 600 which replaces criminal responsibility with disciplinary responsibility, this Tribunal feels that although those provisions were in force when the military case was heard and that they could have impaired the independence and impartiality of the military tribunals that heard the case, they were not applied in this specific Case (*supra* 72).

87. On the other hand, while it is true that in the military judgment of first instance the court invoked, *inter alia*, Article 11 of Decree 591 in which the expression "*Sandinista law*" was used, that term has only a superficial ideological connotation since, according to the aforesaid pre-

cept that forms part of the Chapter on the objectives of the military criminal process, the purpose of that process is to

solve crimes, identify their perpetrators and guarantee proper enforcement of the Law, so that any person guilty of a crime of commission or misdemeanor receives fair punishment and that no innocent person should be punished. Likewise, it must contribute to the strengthening of *Sandinista* legality in military institutions, to the prevention and eradication of crimes and misdemeanors among soldiers, and to their education in strict compliance with the laws, regulations and commands, and the exigencies of military discipline.

These guidelines are common to general military criminal law regardless of the political orientation of the State in question, and in this Case the use of that epithet does not affect this conclusion; it has not been proven that the invoking of Article 11 has either diminished the impartiality and independence of the tribunals or violated Mr. Raymond Genie-Peñalba's procedural rights.

88. This Court finds that it has not been proven that Mr. Raymond Genie-Peñalba found himself in a situation of inferiority in relation to the defendant or the military judges when he appeared as the accusing party before the military courts; consequently, there was no violation of the right to equal protection of the law, established in Article 24 of the Convention and invoked by the Inter-American Commission, inasmuch as that right may only be examined in this Case with regard to the procedural rights of the interested party (*supra* 72).

89. Article 25 of the Convention governs the simple and prompt recourse for the protection of persons injured by violations of their rights enshrined in the Convention. In the instant Case the Commission has indicated the possible violation of Mr. Raymond Genie-Peñalba's procedural rights protected under Article 8(1) of the Convention during the criminal case, but not the non-existence or ineffectiveness of this remedy, nor even that it was applied; consequently, the Court considers that Article 25 of the Convention was not violated (*supra* 73).

90. The Commission alleges that the Government of Nicaragua violated the provisions of Article 2 of the Convention inasmuch as, owing to the incompatibility of Decrees 591 and 600 with the Convention, it has

not fulfilled the obligation to adopt such legislative or other measures as may be necessary to give effect to the rights or freedoms enshrined therein.

91. With regard to the Government's failure to comply with Article 2 of the American Convention with the application of Decrees 591 and 600, this Court found that the military courts did not *per se* violate the Convention (*supra* 84), and regarding the alleged application of some of the provisions of those decrees that could contravene the Convention, it has already been determined that they were not enforced in the instant Case (*supra* 72). Consequently, the Court does not express an opinion on the compatibility of these articles with the Convention; to act otherwise would be to make an abstract analysis, which lies outside the purview of this Court.

92. It must be said, also, that the Legislative Assembly of Nicaragua has issued Law 181 containing the Code of Military Organization, Jurisdiction and Social Welfare of August 23, 1994, promulgated on September 2, 1994, which amended a number of the provisions of the above-cited decrees. This law was not enforced in the instant Case and the Court, therefore, refrains from examining it.

93. As regards the allegation made by the Commission and challenged by the Government to the effect that non-compliance with the recommendations it made in its reports constitutes a violation of the principle of *pacta sunt servanda*, the Court merely reiterates its declaration in another case:

in the Court's Judgment, the term "recommendations" used by the American Convention should be interpreted to conform to its ordinary meaning, in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties. For that reason, a recommendation does not have the character of an obligatory judicial decision for which the failure to comply would generate State responsibility. As there is no evidence in the present Convention that the parties intended to give it a special meaning, Article 31(4) of the Vienna Convention is not applicable. Consequently, the State does not incur international responsibility by not complying with a recommendation which is not obligatory (*Caballero Delgado and Santana Case*, Judgment of December 8, 1995. Series C No. 22, para. 67).

94. Lastly, in accordance with general international law, the Inter-American Court does not act as an appellate court or a court for judicial review of rulings handed down by the domestic courts. All it is empowered to do in this Case is call attention to the procedural violations of the rights enshrined in the Convention which have injured Mr. Raymond Genie-Peñalba, the interested party in the matter; however, it lacks jurisdiction to remedy those violations in the domestic arena, a task, as has been pointed out before, that falls to the Supreme Court of Justice of Nicaragua when it disposes of the application for judicial review which is yet to be resolved.

95. In view of the nature of the violation which the Court has found attributable to the Government in this Case -the authorities' obstruction of the judicial investigation and unwarranted delay in the process- which it will mention in the operative part of this Judgment, any attempt to determine compensation for damages would be based on mere speculation as to the outcome if this type of violation had not occurred (Eur. Court HR, *Case of Schmautzer v. Austria*, judgment of 23 October, 1995, Series A no. 328-A; Eur. Court H.R., *Hauschildt* judgment of 24 May 1989, Series A no. 154; Eur. Court H. R., *Saïdi v. France* judgment of 20 September 1933, Series A no. 261-C and Eur. Court HR, *Fischer v. Austria* judgment of 26 April 1995, Series A no. 312) and therefore refrains from so doing. On the other hand, it considers that, in fairness, it must order the Government to pay pecuniary compensation to the father of young Jean-Paul Genie-Lacayo, which it fixes at US\$ 20,000.00 (twenty thousand dollars of the United States of America) or its equivalent in the local currency of Nicaragua, to be paid, without deduction for taxes, within six months of the date of notification of this Judgment. The amount to be paid shall be calculated on the basis of the exchange rate between the United States dollar and the Nicaraguan currency on the New York stock exchange on the day before the payment is made.

96. Since the Court has found that human rights protected by the Convention have been violated, it finds that Nicaragua must use every means at its disposal to ensure by law the free and full exercise of human rights; as a consequence of that obligation, it must secure the restitution of the violated right and, where appropriate, remedy the delay that is the subject of the violation indicated.

IX

97. Now, therefore:

THE COURT,

unanimously,

1. Dismisses the preliminary objection of non-exhaustion of domestic remedies interposed by the State of Nicaragua.

unanimously,

2. Decides that the State of Nicaragua has violated Article 8(1) of the Convention, in connection with Article 1(1), to the detriment of Mr. Raymond Genie-Peñalba.

unanimously,

3. Decides that the State of Nicaragua has not violated Article 2, 25, 24 and 51(2) of the Convention.

by four votes to one,

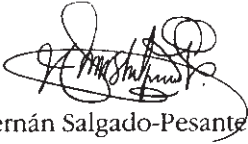
4. Sets at US\$20,000.00 (twenty thousand dollars of the United States of America), or its equivalent in Córdobas on the date of payment, the amount that the State of Nicaragua must pay, exempt from tax, as fair compensation to Mr. Raymond Genie-Peñalba within six months of the date of this Judgment. This payment shall be effected in the form and on the terms set forth in paragraph 95 of this Judgment.

Judge Pacheco-Gómez dissenting.

Done in Spanish and English, the Spanish text being authentic, in San José, Costa Rica, on this twenty-ninth day of January, 1997.



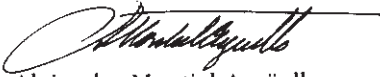
Héctor Fix-Zamudio
President



Hernán Salgado-Pesantes



Rafael Nieto-Navia



Alejandro Montiel-Argüello



Máximo Pacheco-Gómez



Manuel E. Ventura-Robles
Secretary

Read at a public session at the seat of the Court in San José, Costa Rica, on January 31, 1997.

So ordered,



Héctor Fix-Zamudio
President



Manuel E. Ventura-Robles
Secretary