Annex 46

8. Convention on the Elimination of All Forms of Discrimination against Women

New York, 18 December 1979[1]

ENTRY INTO FORCE: 3 September 1981, in accordance with article 27(1).

REGISTRATION: 3 September 1981, No. 20378.

STATUS: Signatories: 99. Parties: 189.

TEXT: United Nations, *Treaty Series* , vol. 1249, p. 13.

Note: The Convention was opened for signature at the United Nations Headquarters on 1 March 1980.

Participant	*Signature*	*Ratification, Accession(a), Succession(d)*
Afghanistan	14 Aug 1980	5 Mar 2003
Albania		11 May 1994 a
Algeria[2]		22 May 1996 a
Andorra		15 Jan 1997 a
Angola		17 Sep 1986 a
Antigua and Barbuda		1 Aug 1989 a
Argentina	17 Jul 1980	15 Jul 1985
Armenia		13 Sep 1993 a
Australia[3]	17 Jul 1980	28 Jul 1983
Austria[4]	17 Jul 1980	31 Mar 1982
Azerbaijan		10 Jul 1995 a
Bahamas		6 Oct 1993 a
Bahrain		18 Jun 2002 a
Bangladesh[5]		6 Nov 1984 a
Barbados	24 Jul 1980	16 Oct 1980
Belarus	17 Jul 1980	4 Feb 1981
Belgium[6]	17 Jul 1980	10 Jul 1985
Belize	7 Mar 1990	16 May 1990
Benin	11 Nov 1981	12 Mar 1992
Bhutan	17 Jul 1980	31 Aug 1981
Bolivia (Plurinational State of)	30 May 1980	8 Jun 1990
Bosnia and Herzegovina[7]		1 Sep 1993 d
Botswana		13 Aug 1996 a
Brazil[8]	31 Mar 1981	1 Feb 1984
Brunei Darussalam		24 May 2006 a
Bulgaria[9]	17 Jul 1980	8 Feb 1982
Burkina Faso		14 Oct 1987 a
Burundi	17 Jul 1980	8 Jan 1992
Cabo Verde		5 Dec 1980 a
Cambodia[10,11]	17 Oct 1980	15 Oct 1992 a
Cameroon	6 Jun 1983	23 Aug 1994
Canada[12]	17 Jul 1980	10 Dec 1981
Central African Republic		21 Jun 1991 a
Chad		9 Jun 1995 a
Chile	17 Jul 1980	7 Dec 1989
China[13,14]	17 Jul 1980	4 Nov 1980
Colombia	17 Jul 1980	19 Jan 1982
Comoros		31 Oct 1994 a
Congo	29 Jul 1980	26 Jul 1982
Cook Islands[15]		11 Aug 2006 a
Costa Rica	17 Jul 1980	4 Apr 1986
Côte d'Ivoire	17 Jul 1980	18 Dec 1995
Croatia[7]		9 Sep 1992 d
Cuba	6 Mar 1980	17 Jul 1980
Cyprus[16]		23 Jul 1985 a
Czech Republic[17]		22 Feb 1993 d
Democratic People's Republic of Korea[18,19]		27 Feb 2001 a
Democratic Republic of the Congo	17 Jul 1980	17 Oct 1986
Denmark[20]	17 Jul 1980	21 Apr 1983
Djibouti		2 Dec 1998 a
Dominica	15 Sep 1980	15 Sep 1980
Dominican Republic	17 Jul 1980	2 Sep 1982
Ecuador	17 Jul 1980	9 Nov 1981
Egypt[21]	16 Jul 1980	18 Sep 1981
El Salvador	14 Nov 1980	19 Aug 1981
Equatorial Guinea		23 Oct 1984 a
Eritrea		5 Sep 1995 a
Estonia		21 Oct 1991 a

Participant	Signature	Ratification, Accession(a), Succession(d)
Eswatini		26 Mar 2004 a
Ethiopia	8 Jul 1980	10 Sep 1981
Fiji[22]		28 Aug 1995 a
Finland	17 Jul 1980	4 Sep 1986
France[23]	17 Jul 1980	14 Dec 1983
Gabon	17 Jul 1980	21 Jan 1983
Gambia	29 Jul 1980	16 Apr 1993
Georgia		26 Oct 1994 a
Germany[24,25,26]	17 Jul 1980	10 Jul 1985
Ghana	17 Jul 1980	2 Jan 1986
Greece	2 Mar 1982	7 Jun 1983
Grenada	17 Jul 1980	30 Aug 1990
Guatemala	8 Jun 1981	12 Aug 1982
Guinea[27]	17 Jul 1980	9 Aug 1982
Guinea-Bissau	17 Jul 1980	23 Aug 1985
Guyana	17 Jul 1980	17 Jul 1980
Haiti	17 Jul 1980	20 Jul 1981
Honduras	11 Jun 1980	3 Mar 1983
Hungary[28]	6 Jun 1980	22 Dec 1980
Iceland	24 Jul 1980	18 Jun 1985
India	30 Jul 1980	9 Jul 1993
Indonesia	29 Jul 1980	13 Sep 1984
Iraq		13 Aug 1986 a
Ireland[29]		23 Dec 1985 a
Israel[30]	17 Jul 1980	3 Oct 1991
Italy	17 Jul 1980	10 Jun 1985
Jamaica[31]	17 Jul 1980	19 Oct 1984
Japan	17 Jul 1980	25 Jun 1985
Jordan	3 Dec 1980	1 Jul 1992
Kazakhstan		26 Aug 1998 a
Kenya		9 Mar 1984 a
Kiribati		17 Mar 2004 a
Kuwait[32]		2 Sep 1994 a
Kyrgyzstan		10 Feb 1997 a
Lao People's Democratic Republic	17 Jul 1980	14 Aug 1981
Latvia		14 Apr 1992 a
Lebanon		16 Apr 1997 a
Lesotho[33]	17 Jul 1980	22 Aug 1995
Liberia		17 Jul 1984 a
Libya[34]		16 May 1989 a
Liechtenstein[35]		22 Dec 1995 a
Lithuania		18 Jan 1994 a
Luxembourg	17 Jul 1980	2 Feb 1989
Madagascar	17 Jul 1980	17 Mar 1989
Malawi[36]		12 Mar 1987 a
Malaysia[37]		5 Jul 1995 a
Maldives[38,39]		1 Jul 1993 a
Mali	5 Feb 1985	10 Sep 1985
Malta		8 Mar 1991 a
Marshall Islands		2 Mar 2006 a
Mauritania[40]		10 May 2001 a
Mauritius[41]		9 Jul 1984 a
Mexico	17 Jul 1980	23 Mar 1981
Micronesia (Federated States of)		1 Sep 2004 a
Monaco		18 Mar 2005 a
Mongolia[42]	17 Jul 1980	20 Jul 1981
Montenegro[43]		23 Oct 2006 d
Morocco		21 Jun 1993 a
Mozambique		21 Apr 1997 a
Myanmar		22 Jul 1997 a
Namibia		23 Nov 1992 a
Nauru		23 Jun 2011 a
Nepal	5 Feb 1991	22 Apr 1991
Netherlands (Kingdom of the)[44]	17 Jul 1980	23 Jul 1991
New Zealand[45,46,47,48,49]	17 Jul 1980	10 Jan 1985
Nicaragua	17 Jul 1980	27 Oct 1981
Niger[50]		8 Oct 1999 a
Nigeria	23 Apr 1984	13 Jun 1985
North Macedonia[7]		18 Jan 1994 d
Norway	17 Jul 1980	21 May 1981
Oman		7 Feb 2006 a
Pakistan		12 Mar 1996 a
Palau	20 Sep 2011	
Panama	26 Jun 1980	29 Oct 1981
Papua New Guinea		12 Jan 1995 a
Paraguay		6 Apr 1987 a
Peru	23 Jul 1981	13 Sep 1982
Philippines	15 Jul 1980	5 Aug 1981
Poland[51]	29 May 1980	30 Jul 1980
Portugal[13,52]	24 Apr 1980	30 Jul 1980
Qatar		29 Apr 2009 a
Republic of Korea[53]	25 May 1983	27 Dec 1984
Republic of Moldova		1 Jul 1994 a
Romania[54]	4 Sep 1980	7 Jan 1982
Russian Federation[55]	17 Jul 1980	23 Jan 1981
Rwanda	1 May 1980	2 Mar 1981

Participant	*Signature*	*Ratification, Accession(a), Succession(d)*
Samoa		25 Sep 1992 a
San Marino	26 Sep 2003	10 Dec 2003
Sao Tome and Principe	31 Oct 1995	3 Jun 2003
Saudi Arabia	7 Sep 2000	7 Sep 2000
Senegal	29 Jul 1980	5 Feb 1985
Serbia[7]		12 Mar 2001 d
Seychelles		5 May 1992 a
Sierra Leone	21 Sep 1988	11 Nov 1988
Singapore[56,57,58]		5 Oct 1995 a
Slovakia[17]		28 May 1993 d
Slovenia[7]		6 Jul 1992 d
Solomon Islands		6 May 2002 a
South Africa	29 Jan 1993	15 Dec 1995
South Sudan		30 Apr 2015 a
Spain	17 Jul 1980	5 Jan 1984
Sri Lanka	17 Jul 1980	5 Oct 1981
St. Kitts and Nevis		25 Apr 1985 a
St. Lucia		8 Oct 1982 a
St. Vincent and the Grenadines		4 Aug 1981 a
State of Palestine		2 Apr 2014 a
Suriname		1 Mar 1993 a
Sweden[59,60]	7 Mar 1980	2 Jul 1980
Switzerland[61]	23 Jan 1987	27 Mar 1997
Syrian Arab Republic		28 Mar 2003 a
Tajikistan		26 Oct 1993 a
Thailand[62]		9 Aug 1985 a
Timor-Leste		16 Apr 2003 a
Togo		26 Sep 1983 a
Trinidad and Tobago	27 Jun 1985	12 Jan 1990
Tunisia	24 Jul 1980	20 Sep 1985
Türkiye		20 Dec 1985 a
Turkmenistan		1 May 1997 a
Tuvalu		6 Oct 1999 a
Uganda	30 Jul 1980	22 Jul 1985
Ukraine	17 Jul 1980	12 Mar 1981
United Arab Emirates[63]		6 Oct 2004 a
United Kingdom of Great Britain and Northern Ireland[14,64,65,66,67,68,69,70]	22 Jul 1981	7 Apr 1986
United Republic of Tanzania	17 Jul 1980	20 Aug 1985
United States of America	17 Jul 1980	
Uruguay	30 Mar 1981	9 Oct 1981
Uzbekistan		19 Jul 1995 a
Vanuatu		8 Sep 1995 a
Venezuela (Bolivarian Republic of)	17 Jul 1980	2 May 1983
Viet Nam	29 Jul 1980	17 Feb 1982
Yemen[71]		30 May 1984 a
Zambia	17 Jul 1980	21 Jun 1985
Zimbabwe		13 May 1991 a

Declarations and Reservations
(Unless otherwise indicated, the declarations and reservations were made upon ratification, accession or succession.)

ALGERIA[72]

Article 2:

The Government of the People's Democratic Republic of Algeria declares that it is prepared to apply the provisions of this article on condition that they do not conflict with the provisions of the Algerian Family Code.

...

Article 15, paragraph 4:

The Government of the People's Democratic Republic of Algeria declares that the provisions of article 15, paragraph 4, concerning the right of women to choose their residence and domicile should not be interpreted in such a manner as to contradict the provisions of chapter 4 (art. 37) of the Algerian Family Code.

Article 16:

The Government of the People's Democratic Republic of Algeria declares that the provisions of article 16 concerning equal rights for men and women in all matters relating to marriage, both during marriage and at its dissolution, should not contradict the provisions of the Algerian Family Code.

Article 29:

The Government of the People's Democratic Republic of Algeria does not consider itself bound by article 29, paragraph 1, which states that any dispute between two or more Parties concerning the interpretation or application of the Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration or to the International Court of Justice.

The Government of the People's Democratic Republic of Algeria holds that no such dispute can be submitted to arbitration or to the Court of International Justice except with the consent of all the parties to the dispute.

ARGENTINA

The Government of Argentina declares that it does not consider itself bound by article 29, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women.

AUSTRALIA[3]

"The Government of Australia states that maternity leave with pay is provided in respect of most women employed by the Commonwealth Government and the Governments of New South Wales and Victoria. Unpaid maternity leave is provided in respect of all other women employed in the State of New South Wales and elsewhere to women employed under Federal and some State industrial awards. Social Security benefits subject to income tests are available to women who are sole parents.

"The Government of Australia advises that it is not at present in a position to take the measures required by article 11 (2) to introduce maternity leave with pay or with comparable social benefits throughout Australia.

.....

"Australia has a Federal Constitutional System in which Legislative, Executive and Judicial Powers are shared or distributed between the Commonwealth and the Constituent States. The implementation of the Treaty throughout Australia will be effected by the Commonwealth State and Territory Authorities having regard to their respective constitutional powers and arrangements concerning their exercise."

AUSTRIA[4]

BAHAMAS[73]

"The Government of the Commonwealth of the Bahamas does not consider itself bound by the provisions of article 2 (a) of the Convention.

The Government of the Commonwealth of the Bahamas does not consider itself bound by the provisions of article 9, paragraph 2, of the Convention.

The Government of the Commonwealth of the Bahamas does not consider itself bound by the provisions of article 29, paragraph 1, of the Convention."

BAHRAIN[74]

Having examined the Decree Law Number 5 for the year 2002, issued by His Majesty the King of the Kingdom of Bahrain, on 18 Dhul Hijjah 1422 H, corresponding to 2 March 2002, regarding the accession to the Convention on the Elimination of All Forms of Discrimination against Women, and Article Two of this Decree which stipulates that the Kingdom of Bahrain makes reservations with respect to the following provisions of the Convention:

- Article 2 to ensure that its implementation within the bound of the provisions of the Islamic Shariah.
- Article 9 paragraph 2.
- Article 15 paragraph 4.
- Article 16 in so far as it is incompatible with the Islamic Shariah.
- Article 29 paragraph 1.

And on the basis of the Decree Law Number 70 for the year 2014, issued by His Majesty the King of the Kingdom of Bahrain, on 4 Safar 1436 H, corresponding to 26 November 2014, amending some provisions of the Decree Law Number 5 for the year 2002, regarding the accession to the Convention on the Elimination of All Forms of Discrimination Against Women, which was approved by both the Council of Representatives on 27 Jumaadal Akhara, 1437 H. corresponding to 5 April 2016, and the Shura Council on 17 Rajab 1437 H, corresponding to 24 April 2016.

The Government of the Kingdom of Bahrain hereby declares:

- The Kingdom of Bahrain continues to make reservations with respect to para. 2 of Article 9 and para. 1 of Article 29 of the Convention on the Elimination of All Forms of Discrimination against Women. These Reservations are combined in Article One of the Decree Law Number 70 for the year 2014 which stipulates that "Article Two of the Decree Law Number 5 for the year 2002 regarding the accession to the Convention on the Elimination ofAll Forms of Discrimination against Women, be replaced with the following text:

Article Two:

The Kingdom of Bahrain makes reservation with respect to paragraphs 2 of Article 9, and 1 of Article 29 of the Convention on the Elimination of All Forms of Discrimination against Women",

- The Kingdom of Bahrain continues to make reservations with respect to Article 2 and Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women in a new formulation. The new formula of the reservation states that the implementation of these articles will be "without breaching the provisions of the Islamic Shariah".
- The Kingdom of Bahrain continues to make reservation with respect to para. 4 of Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women in a new formulation which narrows the scope of this reservation. The new formula of the reservation states that the implementation of para. 4 of Artic1e 15 will be "without breaching the provisions of the Islamic Shariah".
- Combining the reservations with respect to Article 2, para. 4 of Article 15, and Article 16 in Article Two of the Decree Law Number 70 for the year 20 14, under a new and one formula of Reservation. The new formula states that the implementation of these Articles will be "without breaching the provisions of the Islamic Shariah", whereas Article Two of the Decree Law Number 70 for the 2014, stipulates that "a new Article is added to the Decree Law Number 5 for the year 2002 regarding the accession of the Convention on the Elimination of All Forms of Discrimination against Women under number two bis, the text of which is as follows:

Article Two bis:

The Kingdom of Bahrain is committed to implement the provisions of Articles 2, 15 paragraph 4 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women without breaching the provisions of the Islamic Shariah".

***

The Government of Bahrain indicated that the modifications do not imply an expansion of the scope of the original reservations and that they constitute editorial amendments that do not place any limitations on Bahrain's commitments made upon accession to the Convention.

BANGLADESH[5]

"The Government of the People's Republic of Bangladesh does not consider as binding upon itself the provisions of article 2, [... and ...] 16 (1) (c) as they conflict with *Sharia* law based on Holy Quran and Sunna."

BELARUS[55]

BELGIUM[6]

BRAZIL[8]

"... Brazil does not consider itself bound by article 29, paragraph 1, of the above-mentioned Convention."

BRUNEI DARUSSALAM

"The Government of Brunei Darussalam expresses its reservations regarding those provisions of the said Convention that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the official religion of Brunei Darussalam and, without prejudice to the generality of the said reservations, expresses its reservations regarding paragraph 2 of Article 9 and paragraph 1 of Article 29 of the Convention."

BULGARIA[9]

CANADA[12]

CHILE

Declaration:

The Government of Chile has signed this Convention on the Elimination of All Forms of Discrimination Against Women, mindful of the important step which this document represents, not only in terms of the elimination of all forms of discrimination against women, but also in terms of their full and permanent integration into society in conditions of equality.

The Government is obliged to state, however, that some of the provisions of the Convention are not entirely compatible with current Chilean legislation.

At the same time, it reports the establishment of a Commission for the Study and Reform of the Civil Code, which now has before it various proposals to amend, *inter alia* , those provisions which are not fully consistent with the terms of the Convention.

CHINA

The People's Republic of China does not consider itself bound by paragraph 1 of article 29 of the Convention.

COOK ISLANDS[15]

CUBA

The Government of the Republic of Cuba makes a specific reservation concerning the provisions of article 29 of the Convention inasmuch as it holds that any disputes that may arise between States Parties should be resolved through direct negotiations through the diplomatic channel.

CYPRUS[16]

CZECH REPUBLIC[17]

DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA[18,19]

On 23 November 2015, the Government of the Democratic People's Republic of Korea notified the Secretary-General of its decision to withdraw the reservations to paragraph (f) of article 2 and paragraph 2 of article 9 of the Convention. The remaining reservation reads as follows: "The Government of the Democratic People's Republic of Korea does not consider itself bound by the provisions article 29 of [the Convention]."

EGYPT[21]

[.....]

In respect of article 16

Reservation to the text of article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic *Sharia's* provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementary which guarantees true equality between the spouses. The provisions of the *Sharia* lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The *Sharia* therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.

In respect of article 29

The Egyptian delegation also maintains the reservation contained in article 29, paragraph 2, concerning the right of a State signatory to the Convention to declare that it does not consider itself bound by paragraph 1 of that article concerning the submission to an arbitral body of any dispute which may arise between States concerning the interpretation or application of the Convention. This is in order to avoid being bound by the system ofarbitration in this field.

General reservation on article 2

The Arab Republic of Egypt is willing to comply with the content of this article, provided that such compliance does not run counter to the Islamic *Sharia*.

EL SALVADOR

Upon ratification of the Convention, the Government of El Salvador will make the reservation provided for in article 29.

Reservation:

With reservation as to the application of the provision of article 29, paragraph 1.

ETHIOPIA

Socialist Ethiopia does not consider itself bound by paragraph 1 of article 29 of the Convention.

FIJI[22]

FRANCE[23]

Upon signature:

Declaration:

The Government of the French Republic declares that article 9 of the Convention must not be interpreted as precluding the application of the second paragraph of article 96 of the code of French nationality.

[All other declarations and reservations were confirmed in substance upon ratification.]

Upon ratification:

Declarations:

The Government of the French Republic declares that the preamble to the Convention in particular the eleventh preambular paragraph contains debatable elements which are definitely out of place in this text.

The Government of the French Republic declares that the term "family education" in article 5 (b) of the Convention must be interpreted as meaning public education concerning the family and that, in any event, article 5 will be applied subject to respect for article 17 of the International Covenant on Civil and Political Rights and article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Government of the French Republic declares that no provision of the Convention must be interpreted as prevailing over provisions of French legislation which are more favourable to women than to men.

Reservation:

...

Article 29

The Government of the French Republic declares, in pursuance of article 29, paragraph 2, of the Convention, that it will not be bound by the provisions of article 29, paragraph 1.

GERMANY[24,25]

The right of peoples to self-determination, as enshrined in the Charter of the United Nations and in the International Covenants of 19 December 1966, applies to all peoples and not only to those living 'under alien and colonial domination and foreign occupation'. All peoples thus have the inalienable right freely to determine their political status and freely to pursue their economic, social and cultural development. The Federal Republic of

Germany would be unable to recognize as legally valid an interpretation of the right to self-determination which contradicts the unequivocal wording of the Charter of the United Nations and of the two International Covenants of 19 December 1966 on Civil and Political Rights and on Economic, Social and Cultural Rights. It will interpret the 11th paragraph of the Preamble accordingly.

HUNGARY[28]

INDIA

Declarations:

"i) With regard to articles 5 (a) and 16 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.

"ii) With regard to article 16 (2) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy."

Reservation:

"With regard to article 29 of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that it does not consider itself bound by paragraph 1 of this article."

INDONESIA

"The Government of the Republic of Indonesia does not consider itself bound by the provisions of article 29, paragraph 1 of this Convention and takes the position that any dispute relating to the interpretation or application of the Convention may only be submitted to arbitration or to the International Court of Justice with the agreement of all the parties to the dispute."

IRAQ[75]

1. Approval of and accession to this Convention shall not mean that the Republic of Iraq is bound by the provisions of article 2, paragraphs (f) and (g), nor of article 16 of the Convention. The reservation to this last-mentioned article shall be without prejudice to the provisions of the Islamic Shariah according women rights equivalent to the rights of their spouses so as to ensure a just balance between them. Iraq also enters a reservation to article 29, paragraph 1, of this Convention with regard to the principle of international arbitration in connection with the interpretation or application of this Convention.

2. This approval in no way implies recognition of or entry into any relations with Israel.

IRELAND[29]

....

Ireland is of the view that the attainment in Ireland of the objectives of the Convention does not necessitate the extension to men of rights identical to those accorded by law to women in respect of the guardianship, adoption and custody of children born out of wedlock and reserves the right to implement the Convention subject to that understanding.

Ireland reserves the right to regard the Anti-Discrimination (Pay) Act, 1974 and the Employment Equality Act 1977 and other measures taken in implementation of the European Economic Community standards concerning employment opportunities and pay as sufficient implementation of articles 11,1 (b), (c) and (d).

Ireland reserves the right for the time being to maintain provisions of Irish legislation in the area of social security which are more favourable to women than men.

ISRAEL

"1. The State of Israel hereby expresses its reservation with regard to article 7 (b) of the Convention concerning the appointment of women to serve as judges of religious courts where this is prohibited by the laws of any of the religious communities in Israel. Otherwise, the said article is fully implemented in Israel, in view of the fact that women take a prominent part in all aspect of public life.

"2. The State of Israel hereby expresses its reservation with regard to article 16 of the Convention, to the extent that the laws on personal status which are binding on the various religious communities in Israel do not conform with the provisions of that article."

"3. In accordance with paragraph 2 of article 29 of the Convention, the State of Israel hereby declares that it does not consider itself bound by paragraph 1 of that article."

ITALY

Reservation:

Italy reserves the right to exercise, when depositing the instrument of ratification, the option provided for in article 19 of the Vienna Convention on the Law of Treaties of 23 May 1969.

JAMAICA[31]

The Government of Jamaica declares that it does not consider itself bound by the provisions of article 29, paragraph 1, of the Convention."

JORDAN[76]

Jordan does not consider itself bound by the following provisions:

1. Article 9, paragraph 2;
2. ...
3. Article 16, paragraph (1) (c), relating to the rights arising upon the dissolution of marriage with regard to maintenance and compensation;
4. Article 16, paragraph (1) (d) and (g).

KUWAIT[32,77]

...

The Government of Kuwait reserves its right not to implement the provision contained in article 9, paragraph 2, of the Convention, inasmuch as it runs counter to the Kuwaiti Nationality Act, which stipulates that a child's nationality shall be determined by that of his father.

The Government of the State of Kuwait declares that it does not consider itself bound by the provision contained in article 16 (f) inasmuch as it conflicts with the provisions of the *Islamic Shariah* , Islam being the official religion of the State.

4. The Government of Kuwait declares that it is not bound by the provision contained in article 29, paragraph 1.

LEBANON[20]

The Government of the Lebanese Republic enters reservations regarding article 9 (2), and article 16 (1) (c) (d) (f) and (g) (regarding the right to choose a family name).

In accordance with paragraph 2 of article 29, the Government of the Lebanese Republic declares that it does not consider itself bound by the provisions of paragraph 1 of that article.

LESOTHO[32,33]

"The Government of the Kingdom of Lesotho declares that it does not consider itself bound by article 2 to the extent that it conflicts with Lesotho's constitutional stipulations relative to succession to the throne of the Kingdom of Lesotho and law relating to succession to chieftainship."

LIBYA[34]

1. Article 2 of the Convention shall be implemented with due regard for the peremptory norms of the Islamic *Shariah* relating to determination of the inheritance portions of the estate of a deceased person, whether female or male.

2. The implementation of paragraph 16 (c) and (d) of the Convention shall be without prejudice to any of the rights guaranteed to women by the Islamic *Shariah* .

LIECHTENSTEIN[35]

"In the light of the definition given in article 1 of the Convention, the Principality of Liechtenstein reserves the right to apply, with respect to all the obligations of the Convention, article 3 of the Liechtenstein Constitution."

LUXEMBOURG[78]

MALAWI[36]

MALAYSIA[32,37,59,79]

<title>Reservations:</title> ... The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia' law and the Federal Constitution of Malaysia. With regard thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles 9 (2), 16 (1) (a), 16 (1) (c), 16 (1) (f) and 16 (1) (g) of the aforesaid Convention.

<title>Declaration :</title>In relation to article 11 of the Convention, Malaysia interprets the provisions of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only."

MALDIVES[32,38,39]

Maldives made reservations to sub-paragraphs (a), (c), (d) and (f) of paragraph 1 of Article 16.

MALTA

"A. *Article 11*

The Government of Malta interprets paragraph 1 of article II, in the light of provisions of paragraph 2 of article 4, as not precluding prohibitions, restrictions, or conditions on the employment of women in certain areas, or the work done by them, where this is considered necessary or desirable to protect the health and safety of women or the human foetus, including such prohibitions, restrictions or conditions imposed in consequence of other international obligations of Malta.

"B. *Article 13*

(i) The Government of Malta reserves the right, notwithstanding anything in the Convention, to continue to apply its tax legislation which deems, in certain circumstances, the income of a married woman to be the income of her husband and taxable as such.

(ii) The Government of Malta reserves the right to continue to apply its social security legislation which in certain circumstances makes certain benefits payable to the head of the household which is, by such legislation, presumed to be the husband.

"C. *Articles 13, 15, 16*

While the Government of Malta is committed to remove, in as far as possible, all aspects of family and property law which may be considered as discriminatory to females, it reserves the right to continue to apply present legislation in that regard until such time as the law is reformed and during such transitory period until those laws are completely superseded.

"D. *Article 16*

The Government of Malta does not consider itself bound by sub-paragraph (e) of paragraph (1) of article 16 in so far as the same may be interpreted as imposing an obligation on Malta to legalize abortion."

MAURITANIA[40]

Having seen and examined the United Nations Convention on the Elimination of All Forms of Discrimination against Women, adopted by the United Nations General Assembly on 18 December 1979, have approved and do approve it in each and every one of its parts which are not contrary to Islamic Sharia and are in accordance with our Constitution.

On 25 July 2014, the Government of Mauritania informed the Secretary-General that it partially withdraws its general reservation made upon accession, which shall continue to apply in respect of articles 13 (a) and 16 of the Convention.

MAURITIUS[41]

"The Government of Mauritius does not consider itself bound by paragraph 1 of article 29 of the Convention, in pursuance of paragraph 2 of article 29."

MEXICO

Declaration:

In signing *ad referendum* the Convention on the Elimination of All Forms of Discrimination Against Women, which the General Assembly opened for signature by States on 18 December 1979, the Government of the United Mexican States wishes to place on record that it is doing so on the understanding that the provisions of the said Convention, which agree in all essentials with the provisions of Mexican legislation, will be applied in Mexico in accordance with the modalities and procedures prescribed by Mexican legislation and that the granting of material benefits in pursuance of the Convention will be as generous as the resources available to the Mexican State permit.

MICRONESIA (FEDERATED STATES OF)[80]

"1. The Government of the Federated States of Micronesia advises that it is not at present in a position to take the measures either required by Article 11 (1) (d) of the Convention to enact comparable worth legislation, or by Article 11 (2) (b) to enact maternity leave with pay or with comparable social benefits throughout the nation;

2. The Government of the Federated States of Micronesia, in its capacity as trustee of the heritage of diversity within its States under Article V of its Constitution, reserves the right not to apply the provisions of Articles 2 (f), 5, and 16 to the succession of certain well-established traditional titles, and to marital customs that divide tasks or decision-making in purely voluntary or consensual private conduct; and

3. The Government of the Federated States of Micronesia does not consider itself bound by the provisions of Article 29 (1) of the Convention, and takes the position that any dispute relating to the interpretation or application of the Convention may only be submitted to arbitration or to the International Court of Justice with the agreement of all parties to the dispute."

MONACO[81]

1. The implementation of the Convention on the Elimination of All Forms of Discrimination Against Women does not affect the validity of conventions concluded with France.

2. The Principality of Monaco deems that the aims of the Convention are to eliminate all forms of discrimination against women and to guarantee every individual, irrespective of gender, equality before the law, when the aforementioned aims are in line with the principles stipulated in the Constitution.

3. The Principality of Monaco declares that no provision in the Convention can be interpreted as impeding the provisions of the laws and regulations of Monaco that are more favourable to women than to men.

1. The ratification of the Convention by the Principality of Monaco shall have no effect on the constitutional provisions governing the succession to the throne.

2. The Principality of Monaco reserves the right not to apply the provisions of Article 7, paragraph b, of the Convention regarding recruitment to the police force.

3. The Principality of Monaco does not consider itself bound by the provisions of Article 9 which are not compatible with its nationality laws.

4. [...]

5. The Principality of Monaco does not consider itself bound by Article 16, paragraph 1 (e), to the extent that the latter can be interpreted as forcing the legalization of abortion or sterilization.

6. The Principality of Monaco reserves the right to continue to apply its social security laws which, in certain circumstances, envisage the payment of certain benefits to the head of the household who, according to this legislation, is presumed to be the husband.

7. The Principality of Monaco declares, in conformity with the provisions of Article 29, paragraph 2, that it does not consider itself bound by the provisions of the first paragraph of this article.

MONGOLIA[42]

MOROCCO[82]

1. With regard to article 2:

The Government of the Kingdom of Morocco express its readiness to apply the provisions of this article provided that:

- They are without prejudice to the constitutional requirement that regulate the rules of succession to the throne of the Kingdom of Morocco;
- They do not conflict with the provisions of the Islamic Shariah. It should be noted that certain of the provisions contained in the Moroccan Code of Personal Status according women rights that differ from the rights conferred on men may not be infringed upon or abrogated because they derive primarily from the Islamic Shariah, which strives, among its other objectives, to strike a balance between the spouses in order to preserve the coherence of family life.

2. With regard to article 15, paragraph 4:

The Government of the Kingdom of Morocco declares that it can only be bound by the provisions of this paragraph, in particular those relating to the right of women to choose their residence and domicile, to the extent that they are not incompatible with articles 34 and 36 of the Moroccan Code of Personal Status.

3. With regard to article 29:

The Government of the Kingdom of Morocco does not consider itself bound by the first paragraph of this article, which provides that any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration.

The Government of the Kingdom of Morocco is of the view that any dispute of this kind can only be referred to arbitration by agreement of all the parties to the dispute.

MYANMAR

"[The Government of Myanmar] does not consider itself bound by the provision set forth in the said article."

NETHERLANDS (KINGDOM OF THE)

"During the preparatory stages of the present Convention and in the course of debates on it in the General Assembly the position of the Government of the Kingdom of the Netherlands was that it was not desirable to introduce political considerations such as those contained in paragraphs 10 and 11 of the preamble in a legal instrument of this nature. Moreover, the considerations are not directly related to the achievement of total equality between men and women. The Government of the Kingdom of the Netherlands considers that it must recall its objections to the said paragraphs in the preamble at this occasion."

NEW ZEALAND[45,46,47]

...

"The Government of the Cook Islands reserves the right not to apply article 2 (f) and article 5 (a) to the extent that the customs governing the inheritance of certain Cook Islands chief titles may be inconsistent with those provisions."

NIGER[50]

Article 2, paragraphs (d) and (f)

The Government of the Republic of the Niger expresses reservations with regard to article 2, paragraphs (d) and (f), concerning the taking of all appropriate measures to abolish all customs and practices which constitute discrimination against women, particularly in respect of succession.

Article 5, paragraph (a)

The Government of the Republic of the Niger expresses reservations with regard to the modification of social and cultural patterns of conduct of men and women.

Article 15, paragraph 4

The Government of the Republic of the Niger declares that it can be bound by the provisions of this paragraph, particularly those concerning the right of women to choose their residence and domicile, only to the extent that these provisions refer only to unmarried women.

Article 16, paragraph 1 (c), (e) and (g)

The Government of the Republic of the Niger expresses reservations concerning the above-referenced provisions of article 16, particularly those concerning the same rights and responsibilities during marriage and at its dissolution, the same rights to decide freely and responsibly on the number and spacing of their children, and the right to choose a family name.

The Government of the Republic of the Niger declares that the provisions of article 2, paragraphs (d) and (f), article 5, paragraphs (a) and (b), article 15, paragraph 4, and article 16, paragraph 1 (c), (e) and (g), concerning family relations, cannot be applied immediately, as they are contrary to existing customs and practices which, by their nature, can be modified only with the passage of time and the evolution of society and cannot, therefore, be abolished by an act of authority.

Article 29

The Government of the Republic of the Niger expresses a reservation concerning article 29, paragraph 1, which provides that any dispute between two or more States concerning the interpretation or application of the present Convention which is not settled by negotiation

shall, at the request of one of them, be submitted to arbitration.

In the view of the Government of the Niger, a dispute of this nature can be submitted to arbitration only with the consent of all the parties to the dispute.

The Government of the Republic of the Niger declares that the term "family education" which appears in article 5, paragraph (b), of the Convention should be interpreted as referring to public education concerning the family, and that in any event, article 5 would be applied in compliance with article 17 of the International Covenant on Civil and Political Rights.

OMAN[83]

1. All provisions of the Convention not in accordance with the provisions of the Islamic sharia and legislation in force in the Sultanate of Oman;

2. Article 9, paragraph 2, which provides that States Parties shall grant women equal rights with men with respect to the nationality of their children;

3. [...]

4. Article 16, regarding the equality of men and women, and in particular subparagraphs (a), (c), and (f) (regarding adoption).

5. The Sultanate is not bound by article 29, paragraph 1, regarding arbitration and the referral to the International Court of Justice of any dispute between two or more States which is not settled by negotiation.

PAKISTAN[32,52,60]

"The accession by [the] Government of the Islamic Republic of Pakistan to the [said Convention] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan."

"The Government of the Islamic Republic of Pakistan declares that it does not consider itself bound by paragraph 1 of article 29 of the Convention."

POLAND[51]

QATAR[84]

1. Article 2 (a) in connection with the rules of the hereditary transmission of authority, as it is inconsistent with the provisions of article 8 of the Constitution.

2. Article 9, paragraph 2, as it is inconsistent with Qatar's law on citizenship.

3. Article 15, paragraph 1, in connection with matters of inheritance and testimony, as it is inconsistent with the provisions of Islamic law.

4. Article 15, paragraph 4, as it is inconsistent with the provisions of family law and established practice.

5. Article 16, paragraph 1 (a) and (c), as they are inconsistent with the provisions of Islamic law.

6. Article 16, paragraph 1 (f), as it is inconsistent with the provisions of Islamic law and family law. The State of Qatar declares that all of its relevant national legislation is conducive to the interest of promoting social solidarity.

...

3. In accordance with article 29, paragraph 2, of the Convention, the State of Qatar declares, under the terms of that text, that it does not consider itself bound by paragraph 1 of that article.

Declaration:

1. The Government of the State of Qatar accepts the text of article 1 of the Convention provided that, in accordance with the provisions of Islamic law and Qatari legislation, the phrase "irrespective of their marital status" is not intended to encourage family relationships outside legitimate marriage. It reserves the right to implement the Convention in accordance with this understanding.

2. The State of Qatar declares that the question of the modification of "patterns" referred to in article 5 (a) must not be understood as encouraging women to abandon their role as mothers and their role in child-rearing, thereby undermining the structure of the family.

REPUBLIC OF KOREA[53]

Reservation:

"1. The Government of the Republic of Korea does not consider itself bound by the provisions of article 9 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979.

"2. Bearing in mind the fundamental principles as embodied in the said Convention, the Government of the Republic of Korea has recently established the Korea Women's welfare and social activities. A committee under the chairmanship of the prime minister will shortly be set up to consider and coordinate overall policies on women.

"3. The Government of the Republic of Korea will make continued efforts to take further measures in line with the provisions stipulated in the Convention."

Reservation:

"The Government of the Republic of Korea, having examined the said Convention, hereby ratifies the Convention considering itself not bound by the provisions of [...] sub-paragraph [...] (g) of paragraph 1 of Article 16 of the Convention."

ROMANIA[54]

RUSSIAN FEDERATION[55]

SAUDI ARABIA

"1. In case of contradiction between any term of the Convention and the norms of islamic law, the Kingdom is not under obligation to observe the contradictory terms of the Convention.

2. The Kingdom does not consider itself bound by paragraphe 2 of article 9 of the Convention and paragraph 1 of article 29 of the Convention."

SINGAPORE[32,56,57,60]

(1) In the context of Singapore's multiracial and multi-religious society and the need to respect the freedom of minorities to practice their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of articles 2, paragraphs (a) to (f), and article 16, paragraphs 1(a), 1(c), 1(h), and article 16, paragraph 2, where compliance with these provisions would be contrary to their religious or personal laws.

(2) [...]

(3) [...] Singapore considers that legislation in respect of article 11 is unnecessary for the minority of women who do not fall within the ambit of Singapore's employment legislation.

(4) The Republic of Singapore declares, in pursuance of article 29, paragraph 2 of the Convention that it will not be bound by the provisions of article 29, paragraph 1.

SLOVAKIA[17]

SPAIN

The ratification of the Convention by Spain shall not affect the constitutional provisions concerning succession to the Spanish crown.

SWITZERLAND[61]

.....

Said provisions shall be applied subject to several interim provisions of the matrimonial regime (Civil Code, articles 9 (e) and 10, final section).

SYRIAN ARAB REPUBLIC

..... subject to reservations to article 2; article 9, paragraph 2, concerning the grant of a woman's

nationality to her children; article 15, paragraph 4, concerning freedom of movement and of residence and domicile; article 16, paragraph 1 (c), (d), (f) and (g), concerning equal rights and responsibilities during marriage and at its dissolution with regard to guardianship, the right to choose a family name, maintenance and adoption; article 16, paragraph 2, concerning the legal effect of the betrothal and the marriage of a child, inasmuch as this provision is incompatible with the provisions of the Islamic Shariah; and article 29, paragraph 1, concerning arbitration between States in the event of a dispute.

The accession of the Syrian Arab Republic to this Convention shall in no way signify recognition of Israel or entail entry into any dealings with Israel in the context of the provisions of the Convention..

THAILAND[62]

The Royal Thai Government wishes to express its understanding that the purposes of the Convention are to eliminate discrimination against women and to accord to every person, men and women alike, equality before the law, and are in accordance with the principles prescribed by the Constitution of the Kingdom of Thailand.

3. The Royal Thai Government does not consider itself bound by the provisions of article 29, paragraph 1, of the Convention.

TRINIDAD AND TOBAGO

"The Republic of Trinidad and Tobago declares that it does not consider itself bound by article 29 (1) of the said Convention, relating to the settlement of disputes."

TUNISIA[85]

The Tunisian Government declares that it shall not take any organizational or legislative decision in conformity with the requirements of this Convention where such a decision would conflict with the provisions of chapter I of the Tunisian Constitution.

TÜRKIYE[86]

" *With respect to article 29, paragraph 1*

In pursuance of article 29, paragraph 2 of the Convention, the Government of the Republic of Turkey declares that it does not consider itself bound by paragraph 1 of this article."

[.....]

UKRAINE[55]

UNITED ARAB EMIRATES[63]

The United Arab Emirates makes reservations to articles 2 (f), 9, 15 (2), 16 and 29 (1) of the Convention, as follows:

Article 2 (f)

The United Arab Emirates, being of the opinion that this paragraph violates the rules of inheritance established in accordance with the precepts of the Shariah, makes a reservation thereto and does not consider itself bound by the provisions thereof.

Article 9

The United Arab Emirates, considering the acquisition of nationality an internal matter which is governed, and the conditions and controls of which are established, by national legislation makes a reservation to this article and does not consider itself bound by the provisions thereof.

Article 15 (2)

The United Arab Emirates, considering this paragraph in conflict with the precepts of the Shariah regarding legal capacity, testimony and the right to conclude contracts, makes a reservation to the said paragraph of the said article and does not consider itself bound by the provisions thereof.

Article 16

The United Arab Emirates will abide by the provisions of this article insofar as they are not in conflict with the principles of the Shariah. The United Arab Emirates considers that the payment of a dower and of support after divorce is an obligation of the husband, and the husband has the right to divorce, just as the wife has her independent financial security and her full rights to her property and is not required to pay her husband's or her own expenses out of her own property. The Shariah makes a woman's right to divorce conditional on a judicial decision, in a case in which she has been harmed.

Article 29 (1)

The United Arab Emirates appreciates and respects the functions of this article, which provides:

"Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months...the parties are unable..." [any one of those parties] "may refer the dispute to the International Court of Justice..." This article, however, violates the general principle that matters are submitted to an arbitration panel by agreement between the parties. In addition, it might provide an opening for certain States to bring other States to trial in defence of their nationals; the case might then be referred to the committee charged with discussing the State reports required by the Convention and a decision might be handed down against the State in question for violating the provisions of the Convention. For these reasons the United Arab Emirates makes a reservation to this article and does not consider itself bound by the provisions thereof.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND[64,65]

"The Government of the United Kingdom of Great Britain and Northern Ireland declare that it is their intention to make certain reservations and declarations upon ratification of the Convention.

"A. On behalf of the United Kingdom of Great Britain and Northern Ireland:

(a) The United Kingdom understands the main purpose of the Convention, in the light of the definition contained in Article 1, to be the reduction, in accordance with its terms, of discrimination against women, and does not therefore regard the Convention as imposing any requirement to repeal or modify any existing laws, regulations, customs or practices which provide for women to be treated more favourably than men, whether temporarily or in the longer term; the United Kingdom's undertakings under Article 4, paragraph 1, and other provisions of the Convention are to be construed accordingly."

...

(c) In the light of the definition contained in Article 1, the United Kingdom's ratification is subject to the understanding that none of its obligations under the Convention shall be treated as extending to the succession to, or possession and enjoyment of, the Throne, the peerage, titles of honour, social precedence or armorial bearings, or as extending to the affairs of religious denominations or orders or any act done for the purpose of ensuring the combat effectiveness of the Armed Forces of the Crown."

...

"Article 9

The British Nationality Act 1981, which was brought into force with effect from January 1983, is based on principles which do not allow of any discrimination against women within the meaning of Article 1 as regards acquisition, change or retention of their nationality or as regards the nationality of theirchildren. The United Kingdom's acceptance of Article 9 shall not, how ever, be taken to invalidate the continuation of certain temporary

or transitional provisions which will ctinue in force beyond that date."

...

"Article 11

...

"The United Kingdom reserves the right to apply all United Kingdom legislation and the rules of pension schemes affecting retirement pensions, survivors' benefits and other benefits in relation to death or retirement (including retirement on grounds of redundancy), whether or not derived from a Social Security scheme."

"This reservation will apply equally to any future legislation which may modify or replace such legislation, or the rules of pension schemes, on the understanding that the terms of such legislation will be compatible with the United Kingdom's obligations under the Convention."

"The United Kingdom reserves the right to apply the following provisions of United Kingdom legislation concerning the benefits specified:

...

b) increases of benefits for adult dependants under sections 44 to 47, 49 and 66 of the Social Security Act 1975 and under sections 44 to 47, 49 and 66 of the Social Security (Northern Ireland) Act 1975;

...

The United Kingdom reserves the right to apply any non-discriminatory requirement for a qualifying period of employment or insurance for the application of the provisions contained in Article 11 (2)."

"Article 15

...

"In relation to Article 15, paragraph 3, the United Kingdom understands the intention of this provision to be that only those terms or elements of a contract or other private instrument which are discriminatory in the sense described are to be deemed null and void, but not necessarily the contract or instrument as a whole."

"Article 16

As regards sub-paragraph 1 (f) of Article 16, the United Kingdom does not regard the reference to the paramountcy of the interests of the children as being directly relevant to the elimination of discrimination against women, and declares in this connection that the legislation of the United Kingdom regulating adoption, while giving a principal position to the promotion of the children's welfare, does not give to the child's interests the same paramount place as in issues concerning custody over children."

...

"B. On behalf of the Isle of Man, the British Virgin Islands, the Falkland Islands, South Georgia and the South Sandwich Islands, and the Turks and Caicos Islands:

[Same reservations as the one made on behalf of the United Kingdom under paragraphs A (a), (c), and (d) except that in the of case d) it applies to the territories and their laws).]

Article 1

[Same reservation as the one made in respect of the United Kingdom except with regard to the absence of a reference to United Kingdom legislation.]

Article 2

[Same reservation as the one made in respect of the United Kingdom except that reference is made to the laws of the territories, and not the laws of the United Kingdom.]

Article 9

[Same reservation as the one made in respect of the United Kingdom.]

Article 11

[Same reservation as those made in respect of the United Kingdom except that a reference is made to the laws of the territories, and not to the laws of the United Kingdom.]

"Also, as far as the territories are concerned, the specific benefits listed and which may be applied under the provisions of these territories' legislation are as follows:

a) social security benefits for persons engaged in caring for a severely disabled person;

b) increases of benefit for adult dependants;

c) retirement pensions and survivors' benefits;

d) family income supplements.

"This reservation will apply equally to any future legislation which may modify or replace any of the provisions specified in sub-paragraphs (a) to (d) above, on the understanding that the terms of such legislation will be compatible with the United Kingdom's obligations under the Convention."

"The United Kingdom reserves the right to apply any non-discriminatory requirement for a qualifying period of employment or insurance for the application of the provisions contained in Article 11 (2)."

Article 13, 15 and 16

[Same reservations as those made on behalf the United Kingdom.]

VENEZUELA (BOLIVARIAN REPUBLIC OF)

Venezuela makes a formal reservation with regard to article 29, paragraph 1, of the Convention, since it does not accept arbitration or the jurisdiction of the International Court of Justice for the settlement of disputes concerning the interpretation or application of this Convention.

VIET NAM

In implementing this Convention, the Socialist Republic of Viet Nam will not be bound by the provisions of paragraph 1 article 29.

YEMEN[71]

The Government of the People's Democratic Republic of Yemen declares that it does not consider itself bound by article 29, paragraph 1, of the said Convention, relating to the settlement of disputes which may arise concerning the application or interpretation of the Convention.

Objections
(Unless otherwise indicated, the objections were made upon ratification, accession or succession.)

AUSTRIA

"The reservation made by the Maldives is incompatible with the object and purpose of the Convention and is therefore inadmissible under article 19 (c) of the Vienna Convention on the Law of Treaties and shall not be permitted, in accordance with article 28 (2) of the Convention on the Elimination of All Forms of Discrimination Against Women. Austria therefore states that this reservation cannot alter or modify in any respect the obligations arising from the Convention for any State Party thereto."

"Austria is of the view that a reservation by which a State limits its responsibilities under the Convention in a

general and unspecified manner by invoking internal law creates doubts as to the commitment of the Islamic Republic of Pakistan with its obligations under the Convention, essential for the fulfillment of its object and purpose.

It is in the common interests of States that treaties to which they have chosen to become Parties are respected, as to their object and purpose, by all Parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

Austria is further of the view that a general reservation of the kind made by the Government of the Islamic Republic of Pakistan, which does not clearly specify the provisions of the Convention to which it applies and the extent of the derogation therefrom, contributes to undermining the basis of international treaty law.

Given the general character of this reservation a final assessment as to its admissibility under international law cannot be made without further clarification.

According to international law a reservation is inadmissible to the extent as its application negatively affects the compliance by a State with its obligations under the Convention essential for the fulfillment of its object and purpose.

Therefore, Austria cannot consider the reservation made by the Government of the Islamic Republic of Pakistan as admissible unless the Government of the Islamic Republic of Pakistan, by providing additional information or through subsequent practice, ensures that the reservation is compatible with the provisions essential for the implementation of the object and purpose of the Convention.

This view by Austria would not preclude the entry into force in its entirety of the Convention between Pakistan and Austria."

[Same objection, mutatis mutandis, as the one made for Pakistan.]

"Austria has examined the reservations to the Convention on the Elimination of All Forms of Discrimination against Women made by the Government of the Kingdom of Saudi Arabia in its note to the Secretary-General of 7 September 2000.

The fact that the reservation concerning any interpretation of the provisions of the Convention that is incompatible with the norms of Islamic law does not clearly specify the provisions of the Convention to which it applies and the extent of the derogation therefrom raises doubts as to the commitment of the Kingdom of Saudi Arabia to the Convention.

Given the general character of this reservation a final assessment as to its admissibility under international law cannot be made without further clarification. Until the scope of the legal effects of this reservation is sufficiently specified by the Government of Saudi Arabia, Austria considers the reservation as not affecting any provision the implementation of which is essential to fulfilling the object and purpose of the Convention. In Austria's view, however, the reservation in question is inadmissible to the extent that its application negatively affects the compliance by Saudi Arabia with its obligations under the Convention essential for the fulfilment of its object and purpose. Austria does not consider the reservation made by the Government of Saudi Arabia as admissible unless the Government of Saudi Arabia, by providing additional information or through subsequent practice, ensures that the reservation is compatible with the provisions essential for the implementation of the object and purpose of the Convention.

As to the reservation to Paragraph 2 of Article 9 of the Convention Austria is of the view that the exclusion of such an important provision of non-discrimination is not compatible with object and purpose of the Convention. Austria therefore objects to this reservation.

This position, however, does not preclude the entry into force in its entirety of the Convention between Saudi Arabia and Austria."

"Austria has examined the reservations to the Convention on the Elimination of All Forms of Discrimination against Women made by the Government of the Democratic People's Republic of Korea in its note to the Secretary General of 27 February 2001.

Taking into consideration that according to Paragraph 2 of Article 28 of the Convention, reservations which are incompatible with the objective and purpose of the Convention are not acceptable, Austria objects to the reservations in respect of Paragraph f of Article 2 and Paragraph 2 of Article 9.

Both Paragraphs refer to basic aspects of the Convention, that are legislation to abolish existing discrimination against women and a specific form of discrimination, such as the nationality of children.

This position, however, does not preclude the entry into force in its entirety of the Convention between the Democratic People's Republic of Korea and Austria."

"The Government of Austria has examined the reservation to the Convention on the Elimination of all Forms of Discrimination against Women made by the Government of the Islamic Republic of Mauritania in its note to the Secretary-General of 5 June 2001.

The Government of Austria considers that, in the absence of further clarification, this reservation raises doubts as to the degree of commitment assumed by Mauritania in becoming a party to the Convention since it refers to the contents of Islamic Sharia and to existing national legislation in Mauritania. The Government of Austria would like to recall that, according to art. 28 (2) of the Convention as well as customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

For these reasons, the Government of Austria objects to this reservation made by the Government of Mauritania.

This position, however, does not preclude the entry into force in its entirety of the Convention between Mauritania and Austria."

"The Government of Austria has examined the reservation to the Convention on the Elimination of all forms of Discrimination against Women made by the Government of the Kingdom of Bahrain in its note to the Secretary-General of 18 June 2002, regarding articles 2, 9(2), 15(4) and 16.

The reservation to articles 9(2) and 15(4), if put into practice, would inevitably result in discrimination against women on the basis of sex. This is contrary to the object and purpose of the Convention.

The Government of Austria further considers that, in the absence of further clarification, the reservation to articles 2 and 16 which does not clearly specify the extent of Bahrain's derogation from the provisions in question raises doubts as to the degree of commitment assumed by Bahrain in becoming a party to the Convention since it refers to the contents of Islamic Sharia.

The Government of Austria would like to recall that, according to art. 28(2) of the Convention as well as customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes

necessary to comply with their obligations under the treaties.

For these reasons, the Government of Austria objects to this reservation made by the Government of Bahrain.

This position, however, does not preclude the entry into force in its entirety of the Convention between Bahrain and Austria."

"The Government of Austria has examined the reservation made by the Government of the Syrian Arab Republic upon accession to the Convention on the Elimination of All Forms of Discrimination against Women regarding article 2, article 9, paragraph 2, article 15, paragraph 4, article 16, paragraphs 1 (c), (d), (f) and (g) and article 16, paragraph 2.

The Government of Austria finds that the reservations to article 2, article 9, paragraph 2, article 15, paragraph 4, article 16, paragraphs 1 (c), (d), (f) and (g), if put into practice, would inevitably result in discrimination against women on the basis of sex. This is contrary to the object and purpose of the Convention.

The Government of Austria further considers that, in the absence of further clarification, the reservation to article 16, paragraph 2, which refers to the contents of Islamic Sharia, does not clearly specify the extent of the reservation and therefore raises doubts as to the degree of commitment assumed by the Syrian Arab Republic in becoming a party to the Convention.

The Government of Austria would like to recall that, according to article 28 (2) of the Convention as well as customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

For these reasons, the Government of Austria objects to the aforementioned reservations made by the Syrian Arab Republic to the Convention on the Elimination of All Forms of Discrimination against Women.

This position, however, does not preclude the entry into force in its entirety of the Convention between the Syrian Arab Republic and Austria."

"The Government of Austria has examined the reservation made by the Government of the United Arab Emirates upon accession to the Convention on the Elimination of All Forms of Discrimination against Women regarding articles 2 (f), 9, 15 (2), 16 and 29 (1).

The Government of Austria finds that the reservations to article 2 (f), article 9, article 15 (2) and article 16, if put into practice, would inevitably result in discrimination against women on the basis of sex. This is contrary to the object and purpose of the Convention.

The Government of Astria would like to recall that, according to article 28 (2) of the Convention as well as customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations underthe treaties.

For these reasons, the Government of Austria objects to the aforementioned reservations made by the United Arab Emirates to the Convention on the Elimination of All Forms of Discrimination against Women.

This position, however, does not preclude the entry into force in its entirety of the Convention between the United Arab Emirates and Austria."

"The Government of Austria has examined the reservations made by the Government of Brunei Darussalam upon accession to the Convention on the Elimination of All Forms of Discrimination against Women.

The Government of Austria finds that the reservation to article 9, paragraph 2 would inevitably result in discrimination against women on the basis of sex. This is contrary to the object and purpose of the Convention.

The Government of Austria further considers that, in the absence of further clarification, the reservation "regarding those provisions of the said Convention that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam" does not clearly specify its extent and therefore raises doubts as to the degree of commitment assumed by Brunei Darussalam in becoming a party to the Convention.

The Government of Austria would like to recall that, according to article 28, paragraph 2 of the Convention as well as customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

For these reasons, the Government of Austria objects to the aforementioned reservations made by Brunei Darussalam to the Convention on the Elimination of All Forms of Discrimination against Women.

This position however does not preclude the entry into force in its enirety of the Convention between Brunei Darussalam and Austria."

"The Government of Austria has examined the reservations made by the Government of the Sultanate of Oman upon accession to the Convention on the Elimination of All Forms of Discrimination against Women.

The Government of Austria finds that the reservations to article 9, paragraph 2, article 15, paragraph 4, and article 16 would inevitably result in discrimination against women on the basis of sex. This is contrary to the object and purpose of the Convention.

The Government of Austria further considers that, in the absence of further clarification, the reservation to "all provisions of the Convention not in accordance with the provisions of the Islamic sharia and legislation in force in the Sultanate of Oman" does not clearly specify its extent and therefore raises doubts as to the degree of commitment assumed by the Sultanate of Oman in becoming a party to the Convention.

The Government of Austria would like to recall that, according to article 28, paragraph 2 of the Convention as well as customary international law as codified in the Vienna Convention on the Law of Treaties (Art. 19 sub-paragraph c), a reservation incompatible with the object and purpose of a treaty shall not be permitted.

It is in the commoninterest of States that treaties to which they have chosen to become parties are requested as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

For these reasons, the Government of Austria objects to the aforementioned reservations made by the Sultanate of Oman to the Convention on the Elimination of All Forms of Discrimination against Women.

This position however does not preclude the entry into force in its entirety of the Convention between the Sultanate of Oman and Austria."

“The Government of Austria has examined the reservations made by the State of Qatar upon accession to

the Convention on the Elimination of All Forms of Discrimination against Women.

The Government of Austria finds that the reservations to article 9 paragraph 2, article 15 paragraphs 2 and 4, article 16 paragraphs 1a, 1c and 1f would inevitably result in discrimination against women on the basis of sex. These reservations affect essential obligations arising from the Convention and their observance is necessary in order to achieve the purpose of the Convention.

The Government of Austria would like to recall that, according to article 28 paragraph 2 of the Convention as well as customary international law as codified in the Vienna Convention on the Law of Treaties (article 19 sub-paragraph c), a reservation incompatible with the object and purpose of a treaty shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

For these reasons, the Government of Austria objects to the aforementioned reservations made by the State of Qatar to the Convention on the Elimination of All Forms of Discrimination against Women.

This position however does not preclude the entry into force in its entirety of the Convention between the State of Qatar and Austria."

"The Government of Austria has examined the modification of the reservations made by Malaysia to the Convention on the Elimination of All Forms of Discrimination against Women as notified on 19 July 2010.

In the view of Austria a reservation should clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. A reservation which consists of a general reference to constitutional provisions and Islamic Sharia law without specifying its implications does not do so. The Government of Austria therefore objects to this general reservation.

The Government of Austria further finds that the reservations to articles 9 (2), 16 (1) a, 16 (1) f and 16 (1) g, if put into practice, would inevitably result in discrimination against women on the basis of sex. This is contrary to the object and purpose of the Convention. The Government of Austria therefore objects to these reservations.

This position, however, does not affect the application of the Convention in its entirety between Austria and Malaysia."

BELGIUM

Belgium has carefully examined the reservation formulated by Brunei Darussalam when it acceded, on 24 May 2006, to the Convention on the Elimination of All Forms of Discrimination against Women, adopted in New York on 18 December 1979. Belgium notes that the reservation formulated with respect to article 9, paragraph 2, concerns a fundamental provision of the Convention and is therefore incompatible with the object and purpose of that instrument.

In addition, the reservation makes the implementation of the Convention's provisions contingent upon their compatibility with the Constitution of Brunei Darussalam and the beliefs and principles of Islam, the official religion of Brunei Darussalam. This creates uncertainty as to which of its obligations under the Convention Brunei Darussalam intends to observe and raises doubts as to Brunei Darussalam's respect for the object and purpose of the Convention.

Belgium recalls that, under article 28, paragraph 2, of the Convention, reservations incompatible with the object and purpose of the Convention are not permitted. It is in the common interest for all parties to respect the treaties to which they have acceded and for States to be willing to enact such legislative amendments as may be necessary in order to fulfil their treaty obligations. Under customary international law, as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty is not permitted (article 19 (c)).

In consequence, Belgium objects to the reservation formulated by Brunei Darussalam with respect to the Convention on the Elimination of All Forms of Discrimination against Women. This objection shall not preclude the entry into force of the Convention between the Kingdom of Belgium and Brunei Darussalam. The Convention shall enter into force in its entirety, without Brunei Darussalam benefiting from its reservation.

Belgium has carefully examined the reservation formulated by the Sultanate of Oman when it acceded, on 7 February 2006, to the Convention on the Elimination of All Forms of Discrimination against Women, adopted in New York on 18 December 1979. Belgium notes that the reservation formulated with respect to article 9, paragraph 2; article 15, paragraph 4; and article 16 concerns fundamental provisions of the Convention and is therefore incompatible with the object and purpose of that instrument.

In addition, the first paragraph of the reservation makes the implementation of the Convention's provisions contingent upon their compatibility with the Islamic sharia and legislation in force in the Sultanate of Oman. This creates uncertainty as to which of its obligations under the Convention the Sultanate of Oman intends to observe and raises doubts as to Oman's respect for the object and purpose of the Convention.

Belgium recalls that, under article 28, paragraph 2, of the Convention, reservations incompatible with the object and purpose of the Convention are not permitted. It is in the common interest for all parties to respect the treaties to which they have acceded and for States to be willing to enact such legislative amendments as may be necessary in order to fulfil their treaty obligations. Under customary international law, as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purposeof a treaty is not permitted (article 19 (c)).

In consequence, Belgium objects to the reservation formulated by the Sultanate of Oman with respect to the Convention on the Elimination of All Forms of Discrimination against Women. This objection shall not preclude the entry into force of the Convention between the Kingdom of Belgium and the Sultanate of Oman. The Convention shall enter into force in its entirety, without Oman benefiting from its reservation.

Belgium has carefully examined the reservation formulated by Qatar when it acceded, on 29 April 2009, to the Convention on the Elimination of All Forms of Discrimination against Women.

The reservations make the implementation of the Convention's provisions contingent upon their compatibility with the Islamic sharia and legislation in force in Qatar. This creates uncertainty as to which of its obligations under the Convention Qatar intends to observe and raises doubts as to Qatar's respect for the object and purpose of the Convention.

It is in the common interest for all parties to respect the treaties to which they have acceded and for States to be willing to enact such legislative amendments as may be necessary in order to fulfill their treaty obligations.

Belgium notes, moreover, that the reservations formulated with respect to article 9, paragraph 2; article 15, paragraphs 1 and 4; and article 16, paragraphs 1 (a), 1 (c) and 1 (f) concern fundamental provisions of the Convention and are therefore incompatible with the object and purpose of that instrument.

Belgium recalls that under article 28, paragraph 2, of the Convention, reservations incompatible with the object and purpose of the Convention are not permitted. In addition, under customary international law, as codified in

the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty is not permitted (article 19 (c)).

In consequence, Belgium objects to the reservation formulated by Qatar with respect to article 9, paragraph 2; article 15, paragraphs 1 and 4; and article 16, paragraphs 1 (a), 1 (c) and 1 (f) of the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Kingdom of Belgium and Qatar.

CANADA

"In the view of the Government of Canada, this reservation is incompatible with the object and purpose of the Convention (article 28, paragraph 2). The Government of Canada therefore enters its formal objection to this reservation. This objection shall not preclude the entry into force of the Convention as between Canada and the Republic of Maldives."

"Canada has carefully examined the reservation formulated by Brunei Darussalam when it acceded, on 24 May 2006, to the Convention on the Elimination of Al Forms of Discrimination against Women, adopted in New York on 18 December 1979.

Canada notes that the reservation formulated with respect to article 9, paragraph 2, concerns a fundamental provision of the Convention and is therefore incompatible with the object and purpose of that instrument.

In addition, the reservation makes the implementation of the Convention's provisions contingent upon their compatibility with the Constitution of Brunei Darussalam and the beliefs and principles of Islam, the official religion of Brunei Darussalam. The Government of Canada notes that such general reservation of unlimited scope and undefined character does not clearly define for the other States Parties to the Convention the extent to which Brunei Darussalam has accepted the obligations of the Convention and creates serious doubts as to the commitment of the State to fulfil its obligations under the Convention. Accordingly, the Government of Canada considers this reservation to be incompatible with the object and purpose of the Convention.

It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

Canada recalls that, under article 28, paragraph 2, of the Convention, reservations incompatible with the object and purpose of the Convention are not permitted.

Under customary international law, as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty is not permitted.

In consequence, Canada objects to the reservation formulated by Brunei Darussalam with respect to the Convention on the Elimination of All Forms of Discrimination against Women. This objection shall not preclude the entry into force of the Convention between Canada and Brunei Darussalam. The Convention shall enter into force in its entirety, without Brunei Darussalam benefiting from its reservation."

"The Permanent Mission of Canada to the United Nations presents its compliments to the Secretary-General of the United Nations and has the honour to refer to the Secretary-General's note C.N.578.2016.TREATIES-IV.8 (Depositary Notification), dated August 5, 2016, which communicated that the Secretary-General has received from the Kingdom of Bahrain a modification of reservations made upon accession with respect to the Convention on the Elimination of All Forms of Discrimination against Women.

The Permanent Mission of Canada to the United Nations hereby informs that the

Government of Canada notes that the Kingdom of Bahrain continues to make reservations to articles 2, 9 (paragraph 2), 15 (paragraph 4), 16 and 29 (paragraph 1) of the Convention on the Elimination of All Forms of Discrimination against Women.

The Government of Canada has given careful consideration to the Kingdom of Bahrain's reservations to Articles 2 and 16, which subordinate the provisions of the Convention to Islamic Shariah. The Government of Canada notes that these reservations consist of a general reference to religious and national law, without specifying the content or scope of these restrictions. The Government of Canada notes that these reservations do not clearly define to other Parties to the Convention the extent to which the Kingdom of Bahrain commits itself to the Convention. As such, the Government of Canada considers that these reservations constitute a reservation of general scope that may cast doubts on the full commitment of the Kingdom of Bahrain to fulfil its obligations under the Convention.

The Government of Canada considers Articles 2 and 16 to be core provisions of the Convention. As such, reservations to those articles, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the object and purpose of the Convention and therefore impermissible.

The reservations to articles 9 (paragraph 2) and 15 (paragraph 4) exclude the obligations under those provisions to eliminate discrimination against women on the basis of sex. They are therefore contrary to the object and purpose of the Convention and, pursuant to article 28 (paragraph 2), not permitted.

The Government of Canada recalls that by acceding to the Convention, a State commits itself to adopt the measures required for the elimination of discrimination against women in all its forms and manifestations.

For these reasons, the Government of Canada objects to the reservations made by the Kingdom of Bahrain to articles 2, 9 (paragraph 2), 15 (paragraph 4), and 16 of the Convention on the Elimination of All Forms of Discrimination against Women. This objection does not preclude the entry into force of the Convention between the Kingdom of Bahrain and Canada."

CZECH REPUBLIC

"The Government of the Czech Republic has examined the reservations made by the Sultanate of Oman upon accession to the Convention on the Elimination of All Forms of Discrimination against Women.

The Government of the Czech Republic is of the view that the reservations made to Article 9 paragraph 2, Article 15, paragraph 4 and Article 16, if put into practice, would inevitably result in discrimination against women on the basis of sex, which is contrary to the object and purpose of the Convention. Furthermore, the Government of the Czech Republic notes that the reservation regarding all provisions of the Convention not in accordance with the provisions of the Islamic sharia and legislation in force in the Sultanate of Oman does not clearly define for the other States Parties to the Convention the extent to which the Sultanate of Oman has accepted the obligations of the Convention and therefore raises concerns as to its commitment to the object and purpose of the Convention.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. According to Article 28, paragraph 2 of the Convention and according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation that is incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Czech Republic therefore objects to the aforesaid reservations made by the Government of the Sultanate of Oman to the Convention. This objection shall not preclude the entry into force of the Convention between the Czech Republic and the Sultanate of Oman. The Convention enters into force in its entirety between the Czech Republic and the Sultanate of Oman, without the Sultanate of Oman benefiting from its reservation."

"The Government of the Czech Republic has examined the reservations made by the Government of Brunei Darussalam upon accession to the Convention on the Elimination of All Forms of Discrimination against Women regarding Article 9 paragraph 2 and those provisions of the Convention that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam.

The Government of the Czech Republic notes that a reservation to a Convention which consists of a general reference to national law without specifying its contents does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. Furthermore, the reservation made to Article 9 paragraph 2, if put into practice, would inevitably result in discrimination against women on the basis of sex, which is contrary to the object and purpose of the Convention.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. According to Article 28 paragraph 2 of the Convention and according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation that is incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Czech Republic therefore objects to the aforesaid reservations made by the Government of Brunei Darussalam to the Convention. This objection shall not preclude the entry into force of the Convention between the Czech Republic and Brunei Darussalam. The Convention enters into force inits entirety between the Czech Republic and Brunei Darussalam, without Brunei Darussalam benefiting from its reservation."

"The Czech Republic has examined the reservations and declarations made by the State of Qatar upon accession to the Convention on the Elimination of All Forms of Discrimination against Women.

The Czech Republic believes that the reservations No. 2 – 6 of the State of Qatar made to Articles 9(2), 15(1), 15(4), 16(1)(a) and (c) and 16(1)(f) of the Convention, if put into practice, would inevitably result in discrimination against women on the basis of sex, which is contrary to the object and purpose of the Convention. Furthermore, the State of Qatar supports these reservations by references to its domestic law, which is, in the opinion of the Czech Republic, unacceptable under customary international law, as codified in Article 27 of the Vienna Convention on the Law of Treaties. Finally, the reservations No. 3 – 6, that refer to the notions such as "Islamic law" and "established practice" without specifying its contents, do not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. According to Article 28 paragraph 2 of the Convention and according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation that is incompatible with the object and purpose of a treaty shall not be permitted.

The Czech Republic, therefore, objects to the aforesaid reservations made by the State of Qatar to the Convention. This objection shall not preclude the entry into force of the Convention between the Czech Republic and the State of Qatar. The Convention enters into force in its entirety between the Czech Republic and the State of Qatar, without the State of Qatar benefiting from its reservation."

DENMARK

"The Government of Denmark has taken note of the reservation made by the Libyan Arab Jamahiriya when acceding [to the said Convention]. In the view of the Government of Denmark this reservation is subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty."

"The Government of Denmark finds that the reservations made by the Government of Niger are not in conformity with the object and purpose of the Convention. The provisions in respect of which Niger has made reservations cover fundamental rights of women and establish key elements for the elimination of discrimination against women. For this reason, the Government of Denmark objects to the said reservations made by the Government of Niger.

The Convention remains in force in its entirety between Niger and Denmark.

It is the opinion of the Government of Denmark, that no time limit applies to objections against reservations, which are inadmissible under international law.

The Government of Denmark recommends the Government of Niger to reconsider its reservations to the Convention on the Elimination of All Forms of Discrimination against Women."

"The Government of Denmark has examined the reservations made by the Government of Saudi Arabia upon ratification on the Convention on the Elimination of All Forms of Discrimination Against Women as to any interpretation of the provisions of the Convention that is incompatibleith the norms of Islamic law.

The Government of Denmark finds that the general reservation with reference to the provisions of Islamic law are of unlimited scope and undefined character. Consequently, the Government of Denmark considers the said reservations as being incompatible with the object and purpose of the Convention and accordingly inadmissible and without effect under international law.

The Government of Denmark furthermore notes that the reservation to paragraph 2 of article 9 of the Convention aims to exclude one obligation of non-discrimination which is the aim of the Convention and therefore renders this reservation contrary to the essence of the Convention.

The Government of Denmark therefore objects to the aforesaid reservations made by the Government of the Kingdom of Saudi Arabia to the Convention on Elimination of All Forms of Discrimination against Women.

These objections shall not preclude the entry into force of the Convention in its entirety between Saudi Arabia and Denmark.

The Government of Denmark recommends the Government of Saudi Arabia to reconsider its reservations to the Convention on the Elimination of All Forms of Discrimination against Women."

"The Government of Denmark has examined the reservations made by the Government of Mauritania upon accession to the Convention on the Elimination of All Forms of Discrimination Against Women as to any interpretation of the provisions of the Convention that is incompatiblewith the norms of Islamic law and the Constitution in Mauritania.

The Government of Denmark finds that the general reservation with reference to the provisions of Islamic law and the Constitution are of unlimited scope and undefined character. Consequently, the Government of Denmark considers the said reservation as being incompatible with the object and purpose of the Convention and accordingly inadmissible andwithout effect under international law.

The Government of Denmark therefore objects to the aforesaid reservation made by the Government of Mauritania to the Convention on the Elimination of all Forms of Discrimination against Women.

This shall not preclude the entry into force of the Convention in its entirety between Mauritania and Denmark.

The Government of Denmark recommends the Government of Mauritania to reconsider its reservations to the Convention on the Elimination of All Forms of Discrimination against Women."

"The Government of Denmark has examined the reservations made by the Democratic People's Republic of Korea upon accession to the Convention on [the] Elimination of All Forms of Discrimination Against Women in respect of paragraph (f) of article 2 and paragraph 2 of article 9.

The Government of Denmark finds that the reservation to paragraph (f) of article 2 aims at excluding the Democratic People's Republic of Korea from the obligation to adopt necessary measures, including those of a legislative character, to eliminate any form of discrimination against women. This provision touches upon a key element for effective elimination of discrimination against women.

The Government of Denmark furthermore notes that the reservation toparagraph 2 of article 9 of the Convention aims to exclude an obligation of non-discrimination, which is the aim of the Convention.

The Government of Denmark finds that the reservations made by the Democratic People's Republic of Korea are not in conformity with the object and purpose of the Convention.

The Government of Denmark therefore objects to the said reservation made by the Democratic People's Republic of Korea.

The Government of Denmark recommends the Government of [the] Democratic People's Republic of Korea to reconsider its reservations to the Convention.

The Convention on [the] Elimination of All Forms Discrimination Against Women remains in force in its entirety between the Democratic People's Republic of Korea and Denmark."

"The Government of Denmark has examined the reservations made by the Government of Bahrain upon accession to the Convention on the Elimination of All Forms of Discrimination Against Women regarding article 2, paragraph 2 of article 9, paragraph 4 of article 15 and article 16.

The Government of Denmark finds that the reservation to articles 2 and 16 with reference to the provisions of Islamic Sharia is of unlimited scope and undefined character. Consequently, the Government of Denmark considers the said reservations as being incompatible with the object and purpose of the Convention and accordingly inadmissible and without effect under international law.

The Government of Denmark furthermore notes that the reservations to paragraph 2 of article 9 and to paragraph 4 of article 15 of the Convention seek to exclude an obligation of non-discrimination, which is the aim of the Convention. The Government of Denmark finds thatthese reservations made by the Government of Bahrain are not in conformity with the object and purpose of the Convention.

The Government of Denmark therefore objects to the aforementioned reservations made by the Government of Bahrain to the Convention on the Elimination of all Forms of Discrimination Against Women. This shall not preclude the entry into force of the Convention in its entirety between Bahrain and Denmark.

The Government of Denmark recommends the Government of Bahrain to reconsider its reservations to the Convention on the Elimination of All Forms of Discrimination against Women."

"The Government of Denmark has examined the reservations made by the Government of the Syrian Arab Republic upon accession to the Convention on the Elimination of All Forms of Discrimination Against Women regarding article 2, article 9, paragraph 2, article 15, paragraph 4, article 16, paragraphs 1 (c), (d), (f) and (g) and article 16, paragraph 2 in its note of 7 April 2003, to the Secretary-General of the United Nations distributed under reference No. C.N.267.2003.TREATIES-6.

The Government of Denmark finds that the reservation to article 2 seeks to evade the obligation of non-discrimination, which is the aim of the Convention. The Government of Denmark is of the view that a general reservation to one of the core articles of the Convention raises doubts as to the commitment of the Government of the Syrian Arab Republic to fulfil its obligations under the Convention.

The Government of Denmark furthermore notes that the reservations to article 9, paragraph 2, article 15, paragraph 4, article 16, paragraphs 1 (c), (d), (f) and (g) and article 16, paragraph 2, would inevitably result in discrimination against women on the basis of sex, which is contrary to the object and purpose of the Convention. It should be borne in mind that the principles of equal rights of men and women and of non-discrimination on the basis of sex are set forth in the Charter of the United Nations as one of the purposes of the organization, as well as in the Universal Declaration of Human Rights of 1948.

The Government of Denmark finds that these reservations made by the Government of the Syrian Arab Republic are not in conformity with the object and purpose of the Convention.

The Government of Denmark recalls that according to article 28, paragraph 2 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Denmark therefore objects to the aforementioned reservations made by the Government of the Syrian Arab Republic to the Convention on the Elimination of All Forms of Discrimination Against Women.

This shall not prelude the entry into force of the Convention in its entirety between the Syrian Arab Republic and Denmark.

The Government of Denmark recommends the Government of the Syrian Arab Republic to reconsider its reservations to the Convention on the Elimination of All Forms of Discrimination Against Women."

"The Government of Denmark has examined the reservations made by the Sultanate of Oman upon accession to the Convention on the Elimination of all Forms of Discrimination Against Women regarding article 9 (2), 15 (4), 16 (a, c, f), and all provisions of the Convention not in accordance with the principles of the Islamic Sharia.

The Government of Denmark finds that the general reservation with reference to the provisions of the Islamic Sharia is of unlimited scope and undefined character. The Government of Denmark furthermore notes that the reservations made by the Sultanate of Oman to article 9 (2), 15 (4), and 16 (a, c, f) would inevitable result in the discrimination against women on the basis of sex, which is contrary to the object and purpose of the Convention. Consequently, the Government of Denmark considers the said reservations to be incompatible with the object and purpose of the Convention and accordingly inadmissible and without effect under international law.

The Government of Denmark wishes to recall that, according to article 28 (2) of the Convention, reservations

incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Denmark therefore objects to the aforementioned reservations made by the Sultanate of Oman to the Convention on the Elimination of all Forms of Discrimination Against Women. This shall not preclude the entry into force of the Convention in its entirety between Oman and Denmark.

The Government of Denmark recommends the Sultanate of Oman to reconsider its reservations to the Convention on the Elimination of all Forms of Discrimination Against Women."

"The Government of Denmark has examined the reservations made by the Government of Brunei Darussalam upon accession to the Convention on the Elimination of all Forms of Discrimination Against Women regarding article 9 (2) and all provisions of the Convention not in accordance with the principles of Islam.

The Government of Denmark finds that the general reservation made by the Government of Brunei Darussalam with reference to the principles of Islam is of unlimited scope and undefined character. The Government of Denmark furthermore notes that the reservation to article 9 (2) would inevitably result in the discrimination against women on the basis of sex, which is contrary to the object and purpose of the Convention. Consequently, the Government of Denmark considers the said reservations to be incompatible with the object and purpose of the Convention and accordingly inadmissible and without effect under international law.

The Government of Denmark wishes to recall that, according to article 28 (2) of the Convention, reservations incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Denmark therefore objects to the aforementioned reservations made by the Government of Brunei Darussalam to the Convention on the Elimination of all Forms of Discrimination Against Women. This shall not preclude the entry into force of the Convention in its entirety between Brunei Darussalam and Denmark.

The Government of Denmark recommends the Government of Brunei Darussalam to reconsider its reservations to the Convention on the Elimination of all Forms of Discrimination Against Women."

ESTONIA

"The Government of Estonia has carefully examined the reservations made by the Government of the Syrian Arab Republic to Article 2, paragraph 2 of Article 9, paragraph 4 of Article 15 and to paragraphs 1 (c), (d), (f) and (g) of Article 16 of the Convention on the Elimination of all Forms of Discrimination Against Women.

Article 2 of the Convention is one of the core articles of the Convention. By making a reservation to this article, the Government of the Syrian Arab Republic is making a reservation of general scope that renders the provisions of the Convention completely ineffective. The Government of Estonia considers the reservation incompatible with the object and purpose of the Convention.

The reservations to article 9, paragraph 2, article 15, paragraph 4 and article 16, paragraphs 1 (c), (d), (f) and (g), if put into practice, would inevitably result in discrimination against women on the basis of sex, which is contrary to the object and purpose of the Convention. It should be borne in mind that the principles of equal rights of men and women and of non-discrimination on the basis of sex are set forth in the Charter of the United Nations as one of the purposes of the organization, as well as in the Universal Declaration of Human Rights of 1948.

The reservation to article 16, paragraph 2, makes a general reference to the Islamic Shariah. The Government of Estonia is of the view that in the absence of further clarification, this reservation which does not clearly specify the extent of the Syrian Arab Republic's derogation from the provision in question raises serious doubts as to the commitment of the Syrian Arab Republic to the object and purpose of the Convention.

The Government of Estonia recalls that according to article 28, paragraph 2 of the Convention, a reservation incompatible with the object and purpose of the Convention shal not be permitted.

The Government of Estonia therefore objects to the afore-mentioned reservation made by the Government of the Syrian Arab Republic to the Convention.

This objection does not preclude the entry into force of the Convention between the Syrian Arab Republic and Estonia. The Convention will thus become operative between the two States without the Syrian Arab Republic benefiting from its reservations.

The Government of Estonia recommends the Government of the Syrian Arab Republic to reconsider its reservations to the Convention on the Elimination of All Forms of Discrimination Against Women."

"The Government of the Republic of Estonia has carefully examined the reservations made by the Government of Brunei Darussalam to Article 9, paragraph 2 of the Convention on the Elimination of all Forms of Discrimination Against Women.

The reservation to Article 9, paragraph 2, if put into practice, would inevitably result in discrimination against women on the basis of sex, which is contrary to the object and purpose of the Convention.

Furthermore, the reservation made by Brunei Darussalam makes a general reference to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam. The Government of Estonia is of the view that in the absence of further clarification, the reservation makes it unclear to what extent the State of Brunei Darussalam considers itself bound by the obligations of the Convention and therefore raises concerns as to the commitment of the State of Brunei Darussalam to the object and purpose of the Convention.

According to Article 28, paragraph 2 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Estonia therefore objects to the reservation to Article 9, paragraph 2, and to the general reservation regarding the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, made by the Government of Brunei Darussalam to the Convention on the Elimination of all Forms of Discrimination Against Women.

This objection shall not preclude the entry into force of the Convention on the Elimination of all Forms of Discrimination Against Women as between the Republic of Estonia and the State of Brunei Darussalam."

"The Government of the Republic of Estonia has carefully examined the reservations made by the Government of Sultanate of Oman to paragraph 2 of Article 9, paragraph 4 of Article 15, and subparagraphs (a), (c) and (f) of Article 16 of the Convention on the Elimination of all Forms of Discrimination Against Women.

The reservations to paragraph 2 of Article 9, paragraph 4 of Article 15, and subparagraphs (a), (c) and (f) of Article 16, if put into practice, would inevitably result in discrimination against women on the basis of sex, which is contrary to the object and purpose of the Convention. In particular, Article 16 is one of the core provisions of the Convention to which reservations are incompatible with the Convention and therefore impermissible.

Furthermore, section one of the reservation makes a general reference to the provisions of the Islamic sharia and legislation in force in theSultanate of Oman. The Government of Estonia is of the view that in the absence of further clarification, this reservation makes it unclear to what extent the Sultanate of Oman considers itself bound by the obligations of the Convention and therefore raises concerns as to the commitment of the Sultanate of Oman to the object and purpose of the Convention.

According to Article 28, paragraph 2 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Estonia therefore objects to the general reservation made in section one, and reservations to paragraph 2 of Article 9, paragraph 4 of Article 15, and subparagraphs (a), (c) and (f) of Article 16, made by the Government of the Sultanate of Oman to the Convention on the Elimination of all Forms of Discrimination Against Women.

This objection shall not preclude the entry into force of the Convention on the Elimination of all Forms of Discrimination Against Women as between the Republic of Estonia and the Sultanate of Oman".

"The Government of Estonia has carefully examined the reservations made on 29 April 2009 by the Government of the State of Qatar to Articles 2 (a), 9 (2), 15 (1), 15 (4), 16 (1) (a), 16 (1) (c) and 16 (1) (f) of the Convention.

The Government of Estonia wishes to recall that by acceding to the Convention, a State commits itself to eliminate discrimination against women in all its forms and manifestations thereby taking all appropriate measures to modify or abolish existing laws, regulations and practices which constitute such discrimination.

A reservation which consists of a general reference to national law without specifying its content does not clearly indicate to what extent the State of Qatar commits itself when acceding to the Government and thus is contrary to the object and purpose of the Convention.

According to Article 28, paragraph 2 of the Convention as well as to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Estonia therefore objects to the aforesaid reservations made by the Government of the State of Qatar to the Convention.

Notwithstanding, this objection shall not preclude the entry into force in its entirety of the Convention as between the Republic of Estonia and the State of Qatar."

FINLAND

"The Government of Finland has examined the contents of the reservation made by the Libyan Arab Jamahiriya and considers the said reservation as being incompatible with the object and purpose of the Convention. The Government of Finland therefore enters its formal objection to this reservation.

"This objection is not an obstacle to the entry into force of the said Convention between Finland and the Libyan Arab Jamahiriya."

In the view of the Government of Finland, the unlimited and undefined character of the said reservations create serious doubts about the commitment of the reserving State to fulfil its obligations under the Convention. In their extensive formulation, they are clearly contrary to the object and purpose of the Convention. Therefore, the Government of Finland objects to such reservations.

The Government of Finland also recalls that the said reservations are subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as a justification for failure to perform its treaty obligations.

The Government of Finland does not, however, consider that this objection constitutes an obstacle to the entry into force of the Convention between Finland and Maldives."

"The Government of Finland recalls that by acceding to the Convention, a State commits itself to adopt the measures required for the elimination of discrimination, in all its forms and manifestations, against women. In particular, aricle 7 requires States Parties to undertake actions to eliminate discrimination against women in the political and public life of the country. This is a fundamental provision of the Convention the implementation of which is essential to fulfilling its object and purpose.

Reservations to article 7 (a) and article 9 paragraph 2 are both subject to the general principle of the observance of treaties according to which a party may not invoke the provisions of its internal law as justification for its failure to perform its treaty obligations. It is in the common interest of States that contracting parties to international treaties are prepared to undertake the necessary legislative changes in order to fulfill the object and purpose of the treaty.

Furthermore, in the view of the Government of Finland, the unlimited and undefined character of the reservation to article 16 (f) leaves open to what extent the reserving State commits itself to the Convention and therefore creates serious doubts about the commitment of the reserving State to fulfil its obligations under the Convention. Reservations of such unspecified nature may contribute to undermining the basis of international human rights treaties.

In their present formulation the reservations are clearly incompatible with the object and purpose of the Convention and therefore inadmissible under article 28 paragraph 2, of the said Convention. Therefore, the Government of Finland objects to these reservations. The Government of Finland further notes that the reservations made by the Government of Kuwait are devoid oflegal effect.

The Government of Finland recommends the Government of Kuwait to reconsider its reservations to the [said] Convention."

"A reservation which consists of a general reference to religious law without specifying i contents does not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may cast doubts about the commitment of the reserving State to fulfil its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle of the observance of treaties according to which a Party may not invoke the provisions of its internal law as justification for failure to perform a treaty."

"The reservations made by Malaysia, consisting of a general reference to religious and national law without specifying the contents thereof and without stating unequivocally the provisions the legal effect of which may be excluded or modified, do not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore creates serious doubts about the commitment of the reserving State to fulfill its obligations under the Convention. Reservations of such unspecified nature may contribute to undermining the basis of international human rights treaties.

The Government of Finland also recalls that the reservations of Malaysia are subject to the general principles of observance of treaties according to which a party may not invoke the provisions of its internal law as justification for failure to perform its treaty obligations. It is in the common interest of States that Parties to international treaties are prepared to take the necessary legislative changes in order to fulfil the object and purpose of the treaty.

Furthermore, the reservations made by Malaysia, in particular to articles 2 (f) and 5 (a), are two fundamental provisions of the Convention the implementation of which is essential to fulfilling its object and purpose.

The Government of Finland considers that in their present formulation the reservations made by Malaysia are clearly incompatible with the object and purpose of the said Convention and therefore inadmissible under article 28, paragraph 2, of the said Convention. In view of the above, the Government of Finland objects to these

reservations and notes that they are devoid of legal effect."

[Same objection, mutatis mutandis, as the one made for Malaysia.]

[*Same objection, mutatis mutandis, as the one made for Malaysia* .]

[Same objection, mutatis mutandis, as the one made for Malaysia.]

" The Government of Finland notes that the reservations [..] are not in conformity with the object and purpose of the Convention. By acceding to the Convention, a State commits itself to adopt the measures required for the elimination of discrimination against women, in all its forms and manifestations. This includes taking appropriate measures, including legislation, to modify or abolish i.e. customs and practices which constitute discrimination against women.

As it appears evident that the Government of the Republic of Niger will not apply the Convention with a view to fulfilling its treaty obligations to eliminate all forms of discrimination against women and submits reservations to some of the most essential provisions of the Convention, the above-mentioned reservations are in contradiction with the object and purpose of the Convention.

The Government of Finland recalls Part VI, Article 28 of the Convention according to which reservations incompible with object and purpose of the Convention are not permitted.

The Government of Finland therefore objects to the above-mentioned reservations made by the Government of Niger to the Convention.

This objection does not preclude the entry into force of the Convention between Niger and Finland. The Convention will thus become operative between the two states without benefitting from the reservations."

"The Government of Finland has examined the contents of the reservations made by the Government of Saudi Arabia to the Convention on the Elimination of all Forms of Discrimination Against Women.

The Government of Finland recalls that by acceding to the Convention, a State commits itself to adopt the measures required for the elimination of discrimination, in all its forms and manifestations, against women.

A reservation which consistsof a general reference to religious law and national law without specifying its contents, as the first part of the reservation made by Saudi Arabia, does not clearly define to other Parties to the Convention the extent to which the reserving State commits itself to the Convention and therefore creates serious doubts as to the commitment of the reserving State to fulfil its obligations under the Convention.

Furthermore, reservations are subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

As the reservation to Paragraph 2 of Article 9 aims to exclude one of the fundamental obligations under the Convention, it is the view of the Government of Finland that the reservation is not compatible with the object and purpose of the Convention.

The Government of Finland also recalls Part VI, Article 28 of the Convention according to which reservations incompatible with the object and purpose of the Convention are not permitted.

The Government of Finland therefore objects to the above-mentioned reservations made by the Government of Saudi Arabia to the Convention.

This objection does not preclude the entry into force of the Convention between Saudi Arabia and Finland. The Convention will thus become operative between the two States without Saudi Arabia benefiting from the reservations."

"The Government of Finland has carefully examined the contents of the reservations made by the Government of the Democratic People's Republic of Korea to the Convention on the Elimination of all Forms of Discrimination Against Women.

The Government of Finland recalls that by acceding to the Convention, a State commit itself to adopt the measures required for the elimination of discrimination, in all its forms and manifestations, against women.

The Government of Finland notes that the reservation to paragraph (f) of Article 2 aims at excluding the Democratic People's Republic of Korea from the obligations to adopt necessary measures, including those of a legislative character, to eliminate any form of discrimination against women. This provision touches upon a key element for effective elimination of discrimination against women.

The Government of Finland further notes that the reservation to paragraph 2 of Article 9 of the Convention aims to exclude an obligation of non-discrimination, which is the aim of the Convention.

The Government of Finland also recalls Part VI, Article 28 of the Convention according to which reservations incompatible with the object and purpose of the Convention are not permitted.

The Government of Finland finds that the reservations made by the Democratic People's Republic of Korea are not in conformity with the object and purpose of the Convention and therefore objects to the said reservations.

This oection does not preclude the entry into force of the Convention between the People's Democratic Republic of Korea and Finland. The Convention will thus become operative between the two States without the People's Democratic Republic of Korea benefiting from the reservations."

"The Government of Finland has carefully examined the contents of the reservation made by the Government of Mauritania to the Convention on the Elimination of allForms of Discrimination Against Women.

The Government of Finland notes that a reservation which consists of a general reference to religious or other national law without specifying its contents does not clearly define to other Parties to the Convention the extent to which the reserving State commits itself to the Convention and therefore creates serious doubts as to the commitment of the reserving State to fulfil its obligations under the Convention.

Furthermore, reservations are subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

The Government of Finland recalls Part VI, Article 28 of the Convention according to which reservations incompatible with the object and purpose of the Convention are not permitted.

The Government of Finland therefore objects to the above-mentioned reservation made by the Government of Mauritania to the Convention.

This objection does not preclude the entry into force of the Convention between Mauritania and Finland. The Convention will thus become operative between the two states without Mauritania benefiting from the reservations."

"The Government of Finland has carefully examined the contents of the reservations made by the Government of Bahrain to Article 2, paragraph 2 of Article 9, paragraph 4 of Article 15 and to Article 16 of the Convention on the Elimination of all Forms of Discrimination Against Women.

The Government of Finland notes that a reservation which consists of a general reference to religious or other national law without specifying its contents does not clearly define to other Parties to the Convention the extent to which the reserving State commits itself to the Convention and therefore creates serious doubts as to the commitment of the receiving State to fulfil its obligations under the Convention. Such reservations are subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its

domestic law as justification for a failure to perform its treaty obligations.

The Government of Finland further notes that the reservations made by Bahrain, addressing some of the most essential provisions of the Convention, and aiming to exclude some of the fundamental obligations under it, are in contradiction with the object and purpose of the Convention.

The Government of Finland also recalls Part VI, Article 28 of the Convention according to which reservations incompatible with the object and purpose of the Convention are not permitted.

The Government of Finland therefore objects to the above-mentioned reservations made by the Government of Bahrain to the Convention.

This objection does not preclude the entry into force of the Convention between Bahrain and Finland. The Convention will thus become operative between the two states without Bahrain benefiting from its reservations."

"The Government of Finland has carefully examined the contents of the reservations made by the Government of the Syrian Arab Republic to Article 2, paragraph 2 of Article 9, paragraph 4 of Article 15 and to paragraphs 1(c), (d), (f) and (g) of Article 16 of the Convention on the Elimination of all Forms of Discrimination Against Women.

The Government of Finland notes that areservation which consists of a general reference to religious or other national law without specifying its contents does not clearly define for other Parties to the Convention the extent to which the reserving State commits itself to the Convention and therefore creates serious doubts as to the commitment of the reserving State to fulfil its obligations under the Convention. Such reservations are subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

The Government of Finland further notes that the reservations made by the Syrian Arab Republic, addressing some of the most essential provisions of the Convention, and aiming to exclude some of the fundamental obligations under it, are incompatible with the object and purpose of the Convention.

The Government of Finland also recalls Part VI, Article 28, of the Convention, according to which reservations incompatible with the object and purpose of the Convention are not permitted.

The Government of Finland therefore objects to the afore-mentioned reservations made by the Government of the Syrian Arab Republic to the Convention.

This objection does not preclude the entry into force of the Convention between the Syrian Arab Republic and Finland. The Convention will thus become operative between the two states without the Syrian Arab Republic benefiting from its reservations."

"The Government of Finland has carefully examined the contents of the reservations made by the Government of the Federated States of Micronesia to paragraph (f) of Article 2, Article 5, paragraphs 1 (d) and 2 (b) of Article 11 and Article 16 othe Convention on the Elimination of all Forms of Discrimination Against Women.

The Government of Finland recalls that by acceding to the Convention, a State commit itself to adopt the measures required for the elimination of discrimination, in all its forms and manifestations, against women.

The Government of Finland notes that the reservations made by Micronesia, addressing some of the most essential provisions of the Convention, and aiming to exclude the obligations under those provisions, are in contradiction with the object and purpose of the Convention.

The Government of Finland also recalls Part VI, Article 28 of the Convention according to which reservations incompatible with the object and purpose of the Convention are not permitted.

The Government of Finland therefore objects to the ab0ve-mentioned reservations made by the Government of the Federated States of Micronesia to the Convention. This objection does not preclude the entry into force of the Convention between Micronesia and Finland. The Convention will thus become operative between the two states without Micronesia benefiting from its reservations".

"The Government of Finland has carefully examined the contents of the reservations made by the Government of the United Arab Emirates to paragraph (f) of Article 2, Article 9, paragraph (2) of Article 15 and Article 16 of the Convention on the Elimination of all Forms of Discrimination Against Women,

The Government of Finland recalls that by acceding to the Convention, a State commits itself to adopt the measures required for the elimination of discrimination, in all its forms and manifestations, against women.

The Government of Finland notes that a reservation which consists of a general reference to religious or other national law without specifying its contents does not clearly define to other Parties to the Convention the extent to which the reserving State commits itself to the Convention and creates serious doubts as to the commitment of the receiving State to fulfil its obligations under the Convention. Such reservations are, furthermore, subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

The Government of Finland notes that the reservations made by the United Arab Emirates, addressing some of the most essential provisions of the Convention, and aiming to exclude the obligations under those provisions, are in contradiction with the object and purpose of the Convention.

The Government of Finland also recalls Part VI, Article 28 of the Convention according to which reservations incompatible with the object and purpose of the Convention are not permitted.

The Government of Finland therefore objects to the above-mentioned reservations made by the Government of the United Arab Emirates to the Convention. This objection does not preclude the entry into force of the Convention between the United Arab Emirates and Finland. The Convention will thus become operative between the two states without the United Arab Emirates benefiting from its reservations."

The Government of Finland has carefully examined the contents of the general reservation made by the Government of Oman to all provisions of the Convention on the Elimination of All Forms of Discrimination against Women and the specific reservations concerning paragraph 2 of Article 9, paragraph 4 of Article 15 and paragraphs 1 (a), 1 (c) and 1 (f) of Article 16 of the Convention.

The Government of Finland recalls that by acceding to the Convention, a State commits itself to adopt the measures required for the elimination of discrimination, in all its forms and manifestations, against women.

The Government of Finland notes that a reservation which consists of a general reference to religious or other national law without specifying its contents does not clearly define to other Parties to the Convention the extent to which the reserving State commits itself to the Convention and creates serious doubts as to the commitment of the receiving State to fulfil its obligations under the Convention. Such reservations are, furthermore, subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

The Government of Finland also notes that the specific reservations made by Oman, addressing some of the most essential provisions of the Convention, and aiming to exclude the obligations under those provisions, are in

contradiction with the object and purpose of the Convention.

The Government of Finland also recalls Part VI, Article 28 of the Convention, according to which reservations incompatible with the object and purpose of the Convention are not permitted.

The Government of Finland therefore objects to the above-mentioned reservations made by the Government of Oman to the Convention. This objection does not preclude the entry into forceof the Convention between Oman and Finland. The Convention will thus become operative between the two States without Oman benefiting from its reservations.

The Government of Finland has carefully examined the contents of the general reservation made by the Government of Brunei Darussalam to the Convention on the Elimination of All Forms of Discrimination against Women and the specific reservation concerning paragraph 2 of Article 9 of the Convention.

The Government of Finland recalls that by acceding to the Convention, a State commits itself to adopt the measures required for the elimination of discrimination, in all its forms and manifestations, against women.

The Government of Finland notes that a reservation which consists of a general reference to religious or other national law without specifying its contents does not clearly define to other Parties to the Convention the extent to which the reserving State commits itself to the Convention and creates serious doubts as to the commitment of the receiving State to fulfil its obligations under the Convention. Such reservations are, furthermore, subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

The Government of Finland also notes that the specific reservation made by Brunei Darussalam concerning paragraph 2 of Article 9 aims to exclude one of the fundamental obligations under the Convention and is therefore in contradiction with the object and purpose of the Convention.

The Government of Finland also recalls Part VI, Article 28 of the Convention, according to which reservationsincompatible with the object and purpose of the Convention are not permitted.

The Government of Finland therefore objects to the above-mentioned reservations made by the Government of Brunei Darussalam to the Convention. This objection does not preclude the entry into force of the Convention between Brunei Darussalam and Finland. The Convention will thus become operative between the two States without Brunei Darussalam benefiting from its reservations.

<title>With regard to the reservations made by Qatar upon accession:</title>“The Government of Finland has carefully examined the reservation made by Qatar upon accession to the Convention on the Elimination of All Forms of Discrimination against Women, done at New York on 18 December 1979.

The Government of Finland recalls that by acceding to the Convention on the Elimination of All Forms of Discrimination against Women, a State commits itself to adopt the measures required for the elimination of discrimination against women, in all its forms and manifestations. This includes taking appropriate measures, including legislation, to modify or abolish i.e. customs and practices which constitute discrimination against women.

The Government of Finland further recalls that under Article 28 of the Convention, reservations incompatible with the object and purpose of the Convention are not permitted, which is a general principle of treaty law codified in Article 19 (c) of the Vienna Convention on the Law of Treaties.

The Government of Finland notes that a reservation which consists of a general reference to religious or other national law, without specifying its contents, does not clearly define to other States Parties to the Convention the extent to which the reserving State commits itself to the Convention and creates serious doubts as to the commitment of the reserving State to fulfill its obligations under the Convention. Such reservations are, furthermore, subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of domestic law as justification for a failure to perform its treaty obligations.

The Government of Finland finds that the reservations made by Qatar to Articles 9 (2), 15(1), 15 (4), 16 (1) (a) and (c) as well as Article 16 (1) (f) of the Convention address some of the most essential provisions and aim at excluding the obligations to eliminate discrimination against women under those provisions. The Government considers that these reservations in practice lead to discrimination against women and finds them manifestly incompatible with the object and purpose of the Convention.

The Government of Finland therefore objects to the said reservations made by Qatar. This objection shall not preclude the entry into force of the Convention between Qatar and Finland.”

FRANCE

The Government of the French Republic has examined the reservations made by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination against Women, adopted in New York on 18 December 1979. By stating that in case of contradiction between any term of the Convention and the norms of Islamic law, it is not under obligation to observe the terms of the Convention, the Kingdom of Saudi Arabia formulates a reservation of general, indeterminate scope that gives the other States parties absolutely no idea which provisions of the Convention are affected or might be affected in future. The Government of the French Republic believes that the reservation could make the provisions of the Convention completely ineffective and therefore objects to it. The second reservation, concerning article 9, paragraph 2, rules out equality of rights between men and women with respect to the nationality of their children and the Government of the French Republic therefore objects to it.

These objections do not preclude the Convention's entry into force between Saudi Arabia and France. The reservation rejecting the means of dispute settlement provided for in article 29, paragraph 1, of the Convention is in conformity with the provisions of article 29, paragraph 2.

Having considered the reservations and declarations made on 27 February 2001 by the Democratic People's Republic of Korea to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, the Government of the French Republic objects to the said reservations and declarations relating to article 2, paragraph (f) and article 9, paragraph 2.

The Government of the Republic of France has examined the reservations made by the Government of the Kingdom of Bahrain upon accession to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979. The Government of the Republic of France considers that, by making the implementation of articles 2 and 16 of the Convention subject to respect for the Islamic Shariah, the Government of the Kingdom of Bahrain is making two reservations of such a general and indeterminate scope that it is not possible to ascertain which changes to obligations under the Convention they are intended to introduce. Consequently, the Government of France considers that the reservations as formulated could make the provisions of the Convention completely ineffective. For these reasons, the Government objects to the reservations made in respect of articles 2 and 16 of the Convention, which it

considers to be reservations likely to be incompatible with the object and purpose of the Convention.

The Government of France objects to the reservations made in respect of article 9, paragraph 2, and article 15, paragraph 4, of the Convention.

The Government of France notes that these objections shall not preclude the entry into force of the Convention on the Elimination of All Forms of Discrimination against Women between Bahrain and France.

[The Government of the French Republic has examined the reservations made by the Syrian Arab Republic upon its accession to the 1979 Convention on the Elimination of All Forms of Discrimination against Women.

The Government of the French Republic considers that, by making a reservation to article 2 of the Convention, the Government of the Syrian Arab Republic is making a reservation of general scope that renders the provisions of the Convention completely ineffective.For this reason, the French Government objects to the reservation, which it considers to be incompatible with the object and purpose of the Convention.

The French Government objects to the reservations made to article 9, paragraph 2, article 15, paragraph 4, and article 16, paragraphs 1 and 2, of the Convention. The French Government notes that these objections do not preclude the entry into force of the 1979 Convention on the Elimination of All Forms of Discrimination against Women between Syria and France.

The Government of the French Republic has examined the reservations formulated by the United Arab Emirates upon accession to the Convention on the Elimination of All Forms of Discrimination against Women, of 18 December 1979, according to which the United Arab Emirates, on the one hand, does not consider itself bound by the provisions of article 2 (f) and article 15, paragraph 2, because they are contrary to the sharia and, on the other, states that it will abide by the provisions of article 16 insofar as they are not in conflict with the principles of the sharia. The Government of the French Republic considers that, by precluding the application of these provisions, or by making it subject to the principles of the sharia, the United Arab Emirates is formulating reservations with a general scope depriving the provisions of the Convention of any effect. The Government of the French Republic considers that these reservations are contrary to the object and purpose of the Convention and enters an objection thereto. The Government of the French Republic also objects to the reservation formulated to article 9. These objections shall not preclude the entry into force of the Convention between France and the United Arab Emirates.

The Government of the French Republic has considered the reservations made by the Sultanate of Oman upon accession to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, according to which the Sultanate of Oman does not consider itself bound by 'any provisions of the Convention which are incompatible with Islamic Sharia or with the laws in force in the Sultanate of Oman', or by the provisions of article 9, paragraph 2, article 15, paragraph 4 and article 16, in particular paragraph 1 (a), (c) and (f). The Government of the French Republic considers that, by ruling out the application of the Convention or subordinating it to Sharia principles and the laws in force, the Sultanate of Oman is making a reservation of a general and indeterminate nature, thereby depriving the provisions of the Convention of any effect. The Government of the French Republic considers this reservation to be contrary to the object and purpose of the Convention and therefore wishes to register an objection thereto. The Government of the French Republic also objects to the reservations made to article 9, paragraph 2, article 15, paragraph 4 and article 16, in particular paragraph 1 (a), (c) and (f). These objections shall not prevent the entry into force of the Convention between France and the Sultanate of Oman.

The Government of the French Republic has examined the reservations made by Brunei Darussalam upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women, of 18 December 1979. The Government of the French Republic believes that in 'expressing' reservations regarding provisions of the Convention 'that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam', Brunei Darussalam is making a reservation of broad and indeterminate scope which does not allowhe other States Parties to ascertain which provisions of the Convention are envisaged and which may render the provisions of the Convention null and void. The Government of the French Republic believes that this reservation is incompatible with the object and purpose of the Convention and objects to it. The Government of the French Republic also objects to the reservation made specifically to article 9, paragraph 2 of the Convention. These objections shall not preclude the entry into force of the Convention between France and Brunei Darussalam.

GERMANY[24]

The Federal Republic of Germany considers that the reservations made by Egypt regarding article 2, article 9, paragraph 2, and article 16, by Bangladesh regarding article 2, article 13 (a) and article 16, paragraph 1 (c), and (f), by Brazil regarding article 15, paragraph 4, and article 16, paragraph 1 (a), (c), (g) and (h), by Jamaica regarding article 9, paragraph 2, by the Republic of Korea regarding article 9 and article 16, paragraph 1 (c), (d), (f) and (g), and by Mauritius regarding article 11, paragraph 1 (b) and (d), and article 16, paragraph 1 (g), are incompatible with the object and purpose of the Convention (article 28, paragraph 2) and therefore objects to them. In relation to the Federal Republic of Germany, they may not be invoked in support of a legal practice which does not pay due regard to the legal status afforded to women and children in the Federal Republic of Germany in conformity with the above-mentioned articles of the Convention. This objection shall not preclude the entry into force of the Convention as between Egypt, Bangladesh, Brazil, Jamaica, the Republic of Korea, Mauritius and the Federal Republic of Germany.

i) 15 October 1986: In respect of reservations formulated by the Government of Thailand concerning article 9, paragraph 2, article 10, article 11, paragraph 1 (b), article 15, paragraph 3 and article 16; (The Federal Republic of Germany also holds the view that the reservation made by Thailand regarding article 7 of the Convention is likewise incompatible with the object and purpose of the Convention because for all matters which concern national security it reserves in a general and thus unspecific manner the right of the Royal Thai Government to apply the provisions only within the limits established by national laws, regulations and practices).

ii)15 October 1986: In respect of reservations and some declarations formulated by the Government of Tunisia concerning article 9, paragraph 2 and article 16, as well as the declaration concerning article 15, paragraph 4.

iii) 3 March 1987: In respect of reservations made by the Government of Turkey to article 15, paragraphs 2 and 4, and article 16, paragraph 1 (c), (d), (f) and (g); in respect of reservations made by the Government of Iraq with regard to article 2, paragraphs (f) and (g), article 9 and article 16.

iv) 7 April 1988: In respect of the first reservation made by Malawi.

v) 20 June 1990: In respect of the reservation made by the Libyan Arab Jamahiriya.

vi) 24 October 1994: In respect of the reservations made by Maldives.

vii) 8 October 1996: In respect of the reservations made by Malaysia.

viii) 28 May 1997: In respect of the declaration made by Pakistan.

ix) 19 June 1997: In respect of the reservation made by Algeria.

"The Government of the Federal Republic of Germany is of the view that the reservation, with regard to compatibility of CEDAW rules with Islamic law, raises doubts as to the commitment of the Kingdom of Saudi Arabia to CEDAW. The Government of the Federal Republic of Germany considers this reservation to be incompatible with the object and purpose of the Convention.

The Government of the Federal Republic of Germany notes furthermore that the reservation to Paragraph 2 of article 9 of CEDAW aims to exclude one obligation of non-discrimination which is so important in the context of CEDAW as to render this reservation contrary to the essence of the Convention.

The Government of the Federal Republic of Germany therefore objects to the aforesaid reservations made by the Government of the Kingdom of Saudi Arabia to the Convention on Elimination of all Forms of Discrimination against Women.

This objection does not preclude t entry into force of the Convention between the Federal Republic of Germany and the Kingdom of Saudi Arabia."

"The Government of the Federal Republic of Germany has examined the reservations to the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) made by the Government of the Democratic People's Republic of Korea upon its accession to the Convention. The Government of the Federal Republic of Germany is of the view that the reservations to article 2 paragraph (f) and article 9 paragraph 2 of CEDAW are incompatible with the object and purpose of the Convention, for they aim at excluding the Democratic People's Republic of Korea's obligations in respect of two basic aspects of the Convention.

The Government of the Federal Republic of Germany therefore objects to the aforesaid reservations made by the Government of the Democratic People's Republic of Korea to the Convention on all Forms of Discrimination against Women.

This objection does not preclude the entry into force of the Convention between the Federal Republic of Germany and the Democratic People's Republic of Korea."

"The Government of the Federal Republic of Germany has examined the reservation to the Convention on the Elimination of all Forms of Discrimination against Women made by the Government of Mauritania at the time of its accession to the Convention. The Government of the Federal Republic of Germany is of the view that the reservation with regard to the compatibility of the rules of the Convention with the precepts of Islamic Sharia and the Constitution of Mauritania raises doubts as to the commitment of Mauritania to fulfil its obligations under the Convention. The Government of the Federal Republic of Germany consers this reservation to be incompatible with the object and purpose of the Convention. Therefore the Government of the Federal Republic of Germany objects to the aforesaid reservation made by the Government of Mauritania to the Convention.

This objection does not preclude the entry into force of the Convention between the Federal Republic of Germany and Mauritania."

"The Government of the Federal Republic of Germany has examined the reservations to the Convention on the Elimination of All Forms of Discrimination against Women made by the Government of the Kingdom of Bahrain at the time of accession to the Convention.

The Government of the Federal Republic of Germany is of the view that the reservations with regard to the compatibility of the rules of articles 2 and 16 of the Convention with the precepts of Islamic Shariah raises doubts as to the commitment of the Kingdom of Bahrain to fulfil its obligations under the Convention. These reservations are therefore incompatible with the object and purpose of the Convention.

The reservations to article 9 paragraph 2 and article 15 paragraph 4, if put into practice, would inevitably result in discrimination against women on the basis of sex, which is incompatible with the object and purpose of the Convention.

According to article 28 paragraph 2 of the Convention reservations incompatible with the object and purpose of the Convention shall not be permitted.

Therefore, the Government of the Federal Republic of Germany objects to the aforesaid reservations made by the Government of the Kingdom of Bahrain to the Convention.

This objection does not preclude the entry into force of the Convention between the Federal Republic of Germany and the Kingdom of Bahrain."

"The Government of the Federal Republic of Germany has examined the reservations made by the Government of the Syrian Arab Republic to the Convention on the Elimination of All Forms of Discrimination against Women in respect of Article 2; Article 9, paragraph 2; Article 15, paragraph 4; Article 16, paragraph 1 (c), (d), (f) and (g); and Article 16, paragraph 2.

The Government of the Federal Republic of Germany finds that the aforesaid reservations would allow to limit the responsibilities of the reserving State with regard to essential provisions of the Convention and therefore raise doubts as to the commitment assumed by this State in acceding to the Convention.

Consequently, the Government of the Federal Republic of Germany considers that these reservations are incompatible with the object and purpose of the Convention.

According to Article 28, paragraph 2 of the Convention reservations incompatible with the object and purpose of the Convention shall not be permitted.

The Government of the Federal Republic of Germany therefore objects to the aforementioned reservations made by the Government of the Syrian Arab Republic to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection does not preclude the entry into force of the Convention between the Federal Republic of Germany and the Syrian Arab Republic."

The Government of the Federal Republic of Germany has carefully examined the reservations made by the Government of the United Arab Emirates upon accession to the International Convention on the Elimination of All Forms of Discrimination Against Women. It is of the opinion that from the reservations to Article 2 (f), Article 15 (2) and Article 16, which give a specific legal system, the Islamic Sharia, precedence as a rule over the provisions of the Convention, it is unclear to what extent the UAE feels bound by the obligations of the Convention.

Moreover, the reservations to Article 9 (2) and Article 15 (2) would in practice result in a legal situation that discriminated against women, which would not be compatible with the object and purpose of the Convention.

Pursuant to Article 28 (2) of the Convention, reservations that are incompatible with the object and purpose of the present Convention shall not be permitted.

The Government of the Federal Republic of Germany therefore objects to the above-mentioned reservations made by the Government of the United Arab Emirates to the Convention on the Elimination of All Forms of Discrimination Against Women. This objection shall not preclude the entry into force of the Convention between the Federal Republic of Germany and the United Arab Emirates.

"The Government of the Federal Republic of Germany has carefully examined the reservations made by the Sultanate of Oman on 7 February 2006 upon accession to the Convention on the Elimination of All Forms of

Discrimination Against Women of 18 December 1979. The reservations state the Sultanate of Oman does not consider itself bound by provisions of the Convention that are not in accordance with the provisions of the Islamic Sharia and legislation in force in the Sultanate of Oman, and also state that it is not bound by Article 9 (2), Article 15 (4) and Article 16, subparagraphs (a), (c) and (f) of the Convention.

The Government of the Federal Republic of Germany is of the opinion that by giving precedence to the principles of the Sharia and its own national law over the application of the provisions of the Convention, the Sultanate of Oman has made a reservation which leaves it unclear to what extent it feels bound by the obligations of the Convention and which is incompatible with the object and purpose of the Convention. Furthermore, the reservations to Article 9 (2), Article 15 (4) and Article16 will unavoidably result in a legal situation that discriminates against women, which is incompatible with the object and purpose of the Convention.

Pursuant to Article 28 (2) of the Convention, reservations that are incompatible with the object and purpose of the Convention shall not be permitted.

The Government of the Federal Republic of Germany therefore objects to the above-mentioned reservations. This objection shall not preclude the entry into force of the Convention between the Federal Republic of Germany and the Sultanate of Oman."

"The Government of the Federal Republic of Germany has carefully examined the reservations made by Brunei Darussalam on 24 May 2006 upon accession to the Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979. The reservations state that Brunei Darussalam does not consider itself bound by provisions of the Convention that are contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, in particular Article 9 (2) of the Convention.

The Government of the Federal Republic of Germany is of the opinion that by giving precedence to the beliefs and principles of Islam and its own constitutional law over the application of the provisions of the Convention, Brunei Darussalam has made a reservation which leaves it unclear to what extent it feels bound by the obligations of the Convention and which incompatible with the object and purpose of the Convention. Furthermore, the reservation to Article 9 (2) will unavoidably result in a legal situation that discriminates against women, which is incompatibe with the object and purpose of the Convention,

Pursuant to Article 28 (2) of the Convention, reservations that are incompatible with the object and purpose of the Convention shall not be permitted.

The Government of the Federal Republic of Germany therefore objects to the above-mentioned reservations. This objection shall not preclude the entry into force of the Convention between the Federal Republic of Germany and Brunei Darussalam."

The Government of the Federal Republic of Germany has examined the reservations submitted on August 5, 2016 by Bahrain regarding the Convention on the Elimination of All Forms of Discrimination against Women of December 18, 1979.

The Government of the Federal Republic of Germany considers that the reservations are incompatible with the object and purpose of the Convention. The Government of the Federal Republic of Germany therefore objects to these reservations.

This objection shall not preclude the entry into force of the Convention between the Federal Republic of Germany and Bahrain.

GREECE

"The Government of the Hellenic Republic has examined the reservations made by the Government of the Kingdom of Bahrain upon accession to the Convention on the Elimination of all Forms of Discrimination Against Women.

The Government of the Hellenic Republic considers that the reservations with respect to articles 2 and 16, which contain a reference to the provisions of the Islamic Sharia are of unlimited scope and, therefore, incompatible with the object and purpose of the Convention.

The Government of the Hellenic Republic recalls that, according to article 28 (para 2) of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of the Hellenic Republic therefore objects to the aforementioned reservations made by the Government of the Kingdom of Bahrain to the Convention on the Elimination of all Forms of Discrimination Against Women. This shall not preclude the entry into force of the Convention in its entirety between Bahrain and Greece."

"The Government of the Hellenic Republic has examined the reservations made by the Government of the Syrian Arab Republic upon accession to the Convention on the Elimination of All Forms of Discrimination against Women.

The Government of the Hellenic Republic is of the view that the reservation with respect to article 2, which is a core provision of the Convention, is of a general character and is, therefore, contrary to the object and purpose of the Convention.

It also considers that the reservation regarding article 16, paragraph 2 which contains a reference to the provisions of the Islamic Shariah is of unlimited scope and is, similarly, incompatible with the object and purpose of the Convention.

The Government of the Hellenic Republic recalls that according to article 28 paragraph 2 of the Convention, a reservation which is incompatible with the object and purpose of the Convention shall not be permitted.

Consequently, the Government of the Hellenic Republic objects to the aforementioned reservations made by the Government of the Syrian Arab Republic to the Convention on the Elimination of All Forms of Discrimination against Women. This shall not preclude the entry into force of the Convention between Syria and Greece."

"The Government of the Hellenic Republic have examined the reservations made by the Government of the United Arab Emirates upon accession to the Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979).

The Government of the Hellenic Republic consider that the reservations in respect of Articles 2 (f), which is a core provision of the above Convention, 15 paragraph 2 and 16, all containing a reference to the provisions of the Islamic Shariah, are of unlimited scope and, therefore, incompatible with the object and purpose of the Convention.

The Government of the Hellenic Republic recall that, according to Article 28 paragraph 2 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

Consequently, the Government of the Hellenic Republic object to the aforementioned reservations made by the Government of the United Arab Emirates. This objection shall not preclude the entry into force of the Convention between Greece and the United Arab Emirates."

"The Government of the Hellenic Republic have examined the reservations formulated by the Sultanate of Oman upon accession to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979.

The Government of the Hellenic Republic consider that the reservation to "all provisions of the Convention not in accordance with the provisions of the Islamic sharia and legislation in force in the Sultanate of Oman" is of

unlimited scope and undefined character, while, furthermore, subjects the application of the Convention to the domestic law of the Sultanate of Oman. It is, therefore, incompatible with the object and purpose of the Convention.

Moreover, the Government of the Hellenic Republic consider that the reservations to articles 9 par. 2, 15 par. 4 and 16 do not specify the extent of the derogation therefrom and, therefore, are incompatible with the object and purpose of the Convention.

The Government of the Hellenic Republic recall that, according to Article 28 paragraph 2 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

For these reasons, the Government of the Hellenic Republic object to the abovementioned reservations formulated by the Sultanate of Oman.

This objection shall not preclude the entry into force of the Convention between Greece and the Sultanate of Oman."

"The Government of the Hellenic Republic consider that the reservation "regarding those provisions of the said Convention that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the official religion of Brunei Darussalam" is of unlimited scope and undefined character, while furthermore, subjects the application of the Convention to the constitutional law of Brunei Darussalam and the beliefs and principles of Islam. It is, therefore, incompatible with the object and purpose of the Convention.

Moreover, the Government of the Hellenic Republic consider that the reservation to article 9 par. 2 does not specify the extent of the derogationtherefrom and, therefore, are incompatible with the object and purpose of the Convention.

The Government of the Hellenic Republic recall that, according to Article 28 paragraph 2 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

For these reasons, the Government of the Hellenic Republic object to the abovementioned reservations formulated by Brunei Darussalam.

This objection shall not preclude the entry into force of the Convention between Greece and Brunei Darussalam."

HUNGARY

"The Government of the Republic of Hungary has examined the reservations made by the Sultanate of Oman on 7 February 2006 upon accession to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979. The reservations state the Sultanate of Oman does not consider itself bound by the provisions of the Convention that are not in accordance with the provisions of the Islamic Sharia and legislation in force in the Sultanate of Oman, and also state that it is not bound by Article 9 (2), Article 15 (4) and Article 16, subparagraphs (a), (c) and (f) of the Convention.

The Government of the Republic of Hungary is of the opinion that by giving precedence to the principles of the Sharia and its own national law over the application of the provisions of the Convention, the Sultanate of Oman has made a reservation which leaves it unclear to what extent it feels bound by the obligations of the Convention and which is incompatible with the object and purpose of the Convention. Furthermore, the reservations to Article 9 (2), Article 15 (4) and Article 16 will unavoidably result in a legal situation that discriminates against women, which is incompatible with the object and purpose of the Convention.

Pursuant to Article 28 (2) of the Convention, reservations that are incompatible with the object and purpose of the Convention shall not be permitted.

The Government of the Republic of Hungary therefore objects to the above-mentioned reservations. This objection shall not preclude the entry into force of the Convention between the Republic of Hungary and the Sultanate of Oman."

"The Government of the Republic of Hungary has examined the reservation made by the Brunei Darussalam on 24 May 2006 upon accession to the Conventio on the Elimination of All Forms of Discrimination against Women of 18 December 1979. The reservation states that the Brunei Darussalam does not consider itself bound by Article 9 (2) of the Convention.

The Government of the Republic of Hungary is of the opinion that the reservation to Article 9 (2) will unavoidably result in a legal situation that discriminates against women, which is incompatible with the object and purpose of the Convention.

Pursuant to Article 28 (2) of the Convention, reservations that are incompatible with the object and purpose of the Convention shall not be permitted.

The Government of the Republic of Hungary therefore objects to the above-mentioned reservation. This objection shall not preclude the entry into force of the Convention between the Republic of Hungary and the Brunei Darussalam."

“The Government of the Republic of Hungary has examined the reservations made by the State of Qatar on 29 April 2009 upon accession to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979. The reservations state that the State of Qatar does not consider itself bound by Article 2 (a), Article 9 (2), Article 15 (1), Article 15 (4) and Article 16, subparagraphs (a), (c) and (f) of the Convention.

The Government of the Republic of Hungary is of the opinion that the reservations to Article 2 (a), Article 9 (2), Article 15 (1), Article 15 (4) and Article 16, subparagraphs (a), (c) and (f) will unavoidably result in a legal situation that discriminates against women, which is incompatible with the object and purpose of the Convention.

Pursuant to Article 28 (2) of the Convention, reservations that are incompatible with the object and purpose of the Convention shall not be permitted.

The Government of the Republic of Hungary therefore objects to the above-mentioned reservations. This objection shall not preclude the entry into force of the Convention between the Republic of Hungary and the State of Qatar.”

IRELAND

"The Government of Ireland has examined the reservation made, on 7 September 2000, by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination Against Women, in respect of any divergence between the terms of the Convention and the norms of Islamic law. It has also examined the reservation made on the same date by the Government of the Kingdom of Saudi Arabia to Article 9, paragraph 2 of the Convention concerning the granting to women of equal rights with men with respect to the nationality of their children.

As to the former of the aforesaid reservations, the Government of Ireland is of the view that a reservation which consists of a general reference to religious law without specifying the content thereof and which does not clearly specify the provisions of the Convention to which it applies and the extent of the derogation therefrom, may cast doubts on the commitment of the reserving State to fulfil its obligations under the Convention. The Government of Ireland is furthermore of the view that such a general reservation may undermine the basis of international treaty law.

As to the reservation to Article 9, paragraph 2 of the Convention, the Government of Ireland considers that such a reservation aims to exclude one obligation of non-

discrimination which is so important in the context of the Convention on the Elimination of All Forms of Discrimination Against Women as to render this reservation contrary to the essence of the Convention. The Government of Ireland notes in this connection that Article 28, paragraph 2 of the Convention provides that a reservation incompatible with the object andpurpose of the Convention shall not be permitted.

The Government of Ireland moreover recalls that by ratifying the Convention, a State commits itself to adopt the measures required for the elimination ofdiscrimination, in all its forms and manifestations, against women.

The Government of Ireland therefore objects to the aforesaid reservations made by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination Against Women.

This objection shall not preclude the entry into force of the Convention between Ireland and the Kingdom of Saudi Arabia."

"The Government of Ireland has examined the reservation made on 24 May 2006 by Brunei Darussalam to the Convention on the Elimination of All Forms of Discrimination Against Women at the time of its accession thereto.

The Government of Ireland notes that Brunei Darussalam subjects application of the Convention on the Elimination of All Forms of Discrimination against Women to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam. The Government of Ireland is of the view that a reservation which consists of a general reference to religious law and to the Constitution of the reserving State and which does not clearly specify the provisions of the Convention to which it applies and the extent of the derogation therefrom, may cast doubts on the commitment of the reserving State to fulfil its obligations under the Convention. The Government of Ireland is furthermore of the view that such a general reservation may undermine the basis of international treaty law and is incompatible with the object and purpose of the Convention. The Government of Ireland recalls that according to Article 28, paragraph 2 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Ireland further considers that the reservation made with respect to Article 9, paragraph 2 is incompatible with the object and purpose of the Convention.

The Government of Ireland therefore objects tothe aforesaid reservations made by the Brunei Darussalam to the Convention on the Elimination of All forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between Ireland and Brunei Darussalam."

"The Government of Ireland has examined the reservation made on 7 February 2006 by the Sultanate of Oman to the Convention on the Elimination of All Forms of Discrimination against Women at the time of its accession thereto.

The Government of Ireland notes that the Sultanate of Oman subjects application of the Convention on the Elimination of All Forms of Discrimination against Women to the provisions of Islamic sharia and legislation in force in the Sultanate. The Government of Ireland is of the view that a reservation which consists of a general reference to religious law and to the Constitution of the reserving State and which does not clearly specify the provisions of the Convention to which it applies and the extent of the derogation therefrom, may cast doubts on the commitment of the reserving state to fulfil its obligations under the Convention. The Government of Ireland is furthermore of the view that such a general reservation may undermine the basis of international treaty law and is incompatible with the object and purpose of the Convention. The Government of Ireland recalls that according to Article 28, paragraph 2 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Ireland further considers that the reservations made with respect to Article 9, paragraph 2, Article 15, paragraph 4 and Article 16 of the Convention are incompatible with the object and purpose of the Convention.

The Government of Ireland therefore objects to the aforesaid reservations made by the Sultanate of Oman to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between Ireland and the Sultanate of Oman."

"The Government of Ireland has examined the reservations made by the State of Qatar upon accession to the Convention on the Elimination of All Forms of Discrimination against Women.

The Government of Ireland believes that the reservations to article 2 (a), article 9 paragraph 2, article 15 paragraph 1, article 15 paragraph 4, article 16 paragraph 1 (a) and (c), article 16 paragraph 1 (f) and declarations to article 1 and 5 (a), if put into practice, would inevitably result in discrimination against women on the basis of sex. Such reservations seek to exclude the State of Qatar from implementing key provisions of the Convention in their jurisdiction which are necessary to achieve its object and purpose.

The Government of Ireland recalls that according to article 28 paragraph 2 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Ireland is further of the view that a reservation which consists of a general reference to religious law without specifying the content thereof or the extent to which it requires the State to derogate from the cited provisions of the Convention, may cast doubts on the commitment of the reserving State to fulfill its obligations under the Convention. The Government of Ireland is furthermore of the view that such a general reservation may undermine the basis of international treaty law.

The Government of Ireland therefore objects to the aforesaid reservations made by the State of Qatar to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between Irelandand the State of Qatar."

ITALY

"The Government of Italy has examined the reservations made by the Government of the Syrian Arab Republic at the time of its accession to the Convention on the Elimination of All Forms of Discrimination against Women, regarding article 2, article 9, paragraph 2, article 15, paragraph 4, article 16, paragraph 1 (c), (d), (f) and (g), and article 16, paragraph 2.

The Government of Italy considers that the reservations to article 2, article 9, paragraph 2, article 15, paragraph 4, article 16, paragraph 1 (c), (d), (f) and (g) are incompatible with the object and purpose of the above-mentioned Convention, as they contrast with the commitment of all parties to an effective implementation of the basic principles established in the Convention.

Furthermore, the Government of Italy underlines that the reservation with respect to article 16, paragraph 2, of the Convention, concerning the Islamic Sharia of the Syrian Arab Republic, may limit the responsibilities and obligations of the reserving State under the Convention, and therefore raises serious doubts about the real extent of the commitment undertaken by the Syrian Arab Republic at the time of its accession to the Convention.

The Government of Italy recalls that, according to article 28, paragraph 2 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

As a consequence, the Government of Italy objects to the above-mentioned reservations made by the Syrian Arab Republic the Convention on the Elimination of All Forms of Discrimination against Women.

This objection, however, shall not preclude the entry into force of the Convention between the Government of Italy and the Syrian Arab Republic."

"... the Government of Ialy has carefully examined the reservations made by Brunei Darussalam on 24 May 2006 upon accession to the Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979. The reservations state that Brunei Darussalam does not consider itself bound by provisions of the Convention that are contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, in particular Article 9 (2) of the Convention.

The Government of Italy is of the opinion that by giving precedence to the beliefs and principles of Islam and its own constitutional law over the application of the provisions of the Convention, Brunei Darussalam has made a reservation which leaves it unclear to what extent it feels bound by the obligations of the Convention and which is incompatible with the object and purpose of the Convention. Furthermore, the reservation to Article 9 (2) will unavoidably result in a legal situation that discriminates against women, which is incompatible with the object and purpose of the Convention. Pursuant to Article 28 (2) of the Convention, reservations that are incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Italy therefore objects to the above-mentioned reservations. This objection shall not preclude the entry into force of the Convention between Italy and Brunei Darussalam."

"..., the Government of Italy has carefully examined the reservations made by the Sultanate of Oman on 7 February 2006 upon accession to the above mentioned Convention. The reservations state that the Sultanate of Oman does not consider itself bound by provisions of the Convention that are not in accordance with the provisions of the Islamic Sharia and legislation in force in the Sultanate of Oman, and also state that it is not bound by Article 9 (2), Article 15 (4) and Article 16, subparagraphs (a), (c) and (f) of the Convention.

The Government of Italy is of the opinion that by giving precedence to the principles of the Sharia and its own national law over the application of the provisions of the Convention, the Sultanate of Oman has made a reservation which leaves it unclear to what extent it feels bound by the obligations of the Convention and which is incompatible with the object and purpose of the Convention. Pursuant to Article 28 (2) of the Convention, reservations that are incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Italy therefore objects to the above-mentioned reservations. This objection shall not preclude the entry into force of the Convention between Italy and the Sultanate of Oman."

"The Government of Italy has carefully examined the reservations made by the State of Qatar upon accession to the above Convention.

The reservations state that Qatar does not consider itself bound by Article 9 paragraph 2, Article 15 paragraph 14 and Article 16. The Government of Italy finds that the aforementioned reservations would unavoidably result in a legal situation that discriminates against women, which would be incompatible with the object and purpose of the Convention.

The Government of Italy would like to recall that according to Article 28 paragraph 2 of the Convention as well as customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose shall not be permitted.

Moreover, Articles 2 and 16 are considered to be core provisions of the Convention, and their observance is necessary in order to achieve its purpose. Neither traditional, religious or cultural practice nor incompatible domestic laws and policies can justify violations of the Convention.

For these reasons, the Government of Italy objects to the aforementioned reservations made by the State of Qatar to the Convention on the Elimination of All Forms of Discrimination against Women.

This position however does not preclude the entry into force of the Convention between the State of Qatar and Italy."

LATVIA

"The Government of the Republic of Latvia has carefully examined the reservations made by the United Arab Emirates to the Convention on the Elimination of All Forms of Discrimination against Women upon accession to the Convention regarding Article 2 (f), Article 15 (2), and Article 16 thereof.

The Government of the Republic of Latvia considers that the reservations made by the United Arab Emirates contain general reference to national law without making specific reference to the extent of the obligations the United Arab Emirates are accepting.

Moreover, the Government of the Republic of Latvia is of the opinion that these reservations contradict to the object and purpose of the Convention and in particular to obligation all States Parties to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.

The Government of the Republic of Latvia recalls Part VI, Article 28 of the Convention setting out that reservations incompatible with the object and purpose of the Convention are not permitted.

The Government of the Republic of Latvia therefore objects to the aforesaid reservations made by the United Arab Emirates to the Convention on the Elimination of All Forms of Discrimination against Women.

However, this objection shall not preclude the entry into force of the Convention between the Republic of Latvia and the United Arab Emirates."

"The Government of the Republic of Latvia has carefully examined the reservations made by the Brunei Darussalam to the Convention on the Elimination of All Forms of Discrimination against Women upon accession to the Convention regrading paragraph 2 of Article 9, paragraph 1 of Article 29.

The Government of the Republic of Latvia considers that the ai of the said Convention is to grant the equality between men and women and therefore the distinction between genders regarding the rights to determinate the nationality of children is not in accordance with the aim of the said convention.

Moreover, the reservation made by the Brunei Darussalam regarding paragraph 1 of Article 29 is in accordance with the Convention and general principles of international law, because any state may declare that it is not bound by some mechanism of settlement of disputes.

The Government of the Republic of Latvia recalls Article 28 of the Convention setting out that reservations incompatible with the object and purpose of the Convention are not permitted.

The Government of the Republic of Latvia, therefore, objects to the aforesaid reservation made by the Brunei Darussalam to the Convention on the Elimination of All Forms of Discrimination against Women.

However, this objection shall not preclude the entry into force of the Convention between the Republic of Latvia and the Brunei Darussalam. Thus, the Convention will become operative without the Brunei Darussalam benefiting from its reservation."

"The Government of the Republic of Latvia has carefully examined the reservations made by the Sultanate of Oman to the Convention on the Elimination of All Forms of Discrimination against Women upon accession to the Convention regarding Article 9 paragraph 2, article 15 paragraph 4 and article 16.

The Government of the Republic of Latvia considers that the aim of the said Convention is to grant the equality between men and women and therefore the distinction between genders regarding the rights to determinate the nationality of children is not in accordance with the aim of the said convention.

Moreover, the rights to determine its own domicile, is a part of the free movement of person, is very important part of human rights and, thus no limitations may be permitted to the said right.

The Government of the Republic of Latvia is of the opinion that the equality between spouses is a very important issue and, therefore, no exemption regarding the said rights is acceptable.

Moreover, the Government of the Republic of Latvia is of the opinion that these reservations made by the Sultanate of Oman contradict to the object and purpose of the Convention and in particular to the obligation of all States Parties to pursue by all appropriate means and without delay a policy of eliminating the discrimination against women.

The Government of the Republic of Latvia recalls Part VI, Article 28 of the Convention setting out that reservations incompatible with the object and purpose of the Convention are not permitted.

The Government of the Republic of Latvia, therefore, objects to the aforesaid reservations made by the Sultanate of Oman to the Convention on the Elimination of All Forms of Discrimination against Women.

However, this objection shall not preclude the entry into force of the Convention between the Republic of Latvia and the Sultanate of Oman. Thus, the Convention will become operative without the Sultanate of Oman benefiting from its reservation."

"The Government of the Republic of Latvia has carefully examined the reservations made by the State of Qatar to the Convention on the elimination of All Forms of Discrimination against Women (hereinafter –the Convention) upon accession to the Convention regarding Article 2 paragraph (a), Article 9 paragraph 2, Article 15 paragraph 1 and 4, Article 16 paragraph 1 (a), 1 (c) and 1 (f).

The Government of the Republic of Latvia considers that Article 2 of the Convention sets out the object and purpose of the Convention – to grant the equality between men and women. Therefore, no reservations should be allowed to the said Article. Moreover, the reservation submitted by the State of Qatar is drafted in a very unclear manner. It does not make clear whether the State of Qatar has deemed not to grant the equality between genders only regarding the inheritance of the Rule of State as it is prescribed by Article 8 of the Constitution of the State of Qatar or Qatar has deemed not to grant the equality between genders in all laws of the State and other articles of the Constitution.

The Government of the Republic of Latvia is willing to stress that the object of the said Convention is to grant the equality between men and women and therefore the distinction between genders regarding the rights to determine the nationality of children is not in line with the object and purpose of the Convention.

The reservation submitted by the State of Qatar regarding the provisions of the Convention granting the equality before the law due to the reasons mentioned above could not be considered in line with the object and purpose of the Convention.

The Government of the Republic of Latvia is emphasizing that the rights to determine human's own domicile is a part of the free movement of person and therefore is very important part of human rights and, thus no limitations may be permitted to the said right.

Moreover, the Government of the Republic of Latvia believes that any person is entitled to fully enjoy the human rights and the marriage cannot restrict the human rights which the person is entitled to have.

Therefore, the Government of the Republic of Latvia has the opinion that the reservations made by the State of Qatar contradict to the object and purpose of the Convention and in particular to the obligations of all States Parties to pursue by all appropriate means and without delay a policy of eliminating the discrimination against women.

Moreover, the Government of the Republic of Latvia recalls Part VI, Article 28 of the Convention setting out that the reservations incompatible with the object and purpose of the Convention are not permitted.

Therefore, the Government of the Republic of Latvia objects to all reservations made by the State of Qatar to the Convention on the Elimination of All Forms of Discrimination against Women.

However, this objection shall not preclude the entry into force of the Convention between the Republic of Latvia and the State of Qatar. Thus, the Convention will become operative without the State of Qatar benefiting from its reservation."

MEXICO

The Government of the United Mexican States has studied the content of the reservations made by Mauritius to article 11, paragraph 1 (b) and (d), and article 16, paragraph 1 (g), of the Convention and has concluded that they should be considered invalid in the light of article 28, paragraph 2, of the Convention, because they are incompatible with its object and purpose.

Indeed, these reservations, if implemented, would inevitably result in discrimination against women on the basis of sex, which is contrary to all the articles of the Convention. The principles of equal rights of men and women and non-discrimination on the basis of sex, which are embodied in the second preambular paragraph and Article 1, paragraph 3, of the Charter of the United Nations, to which Mauritius is a signatory, and in articles 2 and 16 of the Universal Declaration of Human Rights of 1948, were previously accepted by the Government of Mauritius when it acceded, on 12 December 1973, to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The above principles were stated in article 2, paragraph 1, and article 3 of the former Covenant and in article 2, paragraph 2, and article 3 of the latter. Consequently, it is inconsistent with these contractual obligations previously assumed by Mauritius for its Government now to claim that it has reservations, on the same subject, about the 1979 Convention.

The objection of the Government of the United Mexican States to the reservations in question should not be interpreted as an impediment to the entry into force of the 1979 Convention between the United Mexican States and Mauritius.

i) 21 February 1985: In respect of reservations by Bangladesh* concerning article 2, article 13 (a) and article 16 paragraph 1 (c) and (f).

ii) 21 February 1985: In respect of the reservation by Jamaica concerning article 9 (2).

iii) 22 May 1985: In respect of reservations by New Zealand (applicable to the Cook Islands) concerning article 2 (f) and article 5 (a).

iv) 6 June 1985: In respect of reservations by the Republic of Korea concerning article 9 and article 16, paragraph 1 (c), (d), (e), (f) and (g). In this case, the Government of Mexico stated that the principles of the equal rights of men and women and of non-discrimination on the basis of sex, which are set forth in the Charter of the United Nations as one of its purposes in the Universal Declaration of Human Rights of 1948 and in various

multilateral instruments, have already become general principles of international law which apply to the international community, to which the Republic of Korea belongs.

v) 29 January 1986: In respect of the reservation made by Cyprus to article 9, paragraph 2.

vi) 7 May 1986: In respect of the reservations made by Turkey* to paragraphs 2 and 4 of article 15 and paragraphs 1 (c), 1 (d), 1 (f) and 1 (g) of article 16.

vii) 16 July 1986: In respect of reservations made by Egypt to articles 9 and 16.

viii) 16 October 1986: In respect of reservations by Thailand* concerning article 9, paragraph 2, article 15, paragraph 3 and article 16.

ix) 4 December 1986: In respect of reservations by Iraq concerning article 2, paragraphs (f) and (g), article 9, paragraphs 1 and 2 and article 16.

x) 23 July 1990: In respect of the reservation made by the Libyan Arab Jamahiriya.

NETHERLANDS (KINGDOM OF THE)

"The Government of the Kingdom of the Netherlands considers that the reservations made by Bangladesh regarding article 2, article 13 (a) and article 16, paragraph 1 (c) and (f), by Egypt regarding article 2, article 9 and article 16, by Brazil regarding article 15, paragraph 4, and article 16, paragraph 1 (a), (c), (g), and (h), by Iraq regarding article 2, sub-paragraphs (f) and (g), article 9 and article 16, by Mauritius regarding article 11, paragraph 1 (b) and (d), and article 16, paragraph 1 (g), by Jamaica regarding article 9, paragraph 2, by the Republic of Korea regarding article 9 and article 16, paragraph 1 (c), (d), (f) and (g), by Thailand regarding article 9, paragraph 2, article 15, paragraph 3, and article 16, by Tunisia regarding article 9, paragraph 2, article 15, paragraph 4, and article 16, paragraph 1 (c), (d), (f), (g) and (h), by Turkey regarding article 15, paragraphs 2 and 4, and article 16, paragraph 1 (c), (d), (f) and (g), by the Libyan Arab Jamahiriya upon accession, and the first paragraph of the reservations made by Malawi upon accession, are incompatible with the object and purpose of the Convention (article 28, paragraph 2).

"These objections shall not preclude the entry into force of the Convention as between Bangladesh, Egypt, Brazil, Iraq, Mauritius, Jamaica, the Republic of Korea, Thailand, Tunisia, Turkey, Libyan Arab Jamahiriya, Malawi and the Kingdom of the Netherlands."

The Government of the Kingdom of the Netherlands considers that the declarations made by India regarding article 5 (a) and article 16, paragraph 1. of the Convention are reservations incompatible with the object and purpose of the Convention (article 28, paragraph 2).

The Government of the Kingdom of the Netherlands considers that the declaration made by India regarding article 16, paragraph 2, of the Convention is a reservation incompatible with the object and purpose of the Convention (article 28, para. 2).

The Government of the Kingdom of the Netherlands considers that the declaration made by Morocco expressing the readiness of Morocco to apply the provisions of article 2 provided that they do not conflict with the provisions of the Islamic *Shariah* , is a reservation incompatible with the object and purpose of the Convention (article 28, paragraph 2).

The Government of the Kingdom of the Netherlands considers that the declaration made by Morocco regarding article 15, paragraph 4, of the Convention is a reservation incompatible with the object and purpose of the Convention (article 28, paragraph 2).

The Government of the Kingdom of the Netherlands considers that the reservations made by Morocco regarding article 9, paragraph 2, and article 16 of the Convention are reservations incompatible with the object and purpose of the Convention (article 28, paragraph 2).

The Government of the Kingdom of the Netherlands has examined the reservations made by the Maldives [...]. The Government of the Kingdom of the Netherlands considers the said reservations incompatible with the object and purpose of the Convention.

The Government of the Kingdom of the Netherlands objects to the above-mentioned declarations and reservations.

These objections shall not preclude the entry into force of the Convention as between India, Morocco, the Maldives and the Kingdom of the Netherlands.

"The Government of the Kingdom of the Netherlands considers the reservations made by Kuwait incompatible with theobject and purpose of the Convention (article 28, paragraph 2).

The Government of the Kingdom of the Netherlands therefore objects to the [said] reservations. These objections shall not preclude the entry into force of the Convention between Kuwait and the Kingdom of the Netherlands."

"The Governmentof the Kingdom of the Netherlands considers ... that such reservations, which seeks to limit the responsibilities of the reserving State under the Convention by invoking the general principles of national law and the Constitution, may raise doubts as to the commitment of this State to the object and purpose of the Convention and, moreover contribute to undermining the basis of international treaty law. It is in the common interest of States that treaties to which they have chosen to become parties should be respected, as to object and purpose, by all parties.

The Government of the Kingdom of the Netherlands further considers that the reservations made by Malaysia regarding article 2 (f), article 5 (a), article 9 and article 16 of the Convention are incompatible with the object and purpose of the Convention.

The Government of the Kingdom of the Netherlands therefore objects to the above-mentioned reservations. This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Malaysia."

[Same objection, mutatis mutandis, as the one made for Malaysia.]

"The Government of the Kingdom of the Netherlands ... considers:

- that the reservation under (1) is incompatible with the purpose of the Convention;
- that the reservation under (2) suggests a distinction between migrating men and migrating women, and by that is an implicit reservation regarding article 9 of the Convention, which is incompatible with the object and purpose of the Convention;
- that the reservation under (3), particularly the last part "...and considers that legislation in respect of article 11 is unnecessary for the minority of women who do not fall within the ambit of Singapore's employment legislation" is a reservation, which seeks to limit the responsibilities of the reserving State under the Convention by invoking the general principles of its national law, and in this particular case to exclude the application of the said article for a specific category of women, and therefore may raise doubts as to the commitment of this State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. It is in the common interest of States that treaties to which they have chosen to become parties should be respected, as to object and purpose, by all parties;

The Government of the Kingdom of the Netherlands therefore objects to the above-mentioned reservations.

This objection shall not preclude the entry into force of the Convention between Singapore and the Kingdom of the Netherlands."

[Same objection, mutatis mutandis, as the one made for Malaysia.]

[Same objection, mutatis mutandis, as the one made for Malaysia.]

[Same objection, mutatis mutandis, as the one made for Kuwait.]

"The Government of the Kingdom of the Netherlands has examined the reservations made by the Government of Saudi Arabia at the time of its [ratification of] the Convention on the Elimination of All Forms of Discrimination against Women.

The Government of the Kingdom of the Netherlands considers that the reservation concning the national law of Saudi Arabia, which seeks to limit the responsibilities of the reserving State under the Convention by invoking national law, may raise doubts as to the commitment of this State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law.

The Government of the Kingdom of the Netherlands furthermore considers that the reservation made by Saudi Arabia regarding article 9, paragraph 2, of the Convention is incompatible with the object and purpose of the Convention. The Government of the Kingdom of the Netherlands recalls that according to paragraph 2 of Article 28 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become party should be respected, as to object and purpose, by all parties. The Government of the Kingdomof the Netherlands therefore objects to the aforesaid reservations made by the Government of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Saudi Arabia."

"The Government of the Kingdom of the Netherlands has examined the reservations made by the Government of the Democratic People's Republic of Korea regarding article 2, paragraph (f), and article 9, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination against Women made at the time of its accession to the said Convention.

The Government of the Kingdom of the Netherlands considers that the reservations made by the Democratic People's Republic of Korea regarding article 2, paragraph (f), and article 9, paragraph 2, of the Convention are reservations incompatible with the object and purpose of the Convention. The Government of the Kingdom of the Netherlands recalls that, according to paragraph 2 of Article 28 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to take all appropriate measures, including legislation to comply with their obligations.

The Kingdom of the Netherlands therefore objects to the afore-said reservations made by the Government of the Democratic People's Republic of Korea to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and the Democratic People's Republic of Korea."

"The Government of the Kingdom of the Netherlands has examined the reservation made by the Government of Mauritania at the time of its accession to the Convention on the Elimination of All Forms of Discrimination against Women and considers that the reservation concerning the Islamic Sharia and the national law of Mauritania, which seeks to limit the responsibilities of the reserving State under the Convention by invoking the Sharia and national law, may raise doubts as to the commitment of this State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. The Government of the Kingdom of the Netherlands recalls that, according to paragraph 2 of Article 28 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. The Government of the Kingdom of the Netherlands therefore objects to the aforesaid reservation made by the Government of Mauritania to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Mauritania."

The Government of the Kingdom of the Netherlands has examined the reservations made by the Government of Bahrain at the time of its accession to the Convention on the Elimination of All Forms of Discrimination against Women.

The Government of the Kingdom of the Netherlands considers that the reservations with respect to article 9, paragraph 2, and article 15, paragraph 4, of the Convention are reservations incompatible with the object and purpose of the Convention.

Furthermore, the Government of the Kingdom of the Netherlands considers that the reservations with respect to articles 2 and 16 of the Convention, concerning the Islamic Shariah of Bahrain, reservations which seek to limit the responsibilities of the reserving State under the Convention by invoking the Islamic Shariah, may raise doubts as to the commitment of this State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law.

The Government of the Kingdom of the Netherlands recalls that, according to paragraph 2 of Article 28 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of the Kingdom of the Netherlands therefore objects to the aforesaid reservations made by the Government of Bahrain to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Bahrain.

“The Government of the Kingdom of the Netherlands has examined the reservations made by the Government of the Syrian Arab Republic at the time of its accession to the Convention on the Elimination of All Forms of Discrimination against Women.

The Government of the Kingdom of the Netherlands considers that the reservations with respect to article 2, article 9, paragraph 2, article 15, paragraph 4, and article 16, paragraph 1 (c), (d), (f) and (g), of the Convention are reservations incompatible with the object and purpose of the Convention.

Furthermore, the Government of the Kingdom of the Netherlands considers that the reservation with respect to article 16, paragraph 2, of the Convention, concerning the Islamic Shariah of the Syrian Arab Republic, a reservation which seeks to limit the responsibilities of the reserving State under the Convention by invoking the Islamic Shariah, may raise doubts as to the commitment of this State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of

international treaty law. The Government of the Kingdom of the Netherlands recalls that, according to paragraph 2 of article 28 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all Pares and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of the Kingdom of the Netherlands therefore objects to the aforesaid reservations made by the Government of the Syrian Arab Republic to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and the Syrian Arab Republic."

"The Government of the Netherlands has examined the reservation made by the United Arab Emirates to the Convention on the Elimination of All Forms of Discrimination against Women.

The application of the Articles 2 (f), 15 (2) and 16 of the Convention on the Elimination of All Forms of Discrimination against Women has been made subject to religious considerations. This makes it unclear to what extent the United Arab Emirates considers itself bound by the obligations of the treaty and therefore raises concerns as to the commitment of the United Arab Emirates to the object and purpose of the Covenant.

It is of the common interest of States that all parties respect treaties to which they have chosen to become parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. According to customary international law, as codified in the Vienna Convention on the Law of Treaties, a reservation which is incompatible with the object and purpose of a treaty shall not be permitted (Art. 19 c).

The Government of the Netherlands therefore objects to the reservation made by the United Arab Emirates to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Covenant between the United Arab Emirates and the Kgdom of the Netherlands, without the United Arab Emirates benefiting from its reservation."

"The Government of the Netherlands has examined the reservation made by Oman to the Convention on the Elimination of All Forms of Discrimination against Women. The Government of the Kingdom of the Netherlands considers that the reservations with respect to article 9, paragraph 2; article 15, paragraph 4; and article 16, of the Convention are reservations incompatible with the object and purpose of the Convention.

Furthermore, the Government of the Kingdom of the Netherlands considers that with the first part of the reservation the application of the Convention on the Elimination of All Forms of Discrimination against Women is made subject to the provisions of the Islamic sharia and legislation in force in the Sultanate of Oman. This makes it unclear to what extent Oman considers itself bound by the obligations of the treaty and therefore raises concerns as to the commitment of Oman to the object and purpose of the Convention.

The Government of the Kingdom of the Netherlands recalls that, according to paragraph 2 of article 28 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of the Kingdom of the Netherlands therefore objects to the aforesaidreservations made by the Government of Oman to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Oman."

"The Government of the Kingdom of the Netherlands has examined the reservations made by Brunei Darussalam to the Convention on the Elimination of All Forms of Discrimination against Women. The Government of the Kingdom of the Netherlands considers that the reservation with respect to article 9, paragraph 2, of the Convention is a reservation incompatible with the object and purpose of the Convention.

Furthermore, the Government of the Kingdom of the Netherlands considers that with the first reservation the application of the Convention on the Elimination of All Forms of Discrimination against Women is made subject to the beliefs and principles of Islam and the provisions of constitutional law in force in Brunei Darussalam. This makes it unclear to what extent Brunei Darussalam considers itself bound by the obligations of the Convention and therefore raises concerns as to the commitment of Brunei Darussalam to the object and purpose of the Convention.

The Government of the Kingdom of the Netherlands recalls that, according to paragraph 2 of article 28 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of the Kingdom of the Netherlands therefore objects to the aforesaid reservations made by the Government of Brunei Darussalam to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Brunei."

"It is the understanding of the Government of the Kingdom of the Netherlands that the declarations of the State of Qatar concerning articles 1 and 5 (a) of the Convention do no exclude or modify the legal effect of the provisions of the Convention in their application to the State of Qatar and that these declarations do not affect the principle of equality of men and women which is fundamental to the Convention.

The Government of the Kingdom of the Netherlands considers that with its reservations to articles 9 (2), 15 (1), 15 (4), 16 (1) (a) and (c) and 16 (1) (f) the State of Qatar has made the application of essential obligations under the Convention concerning central themes such as nationality, equality with men before the law, free movement and residence and marriage and family life subject to Islamic law and/or domestic law or practice in force in the State of Qatar. This makes it unclear to what extent the State of Qatar considers itself bound by the obligations of the treaty and raises concerns as to the commitment of the State of Qatar to the object and purpose of the Convention.

The Government of the Kingdom of the Netherlands considers that reservations of this kind must be regarded as incompatible with the object and purpose of the Convention and would recall that, according to article 28 (2) of the Convention, reservations incompatible with the object and purpose of the Convention shall not be permitted.

The Government of the Kingdom of the Netherlands therefore objects to the aforesaid reservations made by the State of Qatar to the Convention.

This objection does not constitute an obstacle to the entry into force of the Convention between the Kingdom of the Netherlands and the State of Qatar.”

"The Government of the Kingdom of the Netherlands has examined the reservations made by the Government of Bahrain on 5 August 2016 to the Convention on the Elimination of All Forms of Discrimination against Women.

The Government of the Kingdom of the Netherlands, with reference to its objection to the reservations made by the Government of Bahrain at the time of its accession to the Convention on the Elimination of All Forms of Discrimination against Women, considers the reservations made on 5 August 2016 incompatible with the object and purpose of the Convention.

The Government of the Kingdom of the Netherlands recalls that, according to paragraph 2 of Article 28 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted. The Government of the Kingdom of the Netherlands therefore objects to the aforesaid reservations made by the Government of Bahrain to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Bahrain."

NORWAY

"The Government of Norway has examined the contents of the reservation made by the Libyan Arab Jamahiriya, by which the accession `is subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic Shariah'. The Norwegian Government has come to the conclusion that this reservation is incompatible with the object and purpose of the Convention (article 28, paragraph 2). The Government of Norway objects to the reservation.

"The Norwegian Government will stress that by acceding to the Convention, a state commits itself to adopt the measures required for the elimination of discrimination, in all its forms and manifestations, against women. A reservation by which a State Party limits its responsibilities under the Convention by invoking religious law (Shariah), which is subject to interpretation, modification, and selective application in different states adhering to Islamic principles, may create doubts about the commitments of the reserving state to the object and purpose of the Convention. It may also undermine the basis of international treaty law. All states have common interest in securing that all parties respect treaties to which they have chosen to become parties."

"In the view of the Government of Norway, a reservation by which a State party limits its responsibilities under the Convention by invoking general principles of internal law may create doubts about the commitments of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermine the basis of international treaty law. It is in the common interest of States thattreaties to which they have chosen to become parties also are respected, as to their object and purpose, by all parties. Furthermore, under well established international treaty law, a State is not permitted to invoke internal law as justification for its failure to perform its treaty obligations. For these reasons, the Government of Norway objects to Maldives reservations.

The Government of Norway does not consider this objection to constitute an obstacle to the entry into force of the above-stated Convention between the Kingdom of Norway and the Republic of Maldives."

[Same objection, mutatis mutandis, as the one made for Maldives.]

"In the view of the Government of Norway, a statement by which a State Party purports to limit its responsibilities under the Convention by invoking general principles of internal or religious law may create doubts about the commitment of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. Under well-established international treaty law, a State is not permitted to invoke internal law as justification for its failure to perform its treaty obligations. Furthermore, the Government of Norway considers that reservation made by the Government of Malaysia with respect to certain specific provisions of the Convention is so extensive as to be contrary to the object and purpose of the Convention, and thus not permitted under article 28, paragraph 2, of the Convention. For theses reasons, the Government of Norway objects to the reservationsmade by the Government of Malaysia.

The Government of Norway does not consider this objection to preclude the entry into force of the Convention between the Kingdom of Norway and Malaysia."

[Same objection, mutatis mutandis, as the one made for Maldives.]

[Same objection, mutatis mutandis, as the one made for Maldives.]

[Same objection, mutatis mutandis, as the one made for Maldives.]

[Same objection, mutatis mutandis, as the one made for Malaysia.]

"The reservation concerns fundamental provisions of the Convention. Article 2 is the core provision as it outlines the measures which the State Party is required to take in order to implement the Convention. The Convention can only be successfully implemented when all measures prescribed by Article 2 are taken. Most importantly, it is unclear how the Convention's substantive provisions will be implemented without adopting measures to modify or abolish existing discriminatory laws, regulations, customs and practices.

The Government of Norway considers the other elements of the reservation, with exception of the reservation made to article 29, as incompatible with the object and purpose of the Convention. The relevant provisions cover fundamental rights of women or they outline key elements in order to abolish discrimination against women. Women will not have the opportunity to live on equal footing with men if these provisions are not implemented.

Further, it is the Norwegian Government's position that Article 5, paragraph (b) covers both public and private family education.

The Government of Norway therefore objects to the reservations made by the Government of Niger to the following provisions:

Article 2, paragraphs (d) and (f)

Article 5, paragraph (a)

Article 15, paragraph 4

Article 16, paragraph 1 (c), (e) and (g)

This objection does not preclude the entry into force in its entirety of the Convention between the Kingdom of Norway and Niger. The Convention thus becomes operative between Norway and Niger without Niger benefiting from these reservations."

"The Government of Norway has examined the contents of the reservation made by the Government of the Kingdom of Saudi Arabia upon ratification of the Convention on the Elimination of all forms of Discrimination Against Women.

According to paragraph 1 of the reservation, the norms of Islamic Law shall prevail in the event of conflict with the provisions of the Convention. It is the position of the

Government of Norway that, due to its unlimited scope and undefined character, this part of the reservation is contrary to object and purpose of the Convention.

Further, the reservation to Article 9, paragraph 2, concerns one of the core provisions of the Convention, and which aims at eliminating discrimination against women. The reservation is thus incompatible with the object and purpose of the Convention.

For these reasons, the Government of Norway objects to paragraph 1 and the first part of paragraph 2 of the reservation made by Saudi Arabia, as they are impermissible according to Article28, paragraph 2 of the Convention.

This objection does not preclude the entry into force in its entirety of the Convention between the Kingdom of Norway and the Kingdom of Saudi Arabia. The Convention thus becomes operative between Norway and Saudi Arabia without Saudi Arabia benefiting from the said parts of the reservation."

"The Government of Norway has examined the contents of the reservation made by the Government of the Democratic People's Republic of Korea upon accession to the Convention on the Elimination of all forms of Discrimination against Women.

Article 2 is the Convention's core provision outlining the measures that the State Party is required to take in order to ensure the effective implementation of the Convention. Without adopting measures to modify or abolish existing discriminatory laws, regulations, customs and practices as prescribed by paragraph (f) of Article 2, none of the Convention's substantive provisions can be successfully implemented. The reservation to paragraph (f) of Article 2 is thus incompatible with the object and purpose of the Convention.

Further, as Article 9, paragraph 2 aims at eliminating discrimination against women, the reservation to this provision is incompatible with the object and purpose of the Convention.

The Government of Norway therefore objects to the parts of the reservation that concern paragraph (f) of Article 2 and paragraph 2 of Article 9, as they are impermissible according to Article 28, paragraph 2 of the Convention.

This objectiondoes not preclude the entry into force in its entirety of the Convention between the Kingdom of Norway and the Democratic People's Republic of Korea. The Convention thus becomes operative between the Kingdom of Norway and the Democratic People's Republic of Korea without the Democratic People's Republic of Korea benefiting from the said parts of the reservation."

"The Government of Norway has examined the contents of the reservation made by the Government of Mauritania upon accession to the Convention on the Elimination of all Forms of Discrimination against Women.

The reservation consists of a general reference to national law and does not clearly define to what extent Mauritania has accepted the obligations under the Convention. The Government of Norway therefore objects to the reservation, as it is contrary to the object and purpose of the Convention and thus impermissible according to Article 28 of the Convention.

This objection does not preclude the entry into force in its entirety of the Convention between the Kingdom of Norway and Mauritania. The Convention thus becomes operative between Norway and Mauritania without Mauritania benefiting from the reservation."

"The Government of Norway has examined the reservations made by the Government of the Syrian Arab Republic upon accession to the Convention on the Elimination of All Forms of Discrimination Against Women regarding Article 2, Article 9, paragraph 2, Article 15, paragraph 4, Article 16, paragraph 1 (c), (d), (f) and (g) and Article 16, paragraph 2.

The said reservations,as they relate to core provisions of the Convention, render the provisions of the Convention ineffective. Moreover, and due to the reference to Islamic Sharia, it is not clearly defined for other States Parties to what extent the reserving State has undertaken the obligations of the Convention. The Government of Norway therefore objects to the aforesaid reservations made by the Government of the Syrian Arab Republic.

This objection does not preclude the entry into force in its entirety of the Convention between the Kingdom of Norway and the Syrian Arab Republic. The Convention thus becomes operative between the Kingdom of Norway and the Syrian Arab Republic without the Syrian Arab Republic benefiting from the aforesaid reservations."

"The Government of the Kingdom of Norway has examined the reservations made by the Government of the United Arab Emirates on 6 October 2004 on accession to the Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979) in respect of articles 2 (f); 9; 15 (c) and 16.

The Government of the Kingdom of Norway is of the view that the reservation in respect of article 2 (f), which is a core provision of the above Convention, taken together with the reservations in respect of articles 9, 15 (c) and 16, raise doubts as to the full commitment of the United Arab Emirates to the object and purpose of the Convention on the Elimination of All Forms of Discrimination against Women and would like to recall that, according to article 28 (2) of the Convention, a reservation incompatible with the object and purpose of the present Convention shall not be permitted.

The Government of the Kingdom of Norway therefore objects to the aforesaid reservations made by the Government of the United Arab Emirates to the Convention on the Elimination of All Forms of Discrimination against Women. This objection does not preclude the entry into force, in its entirety, of the Convention between the Kingdom of Norway and the United Arab Emirates, without the United Arab Emirates benefiting from these reservations."

"The Government of Norway has examined the reservations made by the Government of Brunei Darussalam upon accession to the Convention on the Elimination of All Forms of Discrimination Against Women (New York, 18 December 1979).

In the view of the Government of Norway, a statement by which a State Party purports to limit its responsibilities under the Convention by invoking general principles of internal or religious law may create doubts about the commitment of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law. Under well-established international treaty law, a State is not permitted to invoke internal law as a justification for its failure to perform its treaty obligations. For these reasons, the Government of Norway objects to the reservation made by the Government of Brunei Darussalam.

This objection does not preclude the entry into force in its entirety of the Convention between the Kingdom of Norway and Brunei Darussalam. The Convention thus becomes operative between Norway and Brunei Darussalam without Brunei Darussalam benefiting from the said reservations."

“The Government of Norway finds that the reservations to article 2 (a), article 9, paragraph 2, article 15, paragraphs 1 and 4 and article 16, paragraph 1 (a), (c) and (f) affect essential obligations arising from the Convention, obligations whose observance is necessary in order to achieve the purpose of the Convention. The Government of Norway recalls that, according to article 28, paragraph 2 of the Convention, as well as customary international law as codified in the Vienna Convention on the Law of Treaties article 19, paragraph (c), a reservation incompatible with the object and purpose of a treaty shall

not be permitted. The Government of Norway considers that the reservations made by the State of Qatar are so extensive as to be contrary to the object and purpose of the Convention. For these reasons, the Government of Norway objects to reservations Nos. 1-6 made by the State of Qatar.

This objection does not preclude the entry into force in its entirety of the Convention between the Kingdom of Norway and the State of Qatar. The Convention thus becomes operative between the Kingdom of Norway and the State of Qatar without the State of Qatar benefiting from the aforesaid reservations."

POLAND

"The Government of the Republic of Poland has examined the reservations made by the United Arab Emirates upon accession to the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly of the United Nations on December 18, 1979, hereinafter called the Convention, regarding articles 2 (f), 9, 15 (2) and 16.

The Government of the Republic of Poland considers that the reservations made by the United Arab Emirates are incompatible with the object and purpose of the Convention which guarantees equal rights of women and men to exercise their economic, social, cultural, civil and political rights. The Government of the Republic of Poland therefore considers that, according to the customary international law as codified in the Vienna Convention on the Law of Treaties (article 19 (c)), done at Vienna on 23 May 1969, as well as article 28 (2) of the Convention on the Elimination of All Forms of Discrimination against Women, reservations incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Republic of Poland therefore objects to the aforementioned reservations made by the United Arab Emirates upon accession to the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly of the United Nations on 18 December 1979, regarding articles 2 (f), 9, 15 (2) and 16.

This objection does not preclude the entry into force of the Convention between the Republic of Poland and the United Arab Emirates."

The Government of the Republic of Poland has examined the reservations made by the Sultanate of Oman upon accession to the Convention on the Elimination of All Forms of Discrimination against Women, adopted by General Assembly of the United Nations on December 18, 1979, regarding articles 9 paragraph 2, 15 paragraph 4, 16 (a), (c) and (f) and all provisions of the Convention not in accordance with the principles of the Islamic *Sharia*.

The Government of the Republic of Poland considers that the reservations made by the Sultanate of Oman are incompatible with the object and purpose of the Convention which guarantees equal rights of women and men to exercise their economic, social, cultural, civil, and political rights. The Government of the Republic of Poland therefore considers that, according to article 19 (c) of the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, as well as article 28 (2) of the Convention on the Elimination of All Form of Discrimination against Women, reservations incompatible with the object and purpose of a treaty shall not be permitted.

Moreover, the Government of the Republic of Poland considers that by making a general reference to the Islamic *Sharia* without indicating the provisions of the Convention to which the Islamic *Sharia* applies, the Sultanate of Oman does not specify the exact extent of the introduced limitations and thus does not define precisely enough the extent to which the Sultanate of Oman has accepted the obligations under the Convention.

The Government of the Republic of Poland therefore objects to the aforementioned reservations made by the Sultanate of Oman upon accession to the Convention on the Elimination of All Forms of Discrimination against Women, adopted by General Assembly of theUnited Nations on 18 December 1979, regarding articles 9 paragraph 2, 15 paragraph 4, 16 (a), (c) and (f) and all provisions of the Convention not in accordance with the principles of the Islamic *Sharia*.

This objection does not preclude the entry into force of the Convention between the Republic of Poland and Sultanate of Oman.

"The Government of the Republic of Poland has examined the reservations made by Brunei Darussalam upon accession to the Convention on the Elimination of All Forms of Discrimination against Women, adopted by General Assembly of the United Nations on December 18, 1979, regarding article 9 paragraph 2 and those provisions of the Convention that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam.

The Government of the Republic of Poland considers that the reservations made by the Brunei Darussalam are incompatible with the object and purpose of the Convention which guarantees equal rights of women and men to exercise their economic, social, cultural, civil, and political rights. The Government of the Republic of Poland therefore considers that, according to article 19 (c) of the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, as well as article 28 (2) of the Convention on the Elimination of All Forms of Discrimination against Women, reservations incompatible with the object and purpose of a treaty shall not be permitted.

Moreover, the Government of the Republic of Poland considers that by making a general reference to the 'beliefs and principles of Islam' without indicating the provisions of the Convention to which they apply, Brunei Darussalam doesnot specify the exact extent of the introduced limitations and thus does not define precisely enough the extent to which Brunei Darussalam has accepted the obligations under the Convention.

The Government of the Republic of Poland therefore objects to the aforementioned reservations made by Brunei Darussalam upon accession to the Convention on the Elimination of All Forms of Discrimination against Women, adopted by General Assembly of the United Nations on 18 December 1979, regarding article 9 paragraph 2 and those provisions of the Convention that may be contrary to the Constitution of Brunei Darussalam anto the beliefs and principles of Islam.

This objection does not preclude the entry into force of the Convention between the Republic of Poland and Brunei Darussalam."

"The Government of the Republic of Poland has examined the reservations made by the State of Qatar upon accession to the Convention on the Elimination of All Forms of Discrimination against Women, adopted by General Assembly of the United Nations on December 18, 1979, with regard to Articles 2(a), 9(2), 15(1), 15(4), 16(1)(a) and (c) and 16 (1)(f) and 29 (2) and the declarations made by this State with respect to Articles 1 and 5(a) of the Convention.

The Government of the Republic of Poland is of the view that, if put into practice, the reservations and declarations made by the State of Qatar, especially when taking into account the vast area of life which they affect, will considerably limit the ability of women to benefit from the rights guaranteed to them by the Convention which are related to essential sphere of life, e.g. equality of men and women before the law, nationality of children, family relations and freedom to choose their residence and domicile.

Thus, the Government of the Republic of Poland considers the reservations and declarations made by the State of Qatar (except for the reservations regarding

Article 2(a) and Article 29(2) of the Convention) as incompatible with the object and purpose of the Convention which is the elimination of the discrimination against women in all spheres. Therefore, according to Article 28(2) of the Convention and Article 19(c) of the Vienna Convention on the Law of Treaties, the reservations and declarations shall not be permitted.

In order to justify its will to exclude the legal consequences of certain provisions of the Convention, the State of Qatar raised in its reservations the inconsistency of these provisions with its domestic legislation. The Government of the Republic of Poland recalls that, according to Article 27 of the Vienna Convention on the Law of Treaties, the State Party to an international agreement may not invoke the provisions of its internal law as justification for its failure to perform a treaty. On the contrary, it should be deemed a rule that a State Party adjusts its internal law to the treaty which it decides to be bound by.

Furthermore, the State of Qatar refers in its reservations to the Islamic law and 'established practice' which may be applied in course of the implementation of the Convention. However, it does not specify their exact content. As a consequence these reservations do not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention.

Therefore, the Government of the Republic of Poland objects to the reservations made by the State of Qatar upon accession to the Convention on the elimination of All Forms of Discrimination against Women, adopted by General Assembly of the United Nations on 18 December 1979, with regard to Articles 9(2), 15(1), 15(4), 16(1)(a) and (c) and 16(1)(f) of the Convention.

This objection does not preclude the entry into force of the Convention between the Republic of Poland and the State of Qatar."

PORTUGAL

"The Government of Portugal considers that the reservations formulated by the Maldives are incompatible with the object and purpose of the Convention and they are inadmissible under article19 (c) of the Vienna Convention on the Law of Treaties.

Furthermore, the Government of Portugal considers that these reservations cannot alter or modify in any respect the obligations arising from the Convention for any State party thereto."

"The Government of the Portuguese Republic has examined the reservation made on 7 September by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979), regarding any interpretation of the provisions of the Convention that is incompatible with the precept of Islamic law and the Islamic religion. It has also examined the reservation to article 9.2 of the Convention.

The Government of the Portuguese Republic is of the view that the first reservation refers in general terms to the Islamic law, failing to specify clearly its content and, therefore, leaving the other State parties with doubts as to the real extent of the Kingdom of Saudi Arabia's commitment to the Convention.

Furthermore, it also considers the reservation made by the Government of the Kingdom of Saudi Arabia incompatible with the objective and purpose of the aforesaid Convention, for it refers to the whole of the Convention, and it seriously limits or even excludes its application on a vaguely defined basis, such as the global reference to the Islamic law.

Regarding the reservation to article 9.2, the Government of the Portuguese Republic is of the view that the said reservation intends to exclude one of the obligations of non-discrimination, which is the essnce of the Convention.

Therefore, the Government of the Portuguese Republic objects to the aforementioned reservations made by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Portuguese Republic and the Kingdom of Saudi Arabia."

"The Government of the Portuguese Republic has examined the reservation made by the Government of the Democratic People's Republic of Korea to the Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979) on 27 February 2001 in respect of articles 2 (f) and 9.2 of the Convention.

Recalling that, according tp paragraph 2 of Article 28 of the Convention a reservation incompatible with the object and purpose of the Convention shall not be permitted, the Government of the Portuguese Republic objects to the said reservations.

In fact, the reservation relating to article 2 (f) refers to a basic aspect of the Convention, namely the compromise to enact legislation to abolish all existing legal practices discriminating against women.

Regarding the reservation to article 9.2, the Government of the Portuguese Republic is of the view that the said reservation intends to exclude one of the specific obligations of non-discrimination, which is the essence of the Convention.

It is in the common interests of States that Treaties to which they have chosen to become party are respected by all parties and that the States are prepared to take all appropriate measures, including legislation to comply with their obligations.

Therefore, the Government of the Portuguese Republic objects to the afore mentioned reservations made by the Government of the Democratic People's Republic of Korea to the Convention on the Elination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Portuguese Republic and the Democratic People's Republic of Korea."

"The Government of the Portuguese Republic has examined the reservation made by the Government of the Islamic Republic of Mauritania to the Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979) on 10 May 2001 in respect of any interpretation of the provisions of the Convention that it is incompatible with the precept of Islamic law and its Constitution.

The Government of the Portuguese Republic is of the view that the said reservation refers in a general manner to national law, failing to specify clearly its content and, therefore, leaving the other State parties with doubts as to the real extent of the Islamic Republic of Mauritania's commitment to the Convention.

Furthermore it also considers the reservation made by the Government of the Islamic Republic of Mauritania incompatible with the objective and purpose of the aforesaid Convention, and it seriously limits or even excludes its application on a vaguely defined basis, such as the global reference to the Islamic law.

The Government of the Portuguese Republic therefore objects to the reservation made by the Government of the Islamic Republic of Mauritania to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Portuguese Republic and the Islamic Republic of Mauritania."

"The Portuguese Government has carefully examined the reservations made by the United Arab Emirates upon its accession to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

Most of these reservations concern fundamental provisions of the Convention, such as articles 2 (f), 9, 15 (2) and 16, since they outline the measures which a State

Party is required to take in order to implement the Convention, cover the fundamental rights of women and deal with the key elements for the elimination of discrimination against women.

Portugal considers that such reservations, consisting of references to the precepts of the Shariah and to national legislation, create serious doubts as to the commitment of the reserving State to the object and purpose of the Convention and to the extent it has accepted the obligations imposed by it and, moreover, contribute to undermining the basis of international law.

It is in the common interest of all States that treaties to which they have chosen to become parties are respected as to their object and purpose by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under these treaties.

The Government of the Portuguese Republic, therefore, objects to the above reservations made by the United Arab Emirates to the CEDAW.

This objection shall not preclude the entry into force of the Convention between Portugal and the United Arab Emirates."

"The first reservation concerns "all provisions of the Convention not in accordance with the provisions of the Islamic sharia and legislation in force in the Sultanate of Oman". Portugal considers that this reservation is too general and vague and seeks to limit the scope of the Convention on an unilateral basis that is not authorised by it. Moreover, this reservation creates doubts as to the commitment of the reserving State to the object and purpose of the Convention and, moreover, contributes to undermining the basis of international law. It is in the common interest of allStates that treaties to which they have chosen to become parties are respected as to their object and purpose by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The second, third and fourth reservations concern fundamental provisions of the Convention, such as articles 9 (2), 15 (4) and 16, that cover the fundamental rights of women and deal with the key elements for the elimination of discrimination against women on the basis of sex. These reservations are thus incompatible with the object and purpose of the Convention and are not permitted under article 28 (2) of the CEDAW.

The Government of the Portuguese Republic, therefore, objects to the above mentioned reservations made by the Sultanate of Oman to the CEDAW.

This objection shall not preclude the entry into force of the Convention between Portugal and Oman."

"The reservation concerning the "provisions of the said Convention that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the official religion of Brunei Darussalam" is too general and vague and seeks to limit the scope of the Convention on a unilateral basis that is not authorised by it. Moreover, this reservation creates doubts as to the commitment of the reserving State to the object and purpose of the Convention and, moreover, contributes to undermining the basis of international law. It is in the common interest of all States that treaties to which they have chosen to become parties are respected as to their object and purpose by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The reservation concerning article 9 (2) undermines a key provision of the Convention concerning the elimination of discrimination against women on the basis of sex. This reservation is thus incompatible with the object and purpose of the Convention and is not permitted under article 28 (2) of the CEDAW.

The Government of the Portuguese Republic, therefore, objects to the above mentioned reservations made by the Government of Brunei Darussalam to the CEDAW.

This objection shall not preclude the entry into force of the Convention between Portugal and Brunei Darussalam."

ROMANIA

"The Government of Romania has examined the reservations made by the Government of the Syrian Arab Republic at the time of its accession to the Convention on the Elimination of all Forms of Discrimination against Women, regarding article 2, article 9, paragraph 2, article 15, paragraph 4, article 16 paragraph 1 (c), (d), (f) and (g), and article 16 paragraph 2.

The Government of Romania considers that the reservations to article 2, article 9, paragraph 2, article 15, paragraph 4, article 16 paragraph 1 (c), (d), (f) and (g), article 16 paragraph 2, of the Convention on the Elimination of all Forms of Discrimination against Women are incompatible with the object and purpose of the above-mentioned Convention, taking into account the provisions of article 19 (c) of the Vienna Convention on the Law of Treaties (1969).

As a consequence, the Government of Romania objects to the above-mentioned reservations made by the Syrian Arab Republic to the Convention on the Elimination of all Forms of Discrimination against Women.

This objection, however, shall not preclude the entry into force of the Convention between the Government of Romania and the Syrian Arab Republic."

"The Government of Romania has carefully considered the reservations made by Brunei Darussalam on 24 May 2006 upon accession to the Convention on the Elimination of all Forms of Discrimination against Women (New York), 18 December 1979) and regards the reservation made to Article 9 para. 2 as incompatible with the object and purpose of the Convention, as, by its formulation, a certain form of discrimination against women is maintained and, implicitly, the inequality of rights between men and women is perpetuated.

Furthermore, the Government of Romania is of the opinion that the general reservation made by Brunei Darussalam subjects the application of the provisions of the Convention to their compatibility with the Islamic law and the fundamental law of this State. This reservation is, thus, problematic as it raises questions with regard to the actual obligations Brunei Darussalam understood to undertake by acceding to the Convention, and with regard to its commitment to the object and purpose of the Convention.

The Government of Romania recalls that, pursuant to Article 28 para. 2 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

Consequently, the Government of Romania objects to the aforementioned reservations made by Brunei Darussalam to the Convention on the Elimination of all Forms of Discrimination against Women. This objection shall not preclude the entry into force of the Convention, in its entirety, between Romania and Brunei Darussalam.

The Government of Romania recommends to Brunei Darussalam to reconsider the reservations made to the Convention on the Elimination of all Forms of Discrimination against Women."

"The Government of Romania has carefully considered the reservations made by the Sultanate of Oman on 7 February 2006 upon accession to the Convention on the Elimination of all Forms of Discrimination against Women (New York, 18 December 1979) and regards the reservations made to Article 9 para. 2, Article 15 para.4 and Article 16, sub-paragraphs a), c) and f) (concerning adoptions), as incompatible with the object and purpose of the Convention, as, by their formulation, various forms of discrimination against women are maintained and, implicitly, the inequality of rights between men and women is perpetuated.

Furthermore, the Government of Romania is of the opinion that the general reservation made by the Sultanate of Oman subjects the application of the provisions of the Convention to their compatibility with the Islamic law and the national legislation in force in the Sultanate of Oman. This reservation is, thus, problematic as it raises questions with regard to the actual obligations the Sultanate of Oman understood to undertake by acceding to the Convention, and with regard to its commitment to the object and purpose of the Convention.

The Government of Romania recalls that, pursuant to Article 28 para. 2 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

Consequently, the Government of Romania objects to the aforementioned reservations made by the Sultanate of Oman to the Convention on the Elimination of all Forms of Discrimination against Women. This objection shall not preclude the entry into force of the Convention, in its entirety, between Romania and the Sultanate of Oman.

The Government of Romania recommends to the Sultanate of Oman to reconsider the reservations made to the Convention on the Elimination of all Forms of Discrimination against Women."

"The Government of Romania has carefully considered the reservations made by Qatar upon accession to the Convention on the Elimination of all Forms of Discrimination against Women (New York, 18 December 1979) and regards the reservations made to Article 9 paragraph 2, Article 15 paragraph 1 and paragraph 4 and Article 16, [paragraph 1] (a), (c) and (f) as incompatible with the object and purpose of the Convention, since they maintain a certain form of discrimination against women and, implicitly, perpetuate the inequality of rights between men and women.

These reservations are contrary to Article 28, paragraph 2 of the Convention, which prohibits reservations incompatible with the object and purpose of the Convention.

Consequently, the Government of Romania objects to the aforementioned reservations made by Qatar to the Convention on the Elimination of all Forms of Discrimination against Women. This objection shall not preclude the entry into force of the Convention, in its entirety, between Romania and Qatar."

SLOVAKIA

"The Government of Slovakia has carefully examined the reservation made by the Sultanate of Oman upon its accession to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDA W).

The Government of Slovakia is of the view that the general reservation made by the Sultanate of Oman that "all provisions of the Convention not in accordance with the provisions of the Islamic sharia and legislation in force in the Sultanate of Oman" is too general and does not clearly specify the extent of the obligation (mentioned in the Convention) for the Sultanate of Oman.

The Government of Slovakia finds the reservation to article 9 (2), article 15 (4) and article 16 incompatible with the object and purpose of the Convention and is therefore inadmissible under article 19 (c) of the Vienna Convention on the Law of Treaties. Therefore it shall not be permitted, in accordance with article 2[8], paragraph 2 of the Convention on the Elimination of All Forms of Discrimination Against Women.

For these reasons, the Government of Slovakia objects to the above mentioned reservation made by the Sultanate of Oman upon its accession to the Convention on the Elimination of All Forms of Discrimination Against Women.

This objection shall not preclude the entry into force of the Convention on the Elimination of All Forms of Discrimination Against Women between Slovakia and the Sultanate of Oman. The Convention enters into force in its entirety between Slovakia and the Sultanate of Oman, without the Sultanate of Oman benefitting from its reservation. "

"The Government of Slovakia has carefully examined the content of the reservations made by the Brunei Darussalam upon its accession to the Convention on the Elimination of all Forms of Discrimination againt Women (CEDAW).

The Government of Slovakia is of the opinion that the reservation containing the reference to the beliefs and principles of Islam is too general and raises serious doubt as to the commitment of Brunei Darussalam to the object and the purpose of the Convention.

Moreover, the Government of Slovakia considers that one of the aims of the Convention is to grant the equality between men and women with respect to determine the nationality of their children. Therefore it finds the reservation of Brunei Darussalam to paragraph 2 of article 9 of the Convention as undermining one of key provisions of the Convention and is incompatible with its object and purpose. It is therefore inadmissible and shall be permitted, in accordance with paragraph 2 of article 28 of the Convention on the Elimination of all Forms of Discrimination against Women.

For these reasons, the Government of Slovakia objects to the above mentioned reservations made by the Brunei Darussalam upon its accession to the Convention on the Elimination of all Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between Slovakia and the Brunei Darussalam. The Convention enters into force in its entirety between Slovakia and the Brunei Darussalam without the Brunei Darussalam benefiting from its reservations."

With regard to the reservations made by Qatar upon accession

"The Government of the Slovak Republic has carefully examined the reservations and declarations formulated by the State of Qatar upon its accession to the Convention on the Elimination of All Forms of Discrimination against Women, adopted on 18 December 1979 in New York, according to which :

I. Reservations:

For the reasons explained below, the State of Qatar does not consider itself bound by the following provisions of the Convention:

1. Article 2 (a) in connection with the rules of the hereditary transmission of authority, as it is inconsistent with the provisions of article 8 of the Constitution.

2. Article 9, paragraph 2, as it is inconsistent with Qatar's law on citizenship.

3. Article 15, paragraph 1, in connection with matters of inheritance and testimony, as it is inconsistent with the provisions of Islamic law.

4. Article 15, paragraph 4, as it is inconsistent with the provisions of family law and established practice.

5. Article 16, paragraph 1 (a) and (c), as they are inconsistent with the provisions of Islamic law.

6. Article 16, paragraph 1 (f), as it is inconsistent with the provisions of Islamic law and family law.

The State of Qatar declares that all of its relevant national legislation is conducive to the interest of promoting social solidarity.

II. Declarations:

1. The Government of the State of Qatar accepts the text of article 1 of the Convention provided that, in accordance with the provisions of Islamic law and Qatari legislation, the phrase "irrespective of their marital status" is not intended to encourage family relationships outside legitimate marriage. It reserves the right to implement the Convention in accordance with this understanding.

2. The State of Qatar declares that the question of the modifications of "patterns" referred to in article 5 (a) must not be understood as encouraging women to

abandon their role as mothers and their role in child-rearing, thereby undermining the structure of the family.

Therefore, having studied and approved the Convention, we confirm by this instrument that we accept the Convention, accede to it and undertake to abide [these] provisions, while affirming and bearing in the mind the reservations and declarations mentioned above.

The Government of the Slovak Republic finds the reservations to article 2 (a), article 9, paragraph 2, article 15, paragraph 4, article 16, paragraph 1 (a) and (c), article 16, paragraph 1 (f) and declarations to article 1 and article 5 (a), if put into practice, would inevitably result in discrimination against women on the basis of sex, which is incompatible with the object and purpose of the Convention and is therefore inadmissible under article 19 (c) of the Vienna Convention on the Law of Treaties. Therefore it shall not be permitted, in accordance with article 28, paragraph 2 of the Convention on the Elimination of All Forms of Discrimination Against Women.

For these reasons, the Government of the Slovak Republic objects to the above mentioned reservations and declarations made by the State of Qatar upon accession to the Convention on the Elimination of All Forms of Discrimination Against Women.

This objection shall not preclude the entry into force of the Convention on the Elimination of All Forms of Discrimination Against Women between the Slovak Republic and the State of Qatar. The Convention on the Elimination of All Forms of Discrimination Against Women enters into force in its entirety between the Slovak Republic and the State of Qatar, without the State of Qatar benefiting from its reservations and declarations."

SPAIN

The Government of the Kingdom of Spain has examined the reservation made by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination against Women on [7] September 2000, regarding any interpretation of the Convention that may be incompatible with the norms of Islamic law and regarding article 9, paragraph 2.

The Government of the Kingdom of Spain considers that the general reference to Islamic law, without specifying its content, creates doubts among the other States parties about the extent to which the Kingdom of Saudi Arabia commits itself to fulfil its obligations under the Convention.

The Government of the Kingdom of Spain is of the view that such a reservation by the Government of the Kingdom of Saudi Arabia is incompatible with the object and purpose of the Convention, since it refers to the Convention as a whole and seriously restricts or even excludes its application on a basis as ill-defined as the general reference to Islamic law.

Furthermore, the reservation to article 9, paragraph 2, aims at excluding one of the obligations concerning non-discrimination, which is the ultimate goal of the Convention.

The Government of the Kingdom of Spain recalls that according to article 28, paragraph 2, of the Convention, reservations that are incompatible with the object and purpose of the Convention shall not be permitted.

Therefore, the Government of the Kingdom of Spain objects to the said reservations by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Kingdom of Spain and the Kingdom of Saudi Arabia.

The Government of the Kingdom of Spain has examined the reservations made by the Government of the Democratic People's Republic of Korea to articles 2 (f) and 9 (2) of the Convention on the Elimination of All Forms of Discrimination against Women, on 27 February 2001 in acceding to the Convention.

The Government of the Kingdom of Spain considers those reservations to be incompatible with the object and purpose of the Convention, since their intent is to exempt the Democratic People's Republic of Korea from committing itself to two essential elements of the Convention, one being the general requirement to take measures, including legislation, to eliminate all forms of discrimination against women (article 2 (f)) and the other being the requirement to address a specific form of discrimination with respect to the nationality of children (article 9 (2)).

The Government of the Kingdom of Spain recalls that, under article 28 (2) of the Convention, reservations incompatible with the object and purpose of the Convention are not permitted.

Accordingly, the Government of the Kingdom of Spain objects to the above-mentioned reservations made by the Democratic People's Republic of Korea to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection does not prevent the Convention's entry into force between the Kingdom of Spain and the Democratic People's Republic of Korea.

The Government of the Kingdomof Spain has examined the reservations made by the Government of the Syrian Arab Republic to article 2; article 9, paragraph 2; article 15, paragraph 4; and article 16, paragraph 1 (c), (d), (f) and (g) and paragraph 2 of the Convention on the Elimination of All Forms of Discrimination against Women, upon acceding to the Convention.

The Government of the Kingdom of Spain deems the above-mentioned reservations be contrary to the object and purpose of the Convention, since they affect fundamental obligations of States parties thereunder. Moreover, the reservation to article 16, paragraph 2, of the Convention refers to the Islamic Shariah, without specifying its content, which raises doubts as to the degree of commitment of the Syrian Arab Republic in acceding to the Convention.

The Government of the Kingdom of Spain recalls that, under article 28, paragraph 2, of the Convention, reservations incompatible with the object and purpose of the Convention are not permitted.

Accordingly, the Government of the Kingdom of Spain objects to the reservations made by the Government of the Syrian Arab Republic to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection does not prevent the entry into force of the Convention between the Kingdom of Spain and the Syrian Arab Republic.

The Government of the Kingdom of Spain has examined the reservations entered by the Government of the United Arab Emirates to article 2, subparagraph (f); article 9; article 15, paragraph 2; and article 16 of the Convention on the Elimination of All Forms of Discrimination against Women upon its accession to that instrument on 6 October 2004.

The Government of the Kingdom of Spain considers that these reservations are incompatible with the object and purpose of the Convention, since they are intended to exempt the United Arab Emirates from obligations relating to essential aspects of the Convention: one of a general nature, namely the adoption of measures, including legislation, to eliminate all forms of discrimination against women (article 2, subparagraph (f)), and others concerning specific forms of discrimination in relation to nationality (article 9), legal capacity in civil matters (article 15, paragraph 2) and marriage and family relations(article 16).

The Government of the Kingdom of Spain recalls that, under article 28, paragraph 2, of the Convention,

reservations incompatible with the object and purpose of the Convention are not permitted.

Moreover, the reservation to article 16 of the Convention makes a general reference to the principles of Islamic law without specifying their content, with the result that the other States parties cannot precisely determine the extent to which the Government of the United Arab Emirates accepts the obligations set out in article 16 of the Convention.

Accordingly, the Government of the Kingdom of Spain objects to the reservations entered by the Government of the United Arab Emirates to article 2, subparagraph (f); article 9; article 15, paragraph 2; and article 16 of the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Kingdom of Spain and the United Arab Emirates.

The Government of the Kingdom of Spain has examined the reservations madeby the Sultanate of Oman upon accession to the Convention on the Elimination of All Forms of Discrimination against Women regarding all the provisions of the Convention which are incompatible with Islamic law and with the legislation in force in Oman and to articles 9 (2), 15 (4) and 16 of the Convention.

The Government of the Kingdom of Spain considers that the first part of the reservation which subordinates all the provisions of the Convention to conform to Islamic law and the legislation in force in Oman, to which it makes general reference, without specifying its content, does not permit clear determination as to the extent to which Oman has accepted the obligations derived under the Convention and, consequently, such reservation sheds doubt as to the extent to which the Sultanate of Oman is committed to the object and purpose of the Convention.

Furthermore, the reservations to articles 9 (2), 15 (4) and 16 are incompatible with the object and purpose of the Convention, which aim at exempting Oman from its commitment essential obligations of the Convention.

The Government of the Kingdom of Spain recalls that according to article 28 (2) of the Convention, reservations that are incompatible with the object and purpose of the Convention shall not be permitted.

Therefore, the Government of the Kingdom of Spain objects to the reservations made by the Sultanate of Oman to all the provisions of the Convention on the Elimination of All Forms of Discrimination against Women which are incompatible with Islamic law and with the legislation in force in Oman and to articles 9 (2), 15 (4) and 16 of the Convention.

This objection shall not preclude the entry into force of the Convention between the Kingdom of Spain and the Sultana of Oman.

The Government of the Kingdom of Spain has examined the reservations made by Brunei Darussalam upon acceding to the Convention on the Elimination of All Forms of Discrimination against Women regarding all the provisions of the Convention that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, and regarding article 9.2 of the Convention.

The Government of the Kingdom of Spain believes that, by making the implementation of the provisions of the Convention subject to their compatibility with the Constitution of Brunei Darussalam and with the beliefs and principles of Islam, Brunei Darussalam has made a reservation which does not permit a clear determination of the extent to which it has accepted the obligations deriving from the Convention and that, consequently, the reservation raises doubts about the commitment of Brunei Darussalam to the object and purpose of the Convention. Moreover, the reservation regarding article 9.2 would exempt Brunei Darussalam from its commitment in relation to an essential element of the Convention and allow the continuation of a situation of de jure discrimination against women on grounds of sex which is incompatible with the object and purpose of the Convention.

The Government of the Kingdom of Spain recalls that, under article 28.2 of the Convention, reservations that are incompatible with the object and purpose of the Convention are not permitted.

Accordingly, the Government of the Kingdom of Spain objects to the reservations made by Brunei Darussalam regarding those provisions of the Convention on the Elimination of All Forms of Discrimination against Women that may be contrary to the Constitution ofBrunei Darussalam and to the beliefs and principles of Islam and regarding article 9.2 of the Convention.

This objection shall not preclude the entry into force of the Convention between the Kingdom of Spain and Brunei Darussalam.

The Government of the Kingdom of Spain has examined the reservations made by Qatar upon its accession to the Convention on the Elimination of All Forms of Discrimination against Women with respect to article 9, paragraph 2, article 15, paragraphs 1 and 4, and article 16, paragraph 1 (a), (c) and (f) of the Convention, as well as the declarations made with respect to articles 1 and 5 (a) of the

Convention.

The Government of the Kingdom of Spain believes that the aforementioned declarations relating to articles 1 and 5 (a) have no legal force and in no way exclude or modify the obligations assumed by Qatar under the Convention.

The Government of the Kingdom of Spain believes that the reservations made with respect to article 9, paragraph 2, article 15, paragraphs 1 and 4, and article 16, paragraph 1 (a), (c) and (f) are incompatible with the object and purpose of the Convention, since their intent is to exempt Qatar from committing itself to the elimination of specific forms of discrimination against women in such areas as nationality, equality with men before the law, free movement and residence, the right to enter into marriage, the matrimonial regime and filiation rights. These reservations affect essential obligations arising from the Convention and their observance is necessary in order to achieve the purpose of the Convention.

The Government of the Kingdom of Spain recalls that, according to article 28, paragraph 2, of theConvention, reservations that are incompatible with the object and purpose of the Convention shall not be permitted.

The Government of the Kingdom of Spain also believes that the reservations made by Qatar, which are based on inconsistency with Islamic law and incompatibility with existing domestic legislation, to which a general reference is made without specifying their contents, in no way excludes the legal effects of the obligations arising from the relevant provisions of the Convention.

Accordingly, the Government of the Kingdom of Spain objects to the reservations made by Qatar with respect to article 9, paragraph 2, article 15, paragraphs 1 and 4, and article 16, paragraph 1 (a), (c) and (f) of the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Kingdom of Spain and Qatar.

SWEDEN

- Thailand regarding article 9, paragraph 2, article 15, paragraph 3 and article 16;
- Tunisia regarding article 9, paragraph 2, article 15, paragraph 4, and article 16, paragraph 1 (c), (d), (f), (g) and (h).
- Bangladesh regarding article 2, article 13 (a) and article 16, paragraph 1 (c) and (f);
- Brazil regarding article 15, paragraph 4 and article 16, paragraph 1 (a), (c), (g) and (h);

"Indeed the reservations in question, if put into practice, would inevitably result in discrimination against women on the basis of sex, which is contrary to everything the Convention stands for. It should also be borne in mind that the principles of the equal rights of men and women and of non-discrimination on the basis of sex are set forth in the Charter of the United Nations as one of its purposes, in the Universal Declaration of Human Rights of 1948 and in various multilateral instruments, to which Thailand, Tunisia and Bangladesh are parties.

"The Government of Sweden furthermore notes that, as a matter of principle, the same objection could be made to the reservations made by:

- Egypt regarding article 2, article 9, paragraph 2, and article 16,
- Mauritius regarding article 11, paragraph 1 (b) and (d), and article 16, paragraph 1 (g),
- Jamaica regarding article 9, paragraph 2,
- Republic of Korea regarding article 9 and article 16, paragraph 1 (c), (d), (f) and (g),
- New Zealand in respect of the Cook Islands regarding article 2, paragraph (f) and article 5, paragraph (a).

"In this context the Government of Sweden wishes to take this opportunity to make the observation that the reason why reservations incompatible with the object and purpose of a treaty are not acceptable is precisely that otherwise they would render a basic international obligation of a contractual nature meaningless. Incompatible reservations, made in respect of the Convention on the elimination of all forms of discrimination against women, do not only cast doubts on the commitments of the reserving states to the objects and purpose of this Convention, but moreover, contribute to undermine the basis of international contractual law. It is in the common interest of states that treaties to which they have chosen to become parties also are respected, as to object and purpose, by other parties."

- 12 March 1987 with regard to the reservation made by Iraq in respect of article 2, paragraph (f) and (g), article 9, paragraph 1, and article 16;
- 15 April 1988 with regard to the first reservations made by Malawi;
- 25 May 1990 with regard to the reservation made by the Libyan Arab Jamahiriya;
- 5 February 1993 with regard to the reservations made by Jordan in respect of article 9, paragraph 2, article 15, paragraph 4, the wording of article 16 (c), and article 16 (d) and (g);
- 26 October 1994 with regard to the reservations made by Maldives upon accession.

The Government of Sweden also stated that:

"The Government of Sweden therefore objects to these reservations and considers that they constitute an obstacle to the entry into force of the Convention between Sweden and the Republic of Maldives";

- 17 January 1996 with regard to the reservations made by Kuwait upon accession;
- 27 January 1998 with regard to the reservations made by Lebanon upon accession.
- 27 April 2000 with regard to the reservations to articles 2 , 5, 15 and 16 made by Niger upon accession.

"The Government of Sweden has examined the reservation made by the Government of the Kingdom of Saudi Arabia at the time of its ratification of the Convention on the Elimination of All Forms of Discrimination against Women, as to any interpretation of the provisions of the Convention that is incompatible with the norms of Islamic law.

The Government of Sweden is of the view that this general reservation, which does not clearly specify the provisions of the convention to which it applies and the extent of the derogation therefrom, raises doubts as to the commitment of the Kingdom of Saudi Arabia to the object and purpose of the Convention.

It is in the common interest of States that treaties to which they have been chosen to become parties are respected as to their object and purpose, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. According to customary law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted. The Government of Sweden therefore objects to the aforesaid general reservation made by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination against Women.

This shall not preclude the entry into force of the Convention between the Kingdom of Saudi Arabia and the Kingdom of Sweden, without the Kingdom of Saudi Arabia benefiting from the said reservation".

"The Government of Sweden has examined the reservation made by the Democratic People's Republic of Korea at the time of its accession to the Convention on the Elimination of All Forms of Discrimination against Women, regarding articles 2 (f) and 9 (2) of the Convention.

The reservation in question, if put into practice, would inevitably result in discrination against women on the basis of sex, which is contrary to the object and purpose of the Convention. It should be borne in mind that the principles of the equal rights of men and women and of non-discrimination on the basis of sex are set forth in te Charter of the United Nations as one of the purposes of the organisation, as well as in the Universal Declaration of Human Rights of 1948.

According to Article 28 (2) of the Convention, reservations incompatible with the object and purpose of the Convention shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. According to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Sweden therefore objects to the aforesaid reservation made by the Government of the Democratic People's Republic of Korea to the Conventionon the Elimination of All Forms of Discrimination against Women and considers the reservation null and void. The Convention enters into force in its entirety between the two States, without the Democratic People's Republic of Korea benefiting from its reservation".

"The Government of Sweden has examined the reservation made by Mauritania upon acceding to the Convention on the Elimination of All Forms of Discrimination Against Women.

The Government of Sweden notes that the Convention is being made subject to a general reservation of unlimited scope referring to the contents of Islamic Sharia and to existing legislation in Mauritania.

The Government of Sweden is of the view that this reservation which does not clearly specify the provisions of the Convention to which it applies, and the extent of the derogation therefrom, raises serious doubts as to the commitment of Mauritania to the object and purpose of the Convention. The Government of Sweden would like to recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes

necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the aforesaid reservation made by the Government of Mauritania to the Convention on the Elimination of All Forms of Discrimination Against Women.

The objection shall not preclude the entry into force of the Convention between Mauritania and Sweden. The Convention enters into force in its entirety between the two States, without Mauritania benefiting from its reservation."

"The Government of Sweden has examined the reservation made by Bahrain upon acceding to the Convention on the Elimination of All Forms of Discrimination Against Women, regarding articles 2, 9(2), 15(4) and 16.

The reservation to articles 9(2) and 15(4), if put into practice, would inevitably result in discrimination against women on the basis of sex, which is contrary to the object and purpose of the Convention. It should be borne in mind that the principles of the equal rights of men and women and of non-discrimination on the basis of sex are set forth in the Charter of the United Nations as one of the purposes of the organisation, as well as in the Universal Declaration of Human Rights of 1948.

The reservation to articles 2 and 16 make general references to Islamic sharia. The Government of Sweden is of the view that, in absence of further clarification, this reservation which does not clearly specify the extent of Bahrain's derogation from the provisions in question raises serious doubts as to the commitment of Bahrain to the object and purpose of the Convention.

According to article 28(2) of the Convention, reservations incompatible with the object and purpose of the Convention shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden objects to the aforesaid reservations made by the Government of Bahrain to the Convention on the Elimination of All Forms of Discrimination Against Women and considers the reservation null and void.

This objection shall not preclude the entry into force of the Convention between Bahrain and Sweden. The Convention enters into force in its entirety between the two States, without Bahrain benefiting from its reservation."

"The Government of Sweden has examined the reservations made by the Syrian Arab Republic upon acceding to the Convention on the Elimination of All Forms of Discrimination Against Women regarding article 2, article 9, paragraph 2, article 15, paragraph 4 and article 16, paragraphs 1 (c), (d), (f) (g) and 2 of the Convention.

Article 2 of the Convention is one of the core articles of the Convention. A general reservation to this article seriously raises doubts as to the commitment of the Syrian Arab Republic to the object and purpose of the Convention.

The reservations to articles 9, paragraph 2, article 15,paragraph 4 and article 16, paragraphs 1 (c), (d), (f) and (g), if put into practice, would inevitably result in discrimination against women on the basis of sex, which is contrary to the object and purpose of the Convention. It should be borne in mind that the principles of the equal rights of men and women and of non-discrimination on the basis of sex are set forth in the Charter of the United Nations as one of the purposes of the organisation, as well as in the Universal Declaration of Human Rights of 1948.

The reservation to article 16, paragraph 2,makes a general reference to islamic sharia. The Government of Sweden is of the view that in the absence of further clarification, this reservation which does not clearly specify the extent of the Syrian Arab Republic's derogation from the provision in question raises serious doubts as to the commitment of the Syrian Arab Republic to the object and purpose of the Convention.

According to article 28, paragraph 2, of the Convention, reservations incompatible with the object and purpose of the Convention shall not be permitted. It is in the common interest of all States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the aforesaid reservations made by the Syrian Arab Republic to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between the Syrian Arab Republic and Sweden. The Convention enters into force in its entirety between the two States, without the Syrian Arab Republic benefiting from its reservations."

"The Government of Sweden is of the view that this reservation raises serious doubts as to the commitment of the Government of Micronesia to the object and purpose of the Convention. The reservation would, if put into practice, result in discrimination against women on the basis of sex. It should be borne in mind that the principles of the equal right of men and women and of non-discrimination on the basis of sex are set forth in the Charter of the United Nations as one of the purposes of the organisation, as well as in the Universal Declaration of Human Rights of 1948.

According to article 28 (2) of the Convention, and to customary law as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of the Convention shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the aforesaid reservation made by the Government of the Federated States of Micronesia to the Convention to the Elimination of All Forms of Discrimination against Women and considers the reservation null and void. The Convention enters into force in its entirety between the two States, without the Federated States of Micronesia benefiting from its reservations."

"The Government of Sweden has examined the reservations made by United Arab Emirates upon acceding to the Convention on the Elimination of All Forms of Discrimination Against Women, regarding Article 2 (f), 9, 15 (2) and 16.

The Government of Sweden notes that the said articles are being made subject to reservations referring to national legislation and Sharia principles.

The Government of Swedenis of the view that these reservations which do not clearly specify the extent of the United Arab Emirates' derogation from the provisions in question raises serious doubts as to the commitment of the United Arab Emirates to the object and purpose of the Convention. The reservations in question, if put into practice, would inevitably result in discrimination against women on the basis of sex, which is contrary to the object and purpose of the Convention. It should be borne in mind that the principles of the equal rights of women and men and of non-discrimination on the basis of sex are set forth in the Charter of the United Nations as one of the purposes of the organization, as well as in the declaration of Human Rights of 1948.

According to article 28 (2) of the Convention, and to international customary law as codified in the Vienna convention on the Law of the Treaties, reservations incompatible with the object and purpose of the

Convention shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties are respected as to their object and purpose, by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the aforesaid reservations made by the Government of the United Arab Emirates to the Convention on the Elimination of All Forms of Discrimination Against Women and considers them null and void.

This objection shall not preclude the entry into force of the Convention between the United Arab Emirates and Sweden. The convention enters into force in its entirety between the two States, without the United Arab Emirates benefiting from its reservations."

"The Government of Sweden has examined the reservations made by the Sultanate of Oman on 7 February 2006 to the Conventionon the Elimination of All Forms of Discrimination against Women.

The Government of Sweden notes that the Sultanate of Oman gives precedence to the provisions of Islamic Sharia and national legislation over the application of the provisions of the Convention. The Government of Sweden is of the view that this reservation which does not clearly specify the extent of the Sultanate of Oman's derogation from the provisions in question raises serious doubt as to the commitment of the Sultanate of Oman to the object and purpose of the Convention.

Furthermore, the Government of Sweden considers that, regarding the reservations made with respect to articles 9 (2), 15 (4), 16 (a, c, f), if put into practice, would inevitably result in discrimination against women on the basis of sex, which is contrary to the object and purpose of the Convention. It should be borne in mind that the principles of the equal rights of women and men and of non-discrimination on the basis of sex are set forth in the Charter of the United Nations as one of the purposes of the organization, as well as the declaration of Human Rights of 1948.

According to article 28 (2) of the Convention and to international customary law, as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of the Convention shall not be permitted. It is in the common interest of States that treaties to which they have chosen to become parties, are respected as to their object and purpose by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the aforesaid reservations made by the Sultanate of Oman to the Convention on the Elimination of All Forms of Discrimination against Women and considers them null and void.

This objection shall not preclude the entry into force of the Convention between the Sultanate of Oman and Sweden. The Conventon enters into force in its entirety between the two States, without the Sultanate of Oman benefiting from its reservations."

"The Government of Sweden has examined the reservations made by Brunei Darussalam on 24 May 2006 to the Convention on the Elimination of All Forms of Discrimination against Women.

The Government of Sweden notes that Brunei Darussalam gives precedence to the beliefs and principles of Islam and national legislation over the application of the provisions of the Convention. The Government of Sweden is of the view that this reservation which does not clearly specify the extent of Brunei Darussalam's derogation from the provisions in questions raises serious doubt as to the commitment of Brunei Darussalam to the object and purpose of the Convention.

Furthermore, the Government of Sweden considers that, regarding the reservation made with respect to article 9 (2), if put into practice, would inevitably result in discrimination against women on the basis of sex, which is contrary to the object and purpose of the Convention. It should be borne in mind that the principles of the equal rights of women and men and of non-discrimination on the basis of sex are set forth in the Charter of the United Nations as one of the purposes of the organization, as well as the Universal Declaration of Human Rights of 1948.

According to article 28 (2) of the Convention and to international customary law, as codified in the Vienna convention on the Law of Treaties, reservations incompatible with the object and purpose of the Convention shall not be permitted. It is in the common interest of States that treaties, to which they have chosen to become parties, are respected as to their object and purpose by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden therefore objects to the aforesaid reservations made by Brunei Darussalam to the Convention on the Elimination of All Forms of Discrimination against Women and considers them null and void.

This objection shall not preclude the entry into force of the Convention between Brunei Darussalam and Sweden. The convention enters int force in its entirety between the two States without Brunei Darussalam benefiting from its reservations."

"The Government of Sweden considers that the reservations made with respect to articles 9 (2), 15 (1), 15 (4) and 16 (1 a, c, f) would, if put into practice, inevitably result in discrimination against women on the basis of sex, which is contrary to the object and purpose of the Convention. It should be borne in mind that the principles of the equal rights of women and men and of non-discrimination on the basis of sex are set forth in the Charter of the United Nations as one of the purposes of the organization, and are enshrined in the Universal Declaration of Human Rights of 1948.

The Government of Sweden notes that the reservations made by the State of Qatar would give precedence to the provisions of the national Constitution and legislation as well as to the provisions of Islamic law and established practice. The Government of Sweden is of the belief that these reservations, which do not clearly specify the extent of the derogation by the State of Qatar from the provisions in question, raises serious doubt as to the commitment of the State of Qatar to the object and purpose of the Convention.

According to Article 28 (2) of the Convention and to international customary law, as codified in the Vienna Convention on the Law of Treaties, reservations incompatible with the object and purpose of a Convention shall not be permitted. It is in the common interest of States that treaties, to which they have chosen to become parties, are respected as to their object and purpose by all parties, and that States are prepared to undertake any legislative changes necessary to comply with their obligation under the treaties.

This objection does not preclude the entry into force of the Convention between the State of Qatar and Sweden. The Convention shall enter into force in its entirety between the two States without Qatar benefiting from its reservations.

It is the understanding of the Government of the Sweden that the declarations of the State of Qatar concerning articles 1 and 5 (a) of the Convention do not exclude or modify the legal effect of the provisions of the Convention in their application to Qatar and that these declarations do not affect the principle of equality of men and women which is fundamental to the Convention."

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

"The Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations

presents its compliments to the Secretary-General of the United Nations and has the honour to refer to the reservation made on 7 September 2000 by the Government of the Kingdom of Saudi Arabia to the Convention on the Elimination of All Forms of Discrimination Against Women, done at New York on 18 December 1979, which reads as follows:

"In case of contradiction between any term of the Convention and the norms of Islamic Law, the Kingdom is not under obligation to observe the contradictory terms of the Convention."

The Government of the United Kingdom note that a reservation which consists of a general reference to national law without specifying its contents does not clearly define for other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. The Government of the United Kingdom therefore object to the aforesaid reservation made by the Government [of] the Kingdom of the Saudi Arabia.

This objection shall not preclude the entry into force of the Convention between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Saudi Arabia."

"The Government of the United Kingdom of Great Britain and Northern Ireland have examined the reservation made by the Government of Mauritania in respect of the Convention, which reads as follows:

'Having seen and examined the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the UN General Assembly on 18 December 1979, have approved and do approve it in each and every one of its parts which are not contrary to Islamic Sharia and are in accordance with our Constitution.

The Government of the United Kingdom note that a reservation to a Convention which consists of a general reference to national law without specifying its contents does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. The Government of the United Kingdom therefore object to the reservation made by the Government of Mauritania.

This objection shall not preclude the entry into force of the Convention between the United Kingdom of Great Britain and Northern Ireland and Mauritania."

"The Government of the United Kingdom has examined the reservation made by the Government of the Democratic People's Republic of Korea on 27 February in respect of the Convention, which reads as follows:

'The Government of the Democratic People's Republic of Korea does not consider itself bound by the provisions of paragraph (f) of Article 2...of the Convention on the Elimination of All Forms of Discrimination Against Women.'

Paragraph (f) of Article 2 requires States Parties to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. The Government of the United Kingdom notes that a reservation which excludes obligations of such a general nature does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. The Government of the United Kingdom therefore objects to the reservation made by the Government of the Democratic People's Republic of Korea.

This objection shall not preclude the entry into force of the Convention between the United Kingdom of Great Britain and Northern Ireland and the Democratic People's Republic of Korea."

"The Government of the United Kingdom have examined the reservations made by the Government of the Syrian Arab Republic to the Convention on the Elimination of All Forms of Discrimination Against Women (New York, 18 December 1979) on 28 March 2003 in respect of Article 2; and Article 16, paragraphs 1 (c), (d), (f) and (g), concerning equal rights and responsibilities during marriage and at its dissolution with regard to guardianship, the right to choose a family name, maintenance and adoption; and article 16, paragraph 2, concerning the legal effect of the betrothal and the marriage of a child, inasmuch as this provision is incompatible with the provisions of the Islamic Shariah.

The Government of the United Kingdom note that the Syrian reservation specifies particular provisions of the Convention Articles to which the reservation is addressed. Nevertheless this reservation does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. The Government of the United Kingdom therefore object to the aforesaid reservations made by the Government of the Syrian Arab Republic.

This objection shall not preclude the entry into force of the Convention between the United Kingdom of Great Britain and Northern Ireland and the Syrian Arab Republic."

"The Government of the United Kingdom have examined the reservations made by the Government of the Kingdom of Bahrain to the Convention on the Elimination of All Forms of Discrimination Against Women (New York, 18 December 1979) on 18 June 2002 in respect of Article 2, in order to ensure its implementation within the bounds of the provisions of the Islamic Shariah; and Article 16, in so far as it is incompatible with the provisions of the Islamic Shariah.

The Government of the United Kingdom note that a reservation which consists of a general reference to national law without specifying its contents does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. The Government of the United Kingdom therefore object to the aforesaid reservations made by the Government of the Kingdom of Bahrain.

This objection shall not preclude the entry into force of the Convention between the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Bahrain."

"The Government of the United Kingdom have examined the reservations made by the Government of the United Arab Emirates to [the] Convention on the Elimination of all Forms of Discrimination against Women (New York, 18 December 1979) on 6 October 2004 in respect of Articles 2 (f), 15 (2), and 16 on the applicability of Sharia law.

The Government of the United Kingdom note that a reservation which consists of a general reference to a system of law without specifying its contents does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. The Government of the United Kingdom therefore object to the aforesaid reservations made by the Government of the United Arab Emirates.

This objection shall not preclude the entry into force of the Convention between the United Kingdom of Great Britain and Northern Ireland and the United Arab Emirates."

"The Government of the United Kingdom have examined the reservations made by the Government of Micronesia to the Convention on the Elimination of all Forms of Discrimination against Women (New York, 18 December 1979) on 9 September 2004 in respect of Article 11 (1) (d) on the enactment of comparable worth legislation.

The Government of the United Kingdom object to the aforesaid reservation made by the Government of Micronesia.

This objection shall not preclude the entry into force of the Convention between the United Kingdom of Great Britain and Northern Ireland and Micronesia."

"The Government of the United Kingdom have examined the reservations made by the Government of the Sultanate of Oman to the Convention on the Elimination of all Forms of Discrimination Against Women (New York, 18 December 1979).

In the view of the Government of the United Kingdom a reservation should clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. A reservation which consists of a general reference to a system of law without specifying its contents does not do so. The Government of the United Kingdom therefore object to the Sultanate of Oman's reservation from "all provisions of the Convention not in accordance with the provisions of the Islamic Sharia and legislation in force in the Sultanate of Oman".

The Government of the United Kingdom further object to the Sultanate of Oman's reservations from Article 15, paragraph 4 and Article 16 of the Convention.

These objections shall not preclude the entry into force of the Convention between the United Kingdom of Great Britain and Northern Ireland and Oman."

"The Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations.....has the honour to refer to the reservations made by the Government of Brunei Darussalam to the Convention on the Elimination of all Forms of Discrimination Agains Women (New York, 18 December 1979), which read:

'The Government of Brunei Darussalam expresses its reservations regarding those provisions of the said Convention that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the official religion of Brunei Darussalam and, without prejudice to the generality of the said reservations, expresses its reservations regarding paragraph 2 of Article 9 and paragraph 1 of Article 29 of the Convention.'

In the view of the United Kingdom a reservation should clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. A reservation which consists of a general reference to a system of law without specifying its contents does not do so. The Government of the United Kingdom therefore object to the reservations made by the Government of Brunei Darussalam.

This objection shall not preclude the entry into force of the Convention between the United Kingdom of Great Britain and Northern Ireland and Brunei Darussalam."

"The Government of the United Kingdom notes that a modification of the Kingdom of Bahrain's reservations to the Convention on the Elimination of All Forms of Discrimination Against Women ("the Convention") was received on 5 August 2016.

The Government of the United Kingdom notes that the Kingdom of Bahrain has substantively modified its reservations in respect of Article 2; Article 15, paragraph 4; and Article 16, stating that the implementation of these Articles will be "without breaching the provisions of the Islamic Shariah".

Notwithstanding that the Government of Bahrain has indicated that the modifications do not imply an extension of the original reservations, and that they instead constitute editorial amendments that do not place any limitations on Bahrain's commitments upon accession, the Government of the United Kingdom notes that a condition of compatibility with another system of law has been added to the reservation to Article 15, paragraph 4; and has been reformulated in respect of the reservations to Articles 2 and 16. The Government of the United Kingdom further notes that a reservation which consists of a general reference to a system of law without specifying its contents does not clearly define for the other States Parties to the Convention the extent to which the reserving State has accepted the obligations of the Convention. The Government of the United Kingdom of Great Britain and Northern Ireland therefore objects to the aforesaid reservations in respect of Article 2; Article 15, paragraph 4; and Article 16."

Notes:

[1] *Resolution 34/180, Official Records of the General Assembly of the United Nations, Thirty-fourth Session, Supplement No. 46* (A/34/46), p. 193.

[2] On 15 July 2009, the Government of Algeria notified the Secretary-General that it had decided to withdraw the reservation in respect to article 9 (2) made upon accession. The text of the reservaton reads as follows:

The Government of the People's Democratic Republic of Algeria wishes to express its reservations concerning the provisions of article 9, paragraph 2, which are incompatible with the provisions of the Algerian Nationality code and the Algerian Family Code.

The Algerian Nationality code allows a child to take the nationality of the mother only when:

- the father is either unknown or stateless;

- the child is born in Algeria to an Algerian mother and a foreign father who was born in Algeria;

- moreover, a child born in Algeria to an Algerian mother and a foreign father who was not born on Algerian territory may, under article 26 of the Algerian Nationality Code, acquire the nationality of the mother providing the Ministry of Justice does not object.

Article 41 of the Algerian Family Code states that a child is affiliated to its father through legal marriage.

Article 43 of that Code states that `the child is affiliated to its father if it is born in the 10 months following the date of separation or death.

[3] Upon ratification, the Government of Australia made the following reservations:

"The Government of Australia states that maternity leave with pay is provided in respect of most women employed by the Commonwealth Government and the Governments of New South Wales and Victoria. Unpaid maternity leave is provided in respect of all other women employed in the State of New South Wales and elsewhere to women employed under Federal and some State industrial awards. Social Security benefits subject to income tests are available to women who are sole parents.

"The Government of Australia advises that it is not at present in a position to take the measures required by article 11 (2) to introduce maternity leave with pay or with comparable social benefits throughout Australia.

The Government of Australia advises that it does not accept the application of the Convention is so far as it would require alteration of Defence Force policy which exludes women for combat and combat-related duties. The Governnment of Australia is reviewing this policy do as to more closely define 'combat' and ' combat-related dutes."

On 30 August 2000, the Government of Australia notified the Secretary-General of the following:

"The Government of Australia having considered the reservations [made upon ratification], hereby withdraws that part of the reservations which states:

The Goverment of Australia advises that it does not accept the application of the Convention in so far as it would require alteration of Defence Force policy which excludes women from combat and combat-related duties. The Government of Australia is reviewing this policy so as to more closely define 'combat' and 'combat-related duties'."

and hereby deposits the following reservation:

"The Government of Australia advises that it does not accept the application of the Convention in so far as it would require alteration of Defence Force policy which excludes women from combat duties."

On 14 December 2018, the Government of Australia notified the Secretary-General of the following:

"Whereas on 28 July 1983, the Government of Australia ratified, for and on behalf of Australia and subject to certain reservations, the Convention on the Elimination of All Forms of Discrimination against Women, done at New York on 18 December 1979;

The Government of Australia having considered the reservations, hereby withdraws that part of the reservations which states:

The Government of Australia advises that it does not accept the application of the Convention in so far as it would require alteration of Defence Force policy which excludes women from combat duties."

See depositary notification C.N.592.2018.TREATIES-IV.8 of 14 December 2018.

The complete text of the reservations is published in United Nations, *Treaty Series* , vol. 1325, p. 378.

[4] Upon ratification, the Government of Austria made the following reservation:

"Austria reserves its right to apply the provision of article 7 (b), as far as service in the armed forces is concerned, and the provision of article 11, as far as night work of women and special protection of working women is concerned, within the limits established by national legislation."

On 11 September 2000, the Government of Austria informed the Secretary-General that it had decided to withdraw the reservation to article 7 (b) of the Convention made upon ratification.

Further on 14 September 2006, the Government of Austria informed the Secretary-General of the following:

"The reservation formulated by the Republic of Austria to Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women on the occasion of ratification is withdrawn with regard to the night work of women. The Republic of Austria maintains the reservation with regard to the special protection of working women."

The complete text of the reservation is published in United Nations, *Treaty Series* , vol. 1272, p. 456.

On 10 June 2015, the Government of Austria informed the Secretary-General of the following:

"The Republic of Austria ratified the Convention on the Elimination of All Forms of Discrimination against Women on 31 March 1982 subject to reservations to Article 7 (b) and Article 11.

The reservation to Article 7 (b) was withdrawn in 2000 and the reservation to Article 11 was partly withdrawn in 2006. Following a review of the remaining reservation, the Republic of Austria has decided to withdraw its reservation to Article 11 in accordance with Article 28 (3) of the Convention."

The withdrawn reservation read as follows:

"Austria reserves its right to apply the provision of Article 11, as far as special protection of working women is concerned within the limits established by national legislation."

[5] Upon accession, the Government of Bangladesh made the following reservation:

"The Government of the People's Republic of Bangladesh does not consider as binding upon itself the provisions of articles 2, 13 (a) and 16 (1) *(c)* and *(f)* as they conflict with *Sharia* law based on Holy Quran and Sunna."

On 23 July 1997, the Government of Bangladesh notified the Secretary-General that it had decided to withdraw the reservation relating to articles 13 *(a)* and 16 (1) *(f)* made upon accession.

The complete text of the reservation is published in United Nations, *Treaty Series* , vol. 1379, p. 336.

[6] In communications received on 14 September 1998 and 8 July 2002, the Government of Belgium informed the Secretary-General that it had decided to wihdraw its reservations made upon ratification with respect to articles 7 and 15, paragraphs 2 and 3, respectively. For the text of the reservations, see United Nations, *Treaty Series* , vol. 1402, p. 376.

[7] The former Yugoslavia had signed and ratified the Convention on 17 July 1980 and 26 February 1982, respectively. See also note 1 under “Bosnia and Herzegovina”, “Croatia”, “former Yugoslavia”, “Slovenia”, “The Former Yugoslav Republic of Macedonia” and “Yugoslavia” in the “Historical Information” section in the front matter of this volume.

[8] Upon signature and ratification, the Government of Brazil made, and confirmed, respectively, the following reservation:

"The Government of the Federative Republic of Brazil hereby expresses its reservations to article 15, paragraph 4 and to article 16, paragraphs 1 (a), (c), (g) and (h) of the Convention on the Elimination of All Forms of Discrimination Against Women.

"Furthermore, Brazil does not consider itself bound by article 29, paragraph 1, of the above-mentioned Convention."

On 20 December 1994, the Government of Brazil notified the Secretary-General that it had decided to withdraw the following reservation made upon signature and confirmed upon ratification:

"The Government of the Federative Republic of Brazil hereby expresses its reservations to article 15, paragraph 4 and to article 16, paragraphs 1 (a), (c), (g) and (h) of the Convention on the Elimination of All Forms of Discrimination Against Women.

The complete text of the reservation is published in United Nations, *Treaty Series* , vol. 1249, p. 121.

[9] On 24 June 1992, the Government of Bulgaria notified the Secretary-General of its decision to withdraw the reservation to article 29 (1) of the Convention, made upon signature and confirmed upon ratification. For the text of the said reservation, see United Nations, *Treaty Series* , vol. 1249, p. 121.

[10] The Secretary-General received several objections to the signature of the above Convention by Democratic Kampuchea. These objections are identical in matter, *mutatis mutandis* , as those reproduced in note 3 in chapter IV.3 regarding Democratic Kampuchea. Following is the list of States who have notified their objection with the date of receipt of the notifications:

Participant	***Date of receipt***		
German Democratic Republic	11	Dec	1980
Hungary	19	Jan	1981
Bulgaria	29	Jan	1981
Russian Federation	13	Feb	1981
Belarus	18	Feb	1981
Czechoslovakia	10	Mar	1981

[11] Although Democratic Kampuchea had signed both [the International Covenant on Economic, Social and Political Rights and the International Covenant on Civil and Political Rights] on 17 October 1980 (see note 3 in this chapter), the Government of Cambodia deposited an instrument of accession to the said Covenants.

[12] On 28 May 1992, the Government of Canada notified the Secretary-General of its decision to withdraw the declaration to article 11 (1) (d) of the Convention, made upon ratification. For the text of the said declaration, see United Nations, *Treaty Series* , vol. 1257, p. 496.

[13] On 27 April 1999, the Government of Portugal informed the Secretary-General that the Convention would apply to Macao.

Subsequently, the Secretary-General the Secretary-General received communications concerning the status of Macao from Portugal and China (see note 1 under Portugal and note 3 under China regarding Macao in the “Historical Information” section in the front matter of this volume.) Upon resuming the exercise of sovereignty over Macao, China notified the Secretary-General that the Convention with the reservation made by China will also apply to the Macao Special Administrative Region.

[14] On 10 June 1997, the Secretary-General received communications concerning the status of Hong Kong from the Governments of China and the United Kingdom (see also note 2 under “China” and note 2 under “United Kingdom of Great Britain and Northern Ireland” regarding Hong Kong in the “Historical Information” section in the front matter of this volume). Upon resuming the exercise of sovereignty over Hong Kong, China notified the Secretary-General that the Convention with the reservation made by China will also apply to the Hong Kong special Administrative Region.

In addition, the notification made by the Government of China contained the following declarations:

1. ...

2. The Government of the People's Republic of China understands, on behalf of the Hong Kong Special Administrative Region, the main purpose of the Convention, in the light of the definition contained in article 1, to be the reduction, in accordance with its terms, of discrimination against women, and does not therefore regard the Convention as imposing any requirement upon the Hong Kong Special Administrative Region to repeal or modify any of its existing laws, regulations, customs or practices which provide for women to be treated more favourably than men, whether temporarily or in the longer term. Undertakings by the Government of the People's Republic of China on behalf of the Hong Kong Special Administrative Region under article 4, paragraph 1, and other provisions of the Convention are to be construed accordingly.

3. The Government of the People's Republic of China reserves, for the Hong Kong Special Administrative Region, the right to continue to apply relevant immigration legislation governing the entry into, stay in and departure from the Hong Kong Special Administrative Region as may be deemed necessary from time to time. Accordingly, acceptance of article 15, paragraph 4, and of the other provisions of the Convention is subject to the provisions of any such legislation ass not at the time having the right under the laws of the Hong Kong Special Administrative Region to enter and remain in the Hong Kong Special Administrative Region.

4. The Government of the People's Republic of China understands, in the light of the definition contained in article 1, that none of its obligations under the Convention shall be treated as extending to the affairs of religious denominations or orders in the Hong Kong Special Administrative Region.

5. Laws applicable in the New Territories of the Hong Kong Special Administrative Region which enable male indigenous villagers to exercise certain rights in respect of property and which provide for rent concessions in respect of land or property held by indigenous persons or their lawful successors through the male line will continue to [be] applied.

6. The Government of the People's Republic of China reserves, for the Hong Kong Special Administrative Region, the right to apply all its legislation and the rules of pension schemes affecting retirement pensions, survivors' benefits in relation to death or retirement (including retirement on ground of redundancy), whether or not derived from a social security scheme.

This reservation will apply to any future legislation which may modify or replace such aforesaid legislation, or the rules of pension schemes, on the understanding that the terms of such legislation will be compatible with the Government of the People's Republic of China's obligations under the Convention in respect of the Hong Kong Special Administrative Region.

The Government of the People's Republic of China reserves the right for the Hong Kong Special Administrative Region to apply any non-discriminatory requirement for a qualifying period of employment for the application of the provisions contained in article 11, paragraph 2 of the Convention.

7. The Government of the People's Republic of China understands, on behalf of the Hong Kong Special Administrative Region, the intention of article 15, paragraph 3, of the Convention to be that only those terms or elements of the contract or other private instrument which are discriminatory in the sense described are to be deemed null and void, but not necessarily the contract or instrument as a whole.

[15] On 30 July 2007, the Government of Cook Islands notified the Secretary-General of its decision to withdraw the reservations made upon accession to the Convention. The text of the reservations reads as follows: "The Government of the Cook Islands reserves the right not to apply the provisions of Article 11 (2) (b). The Government of the Cook Islands reserves the right not to apply the provisions of the Convention in so far as they are inconsistent with policies relating to recruitment into or service in: (a) The armed forces which reflect either directly or indirectly the fact that members of such forces are required to serve on armed forces aircraft or vessels and in situations involving armed combat; or (b) The law enforcement forces which reflect either directly or indirectly the fact that members of such forces are required to serve in situations involving violence or threat of violence. The Government of the Cook Islands reserves the right not to apply Article 2 (f) and Article 5 (a) to the extent that the customs governing the inheritance of certain Cook Islands chiefly titles may be inconsistent with those provisions."

[16] On 28 June 2000, the Government of Cyprus informed the Secretary-General that it had decided to withdraw its reservation to article 9 (2) made upon accession. The text of the reservation reads as follows:

"The Government of the Republic of Cyprus wishes to enter a reservation concerning the granting to women of equal rights with men with respect to the nationality of their children, mentioned in article 9, paragraph 2 of the Convention. This reservation is to be withdrawn upon amendment of the relevant law."

[17] Czechoslovakia had signed and ratified the Convention on 17 July 1980 and 16 February 1982, respectively, with a reservation. Subsequently, on 26 April 1991, the Government of Czechoslovakia notified the Secretary-General of its decision to withdraw the reservation made upon signature and confirmed upon ratification. For the text of the reservation, see United Nations, *Treaty Series* , vol. 1249, p 123. See also note 1 under “Czech Republic” and note 1 under “Slovakia” in the “Historical Information” section in the front matter of this volume.

[18] With regard to the reservations made by the Democratic People’s Republic of Korea upon accession, the Secretary-General received the following communication from the State indicated hereinafter:

Ireland (2 April 2002):

"The Government of Ireland has examined the reservations made by the Government of the Democratic People's Republic of Korea to paragraph (f) of article 2 of article 9 of the Convention on the Elimination of All Forms of Discrimination against Women, at the time of its accession thereto.

The Government of Ireland recalls that by acceding to the Convention, a State commits itself to adopt the measures required for the elimination of discrimination, in all its forms and manifestations, against women.

The Government of Ireland notes that the reservation to paragraph (f) of article 2 aims at excluding the Democratic People's Republic of Korea from the obligation to adopt necessary measures, including those of a legislative character, to eliminate any form of discrimination against women. This provision touches upon a key element for the effective elimination of discrimination against women.

The Government of Ireland further notes that the reservation to paragraph 2 of article 9 of the Convention aims to exclude an obligation of non-discrimination, which is the object of the Convention.

The Government of Ireland considers that the obligations contained in paragraph (f) of article 2 and paragraph 2 of article 9 are so central to the aims of the Convention as to render the aforesaid reservations contrary to its object and purpose.

The Government of Ireland recalls that. In accordance with paragraph 2 of article 28 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Ireland therefore objects to the aforesaid reservations made by the Government of the Democratic People's Republic of Korea to the Convention on the Elimination of All Forms of Discrimination against WomenThis objection does not preclude the entry into force of the Convention between Ireland and the Democratic People's Republic of Korea."

[19] On 23 November 2015, the Government of the Democratic People's Republic of Korea notified the Secretary-General of its decision to withdraw the reservations to paragraph (f) of article 2 and paragraph 2 of article 9 of the Convention. The remaining reservation reads as follows: "The Government of the Democratic People's Republic of Korea does not consider itself bound by the provisions article 29 of [the Convention]."

[20] On 26 June 1998, the Secretary-General received from the Government of Denmark the following communication with regard to the reservation made by Lebanon upon accession in respect of article 9, paragraph 2, and article 16, paragraph 1 c), d), f) and g). in as much as the last paragraph deals with the right to choose a family name:

The Government of Denmark is of the view that the reservations made by the Government of Lebanon raise doubts as to the commitment of Lebanon to the object and purpose of the Convention and would recall that, according to article 28, paragraph 2 of the Convention, a reservation incompatible with the object and purpose of the present Convention shall not be permitted. For this reason, the Government of Denmark objects to the said reservations made by the Government of Lebanon.

The Government of Denmark recommends the Government of Lebanon to reconsider their reservations to [the Covenant].

[21] On 4 January 2008, the Government of Egypt notified the Secretary-General that it had decided to withdraw the reservation to article 9 (2) made upon ratification. The reservation reads as follows:

..., concerning the granting to women of equal rights with men with respect to the nationality of their children, without prejudice to the acquisition by a child born of a marriage of the nationality of his father. This is in order to prevent a child's acquisition of two nationalities where his parents are of different nationalities, since this may be prejudicial to his future. It is clear that the child's acquisition of his father's nationality is the procedure most suitable for the child and that this does not infringe upon the principle of equality between men and women, since it is customary for a woman to agree, upon marrying an alien, that her children shall be of the father's nationality.

[22] On 24 January 2000, the Government of Fiji notified the Secretary-General that it had decided to withdraw its "reservations on articles 5 (a) and 9 of the Convention" made upon accession.

[23] Upon ratification, the Government of France had also made the following reservations:

Articles 5 (b) and 16 (1 (d)

1. The Government of the French Republic declares that article 5 (b) and article 16, paragraph 1 (d), must not be interpreted as implying joint exercise of parental authority in situations in which French legislation allows of such excercise by only one parent.

2. The Government of the French Republic declares that aritcle 16, paragraph 1 (d), of the Convention must not preclude the application of article 383 of the Civil Code.

Article 7

The Government of the French Republic declares that article 7 must not preclude the application of the second paragraph of article LO 128 of the electoral code.

Articles 15 (2) and (3) and 16, 1 (c) and (h)

The Government of the French Republic declares that article 15, paragraphs 2 and 3, and article 16, paragraphs 1 (c) and 1 (h), of the Convention must not preclude the application of the provisions of Book Three, part V, chapter II, of the Civil Code.

In a notification received on 26 March 1984, the Government of France informed the Secretary-General of its decision to withdraw the reservation to article 7 of the Convention made upon ratification. The notification specified that the withdrawal was effected because Organic Law No. 83-1096 of 20 December 1983 has abrogated article LO 128 of the electoral code relating to temporary disqualifications of persons who have obtained French nationality.

Subsequently, in a notification received on 21 July 1986, the Government of France informed the Secretary-General that it decided to withdraw its reservation relating to article 15, paragraphs 2 and 3, and article 16, paragraphs 1 (c), (d) and (h) of the Convention, made upon ratification. The notification specified that the withdrawal was effected because the existing discriminatory provisions, against women, in the rules governing property rights arising out of matrimonial relationship and in those concerning the legal administration of the property of children were abrogated by Act No. 85-1372 of 23 December 1985 concerning equality of spouses in respect of property rights arising out of a matrimonial relationship and equality of parents in respect of the property of minor children, which entered into force on 1 July 1986.

Further, on 22 December 2003, the Government of France informed the Secretary-General that it had decided to lift its reservation relating to articles 5(b) and 16 1(d) made upon ratification.

The complete text of the reservations is published in United Nations, *Treaty Series* , vol. 1343, p. 370.

Further, on 14 October 2013, the Government of France informed the Secretary-General that it had decided to withdraw the following reservations relating to articles 14 and 16 1(g) made upon ratification:

Article 14

1. The Government of the French Republic declares that article 14, paragraph 2 (c), should be interpreted as guaranteeing that women who fulfill the conditions relating to family or employment required by French legislation for personal participation shall acquire their own rights within the framework of social security.

2. The Government of the French Republic declares that article 14, paragraph 2 (h), of the Convention should not be interpreted as implying the actual provision, free of charge, of the services mentioned in that paragraph.

Article 16 1 (g)

The Government of the French Republic enters a reservation concerning the right to choose a family name mentioned in article 16, paragraph 1 (g), of the Convention.

[24] The German Democratic Republic had signed and ratified the Convention on 25 June 1980 and 9 July 1980, respectively. For the text of the reservation, see United Nations, *Treaty Series* , vol. 1249, p. 128. See also note 2 under "Germany" in the "Historical Information" section in the front matter of this volume.

[25] Upon ratification, the Government of the Federal Republic of Germany made the following declaration and reservation in respect of article 7 (b):

The Federal Republic of Germany declares in respect of the paragraph of the Preamble to the Convention starting with the words "affirming that the strengthening of international peace and security":

The right of peoples to self-determination, as enshrined in the Charter of the United Nations and in the International Covenants of 16 December 1966, applies to all peoples and not only to those living 'under alien and colonial domination and foreign occupation'. All peoples thus have the inalienable right freely to determine their political status and freely to pursue their economic, social and cultural development. The Federal Republic of Germany would be unable to recognize as legally valid an interpretation of the right to self-determination which contradicts the unequivocal wording of the Charter of the United Nations and of the two International Covenants of 16 December 1966 on Civil and Political Rights and on Economic, Social and Cultural rights. It will interpret the 11th paragraph of the Preamble accordingly.

Reservation

Article 7(b) will not be applied to the extent that it contradicts the second sentence of Article 12 *a* (4) of the Basic Law of the Federal Republic of Germany. Pursuant to this provision of the Constitution, women may on no acount render service involving the use of arms.

On 10 December 2001, the Government of the Federal Republic of Germany informed the Secretary-General that it had decided to withdraw its reservation to article 7 (b) made upon ratification.

The complete text of the reservation is published in United Nations, *Treaty Series* , vol. 1402, p. 378.

[26] See note 1 under "Germany" regarding Berlin (West) in the "Historical Information" section in the front matter of this volume.

[27] An instrument of accession had been deposited on 14 March 1980 with the Secretary-General (See, C.N.88.1980 TREATIES-2 of 1 April 1980). The signature was affixed on 17 July 1980 and was accompanied by the following declaration:

The People's Revolutionary Republic of Guinea wishes to sign the Convention . . . with the understanding that this procedure annuls the procedure of accession previously followed by Guinea with respect to the Convention.

[28] In a communication received on 8 December 1989, the Government of Hungary notified the Secretary-General that it had decided to withdraw the reservation in respect of article 29 (1) made upon ratification. For the text of the reservation see United Nations, *Treaty Series* , vol. 1249, p. 129.

[29] Upon accession, the Government of Ireland also made the following reservations:

" *Article 9 (1)*

Pending the proposed amendment to the law relating to citizenship, which is at an advance stage, Ireland reserves the right to retain the provisions in its existing law concerning the acquisition of citizenship on marriage.

Articles 13 (b) and (c)

The question of supplementing the guarantee of equality contained in the Irish Constitution which special legislation governing access to financial credit and other services and recreational activities, where these are provided by private persons, organisations or enterprises is under consideration. For the time being Ireland reserves the right to regard its existing law and measures in this area as appropriate for the attainment in Ireland of the objectives of the Convention.

Article 15

With regard to paragraph 3 of this article, Ireland reserves the right not to supplement the existing provisions in Irish law which accord women a legal capacity identical to that of men with further legislation governing the validity of any contract or other private instrument freely entered into by a woman.

With regard to paragraph 4 of this article, Ireland observes the equal rights of women relating to the movement of persons and the freedom to choose their residence; pending the proposed amendment of the law of domicile, which is at an advanced stage, it reserves the right to retain its existing law.

Articles 11 (1) and 13 (a)

Ireland reserves the right to regard the Anti-Discrimination (Pay) Act, 1974 and the Employment Equality Act 1977 and other measures taken in implementation of the European Economic Community standards concerning employment opportunities and pay as sufficient implementation of articles 11,1 (b), (c) and (d).

Ireland reserves the right for the time being to maintain provisions of Irish legislation in the area of social security which are more favourable to women than men and, pending t coming into force of the Social Welfare (Amendment) (No. 2) Act, 1985, to apply special conditions to the entitlement of married women to certain social security schemes."

On 19 December 1986, the Government of Ireland notified the Secretary-General that "following the enactment of the Irish Nationality and Citizenship Act 1986, and the Domicile and Recognition of Foreign Divorces Act 1986, it has been decided to withdraw certain reservations which had been made upon accession and relating to articles 9 (1) and 15 (4) of the Convention. Following the coming into force of the Social Welfare (Amendment) (No. 2) Act 1985, it has also been decided to withdraw the reservation contained in the concluding

words in the text of Ireland's reservation to Article (11) (1) and 13 (a), that is: 'and pending the coming into force of the Social Welfare (No. 2) Act 1985, to apply special conditions to the entitlement of married women to certain social security schemes' ".

Further, on 24 March 2000, the Government of Ireland notified the Secretary-General that it had decided to withdraw its reservation made to article 15 (3) made upon accession.

Subsequently, on 11 June 2004, the Government of Ireland notified the Secretary-General that it had decided to withdraw its reservation to articles 13(b) and (c) made upon accession which reads as follows:

"The question of supplementing the guarantee of equality contained in the Irish Constitution which special legislation governing access to financial credit and other services and recreational activities, where these are provided by private persons, organisations or enterprises is under consideration. For the time being Ireland reserves the right to regard its existing law and measures in this area as appropriate for the attainment in Ireland of the objectives of the Convention."

The complete text of the reservations is published in United Nations, *Treaty Series* , vol. 1413, p. 415.

[30] On 12 December 1986, the Secretary General received from the Government of Israel the following objection:

. . . In the view of the Government of the State of Israel, such declaration which is explicitly of a political character is incompatible with the purposes and objectives of the Convention and cannot in any way affect whatever obligations are binding upon Iraq under general international law or under particular conventions.

The Government of the State of Israel will, in so far as concerns the substance of the matter, adopt towards Iraq an attitude of complete reciprocity.

[31] Upon ratification, the Government of Jamaica made the following reservations:

"The Government of Jamaica does not consider itself bound by the provisions of Article 9, paragraph 2, of the Convention."

"The Government of Jamaica delcares that it does not consider itself bound by the provions of Article 29, paragraph 1, of the Convention."

On 8 September 1995, the Government of Jamaica notified the Secretary-General of its decision to withdraw its reservation with respect to article 9 (2) which it had made upon ratification.

The complete text of the reservations is published in United Nations, *Treaty Series* , vol. 1374, p. 439.

[32] The Government of Kuwait informed the Secretary-General, by a notification recieved on 9 December 2005, of its decision to withdraw the following reservation in respect of article 7 (a), made upon accession to the Convention, which read as follows:

The Government of Kuwait enters a reservation regarding article 7 (a), inasmuch as the provision contained in that paragraph conflicts with the Kuwaiti Electoral Act, under which the right to be eligible for election and to vote is restricted to males.

It is recalled that, on 12 February 1997, the Secretary-General received from the Government of Denmark the following communication with regard to reservations made by Kuwait upon ratification:

"The Government of Denmark finds that the said reservations are covering central provisions of the Convention. Furthermore it is a general principle of international law that internal law may not be invoked as justification for failure to perform treaty obligations. The Government of Denmark finds that the reservations are incompatible with the object and purpose of the Convention and accordingly inadmissible and without effect under international law. Consequently, the Government of Denmark objects to these reservations.

It is the opinion of the Government of Denmark that no time limit applies to objections against reservations, which are inadmissible under international law.

The Convention remains in force in its entirety between Kuwait and Denmark.

The Government of Denmark recommends the Government of Kuwait to reconsider its reservations to the [said] Convention."

On that same date, the Secretary-General also received from the Government of Denmark, communications, identical in essence, *mutatis mutandis* , as the one made for Kuwait, with regard to reservations made by Lesotho and Malaysia, Maldives, and Singapore made upon accession, as well as on 23 March 1998, in regard to the resertions made by Pakistan upon ratification.

[33] On 25 August 2004, the Government of Lesotho informed the Secretary-General that it had decided to modify its reservation. The original reservation made upon ratification reads as follows:

"The Government of the Kingdom of Lesotho declares that it does not consider itself bound by article 2 to the extent that it conflicts with Lesotho's constitutional stipulations relative to succession to the throne of the Kingdom of Lesotho and law relating to succession to chieftainship. The Lesotho Government's ratification is subject to the understanding that none of its obligations under the Convention especially in article 2 (e), shall be treated as extending to the affairs of religious denominations. Furthermore, the Lesotho Government declares it shall not take any legislative measures under the Convention where those measures would be incompatible with the Constitution of Lesotho."

[34] On 5 July 1995, the Government of the Socialist People's Libyan Arab Republic notified the Secretary-General of the "new formulation of its reservation to the Convention, which replaces the formulation contained in the instrument of accession" which read as follows:

[Accession] is subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic *Shariah* .

[35] Upon accession, the Government of Liechtenstein made the following reservations:

Reservation concerning article 1

"In the light of the definition given in article 1 of the Convention, the Principality of Liechtenstein reserves the right to apply, with respect to all the obligations of the Convention, article 3 of the Liechtenstein Constitution."

Reservation concerning article 9 (2)

The Principality of Liechtenstein reserves the right to apply the Liechtenstein legislation according to which Liechtenstein nationality is granted under certain conditions."

On 3 October 1996, the Government of Liechtenstein notified the Secretary-General that it had decided to withdraw its reservation to article 9 (2) made upon accession which reads as follows:

The Principality of Liechtenstein reserves the right to apply the Liechtenstein legislation according to which Liechtenstein nationality is granted under certain conditions."

The complete text of the reservation is published in United Nations, *Treaty Series* , vol. 1936, p. 407.

[36] On 24 October 1991, the Government of Malawi notified the Secretary-General of its decision to withdraw the following reservations made upon accession:

"Owing to the deep-rooted nature of some traditional customs and practices of Malawians, the Government of the Republic of Malawi shall not, for the time being, consider itself bound by such of the provisions of the Convention as require immediate eradication of such traditional customs and practices.

"While the Government of the Republic of Malawi accepts the principles of article 29, paragraph 2 of the Convention this acceptance should nonetheless be read in conjunction with [its] declaration of 12th December 1966, concerning the recognition, by the Government of the Republic of Malawi, as compulsory the jurisdiction of the International Justice under article 36, paragraph 2 of the Statute of the Court."

In respect of the first reservation, the Secretary-General had received, on 5 August 1987, from the Government of Mexico the following communication:

The Government of the United Mexican States hopes that the process of eradication of traditional customs and practices referred to in the first reservation of the Republic of Malawi will not be so protracted as to impair fulfillment of the purpose and intent of the Convention.

[37] On 6 February 1998, the Government of Malaysia notified the Secretary-General of a partial withdrawal as follows:

“The Government of Malaysia withdraws its reservation in respect of article 2(f), 9(1), 16(b), 16(d), 16(e) and 16(h).

The same date, the Government of Malaysia notified the Secretary-General that it had decided to modify its reservation made upon accession as follows:

With respect to article 5 (a) of the Convention, the Government of Malaysia declares that the provision is subject to the *Syariah* law on the division of inherited property.

With respect to article 7 (b) of the Convention, the Government of Malaysia declares that the application of said article 7 (b) shall not affect appointment to certain public offices like the Mufti *Syariah* Court Judges, and the Imam which is in accordance with the provisions of the Islamic Shariah law.

With respect to article 9, paragraph 2 of the Convention, the Government of Malaysia declares that its reservation will be reviewed if the Government amends the relevant law.

With respect to article 16.1 (a) and paragraph 2, the Government of Malaysia declares that under the Syariah law and the laws of Malaysia the age limit for marriage for women is sixteen and men is eighteen."

In keeping with the depositary practice followed in similar cases, the Secretary-General proposed to receive the modification in question for deposit in the absence of any objection on the part of any of the Contracting States, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of its notification (21 April 1998), that is to say, on 20 July 1998.

In this regard, on the dates indicated below, the Secretary-General received from the Governments of France and the Netherlands the following communcations relating to the said partial withdrawal.

France (20 July 1998:)

France considers that the reservation made by Malaysia, as expressed in the partial withdrawal and modifications made by Malaysia on 6 February 1998, is incompatible with the object and purpose of the Convention. France therefore objects to the [reservation].

This objection shall not otherwise affect the entry into force of the Convention between France and Malaysia.

Consequently, the modification in question is not accepted, the Government of France having objected thereto.

Netherlands (21 July 1998):

"The Government of the Kingdom of the Netherlands has examined the modfication of the reservations made by Malaysia to article 5(a) and 16.1. (a) and paragraph 2 of the [Convention].

The Government of the Kingdom of the Netherlands acknowledges that Malaysia has specified these reservations, made at the time of its accession to the Convention. Nevertheless the Govenrment of the Kingdom of the Netherlands wishes to declare that it assumes that Malaysia will ensure implementation of the rights enshrined in the above articles and will strive to bring its relevant national legislation into conformity with the obligations imposed by the Convention. This declaration shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Malaysia."

[38] On 29 January 1999, the Government of Maldives notified the Secretary-General of a modification of its reservation made

upon accession. In keeping with the depositary practice followed in similar cases, the Secretary-General proposed to receive the modification in question for deposit in the absence of any objection on the part of any of the contracting States, either to the deposit itself or to the procedure envisaged, within a period of 90 days from the date of its notification (i.e. 25 March 1999). No objection having been received, the modification was accepted for deposit upon the expiration of the 90 day period, that is to say on 23 June 1999. The text of the reservations made upon accession read as follows:

Reservations:

"The Government of the Republic of Maldives will comply with the provisions of the Convention, except those which the Government may consider contradictory to the principles of the Islamic Sharia upon which the laws and traditions of the Maldives is founded.

Furthermore, the Republic of Maldives does not see itself bound by any provisions of the Convention which obliges to change its Constitution and laws in any manner."

In this regard, the Secretary-General received communications from various States on the dates indicated hereinafter:

Finland (17 August 1999):

"The Government of Finland objected in 1994 to the reservations made by the Government of Maldives upon accession to the Convention on the Elimination of All Forms of Discrimination against Women. The Government of Finland has now examined the contents of the modified reservation made by the Government of the Republic of Maldives to the said Convention.

The Government of Finland welcomes with satisfaction that the Government of the Republic of Maldives has specified the reservations made at the time of its accession to the Convention. However, the reservations to Article 7 (a) and Article 16 still include elements which are objectionable. The Government of Finland therefore wishes to declare that it assumes that the Government of the Republic of Maldives will ensure the implementation of the rights recognised in the Convention and will do its utmost to bring its national legislation into compliance with obligations under the Convention with a view to withdrawing the reservation. This declaration does not preclude the entry into force of the Convention between the Maldives and Finland".

Germany (16 August 1999):

The modification does not constitute a withdrawal or a partial withdrawal of the original reservations to the Convention by the Republic of the Maldives. Instead the modification constitutes a new reservation to articles 7 a (right of women to vote in all elections and public referenda and be eligible for elections to all publicly elected bodies) and 16 (elimination of discrimination against women in all matters relating to marriage and family relations) of the Convention extending and reinforcing the original reservations.

The Government of the Federal Republic of Germany notes that reservations to treaties can only be made by a State when signing, ratifying, accepting, approving or acceding to a treaty (article 19 of the Vienna Convention on the Law of Treaties). After a State has bound itself to a treaty under international law it can no longer submit new reservations or extend or add to old reservations. It is only possible to totally or partially withdraw original reservations, something unfortunately not done by the Government of the Republic of the Maldives with its modification.

The Government of the Federal Republic of Germany objects to the modification of the reservations".

[39] On 31 March 2010, the Government of the Republic of Maldives notified the Secretary-General of its decision to withdraw its reservation regarding article 7(a). The reservation read as follows:

" ... The Government of the Republic of Maldives expresses its reservation to article 7(a) of the Convention, to the extent that the provision contained in the said paragraph conflicts with the provision of article 34 of the Constitution of the Republic of Maldives ... ."

On 24 February 2020, the Government of the Republic of Maldives notified the Secretary-General of its decision to partially withdraw its reservations to article 16 of the Convention. See CN.73.2020.TREATIES-IV.8 dated 25 February 2020 for the reservations to article 16 that have been withdrawn. The remaining reservations to article 16 concern sections (a), (c), (d) and (f) of paragraph 1. The original reservations to article 16 read as follows:

“2. The Government of the Republic of Maldives reserves its right to apply article 16 of the Convention concerning the equality of men and women in all matters relating to marriage and family relations without prejudice to the provisions of the Islamic Sharia, which govern all marital and family relations of the 100 percent Muslim population of the Maldives.”

[40] With regard to the reservation made by Mauritania upon accession, the Secretary-General received communications from the following States on the dates indicated hereinafter:

Ireland (13 June 2002):

"The Government of Ireland [has] examined the reservation made by Mauritania upon its accession to the Convention on the Elimination of All Forms of Racial Discrimination against Women.

The Government of Ireland [is] of the view that a reservation which consists of a general reference to religious law and to the Constitution of the reserving State and which does not clearly specify the provisions of the Convention to which it applies and the extent of the derogation therefrom, may cast doubts on the commitment of the reserving State to fulfil its obligations under the Convention. The Government of Ireland [is] furthermore of the view that such a general reservation may undermine the basis of international treaty law.

The Government of Ireland [recalls] that article 28, paragraph 2 of the Convention provides that a reservation incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Ireland therefore [objects] to the reservation made by Mauritania to the Convention on the Elimination of All Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention between Ireland and Mauritania."

France (17 June 2002):

The Government of the French Republic has examined the reservation made by the Government of Mauritania upon accession to the Convention of 18 December 1979 on the Elimination of All Forms of Discrimination against Women. By stating that it approves the Convention in each and every one of its parts which are not contrary to Islamic Sharia and to its Constitution, the Government of Mauritania formulates a reservation of general, indeterminate scope that gives the other States parties no idea which provisions of the Convention are currently affected by the reservation or might be affected in future. The Government of the French Republic considers that the reservation could make the provisions of the Convention ineffective and objects to it.

[41] In a communication received on 5 May 1998, the Government of Mauritius informed the Secretary-General that it had decided to withdraw its reservations with regard to subparagraphs (b) and (d) of paragraph 1 of article 11 and subparagraph (g) of paragraph 1 of article 16 made upon accession. For the text of the reservations, see United Nations, *Treaty Series* , vol. 1361, p. 356.

[42] In a communication received on 19 July 1990, the Government of Mongolia notified the Secretary-General of its decision to withdraw the reservation, made upon ratification with respect to article 29 (1). For the text of the reservation, see United Nations, *Treaty Series* , vol. 1249, p. 131.

[43] See note 1 under "Montenegro" in the "Historical Information" section in the front matter of this volume.

[44] For the Kingdom in Europe, the Netherlands Antilles and Aruba. See also note 2 under “Netherlands” regarding Netherlands Antilles in the “Historical Information” section in the front matter of this volume.

[45] On 13 January 1989, the Secretary-General received from the Government of New Zealand, a communication notifying him that, after consultation with the Government of the Cook Islands and the Government of Niue, it denounced the Convention concerning the employment of women on underground work in mines of all kinds (ILO Convention No. 45) on 23 June 1987 and that in accordance with article 28 (3) of the Convention on the Elimination of All Forms of Discrimination against Women, it withdraws the reservation made upon ratification which reads as follows:

"The Government of New Zealand, the Government of the Cook Islands and the Government of Niue reserve the right, to the extent the Convention is inconsistent with the provisions of the Convention concerning the Employment of Women on Underground Work in Mines of all Kinds (ILO Convention No. 45) which was ratified by the Government of New Zealand on 29 March 1938, to apply the provisions of the latter."

See also note 1 under “Cook Islands” and note 1 under “Niue” in the “Historical Information” section in the front matter of this volume.

[46] On 5 July 2007, the Government of New Zealand informed the Secretary-General that it had decided to withdraw the reservation made upon ratification in accordance with article 28 (1) of the Convention which read as follows: ... the Government of New Zealand, the Government of the Cook Islands and the Government of Niue reserved the right not to apply the provisions of CEDAW in so far as they are inconsistent with policies relating to recruitment into for service in: (a) the Armed Forces which reflect either directly or indirectly the fact that members of such forces are required to serve on armed forces aircraft or vessels and in situations involving armed combat; or (b) the law enforcement forces which reflect either directly or indirectly the fact that members of such forces are required to serve in situations involving violence or threat of violence, in their territories; ... NOW THEREFORE the Government of New Zealand, having considered the said reservation, HEREBY WITHDRAWS the said reservation in respect of the metropolitan territory of New Zealand pursuant to paragraph 3 of article 28 of CEDAW; ... AND DECLARES that, consistent with the constitutional status of Tokelau and taking into account the commitment of the Government of New Zealand to the development of self-government for Tokelau, ther having been consultations regarding CEDAW between the Government of New Zealand and the Government of Tokelau; the withdrawal of the said reservation shall also apply to Tokelau ..."

[47] On 5 September 2003, the Government of New Zealand informed the Secretary-General that it had decided to withdraw its reservation in respect only of the metropolitan territory of New Zealand. The reservation reads as follows:

“The Government of New Zealand, the Government of the Cook Islands and the Government of Niue reserve the right not to apply the provisions of article 11 (2) (b).”

Moreover, the Government of New Zealand notified the Secretary-General of the the following territorial exclusion:

"Declares that, consistent with the constitutional status of Tokelau and taking into account the commitment of the Government of New Zealand to the development of self-government for Tokelau through an act of self-determination under the Charter of the United Nations, the withdrawal of this reservation shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultation with that territory."

See also note 1 under “Cook Islands” and note 1 under “Niue” in the “Historical Information” section in the front matter of this volume.

[48] The instrument of ratification indicates that in accordance with the special relationships which exist between New Zealand and the Cook Islands and between New Zealand and Niue, there have been consultations regarding the Convention between the Government of New Zealand and the Government of the Cook Islands and between the Government of New Zealand and the Government of Niue; that the Government of the Cook Islands, which has exclusive competence to implement treaties in the

Cook Islands, has requested that the Convention should extend to the Cook Islands; that the Government of Niue which has exclusive competence to implement treaties in Niue, has requested that the Convention should extend to Niue. The said instrument specifies that accordingly the Convention shall apply also to the Cook Islands and Niue.

See also note 1 under "Cook Islands" and "Niue" in the Historical Information section in the front matter of this volume.

[49] See also note 1 under “New Zealand" regarding Tokelau in the “Historical Information” section in the front matter of this volume.

[50] With regard to the reservations made by the Government of Niger upon accession, the Secretary-General received from the Governments of the following States, communications on the dates indicated hereinafter:

France (14 November 2000):

By indicating that it "expresses reservations" to article 2, paragraphs (d) and (f), article 5, paragraph (a), and article 16, paragraph 1 (c), (e) and (g), the Government of the Republic of the Niger is aiming completely to preclude the application of the provisions concerned. The reservation to article 15, paragraph 4, which seeks to deprive married women of the right to choose their residence and domicile, is contrary to the object and purpose of the Convention.

The general reservation relating to the provisions of article 2, paragraphs (d) and (f), article 5, paragraphs (a) and (b), article 15, paragraph 4, and article 16, paragraph 1 (c), (e) and (g), seeks to ensure that domestic law, and even domestic practice and the current values of society, prevail in general over the provisions of the Convention. The provisions in question concern not only family relations but also social relations as a whole; in particular, article 2, paragraph (d), imposes an obligation on public authorities and institutions to comply with the ban on any act or practice of discrimination, and article 2, paragraph (f), establishes the obligation to take the appropriate measures, notably legislative measures, to prevent discrimination against women, including in relations between individuals. Because it ignores these obligations, the reservation is manifestly contrary to the object and purpose of the Convention.

The Government of the French Republic considers that the reservations to articles 2, 5, 15 and 16 completely vitiate the undertaking of the Republic of the Niger and are manifestly not authorized by the Convention; in consequence, it enters its objection to them.

[The Permanent Mission further adds] that the reservations of the Republic of the Niger, made on 8 October 1999, were notified by the Secretary-General of the United Nations on 2 November 1999 and received by the French Republic on 16 November 1999. In these circumstances, the French Republic is still able, as at this date and until 15 November 2000, to lodge an objection and the Secretary-General of the United Nations cannot treat this act as a simple communication.

Netherlands (6 December 2000):

“The Government of the Kingdom of the Netherlands is of the view that these reservations which seek to limit the obligations of the reserving State by invoking its national law, may raise doubts as to the commitment of Niger to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international treaty law.

The Government of the Kingdom of the Netherlands recalls that according to paragraph 2 of Article 28 of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Kingdom of the Netherlands therefore objects to the afore-said reservations made by the Government of Niger to the Convention on the Elimination of All Forms of Discrimination against Women. This objection shall not preclude the entry into force of the Convention between the Kingdom of the Netherlands and Niger."

[51] On 16 October 1997, the Government of Poland notified the Secretary-General that it had decided to withdraw its reservation with regard to article 29, paragraph 1 of the Convention made upon ratification. For the text of the reservation see United Nations, *Treaty Series* , vol. 1249, p. 13.

[52] In this regard, on 23 July 1997, the Secretary-General received from the Government of Portugal, the following communication:

"Portugal is of the view that a general declaration of the kind made by Pakistan, constituting in fact in legal terms a general reservation, and not clearly specifying the provisions of the Convention to which it applies and the extent of the derogation therefrom, contributes to undermining the basis of international law.

Furthermore, according to paragraph 2 of article 28 of the Convention, a general reservation of such a kind is incompatible with the object and purpose of the Convention and shall not be permitted.

Portugal therefore objects to the aforesaid general reservation which will not preclude the entry into force of the Convention in its entirety between Pakistan and Portugal."

[53] Upon ratification, the Government of the Republic of Korea made the following reservations:

"The Government of the Republic of Korea, having examined the said Convention, hereby ratifies the Convention considering itself not bound by the provisions of Article 9 and sub-paragraphs (c), (d), (f) and (g) of paragraph 1 of Article 16 of the Convention."

On 15 March 1991, the Government of the Republic of Korea notified the Secretary-General of its decision to withdraw, with effect as from that date, the reservation made upon ratification to the extent that they apply to sub-paragraphs (c), (d) and (f) of paragraph 1 of article 16.

Subsequently, on 24 August 1999, the Government of the Republic of Korea notified the Secretary-General of its decision

to withdraw, with effect as from that date, its reservation made upon ratification to article 9.

[54] On 2 April 1997, the Government of Romania notified the Secretary-General that it had decided to withdraw its reservation made with regard to article 29 of the Convention. For the text of the Convention, see United Nations, *Treaty Series* , vol. 1259, p. 437.

[55] In communications received on 8 March 1989, 19 and 20 April 1989, respectively, the Governments of the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic notified the Secretary-General that they had decided to withdraw the reservations made upon ratification relating to article 29 (1). The reservations were identical in essence, *mutatis mutandis* , to the reservation made by the Union of Soviet Socialist Republics. For the text of the reservations, see United Nations, *Treaty Series* , vol. 1249, pp. 117, 121 and 133.

[56] On 24 July 2007, the Government of Singapore notified the Secretary-General that it had decided to withdraw the following reservation made upon accession to the Convention:
"(2) Singapore is geographically one of the smallest independent countries in the world and one of the most densely populated. The Republic of Singapore accordingly reserves the right to apply such laws and conditions governing the entry into, stay in, employment of and departure from its territory of those who do not have the right under the laws of Singapore to enter and remain indefinitely in Singapore and to the conferment, acquisitions and loss of citizenship of women who have acquired such citizenship by marriage and of children born outside Singapore."

[57] On 30 June 2011, the Government of Singapore informed the Secretary-General that the [...] modification [below] limits the legal effect of the reservations made by Singapore upon accession, so as to achieve a more complete application of the Convention in the relations between Singapore and other States parties to the Convention and, therefore, constitutes a partial withdrawal of the reservations to articles 2 and 16 of the Convention made by Singapore upon accession.

The communication from the Government of Singapore reads as follows:

"Upon accession to the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of Singapore made a reservation reserving the right not to apply the provisions of articles 2 and 16 where compliance with these provisions would be contrary to religious or personal laws of the minorities in the republic of Singapore, the text of which reads as follows:

'(1) In the context of Singapore's multiracial and multi-religious society and the need to respect the freedom of minorities to practice their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of articles 2 and 16 where compliance with these provisions would be contrary to their religious or personal laws.'

The Government of the Republic of Singapore, having reviewed the said reservation hereby modifies the same as follows:

'(1) In the context of Singapore's multiracial and multi-religious society and the need to respect the freedom of minorities to practice their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of article 2, paragraphs (a) to (f), and article 16, paragraphs 1(a), 1(c), 1(h), and article 16, paragraph 2, where compliance with these provisions would be contrary to their religious or personal laws.' "

[58] On 15 October 2015, the Government of the Republic of Singapore notified the Secretary-General of its decision to partially withdraw its reservation to article 11 made upon accession as follows:

"[…] upon accession to the Convention on the Elimination of All Forms of Discrimination against Women, the Government of the Republic of Singapore made a reservation in the following terms:

'(3) Singapore interprets article 11, paragraph 1 in the light of the provisions of article 4, paragraph 2 as not precluding prohibitions, restrictions or conditions on the employment of women in certain areas, or on work done by them where this is considered necessary or desirable to protect the health and safety of women or the human foetus, including such prohibitions, restrictions or conditions imposed in consequence of other international obligations of Singapore and considers that legislation in respect of article 11 is unnecessary for the minority of women who do not fall within the ambit of Singapore's employment legislation.'

[…] the Government of the Republic of Singapore, having reviewed the said reservation, hereby modifies the same as follows:

'(3) Singapore considers that legislation in respect of article 11 is unnecessary for the minority of women who do not fall within the ambit of Singapore's employment legislation.' …"

[59] On 25 October 1996, the Secretary-General received from the Government of Sweden, the following communication regarding reservations made by Malaysia upon accession:

[Same text, mutatis mutandis, as the one made under "Objections".]

[60] On 13 August 1997, the Secretary-General received from the Government of Sweden the following communication with regard to the reservation made by Singapore:

"The Government of Sweden is of the view that these general reservations raise doubts as to the commitment of Singapore to the object and purpose of the Convention and would recall that, according to article 28, paragraph 2, of the Convention, a reservation incompatible with the object and purpose of the Convention shall not be permitted.

It is in the common interest of states that treaties to which they have chosen to become parties are respected, as to their object and purpose, by all parties and that states are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of Sweden is further of the view that general reservations of the kind made by the Government of Singapore, which do not clearly specify the provisions of the Convention to

which they apply and the extent of the derogation therefrom, contribute to undermining the basis of international treaty law.

The Government of Sweden therefore objects to the aforesaid general reservations made by the Government of Singapore to the [said Convention].

This objection does not preclude the entry into force of the Convention between Singapore and Sweden. The Convention will thus become operative between the two states without Singapore benefiting from these reservations.

It is the opinion of the Government of Sweden, that no time limit applies to objections against reservations, which are inadmissible under international law."

On that same date, the Secretary-General received from the Government of Sweden, a communication with regard to the declaration made by Pakistan, identical in essence, *mutatis mutandis* , as the one made for Singapore.

[61] On 29 April 2004, the Government of Switzerland notified the Secretary-General that it had decided to withdraw its reservation in respect of article 7 (b) made upon ratification. The text of the reservation reads as follows:

(a) Reservation concerning article 7 (b):

Said provisions shall be without prejudice to Swiss military legislation prohibiting women from performing functions involving armed conflict, except in self-defence; ...

On 30 October 2013, the Government of Switzerland notified the Secretary-General of the following:

In reference to the Convention on the Elimination of All Forms of Discrimination against Women, done in New York on 18 December 1979, I have the honor, in the name of the Swiss Federal Council, to inform you that Switzerland withdraws its reservation formulated relating to article 16 (1) (g) of the said Convention.

The reservation formulated at the time of the deposit of the instrument of accession by Switzerland on 27 March 1997 and withdrawn hereby, reads as follows:

- Reservation concerning article 16, paragraph 1 (g): Said provision shall be applied subject to the regulations on family name (Civil Code, article 160 and article 8 (a), final section);

The other reservations by Switzerland relating to this Convention and not yet withdrawn are maintained. For clarity, I specify in particular the maintenance of the following reservation relating to article 15, paragraph 2 and to article 16, paragraph 1 (h) of the Convention on the Elimination of All Forms of Discrimination against Women:"Said provisions shall be applied subject to several interim provisions of the matrimonial regime (Civil Code, articles 9 (e) and 10, final section)".

[62] Upon accession, the Government of Thailand made the following declaration and reservations:

“Declaration:

The Royal Thai Government wishes to express its understanding that the purposes of the Convention are to eliminate discrimination against women and to accord to every person, men and women alike, equality before the law, and are in accordance with the principles prescribed by the Constitution of the Kingdom of Thailand.

Reservations:

1. In all matters which concern national security, maintenance of public order and service or employment in the military or paramilitary forces, the Royal Thai Government reserves its right to apply the provisions of the Convention ont the Elmination of all foms of discrimination aginst Women, in particular articles 7 and 10 , only within the limits establshed by national laws regulations and practices.

2. With regard to article 9, paragraph 2, [...] the Royal Thai Government considers that the application of the said provisions shall be subject to the limits and criteria established by national law, regulations and practices."

3. The Royal Thai Government does not consider itself bound by the provisions of [...] article 16 and article 29, paragraph 1, of the Convention.

On 25 January 1991, the Government of Thailand notified the Secretary-General of its decision to withdraw the reservations made upon accession to the extent that they apply to article 11, paragraph 1 (b), and article 15, paragraph 3.

Subsequently, on 26 October 1992, the Government of Thailand notified the Secretary-General its decision to withdraw one of the reservations made upon accession to the Convention, i.e., that relating to article 9 (2), which reservation reads as follows:

"2. With regard to article 9, paragraph 2, [...] the Royal Thai Government considers that the application of the said provisions shall be subject to the limits and criteria established by national law, regulations and practices."

Subsequently, on 1 August 1996, the Government of Thailand notified the Secretary-General of its decision to withdraw, as from that same date, the following reservation, made upon accession:

"1. In all matters which concern national security, maintenance of public order and service or employment in the military or para military forces, the Royal Thai Government reserves its right to apply the provisions of the Convention on the Elimination of all Forms of Discrimination against Women, in particular articles 7 and 10, only within the limits established by national laws, regulations and practices."

The complete text of the declaration and reservations are published in United Nations, *Treaty Series* , vol. 1404, p. 419.

Subsequently, on 18 July 2012, the Government of Thailand notified the Secretary-General of its decision to withdraw, as from that date, the following reservation to article 16 made upon accession :

3. The Royal Thai Government does not consider itself bound by the provisions of article 16 of the Convention.

63 With regard to the reservations made by the United Arab Emirates upon accession, the Secretary-General received a communication from the following State on the date indicated hereinafter:

Denmark (14 December 2005):

"The Government of Denmark has examined the reservations made by the Government of the United Arab Emirates upon accession to the Convention on the Elimination of All Forms of Discrimination against Women regarding article 2 (f), 15 (2) and 16 pertaining to Shariah principles.

The Government of Denmark considers that the reservations made by the United Arab Emirates to article 2 (f), 15 (2) and 16 referring to the contents of the Shariah Law do not clearly specify the extent to which the United Arab Emirates feel committed to the object and purpose of the Convention. Consequently, the Government of Denmark considers the said reservations as being incompatible with the object and purpose of the Convention and accordingly inadmissible and without effect under international law.

The Government of Denmark wishes to recall that, according to article 28 (2) of the Convention reservations incompatible with the object and purpose of the Convention shall not be permitted.

The Government of Denmark therefore objects to the aforementioned reservations made by the Government of the United Arab Emirates to the Convention on the Elimination of All Forms of Discrimination against Women. This shall not preclude the entry into force of the Convention in its entirety between the United Arab Emirates and Denmark.

The Government of Denmark recommends the Government of the United Arab Emirates to reconsider its reservations to the Convention on the Elimination of All Forms of Discrimination against Women."

64 Upon ratification the Government of the United Kingdom made the following declarations and reservations:

"A. On behalf of the United Kingdom of Great Britain and Northern Ireland:

"(a) The United Kingdom understands the main purpose of the Convention, in the light of the definition contained in Article 1, to be the reduction, in accordance with its terms, of discrimination against women, and does not therefore regard the Convention as imposing any requirement to repeal or modify any existing laws, regulations, customs or practices which provide for women to be treated more favourably than men, whether temporarily or in the longer term; the United Kingdom's undertakings under Article 4, paragraph 1, and other provisions of the Convention are to be construed accordingly.

"(b) The United Kingdom reserves the right to regard the provisions of the Sex Discrimination Act 1975, the Employment Protection (Consolidation) Act 1978, the Employment Act 1980, the Sex Discrimination (Northern Ireland) Order 1976, the Industrial Relations (No. 2) (Northern Ireland) Order 1976, the Industrial Relations (Northern Ireland) Order 1982, the Equal Pay Act 1970 (as amended) and the Equal Pay Act (Northern Ireland) 1970 (as amended), including the exceptions and exemptions contained in any of these Acts and Orders, as constituting appropriate measures for the practical realisation of the objectives of the Convention in the social and economic circumstances of the United Kingdom, and to continue to apply these provisions accordingly; this reservation will apply equally to any future legislation which may modify or replace the above Acts and Orders on the understanding that the terms of such legislation will be compatible with the United Kingdom's obligations under the Convention.

"(c) In the light of the definition contained in Article 1, the United Kingdom's ratification is subject to the understanding that none of its obligations under the Convention shall be treated as extending to the succession to, or possession and enjoyment of, the Throne, the peerage, titles of honour, social precedence or armorial bearings, or as extending to the affairs of religious denominations or orders or to the admission into or service in the Armed Forces of the Crown.

"(d) The United Kingdom reserves the right to continue to apply such immigration legislation governing entry into, stay in, and departure from, the United Kingdom as it may deem necessary from time to time and, accordingly, its acceptance of Article 15 (4) and of the other provisions of the Convention is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom.

"Article 1

With reference to the provisions of the Sex Discrimination Act 1975 and other applicable legislation, the United Kingdom's acceptance of Article 1 is subject to the reservation that the phrase "irrespective of their marital status" shall not be taken to render discriminatory any difference of treatment accorded to single persons as against married persons, so long as there is equality of treatment as between married men and married women and as between single men and single women.

"Article 2

In the light of the substantial progress already achieved in the United Kingdom in promoting the progressive elimination of discrimination against women, the United Kingdom reserves the right, without prejudice to the other reservations made by the United Kingdom, to give effect to paragraphs (f) and (g) by keeping under review such of its laws and regulations as may still embody significant differences in treatment between men and women with a view to making changes to those laws and regulations when to do so would be compatible with essential and overriding considerations of economic policy. In relation to forms of discrimination more precisely prohibited by other provisions of the Convention, the obligations under this Article must (in the case of the United Kingdom) be read in conjunction with the other reservations and declarations made in respect of those provisions including the declarations and reservations of the United Kingdom contained in paragraphs (a) - (d) above.

"With regard to paragraphs (f) and (g) of this Article the United Kingdom reserves the right to continue to apply its law relating to sexual offences and prostitution; this reservation will apply equally to any future law which may modify or replace it.

"Article 9

The British Nationality Act 1981, which was brought into force with effect from January 1983, is based on principles which do not allow of any discrimination against women within the meaning of Article 1 as regards acquisition, change or retention of their nationality or as regards the nationality of their children. The United Kingdom's acceptance of Article 9 shall not, how ever, be taken to invalidate the continuation of certain temporary or transitional provisions which will continue in force beyond that date.

"The United Kingdom reserves the right to take such steps as may be necessary to comply with its obligations under Article 2 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Paris on 20 March 1952 and its obligations under paragraph 3 of Article 13 of the International Covenant on Economic, Social and Cultural Rights opened for signature at New York on 19 December 1966, to the extent that the said provisions preserve the freedom of parental choice in respect of the education of children; and reserves also the right not to take any measures which may conflict with its obligation under paragraph 4 of Article 13 of the said Covenant not to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject to the observation of certain principles and standards.

Moreover, the United Kingdom can only accept the obligations under paragraph (c) of Article 10 within the limits of the statutory powers of central Government, in the light of the fact that the teaching curriculum, the provision of textbooks and teaching methods are reserved for local control and are not subject to central Government direction; moreover, the acceptance of the objective of encouraging coeducation is without prejudice to the right of the United Kingdom also to encourage other types of education.

"Article 11

The United Kingdom interprets the "right to work" referred to in paragraph 1 (a) as a reference to the "right to work" as defined in other human rights instruments to which the United Kingdom is a party, notably Article 6 of the International Covenant on Economic, Social and Cultural Rights of 19 December 1966.

"The United Kingdom interprets paragraph 1 of Article 11, in the light of the provisions of paragraph 2 of Article 4, as not precluding prohibitions, restrictions or conditions on the employment of women in certain areas, or on the work done by them, where this is considered necessary or desirable to protect the health and safety of women or the human foetus, including such prohibitions, restrictions or conditions imposed in consequence of other international obligations of the United Kingdom; The United Kingdom declare that, in the event of a conflict between obligations under the prsent Convention and its obligations under the Convention concerning teh emplyoment of wmeon on underground work in mines of all kinds (ILO Convention No. 45), the proviisions of the last mentioned Convention shall prevail.

"The United Kingdom reserves the right to apply all United Kingdom legislation and the rules of pension schemes affecting retirement pensions, survivors' benefits and other benefits in relation to death or retirement (including retirement on grounds of redundancy), whether or not derived from a Social Security scheme.

"This reservation will apply equally to any future legislation which may modify or replace such legislation, or the rules of pension schemes, on the understanding that the terms of such legislation will be compatible with the United Kingdom's obligations under the Convention.

"The United Kingdom reserves the right to apply the following provisions of United Kingdom legislation concerning the benefits specified:

a) social security benefits for persons engaged in caring for a severely disabled person under section 37 of the Social Security Act 1975 and section 37 of the Social Security (Northern Ireland) Act 1975;

b) increases of benefits for adult dependants under sections 44 to 47, 49 and 66 of the Social Security Act 1975 and under sections 44 to 47, 49 and 66 of the Social Security (Northern Ireland) Act 1975;

c) retirement pensions and survivors' benefits under the Social Security Acts 1975 to 1982 and the Social Security (Northern Ireland) Acts 1975 to 1982;

d) family income supplements under the Family Income Supplements Act 1970 and the Family Income Supplements Act (Northern Ireland) 1971.

"This reservation will apply equally to any future legislation which may modify or replace any of the provisions specified in sub-paragraphs (a) to (d) above, on the understanding that the terms of such legislation will be compatible with the United Kingdom's ob ligations under the Convention.

The United Kingdom reserves the right to apply any non-discriminatory requirement for a qualifying period of employment or insurance for the application of the provisions contained in Article 11 (2).

"Article 13

The United Kingdom reserves the right, notwithstanding the obligations undertaken in Article 13, or any other relevant article of the Convention, to continue to apply the income tax and capital gains tax legislation which:

i) Deems for income tax purposes the income of a married woman living with her husband in a year, or part of a year, of assessment to be her husband's income and not to be her income (subject to the right ofe husband and the wife to elect jointly that the wife's earned income shall be charged to income tax as if she were a single woman with no other income); and

ii) Requires tax in respect of such income and of chargeable gains accruing to such a married woman to be assessed on her husband (subject to the right of either of them to apply for separate assessment) and consequently (if no such application is made) restricts to her husband the right to appeal against any such assessment and to be heard or to be represented at the hearing of any such appeal; and

iii) Entitles a man who has his wife living with him, or whose wife is wholly maintained by him, during the year of assessment to a deduction from his total income of an amount larger than that to which an individual in any other case is entitled and entitles an individual whose total income includes any earned

income of his wife to have that deduction increased by the amount of that earned income or by an amount specified in the legislation whichever is the less.

"Article 15

"In relation to Article 15, paragraph 2, the United Kingdom understands the term 'legal capacity' as referring merely to the existence of a separate and distinct legal personality.

"In relation to Article 15, paragraph 3, the United Kingdom understands the intention of this provision to be that only those terms or elements of a contract or other private instrument which are discriminatory in the sense described are to be deemed null and void, but not necessarily the contract or instrument as a whole.

"Article 16

As regards sub-paragraph 1 (f) of Article 16, the United Kingdom does not regard the reference to the paramountcy of the interests of the children as being directly relevant to the elimination of discrimination against women, and declares in this connection that the legislation of the United Kingdom regulating adoption, while giving a principal position to the promotion of the children's welfare, does not give to the child'snterests the same paramount place as in issues concerning custody over children.

"The United Kingdom' acceptance of paragraph 1 of Article 16 shall not be treated as either limiting the freedom of a person to dispose of his property as he wishes or as giving a person a right to property the subject of such limitation.

"B. *On behalf of the Isle of Man, the British Virgin Islands, the Falkland Islands, South Georgia and the South Sandwich Islands, and the Turks and Caicos Islands:*

[Same reservations as the one made on behalf of the United Kingdomunder paragraphs A (a), (c), and (d) except that in the of case d) it applies to the territories and their laws).]

Article 1

[Same reservation as the one made in respect of the United Kingdom except with regard to the absence of a reference to United Kingdom legislation.]

Article 2

[Same reservation as the one made in respect of the United Kingdom except that reference is made to the laws of the territories, and not the laws of the United Kingdom.]

Article 9

[Same reservation as the one made in respect of the United Kingdom.]

Article 11

[Same reservation as those made in respect of the United Kingdom except that a reference is made to the laws of the territories, and not to the laws of the United Kingdom.]

"Also, as far as the territories are concerned, the specific benefits listed and which may be applied under the provisions of these territories' legislation are as follows:

a) social security benefits for persons engaged in caring for a severely disabled person;

b) increases of benefit for adult dependants;

c) retirement pensions and survivors' benefits;

d) family income supplements.

"This reservation will apply equally to any future legislation which may modify or replace any of the provisions specified in sub-paragraphs (a) to (d) above, on the understanding that the terms of such legislation will be compatible with the United Kinom's obligations under the Convention.

"The United Kingdom reserves the right to apply any non-discriminatory requirement for a qualifying period of employment or insurance for the application of the provisions contained in Article 11 (2).

Article 13, 15 and 16

[Same reservations as those made on behalf the United Kingdom.]

On 4 January 1995, the Government of the United Kingdom of Great Britain and Northern Ireland notified the Secretary-General that it had decided to withdraw the following declaration and reservation made upon ratification:

Declaration:

"... the United Kingdom declares that, in the event of a conflict between obligations under the present Convention and its obligations under the Convention concerning the employment of women on underground work in mines of all kinds (ILO Convention No. 45), the provisions of the last mentioned Convention shall prevail."

Reservation:

"Article 13

The United Kingdom reserves the right, notwithstanding the obligations undertaken in Article 13, or any other relevant article of the Convention, to continue to apply the income tax and capital gains tax legislation which:

i) deems for income tax purposes the income of a married woman living with her husband in a year, or part of a year, of assessment to be her husband's income and not to be her income (subject to the right of the husband and the wife to elect jointly that the wife's earned income shall be charged to income tax as if she were a single woman with no other income); and

ii) requires tax in respect of such income and of chargeable gains accruing to such a married woman to be assessed on her husband (subject to the right of either of them to apply for separate assessment) and consequently (if no such application is made) restricts to her husband the right to appeal against any such assessment and to be heard or to be represented at the hearing of any such appeal; and

iii) entitles a man who has his wife living with himor whose wife is wholly maintained by him, during the year of assessment to a deduction from his total income of an amount larger than that to which an individual in any other case is entitled and entitles an individual whose total income includes any earned income of his wife to have that deduction increased by the amount of that earned income or by an amount specified in the legislation whichever is the less.

Further, on 22 March 1996, the Government of the United Kingdom of Great Britain and Northern Ireland notified the Secretary-General that it had decided to withdraw the following reservations and declarations made upon ratification:

"(b) The United Kingdom reserves the right to regard the provisions of the Sex Discrimination Act 1975, the Employment Protection (Consolidation) Act 1978, the Employment Act 1980, the Sex Discrimination (Northern Ireland) Order 1976, the Industrial Relations (No. 2) (Northern Ireland) Order 1976, the Industrial Relations (Northern Ireland) Order 1982, the Equal Pay Act 1970 (as amended) and the Equal Pay Act (Northern Ireland) 1970 (as amended), including the exceptions and exemptions contained in any of these Acts and Orders, as constituting appropriate measures for the practical realisation of the objectives of the Convention in the social and economic circumstances of the United Kingdom, and to continue to apply these provisions accordingly; this reservation will apply equally to any future legislation which may modify or replace the above Acts and Orders on the understanding that the terms of such legislation will be compatible with the United Kingdom's obligations under the Convention."

"Article 1

With reference to the provisions of the Sex Discrimination Act 1975 and other applicable legislation, the United Kingdom's acceptance of Article 1 is subject to the reservation that the phrase "irrespective of their marital status" shall not be taken to render discriminatory any difference of treatment accorded to single persons as against married persons, so long as there is equality of treatment as between married men and married women and as between single men and single women."

"Article 2

In the light of the substantial progress already achieved in the United Kingdom in promoting the progressive elimination of discrimination against women, the United Kingdom reserves the right, without prejudice to the other reservations made by the United Kingdom, to give effect to paragraphs (f) and (g) by keeping under review such of its laws and regulations as may still embody significant differences in treatment between men and women with a view to making changes to those laws and regulations when to do so would be compatible with essential and overriding considerations of economic policy. In relation to forms of discrimination more precisely prohibited by other provisions of the Convention, the obligations under this Article must (in the case of the United Kingdom) be read in conjunction with the other reservations and declarations made in respect of those provisions including the declarations and reservations of the United Kingdom contained in paragraphs (a) - (d) above.

"With regard to paragraphs (f) and (g) of this Article the United Kingdom reserves the right to continue to apply its law relating to sexual offences and prostitution; this reservation will apply equally to any future law which may modify or replace it."

"Article 9

.....

"The United Kingdom reserves the right to take such steps as may be necessary to comply with its obligations under Article 2 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Paris on 20 March 1952 and its obligations under paragraph 3 of Article 13 of the International Covenant on Economic, Social and Cultural Rights opened for signature at New York on 19 December 1966, to the extent that the said provisions preserve the freedom of parental choice in respect of the education of children; and reserves also the right not to take any measures which may conflict with its obligation under paragraph 4 of Article 13 of the said Covenant not to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject to the observation of certain principles and standards."

"Moreover, the United Kingdom can only accept the obligations under paragraph (c) of Article 10 within the limits of the statutory powers of central Government, in the light of the fact that the teaching curriculum, the provision of textbooks and teaching methods are reserved for local control and are not subject to central Government direction; moreover, the acceptance of the objective of encouraging coeducation is without prejudice to the right of the United Kingdom also to encourage other types of education."

"Article 11

The United Kingdom interprets the "right to work" referred to in paragraph 1 (a) as a reference to the "right to work" as defined in other human rights instruments to which the United Kingdom is a party, notably Article 6 of the International Covenant on Economic, Social and Cultural Rights of 19 December 1966.

"The United Kingdom interprets paragraph 1 of Article 11, in the light of the provisions of paragraph 2 of Article 4, as not precluding prohibitions, restrictions or conditions on the employment of women in certain areas, or on the work done by them, where this is considered necessary or desirable to protect the health and safety of women or the human foetus, including such prohibitions, restrictions or conditions imposed in consequence of other international obligations of the United Kingdom;

"The United Kingdom reserves the right to apply the following provisions of United Kingdom legislation concerning the benefits specified:

a) social security benefits for persons engaged in caring for a severely disabled person under section 37 of the Social Security Act 1975 and section 37 of the Social Security (Northern Ireland) Act 1975;

.....

c) retirement pensions and survivors' benefits under the Social Security Acts 1975 to 1982 and the Social Security (Northern Ireland) Acts 1975 to 1982;

d) family income supplements under the Family Income Supplements Act 1970 and the Family Income Supplements Act (Northern Ireland) 1971.

"This reservation will apply equally to any future legislation which may modify or replace any of the provisions specified in sub-paragraphs (a) to (d) above, on the understanding that the terms of such legislation will be compatible with the United Kingdom's ob ligations under the Convention."

"Article 15

In relation to Article 15, paragraph 2, the United Kingdom understands the term "legal capacity" as referring merely to the existence of a separate and distinct legal personality."

.....

"Article 16

.....

The United Kingdom's acceptance of paragraph 1 of Article 16 shall not be treated as either limiting the freedom of a person to dispose of his property as he wishes or as giving a person a right to property the subject of such a limitation."

By the same communication, the Government of the United Kingdom also informed the Secretary-General "for the avoidance of doubt, that the declarations and reservations entered in respect of the dependent territories on behalfof which the Convention was also ratified on 7 April 1986 continue to apply, but are under active review".

The complete text of the declarations and reservations are published in United Nations, *Treaty Series,* vol. 1423, p. 412.

Subsequently, on 6 June 2005, the Government of the United Kingdom notified the Secretary-General of the following:

"..... The Government of the United Kingdom wish to withdraw from paragraph A c) of that reservation the words:

"To the admission into or service in the Armed Forces of the Crown"

and to substitute the words:

"Any act done for the purpose of ensuring the combat effectiveness of the Armed Forces of the Crown."

So that Paragra A c) of the United Kingdom's reservation will then read

"In the light of the definition contained in Article 1, the United Kingdom's ratification is subject to the understanding that none of its obligations under the Convention shall be treated as extending to the succession to, or possession and enjoyment of, the Throne, the peerage, titles of honour, social precedence or armorial bearings, or as extending to the affairs of religious denominations or orders or any act done for the purpose of ensuring the combat effectiveness of the Armed Forces of the Crown."

[65] On 24 July 2007, the Government of the United Kingdom notified the Secretary-General that it had decided to withdraw the following reservation made upon ratification to the Convention: "(d) The United Kingdom reserves the right to continue to apply such immigration legislation governing entry into, stay in, and departure from, the United Kingdom as it may deem necessary from time to time and, accordingly, its acceptance of Article 15 (4) and of the other provisions of the Convention is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom."

[66] The instrument of ratification specifies that the said Convention is ratified in respect of the United Kingdom of Great Britain and Northern Ireland, the Isle of Man, British Virgin Islands, Falkland Islands (Malvinas), South Georgia and the South Sandwich Islands, and Turks and Caicos Islands.

In this connection, on 4 April 1989, the Government of Argentina made the following objection:

The Argentine Republic rejects the extension of the territorial application of the Convention on the Elimination of all Forms of Discrimination againts Women, adopted by the United Nations General Assembly on 18 December 1979, to the Malvinas (Falkland) Islands, South Georgia and the South Sandwich Islands, notified by the Government of the United Kingdom of Great Britain and Northern Ireland upon its ratification of that instrument on 7 April 1986.

The Argentine Republic reaffirms its sovereignty over the aforementioned archipelagos, which are integral part of its national territory, and recalls that the United Nations General Assembly has adopted resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 38/12 and 39/6, in which a sovereignty dispute is recognized and the Governments of Argentina and the United Kingdom are urged to resume negotiations in order to find as soon as possible a peaceful and lasting solution to the dispute and their remaining differneces relating to this question, through the good offices of the Secretary-General. The General Assembly has also adopted resolutions 40/21, 41/40, 42/19 and 43/25, which reiterate its request to the parties to resume such negotiations.

Subsequently, on 27 November 1989, the Secretary-General received from the Government of the United Kingdom of Great Britain and Northern Ireland the following communication:

"The Government of the United Kingdom of Great Britain and Northern Ireland reject the statement made by the Government of Argentina on 4 April 1989 regarding the Falkland Islands and South Georgia and the South Sandwichlands. The Government of the United Kingdom of Great Britain and Nothern Ireland have no doubt as to the British sovereignty of the Falkland Islands and South Georgia and the South Sandwich Islands, and thei consequent right to extend treaties to those Territories."

Further, on 14 October 1996, the Secretary-General received from the Government of the United Kingdom a communication stating that it had decided to apply the Convention to Hong Kong, subject to the following reservations and declarations:

"General

(a) The United Kingdom on behalf of Hong Kong understands the main purpose of the Convention, in the light of the definition contained in article 1, to the reduction, in accordance with its terms, of discrimination against women, and does not therefore regard the Convention as imposing any requirement to repeal or modify any existing laws, regulations, customs or practices which provide for women to be treated

more favourably than men, whether temporarily or in the longer term. Undertakings by the United Kingdom on behalf of Hong Kong under article 4, paragraph 1, and other provisions of the Convention are to be construed accordingly.

(b) The right to continue to apply such immigration legislation governing entry into, stay in and departure from Hong Kong as may be deemed necessary from time to time is reserved by the United Kingdom on behalf of Hong Kong. Accordingly, acceptance of article 15 (4), and of the other provisions of the Convention, is subject to the provisions of any such legislation as regards persons not at the time having the rightunder the law of Hong Kong to enter and remain in Hong Kong.

(c) In the light of the definition contained in article 1, the United Kingdom's extension of its ratification to Hong Kong is subject to the understanding that none of its obligations under the Convention in Hong Kong shall be treated as extending to the affairs of religious denominations or orders.

(d) Laws apcable in the New Territories which enable male indigenous villagers to exercise certain rights in respect of property and which provide for rent concessions in respect of land or property held by indigenous persons or their lawful successors through the male line will continue to be applied.

Specific articles

Article 9

The British Nationality Act 1981, which was brought into force with effect from January 1983, is based on principles which do not allow of any discrimination against women within the meaning of article 1 as regards acquisition, change, or retention of their nationality or as regards the nationality of their children. The United Kingdom's acceptance of article 9 on behalf of Hong Kong shall not, however, be taken to invalidate the continuation of certain temporary or transitional provisions which will continue in force beyond that date.

Article 11

The United Kingdom on behalf of Hong Kong reserves the right to apply all Hong Kong legislation and the rules of pension schemes affecting retirement pensions, survivors' benefits and other benefits in relation to death or retirement (including retirement on grounds of redundancy) whether or not derived from a social security scheme.

This reservation will apply equally to any further legislation which may modify or replace such legislation, or the rules of pension schemes, on the understanding that the terms of such legislation will be compatible with the United Kingdom's obligations under the Convention in respect of Hong Kong.

The United Kingdom on behalf of Hong Kong reserves the right to apply any non-discriminatory requirement for a qualifying period of employment for the application of the provisions contained in article 11(2).

Article 15

In relation to article 15, paragraph 3, the United Kingdom on behalf of Hong Kong understands the intention of this provisions to be that only those terms or elements of a contract or other private instrument which are discriminatory inthe sense described are to be deemed null and void, but not necessarily the contract or instrument as a whole."

67 On 16 March 2016, the Government of the United Kingdom of Great Britain and Northern Ireland notified the Secretary-General that the Convention would extend to the territories of Anguilla and the Cayman Islands. The Government of the United Kingdom of Great Britain and Northern Ireland declared that the extension is subject to the same declarations and reservations as those made in respect of the United Kingdom, except that they apply to the territories and their laws. The Government of the United Kingdom of Great Britain and Northern Ireland further made the following additional reservation on behalf of the territory of the Cayman Islands: "The Cayman Islands reserves the right to continue to apply such immigration legislation governing entry into, stay in, and departure from, the Cayman Islands as it may deem necessary from time to time and, accordingly, its acceptance of Article 15 (4) and of the other provisions of the Convention is subject to the provisions of any such legislation as regards persons not at the time having the right under the laws of the Cayman Islands to enter and remain in the Cayman Islands." The Government of the United Kingdom of Great Britain and Northern Ireland declared that it considers the extension of the Convention to Anguilla and the Cayman Islands to enter into force on the day of deposit of this notification.

68 On 16 March 2017, the Government of the United Kingdom of Great Britain and Northern Ireland notified the Secretary-General that the Convention would extend to the territory of Saint Helena, Ascencion and Tristan Da Cunha as follows:"… the Government of the United Kingdom of Great Britain and Northern Ireland wishes that the United Kingdom's ratification of the Convention… shall be extended to the territory of Saint Helena, Ascension and Tristan Da Cunha, for whose international relations the United Kingdom is responsible. The Government of the United Kingdom of Great Britain and Northern Ireland considers the extension of the Convention to Saint Helena, Ascension and Tristan Da Cunha to enter into force on the day of deposit of this notification."

69 On 16 March 2017, the Government of the United Kingdom of Great Britain and Northern Ireland notified the Secretary-General that the Convention would extend to the territory of Bermuda as follows: "… the Government of the United Kingdom of Great Britain and Northern Ireland wishes that the United Kingdom's ratification of the Convention… shall be extended to the territory of Bermuda, for whose international relations the United Kingdom is responsible.… the Government of the United Kingdom of Great Britain and Northern Ireland on behalf of the territory of Bermuda wishes to make the additional accompanying reservations. The Government of the United Kingdom of Great Britain and Northern Ireland considers the extension of the Convention to Bermuda to enter into force on the day of deposit of this notification …"

Reservations

"I have the honour to refer to the extension of the ratification by the United Kingdom of Great Britain and Northern Ireland of the Convention on the Elimination of All Forms of Discrimination against Women ('the Convention') to the

territory of Bermuda. I have the further honour to inform you that the Government of Bermuda expresses its consent to be bound by the Convention, subject to the same declarations and reservations as those made in respect of the United Kingdom of Great Britain and Northern Ireland, except that they apply to the territory and its laws, and subject to the additional Reservations below. The Government of Bermuda regards the Bermuda Constitution and the Human Rights Act 1981 as embodying the principle of equality of men and women as prescribed by Article 2 of the Convention. The Constitution enshrines the fundamental rights and freedoms of every person whatever that persons race, place of origin, political opinions, colour,creed or sex, and the Human Rights Act 1981 recognizes the inherent dignity and the equal and inalienable rights of all members of the human family and makes better provision to affirm these rights and freedoms and to protect the rights of all members of the community. In the light of the definition contained in Article 1 of the Convention, the extension of the ratification of the Government of the United Kingdom of Great Britain and Northern Ireland on behalf of Bermuda is subject to the understanding that none of Bermuda`s obligations under the Convention shall be treated as extending to the affairs of religious denominations or orders or any act done for the purpose of ensuring the combat effectiveness of the Armed Forces of Bermuda. As it may deem necessary from time to time, the Government of Bermuda reserves the right to apply Article 15 (4) and other provisions of the Convention, subject to section 11 (2) (d) and 11 (5) (c) of the Bermuda Constitution and section 27A of the Bermuda Immigration and Protection Act 1956. Section 11 (2) (d) of the Constitution imposes restrictions on the movement or residence within Bermuda of any person who does not belong to Bermuda. Under section 11 (5) (c) a foreign national wife belongs to Bermuda if, by decree of a court or a deed of separation, she does not live apart from a husband who possesses Bermudian status, or a husband who has been granted a certificate of naturalization. However, section 11 (5) (c) does not apply to the foreign national husband of a wife who possesses Bermudian status. Section 27A of the Bermuda Immigration and Protection Act 1956 provides for an additional condition to apply to the foreign national husband of a wife who possesses Bermudian status in order for him to remain and reside in Bermuda, i.e. that he has no relevant convictions."

On 16 April 2019, the Government of the United Kingdom of Great Britain and Northern Ireland notified the Secretary-General of the partial withdrawal of reservations made by the United Kingdom of Great Britain and Northern Ireland to the Convention on the Elimination of All Forms of Discrimination against Women in respect of the territory of Bermuda on 16 March 2017. The Government of the United Kingdom of Great Britain and Northern Ireland notified the Secretary-General that, under Bermuda's Defence Amendment Act 2018, conscription has ended; hence, that part of the reservation made by the Government of Bermuda that refers to the effect that none of Bermuda's obligations under the Convention shall be treated as extending to "any act done for the purpose of ensuring the combat effectiveness of the Armed Forces of Bermuda" is withdrawn.

Refer to C.N.150.2019.TREATIES-IV.8 for text of the remaining reservations.

[70] On 16 February 2021, the Government of the United Kingdom of Great Britain and Northern Ireland notified the Secretary-General that the Convention would extend to the territory of the Bailiwick of Jersey as follows:

"... the Government of the United Kingdom of Great Britain and Northern Ireland hereby extends the application of the United Kingdom's ratification of the Convention... to the territory of the Bailiwick of Jersey, for the international relations of which the United Kingdom is responsible.

The Government of the United Kingdom of Great Britain and Northern Ireland considers that the extension of the Convention to the Bailiwick of Jersey will enter into force on the date of receipt of this notification..."

<u>Reservations and declarations:</u>

"General

(a) The Bailiwick of Jersey understands the main purpose of the Convention, in the light of the definition contained in Article 1, to be the reduction, in accordance with its terms, of discrimination against women, and does not therefore regard the Convention as imposing any requirement to repeal or modify any existing laws, regulations, customs or practices which provide for women to be treated more favourably than men, whether temporarily or in the longer term; the Bailiwick of Jersey's undertakings under Article 4, paragraph 1, and other provisions of the Convention are to be construed accordingly.

(c) In the light of the definition contained in Article 1, the extension of the ratification of the United Kingdom of Great Britain and Northern Ireland on behalf of the Bailiwick of Jersey is subject to the understanding that none of the Bailiwick of Jersey's obligations under the Convention shall be treated as extending to the succession to, or possession and enjoyment of, the Throne, the peerage, titles of honour, social precedence or armorial bearings, or as extending to the affairs of religious denominations or orders or any act done for the purpose of ensuring the combat effectiveness of the Armed Forces of the Crown.

Article 9

The British Nationality Act 1981, which was brought into force with effect from January 1983, is based on principles which do not allow of any discrimination against women within the meaning of Article 1 as regards acquisition, change or retention of their nationality or as regards the nationality of their children. The Bailiwick of Jersey's acceptance of Article 9 shall not, however, be taken to invalidate the continuation of certain temporary or transitional provisions which will continue in force beyond that date.

Article 11

The Bailiwick of Jersey reserves the right to apply all Jersey legislation and the rules of pension schemes affecting retirement pensions, survivors' benefits and other benefits in relation to death or retirement (including retirement on grounds of redundancy), whether or not derived from a Social Security scheme.

This reservation will apply equally to any future legislation which may modify or replace such legislation, or the rules of pension schemes, on the understanding that the terms of such

legislation will be compatible with the Bailiwick of Jersey's obligations under the Convention.

The Bailiwick of Jersey reserves the right to apply any non-discriminatory requirement for a qualifying period of employment or insurance for the application of the provisions contained in Article 11(2).

Article 13

The Bailiwick of Jersey reserves the right, notwithstanding the obligations undertaken in Article 13, or any other relevant article of the Convention, to continue to apply income tax legislation, pending proposedchanges to these arrangements, which:

i) Deems for income tax purposes the income of a married person living with their spouse in a year, or part of a year, of assessment to be the spouse's income and not that of the married person (subject to the right of either the married person or spouse to elect for separate assessment); and

ii) Requires tax in respect of such income of such a married person to be assessed on their spouse (subject to the right of either the married person or their spouse to apply for separate assessment) and consequently if no such application is made restricts to the spouse the right to appeal against any such assessment and to be heard or to be represented at the hearing of any such appeal.

Article 15

In relation to Article 15, paragraph 3, the Bailiwick of Jersey understands the intention of this provision to be that only those terms or elements of a contract or other private instrument which are discriminatory in the sense described are to be deemed null and void, but not necessarily the contract or instrument as a whole.

The Bailiwick of Jersey reserves the right, notwithstanding the obligations undertaken in Article 15, paragraph 4, or any other relevant article of the Convention, to continue to apply the customary rule of law whereby a wife takes her husband's domicile, pending the planned abolition of this law.

Article 16

The Bailiwick of Jersey reserves the right, notwithstanding the obligations undertaken in Article 16, paragraph 1(h), to continue to apply the customary rule of law whereby where a person dies intestate, with no issue, the distribution of immovable property may favour the paternal side of the family pending the abolition of this law, and noting that the abolition of vidute and changes to the rights of dower do not apply in relation to the estate of a person who died before 1 September 1993."

[71] The formality was effected by Democratic Yemen. See also note 1 under "Yemen" in the "Historical Information" section in the front matter of this volume.

[72] Several Governments notified the Secretary-General that they consider the reservations made by the Government of Algeria upon accession as incompatible with the object and purpose of the said Convention and, therefore, prohibited by virtue of its article 28 (2), on the dates indicated hereinafter:

Participant:	***Date of notification:***		
Sweden	4	Aug	1997
Portugal	14	Aug	1997
Denmark	24	Mar	1998

[73] On 25 February 2011, the Government of the Commonwealth of the Bahamas notified the Secretary-General of its decision to withdraw the reservation in respect to article 16 (1) h) made upon accession. The text of the reservation read as follows:

"The Government of the Commonwealth of the Bahamas does not consider itself bound by the provisions of article 2 (a) of the Convention.

The Government of the Commonwealth of the Bahamas does not consider itself bound by the provisions of article 9, paragraph 2, of the Convention.

The Government of the Commonwealth of the Bahamas does not consider itself bound by the provisions of article 16 (h) of the Convention.

The Government of the Commonwealth of the Bahamas does not consider itself bound by the provisions of article 29, paragraph 1, of the Convention."

[74] On 1 June 2016, the Government of Bahrain notified the Secretary-Genearal of its decision to modify the reservations made upon accession which read as follows:

... the Kingdom of Bahrain makes reservations with respect to the following provisions of the Convention:

- Article 2, in order to ensure its implementation within the bounds of the provisions of the Islamic Shariah;

- Article 9, paragraph 2;

- Article 15, paragraph 4;

- Article 16, in so far as it is incompatible with the provisions of the Islamic Shariah;

- Article 29, paragraph 1.

[75] On 18 February 2014, the Government of the Republic of Iraq notified the Secretary-General that it decided to withdraw its reservation to article 9 of the Convention made upon accession which read as follows:

1. Approval of and accession to this Convention shall not mean that the Republic of Iraq is bound by the provisions of article 2, paragraphs (f) and (g), of article 9, paragraphs 1 and 2, nor of article 16 of the Convention. The reservation to this last-mentioned article shall be without prejudice to the provisions of the Islamic Shariah according women rights equivalent to the rights of their spouses so as to ensure a just balance between them. Iraq also enters a reservation to article 29, paragraph 1, of this Convention with regard to the principle of international arbitration in connection with the interpretation or application of this Convention.

2. This approval in no way implies recognition of or entry into any relations with Israel.

[76] On 5 May 2009, the Government of Jordan informed the Secretary-General that it had decided to withdraw the reservation made upon ratification with regard to article 15 (4) of the Convention. The text of the reservation withdrawn reads as follows:

... a woman's residence and domicile are with her husband.

[77] Several Governments notified the Secretary-General that they consider the reservations made by the Government of Kuwait concerning article 7 (a) and article 16 (f) as "incompatible with the object and purpose of the said Convention and, therefore, as prohibited by virtue of its article 28 paragraph 2" on the dates indicated hereinafter:

Participant:	***Date of notification:***		
Belgium	19	Jan	1996
Austria	22	Feb	1996
Portugal	15	May	1996

[78] On 9 January 2008, the Government of Luxembourg notified the Secretary-General that it had decided to withdraw the reservations made upon ratification. The text of the reservations reads as follows:

a) The application of article 7 shall not affect the validity of the article of our Constitution concerning the hereditary transmission of the crown of the Grand Duchy of Luxembourg in accordance with the family compact of the house of Nassau of 30 June 1783, maintained by article 71 of the Treaty of Vienna of 9 June 1815 and expressly maintained by article 1 of the Treaty of London of 11 May 1867.

(b) The application of paragraph 1 (g) of article 16 of the Convention shall not affect the right to choose the family name of children.

[79] On 19 July 2010, the Government of Malaysia, notified the following:

"... , the Government of Malaysia, [...] withdraws its reservations in respect of articles 5 (a), 7 (b) and 16 (2) of the Convention; ... ."

The previous reservation reads as follows:

"The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic Sharia' law and the Federal Constitution of Malaysia. With regards thereto, further, the Government of Malaysia does not consider itself bound by the provisions of articles [5(a), 7(b), 9(2), 16(1)(a), (c), (f), (g), (h), and 16(2)] of the aforesaid Convention."

In relation to article 11, Malaysia interprets the provisions of this article as a reference to the prohibition of discrimination on the basis of equality between men and women only.

[80] In regard to the reservations made by the Government of Micronesia (Federated States of) upon accession, the Secretary-General received a communication from the following State on the date indicated hereinafter:

Portugal (15 December 2005):

The Government of Portugal has carefully examined the reservations made by the Federated States of Micronesia upon its accession to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

The first and second reservations concern fundamental provisions of the Convention and are not in conformity with its object and purpose. Articles 2, 5, 11 and 16 outline the measures which a State party is required to take in order to implement the Convention, cover the fundamental rights of women and deal with key elements for the elimination and discrimination against women.

Portugal considers that such reservations may create doubts as to the commitment of the reserving State to the object and purpose of the Convention and, moreover, contribute to undermining the basis of international law.

It is in the common interest of all states that treaties to which they have chosen to become parties are respected as to their object and purpose by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties.

The Government of the Portuguese Republic, therefore, objects to the above reservations made by the Federated States of Micronesia to CEDAW.

This objection shall not preclude the entry into force of the Convention between Portugal and Micronesia.

[81] On 19 October 2017, the Government of the Principality of Monaco notified the Secretary-General of its decision to withdraw its reservation to paragraph 1 (g) of article 16 of the Convention. The text of the withdrawn reservation read as follows:

The Principality of Monaco does not consider itself bound by Article 16, paragraph 1 (g), regarding the right to choose one's surname.

[82] On 8 April 2011, the Secretary-General received notification from the Government of the Kingdom of Morocco that it decided to withdraw the reservations made upon accession in respect of articles 9 (2) and 16 of the Convention.

The reservations to articles 9 (2) and 16 of the Convention read as follows:

With regard to article 9, paragraph 2:

The Government of the Kingdom of Morocco makes a reservation with regard to this article in view of the fact that the Law of Moroccan Nationality permits a child to bear the nationality of its mother only in the cases where it is born to an unknown father, regardless of place of birth, or to a stateless father, when born in Morocco, and it does so in order to guarantee to each child its right to a nationality. Further, a child born in Morocco of a Moroccan mother and a foreign father may acquire the nationality of its mother bydeclaring, within two years of reaching the age of majority, its desire to acquire that

nationality, provided that, on making such declaration, its customary and regular residence is in Morocco.

With regard to article 16:

The Government of the Kingdom of Morocco makes a reservation with regard to the provisions of this article, particularly those relating to the equality of men and women, in respect of rights and responsibilities on entry into and at dissolution of marriage. Equality of this kind is considered incompatible with the Islamic Shariah, which guarantees to each of the spouses rights and responsibilities within a framework of equilibrium and complementary in order to preserve the sacred bond of matrimony.

The provisions of the Islamic Shariah oblige the husband to provide a nuptial gift upon marriage and to support his family, while the wife is not required by law to support thefamily.

Further, at dissolution of marriage, the husband is obliged to pay maintenance. In contrast, the wife enjoys complete freedom of disposition of her property during the marriage and upon its dissolution without supervision by the husband, the husband having no jurisdiction over his wife's property.

For these reasons, the Islamic Shariah confers the right of divorce on a woman only by decision of a Shariah judge.

[83] On 6 February 2019, the Government of the Sultanate of Oman informed the Secretary-General that it had decided to withdraw the reservation under article 15 (4) made upon ratification. The text of the withdrawn reservation reads as follows:

3.Article 15, paragraph 4, which provides that States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile;

[84] The Secretary-General received communications with regard to the reservations made by Qatar upon accession from the following States:

Mexico (10 May 2010)

The United Mexican States has examined the reservations made by Qatar to articles 2, 9, 15 and 16, and has concluded that they should be considered invalid in the light of article 28, paragraph 2, of the Convention because they are incompatible with its object and purpose. The said reservations, if implemented, would inevitably result in discrimination against women on the basis of sex, which is contrary to all the articles of the Convention.

The objection of the Government of the United Mexican States to the reservations in question shall not preclude the entry into force of the Convention between the United Mexican States and Qatar.

Portugal (10 May 2010)

"The Government of the Portuguese Republic considers that the reservations are incompatible with the object and purpose of the Convention, insofar as they disregard fundamental principles that shape the core of the Convention.

According to international law, a reservation which is incompatible with the object and purpose of a treaty shall not be permitted.

The Government of the Portuguese Republic therefore objects to the aforesaid reservations made by the Government of the State of Qatar on 29 April 2009 upon its accession to the Convention on the Elimination of all Forms of Discrimination against Women.

This objection shall not preclude the entry into force of the Convention on the Elimination of all Forms of Discrimination against Women between the Portuguese Republic and the State of Qatar."

[85] On 17 April 2014, the Government of the Republic of Tunisia notified the Secretary-General of its decision to withdraw the declaration with regard to article 15(4) of the Convention and the reservations to articles 9(2), 16 (c), (d), (f), (g), (h) and 29(1) of the Convention made upon ratification which read as follows:

1. General declaration:

The Tunisian Government declares that it shall not take any organizational or legislative decision in conformity with the requirements of this Convention where such a decision would conflict with the provisions of chapter I of the Tunisian Constitution.

2. Reservation concerning article 9, paragraph 2:

The Tunisian Government expresses its reservation with regard to the provisions in article 9, paragraph 2 of the Convention, which must not conflict with the provisions of chapter VI of the Tunisian Nationality Code.

3. Reservation concerning article 16, paragraphs (c), (d), (f), (g) and (h):

The Tunisian Government considers itself not bound by article 16, paragraphs (c), (d) and (f) of the Convention and declares that paragraphs (g) and (h) of that article must not conflict with the provisions of the Personal Status Code concerning the granting of family names to children and the acquisition of property through inheritance.

4. Reservation concerning article 29, paragraph 1:

The Tunisian Government declares, in conformity with the requirements of article 29, paragraph 2 of the Convention, that it shall not be bound by the provisions of paragraph 1 of that article which specify that any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall be referred to the International Court of Justice at the request of any one of those parties.

The Tunisian Government considers that such disputes should be submitted for arbitration or consideration by the International Court of Justice only with the consent of all parties to the dispute.

5. Declaration concerning article 15, paragraph 4:

In accordance with the provisions of the Vienna Convention on the Law of Treaties, dated 23 May 1969, the Tunisian Government emphasizes that the requirements of article 15, paragraph 4, of the Convention on the Elimination of All forms of Discrimination against Women, and particularly that part relating to the right of women to choose their residence and domicile, must not be interpreted in a manner which conflicts with the provisions of the Personal Status Code on this subject, as set forth in chapters 23 and 61 of the Code.

[86] On 20 September 1999, the Government of Turkey notified the Secretary-General of a partial withdrawal as follows:

"[...] the Government of the Republic of Turkey has decided to withdraw its reservations made upon [accession to] the Convention on the Elimination of All Forms of Discrimination Against Women with regard to article 15, paragraphs 2 and 4, and article 16, paragraphs 1 (c), (d), (f) and (g).

[...] the reservation and declaration made upon [accession] by the Government of Turkey with respect to article 29, paragraph 1, and article 9, paragraph 1 of the Convention, respectively, continue to apply."

On 29 January 2008, the Government of the Republic of Turkey notified the Secretary-General that it had decided to withdraw the following declaration in respect to article 9 (1) made upon accession:

"Article 9, paragraph 1 of the Convention is not in conflict with the provisions of article 5, paragraph 1, and article 15 and 17 of the Turkish Law on Nationality, relating to the acquisition of citizenship, since the intent of those provisions regulating acquisition of citizenship through marriage is to prevent statelessness."

Annex 47

Decision

At its 1257th meeting, on 12 November 1965, the Council decided to invite the Governments of Portugal and South Africa to send representatives to participate, without vote, in the discussion of the question.

Resolution 216 (1965)

of 12 November 1965

The Security Council

1. *Decides to condemn* the unilateral declaration of independence made by a racist minority in Southern Rhodesia;

2. *Decides to call upon* all States not to recognize this illegal racist minority régime in Southern Rhodesia and to refrain from rendering any assistance to this illegal régime.

Adopted at the 1258th meeting by 10 votes to none, with 1 abstention (France).

Resolution 217 (1965)

of 20 November 1965

The Security Council,

Deeply concerned about the situation in Southern Rhodesia,

Considering that the illegal authorities in Southern Rhodesia have proclaimed independence and that the Government of the United Kingdom of Great Britain and Northern Ireland, as the administering Power, looks upon this as an act of rebellion,

Noting that the Government of the United Kingdom has taken certain measures to meet the situation and that to be effective these measures should correspond to the gravity of the situation,

1. *Determines* that the situation resulting from the proclamation of independence by the illegal authorities in Southern Rhodesia is extremely grave, that the Government of the United Kingdom of Great Britain and Northern Ireland should put an end to it and that its continuance in time constitutes a threat to international peace and security;

2. *Reaffirms* its resolution 216 (1965) of 12 November 1965 and General Assembly resolution 1514 (XV) of 14 December 1960;

3. *Condemns* the usurpation of power by a racist settler minority in Southern Rhodesia and regards the declaration of independence by it as having no legal validity;

Décision

A sa 1257e séance, le 12 novembre 1965, le Conseil a décidé d'inviter les Gouvernements du Portugal et de l'Afrique du Sud à désigner des représentants pour participer, sans droit de vote, à la discussion de la question.

Résolution 216 (1965)

du 12 novembre 1965

Le Conseil de sécurité

1. *Décide de condamner* la déclaration unilatérale d'indépendance proclamée par une minorité raciste en Rhodésie du Sud;

2. *Décide de prier* tous les Etats de ne pas reconnaître ce régime minoritaire raciste illégal de la Rhodésie du Sud et de s'abstenir de prêter aucune assistance à ce régime illégal.

Adoptée à la 1258e séance par 10 voix contre zéro, avec une abstention (France).

Résolution 217 (1965)

du 20 novembre 1965

Le Conseil de sécurité,

Profondément préoccupé par la situation en Rhodésie du Sud,

Considérant que les autorités illégales de Rhodésie du Sud ont proclamé l'indépendance et que le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, en tant que puissance administrante, y voit un acte de rébellion,

Notant que le Gouvernement du Royaume-Uni a pris certaines mesures pour faire face à la situation et que, pour être efficaces, ces mesures doivent correspondre à la gravité de la situation,

1. *Constate* que la situation résultant de la proclamation de l'indépendance par les autorités illégales de Rhodésie du Sud est extrêmement grave, qu'il convient que le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord y mette fin et que son maintien dans le temps constitue une menace à la paix et à la sécurité internationales;

2. *Réaffirme* sa résolution 216 (1965) du 12 novembre 1965 et la résolution 1514 (XV) de l'Assemblée générale, en date du 14 décembre 1960;

3. *Condamne* l'usurpation du pouvoir par une minorité raciste de colons en Rhodésie du Sud et considère que la déclaration d'indépendance proclamée par cette minorité n'a aucune validité légale;

Annex 48

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DE LA BARCELONA TRACTION, LIGHT AND POWER COMPANY, LIMITED

(NOUVELLE REQUÊTE: 1962)
(BELGIQUE c. ESPAGNE)
DEUXIÈME PHASE

ARRÊT DU 5 FÉVRIER 1970

1970

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE BARCELONA TRACTION, LIGHT AND POWER COMPANY, LIMITED

(NEW APPLICATION: 1962)
(BELGIUM *v.* SPAIN)
SECOND PHASE

JUDGMENT OF 5 FEBRUARY 1970

Mode officiel de citation:
Barcelona Traction, Light and Power Company, Limited,
arrêt, C.I.J. Recueil 1970, p. 3.

Official citation:
Barcelona Traction, Light and Power Company, Limited,
Judgment, I.C.J. Reports 1970, p. 3.

N° de vente:
Sales number **337**

INTERNATIONAL COURT OF JUSTICE

YEAR 1970

1970
5 February
General Lis
No. 50

5 February 1970

CASE CONCERNING THE BARCELONA TRACTION, LIGHT AND POWER COMPANY, LIMITED

(NEW APPLICATION: 1962)
(BELGIUM *v.* SPAIN)
SECOND PHASE

Question of admissibility—Capacity of Applicant Government to act.

Claim brought on behalf of natural and juristic persons alleged to be shareholders in foreign limited liability company and based on allegedly unlawful measures taken against the company—Nature of corporate entities under municipal law generally—Distinction between injury to rights of company and injury to direct rights of shareholders—Distinction between rights and interests—No injury to shareholders' direct rights alleged—Injury to shareholders' interests resulting from injury to rights of company insufficient to found claim.

Diplomatic protection—General principle of protection of company by company's national State—Company incorporated in third State, admitted by both Parties to be company's national State—Possible circumstances involving exceptions to general principle: case of disappearance of company; case of company's national State lacking capacity to act—Cessation of protection by company's national State not equivalent to legal impediment—Irrelevance of non-existence of link of compulsory jurisdiction between company's national State and Respondent Government.

Foreign investments as part of State's national economic resources—Injury thereto—No responsibility in absence of injury to recognized rights of State.

Possible relevance of considerations of equity—Right of protection in respect of shareholders' interests if not possible to apply general principle—Practical difficulties of any system of concurrent or secondary rights—Equitable considerations not applicable if company's national State able to act.

JUDGMENT

President: *President* BUSTAMANTE Y RIVERO; *Vice-President* KORETSKY; *Judges* Sir Gerald FITZMAURICE, TANAKA, JESSUP, MORELLI, PADILLA NERVO, FORSTER, GROS, AMMOUN, BENGZON, PETRÉN, LACHS, ONYEAMA; *Judges* ad hoc ARMAND-UGON, RIPHAGEN; *Registrar* AQUARONE.

In the case concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962),

between

the Kingdom of Belgium,

represented by

Chevalier Y. Devadder, Legal Adviser to the Ministry of Foreign Affairs and External Trade,

as Agent,

Mr. H. Rolin, Professor emeritus of the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,

as Co-Agent and Counsel,

assisted by

Mrs. S. Bastid, Professor in the Faculty of Law of the University of Paris
Mr. J. Van Ryn, Professor in the Faculty of Law of the Free University of Brussels and Advocate at the Belgian Court of Cassation,
Mr. M. Grégoire, Advocate at the Brussels Court of Appeal,
Mr. F. A. Mann, Honorary Professor in the Faculty of Law of the University of Bonn, Solicitor of the Supreme Court, England,
Mr. M. Virally, Professor in the Faculties of Law of the Universities of Geneva and Strasbourg and at the Graduate Institute of International Studies in Geneva,
Mr. E. Lauterpacht, Lecturer in the University of Cambridge, Member of the English Bar,
Mr. A. S. Pattillo, Q.C., Member of the Ontario Bar (Canada),
Mr. M. Slusny, Lecturer in the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,
Mr. P. Van Ommeslaghe, *Professeur extraordinaire* in the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,
Mr. M. Waelbroeck, *Professeur extraordinaire* in the Faculty of Law of the Free University of Brussels,
Mr. J. Kirkpatrick, Lecturer in the Faculty of Law of the Free University of Brussels and Advocate at the Brussels Court of Appeal,

as Counsel,

Mr. H. Bachrach, Member of the New York State and Federal Bars,

as Assistant Counsel and Secretary,

and by

Mr. L. Prieto-Castro, Professor in the Faculty of Law of the University of Madrid,

Mr. M. Olivencia Ruiz, Professor in the Faculty of Law of the University of Seville,

Mr. J. Girón Tena, Professor in the Faculty of Law of the University of Valladolid,

as Expert-Counsel in Spanish Law,

and

the Spanish State,

represented by

Mr. J. M. Castro-Rial, Professor, Legal Adviser to the Ministry of Foreign Affairs,

as Agent,

assisted by

Mr. R. Ago, Professor of International Law in the Faculty of Law of the University of Rome,

Mr. M. Bos, Professor of International Law in the Faculty of Law of the University of Utrecht,

Mr. P. Cahier, Professor of International Law at the Graduate Institute of International Studies in Geneva,

Mr. J. Carreras Llansana, Professor in the Faculty of Law of the University of Navarre,

Mr. F. de Castro y Bravo, Professor, Legal Adviser to the Ministry of Foreign Affairs,

Mr. J. M. Gil-Robles Quiñones, Professor in the Faculty of Law of the University of Oviedo,

Mr. M. Gimeno Fernández, Judge of the Supreme Court, Madrid,

Mr. P. Guggenheim, Professor of International Law at the Graduate Institute of International Studies in Geneva,

Mr. E. Jiménez de Aréchaga, Professor of International Law in the Faculty of Law of the University of Montevideo,

Mr. A. Malintoppi, Professor of International Law in the Faculty of Political Science of the University of Florence,

Mr. F. Ramírez, Secretary-General of the Spanish Institute of Foreign Exchange, Madrid,

Mr. P. Reuter, Professor in the Faculty of Law of the University of Paris,

Mr. J. M. Rivas Fresnedo, Inspector and Expert, Ministry of Finance, Madrid,

Mr. J. L. Sureda Carrión, Professor in the Faculty of Law of the University of Barcelona,

Mr. D. Triay Moll, Inspector and Expert, Ministry of Finance, Madrid,

Mr. R. Uría González, Professor in the Faculty of Law of the University of Madrid,

Sir Humphrey Waldock, C.M.G., O.B.E., Q.C., Chichele Professor of Public International Law in the University of Oxford,

Mr. P. Weil, Professor in the Faculty of Law of the University of Paris,

as Counsel or Advocates,

and by
Mr. J. M. Lacleta y Muñoz, Secretary of Embassy,
Mr. L. Martínez-Agulló, Secretary of Embassy,
as Secretaries,

THE COURT,

composed as above,

delivers the following Judgment:

1. In 1958 the Belgian Government filed with the International Court of Justice an Application against the Spanish Government seeking reparation for damage allegedly caused to the Barcelona Traction, Light and Power Company, Limited, on account of acts said to be contrary to international law committed by organs of the Spanish State. After the filing of the Belgian Memorial and the submission of preliminary objections by the Spanish Government, the Belgian Government gave notice of discontinuance of the proceedings, with a view to negotiations between the representatives of the private interests concerned. The case was removed from the Court's General List on 10 April 1961.

2. On 19 June 1962, the negotiations having failed, the Belgian Government submitted to the Court a new Application, claiming reparation for the damage allegedly sustained by Belgian nationals, shareholders in the Barcelona Traction company, on account of acts said to be contrary to international law committed in respect of the company by organs of the Spanish State. On 15 March 1963 the Spanish Government raised four preliminary objections to the Belgian Application.

3. By its Judgment of 24 July 1964, the Court rejected the first two preliminary objections. The first was to the effect that the discontinuance, under Article 69, paragraph 2, of the Court's Rules, of previous proceedings relative to the same events in Spain, disentitled the Belgian Government from bringing the present proceedings. The second was to the effect that even if this was not the case, the Court was not competent, because the necessary jurisdictional basis requiring Spain to submit to the jurisdiction of the Court did not exist. The Court joined the third and fourth objections to the merits. The third was to the effect that the claim is inadmissible because the Belgian Government lacks any *jus standi* to intervene or make a judicial claim on behalf of Belgian interests in a Canadian company, assuming that the Belgian character of such interests were established, which is denied by the Spanish Government. The fourth was to the effect that even if the Belgian Government has the necessary *jus standi*, the claim still remains inadmissible because local remedies in respect of the acts complained of were not exhausted.

4. Time-limits for the filing of the further pleadings were fixed or, at the request of the Parties, extended by Orders of 28 July 1964, 11 June 1965, 12 January 1966, 23 November 1966, 12 April 1967, 15 September 1967 and 24 May 1968, in the last-mentioned of which the Court noted with regret that the time-limits originally fixed by the Court for the filing of the pleadings had not been observed, whereby the written proceedings had been considerably prolonged. The written proceedings finally came to an end on 1 July 1968 with the filing of the Rejoinder of the Spanish Government.

5. Pursuant to Article 31, paragraph 3, of the Statute, Mr. Willem Riphagen, Professor of International Law at the Rotterdam School of Economics, and Mr. Enrique C. Armand-Ugon, former President of the Supreme Court of Justice of Uruguay and a former Member of the International Court of Justice, were chosen by the Belgian and Spanish Governments respectively to sit as judges *ad hoc*.

6. Pursuant to Article 44, paragraph 2, of the Rules of Court, the pleadings and annexed documents were, after consultation of the Parties, made available to the Governments of Chile, Peru and the United States of America. Pursuant to paragraph 3 of the same Article, the pleadings and annexed documents were, with the consent of the Parties, made accessible to the public as from 10 April 1969.

7. At 64 public sittings held between 15 April and 22 July 1969 the Court heard oral arguments and replies by Chevalier Devadder, Agent, Mr. Rolin, co-Agent and Counsel, Mrs. Bastid, Mr. Van Ryn, Mr. Grégoire, Mr. Mann, Mr. Virally, Mr. Lauterpacht, and Mr. Pattillo, Counsel, on behalf of the Belgian Government and by Mr. Castro-Rial, Agent, Mr. Ago, Mr. Carreras Mr. Gil-Robles, Mr. Guggenheim, Mr. Jiménez de Aréchaga, Mr. Malintoppi, Mr. Reuter, Mr. Sureda, Mr. Uría, Sir Humphrey Waldock and Mr. Weil, Counsel or Advocates, on behalf of the Spanish Government.

* * *

8. The Barcelona Traction, Light and Power Company, Limited, is a holding company incorporated in 1911 in Toronto (Canada), where it has its head office. For the purpose of creating and developing an electric power production and distribution system in Catalonia (Spain), it formed a number of operating, financing and concession-holding subsidiary companies. Three of these companies, whose shares it owned wholly or almost wholly, were incorporated under Canadian law and had their registered offices in Canada (Ebro Irrigation and Power Company, Limited, Catalonian Land Company, Limited and International Utilities Finance Corporation, Limited); the others were incorporated under Spanish law and had their registered offices in Spain. At the time of the outbreak of the Spanish Civil War the group, through its operating subsidiaries, supplied the major part of Catalonia's electricity requirements.

9. According to the Belgian Government, some years after the First World War Barcelona Traction's share capital came to be very largely held by Belgian nationals—natural or juristic persons—and a very high percentage of the shares has since then continuously belonged to Belgian nationals, particularly the Société Internationale d'Energie Hydro-Electrique (Sidro), whose principal shareholder, the Société Financière de Transports et d'Entreprises Industrielles (Sofina), is itself a company in which Belgian interests are preponderant. The fact that large blocks of shares were for certain periods transferred to American nominees, to

protect these securities in the event of invasion of Belgian territory during the Second World War, is not, according to the Belgian contention, of any relevance in this connection, as it was Belgian nationals, particularly Sidro, who continued to be the real owners. For a time the shares were vested in a trustee, but the Belgian Government maintains that the trust terminated in 1946. The Spanish Government contends, on the contrary, that the Belgian nationality of the shareholders is not proven and that the trustee or the nominees must be regarded as the true shareholders in the case of the shares concerned.

10. Barcelona Traction issued several series of bonds, some in pesetas but principally in sterling. The issues were secured by trust deeds, with the National Trust Company, Limited, of Toronto as trustee of the sterling bonds, the security consisting essentially of a charge on bonds and shares of Ebro and other subsidiaries and of a mortgage executed by Ebro in favour of National Trust. The sterling bonds were serviced out of transfers to Barcelona Traction effected by the subsidiary companies operating in Spain.

11. In 1936 the servicing of the Barcelona Traction bonds was suspended on account of the Spanish civil war. In 1940 payment of interest on the peseta bonds was resumed with the authorization of the Spanish exchange control authorities (required because the debt was owed by a foreign company), but authorization for the transfer of the foreign currency necessary for the servicing of the sterling bonds was refused and those interest payments were never resumed.

12. In 1945 Barcelona Traction proposed a plan of compromise which provided for the reimbursement of the sterling debt. When the Spanish authorities refused to authorize the transfer of the necessary foreign currency, this plan was twice modified. In its final form, the plan provided, *inter alia*, for an advance redemption by Ebro of Barcelona Traction peseta bonds, for which authorization was likewise required. Such authorization was refused by the Spanish authorities. Later, when the Belgian Government complained of the refusals to authorize foreign currency transfers, without which the debts on the bonds could not be honoured, the Spanish Government stated that the transfers could not be authorized unless it was shown that the foreign currency was to be used to repay debts arising from the genuine importation of foreign capital into Spain, and that this had not been established.

13. On 9 February 1948 three Spanish holders of recently acquired Barcelona Traction sterling bonds petitioned the court of Reus (Province of Tarragona) for a declaration adjudging the company bankrupt, on account of failure to pay the interest on the bonds. The petition was admitted by an order of 10 February 1948 and a judgment declaring the company bankrupt was given on 12 February. This judgment included provisions appointing a commissioner in bankruptcy and an interim

receiver and ordering the seizure of the assets of Barcelona Traction, Ebro and Compañía Barcelonesa de Electricidad, another subsidiary company.

14. The shares of Ebro and Barcelonesa had been deposited by Barcelona Traction and Ebro with the National Trust company of Toronto as security for their bond issues. All the Ebro and the Barcelonesa ordinary shares were held outside Spain, and the possession taken of them was characterized as "mediate and constructive civil possession", that is to say was not accompanied by physical possession. Pursuant to the bankruptcy judgment the commissioner in bankruptcy at once dismissed the principal management personnel of the two companies and during the ensuing weeks the interim receiver appointed Spanish directors and declared that the companies were thus "normalized". Shortly after the bankruptcy judgment the petitioners brought about the extension of the taking of possession and related measures to the other subsidiary companies.

15. Proceedings in Spain to contest the bankruptcy judgment and the related decisions were instituted by Barcelona Traction, National Trust, the subsidiary companies and their directors or management personnel. However, Barcelona Traction, which had not received a judicial notice of the bankruptcy proceedings, and was not represented before the Reus court in February, took no proceedings in the courts until 18 June 1948. In particular it did not enter a plea of opposition against the bankruptcy judgment within the time-limit of eight days from the date of publication of the judgment laid down in Spanish legislation. On the grounds that the notification and publication did not comply with the relevant legal requirements, the Belgian Government contends that the eight-day time-limit had never begun to run.

16. Motions contesting the jurisdiction of the Reus court and of the Spanish courts as a whole, in particular by certain bondholders, had a suspensive effect on the actions for redress; a decision on the question of jurisdiction was in turn delayed by lengthy proceedings brought by the Genora company, a creditor of Barcelona Traction, disputing Barcelona Traction's right to be a party to the proceedings on the jurisdictional issue. One of the motions contesting jurisdiction was not finally dismissed by the Barcelona court of appeal until 1963, after the Belgian Application had been filed with the International Court of Justice.

17. In June 1949, on an application by the Namel company, with the intervention of the Genora company, the Barcelona court of appeal gave a judgment making it possible for the meeting of creditors to be convened for the election of the trustees in bankruptcy, by excluding the necessary procedure from the suspensive effect of the motion contesting jurisdiction. Trustees were then elected, and procured decisions that new shares of the subsidiary companies should be created, cancelling the shares located outside Spain (December 1949), and that the head offices of Ebro and Catalonian Land should henceforth be at Barcelona and not

Toronto. Finally in August 1951 the trustees obtained court authorization to sell "the totality of the shares, with all the rights attaching to them, representing the corporate capital" of the subsidiary companies, in the form of the newly created share certificates. The sale took place by public auction on 4 January 1952 on the basis of a set of General Conditions and became effective on 17 June 1952. The purchaser was a newly formed company, Fuerzas Eléctricas de Cataluña, S.A. (Fecsa), which thereupon acquired complete control of the undertaking in Spain.

18. Proceedings before the court of Reus, various courts of Barcelona and the Spanish Supreme Court, to contest the sale and the operations which preceded or followed it, were taken by, among others, Barcelona Traction, National Trust and the Belgian company Sidro as a shareholder in Barcelona Traction, but without success. According to the Spanish Government, up to the filing of the Belgian Application, 2,736 orders had been made in the case and 494 judgments given by lower and 37 by higher courts. For the purposes of this Judgment it is not necessary to go into these orders and judgments.

19. After the bankruptcy declaration, representations were made to the Spanish Government by the British, Canadian, United States and Belgian Governments.

20. The British Government made representations to the Spanish Government on 23 February 1948 concerning the bankruptcy of Barcelona Traction and the seizure of its assets as well as those of Ebro and Barcelonesa, stating its interest in the situation of the bondholders resident in the United Kingdom. It subsequently supported the representations made by the Canadian Government.

21. The Canadian Government made representations to the Spanish Government in a series of diplomatic notes, the first being dated 27 March 1948 and the last 21 April 1952; in addition, approaches were made on a less official level in July 1954 and March 1955. The Canadian Government first complained of the denials of justice said to have been committed in Spain towards Barcelona Traction, Ebro and National Trust, but it subsequently based its complaints more particularly on conduct towards the Ebro company said to be in breach of certain treaty provisions applicable between Spain and Canada. The Spanish Government did not respond to a Canadian proposal for the submission of the dispute to arbitration and the Canadian Government subsequently confined itself, until the time when its interposition entirely ceased, to endeavouring to promote a settlement by agreement between the private groups concerned.

22. The United States Government made representations to the Spanish Government on behalf of Barcelona Traction in a note of 22 July 1949, in support of a note submitted by the Canadian Government the previous day. It subsequently continued its interposition through the diplomatic channel and by other means. Since references were made by the United States Government in these representations to the presence of

American interests in Barcelona Traction, the Spanish Government draws the conclusion that, in the light of the customary practice of the United States Government to protect only substantial American investments abroad, the existence must be presumed of such large American interests as to rule out a preponderance of Belgian interests. The Belgian Government considers that the United States Government was motivated by a more general concern to secure equitable treatment of foreign investments in Spain, and in this context cites, *inter alia*, a note of 5 June 1967 from the United States Government.

23. The Spanish Government having stated in a note of 26 September 1949 that Ebro had not furnished proof as to the origin and genuineness of the bond debts, which justified the refusal of foreign currency transfers, the Belgian and Canadian Governments considered proposing to the Spanish Government the establishment of a tripartite committee to study the question. Before this proposal was made, the Spanish Government suggested in March 1950 the creation of a committee on which, in addition to Spain, only Canada and the United Kingdom would be represented. This proposal was accepted by the United Kingdom and Canadian Governments. The work of the committee led to a joint statement of 11 June 1951 by the three Governments to the effect, *inter alia*, that the attitude of the Spanish administration in not authorizing the transfers of foreign currency was fully justified. The Belgian Government protested against the fact that it had not been invited to nominate an expert to take part in the enquiry, and reserved its rights; in the proceedings before the Court it contended that the joint statement of 1951, which was based on the work of the committee, could not be set up against it, being *res inter alios acta*.

24. The Belgian Government made representations to the Spanish Government on the same day as the Canadian Government, in a note of 27 March 1948. It continued its diplomatic intervention until the rejection by the Spanish Government of a Belgian proposal for submission to arbitration (end of 1951). After the admission of Spain to membership in the United Nations (1955), which, as found by the Court in 1964, rendered operative again the clause of compulsory jurisdiction contained in the 1927 Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration, the Belgian Government attempted further representations. After the rejection of a proposal for a special agreement, it decided to refer the dispute unilaterally to this Court.

* * *

25. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Belgian Government,

in the Application:

"May it please the Court

1. to adjudge and declare that the measures, acts, decisions and omissions of the organs of the Spanish State described in the present Application are contrary to international law and that the Spanish State is under an obligation towards Belgium to make reparation for the consequential damage suffered by Belgian nationals, natural and juristic persons, shareholders in Barcelona Traction;

2. to adjudge and declare that this reparation should, as far as possible, annul all the consequences which these acts contrary to international law have had for the said nationals, and that the Spanish State is therefore under an obligation to secure, if possible, the annulment of the adjudication in bankruptcy and of the judicial and other acts resulting therefrom, obtaining for the injured Belgian nationals all the legal effects which should result for them from this annulment; further, to determine the amount of the compensation to be paid by the Spanish State to the Belgian State by reason of all the incidental damage sustained by Belgian nationals as a result of the acts complained of, including the deprivation of enjoyment of rights and the expenses incurred in the defence of their rights;

3. to adjudge and declare, in the event of the annulment of the consequences of the acts complained of proving impossible, that the Spanish State shall be under an obligation to pay to the Belgian State, by way of compensation, a sum equivalent to 88 per cent. of the net value of the business on 12 February 1948; this compensation to be increased by an amount corresponding to all the incidental damage suffered by the Belgian nationals as the result of the acts complained of, including the deprivation of enjoyment of rights and the expenses incurred in the defence of their rights";

in the Memorial:

"May it please the Court

I. to adjudge and declare that the measures, acts, decisions and omissions of the organs of the Spanish State described in the present Memorial are contrary to international law and that the Spanish State is under an obligation towards Belgium to make reparation for the consequential damage suffered by Belgian nationals, natural and juristic persons, shareholders in Barcelona Traction;

II. to adjudge and declare that this reparation should, as far as possible, annul all the consequences which these acts contrary to international law have had for the said nationals, and that the Spanish State is therefore under an obligation to secure, if possible, the annulment by administrative means of the adjudication in bankruptcy and of the judicial and other acts resulting therefrom, obtaining for the said injured Belgian nationals all the legal effects which should result for them from this annulment; further, to determine the amount of the compensation to be paid by the Spanish State to the Belgian State by reason of all the incidental damage sustained by Belgian nationals as a result of the acts complained of, including the deprivation of enjoyment of rights and the expenses incurred in the defence of their rights;

III. to adjudge and declare, in the event of the annulment of the consequences of the acts complained of proving impossible, that the Spanish State shall be under an obligation to pay to the Belgian State, by way of compensation, a sum equivalent to 88 per cent. of the sum of $88,600,000 arrived at in paragraph 379 of the present Memorial, this compensation to be increased by an amount corresponding to all the incidental damage suffered by the said Belgian nationals as the result of the acts complained of, including the deprivation of enjoyment of rights, the expenses incurred in the defence of their rights and the equivalent in capital and interest of the amount of Barcelona Traction bonds held by Belgian nationals and of their other claims on the companies in the group which it was not possible to recover owing to the acts complained of";

in the Reply:

"May it please the Court, rejecting any other submissions of the Spanish State which are broader or to a contrary effect,

to adjuge and declare

(1) that the Application of the Belgian Government is admissible;

(2) that the Spanish State is responsible for the damage sustained by the Belgian State in the person of its nationals, shareholders in Barcelona Traction, as the result of the acts contrary to international law committed by its organs, which led to the total spoliation of the Barcelona Traction group;

(3) that the Spanish State is under an obligation to ensure reparation of the said damage;

(4) that this damage can be assessed at U.S. $78,000,000, representing 88 per cent. of the net value, on 12 February 1948, of the property of which the Barcelona Traction group was despoiled;

(5) that the Spanish State is, in addition, under an obligation to pay, as an all-embracing payment to cover loss of enjoyment, compensatory interest at the rate of 6 per cent. on the said sum of U.S. $78,000,000, from 12 February 1948 to the date of judgment;

(6) that the Spanish State must, in addition, pay a sum provisionally assessed at U.S. $3,800,000 to cover the expenses incurred by the Belgian nationals in defending their rights since 12 February 1948;

(7) that the Spanish State is also liable in the sum of £433,821 representing the amount, in principal and interest, on 4 January 1952, of the Barcelona Traction sterling bonds held by the said nationals, as well as in the sum of U.S. $1,623,127, representing a debt owed to one of the said nationals by a subsidiary company of Barcelona Traction, this sum including lump-sum compensation for loss of profits resulting from the premature termination of a contract;

that there will be due on those sums interest at the rate of 6 per cent. per annum, as from 4 January 1952 so far as concerns the sum of £433,821, and as from 12 February 1948 so far as concerns the sum of U.S. $1,623,127; both up to the date of judgment;

(8) that the Spanish State is also liable to pay interest, by way of interest on a sum due and outstanding, at a rate to be determined by

reference to the rates generally prevailing, on the amount of compensation awarded, from the date of the Court's decision fixing such compensation up to the date of payment;

(9) in the alternative to submissions (4) to (6) above, that the amount of the compensation due to the Belgian State shall be established by means of an expert enquiry to be ordered by the Court; and to place on record that the Belgian Government reserves its right to submit in the course of the proceedings such observations as it may deem advisable concerning the object and methods of such measure of investigation;

(10) and, should the Court consider that it cannot, without an expert enquiry, decide the final amount of the compensation due to the Belgian State, have regard to the considerable magnitude of the damage caused and make an immediate award of provisional compensation, on account of the compensation to be determined after receiving the expert opinion, the amount of such provisional compensation being left to the discretion of the Court."

On behalf of the Spanish Government,

in the Counter-Memorial:

"May it please the Court

to adjudge and declare

I. that the Belgian claim which, throughout the diplomatic correspondence and in the first Application submitted to the Court, has always been a claim with a view to the protection of the Barcelona Traction company, has not changed its character in the second Application, whatever the apparent modifications introduced into it;

that even if the true subject of the Belgian claim were, not the Barcelona Traction company, but those whom the Belgian Government characterizes on some occasions as 'Belgian shareholders' and on other occasions as 'Belgian interests' in that company, and the damage allegedly sustained by those 'shareholders' or 'interests', it would still remain true that the Belgian Government has not validly proved either that the shares of the company in question belonged on the material dates to 'Belgian shareholders', or, moreover, that there is in the end, in the case submitted to the Court, a preponderance of genuine 'Belgian interests';

that even if the Belgian claim effectively had as its beneficiaries alleged 'shareholders' of Barcelona Traction who were 'Belgian', or yet again alleged genuine 'Belgian interests' of the magnitude which is attributed to them, the general principles of international law governing this matter, confirmed by practice which knows of no exception, do not recognize that the national State of shareholders or 'interests', whatever their number or magnitude, may make a claim on their behalf in reliance on allegedly unlawful damage sustained by the company, which possesses the nationality of a third State;

that the Belgian Government therefore lacks *jus standi* in the present case;

II. that a rule of general international law, confirmed both by judicial precedents and the teachings of publicists, and reiterated in Article 3 of the Treaty of Conciliation, Judicial Settlement and Arbitration of 19 July 1927 between Spain and Belgium, requires that private persons

allegedly injured by a measure contrary to international law should have used and exhausted the remedies and means of redress provided by the internal legal order before diplomatic, and above all judicial, protection may be exercised on their behalf;

that the applicability of this rule to the present case has not been disputed and that the prior requirement which it lays down has not been satisfied;

III. that the organic machinery for financing the Barcelona Traction undertaking, as conceived from its creation and constantly applied thereafter, placed it in a permanent state of latent bankruptcy, and that the constitutional structure of the group and the relationship between its members were used as the instrument for manifold and ceaseless operations to the detriment both of the interests of the creditors and of the economy and law of Spain, the country in which the undertaking was to carry on all its business;

that these same facts led, on the part of the undertaking, to an attitude towards the Spanish authorities which could not but provoke a fully justified refusal to give effect to the currency applications made to the Spanish Government;

that the bankruptcy declaration of 12 February 1948, the natural outcome of the conduct of the undertaking, and the bankruptcy proceedings which ensued, were in all respects in conformity with the provisions of Spanish legislation on the matter; and that moreover these provisions are comparable with those of other statutory systems, in particular Belgian legislation itself;

that the complaint of usurpation of jurisdiction is not well founded where the bankruptcy of a foreign company is connected in any way with the territorial jurisdiction of the State, that being certainly so in the present case;

that the Spanish judicial authorities cannot be accused of either one or more denials of justice in the proper sense of the term, Barcelona Traction never having been denied access to the Spanish courts and the judicial decisions on its applications and appeals never having suffered unjustified or unreasonable delays; nor is it possible to detect in the conduct of the Spanish authorities the elements of some breach of international law other than a denial of justice;

that the claim for reparation, the very principle of which is disputed by the Spanish Government, is moreover, having regard to the circumstances of the case, an abuse of the right of diplomatic protection in connection with which the Spanish Government waives none of its possible rights;

IV. that, therefore, the Belgian claim is dismissed as inadmissible or, if not, as unfounded";

in the Rejoinder:

"May it please the Court

to adjudge and declare

that the claim of the Belgian Government is declared inadmissible or, if not, unfounded."

In the course of the oral proceedings, the following text was presented as final submissions

on behalf of the Belgian Government,

after the hearing of 9 July 1969:

"1. Whereas the Court stated on page 9 of its Judgment of 24 July 1964 that 'The Application of the Belgian Government of 19 June 1962 seeks reparation for damage claimed to have been caused to a number of Belgian nationals, said to be shareholders in the Barcelona Traction, Light and Power Company, Limited, a company under Canadian law, by the conduct, alleged to have been contrary to international law, of various organs of the Spanish State in relation to that company and to other companies of its group';

Whereas it was therefore manifestly wrong of the Spanish Government, in the submissions in the Counter-Memorial and in the oral arguments of its counsel, to persist in the contention that the object of the Belgian claim is to protect the Barcelona Traction company;

2. Whereas Barcelona Traction was adjudicated bankrupt in a judgment rendered by the court of Reus, in Spain, on 12 February 1948;

3. Whereas that holding company was on that date in a perfectly sound financial situation, as were its subsidiaries, Canadian or Spanish companies having their business in Spain;

4. Whereas, however, the Spanish Civil War and the Second World War had, from 1936 to 1944, prevented Barcelona Traction from being able to receive, from its subsidiaries operating in Spain, the foreign currency necessary for the service of the sterling loans issued by it for the financing of the group's investments in Spain;

5. Whereas, in order to remedy this situation, those in control of Barcelona Traction agreed with the bondholders in 1945, despite the opposition of the March group, to a plan of compromise, which was approved by the trustee and by the competent Canadian court; and whereas its implementation was rendered impossible as a result of the opposition of the Spanish exchange authorities, even though the method of financing finally proposed no longer involved any sacrifice of foreign currency whatever for the Spanish economy;

6. Whereas, using this situation as a pretext, the March group, which in the meantime had made further considerable purchases of bonds, sought and obtained the judgment adjudicating Barcelona Traction bankrupt;

7. Whereas the bankruptcy proceedings were conducted in such a manner as to lead to the sale to the March group, which took place on 4 January 1952, of all the assets of the bankrupt company, far exceeding in value its liabilities, in consideration of the assumption by the purchaser itself of solely the bonded debt, which, by new purchases, it had concentrated into its own hands to the extent of approximately 85 per cent., while the cash price paid to the trustees in bankruptcy, 10,000,000 pesetas—approximately $250,000—, being insufficient to cover the bankruptcy costs, did not allow them to pass anything to the bankrupt company or its shareholders, or even to pay its unsecured creditors;

8. Whereas the accusations of fraud made by the Spanish Government against the Barcelona Traction company and the allegation that that company was in a permanent state of latent bankruptcy are devoid of all

relevance to the case and, furthermore, are entirely unfounded;

9. Whereas the acts and omissions giving rise to the responsibility of the Spanish Government are attributed by the Belgian Government to certain administrative authorities, on the one hand, and to certain judicial authorities, on the other hand;

Whereas it is apparent when those acts and omissions are examined as a whole that, apart from the defects proper to each, they converged towards one common result, namely the diversion of the bankruptcy procedure from its statutory purposes to the forced transfer, without compensation, of the undertakings of the Barcelona Traction group to the benefit of a private Spanish group, the March group;

I

ABUSE OF RIGHTS, ARBITRARY AND DISCRIMINATORY ATTITUDE OF CERTAIN ADMINISTRATIVE AUTHORITIES

Considering that the Spanish administrative authorities behaved in an improper, arbitrary and discriminatory manner towards Barcelona Traction and its shareholders, in that, with the purpose of facilitating the transfer of control over the property of the Barcelona Traction group from Belgian hands into the hands of a private Spanish group, they in particular—

(a) frustrated, in October and December 1946, the implementation of the third method for financing the plan of compromise, by refusing to authorize Ebro, a Canadian company with residence in Spain, to pay 64,000,000 pesetas in the national currency to Spanish residents on behalf of Barcelona Traction, a non-resident company, so that the latter might redeem its peseta bonds circulating in Spain, despite the fact that Ebro continued uninterruptedly to be granted periodical authorization to pay the interest on those same bonds up to the time of the bankruptcy;

(b) on the other hand, accepted that Juan March, a Spanish citizen manifestly resident in Spain, should purchase considerable quantities of Barcelona Traction sterling bonds abroad;

(c) made improper use of an international enquiry, from which the Belgian Government was excluded, by gravely distorting the purport of the conclusions of the Committee of Experts, to whom they attributed the finding of irregularities of all kinds such as to entail severe penalties for the Barcelona Traction group, which enabled the trustees in bankruptcy, at March's instigation, to bring about the premature sale at a ridiculously low price of the assets of the Barcelona Traction group and their purchase by the March group thanks to the granting of all the necessary exchange authorizations;

II

USURPATION OF JURISDICTION

Considering that the Spanish courts, in agreeing to entertain the bankruptcy of Barcelona Traction, a company under Canadian law with its registered office in Toronto, having neither registered office nor commer-

cial establishment in Spain, nor possessing any property or carrying on any business there, usurped a power of jurisdiction which was not theirs in international law;

Considering that the territorial limits of acts of sovereignty were patently disregarded in the measures of enforcement taken in respect of property situated outside Spanish territory without the concurrence of the competent foreign authorities;

Considering that there was, namely, conferred upon the bankruptcy authorities, through the artificial device of mediate and constructive civil possession, the power to exercise in Spain the rights attaching to the shares located in Canada of several subsidiary and sub-subsidiary companies on which, with the approval of the Spanish judicial authorities, they relied for the purpose of replacing the directors of those companies, modifying their terms of association, and cancelling their regularly issued shares and replacing them with others which they had printed in Spain and delivered to Fecsa at the time of the sale of the bankrupt company's property, without there having been any effort to obtain possession of the real shares in a regular way;

Considering that that disregard is the more flagrant in that three of the subsidiaries were companies under Canadian law with their registered offices in Canada and that the bankruptcy authorities purported, with the approval of the Spanish judicial authorities, to transform two of them into Spanish companies, whereas such alteration is not permitted by the law governing the status of those companies;

III

Denials of Justice Lato Sensu

Considering that a large number of decisions of the Spanish courts are vitiated by gross and manifest error in the application of Spanish law, by arbitrariness or discrimination, constituting in international law denials of justice *lato sensu*;

Considering that in particular—

(1) The Spanish courts agreed to entertain the bankruptcy of Barcelona Traction in flagrant breach of the applicable provisions of Spanish law, which do not permit that a foreign debtor should be adjudged bankrupt if that debtor does not have his domicile, or at least an establishment, in Spanish territory;

(2) Those same courts adjudged Barcelona Traction bankrupt whereas that company was neither in a state of insolvency nor in a state of final, general and complete cessation of payments and had not ceased its payments in Spain, this being a manifest breach of the applicable statutory provisions of Spanish law, in particular Article 876 of the 1885 Commercial Code;

(3) The judgment of 12 February 1948 failed to order the publication of the bankruptcy by announcement in the place of domicile of the bankrupt, which constitutes a flagrant breach of Article 1044 (5) of the 1829 Commercial Code;

(4) The decisions failing to respect the separate estates of Barcelona Traction's subsidiaries and sub-subsidiaries, in that they extended to their property the attachment arising out of the bankruptcy of the parent

company, and thus disregarded their distinct legal personalities, on the sole ground that all their shares belonged to Barcelona Traction or one of its subsidiaries, had no legal basis in Spanish law, were purely arbitrary and in any event constitute a flagrant breach of Article 35 of the Civil Code, Articles 116 and 174 of the 1885 Commercial Code (so far as the Spanish companies are concerned) and Article 15 of the same Code (so far as the Canadian companies are concerned), as well as of Article 1334 of the Civil Procedure Code;

If the estates of the subsidiaries and sub-subsidiaries could have been included in that of Barcelona Traction—*quod non*—, it would have been necessary to apply to that company the special régime established by the imperative provisions of Articles 930 *et seq.* of the 1885 Commercial Code and the Acts of 9 April 1904 and 2 January 1915 for the event that public-utility companies cease payment, and this was not done;

(5) The judicial decisions which conferred on the bankruptcy authorities the fictitious possession (termed "mediate and constructive civil possession") of the shares of certain subsidiary and sub-subsidiary companies have no statutory basis in Spanish bankruptcy law and were purely arbitrary; they comprise moreover a flagrant breach not only of the general principle recognized in the Spanish as in the majority of other legal systems to the effect that no person may exercise the rights embodied in negotiable securities without having at his disposal the securities themselves but also of Articles 1334 and 1351 of the Civil Procedure Code and Article 1046 of the 1829 Commercial Code, which require the bankruptcy authorities to proceed to the material apprehension of the bankrupt's property;

(6) The bestowal on the commissioner by the bankruptcy judgment of power to proceed to the dismissal, removal or appointment of members of the staff, employees and management, of the companies all of whose shares belonged to Barcelona Traction or one of its subsidiaries had no statutory basis in Spanish law and constituted a gross violation of the statutory provisions referred to under (4), first sub-paragraph, above and also of Article 1045 of the 1829 Commercial Code;

(7) The Spanish courts approved or tolerated the action of the trustees in setting themselves up as a purported general meeting of the two Canadian subsidiaries and in transforming them, in that capacity, into companies under Spanish law, thus gravely disregarding the rule embodied in Article 15 of the 1885 Commercial Code to the effect that the status and internal functioning of foreign companies shall be governed in Spain by the law under which they were incorporated;

(8) The Spanish courts approved or tolerated the action of the trustees in setting themselves up as purported general meetings and modifying, in that capacity, the terms of association of the Ebro, Catalonian Land, Union Eléctrica de Cataluña, Electricista Catalana, Barcelonesa and Saltos del Segre companies, cancelling their shares and issuing new shares; they thus committed a manifest breach of Article 15 of the 1885 Commercial Code (so far as the two Canadian companies were concerned) and Articles 547 *et seq.* of the same code, which authorize the issue of duplicates only in the circumstances they specify; they also gravely disregarded the clauses of the trust deeds concerning voting-rights, in

flagrant contempt of the undisputed rule of Spanish law to the effect that acts performed and agreements concluded validly by the bankrupt before the date of the cessation of payments as determined in the judicial decisions shall retain their effects and their binding force in respect of the bankruptcy authorities (Articles 878 *et seq.* of the 1885 Commercial Code);

(9) The Spanish courts decided at one and the same time to ignore the separate legal personalities of the subsidiary and sub-subsidiary companies (so as to justify the attachment of their property in Spain and their inclusion in the bankrupt estate) and implicitly but indubitably to recognize those same personalities by the conferring of fictitious possession of their shares on the bankruptcy authorities, thus giving decisions which were vitiated by an obvious self-contradiction revealing their arbitrary and discriminatory nature;

(10) The general meeting of creditors of 19 September 1949 convened for the purpose of appointing the trustees was, with the approval of the Spanish judicial authorities, held in flagrant breach of Articles 300 and 1342 of the Civil Procedure Code, and 1044 (3), 1060, 1061 and 1063 of the 1829 Commercial Code, in that *(a)* it was not convened on cognizance of the list of creditors; *(b)* when that list was prepared, it was not drawn up on the basis of particulars from the balance-sheet or the books and documents of the bankrupt company, which books and documents were not, as the Spanish Government itself admits, in the possession of the commissioner on 8 October 1949, while the judicial authorities had not at any time sent letters rogatory to Toronto, Canada, with the request that they be put at his disposal;

(11) By authorizing the sale of the property of the bankrupt company when the adjudication in bankruptcy had not acquired irrevocability and while the proceedings were suspended, the Spanish courts flagrantly violated Articles 919, 1167, 1319 and 1331 of the Civil Procedure Code and the general principles of the right of defence;

In so far as that authorization was based on the allegedly perishable nature of the property to be sold, it constituted a serious disregard of Article 1055 of the 1829 Commercial Code and Article 1354 of the Civil Procedure Code, which articles allow the sale only of movable property which cannot be kept without deteriorating or spoiling; even supposing that those provisions could be applied in general to the property of Barcelona Traction, its subsidiaries and sub-subsidiaries—*quod non*—, there would still have been a gross and flagrant violation of them, inasmuch as that property as a whole was obviously not in any imminent danger of serious depreciation; indeed the only dangers advanced by the trustees, namely those arising out of the threats of prosecution contained in the Joint Statement, had not taken shape, either by the day on which authorization to sell was requested or by the day of the sale, in any proceedings or demand by the competent authorities and did not ever materialize, except to an insignificant extent;

The only penalty which the undertakings eventually had to bear, 15 months after the sale, was that relating to the currency offence, which had occasioned an *embargo* for a much higher sum as early as April 1948;

(12) The authorization to sell and the sale, in so far as they related to the shares of the subsidiary and sub-subsidiary companies without delivery of the certificates, constituted a flagrant violation of Articles

1461 and 1462 of the Spanish Civil Code, which require delivery of the thing sold, seeing that the certificates delivered to the successful bidder had not been properly issued and were consequently without legal value; if the authorization to sell and the sale had applied, as the respondent Government wrongly maintains, to the rights attaching to the shares and bonds or to the bankrupt company's power of domination over its subsidiaries, those rights ought to have been the subject of a joint valuation, on pain of flagrant violation of Articles 1084 to 1089 of the 1829 Commercial Code and Article 1358 of the Civil Procedure Code: in any event, it was in flagrant violation of these last-named provisions that the commissioner fixed an exaggeratedly low reserve price on the basis of a unilateral expert opinion which, through the effect of the General Conditions of Sale, allowed the March group to acquire the auctioned property at that reserve price;

(13) By approving the General Conditions of Sale on the very day on which they were submitted to them and then dismissing the proceedings instituted to contest those conditions, the judicial authorities committed a flagrant violation of numerous *ordre public* provisions of Spanish law; thus, in particular, the General Conditions of Sale—

(a) provided for the payment of the bondholder creditors, an operation which, under Article 1322 of the Civil Procedure Code, falls under the fourth section of the bankruptcy, whereas that section was suspended as a result of the effects attributed to the Boter motion contesting jurisdiction, no exemption from that suspension having been applied for or obtained in pursuance of the second paragraph of Article 114 of the Civil Procedure Code;

(b) provided for the payment of the debts owing on the bonds before they had been approved and ranked by a general meeting of the creditors on the recommendation of the trustees, contrary to Articles 1101 to 1109 of the 1829 Commercial Code and to Articles 1266 to 1274, 1286 and 1378 of the Civil Procedure Code;

(c) in disregard of Articles 1236, 1240, 1512 and 1513 of the Civil Procedure Code, did not require the price to be lodged or deposited at the Court's disposal;

(d) conferred on the trustees power to recognize, determine and declare effective the rights attaching to the bonds, in disregard, on the one hand, of Articles 1101 to 1109 of the 1829 Commercial Code and of Articles 1266 to 1274 of the Civil Procedure Code, which reserve such rights for the general meeting of creditors under the supervision of the judge, and, on the other, of Articles 1445 and 1449 of the Civil Code, which lay down that the purchase price must be a definite sum and may not be left to the arbitrary decision of one of the contracting parties;

(e) in disregard of Articles 1291 to 1294 of the Civil Procedure Code, substituted the successful bidder for the trustees in respect of the payment of the debts owing on the bonds, whilst, in violation of the general principles applicable to novation, replacing the security for those debts, consisting, pursuant to the trust deeds, of shares and bonds issued by the subsidiary and sub-subsidiary companies, with the deposit of a certain sum with a bank or with a mere banker's guarantee limited to three years;

(f) delegated to a third party the function of paying certain debts, in disregard of Articles 1291 and 1292 of the Civil Procedure Code, which define the functions of the trustees in this field and do not allow of any delegation;

(g) ordered the payment of the debts owing on the bonds in sterling, whereas a forced execution may only be carried out in local currency and in the case of bankruptcy the various operations which it includes require the conversion of the debts into local currency on the day of the judgment adjudicating bankruptcy, as is to be inferred from Articles 883 and 884 of the 1885 Commercial Code;

IV

Denials of Justice Stricto Sensu

Considering that in the course of the bankruptcy proceedings the rights of the defence were seriously disregarded; that in particular—

(a) the Reus court, in adjudicating Barcelona Traction bankrupt on an *ex parte* petition, inserted in its judgment provisions which went far beyond finding the purported insolvency of or a general cessation of payments by the bankrupt company, the only finding, in addition to one on the capacity of the petitioners, that it was open to it to make in such proceedings;

This disregard of the rights of the defence was particularly flagrant in respect of the subsidiary companies, whose property was ordered by the court to be attached without their having been summonsed and without their having been adjudicated bankrupt;

(b) the subsidiary companies that were thus directly affected by the judgment of 12 February 1948 nevertheless had their applications to set aside the order for attachment which concerned them rejected as inadmissible on the grounds of lack of capacity;

(c) the pursuit of those remedies and the introduction of any other such proceedings were also made impossible for the subsidiary companies by the discontinuances effected each time by the solicitors appointed to replace the original solicitors by the new boards of directors directly or indirectly involved; these changes of solicitors and discontinuances were effected by the new boards of directors by virtue of authority conferred upon them by the interim receiver simultaneously with their appointment;

(d) the proceedings for relief brought by those in control of the subsidiary companies who had been dismissed by the commissioner were likewise held inadmissible by the Reus court when they sought to avail themselves of the specific provisions of Article 1363 of the Civil Procedure Code, which provide for proceedings to reverse decisions taken by the commissioner in bankruptcy;

(e) there was discrimination on the part of the first special judge when he refused to admit as a party to the bankruptcy the Canadian National Trust Company, Limited, trustee for the bankrupt company's two sterling loans, even though it relied upon the security of the mortgage which had been given to it by Ebro, whereas at the same time he admitted to the proceedings the Bondholders' Committee

appointed by Juan March, although National Trust and the Committee derived their powers from the same trust deeds;

(f) the complaints against the General Conditions of Sale could be neither amplified nor heard because the order which had approved the General Conditions of Sale was deemed to be one of mere routine;

Considering that many years elapsed after the bankruptcy judgment and even after the ruinous sale of the property of the Barcelona Traction group without either the bankrupt company or those co-interested with it having had an opportunity to be heard on the numerous complaints put forward against the bankruptcy judgment and related decisions in the opposition of 18 June 1948 and in various other applications for relief;

Considering that those delays were caused by the motion contesting jurisdiction fraudulently lodged by a confederate of the petitioners in bankruptcy and by incidental proceedings instituted by other men of straw of the March group, which were, like the motion contesting jurisdiction, regularly admitted by the various courts;

Considering that both general international law and the Spanish-Belgian Treaty of 1927 regard such delays as equivalent to the denial of a hearing;

Considering that the manifest injustice resulting from the movement of the proceedings towards the sale, whilst the actions contesting the bankruptcy judgment and even the jurisdiction of the Spanish courts remained suspended, was brought about by two judgments delivered by the same chamber of the Barcelona court of appeal on the same day, 7 June 1949: in one of them it confirmed the admission, with two effects, of the Boter appeal from the judgment of the special judge rejecting his motion contesting jurisdiction, whereas in the other it reduced the suspensive effect granted to that same appeal by excluding from the suspension the calling of the general meeting of creditors for the purpose of appointing the trustees in bankruptcy;

V

Damage and Reparation

Considering that the acts and omissions contrary to international law attributed to the organs of the Spanish State had the effect of despoiling the Barcelona Traction company of the whole of its property and of depriving it of the very objects of its activity, and thus rendered it practically defunct;

Considering that Belgian nationals, natural and juristic persons, shareholders in Barcelona Traction, in which they occupied a majority and controlling position, and in particular the Sidro company, the owner of more than 75 per cent. of the registered capital, on this account suffered direct and immediate injury to their interests and rights, which were voided of all value and effectiveness;

Considering that the reparation due to the Belgian State from the Spanish State, as a result of the internationally unlawful acts for which the latter State is responsible, must be complete and must, so far as possible, reflect the damage suffered by its nationals whose case the Belgian State has taken up; and that, since *restitutio in integrum* is, in the circumstances

of the case, practically and legally impossible, the reparation of the damage suffered can only take place in the form of an all-embracing pecuniary idemnity, in accordance with the provisions of the Spanish-Belgian Treaty of 1927 and with the rules of general international law;

Considering that in the instant case the amount of the indemnity must be fixed by taking as a basis the net value of the Barcelona Traction company's property at the time of its adjudication in bankruptcy, expressed in a currency which has remained stable, namely the United States dollar;

Considering that the value of that property must be determined by the replacement cost of the subsidiary and sub-subsidiary companies' plant for the production and distribution of electricity at 12 February 1948, as that cost was calculated by the Ebro company's engineers in 1946;

Considering that, according to those calculations, and after deduction for depreciation through wear and tear, the value of the plant was at that date U.S. $116,220,000; from this amount there must be deducted the principal of Barcelona Traction's bonded debt and the interest that had fallen due thereon, that is to say, U.S. $27,619,018, which leaves a net value of about U.S. $88,600,000, this result being confirmed—

(1) by the study submitted on 5 February 1949 and on behalf of Ebro to the Special Technical Office for the Regulation and Distribution of Electricity (Catalonian region) (Belgian New Document No. 50);

(2) by capitalization of the 1947 profits;

(3) by the profits made by Fecsa in 1956—the first year after 1948 in which the position of electricity companies was fully stabilized and the last year before the changes made in the undertaking by Fecsa constituted an obstacle to any useful comparison;

(4) by the reports of the experts consulted by the Belgian Government;

Considering that the compensation due to the Belgian Government must be estimated, in the first place, at the percentage of such net value corresponding to the participation of Belgian nationals in the capital of the Barcelona Traction company, namely 88 per cent.;

Considering that on the critical dates of the bankruptcy judgment and the filing of the Application, the capital of Barcelona Traction was represented by 1,798,854 shares, partly bearer and partly registered; that on *12 February 1948* Sidro owned 1,012,688 registered shares and 349,905 bearer shares; that other Belgian nationals owned 420 registered shares and at least 244,832 bearer shares; that 1,607,845 shares, constituting 89.3 per cent. of the company's capital, were thus on that date in Belgian hands; that on *14 June 1962* Sidro owned 1,354,514 registered shares and 31,228 bearer shares; that other Belgian nationals owned 2,388 registered shares and at least 200,000 bearer shares; and that 1,588,130 shares, constituting 88 per cent. of the company's capital, were thus on that date in Belgian hands;

Considering that the compensation claimed must in addition cover all incidental damage suffered by the said Belgian nationals as a result of the acts complained of, including the deprivation of enjoyment of rights, the expenses incurred in the defence of their rights and the equivalent, in capital and interest, of the amount of the Barcelona Traction bonds held by Belgian nationals, and of their other claims on the companies in the

group which it was not possible to recover owing to the acts complained of;

Considering that the amount of such compensation, due to the Belgian State on account of acts contrary to international law attributable to the Spanish State, cannot be affected by the latter's purported charges against the private persons involved, those charges furthermore not having formed the subject of any counterclaim before the Court;

VI

OBJECTION DERIVED FROM THE ALLEGED LACK OF JUS STANDI OF THE BELGIAN GOVERNMENT

Considering that in its Judgment of 24 July 1964 the Court decided to join to the merits the third preliminary objection raised by the Spanish Government;

Considering that the respondent Government wrongly denies to the Belgian Government *jus standi* in the present proceedings;

Considering that the object of the Belgian Government's Application of 14 June 1962 is reparation for the damage caused to a certain number of its nationals, natural and juristic persons, in their capacity as shareholders in the Barcelona Traction, Light and Power Company, Limited, by the conduct contrary to international law of various organs of the Spanish State towards that company and various other companies in its group;

Considering that the Belgian Government has established that 88 per cent. of Barcelona Traction's capital was in Belgian hands on the critical dates of 12 February 1948 and 14 June 1962 and so remained continuously between those dates, that a single Belgian company, Sidro, possessed more than 75 per cent. of the shares; that the Belgian nationality of that company and the effectiveness of its nationality have not been challenged by the Spanish Government;

Considering that the fact that the Barcelona Traction registered shares possessed by Sidro were registered in Canada in the name of American nominees does not affect their Belgian character; that in this case, under the applicable systems of statutory law, the nominee could exercise the rights attaching to the shares entered in its name only as Sidro's agent;

Considering that the preponderence of Belgian interests in the Barcelona Traction company was well known to the Spanish authorities at the different periods in which the conduct complained of against them occurred, and has been explicitly admitted by them on more than one occasion;

Considering that the diplomatic protection from which the company benefited for a certain time on the part of its national Government ceased in 1952, well before the filing of the Belgian Application, and has never subsequently been resumed;

Considering that by depriving the organs appointed by the Barcelona Traction shareholders under the company's terms of association of their power of control in respect of its subsidiaries, which removed from the company the very objects of its activities, and by depriving it of the whole of its property, the acts and omissions contrary to international law attributed to the Spanish authorities rendered the company practically defunct and directly and immediately injured the rights and interests

attaching to the legal situation of shareholder as it is recognized by international law; that they thus caused serious damage to the company's Belgian shareholders and voided the rights which they possessed in that capacity of all useful content;

Considering that in the absence of reparation to the company for the damage inflicted on it, from which they would have benefited at the same time as itself, the Belgian shareholders of Barcelona Traction thus have separate and independent rights and interests to assert; that they did in fact have to take the initiative for and bear the cost of all the proceedings brought through the company's organs to seek relief in the Spanish courts; that Sidro and other Belgian shareholders, after the sale of Barcelona Traction's property, themselves brought actions the dismissal of which is complained of by the Belgian Government as constituting a denial of Justice;

Considering that under the general principles of international law in this field the Belgian Government has *jus standi* to claim through international judicial proceedings reparation for the damage thus caused to its nationals by the internationally unlawful acts and omissions attributed to the Spanish State;

VII

Objection of Non-Exhaustion of Local Remedies

Considering that no real difference has emerged between the Parties as to the scope and significance of the rule of international law embodied in Article 3 of the Treaty of Conciliation, Judicial Settlement and Arbitration concluded between Spain and Belgium on 19 July 1927, which makes resort to the procedures provided for in that Treaty dependant on the prior use, until a judgment with final effect has been pronounced, of the normal means of redress which are available and which offer genuine possibilities of effectiveness within the limitation of a reasonable time;

Considering that in this case the Respondent itself estimates at 2,736 the number of orders alone made in the case by the Spanish courts as of the date of the Belgian Application;

Considering that in addition the pleadings refer to more than 30 decisions by the Supreme Court;

Considering that it is not contended that the remedies as a whole of which Barcelona Traction and its co-interested parties availed themselves and which gave rise to those decisions were inadequate or were not pursued to the point of exhaustion;

Considering that this circumstance suffices as a bar to the possibility of the fourth objection being upheld as setting aside the Belgian claim;

Considering that the only complaints which could be set aside are those in respect of which the Spanish Government proved failure to make use of means of redress or the insufficiency of those used;

Considering that such proof has not been supplied;

1. With Respect to the Complaints Against the Acts of the Administrative Authorities

Considering that the Spanish Government is wrong in contending that the Belgian complaint concerning the decisions of October and

December 1946 referred to under I *(a)* above is not admissible on account of Barcelona Traction's failure to exercise against them the remedies of appeal to higher authority and contentious administrative proceedings;

Considering that the remedy of appeal to higher authority was inconceivable in this case, being by definition an appeal which may be made from a decision by one administrative authority to another hierarchically superior authority namely the Minister, whereas the decisions complained of were taken with the co-operation and approval of the Minister himself, and even brought to the knowledge of those concerned by the Minister at the same time as by the competent administrative authority;

Considering that it was likewise not possible to envisage contentious administrative proceedings against a decision which patently did not fall within the ambit of Article 1 of the Act of 22 June 1894, which recognizes such a remedy only against administrative decisions emanating from administrative authorities in the exercise of their regulated powers and "infringing a right of an administrative character previously established in favour of the applicant by an Act, a regulation or some other administrative provision", which requirements were patently not satisfied in this case;

2. With Respect to the Complaint concerning the Reus Court's Lack of Jurisdiction to Declare the Bankruptcy of Barcelona Traction

Considering that the Spanish Government is wrong in seeking to derive an argument from the fact that Barcelona Traction and its co-interested parties supposedly failed to challenge the jurisdiction of the Reus court by means of a motion contesting its competence, and allowed the time-limit for entering opposition to expire without having challenged that jurisdiction;

Considering that in fact a motion contesting jurisdiction is not at all the same thing as a motion contesting competence *ratione materiae* and may properly be presented cumulatively with the case on the merits;

Considering that the bankrupt company contested jurisdiction at the head of the complaints set out in its opposition plea of 18 June 1948;

Considering that it complained again of lack of jurisdiction in its application of 5 July 1948 for a declaration of nullity and in its pleading of 3 September 1948 in which it confirmed its opposition to the bankruptcy judgment;

Considering that National Trust submitted a formal motion contesting jurisdiction in its application of 27 November 1948 for admission to the bankruptcy proceedings;

Considering that Barcelona Traction, after having as early as 23 April 1949 entered an appearance in the proceedings concerning the Boter motion contesting jurisdiction, formally declared its adherence to that motion by a procedural document of 11 April 1953;

Considering that the question of jurisdiction being a matter of *ordre public*, as is the question of competence *ratione materiae*, the complaint of belatedness could not be upheld, even in the event of the expiry of the allegedly applicable time-limit for entering a plea of opposition;

3. With Respect to the Complaints concerning the Bankruptcy Judgment and Related Decisions

Considering that the Spanish Government is wrong in contending that the said decisions were not attacked by adequate remedies pursued to

the point of exhaustion or for a reasonable length of time;

Considering that in fact, as early as 16 February 1948, the bankruptcy judgment was attacked by an application for its setting aside on the part of the subsidiary companies, Ebro and Barcelonesa;

Considering that while those companies admittedly confined their applications for redress to the parts of the judgment which gave them grounds for complaint, the said remedies were nonetheless adequate and they were brought to nought in circumstances which are themselves the subject of a complaint which has been set out above;

Considering that, contrary to what is asserted by the Spanish Government, the bankrupt company itself entered a plea of opposition to the judgment by a procedural document of 18 June 1948, confirmed on 3 September 1948;

Considering that it is idle for the Spanish Government to criticize the summary character of this procedural document, while the suspension decreed by the special judge on account of the Boter motion contesting jurisdiction prevented the party entering opposition from filing, pursuant to Article 326 of the Civil Procedure Code, the additional pleading developing its case;

Considering that likewise there can be no question of belatedness, since only publication of the bankruptcy at the domicile of the bankrupt company could have caused the time-limit for entering opposition to begin to run, and no such publication took place;

Considering that the bankruptcy judgment and the related decisions were moreover also attacked in the incidental application for a declaration of nullity submitted by Barcelona Traction on 5 July 1948 and amplified on 31 July 1948;

4. With Respect to the Complaints concerning the Blocking of the Remedies

Considering that the various decisions which instituted and prolonged the suspension of the first section of the bankruptcy proceedings were attacked on various occasions by numerous proceedings taken by Barcelona Traction, beginning with the incidental application for a declaration of nullity which it submitted on 5 July 1948;

5. With Respect to the Complaint concerning the Dismissal of the Officers of the Subsidiary Companies by Order of the Commissioner

Considering that this measure was also attacked by applications for its setting aside on the part of the persons concerned, which were quite improperly declared inadmissible; and that the proceedings seeking redress against those decisions were adjourned until 1963;

6. With Respect to the Failure to Observe the No-Action Clause

Considering that this clause was explicitly referred to by National Trust in its application of 27 November 1948 for admission to the proceedings;

7. With Respect to the Measures Preparatory to the Sale and the Sale

Considering that the other side, while implicitly admitting that adequate proceedings were taken to attack the appointment of the trustees and the authorization to sell, is wrong in contending that this was supposedly not so in respect of—

(1) The failure to draw up a list of creditors prior to the convening of the meeting of creditors for the appointment of the trustees, whereas this defect was complained of in the procedural document attacking the appointment of the trustees and in the application that the sale be declared null and void;

(2) Certain acts and omissions on the part of the trustees, whereas they were referred to in the proceedings taken to attack the authorization to sell and the decision approving the method of unilateral valuation of the assets;

(3) The conditions of sale, whereas they were attacked by Barcelona Traction in an application to set aside and on appeal, in the application of 27 December 1951 for a declaration of nullity containing a formal prayer that the order approving the conditions of sale be declared null and void, and in an application of 28 May 1955 (New Documents submitted by the Belgian Government, 1969, No. 30); the same challenge was expressed by Sidro in its action of 7 February 1953 (New Documents submitted by the Spanish Government, 1969) and by two other Belgian shareholders of Barcelona Traction, Mrs. Mathot and Mr. Duvivier, in their application of 26 May 1955 (New Documents submitted by the Belgian Government, 1969, No. 29);

8. With Respect to the Exceptional Remedies

Considering that the Spanish Government is wrong in raising as an objection to the Belgian claim the allegation that Barcelona Traction did not make use of certain exceptional remedies against the bankruptcy judgment, such as application for revision, action for civil liability and criminal proceedings against the judges, and application for a hearing by a party in default;

Considering that the first of these remedies could patently not be contemplated, not only on account of the nature of the bankruptcy judgment, but also because until 1963 there was an opposition outstanding against that Judgment and, superabundantly, because Barcelona Traction, its subsidiaries and co-interested parties would not have been in a position to prove the facts of subornation, violence or fraudulent machination which alone could have entitled such proceedings to be taken;

Considering that the remedies of an action for civil liability and criminal proceedings against the judges were not adequate, since they were not capable of bringing about the annulment or setting aside of the decisions constituting denials of justice;

Considering that similarly the remedy of application for a hearing accorded by Spanish law to a party in default was patently in this case neither available to Barcelona Traction nor adequate;

FOR THESE REASONS, and any others which have been adduced by the Belgian Government in the course of the proceedings,

May it please the Court, rejecting any other submissions of the Spanish State which are broader or to a contrary effect,

To uphold the claims of the Belgian Government expressed in the submissions [in] the Reply."

The following final submissions were presented

on behalf of the Spanish Government,

at the hearing of 22 July 1969:

"Considering that the Belgian Government has no *jus standi* in the present case, either for the protection of the Canadian Barcelona Traction company or for the protection of alleged Belgian 'shareholders' of that company;

Considering that the requirements of the exhaustion of local remedies rule have not been satisfied either by the Barcelona Traction company or by its alleged 'shareholders';

Considering that as no violation of an international rule binding on Spain has been established, Spain has not incurred any responsibility vis-à-vis the applicant State on any account; and that, in particular—

(a) Spain is not responsible for any usurpation of jurisdiction on account of the action of its judicial organs;

(b) the Spanish judicial organs have not violated the rules of international law requiring that foreigners be given access to the courts, that a decision be given on their claims and that their proceedings for redress should not be subjected to unjustified delays;

(c) there have been no acts of the Spanish judiciary capable of giving rise to international responsibility on the part of Spain on account of the content of judicial decisions; and

(d) there has not been on the part of the Spanish administrative authorities any violation of an international obligation on account of abuse of rights or discriminatory acts;

Considering that for these reasons, and any others expounded in the written and oral proceedings, the Belgian claims must be deemed to be inadmissible or unfounded;

The Spanish Government presents to the Court its final submissions:

May it please the Court to adjudge and declare that the Belgian Government's claims are dismissed."

* * *

26. As has been indicated earlier, in opposition to the Belgian Application the Spanish Government advanced four objections of a preliminary nature. In its Judgment of 24 July 1964 the Court rejected the first and second of these (see paragraph 3 above), and decided to join the third and fourth to the merits. The latter were, briefly, to the effect that the Belgian Government lacked capacity to submit any claim in respect of wrongs done to a Canadian company, even if the shareholders were Belgian, and that local remedies available in Spain had not been exhausted.

27. In the subsequent written and oral proceedings the Parties supplied the Court with abundant material and information bearing both on the preliminary objections not decided in 1964 and on the merits of the case. In this connection the Court considers that reference should be made to the unusual length of the present proceedings, which has been due to the

very long time-limits requested by the Parties for the preparation of their written pleadings and in addition to their repeated requests for an extension of these limits. The Court did not find that it should refuse these requests and thus impose limitations on the Parties in the preparation and presentation of the arguments and evidence which they considered necessary. It nonetheless remains convinced of the fact that it is in the interest of the authority and proper functioning of international justice for cases to be decided without unwarranted delay.

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28. For the sake of clarity, the Court will briefly recapitulate the claim and identify the entities concerned in it. The claim is presented on behalf of natural and juristic persons, alleged to be Belgian nationals and shareholders in the Barcelona Traction, Light and Power Company, Limited. The submissions of the Belgian Government make it clear that the object of its Application is reparation for damage allegedly caused to these persons by the conduct, said to be contrary to international law, of various organs of the Spanish State towards that company and various other companies in the same group.

29. In the first of its submissions, more specifically in the Counter-Memorial, the Spanish Government contends that the Belgian Application of 1962 seeks, though disguisedly, the same object as the Application of 1958, i.e., the protection of the Barcelona Traction company as such, as a separate corporate entity, and that the claim should in consequence be dismissed. However, in making its new Application, as it has chosen to frame it, the Belgian Government was only exercising the freedom of action of any State to formulate its claim in its own way. The Court is therefore bound to examine the claim in accordance with the explicit content imparted to it by the Belgian Government.

30. The States which the present case principally concerns are Belgium, the national State of the alleged shareholders, Spain, the State whose organs are alleged to have committed the unlawful acts complained of, and Canada, the State under whose laws Barcelona Traction was incorporated and in whose territory it has its registered office ("head office" in the terms of the by-laws of Barcelona Traction).

31. Thus the Court has to deal with a series of problems arising out of a triangular relationship involving the State whose nationals are shareholders in a company incorporated under the laws of another State, in whose territory it has its registered office; the State whose organs are alleged to have committed against the company unlawful acts prejudicial to both it and its shareholders; and the State under whose laws the company is incorporated, and in whose territory it has its registered office.

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32. 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.

33. 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*.

34. 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.

35. Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so, for the rules on the subject rest on two suppositions:

> "The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach." (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 181-182.)

In the present case it is therefore essential to establish whether the losses allegedly suffered by Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account

of its nationals' having suffered infringement of their rights as shareholders in a company not of Belgian nationality?

36. Thus it is the existence or absence of a right, belonging to Belgium and recognized as such by international law, which is decisive for the problem of Belgium's capacity.

> "This right is necessarily limited to intervention [by a State] on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged." (*Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 16.)

It follows that the same question is determinant in respect of Spain's responsibility towards Belgium. Responsibility is the necessary corollary of a right. In the absence of any treaty on the subject between the Parties, this essential issue has to be decided in the light of the general rules of diplomatic protection.

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37. In seeking to determine the law applicable to this case, the Court has to bear in mind the continuous evolution of international law. Diplomatic protection deals with a very sensitive area of international relations, since the interest of a foreign State in the protection of its nationals confronts the rights of the territorial sovereign, a fact of which the general law on the subject has had to take cognizance in order to prevent abuses and friction. From its origins closely linked with international commerce, diplomatic protection has sustained a particular impact from the growth of international economic relations, and at the same time from the profound transformations which have taken place in the economic life of nations. These latter changes have given birth to municipal institutions, which have transcended frontiers and have begun to exercise considerable influence on international relations. One of these phenomena which has a particular bearing on the present case is the corporate entity.

38. In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law. All it means is that international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treat-

ment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law. Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the Court must devote attention to the nature and interrelation of those rights.

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39. Seen in historical perspective, the corporate personality represents a development brought about by new and expanding requirements in the economic field, an entity which in particular allows of operation in circumstances which exceed the normal capacity of individuals. As such it has become a powerful factor in the economic life of nations. Of this, municipal law has had to take due account, whence the increasing volume of rules governing the creation and operation of corporate entities, endowed with a specific status. These entities have rights and obligations peculiar to themselves.

40. There is, however, no need to investigate the many different forms of legal entity provided for by the municipal laws of States, because the Court is concerned only with that exemplified by the company involved in the present case: Barcelona Traction—a limited liability company whose capital is represented by shares. There are, indeed, other associations, whatever the name attached to them by municipal legal systems, that do not enjoy independent corporate personality. The legal difference between the two kinds of entity is that for the limited liability company it is the overriding tie of legal personality which is determinant; for the other associations, the continuing autonomy of the several members.

41. Municipal law determines the legal situation not only of such limited liability companies but also of those persons who hold shares in them. Separated from the company by numerous barriers, the shareholder cannot be identified with it. The concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights. The separation of property rights as between company and shareholder is an important manifestation of this distinction. So long as the company is in existence the shareholder has no right to the corporate assets.

42. It is a basic characteristic of the corporate structure that the company alone, through its directors or management acting in its name, can take action in respect of matters that are of a corporate character. The underlying justification for this is that, in seeking to serve its own best interests, the company will serve those of the shareholder too. Ordinarily, no individual shareholder can take legal steps, either in the

name of the company or in his own name. If the shareholders disagree with the decisions taken on behalf of the company they may, in accordance with its articles or the relevant provisions of the law, change them or replace its officers, or take such action as is provided by law. Thus to protect the company against abuse by its management or the majority of shareholders, several municipal legal systems have vested in shareholders (sometimes a particular number is specified) the right to bring an action for the defence of the company, and conferred upon the minority of shareholders certain rights to guard against decisions affecting the rights of the company vis-à-vis its management or controlling shareholders. Nonetheless the shareholders' rights in relation to the company and its assets remain limited, this being, moreover, a corollary of the limited nature of their liability.

43. At this point the Court would recall that in forming a company, its promoters are guided by all the various factors involved, the advantages and disadvantages of which they take into account. So equally does a shareholder, whether he is an original subscriber of capital or a subsequent purchaser of the company's shares from another shareholder. He may be seeking safety of investment, high dividends or capital appreciation—or a combination of two or more of these. Whichever it is, it does not alter the legal status of the corporate entity or affect the rights of the shareholder. In any event he is bound to take account of the risk of reduced dividends, capital depreciation or even loss, resulting from ordinary commercial hazards or from prejudice caused to the company by illegal treatment of some kind.

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44. Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. Thus no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons. Creditors do not have any right to claim compensation from a person who, by wronging their debtor, causes them loss. In such cases, no doubt, the interests of the aggrieved are affected, but not their rights. Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.

45. However, it has been argued in the present case that a company represents purely a means of achieving the economic purpose of its members, namely the shareholders, while they themselves constitute in fact the reality behind it. It has furthermore been repeatedly emphasized

that there exists between a company and its shareholders a relationship describable as a community of destiny. The alleged acts may have been directed at the company and not the shareholders, but only in a formal sense: in reality, company and shareholders are so closely interconnected that prejudicial acts committed against the former necessarily wrong the latter; hence any acts directed against a company can be conceived as directed against its shareholders, because both can be considered in substance, i.e., from the economic viewpoint, identical. Yet even if a company is no more than a means for its shareholders to achieve their economic purpose, so long as it is *in esse* it enjoys an independent existence. Therefore the interests of the shareholders are both separable and indeed separated from those of the company, so that the possibility of their diverging cannot be denied.

46. It has also been contended that the measures complained of, although taken with respect to Barcelona Traction and causing it direct damage, constituted an unlawful act vis-à-vis Belgium, because they also, though indirectly, caused damage to the Belgian shareholders in Barcelona Traction. This again is merely a different way of presenting the distinction between injury in respect of a right and injury to a simple interest. But, as the Court has indicated, evidence that damage was suffered does not *ipso facto* justify a diplomatic claim. Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected.

47. The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties. But a distinction must be drawn between a direct infringement of the shareholder's rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company.

48. The Belgian Government claims that shareholders of Belgian nationality suffered damage in consequence of unlawful acts of the Spanish authorities and, in particular, that the Barcelona Traction shares, though they did not cease to exist, were emptied of all real economic content. It accordingly contends that the shareholders had an

independent right to redress, notwithstanding the fact that the acts complained of were directed against the company as such. Thus the legal issue is reducible to the question of whether it is legitimate to identify an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights.

49. The Court has noted from the Application, and from the reply given by Counsel on 8 July 1969, that the Belgian Government did not base its claim on an infringement of the direct rights of the shareholders. Thus it is not open to the Court to go beyond the claim as formulated by the Belgian Government and it will not pursue its examination of this point any further.

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50. In turning now to the international legal aspects of the case, the Court must, as already indicated, start from the fact that the present case essentially involves factors derived from municipal law—the distinction and the community between the company and the shareholder—which the Parties, however widely their interpretations may differ, each take as the point of departure of their reasoning. If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.

51. On the international plane, the Belgian Government has advanced the proposition that it is inadmissible to deny the shareholders' national State a right of diplomatic protection merely on the ground that another State possesses a corresponding right in respect of the company itself. In strict logic and law this formulation of the Belgian claim to *jus standi* assumes the existence of the very right that requires demonstration. In fact the Belgian Government has repeatedly stressed that there exists no rule of international law which would deny the national State of the shareholders the right of diplomatic protection for the purpose of seeking redress pursuant to unlawful acts committed by another State against the company in which they hold shares. This, by emphasizing the absence of any express denial of the right, conversely implies the admission that there is no rule of international law which expressly confers such a right on the shareholders' national State.

52. International law may not, in some fields, provide specific rules in particular cases. In the concrete situation, the company against which allegedly unlawful acts were directed is expressly vested with a right, whereas no such right is specifically provided for the shareholder in respect of those acts. Thus the position of the company rests on a positive rule of both municipal and international law. As to the shareholder, while he has certain rights expressly provided for him by municipal law as referred to in paragraph 42 above, appeal can, in the circumstances of the present case, only be made to the silence of international law. Such silence scarcely admits of interpretation in favour of the shareholder.

53. It is quite true, as was recalled in the course of oral argument in the present case, that concurrent claims are not excluded in the case of a person who, having entered the service of an international organization and retained his nationality, enjoys simultaneously the right to be protected by his national State and the right to be protected by the organization to which he belongs. This however is a case of one person in possession of two separate bases of protection, each of which is valid (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 185). There is no analogy between such a situation and that of foreign shareholders in a company which has been the victim of a violation of international law which has caused them damage.

54. Part of the Belgian argument is founded on an attempt to assimilate interests to rights, relying on the use in many treaties and other instruments of such expressions as property, rights and interests. This is not, however, conclusive. Property is normally protected by law. Rights are *ex hypothesi* protected by law, otherwise they would not be rights. According to the Belgian Government, interests, although distinct from rights, are also protected by the aforementioned conventional rules. The Court is of the opinion that, for the purpose of interpreting the general rule of international law concerning diplomatic protection, which is its task, it has no need to determine the meaning of the term interests in the conventional rules, in other words to determine whether by this term the conventional rules refer to rights rather than simple interests.

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55. The Court will now examine other grounds on which it is conceivable that the submission by the Belgian Government of a claim on behalf of shareholders in Barcelona Traction may be justified.

56. For the same reasons as before, the Court must here refer to municipal law. Forms of incorporation and their legal personality have

sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.

57. Hence the lifting of the veil is more frequently employed from without, in the interest of those dealing with the corporate entity. However, it has also been operated from within, in the interest of—among others—the shareholders, but only in exceptional circumstances.

58. In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders.

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59. Before proceeding, however, to consider whether such circumstances exist in the present case, it will be advisable to refer to two specific cases involving encroachment upon the legal entity, instances of which have been cited by the Parties. These are: first, the treatment of enemy and allied property, during and after the First and Second World Wars, in peace treaties and other international instruments; secondly, the treatment of foreign property consequent upon the nationalizations carried out in recent years by many States.

60. With regard to the first, enemy-property legislation was an instrument of economic warfare, aimed at denying the enemy the advantages to be derived from the anonymity and separate personality of corporations. Hence the lifting of the veil was regarded as justified *ex necessitate* and was extended to all entities which were tainted with enemy character, even the nationals of the State enacting the legislation. The provisions of the peace treaties had a very specific function: to protect allied property, and to seize and pool enemy property with a view to covering reparation

claims. Such provisions are basically different in their rationale from those normally applicable.

61. Also distinct are the various arrangements made in respect of compensation for the nationalization of foreign property. Their rationale too, derived as it is from structural changes in a State's economy, differs from that of any normally applicable provisions. Specific agreements have been reached to meet specific situations, and the terms have varied from case to case. Far from evidencing any norm as to the classes of beneficiaries of compensation, such arrangements are *sui generis* and provide no guide in the present case.

62. Nevertheless, during the course of the proceedings both Parties relied on international instruments and judgments of international tribunals concerning these two specific areas. It should be clear that the developments in question have to be viewed as distinctive processes, arising out of circumstances peculiar to the respective situations. To seek to draw from them analogies or conclusions held to be valid in other fields is to ignore their specific character as *lex specialis* and hence to court error.

63. The Parties have also relied on the general arbitral jurisprudence which has accumulated in the last half-century. However, in most cases the decisions cited rested upon the terms of instruments establishing the jurisdiction of the tribunal or claims commission and determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case. Other decisions, allowing or disallowing claims by way of exception, are not, in view of the particular facts concerned, directly relevant to the present case.

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64. The Court will now consider whether there might not be, in the present case, other special circumstances for which the general rule might not take effect. In this connection two particular situations must be studied: the case of the company having ceased to exist and the case of the company's national State lacking capacity to take action on its behalf.

65. As regards the first of these possibilities the Court observes that the Parties have put forward conflicting interpretations of the present situation of Barcelona Traction. There can, however, be no question but that Barcelona Traction has lost all its assets in Spain, and was placed in receivership in Canada, a receiver and manager having been appointed. It is common ground that from the economic viewpoint the company has been entirely paralyzed. It has been deprived of all its Spanish sources of income, and the Belgian Government has asserted that the company

could no longer find the funds for its legal defence, so that these had to be supplied by the shareholders.

66. It cannot however, be contended that the corporate entity of the company has ceased to exist, or that it has lost its capacity to take corporate action. It was free to exercise such capacity in the Spanish courts and did in fact do so. It has not become incapable in law of defending its own rights and the interests of the shareholders. In particular, a precarious financial situation cannot be equated with the demise of the corporate entity, which is the hypothesis under consideration: the company's status in law is alone relevant, and not its economic condition, nor even the possibility of its being "practically defunct"—a description on which argument has been based but which lacks all legal precision. Only in the event of the legal demise of the company are the shareholders deprived of the possibility of a remedy available through the company; it is only if they became deprived of all such possibility that an independent right of action for them and their government could arise.

67. In the present case, Barcelona Traction is in receivership in the country of incorporation. Far from implying the demise of the entity or of its rights, this much rather denotes that those rights are preserved for so long as no liquidation has ensued. Though in receivership, the company continues to exist. Moreover, it is a matter of public record that the company's shares were quoted on the stock-market at a recent date.

68. The reason for the appointment in Canada not only of a receiver but also of a manager was explained as follows:

> "In the Barcelona Traction case it was obvious, in view of the Spanish bankruptcy order of 12 February 1948, that the appointment of only a receiver would be useless, as positive steps would have to be taken if any assets seized in the bankruptcy in Spain were to be recovered." (Hearing of 2 July 1969.)

In brief, a manager was appointed in order to safeguard the company's rights; he has been in a position directly or indirectly to uphold them. Thus, even if the company is limited in its activity after being placed in receivership, there can be no doubt that it has retained its legal capacity and that the power to exercise it is vested in the manager appointed by the Canadian courts. The Court is thus not confronted with the first hypothesis contemplated in paragraph 64, and need not pronounce upon it.

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69. The Court will now turn to the second possibility, that of the lack of capacity of the company's national State to act on its behalf. The first question which must be asked here is whether Canada—the third apex of

the triangular relationship—is, in law, the national State of Barcelona Traction.

70. In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments. This notwithstanding, further or different links are at times said to be required in order that a right of diplomatic protection should exist. Indeed, it has been the practice of some States to give a company incorporated under their law diplomatic protection solely when it has its seat *(siège social)* or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the State concerned. Only then, it has been held, does there exist between the corporation and the State in question a genuine connection of the kind familiar from other branches of international law. However, in the particular field of the diplomatic protection of corporate entities, no absolute test of the "genuine connection" has found general acceptance. Such tests as have been applied are of a relative nature, and sometimes links with one State have had to be weighed against those with another. In this connection reference has been made to the *Nottebohm* case. In fact the Parties made frequent reference to it in the course of the proceedings. However, given both the legal and factual aspects of protection in the present case the Court is of the opinion that there can be no analogy with the issues raised or the decision given in that case.

71. In the present case, it is not disputed that the company was incorporated in Canada and has its registered office in that country. The incorporation of the company under the law of Canada was an act of free choice. Not only did the founders of the company seek its incorporation under Canadian law but it has remained under that law for a period of over 50 years. It has maintained in Canada its registered office, its accounts and its share registers. Board meetings were held there for many years; it has been listed in the records of the Canadian tax authorities. Thus a close and permanent connection has been established, fortified by the passage of over half a century. This connection is in no way weakened by the fact that the company engaged from the very outset in commercial activities outside Canada, for that was its declared object. Barcelona Traction's links with Canada are thus manifold.

72. Furthermore, the Canadian nationality of the company has received general recognition. Prior to the institution of proceedings before the Court, three other governments apart from that of Canada (those of the United Kingdom, the United States and Belgium) made representa-

tions concerning the treatment accorded to Barcelona Traction by the Spanish authorities. The United Kingdom Government intervened on behalf of bondholders and of shareholders. Several representations were also made by the United States Government, but not on behalf of the Barcelona Traction company as such.

73. Both Governments acted at certain stages in close co-operation with the Canadian Government. An agreement was reached in 1950 on the setting-up of an independent committee of experts. While the Belgian and Canadian Governments contemplated a committee composed of Belgian, Canadian and Spanish members, the Spanish Government suggested a committee composed of British, Canadian and Spanish members. This was agreed to by the Canadian and United Kingdom Governments, and the task of the committee was, in particular, to establish the monies imported into Spain by Barcelona Traction or any of its subsidiaries, to determine and appraise the materials and services brought into the country, to determine and appraise the amounts withdrawn from Spain by Barcelona Traction or any of its subsidiaries, and to compute the profits earned in Spain by Barcelona Traction or any of its subsidiaries and the amounts susceptible of being withdrawn from the country at 31 December 1949.

74. As to the Belgian Government, its earlier action was also undertaken in close co-operation with the Canadian Government. The Belgian Government admitted the Canadian character of the company in the course of the present proceedings. It explicitly stated that Barcelona Traction was a company of neither Spanish nor Belgian nationality but a Canadian company incorporated in Canada. The Belgian Government has even conceded that it was not concerned with the injury suffered by Barcelona Traction itself, since that was Canada's affair.

75. The Canadian Government itself, which never appears to have doubted its right to intervene on the company's behalf, exercised the protection of Barcelona Traction by diplomatic representation for a number of years, in particular by its note of 27 March 1948, in which it alleged that a denial of justice had been committed in respect of the Barcelona Traction, Ebro and National Trust companies, and requested that the bankruptcy judgment be cancelled. It later invoked the Anglo-Spanish treaty of 1922 and the agreement of 1924, which applied to Canada. Further Canadian notes were addressed to the Spanish Government in 1950, 1951 and 1952. Further approaches were made in 1954, and in 1955 the Canadian Government renewed the expression of its deep interest in the affair of Barcelona Traction and its Canadian subsidiaries.

76. In sum, the record shows that from 1948 onwards the Canadian Government made to the Spanish Government numerous representations which cannot be viewed otherwise than as the exercise of diplomatic

protection in respect of the Barcelona Traction company. Therefore this was not a case where diplomatic protection was refused or remained in the sphere of fiction. It is also clear that over the whole period of its diplomatic activity the Canadian Government proceeded in full knowledge of the Belgian attitude and activity.

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77. It is true that at a certain point the Canadian Government ceased to act on behalf of Barcelona Traction, for reasons which have not been fully revealed, though a statement made in a letter of 19 July 1955 by the Canadian Secretary of State for External Affairs suggests that it felt the matter should be settled by means of private negotiations. The Canadian Government has nonetheless retained its capacity to exercise diplomatic protection; no legal impediment has prevented it from doing so: no fact has arisen to render this protection impossible. It has discontinued its action of its own free will.

78. The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress. The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand the performance of that obligation, and clothe the right with corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect the position internationally.

79. The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action. Whatever the reasons for any change of attitude, the fact cannot in itself constitute a justification for the exercise of diplomatic protection by another government, unless there is some independent and otherwise valid ground for that.

80. This cannot be regarded as amounting to a situation where a violation of law remains without remedy: in short, a legal vacuum.

There is no obligation upon the possessors of rights to exercise them. Sometimes no remedy is sought, though rights are infringed. To equate this with the creation of a vacuum would be to equate a right with an obligation.

81. The cessation by the Canadian Government of the diplomatic protection of Barcelona Traction cannot, then, be interpreted to mean that there is no remedy against the Spanish Government for the damage done by the allegedly unlawful acts of the Spanish authorities. It is not a hypothetical right which was vested in Canada, for there is no legal impediment preventing the Canadian Government from protecting Barcelona Traction. Therefore there is no substance in the argument that for the Belgian Government to bring a claim before the Court represented the only possibility of obtaining redress for the damage suffered by Barcelona Traction and, through it, by its shareholders.

82. Nor can the Court agree with the view that the Canadian Government had of necessity to interrupt the protection it was giving to Barcelona Traction, and to refrain from pursuing it by means of other procedures, solely because there existed no link of compulsory jurisdiction between Spain and Canada. International judicial proceedings are but one of the means available to States in pursuit of their right to exercise diplomatic protection (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 178). The lack of a jurisdictional link cannot be regarded either in this or in other fields of international law as entailing the non-existence of a right.

83. The Canadian Government's right of protection in respect of the Barcelona Traction company remains unaffected by the present proceedings. The Spanish Government has never challenged the Canadian nationality of the company, either in the diplomatic correspondence with the Canadian Government or before the Court. Moreover it has unreservedly recognized Canada as the national State of Barcelona Traction in both written pleadings and oral statements made in the course of the present proceedings. Consequently, the Court considers that the Spanish Government has not questioned Canada's right to protect the company.

84. Though, having regard to the character of the case, the question of Canada's right has not been before it, the Court has considered it necessary to clarify this issue.

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85. The Court will now examine the Belgian claim from a different point of view, disregarding municipal law and relying on the rule that in inter-State relations, whether claims are made on behalf of a State's national or on behalf of the State itself, they are always the claims of the

State. As the Permanent Court said,

> "The question, therefore, whether the . . . dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 12. See also *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 24.)

86. Hence the Belgian Government would be entitled to bring a claim if it could show that one of its rights had been infringed and that the acts complained of involved the breach of an international obligation arising out of a treaty or a general rule of law. The opinion has been expressed that a claim can accordingly be made when investments by a State's nationals abroad are thus prejudicially affected, and that since such investments are part of a State's national economic resources, any prejudice to them directly involves the economic interest of the State.

87. Governments have been known to intervene in such circumstances not only when their interests were affected, but also when they were threatened. However, it must be stressed that this type of action is quite different from and outside the field of diplomatic protection. When a State admits into its territory foreign investments or foreign nationals it is, as indicated in paragraph 33, bound to extend to them the protection of the law. However, it does not thereby become an insurer of that part of another State's wealth which these investments represent. Every investment of this kind carries certain risks. The real question is whether a right has been violated, which right could only be the right of the State to have its nationals enjoy a certain treatment guaranteed by general international law, in the absence of a treaty applicable to the particular case. On the other hand it has been stressed that it must be proved that the investment effectively belongs to a particular economy. This is, as it is admitted, sometimes very difficult, in particular where complex undertakings are involved. Thus the existing concrete test would be replaced by one which might lead to a situation in which no diplomatic protection could be exercised, with the consequence that an unlawful act by another State would remain without remedy.

88. It follows from what has already been stated above that, where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim.

89. Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are

often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests. It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject.

90. Thus, in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements. Indeed, whether in the form of multilateral or bilateral treaties between States, or in that of agreements between States and companies, there has since the Second World War been considerable development in the protection of foreign investments. The instruments in question contain provisions as to jurisdiction and procedure in case of disputes concerning the treatment of investing companies by the States in which they invest capital. Sometimes companies are themselves vested with a direct right to defend their interests against States through prescribed procedures. No such instrument is in force between the Parties to the present case.

91. With regard more particularly to human rights, to which reference has already been made in paragraph 34 of this Judgment, it should be noted that these also include protection against denial of justice. However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought; thus, within the Council of Europe, of which Spain is not a member, the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim.

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92. Since the general rule on the subject does not entitle the Belgian Government to put forward a claim in this case, the question remains to be considered whether nonetheless, as the Belgian Government has contended during the proceedings, considerations of equity do not require that it be held to possess a right of protection. It is quite true that it has been maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals, shareholders in a company which has been the victim of a violation of international law. Thus a theory has been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company. Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction.

93. On the other hand, the Court considers that, in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably. It has been suggested that if in a given case it is not possible to apply the general rule that the right of diplomatic protection of a company belongs to its national State, considerations of equity might call for the possibility of protection of the shareholders in question by their own national State. This hypothesis does not correspond to the circumstances of the present case.

94. In view, however, of the discretionary nature of diplomatic protection, considerations of equity cannot require more than the possibility for some protector State to intervene, whether it be the national State of the company, by virtue of the general rule mentioned above, or, in a secondary capacity, the national State of the shareholders who claim protection. In this connection, account should also be taken of the practical effects of deducing from considerations of equity any broader right of protection for the national State of the shareholders. It must first of all be observed that it would be difficult on an equitable basis to make distinctions according to any quantitative test: it would seem that the owner of 1 per cent. and the owner of 90 per cent. of the share-capital should have the same possibility of enjoying the benefit of diplomatic protection. The protector State may, of course, be disinclined to take up the case of the single small shareholder, but it could scarcely be denied the right to do so in the name of equitable considerations. In that field, protection by the national State of the shareholders can hardly be graduated according to the absolute or relative size of the shareholding involved.

95. The Belgian Government, it is true, has also contended that as high a proportion as 88 per cent. of the shares in Barcelona Traction belonged to natural or juristic persons of Belgian nationality, and it has used this as an argument for the purpose not only of determining the amount of the damages which it claims, but also of establishing its right of action on behalf of the Belgian shareholders. Nevertheless, this does

not alter the Belgian Government's position, as expounded in the course of the proceedings, which implies, in the last analysis, that it might be sufficient for one single share to belong to a national of a given State for the latter to be entitled to exercise its diplomatic protection.

96. The Court considers that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations. The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands. It might perhaps be claimed that, if the right of protection belonging to the national States of the shareholders were considered as only secondary to that of the national State of the company, there would be less danger of difficulties of the kind contemplated. However, the Court must state that the essence of a secondary right is that it only comes into existence at the time when the original right ceases to exist. As the right of protection vested in the national State of the company cannot be regarded as extinguished because it is not exercised, it is not possible to accept the proposition that in case of its non-exercise the national States of the shareholders have a right of protection secondary to that of the national State of the company. Furthermore, study of factual situations in which this theory might possibly be applied gives rise to the following observations.

97. The situations in which foreign shareholders in a company wish to have recourse to diplomatic protection by their own national State may vary. It may happen that the national State of the company simply refuses to grant it its diplomatic protection, or that it begins to exercise it (as in the present case) but does not pursue its action to the end. It may also happen that the national State of the company and the State which has committed a violation of international law with regard to the company arrive at a settlement of the matter, by agreeing on compensation for the company, but that the foreign shareholders find the compensation insufficient. Now, as a matter of principle, it would be difficult to draw a distinction between these three cases so far as the protection of foreign shareholders by their national State is concerned, since in each case they may have suffered real damage. Furthermore, the national State of the company is perfectly free to decide how far it is appropriate for it to protect the company, and is not bound to make public the reasons for its decision. To reconcile this discretionary power of the company's national State with a right of protection falling to the shareholders' national State would be particularly difficult when the former State has concluded, with the State which has contravened international law with regard to the company, an agreement granting the company compensation which the foreign shareholders find inadequate. If, after such a settlement, the national State of the foreign shareholders could in its turn put forward

a claim based on the same facts, this would be likely to introduce into the negotiation of this kind of agreement a lack of security which would be contrary to the stability which it is the object of international law to establish in international relations.

98. It is quite true, as recalled in paragraph 53, that international law recognizes parallel rights of protection in the case of a person in the service of an international organization. Nor is the possibility excluded of concurrent claims being made on behalf of persons having dual nationality, although in that case lack of a genuine link with one of the two States may be set up against the exercise by that State of the right of protection. It must be observed, however, that in these two types of situation the number of possible protectors is necessarily very small, and their identity normally not difficult to determine. In this respect such cases of dual protection are markedly different from the claims to which recognition of a general right of protection of foreign shareholders by their various national States might give rise.

99. It should also be observed that the promoters of a company whose operations will be international must take into account the fact that States have, with regard to their nationals, a discretionary power to grant diplomatic protection or to refuse it. When establishing a company in a foreign country, its promoters are normally impelled by particular considerations; it is often a question of tax or other advantages offered by the host State. It does not seem to be in any way inequitable that the advantages thus obtained should be balanced by the risks arising from the fact that the protection of the company and hence of its shareholders is thus entrusted to a State other than the national State of the shareholders.

100. In the present case, it is clear from what has been said above that Barcelona Traction was never reduced to a position of impotence such that it could not have approached its national State, Canada, to ask for its diplomatic protection, and that, as far as appeared to the Court, there was nothing to prevent Canada from continuing to grant its diplomatic protection to Barcelona Traction if it had considered that it should do so.

101. For the above reasons, the Court is not of the opinion that, in the particular circumstances of the present case, *jus standi* is conferred on the Belgian Government by considerations of equity.

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102. In the course of the proceedings, the Parties have submitted a great amount of documentary and other evidence intended to substantiate

their respective submissions. Of this evidence the Court has taken cognizance. It has been argued on one side that unlawful acts had been committed by the Spanish judicial and administrative authorities, and that as a result of those acts Spain has incurred international responsibility. On the other side it has been argued that the activities of Barcelona Traction and its subsidiaries were conducted in violation of Spanish law and caused damage to the Spanish economy. If both contentions were substantiated, the truth of the latter would in no way provide justification in respect of the former. The Court fully appreciates the importance of the legal problems raised by the allegation, which is at the root of the Belgian claim for reparation, concerning the denials of justice allegedly committed by organs of the Spanish State. However, the possession by the Belgian Government of a right of protection is a prerequisite for the examination of these problems. Since no *jus standi* before the Court has been established, it is not for the Court in its Judgment to pronounce upon any other aspect of the case, on which it should take a decision only if the Belgian Government had a right of protection in respect of its nationals, shareholders in Barcelona Traction.

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103. Accordingly,

THE COURT

rejects the Belgian Government's claim by fifteen votes to one, twelve votes of the majority being based on the reasons set out in the present Judgment.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fifth day of February, one thousand nine hundred and seventy, in three copies, one of which will be placed in the Archives of the Court and the others transmitted to the Government of the Kingdom of Belgium and to the Government of the Spanish State, respectively.

(Signed) J. L. BUSTAMANTE Y RIVERO,
President.

(Signed) S. AQUARONE,
Registrar.

Judge PETRÉN and Judge ONYEAMA make the following Joint Declaration:

We agree with the operative provision and the reasoning of the Judgment subject to the following declaration:

With regard to the nationality of Barcelona Traction, the Judgment refers to the existence of opinions to the effect that the absence of a genuine connection between a company and the State claiming the right of diplomatic protection of the company might be set up against the exercise of such a right. In this context the Judgment also mentions the decision in the *Nottebohm* case to the effect that the absence of a genuine connecting link between a State and a natural person who has acquired its nationality may be set up against the exercise by that State of diplomatic protection of the person concerned. The present Judgment then concludes that given the legal and factual aspects of protection in the present case there can be no analogy with the issues raised or the decision given in the *Nottebohm* case.

Now in the present case the Spanish Government has asserted and the Belgian Government has not disputed that, Barcelona Traction having been incorporated under Canadian law and having its registered office in Toronto, it is of Canadian nationality and Canada is qualified to protect it.

Canada's right of protection being thus recognized by both Parties to the proceedings, the first question which the Court has to answer within the framework of the third preliminary objection is simply whether, alongside the right of protection pertaining to the national State of a company, another State may have a right of protection of the shareholders of the company who are its nationals. This being so, the Court has not in this case to consider the question whether the genuine connection principle is applicable to the diplomatic protection of juristic persons, and, still less, to speculate whether, if it is, valid objections could have been raised against the exercise by Canada of diplomatic protection of Barcelona Traction.

Judge LACHS makes the following Declaration:

I am in full agreement with the reasoning and conclusions of the Judgment, but would wish to add the following observation:

The Court has found, in the light of the relevant elements of law and of fact, that the Applicant, the Belgian Government, has no capacity in the present case. At the same time it has stated that the Canadian Government's right of protection in respect of the Barcelona Traction company has remained unaffected by the proceedings now closed.

I consider that the existence of this right is an essential premise of the Court's reasoning, and that its importance is emphasized by the seriousness of the claim and the particular nature of the unlawful acts with which it charges certain authorities of the respondent State.

President BUSTAMANTE Y RIVERO, Judges Sir Gerald FITZMAURICE, TANAKA, JESSUP, MORELLI, PADILLA NERVO, GROS and AMMOUN append Separate Opinions to the Judgment of the Court.

Judge *ad hoc* RIPHAGEN appends a Dissenting Opinion to the Judgment of the Court.

(Initialled) J. L. B.-R.
(Initialled) S. A.

Annex 49

HUMAN RIGHTS QUARTERLY

The Gender of *Jus Cogens*

Hilary Charlesworth and Christine Chinkin

I. INTRODUCTION: THE DOCTRINE OF *JUS COGENS*

The modern international law doctrine of *jus cogens* asserts the existence of fundamental legal norms from which no derogation is permitted.[1] It imports notions of universally applicable norms into the international legal process. The status of norms of *jus cogens* as general international law, Onuf and Birney argue, "is not a logical necessity so much as a compelling psychological association of normative superiority with universality."[2] A formal, procedural definition of the international law concept of the *jus cogens* is found in the Vienna Convention on the Law of Treaties.[3] Article 53 states that:

> [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.[4]

1. *Jus cogens* norms have also been recognized in many domestic legal systems. *See* Eric Suy, *The Concept of Jus Cogens in Public International Law*, in 2 *The Concept of Jus Cogens in International Law* 17, 18–22 (Carnegie Endowment for International Peace, 1967); J. Sztucki, *Jus Cogens and the Vienna Convention on the law of Treaties* 6–11 (1972). On the existence of the doctrine of *jus cogens* in international law before the 1969 Vienna Convention, *see*, Alfred von Verdross, *Forbidden Treaties in International Law*, 31 Am. J. Int'l L. 571 (1937); Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 Am. J. Int'l L. 946, 948–60 (1967); *International Law Commission Report 1982*, at 132, U.N. Doc. A/37/10 (1982); Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* chs. 1, 2 (1988).
2. N.G. Onuf & Richard K. Birney, *Peremptory Norms of International Law: Their Source, Function and Future*, 4 Denver J. Int'l L. & Pol'y 187, 190 (1974).
3. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 63 Am. J. Int'l L. 875, 891 (1969).
4. Article 53 purports to define the notion of *jus cogens* only for the law of treaties within the Vienna Convention itself, but is generally regarded as having wider significance. *See also, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986*, art. 53, 25 I.L.M. 572 (1986). Apart

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Such a category of principles has had an uneasy existence in international law as "peremptory" norms do not fit well with the traditional view of international law as a consensual order. If the basis of international law, whether customary or conventional, is the agreement of states, how can states be bound by a category of principles to which they may have not freely consented? On what basis can peremptory norms be distinguished from other rules of international law? Thus Prosper Weil has criticized the theory of *jus cogens* both for forcing states "to accept the supernormativity of rules they were perhaps not even prepared to recognize as ordinary norms"[5] and for generally weakening the unity of the international legal system by introducing notions of relative normativity.[6] As Martii Koskenniemi points out, however, the actual terms of Article 53 contain two distinct strains, non-consensualist ("descending") and consensualist ("ascending"): "*jus cogens* doctrine shows itself as a compromise. . . . [P]eremptory norms bind irrespective of consent . . . but what those norms are is determined by consent."[7]

Article 53, together with Article 64 which provides that treaties conflicting with new peremptory norms of international law become void, was one of the most contentious provisions at the Vienna Conference. Much of the support for the inclusion of the concept of *jus cogens* in the Vienna Convention came from socialist and third world states which saw it as some protection from the unmitigated operation of the principle of *pacta sunt servanda*.[8] Some Western nations were particularly critical of the inclusion of this provision on grounds of its challenge to the principle of state sov-

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from these provisions, explicit references to jus cogens in other treaties are rare. *See also*, International Law Commission, *Draft Articles on State Responsibility*, arts. 18(2), 29(1), 33(2), 2 Y.B. Int'l L. Comm'n 30 (1980).

5. Prosper Weil, *Towards Relative Normativity in International Law*, 77 Am. J. Int'l L. 413, 427 (1983). *See also*, Georg Schwarzenberger, *International Jus Cogens*, 43 Texas L. Rev. 455 (1965).
6. Weil, *supra* note 5, at 423–30. Compare W. Riphagen, *From Soft Law to Jus Cogens and Back*, 17 Victoria U. Wellington. L. Rev. 81, 92 (1987) (arguing that relationship between "soft" international law, "hard" international law, and principles of *jus cogens* is not hierarchical, and that "soft" law and principles of *jus cogens* are more accurately seen as closely connected "entry points" to the legal system).
7. Martii Koskenniemi, *From Apology to Utopia* 283 (1989). An example of the operation of the "compromise" *jus cogens* doctrine is the prohibition on apartheid. Although the chief practitioner of apartheid, South Africa, never "consented" to its prohibition, the principle is widely accepted as universally binding as *jus cogens*. *See* Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 Harv. Int'l L.J. 457, 482 (1985).
8. John H. Spencer, *Review of the Tenth and Eleventh Sessions of the Asian-African Legal Consultative Committee, held in 1969 and 1970*, 67 Am. J. Int'l L. 180, 181 (1973); Richard D. Kearney, *The Future Law of Treaties*, 4 Int'l Lawyer 823, 830 (1970); Robert Rosenstock, *Peremptory Norms—Maybe Even Less Metaphysical and Worrisome*, 5 Denver J. Int'l L. & Pol'y 167, 169 (1975).

ereignty, its vagueness, the problem of definition of *jus cogens* norms, and the lack of state practice to support it.[9]

Defenders of the notion of *jus cogens* often explain its basis as the collective international, rather than the individual national, good.[10] On this analysis, principles of *jus cogens* play a similar role in the international legal system to that played by constitutional guarantees of rights in domestic legal systems. Thus states, as national political majorities, accept the limitation of their freedom of choice "in order to reap the rewards of acting in ways that would elude them under pressures of the moment."[11] Among those jurists who accept the category of *jus cogens*, however, continuing controversy remains over what norms qualify as principles of *jus cogens*.

Our concern in this article is neither with the debates over the validity of the doctrine of *jus cogens* in international law nor with particular candidates for *jus cogens* status. Rather, we are interested in the structure of the concept detailed by international law scholars. We argue that the concept of the *jus cogens* is not a properly universal one as its development has privileged the experiences of men over those of women, and it has provided a protection to men that is not accorded to women.

II. THE FUNCTION OF *JUS COGENS* IN INTERNATIONAL LAW

The clearest operation of the doctrine of *jus cogens* in international law is set out in the Vienna Convention on the Law of Treaties: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."[12] The freedom of states to enter into treaties is thus limited by fundamental values of the international community. Despite

9. Hannikainen, *supra* note 1, at 172–73; Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 Am. J. Int'l L. 495, 535–38 (1970); I.M. Sinclair, *Vienna Conference on the Law of Treaties*, 19 Int'l & Comp. L.Q. 47, 66–69 (1970).
10. *E.g.*, Hannikainen, *supra* note 1, at 1–2. Hannikainen writes that "'the international community of States as a whole' . . . is entitled to assume in extremely urgent cases, to protect the overriding interests and values of the community itself and to ensure the functioning of the international legal order, the authority to require one or a few dissenting States to observe a customary norm of general international law as a peremptory customary norm." *Id.* at 241.
11. Laurence H. Tribe, *American Constitutional Law* 10 (1978). *See* Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 Brit Y.B. Int'l L. 1, 19–20 (19??).
12. Vienna Convention on the Law of Treaties, *supra* note 3, art. 53. *See also id.* art. 64 (providing that if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with it becomes void and terminates); art. 66 (allowing submission of disputes concerning the application or interpretation of arts. 53 or 64 to the International Court of Justice); art. 71 (setting out the consequences of nullity on the grounds of *jus cogens*).

fears that the inclusion of this provision would subvert the principle of *pacta sunt servanda* and act to destabilize the certainty provided by treaty commitments, *jus cogens* doctrine has been only rarely invoked in this context.[13] It thus has had little practical impact upon the operation of treaties, although it may possibly exert some restraining influence on the conclusion of treaties.

Inconsistent principles of customary international law cannot stand alongside *jus cogens*.[14] Some jurists have argued that all states have a legal interest, and consequently standing, to complain in international fora about violations of the *jus cogens* by another state.[15] Allusions to *jus cogens*-type norms and their procedural and substantive implications in the jurisprudence of the International Court of Justice, however, have been occasional and ambiguous.[16]

Much of the importance of the *jus cogens* doctrine lies not in its practical application but in its symbolic significance in the international legal process. It assumes that decisions with respect to normative priorities can be made and that certain norms can be deemed to be of fundamental significance. It thus incorporates notions of universality and superiority into international law.[17] These attributes are emphasized in the language used in describing the doctrine: *jus cogens* is presented as "guarding the most fundamental and highly-valued interests of international society";[18] as an "expression of a conviction, accepted in all parts of the world community, which touches

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13. It has been argued that the Treaty of Guarantee of August 16, 1960, between Cyprus, on the one hand, and Greece, Turkey and the United Kingdom on the other, violated the *jus cogens* norm prohibiting the threat or use of force by reserving the right for the Guarantee powers to take action to reestablish the state of affairs created by the Treaty, and that United Nations resolutions on the issue implicitly acknowledge this. Schwelb, *supra* note 1, at 952–53. On assertions of invalidity of the 1979 Camp David agreements on the basis of conflict with norms of *jus cogens*, see Giorgio Gaja, *Jus Cogens Beyond the Vienna Convention*, 172 Recueil Des Cours 271, 282 (1981). For other examples see Gordon Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 Va. J. Int'l L. 585, 607 (1988). The Portuguese application against Australia in the International Court of Justice (Application Instituting Proceedings, filed in the Registry of the Court February 22 1991) obliquely raises *jus cogens* issues in the context of the bilateral Timor Gap Treaty between Indonesia and Australia. 29 I.L.M. 469 (1990).
14. Ian Brownlie, *Principles of Public International Law* 514–15 (4th ed. 1990). *See also*, Jordan Paust, *The Reality of Jus Cogens*, 7 Conn. J. Int'l L. 81, 84 (1991).
15. *E.g.*, Hannikainen, *supra* note 1, at 725–26; Oscar Schachter, *General Course in International Law*, 178 Recueil Des Cours 182–84 (1982).
16. *See, e.g., Barcelona Traction*, 1970 I.C.J. 321, 325 (sep. op. Judge Ammoun); *Namibia* (Advisory Opinion), 1971 I.C.J. 72–75 (sep. op. Judge Ammoun); *US Diplomatic and Consular Staff in Tehran* 1980 I.C.J. 30–31, 40–41, 44–45; *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 14, 100–01. (All discussed in Hannikainen, *supra* note 1, at 192–94.)
17. *See generally*, Onuf & Birney, *supra* note 2.
18. Christenson, *supra* note 13, at 587.

the deeper conscience of all nations;"[19] as fulfilling "the higher interest of the whole international community."[20] Indeed, Suy describes *jus cogens* as the foundation of international society without which the entire edifice would crumble.[21]

In the international legal literature on *jus cogens*, the use of symbolic language to express fundamental concepts is accompanied by abstraction. Writers are generally reluctant to go beyond the abstract assertion of principle to determine the operation and impact of any such norms. A tension thus exists between the weighty linguistic symbolism employed to explain the indispensable nature of *jus cogens* norms and the very abstract and inconclusive nature of their formulation. Some writers have argued that the doctrinal discussion of *jus cogens* has no echo at all in state practice.[22]

The search for universal, abstract, hierarchical standards is often associated with masculine modes of thinking. Carol Gilligan, for example, has contended that different ways of reasoning are inculcated in girls and boys from an early age. Girls tend to reason in a contextual and concrete manner; boys in a more formal and abstract way.[23] Most systems of knowledge prize the "masculine" forms of reasoning. The very abstract and formal development of the *jus cogens* doctrine indicates its gendered origins. What is more important, however, is that the privileged status of its norms is reserved for a very limited, male centered, category. *Jus cogens* norms reflect a male perspective of what is fundamental to international society that may not be shared by women or supported by women's experience of life. Thus the fundamental aspirations attributed to communities are male and the assumptions of the scheme of world order assumed by the notion of *jus cogens* are essentially male. Women are relegated to the periphery of communal values.

Our aim here is not to challenge the powerful symbolic significance of

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19. Ulrich Scheuner, *Conflict of Treaty Provisions with a Peremptory Norm of General International Law and its Consequences*, 27 Zeitschrift Fur Auslandisches Offentliches Recht und Volkerrecht 520, 524 (1967).
20. Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 Am. J. Int'l L. 55, 58 (1966).
21. Suy, *supra* note 1, at 18. Similarly, the West German Federal Constitutional Court referred to *jus cogens* as "indispensable to the existence of the law of nations as an international legal order." *Cited in* Christenson, *supra* note 13, at 592.
22. *See, e.g.*, Sztucki, *supra* note 1, at 93–94 ("[I]n the light of international practice, the question whether the concept of *jus cogens* has been 'codified' or 'progressively developed' in the [Vienna] Convention, may be answered only in the sense that there has been nothing to codify."); David Kennedy, *The Sources of International Law*, 2 Am. U. J. Int'l L. & Pol'y 1, 18 (1987).
23. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 25–51 (1982). For a discussion of this characteristic in the context of traditional international relations theory, *see*, J. Ann Tickner, *Hans Morgenthau's Principles of Political Realism: A Feminist Reformulation*, 17 Millenium: J. Int'l Stud. 429, 433 (1988).

jus cogens but to argue that the symbolism is itself totally skewed and gendered. In doing so we propose a much richer content for the concept of *jus cogens*; if women's lives contributed to the designation of international fundamental values, the category would be transformed in a radical way. Our focus will be the category of human rights often designated as norms of *jus cogens*.[24]

III. HUMAN RIGHTS AS NORMS OF *JUS COGENS*

The "most essential"[25] human rights are considered part of the *jus cogens*. For example, the American Law Institute's Revised Restatement of Foreign Relations Law lists as violations of *jus cogens* the practice or condoning of genocide, slave trade, murder/disappearances, torture, prolonged arbitrary detention or systematic racial discrimination.[26] This list has been described as "a particularly striking instance of assuming American values are synonymous with those reflected in international law."[27] At a deeper level, Simma and Alston argue that "it must be asked whether any theory of human rights law which singles out race but not gender discrimination, which condemns arbitrary imprisonment but not death by starvation, and which finds no place for a right of access to primary health care is not flawed in terms both of the theory of human rights and of United Nations doctrine."[28]

The development of human rights law has challenged the primacy of the state in international law and given individuals a significant legal status. It has, however, developed in an unbalanced and partial manner and promises much more to men than to women. This phenomenon is partly due to male domination of all international human rights fora,[29] which itself fashions

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24. Although many asserted norms of *jus cogens* are drawn from the international law of human rights, *jus cogens* is usually defined as more extensive. For example, the International Law Commission's Special Rapporteur, Sir Humphrey Waldock, proposed three categories of *jus cogens* norms: those prohibiting the threat or use of force in contravention of the principles of the United Nations Charter; international crimes so characterized by international law; and acts or omissions whose suppression is required by international law. Sir Humphrey Waldock, *Second Report on the Law of Treaties*, 2 Y.B. Int'l L. Comm'n 56–59, U.N. Doc. A/CN.4/156 and Add. 1–3 (1963). *See also*, Roberto Ago, Recueil Des Cours 320, 324 (1971); Scheuner, *supra* note 19, at 526–67.
25. Scheuner, *supra* note 19, at 526.
26. *Restatement (Third) of the Foreign Relations Law of the United States*, § 702 (1987). *Compare*, Marjorie M. Whiteman, *Jus Cogens in International Law, With a Projected List*, 7 Ga. J. Int'l & Comp. L. 609, 625–26 (1977).
27. Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens & General Principles*, 12 Aust. Y.B. Int'l L. 82, 94 (1992).
28. *Id.* at 95.
29. For example, within the United Nations, apart from the Committee on the Elimination of all Forms of Discrimination Against Women (whose 18 members are all women), there

the substance of human rights law in accordance with male values. At a deeper level, it replicates the development of international law generally.

A. The Gender Bias of Human Rights Law

International law assumes, and reinforces, a number of dichotomies between public and private spheres of action.[30] One is the distinction drawn between international ("public") concerns and those within the domestic ("private") jurisdiction of states. Within the category of international concerns there is a further public/private distinction drawn. International law is almost exclusively addressed to the public, or official, activities of states, which are not held responsible for the "private" activities of their nationals or those within their jurisdiction. The concept of imputability used in the law of state responsibility is a device to deem apparently "private" acts "public" ones. This more basic dichotomy has significant implications for women. Women's lives are generally conducted within the sphere deemed outside the scope of international law, indeed also often outside the ambit of "private" (national) law.[31]

Although human rights law is often regarded as a radical development in international law because of its challenge to that discipline's traditional public/private dichotomy between states and individuals, it has retained the deeper, gendered, public/private distinction. In the major human rights treaties, rights are defined according to what men fear will happen to them, those harms against which they seek guarantees. The primacy traditionally given to civil and political rights by Western international lawyers and philosophers is directed towards protection for men within their public life—their relationship with government. The same importance has not been generally accorded to economic and social rights which affect life in the private sphere, the world of women, although these rights are addressed to states. This is not to assert that when women are victims of violations of the civil and political rights they are not accorded the same protection,[32] but

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are a total of 13 women out of 90 "independent experts" on specialist human rights committees. *See* Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 Am. J. Int'l L. 613, 624 n.67 (1991).

30. For a fuller discussion, see *id.* at 625–28.

31. As Professor O'Donovan has pointed out, however, the "private" sphere associated with women is in fact often tightly controlled by legal regulation of taxation, health, education and welfare. Katherine O'Donovan, *Sexual Divisions in Law* 7–8 (1985).

32. Indeed Article 3 of the International Covenant on Civil and Political Rights states they will be accorded equal treatment with men. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, *entered into force* 23 Mar. 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 (1966).

that these are not the harms from which women most need protection.

All the violations of human rights typically included in catalogues of *jus cogens* norms are of undoubted seriousness; genocide, slavery, murder, disappearances, torture, prolonged arbitrary detention, and systematic racial discrimination. The silences of the list, however, indicate that women's experiences have not directly contributed to it. For example, although race discrimination consistently appears in *jus cogens* inventories, discrimination on the basis of sex does not.[33] And yet sex discrimination is an even more widespread injustice, affecting the lives of more than half the world's population. While a prohibition on sex discrimination, as racial discrimination, is included in every general human rights convention and is the subject of a specialized binding instrument, sexual equality has not been allocated the status of a fundamental and basic tenet of a communal world order.

Of course women as well as men suffer from the violation of the traditional canon of *jus cogens* norms. However the manner in which the norms have been constructed obscures the most pervasive harms done to women. One example of this is the "most important of all human rights",[34] the right to life set out in Article 6 of the Civil and Political Covenant[35] which forms part of customary international law.[36] The right is concerned with the arbitrary deprivation of life through public action.[37] Important as it is, the protection from arbitrary deprivation of life or liberty through public actions does not address the ways in which being a women is in itself life-threatening and the special ways in which women need legal protection to be able to enjoy their right to life. Professor Brownlie has pointed to the need for empirical,

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33. Compare Brownlie, *supra* note 14, at 513 n.29 (stating that principle of non-discrimination as to sex "must have the same [*jus cogens*] status" as principle of racial non-discrimination). *See also* Hannikainen, *supra* note 1, at 482.
34. Yoram Dinstein, *The Right to Life, Physical Integrity and Liberty,* in *The International Bill of Rights: The Covenant on Civil and Political Rights* 114 (L. Henkin ed., 1981).
35. *See also* Universal Declaration on Human Rights, *signed* 10 Dec. 1948, G.A. Res. 217A (III), art. 3, U.N. Doc. A/810, at 71 (1948); European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, art. 2 (1950).
36. Dinstein, *supra* note 34, at 115.
37. There is debate among various commentators as to how narrowly the right should be construed. Fawcett has suggested that the right to life entails protection only from the acts of government agents. J.E.S. Fawcett, *The Application of the European Convention on Human Rights* 30–31 (1969). Dinstein notes that it may be argued under Article 6 that "the state must at least exercise due diligence to prevent the intentional deprivation of the life of one individual by another." He seems however to confine the obligation to take active precautions against loss of life only in cases of riots, mob action, or incitement against minority groups. Dinstein, *supra* note 34, at 119. Ramcharan argues for a still wider interpretation of the right to life, "plac[ing] a duty on the part of each government to pursue policies which are designed to ensure access to the means of survival for every individual within its country." B.G. Ramcharan, *The Concept and Dimensions of the Rights to Life,* in *The Rights to Life in International Law* 1, 6 (B.G. Ramcharan ed., 1985). The examples of major modern threats to the right to life offered by Ramcharan, however, do not encompass violence outside the "public" sphere. *Id.* at 7–8.

rather than purely abstract, studies on which to base assertions of rights.[38] Such an approach highlights the inadequacy of the formulation of the international legal right to life.

A number of recent studies show that being a women may be hazardous even from before birth due to the practice in some areas of aborting female fetuses because of the strong social and economic pressure to have sons.[39] Immediately after birth womanhood is also dangerous in some societies because of the higher incidence of female infanticide. During childhood in many communities girls are breast-fed for shorter periods and later fed less so that girls suffer the physical and mental effects of malnutrition at higher rates than boys.[40] Indeed in most of Asia and North Africa, women suffer great discrimination in basic nutrition and health care leading to a disproportionate number of female deaths.[41] The well-documented phenomenon of the "feminization" of poverty in both the developing and developed world causes women to have a much lower quality of life than men.[42]

Violence against women is endemic in all states; indeed international lawyers could observe that this is one of those rare areas where there is genuinely consistent and uniform state practice. An International Tribunal on Crimes Against Women, held in Brussels in 1976, heard evidence from women across the world on the continued oppression of women and the commission of acts of violence against them.[43] Battery is the major cause of injury to adult women in the United States, where a rape occurs every six minutes.[44] In Peru, 70 percent of all crimes reported to police involve women as victims.[45] In India, 80 percent of wives are victims of violence, domestic abuse, dowry abuse or murder.[46] In 1985, in Austria, domestic violence against the wife was given as a factor in the breakdown of marriage in 59 percent of 1,500 divorce cases.[47] In Australia, a recent survey indicated

38. Ian Brownlie, *The Rights of Peoples in Modern International Law*, in *The Rights of Peoples* 1, 16 (J. Crawford ed., 1988).
39. United Nations, *The World's Women, 1970–1990: Trends and Statistics* 1 n.2 (1991); Charlotte Bunch, *Women's Rights as Human Rights: Towards a Re-Vision of Human Rights*, 12 Hum. Rts. Q. 486, 488–89 n.3 (1990).
40. Bunch, *supra* note 39, at 489; United Nations, *supra* note 39, at 59.
41. Amartya Sen, *More Than 100 Million Women Are Missing*, N.Y. Rev. Books, 30 Dec. 30 1990, at 61.
42. *See, e.g., Women are Poorer*, 27 (3) U.N. Chronicle 47 (1990).
43. *Crimes Against Women: The Proceedings of the International Tribunal* (D. Russell ed., 1984). Richard Falk has pointed out the importance of such grass roots initiatives in contributing to the normative order on the international level (without referring to this Tribunal). Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in *The Rights of Peoples* 17, 27–29 (J. Crawford ed., 1988). *Compare* Crawford, *The Rights of Peoples: Some Conclusions*, in *id.* at 159, 174–75.
44. Bunch, *supra* note 39, at 490.
45. *Id.*
46. *Id.*
47. United Nations, *supra* note 39, at 19.

that one in five men believed it acceptable for men to beat their wives;[48] while surveys by the Papua New Guinea Law Reform Commission found that up to 67 percent of wives had suffered marital violence.[49]

The United Nations system has not ignored the issue of violence against women. For example, the United Nations Commission on the Status of Women has noted its great concern on this matter and the Economic and Social Council has adopted resolutions condemning it.[50] The General Assembly itself has supported concerted, multidisciplinary action within and outside the United Nations to combat violence against women and has advocated special measures to ensure that national systems of justice respond to such actions.[51] A United Nations report on violence against women observes that "[v]iolence against women in the family has . . . been recognized as a priority area of international and national action. . . . All the research evidence that is available suggests that violence against women in the home is a universal problem, occurring across all cultures and in all countries."[52] But although the empirical evidence of violence against women is strong, it has not been reflected in the development of international law. The doctrine of *jus cogens*, with its claim to reflect central, fundamental aspirations of the international community, has not responded at all to massive evidence of injustice and aggression against women.

The great level of documented violence against women around the world is unaddressed by the international legal notion of the right to life because that legal system is focussed on "public" actions by the state. A similar myopia can be detected also in the international prohibition on torture.[53] A central feature of the international legal definition of torture is that it takes place in the public realm: it must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[54] Although many women are victims of torture in this "public" sense,[55] by far the greatest violence against women occurs in the "private" nongovernmental sphere.

Violence against women is not only internationally widespread, but most

48. Australian Government, Office of the Status of Women, *Community Attitudes Towards Domestic Violence in Australia* 2 (1988).
49. United Nations, *Violence Against Women in the Family* 20 (1989).
50. U.N. E.S.C. Res. 1982/22, 1984/14.
51. G.A. Res. 40/36 (1985), *cited in* United Nations, *supra* note 49, at 4.
52. United Nations, *supra* note 49, at 4.
53. A more detailed analysis of the international law prohibition on torture from a feminist perspective is contained in Charlesworth, Chinkin & Wright, *supra* note 29, at 628–29.
54. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (Dec. 10, 1984), art. 1(1), *draft reprinted in* 23 I.L.M. 1027 (1984), *substantive changes noted in* 24 I.L.M. 535 (1985), also *reprinted in Human Rights: A Compilation of International Instruments*, at 212, U.N. Doc. ST/HR/1/Rev.3 (1988).
55. *See, e.g.*, Amnesty International, *Women in the Front Line: Human Rights Violations Against Women* (1991).

of it occurs within the private sphere of home, hearth and family.[56] In the face of such evidence, many scholars now have moved from an analysis of domestic violence based on the external causes of such violence to a structural explanation of the universal subordination of women: "wife beating is not just a personal abnormality, but rather has its roots in the very structuring of society and the family; that in the cultural norms and in the sexist organization of society."[57]

Violence against, and oppression of, women is therefore never a purely "private" issue. As Charlotte Bunch noted, it is caused by "the structural relationships of power, domination and privilege between men and women in society. Violence against women is central to maintaining those political relations at home, at work and in all public spheres."[58] These structures are supported by the patriarchal hierarchy of the nation state. To hold states accountable for "private" acts of violence or oppression against women, however, challenges the traditional rules of state responsibility.[59] The concept of imputability proposed by the International Law Commission in its draft articles on state responsibility does not encompass the maintenance of a legal and social system in which violence or discrimination against women is endemic and where such actions are trivialized or discounted.[60] It could be argued that, given the extent of the evidence of violence against women, failure to improve legal protection for women and to impose sanctions against perpetrators of violence against women should engage state responsibility.[61]

The problematic structure of traditionally asserted *jus cogens* norms is also shown in the more controversial "collective" right to self-determination.[62] The right allows "all peoples" to "freely determine their political status and freely pursue their economic, social and cultural development."[63] Yet the oppression of women within groups claiming the right of self-determination has never been considered relevant to the validity of their claim or to the form self-determination should take.[64] An example of this is

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56. United Nations, *supra* note 49, at 18–20.
57. *Quoted in id.* at 30.
58. Bunch, *supra* note 39, at 491.
59. *See* Gordon Christenson, *Attributing Acts of Omission to the State*, 12 Mich. J. Int'l L. 312 (1991).
60. The International Law Commission's controversial definition of an international crime in Draft Article 19 (3)(c), *supra* note 4, is also significantly limited in its coverage: it refers to a "serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, apartheid."
61. *See* Americas Watch, *Criminal Injustice: Violence Against Women in Brazil* (1991).
62. This norm is not accepted by all commentators as within the *jus cogens*, but has considerable support for this status. *See* Brownlie, *supra* note 14, at 513.
63. International Covenant on Civil and Political Rights, *supra* note 32, at 1.
64. *See* Christine Chinkin, *A Gendered Perspective to the Use of Force in International Law*, 12 Aust. Y.B. Int'l L. 279 (1992); Charlesworth, Chinkin & Wright, *supra* note 29, at 642–43.

the firm United States support for the Afghani resistance movement after the 1979 Soviet invasion without any apparent concern for the very low status of women within traditional Afghani society.[65] Another is the immediate and powerful United Nations response after Iraq's 1990 invasion of Kuwait. None of the plans for the liberation or reconstruction of Kuwait were concerned with that state's denial of political rights to women. Although some international pressure was brought to bear on the Kuwaiti government during and after the invasion to institute a more democratic system, the concern did not focus on the political repression of women and was quickly dropped.

The operation of the public/private distinction in international human rights law operates to the detriment of women. In a sense, the doctrine of *jus cogens* adds a further public/private dimension to international law as *jus cogens* norms are those which are central to the functioning of the entire international community and are thus "public" in contrast to the "private" or less fundamental human rights canon. In this way, women's lives are treated as being within a doubly private sphere, far from the concerns of the international legal order.

B. A Feminist Rethinking of *Jus Cogens*

In the context of human rights, what can a feminist contribution to the jurisprudence of *jus cogens* be? For example, should we seek to define a "fourth generation" of women's human rights? Such a development could lead to segregation and marginalization of exclusively women's rights and would be unlikely to be accepted as *jus cogens*. It has been argued that the central task of feminist theory in international relations is to understand the world from the perspective of the socially subjugated.[66] One method of doing this in international law is to challenge the gendered dichotomy between public and private worlds and to reshape doctrines based on it. For example, existing human rights law can be redefined to transcend the distinction between public and private spheres and truly take into account women's lives as well as men's.[67] Considerations of gender should be fun-

65. *See* Charlesworth, Chinkin & Wright, *supra* note 29, at 642–43.
66. Sarah Brown, *Feminism, International Theory, and International Relations of Gender Inequality*, 17 Millenium: J. Int'l Stud. 461, 472 (1988).
67. For example, in the context of the right to life, the wide terms of the Human Rights Committee's General Comment on Article 6 of the International Covenant on Civil and Political Rights could be exploited to argue for the prevention of domestic violence as an aspect of this right. *See* U.N. Doc. CCPR/C/21/Rev.1 (1989), at 4–6 (1989). *See also* General Recommendation No. 19 of the Committee on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/1992/L.I/Add.15 (1992), which describes gender based violence as a form of discrimination against women.

damental to an analysis of international human rights law.[68]

Feminist rethinking of *jus cogens* would also give prominence to a range of other human rights; the right to sexual equality, to food, to reproductive freedom, to be free from fear of violence and oppression, and to peace. It is significant that these proposals include examples from what has been described as the third generation of human rights, which includes claimants to rights that have been attacked as not sufficiently rigorously proved, and as confusing policy goals with law-making under existing international law.[69] This categorization of rights to which women would attach special value might be criticized as reducing the quality and coherence of international law as a whole.[70] Such criticism underlines the dissonance between women's experiences and international legal principles generally. In the particular context of the concept of *jus cogens*, which has an explicitly promotional and aspirational character, it should be possible for even traditional international legal theory to accommodate rights that are fundamental to the existence and dignity of half the world's population. Professor Riphagen's nonhierarchical analysis of jus cogens[71] accommodates the inclusion of these rights even more readily.

IV. CONCLUSION

Fundamental norms designed to protect individuals should be truly universal in application as well as rhetoric, and operate to protect both men and women from those harms they are in fact most likely to suffer. They should be genuine human rights, not male rights. The very human rights principles that are most frequently designated as *jus cogens* do not in fact operate equally upon men and women. They are gendered and not therefore of universal validity. Further, the choices that are typically made of the relevant norms and the interpretation of what harms they are designed to prevent reflect male choices which frequently bear no relevance to women's lives. On the other hand, the violations that women do most need guarantees against do not receive this same protection or symbolic labelling. The priorities asserted are male-oriented and are given a masculine interpretation. Taking women's experiences into account in the development of *jus cogens* norms will require a fundamental rethinking of every aspect of the doctrine.

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68. Interesting work already exists in this area. For example, on the prohibition on apartheid, see Cheryl L. Poinsette, *Black Women under Apartheid: An Introduction*, 8 Harv. Women's L.J. 93 (1985); Penny Andrews, *The Legal Underpinnings of Gender Oppression in Apartheid South Africa*, 3 Aust. J.L. & Soc'y 92 (1986).
69. *See, e.g.*, Brownlie, *supra* note 38, at 16.
70. *Id.* at 15.
71. *See supra* note 6.

It has been argued that the "New World Order" promised as a positive and progressive development from the realignment of the superpowers and the apparent renaissance of the United Nations in fact continues the same priorities as the old world order.[72] The gendered nature of the international legal order is not yet on the agenda in the discussions of any truly new world order. Without full analysis of the values incorporated in *jus cogens* norms or the impact of their application, further work to make them effective in a new international legal order will in fact only continue the male orientation of international law.

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72. *See, e.g.*, Philip Alston, *Human Rights in the New World Order: Discouraging Conclusions from the Gulf Crisis,* in *Whose New World Order: What Role for the United Nations?* 85 (M. Bustelo & P. Alston eds., 1991).

Annex 50

Inter-American Court of Human Rights

Case of YATAMA *v.* Nicaragua

Judgment of June 23, 2005

(Preliminary Objections, Merits, Reparations and Costs)

In the *Case of YATAMA*,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court", or "the Court"), composed of the following judges:

Sergio García Ramírez, President
Alirio Abreu Burelli, Vice President
Oliver Jackman, Judge
Antônio A. Cançado Trindade, Judge
Cecilia Medina Quiroga, Judge
Manuel E. Ventura Robles, Judge
Diego García-Sayán, Judge, and
Alejandro Montiel Argüello, Judge *ad hoc*;

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary;

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Articles 29, 31, 37, 56, 57 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure")[1], delivers this judgment.

I
INTRODUCTION OF THE CASE

1. On June 17, 2003, in accordance with the provisions of Articles 50 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") submitted to the Court an application against the State of Nicaragua (hereinafter "the State" or "Nicaragua"), originating from petition No. 12,388, received by the Secretariat of the Commission on April 26, 2001.

2. The Commission presented the application for the Court to decide whether the State had violated Articles 8 (Right to a Fair Trial), 23 (Right to Participate in Government) and 25 (Judicial Protection) of the American Convention, all of them in relation to Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof, to the detriment of the candidates for mayors, deputy mayors and councilors presented by the indigenous regional political party, Yapti Tasba Masraka Nanih Asla

[1] This judgment is delivered under the terms of the Rules of Procedure adopted by the Inter-American Court of Human Rights at its forty-ninth regular session by an order of November 24, 2000, which entered into force on June 1, 2001, and in accordance with the partial reform adopted by the Court at its sixty-first regular session by an order of November 25, 2003, in force since January 1, 2004.

Takanka (hereinafter "YATAMA"). The Commission alleged that these candidates were excluded from participating in the municipal elections held on November 5, 2000, in the North Atlantic and the South Atlantic Autonomous Regions (hereinafter "RAAN" and "RAAS"), as a result of a decision issued on August 15, 2000, by the Supreme Electoral Council. The application stated that the alleged victims filed several recourses against this decision and, finally, on October 25, 2000, the Supreme Court of Justice of Nicaragua declared that the application for amparo that they had filed was inadmissible. The Commission indicated that the State had not provided a recourse that would have protected the right of these candidates to participate and to be elected in the municipal elections of November 5, 2000, and it had not adopted the legislative or other measures necessary to make these rights effective; above all, it had not provided for "norms in the electoral law that would facilitate the political participation of the indigenous organizations in the electoral processes of the Atlantic Coast Autonomous Region of Nicaragua, in accordance with the customary law, values, practices and customs of the indigenous people who reside there."

3. The Commission also requested the Court, in accordance with Article 63(1) of the Convention, to order the State to adopt the specific measures of reparation described in the application. Lastly, it requested the Court to order the State to pay the costs and expenses arising from processing the case in the domestic jurisdiction and before the organs of the inter-American system.

II
JURISDICTION

4. The Court is competent to hear this case, according to the terms of Articles 62 and 63(1) of the Convention, because Nicaragua has been a State Party to the American Convention since September 25, 1979, and accepted the compulsory jurisdiction of the Court on February 12, 1991.

III
PROCEEDING BEFORE THE COMMISSION

5. On April 26, 2001, YATAMA, the *Centro Nicaragüense de Derechos Humanos* (hereinafter "CENIDH") and the Center for Justice and International Law (hereinafter "CEJIL") filed a petition before the Commission.

6. On December 3, 2001, the Commission adopted Report No. 125/01, in which it declared the case admissible. The same day, the Commission made itself available to the parties in order to reach a friendly settlement.

7. On March 4, 2003, pursuant to Article 50 of the Convention, the Commission adopted Report No. 24/03, in which it recommended that the State should:

> 1. Adopt, in its domestic laws, in accordance with Article 2 of the American Convention, such legislative or other measures as may be necessary to establish an effective and simple recourse to contest the resolutions of the Supreme Electoral Council, without limitations as regards the matter contested.
>
> 2. Adopt, in its domestic laws, in accordance with Article 2 of the American Convention, such legislative or other measures as may be necessary to promote and facilitate the electoral participation of the indigenous people and the organizations that represent them, consulting them, and taking into consideration and respecting the customary law, values, practices and customs of the indigenous people residing in the Autonomous Regions on the Atlantic Coast of Nicaragua.

3. Compensate the victims.

4. Adopt the necessary measure to avoid similar events occurring in future, in accordance with its obligation to safeguard and ensure the fundamental rights recognized in the American Convention.

8. On March 19, 2003, the Commission forwarded this report to the State granting it one month from the date of transmittal to provide information on the measures adopted to comply with the recommendations.

9. On March 19, 2003, the Commission informed the petitioners that it had adopted the report indicated in Article 50 of the American Convention on Human Rights and requested them to submit, within two months, their position as regards submitting the case to the Court.

10. On May 2, 2003, YATAMA, CENIDH and CEJIL presented a brief in which they requested the Commission to submit the case to the Court, if the State failed to comply with the recommendations contained in the Commission's report.

11. On June 11, 2003, the State forwarded to the Commission its reply concerning the recommendations made in Report on Merits No. 24/03.

12. On June 12, 2003, having examined the State's reply, the Commission decided to submit the case to the Court.

IV
PROCEEDING BEFORE THE COURT

13. On June 17, 2003, the Inter-American Commission filed the application before the Court (*supra* para. 1) with the documentary evidence, and offered testimonial and expert evidence. The Commission appointed Susana Villarán and Santiago A. Canton as delegates, and Isabel Madariaga and Ariel Dulitzky as legal advisors.

14. On August 21, 2003, after the President of the Court (hereinafter "the President") had made a preliminary review of the application, the Secretariat of the Court (hereinafter "the Secretariat") notified it, together with the attachments, to the representatives of the alleged victims (hereinafter "the representatives") and the State. It also informed the State of the time limits for answering the application and appointing its representatives for the proceedings. The same day, on the instructions of the President, the Secretariat informed the State of its right to appoint a judge *ad hoc* to take part in considering the case.

15. On September 2, 2003, the State appointed José Antonio Tijerino Medrano as its Agent, Carlos Hernández Palacios, as adviser, and María Cecilia Contreras Benavides[2] as assistant, and advised that it had designated Alejandro Montiel Argüello as Judge *ad hoc*.

16. On November 14, 2003, the representatives of the alleged victims submitted their brief with requests and arguments with documentary evidence attached, and offered testimonial and expert evidence.

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[2] On February 9, 2004, the State forwarded a brief in which it advised that it had appointed María Cecilia Contreras Benavides as Deputy Agent, and on April 29, 2005, the State remitted a communication in which it indicated that it had appointed Karla Elaine Carcache Hernández as assistant.

17. On November 14, 2003, the Wisconsin Coordinating Council on Nicaragua, of Wisconsin (United States), submitted an *amicus curiae* brief to the Court.

18. On December 17, 2003, the State submitted a brief filing preliminary objections, answering the application and with comments on the brief with requests and arguments with documentary evidence attached, and offered expert evidence

19. On February 3, 2004, the representatives presented their written arguments on the preliminary objections filed by the State.

20. On February 11, 2004, the Commission forwarded its written arguments on the preliminary objections filed by the State.

21. On February 27, 2004, the State remitted a brief with its considerations on the comments that the representatives and the Commission had made on the preliminary objections, and attached various documents.

22. On May 12, 2004, on the instructions of the President, the Secretariat informed the State that it had decided not to accept the said brief, because it constituted a procedural measure that was not envisaged in the Court's Rules of Procedure, and that, when delivering the corresponding judgment, the Court would decide on the admissibility of incorporating as supervening documentary evidence the three documents submitted by the State as attachments to the brief of February 27, 2004. In addition, on the instructions of the President, the Secretariat requested the State to forward the final official list of candidates for mayors, deputy mayors and councilors presented by the YATAMA political party in the RAAN and by the Coastal People Party Alliance (PPC) and YATAMA in the RAAS for the municipal elections of November 2000.

23. On August 4, 2004, the State presented an official communication from the Director General for Electoral Logistics and Organization of the Supreme Electoral Council advising that "the YATAMA political organization did not even attend the official act when the candidates were presented, and the Supreme Electoral Council has not made any assessment of whether it complies with the requirements of the Electoral Law, since, previously, this Organization had not complied with the requirements to present the 3% supporting signatures, and to have been established six months before the elections, in accordance with the law." The State's agent indicated that, in this "way, the request of the Inter-American Court of Human Rights in its communication of May 12, 2004, had been complied with" (*supra* para. 22).

24. On December 9, 2004, on the instructions of all the judges of the Court, the Secretariat requested the State to collaborate by forwarding the said final list of candidates (*supra* paras. 22 and 23), irrespective of the fact that the YATAMA party not had taken part in the said election because it was considered that it had not complied with the legal requirements and some of the proposed candidates had not been registered.

25. On January 14 and 17, 2005, on the instructions of the President, the Secretariat requested the representatives and the State, respectively, to forward, by January 24, 2005, at the latest, any comments they deemed pertinent concerning the Commission's request in the application that the Court incorporate the expert evidence from the *Mayagna (Sumo) Awas Tingni Community case*, and "order that the

references to the history, situation and organization of the indigenous people of the Atlantic Coast of Nicaragua be considered replicated."

26. On January 21, 2005, the State submitted a brief in which it indicated that it was opposed to the Commission's request regarding the incorporation of the expert evidence from the *Mayagna (Sumo) Awas Tingni Community case* (*supra* para. 25). On January 25, 2005, the representatives remitted to the Court a brief in which they expressed their support for the Commission's said request (*supra* para. 25).

27. On January 25, 2005, the State submitted a brief, to which it attached a list from the Supreme Electoral Council of the mayors, deputy mayors and councilors elected in the municipal elections of November 7, 2004, as documentary evidence "recently issued in relation to the municipal electoral process in Nicaragua."

28. On January 28, 2005, the President issued an order in which he called upon Centuriano Knight Andrews, Nancy Elizabeth Henríquez James and Eklan James Molina, proposed as witnesses by the Commission and the representatives, and also Hazel Law Blanco and Cristina Póveda Montiel, proposed as witnesses by the representatives, to provide their testimonies by means of statements before notary public (affidavits). He also called upon María Luisa Acosta Castellón, proposed as an expert witness by the Commission, Manuel Alcántara Sáez, proposed as an expert witness by the representatives, and Mauricio Carrión Matamoros and Lydia de Jesús Chamorro Zamora, proposed as expert witnesses by the State, to provide their expert reports by means of statements before notary public (affidavits). In the same order, the President convened the parties to a public hearing to be held at the seat of the Inter-American Court, starting on March 9, 2005, to hear their final oral arguments on the preliminary objections and merits, reparations, and costs, and the testimonial statements of Jorge Teytom Fedrick and Brooklyn Rivera Bryan, proposed by the Inter-American Commission and endorsed by the representatives, the testimonial statements of John Alex Delio Bans and Anicia Matamoros de Marly proposed by the representatives, and also the expert evidence of Robert Andrés Courtney Cerda, proposed as an expert witness by the Commission, María Dolores Alvarez Arzate, proposed as an expert witness by the representatives and Carlos Antonio Hurtado Cabrera and Marvin Saúl Castellón Torrez, proposed as expert witnesses by the State. In addition, in this order, the President informed the parties that they had until April 11, 2005, to present their final written arguments on the preliminary objections and merits, reparations, and costs.

29. On February 8, 2005, the State forwarded the sworn written statements made before notary public (affidavits) of two expert witnesses (*supra* para. 28).

30. On February 15, 2005, the Inter-American Commission remitted the sworn statement made by one witness, and also the sworn written statement made before notary public (affidavit) by an expert witness (*supra* para. 28). On the same date, the representatives presented sworn written statements made before notary public (affidavits) by three witnesses, and the sworn statement made by one witness, and stated that "they would abstain from presenting the expert report of Manuel Alcántara" (*supra* para. 28).

31. On February 23, 2005, the Commission forwarded the sworn statement made by the expert witness, Robert Andrés Courtney Cerda, who had been called upon by the President to provide his expert evidence at the public hearing (*supra* para. 28),

and requested the Court to accept it, since the expert witness was unable to attend the hearing.

32. On February 25, 2005, the representatives submitted a brief informing the Court that it had no comments to make on the sworn written statements made before notary public (affidavits) remitted by the Commission and the State, or on the sworn written statement remitted by the Commission (*supra* paras. 29, 30 and 31).

33. On February 25 and March 1, 2005, the State forwarded its comments on the sworn written statements presented by the Commission and the representatives (*supra* paras. 30 and 31). Also, in the brief of March 1, 2005, in response to the request of the President and all the judges of the Court (*supra* paras. 22 and 24), the State attached the "report of the Supreme Electoral Council to the Minister of Foreign Relations […] of February 25, 2005." Among this documentation, the State provided a document signed by the President of the RAAN Regional Electoral Council advising that on July 15, 2000, the legal representative of YATAMA had presented for registration a sheet with the names of the candidates who would take part in the municipal elections in that region.

34. On March 8, 2005, the United Nations University for Peace submitted an *amicus curiae* brief.

35. On March 9, 2005, the representatives forwarded a brief with which they presented a "copy of the final resolution issued in file No. 217/00, on March 3, 2001, by the Ombudsman of Nicaragua." On the same date, the representatives forwarded to the Court a brief in which they clarified that the resolution was issued on March 3, 2005, and that they had provided this document as "a new piece of evidence in the proceedings."

36. On March 9, 2005, the Commission sent a brief with its comments on the State's objections to the "written statements made by the witnesses, Nancy Elizabeth Henríquez James, Centuriano Knight Andrews, Eklan James Molina, Hazel Law Blanco and Cristina Póveda Montiel, and also by the expert witness, María Luisa Acosta Castellón" (*supra* para. 33). On March 12, 2005, on the instructions of the President, the Secretariat of the Court informed the Commission that the brief of March 9, 2005, had not been accepted because it was a written procedural measure that was not provided for in the Court's Rules of Procedure.

37. On March 9 and 10, 2005, the Court held a public hearing on preliminary objections and merits, reparations, and costs, during which it received the statements of the witnesses and the reports of the expert witnesses proposed by the parties (*supra* para. 28). The Court also heard the final arguments of the Commission, the representatives and the State. During the hearing, the witness, Jorge Teytom Fedrick, provided several documents.

There appeared before the Court:

For the Inter-American Commission:

Isabel Madariaga, adviser
Juan Pablo Albán, adviser
Víctor H. Madrigal Borloz, adviser, and
Lilly Ching, adviser.

For the representatives of the alleged victims:

Viviana Krsticevic, Executive Director, CEJIL
Soraya Long, Director, CEJIL Meso-America
Gisela De León, lawyer, CEJIL
Will Bloomfield, assistant, CEJIL, and
Norwin Solano, lawyer, CENIDH.

For the State of Nicaragua:

José Antonio Tijerino Medrano, Agent
María Cecilia Contreras Benavides, Deputy Agent, and
Carlos José Hernández López, adviser.

Witnesses proposed by the Commission and the representatives:

Brooklyn Rivera Bryan, and
Jorge Teytom Fedrick.

Witnesses proposed by the representatives:

John Alex Delio Bans, and
Anicia Matamoros de Marly.

Expert witness proposed by the representatives:

María Dolores Álvarez Arzate.

Expert witnesses proposed by the State:

Carlos Antonio Hurtado Cabrera, and
Marvin Saúl Castellón Torres.

38. On March 24, 2005, the University of Arizona's Indigenous People Law and Policy Program presented an *amicus curiae* brief.

39. On March 31, 2005, the Secretariat reminded the State that, during the public hearing, the Court had requested it to present, by April 11, 2005, at the latest, a copy of the decision of the Regional Committee, in which, as the State had indicated during the hearing, YATAMA was notified that it did not comply with the requirements for the registration of its candidates for mayors, deputy mayors and councilors in the municipal elections of November 2000. It also reminded the parties that, during the said hearing, the Court had requested them to provide, by April 11, 2005, at the latest, the information that the Court needed to be able to determine the identity of the

alleged victims in the case, because the Commission's list differed from that provided by the representatives. In this regard, it also reminded the State that it had not forwarded the list of the RAAS candidates, and had not indicated whether there was any reason it could not do so.

40. On April 8, 2005, in response to the requests of the President and the Court (*supra* paras. 22, 24 and 39), the State submitted a brief with which it provided several documents. Regarding the copy of the Regional Committee's decision (*supra* para. 39), in its brief the State indicated that, "the Regional Committee had not issued a decision." The documents submitted by the State included an attestation issued on April 5, 2005, by the Director General for Political Parties of the Supreme Electoral Council, certifying that "according to the candidate registration records prepared by this General Directorate for the election for mayors, deputy mayors and members of the Municipal Councils in the elections of November 2000, the Yapti Tasba Masraka Nanih Asla Takanka (YATAMA) party did not present candidates in the South Atlantic Autonomous Region (RAAS) to the Supreme Electoral Council."

41. On April 8, 2005, the State presented its final written arguments on preliminary objections and merits, reparations, and costs (*supra* para. 28), and provided copies of three documents that it had attached to its first brief of April 8, 2005 (*supra* para. 40), as well as two new documents.

42. On April 8, 2005, the Office of the Ombudsman of Nicaragua submitted an *amicus curiae* brief.

43. On April 11, 2005, the representatives forwarded their final written arguments on preliminary objections and merits, reparations, and costs (*supra* para. 28), with attachments.

44. On April 12, 2005, the Commission forwarded its final written arguments on preliminary objections and merits, reparations, and costs (*supra* para. 28).

45. On April 15, 2005, on the instructions of the President, the Secretariat requested the State to forward, as soon as possible, any list or attestation it had with regard to the candidates presented by YATAMA in the RAAS, even if they were documents that had not been presented directly to the Supreme Electoral Council but rather to a regional electoral authority, or attestations that had not been issued by the said Council, but by a regional electoral authority (*supra* paras. 22, 24 and 39).

46. On April 21, 2005, in response to the Secretariat's communication of April 15, 2005, the State forwarded a brief indicating that the Secretariat "in this regard, had confused the RAAN with the RAAS"; consequently, it provided a new attestation issued on April 20, 2005, by the Director General for Political Parties of the Supreme Electoral Council, indicating that "for the elections for mayors, deputy mayors and members of the Municipal Councils [...] of November 2000, the Yapti Tasba Masraka Nanih Asla Takanka (YATAMA) party did not present candidates before the Supreme Electoral Council, or before the Electoral Council of the South Atlantic Autonomous Region (RAAS)."

47. On April 27, 2005, on the instructions of the President, the Secretariat reiterated to the State (*supra* paras. 22, 24, 39 and 45) that it should present an official copy of the list of candidates that the alliance between YATAMA and the Coastal People Party had presented to the Supreme Electoral Council, the Directorate General

for the elections for mayors, deputy mayors and municipal councilors, the Regional Electoral Council or any other national or regional authority, because the chapter entitled "Considerations" of the resolution issued by the Supreme Electoral Council on August 15, 2000, indicated that "on July 15, [2000,] the PPC/YATAMA Alliance presented candidates for mayors, deputy mayors and councilors" in the RAAS.

48. On April 29, 2005, on the instructions of the President, the Secretariat requested the Commission and the representatives to clarify and explain the differences in the lists of YATAMA candidates they had provided during the proceedings before the Court and informed them that, should any of the persons on either of the lists in the case file be excluded, they should explain this exclusion.

49. On May 5, 2005, in response to the request made by the President and the Court (*supra* paras. 22, 24, 39, 45 and 47), the State submitted a brief with which it provided "an attestation issued on [May 3, 2005], by the Director for Political Parties of the Supreme Electoral Council with the list containing the details of the candidates [that] the 'PPC/YATAMA Alliance' present[ed] to the Regional Electoral Council in order to participate in the November 2000 municipal elections in the South Atlantic Autonomous Region."

50. On May 9, 2005, on the instructions of the President, the Secretariat informed the Commission and the representatives that, when providing the clarifications and explanations in response to the doubts raised in the notes of April 29, 2005 (*supra* para. 48) regarding the determination of the alleged victims in this case, they should also refer to the attestation of the names of "candidates for mayors and councilors" forwarded by the State on May 5, 2005 (*supra* para. 49), and explain any differences that might appear when comparing the different lists of alleged victims in the RAAS in the case file before the Court.

51. On May 13, 2005, in response to the Secretariat's notes of April 29 and 9 May, 2005 (*supra* paras. 48 and 50), the representatives forwarded a brief with clarifications and explanations relating to the questions raised in relation to the different lists of candidates presented during the proceedings before the Court. On May 16, 2005, in response to the Secretariat's notes, the Commission submitted a brief indicating that "the statement included in the final arguments brief with regard to the fact that 'the alleged victims were candidates for mayors, deputy mayors and councilors' presented by YATAMA in the municipal elections on November 5, 2000, in the [RAAN] and the [RAAS], was the result of a position of principle," because "the Commission considered that the injured party, which it represented, was in a better position to present the important detailed clarifications required [...] during the public hearing in the case."

52. On May 18, 2005, the State forwarded two briefs referring to the brief presented by the representatives of the alleged victims on May 13, 2005 (*supra* para. 51).

53. On May 19, 2005, the State presented a brief in which it transmitted its "comments on the communications [... of the] Inter-American Commission on Human Rights and CEJIL [submitted] on May 16 and 13, [2005]" (*supra* para. 51), and indicated that "at no stage of the proceedings had it provided helpful evidence, and wished for this to be recorded in the respective file."

54. On June 14, 2005, the President addressed a communication to the State regarding the three briefs submitted on May 18 and 19, 2005 (*supra* paras. 52 and 53).

V
PRELIMINARY OBJECTIONS

55. In the brief answering the application and with comments on the brief with requests and arguments (*supra* para. 18), the State filed the following preliminary objections:

> "First: Lack of jurisdiction of the Inter-American Court of Human Rights";
> "Second: Absence of the admissibility requirements established in Article 46 of the American Convention on Human Rights";
> "Third: Illegitimacy of the representatives";
> "Fourth: Lack of right of action"; and
> "Fifth: Obscurity of the application and its expansion".

56. The Court will proceed to examine together the first and fourth preliminary objections presented by the State, and will then examine the other preliminary objections separately in the order in which they were filed.

*
* *

FIRST AND FOURTH PRELIMINARY OBJECTIONS
"Lack of jurisdiction of the Inter-American Court of Human Rights"
and "Lack of right of action"

Arguments of the State

57. Regarding the first objection:

> (a) Since, in Nicaragua, there are norms that regulate the presentation of candidates for the offices of mayor, deputy mayor and councilor, as well as their election, "it is not admissible for the Inter-American Commission on Human Rights to affirm that the State [...] has failed to comply with the obligation to adopt domestic legal provisions that facilitate the exercise of the rights recognized in Article 1(1) of the Convention and, consequently, the Court lacks jurisdiction to consider a violation that does not exist. In view of the foregoing, the Commission cannot [...] affirm that the Nicaraguan State [...] has failed to comply with the general obligation to respect rights referred to in Article 1(1) of the Convention. [T]herefore, [...] the Court lacks jurisdiction to consider a non-existent violation;
>
> (b) "There has been no violation of Article 8 of the Convention, which the Inter-American Commission on Human Rights attributes to the State of Nicaragua and, consequently, the Court lacks jurisdiction to consider a non-existent violation";

(c) With regard to the alleged violation of Article (2)(h) of the Convention: "in this case we have a ruling of the Supreme Electoral Council of the Republic of Nicaragua[,] which is the highest electoral tribunal in Nicaragua." "[T]he persons in whose name the Commission is making a claim […] used the recourses established in the Electoral Law; […]the fact that these recourses were unsuccessful in no way signifies that the State of Nicaragua has failed to adopt the legislative provisions necessary to give effect to the rights embodied in the Convention";

(d) "With regard to the alleged violation of Article 23 of the Convention, [...t]he Electoral Act [...] regulates the exercise of the rights and opportunities referred to in Article 23(1) of the Convention, respecting the parameters contained in the second paragraph of this Article." "The fact that the persons in whose name the Commission has filed the application, and the organizations cited in its expansion, have not complied with the regulations of the Electoral Act and, consequently, have not participated in the election process for mayors, deputy mayors and councilors, in no way signifies a violation of their political rights"; and

(e) "In relation to the alleged violation of Article 25 of the Convention, […] the Constitution of the Republic of Nicaragua, the Amparo Act and the Electoral Act establish the recourses to contest acts that are considered to have violated fundamental rights […. T]herefore[,] the Commission […] has no grounds for affirming that the State of Nicaragua has violated Article 25 of the American Convention on Human Rights." If the recourses are considered inadmissible, the State is unable to take action against this decision.

58. With regard to the fourth objection:

(a) "[This] objection […] is based on the fact that the State of Nicaragua has not violated the rights established in Articles 8, 25, 2 and 1, and 23, 24 and 2 of the Convention." "[T]he YATAMA political party use[d] all the recourses of domestic law that regulate electoral processes";

(b) The Inter-American Commission recognizes the existence of numerous constitutional and legal provisions in favor of the communities of the Atlantic Coast so that they may live and evolve under their own form of social organization. The State "guarantees the concept of the absolute equality before the law of all Nicaraguan citizens"; and

(c) "The Constitution and the laws in force have been applied strictly." Article 173(14) *in fine* of the Constitution grants judicial powers to the Supreme Electoral Council, when it establishes that there is no ordinary or extraordinary recourse against its resolutions. Since "the laws in force have been applied[, ...] the Commission has no right of action against the State of Nicaragua and [the State] requests the Court to declare this." "A system of jurisdictional powers similar to those granted by the Constitution to the Supreme Electoral Council may be appreciated in comparative law."

Arguments of the Commission

59. The Inter-American Commission requested the Court to "reject summarily" the first preliminary objection and indicated that:

(a) It is inadmissible that the State should present arguments disputing the existence of the alleged violations, in order to avoid the Court ruling on the merits of the case; and

(b) The facts that are the subject of this case occurred after the date on which Nicaragua accepted the Court's jurisdiction.

60. The Commission requested the Court to reject "summarily" the fourth preliminary objection, and indicated that it was "clearly inadmissible" for the State to present exclusively "arguments on the merits [...] of the alleged violations[,]in order to avoid the Court ruling on the merits of the case."

Arguments of the representatives of the alleged victims

61. The representatives requested the Court to "postpone considering the State's [first] objection until the merits stage of the case and then reject it, because there have been violations of the American Convention," and they contended that:

(a) The first objection is not a genuine preliminary objection, "but rather mere objections of the State that refer to the merits of the case";

(b) The debate on whether the State has incurred international responsibility for violating the American Convention, "could only constitute a preliminary objection if the application did not present facts that constitute a violation of the Convention," and this has not occurred in the instant case; and

(c) Pursuant to Nicaragua's ratification of the Convention and acceptance of the Court's compulsory jurisdiction, the Court has jurisdiction to hear any case on the interpretation and application of the Convention.

62. The representatives requested the Court "to consider [the fourth preliminary objection] when considering the merits of this case" and indicated that:

(a) The fourth objection is not a genuine preliminary objection, "but rather simple objections" that "inevitably refer to the merits of the case"; and

(b) They requested the Court to "declare that the Commission has full powers to submit this case to the consideration of the Court under Article 61(1) of the American Convention and Article 32 of the Rules of Procedure of the Court, since the procedures established in Articles 44 to 51 of the Convention have been exhausted."

Considerations of the Court

63. The Court considers that the arguments put forward by the State concerning the first and fourth preliminary objections refer to the merits of the case; namely, the existence or not of violations of the American Convention.

64. The application filed by the Commission before the Court sets out a series of facts that describe possible violations of the provisions of the American Convention. Both the Commission and the representatives of the alleged victims have submitted arguments that refer to violations of this treaty allegedly committed by Nicaragua. The

facts described by the Commission occurred after Nicaragua had accepted the Court's jurisdiction.

65. It is for the Court to determine what happened in this case. To this end, it will examine the evidence that has been gathered and the statements of the parties. Based on the facts that it decides have been proved, the Court will rule on the existence of the alleged violations.

66. When deciding on the merits of this case, the Court will bear in mind the State's arguments with regard to the first and fourth preliminary objections, since they involve arguments that contest the existence of the alleged violations.

67. Based on the above, the Court rejects the first and fourth preliminary objections because they do not involve genuine objections.

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* *

SECOND PRELIMINARY OBJECTION
"Absence of the admissibility requirements established in Article 46 of the American Convention on Human Rights"

68. *Arguments of the State:*

(a) "[I]n the instant case, the situations described in subparagraphs (a), (b) and (c) of paragraph (2) of […] Article [46 of the American Convention] do not exist. Therefore, the application and its expansion should not have been admitted." The Court does not have jurisdiction to hear this case, according to Article 61(2) of the Convention;

(b) "Due process of law for the protection of the right or rights that it is alleged have been violated [was] in force, because the plaintiffs exhausted domestic recourses under the Constitution and the Electoral Act." The State also referred to the powers that the Electoral Act grants to the Departmental (CED), Regional (CER) and Municipal (CEM) Electoral Councils. The domestic laws that regulate the exercise of political rights should be adapted to the parameters of the American Convention "to the extent allowed by the Constitution";

(c) "The Commission itself admitted that the existing recourses had been exhausted;

(d) "The powers that Articles 46 and 47 of the Convention […] grant to the Inter-American Commission […] allow it to determine whether the petition of an alleged victim is admissible." Nevertheless, that decision only binds the alleged victim and the Commission, but it does not bind the Court or the defendant State"; and

(e) "The right of the State to contest the application by alleging that it is not admissible was exercised at the opportune moment before the Inter-American Court, by means of the preliminary objections".

69. *Arguments of the Commission*

The Inter-American Commission requested the Court to "reject summarily" this preliminary objection as "unfounded and time-barred," and alleged that:

> (a) The State has stated expressly that domestic remedies have been exhausted. "[T]hus there is no dispute in this regard";
>
> (b) The objection that domestic remedies have not been exhausted "should be rejected because it disregards an explicit decision of the Commission […] in Report 125/01 of December 3, 2001," declaring the petition admissible. The review of matters of admissibility by the Court "would appear to jeopardize procedural equality and create disparity between the parties"; and
>
> (c) The Admissibility Report makes it clear that the State did not exercise its right to submit information, make comments, and contest or question the requirements for the petition's admissibility at the procedural opportunity established in Article 48 of the Convention and Article 30 of the Rules of Procedure. According to the Court's case law and treaty-based norms, objections to the exhaustion of domestic remedies should be filed before the Commission.

70. *Arguments of the representatives of the alleged victims*

The representatives requested the Court to "reject the arguments of the State because they were totally unfounded" and indicated that:

> (a) The State had accepted that "the complainants have exhausted domestic remedies under the Constitution and the Electoral Act";
>
> (b) "It is evident that the State has interpreted Article 46 of the American Convention erroneously." The requirements for the admissibility of a petition are to be found in Article 46(1) of the Convention and the exceptions to them are established in the second paragraph of this Article. "If, as in the instant case, domestic remedies have been exhausted and the petition has been lodged within the period of six months, the second paragraph of Article 46 is not applicable"; and
>
> (c) The State did not submit comments on the initial petition, or present valid arguments that would justify reopening the discussion on admissibility.

Considerations of the Court

71. In the second preliminary objection, Nicaragua does not allege the failure to exhaust domestic remedies, but submits arguments on issues related to merits. By referring to the existence "of domestic laws [...concerning] due process of law for the protection of the right or rights that are alleged to have been violated," and indicating that, in this case, "the situations described in subparagraphs (a), (b) and (c) of paragraph (2) of […] Article [46 of the American Convention] do not exist," it is, in fact, alluding to the merits of the alleged violations of Articles 8 and 25 of the American Convention.

72. When deciding on the merits of the case, the Court will bear in mind the State's arguments with regard to this second preliminary objection, because they dispute the existence of the alleged violations.

73. In view of the above, the Court rejects the second preliminary objection.

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* *

THIRD PRELIMINARY OBJECTION
"Illegitimacy of the representatives"

74. *Arguments of the State:*

(a) The provisions of Article 23(1) and 23(2) of the Rules of Procedure of the Court, concerning the participation of the alleged victims have not been complied with. In the communication of August 13, 2003 addressed to the Secretary of the Court by Brooklyn Rivera, "the latter acknowledges that he has not attached the powers of attorney in favor of CEJIL and CENIDH[,]";

(b) "On page seven of the Expansion of the Application, the signatories, members of CEJIL and CENIDH, acknowledge the illegitimacy of their representation" when they ask the Court "to request the State to submit the official lists and allow [them] to present the powers of attorney of each of the victims, when they have seen the official final list of candidates presented by YATAMA in the RAAN and the RAAS for the 2000 municipal elections";

(c) The powers granted to CENIDH and CEJIL by the alleged victims contain "evident violations of the Nicaraguan Notarial Act in force (art. 23(3) […]";

(d) "[I]t is one thing to have presented 64 powers of attorney, flawed or correct, which [the Court] is empowered to accept as valid or to reject, and quite another not to have presented powers of attorney, which constitutes absolute lack of representation, and this is the point the State of Nicaragua is raising in [this] objection."

(e) The representatives of the alleged victims "have not specified, much less, the alleged circumstances that explain why they were unabe to obtain the powers of attorney"; and

(f) "With regard to the State of Nicaragua failing to provide assistance to enable them to know exactly who the alleged victims are by facilitating the official lists, in Nicaragua, Article 921 of the Code of Civil Procedure establishes the legal procedures for obtaining documents or movables."

75. *Arguments of the Commission*

The Inter-American Commission asked the Court to "reject summarily" this preliminary objection because it was "unfounded and time-barred," and argued that:

(a) The Inter-American Court has established that the proceedings before an international human rights tribunal are not subject to the formalities of domestic laws;

(b) The State's allegations that the powers of attorney granted to CEJIL and CENIDH violate the Nicaraguan Notarial Act "are not admissible before an international human rights court, since the Nicaraguan State knows who

represents the [alleged] victims in this case and the formalities relating to the signature of powers of attorney in no way affects their right to a defense."

76. *Arguments of the representatives of the alleged victims*

The representatives asked the Court to "reject this preliminary objection" and indicated that:

(a) The powers of attorney presented by the representatives do not have to comply with the requirements established in domestic laws. Their validity results from the fact that they identify unequivocally the person granting the power, reflect an evident willingness, individualize clearly the entity to which the power is granted, and indicate precisely the purpose of the representation. The powers of attorney granted in this case show clearly the identification of those granting them and individualize clearly the entities to which the powers are granted;

(b) "The declarations of the Agent of the State of Nicaragua during the public hearing [...] show conclusively that the State has withdrawn the arguments concerning defects in the powers of attorney submitted";

(c) Powers of attorney do not necessarily have to be presented at one precise moment. The representatives may present the powers of attorney "at any time subsequent to notification of the Commission's application. [...] Until that time, according to Article 33(3) of the Rules of Procedure of the Court, the Inter-American Commission 'shall be the procedural representative' of all those [alleged] victims who have not appointed a representative";

(d) Article 44 of the Convention "grants considerable latitude for lodging petitions before the Commission";

(e) There are special circumstances that justify why the representatives have not presented all the powers of attorney;

(f) There were difficulties in identifying the candidates elected by the indigenous communities of the Atlantic Coast owing to their oral culture, which explains the absence of written records, and owing to "the obstructive attitude of the Nicaraguan State." In its answer to the application, the State did not present the official lists of candidates "and, consequently, the representatives of the [alleged] victims [were] unable to individualize them and obtain the respective powers of attorney from each of them";

(g) They have also encountered difficulties in obtaining the powers of attorney of the candidates presented by YATAMA owing to the predominance of the oral culture, problems of access and transport in the Atlantic Autonomous Regions and their high cost for the indigenous people, the considerable number of alleged victims, their cultural differences, and locating them; and

(h) When referring to "the duly accredited representatives," the purpose of Articles 23, 33, 35 and 36 of the Court's Rules of Procedure is to ensure that the alleged victims or their next of kin, "when legally empowered to present their arguments, requests and evidence, do not lack a proper defense in the proceedings before the Court".

Considerations of the Court

77. The State's arguments concerning the objection of "Illegitimacy of the representatives" focus on two main issues: (a) that some of the powers of attorney of the alleged victims were not presented; and (b) that the powers granted to CENIDH and CEJIL by some of the alleged victims contain "evident violations of the Nicaraguan Notarial Act in force."

a) Failure to present the powers of attorney of all the alleged victims

78. Article 44 of the Convention establishes that:

> Any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

79. Article 33 (Filing of the Application) of the Rules of Procedure of the Court, in force when the Commission filed the application in this case before the Court[3], stipulated that:

> The brief containing the application shall indicate:
>
> (1) The claims (including those relating to reparations and costs); the parties to the case; a statement of the facts; the orders on the opening of the proceeding and the admissibility of the petition by the Commission; the supporting evidence, indicating the facts on which it will bear; the particulars of the witnesses and expert witnesses and the subject of their statements; the legal arguments, and the pertinent conclusions. In addition, the Commission shall include the name and address of the original petitioner, and also the name and address of the alleged victims, their next of kin or their duly accredited representatives, when this is possible.
>
> (2) The names of the Agents or the Delegates.
>
> If the application is filed by the Commission, it shall be accompanied by the report referred to in Article 50 of the Convention.

80. Article 35 of the Rules of Procedure (Notification of the Application) establishes that the Secretary shall notify the application to:

> (a) The President and the judges of the Court;
>
> (b) The respondent State;
>
> (c) The Commission, when it is not the applicant;
>
> (d) The original claimant, if known;
>
> (e) The alleged victim, his next of kin, or his duly accredited representatives, if applicable.

81. Article 23 (Participation of the Alleged Victims) of the Court's Rules of Procedure, which the State alleges "have not been complied with" in this case *(supra* para. 74(a)), establishes that:

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[3] This Article was amended by the Court during its sixty-first regular session, on November 25, 2003, with the addition of a third subparagraph. The addition entered into force as of January 1, 2004. The application in this case was presented by the Commission on June 17, 2003.

> 1. When the application has been admitted, the alleged victims, their next of kin or their duly accredited representatives may submit their pleadings, motions and evidence, autonomously, throughout the proceeding.
>
> 2. When, there are several alleged victims, next of kin or duly accredited representatives, they shall designate a common intervenor who shall be the only person authorized to present pleadings, motions and evidence during the proceedings, including the public hearings.
>
> 3. In case of disagreement, the Court shall make the appropriate ruling.

82. The individual's access to the Inter-American system for the protection of human rights cannot be restricted based on the requirement to have a legal representative. The application can be presented by a person other than the alleged victim. The Court has stated that "the formalities that characterize certain branches of domestic law do not apply to international human rights law, whose principal and determining concern is the just and complete protection of those rights."[4]

83. Article 33 of the Rules of Procedure in force when the application was lodged indicated that "when this is possible," the Commission should include the name and address of the alleged victims, their next of kin or their duly accredited representatives. It is understood that the omission of this information does not entail the rejection of the application. Article 35 of the Rules of Procedure established that the application would be notified, *inter alia*, to "the alleged victim, his next of kin, or his duly accredited representatives, if applicable." The possibility of the alleged victims or their next of kin not having appointed representatives was therefore envisaged.

84. The scope of the provisions of these Articles of the American Convention and the Rules of Procedure must be interpreted by the Court in accordance with their purpose and object, which is the protection of human rights,[5] and according to the principle of the *effet util* of the norms.[6]

85. The said Article 23 of the Rules of Procedure, which regulates the participation of the alleged victims in the proceedings before the Court, when the application has been admitted, contains one of the most important regulatory modifications introduced in the Rules of Procedure adopted on November 24, 2000, which entered into force on June 1, 2001. This norm recognizes the right of the alleged victims and their next of kin to participate, autonomously, throughout the proceedings. The previous Rules of Procedure of the Court granted them a more limited legitimacy. The Court could not interpret the said Article 23 of the Rules of Procedure by restricting the rights of the alleged victims and their next of kin and ceasing to hear a case when they do not have a duly accredited representative.

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[4] *Cf. Case of Castillo Petruzzi et al. Preliminary objections*. Judgment of September 4, 1998. Series C No. 41, para. 77.

[5] *Cf. Case of Ricardo Canese*. Judgment of August 31, 2004. Series C No. 111, para. 178; *Case of the 19 Tradesmen*. Judgment of July 5, 2004. Series C No. 109, para. 173; and *Case of Baena Ricardo et al. Competence.* Judgment of November 28, 2003. Series C No. 104, para. 100.

[6] *Cf. Case of the Serrano Cruz Sisters. Preliminary objections.* Judgment of November 23, 2004. Series C No. 118, para. 69; *Case of Baena Ricardo et al. Competence*, *supra* note 5, paras. 66, 67 and 100; and *Case of Constantine et al. Preliminary objections*. Judgment of September 1, 2001. Series C No. 82, para. 74.

86. If an application was not admitted for lack of a representative, this would constitute an unwarranted restriction that would deprive the alleged victim of the possibility of access to justice.

87. The modification to Article 33 of the Rules of Procedure adopted by the Court on November 25, 2003 (*supra* para. 79), which indicates the information that the applications should contain, reaffirms this conclusion. The third paragraph of this Article states that the application should contain "the names and addresses of the representatives of the alleged victims and their next of kin" and that:

> [...] If this information is not provided in the application, the Commission shall act on behalf of the alleged victims and their next of kin in its capacity as guarantor of the public interest under the American Convention on Human Rights to ensure that they have the benefit of legal representation.

88. The Court takes into consideration that the provisions of this third paragraph of Article 33 of the Rules of Procedure concerning the procedural representation that the Commission may exercise, was not in force when the application in this case was lodged, but it has been the consistent practice of the Court for almost ten years. This practice permits establishing that, when the application does not provide any information on the representatives, the Court may hear the case.

89. In the instant case, the Court observes that the Commission provided notarized testimonies of the powers of attorney of 34 of the 109 persons indicated as alleged victims in the application; they show a clear willingness to be represented by officials of CENIDH and CEHIL in the processing of the case before the Court. Moreover, the application indicated the address and other information on these representatives, and provided the powers of attorney of 25 persons who were not on the list of alleged victims. Therefore, the Secretariat, on the instructions of the President, requested the Commission to clarify "whether the 75 alleged victims who ha[d] not granted a power of attorney would also be represented by CENIDH and CEJIL, in which case, they should remit the powers of attorney as soon as possible." It also indicated that "[i]f this is not so, the Commission should defend the interests of those persons, to ensure that they are represented effectively throughout the proceedings before the Court."

90. The Commission presented a note on August 12, 2003, advising the Court that "the original petitioners ha[d] informed it that, owing to various difficulties, they ha[d] been unable to obtain all the powers of attorney of the [alleged] victims mentioned in the C[ommission's] application; however, [CEJIL and CENIDH would] assume the representation of all the [alleged] victims in this case."

91. On August 22, 2003, the said representatives presented a communication from Brooklin Rivera, the legal representative of YATAMA, addressed to the Court, in which he stated that "[t]he indigenous organization […] YATAMA […] indicates […] that […] CEJIL and […] CENIDH, are the legal representatives of all the YATAMA candidates, in both the North Atlantic Autonomous Region and the South Atlantic Autonomous Region, who were excluded from the municipal elections of November 4, 2000," and explained that "[t]he powers of attorney of each candidate in favor of CEJIL and CENIDH are still being collected in each of the places of residence of the candidates" and that "[o]wing to the distance and the number of candidates, this task has been difficult, they would therefore present the respective powers of attorney to the Court as they [were] collected." In their brief with requests and arguments of November 14, 2003, CENIDH and CEJIL indicated that, on various occasions, they had requested the State to provide the official lists of candidates presented by YATAMA for the 2000

municipal elections, but the State only gave them the same list of candidates for the RAAN that was presented when the case was being processed before the Commission. At that time, the representatives did not provide any other power of attorney or proxy. Subsequently, on February 17, 2005, the representatives forwarded the notarized testimony of the powers of attorney granted on February 14, 2005, by seven alleged victims. Finally, when presenting their final written arguments, the representatives provided the notarized testimonies of the powers of attorney granted by 79 alleged victims.

92. Consequently, the powers of attorney of most of the alleged victims were provided during the proceeding before the Court. The Court considers it would have been preferable to have had the powers of attorney when the proceeding before the Court commenced. Nevertheless, it considers that the reasons given by the representatives (*supra* para. 76) show the existence of problems preventing this, which the representatives explained to the Court and the Commission from the first moment in which they intervened autonomously in the proceedings. These difficulties are closely related to the number of alleged victims, their culture which is predominantly oral, the problems of access and transport to reach the different communities on the Atlantic Coast, and the lack of official documentation with the names of all those who were proposed as candidates (*infra* paras. 135 and 136).

93. Given some of the arguments put forward by the State (*supra* para. 74), the Court considers it should clarify that, even if CENIDH and CEJIL, the Commission or any of the representatives of YATAMA had manifested in writing that the first two organizations represented "all" the alleged victims, when the Court has referred to these organizations as "the representatives of the alleged victims," it has done so in the understanding that they would represent those alleged victims who effectively granted them powers of attorney and that, while this did not happen, the Commission would be responsible for defending the interests of those who lacked representation. Likewise, the Court recognizes that, throughout the proceedings before the Court, CENIDH and CEJIL presented requests, arguments and evidence in favor of all the alleged victims, even though not all of them had appointed these organizations as their representatives.

b) "[E]vident violations of the Nicaraguan Notarial Act in force" in the powers of attorney granted to CENIDH and CEJIL by some of the alleged victims

94. The Court has established that it is not essential that the powers of attorney granted by the alleged victims to their representatives in the proceedings before the Court should comply with the same formalities that regulate the domestic law of the defendant State.[7] It has also stated that:

> The practice of this Court with regard to the rules of representation has been guided by [these rules]; hence the latitude the Court has allowed and applied without distinction […].
>
> […] This latitude in accepting instruments granting representation is not without certain limits, however; limits dictated by the practical purpose that the representation itself is intended to serve. First, such instruments are to clearly identify the person granting the power of attorney and include an unambiguous statement of intent. They must also clearly

[7] *Cf. Case of Castillo Páez. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 43, paras. 65 and 66; and *Case of Loayza Tamayo. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 42, paras. 97, 98 and 99.

> name the party to whom the power of attorney is granted and, finally, specify the purpose of the representation. In the opinion of this Court, instruments that meet these requirements are valid and take full effect upon presentation to the Court.[8]

95. The powers of attorney granted by most of the alleged victims to CENIDH and CEJIL indicate clearly the personal information of those granting the powers of attorney, the information about those being granted the power of attorney, its purpose, and the willingness of the former to be represented by officials of these organizations. Consequently, the Court finds that the powers of attorney are valid and effective in the proceeding before this Court. Moreover, the fact that some of the alleged victims have not granted a power of attorney does not result in the Court abstaining from hearing the case, because this would entail an un constraint (*supra* paras. 82 to 92).

96. Consequently, the Court rejects the third preliminary objection.

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FIFTH PRELIMINARY OBJECTION
"Obscurity of the application and its expansion"

97. *Arguments of the State:*

(a) "If the persons on behalf of whom the Commission and the organizations cited in its expansion lodged the application failed to comply with the regulations of the Electoral Act and, consequently, did not [...] participate in the election process for mayors, deputy mayors and councilors, this in no way represents a violation of their political rights";

(b) The electoral organizations are empowered to determine whether the YATAMA party complied or not with the requirements set forth in the Nicaraguan Electoral Act to take part in the municipal elections of November 5, 2000. In Nicaragua, the Supreme Electoral Council is the maximum authority in electoral matters and the final instance in this regard. "[T]he electoral laws grant the Council a jurisdictional function [...] and, based on this, it took a decision as a judicial body of final instance, under the Constitution in force";

(c) The application is obscure because it is not clear what exactly is being claimed. In the part setting forth the legal claims, the Commission requests the Court to declare that Nicaragua should reform its domestic laws to facilitate the political participation of the indigenous organizations in the different electoral processes in the Atlantic Coast Autonomous Region of Nicaragua, in accordance with the customary law, values, practices and customs of the indigenous people who live there. "No grounds are given for that petition"; and

(d) The position of the Commission and the representatives "seeks an abstract revision of the compatibility of domestic law with the American Convention".

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[8] *Cf. Case of Castillo Páez. Reparations, supra note* 7, paras. 65 and 66; and *Case of Loayza Tamayo. Reparations, supra note* 7, paras. 98 and 99.

98. *Arguments of the Commission*

The Inter-American Commission requested the Court to reject "summarily" this objection, because:

> (a) "No legal grounds for this claim can be inferred from the arguments made by the State"; and
>
> (b) Article 37(2) of the Rules of Procedure of the Court establishes that, when filing preliminary objections, the State must set out "the facts on which the objection is based, the legal arguments, and the conclusions and supporting documents, as well as any evidence which the party filing the objection may wish to produce."

99. *Arguments of the representatives of the alleged victims*

The representatives indicated that this objection was not of a preliminary nature, requested the Court to reject it, and stated that:

> a) The Commission and the representatives seek "a ruling of the Inter-American Court on the violations of the human rights of the candidates proposed by YATAMA for the 2000 municipal elections and, should the Court so decide, the adaptation of domestic laws to the American Convention." This is very clear from the text of the application and from the representative's brief with requests and arguments;
>
> b) The violation of the human rights of the alleged victims is not being claim owing merely to the existence of the Electoral Act, "but rather, they have indicated specific actions that violated the rights of duly identified individuals, and also the existence and absence of norms that directly affect them, by not protecting their rights; and
>
> c) The Court has ordered several States to adapt their domestic laws to the Convention. "The State itself incurs international responsibility and not just one of its branches of government."

Considerations of the Court

100. The application and the brief with requests and arguments do not set out a request for "abstract revision of the compatibility of domestic law with the American Convention." The Commission indicated that the State should be declared responsible for specific acts and omissions in relation to the alleged exclusion of the YATAMA candidates in the RAAN and the RAAS from the 2000 municipal elections, and sustained that the Electoral Act that was applied did not guarantee the right to political participation of the indigenous organizations in the Autonomous Regions of the Atlantic Coast of Nicaragua according to the values, practices and customs of their members. The determination of this responsibility constitutes the grounds for this dispute.

101. The substance of the dispute in this case is not for the Court to determine whether or not YATAMA complied with the domestic electoral norms (*supra* para. 97(b)), but rather whether Nicaragua has violated the international obligations it

assumed when it became a State Party to the American Convention.[9] The purpose of international human rights law is to provide the individual with a means of protecting internationally-recognized human rights before the State.[10]

102. It is a function of the Court to determine whether the State complied with the obligation to adapt its domestic laws to the Convention in order to make the rights embodied therein effective. To this end, the Court will take into consideration the arguments made by the State with regard to this fifth preliminary objection, because their purpose is to dispute the existence of the alleged violations.

103. Based on the above, the Court rejects the fifth preliminary objection, because it is not an authentic objection.

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* *

104. Having rejected the five preliminary objections filed by the State, the Court will now proceed to examine the merits of the case.

VI
EVIDENCE

105. Before examining the evidence received, the Court will make some observations, in light of the provisions of Article 44 and 45 of the Rules of Procedure, which are applicable to the specific case, and which have been developed in its case law.

106. The adversary principle, which respects the right of the parties to defend themselves, applies to matters pertaining to evidence. This principle is embodied in Article 44 of the Rules of Procedure, as regards the time at which the evidence should be submitted to ensure equality between the parties.[11]

107. According to the Court's practice, at the commencement of each procedural stage, the parties must indicate the evidence they will offer at the first opportunity they are given to communicate with the Court in writing. Moreover, in exercise of the discretional powers included in Article 45 of its Rules of Procedure, the Court or its President may request the parties to provide additional probative elements as helpful evidence; and this shall not provide a new opportunity for expanding or completing the arguments or offering fresh evidence, unless the Court expressly permits it.[12]

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9 *Cf. Case of Cesti Hurtado. Preliminary objections.* Judgment of January 26, 1999. Series C No. 49, para. 47.

10 *Cf. Case of the Serrano Cruz Sisters.* Judgment of March 1, 2005. Series C No. 120, para. 54; *Case of the Gómez Paquiyauri Brothers.* Judgment of July 8, 2004. Series C No. 110, para. 73; and *Case of the 19 Tradesmen, supra note* 5, para. 181.

11 *Cf. Case of Caesar.* Judgment of March 11, 2005. Series C No. 123, para. 31; *Case of the Serrano Cruz Sisters, supra note* 10, para. 31; and *Case of Lori Berenson Mejía*. Judgment of November 25, 2004. Series C No. 119, para. 62.

12 *Cf. Case of the Serrano Cruz Sisters, supra note* 10, para. 32; *Case of Lori Berenson Mejía, supra note* 11, para. 63; and *Case of Molina Theissen*. *Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of July 3, 2004. Series C No. 108, para. 22.

108. In the matter of receiving and weighing evidence, the Court has indicated that its proceedings are not subject to the same formalities as domestic proceedings and, when incorporating certain elements into the body of evidence, particular attention must be paid to the circumstances of the specific case and to the limits imposed by respect for legal certainty and the procedural equality of the parties. Likewise, the Court has taken account of international case law; by considering that international courts have the authority to assess and evaluate the evidence according to the rules of sound criticism, it has always avoided a rigid determination of the *quantum* of evidence needed to support a judgment. This criterion is valid for international human rights courts, which have greater latitude to evaluate the evidence on the pertinent facts, in accordance with the principles of logic and on the basis of experience.[13]

109. Based on the foregoing, the Court will now proceed to examine and assess the documentary probative elements provided by the Commission, the representatives and the State at different procedural opportunities and as helpful evidence that was requested by the Court and its President, and also the expert and testimonial evidence given before the Court during the public hearing, all of which comprises the body of evidence in this case. In so doing, the Court will respect the principle of sound criticism within the applicable legal framework,

A) DOCUMENTARY EVIDENCE

110. The Commission, the representatives and the State forwarded testimonial statements and expert evidence given before notary public (affidavits), and the Commission provided two sworn written statements as called for by the President in his order of January 28, 2005 (*supra* para. 28). These statements and testimonies are summarized below.

TESTIMONIES

a) Proposed by the Inter-American Commission and the representatives

1. Centuriano Knight Andrews, legal representative of YATAMA in the RAAN

YATAMA emerged in the 1970s under the name of ALPROMISU. In 1978, it extended its coverage to all the municipalities of the RAAN. In 1979, it adopted the name of MISURASATA, and in 1987 it became known as YATAMA, which means "Organization of the sons of Mother Earth."

The indigenous communities consider YATAMA to be their protector and have recourse to its representatives before they resort to any other authority. As of 1990, it began to take part in regional elections as a "public subscription association". This "meant that any organization could take part in the elections if it collected a certain number of signatures, and the presentation of candidates in all the territorial districts was not required." The "public subscription" category was eliminated by the 2000 Electoral Act; this obliged the organization to become a political party on May 4, 2000. The change was imposed by the Government and has prevented YATAMA from "pursuing its actions as an

[13] *Cf. Case of Caesar, supra note* 11, para. 42; *Case of the Serrano Cruz Sisters, supra note* 10, para. 33; and *Case of Lori Berenson Mejía, supra note* 11, para. 64.

indigenous organization[;] for example, it now has difficulty in obtaining international cooperation funds, which are not forthcoming because it is a political party."

The YATAMA candidates for the 2000 municipal elections were elected according to the "organizational" mechanisms of the indigenous communities in municipal territorial assemblies. In principle, a person may only be a YATAMA candidate once. Consequently, many of the candidates who did not take part in the 2000 municipal elections could not participate in the 2004 municipal elections.

"In October 2000," the Supreme Electoral Council notified YATAMA that it would be unable to participate in the 2000 municipal elections, indicating that "it had not obtained its legal status within the previous six months" and that it had not presented candidates in 80% of the municipalities. This was not true, because YATAMA had obtained is legal status on May 4, 2000, and proposed candidates in "five of the six municipalities" of the RAAN. The RAAS and the RAAN are "distinct and independent" regions and, consequently, the fact that YATAMA had been prevented from participating in the RAAS should not have affected its right to participate in the RAAN. Owing to this exclusion, YATAMA filed an application for amparo before the court of appeal of the North Atlantic district, and the judges ruled in favor of YATAMA. However, the Supreme Court of Justice confirmed the decision of the Supreme Electoral Council.

YATAMA's exclusion from the elections affected the candidates and their families, who had invested money and time, and "stopped working to devote themselves to the [...] political campaign." It also affected YATAMA, which had "financed the organization of the assemblies, and the indigenous communities that did not have representatives "who they had already selected." There was absenteeism in the elections; only those living in large urban centers and in "zones where mestizos live" voted. Since the indigenous people had no representatives, "most of the investments and projects were transferred to places when the supporters of those who were elected live." The communities are not "represented in the Legislature," although the indigenous people comprise 80% of the population of the RAAN, 20% of the RAAS, and 15% of the national population. Only five deputies represent the RAAN and the RAAS, and they belong to traditional parties; one of them has "an indigenous perspective." The seven members of the Supreme Electoral Council belong to the traditional political parties and not one of them is an indigenous person. The Electoral Act should be reformed, establishing a "fixed political quota for the indigenous people in the Legislative Assembly and other State bodies."

2. Nancy Elizabeth Henríquez James, member of the governing body of YATAMA

In a resolution of August 15, 2000, the Supreme Electoral Council excluded YATAMA from the 2000 municipal elections, even though YATAMA had fulfilled the requirements established in the Electoral Act and its candidates had been presented within the stipulated time limit. Owing to YATAMA's exclusion, the indigenous communities "organized protests in the streets of Puerto Cabezas." The Government responded to these protests by sending in the specialized forces of the National Police.

3. Eklan James Molina, proposed as a YATAMA candidate for the position of mayor in the municipality of Prinzapolka in the RAAS for the 2000 municipal elections

The witness was selected a YATAMA candidate in February and March 2000. Candidates required the support of the community, represented by one thousand signatures with identity card numbers, and the "approval of the leaders of YATAMA." The selection process was open. After his selection as a candidate, he visited the communities to "present his plan of action if he was elected mayor." The communities offered him their support. During the 2000 campaign, he invested 500,000 cordobas for expenses of transport by land, water and air, rental of venues, and "a payroll for activists."

The candidates for mayors in the different municipalities got together in a workshop held in the "Bilwi Clinic" in Puerto Cabezas and, on that occasion, the Supreme Electoral Council indicated that YATAMA would not take part in the elections because it had not presented "its legal status in time" and had entered into an alliance with the Coastal People Party in one region, while in another it had its own list of candidates. On learning of the Supreme Electoral Council's decision, YATAMA filed an application for amparo before the "regional delegation of the Puerto Cabezas Court of Appeal" and obtained a favorable ruling. YATAMA's exclusion affected the witness, because he gave up his job and this caused problems within his family because "he was responsible for the household expenses."

The communities showed their support for YATAMA with "civic protests" before the Supreme Electoral Council. The Government of Nicaragua responded with Army and Police units. As a result of YATAMA's exclusion from the elections there was an 85% abstention rate in the elections, and "polling stations at the municipal level were not opened."

The Electoral Act should be reformed and "autonomous elections," conducted by the indigenous people according to their customs should be promoted.

4. Hazel Law Blanco, lawyer

YATAMA participated twice in the autonomous regional elections of the Atlantic Coast, under the mechanisms of a "public subscription association". In 2000, the National Assembly reformed the Electoral Act and YATAMA had to become a regional indigenous political party in order to participate in the elections. It had to submit "its charter and by-laws" written up in a public document, and establish "regional and territorial committees, and municipal committees"; this entailed "traveling expenses to the capital, to Bluefields, and to the other municipal capitals." The transformation into a political party was imposed by the State and resulted in "the need for increased financial resources owing to the formal procedures that the law requires of political parties, such as presenting a list of candidates in 80% of the [districts]."

In 2000, the YATAMA candidates were selected at "municipal assemblies of territorial leaders."

The Supreme Electoral Council adduced two reasons to exclude YATAMA from the 2000 municipal elections: that it had not registered its candidates

opportunely; and that the alliance with the Coastal People Party was illegal because the latter had not presented all the necessary signatures. Yet, this argument was not invoked when the candidates were registered, but only when "the exclusion was announced."

YATAMA's absence from the 2000 elections symbolizes one more facet of domination and a manifestation of "arbitrary and racist authority." The indigenous communities were angry and reacted with protests in the different municipalities joined by "mestizo friends." There was an 80% abstention rate in the elections in the RAAN.

YATAMA filed an application for amparo before the Civil Chamber of the RAAN Court of Appeal, alleging the violation of its political rights. The Chamber referred the application to the Supreme Court of Justice, which declared "the application for amparo inadmissible," stating that, according to the Electoral Act, there was no appeal against the resolutions of the Supreme Electoral Council. YATAMA also filed an appeal for review before the Supreme Electoral Council, which took no decision in this regard.

5. Cristina Poveda Montiel, proposed as YATAMA candidate for mayor in the municipality of Rosita in the RAAS for the 2000 municipal elections

The impossibility of taking part in the 2000 municipal elections affected the witness emotionally and financially, because she invested money in campaigning and obtained loans of 150,000 cordobas. It also caused harm to her family. The indigenous people felt discriminated against and "went out onto the streets to protest."

The State should assume the obligations that the candidates acquired, because if they had taken part in the 2000 municipal elections, "in addition to winning the elections for mayors, they would have had candidates for councilors and, consequently, reimbursement of expenses." The State should respect the dignity of the indigenous people, who have the "right to elect" their governments according to their customs and traditions.

EXPERT EVIDENCE

a) Proposed by the Inter-American Commission and the representatives

1. María Luisa Acosta Castellón, lawyer for some of the indigenous communities of the Atlantic Coast

YATAMA is not only a regional political party, but also the oldest established ethno-political party on the Atlantic Coast of Nicaragua, because it is made up of indigenous and ethnic communities, especially by "members of the Miskito indigenous people." YATAMA was established in order "to promote community self-government through communal democracy and, in particular, to defend the traditional communal lands." This form of communal democracy is practiced by YATAMA, applying the practices and customs of the indigenous people.

The series of indigenous cultural traditions that gave rise to these practices and customs comprise what has been called customary law, which is obligatory for

members of the communities, transmitted orally and preserved in the collective and historical memory. Articles 5, 89 and 180 of the Nicaraguan Constitution recognize the validity of the customary law of these indigenous people. The concept of indigenous people "encompasses the recognition of collective rights, such as the right to their culture and language, to elect their authorities, and to administer their local affairs according to their customs and traditions." The purpose of the recognition of ethnic diversity is to eliminate the discrimination endured by these people. This recognition also seeks to guarantee the exercise of their political rights, according to their customs and traditions. The indigenous people have a constitutional right to self-government, which is also embodied in Article 15 of the Statute of Autonomy.

The election of the Council of Elders, the Syndic, the *Wihta* or any other community or territorial authority in the indigenous communities of the Atlantic Coast "does not conform to provisions of written, enacted or codified law, but to their own customary law."

While, as of its inception, YATAMA proposed autonomy as "indigenous territorial self-government," it was the Sandinista Government that adopted the Statute of Autonomy. "Within the multiethnic autonomy regime, the indigenous people continue to be a minority" and the national political parties maintain the hegemony of the Councils of the Autonomous Regions of the Atlantic Coast.

YATAMA's political participation is an extremely important means of contributing to the protection of the cultural and economic survival of the indigenous people. The exclusion of YATAMA from the 2000 municipal elections, demoralized the indigenous and ethnic people of the Caribbean Coast and Jinotega," because the traditional parties have not been able to identify themselves with the indigenous people who are part of YATAMA. The indigenous people and the ethnic communities have a common history with YATAMA. While the other political parties conduct their campaigns in the urban centers, YATAMA carries out its activities within the indigenous communities.

2. Robert Andrés Courtney Cerda, Executive Director of the non-governmental organization "*Ética y Transparencia*"

In order to take part in the RAAS municipal elections, the YATAMA political party began a process to ally itself with the Indigenous Multiethnic Party (PIM) and the Coastal People Party (PPC). Even though it was determined that the latter party had not complied with the requirement to present the signatures of 3% of those registered on the electoral roll, YATAMA considered that its own candidates were registered. However, the Supreme Electoral Council declared that the YATAMA party had not presented sufficient candidates, and this coincided "with the expiry of the time limits established in the electoral calendar," so that YATAMA was excluded from the elections.

YATAMA considered that, since its case was not provided for in the Electoral Act, the Supreme Electoral Council should make the process of presenting candidates more flexible instead of excluding them. It filed a request for review of its case with the Supreme Electoral Council, "but nothing was done until the time had expired for presenting candidates in 80% of the Atlantic Coast municipalities." The case of YATAMA merits special treatment, because the

Electoral Act does not state that, when one of the parties to an alliance has been disqualified, the other cannot participate with its own candidates.

YATAMA filed an application for administrative amparo that was admitted by the RAAN Court of Appeal, which ordered the Supreme Electoral Council to restore matters to their situation before its resolution of August 15, 2000, excluding YATAMA from the elections of November that year. The Supreme Electoral Council informed the RAAN Court of Appeal, that the Supreme Electoral Council had exclusive jurisdiction in electoral matters. The Supreme Court of Justice decided that the application for amparo could not be admitted.

YATAMA insisted before the Supreme Electoral Council that the latter should give a positive response regarding its participation. The Council maintained its decision not to authorize YATAMA's participation.

There was an 80% abstention rate in the municipal elections in the RAAN, which meant that the authorities were lawfully elected, but lack legitimacy, because they do not represent the people, particularly the indigenous people.

b) Proposed by the State

3. Mauricio Carrión Matamoros, lawyer

He referred to the supremacy of the Constitution over the electoral laws. The principle of hierarchy prevents a norm of an inferior category from contradicting the Constitution, and the principle of jurisdiction establishes that, when there are two norms of equal rank, the one that regulates the "matter at issue" will prevail.

The Electoral Act is a constitutional law, because the Nicaraguan Political Charter establishes that it had to be adopted with the vote of 60% of the deputies of the Assembly.

From the provisions of Articles 140, 141, 191 and 195 of the Constitution, it can be inferred that the National Assembly is the "only power with competence to adopt reforms to the Electoral Act."

4. Lydia de Jesús Chamorro Zamora, lawyer

She referred to the supremacy of the Nicaraguan Constitution and to its defense mechanisms, established in Articles 182 to 195.

The Nicaragua legal system contains two types of laws: constitutional laws and ordinary laws. Constitutional laws regulate electoral matters, amparo and states of emergency, and ordinary laws deal with other issues. The Constitution establishes increased requirements to approve constitutional laws, while ordinary laws require only a simple majority. The same special increased majority applies in the case of reforms to the Constitution.

In Nicaragua, the Electoral Act is of a constitutional nature. It is below the Constitution, but above ordinary laws. The Constitution establishes that the application of the Electoral Act "is the exclusive jurisdiction of the Supreme Electoral Council." It is not even possible to apply for amparo before the

Constitutional Chamber of the Supreme Court of Justice. The reform of the Electoral Act depends on the will of the Legislative Assembly. Currently, the special increased majority would only be obtained "by an agreement between the two majority parties."

B) TESTIMONIAL AND EXPERT EVIDENCE

111. On March 9 and 10, 2005, during a public hearing, the Court received the statements of the witnesses proposed by Inter-American Commission on Human Rights and the representatives of the alleged victims, and of the expert witnesses proposed by the State and the representatives. The Court will summarize the principal parts of these testimonies and expert evidences below.

TESTIMONIES

a) Proposed by the Inter-American Commission and the representatives

1. Brooklyn Rivera Bryan, principal leader of YATAMA

The witness is Miskito. Most of the population of the Atlantic Coast of Nicaragua is indigenous. YATAMA emerged in the 1970s as the basic organizational mechanism of the indigenous people of the Atlantic Coast, and since that time has led their struggles and activities. The structure of YATAMA is linked to the traditions, practices and customs of these communities. It is part of their cultural identity. The organization operates on the basis of the active participation of the members of the indigenous people, according to their practices and customs. The leaders and representatives are selected by the communities. The candidates are proposed by the communities; then the communities of a territory meet and select candidates and, lastly, there is a third level corresponding to the regional assemblies, in which the candidates who have been select are ratified. The way that traditional political parties conduct their electoral campaigns does not respond to these practices and customs. In the case of municipal or regional elections, YATAMA allows "all the other people who are not indigenous, such as mestizos," to take part as candidates.

YATAMA decided to enter political life in order to defend the rights of the indigenous communities. It was obliged to transform itself into a political party to comply with the requirements of the 2000 Electoral Act, which eliminated the category of "public subscription association". The political party is a form of organization alien to the traditions of the indigenous communities. This forced the organization to change from an oral to a written tradition. To comply with the requirements of the Electoral Act, the YATAMA candidates have had to play a political role in territories where there are no indigenous communities. In these areas there are municipalities in which YATAMA has an influence, but also some which are of no interest to the organization.

In the 2000 elections, YATAMA complied with the requirements established in the Electoral Act, in both the RAAN and the RAAS. In the latter, YATAMA entered into an alliance with the Coastal People Party (PPC) and the Indigenous Multiethnic Party (PIM). The latter withdrew from the alliance. When it learned that the Coastal People Party did not comply with the legal requirements, YATAMA asked to be allowed to participate in the electoral process under its

"own identity." The Supreme Electoral Council rejected this request and YATAMA was excluded from the elections, despite complying with the legal requirements. In view of this situation, the candidates for the RAAN were also excluded, even though the list of candidates, which included them had already been published. These exclusions were due to the fact that the two "major" political parties entered into a pact to prevent other parties from participating and thus "concentrate" the result of the elections; this was possible because they "dominate the electoral structure of Nicaragua." When this happened, YATAMA tried to communicate with the Supreme Electoral Council on many occasions, without obtaining any response. When the final list was published and the YATAMA candidates in the two regions were not on it, YATAMA filed an appeal for review before the Supreme Electoral Council, on which no decision was taken. It then filed an application for amparo before the Supreme Court of Justice, which ruled against it.

The exclusion of YATAMA resulted in a four-year hiatus for the indigenous communities of the Atlantic Coast. Even though they were eventually able to take part in the 2004 elections, owing to their repeated protests, for four years they had no organization representing their interests.

2. Jorge Teytom Fedrick, responsible for "international relations", YATAMA

He belongs to the Miskito indigenous people. The cultural traditions of the Atlantic Coast differ from those of the Pacific Coast; the people speak six different languages. Also, community systems, the relationship between resources and the land, and the cosmovision are distinct. The indigenous people have a communal tradition and decision-making is based on the community structure. They have a "collective society" with a solid "moral tradition."

YATAMA is the product of a historical process of struggle. During the 1990s, Nicaragua's political situation changed and the category of "public subscription association" was created. YATAMA proposed to enter the political arena by participating in politics in this category. In a "partisan negotiation," the State reformed the Electoral Act as a strategy to impede YATAMA's participation. However, YATAMA formed a team to influence the reform of the Electoral Act, and the Act stipulated that the indigenous organizations of the Atlantic Coast could establish a regional political party. YATAMA is more than a party. It is part of life; it represents history; it is a process of struggle; it is the "organization of the sons of Mother Earth," because "without land, we do not exist."

The Electoral Act established requirements that conflict with the customs of the indigenous people. The first area of conflict is the nature of a political party. Under the indigenous communal system, decisions are taken by consensus. The party system is different because it generates a contest between "competitors"; between personal interests. To be chosen as a candidate in the indigenous communities, a person must have distinguished himself.

Owing to YATAMA's exclusion from the 2000 elections, the witness had to take steps to try and influence the Supreme Electoral Council to allow YATAMA to participate in the elections and to maintain stability. His efforts were unsuccessful.

With regard to reforming the Electoral Act to guarantee the participation of the indigenous people in conditions of equality, the term equality "is relative," because the indigenous people have different cultural traditions and the laws need to be adapted to take this into account. The delimitation of voting districts is not adjusted to the social conditions of the communities, because the indigenous territories do not coincide with those established in the Electoral Act.

b) Proposed by the representatives of the alleged victims

3. John Alex Delio Bans, YATAMA representative in the RAAS in 2000

The witness is Miskito. The State has discriminated against the indigenous communities. They consider that the distinction between the RAAN and the RAAS is the result of an artificial division promoted by the national political parties that does not correspond to the indigenous people' concept of the Atlantic Coast, as a single unit. They consider YATAMA to be part of their tradition. The members of these communities say they are YATAMA "by blood and by conviction." The YATAMA candidates are selected according to the tradition of the indigenous communities in community assemblies. Nowadays, it is necessary to consult the Supreme Electoral Council for the election of community authorities; this was not necessary previously. The State should allow the indigenous people to select their candidates and elect those who represent them in Congress.

In order to participate in the November 2000 municipal elections in the RAAS, YATAMA decided to enter into an alliance with the Indigenous Multiethnic Party (PIM) and with the Coastal People Party (PPC), because they are parties created to defend the interests of the multiethnic communities and, since they had this common purpose, they could obtain better results on the Atlantic Coast. However, the Indigenous Multiethnic Party decided to leave the alliance, possibly as a result of pressure from the Constitutionalist Liberal Party (PLC). When the preliminary list of candidates was published, it contained the YATAMA candidates for the elections in the RAAN, but not those in the RAAS. A protest was made before the Supreme Electoral Council, which advised that this was a mistake. However, the final list of candidates did not include the YATAMA candidates in either the RAAN or the RAAS, without any justification, because YATAMA had complied with all the requirements established in the Electoral Act. In 2000, there were seven municipalities in the RAAS and a party was required to present candidates in 80% of the municipalities. YATAMA proposed candidates in the seven municipalities; in other words, in excess of the required 80%.

As a result of YATAMA's exclusion from the 2000 elections, many candidates have not been able to return to their communities owing to the debts they incurred as a result of the electoral process. It became necessary to inform the communities why YATAMA would not take part in the 2000 elections and explain how the respective expenses would be paid.

4. Anicia Matamoros de Marly, proposed by YATAMA as candidate for deputy mayor in the municipality of Puerto Cabezas in the RAAN for the 2000 municipal elections

The witness belongs to the Miskito indigenous people. The candidates are chosen by the communities and go before an assembly. These communities consider that YATAMA is an organization that reflects the indigenous people' opinions, and through which they can have an influence in different spheres. Without YATAMA, the people do not have a voice. The communities do not want YATAMA to be a political party. This categorization has been imposed by the State.

When she was selected as a candidate, she had to find someone to substitute her in her employment. When it was known that YATAMA had been excluded from the elections, the community held its leaders responsible, but later it was clarified that they had nothing to do with this situation. Many candidates gave up their jobs to devote their time to visiting the communities and, following YATAMA's exclusion, they were unable to return to them. When the witness heard that her organization would not participate in the elections, she was demoralized and considered that a new form of discrimination had been added to the social exclusion her people endured. Moreover, she even thought that the reason for the exclusion was its name or lack of capacity. It was necessary to explain the situation to the communities and avoid them resorting to violence. Since YATAMA did not take part in the elections, the people "felt they were not represented" and this was reflected by the abstention during the elections: "most of the people did not vote." When YATAMA was able to take part in the 2004 elections, she was very happy, because it was recovering the indigenous communities' space that had been lost in 2000.

EXPERT EVIDENCE

a) Expert witness proposed by the representatives of the alleged victims

1. María Dolores Álvarez Arzate, anthropologist and ethnologist

The Atlantic Coast of Nicaragua covers 50% of national territory and has a population of approximately half a million, of whom 170,000 are indigenous people.

The forms of social organization of the indigenous groups have some local variations but, in general, are based on community assemblies. In the community assembly, the chief authorities are the "*wihta* or judge and the syndic." In addition, the community members "with their presence and vote, also take part in community decisions." Health authorities, "*curanderos*" (local healers), teachers, the priest, women and the elderly have been incorporated into these assemblies. There are also other "high-level organizational bodies" such as territorial and regional councils where important decisions are taken. Some forms of social and political organization of the Atlantic Coast communities are regulated by customs, and an individual's word plays an important role because his authority is based on it. YATAMA "represents these ancient mechanisms or forms of traditional organization" and the indigenous and "coastal" diversity.

During the territorial assemblies held in the communities, the people say whether they agree that a specific person should be a candidate. Those who are selected during the territorial assembly receive the "full support of their communities to carry out their respective electoral campaign." To be selected a

representative of the community, people must enjoy prestige and be of sound judgment. The communities support their candidates by providing means of transport or assuming these people's social responsibilities while they are working as candidates and visiting the communities in the course of their electoral campaign.

One of the factors that hinder the political participation of the people of the Atlantic Coast relates to the absence of offices that are "constantly registering voters." There are also problems with the electoral roll, because the members of these communities have life styles that lead them to move from place to place in order to extract resources from the forest without exhausting them. Another factor that hampers their political participation is that the electoral documents are not issued in indigenous languages, but only in Spanish; in many cases, this is a problem owing to lack of education. The rules of the Electoral Act "respond to a global vision of the country" and to the State's intention that all political parties should comply with these rules, disregarding the cultural characteristics of the people of the Caribbean Coast. YATAMA was forced to adopt organizational forms, such as that of a political party, which do not correspond to the "oral tradition of these people."

When they heard that the YATAMA candidates had been excluded from the 2000 elections, the communities began to question these candidates, asking them what they had done wrong; what problems had they encountered. Many candidates reacted by considering that they themselves were insufficiently qualified to take part. Some candidates did not return to their communities for two years, because "they felt they had no moral standing," owing to the debts they had incurred.

b) Expert witnesses proposed by the State

2. Carlos Antonio Hurtado Cabrera, head of the Secretariat for Atlantic Coast Affairs of the Presidency of the Republic

The Secretariat for Atlantic Coast Affairs of the Presidency of the Republic was created at the end of July 2004, in view of the Atlantic Coast's strategic importance for the whole country, and the importance of its biodiversity and multiethnicity. The Atlantic Coast covers 50% of national territory. Likewise, the need was felt to give coherence and effectiveness to the actions of institutions active on the Atlantic Coast. A budget of fifty million dollars has been allocated to this region. The President of the Republic has modified the traditional model of relations with the Atlantic Coast, within the framework of the political autonomy that the regions of the Atlantic Coast enjoy, and with the indigenous communities. The new model is based on the need for permanent two-way communication: from the central Government to the regions and from the regions to the central Government, using communications that respect the special characteristics and institutions of these autonomous regions.

One of the functions of the Secretariat for Atlantic Coast Affairs is to establish relations with the indigenous communities. In this regard, during the electoral campaign, the President of Nicaragua signed an agreement with the YATAMA political organization establishing various commitments. YATAMA "is the principal indigenous political organization in the country" and the indigenous communities' main spokesperson before the Government. The central

Government has taken note of the electoral triumph of YATAMA in the November 2004 municipal elections.

The previous Electoral Act was more representative of the "Nicaraguan people' expectations of democracy," because it included the category of "public subscription association" and contained fewer requirements for forming political parties than the current Electoral Act. This means that there is an "urgent need" to reform the Electoral Act. However, the majority political parties in the National Assembly "do not even have this on the agenda and seem to be satisfied with the actual law."

3. Marvin Saúl Castellón Torres, Deputy Prosecutor for Matters relating to Property

He referred to the supremacy of the Nicaraguan Constitution, embodied in Article 182 of the Constitution. Nicaraguan case law has established that the recourse for unconstitutionality is intended to guarantee this supremacy. The expert witness referred to the principle of the independence and separation of powers.

Article 173 of the Constitution stipulates that, "there shall be no ordinary or special recourse against the resolutions of the Supreme Electoral Council concerning electoral matters." The Supreme Court of Justice of Nicaragua has ruled that, in electoral matters, no recourse is admissible; nevertheless, it is possible to file an application for amparo against an administrative act of the Supreme Electoral Council. When an individual files an appeal for review and the Supreme Electoral Council does not issue a ruling, the individual would be "restricted" because the Council's decision is final.

A reform of the Electoral Act would require "a favorable vote of 60% of the deputies." Bearing in mind the political composition of the Legislature, this would require an agreement between the two majority parties, which are the Sandinista National Liberation Front (FSLN) and the Constitutionalist Liberal Party (PLC). If a reform is possible, it should be the "result of an analysis of the whole Act" by the Supreme Electoral Council.

C) ASSESSMENT OF THE EVIDENCE

Assessment of the documentary evidence

112. In this case, as in others,[14] the Court accepts the probative value of the documents presented by the parties at the proper procedural opportunity or as helpful evidence, in accordance with Article 45(2) of its Rules of Procedure, that were not contested or opposed, and whose authenticity was not questioned.

113. Likewise, the State submitted evidence with regard to facts that supervened the filing of the application, in accordance with Article 44(3) of the Rules of Procedure,; consequently the Court accepts as evidence those documents that were not contested or opposed, and whose authenticity was not questioned, and which are related to the

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[14] *Cf. Case of Caesar*, *supra* note 11, para. 46; *Case of the Serrano Cruz Sisters*, *supra* note 10, para. 37; and *Case of Lori Berenson Mejía*, *supra note* 11, para. 77.

instant case (*supra* para. 27).[15]

114. The State objected to a document presented by the representatives as "new evidence in the proceedings" (*supra* para. 35), which consists of the resolution of the Nicaraguan Ombudsman of March 3, 2005, file No. 217/00, concerning the "complaint filed by the […] legal representative of […] YATAMA" on August 24, 2000. The State indicated, *inter alia,* that "it is inconceivable that State institutions, such as the Office of the Ombudsman[...] can intervene at their own discretion, against the interests of the State at the international level," which "implies evident disloyalty to the State." Despite this, but bearing in mind the State's objections, the Court admits it, applying the rules of sound criticism and assessing this document together with the body of evidence, because it is a resolution that relates to the facts of the instant case, issued by a Nicaraguan State institution on March 3, 2005. Therefore, the Court adds it to the body of evidence pursuant to Article 44(3) of the Rules of Procedure, as it has done in a similar case.[16]

115. With regard to the testimonial statements and the written expert evidence given before notary public (affidavits), as required by the President in an order of January 28, 2005 (*supra* para. 28), the Court admits them to the extent that they correspond to the purpose established in the said order and assesses them with the body of evidence, applying the rules of sound criticism and bearing mind the comments made by the State (*supra* para. 33). The Court accepts the waiver of the representatives to present, in an affidavit, the expert evidence of Manuel Alcántara Sáez (*supra* para. 30).

116. In relation to the sworn statements that were not made before notary public by the witnesses, Nancy Elizabeth Henríquez James and Eklan James Molina, proposed by the Commission and endorsed by the representatives (*supra* paras. 28 and 30), the Court admits them and assesses them with the body of evidence, applying the rules of sound criticism and bearing mind the State's objections. On other occasions, the Court has admitted sworn statements that were not made before notary public, when this does not affect the legal certainty and the procedural equality of the parties.[17] As the Court has indicated, the statements of the alleged victims can provide useful information on the alleged violations and their consequences.[18]

117. The State contested the sworn statement of the expert witness, Roberto Courtney Cerda, presented by the Commission on February 23, 2005 (*supra* para. 31), owing "to his impossibility" of providing his expert evidence in person during the public hearing. The State indicated, *inter alia,* that this sworn statement was time-barred and omitted "elementary formalities," and also that Mr. Courtney Cerda "had not provided his expert evidence in accordance with the order" of the President. In this regard, the

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[15] *Cf. Case of the Serrano Cruz Sisters*, *supra* note 10, para. 37; *Case of De la Cruz Flores*. Judgment of November 18, 2004. Series C No. 115, para. 58; and *Case of the Gómez Paquiyauri Brothers*, *supra* note 10, para. 50.

[16] *Cf. Case of the Serrano Cruz Sisters*, *supra* note 10, para. 42.

[17] *Cf. Case of the Serrano Cruz Sisters*, *supra* note 10, para. 39; *Case of Lori Berenson Mejía*, *supra note* 11, para. 82; and *Case of the Gómez Paquiyauri Brothers*, *supra* note 10, para. 58.

[18] *Cf. Case of the Serrano Cruz Sisters*, *supra* note 10, para. 40; *Case of Lori Berenson Mejía, supra note* 11, para. 78; and *Case of Carpio Nicolle et al.* Judgment of November 22, 2004. Series C No. 117, para. 71.

Court considers that, as the President had decided, this expert evidence "can help the Court determine the facts in the instant case," to the extent that it corresponds to the purpose defined in the said order; it therefore assesses it with the body of evidence, applying the rules of sound criticism and taking into account the State's observations (*supra* para. 33).

118. The Court considers useful the documents presented during the public hearing by the witness, Jorge Teytom Fedrick (*supra* para. 37), and also the documents forwarded by the representatives with their final written arguments (*supra* para. 43), which were not contested or opposed and their authenticity was not questioned, so the Court adds them to the body of evidence, pursuant to Article 45(1) of the Rules of Procedure.

119. In the case of the newspaper Articles submitted by the parties, the Court considers that they can be assessed to the extent that they refer to well-known public facts, or statements by State officials, or corroborate aspects of the instant case.[19]

120. The State "denied any legal value to any of the *amicus curiae* briefs submitted during the proceedings or subsequent to the oral hearing." The Court admits these elements, considering that they are four *amicus curiae* briefs submitted by institutions who have an interest in the subject matter of the application and provide useful information (*supra* paras. 17, 34, 38 and 42).

121. Furthermore, in application of Article 45(1) of its Rules of Procedure, the Court incorporates into the body of evidence in this case, Act. No. 28 of October 30, 1987, entitled "Statute of Autonomy of the Atlantic Coast Regions of Nicaragua," Electoral Act No. 211 of January 8, 1996, the report of the *Instituto Nacional de Estadísticas y Censos de Nicaragua* (INEC) [National Institute of Statistics and Censuses of Nicaragua] entitled "*Población total por área de residencia y sexo, según departamento y grupos de edades, años 2002 y 2003*" [Total population by area of residence and sex, by department and age group, 2002 and 2003], and the study made by the *Fundación para la Autonomía y el Desarrollo de la Costa Atlántica de Nicaragua* (FADCANIC) [Foundation for the Autonomy and Development of the Atlantic Coast of Nicaragua] entitled "*Caracterización Fisiogeográfica y Demográfica de las Regiones Autónomas del Caribe de Nicaragua*" [Physiogeographical and demographic nature of the Autonomous Regions of the Nicaraguan Caribbean], which will be useful for deciding the instant case.

Assessment of the testimonial and expert evidence

122. With regard to the statements made by the two witnesses who were proposed by the Commission and endorsed by the representatives, by the two witnesses and an expert witness proposed by the representatives, and by the two expert witnesses proposed by the State in this case (*supra* para. 111), the Court admits them to the extent they correspond to the purpose defined by the President in his order of January 28, 2005, and grants them probative value, bearing in mind the observations of the parties. The Court considers that the testimony of Anicia Matamoros (*supra* para. 111(b)(4)), which is useful, must be assessed together with all the evidence in the

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[19] *Cf. Case of the Serrano Cruz Sisters*, *supra* note 10, para. 43; *Case of Lori Berenson Mejía, supra note* 11, para. 80; and *Case of De la Cruz Flores, supra note* 15, para. 70.

proceedings and not in isolation because she is an alleged victim and has a direct interest in the case.[20]

123. The State opposed the Commission's request, "endorsed by the representatives, that the Court "consider the expert evidence provided in the Mayagna (Sumo) Awas Tingni Community case, judgment of August 31, 2001, Series C No. 79, as part of the body of evidence and decide that the references to the history, situation and organization of the indigenous people of the Atlantic Coast of Nicaragua should be incorporated into the instant case (*supra* paras. 25 and 26). The State declared, *inter alia*, that "this alleged evidence is inadmissible and unacceptable, because it refers to a different issue (elections and territorial demarcation), with no correlation between the persons allegedly prejudiced." The Court considers it is pertinent and useful to incorporate the expert evidence given before the Court by Rodolfo Stavenhagen Gruenbaum, to the extent that it refers to the history, situation and organization of the indigenous people of the Atlantic Coast of Nicaragua, and assesses this expert evidence with the body of evidence, applying the rules of sound criticism and bearing in mind the State's observations (*supra* para. 25).

VII
PROVEN FACTS

124. Based on the evidence provided, and taking into consideration the statements made by the parties, the Court finds that the following facts have been proved:

CONCERNING THE CARIBBEAN OR ATLANTIC COAST OF NICARAGUA

124(1) The population of Nicaragua is multiethnic, multicultural and multilingual and includes different indigenous and ethnic communities that inhabit the North Central and Pacific Region, as well as the Caribbean or Atlantic Coast.[21]

124(2) Chapter VI of the Nicaraguan Constitution entitled "Rights of the Atlantic Coast communities" establishes that these communities "are an indissoluble part of the Nicaraguan people" and have the right "to preserve and develop their cultural identity within national unity; establish with their own forms of social organization and administer their local affairs in accordance with their traditions."[22]

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[20] *Cf. Case of Caesar, supra note* 11, para. 47; *Case of the Serrano Cruz Sisters, supra note* 10, para. 45; and *Case of Lori Berenson Mejía*, *supra* note 11, para. 78.

[21] *Cf. Desarrollo humano en la Costa Caribe de Nicaragua [Human Development in the Caribbean Coast of Nicaragua].* Report prepared by the *Programa Nacional de Asesoría para la Formulación de Políticas* with the support of the *Consejo Nacional de Planificación Económica Social* (CONPES) (file of appendixes to the application, tome II, appendix 7, folio 470); Article 5 of the 1987 Constitution of the Republic of Nicaragua with the constitutional reforms. Official publication of the President's Office (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix C); Act No. 28 of October 30, 1987, entitled "Statute of Autonomy of the Atlantic Coast Regions of Nicaragua"; and map entitled "*Nicaragua, un país multilingüe, multiétnico y multicultural*" (file of appendixes to the brief with requests and arguments, appendix 4, folio 913).

[22] *Cf.* 1987 Constitution of the Republic of Nicaragua with the constitutional reforms. Official publication of the President's Office (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix C).

124(3) Act No. 28 of September 2, 1987, published in "*La Gaceta*" No. 238 of October 30, 1987, entitled "Statute of Autonomy of the Atlantic Coast Regions of Nicaragua," divided the Caribbean or Atlantic Coast into the North Atlantic Autonomous Region (RAAN) and the South Atlantic Autonomous Region (RAAS), because "autonomy makes it possible for the Atlantic Coast communities to exercise their right to participate in designing ways of exploiting the region's natural resources so that the benefits are reinvested in the Atlantic Coast. This law recognizes that "the indigenous people [are] subject to a process of increasing poverty, segregation, marginalization, assimilation, oppression, exploitation and extermination[, which] requires profound political, economic and cultural changes in order to satisfy their needs and aspirations."[23] The autonomy regime in these regions is regulated by the provisions of the Regulations of October 2, 2003, to Act No. 28.[24]

124(4) The Atlantic Coast covers approximately 45.8% of the State's territory and is the second most populous area of Nicaragua. Around 626,629 people live there; namely, 11.4% of the country's total population.[25] Approximately 72.54% of the population are mestizos. 28% of the population of the Caribbean or Atlantic Coast identifies itself with one of the indigenous communities.[26] About 172,069 inhabitants of the Atlantic Coast belong to indigenous or ethnic communities; that is, 3.13% of the national population. Most indigenous people in Nicaragua live in the RAAN.[27]

124(5) Several multilingual indigenous and ethnic communities inhabit the Caribbean or Atlantic Coast: mestizos, Miskitos, Sumos, Ramas, Creoles and Garifunas. They have a specific cultural identity; they maintain the values and characteristics of

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[23] *Cf.* Act No. 28 of October 30, 1987, entitled "Statute of Autonomy of the Atlantic Coast Regions of Nicaragua" (evidence incorporated *de oficio* by the Court under Article 45(1) of its Rules of Procedure).

[24] *Cf.* Act No. 28 of October 30, 1987, entitled "Statute of Autonomy of the Atlantic Coast Regions of Nicaragua" (evidence incorporated *de oficio* by the Court under Article 45(1) of its Rules of Procedure); and Decree No. 3584 of October 2, 2003, entitled Regulations to Act No. 28 "Statute of Autonomy of the Atlantic Coast Regions of Nicaragua" (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix F, file of preliminary objections, merits and reparations, tome II, folios 404-410).

[25] *Cf. Desarrollo humano en la Costa Caribe de Nicaragua [Human Development in the Caribbean Coast of Nicaragua]*. Report prepared by the *Programa Nacional de Asesoría para la Formulación de Políticas* with the support of the *Consejo Nacional de Planificación Económica Social* (CONPES) (file of appendixes to the application, tome II, appendix 7, folio 502); and report entitled "Población total por área de residencia y sexo, según departamento y grupos de edades, años 2002 and 2003" [Total Population by Residence Area and Gender, according to Department and Age Groups, years 2002 and 2003]. *Instituto Nacional de Estadísticas y Censos de Nicaragua* (INEC), see www.inec.gob.ni (evidence incorporated *de oficio* by the Court under Article 45(1) of its Rules of Procedure).

[26] *Cf. Desarrollo humano en la Costa Caribe de Nicaragua [Human Development in the Caribbean Coast of Nicaragua]*. Report prepared by the *Programa Nacional de Asesoría para la Formulación de Políticas* with the support of the *Consejo Nacional de Planificación Económica Social* (CONPES) (file of appendixes to the application, tome II, appendix 7, folio 470); and Act No. 28 of October 30, 1987, entitled "Statute of Autonomy of the Atlantic Coast Regions of Nicaragua" (evidence incorporated *de oficio* by the Court under Article 45(1) of its Rules of Procedure).

[27] *Cf. Desarrollo humano en la Costa Caribe de Nicaragua [Human Development in the Caribbean Coast of Nicaragua].* Report prepared by the *Programa Nacional de Asesoría para la Formulación de Políticas* with the support of the *Consejo Nacional de Planificación Económica Social* (CONPES) (file of appendixes to the application, tome II, appendix 7, folio 470); and report entitled *Población total por área de residencia y sexo, según departamento y grupos de edades, años 2002, and 2003. Instituto Nacional de Estadísticas y Censos de Nicaragua* (INEC), see www.inec.gob.ni (evidence incorporated *de oficio* by the Court under Article 45(1) of its Rules of Procedure).

their traditional culture, as well as communal forms of ownership and use, and their own social organization.[28]

124(6) Currently, the RAAN has seven municipalities: Rosita, Bonanza, Waslala, Prinzapolka, Puerto Cabezas, Waspam and Siuna. In 2000, the RAAN had the first six of these municipalities. This region covers 24.7% of national territory. Its administrative center is Bilwi, in the municipality of Puerto Cabezas. In the RAAN, approximately 45% of the population are Miskitu, 38% Spanish-speaking mestizos, 14% English-speaking 'Creole' Blacks, and 3% Twahka-speaking Mayagnas.[29]

124(7) The RAAS has 11 municipalities: La Cruz de Río Grande, Desembocadura del Río Grande, Tortuguero, Laguna de Perlas, Bluefields, Corn Island, Kubra Hill, Rama, Nueva Guinea, Muelle de los Bueyes and Bocana de Paiwas. In 2000, the RAAS only had the first seven of these municipalities. The RAAS covers 21.1% of national territory and its administrative center is Bluefields, in the municipality of the same name.[30] In the RAAS, approximately 85.5% of the population are mestizos, 10.3% Creoles, 2.8% Miskitu, 0.7% Garifunas, 0.4% Ramas and 0.3% Mayagnas.[31]

CONCERNING THE INDIGENOUS ORGANIZATION YATAMA

A) YATAMA AS AN INDIGENOUS AND ETHNIC ORGANIZATION

124(8) In 1969, the ecumenical movement, *Asociación de Clubes Agrícolas de Río Coco* (ACARIC) was created, based on communal cooperatives marketing agricultural products in the region of the Río Coco (Wanki), "to contribute to improving the social and economic situation of the indigenous people."[32]

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[28] *Cf.* Article 3 of Decree 3584 of October 2, 2003, entitled Regulation to Act No. 28 "Statute of Autonomy of the Atlantic Coast Regions of Nicaragua" (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix F, file of preliminary objections, merits and reparations, tome II, folios 404 and 405); testimony of Brooklin Rivera Bryan given before the Inter-American Court during the public hearing held on March 9, 2005; and "Indigenous people and poverty: The cases of Bolivia, Guatemala, Honduras and Nicaragua" (file of appendixes to the brief with requests and arguments, tome I, appendix 13, folio 376).

[29] *Cf. Caracterización Fisiogeográfica y Demográfica de las Regiones Autónomas del Caribe de Nicaragua [Fisiographic and Demographic Characterization of the Autonomous Regions of Nicaragua].* Research study by Alfonso Navarrete. *Fundación para la Autonomía y el Desarrollo de la Costa Atlántica de Nicaragua* (FADCANIC), at www.fadcanic.org/investigacion/investigacion1.htm (evidence incorporated *de oficio* by the Court under Article 45(1) of its Rules of Procedure).

[30] *Cf.* testimony of John Alex Delio Bans given before the Inter-American Court during the public hearing held on March 9, 2005; *Desarrollo humano en la Costa Caribe de Nicaragua [Human Development in the Caribbean Coast of Nicaragua]. Consejo Nacional de Planificación Económica Social* (CONPES) (file of appendixes to the application, tome II, appendix 7, folio 470); and *Caracterización Fisiogeográfica y Demográfica de las Regiones Autónomas del Caribe de Nicaragua. [Fisiographic and Demographic Characterization of the Autonomous Regions of Nicaragua].* Research study by Alfonso Navarrete. *Fundación para la Autonomía y el Desarrollo de la Costa Atlántica de Nicaragua* (FADCANIC), at www.fadcanic.org/investigacion/investigacion1.htm (evidence incorporated *de oficio* by the Court under Article 45(1) of its Rules of Procedure).

[31] *Cf. Caracterización Fisiogeográfica y Demográfica de las Regiones Autónomas del Caribe de Nicaragua. [Fisiographic and Demographic Characterization of the Autonomous Regions of Nicaragua]*Research study by Alfonso Navarrete. *Fundación para la Autonomía y el Desarrollo de la Costa Atlántica de Nicaragua* (FADCANIC), en www.fadcanic.org/investigacion/investigacion1.htm (evidence incorporated *de oficio* by the Court under Article 45(1) of its Rules of Procedure).

124(9) The indigenous organization YAPTI TASBA NANIH ASLATAKANKA (hereinafter "YATAMA"), which means "the organization of the people of Mother Earth" or "the organization of the sons of Mother Earth,"[33] emerged in the 1970s in the municipality of Waspam under the name of *Alianza para el Progreso de los Pueblos Miskitus y Sumos* (ALPROMISU), and expanded towards the RAAN. The purpose of ALPROMISU was, among other matters, to "defend our territories and our natural resources."[34]

124(10) On November 11, 1979, a General Assembly of the indigenous people was held at which ALPROMISU changed its name and became the MISURASATA (Miskitos, Sumos, Ramas, Sandinistas Aslatakanaka) organization.[35]

124(11) In 1987, a General Assembly of the indigenous people in Honduras was held, during which MISURASATA became the "regional ethno-political organization" YATAMA.[36] Nowadays, numerous indigenous and ethnic communities of the Nicaraguan Caribbean or Atlantic Coast consider that YATAMA represents them,[37] "especially the members of the Miskitu indigenous people."[38] YATAMA was formed with the purpose of

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[32] *Cf.* sworn written statement by Hazel Law Blanco made before notary public (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 905); sworn written statement by Centuriano Knight Andrews made before notary public (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 891); and newspaper Article entitled "Yapti Tasba Masraka nani Aslatakanka", published on the web page: www.miskito-nicaragua.de/miskito/YATAMA2.htm (file of appendixes to the brief with requests and arguments of the representatives, appendix 1, folio 906).

[33] *Cf.* sworn written statement by Centuriano Knight Andrews made before notary public (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 891).

[34] *Cf.* sworn written statement by Centuriano Knight Andrews made before notary public (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 891); newspaper Article entitled "*YATAMA, una historia de resistencia," [YATAMA, a history of resistance]* published on the web page: www.miskito-nicaragua.de/miskito/YATAMA2.htm (file of appendixes to the brief with requests and arguments, appendix 1, folio 889); and newspaper Article entitled "Yapti Tasba Masraka nani Aslatakanka," published on the web page: www.miskito-nicaragua.de/miskito/YATAMA2.htm (file of appendixes to the brief with requests and arguments, appendix 1, folio 909).

[35] *Cf.* sworn written statement by Centuriano Knight Andrews made before notary public (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 891); newspaper Article entitled "*YATAMA, una historia de resistencia," [YATAMA, a history of resistance]* published on the web page: www.miskito-nicaragua.de/ miskito/YATAMA2.htm (file of appendixes to the brief with requests and arguments, appendix 1, folio 889); and newspaper Article entitled ""Yapti Tasba Masraka nani Aslatakanka," published on the web page: www.miskito-nicaragua.de/miskito/YATAMA2.htm (file of appendixes to the brief with requests and arguments, appendix 1, folio 909).

[36] *Cf.* Newspaper Article entitled "Yapti Tasba Masraka nani Aslatakanka", published on the web page: www.miskito-nicaragua.de/miskito/YATAMA2.htm (file of appendixes to the brief with requests and arguments, appendix 1, folio 910); testimony of Jorge Teytom Fedrick given before the Inter-American Court during the public hearing held on March 9, 2005; and sworn written statement by Centuriano Knight Andrews made before notary public (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 891).

[37] *Cf.* sworn written statement by Centuriano Knight Andrews made before notary public (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 891); expert evidence of María Luisa Acosta Castellón given before public notary (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 874); and Article 6 of the YATAMA Charter of March 20, 2000 (file of appendixes to the application, tome II, appendix 9, folio 560).

[38] *Cf.* expert evidence of María Luisa Acosta Castellón given before public notary (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 874).

"defending the historical right of the indigenous people and ethnic communities to their traditional territories, and promoting self-government, [...] and the economic, social and cultural development of Yapti Tasba, thus fostering community democracy within the framework of democracy, peace and the unity of the Nicaraguan nation-State."[39]

b) Structure and membership of YATAMA

124(12) The basic structure of the YATAMA communities consists of "the sons and daughters of the indigenous and ethnic communities of the Nicaragua Moskitia, who acknowledge their ethnic identity and defend [their own] strategic interests."[40] However, when YATAMA takes part in regional or municipal elections, it allows members of "all the other people that are not indigenous, such as mestizos," to be candidates.[41]

124(13) YATAMA has its own organizational structure, inherited from its ancestors, called "community democracy". It is based on territorial, district and community assemblies in the indigenous or ethnic territories, and regional assemblies in the RAAN, the RAAS and Jinotega.[42] Each community assembly, which is the decision-making body of the community and district, is composed of the assembly of the families (*Tawan Aslika*); namely, all the indigenous or ethnic families who belong to the community or district, and this community assembly is headed by the Community Council (*Wihta Daknika*), which is the assembly's executive structure.[43]

124(14) The territorial assemblies are composed of the representatives of the community assemblies of the indigenous and ethnic communities and districts corresponding to the territory, and their executive structure is the Territorial Council. Each community designates its candidates and proposes them to the assembly. The territorial assembly is responsible for choosing the YATAMA candidates for the positions of councilors for the Regional Council and the Municipal Council, as well as candidates for mayors and deputy mayors in their own territory and municipality. It meets at least

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[39] *Cf.* expert evidence of María Luisa Acosta Castellón given before public notary (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 874); and Article 2 of the YATAMA Charter of March 20, 2000 (file of appendixes to the application, tome II, appendix 9, folio 560).

[40] *Cf.* Article 6 of the YATAMA Charter of March 20, 2000 (file of appendixes to the application, tome II, appendix 9, folio 560).

[41] *Cf.* testimony of Brooklin Rivera Bryan given before the Inter-American Court during the public hearing held on March 9, 2005.

[42] *Cf.* Article 16 of the YATAMA Charter of March 20, 2000 (file of appendixes to the application, tome II, appendix 9, folio 560); testimony of Brooklyn Rivera Bryan given before the Inter-American Court during the public hearing held on March 9, 2005; and testimony of Anicia Matamoros de Marly given before the Inter-American Court during the public hearing held on March 9, 2005.

[43] *Cf.* Articles 17 and 18 of the YATAMA Charter of March 20, 2000 (file of appendixes to the application, tome II, appendix 9, folio 560).

twice a year.[44] Voting is public. Those elected go to the communities to introduce themselves as candidates.[45]

124(15) The regional assembly is composed of the representatives of the "territorial assemblies of the indigenous or ethnic communities or districts" that belong to a specific region. The regional assembly adopts the electoral program and selects the YATAMA candidates for the position of deputies in the National Assembly, and also the candidates for mayors and deputy mayors of the regional capitals (Bilwi and Bluefields) and ratifies the other candidates for elected office in the other municipalities and in the RAAN and the RAAS regional councils.[46]

124(16) "Any leader or member of the organization has the right to be proposed as a candidate for elected office by any of its structures or bodies." Its structure can propose candidates who are not members of YATAMA, with the support of "at least five hundred signatures, certified by the Council of Elders, and they will be selected by the majority vote of the representatives of the respective regional assembly."[47]

c) Participation of YATAMA in Nicaraguan elections as an indigenous and ethnic organization

124(17) YATAMA first participated in the regional elections in Nicaragua in 1990. In 1994, it again took part in these elections.[48] In 1996, YATAMA took part in the municipal elections for the first time. In 1998, it participated in the election for councilors to the regional parliament and obtained 8 of the 45 seats on the RAAN Autonomous Regional Councils and 4 of the 45 seats in the RAAS.[49]

124(18) YATAMA participated in these elections in the category of "public subscription association," under the provisions of the 1990 and 1996 electoral laws. This category gave political participation to any organization assembling a minimum of 5% of the voters on the electoral roll of the respective electoral district, or registered on the voters' list in the preceding election. "Public subscription associations" could present candidates for mayors, deputy mayors and municipal councilors throughout

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[44] *Cf.* Article 20 of the YATAMA Charter of March 20, 2000 (file of appendixes to the application, tome II, appendix 9, folio 565); testimony of Anicia Matamoros de Marly given before the Inter-American Court during the public hearing held on March 9, 2005; and testimony of Brooklyn Rivera Bryan given before the Inter-American Court during the public hearing held on March 9, 2005.

[45] *Cf.* testimony of Anicia Matamoros de Marly given before the Inter-American Court during the public hearing held on March 9, 2005; testimony of Brooklyn Rivera Bryan given before the Inter-American Court during the public hearing held on March 9, 2005; and sworn written statement by Centuriano Knight Andrews made before notary public (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 894).

[46] *Cf.* Article 21 of the YATAMA Charter of March 20, 2000 (file of appendixes to the application, tome II, appendix 9, folio 565).

[47] *Cf.* Article 39 of the YATAMA Charter of March 20, 2000 (file of appendixes to the application, tome II, appendix 9, folio 565).

[48] *Cf.* sworn written statement by Centuriano Knight Andrews made before notary public (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 892).

[49] *Cf.* application for amparo filed by YATAMA's legal representatives before the Civil Chamber of the Court of Appeal of the North Atlantic District, Puerto Cabezas (file of appendixes to the application, tome II, appendix 8(1), folio 528).

the country and also for members of the Councils of the Atlantic Coast Autonomous Regions.[50]

124(19) The indigenous and ethnic communities that form part of YATAMA or to which this organization caters do not have a road network, so that most of the access routes to its territories, particularly in the RAAS, are by river. There is no public transport, which increases the cost of access to most of these communities. The communities are widely spread out, with a population density of 11.72 inhabitants per square kilometer in the RAAS and 7.2 in the RAAN; the national average is 31.14 inhabitants per square kilometer.[51] Despite this, the candidates selected by YATAMA maintain direct, personal contact with the communities that selected them, and from which they receive support in the elections. YATAMA carries out its business according to the oral tradition.[52]

YATAMA IN THE MUNICIPAL ELECTIONS OF NOVEMBER 5, 2000

A) ENACTMENT OF ELECTORAL ACT NO. 331 OF JANUARY 24, 2000

124(20) On January 24, 2000, a new electoral law (Act. No. 331) (hereinafter "the 2000 Electoral Act" or "Electoral Act No. 331 of 2000") was published in Nicaragua's official gazette, approximately nine months before the date of the following municipal elections. This new law did not include the category of "public subscription associations", which had been included in the electoral laws of 1990 and 1996 (*supra* para. 124(18)), among the groups that could take part in the elections.[53] The new law only allows groups to participate in the electoral processes in the legal category of

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[50] *Cf.* sworn written statement by Centuriano Knight Andrews made before notary public (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 892); application for amparo filed by YATAMA's legal representatives before the Civil Chamber of the Court of Appeal of the North Atlantic District, Puerto Cabezas (file of appendixes to the application, tome II, appendix 8(1), folios 528); *Desarrollo humano en la Costa Caribe de Nicaragua [Human Development in the Caribbean Coast of Nicaragua]*. Report prepared by the Programa *Nacional de Asesoría para la Formulación de Políticas* with the support of the *Consejo Nacional de Planificación Económica Social* (CONPES) (file of appendixes to the application, tome II, appendix 7, folios 512 and 513); and Articles 1, 81 and 82 de la Electoral Act No. 211 of January 8, 1996 (evidence incorporated *de oficio* by the Court under Article 45(1) of its Rules of Procedure).

[51] *Cf. Desarrollo humano en la Costa Caribe de Nicaragua [Human Development in the Caribbean Coast of Nicaragua]*. Report prepared by the *Programa Nacional de Asesoría para la Formulación de Políticas* with the support of the *Consejo Nacional de Planificación Económica Social* (CONPES) (file of appendixes to the application, tome II, appendix 7, folio 471); and expert evidence of María Luisa Acosta Castellón given before public notary (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 880).

[52] *Cf.* expert evidence of María Luisa Acosta Castellón given before public notary (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 874); and expert evidence of María Dolores Álvarez Arzate given before the Inter-American Court during the public hearing held on March 9, 2005.

[53] *Cf.* Electoral Act No. 331 of January 24, 2000 (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix D, file of preliminary objections, merits and reparations, tome II); *Desarrollo humano en la Costa Caribe de Nicaragua [Human Development in the Caribbean Coast of Nicaragua]. Report* prepared by the *Programa Nacional de Asesoría* para la Formulación de Políticas with the support of the *Consejo Nacional de Planificación Económica Social* (CONPES) (file of appendixes to the application, tome II, appendix 7, folio 513).

political parties,[54] a form of organization that is non-characteristic of the indigenous and ethnic communities of the Atlantic Coast.[55]

124(21) Article 71 of the 2000 Electoral Act establishes that "regional parties may be formed in the Atlantic Coast Autonomous Regions, and their sphere of action shall be restricted to their districts. The requirements shall be the same as those established for national parties, but circumscribed to the administrative political division of the Autonomous Regions." This law establishes that "[i]n the case of the indigenous organizations, their own natural form of organization and participation will be respected so that they may form regional parties."[56]

124(22) Article 65(9) of the 2000 Electoral Act establishes that, to obtain legal status, a political party must "[p]resent a duly authenticated document demonstrating support by means of the signatures of at least three per cent (3%) of the total voters registered on the electoral roll in the last national elections." Furthermore, Article 77(7) of this law stipulates that, in order to present candidates, the political party must present the signatures of 3% of the voters with their identity card number, as established in Article 65 of the said law, with the exception of political parties that, in the previous national elections, had obtained a minimum of 3% of the valid votes in the presidential elections.[57]

124(23) The first paragraph of Article 77 of the 2000 Electoral Act establishes that in the case of organizations wishing to take part in elections that are not for national authorities (such as municipal elections), in order to present candidates, they must "have obtained their legal status at least [...] six months" before the date of the elections, and "submit a written request [...] to the Supreme Electoral Council."[58]

124(24) Article 82 of the 2000 Electoral Act stipulates that, in the case of municipal elections, the political parties must register their candidates "in at least eighty per cent

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[54] *Cf.* Electoral Act No. 331 of January 24, 2000 (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix D, file of preliminary objections, merits and reparations, tome II); and sworn written statement by Centuriano Knight Andrews made before notary public (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 893).

[55] *Cf.* testimony of Brooklyn Rivera Bryan given before the Court during the public hearing held on March 9, 2005; testimony of John Alex Delio Bans given before the Inter-American Court during the public hearing held on March 9, 2005; and expert evidence of María Dolores Álvarez Arzate given before the Inter-American Court during the public hearing held on March 9, 2005.

[56] *Cf.* Electoral Act No. 331 of January 24, 2000 (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix D, file of preliminary objections, merits and reparations, tome II); *Desarrollo humano en la Costa Caribe de Nicaragua [Human Development in the Caribbean Coast of Nicaragua]*. Report prepared by the *Programa Nacional de Asesoría para la Formulación de Políticas* with the support of the *Consejo Nacional de Planificación Económica Social* (CONPES) (file of appendixes to the application, tome II, appendix 7, folio 513).

[57] *Cf.* Electoral Act No. 331 of January 24, 2000 (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix D, file of preliminary objections, merits and reparations, tome II).

[58] *Cf.* Electoral Act No. 331 of January 24, 2000 (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix D, file of preliminary objections, merits and reparations, tome II).

(80%) of the municipalities [... and have] at least eighty per cent (80%) of the total number of candidates."[59]

124(25) Articles 83 and 84 of the 2000 Electoral Act establish that political parties or alliances of parties, "through their respective legal representatives, may substitute their candidates in one, several or all the districts during the period indicated or during the extension they are granted by the Supreme Electoral Council." Should the Council "deny a request or reject a candidate because they do not comply with the legal requirements, it will notify the political party or alliance of parties within the three days that follow the decision, so that it may proceed to correct the defects or to substitute the candidates."[60]

b) Constitution of YATAMA as a political party

124(26) On March 8, 2000, nine members of YATAMA signed a public instrument "to establish a framework for and adapt its electoral participation [...] as a Regional Ethno-Political group, in accordance with Article 71 of the [Electoral] Act [of January 24, 2000], for presentation to the Supreme Electoral Council, to obtain authorization to proceed to [...] legalize [this organization] and fulfill the established formalities for requesting legal status and being recognized as a 'REGIONAL POLITICAL PARTY'." In this instrument, they appointed Brooklyn Rivera Bryan as their representative before the said Council, and Centuriano Knight Andrews for the RAAN, and John Alex Delio Bans for the RAAS as alternate representatives.[61]

124(27) The General Assembly of the Communities adopted the YATAMA Statute and it was certified by notary public on March 30, 2000. This Statute established that the said "ethno-political organization of the indigenous people and ethnic communities [...] was governed by the [...] principles of the defense of the strategic interests of the indigenous people and ethnic communities of the Caribbean Coast and Jinotega and, in particular, the defense of the territories and self-government."[62]

124(28) On May 4, 2000, one day before the expiry of the time limit for an organization to obtain legal status to take part in the municipal elections of November 5, 2000, according to Article 77 of Electoral Act No. 331 of 2000 (*supra* para. 124(23)), the Supreme Electoral Council issued a resolution in which it granted YATAMA legal status as a regional political party. In this resolution, the Supreme

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[59] *Cf.* Electoral Act No. 331 of January 24, 2000 (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix D, file of preliminary objections, merits and reparations, tome II).

[60] *Cf.* Electoral Act No. 331 of January 24, 2000 (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix D, file of preliminary objections, merits and reparations, tome II, folio 36); application for amparo filed by YATAMA's legal representatives before the Civil Chamber of the Court of Appeal of the North Atlantic District, Puerto Cabezas (file of appendixes to the application, tome II, appendix 8(1), folio 530); and resolution issued by the Supreme Electoral Council on August 15, 2000 (file of appendixes to the application, tome II, appendix 15(2), folio 599).

[61] *Cf.* public instrument of March 8, 2000 (file of appendixes to the application, tome II, appendix 9, folio 556).

[62] *Cf.* Article 3(a) of the YATAMA Charter of March 20, 2000 (file of appendixes to the application, tome II, appendix 9, folios 560).

Council decided that, "as of [that] date [YATAMA] could enjoy the rights and privileges granted it by the Constitution, the Electoral Act, and the other laws of the Republic."[63]

124(29) Pursuant to Articles 4 and 10 of Electoral Act No. 331 of 2000, the Supreme Electoral Council agreed "to adopt the [...] electoral calendar that w[ould] govern the electoral process for municipal authorities" of November 5, 2000.[64]

124(30) The time limit established in the electoral calendar published by the Supreme Electoral Council for the political parties that had obtained legal status within the period established by the law to present the list of candidates they wished to register for the municipal elections of November 5, 2000, expired on July 15, 2000.[65]

c) Presentation of YATAMA candidates in the RAAN

124(31) On July 15, 2000, the legal representative of YATAMA presented to the RAAN Regional Electoral Council the "[r]egistration sheets of the candidates for Waspam Río Coco, Puerto Cabezas, Prinzapolka, Rosita and Bonanza," a "copy of the legal status and emblem of the organization," and also a "[l]ist of candidates for mayors, deputy mayors and councilors [of] Puerto Cabezas, Waspam, Prinzapolka, Rosita and Bonanza."[66] On July 18, 2000, the President of the Regional Electoral Council signed a communication in which he stated that he was forwarding these documents to the Director General for Political Parties of the Supreme Electoral Council.[67]

124(32) As stipulated in the Electoral Act, the Supreme Electoral Council published a "preliminary list" of YATAMA's candidates for the elections of November 5, 2000, in the RAAN. None of the candidates was contested by any political party.[68]

d) Presentation of YATAMA candidates in the RAAS in alliance with the Coastal People party (PPC)

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63 *Cf.* resolution issued by the Supreme Electoral Council on May 4, 2000 (file of appendixes to the application, tome II, appendix 10, folio 573).

64 *Cf.* electoral calendar of the Supreme Electoral Council (file of appendixes to the application, tome II, appendix 11, folio 577).

65 *Cf.* electoral calendar of the Supreme Electoral Council (file of appendixes to the application, tome II, appendix 11, folio 580).

66 *Cf.* letter of July 15, 2000, from the YATAMA representative in the RAAN (file of preliminary objections, merits and reparations, tome III, folio 955); receipt dated July 15, 2000, of the RAAN Regional Electoral Council (file of preliminary objections, merits and reparations, tome III, folio 954); and record of delivery of the original documentation of the candidates dated July 16, 2000, issued by the RAAN Regional Electoral Council (file of preliminary objections, merits and reparations, tome III, folio 942).

67 *Cf.* letter of July 18, 2000, from the President of the RAAN Regional Electoral Council to the Director General for Political Parties of the Supreme Electoral Council (file of appendixes to the application, tome II, appendix 12, folios 582 and 583); and record of delivery of original documentation of municipal candidates for mayor, deputy mayor and councilors of the North Atlantic municipalities (file of appendixes to the application, tome II, appendix 12, folio 584).

68 *Cf.* application for amparo filed by YATAMA's legal representatives before the Civil Chamber of the Court of Appeal of the North Atlantic District, Puerto Cabezas (file of appendixes to the application, tome II, appendix 8(1), folio 530); and testimony of Brooklyn Rivera Bryan given before the Inter-American Court during the public hearing held on March 9, 2005.

124(33) On June 13, 2000, the representatives of the Coastal People Party (PPC), the YATAMA Party and the Indigenous Multiethnic Party (PIM) formed an electoral alliance in a public document, "in order to take part in the municipal elections of November 5, 2000, for mayors, deputy mayors and municipal councilors in the South Atlantic Autonomous Region (RAAS), […] under the name *UNIDAD PIM/YATAMA/PPC*." The document indicated that the principal purpose of the alliance was "to win public office in the municipalities of the South Atlantic Autonomous Region (RAAS), in the interests of the 'indigenous people and ethnic communities' of the Caribbean Coast of Nicaragua[; to this end,] they w[ould] present candidates for the different elected positions within the period established by the Supreme Electoral Council and in accordance with the Electoral Act." Furthermore, the representatives of the said political parties agreed that the executive organs of the parties to the said alliance would establish rules of procedure with norms, procedures and mechanisms to regulate "the selection of the candidates for mayors, deputy mayors and councilors."[69]

124(34) Each of the three political parties that composed the PIM/YATAMA/PPC alliance had legal status granted by the Supreme Electoral Council.[70] The three parties agreed that they would retain their own political identity and legal status" so that, should one of the parties withdraw from the alliance, it "w[ould] continue with the other two." In order to join the alliance, each of the respective political parties had to comply with the requirement established in Article 65(9) of the Electoral Act (*supra* para. 124(22).[71] John Alex Delio Bans was appointed the alliance's legal representative before the Supreme Electoral Council.[72]

124(35) On June 14, 2000, the legal representatives of the regional parties, PIM, YATAMA and PPC, requested the Supreme Electoral Council to authorize the PIM/YATAMA/PPC alliance. On June 24, 2000, the Supreme Electoral Council informed them that they should indicate which party would head this alliance and "under which party's flag they would participate in the elections in which [the alliance would] take part."[73] Article 80 of the 2000 Electoral Act establishes that alliances of political parties shall participate in the corresponding elections under "the name, flag and emblem of

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69 *Cf.* notarized attestation of the public instrument of June 13, 2000, on the constitution of the alliance of political parties *UNIDAD PIM/YATAMA/PPC* (file of appendixes to the application, tome II, appendix 14, folios 589).

70 *Cf.* resolution issued by the Supreme Electoral Council on May 4, 2000 (file of appendixes to the application, tome II, appendix 10, folio 590); notarized attestation of the public instrument of June 13, 2000, on the constitution of the alliance of political parties UNIDAD PIM/YATAMA/PPC (file of appendixes to the application, tome II, appendix 14, folios 588); and attestations issued on June 13, 2000, by the Supreme Electoral Council concerning the legal status of the PPC and the PIM as political parties (file of preliminary objections, merits and reparations, tome III, folios 950 and 951).

71 *Cf.* Articles 65 and 77 of Electoral Act No. 331 of January 24, 2000 (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix D, file of preliminary objections, merits and reparations, tome II, folios 30 and 33).

72 *Cf.* notarized attestation of the public instrument of June 13, 2000, on the constitution of the alliance of political parties UNIDAD PIM/YATAMA/PPC (file of appendixes to the application, tome II, appendix 14, folio 588).

73 *Cf.* resolution issued by the Supreme Electoral Council on August 15, 2000 (file of appendixes to the application, tome II, appendix 15(2), folio 598).

the political party, member of the alliance, they choose and, accordingly, the chosen party shall be the one that heads the said alliance."[74]

124(36) On July 5, 2000, the representative of the PIM/YATAMA/PPC alliance submitted a document to the Supreme Electoral Council in response to its communication of June 24, 2000 (*supra* para. 124(35)), indicating that "the name of the alliance of regional political parties [was] PIM and the political party that [would] head the alliance [was] the Indigenous Multiethnic Party (PIM)." Also, he advised that YATAMA had decided unilaterally to withdraw from the alliance, "therefore, [it was] constituted by the Indigenous Multiethnic Party (PIM) and the Coastal People Party (PPC)."[75]

124(37) On July 11, 2000, the legal representative of YATAMA in the RAAS informed the President of the Supreme Electoral Council that, "the YATAMA party in the South Atlantic Autonomous Region withdrew on June 13, 2000, from a party alliance formed to participate in the municipal elections [because] after the alliance had been created, it encountered problems." Consequently, he requested the Supreme Electoral Council to "issue instructions to whosoever it may concern to notify the other two parties that YATAMA w[ould] participate alone" in the elections of November 5, 2000.[76]

124(38) Although communications had been presented to the Supreme Electoral Council on July 5 and 11, 2000, on July 14, 2000, the representatives of the PPC and YATAMA presented a further communication in which they advised the President of the Council, in response to his communication of June 24, 2000 (*supra* para. 124(35)), that "the name of the alliance of regional political parties [was] PPC and the political party that w[ould] head the alliance [was] the Coastal People Party (PPC). In addition, these representatives advised that the Indigenous Multiethnic Party (PIM) had unilaterally decided to withdraw from the alliance; therefore, the alliance was composed of the Coastal People Party (PPC) and the Yapti Tasbah Masraka Nanih Aslatakanka (YATAMA) party." They also indicated that "[these were] the latest decisions taken by the alliance and, if there were any inconsistencies with previous communications, this communication prevailed over the others."[77] On July 17, 2000, the legal representative of PIM informed the President of the Supreme Electoral Council that "owing to disagreements with YATAMA and PPC, [this] organization ha[d] decided to participate in the municipal elections of November 5, 2000, alone."[78]

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[74] *Cf.* Electoral Act No. 331 of January 24, 2000 (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix D, file of preliminary objections, merits and reparations, tome II).

[75] *Cf.* letter of July 5, 2000, from the national legal representative of the PIM Alliance to the President of the Supreme Electoral Council (file of preliminary objections, merits and reparations, tome III, folio 948); and public instrument providing clarification to the Supreme Electoral Council dated July 4, 2000 (file of preliminary objections, merits and reparations, tome III, folio 952).

[76] *Cf.* letter of July 11, 2000, from the legal representative of YATAMA in the RAAS to the President of the Supreme Electoral Council (file of preliminary objections, merits and reparations, tome III, folio 936); and letter of July 17, 2000, from the legal representative of PIM to the President of the Supreme Electoral Council (file of preliminary objections, merits and reparations, tome III, folio 947).

[77] *Cf.* letter of July 14, 2000, from the legal representatives of YATAMA and the PPC to the President of the Supreme Electoral Council (file of preliminary objections, merits and reparations, tome III, folios 938 and 939); and attestation issued on May 3, 2005, by the Director General for Political Parties of the Supreme Electoral Council (file of preliminary objections, merits and reparations, tome V, folio 1735).

[78] *Cf.* letter of July 17, 2000, from the legal representative of PIM to the President of the Supreme Electoral Council (file of preliminary objections, merits and reparations, tome III, folio 947).

124(39) On July 15, 2000, the date on which the period established in the electoral calendar for presenting the list of candidates for the elections of November 5, 2000, expired (*supra* para. 124(30)), the PPC and YATAMA alliance (called the PPC Alliance), through its legal representative, "presented candidates for mayors, deputy mayors and councilors"[79] to the Regional Electoral Council in Bluefields.[80]

124(40) On July 17, 2000, the national legal representative of the PPC/YATAMA Alliance addressed a letter to the Director for Political Parties of the Supreme Electoral Council, in which, "[i]n compliance with the provisions of the Electoral Act[, …] he forward[ed] the list of candidates for mayors, deputy mayors and municipal councilors, with their respective alternates, for the municipalities of Bluefields, Corn Island, [K]ukra Hill, Laguna de Perlas, La Desembocadura del Río Grande, Tortuguero and La Cruz de Río Grande."[81]

124(41) The Supreme Electoral Council did not refer to the constitution of the PPC/YATAMA alliance until its resolution of August 15, 2000 (*infra* para. 124(51)).[82] Electoral Act No. 331 does not contain any provision that would prevent any political party that had presented itself as part of an alliance from taking part in the elections for which this alliance was established, when another party, which formed part of the alliance, was not authorized to participate.[83]

124(42) On April 20, 2005, the Director General for Political Parties of the Supreme Electoral Council issued an attestation in which he indicated that "according to the records kept by the General Directorate of the registration of candidates for the elections for mayors, deputy mayors and members of the municipal councils in the November 2000 elections, the Yapti Tasba Masraka Nanih Asla Takanka (YATAMA) party did not submit candidates to the Supreme Electoral Council, or to the Regional Electoral Council of the South Atlantic Autonomous Region (RAAS)."[84]

124(43) On May 3, 2005, the Director General for Political Parties of the Supreme Electoral Council certified "that folios 2 to 119 of Tome 1 of the book of candidates corresponding to 2000, contain the details of the candidates for mayors and councilors of the South Atlantic Autonomous Region [RAAS] submitted to the South Atlantic Regional Electoral Council in Bluefields (an organization that is not legally authorized to

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[79] *Cf.* resolution issued by the Supreme Electoral Council on August 15, 2000 (file of appendixes to the application, tome II, appendix 15(2), folios 599).

[80] *Cf.* letter of July 17, 2000, from the legal representative of the Alliance of the PPC and YATAMA (called PPC Alliance) to the President of the Supreme Electoral Council (file of preliminary objections, merits and reparations, tome III, folio 937).

[81] *Cf.* letter of July 17, 2000, from the legal representative of the Alliance of the PPC and YATAMA (called PPC Alliance) to the President of the Supreme Electoral Council (file of preliminary objections, merits and reparations, tome III, folio 937).

[82] *Cf.* resolution issued by the Supreme Electoral Council on August 15, 2000 (file of appendixes to the application, tome II, appendix 15(2), folio 599).

[83] *Cf.* Electoral Act No. 331 of January 24, 2000 (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix D).

[84] *Cf.* certification of April 20, 2005, issued by the Director General for Political Parties of the Supreme Electoral Council (file of preliminary objections, merits and reparations, tome V, folio 1701).

receive candidacies) by the Coastal People Party Alliance (PPC), and to the Supreme Electoral Council on July 17, 2000, when the time limit had expired; the details correspond to [a] list [of candidates whose names are] included" in the said record.[85]

E) Decisions of the Supreme Electoral Council, the Civil Chamber of the RAAN Court of Appeal, the Constitutional Chamber of the Supreme Court of Justice, and the Ombudsman's Office related to the participation of the YATAMA candidates in the elections of November 5, 2000

124(44) The Electoral Power is one of the four branches of government established by the Nicaraguan Constitution, together with the executive, legislative and judicial branches. It is composed of the Supreme Electoral Council, its highest organ, as well as of subordinate electoral organizations, such as the Electoral Councils of the Departments and of the Atlantic Coast Autonomous Regions, the Municipal Electoral Councils, and the Electoral Precinct Boards. It has the exclusive authority "to organize and manage elections, plebiscites [and] referendums."[86]

124(45) On June 7, 2000, the Supreme Electoral Council conducted "an official act to initiate the verification of signatures," during which it began a process of verifying the signatures required by Article 77(7) of the 2000 Electoral Act, No. 331, for registering the candidates of the political parties with legal status.[87]

124(46) On July 18, 2000, the Supreme Electoral Council issued a resolution in which it indicated that "[t]he signatures presented by the political parties were submitted to the signature verification process, pursuant to the corresponding administrative procedures, and the decisions of the auditors and the Supreme Electoral Council."[88] In the resolution, the Supreme Electoral Council "reject[ed] the objections" raised by several candidates from various political parties and "beg[an] the process of canceling the legal status of the political parties that had not presented candidates and of the political parties that [would] not take part in the electoral process, because they did not comply with the requirements for the registration of candidates. The Supreme Electoral Council indicated that, among others, the Coastal People Party (PPC), which headed the Alliance with YATAMA in the RAAS (*supra* paras. 124(38) and 124(39)), had not presented the 3% of the signatures required by Article 77 of the 2000

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[85] *Cf.* certification of May 3, 2005, issued by the Director General for Political Parties of the Supreme Electoral Council (file of preliminary objections, merits, and reparations, tome V, folio 1735).

[86] *Cf.* 1987 Constitution of the Republic of Nicaragua with the constitutional reforms. Official publication of the President's Office and Electoral Act No. 331 of January 24, 2000 (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendixes C and D, file of preliminary objections, merits and reparations, tome II, folio 5); and Electoral Observation in Nicaragua: 2000 Municipal Elections/Unit for the Promotion of Democracy, Americas Series, No. 27, General Secretariat of the Organization of American States (file of appendixes to the application, tome II, appendix 19, folios 624 and 625).

[87] *Cf.* resolution issued by the Supreme Electoral Council on July 18, 2000 (file of appendixes to the application, tome II, appendix 15(1), folio 596); and Electoral Act No. 331 of January 24, 2000 (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix D, file of preliminary objections, merits and reparations, tome II, folio 34).

[88] *Cf.* resolution issued by the Supreme Electoral Council on July 18, 2000 (file of appendixes to the application, tome II, appendix 15(1), folio 596).

Electoral Act, in order to register its candidates in the Region[89] (*supra* para. 124(22)). According to the decisions of the Supreme Electoral Council, only the Constitutionalist Liberal Party (PLC) and the Conservative Party (PC) had submitted the required 3% of the signatures. In the resolution, the Supreme Electoral Council did not make any specific reference to YATAMA's compliance with the requirements in the RAAN or in the RAAS. Also, in this resolution of July 18, 2000, the Supreme Electoral Council ruled on a request presented on July 21, 2000, by the PPC, objecting to the signature verification procedure and alleging "that the signatures with a 'valid identity card number' had not been compared with the information contained on the electoral roll [...] and the valid signatures had been verified illegally, despite the fact that more than the number of valid signatures required by the Electoral Act to participate in the municipal elections had already been submitted."[90] In addition to PPC, other political parties requested the Supreme Electoral Council to cancel 'the signature verification procedure arguing that this [was] illegal," because the only requirement in Article 77(7) of the 2000 Electoral Act was that the signatures should be "notarized" and it did not establish a signature verification procedure.[91] The Supreme Electoral Council did not notify this resolution to YATAMA, and it did not grant this party, which was part of the PPC Alliance, the period of three days "to proceed to rectify the defects or substitute candidates," as established in Article 84 of Electoral Act No. 331 of 2000 (*supra* para. 124(25).[92]

124(47) On July 31, 2000, Brooklyn Rivera, YATAMA's legal representative, addressed a communication to the President of the Supreme Electoral Council, requesting that YATAMA should be authorized to participate in the RAAS, given that, in the last regional elections, "it ha[d] obtained more votes than the percentage required by law to be authorized to take part in elections in the two regions: RAAN and RAAS." In this communication, the said legal representative indicated that, "since, to date, it had not received any official communication from the official [electoral] body, as a participating group, it [was] being affected because the communities and grass-roots sectors were becoming disheartened, and its rhythm of work in both autonomous regions was suffering."[93]

124(48) YATAMA requested the Supreme Electoral Council to "register [this party] for the elections in the South Atlantic Autonomous Region (RAAS) under its own name, presenting [its] own list of candidates to the regional delegate of the Supreme Electoral Council[, …] communications to which it had never received a reply."[94] In one

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89 *Cf.* resolution issued by the Supreme Electoral Council on July 18, 2000 (file of appendixes to the application, tome II, appendix 15(1), folio 596).

90 *Cf.* resolution issued by the Supreme Electoral Council on July 18, 2000 (file of appendixes to the application, tome II, appendix 15(1), folio 594).

91 *Cf.* resolution issued by the Supreme Electoral Council on July 18, 2000 (file of appendixes to the application, tome II, appendix 15(1), folio 592).

92 *Cf.* testimony of Brooklyn Rivera Bryan given before the Inter-American Court during the public hearing held on March 9, 2005; and testimony of John Alex Delio Bans given before the Inter-American Court during the public hearing held on March 9, 2005.

93 *Cf.* letter of July 31, 2000, from the legal representative of YATAMA to the President of the Supreme Electoral Council (file of appendixes to the application, tome II, appendix 16.1, folios 600).

94 *Cf.* appeal for review of August 18, 2000, filed before the Supreme Electoral Council by YATAMA's legal representatives (file of appendixes to the application, tome II, appendix 18, folio 605); and application for amparo filed by YATAMA's representatives before ante the Civil and Labor Chamber of the Court of

of these communications, YATAMA requested that it be allowed to register the candidates presented by the PPC and YATAMA Alliance (called the PPC Alliance) as its own candidates in the RAAS.[95]

124(49) On August 11, 2000, Brooklyn Rivera Bryan, in person, presented a communication to the Supreme Electoral Council, addressed to the President of this body, in which he "formally delivered the list of photocopies of identity documents of candidates for mayors, deputy mayors and councilors and their substitutes for the municipalities of Bluefields, Kubra Hill, Laguna de Perlas, La Desembocadura del Río Grande, Tortuguero and La Cruz de Río Grande [RAAS], proposed by YATAMA [...] to replace the candidates" who had resigned as candidates of the party.[96]

124(50) On August 11, 2000, Brooklyn Rivera Bryan, in person, presented another communication addressed to the President of the Supreme Electoral Council, in which he stated that "[e]ven though, at the last minute, PIM ha[d] abandoned unilaterally its commitment to coastal unity and PPC ha[d] not collected all the required signatures, this did not affect the good intentions or preclude YATAMA's right to take part in the forthcoming elections." Also, in this communication, Mr. Rivera Bryan indicated that, "YATAMA complied with all the legal requirements of the Supreme Electoral Council, including the list of substitutes for the candidates who had resigned in the different municipalities in both autonomous regions, RAAN and RAAS. In the case of the RAAN, the list of candidates [had] already been duly published in the municipalities in which they participated, but the list of candidates in the RAAS had not been published opportunely, which had negatively affected the communities and grass-roots sectors, and the Organization's rhythm of work."[97]

124(51) On August 15, 2000, one month after the expiry of the time limit established in the electoral calendar for the political parties to present their list of candidates, the Supreme Electoral Council issued a resolution excluding YATAMA from the elections of November 5, 2000, in both the RAAN, and the RAAS. The Supreme Electoral Council did not give YATAMA the opportunity to "proceed to correct the defects or to substitute the candidates," pursuant to Articles 83 and 84 of Electoral Act No. 331 of 2000 (*supra* para. 124(25)). In its resolution, the Electoral Council decided:[98]

> (a) With regard to the participation of YATAMA in the South Atlantic Autonomous Region, "[t]he request by YATAMA to register as candidates for this party those candidates presented by the YATAMA/PPC Alliance in the

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Appeal of the North Atlantic District, Puerto Cabezas (file of appendixes to the application, tome II, appendix 8(1), folio 528).

95 *Cf.* letter of July 31, 2000, from the legal representative of YATAMA to the President of the Supreme Electoral Council (file of appendixes to the application, tome II, appendix 16(1), folio 600); application for amparo filed by YATAMA's legal representatives before the Civil and Labor Chamber of the Court of Appeal of the North Atlantic District, Puerto Cabezas (file of appendixes to the application, tome II, appendix 8(1), folio 529).

96 *Cf.* letter of August 11, 2000, from the legal representative of YATAMA to the President of the Supreme Electoral Council (file of appendixes to the application, tome II, appendix 16(2), folio 601).

97 *Cf.* letter of August 11, 2000, from the legal representative of YATAMA to the President of the Supreme Electoral Council (file of appendixes to the application, tome II, appendix 16(3), folio 602).

98 *Cf.* resolution issued by the Supreme Electoral Council on August 15, 2000 (file of appendixes to the application, tome II, appendix 15(2), folio 599).

South Atlantic Autonomous Region is inadmissible (*supra* para. 124(48)). In this regard, it considered "that YATAMA [was] a legally constituted party and in full use of the rights established in the Electoral Act and, as such, it could take part in the elections of November 2000, either in alliances or individually, provided it complie[d] with the Electoral Act and the terms of the electoral calendar." It also indicated that "since [PPC] failed to provide the percentage of signatures referred to in Article 77(7), [...] the number of municipalities in which YATAMA present[ed] candidates is less than the 80% referred to in Article 82(2) in relation to Article 80 *in fine* of the Electoral Act[,] which establishe[d] that the parties or alliances of parties must register candidates for all the elections and positions referred to in Article 1 of [the said] law; and also that Article 89(1) of the Constitution establishes that '[t]he communities of the Atlantic Coast are an indissoluble part of the Nicaraguan people and, as such, enjoy the same rights and have the same obligations'";

(b) With regard to the participation of YATAMA in the North Atlantic Autonomous Region (RAAN), that "the candidates presented by the said Organization in the North Atlantic w[ould] not be registered because [...] they had not complied with the time limit established in the Electoral Act".

124(52) On August 17, 2000, the Supreme Electoral Council notified the said resolution of August 15, 2000, to the legal representatives of YATAMA.[99]

124(53) On August 17, 2000, the President of the RAAN Regional Electoral Council addressed a communication to the President, Vice-President and a Magistrate of the Supreme Electoral Council, in which he requested "emphatically" a clarification with regard to YATAMA's exclusion from the municipal elections and indicated that "it [was] urgent that a magistrate should come immediately to clarify this situation and avoid subsequent harm [or,] if this was not possible, [YATAMA] should be offered a meeting with the magistrates of the [Supreme Electoral Council]." The President of the Regional Electoral Council indicated that "if the regional political organization did not receive a clear and positive reply forthwith, it w[ould] not be responsible for any actions that m[ight] be taken in" the RAAN.[100]

124(54) On August 18, 2000, the legal representatives of YATAMA filed before the Supreme Electoral Council an appeal for review of the resolution of August 15, 2000, issued by this Council (*supra* para. 124(51)). In this appeal, the representatives stated that, in several communications, they had requested the Supreme Electoral Council to "register YATAMA for the elections in the South Atlantic Autonomous Region (RAAS) under its own name, presenting [its] own list of candidates to the regional delegate of the Supreme Electoral Council[, …] but these communications were never answered." They also indicated that, in accordance with Article 81 of the Electoral Act, "those who did not comply with the requirements, who had an impediment or who were prohibited under the Constitution and the pertinent laws, could not be nominated for elected

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[99] *Cf.* resolution issued by the Supreme Electoral Council on August 15, 2000 (file of appendixes to the application, tome II, appendix 15(2), folio 599); and application for amparo filed by YATAMA's legal representatives before the Civil Chamber of the Court of Appeal of the North Atlantic District, Puerto Cabezas (file of appendixes to the application, tome II, appendix 8(1), folio 529).

[100] *Cf.* letter of August 17, 2000, from the President of the RAAN Regional Electoral Council to the President, Vice President and a magistrate of the Supreme Electoral Council (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix A, file of preliminary objections, merits and reparations, tome II, folio 338).

office. However, none of [its] candidates were impeded from being nominated, and consequently the existing parties had not opposed them within the time limited established in Article 85 of the Electoral Act." In addition, they stated that: Since [the Supreme Electoral Council] had published the list of [YATAMA] candidates in the North Atlantic Autonomous Region (RAAN), […] it [was] inconceivable that the resolution issued […] should conclude that the fact that the alliance was not accepted in the RAAS, [...] affected [its] candidates in the RAAN." The representatives of YATAMA indicated that this "constituted a violation of the political rights of the coastal people, because the people of the Atlantic Coast were not being allowed to exercise their right to freedom of election and to be able to vote, thereby promoting the two-party system."[101] There is no evidence in the case file before the Court that the Supreme Electoral Council issued any decision on this appeal.

124(55) On August 30, 2000, Brooklyn Rivera and Centuriano Knight filed before the Civil and Labor Chamber of the Court of Appeal of the North Atlantic District, Puerto Cabezas, an application for administrative amparo, based on Article 23 of the Amparo Act in force, against the resolution issued by the Supreme Electoral Council on August 15, 2000 (*supra* para. 124(51); in it, they requested "the suspension of the resolution and its effects." In this application they stated that:[102]

> (a) The resolution of the Supreme Electoral Council concerning the participation of YATAMA in the RAAN "contradict[ed] the official receipts presented by the President del Electoral Council in the RAAN," since YATAMA presented the list of candidates for mayors, deputy mayors and councilors on July 15, 2000; "consequently the alleged late presentation was unfounded";
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> (b) Regarding the resolution of the Supreme Electoral Council concerning the participation of YATAMA in the RAAS, "the Electoral Act did not prohibit [a party that] withdrew from a planned alliance from trying to take part in the municipal elections based on [its] own legal status";
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> (c) Article 84 of the Electoral Act establishes that when the Supreme Electoral Council "denies a request or rejects a candidate because they do not comply with legal requirements, it shall notify the political party or alliance of parties within the three days following the resolution, so that they may proceed to correct the defects or to substitute the candidates." However, the Supreme Electoral Council "issued a resolution excluding YATAMA which [...] le[ft YATAMA] totally unable to act," because the Council never notified its representatives "that an administrative procedure was being executed with regard to the registration of [the YATAMA candidates," to enable them "to ensure [their] participation in the elections."[103]

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101 *Cf.* appeal for review of August 18, 2000, filed before the Supreme Electoral Council by YATAMA's legal representatives (file of appendixes to the application, tome II, appendix 18, folio 605).

102 *Cf.* application for amparo filed by YATAMA's legal representatives before the Civil and Labor Chamber of the Court of Appeal of the North Atlantic District, Puerto Cabezas (file of appendixes to the application, tome II, appendix 8(1), folio 530).

103 *Cf.* application for amparo filed by YATAMA's legal representatives before the Civil and Labor Chamber of the Court of Appeal of the North Atlantic District, Puerto Cabezas (file of appendixes to the application, tome II, appendix 8(1), folio 530).

124(56) On September 21, 2000, in keeping with the electoral calendar, the electoral campaign began; it lasted 42 days, in accordance with the law, culminating on November 1, 2000.[104]

124(57) On October 11, 2000, the Civil and Labor Chamber of the Court of Appeal of the North Atlantic District, Puerto Cabezas, decided to process the application for amparo presented by YATAMA on August 30, 2000 (*supra* para. 124(55)), and agreed "to suspend *de oficio* the resolution preventing the regional party, YATAMA, from registering its candidates and, thus, excluding them from the elections for municipal authorities of November 5, 2000, LEAVING THE SITUATION OF YATAMA BEFORE THE SUPREME ELECTORAL COUNCIL AS IT WAS BEFORE THE RESOLUTION ISSUED BY THE SUPREME ELECTORAL COUNCIL[, …] SINCE, IF THIS RESOLUTION WAS IMPLEMENTED, IT WOULD BE PHYSICALLY IMPOSSIBLE TO RESTORE THE RIGHTS OF THE APPELLANTS."[105]

124(58) On October 20, 2000, the Supreme Electoral Council filed an appeal for reconsideration of a ruling before the Civil and Labor Chamber of the Court of Appeal of the North Atlantic District, Puerto Cabezas, against this Chamber's ruling of October 11, 2000 (*supra* para. 124(57)), for it "to revoke this ruling [...] declaring its nullity" and to declare that the admitted appeal was out of order and "had no legal effect whatsoever," because the resolution of the Supreme Electoral Council referred strictly to an electoral matter.[106]

124(59) On October 23, 2000, Brooklyn Rivera and Centuriano Knight, YATAMA representatives, filed a brief before the Bilwi Civil Chamber of the Court of Appeal of the North Atlantic Autonomous Region (RAAN), requesting that the appeal for reconsideration of a ruling filed by the Supreme Electoral Council (*supra* para. 124(58)) should be rejected as inadmissible, because the Amparo Act in force established that, in order for the suspension that had been decided to be annulled, the only option would be the offer of a guarantee. They also stated that this was a case of an "objection [...] against an administrative resolution that violated constitutional rights to political participation[, ...] and if it was accepted, it would make it physically impossible to restore [their] rights, because not only would it prevent them from taking part in the election, but it would also [...] result in the loss of [their] legal status, according to Article 74(4) of the Electoral Act."[107]

124(60) On October 24, 2000, the Civil and Labor Chamber of the Court of Appeal of the North Atlantic District, Puerto Cabezas, rejected the appeal for reconsideration of a ruling filed by the Supreme Electoral Council (*supra* para. 124(58)) "because […] it was

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[104] *Cf.* electoral calendar of the Supreme Electoral Council (file of appendixes to the application, tome II, appendix 9, folio 580).

[105] *Cf.* resolution of October 11, 2000, issued by the Court of appeal of the North Atlantic District Civil and Labor Chamber, in Puerto Cabezas (file of appendixes to the application, tome II, appendix 8(2), folio 536).

[106] *Cf.* appeal for reconsideration of ruling filed by the Supreme Electoral Council before the Civil and Labor Chamber of the Court of Appeal of the North Atlantic District, Puerto Cabezas (file of appendixes to the application, tome II, appendix 8(2), folio 538).

[107] *Cf.* petition of October 23, 2000, filed by YATAMA's legal representatives before the Civil and Labor Chamber of the Court of Appeal of the North Atlantic District, Puerto Cabezas (file of appendixes to the application, tome II, appendix 8(4), folio 542).

totally inadmissible," and "safeguarded the rights that the petitioners consider they have, so that they may exercise them in the corresponding instance."[108]

124(61) On October 25, 2000, the Constitutional Chamber of the Supreme Court of Justice issued judgment No. 205, in which it declared "inadmissible *in limine litis*" the application for amparo filed by the representatives of YATAMA (*supra* para. 124(55)), because the resolution of the Supreme Electoral Council of August 15, 2000, "is a resolution concerning an electoral matter," and the said Chamber "lacks [...] competence in electoral matters, based on the final part of Article 173 of the Constitution which establishes: 'There shall be no ordinary or special recourse against the resolutions of the Supreme Electoral Council." Furthermore, the Constitutional Chamber indicated that Article 1 of the Electoral Act established in its "fifth and sixth paragraphs that electoral processes for the election of mayors, deputy mayors and members of municipal councils shall not be subject to any ordinary or special recourse." The said Constitutional Chamber also indicated that, under Nicaraguan laws, "there was no amparo procedure under constitutional or administrative law with regard to electoral matters," and that, in another judgment, "it had ruled on resolutions of the Supreme Electoral Council concerning administrative matters relating to political parties, regarding which the Council ha[d] competence, and it ha[d] so declared." In addition, the said Chamber "reprimanded the Civil and Labor Chamber of the Court of Appeal of the North Atlantic District, for having processed the application for amparo when it should have rejected it"[109] (*supra* para. 124(57)).

124(62) On October 30, 2000, the Supreme Electoral Council issued a communication in which it addressed the "people of Nicaragua in general and the international community to announce [... that] the YATAMA political party had been granted legal status [...] and this was maintained in force and with all its legal effects," and also that the said regional political party "c[ould] participate and present candidates in its respective Autonomous regions in the elections of November [2001]."[110]

124(63) YATAMA, and also the Ombudsman's Office, the President of the National Unity Movement (MUN), the OAS Electoral Observation Mission, and other organizations, such *Ética y Transparencia* [Translator's note: the local branch of Transparency International], requested "that the municipal elections in the North Atlantic Autonomous Region be postponed for a period that w[ould] allow the YATAMA party to organize a campaign and take part in" these elections, since the Supreme Electoral Council was empowered to suspend them "based on Articles 4 and 10(4) of the Electoral Act [...]."[111] The Supreme Electoral Council did not suspend the said

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[108] *Cf.* resolution of October 24, 2000, issued by the Civil and Labor Chamber of the Court of Appeal of the North Atlantic District, Puerto Cabezas (file of appendixes to the application, tome II, appendix 8.5, folio 545).

[109] *Cf.* judgment No. 205 of October 25, 2000, issued by the Constitutional Chamber of the Supreme Court of Justice of Nicaragua (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix A, file of preliminary objections, merits and reparations, tome II, folio 384).

[110] *Cf.* communication of October 30, 2000, issued by the Supreme Electoral Council (file of appendixes to the application, tome II, appendix 17, folio 604).

[111] *Cf.* sworn written statement by Roberto Courtney made on February 21, 2005 (file of preliminary objections, merits and reparations, tome III, folio 843); Final report on the 2000 municipal elections. *Grupo Cívico Ética y Transparencia*. December 2000 (file of appendixes to the application, tome II, appendix 21, folio 741); Electoral Observation in Nicaragua: 2000 Municipal Elections/Unit for the Promotion of

elections, arguing that the suspension fell within the competence of the National Assembly.[112]

124(64) As a result of a complaint filed by Brooklyn Rivera Bryan on August 24, 2000, the Ombudsman's Office asked the Supreme Electoral Council to provide "a detailed report of the reasons for the facts reported in the complaint." The Supreme Electoral Council did not allow the Ombudsman's Office to inspect the "Ledger of Resolutions which contained the resolution that the Council had taken unanimously" on August 15, 2000 (*supra* para. 124(51)), because, according to an official of this Council, "the ledger was locked up and [the] only [person] who has the key [...] had died."[113]

124(65) On March 3, 2005, the Ombudsman's Office issued a final decision with regard to this complaint filed by Brooklyn Rivera Bryan (*supra* para. 124(64), in which it declared that the Supreme Electoral Council and the Supreme Court of Justice "have violated civil and political rights, in the form of the right to equality before the law, the right not to be subjected to discrimination, the right to take part in government, to elect and to be elected, the right to respect for their cultural identity and also the right to judicial protection of the candidates for mayor, deputy mayor, councilors, and the population in general of the Autonomous Regions of the North and South Atlantic."[114]

CONCERNING THE MUNICIPAL ELECTIONS OF NOVEMBER 5, 2000

124(66) On November 5, 2000, the first municipal elections under Electoral Act No. 331 of 2000, were held in keeping with the electoral calendar of the Supreme Electoral Council (*supra* para. 124(29)).[115]

124(67) The YATAMA party did not take part in the elections of November 5, 2000, owing to the resolution of the Supreme Electoral Council of August 15, 2000 (*supra* para. 124(51)). This caused tension that had repercussions on the national and international scene.[116] There were confrontations with the police, protests and arrests of protesters who questioned this decision.[117]

Democracy, Americas Series, No. 27, General Secretariat of the Organization of American States (file of appendixes to the application, tome II, appendix 19, folio 650); and newspaper Article entitled "*Procurador de D.H. aconseja suspender elecciones en la RAAN. CSE no debe medir fuerzas con YATAMA*", published in "*El Nuevo Diario*" on November 3, 2000 (file of appendixes to the application, tome II, appendix 22, folio 808).

[112] *Cf.* newspaper Article entitled "*CSE persiste en jugar con fuego. Mantienen elecciones sin YATAMA*", published in "*El Nuevo Diario*" on November 4, 2000 (file of appendixes to the application, tome II, appendix 22, folio 816); and Second Report. The Carter Center Mission to Evaluate Electoral Conditions in Nicaragua, November 1-8, 2000 (file of appendixes to the application, tome II, appendix 20, folio 731).

[113] *Cf.* resolution of March 3, 2005, issued by the Ombudsman's Office (file of preliminary objections, merits and reparations, tome IV, folio 985); and newspaper Article entitled "*Procurador de D.H. aconseja suspender elecciones en la RAAN. CSE no debe medir fuerzas con YATAMA*", published in "*El Nuevo Diario*" on November 3, 2000 (file of appendixes to the application, tome II, appendix 22, folio 808).

[114] *Cf.* resolution of March 3, 2005, issued by the Ombudsman's Office (file of preliminary objections, merits and reparations, tome IV, folio 992).

[115] *Cf.* Electoral Observation in Nicaragua: 2000 Municipal Elections/Unit for the Promotion of Democracy, Americas Series, No. 27, General Secretariat of the Organization of American States (file of appendixes to the application, tome II, appendix 19, folio 620).

[116] *Cf.* Electoral Observation in Nicaragua: 2000 Municipal Elections/Unit for the Promotion of Democracy, Americas Series, No. 27, General Secretariat of the Organization of American States, and

124(68) Only six political parties took part in the municipal elections of November 5, 2000: the Sandinista National Liberation Front (FSLN), the Constitutionalist Liberal Party (PLC), the Nicaraguan Christian Road (NCC), the Conservative Party (PC), the South Atlantic Indigenous Multiethnic Party (PIM) and the Coastal Unity Movement Party (PAMUC).[118] The candidates who won the elections belonged to the traditional parties.[119] The political parties, PLC, FSLN and PC obtained 94, 52 and 5 mayoralties, respectively.[120] The only coastal political organizations that took part in the municipal elections of November 2000 were the Indigenous Multiethnic Party (PIM) in the RAAS,

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Second Report. The Carter Center Mission to Evaluate Electoral Conditions in Nicaragua, November 1-8, 2000 (file of appendixes to the application, tome II, appendixes 19 and 20, folios 649, 656 and 715); newspaper Articles published in "*El Nuevo Diario*" entitled "*Fraude Consumado*" of July 19, 2000, "*YATAMA afuera*" of October 27, 2000, "*YATAMA preocupa a la OEA*" of October 28, 2000, and "*Policía cree que puede controlar a los YATAMA*" of October 31, 2000 (file of appendixes to the application, tome II, appendix 22, folios 773, 796, 798 and 802); and request for annulment of the elections in the RAAN filed on November 8, 2000, before the Supreme Electoral Council by the Sandinista National Liberation Front Party (PFSLN), the Constitutionalist Liberal Party (PLC), the Coastal Unity Movement Party (PAMUC), the Indigenous Multiethnic Party (PIM), the Nicaraguan Christian Way Party (CCN) and the Nicaraguan Conservative Party (PCN) (file of appendixes to the application, tome II, appendix 22, folio 846).

117 *Cf.* sworn written statement by Centuriano Knight Andrews made before notary public (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 895); Second Report. The Carter Center Mission to Evaluate Electoral Conditions in Nicaragua, November 1-8, 2000 (file of appendixes to the application, tome II, appendix 20, folio 715); newspaper Articles published in "*El Nuevo Diario*" entitled "*YATAMA afuera*" on October 27, 2000, "*YATAMA preocupa a la OEA*" on October 28, 2000, and "*Policía cree que puede controlar a los YATAMA*" on October 31, 2000 (file of appendixes to the application, tome II, appendix 22, folios 796, 798 and 802); and request for annulment of the elections in the RAAN filed on November 8, 2000, before the Supreme Electoral Council by the Sandinista National Liberation Front Party (PFSLN), the Constitutionalist Liberal Party (PLC), the Coastal Unity Movement Party (PAMUC), the Indigenous Multiethnic Party (PIM), the Nicaraguan Christian Way Party (CCN) and the Nicaraguan Conservative Party (PCN) of November 8, 2000 (file of appendixes to the application, tome II, appendix 22, folio 846).

118 *Cf. Desarrollo humano en la Costa Caribe de Nicaragua [Human Development in the Caribbean Coast of Nicaragua]*. Report prepared by the Programa *Nacional de Asesoría para la Formulación de Políticas* with the support of the *Consejo Nacional de Planificación Económica Social* (CONPES) (file of appendixes to the application, tome II, appendix 7, folio 513); Electoral Observation in Nicaragua: 2000 Municipal Elections/Unit for the Promotion of Democracy, Americas Series, No. 27, General Secretariat of the Organization of American States (file of appendixes to the application, tome II, appendix 19, folio 649); and newspaper Article entitled "*Fraude Consumado*", published in "*El Nuevo Diario*" on July 19, 2000 (file of appendixes to the application, tome II, appendix 22, folio 773).

119 *Cf.* Second Report. The Carter Center Mission to Evaluate Electoral Conditions in Nicaragua, November 1-8, 2000 (file of appendixes to the application, tome II, appendix 20, folio 715); Newspaper Articles published in "*El Nuevo Diario*" entitled "*YATAMA afuera*" on October 27, 2000, "*YATAMA preocupa a la OEA*" on October 28, 2000, and "*Policía cree que puede controlar a los YATAMA*" on October 31, 2000 (file of appendixes to the application, tome II, appendix 22, folios 796, 798 and 802); and request for annulment of the elections in the RAAN filed on November 8, 2000, before the Supreme Electoral Council by the Sandinista National Liberation Front Party (PFSLN), the Constitutionalist Liberal Party (PLC), the Coastal Unity Movement Party (PAMUC), the Indigenous Multiethnic Party (PIM), the Nicaraguan Christian Way Party (CCN) and the Nicaraguan Conservative Party (PCN) of November 8, 2000 (file of appendixes to the application, tome II, appendix 22, folio 846).

120 *Cf. Desarrollo humano en la Costa Caribe de Nicaragua [Human Development in the Caribbean Coast of Nicaragua]*. Report prepared by the *Programa Nacional de Asesoría para la Formulación de Políticas* with the support of the *Consejo Nacional de Planificación Económica Social* (CONPES) (file of appendixes to the application, tome II, appendix 7, folio 513); Electoral Observation in Nicaragua: 2000 Municipal Elections/Unit for the Promotion of Democracy, Americas Series, No. 27, General Secretariat of the Organization of American States (file of appendixes to the application, tome II, appendix 19, folios 649); and newspaper Article entitled "*Fraude Consumado*", published in "*El Nuevo Diario*" on July 19, 2000 (file of appendixes to the application, tome II, appendix 22, folio 773).

and the Coastal Unity Movement Party (PAMUC) in the RAAN, which obtained "0.3% of the valid votes in the two Autonomous Regions."[121]

124(69) In the RAAN, there was an abstention level of almost 80%, because part of the electorate, composed of members of indigenous and ethnic communities, was not adequately represented by the national parties.[122]

124(70) The application of Electoral Act No. 331 of 2000, and the requirements for constituting a political party reduced the possibilities of participation by the Atlantic Coast indigenous and ethnic organizations. More than 20 political parties had taken part in the 1996 presidential elections.[123]

124(71) On November 8, 2000, the Constitutionalist Liberal Party (PLC), the Coastal Unity Movement Party (PAMUC), the Indigenous Multiethnic Party (PIM), the Nicaraguan Christian Road (CCN) and the Conservative Party (PCN), "with legal status and national and regional representation, participants in the [...] municipal elections of November 5, [2000], in the North Atlantic Autonomous Region (RAAN)," requested the Supreme Electoral Council "to declare the nullity of the elections in the RAAN [... and] to organize new municipal elections in the RAAN with the inclusion of the YATAMA Indigenous Party," since "[d]uring the electoral campaign and the elections in this region, there were acts of violence and social tension, that did not allow the normal exercise of the right to vote[, a s]ituation that arose from the exclusion of the YATAMA Indigenous Party and as a demonstration of the coastal population's dissent, which culminated in an electoral abstention [...] in excess of 80% of the electoral roll."[124].

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[121] *Cf. Desarrollo humano en la Costa Caribe de Nicaragua [Human Development in the Caribbean Coast of Nicaragua]*. Report prepared by the *Programa Nacional de Asesoría para la Formulación de Políticas* with the support of the *Consejo Nacional de Planificación Económica Social* (CONPES) (file of appendixes to the application, tome II, appendix 7, folio 513); Electoral Observation in Nicaragua: 2000 Municipal Elections/Unit for the Promotion of Democracy, Americas Series, No. 27, General Secretariat of the Organization of American States (file of appendixes to the application, tome II, appendix 19, folios 649); and newspaper Article entitled "*Fraude Consumado*", published in "*El Nuevo Diario*" on July 19, 2000 (file of appendixes to the application, tome II, appendix 22, folio 773).

[122] *Cf.* Electoral Observation in Nicaragua: 2000 Municipal Elections/Unit for the Promotion of Democracy, Americas Series, No. 27, General Secretariat of the Organization of American States and Second Report. The Carter Center Mission to Evaluate Electoral Conditions in Nicaragua, November 1-8, 2000 (file of appendixes to the application, tome II, appendixes 19 and 20, folios 651 and 715).

[123] *Cf.* Electoral Observation in Nicaragua: 2000 Municipal Elections/Unit for the Promotion of Democracy, Americas Series, No. 27, General Secretariat of the Organization of American States, and Second Report. The Carter Center Mission to Evaluate Electoral Conditions in Nicaragua, November 1-8, 2000 (file of appendixes to the application, tome II, appendixes 19 and 20, folios 644 and 715); newspaper Articles published in "*El Nuevo Diario*" entitled "*YATAMA afuera*" on October 27, 2000, "*YATAMA preocupa a la OEA*" on October 28, 2000, and "*Policía cree que puede controlar a los YATAMA*" on October 31, 2000 (file of appendixes to the application, tome II, appendix 22, folios 796, 798 and 802); and request for annulment of the elections in the RAAN filed on November 8, 2000, before the Supreme Electoral Council by the Sandinista National Liberation Front Party (PFSLN), the Constitutionalist Liberal Party (PLC), the Coastal Unity Movement Party (PAMUC), the Indigenous Multiethnic Party (PIM), the Nicaraguan Christian Way Party (CCN) and the Nicaraguan Conservative Party (PCN), of November 8, 2000 (file of appendixes to the application, tome II, appendix 22, folio 846).

[124] *Cf.* request for annulment of the elections in the RAAN filed on November 8, 2000, before the Supreme Electoral Council by the Sandinista National Liberation Front Party (PFSLN), the Constitutionalist Liberal Party (PLC), the Coastal Unity Movement Party (PAMUC), the Indigenous Multiethnic Party (PIM), the Nicaraguan Christian Road Party (CCN) and the Conservative Party of Nicaragua (PCN), of November 8, 2000 (file of appendixes to the application, tome II, appendix 22, folio 846).

124(72) YATAMA did not obtain the reimbursement of the expenses of its electoral campaign for the municipal elections of November 5, 2000, because it did not take part in these elections.[125]

MUNICIPAL ELECTIONS OF NOVEMBER 2004

124(73) In the 2004 elections, YATAMA "obtain[ed] three mayoralties in the largest municipalities of the North Atlantic Autonomous Region and most of the councilors in all the municipalities."[126] Given the large number of members of YATAMA, they "can only be candidates once in order to allow other members to participate." A few of the YATAMA candidates who were going to participate in the 2000 elections took part in the 2004 elections.[127]

REPRESENTATION OF THE COMMUNITIES OF THE ATLANTIC AUTONOMOUS REGIONS

124(74) The indigenous and ethnic communities of the Atlantic Coast represent 3.13% of the national population. In the RAAN, approximately 62% of the population is a member of the ethnic and indigenous communities and, in the RAAS, around 14.5% of the population belong to these communities.[128] Article 132 of the Nicaraguan Constitution establishes that the National Assembly "is composed of ninety deputies[.] At the national level, [...] twenty deputies will be elected and, in the departmental districts and autonomous regions, seventy deputies will be elected." Five deputies

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125 *Cf.* testimony of John Alex Delio Bans given before the Inter-American Court during the public hearing held on March 9, 2005; and sworn written statement by Cristina Póveda Montiel made before notary public (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 903).

126 *Cf.* certification issued by the Supreme Electoral Council on November 30, 2004, confirming the names of the candidates elect in the municipal elections of November 7, 2004 (file of preliminary objections, merits and reparations, tome III, folios 713 to 720); sworn written statement by Centuriano Knight Andrews made before notary public (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 896); and sworn written statement by Hazel Law Blanco made before notary public (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 911).

127 *Cf.* sworn written statement by Centuriano Knight Andrews made before notary public (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 894); official record issued by the RAAN Regional Electoral Council on July 16, 2000, of the registration of the candidates for the municipal elections in five RAAN municipalities (file of preliminary objections, merits and reparations, tome III, folios 942 a 946); official receipt issued by the RAAN Regional Electoral Council on July 18, 2000, for the "original documentation of municipal substitute candidates for mayor, deputy mayor and councilors of the North Atlantic municipalities" forwarded to the Director General for Political Parties of the Supreme Electoral Council (file of appendixes to the application, tome II, appendix 13, folios 584 a 587); attestation issued by the Director General for Political Parties of the Supreme Electoral Council on May 3, 2005, regarding the candidates proposed by "the Coastal People Party Alliance (PPC)" (file of preliminary objections, merits and reparations, tome V, folio 1735); and certification issued by the Supreme Electoral Council on November 30, 2004, regarding the candidates elect in the municipal elections of November 7, 2004 (file of preliminary objections, merits and reparations, tome III, folios 713 to 720).

128 *Cf. Desarrollo humano en la Costa Caribe de Nicaragua [Human Development in the Caribbean Coast of Nicaragua].* Report prepared by the *Programa Nacional de Asesoría para la Formulación de Políticas* with the support of the *Consejo Nacional de Planificación Económica Social* (CONPES) (file of appendixes to the application, tome II, appendix 7); and report entitled "Población total por área de residencia y sexo, según departamento y grupos de edades, años 2002 and 2003" [*Total Population by Residence Area and Gender, according to Department and Age Groups, years 2002 and 2003*]. Instituto Nacional de Estadísticas y Censos de Nicaragua (INEC), on www.inec.gob.ni.

represent the RAAS and the RAAN in the National Assembly and they belong to traditional parties.[129]

CONCERNING THE REFORM OF THE NICARAGUAN ELECTORAL SYSTEM

124(75) On November 8, 2002, in judgment No. 103, the Supreme Court of Justice of Nicaragua declared the unconstitutionality of "paragraphs 1 and 2 of Article 65(9) of [Electoral] Act No. 331 [...] concerning the presentation of 3% of signatures for a political party to obtain legal status[, ... and also] Article 77(7) of this Act, concerning the presentation of 3% of the voters' signatures for the presentation of candidates."[130] The Supreme Court of Justice based its decision on the fact that "there were political parties that, for one reason or another, were unable to obtain the number of signatures required, [... so that] they were unable to acquire legal status and were excluded as electoral options in future campaigns, which violates the political rights of the Nicaraguans [... and] constitutes an interference with and an impairment of individual rights, by establishing a provision in the Electoral Act that obliges voters to manifest their partisan ideological preferences through a process of identification of signatures in support of a party," which "constitutes an undue and abhorrent interference in the political activity of the voters, typical of totalitarian countries."[131]

124(76) In the National Development Plan of the Executive Branch of Nicaragua, the President of the Republic proposed institutional reforms to the Nicaraguan electoral system; the central issues related to the "electoral organ and its characteristics[, the] legal grounds or how to improve the rules of play[, and t]he desirable characteristics of an electoral system."[132]

CONCERNING COSTS AND EXPENSES

124(77) YATAMA's legal representatives took steps to achieve the participation of their candidates in the elections of November 5, 2000, and they have also taken part in the measures taken before the electoral and judicial authorities in the domestic proceedings. The YATAMA party, CENIDH and CEJIL have incurred expenses arising from resorting to the Inter-American system for the protection of human rights.[133]

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129 *Cf.* sworn written statement by Centuriano Knight Andrews made before notary public (affidavit) on February 14, 2005 (file of preliminary objections, merits and reparations, tome III, folio 897).

130 *Cf.* judgment No. 103 of November 8, 2002, delivered by the Supreme Court of Justice of Nicaragua (file of appendixes to the application, tome I, appendix 6, folio 425).

131 *Cf.* judgment No. 103 of November 8, 2002, delivered by the Supreme Court of Justice of Nicaragua (file of appendixes to the application, tome I, appendix 6, folio 425).

132 *Cf.* Draft National Development Plan of the Executive Branch of Nicaragua (appendixes to the brief with preliminary objections, answering the application and with comments on the brief with requests and arguments, appendix X, file of preliminary objections, merits and reparations, tome II, folio 347).

133 *Cf.* notarized testimonies of powers of attorney before the Inter-American Commission and Court granted by 34 alleged victims in favor of CENIDH and CEJIL lawyers (file of appendixes to the application, tome II, appendix 24); powers of attorney before the Inter-American Commission and Court granted by 25 persons in favor of CENIDH and CEJIL lawyers (file of appendixes to the application, tome II, appendix 24); notarized testimony of power of attorney before the Inter-American Commission and Court granted by 7 alleged victims in favor of CENIDH and CEJIL lawyers (file of preliminary objections, merits and reparations, tome III, appendix to the representative's brief of February 17, 2005, folios 780-783); notarized testimonies of powers of attorney before the Inter-American Commission and Court granted by 79 alleged victims in favor of CENIDH and CEJIL lawyers (file of preliminary objections, merits and reparations, tome III, appendix I to the representative's brief with final arguments of April 11, 2005, folios 1484-1614); invoices and receipts submitted in support of the expenses incurred by YATAMA, CENIDH and CEJIL (file of preliminary

VIII
CONSIDERATIONS CONCERNING THE DETERMINATION OF ALLEGED VICTIMS

125. Several problems have arisen concerning the determination of the alleged victims. Consequently, before examining the alleged violations, the Court will establish who it will consider the alleged victims to be.

126. The Commission indicated that the alleged violations of the Convention were committed "to the detriment of the candidates for the positions of mayors, deputy mayors and councilors presented by the regional political party [...] 'YATAMA' for the municipal elections of November 5, 2000, in the North Atlantic Autonomous Region and the South Atlantic Autonomous Region." It explained that, in the RAAS, the YATAMA party presented candidates in alliance with the Coastal People Party (PPC), an alliance that was called the PPC Alliance, and that, in the RAAN, the YATAMA party took part independently.

127. In principle, determination of the alleged victims would need to be supported by official documents presented to the Nicaraguan electoral authorities or issued by the latter, authenticating the name of the candidates proposed by YATAMA, independently or in alliance.

128. On several occasions during the proceeding before the Commission, the representatives of the alleged victims requested the Director for Political Parties of the Supreme Electoral Council, the Secretary of Proceedings, and the magistrates of this Council to provide them with copies of the lists of candidates presented by YATAMA in the Atlantic Autonomous Regions. The only official document that Nicaragua provided was an official receipt of July 18, 2000, for the "original documentation of municipal substitute candidates for mayor, deputy mayor and councilors of the municipalities of the North Atlantic received on July 15, 2000," which the President of the RAAN Regional Electoral Council forwarded to the Director General for Political Parties of the Supreme Electoral Council. This document contains the names of the candidates that the Commission provided in the application. However, it does not give any information on the list of candidates presented in the RAAS and it does not provide information on all the candidates presented in the RAAN, because it is merely a list of substitute candidates.

129. In their briefs with requests and arguments, and with comments on the preliminary objections, the representatives requested the Court to require the State to present the official lists of candidates proposed by YATAMA in both the RAAN and the RAAS for the 2000 municipal elections, because they had made this request and had not obtained complete information from the State.

130. Since it was necessary to have the official lists of candidates presented by YATAMA and there were differences between the lists of alleged victims provided by the Commission and by the representatives, the Secretariat, on the instructions of the President and all the judges of the Court, requested the State's cooperation in the presentation of these lists, in notes of May 12 and December 9, 2004, March 31, and

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objections, merits and reparations, tome V, appendixes to the final written arguments of the representatives of February 17, 2005, appendixes 4 and 5, folios 1647 to 1686).

April 15 and 27, 2005 (*supra* paras. 22, 24, 39, 45 and 47). In addition, during the public hearing held on March 9 and 10, 2005, the Court called upon the parties to present the necessary information in their final written arguments, so that the Court could determine the list of the alleged victims in this case; a request that was recalled to the parties in a note from the Secretariat of March 31, 2005 (*supra* para. 39). The persons proposed by YATAMA to take part in the 2000 municipal elections were not registered as candidates by the Supreme Electoral Council, because it considered that the party had not complied with the legal requirements. Thus, none of them took part in the elections held on November 4 that year. Consequently, the lists, which the State was asked to present, could not refer to registered candidates.

131. In the various requests for the lists of candidates, the State was reminded that, in the RAAS, the list had been presented by the alliance of the Coastal People Party and the YATAMA party; therefore, it should be able to provide these lists irrespective of whether or not YATAMA and its candidates had participated in the 2000 municipal elections, and also that these were documents that had not been presented by YATAMA directly to the Supreme Electoral Council, but to a regional authority, or attestations that had not been issued by the said Council, but by a regional authority.

132. Following the first two requests for collaboration in forwarding the said lists in notes dated May 12 and December 9, 2004 (*supra* paras. 22 and 24), on March 1, 2005, the State provided a document issued by the RAAN Regional Electoral Council on July 15, 2000, stating that, on that day, "the legal representative of the YATAMA regional party presented the registration sheets of the candidates for the elections [...] in the municipalities of Waspam Río Coco, Puerto Cabezas, Prinzapolka, Rosita and Bonanza," and indicated their names (*supra* para. 33). Accordingly, it was possible to have complete information on the persons proposed by YATAMA as candidates in the RAAN, given that the Court already had the official list of alternate or substitute candidates (*supra* para. 128). Nevertheless, the State did not provide any information on the list of proposed candidates in the RAAS.

133. Finally, on May 5, 2005 (*supra* para. 49), after the Court or its President had made five requests (*supra* paras. 22, 24, 39, 45 and 47), the State delivered an attestation issued on May 3, 2005, by the Director General for Political Parties of the Supreme Electoral Council, which contained the names of the "candidates for mayors and councilors of the South Atlantic Autonomous Region, presented [… t]o the South Atlantic Regional Electoral Council in Bluefields (an organization that is not legally empowered to receive candidacies) by the Coastal People Party Alliance (PPC) and to the Supreme Electoral Council on July 17, 2000, after the time limited had expired,"[134]

134. The Court has established that the parties must provide the Court opportunely with the evidence that it requests, so that it has the maximum information to evaluate

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[134] With regard to the persons proposed for registration as candidates in the RAAS, the Court notes that, the attestation issued on May 3, 2005, by the Director for Political Parties of the Supreme Electoral Council with regard to the RAAS (*supra* para. 49), contains the names of those who were proposed by the alliance of the PPC and YATAMA parties, and it is not possible to distinguish who belonged to each of these parties. Even though the Commission does not include the manner in which the PPC and its candidates were excluded from participating in the 2000 municipal elections as an act that violates the Convention, it does include as alleged victims all the persons who were proposed by the alliance and who YATAMA requested the Supreme Electoral Council to accept as YATAMA candidates, when the PPC was subsequently excluded.

the facts and substantiate its decisions.[135] In proceedings on human rights violations, the applicant may not be able to provide evidence that can only be obtained with the cooperation of the State, which, in many cases, controls the means to clarify facts that have occurred on its territory.[136]

135. The Court considers that the State had the required official information and that, despite the Court's repeated requests based on Article 45(2) of the Rules of Procedure, it failed to present this information in a timely manner, invoking unsubstantiated arguments (*supra* paras. 23, 40 and 46). It stated that YATAMA had not fulfilled the legal requirements for participating in the elections (some of which were not even considered by the Supreme Electoral Council when it decided not to register YATAMA's candidates (*supra* para. 124(51)), and it acted as if it did not understand that, when it was requested to provide information on the candidates proposed by YATAMA in the RAAS, it should provide this, even though YATAMA had presented them in alliance with the PPC.

136. This omission by the State caused unnecessary difficulties in determining the alleged victims and signified non-compliance with the obligation to cooperate with the Court, owing to the failure to provide the information required in a timely manner. It is not for the State, or any other party, to determine the merits and consequences of providing documents requested by the Court or its President.

137. At the date on which this judgment is delivered, the Court holds official documentation determining the names of the alleged victims, so this problem has been resolved.

138. The Court has taken into consideration the following probative elements to determine the persons who were presented by YATAMA as candidates to take part in the 2000 municipal elections: (a) the official receipt dated July 18, 2000, for the delivery of the "original documentation of municipal substitute candidates for mayor, deputy mayor and councilors of the North Atlantic municipalities," that the President of the RAAN Regional Electoral Council forwarded to the Director General for Political Parties of the Supreme Electoral Council; (b) the document issued by the RAAN Regional Electoral Council on July 15, 2000, stating that the same day "the legal representative […] of the […] YATAMA regional party presented the registration sheets of the candidates for elections […] in the municipalities of Waspam Río Coco, Puerto Cabezas, Prinzapolka, Rosita and Bonanza"; (c) attestation of May 3, 2005, issued by the Director General for Political Parties of the Supreme Electoral Council, containing the names of the "candidates for mayors and councilors of the South Atlantic Autonomous Region, presented [… t]o the South Atlantic Regional Electoral Council in Bluefields […] by the Coastal People Party Alliance (PPC) and to the Supreme Electoral Council on July 17, 2000, after the time limit had expired"; (d) list of candidates presented by the petitioners in the proceedings before the Commission; (e) list of candidates presented by the Commission as attachment 1 to its application; (f) list of candidates included by the representatives in the brief with requests and arguments;

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[135] *Cf. Case of Tibi*. Judgment of September 7, 2004. Series C No. 114, para. 83; *Case of the "Juvenile Reeducation Institute"*. Judgment of September 2, 2004. Series C No. 112, para. 93; and *Case of the 19 Tradesmen*, *supra note* 5, para. 77.

[136] *Cf. Case of Tibi*, *supra* note 135, para. 83; *Case of the 19 Tradesmen*, *supra note* 5, para. 77; and *Case of Juan Humberto Sánchez. Interpretation of the judgment on preliminary objections, merits and reparations.* (Art. 67 American Convention on Human Rights). Judgment of November 26, 2003. Series C No. 102, para. 47.

(g) final list of candidates presented by the representatives in their final written arguments;[137] (h) brief of May 13, 2005, in which the representatives submitted clarifications and explanations concerning the differences in the lists of candidates provided during the proceedings before the Court;[138] (i) brief of May 16, 2005, in which the Commission submitted clarifications and explanations concerning the differences in the lists of candidates provided during the proceedings before the Court; and (j) briefs of May 18 and 19, 2005, in which the State presented observations on the two said briefs.

139. When determining the identity of the persons whose names were submitted for registration as candidates for YATAMA, the Court has given prevalence to the first three documents indicated in the preceding paragraph, which are official attestations issued by the electoral organs, whose authenticity and content have not been opposed or questioned.

140. Based on the foregoing, the Court considers as alleged victims the following persons who were proposed by YATAMA to be registered and participate as candidates for mayors, deputy mayors and municipal councilors in the 2000 municipal elections in the RAAN: *Municipality of Puerto Cabezas:* Rodolfo Spear Smith (mayor), Anicia Matamoros Bushey (deputy mayor), Lilly Mai Henríquez James (councilor), Donly Mendoza Cisnero (substitute councilor), Ovencio Maikell Barwell (councilor), Gumersindo Rodríguez Francis (substitute councilor), Edmundo Catriciano Joseph (councilor), Sonia Pedro Feliciano (substitute councilor), Jerry Labonte Moody (councilor), Evaristo Lacayo Salvador (substitute councilor), Elmer Emsly Blanco (councilor), Winston Joel Livy (substitute councilor), Rodolfo Alciriades Sánchez (councilor), Alfredo Gabriel Gabrino (substitute councilor), Teresa Jonson Bengis (councilor), Roberto Labonte Centeno (substitute councilor), Minario Emsly Wilson (councilor); *Municipality of San Juan de Río Coco Waspam:* Celio Thomas Zamora (mayor), Calistro Osorio Bans M. (deputy mayor), Diego Guzmán Vanegas Allington (councilor), Aguilar Salomón Dixon (substitute councilor), Adrián Padilla Richard (councilor), Morano Castro Castro (substitute councilor), Gilberto Williams Jirón (councilor), Alonso Fresly Gabriel (substitute councilor), Lucio Alfred Lacayo Kitler (councilor), Armando Thomas (substitute councilor), José Guzmán Guzmán Briman (councilor), Antonio Avila Gutiérrez (substitute councilor), Bernaldo García Pantin (councilor), Arturo Solórzano White Solórzano (substitute councilor), Loenida Martínez Pasly (councilor), Lobres Josenes Josenes Figueroa (substitute councilor), Remigio Narciso Zepeda (councilor), Antonio Reyes Waldan (substitute councilor); *Municipality of Bonanza:* Mario Peralta Bands (mayor), Jorge Chacón Wilson (deputy mayor), Ceferino Wilson Bell (councilor), Patricio López Díxon (substitute councilor), Icasio Díxon Reyes (councilor), Cindyluz Carolina Couberth Cárdenas (substitute councilor), Neiria Elizabeth Fúnez Muller (councilor); *Municipality of Rosita:* Cristina Poveda

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[137] The Court has noted that the representatives included 20 people on their lists, but their names do not appear in the application or on the State's official lists. When explaining this difference, the representatives indicated in their brief of May 13, 2005, that, following the "dissolution of the PPC/YATAMA Alliance," it was requested that these persons should be registered as candidates and they asked the Court to consider them alleged victims. The Court will not consider these persons alleged victims because their presentation is not confirmed in any official document, and they were not included on the list presented by the petitioners in the proceeding before the Commission or in the application filed by the Commission, so that the State was unable to consider them.

[138] In their brief with clarifications and explanations, the representatives acknowledged that two people who had been included as alleged victims in their final list of candidates in the RAAN had been substituted, so they would not be candidates proposed by YATAMA. Also, the representatives acknowledged that they had included four people on their lists of candidates in the RAAS who should be considered "victims in their capacity as voters" and not as candidates.

Montiel (mayor), Morgan Johnny Anderson (deputy mayor), Daniel Manuel Juwith (councilor), Oliverio Mairena Ocampo (substitute councilor), Edison Johnny Anderson (councilor), Lorenzo Mairena Ocampo (substitute councilor), Andrés López Martínez (councilor); *Municipality of Prinzapolka:* Eklan James Molina (mayor), Jaime Timoteo Hammer Berig (deputy mayor), Marvin Ignacio Serapio (councilor), Romer Barkley Hemphry (substitute councilor), Alonso Edwards Salomón (councilor), Antonio López Hans (substitute councilor), Domingo Peralta Cristóbal (councilor), Fidencio Rivera Janneth (substitute councilor), Melancio Hernández Budier (councilor) and Pedro Morley Rivera (substitute councilor).

141. The Court also considers as alleged victims the following persons who were proposed by YATAMA to be registered and participate as candidates for mayors, deputy mayors and municipal councilors in the 2000 municipal elections in the RAAS: *Municipality of Bluefields:* Manuel Salvador Paguagua García (mayor), Yahaira Ivonne Amador Gadea (deputy mayor); Councilors: Eustacio Flores Wilson, Ashmet Alexander Ally, Julio Cesar Delgado Pacheco, Israel Díaz Amador, Angela Gibson Morales, Reynaldo Lagos Amador, Eduardo Alexander Siu Estrada, Isabel Reina Estrada Colindres, Lillian Elizabeth Francis Wilson, Carlos John Omeir, Nelly Sánchez Castillo, Flor Deliz Bravo Carr, William Wong López, Jenny Mitchell Omeir, Sergio Warren León Corea, Olga Orelia Shepperd Hodgson; *Municipality of Corn Island:* Dayne Winston Cash Cassanova (mayor), Cristina Morris Anisal (deputy mayor); Councilors: Lorenzo Fidencio Britton Calderón, Keston Orville López Lewis, Lowell Alvin Rigby Downs, Cherrul Eltina Tucker Hunter, Marlene del Socorro Hebbert Escorcia, Vaden Davis Downs White, Erick Alvaro Archibol Lavonte, Olga María Leyman Francis; *Municipality of la Cruz de Río Grande:* Exibia Alarcón Herrera (mayor), Gloria Maritza Colindres Romero (deputy mayor); Councilors: Angela Barbarina Hurtado, Juan Francisco Díaz Matamoro, Marcelino Lanzas Amador, Juan Carlos Loáisiga, Digno Días González, Gloria Isabel Lira Díaz, Teodora Duarte Sequeira, Maritza Collado Plazaola; *Municipality of Desembocadura de Río Grande:* Roberto Chow Molina (mayor), Edward Nixon Ellis Brooks (deputy mayor); Councilors; Kramwel Frank James, Donald Wilson Martínez Roland, Cristina Josefina Hills Thompson, Carolina Del Socorro Hurtado Rocha, Carlos Julián Prudo, Norman Marcelina Inglish, Belarmino Young Richard, Hipólito García López; *Municipality of Tortuguero:* Gorge Antonio Gutiérrez Robledo (mayor), Pastora Carmen García Guillen (deputy mayor); Councilors: Jacinta Pérez González, Juana María Jirón Rodríguez, Alejandro Miranda Reyes, Sandra Esther Reyes López, Emelina Valle Solano, Andrea Lira Gaitán, Guillermina López García, Hilda María Miranda Reyes; *Municipality of Kukra Hill:* Juan Casterio Reyes Craford (mayor), José Mateo López Rigby (deputy mayor); Councilors; Dionicio Márquez Méndez, Ruth Vargas Smith, Leonor Haydé Maesk Thompson, Miguel Amador Huate, Alicia Reyes, Roberto Ramos Renis, Hilda Estela Méndez Sinclair, Samuel Walter Lewis Fedrick; *Municipality of Laguna de Perlas:* Rodolfo Chang Bennett (mayor), Alonso Florencio Willis Tucker (deputy mayor); Councilors: Liston Hooker Allen, Constantino Franklin Humpheys Hogdson, Jason Kenred Gutiérrez Peralta, Arlen Joan Peralta Davis, Winston Brown Martin López, Clarinda Catalina Hamphys Moses,[139] Ilva Bernard, Wilma Janeth Taylor Hebbert and William Martin.[140]

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[139] The Court notes that "Catalina Hamphuys" appears as an alleged victim in the list with the application, while someone with the name "Clarinda Catalina Hamphys Moses", appears in the brief with requests and arguments as an alleged victim; in the representative's final list both names appear as if there were two different people: namely, both "Catalina Hamphuys" and "Clarinda Catalina Hamphys Moses." The representatives presented the Court with two notarized testimonies of powers granted by "Catalina Hamphuys" and "Clarinda Catalina Hamphys Moses." However, in the attestation issued on May 3, 2005, by the Director General for Political Parties of the Supreme Electoral Council with regard to the RAAS (*supra* para. 49) only "Clarinda Catalina Hamphys Moses" appears. The Court will consider as an alleged victim the persons with the latter name, because it is the name that appears in the said attestation issued by the

IX
VIOLATION OF ARTICLES 8(1) AND 25 OF THE CONVENTION IN RELATION TO ARTICLES 1(1) AND 2 THEREOF (RIGHT TO A FAIR TRIAL AND TO JUDICIAL PROTECTION)

142. *Arguments of the Commission*

(a) The decisions of the Supreme Electoral Council not to accept YATAMA's request to register as candidates of this party, those candidates presented by the alliance between YATAMA and the Coastal People Party in the RAAS, and "not to register the candidates presented by YATAMA in the RAAN, because the organization had not complied with the time limit established in the Electoral Act" were arbitrary. The Nicaraguan Electoral Act stipulates that, when the period for presenting candidates has expired, if the Council denies a request or rejects a candidate, "within the three days following the decision, it shall notify the political party that presented [the request or candidate] so that it can proceed to correct the defects or substitute the candidates";

(b) The Supreme Electoral Council indicated in its resolution of August 15, 2000, that YATAMA had not complied with the time limit established in the Electoral Act, which could "only refer to the period of six months provided for in Article 77 of the Electoral Act," the minimum lapse that should transpire between the recognition of the legal status of the political party and the date of the elections. However, the Supreme Electoral Council had acknowledged YATAMA's status as a political party on May 4, 2000; namely six months before the 2000 municipal elections, thus complying with the requirement established in Article 77 of the Electoral Act; and

(c) The State "deprived the candidates of YATAMA for the municipal elections of November 5, 2000, of the right to a fair trial, to be heard and to exercise their right to defense, by failing to provide for a simple and effective recourse under domestic law to contest the resolutions of the Supreme Electoral Council."

143. *Arguments of the representatives of the alleged victims*

(a) The resolution of the Supreme Electoral Council "did not give any type of reasoning with regard to [...] the decisions it contained" and, when ordering that the candidates should not be registered as they had not been presented

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Director General for Political Parties of the Supreme Electoral Council with regard to the RAAS, which was forwarded to the representatives and to the Commission. They were requested, when submitting their comments, to include an explanation on the differences that might arise when comparing the different lists of alleged victims in the RAAS with the list presented by the State in this attestation, and neither the Commission nor the representatives provided any explanation as regards the fact that the attestation only included the name of "Clarinda Catalina Hamphys Moses."

[140] In the case of William Martin, whose registration as a candidate was requested, according to the representatives, following the resolution of the Supreme Electoral Council that excluded the PPC and who does not appear in the attestation regarding the RAAS issued on May 3, 2005, by the Director for Political Parties of the Supreme Electoral Council (*supra* para. 49), the Court will consider him an alleged victim because he appears on the list that accompanied the application filed by the Commission and on the list that the petitioners presented in the proceeding before the latter, which appears in appendix 6 to the application.

within the time limit established by the law, "it did not explain whether the time to which it referred is the time that a party must have existed in order to take part in the elections or the time established for the registration of candidates";

(b) YATAMA was not notified of the Supreme Electoral Council's resolution "not to accept the candidates proposed by the PPC," with which YATAMA had formed an alliance in the RAAS. When it entered into communication with officials of the Supreme Electoral Council, they advised that "the complete list for YATAMA would appear in the final publication of candidates," but this did not happen;

(c) Article 84 of the Electoral Act stipulates that when the Council rejects a candidate because he does not comply with the legal requirements, it shall notify this to the political party or alliance of parties within the following three days so that it may correct the defects or substitute the candidates. "Not only did the Supreme Electoral Council fail to initiate the procedure for remedying the candidacies, but it also failed to notify that it had rejected them";

(d) Article 98 of the Electoral Act establishes the possibility of the parties and alliances filing recourses "before the Supreme Electoral Council against decisions of the Electoral Councils which they consider have violated their rights." Since the resolution of August 15, 2000, was issued by the "sole instance," the representatives of YATAMA filed an appeal for review before it, which "was never decided";

(e) The State was obliged "to respect the procedure established in the law," even though its resolutions were administrative or jurisdictional;

(f) Since the legal consequence of YATAMA failing to participate in the 2000 municipal elections was "the cancellation of the legal status" of the political party, "the legal representatives of YATAMA presented an application for amparo based on Article 76 of the Electoral Act[,] which allows parties to apply [for] amparo if their legal status is cancelled." However, the procedure to cancel the legal status of the parties that "did not take part in the 2000 electoral process" was never officially initiated, which implied that, if "the existence of a final resolution was necessary in order to apply for amparo, the State had already curtailed this right by not initiating the cancellation process for YATAMA, as established in the Electoral Act." The Court of Appeal, which expedited the initial processing of the application for amparo decided "to suspend *de oficio* the resolution with regard to not allowing the YATAMA Regional Party to register its candidates." The Supreme Electoral Council did not comply with this decision;

(g) The Supreme Court of Justice rejected the application for amparo filed by YATAMA without mentioning the "reasons that [...] its jurisdiction" or the "main purpose of the application";

(h) The Supreme Electoral Council exercises administrative rather than jurisdictional functions. The laws of Nicaragua do not require the members of this body to be experts in legal or electoral matters. Also, "in the case of Nicaragua, there is no judicial recourse against decisions on electoral matters, while, in other countries whose electoral body has similar characteristics, there is a possibility of having recourse to the Judiciary; and

(i) The State left the alleged victims in this case defenseless and violated their right to a "prompt and effective recourse" by failing to provide for a means of "contesting the resolutions of the Supreme Electoral Council."

144. *Arguments of the State*

(a) In the case of YATAMA, the "procedure [established in the Electoral Act] was not applicable, because it was not rejecting one candidate in particular; it was not denying a request for registration of candidates, but rather the YATAMA political party did not comply with the requirements for the presentation of candidates, according to title VI of the Electoral Act";

(b) YATAMA did not comply with the provisions of Article 77 of the Electoral Act, because it requested that the candidates presented by the political alliance be registered on its behalf, and this request should have been submitted to the Supreme Electoral Council;

(c) The Supreme Electoral Council decided that "of the political parties that presented voters' signatures, in accordance with Article 77 [of the] Electoral Act, only those presented by the Constitutionalist Liberal Party (PLC) and the Conservative Party (PC) amounted to the 3% referred to in the said Article";

(d) "Owing to the dissolution of the political alliance it had formed, the YATAMA political party did not comply with Article 82(2) of the Electoral Act, which requires that, for the municipal elections, candidates must be registered in at least 80% of the municipalities";

(e) The resolution issued by the Supreme Electoral Council on August 15, 2000, "is of a strictly electoral content and matter" and "there is no ordinary or special recourse" against this type of decision (Articles 173 of the Constitution, 1 of the Electoral Act, and 51(5) of the Amparo Act). The Supreme Court of Justice of Nicaragua has stated that there is no recourse against resolutions of the Supreme Electoral Council on electoral matters;

(f) The YATAMA party based its application for amparo on Article 76 of the Electoral Act, which stipulates that this recourse is admissible before the courts of justice against resolutions that the Supreme Electoral Council issues with regard to political parties. However, the resolution issued on August 15, 2000, by the Supreme Electoral Council, is strictly electoral in nature and does not refer to political parties. Matters relating to political parties are regulated in "paragraphs 17, 18 and 19" of Article 10 of the Electoral Act; and

(g) The representatives indicated that the procedure established in "Article 37 and *ff*." was not followed, but they did not say that Article 51(5) of the Amparo Act declares that this recourse is inadmissible against resolutions of the Supreme Electoral Council on electoral matters.

Considerations of the Court

145. Article 8(1) of the Convention indicates that:

> Every person has the right 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 nature.

146. As established by the proven facts (*supra* para. 124(51), 124(57) and 124(61)), the Supreme Electoral Council, the Civil and Labor Chamber of the Court of Appeal of the North Atlantic District, Puerto Cabezas, and the Constitutional Chamber of the Supreme Court of Justice adopted decisions concerning the participation of the YATAMA candidates in the municipal elections of November 2000.

1) Application of Article 8(1) as regards decisions of the Supreme Electoral Council

147. Article 8 of the American Convention applies to all the requirements that should be observed by the procedural bodies, whatsoever they may be, so that a person may defend himself adequately against any act of the State that could affect his rights.[141]

148. According to the provisions of Article 8(1) of the Convention, when determining a person's rights and obligations of a criminal, civil, labor, fiscal or any other nature, "due guarantees" must be observed that ensure the right to due process, in accordance with the corresponding procedure.

149. All the organs that exercise functions of a substantially jurisdictional nature have the obligation to adopt just decisions based on full respect for the guarantee of due process established in Article 8 of the American Convention.[142] Article 8(1) of the Convention, which alludes to the right of every person to a hearing by a "competent judge or tribunal" for the "determination of his rights," is also applicable in situations in which a public rather than a judicial authority issues decisions that affect the determination of such rights,[143] as occurred in the instant case.

150. The decisions issued by domestic bodies with regard to electoral matters may affect the enjoyment of political rights. Consequently, in this sphere also, the minimum guarantees established in Article 8(1) of the Convention must be observed, to the extent that they are applicable in the respective proceeding. In this case, it should be taken into account that the electoral procedure preceding the municipal elections calls for promptness and a simple process that facilitates decision-making within the framework of the electoral calendar. The Supreme Electoral Council should respect the specific guarantees provided for in Electoral Act No. 331 of 2000, which regulates the election process for mayors, deputy mayors and councilors.

151. The decisions issued by the Supreme Electoral Council had a direct effect on the exercise of the right to political participation of the persons proposed by the YATAMA party to participate in the municipal elections of November 2000, because they were decisions that denied their registration as candidates and the possibility of being elected to specific public positions. Nicaraguan laws have assigned functions of a substantially jurisdictional nature to the Supreme Electoral Council. Indeed, the State,

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[141] *Cf. Case of Ivcher Bronstein*. Judgment of February 6, 2001. Series C No. 74, para. 102; *Case of Baena Ricardo et al.* Judgment of February 2, 2001. Series C No. 72, para. 124; *Case of the Constitutional Court*. Judgment of January 31, 2001. Series C No. 71, para. 69; and *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 27.

[142] *Cf. Case of Ivcher Bronstein*, *supra note* 141, para. 104; and *Case of the Constitutional Court*, *supra note* 141, para. 71.

[143] *Cf. Case of Ivcher Bronstein*, *supra note* 141, para. 105; and *Case of the Constitutional Court*, *supra note* 141, para. 71.

in its arguments, indicated that "the electoral laws assign a jurisdictional function to the Council [...] and, consequently, it decided as a judicial body of final instance, pursuant to the Constitution in force."

152. Decisions adopted by domestic bodies that could affect human rights, such as the right to political participation, should be duly ; otherwise, they would be arbitrary decisions.[144]

153. The decisions that the Supreme Electoral Council issued on electoral matters and which affected the political rights of the persons proposed by YATAMA as candidates to take part in the municipal elections of November 2000, should have been duly , which involved indicating the norms on which the requirements that YATAMA failed to comply with were based, the facts regarding non-compliance, and the consequences of non-compliance.

154. As has been proved (*supra* para. 124(46)), on July 18, 2000, the Supreme Electoral Council issued a resolution in which it indicated, *inter alia*, that the Coastal People Party (PPC), which headed the alliance with YATAMA in the RAAS (*supra* para. 124(38) and 124(39)), had not complied with the requirements for registering candidates. The Court has verified that this resolution makes no reference to non-compliance with requirements by YATAMA in the RAAS or in the RAAN, and this created uncertainty concerning the approval of the participation of its candidates. The Council did not notify this decision to YATAMA, even though it affected YATAMA, since the exclusion of the Coastal People Party (PPC) could have consequences for the participation of the YATAMA candidates in the RAAS. Moreover, it did not indicate that there was any problem for the participation of the YATAMA candidates in the RAAN.

155. Following this decision of July 18, 2000, the representatives of YATAMA sent several communications to the Supreme Electoral Council, in which they basically requested the Council to define the situation of its candidates, because YATAMA had not received any official communication with regard to the political participation of its candidates in the municipal elections that year (*supra* para. 124(47) to 124(50)).

156. The Supreme Electoral Council ruled on the political participation of the YATAMA candidates in the RAAS and in the RAAN on August 15, 2000, and resolved not to register this party's candidates in the electoral process of November that year (*supra* para. 124(51)).

157. With regard to the participation of the candidates proposed by YATAMA in the RAAS, in the resolution of August 15, 2000, the Supreme Electoral Council declared: "Inadmissible, the request by YATAMA to register as candidates of this party, the candidates presented by the YATAMA/PPC Alliance in the South Atlantic Autonomous Region" (*supra* para. 124(51)(a)). No grounds for this decision were given. Furthermore, in the "Considering II" it indicated that "YATAMA [was] a legally constituted party, in full use of the rights established in the Electoral Act and, as such, c[ould] take part in the elections of November 2000, either in alliances or alone, provided it complied with the Electoral Act and the terms of the electoral calendar." However, the Council stated that, since the Coastal People Party (PPC) did not have the percentage of signatures referred to in Article 77(7) of the Electoral Act, "the

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144 *Cf. García Ruiz v. Spain [GC]*, no. 30544/96, § 26, ECHR 1999-I; and *Eur. Court H.R., Case of H. v. Belgium*, Judgment of 30 November 1987, Series A no. 127-B, para. 53.

number of municipalities in which YATAMA present[ed] candidates d[id] not attain the 80% referred to in Article 82(2) pursuant to Article 80 *in fine* of the Electoral Act." The Council did not indicate the municipalities in which YATAMA was not represented.

158. With regard to the participation of the candidates proposed by YATAMA in the RAAN, the said resolution of August 15, 2000, declared that, "the candidates presented by this Organization in the North Atlantic [were] not registered because it had not complied with the time limit established in the Electoral Act" (*supra* para. 124(51)(b)). The "Considering clauses" contained no reference to the grounds for this decision. The Supreme Electoral Council did not indicate whether the "time limit established in the Electoral Act" that YATAMA "ha[d] not complied with" was the one for obtaining YATAMA's legal status as a political party in order to take part in these elections (*supra* para. 124(23)), or the one established in the electoral calendar for the presentation of the list of candidates (*supra* para. 124(30)).

159. Given that, as has been proved, YATAMA had obtained its legal status within the time limit established by Article 77 of the Electoral Act in order to take part in the municipal elections of November 2000 (*supra* para. 124(23) and 124(28)), and that it had presented the lists of candidates within the time limit stipulated on the electoral calendar (*supra* para. 124(30), 124(31) and 124(39)), the Council should have indicated the specific requirement of the Electoral Act that YATAMA had failed to comply with, indicating the corresponding norm, so that it could be understood which "time limit established in the Electoral Act" YATAMA had not "complied with" and the reasons for that conclusion.

160. Compliance with the guarantee to justify the decisions adopted during the electoral process of November 2000 was especially important, since Electoral Act No. 331, which regulated this process, had entered into force approximately nine months before the date set for holding the elections. In other words, this was the first electoral process organized under this law, which embodied significant modifications with regard to the previous law, such as the elimination of the category of "public subscription association" and the new requirement that an individual could only participate as a candidate through a political party (*supra* para. 124(20)).

161. The Court considers that, by excluding the alleged victims from participating in the 2000 municipal elections, the Supreme Electoral Council did not respect the guarantee established in Article 84 of Electoral Act No. 331, which stipulates:

> When the Supreme Electoral Council, pursuant to the provisions of this law, denies a request or rejects a candidate for failing to comply with the legal requirements, it shall notify this to the political party or alliance of parties within the three days following the resolution, so that they may proceed to correct the defects or to substitute the candidates.

162. When deciding that YATAMA had not complied with the requirements for registering its candidates in the RAAS and the RAAN, the Supreme Electoral Council did not grant this organization the opportunity to correct the existing defect. Moreover, it did not notify to YATAMA the resolution issued by the Council on July 18, 2000 (*supra* para. 124(46)) that excluded the PCC from participating in the elections, even though PPC headed the alliance with YATAMA in the RAAS, an alliance that was pending authorization by the Supreme Electoral Council. One month later, the Council decided that the candidates proposed by YATAMA could not participate because it had not complied with all the respective requirements (*supra* para. 124(51)).

163. On October 30, 2000, the Supreme Electoral Council addressed itself "to the population in general and to the international community to inform them [... t]hat [...] the political party [...] YATAMA had been granted legal status, which retained all its legal effects," and that this regional political party "c[ould] take part and present candidates in its respective Autonomous Regions in the elections of November [2001]" (*supra* para. 124(62)). This action of the Supreme Electoral Council is surprising and even contrary to the provisions of Electoral Act No. 331, which establishes as a cause for cancellation of the legal status of a political party that it "does not take part in the elections that are called" (art. 74(4)). On the one hand, the Council decides that the candidates proposed by YATAMA may not participate in the elections of November 2000 (*supra* para. 124(51)), which would result in the cancellation of its legal status as a political party and, on the other hand, it issues a communication indicating that YATAMA retains its legal status as a party.

164. Based on these findings, the Court concludes that the decisions adopted by the Supreme Electoral Council, which affected the political participation of the candidates proposed by YATAMA for the municipal elections of November 2000, were not duly , nor were they adapted to the parameters established in Article 8(1) of the American Convention, so that the State violated the judicial guarantees embodied in this Article in relation to Article 1(1) of the Convention, to the detriment of the said candidates.

2) Right to a simple and prompt recourse, or any other effective recourse, embodied in Article 25(1) of the Convention

165. Article 25(1) of the Convention indicates that:

> 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his 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.

166. Article 2 establishes that:

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

167. The safeguard of the individual in the face of the arbitrary exercise of the powers of the State is the primary purpose of the international protection of human rights.[145] The inexistence of effective domestic remedies places the individual in a situation of defenselessness. Article 25(1) of the Convention has established, in broad terms:

> The obligation of the States to provide to all persons within their jurisdiction, an effective judicial remedy to violations of their fundamental rights. It provides, moreover, for the application of the guarantee recognized therein not only to the rights contained in the Convention, but also to those recognized by the Constitution and laws.[146]

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[145] *Cf. Case of Tibi*, *supra note* 135, para. 130; *Case of the "Five Pensioners".* Judgment of February 28, 2003. Series C No. 98, para. 126; and *Case of the Constitutional Court*, *supra note* 141, para. 89.

[146] *Cf. Case of Tibi*, *supra note* 135, para. 130; *Cantos case.* Judgment of November 28, 2002. Series C No. 97, para. 52; *Case of the Mayagna (Sumo) Awas Tingni Community.* Judgment of August 31, 2001. Series C No. 79, para. 111; and *Judicial Guarantees in States of Emergency*, *supra note* 141, para. 23.

168. The absence of an effective remedy to violations of the rights recognized in the Convention is itself a violation of the Convention by the State Party.[147]

169. For the State to comply with the provisions of Article 25 of the Convention, it is not enough that the recourses exist formally, but they must be effective;[148] in other words, they must provide the individual with the real possibility of filing a remedy in the terms of this Article. The existence of this guarantee "is one of the basic pillars, not only of the American Convention, but also of the rule of law itself in a democratic society, in the terms of the Convention."[149]

170. The general obligation that the State should adapt its domestic laws to the provisions of the Convention to guarantee the rights it embodies, which is established in Article 2, includes the issuance of rules and the development of practices leading to effective enforcement of the rights and freedoms embodied in the Convention, and also the adoption of measures to derogate norms and practices of any kind that entail a violation of the guarantees established in the Convention.[150] This general obligation of the State Party implies that the measures of domestic law must be effective (the principle of *effet utile*), and to this end the State must adapt its actions to the protection norms of the Convention.[151]

171. Chapter VI of the Constitution de Nicaragua establishes an Electoral Power that is independent of the other three branches of government and whose maximum authority is the Supreme Electoral Council (Article 129). With regard to the resolutions of this Council concerning electoral matters, the Constitution establishes that 'there shall be no ordinary or special recourse" (Article 173(14)), the Amparo Act stipulates that the application for amparo is inadmissible "against the resolutions issued on electoral matters" (Article 51(5)), and the Electoral Act establishes that "the petitioner groups or political parties may have recourse to the amparo procedure before the courts of justice against the final resolutions concerning political parties issued by the Supreme Electoral Council in the exercise of the powers that this law confers on it" (Article 76).

172. On August 30, 2000, Brooklyn Rivera and Centuriano Knight, YATAMA's legal representatives filed before the Court of Appeal of the North Atlantic Autonomous Region (RAAN) (Civil Chamber, Bilwi), an application for administrative amparo (*supra* para. 124(55)), based on Article 23 of the Amparo Act in force, against the resolution

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147 *Cf. Case of the Mayagna (Sumo) Awas Tingni Community*, *supra note* 146, para. 113; *Case of Ivcher Bronstein*, *supra note* 141, para. 136; and *Case of the Constitutional Court*, *supra note* 141, para. 89.

148 *Cf. Case of Tibi*, *supra note* 135, para. 131; *Case of Maritza Urrutia*. Judgment of November 27, 2003. Series C No. 103, para. 117; and *Case of Juan Humberto Sánchez.* Judgment of June 7, 2003. Series C No. 99, para. 121.

149 *Cf. Case of the Serrano Cruz Sisters*, *supra note* 10, para. 75; *Case of Tibi*, *supra note* 135, para. 131; and *Case of the 19 Tradesmen*, *supra note* 5, para. 193.

150 *Cf. Case of Caesar*, *supra note* 11, para. 91; *Case of Lori Berenson Mejía*, *supra note* 11, para. 219; *Case of the "Juvenile Reeducation Institute"*, *supra note* 135, para. 206; and *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 78.

151 *Cf. Case of Lori Berenson Mejía*, *supra note* 11, para. 220; *Case of the "Juvenile Reeducation Institute"*, *supra note* 135, para. 205; and *Case of Bulacio.* Judgment of September 18, 2003. Series C No. 100, para. 142.

of August 15, 2000, in which the Supreme Electoral Council excluded YATAMA from the 2000 municipal elections (*supra* para. 124(51)). On October 25, 2000, the Constitutional Chamber of the Supreme Court of Justice ruled on the application for amparo that had been filed, declaring it inadmissible *in limine litis* (*supra* para. 124(61)) on the grounds that it did not have jurisdiction to deliberate on electoral matters, because the resolution issued by the Supreme Electoral Council referred to such matters and Article 173 of the Constitution established that no ordinary or special recourse was admissible against the resolutions of this body. In this ruling, the Constitutional Chamber also indicated that, pursuant to the judgment it had delivered in another case on July 1, 1999, the only resolutions of the Supreme Electoral Council that could be appealed against by an application for amparo were those relating to administrative matters concerning political parties. Nevertheless, it did not include any observations with regard to the differences that existed between matters concerning political parties and those concerning electoral issues, or to the reasons why the resolution that YATAMA was appealing was included in the latter category.

173. There was no judicial remedy against the resolution of the Supreme Electoral Council of August 15, 2000 (*supra* para. 124(51), so this could not be revised, even if it had been adopted without respecting the guarantees of the electoral procedure established in the Electoral Act or the minimum guarantees established in Article 8(1) of the Convention, applicable to the process.

174. Even though the Nicaraguan Constitution has established that the resolutions of the Supreme Electoral Council on electoral matters are not subject to ordinary or special recourses, this does not mean that this Council should not be subject to judicial controls, as are the other branches of government. The requirements arising from the principle of the independence of the powers of the State are not incompatible with the need to establish recourses or mechanisms to protect human rights.

175. Irrespective of the regulations that each State establishes for its supreme electoral body, the latter must be subject to some form of jurisdictional control that allows it to be determined whether its acts have been adopted respecting the minimum guarantees and rights established in the American Convention, and those established in its own laws; this is not incompatible with regard for the functions inherent in this body concerning electoral matters. This control is essential when the supreme electoral bodies such as the Supreme Electoral Council in Nicaragua, have broad powers, which exceed administrative faculties and which could be used, without an adequate control, to favor determined partisan objectives. In this sphere, this recourse must be simple and prompt, taking into account the characteristics of the electoral process (*supra* para. 150).

176. In view of the above, the Court concludes that the State violated the right to judicial protection embodied in Article 25(1) of the American Convention, to the detriment of the candidates proposed by YATAMA to participate in the 2000 municipal elections, in relation to Articles 1(1) and 2 thereof.

177. With regard to the other allegations of the representatives, the Court does not find that the facts set out by the Commission in the instant case show that they constitute a violation of Article 25(2)(c) of the Convention.

X
VIOLATION OF ARTICLES 23 AND 24 OF THE AMERICAN CONVENTION

IN RELATION TO ARTICLES 1(1) AND 2 THEREOF
(RIGHT TO PARTICIPATE IN GOVERNMENT AND RIGHT TO EQUAL PROTECTION)

178. *Arguments of the Commission*

With regard to the violation of Article 23 in relation to Articles 1(1) and 2 of the Convention, it alleged that:

(a) The candidates presented by YATAMA for the municipal elections of November 5, 2000, in the RAAN and the RAAS were prevented from participating in the elections as a result of the resolution issued by the Supreme Electoral Council of Nicaragua on August 15, 2000. They did not have access to an effective recourse that would have allowed them to exercise their fundamental political rights. "The voters in the Atlantic Autonomous Region of Nicaragua were prevented from choosing between the candidates and electing those presented by the YATAMA indigenous party";

(b) "The exercise of political rights, including the right 'to be elected,' implies that the bodies responsible for monitoring their practice and fulfillment must act in accordance with the rules of due process and that their decisions are subject to review." Electoral bodies must guarantee the exercise of political rights "through the independence and impartiality with which they exercise their functions";

(c) "In international law, in general, and in inter-American law, in particular, special protection is needed for the indigenous people to be able to exercise their rights fully and on an equal footing with the rest of the population. Also, it may be necessary to establish special measures of protection for the indigenous people, in order to ensure their physical and cultural survival," and to ensure their effective participation in the decision-making processes that affect them;

d) Article 23 of the American Convention should be interpreted in light of the normative provisions of the Constitution, the Statute of Autonomy of the Atlantic Coast, and the Municipalities Act, which tend to strengthen the political participation of the indigenous people;

(e) Despite the norms of a constitutional and legal nature that recognize the right of the Atlantic Coast communities to live and evolve under the forms of social organization that correspond to their historical and cultural traditions, the 2000 Electoral Act obliged the indigenous communities of the Atlantic Coast to constitute themselves into political parties. Even though Article 71 of this law states that the natural form of organization and participation of the indigenous organizations will be respected so that they may form regional parties, "in practice, they must submit to the same rules applicable to the non-indigenous regional or national electoral parties." The members of YATAMA complied with the requirements of the Electoral Act;

(f) The Electoral Act divested part of the population of some of their rights based on their ethnic origin; and

(g) It requested the Court to declare that Nicaragua was responsible for the violation of Article 23 of the Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of the candidates for the positions of mayors, deputy

mayors and councilors presented by the regional indigenous political party YATAMA in the RAAN and the RAAS, "because it had not provided for norms in the Electoral Law that would facilitate the political participation of the indigenous organizations in the different electoral processes of the Atlantic Coast Autonomous Region of Nicaragua, according to the customary law, values, practices and customs of the indigenous people who live there."

179. *Arguments of the representatives*

In addition to alleging the violation of Article 23 of the Convention, the representatives of the alleged victims alleged that the State had violated Article 24 of the Convention, in relation to Articles 1(1) and 2 thereof, an allegation that does not appear in the application presented by the Commission. Regarding the violation of all these Articles, the representatives proposed the same arguments that are summarized in paragraph 143 of this judgment, and also indicated that:

(a) The State violated the political rights embodied in the Convention to the detriment of the candidates presented by YATAMA and of the indigenous communities who had chosen them, because it excluded these candidates from the municipal elections, as a result of the resolution issued by the Supreme Electoral Council on August 15, 2000, and the confirmation of this resolution by the judgment of the Supreme Court of Justice of October 25 that year; by "not allowing them to contest the resolution of the CSE, arguing that it referred to 'electoral matters,' and by not complying with its own domestic laws that ordered the State to eliminate any barriers that stood in the way of equality among all Nicaraguans and their effective participation in the country's political, economic and social life";

(b) The candidates of YATAMA could not exercise the political representation of the indigenous organizations and communities that had chosen them according to their customary law, values, practices, and customs, and they could not fulfill their personal and community aspirations or take part in the conduct of public affairs. In addition, "the indigenous communities [...] were unable to be represented by their own members." "The authorities who were elected on the Atlantic coast do not represent 85% of the voters, most of them indigenous people, who did not vote as a protest for the exclusion of YATAMA. This absence of political representation has had a direct effect on the decisions taken at the municipal level regarding the use and management of resources";

(c) YATAMA was unable to take part in municipal affairs, even though indigenous people are the majority in the Atlantic Autonomous Regions. Moreover, the legal existence of the YATAMA political party was jeopardized;

(d) The Statute of Autonomy of the Atlantic Coast Regions "does not guarantee the right of the indigenous people that inhabit this region to play an active part in the decisions that affect them";

(e) The draft American Declaration on the Rights of Indigenous People recognizes the right to self-government of the indigenous people and the draft United Nations Declaration on the Rights of Indigenous People states that they have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures,

as well as to maintain and develop their own indigenous decision-making institutions. The Supreme Electoral Council "did exactly the contrary; that is, it erected barriers to YATAMA's participation";

(f) The State's discrimination against the members of YATAMA, as regards their right to elect and to be elected, resulted from the imposition of a series of excessive requirements, that were too burdensome for the indigenous people: the State's interpretation of the Electoral Act, indicating that it required the presentation of documents exclusively before the Supreme Electoral Council in Managua; diverse barriers erected by the Supreme Electoral Council and by the administration of justice itself, which translated into grave violations of due process and effective judicial protection; and the failure to adopt special measures that would allow political participation in conditions of equality. "The indigenous organizations do not have the same possibilities as the national political parties to comply with the requirements of the Electoral Act";

(g) Special measures of protection are necessary and urgent to ensure that the indigenous communities can exercise their rights effectively, on an equal footing with the rest of the population, in order to guarantee the survival of their cultural values and, in particular, their forms of political participation;

(h) The State's laws established inappropriate requirements that had a discriminatory impact on the indigenous people, did not provide for measures to protect the rights of the alleged victims, and arbitrarily excluded the candidates presented by YATAMA;

(i) "The State did not allow the YATAMA candidates to participate in the 2000 municipal elections on an equal footing; it did not ensure equality of access to public office and positions; it did not ensure that the indigenous voters were represented on an equal footing with the other voters"; and

(j) The State has also violated the right to equality because it did not adopt special measures of protection to facilitate and ensure the political participation of the indigenous people, according to their values, practices and customs.

180. *Arguments of the State*:[152]

(a) The 2000 municipal elections respected the constitutional provisions and the Electoral Act in force;

(b) The candidates for the positions of mayors, deputy mayors and councilors did not obtain favorable results in these elections owing to errors in complying with the requirements established in the electoral laws;

(c) The statements made in affidavits by Lidia Chamorro and Mauricio Carrión Matamoros established the validity of the Electoral Act, the constitutional level of the Supreme Electoral Council, and the application of the law. The statements of the expert witnesses, Carlos Hurtado Cabrera, Secretary of the Presidency for Atlantic Coast Affairs, and Saul Castellón reveal the State's

[152] The State did not present independent arguments referring specifically to the alleged violation of Article 23 of the Convention.

concern for the economic, political and social development of the Nicaraguan Caribbean and its full interconnection with the north, center and west of the country;

(d) During the elections of November 4, 2004, YATAMA complied with the requirements of the Electoral Act, and its candidates were elected in Puerto Cabezas, Waspam, Prinzapolka, Desembocadura de Río Grande, Corn Island and Tortuguero;

(e) The candidates selected by the indigenous communities have to submit to the provisions of the law, in the same way as the candidates from other regions and departments of Nicaragua;

(f) The opinion of the expert witness, María Luisa Acosta, who said that the strategic purpose of YATAMA is to achieve indigenous self-government implies "envisaging an independent group within an independent State, which is totally unacceptable";

(g) "The [Electoral] Act […], like other laws, needs to be reformed." Nicaragua is "in the process of modifying and improving its laws." The State can probably "find a way [that,] based on the recommendations of international organizations," permits making the said law more flexible "in order to make participation more effective, especially with regard to regions that are far from the capital";

(h) It trusts that the Court "will assist [it with] recommendations [...] to improve the laws to the benefit not only of the YATAMA community, [...] but of all the Pacific communities that include mestizos, and other communities in the North and Center of the country";

(i) The Electoral Act is a constitutional law. Its reform "requires finding 60% of the votes";

(j) "It does not accept and contests" that it has violated the right to equality and to non-discrimination; and

(k) The Electoral Act provides for special measures of protection for the indigenous people, because "it allows them to select those who wish to take part in public life[,] taking into account their traditions, values, practices and customs"; but, once selected, the "official candidates [of the indigenous communities] must submit to the provisions of the law in the same way as the candidates from the other regions. [...I]f special requirements are established for specific regions, this would create different categories of Nicaraguan citizens, since [...] the law is general and applies to all Nicaraguans equally."

Considerations of the Court

181. Article 23 of the Convention stipulates that:

> 1. Every citizen shall enjoy the following rights and opportunities:
>
> (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

(c) to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

182. Article 24 of the American Convention establishes that:

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

183. The Court has established that the alleged victim, his next of kin or his representatives may invoke different rights to those included in the application of the Commission, based on the facts presented by the latter.[153]

184. The principle of the equal and effective protection of the law and of non-discrimination constitutes an outstanding element of the human rights protection system embodied in many international instruments[154] and developed by international

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153 *Cf. Case of De la Cruz Flores*, *supra note* 15, para. 122; *Case of the "Juvenile Reeducation Institute"*, *supra note* 135, para. 125; and *Case of the Gómez Paquiyauri Brothers*, *supra note* 10, para. 179.

154 These international instruments include: the OAS Charter (Article 3(1)); the American Convention on Human Rights (Articles 1 and 24); the American Declaration of the Rights and Duties of Man (Article II); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (Article 3); the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Articles 4(f), 6 and 8(b)); the Inter-American Convention for the Elimination of all Forms of Discrimination against Persons with Disabilities (Articles I(2)(a), II, III, IV and V); the Charter of the United Nations (Article 1(3)); the Universal Declaration of Human Rights (Articles 2 and 7); the International Covenant on Economic, Social and Cultural Rights (Articles 2(2) and 3); the International Covenant on Civil and Political Rights (Articles 2(1) and 26); The International Convention on the Elimination of All Forms of Racial Discrimination (Article 2); the Convention on the Rights of the Child (Article 2); the Declaration on the Rights of the Child (Principle 1); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Articles 1(1), 7, 18(1), 25, 27, 28, 43(1), 43(2), 45(1), 48, 55 and 70); the Convention on the Elimination of All Forms of Discrimination against Women (Articles 2, 3, 5, 7 to 16); the Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief (Articles 2 and 4); Declaration of the International Labour Organization (ILO) of Fundamental Principles and Rights of Work (2(d)); International Labour Organization (ILO) Convention No. 97 on Migration for Employment (Revised) (Article 6); International Labour Organization (ILO) Convention No. 111 concerning discrimination in Respect of Employment and Occupation (Articles 1 to 3); International Labour Organization (ILO) Convention No. 143 on Migrant Workers (Supplementary Provisions) (Articles 8 and 10); International Labour Organization (ILO) Convention No. 168 concerning Employment Promotion and Protection against Unemployment (Article 6); Proclamation of Teheran, International Human Rights Conference at Teheran, May 13, 1968 (paras. 1, 2, 5, 8 and 11); the Vienna Declaration and Programme of Action, World Conference on Human Rights, June 14 to 25, 1993 (I(15); I(19); I(27); I(30); II(B)(1), Articles 19 to 24; II(B)(2), Articles 25 to 27); the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (Articles 2, 3, 4(1) and 5); the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration and Program of Action (paragraphs of the Declaration: 1, 2, 7, 9, 10, 16, 25, 38, 47, 48, 51, 66 and 104); the Convention against Discrimination in Education (Articles 1, 3 and 4); the Declaration on Race and Racial Prejudice (Articles 1, 2, 3, 4, 5, 6, 7, 8 and 9); the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which they Live (Article 5(1)(b) and 5(1)(c)); European Union's Charter of the Fundamental Rights (Articles 20 and 21); the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 14); the European Social Charter (Article 19(4), 19(5) and 19(7)); Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 1); the African Charter on Human and People' Rights "Banjul Charter" (Articles 2 and 3); the Arab Charter on Human Rights (Article 2); and the Cairo Declaration on Human Rights in Islam (Article 1).

legal doctrine and case law. At the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens.* The juridical framework of national and international public order rests on it and it permeates the whole juridical system.[155]

185. This principle is fundamental for the safeguard of human rights in both international and national law; it is a principle of peremptory law. Consequently, States are obliged not to introduce discriminatory regulations into their laws, to eliminate regulations of a discriminatory nature, to combat practices of this nature, and to establish norms and other measures that recognize and ensure the effective equality before the law of each individual.[156] A distinction that lacks objective and reasonable justification is discriminatory.[157]

186. Article 24 of the American Convention prohibits any type of discrimination, not only with regard to the rights embodied therein, but also with regard to all the laws that the State adopts and to their application. In other words, this Article does not merely reiterate the provisions of Article 1(1) of the Convention concerning the obligation of States to respect and ensure, without discrimination, the rights recognized therein, but, in addition, establishes a right that also entails obligations for the State to respect and ensure the principle of equality and non-discrimination in the safeguard of other rights and in all domestic laws that it adopts.

187. With regard to the obligation to respect rights, Article 1(1) of the Convention stipulates that:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

188. Concerning the domestic legal effects, Article 2 of the Convention establishes that:

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

189. The Court has established that the general obligation in Article 2 of the Convention entails the suppression of norms and practices of any type that entail the

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155 *Cf. Juridical Condition and Rights of the Undocumented Migrants*, *supra note* 150, para. 101.

156 *Cf. Juridical Condition and Rights of the Undocumented Migrants*, *supra note* 150, para. 88; *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 44; and *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 54.

157 *Cf. Juridical Condition and Rights of the Undocumented Migrants*, *supra note* 150, para. 89; *Juridical Condition and Human Rights of the Child*, *supra note* 156, para. 46; and *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, *supra note* 156, para. 56. *Cf.* also *Eur. Court H.R.*, *Case of Willis v. The United Kingdom*, Judgment of 11 June 2002, para. 39; *Eur. Court H.R., Case of Wessels-Bergervoet v. The Netherlands*, Judgment of 4th June 2002, para. 46; *Eur. Court H.R., Case of Petrovic v. Austria*, Judgment of 27th March 1998, Reports 1998-II, para. 30; and U.N., Human Rights Committee, *Joseph Frank Adam v. Czech Republic* (586/1994), opinion of July 25, 1996, para. 12.4.

violation of the guarantees established in the Convention, as well as the issuance of rules and the development of practices leading to the effective enforcement of the said guarantees.[158]

190. In light of the proven facts in this case, the Court must determine whether Nicaragua restricted unduly the political rights embodied in Article 23 of the Convention and whether there has been a violation of the equal protection embodied in Article 24 thereof.

1) Political rights in a democratic society

191. The Court has established that "[i]n a democratic society, the rights and freedoms inherent in the human person, the guarantee applicable to them and the rule of law form a triad," in which each component defines itself, complements and depends on the others for its meaning.[159] When deliberating on the importance of political rights, the Court observes that the Convention itself, in its Article 27, prohibits their suspension as well as that of the judicial guarantees essential for their protection.[160]

192. This Court has stated that "[r]epresentative democracy is the determining factor throughout the system of which the Convention is a part," and "a 'principle' reaffirmed by the American States in the OAS Charter, the basic instrument of the inter-American system."[161] The political rights protected in the American Convention, as well as in many international instruments,[162] promote the strengthening of democracy and political pluralism.

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158 *Cf. Case of Caesar*, *supra note* 11, para. 91; *Case of Lori Berenson Mejía*, *supra note* 11, para. 219*; Case of the "Juvenile Reeducation Institute"*, *supra note* 135, para. 206; *and Juridical Condition and Rights of the Undocumented Migrants*, *supra note* 150, para. 78.

159 *Cf. Juridical Condition and Human Rights of the Child*, *supra note* 156, para. 92; *Certain Attributes of the Inter-American Commission on Human Rights* (arts. 41, 42, 44, 46, 47, 50 and 51 American Convention on Human Rights). Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 31; *Judicial Guarantees in States of Emergency*, *supra note* 141, para. 35; and *Habeas Corpus in Emergency Situations* (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 26.

160 *Cf. The Word "Laws" in Article 30 of the American Convention on Human Rights.* Advisory Opinion OC-6/86 of May 9 1986. Series A No. 6, para. 34.

161 *Cf. the Word "Laws" in Article 30 of the American Convention on Human Rights*, *supra note* 160, para. 34.

162 These international instruments include: the Inter-American Democratic Charter (Articles 2, 3 and 6); the American Convention on Human Rights (Article 23); the American Declaration of the Rights and Duties of Man (Article XX); the Universal Declaration of Human Rights (Article 21); the International Covenant on Civil and Political Rights (Article 25); the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5(c)); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Article 42); the Convention on the Elimination of All Forms of Discrimination against Women (Article 7); the Convention on the Political Rights of Women (Articles I, II and III); the United Nations Declaration on the Elimination of All Forms of Racial Discrimination (Article 6); the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (Articles 2 and 3); International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal People (Article 6); Proclamation of Teheran, International Human Rights Conference at Teheran, May 13, 1968 (para. 5); Vienna Declaration and Programme of Action, World Conference on Human Rights, June 14 to 25, 1993 (I.(8) I(18), I(20), II(B)(2)(27)); Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3); and the African Charter on Human and People' Rights "Banjul Charter" (Article 13).

193. On September 11, 2001, during the OAS Special Assembly, the Ministers of Foreign Affairs of the Americas adopted the Inter-American Democratic Charter, which states that:

> Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of governments.[163]

2) Content of political rights

194. Article 23 of the Convention establishes the rights to take part in the conduct of public affairs, to vote and to be elected, and to have access to public service, which must be guaranteed by the State under conditions of equality.

195. It is essential that the State should generate the optimum conditions and mechanisms to ensure that these political rights can be exercised effectively, respecting the principles of equality and non-discrimination. The facts of the instant case refer principally to political participation through freely-elected representatives, the exercise of which is also protected in Article 50 of the Nicaraguan Constitution.[164]

196. Political participation may include broad-ranging and varied activities that can be executed individually or in an organized manner, in order to intervene in the designation of those who will govern a State or who will be responsible for managing public affairs, as well as influencing the elaboration of State policy through direct participation mechanisms.

197. The exercise of the rights to be elected and to vote, which are closely related to each other, is the expression of the individual and social dimension of political participation.

198. Citizens have the right to take part in the management of public affairs through freely elected representatives. The right to vote is an essential element for the existence of democracy and one of the ways in which citizens exercise the right to political participation. This right implies that the citizens may freely elect those who will represent them, in conditions of equality.

199. Participation through the exercise of the right to be elected assumes that citizens can stand as candidates in conditions of equality and can occupy elected public office, if they obtain the necessary number of votes.

200. The right to have access to public office, under general conditions of equality, protects access to a direct form of participation in the design, implementation, development and execution of the State's political policies through public office. It is

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[163] Inter-American Democratic Charter. Adopted at the first plenary session of the OAS General Assembly, held on September 11, 2001, Article 3.

[164] It establishes that "citizens have a right to participate in equal conditions in public affairs and in the state administration. The effective participation of the population shall be guaranteed nationally and locally by law."

understood that these general conditions of equality refer to access to public office by popular election and by appointment or designation.

3) Obligation to guarantee the enjoyment of political rights

201. The Court understands that, in accordance with Articles 23, 24, 1(1) and 2 of the Convention, the State has the obligation to guarantee the enjoyment of political rights, which implies that the regulation of the exercise of such rights and its application shall be in keeping with the principle of equality and non-discrimination, and it should adopt the necessary measures to ensure their full exercise. This obligation to guarantee is not fulfilled merely by issuing laws and regulations that formally recognize these rights, but requires the State to adopt the necessary measures to guarantee their full exercise considering the weakness or helplessness of the members of certain social groups or sectors.[165]

202. When examining the enjoyment of these rights by the alleged victims in this case, it must be recalled that they are members of indigenous and ethnic communities of the Atlantic Coast of Nicaragua, who differ from most of the population, *inter alia*, owing to their languages, customs and forms of organization, and they face serious difficulties that place them in a situation of vulnerability and marginalization. This has been recognized in the Statute of Autonomy of the Regions of the Atlantic Coast of Nicaragua (*supra* para. 124(3)) and in the 2001 report on "*Desarrollo Humano en la Costa Caribe de Nicaragua*" [Human development on the Caribbean Coast of Nicaragua].[166] Furthermore, the expert witness, María Dolores Álvarez Arzate, and the witnesses, Jorge Frederick and John Alex Delio Bans, made specific reference to the difficulties faced by the members of these communities during the 2000 municipal elections (*supra* para. 111).

203. When considering Electoral Act No. 331 of 2000, the Court will interpret the contents of Articles 23 and 24 of the Convention according to the interpretation criteria established in Article 29(a) and (b) thereof.

204. According to Article 29(a) of the Convention, the full scope of political rights cannot be restricted in such a way that their regulation or the decisions adopted in application of this regulation prevent people from participating effectively in the governance of the State or cause this participation to become illusory, depriving such rights of their essential content.

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[165] *Cf. Juridical Condition and Rights of the Undocumented Migrants*, *supra note* 150, para. 89; and *Juridical Condition and Human Rights of the Child*, *supra note* 156, para. 46.

[166] *Desarrollo humano en la Costa Caribe de Nicaragua [Human Development in the Caribbean Coast of Nicaragua]*. Report prepared by the *Programa Nacional de Asesoría para la Formulación de Políticas* with the support of the *Consejo Nacional de Planificación Económica Social* (CONPES). This report indicates that, according to the *Instituto Nacional de Estadísticas y Censos de Nicaragua* (INEC) "among the 25 poorest municipalities in Nicaragua, 12 correspond to municipalities in the Autonomous Regions"; "One of the main inequalities on the Caribbean Coast, which should be underscored, is the limited infrastructure in this part of the country[, which] places the population at a disadvantage as regards their capacity of access to services and entails greater difficulties for transportation and communication"; and "According to data from 1999, the Caribbean Coast, occupying 46% of national territory has only 8.26% of the access roads." Also, the expert witness, Rodolfo Stavenhagen Gruenbaum, whose expert evidence was incorporated into the body of evidence in this case (*supra* para. 123), indicated that "the communities of the Atlantic Coast of Nicaragua [..] have traditionally been marginalized from the central power and linked to interests of an international or economic type, but they are very aware of their cultural identity, their self-awareness, of being social groups with historical continuity, with links to the land, and their own forms of organization and economic activities that have distinguished them from the rest of the population of Nicaragua."

205. According to the provisions of Article 29(b) of the American Convention, the Court considers that, in order to guarantee the effectiveness of the political rights of the members of the indigenous and ethnic communities of the Atlantic Coast, who include the alleged victims in this case, Nicaragua should take into account the specific protection established in Articles 5,[167] 49,[168] 89[169] and 180[170] of the Constitution and Article 11(7)[171]of the Statute of Autonomy of the Atlantic Coast Regions.

206. Instituting and applying requirements for exercising political rights is not, *per se*, an undue restriction of political rights. These rights are not absolute and may be subject to limitations.[172] Their regulation should respect the principles of legality, necessity and proportionality in a democratic society. Observance of the principle of legality requires the State to define precisely, by law, the requirements for voters to be able to take part in the elections, and to stipulate clearly the electoral procedures prior to the elections. According to Article 23(2) of the Convention, the law may regulate the exercise of the rights and opportunities referred to in the first paragraph of this Article, only for the reasons established in this second paragraph. The restriction should be established by law, non-discriminatory, based on reasonable criteria, respond to a useful and opportune purpose that makes it necessary to satisfy an urgent public interest, and be proportionate to this purpose. When there are several options to achieve this end, the one that is less restrictive of the protected right and more proportionate to the purpose sought should be chosen.[173]

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167 "The State acknowledges the existence of the indigenous people, who enjoy the rights, obligations and guarantees embodied in the Constitution and, particularly those related to maintaining and developing their own identity and culture, and having their own forms of social organization and administering their local affairs[.]"

168 "In Nicaragua, the communities of the Atlantic Coast and the population in general have the right to establish organizations […], without any discrimination, in order to achieve their aspirations according to their own interests and to participate in the construction of a new society.

These organizations shall be established in accordance with the participatory and elective will of the population, they shall have a social function and may be of a partisan nature or not, according to their purpose and object."

169 "The communities of the Atlantic Coast have the right to preserve and develop their cultural identity within national unity; establish their own forms of social organization and administer local affairs according to their traditions."

170 "The communities of the Atlantic Coast have the right to live and develop under the forms of social organization that correspond to their historical and cultural traditions."

171 "The inhabitants of the communities of the Atlantic Coast have the right to "[e]lect and be elected authorities of the Autonomous Regions."

172 *Cf. Case of Hirst v. the United Kingdom (no. 2),* no. 74025/01, § 36, ECHR-2004.

173 *Cf. Case of Ricardo Canese*, *supra note* 5, paras. 96 and 133; *Case of Herrera Ulloa*. Judgment of July 2, 2004. Series C No. 107, paras. 121 and 123; and *Compulsory Membership in an Association prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 46. Also *cf. Eur. Court H.R., Case of Barthold v. Germany*, Judgment of 25 March 1985, Series A no. 90, para. 58; *Eur. Court H.R., Case of Sunday Times v. United Kingdom*, Judgment of 26 April 1979, Series A no. 30, para. 59; U.N., Human Rights Committee, General comment No. 27, Freedom of movement (art. 12) of November 2, 1999, paras. 14 and 15; and U.N., Human Rights Committee, General comment No. 25, Right to participate in public affairs, voting rights and the right of equal access to public service (art. 25) of July 12, 1996, paras. 11, 14, 15 and 16.

207. States may establish minimum standards to regulate political participation, provided they are reasonable and in keeping with the principles of representative democracy. These standards should guarantee, among other matters, the holding of periodic free and fair elections based on universal, equal and secret suffrage, as an expression of the will of the voters, reflecting the sovereignty of the people, and bearing in mind, as established in Article 6 of the Inter-American Democratic Charter, that "[p]romoting and fostering diverse forms of participation strengthens democracy"; to this end, States may design norms to facilitate the participation of specific sectors of society, such as members of indigenous and ethnic communities.

208. With regard to the restrictions to the right to be elected, the United Nations Human Rights Committee has stated that:

> The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy.[174]

209. Electoral Act No. 331 of 2000, stipulates requirements that were not included in the previous law and which place maximum limitations on the possibility of participating in the municipal elections (*supra* para. 124(20)). This new Electoral Act entered into force approximately nine months before the day set for holding the elections, in the first electoral process organized while it was in force.

210. The Court takes note of the State's acknowledgement of the need to reform Electoral Act No. 331 of 2000, and considers that this implies an admission that the law contains provisions that affect the exercise of the right to political participation. During the public hearing before the Court (*supra* para. 37), the State's Agent declared "with conviction […] that there is a need to reform both this law and a series of laws in Nicaragua," "to this end, it would be very useful to receive assistance with contributions, recommendations, to try and make the law more flexible with regard to those points which do not affect the substance of the law[,] to ensure that participation is more effective, especially in the case of regions that are far from the capital." The Agent added that "he [would] try to ensure that, as soon as possible, an improvement to the electoral laws was negotiated and arranged, [...] to benefit not only YATAMA, which merits it, but also other groups in the country and the members of political parties […]." Likewise, the Secretary for Atlantic Coast Affairs of Nicaragua, who provided expert evidence to the Court, stated that there was "an urgent need to reform this law" (*supra* para. 111).

211. In "Electoral Observation, Nicaragua 2000: Municipal Elections," the OAS Secretariat General stated that Electoral Act No. 331 of 2000 "considerably reduced opportunities to participate in municipal elections," and referred to the law's lack of clarity when it underscored that:

> Controversies arose about the interpretation of the law, and even more about its application. During its stay, the Mission noted that different interpretations were applied to similar cases and consequently produced differing decrees or decisions.

212. As regards observance of the principle of legality, the Court finds that Electoral Act No. 331 of 2000, is ambiguous because it does not establish clearly the consequences of non-compliance with certain requirements for both those who

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[174] U.N., Human Rights Committee, General comment No. 25, *supra* note 173, para. 17.

participate through a party and those who do so through an alliance of parties; the wording is imprecise on the applicable procedures when the Supreme Electoral Council determines that a requirement has not been complied with; and it does not regulate clearly the fundamental decisions that this body must adopt to establish who is registered to participate in the elections and who does not comply with the registration requirements, or the rights of those whose participation is affected by a decision of the State. This law does not allow the voter or the electoral bodies to have a clear understanding of the process and encourages its arbitrary and discretional application through extensive and contradictory interpretations that unduly restrict the participation of voters; a restriction that is particularly undesirable when it severely affects fundamental rights, such as recognized political rights.[175]

213. With regard to the requirements in order to be elected established in the 2000 Electoral Act, the Court takes note that the Supreme Court of Justice of Nicaragua, in judgment No. 103 delivered on November 8, 2002, declared that paragraphs 1 and 2 of Article 65(9) of this law were unconstitutional, as well as Article 77(7) thereof, regarding the requirement for the presentation of the signatures of 3% of voters in order to present candidates, because it found that the provisions in the said paragraphs of Article 65 constituted "a barrier to the exercise of political rights" and that the provisions of Article 77(7) constitute[d] an undue and abhorrent interference in the political activity of the voters" (*supra* para. 124(75)).

214. Furthermore, Electoral Act No. 331 of 2000, only permits participation in electoral processes through political parties (*supra* para. 124(20)), a form of organization that is not characteristic of the indigenous communities of the Atlantic Coast. It has been proved that YATAMA was able to obtain legal status to take part in the municipal elections of November 2000 as a political party, fulfilling the corresponding requirements (*supra* para. 124(28)). Nevertheless, the witnesses, Brooklyn Rivera Bryan and Jorge Teytom Fedrick, and the expert witness, María Dolores Álvarez Arzate, emphasized that the requirement to become a political party disregarded the customs, organization and culture of the candidates proposed by YATAMA, who are members of the indigenous and ethnic communities of the Atlantic Coast.

215. There is no provision in the American Convention that allows it to be established that citizens can only exercise the right to stand as candidates to elected office through a political party. The importance of political parties as essential forms of association for the development and strengthening of democracy are not discounted,[176] but it is recognized that there are other ways in which candidates can be proposed for elected office in order to achieve the same goal, when this is pertinent and even necessary to encourage or ensure the political participation of specific groups of society, taking into account their special traditions and administrative systems, whose legitimacy has been recognized and is even subject to the explicit protection of the

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[175] *Cf. Case of Ricardo Canese*, *supra* note 5, para. 125; *Case of Baena Ricardo et al.*, *supra note* 141, paras. 108 and 115; and *Case of Cantoral Benavides*. Judgment of August 18, 2000. Series C No. 69, para. 157.

[176] *Cf. Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 87, ECHR 2003-II; *Case of Yazar and Others v. Turkey,* nos. 22723/93, 22724/93 and 22725/93, § 32, ECHR 2002-II; and *Eur. Court H.R., Case of Socialist Party and Others v. Turkey,* Judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, para. 29.

State. Indeed, the Inter-American Democratic Charter states that "[t]he strengthening of political parties and other political organizations is a priority for democracy."[177]

216. Political parties and organizations or groups that take part in the life of the State, such as in electoral processes in a democratic society, must have aims that are compatible with regard for the rights and freedoms embodied in the American Convention. In this regard, Article 16 of the Convention establishes that the exercise of the right to associate freely "shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others."

217. The Court considers that the participation in public affairs of organizations other than parties, based on the conditions mentioned in the preceding paragraph, is essential to guarantee legitimate political expression and necessary in the case of groups of citizens who, otherwise, would be excluded from this participation, with all that this signifies.

218. The restriction that they had to participate through a political party imposed on the YATAMA candidates a form of organization alien to their practices, customs and traditions as a requirement to exercise the right to political participation, in violation of domestic laws (*supra* para. 205) that oblige the State to respect the forms of organization of the communities of the Atlantic Coast, and affected negatively the electoral participation of these candidates in the 2000 municipal elections. The State has not justified that this restriction obeyed a useful and opportune purpose, which made it necessary so as to satisfy an urgent public interest. To the contrary, this restriction implied an impediment to the full exercise of the right to be elected of the members of the indigenous and ethnic communities that form part of YATAMA.

219. Based on the foregoing, the Court considers that the restriction examined in the preceding paragraphs constitutes an undue limitation of the exercise of a political right, entailing an unnecessary restriction of the right to be elected, taking into account the circumstances of the instant case, which are not necessarily comparable to the circumstances of all political groups that may be present in other national societies or sectors of a national society.

220. Having established the foregoing, the Court finds it necessary to indicate that any requirement for political participation designed for political parties, which cannot be fulfilled by groups with a different form of organization, is also contrary to Articles 23 and 24 of the American Convention, to the extent that it limits the full range of political rights more than strictly necessary, and becomes an impediment for citizens to participate effectively in the conduct of public affairs. The requirements for exercising the right to be elected must observe the parameters established in paragraphs 204, 206 and 207 of this judgment.

221. Article 82 of the 2000 Electoral Act establishes as a requirement to participate in the municipal elections that political parties must present candidates in at least 80% of the municipalities in the respective territorial district and with regard to 80% of the total candidacies (*supra* para. 124(24)). In this case, when the Supreme Electoral

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[177] Inter-American Democratic Charter. Adopted at the first plenary session of the OAS General Assembly, held on September 11, 2001, Article 5.

Council resolved not to register the candidates proposed by YATAMA in the RAAS, it considered that, since the party that had presented itself in alliance with YATAMA was excluded, YATAMA alone did not comply with the requirement that it should present candidates in 80% of the municipalities in the territorial district (*supra* para. 124(51)(a)).

222. The witness, Brooklyn Rivera Bryan, explained that:

> They were obliged to [...] enter in other areas where there were no indigenous people, because the Electoral Act makes it obligatory to have 80% of the candidates that must be registered in all the municipalities. Consequently, in the Autonomous Region, there are indigenous municipalities where they predominate, where they exercise their leadership and structure, but there are other municipalities which are mestizo or ladino [with which they have] no connection or interest, but the law obliges them to organize and take part in the processes in these municipalities; otherwise [they would] be disqualified from participating in the elections.

223. This requirement of Electoral Act No. 331 of 2000 constitutes a disproportionate restriction that limited unduly the political participation of the candidates proposed by YATAMA for the municipal elections of November 2000. It did not take into account that the indigenous and ethnic population is a minority in the RAAS, or that there were municipalities in which they did not have the support to present candidates or where they were not interested in seeking this support.

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224. The Court finds that Nicaragua did not adopt the necessary measures to guarantee the enjoyment of the right to be elected of the candidates proposed by YATAMA, who are members of the indigenous and ethnic communities of the Atlantic Coast of Nicaragua, because they were affected by legal and real discrimination, which prevented them from participating, in equal conditions, in the municipal elections of November 2000.

225. The Court considers that the State should adopt all necessary measures to ensure that the members of the indigenous and ethnic communities of the Atlantic Coast of Nicaragua can participate, in equal conditions, in decision-making on matters and policies that affect or could affect their rights and the development of these communities, so that they can incorporate State institutions and bodies and participate directly and proportionately to their population in the conduct of public affairs, and also do this from within their own institutions and according to their values, practices, customs and forms of organization, provided these are compatible with the human rights embodied in the Convention.

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226. The violations of the rights of the candidates proposed by YATAMA are particularly serious because, as mentioned above, there is a close relationship between the right to be elected and the right to vote to elect representatives (*supra* para. 197). The Court finds it necessary to observe that the voters were affected as a result of the violation of the right to be elected of the YATAMA candidates. In the instant case, this exclusion meant that the candidates proposed by YATAMA were not included among the options available to the voters, which represented a direct limitation to the exercise of the vote and affected negatively the broadest and freest expression of the

will of the electorate, which implies grave consequences for democracy. This harm to the electors constituted non-compliance by the State with the general obligation to guarantee the exercise of the right to vote embodied in Article 1(1) of the Convention.

227. To assess the scope of this harm, it should be recalled that YATAMA contributes to the consolidation and preservation of the cultural identity of the members of the indigenous and ethnic communities of the Atlantic Coast. Its structure and purposes are related to the practices, customs and forms of organization of these communities. Consequently, the exclusion of the participation of the YATAMA candidates particularly affected the members of the indigenous and ethnic communities that were represented by this organization in the municipal elections of November 2000, by placing them in a situation of inequality as regards the options among which they could choose to vote, since those persons who, in principle, deserved their confidence because they had been chosen directly in assemblies (according to the practices and customs of these communities) to represent the interests of their members, had been excluded from participating as candidates. This exclusion resulted in a lack of representation of the needs of the members of the said communities in the regional bodies responsible for adopting policies and programs that could affect their development.

228. This harm to the voters was reflected in the 2000 municipal elections; for example, there was an abstention rate of approximately 80% in the RAAN, due to the fact that part of the electorate did not consider they were adequately represented by the participating parties (*supra* para. 124(69)) and five political parties requested the Supreme Electoral Council to "[d]eclare the nullity of the elections in the RAAN[… and o]rganize new municipal elections […], with the inclusion of the YATAMA Indigenous Party" (*supra* para. 124(71)). Also, the expert witness, Carlos Antonio Hurtado Cabrera, emphasized that YATAMA "is the principal indigenous political organization in the country" (*supra* para. 111).

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229. In view of the above, the Court finds that the State violated Articles 23 and 24 of the Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of the candidates proposed by YATAMA to participate in the municipal elections of November 2000, because it established and applied provisions of Electoral Act No. 331 of 2000, that create an undue restriction to the exercise of the right to be elected and regulates these provisions it in a discriminatory manner. The Court also finds that the State violated Article 23(1) of the Convention, in relation to Article 1(1) thereof, to the detriment of these candidates, because the decisions that excluded them from exercising this right were adopted in violation of the guarantees embodied in Article 8 of the Convention and could not contested by means of a judicial recourse (*supra* paras. 164, 173 and 176).

XI
REPARATIONS
APPLICATION OF ARTICLE 63(1)

OBLIGATION TO REPAIR

230. This Court has established that it is a principle of international law that any violation of an international obligation that has produced damage entails the obligation

to repair it adequately.[178] In this regard, the Court has based itself on Article 63(1) of the American Convention, which stipulates:

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

231. Article 63(1) of the American Convention reflects a customary norm that constitutes one of the basic principles of contemporary international law on State responsibility. When an unlawful act occurs, which can be attributed to a State, this gives rise immediately to its international responsibility, with the consequent obligation to cause the consequences of the violation to cease and to repair the damage caused.[179]

232. Whenever possible, reparation of the damage caused by the violation of an international obligation requires full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation. If this is not possible, as in the instant case, the international Court must determine a series of measures to ensure that, in addition to guaranteeing respect for the violated rights, the consequences of the violations are remedied and compensation paid for the damage caused.[180] It is also necessary to add any positive measures the State must adopt to ensure that the harmful acts, such as those that occurred in this case, are not repeated.[181] The responsible State may not invoke provisions of domestic law to modify or fail to comply with its obligation to provide reparation, which is regulated by international law.[182]

233. Reparations consist of measures tending to eliminate the effects of the violations that have been committed. Their nature and amount depend on both the pecuniary and non-pecuniary damage that as been caused. Reparations should not make the victims or their successors either richer or poorer and they should be proportionate to the violations that have been declared in the judgment.[183]

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A) BENEFICIARIES

234. *Arguments of the Commission*

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[178] *Cf. Case of Caesar*, *supra* note 11, para. 120; *Case of Huilca Tecse.* Judgment of March 3, 2005. Series C No. 121, para. 86; and *Case of the Serrano Cruz Sisters*, *supra* note 10, para. 133.

[179] *Cf. Case of Caesar*, *supra* note 11, para. 121; *Case of Huilca Tecse*, *supra* note 178, para. 87; and *Case of the Serrano Cruz Sisters*, *supra* note 10, para. 134.

[180] *Cf. Case of Caesar*, *supra* note 11, para. 122; *Case of Huilca Tecse*, *supra* note 178, para. 88; and *Case of the Serrano Cruz Sisters*, *supra* note 10, para. 135.

[181] *Cf. Case of the Serrano Cruz Sisters*, *supra* note 10, para. 135; *Case of Carpio Nicolle et al.*, *supra* note 18, para. 88; and *Case of the Plan de Sánchez Massacre*. *Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of November 19, 2004. Series C No. 116, para. 54.

[182] *Cf. Case of Caesar*, *supra* note 11, para. 122; *Case of Huilca Tecse*, *supra* note 178, para. 88; and *Case of the Serrano Cruz Sisters*, *supra* note 10, para. 135.

[183] *Cf. Case of Caesar*, *supra* note 11, para. 123; *Case of Huilca Tecse*, *supra* note 178, para. 89; and *Case of the Serrano Cruz Sisters*, *supra* note 10, para. 136.

(a) "The candidates for the positions of mayors, deputy mayors and councilors presented by the regional indigenous political party" YATAMA for the municipal elections of November 2000 in the RAAN and the RAAS, are the injured parties;

(b) "The representatives have advised the Court that the final list of victims is the result of consultations with the leaders and members of YATAMA." These consultations "are the most appropriate source for drawing up the final lists, particularly in the RAAS"; and

(c) The list of 59 candidates in the RAAN "results from information certified by the State," which has appropriate probative value. Regarding the two people who were substituted in the RAAS, the injured parties "are in a position to explain why they consider that, although they were substitutes, they are also [alleged] victims."

235. *Arguments of the representatives of the victims*

(a) The "candidates presented by the YATAMA indigenous organization" who were excluded from the municipal elections of November 5, 2000, have the right to reparation;

(b) The State "has violated the political rights of the indigenous communities of the Atlantic Coast" and, consequently the reparations should include the members of these communities who were prevented from voting for the candidates they had previously selected, and being represented by them;

(c) On several occasions, they requested the Supreme Electoral Council to "provide them with copies of the official lists of candidates." The State "refused to provide the list of candidates presented by YATAMA in the [...] RAAS";

(d) The list for the RAAS "includes more than one candidate for each elected office[, because ...] they were unable to obtain the official lists of candidates." "These inconsistencies [...] can be clarified when the State presents the official lists"; and

(e) In cases in which the alleged victims are not individualized and the Court is unable to establish any compensation for them, the Court has established reparations for all the members of the indigenous communities affected by the facts of a case.

236. *Arguments of the State*

The State argued that "it does not recognize victims or alleged victims" and, with regard to the fact that "it has not provided facilities for knowing exactly who the alleged victims are [and] for obtaining the official lists, [it indicated that,] in Nicaragua, Article 921 of the Code of Civil Procedure establishes the legal procedures [for] obtaining the exhibition of documents or movables."

Considerations of the Court

237. The Court considers that the "injured parties," victims of the violations of the rights embodied in Articles 23, 24 and 25 of the American Convention, all in relation to Articles 1(1) and 2 thereof, and of Article 8(1), in relation to Article 1(1) thereof, are the candidates for the positions of mayors, deputy mayors and municipal councilors proposed by YATAMA for the 2000 municipal elections in the RAAN and the RAAS. These people will be the beneficiaries of the reparations established by the Court.

238. The Court determined the identity of the candidates proposed by YATAMA in the RAAN and the RAAS to participate in the municipal elections of November 2000 in Chapter VIII of this judgment, entitled "Considerations concerning the determination of alleged victims" (*supra* paras. 125 to 141).

B) PECUNIARY AND NON-PECUNIARY DAMAGE

239. *Arguments of the Commission:*

(a) With regard to pecuniary damage, it requested the Court to establish "on grounds of equity, an amount determining the compensation that corresponds to the victims for indirect damage and loss of earnings" and, to this end, it should take into consideration "not only the difficulties caused to the victims by being prevented from taking part in the municipal elections of November 2000 on the Atlantic Coast[,] but also the effect on their life projects as political leaders representing their communities, whose possibilities of representing community interests in local government were frustrated";

(b) With regard to non-pecuniary damage, "the type of violations and the impact on the individuals and the community of the State's acts and omissions should be taken into account." The effects on the indigenous communities should be taken into consideration; consequently, the Court should order individual and collective reparations;

(c) The candidates presented by YATAMA to participate in the 2000 municipal elections on the Atlantic Coast were selected by the communities; when they were not allowed to take part in this process, "they felt discredited n the eyes of their communities";

(d) The exclusion of the YATAMA candidates from the municipal elections of November 2000 "also affected the members of the different indigenous people [...] and demoralized the entire society of the Atlantic Coast"; and

(e) The State caused "individual non-pecuniary harm with a collective impact," which the Court should consider in order to "repair it, adapting the payment to the principle of equity." The right of the indigenous electorate to vote and freely elect candidates that represented their communities was violated.

240. *Arguments of the representatives of the victims*

(a) With regard to indirect damage:

(i) Both the candidates of YATAMA for the elections of November 2000 and the communities incurred expenses required to participate in the elections;

(ii) "The indigenous communities to which the YATAMA candidates belong, not only selected them according to their practices, customs, values and customary law, but also contributed [...] certain goods and services in support of their candidates";

(iii) The calculation of the amount of the expenses incurred by the YATAMA candidates and their communities should take into account the oral tradition of the indigenous people;

(iv) The Court should establish compensation for the expenses incurred during the electoral campaign, on grounds of equity. As an example, an estimate is submitted of the total expenditure incurred by a candidate for mayor (US$46,903.97), a candidate for deputy mayor (US$12,190.80), a candidate for councilor (US$16,057.05) and a candidate for substitute councilor (US$11,491.43);

(v) The Court should establish, on grounds of equity, compensation for the indigenous communities of the RAAN and the RAAS, for the same concept; this amount "should be invested by the State" "in infrastructure or services of a collective interest to the benefit of [these] communities [...,] by mutual agreement with them and with the YATAMA indigenous organization"; and

(vi) In their arguments on costs and expenses, they referred to the expenses incurred by YATAMA in the electoral campaign in Puerto Cabezas and Waspam, but they did not request a specific amount for compensation.

(b) The Court should establish, on the grounds of equity, the amounts corresponding to loss of earnings, because the YATAMA candidates had to abandon their employment or suspend their economic activities to devote themselves to the political campaign;

(c) With regard to non-pecuniary damage, they requested the Court to establish, on the grounds of equity, the compensation that the State should pay to the YATAMA candidates for the non-pecuniary damage that their exclusion from politics caused them, and also to the indigenous communities of the Atlantic Coast. The victims suffered family and social dishonor owing to the impossibility of "fulfilling the undertaking they had [made] to their communities." In addition, they have suffered anguish and family problems "because they lost their employment and [...] sacrificed their savings." The Court should take into "account the damage caused to the life project of the candidates and establish an amount for non-pecuniary damage," "because it will be very difficult for them to stand again as candidates in other elections"; and

(d) The Court should order the State "to create a special development fund for the indigenous communities," and they should be consulted constantly about its creation and administration.

241. *Arguments of the State:*

(a) It rejects the claim to compensate indirect damage and loss of earnings, because it has not violated any of the rights embodied in the American Convention to the detriment of the YATAMA candidates, and it does not acknowledge the obligation to provide compensation;

(b) Each candidate becomes involved in the electoral processes at his own risk. Individuals who aspire to participate in "public life in Nicaragua" are not obliged to abandon their employment. It is "probable that the YATAMA candidates voluntarily interrupted their employment"; and

(c) With regard to non-pecuniary damage, it contested the claim that it had jeopardized the life plans of the candidates, and also "the claim concerning non-pecuniary damage caused to the YATAMA candidates, because it has been shown that they exercised the rights established in the laws in force," and "when a political organization or a person accepts a pre-established legal framework, they may succeed or fail to obtain the desired results."

Considerations of the Court

242. Pecuniary damage generally presumes the loss of or detriment to income, the expenses incurred as a result of the facts and the consequences of a pecuniary nature that have a causal relationship with the facts *sub judice*.[184] When applicable, the Court establishes an amount that seeks to compensate the patrimonial consequences of the violations. To decide the claims regarding pecuniary damage, the Court will take into account the body of evidence, its own case law and the arguments of the parties.

243. Non-pecuniary damage can include the suffering and hardship caused to the victims, the harm of objects of value that are very significant to the individual, and also changes, of a non-pecuniary nature, in the living conditions of the victims. Since it is not possible to allocate a precise monetary equivalent to non-pecuniary damage, it can only be compensated by the payment of a sum of money that the Court decides by the reasonable exercise of judicial discretion and based on the principle of equity, and by acts or projects with public recognition or repercussion, such as broadcasting a message that officially condemns the human rights violations in question and makes a commitment to efforts designed to ensure that it does not happen again. Such acts have the effect of acknowledging the dignity of the victims.[185] The first aspect of reparation for non-pecuniary damage will be considered in this section and the second in section (C) of this chapter.

244. The candidates for the positions of mayors, deputy mayors and councilors proposed by YATAMA, and also this organization, incurred various expenses during the electoral campaign before the Supreme Electoral Council decided not to register these candidates. The members of the communities of the Atlantic Coast who selected the candidates in assemblies made material contributions to support their participation. In the instant case, the candidates proposed by YATAMA were excluded from participating in the election by decisions that violated the Convention. Consequently, they merit compensation for non-pecuniary damage for the expenses they incurred; to this end,

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[184] *Cf. Case of Huilca Tecse*, *supra* note 178, para. 93; *Case of the Serrano Cruz Sisters*, *supra* note 10, para. 150; and *Case of the "Juvenile Reeducation Institute"*, *supra* note 135, para. 283.

[185] *Cf. Case of Caesar*, *supra* note 11, para. 125; *Case of Huilca Tecse*, *supra* note 178, para. 96; and *Case of the Serrano Cruz Sisters*, *supra* note 10, para. 156.

the Court takes into account the vouchers provided by the representatives, diverse testimonies provided to the Court, and the statement of the expert witness, María Dolores Álvarez Arzate, regarding the oral tradition of the indigenous communities.

245. The Court will not establish compensation for loss of earnings, with regard to non-attendance to economic or work activities, since they do not have a causal relationship with the violations declared in the judgment.

246. With regard to the non-pecuniary damage caused to the candidates, the Court must bear in mind that being proposed as a candidate to participate in an electoral process has particular importance and is a great honor among the members of the indigenous and ethnic communities of the Atlantic Coast. Those who accept a candidacy must demonstrate capacity, honesty, and commitment to the defense of the needs of the communities, and assume the significant responsibility of representing their interests. The witness, John Alex Delio Bans, stated that the candidates felt discriminated against, because they could not exercise their right to be elected. The witness, Anicia Matamoros de Marly, stated that she "felt demoralize[d and as if all their lives [they had been excluded[, ...] and that they were being excluded again"; the communities "almost blamed their leaders, [because they thought] that they had made a pact." The witness. Eklan James Molina, and the expert witness, María Dolores Álvarez Arzate, made similar statements.

247. The Court considers these special circumstances when assessing the frustration that the candidates felt at finding themselves unduly excluded from participating in the elections and representing their communities. This feeling was accentuated by the fact that the Supreme Electoral Council did not provide any justification to explain why the candidates proposed by YATAMA could not be registered. This meant that the communities did not understand the reasons for the exclusion of their candidates. The latter felt powerless to give an explanation to their communities and considered that the exclusion was the result of their condition as members of indigenous communities.

248. In view of the foregoing, the Court establishes, based on the principle of equity, the amount of US$80,000.00 (eighty thousand United States dollars) or the equivalent in Nicaraguan currency, as compensation for the said pecuniary and non-pecuniary damage, to be delivered to YATAMA, which should distribute it as appropriate.

c) Other Forms of Reparation
(Measures of Satisfaction and Guarantees of Non-Repetition)

249. *Arguments of the Commission*

It requested the Court to order the State:

> (a) To publicly acknowledge the candidates for the positions of mayors, deputy mayors and councilors presented by the regional indigenous political party YATAMA for the municipal elections of November 5, 2000, in the RAAN and the RAAS, in a symbolic act, previously agreed with the victims and their representatives;
>
> (b) To adopt in its domestic legislation all necessary measures to create an effective and simple recourse to contest the resolutions of the Supreme

Electoral Council, without any restrictions concerning the matter appealed against;

(c) To adopt the legislative, administrative and any other type of measure necessary to guarantee the participation of the indigenous people of the Atlantic Coast of Nicaragua in the electoral processes, according to their customary law, values, practices and customs; and

(d) To adopt the necessary measures to avoid a recurrence of similar facts in the future.

250. *Arguments of the representatives of the victims*

They requested the Court to order the State:

(a) To acknowledge publicly its responsibility for the violations committed; this should be done orally, translated into Miskito, Sumo, Rama and English and published and distributed among the indigenous communities of the Atlantic Coast;

(b) To buy time on a radio station to acknowledge publicly the human rights violations committed, to make an undertaking to avoid their repetition and to read "the facts and the concluding part of the judgment delivered by the Court," an also "to establish a fund so that the communities can disseminate the content of this communication in the different languages […] by radio";

(c) To publish the judgment of the Court in the two newspapers with the most widespread circulation in the country, and in Nicaragua's official gazette;

(d) To modify the requirements for participating in the elections so as to ensure that the indigenous communities can accede to public office through their representatives, selected according to their customary law, practices, values and customs;

(e) To modify its domestic laws so that organizations can present candidates in the regions in which they are established;

(f) To adopt legislative measures that "ensure the representation of the indigenous communities in the different power structures," in consultation with these communities and respecting their forms of organization. The State should establish electoral districts that take into account the indigenous territories and establish an "ethnic quota" in favor of the indigenous people in the Legislative Assembly;

(g) To adopt affirmative measures in order to promote and guarantee the political participation of the indigenous people, after consulting with them;

(h) To enact measures that allow the resolutions of the Supreme Electoral Council to be appealed before a judicial body, whether or not they concern electoral matters; and

(i) To create "by law, a Secretariat for Indigenous Affairs, which should be responsible for meeting the needs of this sector of the population; the head of the Secretariat should be selected in consultation with the communities."

251. *Arguments of the State:*

(a) It was opposed to guarantees of non-repetition being ordered, because "while the Constitution and the Electoral Act are in force, the electoral processes must be adapted to these laws";

(b) It does not accept the claim that "special measures of protection" should be adopted in favor of the indigenous people organized in YATAMA so that they can participate in the municipal elections according to their practices and customs; and

(c) The Electoral Act, "as other laws[,] needs to be reformed." The State is in "the process of modifying and improving the laws," and it is possible that it can "find a way, in keeping with the recommendations of international organizations" "to make the law more flexible," to ensure "that participation is more effective, particularly in the case of the regions that are far away from the capital."

Considerations of the Court

a) Publication of the judgment

252. As it has on other occasions,[186] the Court orders that the State should publish in the official gazette and in another newspaper with widespread national circulation, at least once, Chapter VII (Proven Facts), paragraphs 153, 154, 157 to 160, 162, 164, 173, 175, 176, 212, 218, 219, 221, 223, 224, 226 and 227, which correspond to Chapters IX and X on the violations declared by the Court, and the operative paragraphs of this judgment. The publication should include the titles of the said chapters. The entire judgment should be published on the State's official web site. These publications should be made within one year of notification of this judgment.

253. The Court takes into account that "the communities use community radio as a means of information"; it therefore considers it necessary for the State to publicize, on a radio station with broad coverage on the Atlantic Coast, paragraphs 124(11), 124(20), 124(28), 124(31), 124(32), 124(39), 124(40), 124(46), 124(51), 124(62), 124(68), 124(70) and 124(71) of Chapter VII (Proven Facts); paragraphs 153, 154, 157 to 160, 162, 164, 173, 175, 176, 212, 218, 219, 221, 223, 224, 226 and 227 which correspond to Chapters IX and X on the violations declared by the Court, and the operative paragraphs of this judgment. This should be done in Spanish, Miskito, Sumo, Rama and English. The radio broadcast should be made on at least four occasions with an interval of two weeks between each broadcast. To this end, the State has one year from notification of this judgment.

b) Adoption of legislative measures to establish a simple, prompt and effective recourse against the decisions of the Supreme Electoral Council

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186 *Cf. Case of Huilca Tecse*, *supra* note 178, para. 112; *Case of the Serrano Cruz Sisters*, *supra* note 10, para. 195; and *Case of Lori Berenson Mejía*, *supra* note 11, para. 240.

254. Taking into account the declaration in this judgment concerning the violation of Article 25(1) of the Convention, in relation to Articles 1(1) and 2 thereof, the State must adopt, within a reasonable time, the necessary legislative measures to establish a simple, prompt and effective judicial recourse that allow the decisions of the Supreme Electoral Council, which affect human rights, such as political rights, to be contested, respecting the corresponding treaty-based and legal guarantees, and must derogate the norms that prevent the filing of this recourse.

255. This recourse must be simple and prompt, bearing in mind the need for a prompt decision within the electoral calendar (*supra* paras. 150 and 175).

c) Reforms to Electoral Act No. 331 of 2000, and other measures

256. The Court notes the State's acknowledgement during the public hearing of the need to reform Electoral Act No. 331 of 2000, and its willingness to receive assistance to this end (*supra* para. 210). This attitude could constitute a positive element for compliance with the obligations established in this judgment.

257. With regard to the State's allegations that the reform "would require finding 60% of the votes," that elections would be held in November 2006 and that, since "an electoral process [was underway,] it was difficult to change the rules of the game," the Court recalls that States may not invoke provisions of domestic law to justify non-compliance with international obligations.[187]

258. To comply with the requirements of the principle of legality in this matter (*supra* para. 212), the State must reform Electoral Act No. 331 of 2000, so that it regulates clearly the consequences of non-compliance with the requirements for electoral participation, the procedures that the Supreme Electoral Council should observe when determining such non-compliance, and the reasoned decisions that this Council should adopt in this regard, as well as the rights of those whose participation is affected by a decision of the State.

259. The State must reform the regulation of the requirements established in Electoral Act No. 331 of 2000 that, it has been declared, violate the Convention (*supra* paras. 214, 218 to 221 and 223) and adopt, within a reasonable time, the necessary measures to ensure that the members of the indigenous and ethnic communities may participate in the electoral processes effectively and taking into account their traditions, practices and customs, within the framework of a democratic society. The requirements established should permit and encourage the members of these communities to have adequate representation that allows them to intervene in decision-making processes on national issues that concern society as a whole, and on specific matters that pertain to these communities; therefore, these requirements should not constitute barriers for such political participation.

260. Finally, the Court finds that this judgment constitutes, *per se,* a form of reparation.[188]

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[187] *Cf. Case of Caesar*, *supra* note 11, para. 133; *Case of Ricardo Canese*, *supra* note 5, para. 148; *Case of Baena Ricardo et al. Competence*, *supra* note 5, para. 61; and *Juridical Condition and Rights of the Undocumented Migrants*, *supra* note 150, para. 165.

[188] *Cf. Case of Caesar*, *supra* note 11, para. 126; *Case of Huilca Tecse*, *supra* note 178, para. 97; and *Case of the Serrano Cruz Sisters*, *supra* note 10, paras. 157 and 201.

D) COSTS AND EXPENSES

261. *Arguments of the Commission*

The Commission requested the Court to order the State "to pay the costs arising at the domestic level from processing the legal actions filed by the victims or their representatives before the domestic system of justice, as well as those arising at the international level from processing the case before the Commission, and those deriving from processing the [...] application before the Court," and it corresponded "to the Court to prudently assess [their] scope."

262. *Arguments of the representatives of the victims*

They requested the Court to order the State to reimburse:

a) "To each candidate excluded from the municipal elections, all the expenses incurred during the consultation process with their community";

b) US$61,222.04 (sixty-one thousands two hundred and twenty-two United States dollars and four cents) in favor of YATAMA,[189] for the expenses it incurred at the domestic and international level, from filing "the administrative recourses before [the Supreme Electoral Council] and judicial recourses before the Court of Appeal and the Supreme Court of Justice," and also as a result of the different meetings that it has had to carry out in the RAAN and the RAAS, in order to "assemble all its candidates and plan the best strategies for litigating the case at the domestic and the international level [and] to explain the corresponding progress to them." YATAMA also incurred expenses related to "the preparation of the affidavits and the powers of attorney presented [to the] Court," as well as to "the transportation and accommodation of some of those presented as witnesses during the hearing" before the Court;

c) US$13,137.99 (thirteen thousand one hundred and thirty-seven United States dollars and ninety-nine cents) in favor of CENIDH[190] for the expenses incurred in the international proceedings; and

d) US$34,178.91 (thirty-four thousand one hundred and seventy-eight United States dollars and ninety-one cents) in favor of CEJIL[191] for the expenses incurred in the international proceedings.

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189 The description of the costs and expenses which YATAMA incurred and the receipts and documents presented to support these expenses are in: file of preliminary objections, merits and reparations, tome I, folio 200; file of appendixes to the brief with requests and arguments, appendix 16, folios 1108 to 1153; and appendixes to the final written arguments of the representatives, appendix 4, file of preliminary objections, merits and reparations, tome V, folios 1647 a 1650.

190 The description of the costs and expenses which CENIDH incurred and the receipts and documents presented to support these expenses are in: file of preliminary objections, merits and reparations, tome I, folio 201; file of appendixes to the brief with requests and arguments, appendix 17, folios 1154 to 1167; and appendixes to the final written arguments of the representatives, appendix 5, file of preliminary objections, merits and reparations, tome V, folios 1651 to 1669.

191 The description of the costs and expenses which CEJIL incurred and the receipts and documents presented to support these expenses are in: file of preliminary objections, merits and reparations, tome I, folio 201 and 202; file of appendixes to the brief with requests and arguments, appendix 14, folios 998 to

263. *Arguments of the State*

The State objected to the payment of costs and expenses to YATAMA and its representatives, because "the application is without legal grounds."

Considerations of the Court

264. The Court has established that costs and expenses are included in the concept of reparation embodied in Article 63(1) of the American Convention.[192] The Court must prudently assess their scope, which includes the expenses incurred in both the domestic and the inter-American jurisdiction, taking into account the authentication of the expenses incurred, the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be based on the principle of equity.[193]

265. YATAMA incurred expenses directly owing to the measures it took in representation of the victims at the domestic level and incurred some expenses in the proceedings before the inter-American system for the protection of human rights. Also, CENIDH and CEJIL incurred expenses when representing the alleged victims in the international proceeding. Consequently the Court deems in equitable to order the State to reimburse the amount of US$15,000.00 (fifteen thousand United States dollars) or the equivalent in Nicaraguan currency to YATAMA for costs and expenses; YATAMA shall deliver to CENIDH and CEJIL the part that corresponds to them to compensate their expenses.

E) METHOD OF COMPLIANCE

266. The State shall pay the compensation for pecuniary and non-pecuniary damage (*supra* para. 248), and the reimbursement of costs and expenses (*supra* para. 265) and shall adopt the publicity measures ordered by the Court (*supra* paras. 252 and 253) within one year of notification of this judgment.

267. Nicaragua shall implement the measures of reparation relating to the creation of a simple, prompt and effective judicial recourse against the decisions of the Supreme Electoral Council (*supra* paras. 254 and 255), the reform of Electoral Act No. 331 of 2000 (*supra* paras. 258 and 259), and the adoption of the necessary measures to guarantee the political rights of the members of the indigenous and ethnic communities of the Atlantic Coast (*supra* para. 259) within a reasonable time.

268. The State shall comply with its pecuniary obligations by payment in United States dollars or the equivalent in Nicaraguan currency, using the exchange rate in force on the New York, United States of America, market the day before the payment to make the calculation.

1042; and appendixes to the final written arguments of the representatives, appendix 6, file of preliminary objections, merits and reparations, tome V, folios 1670 to 1686.

192 *Cf. Case of the Serrano Cruz Sisters*, *supra* note 10, para. 205; *Case of Carpio Nicolle et al.*, *supra* note 18, para. 143; and *Case of the Plan de Sánchez Massacre. Reparations*, *supra* note 181, para. 115.

193 *Cf. Case of the Serrano Cruz Sisters*, *supra* note 10, para. 205; *Case of Lori Berenson Mejía*, *supra* note 11, para. 242; and *Case of Carpio Nicolle et al.*, *supra* note 18, para. 143.

269. The payment of the compensation for pecuniary and non-pecuniary damage established in this judgment shall be delivered to YATAMA, which shall distribute it as appropriate (*supra* para. 248).

270. The payment corresponding to the reimbursement of the costs arising from the measures taken by YATAMA, CENIDH and CEJIL in the domestic proceeding and before the inter-American system for the protection of human rights shall be made in favor of YATAMA, as established in paragraph 265 of this judgment.

271. The amounts allocated in this judgment under the headings of compensation for pecuniary and non-pecuniary damage and for the reimbursement of costs and expenses may not be affected or conditioned by current or future taxes or charges. Consequently, they shall be delivered to YATAMA integrally, as established in this judgment.

272. If, for reasons attributable to YATAMA, it is unable to receive these amounts within the period of one year, the State shall deposit the amounts in favor of this organization in an account or a deposit certificate in a solvent Nicaraguan banking institute, in United States dollars or the equivalent in Nicaraguan currency, and in the most favorable financial conditions permitted by law and banking practice in Nicaragua. If, after 10 years, the compensation has not been claimed, the amount shall revert to the State with the accrued interest.

273. If the State falls into arrears, it shall pay interest on the amount owed, corresponding to banking interest on arrears in Nicaragua.

274. In accordance with its consistent practice, the Court reserves the right, inherent in its attributes and also deriving from Article 65 of the American Convention, to monitor compliance with all the terms of this judgment. The case will be closed when the State has fully complied with the terms of this judgment. Within one year from notification of the judgment, Nicaragua shall provide the Court with a report on the measures adopted to comply with the judgment.

XII
OPERATIVE PARAGRAPHS

275. Therefore,

THE COURT,

DECIDES,

Unanimously, that

1. It rejects the five preliminary objections filed by the State, in accordance with paragraphs 63 to 67, 71 to 73, 82 to 96 and 100 to 103 of this judgment.

DECLARES:

By seven votes to one, that

2. The State violated the judicial guarantees embodied in Article 8(1) of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of the candidates proposed by YATAMA to participate in the 2000 municipal elections, in the terms of paragraphs 147 to 164 of this judgment.

Judge *ad hoc* Montiel Argüello dissenting.

3. The State violated the right to judicial protection embodied in Article 25(1) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 thereof, to the detriment of the candidates proposed by YATAMA to participate in the 2000 municipal elections, in the terms of paragraphs 165 to 176 of this judgment.

Judge *ad hoc* Montiel Argüello dissenting.

4. The State violated the political rights and the right to equality before the law embodied in Articles 23 and 24 of the American Convention on Human Rights, in relation to Articles 1(1) and 2 thereof, to the detriment of the candidates proposed by YATAMA to participate in the 2000 municipal elections, in the terms of paragraphs 201 to 229 of this judgment.

Judge *ad hoc* Montiel Argüello dissenting.

5. This judgment constitutes *per se* a form of reparation, in the terms of paragraph 260 thereof.

Judge *ad hoc* Montiel Argüello dissenting.

AND ORDERS:

By seven votes to one, that:

6. The State shall publish, within one year, in the official gazette and in another newspaper with widespread national circulation, at least once, Chapter VII (Proven Facts), paragraphs 153, 154, 157 to 160, 162, 164, 173, 175, 176, 212, 218, 219, 221, 223, 224, 226 and 227, which correspond to Chapters IX and X on the violations declared by the Court, and the operative paragraphs of this judgment, in the terms of paragraph 252 thereof.

Judge *ad hoc* Montiel Argüello dissenting.

7. The State shall publish the entire judgment on the State's official web site, within one year, in the terms of paragraph 252 thereof.

Judge *ad hoc* Montiel Argüello dissenting.

8. The State shall publicize, using a radio station with widespread coverage on the Atlantic Coast, within one year, paragraphs 124(11), 124(20), 124(28), 124(31), 124(32), 124(39), 124(40), 124(46), 124(51), 124(62), 124(68, 124(70) and 124(71)

of Chapter VII (Proven Facts), paragraphs 153, 154, 157 to 160, 162, 164, 173, 175, 176, 212, 218, 219, 221, 223, 224, 226 and 227, which correspond to Chapters IX and X on the violations declared by the Court, and the operative paragraphs of this judgment, in Spanish, Miskito, Sumo, Rama and English, on at least four occasions, with an interval of two weeks between each broadcast, in the terms of paragraph 253 of this judgment.

Judge *ad hoc* Montiel Argüello dissenting.

9. The State shall adopt, within a reasonable time, the necessary legislative measures to establish a simple, prompt and effective recourse to contest the decisions of the Supreme Electoral Council that affect human rights, such as the right to participate in government, respecting the corresponding treaty-based and legal guarantees, and derogate the norms that prevent the filing of this recourse, in the terms of paragraphs 254 and 255 of this judgment.

Judge *ad hoc* Montiel Argüello dissenting.

10. The State shall reform Electoral Act No. 331 of 2000, so that it regulates clearly the consequences of failure to comply with the requirements for electoral participation, the procedures that the Supreme Electoral Council should observe when determining such non-compliance, and the reasoned decisions that this Council should adopt in this regard, as well as the rights of the persons whose participation is affected by a decision of the State, in the terms of paragraph 258 of this judgment.

Judge *ad hoc* Montiel Argüello dissenting.

11. The State shall reform the regulation of the requirements established in Electoral Act No. 331 of 2000 that, it has been declared, violate the American Convention on Human Rights and adopt, within a reasonable time, the necessary measures to ensure that the members of the indigenous and ethnic communities may participate in the electoral processes effectively and according to their traditions, practices and customs, in the terms of paragraph 259 of this judgment.

Judge *ad hoc* Montiel Argüello dissenting.

12. The State shall pay the amount established in paragraph 248 of this judgment in compensation for the pecuniary and non-pecuniary damage, and this shall be delivered to YATAMA, which shall distribute it as appropriate.

Judge *ad hoc* Montiel Argüello dissenting.

13. The State shall pay to YATAMA the amount established in paragraph 265 of this judgment for costs and expenses arising in the domestic sphere and in the international proceedings before the inter-American system for the protection of human rights, and YATAMA shall deliver to CENIDH and CEJIL the appropriate part to compensate the expenses they incurred.

Judge *ad hoc* Montiel Argüello dissenting.

14. The State shall make the payments for pecuniary and non-pecuniary damage and the reimbursement of costs and expenses within one year from notification of this judgment, in the terms of paragraphs 266 and 268 to 273 hereof.

Judge *ad hoc* Montiel Argüello dissenting.

15. It shall monitor full compliance with this judgment and shall close this case when the State has complied fully with its terms. Within one year from notification of the judgment, the State shall provide the Court with a report on the measures adopted to comply with it, in the terms of paragraph 274 of this judgment.

Judge *ad hoc* Montiel Argüello dissenting.

Judge *ad hoc* Montiel Argüello informed the Court of his dissenting opinion concerning the second to fifteenth operative paragraphs. Judges García Ramírez, Jackman, Cançado Trindade and García-Sayán informed the Court of their separate opinions. These opinions accompany this judgment.

Sergio García Ramírez
President

Alirio Abreu Burelli

Oliver Jackman

Antônio A. Cançado Trindade

Cecilia Medina Quiroga

Manuel E. Ventura Robles

Diego García-Sayán

Alejandro Montiel Argüello
Judge *ad hoc*

Pablo Saavedra Alessandri
Secretary

So ordered,

Sergio García Ramírez
President

Pablo Saavedra Alessandri
Secretary

DISSENTING OPINION OF JUDGE *AD HOC*
ALEJANDRO MONTIEL ARGÜELLO

1. Under Nicaraguan legislation, the Electoral Power, independent of the three traditional branches of government, is responsible for the organization, administration and supervision of elections. The highest body of the Electoral Power is the Supreme Electoral Council, which has jurisdictional and administrative functions. It is evident that the registration of candidates to participate in the elections was an electoral jurisdictional function that required a decision on whether a party or alliance of parties presenting a request was legally authorized to present it, whether the request complied with the legal requirements, and whether the candidates fulfilled the necessary conditions.

2. In this case, the Supreme Electoral Council exercised its functions by denying the registration of the candidates presented by YATAMA for mayors, deputy mayors and municipal councilors in the Autonomous Regions of the Atlantic Coast for the elections held in 2000. The resolution issued by the Supreme Electoral Council constituted the culmination of a process to determine whether YATAMA had the right to present candidates and, concerning this process, no specific violation has been alleged of the judicial guarantees contained in Article 8(2) of the Convention, which, using a broad interpretation, has been applied to many types of proceedings and not merely to criminal proceedings.

3. Regarding Article 23 (Right to Participate in Government) of the American Convention on Human Rights it has been alleged that it has been violated because the YATAMA candidates were prevented from participating in the elections. It has also been alleged that Article 24 (Right to Equal Protection) has been violated, because the YATAMA candidates were required to comply with the same conditions as non-indigenous candidates, and that Article 25 (Judicial Protection) has been violated, because a recourse to protect participation in the elections had not been provided for.

4. It should be noted that Article 23(2) grants the States the right to regulate the exercise of political rights exclusively on the basis of age and some other conditions. Regulations for other reasons are contrary to the Convention and constitute violations of rights. Nevertheless, the regulations that are permitted, even though only with restrictions, refer to the individual, because this provision cannot be interpreted in the sense that all other regulations, even though they do not refer to the individual, violate human rights, since it is evident that in order to hold elections, it is necessary to regulate the parties that can participate in them, the nomination of the candidates of these parties, and many other issues. It is on the basis of these regulations that elections can be held in an orderly manner and be representative of the people's will, and it was in application of these permitted regulations that the Supreme Electoral Council denied the registration of the YATAMA candidates.

5. With regard to Article 24, it was precisely in application of the principle of equality that the indigenous candidates were required to fulfill the same conditions as the non-indigenous candidates. With the exception of very special cases, a State cannot have different laws for each of the races that compose it for the election of

authorities who exercise their functions in territories inhabited by different races, such as the municipalities of the Autonomous Regions.

6. In relation to Article 25, it should be noted that, in its Advisory Opinion OC-9/87 ("Judicial Guarantees in States of Emergency," para. 27), the Court stated that: "in the Spanish text of the Convention, the title of this provision (Article 8(1) of the Convention), whose interpretation has been specifically requested, is "Judicial Guarantees."[1] This title may lead to confusion because, strictly speaking, the provision does not recognize any judicial guarantees. Article 8 does not contain a specific judicial remedy, but rather the procedural requirements that should be observed in order to be able to speak of effective and appropriate judicial guarantees under the Convention."

Article 25 of the Convention is entitled "Judicial Protection" and establishes the right to a simple and prompt recourse before a competent court or tribunal and, later describes the State's undertaking "to develop the possibility of judicial remedy."

These two provisions have been interpreted as if they established the remedy of amparo as obligatory in all cases, but this is not so.

7. Nicaraguan electoral legislation establishes a series of remedies against lesser electoral officials, which, in some cases, can reach the Supreme Electoral Council, but it expressly excludes the remedy of amparo in relation to electoral issues, as do the laws of many other countries. Also, many other countries, like Nicaragua, exclude judicial decisions from the remedy of amparo because they consider that ordinary recourses are sufficient to guarantee human rights. In the instant case, when the Supreme Electoral Council ruled on YATAMA's request for the registration of its candidates, it was not exercising a simple administrative function, but was acting as a judicial tribunal on electoral matters and, consequently, the remedy of amparo which YATAMA applied for before officials of the Judiciary was inadmissible against this decision. As the grounds for this legal provision, it should be recalled that the high level of partisan politicization that exists in many countries makes it preferable not to politicize the Judiciary; and this would inevitably happen if it was entrusted with electoral matters. Thus, both because this was a jurisdictional decision and because it dealt with an electoral issue, the remedy of amparo was inadmissible.

8. Since this case refers to permitted regulations, it is outside the Court's competence to examine the Supreme Electoral Council's resolution to determine whether it was issued in correct application of the Nicaraguan electoral laws. This would be equivalent to converting the Court into a higher court of appeal than all the national courts, distancing it from its functions of interpretation and application of the provisions of the Convention. Moreover, the Court cannot consider Nicaraguan laws in the absence of any evidence that they are contrary to human rights and bearing in mind that, under the same laws, YATAMA took part in the 2004 local elections without any problem.

9. To conclude I would like to put on record the reasons for my dissent on the points relating to the publication of this judgment, the reform of the law, and the adoption of other measures, because, as I said in paragraph 14 of my opinion in the Serrano Cruz Sisters v. El Salvador, judgment of March 1, 2005, Article 63 of the

[1] "Right to a Fair Trial" in the English text

Convention does not entrust the Court with promoting human rights and the points cited constitute promotion rather than reparation for the victims.

10. The contents of the preceding paragraph should not be interpreted to mean that I consider that Nicaraguan laws are perfect as regards the treatment of the indigenous peoples who inhabit the Atlantic Coast. The Government of Nicaragua, respectful of the rights of the indigenous communities, is aware of the defects. Consequently, the 1995 constitutional reform defined the autonomy regime for the ethnic communities and, in 1987, the Statute of Autonomy of the Atlantic Coast Regions was enacted (Act No. 28) while, in 2003, the Act concerning the Communal Property of the Indigenous Communities and Ethnic Communities of the Autonomous Regions of the Atlantic Coast was promulgated (Act No. 445). Moreover, it has created an office of the Special Adviser on Atlantic Coast Affairs within the Presidency of the Republic, and the position is currently filled by one of the persons who testified during the oral stage of this case.

11. I have dissented from the operative paragraphs on pecuniary and non-pecuniary damage and reimbursement of expenses in favor of YATAMA and its candidates, because they are not justified in the absence of human right violations. Furthermore, even if a violation had occurred, this judgment constitutes sufficient reparation, bearing in mind that the only expectation of the claimants was to take part in the elections and that occupying public office, particularly the positions disputed in these elections, constitutes a civic duty and an honor, and should not be considered a source of income. In addition, it is important to point out that YATAMA participated fully in the 2004 elections for local authorities. In numerous cases, the European Court of Human Rights has decided that its declaration that the State has violated human rights constitutes sufficient reparation and the instant case merits the application of this case law, taking its circumstances into account.

Alejandro Montiel Argüello
Judge *ad hoc*

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE SERGIO GARCIA-RAMIREZ TO THE JUDGMENT IN *YATAMA v. NICARAGUA* OF JUNE 23, 2005

A) *Categories of violations. Individuals and members of groups or communities*

1. The Inter-American Court has heard cases concerning isolated violations committed against individuals, which may be reduced to one specific case or reveal a pattern of behavior and suggest measures designed to avoid renewed violations of a similar kind against many people. The Court has also heard cases of violations that affect numerous members of a human group and reflect attitudes or situations with a general scope and even deep historical roots.

2. This second category of issues leads to reflections, based on a specific case and certain individualized victims, on the situation of the members of this group and even the group itself, without in any way exceeding the jurisdictional attributes of the Inter-American Court, since each decision refers to a concrete presumption and decides on it, even though it may lead to reflections and criteria that could be useful for examining other similar situations. If these are posed before the same jurisdiction, they would be examined individually, but case law elaborated on other occasions would contribute to this examination.

3. Furthermore, the idea that case law, which is rationally developed, pondered and reiterated – until it constitutes "consistent case law" – can be extended to situations with the same conditions *de facto* and *de jure* that have determined it, is entirely consequent with the work of an international treaty-based tribunal, such as the Inter-American Court of Human Rights, which is called on to apply the American Convention on Human Rights and other multilateral instruments that grant it material jurisdiction.

4. The regional human rights tribunal is not another instance for the review of resolutions of judicial bodies, but a unique international instance, created to define the scope of the human rights contained in the American Convention, by applying and interpreting it. The Convention itself has established this, and the Court has understood it likewise, and this is recognized with increasing uniformity and emphasis, by the highest courts of the countries of the Americas, whose acceptance of the Inter-American Court's case law is one of the most recent, valuable and encouraging characteristics of the development of the jurisdictional protection of human rights throughout the continent.

5. The Court's deliberations are described in all the cases submitted to its consideration, and also in the advisory opinions it issues. They have acquired their greatest importance in cases concerning members of minority groups – generally, indigenous and ethnic communities – present in different national societies, when examining factors relating to elimination, exclusion, marginalization or "containment." These are expressions or elements of the violation of rights exercised with different levels of intensity. They follow the same line of conduct and reveal different moments of the historical processes of which they form part. They possess specific characteristics and imply a violation or an imminent risk of violation of the principles of equality and non-discrimination, in different areas of social life. They translate into the violation of numerous rights.

6. When examining these cases, the Court has always recalled the objective

scope of its jurisdiction in light of Article 1(2) of the American Convention on Human Rights, which clarifies the connotation that this international instrument gives to the concept of "person": the human being, the individual, as the possessor of rights and freedoms. The Court cannot go beyond the frontier established by the Convention that defines its jurisdiction. But, neither can it abstain from the thorough examination of the issues submitted to it, to define their real characteristics, origins implications, consequences, etc., in order to understand the nature of the violations committed, when applicable, and come to an appropriate decision on possible reparations.

7. Consequently, in several decisions – particularly in relation to members of indigenous or ethnic groups – the Court has considered the rights of the individuals, who are members of the communities or groups, within their necessary, characteristic, physical framework: the collective rights of the communities to which they belong: their culture, which endows them with a "cultural identity," to which they have a right and which influences their individuality and personal and social development, and their customs and practices, which coalesce to integrate a point of reference required by the Court in order to understand and decide the cases submitted to it. It would be useless and lead to erroneous conclusions to extract the individual cases from the context in which they occur. Examining them in their own circumstances – in the broadest meaning of the expression: actual and historical – not only contributes factual information to understand the events, but also legal information through the cultural references – to establish their juridical nature and the corresponding implications.

8. The Court has also had to examine certain issues relating to other large human groups, also exposed to violations or victims of violations, even when the elements of their social identification are different from those that exist in the contentious cases that I referred to in the previous paragraphs. It has done this, especially in recent years, in various advisory opinions that have helped clarify the scope of the human rights of people exposed to rejection, abuse or marginalization; for example, foreign detainees, in the terms of *Advisory Opinion OC-16*; children who commit offences or are subject to measures of public protection, *Advisory Opinion OC-17*, and migrant workers, especially if they are undocumented, in *Advisory Opinion OC-18.* I have added separate opinions to these three opinions. I refer to what I said in them.

9. The Inter-American Court has also examined pending issues relating to groups of people with professional or occupational connections or the same interests. In these cases, it has been necessary to order provisional measures in the terms of Article 63(2) of the Convention, in order to preserve rights and maintain unharmed the juridical prerogatives they protect. In these cases, the Court has gone further, an advance explained and justified taking into account the inherent characteristics of the cases submitted and the very nature of provisional measures. Indeed, the Court has ruled on immediate precautionary protection in relation to many unidentified persons, whose rights were in grave danger. These are not measures for a group, a corporation, an association, a people, but rather for each member: physical persons, possessors of the endangered rights.

10. This new scope of international protection, produced by the evolution of inter-American case law – which could advance even further to the extent allowed by the reasonable interpretation of the Convention – occurred following the order on provisional measures in the *Case of the Peace Community of San José de Apartadó*,

as can be seen in the joint separate opinion issued by Judge Alirio Abreu Burelli and I, five years' ago, adopting a criterion on which I have insisted in other separate opinions relating to provisional measures that have followed the precedent established in that *case*.

B) *Indigenous communities*

11. During its sixty-seventh regular session (June 13 to 30, 2005), the Inter-American Court deliberated and delivered judgment on several cases in which the considerations that I am setting out in this opinion attached to the judgment in *YATAMA v. Nicaragua* are applicable. Evidently, I refer to the latter, and the final rulings in the *Moiwana Community v. Suriname* and in *the Indigenous Community Yakye Axa v. Paraguay*; also, to some extent, the order for provisional measures in the *Matter of the Pueblo Indigena de Sarayaku*, concerning Ecuador.

12. These three contentious cases, which have culminated in judgments on merits and reparations, examine points related to issues that involve the members of indigenous and ethnic communities, as such – not for strictly personal or individual motives – and which have their origin or development in the relationship that these communities have historically kept and still maintain with other sectors of society and, evidently, with the State itself, a relationship that affects the members of these groups and has an impact on their human rights. Obviously, this does not refer to isolated issues or issues exclusive to the States or national societies within which the conflicts examined in these cases have arisen, although the judgments refer – as is natural – exclusively to these conflicts and do not attempt – nor could they attempt – to affect other current or potential cases.

13. For anyone who studies these issues – and, in any case, for the author of this opinion – it is interesting to observe that, in other parts of the American continent, problems such as those examined herein have also arisen, and they have been brought to the attention of the Court with increasing frequency and have produced certain developments in its case law. These developments, which are binding in the sphere of each judgment, could be of interest in a broader sphere – as I have mentioned above – bearing in mind the great similarity and even sameness of the juridical, social and cultural conditions – historical and actual – that are found at the origin of the disputes observed in very diverse national territories.

14. Some significant precedents should be recalled, as a useful reference for the identification of certain categories of cases and the definition of the general profile of our case law. The list begins, probably, with the *Case of Aloeboetoe*, one of the oldest in the case history of the Inter-American Court, in which issues associated with the victims' membership in a specific minority group were presented. Likewise, the *case of the Mayagna (Sumo) Awas Tingni Community* of Nicaragua should be stressed; this has special relevance since it engendered a wide-reaching examination of the rights of the members of indigenous communities in an American country. I also attached a separate opinion to that judgment in which I referred extensively to these issues.

15. Evidently, there have been other cases in which issues of membership in indigenous communities and cultures has been relevant; they reveal the right to identity and the different implication that this can and does have under the American Convention. All this invites us to consider that we are not looking at occasional, isolated cases, circumscribed to a single area, or to ordinary disputes that must be

examined and resolved on the basis of abstract, uniform formulas, which disregard the history and inherent legal system of the parties concerned, a legal system that helps to establish the scope – here and now, at a precise place and time, and not outside them – of the juridical concepts that underlie the American Convention.

C) *Elimination. Case of the Moiwana Community*

16. In the *Case of the Moiwana Community,* the Court did not examine the massacre that occurred on November 29, 1986, because this related to facts prior to the date on which the Inter-American Court could exercise its jurisdiction, *ratione temporis*. Rather, it examined violations that had continued since that date – namely, continuing or permanent violations, a concept that case law has defined in other cases, particularly in relation to the presumption of enforced disappearance – or more recent violations of the American Convention, over which it evidently has jurisdiction. It is not excessive to observe – because it is a historical fact – that if we need to seek a starting point for the tribulations of the members of the Moiwana community, we would not find this in the date of the massacre, but at the time when their ancestors were forced to leave their African lands and were brought to America as slaves, an episode that constitutes one of the darkest pages in the history of humanity.

17. In this case - even though the Court did not issue a declaration or condemnation in this respect, owing to the lack of jurisdiction *ratione temporis* that I referred to above – the most severe public action that could be produced against the members of a community occurred: their physical elimination. This led to the dispersion of the survivors, but not to the loss of the members' rights, or to the alteration of the characteristics of these rights, or to the disappearance of the State's obligation to respect and ensure such rights (that remain in force), precisely in the terms imposed by their nature.

18. All this is contained in the Court's judgment, which emphasizes: (a) the ownership of rights to the territory traditionally occupied, regardless of the lack of documentation authenticating this, considering that the documentary formality is not an element that constitutes ownership in these cases, nor the only evidence of the ownership of rights and not even an appropriate means of authenticating them; (b) the nature *sui generis* of the relationship that the members of the community, within its framework, have to the territory they own, a relationship that must be considered and that influences another of the state's obligation (which has, of course, its own justification): the obligation of criminal justice, inasmuch as the exercise of the latter permits the "purification" of the territory, which, in turn, encourages the return of the inhabitants, and (c) the protection of the community's culture, which extends to the members of the group as a right to cultural identity, as illustrated by the decisions that the Court structures, based specifically on the characteristic elements of that culture.

D) *Exclusion. Case of the Indigenous Community Yakye Axa*

19. The *Case of the Indigenous Community Yakye Axa* presents problems of ancient origin: not only those that began with the avatars of the first conquest and colonization, common to the countries of Latin America, but those that derive from certain very remote events, which also produced adverse consequences for the indigenous groups, as was seen during the proceeding. I refer to what is briefly

described in a revealing paragraph of the proven facts in the respective judgment: “At the end of the nineteenth century, vast areas of the Paraguayan El Chaco were sold on the stock market in London.” This second process of colonization, if one can refer to it thus, determined a long process during which, for different motives, there were several displacements of the indigenous communities whose ancestors had once been lords and masters of those lands.

20. In its judgment in that case, the Inter-American Court discusses two very relevant issues, among others (which include the issue of due process applied to territorial claims). They are: (a) the community’s ownership of its ancestral lands, or more important still: the relationship – which is much more than a traditional right to property, as I will indicate below – that the community has to the land it has occupied; a relationship that, evidently, extends to the members of the community and makes a specific contribution to all their rights, and (b) the right to life of the members of the community, in the terms of Article 4(1) of the Convention, in relation also to the meaning of the right to ownership of the land and all that derives from the ways this is exercised.

21. Once again, the Court establishes the scope of ownership in the case of members of indigenous communities, or rather: once again it determines its scope (which the State must respect), under the auspices of an ancestral culture in which this right is deeply rooted and from which its takes its principle characteristics. In these cases, ownership has different characteristics from those that it has (also validly) in other spheres. It implies a singular relationship between the possessor of the right and the property this relates to. It is more than a real right, according to the meaning currently attributed to that expression. It incorporates other components that are also of interest – or of great interest – in order to redefine ownership in light of the indigenous culture in which ownership is exercised. In my opinion, by doing this, the Court affirmed another interpretation of Article 21 of the Convention, so that it protects both the right to property in its classic sense – which the liberal principles that prevailed in the twenty-first century transferred to our continent – and also the underlying right to property that finally reappeared. This other interpretation is the appropriate one.

22. Both the constitutional and other laws of Paraguay have recognized the existence of the indigenous peoples “as cultural groups that existed prior to the establishment and organization of the Paraguayan State.” This emphatic recognition not only of a demographic fact, by also of a cultural reality, that entails juridical consequences, must translate into respect for the traditional forms of land ownership – prior to the establishment and organization of the state – and into the assurance that all the rights derived from this ownership will be effective and effectively guaranteed by the public authorities in their legislative, executive and jurisdictional functions.

23. The Court has previously examined the right to life. This examination has revealed both the prohibitions that this right embodies with regard to the arbitrary action of the State, and the actions, initiatives, entitlements and promotions that the State itself must assume and develop to establish or foster conditions for a decent life. The first absolutely essential element of these obligations was supplied by a previous stage in the development of law and the provision of rights. The second element, which is also necessary – so that the right to ‘life,’ a concept with a moral tone, is not resumed in a simple ‘possibility of existence or subsistence,’ a biological fact – is characteristic of the current stage. This concept has entered into force in the

Court's case law.

24. I understand that the creation of the conditions for a decent life, which signifies the development of an individual's potential and the search for his own destiny, should take place in accordance with that individual's own decisions, his respective opinions, his shared culture. This is the basis for the close connection between the right to a decent life, on the one hand, and the right to the "relationship between man and the land" – ownership, property, in the broadest sense – which the judgment has taken into account, on the other. This explains why there was a violation of the right to life embodied in Article 4(1) of the Convention – with the scope we have described – to the detriment of the members of the Yakye Axa community. The lack of evidence about the causes of the death of 16 members of the community, which explains the majority vote in that judgment, does not exclude or reduce the terms of the declaration formulated in the third operative paragraph: there was a violation of the right to life and this violation affected all the members of the community.

E) *Containment. Case of YATAMA*

25. The *Case of YATAMA* has examined another group of violations that harm members of communities. This case does not deal with the more dramatic aspects seen in the previous cases, such as: physical suppression, deprivation of land, violation of the right to life. The circumstances in which the facts of this case occurred suggest that, following a long struggle which has produced appreciable progress, YATAMA, which unites members of many communities, has opened up its own space in political and social life, which gives it a relevant and accepted position – not without severe reticence, with diverse juridical implications – and safeguards it from aggressions such as those observed in the other cases. This case deals with the acts or omissions by which the progress of the communities, as such, is "contained." Thus, we find ourselves faced with a different situation which, perhaps, corresponds to the final stage in the series of refusals to accept equality and non-discrimination in favor of every individual, including, of course, the members of these minority groups.

26. In this case the acts and omissions that harm the right recognized in the Convention are concentrated in political activities and, in this regard, affect the possibility of the members of indigenous communities from intervening on an equal footing with their fellow citizens, members of other social sectors, and participating effectively in the decisions that affect them, together with the latter. One of the ways in which this intervention and participation occurs is through the exercise of political rights.

27. Here, I refer, as I have already said, to material equality and effective non-discrimination, not to a mere formal equality that leaves intact – or scarcely hides – marginalization and maintains discrimination. This type of equality tends to be obtained through factors or elements of compensation, equalization, development or protection that the State provides to the members of the communities, by means of a juridical regime that recognizes the facts relating to a certain cultural background and is established on the basis of a genuine recognition of real limitations, discriminations or restrictions and contributes to overcoming, suppressing or compensating them with appropriate instruments; not merely with general declarations on an inexistent and impracticable equality. Equality is not a starting

point, but a finishing point to which the State's efforts should be addressed. In the words of Rubio Llorente, the "Law attempts to be fair, and it is the idea of justice that leads directly to the principle of equality, which, in a way, constitutes its essential content." Nevertheless, "equality is not a starting point, but rather a goal."

F) *Participation and political rights*

28. These objectives are not being achieved – nor, therefore, are equality and non-discrimination being protected – if the path of those who are struggling for political participation through the exercise of the respective rights, including the right to vote, is strewn with obstacles and unnecessary and disproportionate requirements. The requirement that participation is only through political parties, which today is being established as a natural fact in the democracies of the Americas, should accept the methods suggested by the traditional organization of the indigenous communities. In no way, is this an attempt to undermine the party system, but rather to protect the living conditions, work and organization of the indigenous communities, in the way and in terms that are reasonable and pertinent. The acceptance of these conditions and the respective methods of political participation are not transferred automatically to all mechanisms, nor do they extend beyond the territorial, social and temporal framework in which they are proposed and resolved. The Court decides what it considers admissible based on the circumstances before it.

29. This is the first time that the Court reflects on political rights, which are referred to in Article 23 of the Pact of San José, and which the Court has examined in connection with the other provisions of a broader scope: Articles 1(1), 2 and 24 of the same instrument. In the Court's opinion – as I understand it – these rights should be considered in the circumstances in which their possessors have to assume them and exercise them. It is not possible, even now, to consider rights in abstract, as empty, neutral, colorless formulas provided to conduct the life of imaginary citizens, defined by texts and not by the strict reality.

30. In the instant case, the object is to promote the participation of people in managing their own lives, through political activities. Consequently, the form that this promotion should take must be considered, in keeping with the specific circumstances of those who are the possessors of rights, which should not be examined in abstract. To this end, it is necessary to remove determined obstacles, consider organizational alternatives, provide measures; in brief, "create circumstances" that allow certain individuals, in a specific characteristic situation, to achieve the objectives sought by human rights in the area of politics. To suppose that general declarations will be sufficient to facilitate the actions of people who are in distinct and distant conditions from those that the authors of these declarations had in mind, is to label illusion as reality.

31. The Court has not established, nor would it have to, the characteristics of a system of laws – and, in general, public action, which is more than general norms – favorable to the exercise of the political rights of members of indigenous communities, so that they are, truly, "as much citizens as the other citizens." The State must examine the situation before it in order to establish the means to allow the exercise of the rights universally assigned by the American Convention, precisely in those situations. The fact that the rights are of a universal nature does not mean that the measures that should be adopted to ensure the exercise of the rights and freedoms has to be uniform, generic, the same, as if there were no differences,

distances and contrasts among their possessors. Article 2 of the Pact of San José should be read carefully: the States must adopt the necessary measures to give effect to the rights and freedoms. The reference to "necessary" measures that "give effect" to the rights, refers to the consideration of particularities and compensations.

32. Obviously, we have not exhausted the examination of democracy, which is the foundation and the destiny of political participation, understood in light of the American Convention. The need to have means of participating in the conduct of public affairs is clear, in order to intervene in the guidance of the nation and in community decisions, and this is related to the active and passive right to vote, among other participatory instruments. Achieving this signifies a historical step from the time – which still exists, as we have seen in other cases decided by the Inter-American Court in the current session and mentioned in this opinion – when the struggle for the right was related only to the physical survival, the patrimony and the settlement of the community. However, the progress on the path towards electoral presence – an advance contained, confronted by measures that foster inequality and discrimination – should not detain or dissuade access to comprehensive democracy, in which the access of individuals to the means that will encourage the development of their potential is promoted.

33. As can be observed, the contentious cases I have mentioned in this concurring opinion to the respective judgments examine issues that are common to the indigenous communities and to the rights of their members, even though they do so in relation to different facts and according to the specific circumstances of each case. These decisions are situated in one and the same historical reality and attempt to resolve the specific manifestations that this has resulted in today. Thus, they encourage the application of solutions guided by the same liberating and egalitarian objective that permits the exercise of the individual rights of those who are members – and have full rights to continue being members – of ethnic and indigenous communities that form part of the broader national communities. After all, the idea is to resolve, in the twenty-first century, the problems inherited from preceding centuries. The specific increasingly abundant and comprehensive case law of the Inter-American Court can contribute to this.

Sergio García-Ramírez
Judge

Pablo Saavedra-Alessandri
Secretary

SEPARATE CONCURRING OPINION OF JUDGE JACKMAN

I have voted in favor of this judgment because I am in complete agreement with the conclusions reached by the Court, as well as with the operative paragraphs.

Nevertheless, I feel obliged to put on record a certain level of disagreement with the *ratio decidendi* of the Court in relation to the violation by the State of Nicaragua ("the State") of the rights embodied in Article 23 of the American Convention on Human Rights ("the Convention"), to the detriment of the YATAMA candidates.

The specific focus of this opinion is the Court's analysis (in paragraphs 214 to 229 of this judgment) of the State's responsibility in relation to Article 23(1)(b) of the Convention. I propose to consider this analysis, taking into account the provisions of Article 1(2) and Article 2.

Article 1(2) establishes that:

> 2. For the purposes of this Convention, "person" means every human being.

Article 23(1)(b) establishes that:

> 1. Every citizen shall enjoy the following rights and opportunities:
> [...]
> b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

Article 2 stipulates that:

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

The principal arguments of this judgment concerning the violation of political rights (Article 23) and the right to equal protection of the law (Article 24) committed by the State can be summarized as follows:

(1) The 2000 Electoral Act only permitted participation in electoral processes through political parties, a form of organization alien to the customs, organization and culture of the "indigenous and ethnic" communities of the Atlantic Coast (para. 214).

(2) There is no provision of the American Convention that allows it to be established that citizens should belong to a political party in order to stand as candidates for public office. The Convention recognizes that, for electoral purposes, other forms of political organization may be appropriate and even necessary to attain common goals, by encouraging or ensuring the participation of specific groups (para. 215).

(3) According to domestic laws, the State is obliged to respect the forms of organization of the communities of the Atlantic Coast. The State has not

demonstrated the existence of an urgent public interest that would justify the requirement for YATAMA to become a political party so that its members can participate as candidates in the elections or that the latter must participate through political parties (para. 218).

(4) **Based on these considerations** (emphasis added), the restriction imposed constituted an undue limitation of the exercise of a political right, "taking into account the circumstances of the instant case, which are not necessarily comparable to all the circumstances of all political groups that may be present in other national societies or sectors of a national society" (para. 219). "[A]ny requirement for political participation designed for political parties, which cannot be fulfilled by groups with a different form of organization, is also contrary to Articles 23 and 24 of the American Convention" (para. 220).

In my understanding, the *ratio* described in point (4) *supra* is an unnecessarily indirect and potentially confusing interpretation of the nature of the right embodied in Article 23(1)(b), the language and purpose of which could not be more clear. A "citizen" – who must obviously be an "individual" and not a group, in the terms of Article 1(2) – has an absolute right "**to vote and be elected**" in democratic elections, as established in the said article. In this way, any requirement that a "citizen" must be a member of a political party or of any other form of political organization to exercise that right clearly violates both the spirit and letter of the norm in question.

It is completely irrelevant whether that requirement can or cannot be "complied with by groups with a different form of organization," such as YATAMA in the instant case. It is the individual right of the individual "citizen" that is proclaimed and must be protected by the Court. I am concerned that by including questions of culture, customs and traditional forms of organization in its ruling on this issue, the Court is running the risk of reducing the protection that should be available to every "citizen" under the jurisdiction of every State, irrespective of his culture, customs or traditional forms of association.

Consequently, in my opinion, merely by imposing the requirement under discussion, the State violated the right of the members of YATAMA to vote and be elected.

My opinion is supported by a careful reading of the relevant sections of the *travaux préparatoires* of the Convention. From these, it is clear that the Conference that drafted and adopted the Convention specifically rejected a proposal that could have included in the current Article 23(1), a right to belong to political parties, the activities of which would be "protected" by law.

It would be a great shame if this judgment of the Court opens the way to interpretations of this important article that the authors of the Convention, in their wisdom, made an effort to exclude.

Oliver Jackman
Judge

Pablo Saavedra-Alessandri
Secretary

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. When voting in favor of the adoption by the Inter-American Court of Human Rights of this judgment in *YATAMA v. Nicaragua*, I am obliged to add this separate opinion in order to emphasize two points that I believe deserve special attention. First, when rejecting the third preliminary objection filed by the State, the Court's ruling reflects the perfecting of the proceeding before the Court in recent years, particularly since the adoption of its current Rules of Procedure on November 24, 2000, in force since June 1, 2001. Based on the evolution embodied in these Rules of Procedure, the individual is strengthened as a *subject of international human rights law endowed with full international juridical and procedural capacity,* in particular owing to the historic change introduced by Article 23 of the Court's Rules of Procedure granting him *locus standi in judicio* throughout the proceedings before the Court.

2. Moreover, the addition of a new paragraph introduced by the Court into Article 33 *in fine* of the said Rules of Procedure (paragraph in force as of January 1, 2004), to the effect that, if the information on the representatives of the alleged victims and their next of kin is not provided in the application, the Inter-American Commission on Human Rights:

> "shall act on behalf of the alleged victims and their next of kin in its capacity as guarantor of the public interest under the American Convention on Human Rights to ensure that they have the benefit of legal representation."

- provided a definitive clarification of the full scope of the individual right of access to the supreme judicial body under the American Convention on Human Rights.

3. In my opinion, this noteworthy evolution will be complete the day on which – as I have been affirming for some time - the alleged victims are granted *jus standi* before the Court.[1] Nevertheless, there can no longer be any doubt that it is not possible to cite alleged lacunae concerning the legal representation of the alleged victims to try and restrict their access to the Court. The extraordinary qualitative leap made by the Court over the period November 2000 to January 2004, with regard to the international juridical and procedural capacity of the individual under the American Convention, admits of no turning back.

4. In this sphere, there is no *vacatio legis*; nor can the alleged victims be defenseless. In circumstances such as the *cas d'espèce*, the Court can and should hear the case; as the Court correctly reasoned when rejecting the third preliminary objection filed by the State:

> "If an application was not admitted owing to lack of representation, there would be an undue restriction that would deprive the alleged victim of the possibility of access to justice."[2]

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1. A.A. Cançado Trindade, *Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección*, First edition, San José, Costa Rica, Inter-American Court of Human Rights, 2001, pp. 1-669 (and Second edition, 2003, pp. 1-750).

2. Paragraph 86, and cf. paras. 95-96.

5. In sum, nowadays, the right of the individual to international justice under the American Convention is safeguarded both by the relevant treaty-based norms and by the Court's resolve, which has perfected its *interna corporis* notably (particularly over the period November 2000 to January 2004), by not admitting undue restrictions to that right. This contributes, in my opinion, to the actual process of *humanization* of international law, in addition to constituting a definitive conquest of contemporary civilization within the framework of the American Convention.

6. The second point I wish to emphasize in my separate opinion concerning this judgment, which is the Inter-American Court's first judgment on political rights in a democratic society[3] under Article 23 of the American Convention, is the relevant connection that the Court has made between political rights and the right to equal protection of the law, embodied in Article 24 of the American Convention. The latter is constituted by a basic principle that the Court itself has recognized as belonging to the domain of international *jus cogens*: the principle of equality and non-discrimination.

7. In this judgment in *YATAMA v. Nicaragua*, the Court confirms the significant advance in its case law with regard to the historic Advisory Opinion No. 18 on the *Juridical Status and Rights of Undocumented Migrants* (2003), by reasoning (in paragraphs 184 to 186 that:

> "The principle of the equal and effective protection of the law and of non-discrimination constitutes an outstanding element of the human rights protection system embodied in many international instruments and developed by international legal doctrine and case law. At the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens.* The juridical framework of national and international public order rests on it and it permeates the whole juridical system.
>
> This principle is fundamental for the safeguard of human rights in both international and national law; it is a principle of peremptory law. Consequently, States are obliged not to introduce discriminatory regulations into their laws, to eliminate regulations of a discriminatory nature, to combat practices of this nature, and to establish norms and other measures that recognize and ensure the effective equality before the law of each individual. A distinction that lacks objective and reasonable justification is discriminatory.
>
> Article 24 of the American Convention prohibits any type of discrimination, not only with regard to the rights embodied therein, but with regard to all the laws that the State adopts and to their application. In other words, this article does not merely reiterate the provisions of Article 1(1) of the Convention concerning the obligation of States to respect and ensure, without discrimination, the rights recognized therein, but, in addition, establishes a right that also entails obligations for the State to respect and ensure the principle of equality and non-discrimination in the safeguard of other rights and in all domestic laws that it adopts.

8. Regarding the broad scope of the basic principle of *jus cogens*, equality and non-discrimination, I have already referred to this in my extended concurring opinion to the Court's Advisory Opinion No. 18 on the *Juridical Status and Rights of Undocumented Migrants,* which I will refer to here. In this concurring opinion I stated, for example, that this principle permeates the whole *corpus juris* of international human rights law (para. 59) of which it is one of the pillars,[4] in addition

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[3]. And, in this *Case of YATAMA*, as the Court's judgment recognizes, the exercise of political rights is increasing in importance, because it has a direct impact on the need to preserve the right to cultural identity and the right to participate in public life of the indigenous communities of the Atlantic Coast of Nicaragua (paras. 226-228).

[4]. A. Eide and T. Opsahl, *Equality and Non-Discrimination*, Oslo, Norwegian Institute of Human

to being an element of general international law or customary law, because the normative of *jus gentium* should, by definition, "be the same for all the subjects of the international community"[5] (para. 60).[6] The State's obligation to respect and to guarantee the principle of equality and non-discrimination has the nature of real obligations *erga omnes*.

9. What I would like to add here, in this separate opinion, is that, nowadays, the judicial recognition of the *jus cogens* nature of the basic principle of equality and non-discrimination is evident in case law not only in advisory matters, but also, as attested to by this judgment in the *Case of YATAMA* – in the cases heard by this Court, thus making a positive contribution in the vanguard of the development of the bases of international human rights law itself.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra Alessandri
Secretary

Rights (publ. No. 1), 1990, p. 4, and cf. pp. 1-44 (study reproduced *in* T. Opsahl, *Law and Equality - Selected Articles on Human Rights*, Oslo, Notam Gyldendal, 1996, pp. 165-206).

5. H. Mosler, "To What Extent Does the Variety of Legal Systems of the World Influence the Application of the General Principles of Law within the Meaning of Article 38(1)(c) of the Statute of the International Court of Justice?", *in International Law and the Grotian Heritage* (Hague Commemorative Colloquium of 1983 on the Occasion of the Fourth Centenary of the Birth of Hugo Grotius), The Hague, T.M.C. Asser Instituut, 1985, p. 184.

6. And cf. paras. 61-64.

CONCURRING OPINION OF JUDGE DIEGO GARCÍA-SAYÁN

1. This is the first case that the Inter-American Court of Human Rights hears on the crucial issue of political rights. To the significance with which this circumstance alone endows the case is added its intrinsic importance for the affirmation and protection such rights in situations such as those described therein.

2. Regardless of this case, there is no doubt that the exercise of political rights and the fundamental components of democracy are delicate matters that, in the past and nowadays, have affected vital aspects of the life of the region's population. Governments emerging from military coups are a thing of the past, but today's reality reveals a multitude of threats to democracy and to political rights that pose daily challenges that must be confronted in almost al the countries of the region. The Court, with this judgment, strengthens and develops vital aspects of the political rights stipulated in the Convention. For all these reasons, I consider it necessary to emit this concurring opinion that seeks to add other considerations and perspectives to those already included in the judgment, which I support completely.

3. As the judgment truly states, representative democracy is determinant throughout the system of which the American Convention on Human Rights forms part. Indeed, from the start, the Organization of American States (OAS) was explicit in stating that democracy and its promotion is one of the basic purposes of the Organization. Already, in 1948, the OAS Charter proclaimed the fundamental rights of the person, without distinction based on race, nationality religion or sex, and stipulated that respect for human rights was one of the fundamental obligations of States. Among the first objectives of the OAS was the *"...promotion and strengthening of representative democracy."*

4. Thus, since the inception of the OAS, democracy and respect for the essential human rights were conceived as interdependent. This connection is present in the preamble to the Charter, in the American Declaration of the Rights and Duties of Man and, particularly, in the American Convention on Human Rights. The 1959 Declaration of Santiago described this conceptual unity between human rights and democracy when defining inter-American democratic standards. Subsequently, Resolution 991, "Rights and democracy," established that the members of the OAS should strengthen their democratic systems through the full respect for human rights.

5. This is the context for the provisions of Article 23 of the Convention on political rights. It is a significant component of a broad normative process for the conceptual affirmation of political rights which, evidently, are not exhausted by the contents of the provisions of the Convention. Based on the grounds and findings set out in the judgment, the Court considers correctly that this is one of the rights violated by the State of Nicaragua in the instant case. The grounds for the violation of political rights in YATAMA v. Nicaragua make it advisable to consider the plentiful body of arguments and opinions that have been developed in the inter-American system over recent decades concerning the exercise of political rights in the affirmation of democracy, one of the essential obligations of the States Parties to the inter-American system.

6. Throughout the 1990s, democratic values were reaffirmed at the global and inter-American levels. Within the inter-American system, important decisions were

adopted at the hemispheric Summits and at the OAS General Assemblies designed to strengthen democratic principles, and the first steps were taken to produce what was later, with the Inter-American Democratic Charter, called the "collective defense of democracy." In this process, Resolution 1080 of 1991, the 1992 Protocol of Washington, and Resolution 1753 of 2000 in relation to the case of Peru stand out. This process has gradually consolidated the notion that there is no opposition between the principle of non-intervention and the defense of democracy and human rights, among other reasons because the commitments to defend human rights and democracy are made by countries in the free exercise of their sovereignty.

7. It is a well-known fact that the list of human rights has never been static. It has gradually been defined and embodied in legal instruments with the development over time of society, the organization of the State, and the evolution of political regimes. This explains why we are currently seeing the development and expansion of political rights, and even what some have called the "human right to democracy." This development is expressed in the Inter-American Democratic Charter, the juridical instrument that the inter-American system has engendered to strengthen democracy and related rights. Its first article stipulates that: "*The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it.*"

8. Following the same rationale, the inter-American system has been defining and refining the concept of democracy, strengthening the evolutive meaning of political rights above and beyond the text of the provisions of Article 23 of the Convention. This development has to be borne in mind when deciding a contentious case on the matter as, indeed, the Court has done in this judgment.

9. In this case, the Court has ruled on the alleged violation of political rights (Article 23 of the Convention) and on equality before the law (Article 24 of the Convention), in addition to the violation of Articles 8 and 25. This separate opinion does not need to repeat the findings of the Court that are set out in the judgment in the Case of YATAMA. As I pointed out above, I fully share the content of this judgment and refer to it. Nevertheless, it gives rise to some reflections of a general nature on political rights that are prompted by this specific case.

10. Article 23 of the American Convention on Human Rights stipulates a series of State obligations with regard to political rights. These are grouped into three types of rights which entail State obligations as a logical counterpart: (1) to take part in the conduct of public affairs, directly or through freely chosen representatives (Art. 23(1)(a); (2) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters (Art. 23(1)(b), and; (c) to have access, under general conditions of equality, to the public service of [one's] country (Art. 23(1)(c). In this judgment, the Court declares that all the rights embodied in Article 23(1) have been violated. The Court also declares that Article 24 of the Convention has been violated as regards the right to equality and non-discrimination.

11. A first general consideration is that, in this case, the political rights which the Court considers that Nicaragua has violated have been violated twice. On the one hand, because the provisions of Electoral Act No. 331 of 2000 violated Article 23 owing to the ambiguity of several of its provisions, the obstacles that it established to the electoral participation of organizations other than political parties, and the requirements that it establishes for the presentation of candidates in at least 80% of

the municipalities of the respective districts and 80% of the total number of candidacies. On the other hand, because the State has failed to comply with its obligation, established in Article 1(1) and 2 in relation to Article 23, to produce the appropriate conditions and mechanisms for the participation in public affairs of those who wished to be candidates in the Atlantic Coast of Nicaragua as members or representatives of YATAMA, an organization that represents the indigenous peoples of this region of the country.

12. The right to participate in Government, as all juridical categories, has evolved and has been reformulated with historical and social progress. Indeed, its conceptualization has been enhanced over the period that has elapsed since the adoption of the Convention almost 40 years ago. Although, in the initial instruments of the OAS, the reference to representative democracy and political rights was almost exhausted in the right to vote and be elected, the text of the Convention was already an important step in the evolutive meaning of political rights including other important components such as the nature of elections ("…genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voter..." Art. 23(1)(b)).

13. In recent years, this evolution has developed substantially the concept of the right to take part in the conduct of public affairs, which, nowadays, is a reference point that includes a very wide variety of components that can range from the right to support the removal of elected authorities, to supervise public administration, to have access to public information, to propose initiatives, to express opinions, etc. Indeed, the broad and general concept of the right "to take part in the conduct of public affairs," as it appears in the Convention, has been refined and expanded.

14. At the beginning of the twenty-first century, the member countries of the Inter-American system share an important characteristic that was almost exceptional when the American Convention on Human Rights was adopted in 1969: all the Governments have been democratically elected. The actual context, resulting from complex political and social processes, has given place to new problems and challenges as regards the participation of the citizen in the conduct of public affairs. This has had an impact on the provisions of the fundamental juridical instruments of the inter-American system.

15. It was in this context that the Inter-American Democratic Charter emerged, adopted by consensus by all the countries of the system in 2001, following a broad consultation process of civil society throughout the continent. In this and other aspects, the Charter embodied conceptual developments which, at that time, were derived from this new situation, giving a new formal dimension to a series of juridical categories, and constituting a transcendental landmark in the inter-American system as regards the evolutive content of political rights. Among other aspects, the Democratic Charter develops the concept of the said right to take part in the conduct of public affairs and, as a counterpart, the State's obligations in this regard.

16. The Inter-American Democratic Charter emphasizes the importance of the citizen's participation as a permanent process that strengthens democracy. Thus, the Charter declares that "*Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order*" (Article 2). This general declaration acquires a fundamental teleological meaning for the conceptual development of political rights that the Charter itself establishes in its Article 4. The

foregoing constitutes an approach based on consensual expression, which is directly related to the interpretation and application of a broad provision such as the one contained in Article 23 of the American Convention.

17. Indeed, Article 4 of the Inter-American Democratic Charter enumerates a series of "essential components" of the exercise of democracy that express the conceptual development of the right to take part in the conduct of public affairs, and that are condensed in this inter-American instrument. It underscores a series of State obligations which are merely the counterpart of the rights of citizens: "...*Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press*." In the absence of progress in clarifications such as these, which the American community has adopted consensually, it is evident that the said right to take part in the conduct of public affairs would be frozen in time, and not reflect the changing requirements of the democracies in our region.

18. The second component of political rights, as expressed in Article 23 of the Convention, is "*to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters*" (underlining added). This provision refers us to one of the fundamental requirements of representative democracy that has inspired the normative and purposes of the inter-American system since its conception. It stresses that elections should be genuine and periodic and also the characteristics of the vote: universal, equal and secret, in order to comply with a requirement that is also mentioned in Article 23: to guarantee the free expression of the will of the voters. It is evident that, unless this essential ingredient is present, other forms of participation would be weakened as they would not encounter, in elections, a way to build strong democracies for assuming and exercising public office.

19. In this judgment, the Court has revealed clearly the findings that lead it to conclude that, in this case, the State of Nicaragua has violated the norm cited in the preceding paragraph. Consequently, I refer to this reasoning and these conclusions. In this regard, Article 23 is very clearly formulated and the proven facts show that this violation occurred. Nevertheless, taking into account the complexities of political processes in general, and of electoral processes in particular, it cannot be ignored that the components established in the said provision of Article 23 are, at this point in juridical evolution, insufficient and the countries of the inter-American system have understood this.

20. The wealth of the political, social and juridical processes that the region has undergone has been expressed in a parallel process of refinement of the fundamental characteristics of electoral processes and the vote of the citizen. The varied and eventful course of the political processes has revealed that, in order to guarantee "the free expression of the will of the voters," the component of "universal and equal suffrage by secret ballot" was essential but, also, insufficient, given the very different threats and difficulties posed by the reality. Thus, the difficulties – or facilities – of access to means of communication, the complexities in the registration of candidates or the characteristics of the electoral rolls, became serious problems in a context in which, owing to the new political context, "universal and equal suffrage by secret ballot" no longer appeared to be an issue.

21. Therefore, as in other components of the political rights mentioned in Article 23(1) of the Convention, the fundamental concept of the "free expression of the will

of the voters" has been enhanced by important institutional evolutions in domestic law and in the inter-American system itself in light of which this general provision of the Convention must be interpreted and applied, with regard to both the rights of the citizens and the obligations of the State. As regards the right to take part in the conduct of public affairs, the Inter-American Democratic Charter has summarized and expressed the current consensual status in the inter-American system with regard to the "free expression of the will of the voters."

22. Indeed, the Charter reiterates principles that coincide in general with the contents of the Convention when it indicates that: "*Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government"* (Article 3).

23. As we can see, at least two important aspects of the requirements that the Convention already contained were clarified and developed by the Inter-American Democratic Charter: (a) not only the access to power but also its <u>exercise</u> should be subject to the rule of law; in this way, the "legitimacy of exercise" is added as an inter-American principle to the already recognized "legitimacy of origin"; (b) the pluralistic system of political parties and organizations. The political parties merit a specific additional consideration in the Charter, since it stipulates that "*The strengthening of political parties <u>and other political organizations</u> is a priority for democracy. Special attention will be paid to the problems associated with the high cost of election campaigns and the establishment of a balanced and transparent system for their financing"* (Article 5, underlining added). Reading the American Convention in light of these conceptual evolutions that the inter-American consensus has expressed in the Democratic Charter shows that the free expression of the will of the electors would be affected if authorities elected under the rule of law (legitimacy of origin) exercise their functions in violation of the rule of law.

24. In relation to political parties and organizations, this is an absolutely central issue that has direct repercussions as regards the rights of those who tried unsuccessfully to be candidates for YATAMA on the Atlantic Coast of Nicaragua. Curiously, this issue is not mentioned explicitly in the OAS Charter or in the American Convention. However, the conceptual essence of representative democracy presumes and requires ways of representation that, in light of the provisions of the Democratic Charter, would be the parties and "other political organizations" that should be protected and also strengthened according to the provisions of Article 5.

25. With regard to political parties and "other political organizations," a first issue to mention is that, since they are considered essential elements for channeling the free will of the voters, it is the State's obligation to provide the conditions for strengthening these means of representation; *contrario sensu,* to abstain from adopting measures that could weaken them. The Democratic Charter mentions explicitly the issue of the financing of electoral campaigns as a matter to which attention should be paid, and also emphasizes the need to ensure "*the establishment of a balanced and transparent system for their financing*." Without mentioning it, the Democratic Charter is conveying that, faced with possible imbalances and inequalities, a counterbalancing system should be ensured in order to achieve the

desired equality. Accordingly, this clearly calls for effective actions that preferably benefit those affected by such imbalances and inequalities.

26. In the instant case, it has been proved that YATAMA's form of organization in order to take part in the 2000 electoral process met with difficulties owing to the provisions of Electoral Act No. 331 of 2000. This violated the rights of those who intended to be candidates, and affected the principle that it is possible to organize in ways other than political parties in order to exercise the right to take part in the conduct of public affairs, in this case prejudicing an organization that represented the indigenous peoples of this part of Nicaragua. Consequently, the State not only obstructed their participation but also did not adopt the necessary measures to facilitate the participation of an organization such as YATAMA.

27. In this line of reasoning, it should be understood that granting the necessary facilities to the so-called "political organizations" is designed to generate the conditions for expanding and consolidating the participation of the citizens in the conduct of public affairs. This should not be understood as opposing but rather as complementing the existence of the political parties and strengthening them, since they are a necessary means of representation and participation in a democratic society. In this perspective, it is perfectly legitimate and concordant with the letter and spirit of the Convention that, within the national system of laws, there are homogeneous norms that emphasize the participation of political parties in the electoral processes as well as regulations designed to strengthen their representative and democratic nature, without detriment to their independence from the State. In addition, it is legitimate that domestic laws should include legal provisions concerning "other political organizations," aimed at facilitating the participation of specific sectors of society, as could be the case of the indigenous peoples.

28. The third component of political rights protected by Article 23 of the Convention stipulates that every citizen should "… <u>have access, under general conditions of equality, to the public service of his country</u>" (underlining added). This aspect of political rights has to be understood systematically in relation to both the other explicit components of the political rights contained in Article 23(1), and the rest of the Convention and the inter-American legal system, in particular Article 24 of the Convention which refers to the right to equality and non-discrimination.

29. In this regard, when considering the provision of Article 23 on the "general conditions of equality," this should be referred to two aspects that can and should be understood concurrently and simultaneously. First, the norm establishes that it is necessary to guarantee access to public office to everyone "under general conditions of equality." This means that specific measures should be promulgated to facilitate the access to public office of the sectors of the population that may face special disadvantages and, thus, inequality – as could be the case of the indigenous peoples. In this case, it has been proved that Nicaragua did not adopt such measures; to the contrary, the 2000 Electoral Act created obstacles to this access.

30. Second, this general provision on access to public service, consistent with Article 29 of the Convention should be interpreted not only in relation to appointments or designations by the authority but also with reference to the public service that is exercised by popular election. In other words, the Court does not accept a restrictive interpretation referring only to public office or positions derived from appointments and designations. This is, without doubt, the meaning of this

provision that seeks, precisely, to stress the principle of equality in the specific sphere of public service.

31. The above should be read and interpreted in close connection with the provisions of Article 24 of the Convention as regards equality and non-discrimination. As the judgment states, Article 24 of the Convention prohibits discrimination *de facto* and *de jure* with the obligation that this entails for the State to respect the said principle of equality and non-discrimination for all the rights embodied in the Convention and in all domestic laws that it adopts. In this regard, the provisions of Article 23(1)(c) are designed to emphasize the significance that the Convention accords to the principle of equality and non-discrimination in the right to take part in the conduct of public affairs.

32. Consequently, given the proven facts in this case in light of the reasoning derived from the provisions of Article 23(1)(c) concerning the general conditions of equality and of Article 24 concerning equality and non-discrimination, the State's obligation not to tolerate practices or norms that could have a discriminatory effect is clear. This should not be understood as contrary to homogeneous rules and conditions for all of society and all citizens with regard to the full exercise of political rights.

Diego García-Sayán
Judge

Pablo Saavedra-Alessandri
Secretary

Annex 51

Inter-American Court of Human Rights

Case of Servellón-García *et al*. *v.* Honduras

Judgment of September 21, 2006
(Merits, Reparations and Costs)

In the case of *Servellón García et al.,*

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court", "the Court", or "the Tribunal"), composed of the following judges[**]:

Sergio García Ramírez, President;
Alirio Abreu Burelli, Vice-President;
Antônio A. Cançado Trindade, Judge;
Cecilia Medina Quiroga, Judge;
Manuel E. Ventura Robles, Judge, and
Diego García-Sayán, Judge;

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Articles 29, 31, 53(2), 55, 56, and 58 of the Court's Rules of Procedure (hereinafter "the Rules of Procedure"), delivers the present Judgment.

I
INTRODUCTION OF THE CASE

1. On February 2, 2005, pursuant to that stated in Articles 51 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted an application against the Republic of Honduras (hereinafter "the State" or "Honduras") to the Court, originating from petition No. 12,331, received at the Commission's Secretariat on October 11, 2000.

2. The Commission presented the petition in this case for the Court to decide if the State has violated Articles 4 (Right to Life), 5 (Right to Humane Treatment), 7

[**] The Judge Oliver Jackman did not participate in the deliberation and signing of the present Judgment, since he informed the Court that, due to reasons of force majeure, he could not participate in the LXXII Regular Session of the Tribunal.

(Right to Personal Liberty), 8 (Right to a Fair Trial), and 25 (Right to Judicial Protection) of the American Convention, in relation with Article 1(1) (Obligation to Respect Rights) of the same, in detriment of Marco Antonio Servellón García (16 years old), Rony Alexis Betancourth Vásquez (17 years old), Diomedes Obed García Sánchez (19 years old), and Orlando Álvarez Ríos (32 years old). Likewise, it requested that the Court issue a ruling regarding the violation by the State of Articles 5(5) (Right to Humane Treatment), 7(5) (Right to Personal Liberty), and 19 (Rights of the Child) of the Convention in relation with Article 1(1) (Obligation to Respect Rights) of said treaty, in detriment of the children Marco Antonio Servellón García and Rony Alexis Betancourth Vásquez, and of Articles 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), and 25 (Right to Judicial Protection) of the Convention, in connection to Article 1(1) (Obligation to Respect Rights) of said treaty, in detriment of the next of kin of the alleged victims. The Commission mentioned that it presented before the Court the petition due to the alleged inhumane and degrading conditions of detention of the alleged victims by the State; the blows and attacks against the personal integrity that they are mentioned as being the victims of by the police agents; their alleged death while they were detained under the custody of police agents; as well as the alleged lack of investigation and right to a fair trial that characterize their cases, which are still in impunity more than "nine" years after the facts occurred. Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos and Diomedes Obed García Sánchez, were allegedly arrested, between September 15 and 16, 1995, during a preventive detention or operation carried out by the Public Security Force of that time (hereinafter "FUSEP").[1] State agents allegedly extra judicially killed the four youngsters and their bodies were found on September 17, 1995 out in the open in different places of the city of Tegucigalpa, Honduras.

3. The Commission requested that the Court, pursuant to Article 63(1) of the Convention, order the State to adopt certain measures of reparation indicated in the petition. Finally, it requested that the Tribunal order the State to pay the costs and expenses generated in the processing of the case in the domestic jurisdiction and before the bodies of the Inter-American system.

II
COMPETENCE

4. The Inter-American Court is competent to hear the present case, in the terms of Articles 62 and 63(1) of the Convention, since Honduras is a State Party in the American Convention since September 8, 1977 and it acknowledged the adjudicatory jurisdiction of the Court on September 9, 1981.

III
PROCEDURE BEFORE THE COMMISSION

[1] In 1993 a police reform process was started which resulted, in the year 1998, in the enactment of the Organic Police Law (Decree Number 156/98), which substituted the Organic Law of the Public Security Force (Decree Number 369 of August 16, 1976). Pursuant to the new Law, the Preventive Police and the Investigation Police were merged under the responsibility of the General Authority of Criminal Investigation attached to the State Security Secretary. The hierarchal structure of the Public Security Force (FUSEP) was modified when it was transformed into the National Police, going from a military organization to a police organization.

5. On October 11, 2000 the Center for Justice and International Law and the Association Casa Alianza Latin America (hereinafter "the petitioners") presented before the Inter-American Commission a petition, which was processed under the number 12,331.

6. On February 27, 2002, the Inter-American Commission approved Admissibility Report No. 16/02, in which it declared the admissibility of the case.

7. On October 19, 2004 the Commission, during its 121° Regular Meeting, approved Report of Merits No. 74/04, pursuant to Article 50 of the Convention, through which it concluded that the State is responsible for the violation of the rights enshrined in Articles 4(1) (Right to Life), 5(1) and 5(2) (Right to Humane Treatment), 7 (Right to Personal Liberty), 8(1) (Right to a Fair Trial), and 25 (Right to Judicial Protection) of the American Convention, in relation to Article 1(1) (Obligation to Respect Rights) of said treaty, in detriment of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez, and Articles 5(5) (Right to Humane Treatment) and 19 (Rights of the Child) of the Convention, in detriment of the alleged underage victims. Likewise, the State is responsible for the violation of Articles 5 (Right to Humane Treatment), 8(1) (Right to a Fair Trial), and 25 (Right to Judicial Protection) of the Convention, in relation to Article 1(1) (Obligation to Respect Rights) of said instrument, in detriment of the next of kin of the alleged victims. At the same time, the Commission recommended that the State adopt a series of measures in order to correct the mentioned violations.

8. On November 2, 2004 the Inter-American Commission transmitted Report of Merits No. 74/04 to the State and granted it a two-month period to inform on the measures adopted in order to comply with the recommendations made. On that same day, the Commission informed the petitioners of the approval of the report and its transmission to the State and requested that they present their position regarding the assertion of the case before the Inter-American Court. On December 2, 2004 the petitioners requested that the case be submitted before the Court.

9. On January 13, 2005 the State presented information, in which it referred to the measures adopted regarding the recommendations included in the Report of Merits No. 74/04.

10. On February 1, 2005 the Commission decided to submit the present case to the jurisdiction of this Tribunal.

IV
PROCEEDING BEFORE THE COURT

11. On February 2, 2005 the Commission submitted the application to the Court, and it included documentary evidence as well as testimonial evidence and expert assessments. The Commission appointed Evelio Fernández Arévalo and Santiago A. Canton as delegates, and Ariel Dulitzky, Martha Braga, Victor Madrigal Borloz, and Manuela Cuvi Rodríguez as legal advisors.

12. On March 2, 2005 the Secretariat of the Court (hereinafter "the Secretariat"), prior preliminary examination of the application by the President of the Court

(hereinafter "the President"), notified it to the State and informed the latter of the terms for its reply and appointment of their representation in the process. The Secretariat, following the President's instructions, also informed the State of its right to appoint a judge *ad hoc* to participate in the consideration of the case.

13. On that same day, pursuant to that established in Articles 35(1)(d) and 35(1)(e) of the Rules of Procedure, the Secretariat notified the Center for Justice and International Law (hereinafter "CEJIL") and the Association Casa Alianza Latin America (hereinafter "Casa Alianza"), appointed in the application as the representatives of the alleged victims and their next of kin (hereinafter "the representatives"), of the application and informed them that there was a two-month term to present their brief of pleadings, motions, and evidence (hereinafter "brief of pleadings and motions").

14. On April 29, 2005 the State informed of the appointment of Mr. Álvaro Agüero Lacayo, Ambassador before the Government of Costa Rica, as Agent and of Mrs. Argentina Wellerman, as deputy agent.[2]

15. On May 2, 2005 the representatives presented their brief of pleadings and motions, with which they enclosed documentary evidence and they offered testimonial evidence and expert assessments. The representatives requested that the Court conclude that the State is responsible for the violation of Articles 4(1) (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8(1) (Right to a Fair Trial), and 25 (Right to Judicial Protection) of the American Convention, in relation to Article 1(1) (Obligation to Respect Rights) of said treaty, in detriment of the alleged victims, and for the violation of Articles 5(5) (Right to Humane Treatment) and 19 (Rights of the Child) of the Convention with regard to Marco Antonio Servellón García and Rony Alexis Betancourth Vásquez. The representatives claimed the violation of Articles 5 (Right to Humane Treatment), 8(1) (Right to a Fair Trial), and 25 (Right to Judicial Protection) of the Convention, in relation to Article 1(1) (Obligation to Respect Rights) of the same with regard to the next of kin of the alleged victims. Similarly, they requested that the Court declare the violation of the right to truth of the next of kin of the alleged victims and the Honduran society in general, pursuant to Articles 8, 13, 25, and 1(1) of the Convention. Finally, they requested that the Court order specific measures of reparation in favor of the alleged victims and their next of kin, as well as payment of costs and expenses.

16. On July 4 and 12, 2005 the State presented its response to the petition and observations to the brief of pleadings and motions (hereinafter "brief of response to the petition") and its appendixes, respectively, through which it communicated its assent to the facts included in paragraphs 27 through 106 of the petition presented by the Inter-American Commission and it responded to the facts that referred to the alleged context in which they occurred, thus rejecting that the violations occurred in a context of systematic violation of human rights tolerated by the State. Likewise, it acknowledged its international responsibility for the violation of the rights enshrined in Articles 4, 5, 7, 8, and 25 of the American Convention, making several considerations in this sense (*infra* paras. 54 and 55). In said brief it communicated the appointment of Mr. Sergio Zavala Leiva, Attorney General of the Republic of Honduras, as agent in the present case.

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[2] During the processing of the case, the State made changes in the appointment of its representatives before the Court.

17. On August 16, 2005 the Inter-American Commission and the representatives forwarded, respectively, their observations to the assent made by the State in its brief of response to the petition.

18. On October 4, 2005 the Secretariat informed the parties of the Court's decision not to summon a public hearing in the present case. Instead, the Secretariat, following the President's instructions, requested that the list of witnesses and experts proposed by the parties be forwarded to it so that the President could evaluate the relevance of ordering that they offer a sworn statement before a notary public (affidavit).

19. On November 8, 2005 the representatives and the Commission presented their observations to the definitive list of expert witnesses proposed by the State. In its observations, the Commission and the representatives referred to Messrs. Ramón Antonio Romero Cantanero and Ricardo Rolando Díaz Martínez, and the representatives also mentioned Mrs. Nora Suyapa Urbina Pineda, indicating that these persons could have participated in the processing of the case in the domestic jurisdiction, reason for which they could be included in any of the causes described in Article 50 of the Rules of Procedure in relation to Article 19(1) of the Statutes. On November 9, 2005, the Secretariat, following the President's instructions, requested Messrs. Romero Cantanero and Díaz Martínez and Mrs. Urbina Pineda to refer to, no later than November 13, 2005, through the State, the observations made by the Commission and the representatives. On November 16 and 21, 2005, the Secretariat reiterated to the State that the persons mentioned should forward through them their observations to that stated by the Commission and the representatives. The persons stated did not present the observations mentioned.

20. On November 24, 2005 the Court issued a Ruling, through which it requested that Mr. Leo Valladares Lanza, proposed as an expert witness by the Inter-American Commission; Mrs. Reina Auxiliadora Rivera Joya and Mr. Carlos Tiffer Sotomayor, proposed as expert witnesses by the representatives, and Mrs. Lolis María Salas Montes and Nora Suyapa Urbina Pineda and Messrs. Ramón Antonio Romero Cantarero and Ricardo Rolando Díaz Martínez, proposed as expert witnesses by the State, present their expert opinion through a statement given before a notary public (affidavit). These expert opinions should be presented no later than December 19, 2005. Besides, in the mentioned Ruling the Tribunal informed the parties that they had time until January 23, 2006 to present their final written arguments in relation to the merits and the possible reparations and costs.

21. On December 19, 2005 the representatives presented the authenticated expert opinions of Mrs. Reina Auxiliadora Rivera Joya and Mr. Carlos Tiffer Sotomayor.

22. On December 19, 2005 the Commission presented the authenticated expert opinion of Mr. Leo Valladares Lanza, and the appendixes enclosed in it.

23. On December 20 and 22, 2005 the State presented the expert opinions given before notary public by Mrs. Lolis María Salas Montes and Messrs. Ricardo Rolando Díaz Martínez and Ramón Antonio Romero Cantarero. On January 16, 2006 the State, after an extension granted until January 5, 2006, presented the time-barred expert opinion of Mrs. Nora Suyapa Urbina Pineda.

24. On January 23, 2006, the Commission forwarded its observations to the expert opinions presented by the parties (*supra* paras. 21 and 23). The State and the representatives did not present observations.

25. On January 23, 2006 the Commission and the representatives presented their final written arguments. The representatives enclosed several appendixes to said arguments.

26. On February 24, 2006 the State presented its brief of final arguments and several appendixes. This presentation was time-barred, since the term to do so had expired on January 23, 2006.

27. On March 8, 2006 the State informed that it appointed, as of January 27, 2006, Mrs. Rosa América Miranda de Galo, Attorney General of the Republic of Honduras, as agent in the present case in substitution of Mr. Sergio Zavala Leiva. On April 7, 2006 the State informed that it appointed, as of that date, Mr. David Reyes Paz, Sub Attorney General of the Republic, as agent in the present case in substitution of Mrs. Rosa América Miranda de Galo.

28. On April 25, 2006 the Secretariat, following the President's instructions, requested that the Commission, the representatives, and the State forward, no later than May 26, 2006, certain information and documentation as evidence to facilitate adjudication of the case.

29. On May 26, 2006 the representatives presented part of the documentation as evidence to facilitate adjudication of the case, in response to that requested by the President in its note of April 25, 2006. On June 14 and July 24, 2006 the representatives informed that they had located some of Diomedes Obed García Sánchez's next of kin. On May 25 and 31, and June 23, 2006 the State presented part of the documentation requested as evidence to facilitate adjudication of the case.

30. On August 25, 2006 the Secretariat requested that the representatives forward, no later than September 4, 2006, certain information and documents as evidence to facilitate adjudication of the case.

31. On September 4, 2006 the representatives presented the evidence to facilitate adjudication of the case, in response to the request made by the President in his note of August 25, 2006. On September 6, 2006 the Secretariat granted the Commission and the State an unpostponable term until September 12, 2006 so they could, if they considered it convenient, present the observations to the sworn statement of Mrs. Dilcia Álvarez Ríos presented by the representatives as evidence to facilitate adjudication of the case. On September 11, 2006 the Commission informed that it did not have any observations regarding said evidence. On September 13, 2006 the State presented its observations to the mentioned sworn statement of Mrs. Dilcia Álvarez Ríos.

V
EVIDENCE

32. Prior to examining the evidence offered, the Court will present, based on that established in Articles 44 and 45 of the Rules of Procedure, some considerations developed in the jurisprudence of the Tribunal and applicable to this case.

33. The principle of the presence of the parties to the dispute applies to evidentiary matters, and it involves respecting the parties' right to a defense. The principle is enshrined in Article 44 of the Rules of Procedure, in what refers to the time frame in which evidence must be submitted, in order to secure equality among the parties.[3]

34. According to the Tribunal's practice, at the beginning of each stage in the first opportunity granted to offer a written statement, the parties must mention what evidence they will offer. Also, in the exercise of the discretionary authorities contemplated in Article 45 of the Rules of Procedure, the Court or its President may request additional evidentiary elements from the parties as evidence to facilitate adjudication of the case, without this turning into a new opportunity to expand or supplement the arguments, unless expressly permitted by the Tribunal.[4]

35. The Court has stated, with regard to the receipt and assessment of the evidence, that the proceeding followed before them is not subject to the same formalities as domestic judicial actions, and that the incorporation of certain elements into the body of evidence must be done paying special attention to the circumstances of the specific case and taking into account the limits imposed by the respect to legal security and the procedural balance of the parties. The Court has also taken into account that international jurisprudence, when it considers that international courts have the power to appraise and assess the evidence according to the rules of competent analysis, has not established a rigid determination of the *quantum* of the evidence necessary to substantiate a ruling. This criterion is especially valid for international human rights tribunals that have ample powers in the assessment of evidence presented before them regarding the relevant facts, pursuant to the rules of logic and on the basis of experience.[5]

36. Based on the aforementioned, the Court will proceed to examine and assess the documentary evidentiary elements forwarded by the Commission, the representatives, and the State in the different procedural opportunities or as evidence to facilitate adjudication of the case requested by the Tribunal or its President, all of which makes up the body of evidence of the present case. For this, the Tribunal will comply with the principles of competent analysis, within the corresponding legal framework.

A) DOCUMENTARY EVIDENCE

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[3] *Cfr. Case of Ximenes Lopes.* Judgment of July 4, 2006. Series C No. 149, para. 42; *Case of Ituango Massacres.* Judgment of July 1, 2006. Series C No. 148, para. 106; and *Case of Baldeón García.* Judgment of April 6, 2005. Series C No. 147, para. 60.

[4] *Cfr. Case of Ximenes Lopes, supra* note 3, para. 43; *Case of the Ituango Massacres, supra* note 3, para. 107; and *Case of Baldeón García*, *supra* note 3, para. 61.

[5] *Cfr. Case of Ximenes Lopes, supra* note 3, para. 44; *Case of the Ituango Massacres, supra* note 3, para. 108; and *Case of Baldeón García*, *supra* note 3, para. 62.

37. The Commission, the representatives, and the State presented the expert opinions authenticated or given before a notary public, in response to that stated by the Court in its Ruling of November 24, 2005 (*supra* para. 20). Said expert opinions are summarized below.

1. Expert witness proposed by the Inter-American Commission

a) Leo Valladares Lanza, former National Human Rights Commissioner of Honduras

He was the National Human Rights Commissioner from October 1992 up to March 5, 2002. On January 21, 2002 he published the "Special Report on the Violent Deaths of Boys, Girls, and Teenagers in Honduras," where he summarizes the findings and presents a series of conclusions and recommendations to the State, which he enclosed in his expert opinion.

The State has adopted measures seeking to improve the situation with children, but there are still an elevated number of young deaths and the almost complete ineffectiveness in their investigations persists, as well as the lack of sanctions upon those responsible. Police officers accused of abusing children's' human rights have been brought before the courts, but the number is low in comparison with the number of cases denounced. The State has increased repressive measures against youngsters. On one hand, there is no criminal policy to avoid the abuse against youngsters, and on the other hand, the prevention and protection measures are weak. The Honduran Institute for Children and the Family (hereinafter "IHNFA") is characterized by its bureaucracy, which makes it inefficient. Similarly, the Code for Children and Teenagers, despite being in force for a decade, has not had an effective application and the judges have not received a proper formation. Honduras is the country with the highest poverty levels in the hemisphere, but this does not justify that the main problems be left unattended, and one of them is the situation of boys, girls, and teenagers.

From his Report as National Human Rights Commissioner and of the observations of the current situation, the expert witness concludes that there is a context of violence with regard to boys, girls, and teenagers in Honduras, that impunity persists, and that inmates are not offered an adequate treatment.

2. Expert witnesses proposed by the representatives

a) Reina Auxiliadora Rivera Joya, current executive director of the non-governmental organization, Center for the Investigation and Promotion of Human Rights, former Criminal Judge and former assistant district attorney of the Human Rights Public Prosecutors' Office.

During the decades of the eighties and nineties and the beginning of the twenty-first century, the State has gone from worrying about national security and the regional armed conflict to a fear for public safety, especially due to the increase of organized crime and street violence.

Given the increase in the number of homicides as of the year 1992, police bodies started giving common delinquency a priority as well as trying to comply with their

role of auxiliary bodies to the Office of the Public Prosecutor and the Judicial Power. In 1998 the Public Security Force (FUSEP) disappeared and the special Police forces attached to the Secretariat of Security were created. Despite the change of approach regarding the new threats to security, the personnel and professional formation of police remained under the coordination of the Armed Forces until the end of the year 1998, reason for which the accusations regarding violations to human rights that were allegedly committed by security bodies were a constant in that decade. Said situation continues up to this date, despite the transition to civil command. There are a high number of complaints against different authorities and against the Armed Forces due to abuse of authority, excessive use of force, physical aggressions, illegal arrests, as well as homicides.

In the year 2002 the Human Rights Commissioner, Leo Valladares Lanza, presented a report that accuses the State and specifically, the police forces, of organizing and/ or tolerating “death squads” under modalities similar to those applied during forced disappearances and extrajudicial killings in the eighties, since there was a “social cleaning” or “social prophylaxis” campaign. In the year 2003, the Head of Affairs of the Secretariat of Security, surprised all Hondurans by publicly accusing police officials and agents of being involved in activities of organized crime such as theft of vehicles, drug trafficking, and especially illegally arrests, torture, and the extrajudicial killing of “criminal” adults and hundreds of children and youngsters who were accused of criminal activities and of belonging to a mara or young gangs. In recent times the promotion (case of Committees of public safety and of legislations such as the reform to Article 332 wrongly called the “antimaras” law) as well as tolerance (police involved in extrajudicial killings and the high impunity of investigations) to the existence of patterns of “social cleaning” is clear, with teenagers and young gang members currently being their main victims.

Youngsters are normally, on a daily basis, victims and perpetrators of violent acts that result in injuries and deaths. Crime and violence become phenomena that are practically inseparable, whichever their causes, and it has been proven that the greatest number of violent deaths are of teenagers and youngsters. Data in general state that in Honduras, during the last three years, almost 14,000 people have lost their life in a violent manner. Statistics inform that in a large proportion the victims of violence are young men between the ages of 16 and 35. Aggressors are also mainly young men. Studies affirm that the participation of children in criminal activities is no greater than 18% in more than two decades.

The violation to the right to life of children and youngsters in Honduras have their maximum expression in the summary killings that have been occurring in the country since the beginning of the nineties, but that started receiving more public attention at the end of this decade. Honduran children and youngsters, especially the poor, live in violent contexts, in which they are the main victims of a war where the authorities, adults, the society in general, and youngsters themselves are active protagonists of the wiping out of hundreds of children, teenagers, and youngsters murdered as a consequence of the stigmatization of being a member of a mara or gang. Data from the National Commission of Human Rights points out that of the deaths accounted for in the year 2001, in 54.9% the authors are unknown, a number that allows us to infer that they are planned and executed with premeditation and in an environment in which the authors are concealed.

The maras or gangs are not a new phenomenon in Honduras. The maras are connected to organized crime, because the policy in charge of cleaning the streets

has joined many members to drug traffickers, for protection. Gangs are classified as a violent response to a state violence to which their members have been submitted through both exclusion and abandonment.

The main measures adopted by the State to confront the problem of young delinquency stereotyped in gangs or maras have been an increase in administrative apprehensions as of the nineties, which has generated the segregation of children and youngsters in street situations and "under suspicion" of belonging to a mara, and the State's policy of "zero tolerance", among others.

According to data of 2003, in Honduras 50.4% of the population was under the age of 18. 66% of boys and girls between the ages of 0 and 14 years old are under the line of poverty. Despite the important legal instruments the State has, in which it acknowledges the superior interest of children, it has not been able in the practice to improve the general situation of Honduran children and youngsters, since there is a lack of guiding policies and plans in the matter.

b) Carlos Tiffer-Sotomayor, attorney

The current violence in Central America is the result of a long structural process linked to problems of a social, economic, and political-military nature. In recent years a phenomenon of juvenile violence has expanded, and in the case of Honduras it has reached the level of juvenile gangs. Said gangs frequently find themselves involved in illegal activities such as drug consumption, violent acts with other gangs, and the committing of crimes against property such as robbery and theft, and in some cases a delinquency related with crimes against life, sexual liberty, drug trafficking, or extortive kidnapping. However, it is not true that the child and teenage factor are the determining conditions in a phenomenon of insecurity. Besides, we would have to add the important difference between the real criminal rate and the phenomenon of the perception of citizens regarding crime and the security or insecurity in a society. This difference between perception and reality is generated by some members of the press, who exacerbate the fears of the population, with regard to the violence and insecurity generated by the so-called young gangs.

In Honduras the State's response is focused on repression, not only institutional but even private, that seeks to eliminate violence with more violence, thus creating a completely erroneous public policy. True public safety is achieved with a solid social security. Violence has a social structure with a spiral form, that is, if when faced with a violent reaction, the response is more violence, it is sure and probable that there will be more violence. When this repression is focused toward children and teenagers, the problem and dimension of the violent response are greater, since they include violence as cultural patterns, reason for which they will also be violent adults. Public policies must be oriented toward social, and especially, educational policies. At the same time, the best criminal policy must be a good social policy, especially when dealing with young gangs or maras. The criminal policy oriented only to repression is condemned to fail.

The stigmatization suffered by children and teenagers turn them from perpetrators to victims, and produces a phenomenon of exclusion both by the population as well as through auto exclusion. When perceived as those responsible for the lack of public safety, they themselves incorporate this perception and consider themselves excluded from society. Said stigmatization will emphasize stratification and the differences between social classes.

The elaboration of a public policy for children and teenagers that considers prevention, before repression, and a predominant educational purpose, that minimizes state intervention and that makes criminal reaction flexible and diversified, and that offers greater reflection and a multidisciplinary analysis is necessary. Specific measures are necessary, such as prioritizing social policy along with studies of the cost of violence, redistribution of wealth and an offer of a better work level for all and the possibility of healthy recreation for youngsters.

3) Expert witnesses proposed by the State

a) Lolis María Salas Montes, attorney

The State carried out an interinstitutional process of large dimensions that seeks to deepen the legislation regarding family and children matters, with the objective of overcoming the gaps, hiatus, contradictions, and legislative dispersion in this subject. It also seeks to update said legislation to the international instruments Honduras has signed. Among the actors that conform this initiative are The Supreme Court of Justice, the National Congress, the National Human Rights Commission, and the State Secretariat in the Offices of the Interior and Justice.

A National Plan for the Attention of Children and Teenagers is being prepared, programmed to be executed in the period 2002-2010. Governmental sectors, the civil society, and non-governmental organizations were recently summoned in order to revise the mentioned Plan and improve the elaboration of the actions executed in the country in favor of children and teenagers. One of the great recommendations is directed to the inclusion of a new chapter on violence against boys, girls, and teenagers, which includes sections on child abuse, sexual abuse, and on maras or gangs.

Another effort of the State was the intervention of the Honduran Institute for Children and Family (IHNFA) that motivated the conformation of an Intervening Commission to diagnose the reality of this Institute, of which the expert witness was a part from August 2003 to September 2004. This Intervening Commission prepared the Situational Diagnosis on the institutional scenario of the IHNFA and suggested strategies to achieve absolute respect of the superior interest of boys and girls. As a result, the State expanded the time period to appoint the Intervening Commission, time in which a series of actions were executed in order to ensure the protection of minors in situations of social risk and in conflict with the law, based on national legislation and international instruments on matters of children and teenagers. Likewise, an approach was achieved with all sectors of civil society and non-governmental organizations to analyze the situation of the IHNFA and to know of both the work of the State and those sectors.

The State has shown good will in collecting the national budgets in order to assign sufficient resources to attend the needs of the child and teenage populations in vulnerable conditions. The institutions with the responsibility of leading this matter must be located in the corresponding level given their fundamental importance and to receive the budget demanded.

b) Ramón Antonio Romero Cantarero, Presidential Advisor in Security matters, former Consultant of the Interinstitutional

Commission for the Protection of the Moral and Physical Integrity of Children

The phenomena of violent deaths in boys and girls has multiple causes, among which we can mention, based on the results of the investigations of the Special Unit of Investigation of Deaths of Minors: the deaths occurred within gangs; those produced in conflicts between rival gangs; those produced in confrontations with the authority or with citizens when gang members are committing crimes; those produced by executions ordered by groups of drug traffickers and organized crime, and those produced by clandestine groups, which have been characterized by the Former National Human Rights Commissioner, Leo Valladares Lanza, himself as groups of social cleaning financed by non-identified national sectors, presumably formed by criminal, military members, former military members, police agents, and former police agents.

From 1986 and up to 2002 approximately 700 boys and girls died violently and in unclear conditions, conclusion based on the forms for the removal of bodies of the Department of Forensic Medicine of the Public Prosecutors' Office and the DGIC, which offer the trustworthiest information. The above explains the difference between the numbers of the State in comparison with the numbers presented by non-governmental organizations whose source is the imprecise information published in national newspapers. The deaths within gangs are approximately 60% of the cases, the actions of organized crime and drug trafficking cause more than 30% of said deaths, and 8% is attributed to specific clandestine groups of "social cleaning". Investigations have also established that among the alleged guilty parties are police agents linked to specific clandestine groups of "social cleaning", proceeding immediately to their criminal processing. The results of the different actions tend to be evident and decisive in the medium and long term, although there are already valuable results in the short-term.

The State has worried about investigating the cases of deaths in minors and ending all type of impunity. The President of the Republic has acknowledged before the national and international community that the phenomenon of violent deaths of youngsters is occurring in Honduras, many of them linked to gangs, as well as its commitment to investigate these deaths.

The State has adopted several measures for the prevention of the death of minors and violence related to gangs: the creation of the National Program for the Prevention, Rehabilitation, and Social Reinsertion of people related to gangs; the intervention and restructuring of the IHNFA; the request for international cooperation for the execution of projects for methodological readjustment and social infrastructure for the internment of boys and girls under the responsibility of the IHNFA; the offering of the opportunity to more than 600 boys and girls of the street or in risky situations of being attended in Spanish institutions and to a greater number of being attended nationally, as well as more than a million children benefited by the Program of School Snacks; the readjustment of the infrastructure of criminal centers, and the execution of rehabilitation programs and removal of tattoos in criminal centers and in some penitentiary centers.

c) Ricardo Rolando Díaz Martínez, general supervisor of the Secretariat of Security, appointed in charge of the Special Unit for the Investigation of the Deaths of Minors

The Special Unit for the Investigation of the Deaths of Minors must investigate all the cases of deaths of people under the age of 21 that have characteristics of patterns considered as executions. The team is in charge of around 1,016 files assigned to homicides, among which an average of 186 have been forwarded to the Prosecutors of the Public Prosecutors' Office.

Monthly reports with the results of the investigative activities are given to the Interinstitutional Commission for the Protection of Children, which is the governing body of the Special Unit. Through cooperation with non-governmental institutions some type of witness protection to deponents or personnel who becomes aware of violent acts has been established. Likewise, transparent mechanisms of information regarding the investigative activities carried out have been established.

C) EVIDENCE ASSESSMENT

Assessment of Documentary Evidence

38. In this case, as in others,[6] the Tribunal admits the probative value of the documents presented in a timely fashion by the parties, or requested as evidence to facilitate adjudication of the case pursuant to Article 45 of its Rules of Procedure, that were not disputed or objected, and whose authenticity was not questioned.

39. The Court adds to the body of evidence, pursuant to Article 45(1) of the Rules of Procedure and because it considers that they are useful in the issuing of a ruling in this case, the documents provided by the representatives as appendixes to their final written arguments (*supra* para. 25), and the documents provided by the expert witness Leo Valladares Lanza as appendixes to his expert opinion (*supra* para. 22).

40. In application of that stated in Article 45(1) of the Rules of Procedure, the Court included in the body of evidence of the case the documents presented by the representatives, which correspond to part of the documents requested by the Tribunal as evidence to facilitate adjudication of the case (*supra* paras. 29 and 31). The State also presented part of the evidence requested to facilitate adjudication of the case (*supra* para. 29).

41. The Court adds the following documents, which were not presented by the representatives in the corresponding procedural moment, to the body of evidence, in application of Article 45(1) of the Rules of Procedures since it considers them useful for the resolution of this case, specifically: part of the domestic judicial dossier that corresponds to folios 502 through 569; official letter of the Criminal Court of First Instance of the Judicial Section of Tegucigalpa, Department of Francisco Morazán, addressed to the President of the Supreme Court of Justice of Honduras, dated May 26, 2006; birth certificate of Diomedes Tito Casildo García, No. 0201-1940-00277, issued by the National Registry of Persons, Civil Municipal Registry, on June 19, 2006; birth certificate of Andrea Sánchez Loredo, No. 0201-1935-00149, issued by the National Registry of Persons, Civil Municipal Registry, on June 19, 2006; death certificate of Andrea Sánchez Loredo, No. 0107-1985-00206, issued by the National Registry of Persons, Civil Municipal Registry on June 20, 2006; birth certificate of

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[6] *Cfr. Case of Ximenes Lopes, supra* note 3, para. 48; *Case of the Ituango Massacres, supra* note 3, para. 112; and *Case of Baldeón García*, *supra* note 3, para. 65.

Ester Patricia García Sánchez, No. 0801-1979-08582, issued by the National registry of Persons, Civil Municipal Registry on June 19, 2006; birth certificate of Jorge Moisés García Sánchez, No. 0801-1976-09742, issued by the National Registry of Persons, Civil Municipal Registry, on June 19, 2006; and birth certificate of Fidelia Sarahí García Sánchez, No. 0801-1977-07721, issued by the National Registry of Persons, Civil Municipal Registry, on June 19, 2006. Likewise, pursuant to that stated in Article 45(1) of the Rules of Procedure, the Court adds to the body of evidence some documents that, even though presented in a time-barred manner by the State as appendixes to their brief of final arguments (*supra* para. 26 and *infra* para. 49), the Tribunal considers that they contribute elements and are useful for the resolution of this case, specifically: Diagnosis on Criminality in Honduras (Executive Summary), National Human Rights Commission of Honduras, UNDP; Synopsis of agreements 2000-2003, Interinstitutional Commission on Criminal Justice (CIJP), Spanish Agency of International Cooperation (AECI), Project for the Strengthening of the Judicial Power of Honduras. Tegucigalpa M.D.C., Honduras. May 2004; Report on the advances in the legal proceedings and investigation of the deaths of children and youngsters in Honduras of August 25, 2003. Secretariat of State in the Offices of the Interior and Justice, Tegucigalpa M.D.C., Honduras; Report on the advances in the legal proceedings and investigation of the deaths of children and youngsters in Honduras of February 25, 2004, Secretariat of State in the Offices of the Interior and Justice, Tegucigalpa M.D.C, Honduras; Report on the advances in the legal proceedings and investigation of the deaths of children and youngsters in Honduras of August 25, 2003, Secretariat of State in the Offices of the Interior and Justice, Tegucigalpa M.D.C, Honduras; National Statistics. Published between July 2003 and October 2005 and National Statistics. Published between July 2003 and January 2006. Special Unit for the Investigation of the Deaths of Minors; Report on convictions in violent deaths of boys and girls. Public Prosecutors' Office; Lists of participants and training materials for Workshops on the identification of maras and tattoos; and National Statistics from June 2003 through January 2006. Special Unit for the Investigation of Deaths in Minors. Finally, pursuant to that stated in Article 45(1) of the Rules of Procedure, the Court adds as evidence to facilitate adjudication of the case the document "*Los derechos civiles y políticos, en particular las cuestiones relacionadas con las desapariciones y las ejecuciones sumarias. Ejecuciones extrajudiciales, sumarias o arbitrarias*". Report of the Special Rapporteur, Mrs. Asma Jahangir, presented in compliance of Decision 2002/36 of the Human Rights Commission. Addition. Mission to Honduras. E/CN.4/2003/3/Add.2. June 14, 2002.

42. Regarding the statements given before to a notary public (affidavit) by the expert witnesses Ramón Antonio Romero Cantarero, Ricardo Rolando Díaz Martínez, and Nora Suyapa Urbina Pineda (*supra* para. 23), the Commission stated that it agreed with the observation made at that time by the representatives, in the sense that these persons were public employees, and that due to their position they could have a motive that leads to the possibility to question their characterization as expert witnesses. In what refers to the specific observations, the Commission stated

that Mr. Ricardo Rolando Díaz Martínez, General Supervisor of the Secretariat of Security, appointed in charge of the Special Unit for the Investigation of the Deaths of Minors since May 2003, gave his statement "from the point of view of a person interested in proving the effectiveness of measures adopted by the State regarding some substantive elements." Likewise, it stated that Mr. Romero Cantarero gave a statement referring to "matters that were under his charge [as Consultant or Presidential Advisor]" and that Mrs. Urbina Pineda offered a statement on "the defense of her work as Special Prosecutor of Children". Therefore, the Commission concluded that the three statements "lack the characteristics of fairness necessary to substantiate the receipt of an opinion of an expert witness."

43. In this regard, in first instance, the Court observes that, despite calling repeatedly upon Ramón Antonio Romero Cantarero, Ricardo Rolando Díaz Martínez, and Nora Suyapa Urbina Pineda, through the State, for the presentation of information regarding if they were included in any of the motives described in Article 50 of the Rules of Procedure in relation with Article 19(1) of the Statute and if they had any direct participation in this case, it was not presented. In that sense, this Tribunal reprimanded the State who upon proposing said persons as expert witnesses, who through it should have sent the information required, it should have made the corresponding diligences to send the Court said information, so the Tribunal could have it.[7]

44. In second place, in what refers specifically to the statements offered before a notary public by the expert witnesses Ramón Antonio Romero Cantarero (*supra* para. 37(3)(b)) and Ricardo Rolando Díaz Martínez (supra para. 37(3)(c)), taking into account the Commission's observations, this Court admits them within the totality of the body of evidence, pursuant to the principles of competent analysis.

45. In what refers to the statement offered before a notary public by Mrs. Nora Suyapa Urbina Pineda, it was presented in a time-barred manner, on January 16, 2006 (*supra* para. 23), that is, eleven days after the time period set to do so, reason for which this Tribunal does not accept it within the body of evidence.

46. Regarding the authenticated statement offered by the expert witnesses Leo Valladares Lanza (*supra* para. 37(1)(a)), offered by the Commission; Reina Auxiliadora Rivera Joya (*supra* para. 37(2)(a)) and Carlos Tiffer Sotomayor (*supra* para. 37(2)(b)), offered by the representatives, and the expert opinion given before a notary public (affidavit) by Lolis María Salas Montes (*supra* para. 37(3)(a)), proposed by the State, this Court admits the expert opinions, and assesses them within the totality of the body of evidence pursuant to competent analysis. It is important to mention that the Tribunal has, on other occasions, admitted sworn statements that were not given before a notary public, when this does not affect legal certainty and the procedural balance between the parties.[8]

47. On the other hand, through its Decision of November 24, 2005, the Court ordered that the Inter-American Commission, the representatives, and the State

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[7] *Cfr. Case of the Sawhoyamaxa Indigenous Community.* Judgment of March 29, 2006. Series C No. 146, para. 48; *Case of the Pueblo Bello Massacre.* Judgment of January 31, 2006. Series C No. 140, para. 77; and *Case of Gómez Palomino*. Judgment of November 22, 2005. Series C No. 136, para. 52.

[8] *Cfr. Case of Ximenes Lopes*, *supra* note 3, para. 52; *Case of the Ituango Massacres*, *supra* note 3, para. 114; and *Case of Baldeón García, supra* note 3, para. 66.

present their final written arguments, no later than January 23, 2006 (*supra* para. 20). Both the Commission and the representatives presented the mentioned final arguments on the date stated (*supra* para. 25). The State, however, presented its brief of final arguments along with its appendixes on February 24, 2006 (*supra* para. 26).

48. In this sense, on March 13, 2006 the Commission and the representatives presented their observations with regard to the presentation of said brief by the State. The Commission indicated that the presentation of the State's final arguments and its appendixes was time-barred and that its admission would threaten the equality between the parties in the proceedings before the Court. On their part, the representatives requested that the Court "not admit the final arguments presented by the […] State […], since they were presented in a time-barred manner and affected the procedural balance" of the parties. However, they also mentioned that in the section called "Content and scope of the State's Partial Assent", Honduras offers "light on the scope of the acceptance of the State's international responsibility, that up to that time was not clear[, and that] it seems to indicate that its assent covers all matters of this case that do no refer to the existence of a pattern of extrajudicial killings of boys, girls, and teenagers tolerated or fomented by the State," and they requested that the Court "issue a favorable ruling regarding the assent presented [by the State] in the terms described."

49. Given that the State presented its brief of final arguments along with its appendixes in a time-barred manner, this Tribunal does not admit them. However, this Court cannot ignore that in the mentioned brief the State expressed its position on the scope of its acknowledgement of responsibility, by expanding and precising its terms with regard to the violations presented by the Commission and the representatives. In this sense, given that the State may assent during any stage of the procedure,[9] this Tribunal considers that it may not exclude or limit the effect of that expressed by the State regarding its acquiescence. Therefore, this Court will consider that expressed by the State regarding its assent in the mentioned brief.

50. Regarding the articles published by the press presented by the parties, the Tribunal considers that they may be assessed when they include public or notorious facts or statements of State employees or when they corroborate aspects related to the case.[10]

VI
ACKNOWLEDGMENT OF INTERNATIONAL RESPONSIBILITY

51. Article 53(2) of the Rules of Procedures establishes that

> [i]f the respondent informs the Court of its acquiescence to the claims of the party that has brought the case as well as to the claims of the representatives of the alleged victims, their next of kin or representatives, the Court, after hearing the opinions of the other parties to the case, shall decide whether such acquiescence and its juridical effects are acceptable. In that event, the Court shall determine the appropriate reparations and indemnities.

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[9] *Cfr. Case of the "Mapiripán Massacre".* Judgment of September 15, 2005. Series C No. 134, para. 66*;* and *Case of Mack Chang*. Judgment of November 25, 2003. Series C No. 101, para. 108.

[10] *Cfr. Case of Ximenes Lopes, supra* note 3, para. 55; *Case of the Ituango Massacres, supra* note 3, para. 122; and *Case of Palamara Iribarne.* Judgment of November 22, 2005. Series C No. 135, para. 60.

52. The Inter-American Court, in exercising its contentious function, applies and interprets the American Convention and, when a case has already been submitted to its jurisdiction, it is empowered to declare the international responsibility of a State Party to the Convention for violation of its provisions.[11]

53. The Tribunal, in the use of its jurisdictional functions of international protection of human rights, may determine if an acknowledgment of international responsibility made by a respondent State offers sufficient foundation, in the terms of the American Convention, to continue or not with the examination of the merits and the determination of the possible reparations and costs. For these effects, the Court will analyze the situation presented in each specific case.[12]

54. In the respondent's plea the State indicated that

> it does not contest the facts exposed in paragraphs 27 through 106 of the application [… of] the Inter-American Commission […], nor does it contest the arguments regarding these same facts presented by [… the] representatives, [… since] the same are duly substantiated and proven. Therefore, the State […] accepts the commission of acts by individuals that, despite having resulted in the violations argued by the […] Commission and […] [the representatives] in what refers to the [alleged] victims and their next of kin, it rejects that the same have occurred within the context of a systematic violation of human rights tolerated by the State.
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> […]
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> […T]he State […] assents to the parts of the application that relate to those regretful facts, accepting the measures of reparation proposed by the applicants and promising to comply in the least time possible to what that […] Court decides to order in this sense. The State […] DOES NOT assent to the parts included in the arguments of the […] Commission […] and […the] representatives that mention the existence of a context of alleged systematic violation of human rights tolerated and consented by it.

55. When referring to the acknowledgment of responsibility, the State, *inter alia*:

> a) acknowledged, in reference to the violation of Article 7 of the Convention, that: i) Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez were detained without an arrest warrant, and none of them was surprised *in fraganti* in the commission of a crime, reason for which in the arrest with excessive violence and without a justified reason Articles 7(2) and 7(3) of the Convention were violated; ii) it did not inform the parents of the minors Servellón García and Betancourth Vásquez about their arrest, despite there was a special obligation to do so, nor did it inform the next of kin of Orlando Álvarez Ríos and Diomedes Obed García Sánchez, in violation of Article 7(4) of the Convention; iii) the alleged victims were not released despite the fact that the Police Judge issued a decision that stated it, being detained in a clandestine manner, since they appeared in the list of persons released on September 16, 1995, and that said Judge did not make sure that the mentioned decision was made effective, in violation of Article 7(5) of the Convention; iv) the minors Servellón García and Betancourth Vásquez were

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[11] *Cfr. Case of Ximenes Lopes, supra* note 3, para. 61*; Case of the Ituango Massacres, supra* note 3, para. 57; and *Case of Baldeón García*, *supra* note 3, para. 37.

[12] *Cfr. Case of Montero Aranguren et al.* Judgment of July 5, 2006. Series C No. 150, para. 39; *Case of Ximenes Lopes*, *supra* note 3, para. 62; and *Case f the Ituango Massacres, supra* note 3, para. 58.

not separated from the adults at the time of their arrest and they remained in the police cells, which exposed them to damaging circumstances for the minors, nor were measures adopted so that the children could have contact with their next of kin or that a minor's judge revise the legality of their arrest, and v) by being detained in a clandestine manner the alleged victims were deprived of their right to make use of a simple and effective recourse to guarantee their liberty (habeas corpus), in violation of Article 7(6) of the Convention;

b) acknowledged the violation of Article 4 of the Convention, in detriment of the four alleged victims, since their death was caused and the fact occurred while they were under the custody of State agents;

c) acknowledged the violation of Article 5 of the Convention, in detriment of the four alleged victims, for the tortures and cruel, inhuman, and degrading treatments to which they were submitted, as proven by physical evidence at the time of the disinterment;

d) acknowledged the violation of Articles 8 and 25 of the Convention, since in the way in which the facts occurred it was not possible to provide the four detainees who were later murdered with an effective protection through the recourse of habeas corpus. With regard to the "pardon" allegedly granted by the Police Judge Roxana Sierra, as has been argued by the State, what happened was that there was "a bad use of the term" by the police officials;

e) acknowledged that the results produced in the investigation have not been up to now adequate and that, therefore, Articles 8 and 25 of the Convention have been violated by omission, in detriment of the next of kin of the alleged victims, but it rejected that the facts have not been investigated, and

f) it acknowledged having violated the rights mentioned, since "there has still not been an adequate sanction for the perpetrators [of the] crime."

56. In its observations to the State's acquiescence, the Commission indicated, *inter alia*, that

a) the controversy on the facts described in paragraphs 27 through 106 of the application has ceased, as well as regarding the allegations made in this sense by the representatives in their brief of pleadings and motions, with the exception of the context in which the facts occurred described in paragraphs 23 through 26 of the application. In what refers to the facts not acknowledged by the State regarding the alleged context of violence in which they occurred, the Commission mentioned that the evidence provided in a timely manner proves a context of violence and immunity, and that the verification of the context is essential in qualifying the violations for which the State has assumed responsibility and, especially, in defining the reparations whose execution results imperative in order to guarantee the prevention of similar violations;

b) the State acknowledged the violation of the Articles of the Convention argued by the Commission in its application, but presented some considerations on the way in which, in its opinion, said violations occurred. Therefore, the Commission considers that the facts and reasons in which the State substantiates said acknowledgment do not correspond integrally to the arguments presented by it. In that sense, the Commission mentioned that in the present case a situation of impunity has presented itself, since more than "nine" years after the facts occurred those responsible for the extra judicial

> killings and torture of the four alleged victims have not been individualized or sanctioned through a definitive and executed judgment. However, the State, when referring to the legal claims of the application, indicated that "we cannot speak of impunity in these cases, in a conclusive and definitive manner," reason for which the Commission considers that this affirmation "does not concur with the realities proven in the case […]."
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> c) the acknowledgment of the state's responsibility includes a general acceptance of the obligation to repair the alleged victims and their next of kin, and
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> d) it values the acknowledgment of partial responsibility made by the State.

57. Finally, the Commission requested that the Court admit the acceptance of the facts, as well as the partial acknowledgment of international responsibility made by the State, and that the Court detail in its judgment the facts and the legal considerations that substantiate the violations acknowledged by the State.

58. On its part in its observations to the assent made by the State, the representatives acknowledged "the good will expressed by the State […] by not contesting the facts presented in the application […] and in [the brief of pleadings and motions] 'since the same are duly substantiated and proven´ and upon the acceptance of the measures of reparation proposed by both parties." However, they stated that

> the terms in which [the State] […] made the mentioned acquiescence are not clear, since they seem to indicate that the State accepts its international responsibility for all the violations argued based on the facts accepted as true, but [… from] the section titled "*ON THE RIGHTS OF THE AMERICAN CONVENTION ON HUMAN RIGHTS THAT THE COMMISSION AND THE PETITIONERS CONSIDER HAVE BEEN VIOLATED IN THE PRESENT CASE,*" we can conclude that the State is not accepting all the violations claimed.
>
> Besides, the State denies the existence of a pattern of "*social cleaning*" in Honduras.

59. Additionally, the representatives indicated, *inter alia*, that the State: did not refer to its responsibility for not having notified the alleged victims of the reasons for their arrest (Article 7(4) of the Convention), and only referred to the violation of the right to legal control of the alleged minor victims, not that of those of legal age, who were not presented before an impartial and independent judge, but instead before a police judge (Article 7(5) of the Convention). According to the representatives, the State did not refer to the violation of Articles 5(5) and 19 of the Convention, in detriment of the alleged minor victims, for having been detained along with adults and for omitting the adoption of special protective measures in relation to these, nor to the violation of Article 5 of the Convention, in detriment of the next of kin of the alleged victims. The representatives argued that the State did not acknowledge its responsibility for the violation of the alleged victim's right to be heard in a reasonable period of time (Article 8(1) of the Convention), nor did it refer to the violation of the principle of presumption of innocence of the alleged victims (Article 8(2) of the Convention). Likewise, the State omitted all reference to its responsibility for the violation of the right to truth of the next of kin of the alleged victims and the Honduran society in general (Articles 8, 13, 25, and 1(1) of the Convention).

60. Later, the State pointed out that even though the acknowledgment was accompanied of a full detail of the rights of the American Convention it acknowledged had been violated in the present case, due to the interest of the petitioners in a clarification regarding the scope of the assent, it stated that it acknowledged:

> a) expressly in the respondent's plea the violation of Article 7 subparagraphs 1, 2, 3, 4, 5, and 6 (Right to Personal Liberty) of the Convention, and clarified that said transgression was in accordance with Article 1(1) of that Treaty, and that the violation of Article 7(6) of the Convention was at the same time in relation with Articles 25 and 1(1) of the same;
> b) expressly the violation of Article 5 (Right to Humane Treatment) of the Convention, and clarified that it acknowledged said violation in the terms of subparagraphs 1 and 2 of the mentioned article, and always in relation with Article 1(1) of that instrument;
> c) expressly its responsibility for the violation of Article 4 (Right to Life) of the Convention, and, clarified that this acknowledgment was made in connection with Article 1(1) of that treaty;
> d) expressly in the respondent's plea the violation of Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the Convention regarding Marco Antonio Servellón García, Rony Alexis Betancourt Vásquez, Diomedes Obed García Sánchez, and Orlando Alvarez Ríos, and clarified that it acknowledged said violation in the terms of subparagraphs 1 and 2 of Article 8 and subparagraph 1 of Article 25 of the Convention, and in relation with Article 1(1) of that treaty, and
> e) its responsibility for the violation of Articles 19 (Rights of the Child), 5(5), and 7(5) of the American Convention, in connection with Article 1(1) of the same, regarding the minors Marco Antonio Servellón García and Rony Alexis Betancourth Vásquez, since said acknowledgment was omitted from its response to the petition.

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61. Based on the facts established, the evidence presented in the present case, as well as that argued by the parties, the Court will proceed to determine the scope and legal effects of the acknowledgment of international responsibility made by the State (*supra* paras. 16, 54, 55, and 60), within the framework of the state's responsibility generated by violations to the American Convention. For said effects it will analyze the mentioned acknowledgment of responsibility under three aspects: 1) regarding the facts; 2) regarding the law, and 3) regarding the reparations.

1) Regarding the facts

62. In attention to the acknowledgment of responsibility made by the State, the Tribunal considers that the controversy between the facts included in paragraphs 27 through 106 of the application presented by the Inter-American Commission in the present case (*supra* para. 11) has ceased. However, the State mentioned that it is not true that there has not been an investigation and that we cannot speak of a conclusive and definitive impunity in this case.

63. Therefore, the Court considers it appropriate to open a chapter regarding the facts of the present case, which will cover both the facts acknowledged by the State

and those that result proven from the totality of elements that appear in the case file.

2) Regarding the legal claims

64. In attention to the acknowledgment of responsibility made by the State (*supra* paras. 16, 54, 55, and 60), the Court considers as established the facts referred to in paragraphs 79(1) and 79(60) of this Judgment and, based on them and weighing in the circumstances of the case, proceeds to precise the different violations found against the articles claimed.

65. The Court considers that it its convenient to admit the acknowledgment of international responsibility made by the State for the alleged violation of the rights enshrined in Articles 4(1) (Right to Life); 5(1) and 5(2) (Right to Humane Treatment); 7(1), 7(2), 7(3), 7(4), 7(5), and 7(6) (Right to Personal Liberty), 8(1) and 8(2) (Right to a Fair Trial), and 25(1) (Right to Judicial Protection) of the American Convention, in detriment of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Diomedes Obed García Sánchez, and Orlando Álvarez Ríos, as well as the violation of Articles 5(5) (Right to Humane Treatment), 7(5) (Right to Personal Liberty), and 19 (Rights of the Child) of the Convention, in detriment of the minors Marco Antonio Servellón García and Rony Alexis Betancourth Vásquez.

@66. Likewise, this Tribunal admits the acknowledgment of international responsibility made by the State in relation to the alleged violation of the rights enshrined in Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention, in detriment of the next of kin of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez.

67. However, the Court points out that the State did not refer in its assent to the alleged violation of Article 5 of the Convention, in detriment of the next of kin of the alleged victims.

3) Regarding the reparations

68. In the respondent's plea the State indicated that "it assent[ed] to the parts of the petition related to those regretful facts, accepting the measures of reparation proposed by the petitioners and promising to comply faithfully in the least time possible with what [the…] Court decides to order in this sense […]." However, at the same time the State made considerations regarding the implementation of some of the measures requested by the Commission and the representatives, by stating, for example, that "the Public Prosecutors' Office continues to develop important efforts for the persecution and sanction of the perpetrators and planners of the arrest and death [of the alleged victims]," and that it has elaborated the National Plan for the Attention of Children and Teenagers 2002-2010, which must serve as the framework document for the State's public policies.

69. In this regard, the Inter-American Commission pointed out that the State made several affirmations, that "even though they show an appreciable statement from [it] to repair the next of kin of the [alleged] victims, it does not constitute an assent to the demands presented for them to the Court" and stated that "the next of kin of the [alleged] victims specified their demands for different aspects in a very

detailed manner in their brief of pleadings [and] motions […]." Likewise, the Commission mentioned that the State, when it referred to the demands of the petition, "made arguments that seemed destined to contest the measures requested, with different shades. Therefore, the Commission consider[ed] that it cannot exactly speak of assent in the present case, since the State has only partially accepted the demands of the Commission and of the representatives of the [alleged] victims and their next of kin."

70. The representatives stated that, "even when the State has assented to the reparations, it is important to consider that the arguments presented in this sense do not satisfy the totality of the reparations requested." They added, "the considerations made by the […] State in relation to the measures adopted by it refer only to some of the reparations developed by the Commission and by [that] representation, but that they do not imply the totality of the reparations."

71. From that exposed, the Court understands that the observations made by Honduras regarding the measures of non-repetition or satisfaction requested by the Commission and the representatives seek to prove that the State is making efforts to implement them, and that the observations are consistent with that mentioned by the State in the sense that it "accept[ed] the measures of reparation proposed […]." However, given that both the Commission and the representatives differ in some aspects regarding these measures, specifically, in regard to their implementation or effectiveness, this Court considers it appropriate to issue a ruling on this matter (*infra* paras. 186 through 203).

C) *The extent of the subsisting controversy*

72. Article 38(2) of the Rules of Procedures states that

> [i]n its answer, the respondent must state whether it accepts the facts and claims or whether it contradicts them, and the Court may consider accepted those facts that have not been expressly denied and the claims that have not been expressly contested.

73. The Tribunal has previously stated that, pursuant to the mentioned Article 38(2) of the Rules of Procedure, the Court has the power to consider as accepted the facts that have not been expressly denied and the claims that have not been expressly contested. However, the Tribunal is not obliged to do so in all cases in which a similar situation presents itself. Therefore, in the exercise of its responsibility to protect human rights, the Court will determine in each specific case the need to make legal considerations and to consider the facts as established, either as presented by the parties, assessing the elements of the body of evidence, or as best concluded from said analysis.[13]

74. Based on the previous considerations, this Tribunal grants complete effect to the partial acknowledgment of responsibility (*supra* paras. 16, 54, 55, and 60). However, the Court acknowledges that there is still a controversy with regard to some of the violations claimed.

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[13] *Cfr. Acosta Calderón.* Judgment of June 24, 2005. Series C No. 129, para. 37; and *Case of Caesar.* Judgment of March 11, 2005. Series C No. 123, para. 38.

75. Pursuant to the terms in which the parties have made themselves heard, the Court considers that the controversy subsists with regard to:

a) the fact that the State denied that there has not been an investigation and that there has been impunity in the present case, despite that it assented to the violation of Articles 8(1) and 25(1) of the Convention, in relation with Article 1(1) of that instrument, in detriment of the next of kin of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Diomedes Obed García Sánchez, and Orlando Álvarez Ríos. With regard to the investigation, the State differs in what refers to the reasons argued by the Commission and the representatives to substantiate the mentioned violation. Likewise, the State did not refer to the alleged unjustified delay in the investigations;

b) the alleged violation of Article 5 (Right to Humane Treatment) of the Convention, in relation to Article 1(1) of the same instrument, in detriment of the next of kin of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Diomedes Obed García Sánchez, and Orlando Álvarez Ríos, and

c) that referring to the determination of the reparations and costs and expenses (*supra* para. 71).

76. Even though the State did not go on record in the respondent's plea regarding the alleged violation of the right to truth, the Court does not consider that this is an autonomous right enshrined in Articles 8, 13, 25, and 1(1) of the American Convention, as argued by the representatives, and therefore, it will not issue a ruling regarding this matter. The Court has stated that the right to truth is included in the right of the victim or his next of kin to obtain from the State's competent bodies the clarification of the violating facts and the corresponding responsibilities, through investigation and a trial.[14]

77. The Court considers that the State's assent constitutes a positive contribution to the development of this process and to the effectiveness of the principles that inspire the American Convention[15] in Honduras.

78. Taking into account the responsibilities that correspond to the State of protecting human rights and given the nature of the present case, the Court considers that the issuing of the present Judgment, in which the truth regarding the facts and all the elements of the merits of the matter are determined, as well as the corresponding consequences constitutes in itself a form of reparation,[16] in favor of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Diomedes Obed García Sánchez, and Orlando Álvarez Ríos.

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[14] *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 55; *Case of Baldeón García, supra* note 3, para. 166; and *Case of the Pueblo Bello Massacre*, *supra* note 7, para. 219.

[15] *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 57; *Case of Ximenes Lopes, supra* note 3, para. 80; and *Case of the Ituango Massacres, supra* note 3, para. 79.

[16] *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 131; *Case of Ximenes Lopes, supra* note 3, para. 81; and *Case of the Ituango Massacres, supra* note 3, para. 80.

VII
PROVEN FACTS

79. Examining the evidentiary elements on record in the dossier of the present case, the statements made by the parties, as well as the acknowledgment of international responsibility made by the State, the Court considers as proven the facts detailed below. The majority of the paragraphs included in this section are the facts considered as established by this Tribunal based on the acknowledgment of responsibility made by the State, and that correspond to the facts presented in paragraphs 27 through 106 of the application presented by the Inter-American Commission (*supra* para. 11). Additionally, the Court has established as proven a series of other facts, mainly regarding the criminal proceeding, pursuant to the evidence presented by the Commission, the representatives, and the State.

A) Context of violence against children and youngsters in Honduras: extrajudicial killings and impunity

79(1) At the beginning of the nineties, and within the framework of the state's response of preventive and armed repression of young gangs, a context of violence that is currently marked by the victimization of children and youngsters in a situation of social risk, identified as young delinquents that cause the increase in public insecurity, appeared. The deaths of youngsters identified as involved with "maras" or young gangs became more frequent every day between 1995 and 1997. Thus, for example, 904 minors died violently between the years of 1995 and 2002.[17]

79(2) That context of violence is materialized in the extrajudicial killings of children and youngsters in risky situations, both by state agents as well as by individual third parties. In this last case, the violence occurs, among others, within the young gangs or between rival gags or as a consequence of the action of alleged clandestine groups of social cleaning.[18]

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[17] *Cfr*. Civil and political rights, specifically the matters related with the disappearances and summary killings. Extrajudicial, summary or arbitrary killings. Report of the Special Rapporteur, Mrs. Asma Jahangir, presented in compliance of Decision 2002/36 of the Human Rights Commission. Addition. Mission to Honduras. E/CN.4/2003/3/Add.2. June 14, 2002; National Human Rights Commission of Honduras, Annual Report 2003, Chapter II (dossier of appendixes to the brief of pleadings and motions, appendix 2, folios 1927 through 1932); Special Report on the violent deaths of boys, girls, and teenagers in Honduras. National Human Rights Commission. January 21, 2002 (dossier of appendixes to the petition, appendix 10(8), folios 1575 through 1628); Gangs or maras within the context of violence and impunity in Honduras. Casa Alianza Honduras, Reflection, Investigation, and Communication Team (ERIC) of the Compañía de Jesús of Honduras, March 2004 (dossier of appendixes to the brief of pleadings and motions, appendix 1, folios 1828 through 1895); Casa Alianza Honduras, Reflection, Investigation, and Communication Team (ERIC) of the Compañía de Jesús of Honduras, "Work Meeting on the phenomenon of maras or gangs in Honduras" of October 26, 2004 (dossier of appendixes to the petition of the representatives of the victims and their next of kin, volume I, appendix 5, folios 1969 through 1983); Diagnosis of Criminality in Honduras (Executive Summary). National Human Rights Commission of Honduras (dossier of evidence to facilitate adjudication of the case, folios 2370 through 2417); and National Statistics. Published between July 2003 and October 2005 and National Statistics. Published between July 2003 and January 2006. Special Unit for the Investigation of the Deaths of Minors (dossier of evidence to facilitate adjudication of the case, folios 2738 through 2866).

[18] *Cfr*. Civil and political rights, specifically the matters related with the disappearances and summary executions. Extrajudicial, summary or arbitrary killings. Report of the Special Rapporteur, Mrs. Asma Jahangir, presented in compliance of Decision 2002/36 of the Human Rights Commission. Addition. Mission to Honduras. E/CN.4/2003/3/Add.2. June 14, 2002; Special Report on the violent deaths of boys, girls, and teenagers in Honduras. National Human Rights Commission. January 21, 2002 (dossier of appendixes to the petition, appendix 10(8), folios 1575 through 1628); Gangs or maras within the context of violence and impunity in Honduras. Casa Alianza Honduras, Reflection, Investigation, and

79(3) The violence has obeyed to a common pattern in relation to: a) the victims, who are children and youngsters in risky situations; b) the cause of the deaths, which are extrajudicial killings characterized by extreme violence, produced with fire arms and cutting and thrusting weapons, and c) the publicity of the crimes since the victims' bodies are exposed to the population.[19]

79(4) Those responsible for the crimes are reported by the police as unidentified persons and the investigations carried out with the objective of attributing responsibility are generally not able to identify the authors of said crimes.[20]

Communication Team (ERIC) of the Compañía de Jesús of Honduras, March 2004 (dossier of appendixes to the brief of pleadings and motions, appendix 1, folios 1828 through 1895); Casa Alianza Honduras, Reflection, Investigation, and Communication Team (ERIC) of the Compañía de Jesús of Honduras, "Work Meeting on the phenomenon of maras or gangs in Honduras" of October 26, 2004 (dossier of appendixes to the petition of the representatives of the victims and their next of kin, volume I, appendix 5, folios 1969 through 1983); Diagnosis of Criminality in Honduras (Executive Summary). National Human Rights Commission of Honduras (dossier of evidence to facilitate adjudication of the case, folios 2370 through 2417); and expert opinion of Mr. Ramón Antonio Romero Cantarero offered on December 14, 2005 (dossier of merits, reparations, and costs, volume III, folios 548 through 554).

[19] *Cfr*. National Human Rights Commission of Honduras, Annual Report 2003, Chapter II (dossier of appendixes to the brief of pleadings ands motions, appendix 2, folio 1928); National Human Rights Commission of Honduras, Annual Report 2003, Chapter II (dossier of appendixes to the brief of pleadings and motions, appendix 2, folios 1927 through 1932); Special Report on the violent deaths of boys, girls, and teenagers in Honduras. National Human Rights Commission. January 21, 2002 (dossier of appendixes to the petition, appendix 10(8), folios 1575 through 1628); Gangs or maras within the context of violence and impunity in Honduras. Casa Alianza Honduras, Reflection, Investigation, and Communication Team (ERIC) of the Compañía de Jesús of Honduras, March 2004 (dossier of appendixes to the brief of pleadings and motions, appendix 1, folios 1828 through 1895); Casa Alianza Honduras, Reflection, Investigation, and Communication Team (ERIC) of the Compañía de Jesús of Honduras, "Work Meeting on the phenomenon of maras or gangs in Honduras" of October 26, 2004 (dossier of appendixes to the petition of the representatives of the victims and their next of kin, volume I, appendix 5, folios 1969 through 1983); and Diagnosis of Criminality in Honduras (Executive Summary). National Human Rights Commission of Honduras (dossier of evidence to facilitate adjudication of the case, folios 2370 through 2417).

[20] *Cfr*. National Human Rights Commission of Honduras, Annual Report 2003, Chapter II (dossier of appendixes to the brief of pleadings ands motions, appendix 2, folio 1928); Casa Alianza Honduras, Reflection, Investigation, and Communication Team (ERIC) of the Compañía de Jesús of Honduras, "Gangs or maras within the context of violence and impunity in Honduras," March, 2004, Report presented before the Inter-American Commission of Human Rights during its 120º period of hearings (dossier of appendixes to the brief of pleadings and motions, appendix 1, folios 1828 through 1895); Civil and political rights, specifically the matters related with the disappearances and summary executions. Extrajudicial, summary or arbitrary killings. Report of the Special Rapporteur, Mrs. Asma Jahangir, presented in compliance of Decision 2002/36 of the Human Rights Commission. Addition. Mission to Honduras. E/CN.4/2003/3/Add.2. June 14, 2002; Special Report on the violent deaths of boys, girls, and teenagers in Honduras. National Human Rights Commission. January 21, 2002 (dossier of appendixes to the petition, appendix 10(8), folios 1575 through 1628); Gangs or maras within the context of violence and impunity in Honduras. Casa Alianza Honduras, Reflection, Investigation, and Communication Team (ERIC) of the Compañía de Jesús of Honduras, March 2004 (dossier of appendixes to the brief of pleadings and motions, appendix 1, folios 1828 through 1895); Casa Alianza Honduras, Reflection, Investigation, and Communication Team (ERIC) of the Compañía de Jesús of Honduras, "Work Meeting on the phenomenon of maras or gangs in Honduras" of October 26, 2004 (dossier of appendixes to the petition of the representatives of the victims and their next of kin, volume I, appendix 5, folios 1969 through 1983); Diagnosis of Criminality in Honduras (Executive Summary). National Human Rights Commission of Honduras (dossier of evidence to facilitate adjudication of the case, folios 2370 through 2417); and Diagnosis of Criminality in Honduras (Executive Summary). National Human Rights Commission of Honduras (dossier of evidence to facilitate adjudication of the case, folios 2370 through 2417); and National Statistics. Published between July 2003 and October 2005 and National Statistics. Published between July 2003 and January 2006. Special Unit for the Investigation of the Deaths of Minors (dossier of evidence to facilitate adjudication of the case, folios 2738 through 2866).

B) General aspects of the arrest of the victims

79(5) The 15th day of September of 1995 the Public Security Force (FUSEP) made collective arrests, that included the capture of 128 people, within the framework of a preventive and indiscriminate police operative that took place in the surroundings of the National Stadium Tiburcio Carias Andino, in the city of Tegucigalpa, in order to avoid disturbances during the parades held to celebrate Honduras' National Independence Day.

79(6) The 16th day of September of 1995 the Police judge Roxana Sierra Ramírez issued a ruling of "pardon" accompanied by a list with the names of 62 people, among which Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, and Orlando Álvarez Ríos were included. On that same day, although the majority of the detainees were released, eight people were taken to the second floor of the Seventh Regional Command of the FUSEP (hereinafter "CORE VII") in order to take their fingerprints, and only four of them returned to their cells and were released.

79(7) The Lieutenant José Alberto Alfaro Martínez gave the order that the four victims of the present case remain on the second floor of the CORE VII, specifically, "Lieutenant Alfaro […] said, ['leave these separate for me['…,] the four that appeared dead on Sunday September seventeenth of [1995]; and he could observe that they were tied with some rope he had, and he saw that DIOMEDES was crying[. They were] tied to a Plywood [(sic)], looking towards the wall, […]. They were nervous, because they were afraid they were going to be killed, since they had been warned and [they had been told] they belonged to the MARA OF THE [POISON] and that they had a debt to pay."[21]

C) Arrest, torture, and extrajudicial killing of Marco Antonio Servellón García

79(8) Marco Antonio Servellón García was born on May 3, 1979, in the Central District of the department of Francisco Morazán. He was the son of Reyes Servellón Santos and Bricelda Aide García Lobo. He lived in the Colony El Carrizal No. 2, Main Street, of the city of Tegucigalpa, Honduras. During the day he sold lottery and he attended his primary studies in the night school for adults Centroamérica Oeste. At the time of his arrest he was 16 years old.

79(9) Marco Antonio Servellón García was arrested in the collective arrest of September 15, 1995. He was obliged to lie down on the floor, he was hit on the head with a gun, and accused of being a thief. They later took the laces from his shoes, tied him up, and drove him to CORE VII, located in the "Los Dolores" suburb of Tegucigalpa. On the way and in the offices of the CORE VII, the police agents hit him in the face, kept him isolated for an hour during which they tied him up by his feet, pulled him across the floor, and hit him on the back, in the stomach, and on the face, and on one opportunity they hit him with a chain. He was detained with adults.

79(10) Marco Antonio Servellón García was isolated from the outside world, without being able to communicate with his next of kin and inform them of the violent treatment he was receiving from the agents of the CORE VII. Even though his mother Bricelda Aide García Lobo visited the CORE VII on the 15th and 16th days of

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[21] *Cfr*. statement offered by Marvin Rafael Díaz before the Second Criminal Peace Court on March 19, 1996 (dossier of appendixes to the petition, appendix 4, volume I, folio 1201 through 1203).

September of 1995, asking for her son, she was not allowed to communicate with him.

79(11) Bricelda Aide García Lobo, saw her son alive for the last time on September 16, 1995, at 1:00 in the afternoon, when she saw him go up to the second floor of the CORE VII, while under the custody of State agents. On September 17, 1995 the body of Marco Antonio Servellón García was found dead close to the surroundings of a place known as "El Lolo".

79(12)The autopsy practiced on Marco Antonio Servellón García's body on September 19, 1995 revealed that the victim presented four wounds caused by a fire arm whose entrance wounds were: one at the level of the right retro auricular region; one at the level of the right occipital: one in the cheekbone of the face, and one in the region of the left occipital, that is the four shots were directed to his face and head.

79(13) The autopsy did not refer to the state of Marco Antonio Servellón García's body, nor did it prove that there were wounds caused with a blade, evidence of beatings, bruises, or signs on his wrists. The Public Prosecutors' Office, in its Report of Ocular Inspections of September 17, 1995, mentioned that the victim "was found at the side of the road, toward [E]l [L]olo, he had signs on his wrists as if he would have [(sic)] been tied up, [and that] a white tennis lace was found next to his right hand."[22] The Office of the Public Prosecutor did not take pictures of the body, because it did not have film.

D) Arrest, torture, and extrajudicial killing of Rony Alexis Betancourth Vásquez

79(14) Rony Alexis Betancourth Vásquez was born on November 2, 1977 in the Department of Choluteca, Honduras. He was the son of Manases Betancourth Núñez and Hilda Estebana Hernández López. He lived in the Colony of Nueva Suyapa and he had finished the third grade of his primary education. According to the statement given by the father of Rony Alexis Betancourth Vásquez, he had been a "gang member" at the age of fourteen, reason for which the father had filed a complaint against the gang in order to save him. According to Mr. Betancourth Núñez the gang was later disbanded. At the time of his arrest Rony Alexis Betancourth Vásquez was 17 years old.

79(15) Rony Alexis Betancourth Vásquez was detained in the collective arrest of September 15, 1995. He was beaten on the way to and during his stay at the CORE VII. Rony Alexis Betancourth Vásquez indicated through signs to Carlos Yovanny Arguijo Hernández, who had also been arrested on that same day, that he was going to be killed, "that he was going to have his head cut off, since [Rony] took one of his hands to his neck, making him understand […] and what was what he heard him say 'if they kill me, they kill me…' since [Rony] told [him] that they were saying that he belonged to the mara of the poison."[23] He was detained with adults.

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[22] *Cfr*. report of ocular inspections No. 2192 issued by the Public Prosecutors' Office on September 17, 1995 (dossier of appendixes to the petition, appendix 4, volume I, folio 1006).

[23] *Cfr*. statement offered by Carlos Yovanny Arguijo Hernández before the Second Criminal Peace Court on March 20, 1996 (dossier of appendixes to the petition, appendix 4, volume I, folios 1146 through 1148).

79(16) His arrest was kept clandestine, the victim was isolated from the outside world and was not allowed to communicate with his family and friends. His mother found out about the arrest through a third party at the end of the afternoon of September 16, 1995. The victim's partner, Ana Luisa Vargas Soto, was informed by the Police Judge that her partner would not be released on September 16, 1995 because he was going to be investigated, and she was told by the guards of the CORE VII that Rony Alexis Betancourth Vásquez was not at that Command.

79(17) Rony Alexis Betancourth Vásquez was not released nor did he exit the CORE VII at 11:00 a.m. on September 16, 1995, as was registered by the judge, but instead he continued to be under the custody of State agents. The body of Rony Alexis Betancourth Vásquez was found dead on September 17, 1995, in hours of the morning, in the Suyapa village.

79(18) The autopsy performed on Rony Alexis Betancourth Vásquez's body on September 17, 1995 by the Public Prosecutors' Office revealed that the victim presented two wounds made by a fire weapon with entrance wounds at: one on the cheekbone in the face and one at the level of the right retro auricular region; and four wounds caused with a blade as follows: one blade wound at the level of the sternal manubrium and three blade wounds caused over the left breast. As with the bodies of the other three victims he presented bruises and torture marks.

E) Arrest, torture, and extrajudicial killing of Orlando Álvarez Ríos

79(19) Orlando Álvarez Ríos was born on November 22, 1962 in the location of Santa Rita, Department of Yoro. He was the son of Concepción Álvarez and Antonia Ríos. He had graduated with an industrial high school degree and since January 1995 worked in the construction of the home of his sister, Dilcia Álvarez Ríos. At the time of his arrest Orlando Álvarez Ríos was 32 years old.

79(20) He was detained in the collective arrest of September 15, 1995. Of the four victims of the present case he was the only one allowed to inform a family member that he was detained, opportunity in which he told his sister, Dilcia Álvarez Ríos, not to worry since they had told him that he would be released on Monday September 18, 1995. The victim remained in the custody of agents of the CORE VII even after the police judge registered his release. On September 17, 1995, in hours of the morning, the body of Orlando Álvarez Ríos was found dead on the North highway, at the height of kilometer 41 near the Community of Las Moras, in Tegucigalpa.

79(21) Dilcia Álvarez Ríos went to the CORE VII to ask for her brother on September 19, 1995, since he had not come back on September 18th as he had told her. In said Command they informed her that [nobody with [the] name [of Orlando Álvarez Ríos] had been there and that if he had been there he had already left." She later went to the Office of Criminal Investigation where once again her brother was not on the list of the detainees. Finally, she went to the morgue, where she identified the body of Orlando Álvarez Ríos.

79(22) The autopsy practiced on the body of Orlando Álvarez Ríos on September 17, 1995 by the Public Prosecutors' Office revealed that the victim presented two wounds produced by fire weapon with entrance wounds at: one behind the right ear and the

other located 3 cm. under the right ear. The autopsy does not refer to blade wounds, bruises, or other marks that could have been found on the body of Orlando Álvarez Ríos.

79(23) Orlando Álvarez Ríos' body was found with signs of having been object of sexual violence. The State did not perform exams to investigate whether the victim was sexually abused before his extrajudicial killing.

F) Arrest, torture, and extrajudicial killing of Diomedes Obed García Sánchez

79(24) Diomedes Obed García Sánchez was born on August 20, 1974 in Trujillo, Department of Colón, and he lived in the Colony of San Miguel of Tegucigalpa. He was the son of Diomedes Tito García Casildo and Andrea Sánchez Loredo. He lived in the "Nazareth" house, coordinated by Mr. Carlos Jorge Mahomar Marzuca, dedicated to offer housing to youngsters with behavioral problems and drug addictions. At the time of his arrest he was 19 years old.

79(25) He was arrested between the 15th and 16th day of September of 1995 in the surroundings of a video game establishment located next to the Church of la Merced in Tegucigalpa. He was later transported in a police vehicle to the CORE VII. His arrest was not recorded in the corresponding registries, reason for which he does not appear on the list of those "pardoned" on September 16, 1995.

79(26) Diomedes Obed García Sánchez had been previously threatened by the Lieutenant José Alberto Alfaro Martínez, when the latter told him that "he would give him fifty lempiras […] to disappear from Tegucigalpa; and this was before being arrested, like on a Monday; and, he told him that if he were to end up there again, he knew what would happen to him, that they were going to finish him off."[24]

79(27) Marvin Rafael Díaz, in his statement given before the Public Human Rights Prosecutors' Office on September 20, 1995, stated that Diomedes Obed García Sánchez was taken to the second floor of the CORE VII when Lieutenant Marco Tulio Regalado Hernández threatened him saying: "you see I told you what was going to happen to you the next time, that I did not want to see you here," to which Diomedes responded that "he had been taken in without reason, that he was not stealing anything." At the CORE VII the Lieutenants Marco Tulio Regalado Hernández, José Alberto Alfaro Martínez, Hugo Antonio Vivas, José Antonio Martínez Arrazola made death threats to Marlon Antonio Martínez Pineda, known as "Big Foot", and to Diomedes Obed García Sánchez.

79(28) On October 30, 1995 Marlon Antonio Martínez Pineda, known as "Big Foot", and another youngster named Milton Adaly Sevilla Guardado were found dead in a similar manner to the victims of the present case.

79(29) Days prior to his death, Diomedes Obed García Sánchez told his girlfriend "they had already told him that they were going to kill him."[25] Likewise, prior to

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[24] *Cfr.* statement offered by Marvin Rafael Díaz before the Second Criminal Peace Court on March 19, 1996 (dossier of appendixes to the petition, appendix 4, volume I, folio 1201 through 1203). In consideration of the context of the statement, the Court understands that "finish" means kill.

[25] *Cfr.* statement offered by Krisell Mahely Amador before the Second Criminal Peace Court on October 11, 1995 (dossier of appendixes to the petition, appendix 4, volume I, folios 1183 through 1186).

September 15, 1995, Diomedes and a friend had been arrested for being undocumented and on that day "they beat [Diomedes] up with a thole and their fists, and they tie[d] up his hands and torture[d] him and […] they [did] nothing to [his friend]."[26]

79(30) The body of Diomedes Obed García Sánchez was found dead in the morning of September 17, 1995, on kilometer 8 and 9 of the Olancho highway, in Tegucigalpa.

79(31) The autopsy practiced on the body on September 17, 1995, by the Public Prosecutors' Office revealed that Diomedes Obed García Sánchez presented eight wounds produced by a fire weapon as well as three blade wounds, one of which was so deep that "they almost cut off his head."[27] The entry wounds of the bullets were: one in the left temporal region, one in the top part of the left cheekbone, one behind the right ear, one in the left cheek, one in the left pectoral region, and three bullet entries in the left hand. Besides, the body presented two blade wounds produced with a machete, one on the right side of the neck and another on his right arm, and a blade wound on the left side of his neck. The Public Prosecutors' Office did not take any pictures of the body, "due to lack of film."

G) Similarities between the four illegal arrests, tortures, and extrajudicial killings

79(32) After having been arrested and having remained under the custody of the State since the 15th or 16th of September of 1995, the bodies of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez were found on September 17, 1995, after having been tortured and murdered,[28] in different parts of Tegucigalpa, Honduras. The points of the city in which the bodies were found, when joined together formed a circle, reason for which the case was locally known as "the four cardinal points."

79(33) The deaths of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez were "all […] homicides, [and] the relationship between the ways in which they died is similar at the light of the characteristics of the entrance wounds of the bullets[,…] reason for which we could be dealing with the same weapon[. The] injuries found, […] are compatible with those produced by bullets from fire weapons, with signs of having been produced from short and long distances. The blade wounds […] are compatible with those produced by a long metal object that is sharp on one of its sides, whose measures are similar and the mechanism of production is pressure that is exercised overcoming the elasticity of the tissue producing serious internal injuries. The blade

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[26] *Cfr.* statement offered by Cristian Omar Guerrero Harry before the Second Criminal Peace Court on March 15, 1996 (dossier of appendixes to the petition, appendix 4, volume I, folios 1197 and 1198).

[27] *Cfr*. newspaper article titled "*Encuentran otros tres desconocidos ejecutados en diferentes lugares*", published by the newspaper El Heraldo, on September 18, 1995 (dossier of appendixes to the petition, appendix 4, folio 967).

[28] *Cfr*. "report on claim [No.] 9173 received [(sic)] in the DIC" issued by the human rights inspector of the DIC, Mrs. Nery Suyapa Osorio, addressed to the Main Prosecutor of the Public Human Rights Prosecutors' Office, Mrs. Marlina Durbor de Flores, on September 17, 1995 (dossier of appendixes to the petition, appendix 4, volume I, folio 987 through 980).

wounds are compatible with those produced by a long metal instrument that is sharp on one of its sides, which acts through its weight and edge (machete) […]."[29]

79(34) The bullets extracted from the bodies of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, and Diomedes Obed García Sánchez were shot by the same fire weapon. The caliber of the bullet found in Orlando Álvarez Ríos' body could not be determined due to its deformation. The Human Rights inspector subordinated to the Office of Criminal Investigation expressed that its hypothesis was that the four deaths were related, reason for which he decided to investigate them in a joint manner.

79(35) In the murders of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez a common *modus operandi* was used, and they occurred within in the context of extrajudicial killings of children and youngsters in risky situations that existed at the time of the facts in Honduras (*supra* paras. 79(1), 79(2), and 79(3)).

H) Regarding the police investigations and the criminal proceedings initiated as a result of the deaths of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez

79(36) After September 18, 1995 the Main Prosecutor of the Human Rights Public Prosecutors' Office received from the Human Rights Inspector of the Office of Criminal Investigation, a report on the claim made by Mrs. Marja Ibeth Castro García for the illegal arrest of her brother Marco Antonio Servellón García and the investigations that had been carried out by the Human Rights Public Prosecutor's Office as a result of said claim.[30]

79(37) On October 5, 1995 the First Assistant of the National Human Rights Commission forwarded to the Special Human Rights Prosecutor the claim presented by Dilcia Álvarez Ríos, in which she argued that her brother Orlando Álvarez Ríos had been found dead with two bullet shots to the head. The First Assistant of the National Human Rights Commission requested that the corresponding investigations regarding the case be carried out.[31]

79(38) On March 5, 1996 Mr. Manases Betancourth Núñez, father of the minor Rony Alexis Betancourth Vásquez, presented a criminal accusation "for the crimes of Abuse of Authority and Violation of the Duties of Officials, Illegal Arrest, and Murder against Messrs. Lieutenant Colonel David Abraham Mendoza Regional Commander of the FUSEP, the Captains [Miguel Ángel] Villatoro [Aguilar], [Egberto] Arias [Aguilar], [Rodolfo] Pagoada [Medina], [Juan Ramón] Ávila [Meza], the Effective Lieutenants Marco Tulio Regalado [Hernández], [José Francisco] Valencia [Velásquez], [Edilberto]

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[29] *Cfr*. expansion of the legal medical report of the specialist in Legal Medicine and Forensic Pathology of the Public Prosecutors' Office of December 8, 1995 (dossier of appendixes to the petition, appendix 4, volume 1, folios 927 and 928).

[30] *Cfr.* report of the Human Rights Inspector of the Office of Criminal Investigation, Nery Suyapa Osorio, addressed to the Main Prosecutor of the Human Rights Public Prosecutors' Office, Sonia Marlina Durbor de Flores, on September 17, 1995 (dossier of appendixes to the petition, appendix 4, volume I, folio 987 through 990).

[31] *Cfr.* official letter of the First Assistant of the National Human Rights Commission, Irma Esperanza Pineda Santos, addressed to the Special Human Rights Public Prosecutor, Sonia Marlina Dubor de Flores, of October 5, 1995 (dossier of appendixes to the petition, appendix 4, volume I, folio 952).

Brizuela [Reyes], the Second Lieutenants [José] Alberto Alfaro [Martínez][*], [Leonel] Matute Chávez, [Orlando] Mejía [Murcia], [José Reinaldo] Servellón [Castillo], and [Osvaldo] López [Flores], for the same crimes against Seargents Núñez, Palacios, Adan, Zambrano, and Miranda and Cano for the same crimes against agents Laínez, [Hugo Antonio] Vivas, [José Antonio] Martínez [Arrazola], and Francisco Morales Suanzo and against the Police Judge Roxana Sierra [Ramírez], for the crimes of Illegal Arrest, Abuse of Authority, and Violation of the duties of Officials and Concealment, in detriment of the minor Rony Alexis Betancourth [Vásquez]."[32]

79(39) On March 5, 1996 the Criminal Court of First Instance (hereinafter "the Court") admitted the accusation, prior obligatory proceedings, and ordered the measures and investigations that needed to be performed.[33]

79(40) On May 6, 1996 the representative of the Public Prosecutors' Office presented a criminal accusation before the Court against "Marco Tulio Regalado Hernández, [José Alberto] Alfaro Martínez, Hugo Antonio Vivas, José Antonio Martínez Arrazola, [and] Roxana Sierra Ramírez […] for the crimes of murder committed in detriment of the youngsters Orlando Álvarez Ríos, Rony Alexis Betancourth [Vásquez], Marco Antonio Servellón García, and Diomedes Obed García Sánchez, […] by [said] officials against the exercise of the rights guaranteed by the Constitution, in detriment of the existence and security of the State, and abuse of authority, in detriment of public administration." In the charges, they requested, among others, that: 1) the corresponding arrest warrants be issued, and 2) the joining of the charges with the records of the proceedings started regarding these same facts through the indictment presented before the same Court by the Ombudsman of the Committee for the Defense of Human Rights in Honduras (CODEH), as well as those presented before the Second Criminal Peace Court of Comayaguela.[34]

79(41) On May 6, 1996 the Court admitted the charges presented by the Public Prosecutors' Office, and therefore ordered that the corresponding inquiries be made, that a communication be issued to the Second Criminal Court of Tegucigalpa and the Second Criminal Peace Court of Comayagüela, so that they could disqualify themselves from hearing the cases conducted to clarify the deaths of Marco Antonio Servellón García, Orlando Álvarez Ríos, Rony Alexis Betancourth Vásquez, and Diomedes Obed García Sánchez and which were forwarded to said Court for their continuation. Finally, the Court denied the request for an arrest warrant based on lack of sufficient grounds to do so.[35]

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[*] In what refers to Mr. José Alberto Alfaro Martínez, in the documents presented by the parties he appears indistinctively with the name José Alberto or Alberto José. This Court understands that it is dealing with the same person, thus in the present Judgment it will use the name José Alberto Alfaro Martínez.

[32] *Cfr.* claim of March 5, 1996 presented by Manases Betancourth Nuñez before the Criminal Court of First Instance (dossier of appendixes to the petition, appendix 4, volume I, folios 845 through 850)

[33] *Cfr.* ruling issued by the Criminal Court of First Instance, of March 5, 1996 (dossier of appendixes to the petition, appendix 4, volume I, folios 864 through 865).

[34] *Cfr.* criminal charges presented by the Assistant District Attorney of the Special Human Rights Public Prosecutors' Office, Mercedes Suyapa Vásquez Coello before the Criminal Court of First Instance, of May 6, 1996 (dossier of appendixes to the petition, appendix 4, volume I, folios 905 through 926).

[35] *Cfr.* ruling issued by the Criminal Court of First Instance, on May 6, 1996 (dossier of appendixes to the petition, appendix 4, volume I, folios 1022 and 1023).

79(42) On August 6, 1996 Mr. Manases Betancourth Núñez asked the Judge to issue an arrest warrant against Messrs. Lieutenant Colonel David Abraham Mendoza; the Captains Miguel Angel Villatoro Aguilar, Egberto Arias Aguilar, Rodolfo Pagoada Medina, and Juan Ramón Avila Meza; Lieutenants Marco Tulio Regalado [Hernández], José Francisco Valencia Velásquez, and Edilberto Brizuela Reyes; Second Lieutenants José Alberto Alfaro Martínez, Leonel Matute Chavez, Orlando Mejía Murcía, José Reinaldo Servellón Castillo, and Osvaldo López Flores; the agents Núñez, Palacios, Cano, Laínez, Hugo Antonio Vivas, and Francisco Morales Suazo, and the Police Judge Roxana Sierra Ramírez, since from the preliminary proceedings presented, the persons mentioned resulted involved in the commission of the crimes denounced, in detriment of the minor Rony Alexis Betancourth Vásquez, besides "having gathered on record enough evidence verified through Expert Opinions and Doctors and issued by the Office of Criminal Investigation and Forensic Medicine [...] to produce sufficient evidence of their guilt.[36]"

79(43) On the same August 6, 1996 the Court denied the request for an arrest warrant since there were not enough grounds to issue a commitment order. The representatives of Mr. Manases Betancourth Núñez appealed said decision, and on January 21, 1997 the First Appeals Court denied the appeal presented and confirmed the decision appealed.[37]

79(44) From March 1996 to February 2005 both the Public Prosecutors' Office and the legal authorities focused the preliminary proceedings mainly on five requests: a) inspect the installations of the Seventh Regional Command (CORE VII) in order to verify in the Registration Book of detainees the day and entry time and alleged exit of the victims; b) verify the complete name, assignment and degree of the accused in the sheet of police services for the month of September 1995, especially Marco Tulio Regalado Hernández; c) determine from the inventory of weapons if they were seized and not returned by the Police, the permits to carry weapons in force in that dependency and if the suspects possessed personal weapons assigned in 1995; d) request the expert reports that include the result of the bullets found in the victims' bodies from the Ballistics Laboratory of the Public Prosecutors' Office and e) seek the expansion of the testimony of Mrs. Liliana Ortega Alvarado. At the beginning of the year 2005, more than nine years after the facts occurred, the criminal process was still in its preliminary stages.

79(45) On May 16, 2002 the Supreme Court of Honduras requested *ad efectum videndi* that the Court forward the cause presented for the crime of murder in detriment of Marco Antonio Servellón García et al., in attention to the request of the

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[36] *Cfr.* complaint of the attorney Henriech Rommel Pineda Platteros, legal proxy of Mr. Manases Betancourt Núñez, presented before the First Criminal Court of First Instance, on August 6, 1995 (dossier of appendixes to the petition, appendix 4, volume I, folios 1210 and 1211).

[37] *Cfr.* ruling issued by the First Criminal Court of First Instance, on August 6, 1996 (dossier of appendixes to the petition, appendix 4, volume I, folio 1212); complaint of the attorney Mercedes Suyapa Vasquez Coello presented before the First Criminal Court of First Instance requesting reconsideration and appeal in subsidy, of August 13, 1996 (dossier of appendixes to the petition, appendix 4, volume I, folios 1215 and 1216); and decision issued by the First Appellate Court, Tegucigalpa, Municipality of the Central District, of January 21, 1997 (dossier of appendixes to the petition, appendix 4, volume I, folios 1223 through 1226).

Secretariat of Foreign Affairs of Honduras so that the Supreme Court could issue an analysis of the "unjustified delay in justice" in the mentioned cause.[38]

79(46) On August 12, 2002, the Criminal Chamber of the Supreme Court of Justice verified that: "1. The present investigative proceedings are still in its preliminary stages, [which pursuant to legislation] [can] not [exceed] three months. 2. [That] within the proceedings ordered by the examining judge are: identification of files, appointments, the reason for the appointment and discharges of some lieutenants and agents, without having executed the requirements ordered by the authority responsible obliged to supply the information required [and that the] Judge responsible for the investigation can not let said negligence go by without being noticed [...]. 3. The levels of investigation practiced up to now […] have not been effective, since they have not been able to fulfill the objective of the preliminary stage of the process[,] which is the practice of proceedings with the purpose of proving the body of the crime, discovering its authors or participants, finding out their personality and [the] nature and amount of the damage."[39]

79(47) On January 14, 2005 once again the Public Prosecutors' Office requested that the corresponding arrest warrants be issued against David Abraham Mendoza, Marco Tulio Regalado Hernández, José Alberto Alfaro Martínez, José Antonio Martínez Arrazola, and Roxana Sierra Ramírez.[40] On February 9, 2005, more than nine years after the extrajudicial killings, the Court decided to "order the immediate capture of Messrs. José Alberto Alfaro Martínez and Víctor Hugo Vivas Lozano, for considering them responsible for having committed the crimes of Torture […] and Murder, in detriment of Orlando Álvarez Ríos, Rony Alexis Betancourth [Vásquez], Marco Antonio Servellón García, and Diomedes Obed García Sánchez and [...] the immediate capture of Mrs. Roxana Sierra Ramírez, for considering her responsible of having committed the crime of Illegal Arrest [...]."[41] The Public Prosecutors' Office appealed said decision because it ordered the capture of only some of the people accused of the deaths of the victims.[42]

79(48) On February 15, 2005 José Alberto Alfaro Martínez appeared before the Court to "present [himself] voluntarily […] since he was aware that a process was start[ed

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[38] *Cfr.* official letter of the Secretariat of the Supreme Court of Justice addressed to the First Criminal Court of First Instance, of May 21, 2002 (dossier of appendixes to the petition, appendix 4, volume II, folio 1433).

[39] *Cfr.* official letter of the Secretariat of the Supreme Court of Justice addressed to the Criminal Court of First Instance of the Judicial Section of Tegucigalpa, of August 21, 2002 (dossier of appendixes to the petition, appendix 4, volume II, folio 1433).

[40] *Cfr.* complaint of the attorney Tania Fiallos Rivera, Prosecutor of the Public Prosecutors' Office, attached to the Special Human Rights Prosecutors' Office, addressed to the Criminal Judge of First Instance, of January 14, 2005 (dossier of appendixes of evidence to facilitate adjudication of the case, folios 2317 through 2325).

[41] *Cfr.* operative ruling of the Criminal Court of First Instance of the Judicial Section of Tegucigalpa, of February 9, 2005 (dossier of appendixes of evidence to facilitate adjudication of the case, folios 2327 through 2334).

[42] *Cfr.* order of notification of the attorney Tania Fiallos Rivera, presenting an application for reconsideration and appeal in subsidy against the court's ruling of February 9, 2005, on February 16, 2005. (dossier of appendixes to the respondent's plea, folio 2359); and ruling of the Criminal Court of First Instance of the Judicial Section of Tegucigalpa, of February 17, 2005 (dossier of appendixes of evidence to facilitate adjudication of the case, folio 2363).

against him] for being considered the responsible of the commission of the crimes of MURDER AND TORTURE in detriment of Messrs. Rony Alexis Betancourt [Vásquez], Diomedes Obed García Sánchez, Marco Antonio Servellón García, and Orlando Álvarez Ríos [...],"[43] and on that same day he offered his preliminary examination statement.[44] On February 20, 2005 Mr. José Alberto Alfaro Martínez requested, within the legal term to make inquiries, that the Court declare a definitive dismissal, since the incriminating conditions necessary to issue a commitment order had disappeared.[45]

79(49) On February 21, 2005 the Court issued a commitment order against José Alberto Alfaro Martínez, it declared the preliminary proceeding closed and forwarded the proceedings to full trial.[46] On the next day, the defense attorneys of José Alberto Alfaro Martínez appealed said decision.[47] On June 22, 2005 the First Appellate Court declared the appeal presented admissible, it revoked the commitment order against Mr. José Alberto Alfaro Martínez and issued a definitive dismissal of the proceedings in his favor.[48]

79(50) On June 22, 2005 the First Appellate Court declared the appeal presented against the ruling of February 9, 2005 inadmissible (*supra* para. 79(47)), since it understood that "the arrest warrants issued at its time against some of the accused were issued by the Judge in the exercise of his powers and supposing that there were grounds to do so only with regard to the same, reason for which the decision appealed was in accordance with the law."[49] On August 2, 2005 the Public Prosecutors' Office presented an appeal of relief against this decision, which was decided on by the Supreme Court of Justice on December 14, 2005, which in application of, among others, Articles 8 and 25 of the American Convention, accepted the appeal of relief, "so that a new decision could be issue[d] [deciding the appeal

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[43] *Cfr.* brief of Alberto José Alfaro Martínez presented before the Criminal Court of First Instance, Judicial Section of Tegucigalpa, of February 15, 2005 (dossier of appendixes of evidence to facilitate adjudication of the case, folios 2344 and 2345).

[44] *Cfr.* record of the preliminary examination statement of José Alberto Alfaro Martínez given before the First Criminal Court of First Instance, on February 15, 2005 (dossier of appendixes of evidence to facilitate adjudication of the case, folios 2351 through 2355).

[45] *Cfr.* complaint of the attorneys Isis B. Linares Mendoza and Juan Pablo Aguilar Galo, addressed to the Criminal Judge of First Instance, Judicial Section of Tegucigalpa, of February 20, 2005 (dossier of appendixes of evidence to facilitate adjudication of the case, folios 2372 through 2383).

[46] *Cfr.* ruling of the Criminal Court of First Instance, of the Judicial Section of Tegucigalpa of the Department of Francisco Morazán, of February 21, 2005 (dossier of appendixes of evidence to facilitate adjudication of the case, folios 2393 through 2400).

[47] *Cfr.* order of notification of the attorney Juan Pablo Aguilar Galo and the attorney Isis B. Linares Mendoza presenting an application for reconsideration and appeal in subsidy, of February 22, 2005 (dossier of appendixes of evidence to facilitate adjudication of the case, folios 2401 through 2402), and official letter of the First Supreme Court of Appeals addressed to the Criminal Court of the Judicial Section of Tegucigalpa of the Department of Francisco Morazán, of April 14, 2005 (dossier of appendixes of evidence to facilitate adjudication of the case, folio 2412).

[48] *Cfr.* judgment of the Supreme Court of Justice, Constitutional Chamber, of December 14, 2005 (dossier of evidence to facilitate adjudication of the case, appendix A, folios 3241 through 3252).

[49] *Cfr.* ruling of the First Appellate Court, of June 22, 2005 (dossier of evidence to facilitate adjudication of the case, appendix A, folios 3229 through 3240).

presented by the Public Prosecutors' Office against the ruling of February 9, 2005] with the motives and grounds ordered by the due process."[50] (*supra* para. 79(47))

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* *

79(51) Up to the date of the present Judgment the criminal trial is still in process, the Court has decided to close the preliminary proceedings and forward the procedures to full trial, decision that is still pending an appeal (*supra* paras. 79(49) and 79(50)). Likewise, the Court has issued arrest warrants against three of the accused, Messrs. Víctor Hugo Vivas Lozano, Roxana Sierra Ramírez, and José Alberto Alfaro Martínez. Regarding the first two, said orders have not been effective. In what refers to Mr. José Alberto Alfaro Martínez, who had been in preventive detention, on the date of the present Judgment, he has been released since the case was dismissed in his favor (*supra* para. 79(49)).

I) On the victims' next of kin

79(52) The next of kin of Marco Antonio Servellón García are Reyes Servellón Santos, father, who passed away after the facts; Bricelda Aide García Lobo, mother; Marja Ibeth Castro García, sister; Pablo Servellón García, brother, and Héctor Vicente Castro García, brother.

79(53) The next of kin of Rony Alexis Betancourth Vásquez are Manases Betancourth Núñez, father; Hilda Estebana Hernández López, mother; Juan Carlos Betancourth Hernández, brother; Manaces Betancourt Aguilar, brother; Emma Aracely Betancourth Aguilar, sister; Enma Aracely Betancourth Abarca, sister; Lilian María Betancourt Álvarez, sister; Ana Luisa Vargas Soto, partner; Zara Beatris Bustillo Rivera, daughter, and Norma Estela Bustillo Rivera, mother of Zara Beatriz.

79(54) The next of kin of Orlando Álvarez Ríos are Concepción Álvarez, father, who passed away on October 15, 1982; Antonia Ríos, mother, and Dilcia Álvarez Ríos, sister.

79(55) The next of kin of Diomedes Obed García Sánchez are Diomedes Tito García Casildo, father; Andrea Sánchez Loredo, mother, who passed away on October 25, 1985; Esther Patricia García Sánchez, Jorge Moisés García Sánchez, and Fidelia Sarahí García Sánchez, siblings.

79(56) Messrs. Reyes Servellón Santos and Bricelda Aide García Lobo, the parents of Marco Antonio Servellón García; and Manases Betancourth Núñez and Hilda Estebana Hernández López, the parents of Rony Alexis Betancourth Vásquez, suffered when they found out of the ways in which their sons were arrested and kept imprisoned under an illegal arrest, submitted to torture and cruel, inhuman, and degrading treatment, and then extra judicially killed, as well as for the way in which the victims' bodies were found, in different parts of the city of Tegucigalpa, along side the street. Rony Alexis Betancourth Vásquez's mother also suffered upon recognizing her son's mortal remains, since she hoped he was safe under the State's custody.

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[50] *Cfr*. ruling of the Supreme Court of Justice, Constitutional Chamber, of December 14, 2005 (dossier of evidence to facilitate adjudication of the case, appendix A, folios 3241 through 3252).

These next of kin have been submitted to a deep suffering and anguish in detriment of their mental and moral integrity.

79(57) Dilcia Álvarez Ríos, the sister of Orlando Álvarez Ríos, has suffered as a consequence of the death of her brother, with whom she lived at the time of the facts and with who she had a close affective relationship and she suffered of anguish and pain when she saw that her brother did not come home like he had promised. On Monday September 19, 1995, she looked for her brother and made several diligences to find him. She was informed that the victim was not detained in the CORE VII, until she finally found her brother's body in the morgue. She has suffered in the search for justice she started. Likewise, Marja Ibeth Castro García, sister of Marco Antonio Servellón García, has suffered due to the arrest conditions and extrajudicial killing of her brother, when he was under the custody of state authorities, and during the proceedings she carried out to present a claim for the facts occurred.[51]

79(58) Ana Luisa Vargas Soto maintained an affectionate bond and was the partner of Rony Alexis Betancourth Vásquez.[52]

79(59) The girl Zara Beatris Bustillo Rivera is the daughter of Rony Alexis Betancourth Vásquez.

J) Costs and Expenses

79(60) Casa Alianza has incurred in a series of expenses in the domestic jurisdiction. The Center for Justice and International Law (CEJIL) and Casa Alianza have incurred in expenses related to the processing of the present case before the bodies of the Inter-American System for the Protection of Human Rights, in representation of some of the victims' next of kin.[53]

VIII
VIOLATION OF ARTICLES 4(1), 5(1), 5(2), AND 5(5), 7(1), 7(2), 7(3), 7(4), AND 7(5), AND 19, OF THE AMERICAN CONVENTION, IN RELATION WITH ARTICLE 1(1) OF THE SAME

(Right to Life, to Humane Treatment, to Personal Liberty, Rights of the Child and Obligation to Respect Rights)

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[51] *Cfr*. statement of Dilcia Álvarez Ríos given before the Criminal Peace Court of Tegucigalpa, on February 23, 1996 (dossier of appendixes to the petition, appendix 4, volume I, folios 1102 and 1103); and report of the Human Rights Inspector of the Office of Criminal Investigation, Nery Suyapa Osorio, addressed to the Main Prosecutor of the Human Rights Prosecutors' Office, Sonia Marlina Dubor de Flores, on September 17, 1995 (dossier of appendixes to the petition, appendix 4, volume I, folios 987 through 990).

[52] *Cfr*. statement offered by Ana Luisa Vargas Soto before the First Criminal Court of First Instance on March 07, 1996 (dossier of appendixes to the petition, appendix 4, volume I, folios 867 through 870), and statement given by Manases Betancourt Nuñes before the Second Criminal Peace Court on March 7, 1996 (dossier of appendixes to the petition, appendix 4, volume I, folios 1137 through 1140).

[53] *Cfr*. receipts of expenses of CEJIL (appendixes to the brief of pleadings and motions, volume II, folios 2255 through 2259, and dossier of appendixes to the brief of final arguments presented by the representatives, folios 2252 through 2254; and 2258 through 2260).

80. The Court in Chapter VI concluded that the State acknowledged its international responsibility for the violation of Articles 4(1), 5(1) and 5(2) and 7(1), 7(2), 7(3), 7(4) and 7(5) of the American Convention, in relation with Article 1(1) of said instrument, in detriment of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez, and Articles 5(5) and 19 of the Convention, in detriment of Marco Antonio Servellón García and Rony Alexis Betancourth Vásquez. Based on the aforementioned, the Court will not summarize the arguments presented by the Commission, the representatives, and the State.

Considerations of the Court

81. Article 7 of the American Convention states that:

> 1. Every person has the right to personal liberty and security.
>
> 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
>
> 3. No one shall be subject to arbitrary arrest or imprisonment.
>
> 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
>
> 5. Any person detained shall be brought promptly before a judge or other office authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
>
> [...]

82. Article 5 of the American Convention establishes that:

> 1. Every person has the right to have his physical, mental, and moral integrity respected.
>
> 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
>
> [...]
>
> 5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
>
> [...]

83. Article 4 of the Convention states that

> [e]very 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.
>
> [...]

84. Article 19 of the Convention establishes that

> [e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

85. Article 1(1) of the American Convention states that

> [t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

86. The Convention has enshrined the prohibition of an illegal or arbitrary detention or imprisonment as the main guarantee of personal liberty and security. The Court has stated, with regard to illegal arrests, "that even though […] the State has the right and obligation to guarantee its security and maintain public order, its power is not unlimited, since it has the duty, at all times, to apply procedures pursuant to Law and respectful of the fundamental rights, of all individual under its jurisdiction."[54]

87. Therefore with the purpose of maintaining public security and order, the State legislates and adopts different measures of a diverse nature to prevent and regulate the behavior of its citizens, one of which is to promote the presence of police forces in public spaces. However, the Court points out that any incorrect action of those state agents in their interaction with the persons it must protect, represents one of the main threats to the right to personal liberty, which, when violated, generates a risk of violation to other rights, such as humane treatment and, in some cases, life.

88. Article 7 of the Convention enshrines guarantees that represent limits to the exercise of authority by State agents. Those limits are applied to the instruments of state controls, one of which is the detention. Said measure shall be pursuant to the guarantees enshrined in the Convention as long as its application has an exceptional nature, it respects the principle of presumption of innocence and the principles of legality, need, and proportionality, all of which are strictly necessary in a democratic society.[55]

89. A restriction to the right to personal liberty, such as an arrest, must be carried out only due to the causes and the conditions previously established by the Political Constitutions or by the laws enacted pursuant to them (material aspect), as well as strictly subject to the procedures objectively defined in the same (formal aspect).[56] At the same time, the legislation that establishes the grounds for a restriction to personal liberty must be issued pursuant to the principles that govern

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[54] *Cfr. Case of Bulacio*. Judgment of September 18, 2003. Series C No. 100, para. 124; *Case of Juan Humberto Sánchez.* Judgment of June 7, 2003. Series C No. 99, para. 86; and *Case of Hilaire, Constantine and Benjamín et al.* Judgment of June 21, 2002. Series C No. 94, para. 101.

[55] *Cfr. Case of López Álvarez*. Judgment of February 1, 2006. Series C No. 141, para. 67; *Case of García Asto and Ramírez Rojas.* Judgment of November 25, 2005. Series C No. 137, para. 106; *and Case of Palamara Iribarne, supra* note 10, para. 197.

[56] *Cfr. Case of the Ituango Massacres, supra* note 3, para. 149; *Case of López Álvarez, supra* note 55, para. 58; and *Case of the Pueblo Bello Massacre, supra* note 7, para. 108.

the Convention, and be conducive to the effective observation of the guarantees established thereto.

90. Likewise, the Convention prohibits the arrest or imprisonment by methods that although qualified as legal, may in the practice result unreasonable or out of proportion.[57] The Court has established that in order to comply with the requirements necessary to restrict the right to personal liberty, there must be sufficient evidence to lead to a reasonable supposition of guilt of the person submitted to a proceeding and the arrest must be strictly necessary to ensure that the accused party will not impede an effective development of the investigations nor will he evade the action of justice. When ordering restrictive measures to freedom it is precise that the State justify and prove the existence, in the specific case, of those requirements demanded by the Convention.[58]

91. In this case the arrest of the victims was part of a collective and programmed arrest, in which approximately 128 people were detained, without an arrest warrant and without having been caught in the act of committing a crime, and that was carried out with the declared purpose of avoiding disturbances during the parades that would take place to celebrate the National Independence Day (*supra* para. 79(5)).

92. The Tribunal understands that a collective arrest may represent a mechanism to guarantee public security when the State has elements to prove that the actions of each of the persons affected fits into one of the causes of arrest established in its internal norms consistent with the Convention. That is, when there are elements to individualize and separate the behaviors of each of the detainees and that there is, at the same time, control of the judicial authority.

93. Therefore, a massive and programmed arrest of people without legal grounds, in which the State massively arrests people that the authority considers may represent a risk or danger to the security of others, without substantiated evidence of the commission of a crime, constitutes an illegal and arbitrary arrest. Consistent with the aforementioned, in the *Case of Bulacio* the Court established that the *razzias* are not compatible with the respect for fundamental rights, among others, the presumption of innocence, the existence of a legal arrest warrant –except in the case of a crime detected in the act- and the obligation to inform the legal guardians of all minors.[59]

94. This Tribunal considers that the fundamental principle of equality and non-discrimination belongs to the realm of *jus cogens* that, of a peremptory character, entails obligations *erga omnes* of protection that bind all States and result in effects with regard to third parties, including individuals.[60]

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[57] *Cfr. Case of López Álvarez*, *supra* note 55, para. 66; *Case of García Asto and Ramírez Rojas*, *supra* note 55, para. 105; and *Case of Palamara Iribarne, supra* note 10, para. 215.

[58] *Cfr. Case of López Álvarez*, *supra* note 55, para. 69; *Case of Palamara Iribarne, supra* note 10, para. 198; and *Case of Acosta Calderón*, *supra* note 13, para. 111.

[59] *Cfr*. *Case of Bulacio*, *supra* note 54, para. 137.

[60] *Cfr. Juridical Condition and Rights of the Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 110.

95. The Tribunal, in its *Advisory Opinion OC-18 on the Judicial Condition and Rights of Undocumented Migrants,* established that there is an indissoluble bond between the obligation to respect and guarantee human rights and the fundamental principle of equality and non-discrimination, and that it must permeate all the State's actions.[61] In that sense, the State may not act against a specific group of people, owing to reasons of gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status.[62]

96. Programmed and collective arrests, which are not well-founded on the individualization of punishable acts and that lack judicial control, are contrary to the presumption of innocence, they wrongfully coerce personal liberty and they transform preventive detention into a discriminatory mechanism, reason for which the State may not perform them under any circumstance.

97. On its part, Article 5 of the American Convention expressly acknowledges the right to humane treatment, which implies the absolute prohibition of torture and cruel, inhuman, or degrading punishments or treatments. This Tribunal has constantly considered in its jurisprudence that said prohibition is currently encompassed in the *jus cogens.*[63] The right to humane treatment may not be suspended under any circumstance.[64]

98. Article 4 of the Convention guarantees the right of every human being to not be deprived of his life arbitrarily, which includes the need that the State adopt substantive measures to prevent the violation of this right, as would be the case of all measures necessary to prevent arbitrary killings by its own security forces, as well as to prevent and punish the deprivation of life as a consequence of criminal acts carried out by individual third parties.[65]

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61 *Cfr. Juridical Condition and Rights of the Undocumented Migrants.* Advisory Opinion OC-18/03, *supra* note 60, para. 85.

62 *Cfr. Juridical Condition and Rights of the Undocumented Migrants.* Advisory Opinion OC-18/03, *supra* note 60, paras. 100 and 101.

63 *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 85*; Case of Ximenes Lopes, supra* note 3, para. 126; *Case of the Ituango Massacres, supra* note 3, para. 252; *Case of Baldeón García, supra* note 3, para. 117; *Case of García Asto and Ramírez Rojas, supra* note 55, para. 222; *Case of Fermín Ramírez*. Judgment of June 20, 2005. Series C No 126, para. 117; *Case of Caesar, supra* note 13, para. 59; *Case of Lori Berenson Mejía*. Judgment of November 25, 2004. Series C No.119, para. 100; *Case of De la Cruz Flores.* Judgment of November 18, 2004. Series C No. 115, para. 125; *Case of Tibi.* Judgment of September 7, 2004. Series C No. 114, para. 143; *Case of the Gómez Paquiyauri Brothers.* Judgment of July 8, 2004. Series C No. 110, paras. 111 and 112; *Case of Maritza Urrutia.* Judgment of November 27, 2003. Series C No. 103, paras. 89 and 92; *Case of Bámaca Velásquez*. Judgment of November 25, 2000, Series C No. 70, para. 154; and *Case of Cantoral Benavides*. Judgment of August 18, 2000. Series C No. 69, para. 95.

64 *Cfr. Case of Ximenes Lopes, supra* note 3, para. 126; *Case of the Pueblo Bello Massacre, supra* note 7*,* para. 119; and *Case of the "Juvenile Reeducation Institute".* Judgment of September 2, 2004. Series C No. 112, para. 157.

65 *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 64; *Case of Ximenes Lopes*, *supra* note 3, para.125; and *Case of the Ituango Massacres*, *supra* note 3, para. 131.

99. In the present case, the victims were detained collectively, illegally and arbitrarily, submitted to torture and cruel, inhuman, and degrading treatments during their detention. They were hit on the head with guns and chairs, accused of being thieves" and they were isolated and tied up during their detention in the CORE VII. While under state custody, and fulfilling the threats made by state agents, they were murdered with fire weapons and cutting and thrusting weapons (*supra* paras. 79(5) through 79(31)). The minor Marco Antonio Servellón García was killed with four shots from a fire weapon to his face and head. The minor Rony Alexis Betancourth Vásquez received two shots from a fire weapon to the head, and four blade wounds, three of which were located on his chest. Orlando Álvarez Ríos died as a consequence of two shots from a fire weapon and his body presented signs that he had been object of sexual violence prior to his death. Diomedes Obed García Sánchez was killed by eight shots produced by a fire weapon, besides three blade wounds, two of them made with a machete, one of which was so deep that it "almost […] cut off his head." (*supra* para. 79(31)). The extreme cruelty with which the victims were killed, depriving them of their life in a humiliating manner, the marks of physical torture present in the four bodies, and the manner in which their bodies were abandoned out in the open, were serious assaults against the right to life, to humane treatment, and personal liberty.

100. In this regard, in the statement offered by Marvin Rafael Díaz in the Second Criminal Peace Court on March 19, 1996, he stated that "lieutenant Alfaro […] said, ['']leave these separate for me[´], the four appeared dead on Sunday September 17, [1995]; and he could observe that they were tied with some rope he had, and he saw that DIOMEDES was crying[. They were] tied to a Plywood [(sic)], looking towards the wall, […]. They were nervous, because they were afraid they were going to be killed, since they had been warned and [they had been told] they belonged to the MARA OF THE [POISON] and that they were out to get them." (*supra* para. 79(7)) On her part, Krisell Mahely Amador, the girlfriend of Diomedes Obed García Sánchez, in her statement offered before the Special Human Rights Prosecutor on October 11, 1995, stated that days before his death, the victim told her "that they had already told him that they were going to kill him." (*supra* para. 79(29))

101. Likewise, this Court points out the treatment received by the underage victims. Rony Alexis Betancourth Vásquez indicated through signs to Carlos Yovanny Arguijo Hernández, who had also been arrested on that same day, that he was going to be killed, "that he was going to have his head cut off, since [Rony] took one of his hands to his neck, making him understand […] and what was what he heard him say 'if they kill me, they kill me…' since [Rony] told [him] that they were saying that he belonged to the mara of the poison." (*supra* para. 79(15)).

102. Any form of exercise of public power that violates the rights acknowledged by the Convention is illegal.[66] The Court has stated that the States respond for the acts of its agents, carried out under the protection of their official nature, and for the omissions of the same, even when they act outside the limits of their competence or in violation of their domestic legislation.[67] The States must especially supervise that

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[66] *Cfr. Case of Ximenes Lópes, supra* note 3, para. 84; *Case of the "Mapiripán Massacre"*, *supra* note 9, para. 108; and *Case of the Gómez Paquiyauri Brothers, supra* note 63, para. 72.

[67] *Cfr. Case of Ximenes Lopes*, *supra* note 3, para. 84; *Case of the Pueblo Bello Massacre*, *supra* note 7, para. 111; and *Case of the "Mapiripán Massacre", supra* note 9, para. 108.

their bodies of security, which are attributed the use of legitimate force, respect the right to life of those under its jurisdiction.[68]

103. In the present case agents of the police force, making illegal use of their authority, arrested and killed the victims. In this regard, the Court has reiterated that when dealing with the right to life, the State has the obligation to guarantee the creation of the conditions required to avoid violations of that inalienable right,[69] and that its violation is especially serious when it is produced by state agents, fact acknowledged by the State in its assent.

104. Besides the aforementioned, the Court has established, that the facts of this case occurred within the framework of a context of violence against children and youngsters in situations of social risk in Honduras (*supra* paras. 79(1), 79(2), 79(3) and 79(35)).

105. The Tribunal points out that, even though in the dossier of the present case the existence, at the time of the facts, of a systematic pattern of violations of human rights in detriment of children and youngsters in risky situation has not been proven, the context of violence within which the violations to the rights to life, humane treatment, and personal liberty occurred in this case has been proven.

106. It is necessary to point out that the State said before the Court that "since 1997 and up to this date [of presentation of the respondent's plea, on July 4, 2005], an important number of violent deaths of children has been recorded," and that the State "[…] has been doing important efforts to strengthen a policy for the protection of children and their rights in general and, specifically, to counteract the phenomenon of deaths of minors." The State acknowledges the existence of what it has called the phenomenon of violent deaths of minors, although it denies the argument that the phenomenon is the result of a policy of "social prophylaxis".

107. However, the Court has affirmed that international responsibility appears immediately with the international crime attributed to the State, and it is the consequence of any damage to human rights that may be attributed to that action, as well as the omission, of any power or body of the same.[70] International responsibility may also be attributed even in the absence of intention, and the acts that violate the Convention are the State's responsibility regardless of the fact that they are or not a consequence of a deliberate state policy.

108. The positive duty, derived from the obligation to respect and guarantee, of creating the conditions required to avoid violations to human rights in circumstances

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68 *Cfr. Case of Montero Aranguren et al.*, *supra* note 12, para. 66.

69 *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 64*; Case of Ximenes Lopes*, *supra* note 3, para. 125; *Case of the Ituango Massacres, supra* note 3, para. 129; *Case of Baldeón García, supra* note 3*,* para. 83; *Case of the Sawhoyamaxa Indigenous Community, supra* note 7*,* para*.* 151*; Case of the Pueblo Bello Masacre*, *supra* note 7, para. 120; *Case of Huilca Tecse.* Judgment of March 3, 2006. Series C No. 121, para. 65; *Case of the "Juvenile Reeducation Institute", supra* note 64, para. 156; *Case of the Gómez Paquiyauri Brothers, supra* note 63*,* para. 128*; Case of 19 Tradesmen.* Judgment of July 12, 2003. Series C No. 93, para. 153; *Case of Myrna Mack Chang*, *supra* note 9, para. 152; *Case of Juan Humberto Sánchez*, *supra* note 54, para. 110; and *Case of the "Street Children" (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 144.

70 *Cfr. Case of Ximenes Lopes*, *supra* note 3, para. 172; *Case of Baldeón García*, *supra* note 3, para. 140; and *Case of the Pueblo Bello Massacre, supra* note 7, para. 112.

such as that of the present case, in which there has been a context of violence characterized by extrajudicial killings and impunity, becomes the State's duty to stop the conditions that allow the repeated occurrence of the arbitrary deprivations of life and their lack of investigation.

109. In the present case, it has been proven that the State did not adopt the measures necessary to change the context of violence against children and youngsters, framework within which Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez were killed. This makes the State's international responsibility worse.

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110. The mentioned context was marked by the stigmatization of the youngsters as the alleged responsible parties for the increase in public insecurity in Honduras and by the identification, as young delinquents, of the children and youngsters in situations of social risk, that is, poor, in situations of vagrancy, without stable employment or that suffer from other social problems (*supra* para. 79(1)).

111. Regarding that link between poverty and violence directed to children and youngsters, the Special Rapporteur of the United Nations for Extrajudicial, Summary, or Arbitrary Killings, stated in her report of June 14, 2003 regarding Honduras, that "[e]ven though children are vulnerable and they are exposed to abuses and to crime due to lack of autonomy, juvenile delinquency can never be used to justify the killing of children by security forces in order to maintain public order."[71]

112. The Court warns that, in attention to the principle of equality and non-discrimination, the State cannot allow that its agents, nor can it promote in the society practices that reproduce the stigma that poor children and youngsters are conditioned to delinquency, or necessarily related to the increase in public insecurity. That stigmatization creates a climate propitious so that those minors in risky situations are constantly facing the threat that their lives and freedom be illegally restrained.

113. The previous is especially serious in the present case, since Marco Antonio Servellón García and Rony Alexis Betancourth Vásquez were juveniles. In *Advisory Opinion No. 17 on the Juridical Condition and Human Rights of the Child,* the Court stated that the cases in which the victims of violations to human rights are boys and girls, who also have special rights derived from their condition, and these are accompanied by specific duties of the family, society, and the State, are especially gross.[72] The Tribunal understands that the due protection of children's' rights must take into consideration the characteristics of children themselves and the need to

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[71] *Cfr*. Civil and political rights, specifically the matters related with the disappearances and summary killings. Extrajudicial, summary or arbitrary killings. Report of the Special Rapporteur, Mrs. Asma Jahangir, presented in compliance of decision 2002/36 of the Human Rights Commission. Addition. Mission to Honduras. E/CN.4/2003/3/Add.2. of June 14, 2002.

[72] *Cfr. Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 54. *Cfr.* also, *Case of the Ituango Massacres, supra* note 3, para. 244; *Case of the "Mapiripán Massacre"*, supra note 9, para. 152; and *Case of the girls Yean and Bosico*. Judgment of September 8, 2005. Series No C 130, para. 33.

foster their development, and it must offer them the conditions necessary so that the child may live and develop his abilities with full use of his potential.[73] Likewise, the Court mentioned that Article 19 of the Convention must be understood as a complementary right that the treaty established for human beings that due to their physical and emotional development require special measures of protection.[74]

114. The Tribunal in the *Case of the "Street Children" (Villagrán Morales et al.)* established that special assistance to the children deprived of their family environments, the guarantee of survival and development of the child, the right to an adequate life style, and the social reinsertion of all children victims of abandonment or exploitation should be included within the measures of protection referred to in Article 19 of the Convention.[75] The State has the duty to adopt positive measures to fully ensure effective exercise of the rights of the child.[76]

115. The then National Human Rights Commissioner, in his report titled "Special Report on the Violent Deaths of Boys, Girls, and Teenagers in Honduras" of January 21, 2002, mentioned that "since Honduras returned to a constitutional order in the year 1980, no government adopted actions or extraordinary budgets to protect and attend to the needs of the children, despite the seriousness of the situation." Regarding the violence that affects a sector of Honduras' youth, he stated that

> [the] substitution of investigation and analysis for a journalistic coverage of the matter characterized by "sensationalism" [took place], through which the "marero" was stereotyped or labeled as a "criminal", despite the fact that the numbers provided by the General Office of Criminal Investigation (DIC) confirmed that those under the age of 18 are not the main protagonists of public insecurity. Of 42 thousand claims received up to February 2000, only 5.5% of those responsible were under the age of 18. One investigation on Gangs and Juvenile Violence stated that "it is not unusual to find in the pages dedicated to accident and crime reports in the local press, chronicles dedicated to the narration of criminal and violent actions perpetrated by teenagers and young *mareros* or gang members. This wide reception that their activities have had in the local press has contributed to projecting before the public opinion an image that the young *maras* or gangs are made up of incorrigible teenagers and youngsters for who the only alternative of social prophylaxis is a life sentence or death."

116. The State has the obligation to ensure the protection of children and youngsters affected by poverty and socially alienated[77] and, especially, to avoid their social stigmatization as criminals. It is convenient to point out, as did the Court in the *Case of the "Street Children" (Villagrán Morales et al.)*, that if the States have elements to believe that the children in risky situations are affected by factors that

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[73] *Cfr. Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02, *supra* note 72, para. 56. *Cfr.* also, *Case of the Ituango Massacres*, *supra* note 3, para. 244; *Case of the "Mapiripán Massacre", supra* note 9, para. 152; and *Case of the Gómez Paquiyauri Brothers*, *supra* note 63, para. 163.

[74] Cfr. *Case of the Ituango Massacres, supra* note 3, para. 244; *Case of the "Mapiripán Massacre"*, *supra* note 9, para. 152; and *Case of the "Juvenile Reeducation Institute", supra* note 64, para. 147.

[75] *Cfr. Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 69, para. 196; and *Case of the "Street Children" (Villagrán Morales et al.)*. Reparations (Art.63(1) American Convention on Human Rights). Judgment of May 26, 2001. Series C No. 77, para. 90.

[76] *Cfr*. *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02, *supra* note 72, para. 91.

[77] *Cfr.* Health and development of teenagers within the context of the Convention of Children's' Rights, July 21, 2003, UN Document CRC/GC/2003/4.

may lead them to commit criminal acts, or it has elements to conclude that they have committed them, in specific cases, they must go to an extreme with criminal prevention measures.[78] The State must assume its special position of protector with greater care and responsibility, and it must take special measures oriented toward the principle of the child's greater interest.[79]

117. The facts of the present case occurred in reason of the victims' condition of people in situations of social risk, which proves that the State did not provide Marco Antonio Servellón García or Rony Alexis Betancourth Vásquez with an environment that would protect them from violence and abuse, nor did it allow them access to basic services and goods, in such a way that said absence without doubt deprived the minors of their possibility to emancipate, develop, and become adults that could determine their own future.

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118. The Court cannot leave unmentioned that the facts of the present case are part of a situation in which a high level of impunity prevails in criminal acts carried out both by state agents and individuals (*supra* paras. 79(2) and 79(4)), which creates a propitious field for violations like those of this case to keep on occurring.

119. The Court has established that one of the conditions to effectively guarantee the rights to life, humane treatment, and personal liberty is the compliance with the duty to investigate the violations to the same, which derive from Article 1(1) of the Convention, along with the substantive right that must be protected, or guaranteed.[80] At the light of this duty, once the state authorities become aware of the fact, they must begin a serious, impartial, and effective investigation *ex officio* and without delay.[81] This investigation must be carried out through all legal means available and oriented to the determination of the truth and the investigation, persecution, capture, prosecution, and in its case, punishment of all those responsible for the facts.[82]

120. This Tribunal has specified that the efficient determination of truth within the framework of the obligation to investigate a death that could have been the result of an extrajudicial killing, must occur as of the moment of the first proceedings with all due precision. The Court has mentioned that the Manual on the Prevention and

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[78] *Cfr. Case of the "Street Children" (Villagrán Morales et al.), supra* note 69, para. 197; and *Guidelines from the United Nations for the prevention of juvenile delinquency (Riad Guidelines).* Adopted and proclaimed by the UN General Assembly in its ruling 45/112 of December 4, 1990, Chapter III, para. 9.

[79] *Cfr. Case of the Gómez Paquiyauri Brothers, supra* note 63, paras. 124, 163 through 164, and 171; *Case of Bulacio*, *supra* note 54, paras. 126, 133, and 134; *Case of the "Street Children" (Villagrán Morales et al.), supra* note 69, paras. 146 and 195; and *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02, *supra* note 72, para. 60.

[80] *Cfr. Case of Ximenes Lopes, supra* note 3, para. 147; *Case of the Ituango Massacres, supra* note 3, para. 297; and *Case of Baldeón García, supra* note 3, para. 92.

[81] *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 79; *Case of Ximenes Lopes, supra* note 3, para. 148; and *Case of the Ituango Massacres, supra* note 3, para. 296.

[82] *Cfr. Case of Ximenes Lopes, supra* note 3, para. 148; *Case of Baldeón García, supra* note 3, para.94; and *Case of the Pueblo Bello Massacre, supra* note 9, para. 143.

Effective Investigation of Extrajudicial, Arbitrary, and Summary Killings of the United Nations must be taken into account in orienting said proceedings.[83] The state authorities that carry out an investigation must, *inter alia,* a) identify the victim; b) recover and preserve the evidentiary material related to the death; c) identify possible witnesses and obtain their statements with regard to the death that is being investigated; d) determine the cause, form, place, and time of death, as well as any procedure or practice that could have caused it, and e) distinguish between a natural death, an accidental death, suicide, and homicide. Besides, it is necessary to thoroughly investigate the crime scene, autopsies and competent professionals employing the most appropriate procedures must carefully practice analysis of the human remains.

121. The Court observes that in the case *sub judice* several proceedings were performed, but they presented important omissions, such as:

> a) the removal of the victims' bodies was done on September 17, 1995, without assuring the recollection and preservation of the crime scene. Blood samples of the victims were not taken, nor were their clothes examined. There is no evidence that the crime scene was analyzed for the presence of blood, hairs, or fibers or any type of fingerprints, nor were the bodies or objects examined to determine the existence of fingerprints. In the photographs of the bodies in the case file the existence of wounds or torture markings cannot be appreciated, and in some of the cases the photographs are only of the top part of the body. This becomes more serious in two of the proceedings regarding the removal of the bodies of Marco Antonio Servellón García and Diomenes Obed García, since the record indicates that photographs of the bodies were not taken due to lack of film for the camera;
> b) in the case of Orlando Álvarez Ríos the body appeared with signs of having been the object of sexual violence by the aggressors, however, no exam was run to prove it. The Public Prosecutor's Office in charge of the investigation did not request proceedings in this sense, and
> c) the autopsies of Marco Antonio Servellón García, Rony Alexis Betancourth Vázquez, Diomedes Obed García Sánchez, and Orlando Álvarez Ríos were included in the criminal proceedings before the First Criminal Court on June 7 and August 5, 1996. In said autopsies the cause of death of each of the victims was stated and the existence of wounds produced with fire weapons or cutting and thrusting weapons was mentioned, but they did not refer to other types of wounds or torture markings or physical violence in the bodies.

122. In what refers to other marks or injuries in the victims' bodies, in the report of claim No. 9173, issued by the Main Prosecutor of the Human Rights Public Prosecutors' Office on September 17, 1995, it indicated that "all [the bodies] had signs of torture." Despite the conclusion of said report, the prosecutors' office in charge did not request the performance of a new autopsy or of additional exams to investigate and document the torture practiced on the victims prior to their death.

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[83] *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 140; *Case of Ximenes Lopes, supra* note 3, para. 179; *Case of the Ituango Massacres, supra* note 3, para. 298; and Manual on the Prevention and Effective Investigation of Extrajudicial, Arbitrary, and Summary Killings of the United Nations, E/ST/CSDHA/.12 (1991).

123. In cases of extrajudicial killings it is essential that the States effectively investigate the deprivation of the right to life, and in its case, punish all those responsible, especially when state agents are involved, since on the contrary, it would be creating, within an environment of impunity, the conditions necessary for the repetition of this type of facts, which is contrary to the duty to respect and guarantee the right to life.[84] Besides, if the acts that violate human rights are not investigated seriously, they would, in some way, result aided by public power, which compromises the State's international responsibility.[85]

124. To determine if the obligation to protect the rights to life, humane treatment and personal liberties through a serious investigation of what has occurred, has been fully complied with, the procedures opened at an internal level destined to identifying those responsible for the facts of the case must be examined. This exam shall be made in the light of that stated in Article 25 of the American Convention and of the requirements imposed by Article 8 of the same for all proceedings, and it will be carried out in Chapter IX of the present Judgment.

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125. The previous considerations lead the Court to conclude that, for having failed in its duties of respect, prevention, and protection of the rights to life, a humane treatment, and personal liberties as a consequence of the illegal and arbitrary arrest, torture, and cruel, inhuman or degrading treatment, and the death of the victims, the State is internationally responsible for the violation of Articles 7(1), 7(2), 7(3), 7(4) and 7(5), 5(1) and 5(2), and 4(1) of the American Convention in relation to Article 1(1) of said treaty, in detriment of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez, as well as for the violation of Article 5(5) of the Convention in connection with Article 19 of that instrument, both in relation to Article 1(1) of the same treaty, in detriment of Marco Antonio Servellón García and Rony Alexis Betancourth Vásquez.

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126. The Tribunal goes on to analyze that argued by the Commission and the representatives regarding the violation of Article 5(1) and 5(2) of the American Convention, in detriment of the victims, due to the alleged anguish and suffering experimented as a consequence of the illegal arrest, torture, and extrajudicial killing of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez, as well as for the circumstances surrounding their murder, and for the treatment given to their bodies, since they were found with marks of violence and abandoned outdoors in different parts of the city of Tegucigalpa, which would have constituted for their next of kin a cruel, inhuman, or degrading treatment. Added to that, the frustration and helplessness

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[84] *Cfr. Case of Baldeón García, supra* note 3, para. 91; *Case of the Pueblo Bello Massacre*, *supra* note 7, para. 143; and *Case of Myrna Mack Chang*, *supra* note 9, para. 156.

[85] *Cfr. Case of Baldeón García, supra* note 3, para. 91; *Case of the Pueblo Bello Massacre, supra* note 7, para. 145; *Case of the "Mapiripán Massacre", supra* note 9, paras. 137 and 232.

before the lack of investigation of the facts and punishment of those responsible, eleven years after the occurrence of the facts.

127. In its assent, the State did not refer expressly to the alleged violation of Article 5 of the Convention, in detriment of the victims' next of kin.

128. This Court has mentioned, on repeated opportunities,[86] that the next of kin of the victims of violations of human rights may be, at the same time, victims. The Tribunal has considered the right to mental and moral integrity of some of the victims' next of kin violated based on the suffering they have undergone as a consequence of the specific circumstances of the violations committed against their loved ones and based on the subsequent actions or omissions of state authorities regarding the facts.

129. Having analyzed the circumstances of the case, the Court considers that the illegality and arbitrariness of the arrest of Marco Antonio Servellón García and of Rony Alexis Betancourth Vásquez, the torture and cruel, inhuman, or degrading treatment to which they were submitted, and the extreme cruelty of their extrajudicial killing, breached the right to humane treatment of Messrs. Reyes Servellón Santos and Bricelda Aide García Lobo, parents of Marco Antonio Servellón García, and of Messrs. Manases Betancourth Núñez and Hilda Estebana Hernández López, parents of Rony Alexis Betancourth Vásquez. Regarding the mother of Orlando Álvarez Ríos, Mrs. Antonia Ríos, who left Honduras since the year 1989, and who currently lives in the United States of America, this Tribunal has not found enough elements in the body of evidence of the present case to verify an infringement to her personal integrity due to the death of her son.

130. The Court observes that at the time of his death, Diomedes Obed García Sánchez lived in a welfare house for street children and the whereabouts of his next of kin were unknown, from which we can conclude that said family members had interrupted their ties with the victim, thus an infringement to their rights as a consequence of the facts of this case cannot be established. The aforementioned is reflected in the lack of location of the father and other family members of the victim throughout the domestic proceeding and during the processing of the present case before the bodies of the Inter-American system, after eleven years of the occurrence of the facts. Therefore, this Court considers that the right to humane treatment enshrined in Article 5 of the American Convention of Mr. Diomedes Tito García Casildo, father, Ester Patricia García Sánchez, Jorge Moisés García Sánchez, and Fidelia Sarahí García Sánchez, siblings of Diomedes Obed García Sánchez, was not violated.

131. On the other hand, in what refers to Mr. Concepción Álvarez, father of Orlando Álvarez Ríos, and Mrs. Andrea Sánchez Loredo, mother of Diomedes Obed García Sánchez, since they passed away prior to the occurrence of the facts of the case *sub judice*, this Tribunal will not issue a ruling regarding the alleged violation to their right to humane treatment.

132. In what refers to the sister of Orlando Álvarez Ríos, Mrs. Dilcia Álvarez Ríos, the Court considers that it is necessary to point out that the victim lived with her at

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[86] *Cfr. Case of Ximenes Lopes*, *supra* note 3, para. 156; *Case of Baldeón García*, *supra* note 3, para. 128; and *Case of Gómez Palomino*, *supra* note 7, para. 60.

the time of the facts. She has suffered due to the treatment received by her brother from state agents, for the actions she carried out to try to locate him and finally find him in the morgue, when she was sure that her brother was under State custody. Likewise, she has participated in the search for justice for the death of her brother, reason for which she has relived the circumstances in which he died. The aforementioned breached the right to humane treatment of the victim's sister.

133. Of the facts of the present case we can observe the anguish suffered by the sister of Orlando Álvarez Ríos, who in her statement offered on February 23, 1996 before the Criminal Peace Court of Tegucigalpa said the following:

> […t]hen on Sunday, [she] wait[ed] [for her brother, Orlando Álvarez Ríos]; but he never came; and then, […] she did not know anything; and she felt a great sadness […] and she arriv[ed] home at around twelve noon; and when she [saw] that [her] brother was not there; she start[ed] to feel worried; and, all day Monday, they wait[ed] for him until nighttime; and, she [thought] that maybe they would release him at the last hour, and she did not look for him and since she was sure that they had him locked up because he [had] called her telling her that he was in the Seventh Command. Then, on Tuesday, when it was noon, and she saw that he had not come home, [she] became trouble[d] and decided to go look [for him] at the Seventh Command […]. [When she returned] home, she got a feeling that [her] brother could be dead, and [she] went to the Morgue, at seven at night of that same Tuesday she went with [her] son and the Guard from her Colony; upon arriving, [her] son, who went in to see him did not take more than five minutes to identify [Orlando, whose body] was in the freezer. Then the employees of the Morgue told [her] that they had found him at kilometer 41; and she accused the authorities of the Seventh Command of the Public Security Force.

134. Similarly, in what refers to Mrs. Marja Ibeth Castro García, sister of Marco Antonio Servellón García, she has suffered due to the conditions of the arrest and extrajudicial killing of her brother, when he was under the custody of state authorities, and during the actions she carried out to denounce the facts occurred. Due to the aforementioned, this Tribunal concludes that the State breached her right to humane treatment.

135. With regard to the other siblings of the victims, that is: Pablo Servellón García and Héctor Vicente Castro García, brothers of Marco Antonio Servellón García; and Juan Carlos Betancourth Hernández, Manaces Betancourt Aguilar, Emma Aracely Betancourth Aguilar, Enma Aracely Betancourth Abarca, and Lilian María Betancourt Álvarez, siblings of Rony Alexis Betancourth Vásquez, the parties have not presented to the Tribunal evidence that lets it determine the infringement or suffering that the death of the victims could have caused them. Therefore, this Court considers that there are not sufficient evidentiary elements to conclude that the State violated Article 5 of the American Convention, in detriment of the mentioned siblings of the victims.

136. On the other hand, the Commission and the representatives have mentioned the child Zara Beatris Bustillo Rivera, who they argue is the daughter of Rony Alexis Betancourth Vásquez and Mrs. Ana Luisa Vargas Soto, who they argue was his partner at the time of the facts of the present case, as alleged victims. The Commission also included the mother of the child, Mrs. Norma Estela Bustillo Rivera, as an alleged victim.

137. This Court points out that the birth certificate of the child Zara Beatris Bustillo Rivera does not state that she is the daughter of Rony Alexis Betancourth Vásquez. However, the State did not object her existence or her relationship to the victim. Therefore, this Court considers the child Zara Beatris Bustillo Rivera as the daughter

of Rony Alexis Betancourth Vásquez. Likewise, the State did not deny the relationship between the victim and Ana Luisa Vargas Soto, reason for which this Tribunal considers that she was his partner at the time of the facts. Finally, this Tribunal has not found sufficient evidentiary elements to establish that a meaningful infringement was produced to Mrs. Norma Estela Bustillo as a consequence of the facts of the present case.

138. In what refers to the child Zara Beatris Bustillo Rivera, this Court points out that, due to her condition of a minor, the presence of her father was essential for her full development. As a consequence of the extrajudicial killing of Rony Alexis Betancourth Vásquez, she has grown up without a father figure. Regarding Ana Luisa Vargas Soto, partner of Rony Alexis Betancourth Vásquez, this Tribunal, in consideration of the violent circumstances of the arrest and extrajudicial killing of her partner, when he was under the custody of state authorities, it concludes that they have caused her suffering and pain. This Court considers that the State is responsible for the breach of the mental and moral integrity of Zara Beatris Bustillo Rivera and Ana Luisa Vargas Soto.

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139. The previous considerations lead the Court to conclude that the State is responsible for the violation of the right to humane treatment enshrined in Article 5(1) of the American Convention, in relation to Article 1(1) of said treaty, in detriment of the next of kin of Marco Antonio Servellón García, Messrs. Reyes Servellón Santos, father, Bricelda Aide García Lobo, mother, and Marja Ibeth Castro García, sister; of the next of kin of Rony Alexis Betancourth Vásquez, Messrs. Manases Betancourth Núñez, father, Hilda Estebana Hernández López, mother, Zara Beatris Bustillo Rivera, daughter, and Ana Luisa Vargas Soto, partner, and of the sister of Orlando Álvarez Ríos, Mrs. Dilcia Álvarez Ríos.

IX
VIOLATION OF ARTICLES 8(1) AND 8(2), 7(6) AND 25(1) OF THE AMERICAN CONVENTION, IN RELATION TO ARTICLE 1(1) OF THE SAME
(Right to a Fair Trial, Personal Liberty, Judicial Protection, and Obligation to Respect Rights)

140. The Court in Chapter VI concluded in light of the State's acknowledgment of its international responsibility, that it violated Articles 7(6), 8(1) and 25(1) of the American Convention, in detriment of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez, for not having guaranteed an effective protection through the writ of habeas corpus, and that the State violated Article 8(2) of the Convention for not having respected the principle of presumption of innocence, in detriment of the mentioned victims. Likewise, the Tribunal admitted the violation of Articles 8 and 25 of the Convention, in detriment of the next of kin of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez for the lack of an adequate investigation of the case. In consideration of said assent, the Court will not summarize the arguments presented by the parties. However, the Court determined with regard to Articles 8 and 25 of the American Convention that there was still controversy with regard to the non-compliance of Article 8 of the

Convention, which has led to the impunity argued by the Commission and the representatives in the present case.

Considerations of the Court

141. Article 7(6) of the American Convention states that:

> 6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.
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> [...]

142. Article 8 of the Convention states that:

> 1. Every person has the right 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 nature.
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> 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality [...] to the minimum guarantees [.]
>
> [...]

143. Article 25 of the Convention states that:

> 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his 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.
>
> [...]

144. Article 1(1) of the American Convention states that:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

145. The Commission and the representatives mentioned that “nine” years after the facts occurred, an accusation has not been presented against any suspect, and that the State has incurred in an unjustified delay in the investigations, since at the time of the presentation of the accusation in the criminal process it was still in its preliminary stages, reason for which the impunity in the present case persists. On its part, the State denied that it had not investigated the facts, but it accepted that the results produced from the same have not been up to now adequate, since “there has

still not been an adequate punishment of the perpetrators [of the] crime." It also stated that the Public Prosecutors' Office continues to make important efforts in the persecution and sanction of the perpetrators and planners of the arrest and death of the victims, which would mean "that we cannot speak of impunity in these cases, in a conclusive and definitive manner." The State did not refer expressly to the alleged unjustified delay in the investigation.

146. In the present case, the Court established that the State has failed in its duty to respect, prevent, and protect, and therefore it is responsible for the violation of the rights to life, humane treatment, and personal liberty of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez. In reason of all the above, the State has the duty to investigate the infringement of said rights as a condition for their guarantee, as can be concluded from Article 1(1) of the American Convention.

147. The States Parties to the Convention are obliged to provide effective judicial recourses to the victims of violations to human rights (Article 25), recourses that must be substantiated pursuant to the rules of the due process of law (Article 8(1)), all within the general obligation, of the same States, to guarantee the full and complete exercise of the rights acknowledged by the mentioned treaty to all persons under their jurisdiction (Article 1(1)).[87]

148. The Court has verified that a criminal process was started in the ordinary jurisdiction, in which the cases started with regard to the facts of the present case were accumulated. The Tribunal recalls that, in the light of that established in Articles 8 and 25 of the Convention, the proceeding must be developed effectively in regards to a fair trial, in a reasonable period of time, and they must provide an effective recourse to ensure the rights to access to justice, knowledge of the truth of the facts, and the reparation of the next of kin.[88]

149. In the present case the criminal process was started on March 5, 1996 and in consideration of the processing of the same an opinion was requested from the Criminal Chamber of the Supreme Court of Justice regarding the direction of the procedure. Said Chamber, in its response of August 12, 2002, stated the following:

> […]1. The present investigative proceedings are still in their preliminary stages, despite the disposition to process included in Article 174 of the Code of Criminal Procedures of 1984, in what refers to the preliminary proceedings not lasting more than one month, except in those cases in which evidence must be collected outside the national territory, but in no case will it exceed 3 months. 2. Within the proceedings ordered by the Examining judge are, identification of files, appointments, cause[s] for the appointments and discharges of some lieutenants and agents, without said requirements having been executed by the authority responsible for providing the information required; likewise it has ordered the forwarding of information on the accused parties' curriculums without the Court having received timely and precise answers to strengthen the investigation; before the inobservance of that ordered, the judge responsible for the investigation cannot let said negligence go by unnoticed, and therefore should act responsibly within the sphere of his attributions. 3. The levels of investigation practiced up to now to investigate the deaths of MARCO ANTONIO SERVELLON GARCIA, DIOMEDES OBED GARCIA, ORLANDO ALVAREZ RIOS, AND RONY ALEXIS BETANCOURT[H], have not been

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87 *Cfr. Case of Ximenes Lopes, supra* note 3, para. 175; *Case of the Ituango Massacres, supra* note 3, para. 287; and *Case of Baldeón García, supra* note 3, para. 143.

88 *Cfr. Case of Ximenes Lopes, supra* note 3, para. 171; *Case of the Ituango Massacres, supra* note 3, para. 291; and *Case of Baldeón García, supra* note 3, para. 139.

> effective, since they have not been able to fulfill the objective of the preliminary proceedings of the process […].

150. The situation mentioned by the Criminal Chamber of the Supreme Court of Justice has not changed in the eleven years after the occurrence of the facts or in the four years after having issued the mentioned opinion. In the criminal processing before the First Criminal Court of First Instance of Tegucigalpa a lower court ruling has not yet been issued, in breach of a reasonable time. This Tribunal considers, as it has stated in other cases that said delay, excessively extended, is *per se* a violation to the right to a fair trial, which has not been justified by the State.[89]

151. The above proves the lack of diligence in the impulse of procedures oriented to investigating, prosecuting, and, in its case, punishing all those responsible. The function of the judicial bodies that intervene in the proceedings does not end with providing a due process that guarantees the defense in the trial, but it must also ensure, in a reasonable period of time,[90] the right of the victim or his next of kin to know the truth of what happened, as well as the punishment of the resulting responsible parties.[91] The right to an effective judicial protection demands that the judges that direct the process avoid unnecessary delays and obstructions, which lead to impunity and frustrate the due judicial protection of human rights.[92]

152. Likewise, in the case *sub judice* the relationship of the State agents, allegedly responsible of participating in the extrajudicial killing of the victims, with the facts of the case has not been fully investigated; reason for which the corresponding criminal responsibilities for said facts has not been determined. After several requests of the Public Prosecutors' Office, on February 9, 2005 the First Criminal Court of First Instance issued arrest warrants against three of the accused, Messrs. José Alberto Alfaro Martínez, Víctor Hugo Vivas Lozano, and Roxana Sierra Ramírez, but these orders have not had any effectiveness. Among those accused, the only detainee, Mr. José Alberto Alfaro Martínez, turned himself in voluntarily. The State has not adopted specific measures to make the investigation, processing, and, in its case, the punishment of those responsible effective.

153. Taking into account the acknowledgment made by the State and the body of evidence of the present case, the tribunal finds that the lack of promptness in the investigation and the negligence of the judicial authorities in performing a serious and full investigation of the facts that would lead to their elucidation and to the prosecution of those responsible, is a gross offense to the duty to investigate and offer an effective recourse that may establish the truth of the facts, the prosecution and punishment of those responsible for them, and guarantee the access to justice for the next of kin of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez in complete

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89 *Cfr. Case of Ximenes Lopes, supra* note 3, para. 203; *Case of Baldeón García, supra* note 3, para. 153; and *Case of López Alvarez, supra* note 55, para. 128;

90 *Cfr. Case of 19 Tradesmen*, *supra* note 69, para. 188; *Case of Myrna Mack Chang*, *supra* note 9, para. 209; and *Case of Bulacio, supra* note 54, para. 114.

91 *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 55; *Case of Ximenes Lopes, supra* note 3, para. 206; and *Case of the Ituango Massacres, supra* note 3, para. 289.

92 *Cfr. Case of Myrna Mack Chang, supra* note 9, para. 210; and *Case of Bulacio, supra* note 54, para. 115.

observance of a fair trial. The investigation that is currently being carried out could leave the possible responsible parties of the facts in impunity.

154. The Court warns that the State has the obligation to fight impunity by all available legal means, since it promotes the chronicle repetition of violations to human rights and the complete defenselessness of the victims and their next of kin.[93] That obligation to fight impunity is emphasized when dealing with violations whose victims are children. The impunity in the present case is verified by the State itself who, in its "Report of the Advances in the legal and investigative procedures of deaths in children and youngsters in Honduras, of August 25, 1003" stated that "up to now, those responsible for the majority of those crimes[, murders of children under the age of 18,] have not been apprehended."

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155. The Tribunal considers that the State is responsible for the violation of the rights enshrined in Articles 8(1), 8(2), 7(6), and 25(1) of the American Convention, in relation to Article 1(1) of that treaty, in detriment of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez.

156. The Court concludes that the criminal process has not been an effective recourse to guarantee access to justice, the determination of the truth of the facts, the investigation, and, in its case, the punishment of those responsible and the reparation of the consequences of the violations. Therefore, the State is responsible for the violation of Articles 8(1) and 25(1) of the Convention in relation to Article 1(1) of that instrument, in detriment of the next of kin of Marco Antonio Servellón García, Reyes Servellón Santos, father, Bricelda Aide García Lobo, mother, and Marja Ibeth Castro García, Pablo Servellón García, and Héctor Vicente Castro García, siblings; of the next of kin of Rony Alexis Betancourth Vásquez, Manases Betancourth Núñez, father, Hilda Estebana Hernández López, mother, Zara Beatris Bustillo Rivera, daughter, Ana Luisa Vargas Soto, partner, and Juan Carlos Betancourth Hernández, Manaces Betancourt Aguilar, Emma Aracely Betancourth Aguilar, Enma Aracely Betancourth Abarca, and Lilian María Betancourt Álvarez, siblings; of the next of kin of Orlando Álvarez Ríos, Antonia Ríos, mother, and Dilcia Álvarez Ríos, sister, and of the next of kin of Diomedes Obed García Sánchez, Diomedes Tito García Casildo, father, and Esther Patricia García Sánchez, Jorge Moisés García Sánchez, and Fidelia Sarahí García Sánchez, siblings.

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157. In what refers to the next of kin of Diomedes Obed García Sánchez it should be mentioned that they were not identified in the application presented by the Commission. His parents, Messrs. Diomedes Tito García Casildo and Andrea Sánchez Loredo, were included in the list of next of kin presented by the representatives in their brief of pleadings and motions. On June 14th and July 24th, 2006 the representatives indicated to the Tribunal that "after ten years of a difficult search"

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[93] *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 137; *Case of the Ituango Massacres, supra* note 3, para. 299; and *Case of Baldeón García, supra* note 3, para. 168.

they had been able to locate the following family members of Diomedes: Diomedes Tito García, father, Ester Patricia García Sánchez, Jorge Moisés García Sánchez, and Fidelia Sarahí García Sánchez, siblings, and Lidia Sánchez Loredo and Betania García Casildo, aunts. Besides, they informed that Mrs. Andrea Sánchez Loredo, mother of the victim, had passed away in the year 1985. They enclosed the birth certificates of the parents and siblings, and the death certificate of the victim's mother. Prior to that finding and during the processing of the case before the Inter-American system, both the Commission and the representatives had stated that they had not been able to "locate [the parents of Diomedes], since the youngster did not have any type of relationship with them and at the time of his killing he lived in a welfare house for minors in street situations […]".

158. The jurisprudence of this Tribunal, in what refers to the determination of who the victims are, has been ample and adjusted to the circumstances of the case. The alleged victims must be identified in the application and in the report of merits of the Commission issued pursuant to Article 50 of the Convention. Therefore, pursuant to Article 33(1) of the Rules of Procedure of the Court, it corresponds to the Commission, and not to this Tribunal, to identify with precision, and in the due procedural opportunity, the alleged victims in a case before the Court.[94] However, in its defect, on some occasions the Court has considered as victims people that were not argued as such in the application, as long as the right to defense of the parties has been respected and that the alleged victims are related to the facts described in the application and with the evidence presented to the Court.[95]

159. In this regard, since the father of Diomedes Obed García Sánchez had been included in the brief of pleadings and motions, and that subsequently the representatives proved the existence of Ester Patricia García Sánchez, Jorge Moisés García Sánchez, and Fidelia Sarahí García Sánchez and of their corresponding bonds or relationships with Diomedes Obed García Sánchez, this Court, in consideration of the fact that their lack of inclusion was due to a difficulty in finding them, and that their location was only possible after the presentation of the application and the brief of pleadings and motions, it considers said family members as alleged victims and it ruled a violation of Articles 8 and 25 of the Convention in their detriment (*supra* para. 156). The parties were granted their right to a defense by forwarding them the information provided by the representatives and no observation was received in this regard.

X
REPARATIONS
APPLICATION OF ARTICLE 63(1)
OBLIGATION TO REPAIR

160. Pursuant to the analysis made in the aforementioned chapters, the Court has declared, based on the State's partial acknowledgment of responsibility, and on the facts of the case and the evidence presented before this Tribunal, that the State is responsible for the violation of the rights enshrined in Articles 4(1), 5(1), 5(2), 5(5), 7(1), 7(2), 7(3), 7(4), 7(5), 7(6), 8(1), 8(2), 19, and 25(1) of the American Convention, and for the non-compliance of the obligations derived from Article 1(1)

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94 *Cfr. Case of the Ituango Massacres*, *supra* note 3, para. 98.

95 *Cfr. Case of the Ituango Massacres*, *supra* note 3, para. 91; and *Case of Acevedo Jaramillo et al.* Judgment of February 7, 2006. Series C No. 144, para. 227.

of the same international instrument (*supra* paras. 125, 139, 155, and 156). The Court has established, on several occasions, that all violation of an international obligation that has produced damage involves the duty to adequately repair it.[96] To this effect, Article 63(1) of the American Convention states that:

> [i]f the Court finds that there has been a violation of a right or freedom protected by [this] Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

161. As previously stated by the Court, Article 63(1) of the American Convention constitutes a rule of customary law that enshrines one of the fundamental principles in contemporary international law on state responsibility. Thus, when an illicit act is imputed to the State, its international responsibility arises, together with the subsequent duty of reparation and to put an end to the consequences of said violation.[97] Said international responsibility is different to the responsibility in domestic legislation.[98]

162. The reparation of the damage caused by a violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum),* which consists in restoring the situation that existed before the violation occurred. When this is not possible, the international court will determine a series of measures to guarantee the rights violated, repair the consequences caused by the infractions, and establish payment of an indemnity as compensation for the harm caused[99] or other means of satisfaction. The obligation to repair, regulated in all its aspects (scope, nature, modalities, and determination of the beneficiaries) by International Law, may not be modified or ignored by the State obliged, by invoking stipulations of its domestic law.[100]

163. Reparations, as indicated by the term itself, consist in those measures necessary to make the effects of the committed violations disappear. Their nature and amount depend on the harm caused at both material and moral levels. Reparations cannot entail either enrichment or impoverishment of the victim or his successors.[101]

164. Pursuant to the evidentiary elements collected during the process and in the light of the aforementioned criteria, the Court proceeds to analyze the demands

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96 *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 115; *Case of Ximenes Lopes, supra* note 3, para. 207; and *Case of the Ituango Massacres, supra* note 3, para. 345.

97 *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 116; *Case of Ximenes Lopes, supra* note 3, para. 208; and *Case of the Ituango Massacres, supra* note 3, para. 346.

98 *Cfr. Case of Ximenes Lopes, supra* note 3, para. 208; *Case of the Ituango Massacres, supra* note 3, para. 365; and *Case of the "Mapiripán Massacre", supra* note 9, para. 211.

99 *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 117; *Case of Ximenes Lopes, supra* note 3 para. 209; and *Case of the Ituango Massacres, supra* note 3, para. 347.

100 *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 117; *Case of Ximenes Lopes, supra* note 3, para. 209; and *Case of the Ituango Massacres, supra* note 3, para. 347.

101 *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 118; *Case of Ximenes Lopes, supra* note 3, para. 210; and *Case of the Ituango Massacres, supra* note 3, para. 348.

presented by the Commission and by the representatives and the State's consideration regarding the reparations in order to determine, first of all, who the beneficiaries of the reparations are, in order to later order the measures of reparation of the material and moral damages, the measures of satisfaction and non-repetition and, finally, that regarding costs and expenses.

165. The Court goes on now to summarize the arguments of the Inter-American Commission, the representatives, and the State regarding the reparations.

Arguments of the Commission:

166. The Commission stated, *inter alia*, the following:

a) Beneficiaries

The right to reparation in the terms of Article 63(1) of the convention vests in the victim Marco Antonio Servellón García and his next of kin, specifically: Reyes Servellón Santos, father; Bricelda Aide García Lobo, mother; Marja Ibeth Castro García, Pablo Servellón García, and Héctor Vicente Castro García, siblings; the victim Rony Alexis Betancourth Vásquez and his next of kin, specifically: Manases Betancourth Núñez, father; Hilda Estebana Hernández López, mother; Juan Carlos Betancourth Hernández, Manaces Betancourt Aguilar, Emma Aracely Betancourth Aguilar, Enma Aracely Betancourth Abarca, and Lilian María Betancourt Álvarez siblings; Ana Luisa Vargas Soto, partner; Norma Estela Bustillo Rivera, mother of his daughter, and Zara Beatris Bustillo Rivera, daughter; the victim Orlando Álvarez Ríos and his next of kin, specifically: Concepción Álvarez, father; Antonia Ríos, mother, and Dilcia Álvarez Ríos, sister. On the date of the presentation of the application the Commission did not identify the beneficiaries of the reparations due to Diomedes Obed García Sánchez.

b) Pecuniary damage

It requested that the Court determine that the victims receive fair and prompt reparation for the violations established in virtue of the pecuniary damages caused, taking into account international standards.

c) Non-pecuniary damage

In consideration of the suffering undergone by the victims' next of kin due to the lack of a diligent investigation of the facts and the corresponding punishment of those responsible, among other damages, it requested that the Court set in equity a compensatory amount for that concept.

d) Other forms of reparation

It requested that the Court order the State to:

i) identify, prosecute, and criminally punish the perpetrators and planners of the arrests, tortures, and subsequent extrajudicial killings of the victims;

ii) make a public acknowledgment of its international responsibility and adopt administrative measures or of another nature tending to remove the State agents that result involved in the violations;

iii) identify the authors of the violations and their duties within the administration, which must be done through the study and publishing of the flow charts that existed in the institutions where the violations were executed;

iv) "advance in its investigation programs on the conditions of children and youngsters, in relation with the compliance of their rights and in the design of a national policy for the prevention and comprehensive protection of children, with the opinion or participation of citizens and institutions;"

v) "advance in its policy for the promotion and protection of children's human rights, including the diffusion of the rights of children and the special duty of protection that must be offered by state authorities and society in general regarding said group;"

vi) implement an effective and impartial system for the supervision of police actions and reinforce the actions of the Inter-Institutional Commission for the Protection of Physical and Moral Integrity of Children created in the year 2002 through Executive Decree PCM-006-2002 in which organizations and members of the civil society participate, and

vii) implement permanent programs for the formation of police personnel offering training on international standards in matters of prohibition of torture, illegal or arbitrary arrests, and the principles related to the use of force and fire weapons, as well as on the treatment that must be given to children, in light of the special protection established in the instruments that form part of the international *corpus juris* in this subject.

e) Costs and Expenses

It requested the payment of costs and expenses incurred in by the victims and their next of kin in the processing of the case at a domestic level, as well as those originated from the processing of the case before the Inter-American system.

Arguments of the representatives:

167. The representatives stated, *inter alia,* the following:

a) Beneficiaries

The victims are Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez, and the reparations that correspond to them shall be transmitted to their successors. Likewise their next of kin shall also be considered beneficiaries of the reparations ordered by the Court. The next of kin of Marco Antonio Servellón García are: Reyes Servellón Santos, father; Bricelda Aide García Lobo, mother; Marja Ibeth Castro García, Pablo Servellón García, and Héctor Vicente Castro García, siblings. The next of kin of Rony Alexis Betancourth

Vásquez are: Manases Betancourth Núñez, father; Hilda Estebana Hernández López, mother; Juan Carlos Betancourth Hernández, Manaces Betancourt Aguilar, Emma Aracely Betancourth Aguilar, Enma Aracely Betancourth Abarca, and Lilian María Betancourt Álvarez, siblings; Ana Luisa Vargas Soto, partner, and Zara Beatris Bustillo Rivera, daughter, represented by her mother Norma Estela Bustillo Rivera. The next of kin of Orlando Álvarez Ríos are: Concepción Álvarez, father; Antonia Ríos, mother, and Dilcia Álvarez Ríos, sister. The next of kin of Diomedes Obed García Sánchez are: Diomedes Tito García Casildo, father, and Andrea Sánchez Loredo, mother.

b) Pecuniary damage

i) Marco Antonio Servellón García was 16 years old at the time of his death and he sold lottery and went to night school and the Centroamérica West School. Given his occupation it is difficult to estimate his income, taking as a base the value of a minimum wage of 18.10 lempiras per day in the area of Tegucigalpa, pursuant to the decree of minimum wages corresponding to the economic activity called "Communal, Social, and Personal Services", the Honduran labor legislation that contemplates two minimum monthly wages per year as a measure of social compensation, that life expectancy for men was 65.6 in the year 1995 and minus 25% for expenses, the representatives requested the amount of US$28,881.90 (twenty eight thousand eight hundred and eighty one dollars of the United States of America with ninety cents) in the concept of lost earnings;

ii) Rony Alexis Betancourth Vásquez was 17 years old at the time of his death and he worked as a welder. Taking as a base the value of a minimum wage of 18.10 lempiras per day in the area of Tegucigalpa, pursuant to the decree of minimum wages corresponding to the economic activity called "Communal, Social, and Personal Services", the Honduran labor legislation that contemplates two minimum monthly wages per year as a measure of social compensation, that life expectancy for men was 65.6 in the year 1995 and minus 25% for expenses, the representatives requested the amount of US$28.299,62 (twenty eight thousand two hundred and ninety nine dollars of the United States of America with sixty two cents) in the concept of lost earnings;

iii) Diomedes Obed García Sánchez was 19 years old at the time of his death and we do not have enough information regarding his income. Given the aforementioned, it requested that the presumption of minimum wage be used to calculate lost wages. Therefore, they indicated that taking as a base the value of a minimum wage of 18.10 lempiras per day in the area of Tegucigalpa, pursuant to the decree of minimum wages corresponding to the economic activity called "Communal, Social, and Personal Services", the Honduran labor legislation that contemplates two minimum monthly wages per year as a measure of social compensation, that life expectancy for men was 65.6 in the year 1995 and subtracting 25% for expenses, the representatives requested the amount of US$27,135.03 (twenty seven thousand one hundred and thirty five dollars of the United States of America with three cents) in the concept of lost wages;

iv) Orlando Álvarez Ríos died at the age of 32 and he was an industrial expert in general mechanics. He also worked as a carpenter in construction

work and worked on weekends. The representatives considered that due to the victim's technical specialization, the minimum wage should not be assigned to him when estimating lost wages, but that they did not know the amount he perceived as salary. Therefore, they indicated that taking into account the value of a salary of 25 lempiras per day, the Honduran labor legislation that contemplates two minimum monthly wages per year as a measure of social compensation, that life expectancy for men was 65.6 in the year 1995 and subtracting 25% for expenses, the representatives requested the amount of US$27,023.15 (twenty seven thousand and twenty three dollars of the United States of America with fifteen cents) in the concept of lost wages, and

v) the next of kin incurred in expenses regarding the vigil and burial of the alleged victims, and due to the time that has gone by they do not have the receipts for said expenses, reason for which they requested that the Court set in equity the amount of those damages.

c) Non-pecuniary damages

i) the vulnerability of the victims regarding state agents, the way in which they were arrested, the threats and tortures they were subject to, their emotional and physical suffering, and the way in which they were killed must be taken into consideration when estimating a compensation for "non-pecuniary damages". Likewise, the violation to the victims' life project must be considered when estimating the "non-pecuniary damages";

ii) they requested that the Court set the amount of US$150,000.00 (one hundred and fifty thousand dollars of the United States of America) in the cases of Orlando Álvarez Ríos and Diomedes Obed García Sánchez to compensate the suffering lived. Due to their conditions of minors, they requested the amount of US$175,000.00 (one hundred and seventy five thousand dollars of the United States of America) for Marco Antonio Servellón García and Rony Alexis Betancourth Vásquez, and

iii) that the next of kin are also victims and that among the facts that must be analyzed by the Court are that the mother of Marco Antonio Servellón García was not allowed to see her son while he was detained; that the mother of Rony Alexis Betancourt Vásquez "thought that he was safe because he was in State custody" and that his partner was not allowed to see him, despite the fact that she waited all day outside the police office; and Orlando Álvarez Ríos informed his sister that he would be released, which did not happen. Likewise, the mental state of the next of kin was altered by the subsequent knowledge of the arbitrary arrest, the threats, the physical and physcological torture, and the killing of their loved ones, whose bodies were left in different parts of Tegucigalpa. The lack of an exhaustive investigation of the facts caused feelings of helplessness and uncertainty in the victims' next of kin, situation that worsened the "non-pecuniary damages" suffered. Due to the aforementioned, they requested that the court set in equity a compensatory amount in their favor.

d) Other forms of reparation

They requested that the Court order that the State:

i) investigate and determine the material and intellectual responsibilities for the facts and guarantee that those responsible comply effectively with the punishment imposed upon them, and punish the public officials and individuals that have obstructed, put off, or delayed the investigation of the facts;

ii) hold a public act in which the State acknowledges its international responsibility for the violation of the rights of the victims and their next of kin, in which the highest state leader must participate;

iii) designate one day of the year and issue postal stamps to commemorate the boys, girls, and youngsters that have been victims of violence, which must indicate the year 1995, as non-pecuniary compensation for the next of kin of the victims;

iv) strengthen the Special Unit for the Investigation of the Deaths of Minors, the Human Rights Public Prosecutors' Office, and the Inter-institutional Commission for the Protection of Children's Physical and Moral Integrity;

v) establish programs directed to the authorities in charge of public security and the fight against violence, and to social communicators, according to the standards of international instruments; assign specific resources for its design and implementation and ensure the participation of civil society;

vi) adopt programs tending to the comprehensive attention of children and the prevention of violence, so that the State may: a) adopt, in consultation with civil society, a short, medium, and long term policy for the attention of children and teenagers in conflict with the law and in a street situation, pursuant to the standards of international instruments on the subject; b) seek the strengthening of the task of non-governmental organizations dedicated to the assistance of children, through the granting of resources and facilities in order to fulfill their tasks; c) establish a school of technical education named after the victims of the case, for young offenders that wish to be reinserted in a social and working life, which should offer a program of complete scholarships, and d) establish in its detention centers for minors and adults training programs that tend to make their social and work reinsertion easier;

vii) publish, for a single time, the parts corresponding to the facts and operative paragraphs of the Judgment of the Court in the main means of communication of national circulation;

viii) implement a registry of detainees that permits a control of the legality of the arrests by the next of kin and protection organizations, and

ix) prohibit razzias or collective arrests through the adoption of a specific legislation.

e) Costs and Expenses

The representatives stated that

i) Casa Alianza Honduras promoted the judicial proceedings at a domestic level and incurred in expenses related with the investigation, mail, telephone, and transfers estimated in the amount of US$27,145.44 (twenty seven thousand one hundred and forty five dollars with forty four cents). Since they have not been able to present the receipts corresponding to those expenses, the representatives asked the Court to set the amount in equity and order the State the reimbursement of the same, and

ii) CEJIL has acted as a representative of the victims before the Inter-American system for which it has incurred in expenses that include trips, hotel payments, communication expenses, photocopies, stationery, and shipments. In this regard, it requested the amount of US$10,213.97 (ten thousand two hundred and thirteen dollars of the United States of America with ninety seven cents). It also requested that, in the corresponding procedural stage, they be given the opportunity to present updated numbers and receipts regarding the expenses in which it will incur during the international process.

Arguments of the State

168. The State declared, *inter alia*, the following:

a) Beneficiaries

It did not refer expressly to the persons entitled to reparations. However, the State acknowledged to the next of kin of the victims their right to fair and prompt reparations.

b) Pecuniary and non-pecuniary damages

The State acknowledged the right of the next of kin of the victims to fair and prompt reparations, which include the measures of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. The compensation must be given in relation to a calculable damage for the violations of human rights.

c) Other forms of reparation:

The State mentioned that:

i) the Public Prosecutors' Office of Honduras continues making efforts in the prosecution and punishment of the perpetrators and planners of the case; since March 4, 1996 it has followed a criminal proceeding before the First Criminal Court of First Instance of Tegucigalpa under registry No.224-96 regarding the case, and an arrest warrant was issued against Víctor Hugo Vivas Lozano for being considered one of the authors of the crimes committed against the victims. The criminal action derived from the facts has not expired and the Commission, in its Report No. 74/04, spread upon the record that the Human Rights Inspector appointed to the case and the Public Prosecutors' Office "did a good job with the investigation of the facts";

ii) it accepts to make a public acknowledgment of its responsibility in the terms agreed upon and promises to invoke the corresponding administrative responsibilities;

iii) it promises to inform of the location, within the Administration, of those responsible for the facts occurred, once the courts have delimited their participation and have determined their guilt in an unappealable and definitive manner;

iv) it prepared the "National Plan for the Attention of Children and Teenagers 2002-2010", which seeks to act as a framework document for public policies for Honduras. It created the IHNFA, whose law grants it the attribution to "prepare, promote, execute, and supervise, in coordination with the public sector and the private sector, the policies for the prevention and comprehensive protection of children." The Interinstitutional Commission for the Protection of the Physical and Moral Integrity of Children is "a consulting entity for the Executive Power, in all that related to the protection of the integrity" of children. Among the efforts oriented to the prevention and comprehensive protection of children and their rights, it has created different bodies to face the main matters related to childhood, such as the Commission for the Gradual and Progressive Eradication of Child Labor; The Support Committee for the Commission of Children and Families of the National Congress; the Project "Pact for Childhood"; the Municipal Ombudsman for Childhood; the Permanent Interinstitutional Civic Committee; the Interinstitutional Committee of support for Children who have been Orphaned and are Vulnerable due to AIDS, as well as the reform to the IHNFA and the creation of the program Municipalities Friendly to Children;

v) it created a body of internal control in the Secretariat of Security called "Unit of Internal Affairs", whose function is to investigate the crimes or infractions committed by any member of the police in a preventive manner. As a result, the documentation of these investigations has been forwarded to the Public Prosecutors' Office and criminal accusations of different order have been presented. The National Council of Internal Security (CONSAIN) was created with duties of supervision, control, follow-up, and evaluation of the system of public security, of police activities, and of the actions of the members of the National Police Force, and it has the participation of different sectors. Regarding the Interinstitutional Commission for the Protection of the Physical and Moral Integrity of Children, the State promises to give this important consulting entity of the Executive Power continuity, and include in its sessions and activities all those organizations and individuals that may collaborate. It also created the Special Unit for the Investigation of the Deaths of Minors that supervises the actions of police officers, proceeding with the investigation and processing of the members involved, and

vi) it included the subjects of human rights, police ethics, and general ethics within the academic program of the University Program of Police Sciences, as of the police reform made.

e) Costs and Expenses

The State did not refer expressly to the costs and expenses.

Considerations of the Court

A) BENEFICIARIES

169. The Court considers Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez as the "injured parties" in their nature of victims of the violations of the rights enshrined in Articles 4(1), 5(1) and 5(2), 7(1), 7(2), 7(3), 7(4), 7(5) and 7(6), 8(1) and 8(2) and 25(1) of the American Convention, in relation to Article 1(1) of the same instrument, and in the case of the underage victims also for the violation of the rights enshrined in Articles 5(5) and 19 of the American Convention, in relation to Article 1(1) of said treaty, reason for which they will be entitled to the reparations set by the Tribunal for pecuniary and non-pecuniary damages.

170. Some of the victims' next of kin will be entitled to the reparations set by the Tribunal for pecuniary and non-pecuniary damages, in their own nature of victims of the violations to the Convention determined by this Court, as well as of those reparations set by the Court in their nature of successors of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez.

171. The victims' next of kin indicated herein shall also be entitled to the reparations that the Tribunal will set in their nature of successors as a consequence of the violations committed in detriment of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez, which shall be distributed as follows:

a) in the case of the next of kin of Marco Antonio Servellón García, the corresponding compensation shall be distributed in equal parts between Mr. Reyes Servellón Santos, his father, and Mrs. Bricelda Aide García Lobo, his mother. In reason of the death of Mr. Reyes Servellón Santos, the part that corresponded to him will be added to that of his widow Bricelda Aide García Lobo;

b) in the case of the next of kin of Rony Alexis Betancourth Vásquez, the corresponding compensation must be distributed in equal parts between Manases Betancourth Núñez, his father; Hilda Estebana Hernández López, his mother, Zara Beatris Bustillo Rivera, his daughter, and Ana Luisa Vargas Soto, his partner;

c) in the case of the next of kin of Orlando Álvarez Ríos, fifty per cent (50%) of the corresponding compensation shall be distributed in equal parts between Mr. Concepción Álvarez, his father, and Antonia Ríos, his mother. In reason of the death of Mr. Álvarez, the part that corresponded to him shall be added to that of his widow Antonia Ríos. The other fifty per cent (50%) shall be delivered to Mrs. Dilcia Álvarez Ríos, his sister, and

d) in the case of Diomedes Obed García Sánchez, one hundred per cent (100%) of the corresponding compensation shall be distributed in equal parts between Mr. Diomedes Tito García Casildo, his father; Esther Patricia García Sánchez, sister; Jorge Moisés García Sánchez, brother, and Fidelia Sarahí García Sánchez, sister.

172. In the event that the next of kin entitled to the compensations determined in the present Judgment were to pass away prior to the delivery of the corresponding compensation, the amount that would have corresponded to them will be distributed pursuant to domestic legislation.[102] In relation to Mrs. Fidelia Sarahí García Sánchez, and in consideration of the fact that, as was informed by the representatives, she is confined in a S.O.S. Aldea, since as a child she suffered an accident that caused her to have brain damage, the amount that corresponds to her, shall be handed over to those who exercise her ward or representation pursuant to the stipulations of domestic legislation.

B) Pecuniary Damage

173. This Court enters to determine the pecuniary damage, which entails the loss or detriment of the income of the victims and, in its case, of their next of kin, and the expenses incurred in as a consequence of the facts in the case *sub judice*[103]. In this regard, it will set a compensatory amount that seeks to compensate the material consequences of the violations declared in the present Judgment. To decide on the pecuniary damage, the body of evidence, the jurisprudence of the Tribunal itself, and the arguments of the parties will be taken into consideration.

174. With regard to the loss of income of the youngsters Marco Antonio Servellón García and Rony Alexis Betancourth Vásquez, the Court observes that there is no true fact that lets it establish the activity or profession that said youngsters would develop in the future. This item must be estimated as of a true detriment with enough substantiation to determine its probable realization.[104] In the circumstances of the present case there is not enough evidence to determine the income that was not perceived by them. Therefore, the Court will determine the pecuniary damage pursuant to the principle of equality.

175. In relation to Diomedes Obed García Sánchez there was not a lot of information on his income. Regarding Orlando Álvarez Ríos, the representatives have arguments that he was an industrial expert in general mechanics and worked in construction; however, there are no suitable receipts in the file to determine with exactness the income he was perceiving at the time of the facts. Therefore, the Court will also set the pecuniary damage that corresponds to them pursuant to the principle of equality.

176. In reason of the aforementioned, the Court sets in equity the amount of US$10,000.00 (ten thousand dollars of the United States of America) for Rony Alexis Betancourth Vásquez; the amount of US$10,000.00 (ten thousand dollars of the United States of America) for Diomedes Obed García Sánchez, and the amount of

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[102] *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 124; *Case of Ximenes Lopes, supra* note 3, para. 219; and *Case of Baldeón García, supra* note 3, para. 192

[103] *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 126; *Case of Ximenes Lopes, supra* note 3, para. 220; and *Case of Baldeón García, supra* note 3, para. 183.

[104] *Cfr. Case of the "Juvenile Reeducation Institute"*, *supra* note 64, para. 288; Case of *Molina Theissen.* Reparations. Judgment of July 3, 2004. Series C, No. 108 , para. 57; and *Case of Bulacio*, *supra* note 54, para. 84.

US$10,000.00 (ten thousand dollars of the United States of America) for Orlando Álvarez Ríos, in the concept of loss of income. The compensations previously set must be delivered to the victims' next of kin, pursuant to that stated in paragraphs 171 and 172 of this Judgment.

177. Having analyzed the information received by the parties, the facts of the case, and its jurisprudence, the Court observes that despite that the receipts of expenses were not presented, it can be assumed that the next of kin of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, and Orlando Álvarez Ríos incurred in different burial expenses due to their deaths, which is pursuant with the Tribunal's constant jurisprudence.[105] Therefore, the Court considers is appropriate to set, in equity, the amount of US$1,500.00 (one thousand five hundred dollars of the United States of America) as compensation for the concept of consequential damages, for each of the victims. Said amount must be delivered to each of the following persons: Bricelda Aide García Lobo, Hilda Estebana Hernández López, and Dilcia Álvarez Ríos, respectively.

178. In what refers to Diomedes Obed García Sánchez, pursuant to that stated *(supra* para. 79(24)), at the time of his death he resided in a "room at a welfare house for minors in street situations, administered by Mr. Carlos Jorge Mahomar Marzuca", from which it can be concluded that his next of kin did not incur in any expense due to his death, reason for which this Court considers that it should dismiss this aspect with regard to him.

C) Non-Pecuniary Damage

179. Non-pecuniary damages may include suffering and affliction, detriment to very significant personal values, as well as non-pecuniary alterations in the conditions of existence of a victim. Since it is not possible to assign a precise monetary equivalent to non-pecuniary damages, for the purposes of a comprehensive reparation to the victims, it can only be the object of compensation in two forms. First, through payment of an amount of money or delivery of goods or services that can be estimated in monetary terms, which the Tribunal will establish through reasonable application of judicial discretion and equity. And, second, through acts or works which are public in their scope or effects, which among other effects have that of acknowledging the victim's dignity and avoiding the repetition of the violations.[106]

180. International jurisprudence has repeatedly established that the judgment constitutes, *per se,* a form of reparation.[107] In the case *sub judice,* in consideration of the suffering caused to Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez, and that also caused suffering to some of their next of kin, the change in their conditions of existence, and other consequences of a non-pecuniary nature, the Court considers it

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[105] *Cfr. Case of Ximenes Lopes, supra* note 3, para. 226; and *Case of the Gómez Paquiyauri Brothers, supra* note 63, para. 207.

[106] *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 130; *Case of Ximenes Lopes, supra* note 3, para. 227; and *Case of the Ituango Massacres, supra* note 3, para. 383.

[107] *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 131; *Case of Ximenes Lopes, supra* note 3, para. 236; and *Case of the Ituango Massacres, supra* note 3, para. 387.

convenient to determine payment of a compensation, set with equity, for non-pecuniary damages.

181. This Tribunal acknowledges that a non-pecuniary damage has been caused to Reyes Servellón Santos, Bricelda Aide García Lobo, Marja Ibeth Castro García, Manases Betancourth Núñez, Hilda Estebana Hernández López, Ana Luisa Vargas Soto, Zara Beatris Bustillo Rivera, and Dilcia Álvarez Ríos.

182. In consideration of the different aspects of the damage argued by the Commission and the representatives, regarding Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez, the Court takes into consideration, for the determination of the compensation for the concept of non-pecuniary damage, the suffering of the victims upon being illegally and arbitrarily arrested, that their rights to an effective recourse were not respected during their confinement, that they were submitted to torture, cruel, inhuman, or degrading treatments, and they were later extra judicially killed, situation that was aggravated by the context in which the facts occurred. Besides, this Court takes into consideration the particularly traumatic circumstances of their death, which is made worse in relation to the two underage victims, Marco Antonio Servellón García and Rony Alexis Betancourth Vásquez *(supra* paras. 79(8) through 79(13) and 79(14) through 79(18)), since it is presumed that the suffering caused by the facts of the case assumed characteristics of a special intensity with regard to said minors.[108]

183. Similarly, in what refers to Reyes Servellón Santos, Bricelda Aide García Lobo, and Marja Ibeth Castro García, next of kin of Marco Antonio Servellón García; Manases Betancourth Núñez, Hilda Estebana Hernández López, Zara Beatris Bustillo Rivera, and Ana Luisa Vargas Soto, next of kin of Rony Alexis Betancourth Vásquez, and Dilcia Álvarez Ríos, sister of Orlando Álvarez Ríos, the Tribunal, for the determination of the compensation for non-pecuniary damages, considers the suffering caused to these with the facts related to the arrest, torture, cruel, inhuman, and degrading treatment, and the extrajudicial killing of their loved ones.

184. In consideration of the aforementioned, the Court considers it convenient to determine payment of a compensation, set in equity, for non-pecuniary damages in the following terms:

> a) for Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez, the Court sets the amount of US$25,000.00 (twenty five thousand dollars of the United States of America) for each of them;
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> b) for Marco Antonio Servellón García and Rony Alexis Betancourth Vásquez, who were underage at the time of the facts, this Court sets an additional amount of US$5,000.00 (five thousand dollars of the United States of America) for each of them. Therefore, the compensation for damages referred to in the previous paragraph, will be added to the aforementioned amount;

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[108] *Cfr. Case of the Ituango Massacres, supra* note 3, para. 390(b); and *Case of the Pueblo Bello Massacre, supra* note 7, para. 258(b).

c) for Reyes Servellón Santos and Bricelda Aide García Lobo, parents of Marco Antonio Servellón García; Manases Betancourth Núñez and Hilda Estebana Hernández López, parents of Rony Alexis Betancourth Vásquez, the Court sets the amount of US$12,500.00 (twelve thousand five hundred dollars of the United States of America) for each of them;

d) for Dilcia Álvarez Ríos, the Court sets the amount of US$10,000.00 (ten thousand dollars of the United States of America);

e) for Marja Ibeth Castro García, the Court sets the amount of US$5,000.00 (five thousand dollars of the United States of America);

f) for Zara Beatris Bustillo Rivera, the Court sets the amount of US$10,000.00 (ten thousand dollars of the United States of America), and

g) for Ana Luisa Vargas Soto, the Court sets the amount of US$12,500.00 (twelve thousand five hundred dollars of the United States of America).

185. The compensation determined in subparagraphs a and b of the previous paragraph will be delivered to the victims' next of kin, pursuant to that stated in paragraphs 171 and 172 of the present Judgment, and the compensation set in subparagraphs c, d, e, f, and g of the previous paragraph shall be delivered to each beneficiary. If any of them were to die before the corresponding compensation is given to them, the amount that would have corresponded to them will be distributed pursuant to the national legislation applicable.[109]

D) OTHER FORMS OF REPARATION
(MEASURES OF SATISFACTION AND NON-REPETITION GUARANTEES)

186. In this section the Tribunal will determine those measures of satisfaction that seek to repair non-pecuniary damages, that do not have a pecuniary scope, and it will establish measures of a public scope or repercussion.[110]

187. For the effects of non-repetition of the facts of the present case, the Court values and appreciates the acknowledgment of international responsibility made by the State (*supra* paras. 16, 54, 55, and 60). In its response to the petition, the State said that:

> we assent with the parties to the application related to [the] regretful acts, accepting the measures of reparation proposed by the claimants and promising to comply in the least time possible to what that […] Court considers convenient to order in this sense.

188. Among the Honduran institutions dedicated to guaranteeing the rights of children and youngsters and to prevent any type of breach to these rights are: a) the Honduran Institute for Childhood and Family, created through Decree No.199-97 in December 1997; b) the National Human Rights Commission, created through Decree No. 153-95 in October 1995; c) the Interinstitutional Commission for the Protection

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[109] *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 124; *Case of Ximenes Lopes, supra* note 3, para. 219; and *Case of Baldeón García, supra* note 3, para. 192.

[110] *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 136; *Case of Ximenes Lopes, supra* note 3, para. 240; and *Case of the Ituango Massacres, supra* note 3, para. 396.

of Physical and Moral Integrity of Children, and d) the Special Unit for the Investigation of the Deaths of Children and the Public Human Rights Prosecutors' Office, as the organization in charge of investigating and punishing the violations of human rights of children and teenagers.

189. This Tribunal observes that the State has specialized organizations to attend to the problems through which this group of the Honduran population is going through. However, as has been stated by the representatives and the Commission, the creation of said institutions has not represented measures that are sufficient or efficient in counteracting the extrajudicial killings of the youngsters in Honduras, or in guaranteeing the rights of children and youngsters.

190. In the opinion of this Court, it is necessary that all institutions created to prevent and sanction the violations of human rights against children and youngsters be fully effective in their performance. The stipulations of the domestic legislation and, in this case, the institutions created to guarantee the human rights of children and youngsters, have to be effective, which means that the State must adopt all the measures necessary so that the stipulations of the Convention are really complied with.[111]

191. Therefore, the State must provide the institutions with suitable personnel trained for the investigation of extrajudicial killings and of the adequate recourses so they may fully comply with their mandate. For the investigation of extrajudicial killings the international norms on the documentation and interpretation of the forensic elements of evidence must be taken into consideration with regard to the commission of acts of torture, and especially those defined in the Manual of the United Nations on the Prevention and Efficient Investigation of Extralegal, Arbitrary, and Summary Killings.[112]

a) *Obligation to investigate the facts that caused the violations of the present case, and identify, prosecute, and sanction those responsible*

192. The Court has defined impunity as an offense within the obligation to investigation, persecute, capture, prosecute, and sentence those responsible for the violations of the rights protected by the American Convention.[113] The State is obliged to fight this situation through all means available, since it promotes the chronicle repetition of violations to human rights and the total defenselessness of the victims and their next of kin.[114]

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[111] *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 64; *Case of the Ituango Massacres, supra* note 3, para. 129; and *Case of Baldeón García, supra* note 3, para. 83.

[112] *Cfr. Case of Montero Aranguren et al.*, *supra* note 12, para. 140; *Case of the Moiwana Community*. Judgment of June 15, 2005. Series C No. 124, para. 208; and Manual of the United Nations on the Prevention and Efficient Investigation of Extralegal, Arbitrary, and Summary Killings. E/ST/CSDHA/.12 (1991).

[113] *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 137; *Case of Baldeón García, supra* note 3, para. 195; and *Case of Blanco Romero*. Judgment of November 28, 2005. Series C No. 138, para. 94.

[114] *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 137; *Case of Baldeón García, supra* note 3, para. 195; and *Case of the Pueblo Bello Massacre, supra* note 7, para. 266.

193. Likewise, the next of kin of the victims of gross violations to human rights have the right to know the truth. Knowledge of the truth of the fact in cases of notorious violations of human rights such as those of the present case, is a inalienable right, an important means of reparation for the victims and their next of kin and it is a fundamental way of elucidation so that the society may develop its own mechanisms and the prevention of violations such as those of this case in the future.[115]

194. In the present case the Court established that, eleven years after the occurrence of the facts, the authors of the illegal and arbitrary deprivation of freedom, torture, cruel, inhuman, or degrading treatment, and extrajudicial killing of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez have not been held responsible for said violations, thus the existence of impunity (*supra* paras. 125, 154, and 156).

195. In consideration of the violations declared, as well as of that said by the State, this Tribunal considers that the State must seriously comply with all the actions necessary to identify, prosecute, and, in its case, punish all the perpetrators and planners of the violations committed in detriment of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez in a reasonable period of time, for criminal effects and any other that could result from the investigation of the facts. For this purpose, as has been ordered by the Court in other cases,[116] the State must remove, in a reasonable period of time, all obstacles and mechanisms of fact and law that help maintain impunity in the present case.

196. The victims' next of kin or their representatives must have full access and capacity to act in all the stages and instances of the domestic criminal proceedings started in the present case, pursuant to domestic legislation and the American Convention. The results of these processes must be publicly diffused by the State, in a manner such that the Honduran society will know the truth about the facts of the present case.[117]

b) Publishing of the judgment

197. As has been ordered in other cases, as a satisfaction measure,[118] the State must publish the Chapter on facts proven of this Judgment, without the corresponding footnotes, and the operative part of the same, once, in the Official Newspaper and in another newspaper of national circulation in Honduras. For these publications the Court establishes a six-month period, as of the notification of the present Judgment.

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[115] *Cfr. Case of Ximenes Lopes, supra* note 3, para. 245; *Case of Baldeón García, supra* note 3, para. 196; and *Case of the Pueblo Bello Massacre, supra* note 7, para. 266.

[116] *Cfr. Case of Montero Aranguren et al.*, *supra* note 12, para. 138.

[117] *Cfr. Case of Montero Aranguren et al.*, *supra* note 12, para. 139; *Case of Baldeón García*, *supra* note 3, para. 199; and *Case of the Pueblo Bello Massacre,* s*upra* note 7, para. 267.

[118] *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 151; *Case of Ximenes Lopes, supra* note 3, para. 249; and *Case of the Ituango Massacres, supra* note 3, para. 410.

c) Public act of acknowledgment of responsibility

198. In order for the assent made by the State and that established by this Tribunal to have their complete effects of reparation, as well as for it to act as a guarantee of non-repetition, the Court considers that the State must hold a public act of acknowledgment of its international responsibility, for the illegal arrest, torture, and extrajudicial killing of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Diomedes Obed García Sánchez, and Orlando Álvarez Ríos and for the impunity that prevails in the case. This act must take place within a period of six months as of the notification of the present Judgment.

d) *Street or plaza and plaque*

199. The State must name, within a one-year period as of the notification of the present Judgment, a street or a plaza, in the city of Tegucigalpa, in memory of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Diomedes Obed García Sánchez, and Orlando Álvarez Ríos. The State must place a plaque on said street or plaza with the names of the mentioned four victims.

e) Establishment of training programs in human rights

200. This Court considers that the State must establish, within a reasonable period of time, a program for the formation and training of police and judicial personnel as well as personnel of the Public Prosecutors' Office and of the penitentiary. That training should deal with the special protection that must be offered by the State to children and youngsters, the principle of equality and non-discrimination, and the principle and norms for the protection of human rights, related to the application of international standards for the arrest of people, respect for their rights and judicial guarantees, the treatment that they must receive, their detention conditions, treatment, and medical control, the right to have an attorney, to receive visits, and that minors and adults, as well as those being processed and those already convicted, be located in different installations. The design and implementation of the training program must include the assignment of specific resources to achieve its purposes.

f) National campaign for sensitization with regard to children and youngsters in risky situations

201. It was established in the present case that the State tends to identify the children and youngsters in situations of risk with the increase of criminality. In reason of this, the State must carry out, within a reasonable period of time, a campaign with the purpose of creating awareness in the Honduran society regarding the importance of the protection of children and youngsters, inform it of the specific duties for their protection that correspond to the family, society, and the State, and make the population see that children and youngsters in situations of social risk are not identified with delinquency (*supra* para. 79(1)).

202. Within the framework of this campaign, the State must issue, within a one-year period as of the date of the notification of the present Judgment, a postal stamp allusive to the protection due by the State and society to children and youngsters in risky situations, in order to prevent them from becoming victims of violence.

g) Creation of a database on the deaths of youngsters due to violence

203. It was established that the State does not have a unified registry, coordinated between the State's institutions, for the recording of information on criminality, especially the deaths of youngsters under the age of 18 due to violence. In the light of the aforementioned, the State must create, within a reasonable period of time, a unified data base between all institutions involved in the investigation, identification, and punishment of those responsible for the violent deaths of children and youngsters in risky situations. That registry must help increase the effectiveness of the investigations.

E) Costs and Expenses

204. The costs and expenses are included within the concept of reparation enshrined in Article 63(1) of the American Convention. The Tribunal must prudently and based on equity appraise their scope, considering the expenses generated before the domestic and Inter-American jurisdictions, and taking into account their verification, the circumstances of the specific case, and the nature of the international jurisdiction for the protection of human rights.[119]

205. In this regard, the Tribunal considers it in equity to order the State to reimburse the amount of US$11,000.00 (eleven thousand dollars of the United States of America) or its equivalent in Honduran currency, which must be delivered to Bricelda Aide García Lobo, Hilda Estebana Hernández López, and Dilcia Álvarez Ríos so that they may, on one hand, compensate the expenses in which the next of kin of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, and Orlando Álvarez Ríos incurred in before the authorities of domestic jurisdiction, and on the other, deliver to Casa Alianza and CEJIL the amounts considered appropriate to compensate the expenses made by them, during the proceedings before the Inter-American system.

F) Means of Compliance

206. The State shall pay the compensations and reimburse the costs and expenses (*supra* paras. 176, 177, 184, and 205) within one year, as of the notification of this Judgment. In the case of the other reparations ordered the measures must be complied with in a reasonable period of time (*supra* paras. 197, 198, 199, and 202).

207. Payment of the compensations established in favor of the victim and his next of kin will be made directly to them. If any of them were to pass away, payment will be made to their successors.

208. In what refers to the compensation ordered in favor of Fidelia Sarahí García Sánchez, it must be made within a one-year period as of notification of the present Judgment, to whom exercises her representation or wardship pursuant to the stipulations of domestic legislation. If said representation has not been appointed, the State must deposit it in a solvent Honduran institution. Said deposit will be made within a one-year period as of the notification of the present Judgment, in the most favorable financial conditions allowed by legislation and bank practices. The person that results her legal representative within domestic legislation may withdraw

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[119] *Cfr. Case of Montero Aranguren et al., supra* note 12, para. 152; *Case of Ximenes Lopes, supra* note 3, para. 252; and *Case of the Ituango Massacres, supra* note 3, para. 414.

the deposit. If the compensation is not claimed after ten years as of the turning of legal age, the amount will be returned to the State, along with the interests earned.

209. If due to causes attributable to the other beneficiaries of the compensation it were not possible for them to receive it within the mentioned one-year term, the State will deposit said amounts in favor of those in an account or certificate of deposit in a solvent Honduran bank institution, and in the most favorable financial conditions permitted by the legislation and bank practices. If the compensation has not been claimed after ten years, the corresponding amount will be returned to the State, along with the interests earned.

210. The payment destined to compensate the costs and expenses incurred in by the next of kin of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, and Orlando Álvarez Ríos before the authorities of the domestic legislation, and, on the other hand, deliver to Casa Alianza and CEJIL the amounts considered convenient to compensate the expenses made by them, during the proceedings before the Inter-American system, which will be made to Mrs. Bricelda Aide García Lobo, Hilda Estebana Hernández López, and Dilcia Álvarez Ríos (*supra* para. 205), who will make the corresponding payments.

211. The State must comply with the economic obligations stated in this Judgment through payment in dollars of the United States of America or its equivalent in the national currency of Honduras.

212. The amounts assigned in the present Judgment under the concepts of compensations, expenses, and costs must be delivered to the beneficiaries in their totality pursuant to that established in the Judgment. Therefore, they may not be affected, reduced, or conditioned by current or future fiscal reasons.

213. If the State falls in arrears, it shall pay interests over the amount due, corresponding to bank interest on arrears in the Republic of Honduras.

214. In accordance with its consistent practice in all cases subject to its knowledge, the Court will monitor compliance of the present Judgment in all its aspects. This supervision is inherent to the Tribunal's jurisdictional attributions and necessary so that it may comply with the obligation assigned to it in Article 65 of the Convention. The case will be closed once the State has fully implemented all of the provisions of this Judgment. Within one year of notification of this Judgment, the State must present a first report of the measures taken in compliance of this Judgment.

XIV
OPERATIVE PARAGRAPHS

215. Therefore,

THE COURT,

DECIDES,

Unanimously to,

1. Admit the acknowledgment of international responsibility made by the State for the violation of the rights to personal liberty and humane treatment, to life, to a

fair trial, and the judicial protection enshrined in Articles 7(1), 7(2), 7(3), 7(4) 7(5) and 7(6), 5(1) and 5(2), 4(1), 8(1) and 8(2), 25(1) of the American Convention, in detriment of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez, and the right to humane treatment enshrined in Article 19 of the Convention, in detriment of Marco Antonio Servellón García and Rony Alexis Betancourth Vásquez, all in relation with the general obligation to respect and guarantee the rights established in Article 1(1) of said treaty, in the terms of paragraphs 54, 55, 60, and 65 of the present Judgment.

2. Admit the acknowledgment of international responsibility made by the State for the violation of the rights to a fair trial and to judicial protection enshrined in Articles 8(1) and 25(1) of the American Convention, in relation with the general obligation to respect and guarantee the rights established in Article 1(1) of said treaty, in the terms of paragraphs 54, 55, and 66 of the present Judgment.

DECLARES,

Unanimously, that

3. The State violated the rights to personal liberty and humane treatment and to life enshrined in Articles 7(1), 7(2), 7(3), 7(4), and 7(5), 5(1) and 5(2), and 4(1) of the American Convention, and the right to humane treatment enshrined in Article 5(5) of the Convention, in detriment of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez, in relation to the rights of the child enshrined in Article 19 of the Convention, in detriment of Marco Antonio Servellón García and Rony Alexis Betancourth Vásquez, all in relation with the general obligation to respect and guarantee the rights established in Article 1(1) of said treaty, in the terms of paragraphs 86 through 125 of the present Judgment.

4. The State violated the right to humane treatment enshrined in Article 5(1) of the American Convention, in detriment of the next of kin of Marco Antonio Servellón García, Reyes Servellón Santos, father; Bricelda Aide García Lobo, mother, and Marja Ibeth Castro García, sister; of the next of kin of Rony Alexis Betancourth Vásquez, Manases Betancourth Núñez, father, Hilda Estebana Hernández López, mother, Zara Beatris Bustillo Rivera, daughter, and Ana Luisa Vargas Soto, partner, and of the sister of Orlando Álvarez Ríos, Dilcia Álvarez Ríos, in relation with the general obligation to respect and guarantee the rights established in Article 1(1) of said treaty, in the terms of paragraphs 126 through 139 of the present Judgment.

5. The State violated Articles 8(1), 8(2), 7(6), and 25(1) of the Convention, in detriment of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez, all in relation with the general obligation to respect and guarantee the rights established in Article 1(1) of said treaty, in the terms of paragraphs 140 and 155 of the present Judgment.

6. The State violated the right to a fair trial and judicial protection enshrined in Articles 8(1) and 25(1) of the American Convention, in detriment of the next of kin of Marco Antonio Servellón García, Reyes Servellón Santos, father, Bricelda Aide García Lobo, mother, and Marja Ibeth Castro García, Pablo Servellón García, and Héctor Vicente Castro García, siblings; of the next of kin of Rony Alexis Betancourth Vásquez, Manases Betancourth Núñez, father, Hilda Estebana Hernández López,

mother, Zara Beatris Bustillo Rivera, daughter, Ana Luisa Vargas Soto, partner, and Juan Carlos Betancourth Hernández, Manaces Betancourt Aguilar, Emma Aracely Betancourth Aguilar, Enma Aracely Betancourth Abarca, and Lilian María Betancourt Álvarez, siblings; of the next of kin of Orlando Álvarez Ríos, Antonia Ríos, mother, and Dilcia Álvarez Ríos, sister, and of the next of kin of Diomedes Obed García Sánchez, Diomedes Tito García Casildo, father, and Esther Patricia García Sánchez, Jorge Moisés García Sánchez, and Fidelia Sarahí García Sánchez, siblings, in relation with the general obligation to respect and guarantee the rights established in Article 1(1) of said treaty, in the terms of paragraphs 140, 145 through 154, and 156 through 159 of the present Judgment.

7. This Judgment is, *per se,* a form of reparation, in the terms of paragraph 180 of the same.

AND DECIDES:

Unanimously, that:

8. The State must seriously undertake, within a reasonable period of time, all actions necessary to identify, prosecute, and, in its case, punish all the perpetrators and planners of the violations committed in detriment of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Orlando Álvarez Ríos, and Diomedes Obed García Sánchez, for criminal effects and any other that may result from the investigation of the facts. For this, the State must remove, in a reasonable period of time, all obstacles and mechanisms of fact and law that have maintained the impunity in the present case, in the terms of paragraphs 192 through 196 of the present Judgment.

9. The State must publish, within a six-month period, the Chapter on facts proven of this Judgment, without the corresponding footnotes, and the operative part of the same, once, in the terms of paragraph 197 of the present Judgment.

10. The State must hold, within a six-month period, a public act of acknowledgment of its international responsibility, in the terms of paragraph 198 of the present Judgment.

11. The State must name, within a one-year period, a street or a plaza, in the city of Tegucigalpa, in memory of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Diomedes Obed García Sánchez, and Orlando Álvarez Ríos. The State must place a plaque on said street or plaza with the names of the mentioned four victims, in the terms of paragraph 199 of the present Judgment.

12. The State must establish, within a reasonable period of time, a program for the formation and training of police and judicial personnel as well as personnel of the Public Prosecutors' Office and of the penitentiary regarding the special protection that must be offered by the State to children and youngsters, the principle of equality and non-discrimination, and the principles and norms for the protection of human rights, related to the application of international standards for the arrest of people, respect for their rights and judicial guarantees, the treatment that they must receive, their detention conditions, treatment, and medical control, the right to have an attorney, to receive visits, and that minors and adults, as well as those being

processed and those already convicted, be located in different installations, in the terms of paragraph 200 of the present Judgment.

13. The State must carry out, within a reasonable period of time, a campaign with the purpose of creating awareness in the Honduran society regarding the importance of the protection of children and youngsters, inform it of the specific duties for their protection that correspond to the family, society, and the State, and make the population see that children and youngsters in situations of social risk are not identified with delinquency. Likewise, the State must issue, within a one-year period, a postal stamp allusive to the protection due by the State and society to children and youngsters in risky situations, in order to prevent them from becoming victims of violence, in the terms of paragraphs 201 and 202 of the present Judgment.

14. The State must create, within a reasonable period of time, a unified data base between all institutions involved in the investigation, identification, and punishment of those responsible for the violent deaths of children and youngsters in risky situations, in the terms of paragraph 203 of the present Judgment.

15. The State must pay the next of kin of Marco Antonio Servellón García, Rony Alexis Betancourth Vásquez, Diomedes Obed García Sánchez, and Orlando Álvarez Ríos, in their condition of successors, and in a one-year period, as compensations for pecuniary and non-pecuniary damages, the amounts determined in paragraphs 176 and 184(a) and 184(b) of the present Judgment, in the terms of paragraphs 169 through 172, 176, 180, 182, 184(a) and 184(b) and 185 of the same.

16. The State must pay Bricelda Aide García Lobo, Hilda Estebana Hernández López, and Dilcia Álvarez Ríos, within a one-year period, as compensation for pecuniary damages, the amount set in paragraph 177 of the present term, pursuant to its terms.

17. The State must pay Reyes Servellón Santos, Bricelda Aide García Lobo, Marja Ibeth Castro García, Manases Betancourth Núñez, Hilda Estebana Hernández López, Zara Beatris Bustillo Rivera, Ana Luisa Vargas Soto, and Dilcia Álvarez Ríos, within a one-year period, as compensation for non-pecuniary damages, the amounts set in paragraphs 184(c), 184(d), 184(e), 184(f) and 184(g) of the present Judgment, in the terms of paragraphs 180, 181, 183, 184(c), 184(d), 184(e), 184(f) and 184(g), and 185 of the same.

18. The State must pay, within a one-year period, in the concept of costs and expenses generated in the domestic realm and in the international proceedings before the Inter-American system for the protection of human rights, the amount set in paragraph 205 of the present Judgment, which must be delivered to Bricelda Aide García Lobo, Hilda Estebana Hernández López, and Dilcia Álvarez Ríos, in the terms of paragraphs 204 and 205 of the same.

19. It will monitor the compliance of the present Judgment in all its aspects, and it will close the present case once the State has fully implemented all of the provisions of this Judgment. Within one year of notification of this Judgment, the State must present a report of the measures taken in compliance of this Judgment to the Court.

Judge Antônio A. Cançado Trindade advised the Court of his Concurring Opinion, which accompanies the present Judgment.

Sergio García-Ramírez
President

Alirio Abreu-Burelli

Antônio A. Cançado Trindade

Cecilia Medina-Quiroga

Manuel E. Ventura-Robles

Diego García-Sayán

Pablo Saavedra-Alessandri
Secretary

So ordered,

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

CONCURRING VOTE OF THE JUDGE A.A. CANÇADO TRINDADE

1. Destiny presented once again, during my period of service as a Full Judge of the Inter-American Court of Human Rights, the drama of the street children before this Tribunal. Seven years after the Court's first Judgment in the historic leading case of the "*Street Children* " (*Villagrán Morales et al.*) *versus Guatemala*, (merits, 1999, and reparations, 2001), and three years after the Judgment of the Court in the dramatic case of *Bulacio versus Argentina* (merits and reparations, 2003), the subject of violence of children and youngsters in the streets once again occupies the central position in a Judgment of this Court, in the present case of *Servellón et al. versus Honduras*. When voting in the adoption of the present Judgment, I allow myself to add to the same this Concurring Vote, with my personal reflections as the grounds to my position regarding that discussed by the Court. I will focus my reflections on the following matters: a) grounds for the State's international responsibility; b) foundations for international jurisdiction; c) the threats against human rights within the decadence of social fabric; and d) the reaction of the Law: the prohibitions of the *jus cogens* and the due *reparatio* revisited.

I. Grounds for the State's International Responsibility.

2. In the present Judgment in the case of *Servellón et al.,* the Court has positively assessed the State's acknowledgement of responsibility for the violations against the rights protected by the American Convention (para. 77). However, the terms of said acknowledgment do not cover the totality of the vindications included in the petition (para. 75), AND, I allow myself to add, the terms of the acknowledgment of the State's responsibility, when it expressly excludes "the existence of a context of alleged systematic violence of human rights, both tolerated and consented" by the State (para. 54), set forth a matter that touches the foundations of a State's responsibility (including the basic distinctions between direct and indirect responsibility, objective or absolute international responsibility, and responsibility based on the offense (*guilt*), besides the matter of intentions (*dolus*) or lack of as the configuration or not of an aggravated international responsibility).

3. The Court, when facing the terms of the acknowledgment of the State's responsibility, made a mistake in its hasty discussion when it did not summon a public hearing for this important case. The present hearing that was not held, would have without doubt enriched the present Judgment, in three aspects: a) it would have enriched the dossier and preliminary proceedings of the case (especially with the positive attitude of procedural collaboration assumed by the State); b) it would have applied in its totality the principle of the presence of both parties to the case in what refers to the context of the same; and c) it would have served as satisfaction (as a means of reparation) for the victims' next of kin. But in the current desire – that I do not share, and to which I am opposed, - of *productivity* of the Court (accompanied of decisions that are inevitably rushed), the current senseless urge to decide on the greatest number of cases in record time, deprived it of elements that could have enriched this Judgment.

4. In what refers to the present case of *Servellón García et al.*, one cannot find in the case file presented before this Court evidentiary elements that may lead to the establishment of an *intention (dolus)* of the State to carry out a deliberate, systematic, and massive violation of human rights in detriment of a segment of its

population (essentially, youngsters). However, this does not exonerate the State of its responsibility for the *sustained pattern of chronicle violence* victimizing a segment of its population (youngsters), - pattern proven in the unsatisfactory dossier of the present case. Truly, this pattern has unfortunately continued for a prolonged period of time, that includes the year of occurrence of the facts of the present case (1995) and continues up to this date (that is, more than a decade).

5. There is one detail that I would not like to leave unmentioned, since in my opinion it is very symbolic. As stated by the Court in its recount of the facts proven in the *cas d'espèce*, "the 15th day of September of 1995 the Public Security Force (FUSEP) made collective arrests, that included the capture of 128 people, within the framework of a preventive and indiscriminate police operative (...) in the city of Tegucigalpa, in order to avoid disturbances during the parades held to celebrate Honduras' National Independence Day." (para. 79(5)). Among those arrested were Marco Antonio Servellón García (16 years old), Rony Alexis Betancourth Hernández (17 years old), Diomedes Obed García (19 years old), and Orlando Álvarez Ríos (32 years old), the victims of the present case (that is, two children, one youngster, and one adult), - that were shortly afterwards found murdered, with gun wounds to their nape, head, and chest, in different parts of the city of Tegucigalpa, reason for which the episode was called, and was known as, the case of the "four cardinal points" (para. 79(32)).

6. That is, maintaining the order for the celebrations of the national holiday was an excuse for the perpetration of this violent and criminal operation. The symbolism that characterizes the episode resides, as seen by me, in the *counter position between the State and the nation.* The State, historically and originally conceived and created for the realization of common good, goes on to victimize – in a scary reversion of values – "undesirable" segments alienated from their own population. As I pointed out in my recent and extensive *General Course on Public International Law* at the Academy of International Law of La Haya (2005), [1] of the classic constitutive elements of the State, - and prerequisites of its international judicial personality,- that make up its own identity and continuity in time (that is, territory, normative system, and population), it is precisely the most precise of them, *population,* the one that has been most neglected and mistreated both in doctrine and in practice!

7. This reveals characteristics of a real tragedy, the great tragedy of our times, aggravated by the fact that today those that read and think, and seem willing to learn from the lessons of the past are constantly reduced. In the extremely violent world in which we live in today, we must, to the contrary, seek protection *from* the State, - against the myth of the State[2], - against its actions and omissions, and before its express incapacity – in almost all parts of the contemporary world – to offer a minimum protection to its population, and especially to its most vulnerable segments.

8. That decided in the present Judgment of the Court in the case of *Servellón García et al.* is based on the State's objective international responsibility. The

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[1]. A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* - General Course on Public International Law", *Recueil des Cours de l'Académie de Droit International de la Haye* (2005) ch. XXI (in press).

[2]. To evoke the expression used in a classic study of Ernst Cassirer.

classical case in this sense, in the jurisprudence of this Court, is that of "*The Last Temptation of Christ* ", regarding Chile (Judgment of 02.05.2001), in which I allowed myself to present, in my Concurring Opinion, the grounds for objective or absolute responsibility in the legal international doctrine. But not all the cases of violations of human rights are based on an objective international responsibility.

9. In my aforementioned *General Course* of 2005 in the Academy of International Law of La Haya, I observed that, next to said grounds for international responsibility, there are also cases of violations to human rights in which the *guilt* (offense), and even the *dolus* (when the intention is proven), are present, thus arising the *aggravated* international responsibility.[3] We can recall, as examples in this last sense, the cases of *Myrna Mack Chang versus Guatemala* (Judgment of 11.25.2003), of the *Massacre of Plan de Sánchez versus Guatemala* (Judgment of 04.29.2004), of the *19 Tradesmen versus Colombia* (Judgment of 07.05.2004), of the *Mapiripán Massacre versus Colombia* (Judgment of 09.15.2005), of the Massacre of the *Moiwana Community versus Suriname* (Judgment of 06.15.2005), of the *Ituango Massacre versus Colombia* (Judgment of 07.01.2006), - in which the State's *intent* to commit *gross* violations of human rights, or its express negligence to avoid them, were irrefutably proven.

10. In these cases, the gross breaches were perpetrated in name of the State, as a subject of International Law, and, also, in the same line of its criminal acts the facts were covered, with its *aggravated* international responsibility deriving from all this. In summary, and in conclusion regarding the present matter under examination, in the current general theory on the State's international responsibility, there is still a coexistence between objective (or absolute) international responsibility and the State's international responsibility based on *guilt,* and even on *dolus* (aggravated).

II. Foundations of the International Jurisdiction.

11. I go on to the next point of my reasoning: In my Concurring Opinion in the case of *Blake versus Guatemala* (merits, Judgment of 01.24.1998) I already allowed myself to point out the grounds for international responsibility (conventional obligations) and of international jurisdiction. The first is of material law, being the second of a jurisdictional order. Although in the present case of *Servellón García et al. versus Honduras* there were no problems of a jurisdictional order, there is room here for one precision. When extending its examination of the case further on than what was object of the acknowledgment of responsibility by the State, the Court – without saying it – has exercised an *inherent power* to its jurisdiction. The Court seems to not have noticed that the thesis of the *inherent powers* strengthens its jurisdictional foundations.

12. This has been irrefutably proven in its experience in recent years, in the exercise of its functions, both advisory and contentious. With regard to the first, the Court made use, in an exemplary manner, of its inherent powers in its Advisory Opinion n. 15, on *Reports of the Inter-American Commission on Human Rights*

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[3]. A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* - General Course on Public International Law", *Recueil des Cours de l'Académie de Droit International de la Haye* (2005) ch. XV (in press).

(*Article 51 of the American Convention on Human Rights* – of 11.14.1997), as I stated in my Concurring Opinion. And, in what refers to its contentious function, with its two historical Judgments, in jurisdictional subjects, in the cases of the *Constitutional Tribunal* and of *Ivcher Bronstein versus Peru* (both of 09.24.1999), which are currently acclaimed as a great contribution to the international jurisprudence in the sense of preservation of integrity and strengthening of the same.

13. The few differing and reactionary voices that still insist on maintaining a willing position on the subject,[4] more attentive and open to the State's unilateralism (including the pretension to withdraw the state's acceptance of the competence of the Court with "immediate effects") than to the imperatives of international jurisdiction, forget the special nature of the human rights treaties; forget the thousands and thousands of victims of the repressive regimen established in the State accused at this time; forget that the credibility and integrity themselves of the Court were at stake; forget that the international jurisdiction was the last hope of the defendants that were completely helpless; forget the imperative of access to justice (belonging, from my point of view, to the domain of the *jus cogens*). If the Court had followed a willing and strictly formalistic vision of the applicable law, maybe it would no longer exist.

14. Fortunately, when facing the largest crisis it has faced in all its history up to now, the Court made a firm and correct use of the powers inherent to its jurisdiction, and its two mentioned avant-garde Judgments of 09.24.1999 are a framework for contemporary international jurisprudence in matters of international protection of human rights, as internationally acknowledged. Another notable example of the use of the powers inherent to its jurisdiction can be found in its Judgment of 11.28.2003 in the case of *Baena Ricardo et al. versus Panama*, in which it held with the same firmness its inherent power to supervise the execution or faithful compliance of its own judgments. Thus, in the present case of *Servellón García et al. versus Honduras*, the Court could have been more explicit in what refers to the power inherent to its jurisdiction of having made a more deep examination of the context of the *cas d'espèce*.

15. Even so, the Court duly took into account the context of the present case. As stated in this Judgment, the State acknowledged the existence of the "phenomena of violent deaths of underage children," but it denied that it was "a policy of 'social prophylaxis'." (para. 106). The Court correctly affirmed that

> "International responsibility may also be attributed even in the absence of intention, and the acts that violate the Convention are the State's responsibility regardless of the fact that they are or not a consequence of a deliberate state policy." (para. 107)

16. That is, the Court, in the exercise of a *power inherent* to its jurisdiction, determined the State's objective international responsibility (*supra*). The Court stated that, in the origin of the configuration of the State's international responsibility, the latter proceeded to a programmed and collective arrest of 128 persons, "without an arrest warrant and without having been arrested in a crime detected in the act," arrest carried out "with the declared purpose of avoiding disturbances during the parades that would be held to celebrate the National

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[4]. Including, to my astonishment and regret, those of four Latin American authors.

Independence Day." (para. 91) In the Court's assessment, and pursuant to its previous Judgment (of 09.18.2003) in the case of *Bulacio versus Argentina*, "*razzias* are incompatible with the respect of fundamental rights," (para. 93), and the facts of the present case of *Servellón García et al.* occurred "within the framework of a context of violence against children and youngster in situations of social risk in Honduras." (para. 104)

III. A Contemporary Tragedy: The Attacks against Human Rights in Midst of the Decadence of Social Fabric.

17. In the expert opinions included in the dossier of the present case, gathered in the Judgment that this Court has just adopted, there are references to "the street-cleaning policy" and "the State's 'zero tolerance' policy" (para. 37(2)(a)) as well as to the actions of organized crime, drug traffickers, and "private clandestine groups of 'social cleaning'." (para. 37(3)(b)). What we can conclude from the facts of the present case is, in my opinion, a clear decadence of the social fabric, a social environment indifferent to the luck of its alienated members, and partisan of repressive policies, - as can be seen in almost the complete totality of Latin America and in practically the whole world, especially with regard to youngsters (who live in a brief present, without a future), and undocumented immigrants.

18. Not surprisingly and in a good way, the Inter-American Court goes back to its best jurisprudence of Advisory Opinions n. 17 of *The Juridical Condition and Human Rights of the Child* (of 08.28.2002) and n. 18, on *The Juridical Condition and Rights of the Undocumented Migrants* (of 09.17.2003), as well as of its Judgments in the case of the *"Street Children" (Villagrán Morales et al.) versus Guatemala* (merits, 11.19.1999, and reparations, 05.26.2001).[5] Now, in the present case of *Servellón García et al.*, the facts that have given origin to the *cas d'espèce* reveal, once more, that the cases of this nature represent a micro-cosmos of the violence perpetrated, without boundaries, against street children throughout the world, revealing at the same time the sad fate of many of those already alienated and excluded in the dawn of their lives. For them, life is actually nothing more than a walking shadow, in the expression of a universal author, and a shadow that fades very rapidly. Their sad fate evokes the classical regret of Shakespeare's *Macbeth* (1606):

> "Tomorrow, and tomorrow, and tomorrow,
> Creeps in this petty pace from day to day,
> To the last syllable of recorded time;
> And all our yesterdays have lighted fools
> The way to dusty death. Out, out, brief candle,
> Life's but a walking shadow, a poor player
> That struts and frets his hour upon the stage,
> And then is heard no more. It is a tale
> Told by an idiot, full of sound and fury
> Signifying nothing."[6]

19. But no matter how brief and ephemeral the life of those abandoned by the world, and tortured and murdered with brutality by their piers, they occupy, as victims, *a center stage* in the International Law on Human Rights. The establishment

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[5]. Paras. 113, 95, 114, and 116 respectively, of the present Judgment.

[6]. Shakespeare, *Macbeth* (1606), act V, scene 5.

of the centralization of the victims within the conceptual universe of International Law on Human Rights is currently very solid, to which the jurisprudence of this Inter-American Court has contributed in a decisive manner. As stated in my Concurring Vote in the case of the *"Street Children"* (reparations, 2001), - and as the present case of *Servellón García et al.* once again reveals, -

> "The human being, even in the most adverse conditions, emerges as subject of the International Law of Human Rights, endowed with full international juridical-procedural capacity." (para. 1)

20. In his classic *Los Misérables* (1862), Victor Hugo weighs in with a witty spirit:

> "L'avenir arrivera-t-il? Il semble qu'on peut presque se faire cette question quand on voit tant d'ombre terrible. Sombre face-à-face des égoïstes et des misérables. Chez les égoïstes, les préjugés, les ténèbres de l'éducation riche, l'appétit croissant par l'enivrement, un étourdissement de prosperité qui assourdit, la crainte de souffrir qui, dans quelques-uns, va jusqu'à l'aversion des souffrants, une satisfaction implacable, le moi si enflé qu'il ferme l'âme; - chez les misérables, la convoitise, l'envie, la haine de voir les autres jouir, les profondes secousses de la bête humaine vers les assouvissements, les coeurs pleins de brume, la tristesse, le besoin, la fatalité, l'ignorance impure et simple. Faut-il continuer de lever les yeux vers le ciel? (...)."[7]

21. The penetrating words of Victor Hugo acquire great topicality. The disparities that flagellate national societies (and are currently more serious in the erroneously "globalized" world of our days), reveal one of its most marked characteristics: the sad *repressive* nature of said societies. In the name of public security the most vulnerable, alienated, and excluded, the "undesirable", Victor Hugo's *misérables,* are killed with impunity. Additionally, our repressive societies of today – not only in Latin America but in all continents (I have visited them all, and I know what I am talking about), - do not have a memory, they are condemned to live in a brief and despairing present, without encouraging perspectives, without a future.

22. On the graves of each of the children and youngsters killed in the *cas d'espèce* the verses with which Victor Hugo concludes his work *Les Misérables* could perfectly be transcribed – until the wind and rain wash them away, that is after the "collective memory",-:

> "Il dort. Quoique le sort fût pour lui bien étrange,
> Il vivait. Il mourut quand il n'eut plus son ange;
> La chose simplement d'elle-même arriva,
> Comme la nuit se fait lorsque le jour s'en va."[8]

It was precisely to the *chiaroscuro* of life that I made reference to, within the Inter-American Court half a decade ago, in my Concurring Opinion in the aforementioned case of the "*Street Children",* when I referred to the trilogy formed by victimization, human suffering, and the rehabilitations of the victims, - to be considered as from the integrality of the personalities of the victims (paras. 3 and 19):

> " (...) The tension of the clear-dark, of the advances intermingled with setbacks, is proper of the human condition, and it constitutes, in fact, one of the most precious legacies of the thinking of the ancient Greeks (always so contemporary) to the evolution

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7. Victor Hugo, *Les Misérables* (1862) (préface de Ch. Baudelaire), volume III, Paris, Libr. Gén. Française, 1972, p. 30.

8. *Ibid*., volume III, p. 536.

> of the human thinking itself, which has penetrated human conscience throughout the centuries. The Platonic allegory of the cave, for example, reveals, with all lucidity and its great existential density, la precariousness of the human condition, and, accordingly, the necessity of transcendence, beyond the alleged crude "reality" of the facts. In the domain of Law, well beyond legal positivism, one is to bear in mind the reality of the *human conscience*." (para. 18)

23. Regarding the projection of the victims' suffering I warned, in the same Concurring Opinion,

> "(…) the suffering of the excluded ones is ineluctably projected into the whole social corpus. The supreme injustice of the state of poverty inflicted upon the unfortunate ones contaminates the whole social milieu, which, in valuing violence and aggressiveness, relegates to a secondary position the victims (…).Human suffering has a dimension which is both personal and social. Thus, the damage caused to each human being, however humble he might be, affects the community itself as a whole." (para. 22)

24. The free and unnecessary violence of bodies and agents of the state, especially against the most vulnerable segments of the population, and the exclusion and punishment, as well as the confinement, of those that are "undesirable", as state "responses" to a "social problem", has been a constant in the history of the modern State. This has not only happened in Latin American countries, but also in Europe and the whole world. When examined with historical details, the countries of Western Europe, in the period from 1500 to 1800 (in a work originally published in France in 1961), Michel Foucault let himself comment that "civilization, in a general way, constitutes a *milieu* favorable to the development of madness", being the latter (madness) "the denial of reason."[9] The murder of street children is, besides a gross breach of human rights, a statement of the madness of the "civilized", the most emphatic and scary denial of reason.

25. In this regard, the respectable legal philosopher Karl Jaspers warned, some decades ago, that reason – which is inseparable from human existence – is not imposed *per se*, but instead it results from a decision made by a person in the exercise of his liberty. Since we are clearly at the mercy of events that occur "beyond our control", the result is that "reason can stand firm only in the strength of reason itself."[10] I believe that this entire matter is up to a certain point involved by the mystery of human existence itself.

26. Among the four victims, tortured, and murdered by their executioners in the present case of *Servellón et al.*, one of them, Diómedes, simply cried. He cried when receiving a "prior notice" that he would be tortured and killed. He cried because of his helplessness and the inevitability of his murder before the monopoly of the use of public force by the State. He could do nothing else but cry, when he said goodbye to his life, due to an arbitrary and criminal decision made by his executioners. And this is only one of the many congenerous cases that occur every day throughout Latin America and the world. The State creates the "undesirables", when it stops fulfilling the social duties for which it was historically created, and it later alienates them, excludes them, confines them, or kills them (or lets them be killed).

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[9]. Michel Foucault, *Madness and Civilization - A History of Insanity in the Age of Reason*, N.Y., Vintage, [1986 - reed.], pages 217 and 107, and cf. pages 47-49, 221-222, 269 and 289.

[10]. K. Jaspers, *Reason and Anti-Reason in Our Time*, Hamden/Conn., Archon Books, 1971, pages 59, 50 and 84.

IV. The Reaction of the Law: The Prohibitions of the *Jus Cogens* and the Due *Reparatio* Revisited.

27. I could not conclude this Concurring Opinion without highlighting the importance of the international jurisdiction on human rights: once more, those forgotten by the world presented their case before it. The humiliations and suffering they underwent have been judicially acknowledged, along with their juridical consequences for the responsible parties. In the present Judgment, the Court has warned that the dangerous stigmatization that poor children and youngsters would be conditioned to delinquency, creates a "favorable climate" so that said minors in risky situations be placed before a constant threat to their life, their right to humane treatment and personal liberties (para. 112).

28. In its *Report* of 06.14.2002 regarding Honduras, the Special Rapporteur of the United Nations on Extrajudicial, Summary, or Arbitrary Killings (Sra. A. Jahangir), warning against "the criminalization of poverty" and the wrong tendency of attributing the violent deaths of minors to "confrontations between gangs,"[11] stated that

> "the cases of extrajudicial killings of children and the general phenomenon of young violence and poverty in Honduras are linked both in a solid and categorical manner. (...) Young delinquency may never be used to justify security forces killing children in order to maintain public order."[12]

29. And it made it worse that in Honduras "children make up the majority of the population," living in conditions of vulnerability, affected by "the poverty and insecurity" derived from "social, political, and economic injustice."[13] According to the Special Rapporteur of the United Nations,

> "in Honduras some children have been killed by members of the police force. In the majority of the cases the children were unarmed and they had not provoked the police officer to employ force, and even less so lethal means. (...) Besides institutionalized impunity, there is a campaign to condition the public opinion to support the 'cleaning' of undesirable children from the streets of Honduras."[14]

30. On its part, and in the same line of reasoning, the [then] National Human Rights Commissioner (Mr. Leo Valladares Lanza), in his *Special Report on the Violent Deaths of Boys, Girls, and Teenagers in Honduras*, of 01.21.2002, also warned against the social alienation of children and youngsters in Honduras, the social indifference, and the "intolerable impunity" when facing the "massive death of teenagers and youngsters," and their fateful consequences, such as the increase of violence and public insecurity. In his words,

> "In the last four years the rights to life and to humane treatment have been systematically breached, toward a clearly identified sector. Teenagers and youngsters

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[11]. UN, document E/CN.4/2003/3/Add.2, of 06.14.2002, page 12, paras. 31-32.

[12]. *Ibid*., page 11, para. 29.

[13]. Ibid., pages 27 and 14, paras. 87 and 39. According to the Special Rapporteur of the United Nations, "many of the victims of the extrajudicial killings belong to single-parent families that are normally headed by the mother. The loss of women's autonomy is closely linked to the alienation of the child"; *ibid*., page 27, para. 88.

[14]. *Ibid*., page 25, para. 73.

> have been murdered in different cities of the country under arbitrary presumptions and by police agents or groups organized under State tolerance, and even as individual revenges." (para. 7)[15]

31. When referring expressly to the case of *Servellón García et al.*, known as the case of the "four cardinal points" (para. 71), he added that "youngsters had been forced to suspect a society that not only alienates them, but also deprives them and puts thousands of obstacles for them to achieve their development or a minimum level of life quality with dignity." (para. 38) This is no longer about forced disappearances or "clandestine cemeteries" or "hidden detention centers" as occurred in the eighties (para. 69). In the mid nineties, it was about

> "a campaign of 'social cleaning' or 'social prophylaxis', in which with frequency the identity of the victims is unknown, that of the perpetrators is confused, and in many cases nobody asks for an investigation of what happened. (…) The rights of street children or youngsters are not acknowledged, and they are always presumed guilty instead of innocent. (…) The majority of the authors of the violence are police agents, but little by little people classified as 'unknown', (…) extermination groups, or death squads, whose members have sometimes been recognized as members of the State's security forces, have intervened." (paras. 69 and 72).

32. The authoritarianism of the eighties was followed by this frame of chronicle violence of the nineties, with the State's tolerance and its negligence regarding impunity.[16] In the lucid evaluation of the author of the mentioned *Special Report,* former Commissioner Leo Valladares Lanza,

> "Poverty or extreme poverty is still (…) the worst form of violence to which a large part of the country's children and youngsters are submitted. In it is the root that explains the thousands of boys and girls that are, on a daily basis, submitted to abuse on the street. (...) Adults have seemed indifferent or have responded wrongly, considering them 'objects of compassion and repression at the same time, instead of fully legal persons'." (para. 43)

33. Before this international jurisdiction, those forgotten by the world are treated as fully legally persons, endowed with international juridical-procedural capacity. Their sufferings are not in vain. In the present Judgment in the case of *Servellón García et al.*, the case of the "four cardinal points", the Inter-American Court concluded that

> "the victims were detained collectively, illegally and arbitrarily, submitted to torture and cruel, inhuman, and degrading treatments during their detention. (…)The extreme cruelty with which the victims were killed, depriving them of their life in a humiliating manner, the marks of physical torture present in the four bodies, and the manner in which their bodies were abandoned out in the open, were serious assaults against the right to life, to humane treatment, and personal liberty." (para. 99)

34. When facing the facts of the present case, the Court has correctly reiterated its position in the sense that the absolute prohibition of torture and cruel, inhuman, or degrading punishments or treatments, and respect for the basic principle of equality and non-discrimination, acquire an imperative nature, belong to the domain

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15. And cf. paras. 1-3 and 11-12.

16. Paras. 91, 152, and 192(11); the mentioned *Special Report* adds that, of the totality of youngsters that died in a violent manner, "a large number did not belong to 'maras' or gangs (66%), nor did they have previous criminal records." (para. 192(2))

of the *jus cogens*, and bring about obligations *erga omnes* of protection (paras. 97 and 94), with all their juridical consequences for the reparations. On this final point, I repeat here what I stated in my Concurring Vote to the case of *Bulacio versus Argentina* (Judgment of 09.18.2003), specifically:

> "It is here that the Law intervenes, to halt the cruelty with which human beings treat their fellow men or women. In light of this, it is here that the Law intervenes, to affirm its own prevalence over brute force, to attempt to organize human relations on the basis of recta ratio (natural law), to mitigate human suffering, and thus make life less unbearable, or perhaps bearable –understanding that life with suffering, and solidarity, is preferable to non-existence. (...)
>
> This explains the importance of the realization of justice. The juridical order (both domestic and international) sets itself up to oppose violent acts that breach human rights, to ensure that justice prevails and, thus, to provide satisfaction to the direct and indirect victims. In his work on L'Ordinamento Giuridico, originally published in 1918, the Italian philosopher of the Law, Santi Romano, argued that punishment is not attached to specific juridical provisions, but rather is inherent to the juridical order as a whole, operating as an "effective guarantee" of all subjective rights protected by said order.[17] (...)
>
> The Law, issuing from and moved by human awareness, provides reparatio (from the Latin reparare, "to dispose once again"); it also intervenes to avoid repetition of the wrong, in other words, to establish, as one of the non-pecuniary forms of reparation of damage resulting from violations of human rights, the guarantee of non-recidivism of the injurious acts. Said guarantee of non-recidivism already has a definite place among the range of forms of reparation for human rights violations. (...)
>
> Reparatio does not end what happened, the violation of human rights. The wrong was already committed[18]; *reparatio* avoids a worsening of its consequences (due to indifference of the social milieu, due to impunity, due to oblivion). From this perspective, *reparatio* takes on a dual meaning: it provides satisfaction (as a form of reparation) to the victims, or to their next of kin, whose rights have been abridged, while also reestablishing the legal order weakened by said violations –a legal order erected on the basis of full respect for the inherent rights of the human person.[19] The legal order, thus reestablished, requires guarantees of non-recidivism of the injurious facts.
>
> *Reparatio* disposes once again, reestablishes order in the lives of the surviving victims, but cannot eliminate the pain that is inevitably incorporated into their daily existence. (...) *Reparatio* is an unavoidable duty of those responsible for rendering justice. In a stage of greater development of human awareness, and therefore of the Law itself, undoubtedly the realization of justice overcomes any and every obstacle (...). *Reparatio* is a reaction, in the field of the Law, to human cruelty, expressed in various ways: violence in dealing with other human beings, impunity of those responsible with respect to the public authorities, indifference and oblivion in the social milieu
>
> This reaction of the legal order breached (the *substratum* of which is precisely respect for human rights) is ultimately moved by the spirit of human solidarity. The latter, in turn, teaches us that oblivion is inadmissible (...). Reparation, thus understood - providing satisfaction to the victims (or their next of kin) and guarantees of non-recidivism of the injurious facts, (...) is undeniably important. Rejection of indifference and oblivion, and guarantees of non-recidivism of the violations, are expressions of solidarity between the victims and the potential victims, in the violent world, empty of values, in which we live. (...)" (paras. 30, 33, 35, and 37-40).

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17. Santi Romano, *L'ordre juridique* (trad. 2a. ed., reed.), Paris, Dalloz, 2002, page 16.

18. Human capacity both to promote good and for evil has not ceased to attract the attention of human reflection over the centuries; cf. F. Alberoni, *Las Razones del Bien y del Mal*, Mexico, Gedisa Edit., 1988, pp. 9-196; A.-D. Sertillanges, *Le problème du mal*, Paris, Aubier, 1949, pages 5-412.

19. As I pointed out in my Separate Concurring Opinion yesterday, with respect to Advisory Opinion No. 18 of the Inter-American Court, on the *Legal Status and Rights of Migrants without Documents* (on the 17.09.2203), para. 89.

Annex 52

35. These reflections, which I allowed myself to develop in the case of *Bulacio*, place, in my opinion, in their due dimension the different modalities of reparation ordered by the Inter-American Court also in the present case of *Servellón García et al.* I find it completely appropriate to order, v.g., as has the Court in the present Judgment (operative paragraph n. 13), the realization by the respondent State of "a campaign with the purpose of creating awareness in the Honduran society regarding the importance of the protection of children and youngsters, inform it of the specific duties for their protection that correspond to the family, society, and the State, and make the population see that children and youngsters in situations of social risk are not identified with delinquency."

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF EXPELLED DOMINICANS AND HAITIANS *v.* DOMINICAN REPUBLIC

JUDGMENT OF AUGUST 28, 2014
(*Preliminary objections, merits, reparations and costs*)

In the case of *Expelled Dominicans and Haitians,*[*]

the Inter-American Court of Human Rights (hereinafter also "the Inter-American Court" or "the Court"), composed of the following judges:[**]

Humberto Antonio Sierra Porto, President
Roberto F. Caldas, Vice President
Manuel E. Ventura Robles, Judge
Eduardo Vio Grossi, Judge, and
Eduardo Ferrer Mac-Gregor Poisot, Judge;

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary;

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter also "the American Convention" or "the Convention") and Articles 31, 32, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers this Judgment, structured as follows:

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[*] The case was processed before the Inter-American Commission on Human Rights, as well as during the proceedings on the contentious case before the Inter-American Court of Human Rights, under the heading of "*Benito Tide et al. v. Dominican Republic.*" By a decision of the Court, this Judgment is delivered under the heading *Case of Expelled Dominicans and Haitians v. Dominican Republic.*

[**] On August 20, 2014, Judge García-Sayán excused himself from taking part in all the activities of the Court while he is a candidate for the post of Secretary General of the Organization of American States (OAS), and, on the same date, the President of the Court accepted his excuse; consequently Judge García-Sayán did not take part in the deliberation of this Judgment. In addition, Judge Alberto Pérez Pérez was unable to participate in the deliberation of this Judgment for reasons beyond his control.

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *Submission of the case and synopsis:* On July 12, 2012, in accordance with Articles 51 and 61 of the Convention, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the Court case 12,271 against the State of the Dominican Republic (hereinafter "the State" or "the Dominican Republic"). According to the Commission, the case relates to the "arbitrary detention and summary expulsion from the territory of the Dominican Republic" of the presumed victims who are Haitians and Dominicans of Haitian descent, including children (*infra* para. 3.c.i), without following the expulsion procedure set out in domestic law. In addition, the Commission considered "that a series of obstacles prevented Haitian immigrants from registering their children born in Dominican territory," and persons of Haitian descent born in the Dominican Republic from obtaining Dominican nationality.

2. According to the Commission the case "occurred in a tense climate of mass collective expulsions of individuals that involved Dominicans and aliens alike, both documented and undocumented, who had established permanent residence in the Dominican Republic, where they had close family and work-related ties." In addition, among other considerations, the Commission referred to: (a) "impediments to granting nationality to persons born in Dominican territory, despite the fact that the State follows the principle of *ius soli*"; (b) that "the State failed to submit information demonstrating that the repatriation procedure in effect at the time of these events had been applied to the [presumed] victims," and (c) that the presumed victims "were not provided with legal assistance, and did not have the opportunity to appeal the deportation decision; furthermore, there no order from a competent, independent, and impartial authority ruling on their deportation." In addition, "the State did not indicate a specific remedy the [presumed] victims could have accessed to protect their rights." Also, according to the Commission, "during their arbitrary detention and expulsion, [they] did not have the opportunity to present their documentation and, in those cases where it was presented, it was destroyed by the Dominican officials," which meant that the presumed victims "were deprived of the ability to demonstrate their physical existence and juridical personality." In addition, "during their detention, the [presumed] victims did not receive water, food, or medical assistance, and their expulsion led to the uprooting and breakdown of family structures and affected the normal development of familial relations, even for new members of the family."

3. *Processing before the Commission.* The case was processed before the Inter-American Commission as follows:

a) *Petition.* The initial petition, dated November 12, 1999, was presented by the International Human Rights Law Clinic at the University of California, Berkeley, School of Law, Boalt Hall, the Center for Justice and International Law (hereinafter "CEJIL"), and the National Coalition for Haitian Rights (hereinafter "NCHR").[1] On May 8, 2000, the Commission opened case 12,271. On January 30, 2002, the representatives presented an *addendum* to the petition in favor of 28 persons, in order to litigate the

[1] In a brief of November 17, 1999, the then petitioners asked the Inter-American Commission to grant precautionary measures "to protect the Dominicans of Haitians descent and the Haitians who lived and worked in the Dominican Republic from arbitrary expulsions and deportations perpetrated by the Dominican Government." On November 22, 1999, the Commission asked the State to adopt precautionary measures.

case. During the merits stage, the presumed victims were represented by CEJIL, the Human Rights Clinic at Columbia University School of Law (hereinafter also "the Human Rights Clinic" or "Columbia University"), the Repatriates and Refugees Support Group (hereinafter also "GARR"), and the Movement of Dominican-Haitian Women (hereinafter "MUDHA").

b) *Admissibility report.* On October 13, 2005, the Commission approved Admissibility report No. 68/05 (hereinafter "the Admissibility report").[2]

c) *Merits report.* On March 29, 2012, the Commission issued Merits report No. 64/12, under Article 50 of the American Convention (hereinafter "the Merits report").

i) *Conclusions.* The Commission concluded that the Dominican Republic was responsible for the violation of:

> The rights to juridical personality, personal integrity, personal liberty, judicial guarantees, protection of the family, rights of the child, nationality, property, freedom of movement and residence, equality and nondiscrimination, and judicial protection, recognized in Articles 3, 5, 7, 8, 17, 19, 20, 21, 22(1), 22(5), 22(9), 24 and 25 of the American Convention, [respectively,] in relation to Article 1(1) [of this instrument], to the detriment of Benito Tide Méndez, Willia[n] Medina Ferreras,[3] Lilia Jean Pierre,[4] [Aw]ilda Medina,[5] Luis Ney Medina, Carolina Isabel Medina, Jeanty Fils-Aimé,[6] Janise Midi, Nené Fils-Aimé, Diane Fils-Aimé, Antonio Fils-Aimé, Marilobi Fils-Aimé, Endry Fils-Aimé, Andren Fils-Aimé, Juan Fils-Aimé, Ber[s]son Gelin,[7] Ana Virginia Nolasco, Ana Lidia Sensión, Reyita Antonia Sensión, Andrea Alezy, Rafaelito Pérez Charles, Victor Jean, Marlene Mesidor, M[ar]kenson Jean,[8] Victoria Jean, Miguel Jean and Nat[…]alie Jean.[9] The Commission also conclude[d] that the State had violated the right to personal integrity, protected under Article 5 of the Convention […] and the right to protection of the family, recognized in Article 17 of the American Convention, in relation to [its] Article 1(1) […], to the detriment of "Carmen Méndez, Aíta Méndez, Domingo Méndez, Rosa Méndez, José Méndez, Teresita Méndez, Carolina Fils-Aimé, María Esthe[l] [Matos] Medina […],[10] Jairo Pérez Medina, Gimena Pérez Medina, Antonio

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[2] The Commission declared the petition admissible with regard to Articles 3, 5, 7, 8, 17, 19, 20, 22, 24 and 25, in relation to Article 1(1) of the Convention, as well as to Article 7 of the Convention of Belém do Pará, and considered that "Benito Tide Méndez, Antonio Sensión, Andrea Alezi, J[e]anty Fils-Aimé, Willia[n] Medina Ferreras, Rafaelito Pérez Charles and Bers[s]on Gelin" were the possible victims.

[3] Although the Commission referred to "William Medina Ferreras" in the Merits report, for the effects of this Judgment he will be referred to as "Willian Medina Ferreras" (hereinafter also "Willian Medina," "Willian" or "Mr. Medina Ferreras"), as indicated below (*infra* para. 83).

[4] Although the State raised doubts about the name of this person, the Court, in keeping with its decision in this regard (*infra* para. 83), will refer to her as Lilia Jean Pierre.

[5] Although the Commission referred to "Wilda Medina" in the Merits report, for the effects of this Judgment she will be referred to as "Awilda Medina Pérez" (hereinafter also "Awilda Medina" or "Awilda"), as indicated below (*infra* para. 83).

[6] Although the State raised doubts about the name of this person, the Court, in keeping with its decision in this regard (*infra* para. 86), will refer to him as Jeanty Fils-Aimé (hereinafter also "Mr. Fils-Aimé" or "Jeanty").

[7] Although the Commission referred to "Berson Gelin" in the Merits report, for the effects of this Judgment, the Court will refer to him as "Bersson Gelin" (hereinafter also "Mr. Gelin"), based on the documentation provided that substantiates his name (*infra* para. 86).

[8] Although, the Commission referred to "Mckenson Jean" in the Merits report, for the effects of this Judgment, the Court will refer to him as "Markenson Jean" (hereinafter also "Markenson"), as indicated below (*infra* footnote 56).

[9] Although, the Commission referred to "Nathalie Jean" in the Merits report, for the effects of this Judgment, the Court will refer to her as "Natalie Jean" (hereinafter also "Natalie"), because this is how her name appears in her safe-conduct (*infra* para. 222 and footnote 264), a document issued by the State.

[10] Although the Commission referred to "María Esther Medina Matos" in the Merits report, for the effects of this Judgment, the Court will refer to her as "María Esthel Matos Medina," as indicated below (*infra* para. 95).

Sensión, Ana Dileidy Sensión, Maximiliano Sensión, Emiliano Mache Sensión, Analideire Sensión, [Julie Sainlice],[11] Jamson Gelim, Faica Gelim, Kenson Gelim, Jessica Jean and Victor Manuel Jean."

ii) *Recommendations.* The Inter-American Commission recommended that the State:

1. Permit all the victims who are still in Haitian territory to return to the territory of the Dominican Republic.
2. Take the measures necessary to:
   (a) recognize the Dominican nationality of Benito Tide Méndez, William Medina Ferreras, Wilda Medina, Luis Ney Medina, Ana Lidia Sensión, Reyita Antonia Sensión, Rafaelito Pérez Charles, Miguel Jean, Victoria Jean and Natalie Jean and replace or provide all the necessary documentation certifying them as Dominican nationals.
   (b) provide Nene Fils-Aimé, Diane Fils-Aimé, Antonio Fils-Aimé, Marilobi Fils-Aimé, Endry Fils-Aimé, Andren Fils-Aimé, Juan Fils-Aimé, Berson Gelin and Victor Jean with the necessary documentation certifying that they were born in Dominican territory, and facilitate the procedures required to recognize their Dominican nationality.
   (c) ensure that Lilia Jean Pierre, Janise Midi, Carolina Fils-Aimé, Ana Virginia Nolasco, Andrea Alezy, Marlene Mesidor and McKenson Jean, Haitian nationals, are able to remain legally in Dominican territory with their families.
3. Pay integral compensation to the victims, or their heirs where appropriate; the compensation should cover pecuniary and non-pecuniary damage and the property the victims had to leave behind in the Dominican Republic when they were expelled.
4. Publicly acknowledge the violations declared in this case, using appropriate means of dissemination.
5. Adopt measures of non-repetition that:
   (a) ensure the cessation of the practice of collective expulsions and deportations, and adapt repatriation procedures to the international human rights standards established in the merits report; in particular, ensuring the principle of equality and non-discrimination, and observing the State's specific obligations in relation to children and women.
   (b) include a review of domestic legislation on registration and the granting of nationality to persons of Haitian descent born in Dominican territory, and the repeal of those provisions that directly or indirectly have a discriminatory impact based on racial characteristics or national origin, taking into account the principle of *ius soli* accepted by the State, the State obligation to prevent statelessness and relevant standards of international human rights law.
6. Implement effective measures to eradicate the practice of sweeps or immigration control operations based on racial profiling.
7. Ensure that the Dominican authorities who perform immigration-related functions receive intensive training in human rights to guarantee that, in the performance of their functions, they respect and protect the fundamental rights of everyone, without discrimination by reason of race, color, language, national or ethnic origin, or any other social condition.
8. Investigate the facts of this case, determine who is responsible for the violations that are proved and establish the pertinent sanctions.
9. Establish effective judicial remedies for cases of human rights violations committed in the course of expulsion or deportation procedures.

4. *Notification of the State.* The Merits report was notified to the Dominican Republic in a communication of April 12, 2012, and it was given two months to report on compliance with the recommendations. The Commission indicated that this period elapsed without the State complying with the recommendations; therefore, it submitted the case to the Court due to the need to obtain justice and fair reparation.

5. *Submission to the Court.* On July 12, 2012, the Commission submitted to the Court's jurisdiction the facts and human rights violations described in the Merits report "that have continued since [Dominican Republic] accepted the contentious jurisdiction of the Court on March 25, 1999." The Inter-American Commission appointed Commissioner Rosa María Ortiz, and its Deputy Executive Secretary, Elizabeth Abi-Mershed, as delegates, and Isabel Madariaga Cuneo and Tatiana Gos, Executive Secretariat lawyers, as legal advisers.

[11] Although the Commission referred to "Gili Sainlis" in the Merits report, for the effects of this Judgment, the Court will refer to her as "Julie Sainlice" because, at the Court's request, the representatives clarified her name on August 28, 2013.

6. *Requests of the Inter-American Commission.* Based on the foregoing, the Commission asked the Court to declare the violation of Articles 3 (Right to Juridical Personality), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), 17 (Rights of the Family), 19 (Rights of the Child), 20 (Right to Nationality), 21 (Right to Property), 22(1), 22(5) and 22(9) (Freedom of Movement and Residence), 24 (Right to Equal Protection), and 25 (Right to Judicial Protection) of the Convention, in relation to Article 1(1) (Obligation to Respect Rights) of this instrument. In addition, the Commission asked the Court to order the State to adopt specific measures of reparation.

II
PROCEEDINGS BEFORE THE COURT

7. *Notification of the State and the representatives.* The Commission's submission of the case was notified to the State and to the representatives on August 28, 2012.

8. *Brief with motions, arguments and evidence.* On October 30, 2012, MUDHA, the Human Rights Clinic, GARR and CEJIL (hereinafter "the representatives")[12] presented their brief with motions, arguments and evidence (hereinafter "motions and arguments brief") to the Court, under Articles 25 and 40 of the Rules of Procedure. The representatives agreed in substance with the Commission's arguments, and asked the Court to declare the international responsibility of the State for the violation of the same articles alleged by the Commission and also asked that the Court declare the violation of Articles 11 (Right to Privacy), 18 (Right to a Name) and 2 (Domestic Legal Effects) of the American Convention. Lastly, they asked the Court to order the State to adopt diverse measures of reparation and to reimburse certain costs and expenses. In addition, they asked for access to the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights (hereinafter also "the Victims' Legal Assistance Fund," "the Assistance Fund" or "the Fund") "to cover some specific expenses related to the production of evidence during the proceedings before the Court."

9. *The State's answering brief.* On February 10, 2013, the State presented to the Court its brief filing preliminary objections, answering the submission of the case and with observations on the motions and arguments brief (hereinafter "the answering brief"). The State raised the following preliminary objections: (a) "Inadmissibility [of the case] owing to failure to exhaust domestic remedies"; (b) "Partial inadmissibility of the case owing to lack of competence *ratione temporis* to examine part of the factual framework [of the case]," and (c) "Partial inadmissibility [of the case] *ratione personae* in relation to the members of the Jean family." Furthermore, it referred to two "preliminary issues," which it did not submit as preliminary objections, namely: (a) "some petitioners not qualified to be considered presumed victims in this case," and (b) "the acts alleged by the representatives that were not substantiated by the Commission within its factual framework." In this brief, the State, *inter alia*, referred to the representatives' request to access the Assistance Fund. On October 1, 2012, the State advised that it had appointed Néstor Cerón Suero as Agent, and Santo Miguel Román as Deputy Agent, and had also designated four legal advisers: José Marcos Iglesias Iñigo, Gina Salime Frías Pichardo, Marino Vinicio Castillo Hernández and José Casado-Liberato.

[12] In the communication of August 21, 2012, they advised the Court that the said organizations would act before the Court "as representatives in the said case" of the "Medina Ferreras, Jean Mesidor, Sensión Nolasco, Fils-Aimé, Gelin and Pérez Charles" families. They added that they had "lost contact with Andrea Alezy for several years, and this prevented them from presenting a document accrediting that they represented her, so that they [would] not submit arguments with regard to her." They indicated that CEJIL was the common intervener.

10. *Access to the Legal Assistance Fund.* In an Order of March 1, 2013, the President of the Court (hereinafter also "the President") declared admissible the request presented by the presumed victims, through their representatives, to access the Victims' Legal Assistance Fund.[13]

11. *Preliminary objections.* In briefs received on July 5, 2013, the representatives and the Commission presented their observations on the preliminary objections filed by the State and asked the Court to reject them. In addition, they indicated that the State's arguments were not "preliminary issues."

12. *Public hearing.* In an Order of September 6, 2013,[14] the President summoned the parties to a public hearing and required, among other matters, that several statements be submitted by affidavit[15] (*infra* para. 111). The public hearing took place on October 8 and 9, 2013, during the Court's forty-eighth special session, held in Mexico City, Mexico[16] (hereinafter "the public hearing"). During this hearing, the Court received the statements of one presumed victim and one expert witness offered by the Commission, two expert witnesses offered by the representatives, and two expert witnesses offered by the State, as well as the final oral observations and arguments of the Inter-American Commission, the representatives, and the State, respectively. Also, during this hearing, the Court required the parties to submit specific documentation and clarifications on matters relating to the application of certain laws and regulations, legal deportation procedures, and details of the alleged violations. Furthermore, the State showed a video with regard to one presumed victim.

13. *Supervening facts.* The parties cited the following: (a) on October 2, 2013, the representatives advised that the Constitutional Court of the Dominican Republic had handed down judgment TC/0168/13 on September 23, 2013 (hereinafter also "judgment TC/0168/13"), in which "it ruled on the application of article 11 of the Dominican Constitution, applicable to this case." In view of the fact that this occurred after the presentation of the motions and arguments brief, and that "it is closely related to the facts of this case," they asked that "the judgment in question be admitted as supervening evidence"; (b) on May 22, 2014, the representatives advised that Victoria Jean had died on April 20, 2014, and (c) on June 9, 2014, the State advised that it had issued Decree

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[13] *Cf.* Order of the President of the Court of March 1, 2013. Case of Tide Méndez et al. v. Dominican Republic. Victims' Legal Assistance Fund. Available at: http://joomla.corteidh.or.cr:8080/joomla/es/jurisprudencia-oc-avanzado/38-jurisprudencia/1983-resolucion-del-presidente-de-la-corte-interamericana-de-derechos-humanos-caso-tide-mendez-y-otros-vs-republica-dominicana-fondo-de-asistencia-legal-de-victimas-de-1-de-marzo-de-2013

[14] *Cf.* Order of the President of the Court of September 6, 2013. Available at: http://joomla.corteidh.or.cr:8080/joomla/component/content/article/38-Jurisprudencia/2081-corte-idh-caso-tide-mendez-y-otros-vs-republica-dominicana-resolucion-del-presidente-de-la-corte-interamericana-de-derechos-humanos-de-06-de-septiembre-de-2013. By an Order of the President of the Court of September 11, 2013, it was decided to amend the sixty-fifth *considerandum* and twelfth operative paragraph of the Order of the President of the Court of September 6, 2013. Available at: http://www.corteidh.or.cr/docs/asuntos/mendez_fv_13_2.pdf

[15] *Cf.* Order of the President of the Court of September 6, 2013. Following the request of the State, the representatives and the Commission, the time limit for the parties and the Commission to present the affidavits required in the said order, which had originally been set at September 25, 2013, was extended until October 1, 2013.

[16] There appeared at this hearing: (a) for the Inter-American Commission: Felipe González, Commissioner, Elizabeth Abi-Mershed, Deputy Executive Secretary, Silvia Serrano Guzmán and Jorge Humberto Meza, advisers; (b) for the representatives of the presumed victims: Jenny Morón, Cristina Francisco Luis and Leonardo Rosario Pimentel (MUDHA); Francisco Quintana, Gisela de León and Carlos Zazueta (CEJIL); Lisane André (GARR), and Paola García Rey (Columbia University), and (c) for the State: Santo Miguel Román, Deputy Director, General Directorate of Immigration, attached to the Ministry of the Interior and Police, Deputy Agent; Fernando Pérez Memén, Ambassador Extraordinary and Plenipotentiary of the Dominican Republic to the United Mexican States; José Casado-Liberato, Lawyer-Human Rights Analyst for OAS Affairs, Adviser, and Paola Torres de la Cruz, Minister Counsellor of the Embassy of the Dominican Republic in Mexico.

No. 327-13 of November 29, 2013, and Law No. 169-14 of May 23, 2014, and asked that they be incorporated into the case file because it considered that they were supervening facts.

14. *Amici curiae.* The Court received *amici curiae* briefs from various institutions: (1) the Human Rights Clinic of the University of Texas School of Law; (2) the Public Actions Group (GAP), the Jurisprudence Faculty of the Universidad del Rosario, Colombia, and the Pro Bono Foundation, Colombia; (3) the RFK International Strategic Litigation Unit; (4) the Centro de Estudios Legales y Sociales (CELS) Argentina, the Iniciativa Frontera Norte de Mexico (IFNM) and the Fundar Centro de Análisis e Investigación, Mexico; (5) the Human Rights Clinic of Santa Clara University Law School; (6) the Latin American Council of Students of International and Comparative Law, Dominican Republic Chapter (hereinafter "COLADIC-RD"); (7) the International Human Rights Law Clinic of the University of Virginia School of Law; (8) the International Human Rights Clinic of the Inter-American University of Puerto Rico Law School and the Caribbean Institute for Human Rights; (9) the Human Rights Clinic of the University of Miami School of Law, and (10) the Pedro Francisco Bonó Center, the Centro de Formación y Acción Social Agraria (CEFASA), Solidaridad Fronteriza, the Jesuit Migration Service Network, Dominican Republic, and the National Director of the Social Sector of the Company of Jesus in the Dominican Republic, Mario Serrano Marte. In addition Paola Pelletier Quiñones presented an *amicus curie.*

15. Regarding the *amici curiae* presented by the Human Rights Clinic of the University of Virginia, and by the International Human Rights Clinic and Law School of the Inter-American University of Puerto Rico and the Caribbean Human Rights Institute, the State asked that both *amici curiae* be declared inadmissible and excluded from the deliberations on the case, asserting that it had been proved that the content of the former had been guided, coordinated and revised by CEJIL, which was a party to this international litigation and, with regard to the latter, that Mrs. Martínez-Orabona, was not someone who was "unrelated to the proceedings," so that the brief did not qualify as an *amici curiae*, under Article 2(3) of the Rules of Procedure. The Court points out that, under Article 2(3) of the Rules of Procedure, the person presenting an *amicus* should be a person or institution that is unrelated to the litigation and proceedings before the Court, who submits arguments on the facts contained in the submission of the case, or legal considerations on the subject-matter of the proceedings. In other words, the person should not be a procedural party to the litigation, and the document is presented in order to clarify to the Court some factual or legal matters related to the case being processed by the Court; therefore, it cannot be understood as a motion or pleading that the Court must assess in order to decide the case, and an *amicus curiae* brief may never be assessed as an actual probative element.[17] Hence, the State's request that they be excluded from the deliberations is inadmissible. Consequently, the Court admits the said *amici curiae*, in keeping with the preceding considerations.

16. Regarding the *amici curiae* presented by COLADIC-RD and by the Bonó Center and their attachments, the State argued that "the rules of procedure do not establish that those who participate in the proceedings as *amici curiae* may submit documents of any kind, rather they must present legal arguments." The Court underlines that Article 44(1) of the Rules of Procedure which refers to submission of *amici curiae*, establishes that "[a]ny person or institution seeking to act as *amicus curiae* may submit a brief to the Court, together with its annexes, by any of the means established in Article 28(1) of the […] Rules of Procedure." Consequently, the Court considers that the State's observations are inadmissible, and admits the said documents.

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[17] *Cf. Case of the Pacheco Tineo Family v. Bolivia. Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2013. Series C No. 272, para. 10.

17. *Final written arguments and observations.* On November 9, 2013, the representatives forwarded their final written arguments (hereinafter also "final arguments") together with various annexes, and the Commission submitted its final written observations. The State presented its final written arguments, together with several annexes, on November 10, 2013, through *Dropbox.*[18]

18. *Observations on the documents annexed to the final written arguments*. The briefs with final arguments and observations were forwarded to the parties and to the Inter-American Commission on December 17, 2013, and the President granted the parties and the Commission until January 6, 2014, to present any observations they deemed pertinent on the information and annexes forwarded by the representatives and the State, as applicable. On January 6, 2014, the representatives presented their observations and, after the extension requested by the State had been granted, the latter presented its observations on January 17, 2014. The Inter-American Commission did not present observations.

19. *Helpful evidence*. On February 6, 2014, the Secretariat of the Court (hereinafter also "the Secretariat"), on the instructions of the President, asked the State, under Article 58(b) of the Rules of Procedure, to provide information concerning Willian Medina Ferreras. The State presented the information on March 3[19] and 16, 2014. On April 10 and 14, 2014, respectively, the representatives and the Commission presented their observations. On April 15, 2014, the Secretariat forwarded the documentation to the parties and to the Commission and advised the representatives that their "petitions, together with the admissibility and pertinence of the documentation submitted w[ould] be determined at the appropriate time." In addition, the Commission was informed that the admissibility of the observations would be determined opportunely (*infra* para. 144).

20. In its communications of March 3 and 16, 2014, the State informed the Court that it had instituted certain proceedings in the domestic jurisdiction concerning the situation of Willian Medina and his children, Awilda Medina, Luis Ney Medina (hereinafter also "Luis Ney") and Carolina Isabel Medina (hereinafter also "Carolina Isabel"), who is deceased. On May 7, 2014, the Secretariat, on the instructions of the President and under Article 58(b) of the Rules of Procedure, asked the State to provide helpful evidence by forwarding, by May 22, 2014, at the latest, a full and true copy of all the administrative and judicial procedures and proceedings, including those in the criminal jurisdiction, concerning Willian Medina Ferreras, and Awilda, Luis Ney and Carolina Isabel, and the representatives to provide the identify cards of two presumed victims and, as appropriate, the pertinent explanations. The State responded on May 28 and 29, 2014 (*infra* para. 145). On May 30, 2014, the State was asked to provide clarifications by June 3, 2014, at the very latest;[20] however, the clarifications were not presented within this time frame, but rather on June 13, 2014. As regards this documentation sent on June 13, 2014, the State was informed

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[18] In their presentations, the representatives and the State responded to the requests made by the Court during the public hearing for helpful information, documentation and explanations (*supra* para. 12 and *infra* para. 134).

[19] The documentation presented by the State on March 3, 2014, included two documents "apparently of a notarial nature that [were] incomplete"; therefore, the State was asked to forward the Court a complete copy of the documents, or else the pertinent clarifications. After the Secretariat of the Court had reiterated the request to the State on March 14, 2014, the latter responded to the request on March 16, 2014.

[20] Specifically: (a) to clarify whether it had sent the complete case file and, if not, to send a complete and updated copy of the file, and (b) to confirm whether other administrative or judicial procedures or proceedings, including of a criminal nature, were open in relation to the identity and voter registration cards and/or birth certificates of the persons identified as Willian Medina Ferreras, Awilda Medina, Luis Ney Medina and Carolina Medina and, as appropriate, to forward the Court a complete and updated copy of the said proceedings.

that, since it had been presented belatedly, its admissibility would be determined at the appropriate time (*infra* para. 145). The representatives, on June 17, 2014, and the Commission, on June 24, 2014, presented their observations within the respective time frame.

21. *Disbursements in application of the Assistance Fund.* On January 31, 2014, the Secretariat, on the instructions of the President, forwarded information to the State on the disbursements made in application of the Victims' Legal Assistance Fund in this case and, as established in article 5 of the Court's Rules for the Operation of the Fund, granted it a time frame for presenting any observations it deemed pertinent. However, the State did not present observations.

22. *Provisional measures.* On May 30, 2000, the Commission requested provisional measures in favor of Haitians and Dominicans of Haitian origin who risked being "expelled" or "deported" collectively, in relation to case No. 12,271. In orders of August 18, September 14 and November 12, 2000, May 26, 2001, October 5, 2005, and February 2, 2006, the Court required the adoption of measures in favor of Benito Tide Méndez (hereinafter also "Benito Tide" or "Mr. Tide"), Antonio Sensión, Andrea Alezy, Jeanty[21] Fils-Aimé, Willian Medina Ferreras, Bersson Gelin and Rafaelito Pérez Charles, who were named as presumed victims in the Merits report of this case (*supra* para. 3.c.i). The Court required the State to adopt, immediately, all necessary measures to protect the life and personal integrity of the beneficiaries. Furthermore, it required the State to abstain from deporting or expelling Benito Tide Méndez and Antonio Sensión from its territory; to permit the immediate return to its territory of Jeanty Fils-Aimé and Willian Medina Ferreras, and the family reunification of Antonio Sensión and Andrea Alezy with their underage children in the Dominican Republic, and also to collaborate with Antonio Sensión to obtain information on the whereabouts of his family members in the State of Haiti (hereinafter also "Haiti" o "Republic of Haiti") or in the Dominican Republic. It also required the adoption of measures in favor of the priest Pedro Ruquoy and of Solain Pie or Solain Pierre or Solange Pierre and her four children. Subsequently, the Court ordered the lifting of the provisional measures in favor of Benito Tide and Andrea Alezy at the request of the representatives themselves, and also those in favor of Jeanty Fils-Aimé and Solain Pie or Solain Pierre or Solange Pierre due to their decease. Moreover, owing to the particular situation of the beneficiaries, in the different Orders, the Court gradually lifted the measures because the situation of extreme gravity and urgency to avoid irreparable damage to these persons no longer persisted. Lastly, in its Order of September 7, 2012, the Court decided "[t]o lift the provisional measures" with regard to all those who had been beneficiaries, because they did not meet the requirements established in Articles 63(2) of the Convention and 27 of the Rules of Procedure, and to archive the respective file.

III
COMPETENCE

23. The Inter-American Court is competent to hear this case pursuant to Article 62(3) of the Convention, because the Dominican Republic has been a State Party to the American Convention since April 19, 1978, and accepted the contentious jurisdiction of the Court on March 25, 1999. The State's objections to the Court's competence *ratione temporis* in relation to some of the facts of this case will be examined in the following chapter.

IV

[21] Although when processing the provisional measures and in the said Order he was identified as "Janty Fils-Aimé," the Commission identified him as "Jeanty Fils-Aimé" in the Merits report; hence, for the effects of this Judgment he will be referred to thus (*supra* footnote 6 and *infra* para. 86).

PRELIMINARY OBJECTIONS

24. The State filed three preliminary objections concerning: (a) the alleged failure to exhaust domestic remedies; (b) the Court's alleged lack of competence *ratione temporis* in relation to certain facts and acts, and (c) the aforementioned partial lack of competence *ratione personae* "in relation to the members of the Jean family."

A) Preliminary objection of failure to exhaust domestic remedies

A.1. Arguments of the parties and of the Commission

25. The State argued: (a) that the process before the Commission failed to comply with the appropriate procedure in relation to the State's argument of failure to exhaust domestic remedies, and (b) the existence of effective domestic remedies that had not been exhausted, and mentioned the existence of the remedy of *amparo.*[22]

26. In this regard, the State asserted that the Commission had "received the petition on November 12, 1999," and that, in a brief of "August 8, 2000,"[23] presented in the context of the processing of the provisional measures,[24] the State had advised the Commission that "the remedies of the domestic jurisdiction ha[d] not been exhausted […] and presented a certification in this regard." Furthermore, in its answering brief, the State clarified that *amparo* "was the effective domestic remedy."[25] In addition, it indicated in this brief that "the Supreme Court of Justice […] recognized and regulated the action for *amparo*, based on the impact of Article 25 of the American Convention on the domestic jurisdiction,"[26] and that "the National Congress [had] enacted Law No. 437-06, of November 30, 2006, establishing the remedy of *amparo.*" The State added that, in its Admissibility report and also in its Merits report, the Commission had affirmed that "the State had not filed the objection of [failure to] exhaust domestic remedies." It also

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[22] It should be mentioned that, in its final written arguments, the State affirmed that it "reiterate[d] that the domestic remedies available at the time of the presumed facts and/or acts described in the factual framework of the case were: **(I)** the application for *habeas corpus* to counter any infringement of the right to personal liberty; **(II)** the application for *amparo* to safeguard any fundamental right other than personal liberty, and **(III)** the remedies of the contentious-administrative jurisdiction to counter the alleged acts and decisions of the agents of the General Directorate of Immigration. However, and consistent […] with [its] procedural position, the State only present[ed] arguments in relation to the availability and effectiveness of the application for *amparo* in the instant case, and the failure to exhaust this substantiates this objection" (*bold type in the original text*). Based on the State's observations, the Court will only analyze the arguments relating to the "application for *amparo,"* in relation to the said preliminary objection of failure to exhaust domestic remedies.

[23] Secretariat of State for Foreign Affairs of the Dominican Republic. The State's brief of December 15, 1999, answering the request for precautionary measures sent by the Commission. The State's brief of August 8, 2000, answering the transfer of case, Note No. DEI.-99-1367 of December 7, 1999 (file of annexes to the Merits report, annex 1, fs. 6 to 25).

[24] This document was in the case file processed before the Commission, which the latter forward to the Court. The State explained that, "during the first public hearing held by the Court […] to examine [the provisional measures related to the case, it had] deposited a brief dated August 8, 2000, in which it clarified" – referring to the requirement of prior exhaustion of domestic remedies – that the Supreme Court of Justice had "recognize[d], in a judgment delivered on February 24, 1999, the remedy of *amparo* based on the American Convention." It indicated that, on that occasion, the Commission had advised the Court "that it should not refer to the said brief, […] because it would be dealt with within the contentious procedure instituted before [the Commission."

[25] It also indicated that "[t]he procedure on provisional measures and that on a contentious case […] are of a different juridical and procedural nature."

[26] The State, in its answering brief, advised that the judgment of the Supreme Court of Justice had been delivered on February 24, 1999. It also argued that, more recently, "within the framework of the 2010 amendment of the Constitution, the Legislature had enacted the Organic Law of the Constitutional Court and Constitutional Proceedings No. 137-11 on June 13, 2011 [… in which] it authorized new types of *amparo* remedies, such as the *amparo* on compliance, collective *amparo*, and electoral *amparo*."

indicated that "at no time prior to the [Merits report] did the Commission inform the State that the petitioners had argued the exceptions established in Articles 46(2)(a) and 46(2)(b) of the Convention, so that this is a new argument in the proceedings." Lastly, in its final written arguments, the State indicated that, in their observations on the preliminary objections, the Commission and the representatives "recognized expressly that the State had indicated at the appropriate procedural moment that the effective remedy available was the application for *amparo*."

27. The State concluded that it had not tacitly waived the filing of the preliminary objection, and "that the Commission failed to observe its own rules of procedure when it admitted the petition lodged in this case, without evaluating [with due rigor, whether the representatives of the [presumed] victims had filed and also exhausted the domestic remedies."

28. The Commission observed that the Dominican Republic was referring to a brief presented to this Court in a proceeding other than the processing of the contentious case, and that "the fact that, in a communication to the Court, it had indicated in general terms that the issues raised by the State corresponded to the analysis of the contentious case did not exempt the State from presenting the objection of failure to exhaust domestic remedies expressly before the Commission, accompanied by the necessary information." During the public hearing it added that "[t]he State […] merely cited the existence of the remedy of *amparo* without specifying how it could have been filed by the victims who had actually been deported in the circumstances described."

29. The representatives stated that, in the said brief of August 8, 2000, the State "did not indicate the appropriate remedy that allegedly had not been exhausted, nor did it mention whether it was available, suitable and effective"; hence, the argument was not made appropriately and, in any case, that brief had been presented "in a different proceeding to this one and, therefore, the argument should not be taken into account." They added that "the exception to the exhaustion of domestic remedies contained in Article 46(2)(b) of the Convention […] is applicable to this case, because the [presumed] victims were formally and physically prevented from access to the remedies under domestic law," as they had been expelled or deported without a court order, so that there was no judicial decision that they could contest and, added to this, outside Dominican territory they did not have access to an effective remedy.

A.2. Considerations of the Court

30. Article 46(1)(a) of the Convention establishes that, for a petition or communication lodged before the Commission to be admissible, it is necessary that "the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." This rule was conceived in the interests of the State to allow it to resolve the dispute in the domestic sphere before being faced with international proceedings.[27] This means that not only must these remedies exist formally, but they must also be adequate and effective,[28] as a result of the exceptions established in Article

[27] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 61*; Case of Mejía Idrovo v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of July 5, 2011. Series C No. 228, para. 27*, and Case of Liakat Ali Alibux v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of May 19, 2014. Series C No. 277, para. 15.

[28] This means, on the one hand, that the function of the remedy in question, "within the domestic legal system, must be appropriate to protect the juridical situation infringed. Numerous remedies exist under every domestic legal system, but they are not all applicable in every circumstance. If, in a specific case, the remedy is not appropriate, it is evident that it is not necessary to exhaust it." "Furthermore, a remedy must be effective; in other words, it must be able to produce the result for which it was conceived." *Cf. Case of Velásquez Rodríguez v.*

46(2) of the Convention.[29] Since the State has alleged the failure to exhaust domestic remedies, it should have indicated, at the appropriate opportunity, the remedies that must be exhausted and their effectiveness. It is not the task of the Court, or of the Commission, to identify *ex officio* the domestic remedies that remain to be exhausted, and it is not incumbent on the international organs to rectify the lack of precision of the State's arguments.[30] This reveals that when the State refers to the existence of a domestic remedy that has not been exhausted, this must not only be indicated opportunely, but also precisely, identifying the remedy in question and also how, in the specific case, it would be adequate and effective to protect the persons in the situation denounced.

31. In the procedure prior to the decision on the admissibility of this case, the Commission made no distinction between the proceedings on the admissibility of the case and the processing of precautionary and provisional measures; moreover, the Admissibility report does not reveal any background information for the decision other than the processing of the said measures. In addition, the brief of August 8, 2000, on which the State substantiates its arguments, is part of "the whole case filed before the Commission," copy of which was forwarded to the Court, as indicated in the brief submitting the case. Also, the Commission mentioned that the said brief "w[ould] be duly dealt with during the contentious procedure before the Commission."[31] Consequently, even though the parties and the Commission are in agreement in indicating that the processing of provisional measures is different from that of the contentious case (*supra* paras. 28 and 29, and *infra* footnote 42), which, in general, is in keeping with the Court's case law,[32] in the specific circumstances of this case, this, in itself, is insufficient to conclude that the State did not present the objection of failure to exhaust domestic remedies opportunely.

32. Thus, the Court notes that, in its brief of August 8, 2000, the State alleged that the presumed victims had not exhausted the domestic proceedings and indicated that the available remedy was the application for *amparo*. Nevertheless, apart from this mention on that occasion, the Dominican Republic did not explain the supposed suitability and effectiveness of the remedy of *amparo* in light of the facts of this case.

Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 64 and 66*, and Case of Memolí v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265, para. 46.

[29] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits,* para. 63, *and Case of Memolí v. Argentina*, para. 46.

[30] *Cf. Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 23*, and Case of Liakat Ali Alibux v. Suriname,* para. 16.

[31] The Commission made this assertion when presenting observations on the said brief of August 8, 2000, during the processing of the provisional measures. As in the case of this brief, the Commission's observations were forwarded to the Court during the processing of the contentious case before the Court, because they are included in the file of the contentious processing of the case before the Commission that was provided to the Court *(cf.* file before the Commission, fs. 835 to 837).

[32] The Court has stated that "the purpose of the proceedings on [provisional measures is] accessory, precautionary and protective in nature; it is different from the purpose of a contentious case, in both the procedural aspects and the assessment of the evidence and in the implications of the decisions. Consequently, although the arguments, factual grounds and probative elements aired during the provisional measures may be closely related to the facts of the […] case, they are not automatically considered as such or as supervening facts" (*cf. Case of Ríos et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 194, para. 58). Despite this, the Court has considered circumstances in which the beneficiaries of the provisional measures, and the presumed victims of a contentious case were the same and, also, in which the purpose of such measures also coincides to a certain extent with the merits of the dispute. In this context, the Court has indicated that, "as appropriate, and insofar as they have been opportunely, specifically and duly mentioned and identified by the parties in relation to their arguments" it could "consider part of the body of evidence" "the briefs and documentation presented in the proceedings on provisional measures" (*cf. Case of Uzcategui et al. v. Venezuela. Merits and reparations.* Judgment of September 3, 2012. Series C No. 249, para. 33).

33. Also, neither in this brief nor subsequently, did the State affirm that expulsion proceedings had been instituted, in relation to the facts concerning the presumed victims. This is consistent with the State's denial that these acts of expulsion or deportation really occurred. Contrary to the Dominican Republic, the representatives and the Commission alleged that the expulsions or deportations did happen, and that they were carried out without a proper expulsion procedure that would have allowed the presumed victims who, according to the alleged facts were summarily deported to Haiti, to file an effective remedy. This Court considers that it is not possible to examine the alleged preliminary objection of failure to exhaust domestic remedies in relation to the remedy of *amparo*, because the dispute described cannot be decided in a preliminary way, but are related to the merits of the matter.[33]

34. Based on the above, the Court rejects the preliminary objection of failure to exhaust domestic remedies filed by the State.

B) Objection of the Court's lack of competence ratione temporis

B.1. Arguments of the parties and of the Commission

35. The State, in its answering brief, argued that it "accepted the contentious jurisdiction of the Court on March 25, 1999," and that:

> This act […] took place at least **one (1) year after** the presumed expulsion of Benito Tide Méndez, **four (4) years after** the alleged first deportation of Bers[s]on Gelin, **almost five (5) years after** the supposed expulsion of […] Ana Virginia Nolasco, Ana Lidia Sensión, Reyita Antonia Sensión and Antonio Sensión and **at least one (1) year after** the presumed first deportation of Victor Jean, Marlene Mesidor, M[ar]Kenson Jean, Miguel Jean and Natalie Jean (bold type in the original text).

36. The State also pointed out that, in their motions and arguments brief, the representatives had explicitly indicated that they were not submitting the facts relating to the expulsion of Benito Tide to the Court because these occurred in 1998. The State also indicated that "[i]t is not true" that, as affirmed by the representatives, the presumed victims, members of the Sensión family, have remained separated from their loved ones for eight years. It added that "Antonio Sensión, Ana Lidia Sensión and Reyita Antonia Sensión possess their Dominican identity and voter registration cards," and that Ana Virginia Nolasco (hereinafter also "Mrs. Nolasco" or "Ana Virginia") "has been able to reside and move around [Dominican Republic] owing to the legal effects of the safe-conducts granted by the [State] in 2002, renewed in 2012 and in force [until February 10, 2013]."

37. The State asserted that "not only is the exceptional derogation of the principle of the non-retroactivity of treaties inapplicable to this case but, furthermore, the factual framework of the application only alleges the occurrence of acts of an instantaneous nature that began to be executed and that concluded before March 25, 1999."

38. The Commission argued that the "human rights violations established in this case remain unpunished." It added that "acts and omissions of the State that occurred after [the acceptance of the Court's jurisdiction] establish the continuing violation of the right to nationality and the arbitrary interference in family life." It linked the impossibility of some presumed victims to return to the Dominican Republic to structural conditions of discrimination that make them afraid to go back, and indicated that this situation

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[33] The Court has decided similarly in previous cases: *cf*. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, para. 94, and *Case of Liakat Ali Alibux v. Suriname,* para. 21.

continued after the expulsions. It affirmed, in its brief with observations on the preliminary objections, that the "effects" of the expulsion of Mrs. Nolasco, Ana Lidia Sensión and Reyita Antonia Sensión "extended" after March 25, 1999, because the "family reunification" and the return to Dominican territory was in 2002. However, during the public hearing, it did not refer to "effects," but rather to "continuance," indicating that "the deportations were the start of implementation, but the structural conditions continued after the acceptance of jurisdiction." It also stated on that occasion that "the fact that a factual situation begins to be implemented before the acceptance of […] jurisdiction, does not remove the individuals from the Court's protection in case of subsequent acts or omissions. [… S]ubsequent acts exist that constitute autonomous violations."

39. The representatives agreed, in substance, with the Commission. However, they indicated that they were "not submitting the facts relating to the expulsion of Benito Tide Méndez to the Court's consideration, because they took place in 1998," and clarified that these alleged acts "did not continue once [the] Court had acquired competence." In addition, like the Commission, they referred to both the "continuance" of the acts and to their "effects." Thus, on the one hand, they indicated, in relation to Mrs. Nolasco, Ana Lidia and Reyita Antonia Sensión, that the facts, "although they began to occur before March 25, 1999, continued to occur up until 2002." In addition, they alleged that, "in the case of the Sensión family, […] the effects of the expulsion remained over time, in the sense that Mrs. Sensión and her daughters were unable to return to the Dominican Republic for […] eight years and remained separated from Mr. Sensión for all that time; thus […] there was a continuing violation […] of the rights of the family." Unlike the Commission, the representatives did not refer to the alleged impunity in relation to the objection of lack of temporal competence.

B.2. Considerations of the Court

40. The State deposited the document ratifying the American Convention before the General Secretariat of the Organization of American States on April 19, 1978, and the treaty entered into force on July 18 that year. The State accepted the jurisdiction of the Court on March 25, 1999. Based on this, and on the principle of non-retroactivity, codified in Article 28 of the 1969 Vienna Convention on the Law of Treaties, the Court is able to examine the acts or facts which took place after the acceptance of its competence, even those that began before that date, but execution of which is continuing or permanent.[34]

41. Having established the above, the Court must analyze the Commission's observation regarding the "impunity" in which the alleged human rights violations remain, even those relating to expulsions or deportations that took place before March 25, 1999. In this regard, the Court has indicated that:

> Even when a State obligation refers to acts that took place before the date of the acceptance of the respective jurisdiction, the Court is able to analyze whether or not that obligation was met by the State as of that date. In other words, the Court may make the said examination to the extent that this is feasible based on independent acts that occurred within the temporal limit of its competence.[35]

42. The Court notes that the Commission did not identify independent acts that occurred after March 25, 1999, but rather referred, in general, to case law on "the State obligation to act with due diligence in the face of human rights violations," including the duty to

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[34] *Cf. Case of Blake v. Guatemala. Preliminary objections.* Judgment of July 2, 1996. Series C No. 27, para. 40, and *Case of Osorio Rivera and family members v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 26, 2013. Series C No. 274, para. 32.

[35] *Case of García Lucero et al. v. Chile. Preliminary objection, merits and reparations.* Judgment of August 28, 2013. Series C No. 267, para. 30.

"investigate," and did not provide any grounds other than this background information. In particular, it did not explain why, under the applicable domestic or international law, the State had a duty to investigate the alleged facts in this case. In addition, it did not indicate that there had been, either before or after March 25, 1999, proceedings relating to the investigation of the facts, or claims made requiring this, or any other act or fact related to it. Consequently, when determining its temporal competence, the Court is unable to consider the alleged "impunity" of the facts of the case. Since this is true of all the alleged acts of expulsion, both those had took place prior to March 25, 1999, and those that occurred subsequently, the Court will not take into account the alleged "impunity" when examining the merits of the violations alleged in relation to acts for which it has competence.

43. Having established the foregoing, it should be noted that the alleged expulsions in this case are acts whose execution concluded with their implementation; that is, with the implementation, ordered and imposed by State authorities or officials, of the removal of the person in question from the State's territory. The aftereffects of such acts do not constitute their continuing nature, and therefore the Court cannot examine them,[36] unless they are independent acts that constitute the violation of other treaty-based rights.

44. Consequently, the Court will not examine the following facts and effects, because they fall outside its temporal competence and, furthermore, they were not submitted to its consideration:

a) The facts relating to the alleged expulsion of Benito Tide Méndez from Dominican territory in 1998, and its effects;[37]

b) The facts relating to the alleged expulsion of Bersson Gelin in 1995, or its effects;

c) The facts relating to the detention and expulsion of Ana Virginia Nolasco, Ana Lidia Sensión and Reyita Antonia Sensión in 1994,[38] and

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[36] *Cf.* similarly, *Case of Alfonso Martin del Campo Dodd v. Mexico. Preliminary objections.* Judgment of September 3, 2004. Series C No. 113, para. 78, and *Case of García Lucero et al. v. Chile,* para. 36.

[37] Despite the foregoing, in its Merits report, the Commission indicated among the facts the steps that Mr. Tide had taken in 2007 to replace his Dominican identity card, and related this to the alleged violation of the right to juridical personality and to equality before the law. The Court would have temporal competence to examine these facts. However, for reasons of procedural economy it should be noted that there is no evidence of this fact, which the Commission asserted based on the "observations on the merits of the case presented [to the Commission] by the representatives [that] were not contested by the State." In addition, it emerges *prima facie* that these facts, taken in isolation, only describe steps taken by Mr. Tide (the completion of which is not recorded), so that they do not prove infringements of treaty-based rights. In fact, they indicate that Benito Tide Méndez "had lost" his "Dominican identity card"; that "he tried to replace" it, and that Dominican authorities "refused" to do this, because they told him that he must "go to the Central Electoral Board" because "he was being investigated." In this regard, the Commission considered that "the steps taken [by Benito Tide Méndez] in order to recover his documentation encountered several obstacles and additional requirements, and he was allegedly refused the documentation owing to an investigation that was underway." Hence, the Commission did not assert conclusively, but only potentially, that the "documentation" "had allegedly been refused," and did not provide explanations, other than those described, as to why the supposed "obstacles and additional requirements," or the said "investigation" would, in themselves, give rise to violations of treaty-based rights. The Court considers that the facts described and the considerations, isolated from other facts concerning Benito Tide Méndez that the Court is unable to analyze owing to the limits to its temporal competence, reveal *a priori* that it is not possible to infer violations of the American Convention; accordingly, it is not necessary to analyze these circumstances. Thus, the Court is unable to examine any presumed act or fact relating to Benito Tide. This means that the Court cannot rule on the members of Mr. Tide's family, because the allegations with regard to them are based on a connection to the supposed acts that concern him.

[38] It is relevant to establish that the Court will not examine the allegations relating to the presumed impossibility of Ana Lidia Sensión and Reyita Antonia Sensión to present their personal documentation to the authorities, or the supposed destruction of this documentation. In this regard, it should be explained that, in the Merits report, the Commission determined that Ana Lidia Sensión and Reyita Antonia Sensión, "during their arbitrary detention and expulsion, […] were not given the opportunity to present [their] documentation [or this]

d) The alleged facts relating to the expulsion of Victor Jean in 1998.

45. To the contrary, the Court is competent to rule on facts that, as indicated in the Merits report, occurred after March 25, 1999.

46. Hence, the Court will examine the facts that took place following the acceptance of its contentious jurisdiction by the Dominican Republic that are independent facts that may constitute autonomous violations.[39]

47. Consequently, the Court admits partially the preliminary objection of lack of temporal competence, in the terms described above.

48. However, according to Article 42(1) of the Rules of Procedure, "[p]reliminary objections may only be filed in the [answering] brief." Therefore, the State's presentation in its final written arguments of an objection of lack of competence *ratione temporis* in relation to the Medina and Fils-Aimé families is time-barred.[40] Nevertheless, it will be taken into account, as pertinent, when examining the merits of the case.[41]

C. Objection of the Court's lack of competence ratione personae

C.1. Arguments of the parties and the Commission

49. The State noted that Victor Jean, and the members of his family, "Marlene Mesidor, Ma[r]kenson Jean, Victoria Jean, Miguel Jean, Nat[…]alie Jean, Jessica Jean and Victor Manuel Jean," were not "identified by the Inter-American Commission in the Admissibility report.[42] It asked that the Court "declare the application inadmissible *ratione personae"* with regard to them. It asserted that the presentation of the members of the Jean family as presumed victims "violates the State's right of defense and the principle of procedural equality, because the State did not have the corresponding procedural opportunity to defend itself in the case [of] the Jean family." It added that the State should have the

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was destroyed by the Dominican officials" and, on this basis, "conclude[d] that the State violated the[ir] rights to juridical personality and to nationality." When submitting the case to the Court, the Commission asked that the Court declare the violation of these rights to the detriment of the said persons. However, at the same time, the Commission indicated that it submitted the case to the Court only with regard to "the [alleged] acts and human rights violations committed by the State […] that have continued since the acceptance of the Court's contentious jurisdiction on March 25, 1999." Therefore, since the said destruction of documents or the impossibility of presenting them occurred before March 25, 1999, these facts fall outside the Court's temporal competence and were not submitted to its consideration.

39 *Cf. Case of the Serrano Cruz Sisters v. El Salvador. Preliminary objections.* Judgment of November 23, 2004. Series C No. 118, para. 84, and *Case of García Lucero et al. v. Chile*, para. 35.

40 The State explained that, since the most recent temporal reference was only made during the public hearing, it had not presented the objection in its answering brief and, therefore, presented the objection in its final written arguments, an occasion that, according to the State, is the "opportune procedural moment […] according to Article 57(2) of the Court's Rules of Procedure."

41 The Court also notes that the State did not affirm that the respective facts, as described in the Merits report, were outside the Court's temporal competence. The Court will consider the facts that fall within the factual framework of the case, within the limits of its temporal competence, and based on the relevant evidence.

42 The State alleged, referring to the Merits report, that, in order to consider the said persons as victims, the Commission had taken into account the State's position during the friendly settlement process and the provisional measures (paragraph 109 of the Merits report asserts that during the friendly settlement process both parties regarded the Jean family as victims in this case," and that "the State granted them safe-conducts in the context of the implementation of the provisional measures." The State rejected this, indicating that: (a) although the friendly settlement procedure and the proceedings of a contentious case may intersect, their juridical and their procedural nature are distinct, as indicated by the Convention." Regarding the former, it asserted that, in paragraph 124 of its judgment in the case of *Abrill Alosilla,* the Court had stated: "not every position taken […] before the Commission gives rise to […] an acknowledgement of facts or of responsibility."

opportunity to resolve the alleged violations in the domestic sphere, and that the Commission should have notified it of the Jean family's request to be included.

50. The representatives alleged that, based on "consistent case law of the Court since [the judgment of November 20, 2007, in the case of *García Prieto et al. v. El Salvador,*" "[t]he opportune procedural moment to identify the [presumed] victims in the proceedings before the Court is the Merits report." In addition, they noted that "the first mention of [the members of] the Jean family as victims […] was [in the brief dated] January 29, 2002, in an addendum to the initial petition lodged before the Commission." They also listed various presentations and actions, in the context of the process before the Commission, in which, following the issue of the Admissibility report, reference had been made to the members of the Jean family, or on which the State had not made any relevant observations (*infra* para. 55). They inferred from this that "[t]he State had 10 years and numerous procedural opportunities to comment on the situation of the Jean family and to present the arguments and evidence to defend itself and, nevertheless, did not do so."

51. The Commission stated that "the explanation for the inclusion of the Jean family is found in the Merits report" and that "the individualization made in [the report] is consistent with the indications of the Inter-American Court since 2007, to the effect that the persons considered victims must be identified in the merits report of the Commission." According to the Commission, this "is supported by the fact that the Commission determines the factual basis of the case at the merits stage and not in the admissibility stage, which is based on a *prima facie* standard of assessment." In addition, it clarified that:

> The reference to the friendly settlement procedure does not mean that the merits report accords legal effect to questions debated during the procedure; [but rather] it relates to safeguarding the State's right of defense […], taking into account that, since 2002, the State was aware that the petitioners considered this family a victim.

C.2. Considerations of the Court

52. The Court considers it pertinent to indicate that the Commission did not identify the members of the Jean family in the Admissibility report, even though the representatives had presented "additional information" to the Commission on January 30, 2002, in which they referred to these persons. The omission consisted in: (a) the failure to mention their names expressly, and (b) the absence of any reference to the facts relating to the members of this family. However, in the Merits report, the Commission "concluded that the State […] is responsible for the violation of [certain] rights, […] to the detriment of, [*inter alia*], Victor Jean, Marlene Mesidor, M[ar]Kenson Jean, Victoria Jean, Miguel Jean, Natalie Jean[,…] Jessica Jean [and] Victor Manuel Jean" and, in its paragraphs 109 to 116, indicated the facts relating to the members of the Jean family.[43]

53. Under Article 35(1) of the Rules of Procedure of the Court and its consistent case law, the presumed victims must be identified in the merits report issued pursuant Article 50 of the Convention.[44] In the instant case, the Commission identified the members of the Jean family in the Merits report and thus complied with this regulatory provision.

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[43] Thus, the Commission provided information on the composition of the family and the events that occurred in 1998 and on December 1, 2000, which, allegedly, resulted in the expulsion of Victor Jean from Dominican territory and, on the second occasion, the expulsion of the members of his family also. In addition, reference is made to financial losses of Victor Jean and the members of his family and to the safe-conducts granted to the members of this family in March 2002.

[44] *Cf. Case of García Prieto et al. v. El Salvador. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2007. Series C No. 168, para. 65, and *Case of Chaparro Álvarez and Lapo Íñiguez v.*

54. Despite the foregoing, the State filed this objection owing to the difference between the Admissibility report and the Merits report and the alleged violation of its "right of defense" and to "procedural equality," in relation to the inclusion of the members of the Jean family as presumed victims in the second document.

55. The Merits report of this case indicates that, "[a]lthough the Jean family was not mentioned by name in the Admissibility Report […], the Commission notes that the information on the situation of these people was supplied to the Commission starting in 2002 and forwarded to the State thereafter." Indeed, the Court has verified that, on several occasions before and after the issue of the Admissibility report on October 13, 2005, information was presented on the members of the Jean family of which the State was aware.[45]

56. The Court notes that, during the processing of the case before the Commission prior to the issue of the Merits report, the State was able to present its exculpatory arguments on this aspect. The State has not indicated any reason or proved why, in the instant case, the failure to identify the members of the Jean family and the respective facts in the Admissibility report would prejudice its ability to defend itself, or that this had not been rectified by the subsequent opportunities it has had to submit its exculpatory arguments.

57. Based on the above, the Court rejects the objection filed by the State.

V
PRELIMINARY ISSUES

58. The State presented two preliminary issues that relate to: (a) some petitioners were disqualified from being considered presumed victims in this case, and (b) the inadmissibility *ratione materiae* [….] of the presumed facts and acts alleged by the representatives that were not recognized by the Commission [….] in its factual framework." The issues raised by the State will be analyzed as follows: (A) Determination of the presumed victims, and (B) Factual framework.

A) Determination of the presumed victims

59. The Court will now describe and analyze the aspects grouped by the State into a "preliminary issue" concerning whether certain persons qualified as presumed victims; in other words, concerning the possibility of examining the alleged violation of treaty-based rights with regard to these persons. Notwithstanding the fact that, as indicated by the Commission and the representatives this "preliminary issue" relates in part to factual determinations *(infra* para. 69), for reasons of procedural economy and greater clarity,

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Ecuador. *Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, para. 224. These judgments were adopted by this Court during the same session. This criterion has been ratified when applying the Court's new Rules of Procedure: *cf. Case of the Barrios Family v. Venezuela. Merits, reparations and costs*. Judgment of November 24, 2011. Series C No. 237, footnote 214, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs.* Judgment of May 29, 2014. Series C No. 279, para. 29.

[45] After the issue of the Admissibility report on March 31, 2006, the representatives presented a communication to the Commission in which they stated that "the family of Victor Jean is not expressly mentioned as a victim in the Admissibility report." That communication was forwarded to the State on May 8, 2006, and the Commission asked it "to present any observations it deemed opportune." There is no record that the State responded to this request. Later, a series of steps were taken corresponding to measures to achieve a friendly settlement; in addition, the representatives presented observations on the merits of the matter, and requested that the Commission issue the merits report. They also forwarded a list of victims, including the members of the Jean family. Furthermore, the State mentioned some members of the Jean family during the friendly settlement process when requesting certain information.

the Court considers it appropriate to deal with these arguments of the State before examining the facts of the case and their legal effects. This is in order to determine, first, the persons regarding whom it will analyze whether their rights have been violated. For the same reasons and purpose, the Court will also include in this evaluation an examination of information and arguments that, even though the State did not relate them to the "preliminary issue" that it raised, are closely related to the identification of the presumed victims in this case. In doing so, the Court will abide by the criteria established for the assessment of evidence, which is indicated below (*infra* paras. 193 to 198).

A.1. Arguments of the parties and the Commission

60. The State, in its answering brief, asserted that the Court could only consider the following as presumed victims: "Willia[n] Medina Ferreras"; "[Aw]ilda Medina"; "Luis Ney Medina"; "Carolina Isabel Medina"; "Jeanty Fils-Aimé (deceased)"; "Janise Midi"; "Diane Fils-Aimé"; "Antonio Fils-Aimé"; "Marilobi Fils-Aimé"; "Endry Fils-Aimé"; "Andrén Fils-Aimé"; "Carolina Fils-Aimé"; "Bers[s]on Gelin" and "Rafaelito Pérez Charles." In this brief, it filed an "objection that [certain] persons were not qualified to be considered presumed victims" as a "preliminary issue." The State also referred to Benito Tide and to the members of his family, and also to the members of the Jean family.[46] In addition, in raised questions regarding the following persons, who it grouped by family:

> [A] **Medina family:** (**1**) Lilia Jean Pierre [and] (**2**) Kimberly Medina Ferreras
> [B] **Fils-Aimé family:** (**1**) Juan Fils-Aimé and (**2**) Nené Fils-Aimé
> [C] **Gelin family:** (**1**) [Julie Sainlice,] (**2**) Jamson Gelin, (**3**) Faica Gelin, (**4**) Kenson Gelin, [and] (**5**) William Gelin
> [D] **Sensión Family:** (**1**) Antonio Sensión, (**2**) Ana Virginia Nolasco, (**3**) Ana Lidia Sensión, (**4**) Reyita Antonia Sensión, (**5**) Ana Dileidy Sensión, (**6**) Maximiliano Sensión, (**7**) Emiliano Mache Sensión, [and] (**8**) Analideire Sensión
> [E] **Andrea Alezy**, and
> [F] **Pérez Charles family:** (**1**) María Esther [Matos Medina], (**2**) Jairo Pérez Medina, and (**3**) Gimena Pérez Medina (*bold in the original text*).

61. The State also presented information and concerns regarding the identity or relationship of some of the persons who, in its answering brief, it had indicated that they could be considered presumed victims. These persons are: Willian Medina Ferreras, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina, and Jeanty Fils-Aimé, according to the names that have been established (*infra* paras. 83 and 86). In addition, in its final written arguments, on the basis of arguments relating to the statements made before the Court after it had presented its answering brief, it objected to Marilobi, Andren and Carolina, all surnamed Fils-Aimé. The case file before the Court also contains documents in which the State presented information and arguments on data related to the identity of Jeanty Fils-Aimé, Bersson Gelin and Rafaelito Pérez Charles (hereinafter also "Mr. Pérez Charles"),[47] which the Court finds it desirable to deal with prior to analyzing the merits of the case. The State's arguments and information are described below (grouped by the family of the persons to whom the said concerns refer).

62. *Medina family*. The State indicated that, in the case of Lilia Jean Pierre, the Commission had founded "its application" on "presumed sworn statements of Willia[n]

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[46] Regarding the members of the Jean family, in the "preliminary issue," the State repeated substantially the same arguments as it had submitted with regard to the objection *ratione personae* that it had filed *(supra* para. 49). In this regard, the Court has already taken the respective decision (*supra* paras. 52 to 57). Nevertheless, it will include other considerations on members of the Jean family in this section (*infra* para. 93).

[47] *Cf.* The State's thirtieth report on compliance with the provisional measures ordered by the Court in the Matter of Haitians and Dominicans of Haitian origin in the Dominican Republic of September 8, 2006, and the attached documents (file of annexes to the Merits report annex 38, fs. 302 to 345).

Medina Ferreras and Lilia Jean Pierre herself" (annexes 13 and 14 to the Merits report), and that Mr. Medina Ferreras indicated that his wife was "Lilia Pérez" and she was 36 years old in 2000, rather than 29 years of age, as can be inferred from Lilia Jean Pierre's statement. Therefore, "there are strong […] reasons to presume that [the person] who Mr. Medina referred to […] is not [the person] that the Commission presented as a presumed victim." The State indicated these objections while arguing also that the documents containing the said statements have not been authenticated (*infra* paras. 121 and 124). Similarly, it affirmed that, in his statement before the Court, Willian Medina Ferreras reiterated that his wife's name was "Lilia Pérez," who was Haitian, and that the extract from the birth certificate of Awilda Medina, provided by the representatives on October 6, 2013, indicates that her mother is "Liliana Pérez," a Dominican national. The State indicated also that Kimberly Medina Ferreras was not named as a victim by either the Commission or the representatives.

63. Regarding *Willian Medina Ferreras*, the State questioned his identity. Thus, it affirmed that, although it is true that the proof of identity submitted to the Court was a State document, "it is no less true that the State has advised, since 2000, that according to its investigation, this was a case of identity theft" and the investigations had not continued "out of respect" for the Court, in view of the provisional measures that were in force (*supra* para. 22). Moreover, during the public hearing, the Dominican Republic stated that, according to photographs shown to him at that time, the person identifying himself as Willian Medina Ferreras did not recognize his siblings and, according to a video shown as part of the State's arguments, supposed members of his family did not recognize him (*infra* para. 128). It asked that the Court "exclude […] Willia[n] Medina Ferreras […] from the case file, […] because there is a strong probability that he is not the same person as the one referred to by the representatives[. …] Rather, […] the person who appeared at the public hearing […] was really Wilnet Yan, a Haitian national." At the Court's request, on March 3, 2014, the State presented information on the measures taken by the Central Electoral Board that also involved Awilda Medina, Luis Ney Medina and Carolina Isabel Medina subsequently (*supra* para. 20 and *infra* paras. 140 to 144 and 206 to 208).[48]

64. *Fils-Aimé family.* The State also indicated that while the Commission had named "Juan" Fils-Aimé, who was allegedly born in 1997, as a presumed victim, the representatives referred to "Juana" Fils-Aimé who, according to the power of attorney granted, was born in 1989. Accordingly, according to the State, this is not the same person. As regards Nené Fils-Aimé (hereinafter also "Nené"), it alleged that the representatives had not presented the respective power of attorney. In addition, in its final written arguments, the State indicated that "[a]ccording to the statement of [Janise Midi (hereinafter also "Mrs. Midi")], Nené Fils-Aim[é] was born in Haiti," contrary to the assertions of the Commission and the representatives.[49] At that time, the State also requested the "exclusion from the case file" of Marilobi Fils-Aimé (hereinafter also "Marilobi") and Andren Fils-Aimé (hereinafter also "Andren"), and Carolina Fils-Aimé (hereinafter also "Carolina") because, according to the State, the statement given by Janise Midi before the Court reveals that the first two were not in the house when the supposed deportation took place, because they no longer lived there, and that Carolina was born after this alleged incident. The case file also contains documentation in which the State asserted that the supposed Dominican identity card of the person indicated in

[48] Minutes No. 23-2013 of the Central Electoral Board, "Minutes of the regular meeting of the registrars' committee held on October 18, 2013" (file of preliminary objections, merits and reparations, fs. 3478 to 3490).

[49] The State clarified that the Commission "indicated that '[t]he seven oldest children of [Mr.] Fils-Aimé were born in the Dominican Republic,' which necessarily includes Nené Fils-Aimé, because he is the oldest of them. The representatives of the presumed victims made a similar affirmation."

the Merits report as Jeanty Fils-Aimé is not registered, and referred to statements by individuals who have said that the real name of the person indicated is "Yantil" or "Fanty" and that he is Haitian.[50]

65. *Gelin family.* The State alleged that the representatives had waived the possibility of presenting arguments in favor of Julie Sainlice,[51] Jamson Gelin, Faica Gelin and Kenson Gelin, because their situation related to the life of Bersson Gelin and his family in Haiti, and had no causal nexus with the supposed facts of the case; in addition, the State had obligations with regard to individuals in its territory, and could not "assess facts or acts […] that occurred outside [this]." It also asserted that the power of attorney granted by Bersson Gelin "does not include [Willian Gelin] as a beneficiary of the legal defense and request for reparations" and that, even though Julie Sainlice granted a power of attorney on May 9, 2012, neither the Commission nor the representatives named this person as a presumed victim. Also, in relation to the person who was identified as Bersson Gelin in the Merits report, a document exists in which the State affirmed that his supposed Dominican identity card was not registered.[52]

66. *Sensión Family.* Regarding Antonio Sensión, Reyita Antonia Sensión Nolasco (hereinafter also "Reyita Antonia Sensión" or "Reyita Antonia"), Ana Lidia Sensión Nolasco (hereinafter also "Ana Lidia Sensión" or "Ana Lidia") *and* Ana Virginia Nolasco, the State asserted that the signature of Antonio Sensión on the power of attorney that he granted does not coincide with the signatures on the three sworn statements provided by the Commission and, also, that the power of attorney does not bear the signature or seal of the notary public. It also questioned Ana Virginia Nolasco, alleging that Antonio Sensión refers to his wife as "Ana Virgil" in his statements of May 8, 2001, and March 27, 2007, but the Commission, in the brief submitting the case and in the Merits report, and the representatives in their motions and arguments brief, refer to Ana Virginia Nolasco. Furthermore, the State indicated that the representatives had waived the possibility of presenting arguments in favor of Ana Dileidy, Maximiliano, Emiliano and Analideire, all surnamed Sensión; moreover, as Maximiliano was deceased, and "since he has been established as an indirect victim," his "eventual right to reparations has ceased."

67. *Pérez Charles family.* The State affirmed that, according to the official records, María Esthel Matos Medina, who the Merits report refers to as "María Esther Medina Matos," is not the mother of Rafaelito Pérez Charles. However, the representatives indicated that Clesineta Charles[53] agreed to register Rafaelito as her son due to problems experienced by Mrs. Matos Medina who, according to the representatives, is his real mother. However, this statement alone does not disprove the legal presumption *juris et de jure* provided by Rafaelito's birth certificate. Regarding Jairo and Gimena, both surnamed Pérez Medina, the State indicated that doubts exist about their relationship to Mr. Pérez Charles, because this has not been proved. The State indicated, on the one hand, that it has not been alleged or proved that they are the children of Rafael Pérez, father of Rafaelito Pérez Charles and, on the other hand, that, since Mrs. Matos Medina is not the mother of the latter, the maternal surname is different.

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[50] The State's thirtieth report on compliance with the provisional measures mentions that Jeanty Fils-Aimé is "Yantil" or "Fanty."

[51] During the public hearing, the State added that its arguments were not altered by the representatives' explanation about the name of the person identified in the Merits report as "Gili Sainlis" who, according to this explanation, is Julie Sainlice (*supra* footnote 11).

[52] The State's thirtieth report on compliance with the provisional measures.

[53] Although the representatives referred to "Clerineta Charles" in the motions and arguments brief, for the effects of this Judgment, the Court will refer to her as "Clesineta Charles," because this is the name that appears on the birth certificate of Rafaelito Pérez Charles (*infra* para. 95).

68. Lastly, the State affirmed that the representatives had indicated their "express waiver of representing [Andrea Alezy] in this case."

69. The representatives and the Commission indicated that the "preliminary issue" presented by the State was, to the contrary, a question relating to the merits of the case that concerned the assessment of the evidence. Nevertheless, the representatives and, to a lesser extent, the Commission, referred to some aspects of the State's arguments.

70. Regarding the Medina family, the representatives asserted that the difference in name between Lilia Jean Pierre and Lilia Pérez is due to the fact that Haitians living in the Dominican Republic tend to "latinize" their names.

71. In relation to Willian Medina Ferreras, both the representatives and the Commission indicated that the photographs and video on which the State based its arguments (*infra* paras. 127 and 128) are not admissible, because their presentation was time-barred. The representatives also asserted that the principle of estoppel is applicable, because the State, during the processing of the case before the Commission and in its answering brief, had indicated that the presumed victim is Willian Medina Ferreras. In addition, the representatives, in their written arguments, indicated that Willian Medina Ferreras was being investigated on the basis of his statements before the Court; that is, in violation of Article 53 of the Rules of Procedure.[54] However, it then stated that, "the State opened the new investigation on September 26, 2013, in other words 12 days before this hearing was held before the Court." They also recalled that the State had "accepted" that "Willia[n] Medina Ferreras, Awilda Medina [and] Luis Ney Medina […] are Dominican citizens."[55]

72. Regarding the person identified as "Juan Fils-Aimé" in the Merits report, the representatives clarified that she is, in fact, "Juana Fils-Aimé." Nevertheless, they indicated that "based on the statement of Janise Midi […] before the Court, [they] consider that [Juana Fils-Aimé] should not be considered a victim […], because she was not living with the Fils-Aimé family at the time of their expulsion."

73. They also stated that they had lost contact with Andrea Alezy and that they would not present arguments with regard to her.

74. As for the person identified as "Ana Virginia Nolasco" in the Merits report, the representatives explained that "her correct name in her mother tongue, Creole, is Ana Virgil Nolasco, and her latinized name […] is Ana Virginia Nolasco."

75. They also indicated, regarding the State's objection to "María Esthel Matos Medina," that "Mrs. [Matos] Medina [is] the person with whom Rafaelito has ties of affection and, therefore, it was she whose 'right to physical and moral integrity' was affected 'owing to suffering […] as a result of […] the violations perpetrated […].' Thus, it is irrelevant that she does not appear as his mother in the birth records."

76. The representatives also forwarded the Haitian identity documents of Bersson Gelin and Jeanty Fils-Aimé that it had at that time. They repeated that Bersson Gelin was born

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[54] In addition, in their brief of April 10, 2014, they "advised the Court that the State ha[d] filed a criminal complaint against Mr. Medina Ferreras on March 4, 2014," and that "Willia[n] Medina Ferreras ha[d] forwarded [them] the notification of the institution of an action to annul his birth certificate, considering that the data provided was false." A copy of this was forwarded to the Court.

[55] *Cf.* Report of the Dominican Government of July 6, 2012, on the measures adopted to comply with the Commission's recommendations (file before the Commission, fs. 2165 to 2170).

in the Dominican Republic and that "the State has denied him access to his identity card," and that, "when [Mr. Gelin] found himself in a situation of extreme vulnerability in Haiti, he was obliged to obtain Haitian identity documents to survive outside his country of birth." They added that Jeanty Fils-Aimé was born in the Dominican Republic, and that "the Dominican State refused to acknowledge his nationality by granting him his identity card as part of the State practices described in the motions and arguments brief." Lastly, they asked that, notwithstanding the Haitian identity documents, the "State provide the corresponding Dominican documentation."

A.2. Considerations of the Court

77. The Court notes that some of the arguments contesting the status of certain persons as presumed victims refer to questions relating to their identity (*supra* paras. 61 to 67), such as the name, the relationship, or the place of birth. The domestic authorities must determine this information, and also resolve eventual challenges to their decisions. The Court, within the framework of its competence and functions requires, pursuant to Article 35 of the Rules of Procedure, that the presumed victims be identified, without prejudice to the exceptions established in paragraph 2 of this article, which do not apply in the instant case.

78. In view of the situation described, and based on the arguments of the parties and the Commission, the corresponding body of evidence, as well as in light of the particularities of this case, the Court, notwithstanding any considerations that may be made subsequently when examining the merits of the case, determines that the following are presumed victims: Victor Jean, Marlene Mesidor, Markenson Jean,[56] Victoria Jean, Miguel Jean, Natalie Jean, Willian Medina Ferreras, Lilia Jean Pierre, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina, Jeanty Fils-Aimé, Janise Midi, Nené Fils-Aimé, Diane Fils-Aimé, Antonio Fils-Aimé, Endry Fils-Aimé, Bersson Gelin, William Gelin, Antonio Sensión, Ana Virginia Nolasco, Ana Lidia Sensión, Reyita Antonia Sensión and Rafaelito Pérez Charles. The other persons named in the Merits report will not be considered presumed victims (*infra* paras. 92 to 95). Furthermore, the Court is unable to rule on supposed facts and violations to treaty-based rights to the detriment of Benito Tide and the members of his family, and of Andrea Alezy, as explained below (*infra* para. 96). The Court finds it pertinent to make the following clarifications in relation to all the foregoing.

A.2.1. Persons identified with different names

79. Regarding Lilia Jean Pierre, the Court notes that the State partially founded its argument on information that emerged from statements presented by the Human Rights Clinic (*infra* para. 124) concerning the person who, in the Merits report, is identified as Lilia Jean Pierre. The Court observes that this is consistent with the statement of Willian Medina Ferreras who affirmed that his wife is called "Lilia Pérez," a Haitian national, and the statement of Awilda Medina, who indicated that her mother is "Lilia Pérez also known as Lilia Pierre" and that she was born in Haiti. The Court also notes that the extract from Awilda Medina's birth certificate indicates that her mother is "Liliana Pérez."[57] In addition,

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[56] The Court, for the effects of this Judgment, will refer to him as Markenson Jean, placing on record that this name refers to the person who, in the Merits report, was identified as "McKenson Jean." This is because "Markenson Jean" is the name revealed by different documents, including official ones (*cf.* Birth certificate of Markenson Jean issued by the Republic of Haiti (file of annexes to the motions and arguments brief, annex B08, f. 3527), and Affidavit made by Markenson Jean on September 29, 2013 (file of preliminary objections, merits and reparations, f. 1730).

[57] *Cf.* Extract from the birth certificate of Awilda Medina, issued by the National Civil Registry Directorate, Central Electoral Board on October 17, 1999 (file of annexes to the motions and arguments brief, annex B02, f.

the case file contains the Haitian electoral identity document of "Lilia Jean" and the birth certificate of the same country for "Lilia Jean Pierre."[58]

80. The State also argued that there was a difference between the name of "Ana Virginia Nolasco," that appears in the Merits report, and the name of "Ana Virgil" that Antonio Sensión mentioned in certain statements. Despite this, the Court takes note of the representatives' explanation that the "correct name" of Mrs. Nolasco in Creole is "Ana Virgil," which Antonio Sensión also indicated in his statement before the Court.

81. Lastly, a similar situation occurred with "William Medina Ferreras" and "Wilda Medina." The birth certificate of Willian Medina Ferreras has been provided to the Court,[59] and although the latter is named "Wilda Medina" in the Merits report, the Court has been provided with documentation that substantiates that her name is Awilda Medina Pérez (*infra* footnote 183).

82. Taking into account the evidence provided to the Court in the form of documents substantiating identity and birth, and in accordance with the criteria concerning evidence that are applicable to the case (*infra* para. 193 to 198), this Court considers that the State's arguments and the differences that exist in the said documents are insufficient to find that the persons named in the Merits report have not been duly identified, or to determine that they lack the family ties indicated, consequently, limiting their consideration as presumed victims. Moreover, it is understood that, as the representatives have indicated, Haitians living in the Dominican Republic tend to adopt the Spanish form of their names.

83. Based on the above, the Court determines that, for the effects of this Judgment, it will understand that the persons identified in the Merits report with other names – as in the case of Lilia Jean Pierre, who is also known as "Lilia Jean" or "Lilia Pierre" or "Lilia Pérez" or "Liliana Pérez"; of Ana Virginia Nolasco, whose name in Creole is "Ana Virgil," and of those who, according to the documentation presented, have accredited that their names are Willian Medina Ferreras and Awilda Medina Pérez, who the Merits report refers to as "William Medina Ferreras" and "Wilda Medina" – are the same persons, respectively, and hereinafter the first names indicated in each case will be used.

A.2.2. Persons whose place of birth could not be determined

84. With regard to those who were identified in the Merits report as Jeanty Fils-Aimé, born in "Dominican Republic" and Bersson Gelin, born "in Mencía, Pedernales, Dominican Republic," the documentation issued by the State[60] casts doubts on these data, indicating that [neither Jeanty nor Bersson] were […] registered […] with those names […] in [its] database, because the identity card number does not correspond […] to that of an identity document, either [to the] previous or [to the] actual identity cards."[61] Although Mr. Fils-

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3495), and sheet with general information on Awilda Medina Pérez, issued by the Central Electoral Board, based on its master list of those registered, on July 4, 2012 (file before the Commission, annex 3, f. 2183).

58 *Cf.* Electoral identity document and Haitian birth certificate of Lilia Jean Pierre (file of annexes to the Merits report, annex 8, fs. 158 and 159).

59 *Cf.* Birth certificate of Willian Medina Ferreras, issued by the Central Electoral Board on January 14, 1994 (file of annexes to the Merits report, annex 38, f. 342).

60 The State's thirtieth report on compliance with the provisional measures.

61 Note 34,143, signed by the President of the Central Electoral Board on September 22, 2006, attached to the State's thirtieth report on compliance with the provisional measures.

Aimé stated that he was born in the Dominican Republic,[62] the State attached copies of the sworn statements of six individuals who indicated that the name of "Jeanty Fils-Aimé" is "Yantil" or "Fanty" and that he is a Haitian national. The State added that, the affidavit prepared by Bersson Gelin and presented to the Court records that he "identifie[d] himself with [a] Haitian identity document," and stated that "[a]lthough [he] was born in the Dominican Republic, [he has] a Haitian birth certificate." Consequently, the Secretariat, on the instructions of the President, requested helpful evidence and, in response, on May 22, 2014, the representatives presented copies of the Haitian identification documents of Jeanty Fils-Aimé (with that name) and of Bersson Gelin indicating that they were born in the Haitian town of Anse-à-Pitres.

85. Regarding Nené Fils-Aimé, the Commission and the representatives stated that he was born in Dominican territory and that he is the son of Jeanty Fils-Aimé and Janise Midi; whereas the State asserted, as it did with regard to other members of the Fils-Aimé family, that his birth was not registered. Also, Janise Midi stated that Nené Fils-Aimé is the son of Jeanty Fils-Aimé, but is not her son, and that she believed that he was born in Haiti.[63] In addition, in her affidavit presented to the Court, Janise Midi stated that her children "Endry, Antonio and Diane were born in the Dominican Republic." She added that, when she was in Haiti, she "registered [her] children in Haiti, because they needed documents in order to attend school." In this regard the State indicated that "this is proof […] that the members of the Fils-Aimé family have Haitian documents, based on their Haitian nationality."

86. The representatives alleged "the difficulties and obstacles faced by persons of Haitian descent born in Dominican territory to obtain documents accrediting their nationality." However, the Court considers that this assertion is unrelated to the issue of Haitian documents and, therefore, cannot consider it proved that the persons identified as Jeanty Fils-Aimé, Bersson Gelin and Nené Fils-Aimé have Dominican documentation, or that they were born in Dominican territory. Also, the Court cannot consider proved that Diane Fils-Aimé, Antonio Fils-Aimé and Endry Fils-Aimé were born in Dominican territory. The Court places on record that it will use the name Bersson Gelin for the person who the Merits report identified as "Berson Gelin," and "Jeanty Fils-Aimé" for the person who the representatives in their motions and arguments brief and the Commission in the Merits report identified with that name.

87. The Court considers that the impossibility of determining the country of birth of these persons does not prevent them from continuing to be presumed victims in this case. Moreover, it will not consider that the place or birth or nationality of any of these persons has been proved and, with regard to Nené Fils-Aimé, neither has his maternal filiation (*infra* para. 209)

A.2.3. Absence of powers of attorney in favor of the representatives

88. The State raised other questions related to the presumed lack of representation of William Gelin and Nené Fils-Aimé, owing to the alleged absence of powers of attorney in favor of the representatives. The Court considers that the alleged absence of powers of attorney refers to the legal representation of these persons and not to their status as presumed victims. Moreover, the Court has indicated "the consistent practice of this Court with regard to the rules of representation has been flexible" and that "it is not essential

[62] *Cf.* Statement made by Jeanty Fils-Aimé to Columbia University on April 1, 2000 (file of annexes to the Merits report, Annex 19, fs. 212 to 219), and Affidavit made by Janise Midi on September 24, 2013 (file of preliminary objections, merits and reparations, f.1711).

[63] *Cf.* Affidavit made by Janise Midi.

that the powers of attorney granted by the presumed victims in order to be represented in the proceedings before the Court meet the same formalities as those required by the domestic law of the defendant State."[64] In this context, the State's arguments are not sufficient to consider that these persons are inadequately represented. This conclusion is supported by the fact that there has been continuity in the measures taken by the representative organizations starting with the processing of the case before the Commission. Indeed, all the representative organizations acted as petitioners during the merits stage before the Commission, and there is no record that any of the presumed victims indicated their inconformity throughout the years that the proceedings lasted.[65] In addition, Nené Fils-Aimé and William Gelin are next of kin of persons who did grant power of attorney; the former is the son of Jeanty Fils-Aimé and the latter of Bersson Gelin. Therefore the Court rejects the said reservations and determines that they are not sufficient to question their status as presumed victims.

A.2.4. Questions raised about identity

89. The State, during the public hearing and subsequently, questioned the identity of the person identified as Willian Medina and presented information in this regard, as well as that of Awilda, Luis Ney and Carolina Isabel, all surnamed Medina (*supra* para. 63). Nevertheless, in its answering brief, the State had asserted that Willian Medina Ferreras, Awilda Medina, Luis Ney Medina and Carolina Isabel Medina should be considered presumed victims (*supra* para. 60) and that the first three "are Dominican citizens as revealed by the corresponding entries in the Civil Registry," and the Court will understand this to be so. However, in the case of Willian Medina, the State based some of its arguments on what happened during the public hearing following the presentation of a video, and on the fact that it had opened administrative and judicial proceedings to cancel Mr. Medina's electoral identity document and the birth declarations of his children Awilda, Luis Ney and Carolina Isabel (*infra* paras. 128, 207 and 208).

90. Similarly, in a document forwarded to the Court for the first time during the processing of the provisional measures, and also presented by the Commission in annex to the Merits report, the State asserted that it had reached the "conclusion" of "identity theft in the case of Rafaelito Pérez Charles."

91. This Court emphasizes that there is no record that the above-mentioned proceedings, or others, have concluded, or that the competent authority has reached a final decision establishing that the identity of these persons is different from the one that appears in the documents issued by the State. Consequently, the Court does not have any evidence that warrants disagreeing with the information indicated in the State's documentation. Thus, the Court rejects the State's arguments and, for the effects of this Judgment, will consider the persons identified as Willian Medina Ferreras, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina and Rafaelito Pérez Charles as presumed victims, with those names.

A.2.5. Persons who will not be considered presumed victims

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[64] *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*, para. 33; *Case of Loayza Tamayo v. Peru. Reparations and costs.* Judgment of November 27, 1998. Series C No. 42, para. 98, and *Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 54.

[65] As explained in the Merits report, CEJIL also acted as petitioner at the admissibility stage, together with entities who did not act at the merits stage: "the International Human Rights Law Clinic at the University of California, Berkeley, School of Law, Boalt Hall, […] and the National Coalition for Haitian Rights (NCHR)."

92. The Court notes that the State questioned the status as presumed victims of Marilobi and Andren, both surnamed Fils-Aimé, based on the statement of Janise Midi, and also of Juana (or Juan) (*supra* para. 64). As the State has indicated, it is true that, in her statement, Mrs. Midi failed to mention explicitly that Marilobi and Andren were present when the agents came to the house; she also failed to mention Juana (or Juan). However, she did state that, at that time, she "had three children with [her] husband. A son of [her] husband, called [Nené], and [the] children [(of her husband and herself)] Endry, Antonio and Diane, lived with them at the time." Regarding Juan Fils-Aimé, the representatives affirmed that, based on Janise Midi's statement, this person should not be considered a victim in the case. Accordingly, the Court considers that it is not possible to infer from the said statement that Marilobi, Andren and Juana (or Juan) surnamed Fils-Aimé[66] were in the house at the time of the events; thus, there is no factual support to consider them presumed victims.

93. In addition, some individuals indicated as presumed victims were born on Haitian territory after the dates indicated for the expulsions in this case, or their ties to the persons who are alleged to have been expelled or deported were established after those dates. In this regard, the Commission alleged in the Merits report that the expulsions affected "even the new members of the families" and, according to the Commission, this resulted in violations to their human rights. This is the case of Carolina Fils-Aimé, who was born on November 15, 2000, whose status as a presumed victims was contested by the State for this reason (*supra* para. 64); and also of those who, in the Merits report, were referred to as "Gili Sainlis" (*supra* footnote 11), Jamson, Faica and Kenson, all surnamed Gelin, regarding whom it was merely indicated that they are the companion and children, respectively, with whom Bersson Gelin lives in Haiti "following [his] expulsion." This is also revealed by the arguments of the representatives. It is also the case of Ana Dileidy and Analía,[67] both surnamed Sensión, daughters of Ana Lidia Sensión, who were born in 2007 and 2009, respectively, and of Maximiliano Sensión and Emiliano Mache, sons of Reyita Antonia Sensión, who were born following their expulsion and after Antonio Sensión had found the members of his family (*infra* para. 218).[68] In addition, the persons identified as Jessica and Victor Manuel, both surnamed Jean, were born in September 2003 and on January 16, 2005, respectively.[69] The Court considers it evident that the State actions

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66 Janise Midi's statement contradicts Jeanty Fils-Aimé's affirmation in his 2002 statement, when he said that his wife and his "seven" children had been detained (file of annexes to the Merits report, annex 19, f. 212). In view of the contradiction between the two statements, and considering the above-mentioned position of the representatives, the Court considers it appropriate to abide by Mrs. Midi's statement rather than that of Jeanty Fils-Aimé, because Mrs. Midi's statement was presented in the context of these proceedings before the Court and made by affidavit (*infra* para. 111).

67 The Merits report mentions this person as "Analideire." However, the birth registration indicates "Analía"; therefore the Court will use the latter name, placing on record that this refers to the person who was referred to as "Analideire" in the Merits report (*cf.* Certification of birth registration of Analía Sensión, daughter of Ana Lidia Sensión, issued by the National Civil Registry Directorate, attached to the Central Electoral Board on February 16, 2010 (file of annexes to the motions and arguments brief, annex B17, f. 3552).

68 Although there is no official information on the date of birth of Maximiliano Sensión and Emiliano Mache Sensión, sons of Ana Reyita, the representatives advised that "Emiliano Mache Sensión […] was born on November 27, 2007," and that Maximiliano Sensión was the "youngest son" of Reyita Antonia Sensión. In addition, the Court has been advised that Maximiliano is deceased (*cf.* Affidavit made by Antonio Sensión on September 29, 2013, file of preliminary objections, merits and reparations, f. 1772).

69 Affidavit made by Marlene Mesidor on September 29, 2013 (file of preliminary objections, merits and reparations, fs. 1735 and 1736). The Merits report merely indicates that "the family members of the presumed victims in this case are […] Jessica Jean and Victor Manuel Jean" and, in this regard, cites the "Observations on the merits of the case presented by the petitioners on April 16, 2009" (file of annexes to the Merits report, annex 5, fs. 36 to 119). This document indicates that "Victor Manuel (born on January 16, 2005,) [and] the child Jessica[,] were born in Santo Domingo, Dominican Republic." Regarding these persons, in the Merits Report, the Commission considered that Articles 5 and 17 of the Convention had been violated to their detriment without providing any specific legal or factual grounds. The representatives did not present any specific arguments on Victor Manuel Jean and Jessica Jean either.

alleged to have violated treaty-based rights and related to the presumed expulsions could not have affected these persons. Therefore, given that the arguments concerning these persons relate to the said expulsions [or, in the case of Victor Manuel Jean and Jessica Jean, the events that occurred are not mentioned], the Court will not examine the facts in relation to them.

94. The Court also notes that, as the State indicated, Kimberly Medina Ferreras was not presented as a presumed victim by either the Commission or the representatives; hence the Court will not consider her as such.

95. Lastly, in relation to the person identified in the Merits report as "María Esther Medina Matos," and "María Esthel Matos Medina" according to documentation issued by the State's entities,[70] as the State asserted, this person does not appear as the mother of Rafaelito Pérez Charles in the respective legal document.[71] As the representatives have accepted (*supra* para. 75), and also Rafaelito Pérez Charles himself in his statement, these documents record that Rafaelito's mother is a person named "Cle[s]ineta" Charles, who was not mentioned as a victim in the Merits report. Although the Court take note of the representatives' explanation about the "ties of affection" that exists between María Esthel Matos Medina and Rafaelito Pérez Charles, the facts presented by the Merits report do not refer to these ties of affection, but rather indicate Mrs. "Matos Medina" as the "mother" of Rafaelito Pérez Charles, a circumstance that the Court is unable to consider proved. Consequently, the Court will not consider María Esthel Matos Medina one of the presumed victims in this case. Furthermore, based on its arguments (*supra* para. 67), the State is right that the connection of the persons identified in the Merits report as Jairo Pérez Medina and Gimena Pérez Medina to Rafaelito Pérez Charles has not been proved, so that they will not be considered presumed victims.

96. Regarding the person identified in the Merits report as Andrea Alezy, the representatives and the State agree that the former waived the possibility of presenting arguments with regard to her. Even though the Merits report indicates that this person is a victim, in view of the failure to provide the Court with any probative elements concerning her, the Court is prevented from examining the respective facts. Therefore, the Court will not rule on Andrea Alezy. In addition, the Court has already established that the alleged expulsion of Benito Tide falls outside its competence (*supra* para. 44). This prevents the Court from ruling on supposed facts and violations of rights with regard to Benito Tide, and also in relation to the members of his family named in the Merits report: Carmen, Aíta, Domingo, Rosa, José and Teresita, all surnamed Méndez. Moreover, in the brief submitting the case, the Commission did not ask the Court to declare violations of treaty-based rights to the detriment of these family members.

B) The factual framework

B.1. Arguments of the parties and the Commission

97. The State alleged that some of the facts alleged by the representatives were not included in the Merits report and, therefore, asked that the Court declare their

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[70] *Cf.* Sheet with general information on María Esthel Matos Medina, issued by the Central Electoral Board, based on its master list of those registered, on June 21, 2006, and birth certificate of María Esthel Matos Medina, issued by the Central Electoral Board on August 9, 1997 (file of annexes to the Merits report, annex 38, fs. 330 and 331).

[71] *Cf.* Birth certificate of Rafaelito Pérez Charles issued by the Central Electoral Board on June 13, 1997 (file of annexes to the Merits report, annex 38, f. 328).

"inadmissibility *ratione materiae.*"[72] The respective arguments, grouped by "family" for greater clarity, are indicated below.

98. Regarding the *Medina family,* the State alleged that the following circumstances exceed the factual framework: (a) the "new" expulsion of Willian Medina Ferreras: the Commission had indicated a single expulsion of the members of the family in November 1999 or January 2000; however, the representatives alleged two expulsions, one of Mr. Medina alone, in November 1999, and the other, on January 6, 2000, of all the members of his family; (b) that, on January 6, 2000, an immigration agent took Mrs. Jean Pierre by the arm and shouted "walk" and that the Director of Immigration told her "go back to your country, blackie"; (c) that the members of the Medina Jean family were transported from the place in which they were apprehended in a military truck with 20 other individuals, in the custody of armed guards; (d) the alleged emotional harm caused by the death of the minor Carolina Isabel Medina; (e) that Mr. Medina Ferreras was an agricultural worker, and (f) that the value of the belongings that Willian Medina Ferreras allegedly lost was RD$50,000.00 (fifty thousand pesos).

99. With regard to the *Fils-Aimé family*, the State understood that the reference to the following facts exceeded the factual framework: (a) that, when Jeanty Fils-Aimé was deported on November 3, 1999, he was taken to the Pedernales Army Garrison; the Merits report indicated that he was taken to the Pedernales public prison; (b) that Jeanty Fils-Aimé had heard the words "get out, scum!" when he alighted from the bus that took him to the border; (c) that the bus that supposedly transported Janise Midi and her children to the border carried another 100 persons, and (d) that "[t]he supposed lot cultivated by the members of the Fils-Aimé Midi family represented fifty thousand pesos (RD$50,000)."

100. As regards the *Gelin family*, it argued that the following circumstances did not form part of the factual framework: (a) the alleged actions of 10 to 20 soldiers led by General Pedro de Jesús Candelier in the supposed deportation of Mr. Gelin on December 5, 1999, and (b) that the said soldiers did not verify Mr. Gelin's identity documents and did not allow him to advise his family.

101. In relation to the *Sensión Family*, the State questioned the presumed inclusion in the case of the following facts: (a) Ana Lidia Sensión's assertion that she had been taken to the border in 1994, in "a long truck with bars that was full of people, even women with babies"; (b) the valuation at RD$35,000 (thirty-five thousand pesos) of the household goods supposedly lost owing to Antonio Sensión's visits to Haiti, and (c) the details given by the representatives about the supposed actual situation of Mr. Sensión.

102. Lastly, the State included similar considerations on certain facts relating to the Jean family: (a) the expulsion of Victor Jean and Marlene Mesidor in 1991: the Commission had only referred to two expulsions, in 1998 and in 2000, and the representatives added one in 1991, and (b) the details provided by the representatives concerning the situation of the Jean Mesidor family following the expulsion to Haiti in 2000, as well as those relating to their actual situation.

103. The representatives indicated that "each of [the facts that were supposedly inadmissible, according to the State] result from facts included in the Merits report and merely explain or clarify them."

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[72] The State cited, as grounds for its position, the Court's decision on merits in the case of *Vélez Loor v. Panama.*

104. The Commission alleged that the State's arguments were not preliminary in nature, because deciding them involved aspects related to the merits of the case.

B.2. Considerations of the Court

105. The Court has established that the factual framework of the proceedings before it is constituted by the facts contained in the Merits report submitted to its consideration. Consequently, it is not admissible for the parties to allege new facts that are distinct from those included in the said report, without prejudice to describing facts that explain, clarify or reject the facts mentioned in the report and submitted to the Court's consideration (also called "complementary facts").[73] The exception to this principle are facts that can be classified as supervening and, provided they are connected to the facts of the case, these may be forwarded to the Court at any stage of the proceedings prior to the delivery of the judgment.[74]

106. The Court has also considered that it does not have to rule on the factual framework of the case in a preliminary manner, because the analysis of this corresponds to the merits of the case.[75]

107. Based on the foregoing, in this case the State's arguments must be rejected as preliminary issues. When the facts of the case are determined based on the factual framework established in the Merits report and the existing evidence, the factual elements questioned by the State may explain or clarify those facts. The Court will also decide whether it is admissible to examine certain facts in the corresponding sections.

108. Consequently, it is not incumbent on the Court to make a preliminary ruling on the matters raised by the State**.**

VI
EVIDENCE

109. Based on the provisions of Articles 50, 57 and 58 of the Rules of Procedure, the Court will determine the admissibility of the documentary evidence forwarded by the parties on different procedural occasions, the statements and testimony provided by affidavit and during the public hearing, and the helpful evidence requested by the Court. It will also decide on the incorporation of evidence *ex officio*, and the admission of the evidence on supervening facts.

110. Regarding reception of evidence, the Court has established that the proceedings before it are not subject to the same formalities as domestic judicial proceedings, and that the incorporation of certain elements of the body of evidence must be made paying special attention to the circumstances of the specific case, and bearing in mind the limits imposed by respect for legal certainty and the procedural equality of the parties.[76]

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[73] *Cf. Case of "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 153, and *Case of Norín Catrimán et al. v. Chile (Leaders, members and activist of the Mapuche Indigenous People),* para. 39.

[74] *Mutatis mutandi, Case of "Five Pensioners" v. Peru*, para. 154*; Case of Pacheco Tineo v. Bolivia*, para. 21, and *Case of J. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of November 27, 2013. Series C No. 275, para. 27.

[75] *Cf. Case of Mendoza et al. v. Argentina. Preliminary objections, merits and reparations.* Judgment of May 14, 2013. Series C No. 260 para. 25, and *Case of Pacheco Tineo v. Bolivia*, para. 24.

[76] *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs*. Judgment of June 21, 2002. Series C No. 94, para. 65, and *Case of Gutiérrez and Family v. Argentina. Merits, reparations and costs.* Judgment of November 25, 2013. Series C No. 271, para. 79.

A) Documentary, testimonial and expert evidence

111. The Court received different documents presented as evidence by the Inter-American Commission, the representatives, and the State, attached to their main briefs (*supra* paras. 1, 8 and 9). The Court also received the affidavits made by the presumed victims Awilda Medina, Markenson Jean, Marlene Mesidor, Antonio Sensión, Ana Lidia Sensión Nolasco, Rafaelito Pérez Charles, Janise Midi and Bersson Gelin, proposed by the representatives, as well as of the witness Carmen Maribel Ferreras Mella, proposed by the State, and of the expert witnesses Cristóbal Rodríguez Gómez, and Rosa del Rosario Lara, proposed by the representatives, and Fernando Ignacio Ferrán Brú (hereinafter also "expert witness Fernando I. Ferrán Brú", or "Mr. Ferrán Brú" or "expert witness Ferrán Brú") and Manuel Núñez Asencio (hereinafter also "expert witness Núñez Asencio"), proposed by the State. As for the evidence provided during the public hearing, the Court received the statements of the presumed victim Willian Medina Ferreras, proposed by the representatives, and of the expert witnesses Pablo Ceriani Cernadas, proposed by the Commission, Bridget Frances Wooding (hereinafter also "Bridget Wooding" or "expert witness Bridget Wooding") and Carlos Enrique Quesada Quesada (hereinafter also "Carlos Quesada Quesada" or "Carlos Quesada"), proposed by the representatives, and Juan Bautista Tavarez Gómez and Cecilio Esmeraldo Gómez Pérez (hereinafter also "Cecilio Gómez Pérez" or "expert witness Gómez Pérez"), proposed by the State.[77]

112. On October 1, 2013, the representatives advised that Tahira Vargas had serious health problems that meant she was unable to provide her expert opinion; they therefore waived her presentation.

B) Admission of the documentary evidence

113. In this case, as in others, the Court admits those documents forwarded by the parties and the Commission at the appropriate procedural opportunity, that were not contested or opposed and the authenticity of which was not challenged, to the extent that they are pertinent and useful to determine the facts and their eventual legal consequences.[78] However, the Court will now make some clarifications and decide the discrepancies that have been expressed concerning the admissibility of certain documents.

114. *Newspaper articles.*[79] The Court has considered that newspaper articles may be assessed when they refer to well-known public facts or declarations by State officials, or when they corroborate aspects related to the case. The Court decides to admit those documents that are complete or that, at least, allow their source and date of publication to the verified.[80]

115. *Documents indicated by the parties and the Commission by means of Internet links.* The parties and the Commission have indicated several documents by means of Internet links. The Court has established that if a party or the Commission provides, at least the direct Internet link to the document that it cites as evidence, and it is possible to access it,

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[77] The purpose of all these statements was established in the Order of the President of the Court of September 6, 2013, *supra* para. 12.

[78] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits,* para. 140, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile. Merits, reparations and costs.* Judgment of May 29, 2014. Series C No. 279, para. 54.

[79] The parties and the Commission presented numerous newspaper articles.

[80] *Cf. Case of Velásquez Rodríguez. Merits*, para. 146, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 58.

neither legal certainty nor procedural equality is affected, because the Court, the other parties and the Commission can find it immediately.[81] In the instant case, neither the parties nor the Commission opposed or made observations on the content and authenticity of such documents, with the exception of the representatives' observations on the attachments to the final arguments in relation to some documents listed by the State (*infra* para. 136). Consequently, the said documents that were not opposed or the subject of observations are admitted.

116. *Opinions provided to the Court in other cases.* The Commission, in its brief submitting the case, asked for "the transfer of the pertinent parts of the expert opinion […] of Samuel Martínez […] in the case of the *Yean and Bosico Girls v. Dominican Republic*, and of Gabriela [Elena] Rodríguez Pizzaro in the case of *Vélez Loor v. Panama.*" In the Order of September 6, 2013 (*supra* para. 12), it was determined that the opinions of Mr. Martínez and Mrs. Rodríguez Pizarro would be "incorporated […] merely as documentary evidence, and for the Court to determine their admissibility […] at the opportune procedural moment."[82] Regarding the former, which was provided by affidavit, the State argued that the opinion had "been relevant to the facts and/or acts involved" in the case of the *Yean and Bosico Yean v. Dominican Republic*, "which differed materially and procedurally" from the instant case. With regard to the latter, the State indicated its limited applicability to the case. The Court notes that the observations on the opinions of Samuel Martínez and Mrs. Rodríguez Pizarro refer to their probative value and not to their admissibility. Hence, the Court admits them as documentary evidence in this case.

117. *Expert opinion provided by Julia Harrington Reddy.* This expert opinion was presented by affidavit on October 1, 2013, in English. Under Article 28(1) of the Rules of Procedure, the Court considers that, since the Spanish version of the opinion was presented on October 21, 2013, within the 21-day period established to forward the originals or a complete set of attachments, this opinion is admissible.

118. *Expert opinion provided by Fernando I. Ferrán Brú*. Mr. Ferrán Brú, in his expert opinion sent on October 1, 2013, announced that he would present as annexes two books: "*El Batey. Estudio socioeconómico de los bateyes del Consejo Estatal del Azúcar*" by Frank Moya Pons, and "*Pelo bueno pelo malo. Estudio Antropológico de los Salones de Belleza en la República Dominicana*" by Gerald F. Murray and Marina Ortiz, and these were received on October 6, 2013; that is, four days after the time limit established for the presentation of the opinions. The Court considers that, since these books were presented within the 21-day period established to forward the originals or a complete set of attachments, as established in Article 28(1) of the Rules of Procedure, they are admissible.

119. *Documents attached to the expert opinions.* With regard to the documents presented by the expert witnesses Juan Bautista Tavarez Gómez,[83] Bridget Wooding, and Cecilio

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[81] *Cf. Case of Escué Zapata v. Colombia*. *Merits, reparations and costs.* Judgment of July 4, 2007. Series C No. 165, para. 26, *and Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 59.

[82] Regarding the expert opinion of Samuel Martínez, its purpose was "racial relations and discrimination against Haitians and their children in the Dominican Republic; the State's policy in relation to the recognition of the rights to nationality and to education to members of these communities, and the impact of these policies on the full enjoyment of the rights of Haitians and Dominico-Haitians in the Dominican Republic" (*Case of the Yean and Bosico Girls v. Dominican Republic*. Order of the President of the Court of January 31, 2005, first operative paragraph). That of Gabriela Elena Rodríguez Pizarro concerns "the basic guarantees that, according to international human rights standards, must govern any criminal or other type of proceedings that involve[the determination of the immigration status of a person or that may result in a sanction as a result of this status" (*Case of Vélez Loor v. Panama*, para. 73.3).

[83] The Court considers it relevant to place on record, in relation to the documentation presented by expert witness Juan Bautista Tavarez Gómez, that the purpose established for his expert opinion was the "domestic legal

Gómez Pérez when providing their opinions during the public hearing, this Court admits them to the extent that they relate to the purpose established for the expert opinion (*supra* para. 12).

120. *Expert opinion provided by Rosa del Rosario Lara.* Regarding expert witness Rosa del Rosario Lara, the Dominican Republic affirmed that, when answering one of the State's questions, she had indicated that she "worked as an 'expert in psychology [for …] MUDHA,'" which the State had "been unaware of prior to the notification of the expert opinion by affidavit." It therefore "proceed[ed] to recuse her pursuant to Article 48(1)(c) of the Rules of Procedure." Regarding the "recusal" of expert witness Rosa del Rosario Lara, this is not admissible as such, because it was time-barred under the provisions of Article 48(2) of the Rules of Procedure. Despite this, in this case, the Court will take the State's observations into account when assessing the expert opinion.[84]

121. *Objection to documentary evidence provided by the presumed victims contained in documents prepared by the Human Rights Clinic at Columbia University School of Law.* The State argued that the said documents contained "shortcomings that jeopardize the authenticity of the document," and contested them based on one or several of the following alleged shortcomings, as applicable: (a) absence of notarization; (b) lack of stamps or seals; (c) absence of the signature of the deponents, or of fingerprints in the case of those unable to write; (d) the signature "*de orden (D/o*)" of "the person who presumably appears as a witness"; (e) the lack of witnesses; (f) elaboration in English; (g) "computer transcription [of the supposed statement, while] the attached power of attorney that was granted and the record of the said statements are [handwritten]; (h) failure of the deponents to initial all the pages of the documents; (i) alleged illegibility of "supposed" handwritten statements; (j) failure to number various pages; (k) presence of deletions and crossings-out, and (l) the signature of the deponent is different from that on other statements by the same person. The State also argued that the testimony of Carmen Méndez (a document that was forwarded by the Commission as annex 59 to the Merits report) "lacks probative value" because "it is not notarized; it is not signed by the deponent and it does not bear her fingerprint […]; it does not bear a single stamp, [and it] has not been witnessed." The State also alleged that the "authenticity" of four "documents supposedly containing sworn statements" is "jeopardized" because "they lack the signature, stamp and protocol number of the presumed notary public." These documents are annexed to the State's report No. 30 on the provisional measures of August 25, 2000, which was also presented as annex 38 to the Merits report.

122. In this regard, the representatives stated that "[the] Court should take into account the specific circumstances of the [case]," because "following the [alleged] expulsions" the presumed victims "were placed in […] circumstances of extreme poverty, so that they live in very remote places, some […] in Haiti, near the border with the Dominican Republic, and others in places that are difficult to access in the Dominican capital, which made it problematic to collect the statements of the [presumed] victims and to notarize them." The representatives added that they had made every effort to verify the truth of these documents, and had attached a transcript of the handwritten statements to them. In addition, it indicated that "most of the [presumed] victims are illiterate, so that it is understandable that their signature would be different in the different documents."

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regime relating to the functioning of the Civil Registry Office" and related aspects, and did not include facts of the case, or those directly related to the presumed victims. Therefore, the said document will be assessed exclusively as regard the purpose required of the opinion.

[84] The Court places on record that the Dominican Republic made observations on the affidavit made by Gabriela Rodríguez Pizarro, and the expert opinion of Cristóbal Rodríguez Gómez, without objecting to them.

123. As regards the supposed statements of Carmen Méndez (undated), of Andrea Alezy on April 1, 2000, and of Bersson Gelin, which appears in the document entitled "*Declaración de Bers[s]on Geli[n], traducción al español de la parte en inglés de la declaración tomada por el señor Michael Granne el 12 de julio de 2001*" [Statement of Bers[s]on Geli[n], translation into Spanish of the part in English of the statement taken by Michael Granne on July 12, 2001], these are unsigned, so that the Court has insufficient evidence to determine with certainty in each case who made the statements that appear in these documents. With regard to the supposed statement of Antonio Sensión of May 8, 2000, and the four supposed "sworn statements" that are in annex 38 of the Merits report,[85] the Court has verified that, although these documents bear the signature of the deponent and of witnesses, each document records that the statements were made before notary public, but they are not signed or authenticated by the latter. In view of its previous considerations, and taking into account the observations of the State, the Court finds that it is unable to admit this documentation.[86]

124. In addition, with regard to the statements of: Rafaelito Pérez Charles of January 10, 2001; Benito Tide of January 10, 2001;[87] Antonio Sensión of January 11, 2001, and March 27, 2007; Ana Lidia Sensión of March 27, 2007; Willian Medina Ferreras of April 1, 2000; Jeanty Fils-Aimé of April 1, 2000; Bersson Gelin of April 1, 2000; Marlene Mesidor of January 11, 2001; Lilia Jean Pierre of January 13, 2001; Janise Midi of January 13, 2001, and Victor Jean of January 11, 2001, the Court considers that the statements of the presumed victims constitute documentary evidence and do not call for the formalities of affidavits or statements made before a judicial authority; furthermore they are not sworn statements. In addition transcripts were presented of the handwritten statements of Willian Medina Ferreras, Jeanty Fils-Aimé, Bersson Gelin and Marlene Mesidor. Based on the State's observations, and since those documents do not require the formalities of domestic law, the Court admits the said statements as documentary evidence.

125. *Objections to a list of deported persons who lived in the Dominican Republic presented by the Commission in annex 21 of the Merits report and attached to the Commission's Report on the Situation of Human Rights in the Dominican Republic of October 7, 1999.* The State alleged that the first document "lacks any probative value because only the General Directorate of Immigration [(hereinafter also "the DGM")] has legal competence to present official statistics in this regard." In addition, it indicated that the Inter-American Commission's report on the situation of human rights in the Dominican Republic of October 7, 1999, cited by the Commission and the representatives, "refers to presumed acts and facts that would have taken place before the acceptances of the Court's contentious jurisdiction, so that [the Court] lacks temporal competence to examine them, or even to analyze them in the elaboration of the supposed historical context to this case." In addition, the State "indicate[d] that, in this report, the Inter-American Commission recognized that 'the problems that affect the full observance of rights are not the result of a State policy aimed at violating those rights.'" The Dominican Republic's arguments concerning the first document are not related to its admissibility as evidence, but rather to its probative value. As to the argument that the Inter-American Commission's report of October 7, 1999, refers to acts that occurred prior to the Court's competence, in its case law, the Court has considered historical background material that

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[85] Statements allegedly provided by Carmen Méndez, María Esthel Matos Medina, Adolfo Encarnación, Saint Foir José Louis and Eristen González González.

[86] *Cf. Case of Juan Humberto* Sánchez *v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of June 7, 2003. Series C No. 99, paras. 50 and 55.

[87] Although Benito Tide's statement is admissible, the Court notes that it refers to facts that it will not analyze (*supra* para. 44).

is relevant to the specific case;[88] thus the said report of the Inter-American Commission (*infra* footnote 132), which is also a public document that has been referred to by the representatives in the case *sub judice* and regarding which the State has been able to comment, is admissible as evidence in this sense. Consequently, the Court incorporates both these documents.

126. *Evidence of supervening facts.* Under Article 57(2) of the Rules of Procedure, the Court admits as evidence of supervening facts (*supra* para. 13 and *infra* para. 146), the documents containing the following: judgment TC/0168/13, Decree No. 327-13, Law No. 169-14, and Decree No. 250-14. It also admits other documents presented by the parties under this heading that will be described below.

127. *Photographs.* During the public hearing, the State presented, for the first time, several photographs that, according to the State, corresponded to several siblings and to the father of Willian Medina, which it showed to Mr. Medina Ferreras, questioning him about them.[89] The Court recalls that evidence must be presented in keeping with Article 57(2) of the Rules of Procedure. In this case, the State did not justify its presentation outside the appropriate procedural moment, so that the Court considers its presentation time-barred, and it cannot be admitted as evidence.

128. *Video.* During the public hearing on October 8 and 9, 2013 (*supra* para. 12), the State showed a video concerning Willian Medina Ferreras in which someone, who says he is an official of the Central Electoral Board, appears interviewing several individuals who state that they are descendants of the alleged parents of Mr. Medina Ferreras. In this regard, the State indicated that the presentation consisted of two videos which were both shown. One was recorded "on September 26, 2013," in "the sector of La Ciénaga, Santo Domingo, National District," and the other was recorded "one day later," on September 27, "in the city of Barahona, in the province of the same name." According to the State, "these videos were recorded because the [alleged] identity theft of Wilnet Yan, or Willia[n] Medina Ferreras, as he called himself, had been discovered a few days before the hearing." The State also affirmed that the videos were prepared for the proceedings before the Inter-American Court, "merely and exclusively as part of the oral arguments," and that, "in principle, they d[id] not form part" of any domestic proceedings. Nevertheless, contrary to this, the State provided information on domestic proceedings dating from at least September 12, 2013, that included the interviews shown in the video (*infra* paras. 207 and 208), and indicated that "the investigation consisted in comparing the birth certificates of the real children of Abelardo Medina and Consuelo Ferreras with that of Mr. Willia[n] Medina Ferreras." Lastly, it asked that the video "be […] incorporated into the body of evidence" of the case.

129. Both the representatives and the Commission objected to the presentation of the video. The former considered that it "was evidence that did not form part of the body of

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[88] *Cf. Case of the Moiwaina Community v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of June 15, 2005. Series C No. 145, paras. 43 and 86.1 to 86.20, and *Case of García Lucero et al. v. Chile*, paras. 35 and 55.

[89] The Court notes that one of the photographs, corresponding to Abelardo Medina, appears in a document of June 28, 2006, entitled "Printout of the citizens' data," issued by the Central Electoral Board, based on its master list of those registered, and that this document was presented by the Commission as part of Annex 38 of the Merits report. However, this photograph is in a different format from the ones presented by the State during the hearing, because the one that appears in Annex 38 presented by the Commission is in a reduced format and incorporated into a page of a document that includes other information. This document does not include, in any format, the other photographs used by the Dominican Republic during the hearing. Therefore, the fact that the photograph of Abelardo Medina appears in the said document does not change the consideration that the photographs shown to Mr. Medina Ferreras during the public hearing were presented for the first time during that procedure.

evidence [in the] proceedings." They added that, in their opinion, "the presentation of the video during the time allocated to the State's final arguments constitute[d] a grave violation of the [Court's] Rules of Procedure and severely affect[ed] the right of defense and procedural equality."

130. As regard the Commission, during the public hearing, Commissioner Felipe González submitted considerations with which the representatives "fully agreed," stating that:

> The procedure for the admission of evidence in the hearings before the Inter-American Court includes a series of steps that […] the State has not respected, because […] [the video] was never proposed as part of the evidence, and it could not be contested by the representatives of the [presumed] victims, or eventually by the Inter-American Commission. In the future, not only in this case, this mechanism could be used by any of the parties to introduce additional evidence that has not received the corresponding authorization of the Court.

131. The State, during the meeting held prior to the public hearing,[90] asked to be allowed to transmit a video during its final oral arguments and, as in other cases, the Court authorized this, in the understanding that it was a visual aid to these arguments. The video was shown during the public hearing. However, owing to the dispute that arose between the parties and the Commission, and the objections of the representatives and the Commission, at that time the President of the Court indicated "that the Court had understood that the video was part of the State's oral arguments, without this meaning that it was tacitly accepting it as evidence."

132. Evidence must be presented by the parties and the Commission at the pertinent procedural moment and, to the contrary, its presentation must be duly justified, as established in Article 57(2) of the Rules of Procedure. In the case of the presentation of the video during the public hearing, the State sought to incorporate it into the proceedings as evidence, without justifying its presentation based on the regulatory provisions; the Court therefore finds that it is time-barred. In any case, the State did not justify why the video could not have been made before the presentation of the answering brief, and the Court notes that, as the State itself indicated, the interviews contained in the video were conducted before the public hearing. Consequently, the video cannot be admitted as evidence in these proceedings and, therefore, will not be included in the body of evidence. Accordingly, the presumed victim's answers to the questions posed by the State on the basis of the said video will not be included in the body of evidence, and the arguments based on the video will not be taken into account.

133. *Judgment provided by the State following the public hearing.* During the hearing, the State asked to be "authorized to submit [… ten] judgments handed down by different [domestic] courts with regard to *amparo,*" and then forwarded copies of nine judgment to the Court, indicating an Internet link to access the tenth, on October 20, 2014. The Court has verified that the said documentation was issued prior to the presentation of the answering brief and that its late submission was not justified by *force majeure* or serious impediment. The State requested the Court to authorize the incorporation of these documents "as supervening evidence to ensure the State's right of defense in view of a new allegation by the representatives that the application for *amparo* was not effective until the promulgation of Law No. 437-03 of 2006, presented in their brief with observations on the preliminary objections." The Court notes that, in its answering brief, the State argued the effectiveness of remedies of *amparo* and, on that occasion, in order to substantiate its arguments, failed to submit any evidence. Consequently, the Court

[90] It is the Court's consistent practice to invite the Commission and the parties to a meeting before the public hearing to deal with and clarify the procedural aspects of the hearing.

decides not to admit this documentation, because its presentation does not meet the requirements of Article 57(2) of the Rules of Procedure.

134. *Documents presented with the final written arguments.*[91] The State and the representatives presented documents with their final written arguments, and the Court will only admit those that were sent in order to respond to the questions asked by the judges during the hearing, with the exception of those that the Court refers to below.

135. *Observations of the State on the annexes presented with the representatives' final arguments.* On January 17, 2014, the State presented its observations on the documents attached to the representatives' final written arguments (*supra* para. 18). On that occasion, the State also included other observations on one presumed victim and on the representatives' final written arguments that were not admissible because the State's brief was not a new opportunity to present allegations. Therefore, the Court will only consider the State's observations on the documents presented by the representatives with their final written arguments that had not been incorporated into the proceedings previously[92] and, with regard to these documents, will examine the objections raised by the Dominican Republic. Regarding some expense vouchers, the State's objections will be analyzed below (*infra* para. 139). In addition, as regards the "Concluding observations on the thirteenth and fourteenth periodic reports of the Dominican Republic [(advance or unedited version)], of the Committee on the Elimination of Racial Discrimination," it asked the Court to declare this document inadmissible, "because it was submitted outside the time frame established in Article 40[.2.b)] of the Rules of Procedure [and] did not qualify as supervening evidence under Article 57[.2] of the Rules of Procedure," because the representatives had not justified its presentation. In this regard, the representatives asked the Court to include this document in the case file as supervening "evidence," because it had been issued after the presentation of the motions and arguments brief on October 30, 2012. Based on the arguments of the parties and having verified that this report were issued by the said Committee after the presentation of the motions and arguments brief, the Court incorporates it into the body of evidence, as supervening evidence.

136. *The representatives' observations on the annexes presented with the final arguments of the State.* In their observations, the representatives alleged that the State, in its final arguments, had listed a series of documents related to the judgment issued by the Constitutional Court on September 23, 2013, which were not presented although, in some cases, an electronic link where they could be found was indicated. Consequently, they indicated that "those documents that were announced, but not presented and no link to a website was given where they could be located, cannot be considered part of the body of evidence." They added, with regard to the documents that could be located, because the link had been indicated, that "they merely reflect the State's position with regard to the

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[91] The Court recalls that the final arguments are essentially an opportunity to systematize factual and legal arguments presented at the appropriate moment, and not a stage to present new facts and/or additional legal arguments, because the other parties would be unable to respond to them. Consequently, the Court stipulates that it will only consider in its decision the final written arguments that are strictly related to the evidence and legal arguments that have already been provided at the appropriate procedural moment, or to the helpful evidence requested by a judge or the Court and, if applicable, to the exceptions established in Article 57 of the Rules of Procedure, which, if necessary, will be indicated in this Judgment in the corresponding section. To the contrary, any new pleading presented in the final written arguments will be inadmissible, as time-barred, save for the exceptions under Article 43 of the Rules of Procedure.

[92] The documents provided by the representatives with their final written arguments included the following, as identified by the representatives: (a) "[c]opy of the photograph of Abelardo Medina shown to Willian Medina during the public hearing," and (b) "[h]istorical documents provided by [expert witness] Bridget Wooding." These documents had already been incorporated into the proceedings; thus the State had been able to refer to them in its final arguments.

said judgment; they do not prove that this judgment did not have discriminatory bias and, in particular, do not show that [their clients] are not in real danger of being stripped of their nationality because they are of Haitian descent." The Court considers that the representatives' arguments concerning some of the documents relate to their content and not to their admissibility. Consequently, it admits those documents for which the State indicated a link to a website and which the representatives and the Commission have been able to access.

137. The representatives also referred to the "documentation [presented by the State] that sought to question the identity of Willian Medina Ferreras" and affirmed that it "supported what [they] had indicated in [their] final [written] arguments with regard to the reprisals taken […] against [Mr. Medina] owing to his participation in these proceedings." They added that "the documents are merely newspaper articles that replicate the State's position before the Court." Lastly, they asked the Court to "take into account [their] observations when assessing the evidence proposed by the State." The Court considers that the representatives' observations do not compromise the admissibility of the documents, and determines that they are admissible.

138. With regard to the 40 case files relating to the deportation of individuals other than the presumed victims in this case, the representatives argued that the procedural moment to submit evidence had precluded, and the State had "not justified" its "late presentation," because the files had been "produced prior to the presentation of the answering brief" and, therefore, could not be considered supervening evidence. They also indicated that the State sought to justify their presentation by a question posed by Judge Ferrer Mac-Gregor Poisot concerning "the existence of documents recording expulsions from the Dominican Republic," and this documentation "was not a record of such actions," but rather "deportation requests relating to individuals other than the [presumed] victims in this case." They also asked that the political map of the Dominican Republic provided by the State should not be admitted, because it was presented late, and was not relevant to this litigation. The Court considers that the presentation of the said case files responds to the request, because they are related to procedures concerning the expulsion of individuals from the Dominican Republic, and that the political map of the Dominican Republic is public knowledge; consequently, it admits this documentation.

139. *Vouchers for litigation expenses of the representatives in this case presented with their final arguments.* The State objected to some of the documents remitted, and this will be taken into account when examining this item in the chapter on reparations. In this regard, the Court will only consider those expenses that refer to costs and expenses that were incurred after the presentation of the motions and arguments brief (*infra* paras. 494 to 500).

140. *Helpful evidence requested by the Court*. In answer to a request by the Court,[93] on March 3, 2014, the State clarified that "when it asserted in its answering brief […] that

[93] The Court asked the State, pursuant to Article 58(b) of the Rules of Procedure, to provide information on certain assertions included its answering brief and in its final written arguments. In the former, it had indicated that certain "initial investigations" conducted in 2000, based on actions of the DGM, indicated that Willian Medina Ferreras was really called Wilnet Van (*sic*). In this regard, the State had indicated that, although the DGM, in a certification of July 19, 2000, had recorded the "deportation" of Mr. Medina Ferreras, in reality that was Wilnet Van (*sic*). In this regard, the State had affirmed that "[t]he corresponding correction was made subsequently." In addition, in its final written arguments, the State mentioned a document indicating that Willian Medina had obtained his identity card fraudulently, and that, according to unconcluded "investigations" by the State, "this was a case of identity theft." Consequently, the State was asked to indicate "specifically and precisely": (a) "the 'correction' made in relation to the 'certification' issued by the DGM and, if appropriate, to forward the Court a true copy of the document with the record or declaration" and (b) to "indicate whether the assertion made in the brief of July 19, 2000, that 'identity card No. 019-0014832-9 [was] obtained fraudulently' was supported by an

'the initial investigations indicated that the real identity of Mr. Medina Ferreras' was Wilnet Yan, but that 'this was subsequently amended as necessary,' it referred to a change in the line of investigation." According to the State the Directorate General of Immigration (DGM) "was investigating the presumed deportation of Willia[n] Medina Ferreras, but on finding that there was no record of the deportation of anyone with that name, it understood that two different persons were referred to"; this explains "the said assertion in the State's answering brief." The State added that "in view of what took place during the public hearing of the case, the initial line of investigation was revalidated" and "the Central Electoral Board […] resumed the initial DGM investigation and concluded that [the] original line of investigation was correct." Accordingly, the Central Electoral Board "provisionally suspended the corresponding birth certificate," and "the Legal Office of [the Board] was instructed to require the annulment of the birth declaration, [and] the identity and voter registration cards were cancelled." In addition, the State indicated that the assertion of "identity theft" was based on the DGM investigation, and that the case file before the Court included the "notarized statements" in which several individuals "testified" that they knew "Winet Yan." The State added that "the inquiries" made in 2000 "did not continue for the [following] reasons […]; (a) strict compliance with the provisional measures, and (b) a circumstantial change in the line of investigation." Together with these explanations, the State forwarded a series of documents in which the actions taken since September 12, 2013, were recorded (*infra* paras. 207 and 208).

141. In their observations on the State's brief, the representatives indicated that the "subsequent correction that the State refer[red] to in its answer […] (para. 21.1.5), should be analyzed taking into account [the whole] content of the document to which this assertion relates," and that "paragraph 21.1.5 [of that document], which indicates that '[t]his was subsequently corrected as necessary' cannot be interpreted in a way that is contrary to the State's recognition of the juridical personality and nationality of Mr. Medina Ferreras." They added that "the arguments presented by the State in relation to the 'subsequent correction' of the 'certification' issued by the DGM lack a factual basis or coherence with the evidence provided. The State is trying to justify its change in the line of the investigation by "what took place during the public hearing,'" but it has been "proved that the date on which the State opened the new investigation was September 26, 2013; in other words, 12 days before […] the said hearing before the Court." They added that "the State was unable to provide the document recording the 'correction' of the 'certification' issued by the DGM" and that:

> The valid documents with legal effects, including all the documents presented to the [Commission] and the [Court], such as the birth certificates, the certifications issued by the National Civil Registry Directorate, and the full records (*in extenso*) issued by the Internal Director of the Civil Registry, only indicate that the sole correction made by the State was to recognize the juridical personality and nationality of Willian Medina Ferreras.

They added that "[t]here is no formal record or declaration of […] fraud, especially one that was valid and gave rise to legal effects, or that had been issued by a competent authority, to justify this action." Regarding the "circumstantial change in the line of investigation, [they considered "that it was the State itself that created the evidence supporting this 'change in the line of investigation' with elements under its control."

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official record or statement of this fraud with legally validity and effects […] issued by the competent authority and, if so, to forward the Court a true copy of the document with this record or statement." In this regard, the State was asked to "describe the 'investigations' that were conducted in 2000 and how they made it possible, since they were not concluded, to determine the 'identity theft.' Likewise, the State was asked to provide information on whether the determination was supported by or derived from an official record or declaration of this 'identity theft' with legal validity and effects, issued by the competent authority. If so, the State was asked to send the Court a true copy of the document supporting this record or declaration."

142. The representatives argued that the Court, "when assessing the incorporation of the evidence into the proceedings, in addition to verifying strict compliance with its Rules of Procedure, […] should take into account whether the party presenting it was acting in good faith." They added that the Court "should assess whether, owing to [its] actions, the State was really trying to clarify the facts based on the discovery of new facts, or whether, to the contrary, it was seeking to discredit the victims or their representatives or the Court itself." The representatives presented several documents as annexes to their brief.

143. Meanwhile, in its observations the Commission considered that:

> The information provided by the State does not answer the specific questions raised by the Court and, to the contrary, many aspects of this information are inconsistent with and contradict other official documents and the numerous acknowledgements made by the State throughout the years that the case was being processed before the Commission […] in relation to the Dominican nationality of Mr. Medina Ferreras.

144. Regarding the State's explanations concerning the Court's request for helpful evidence, as well as the observations of the representatives and the Commission on the State's brief, the Court admits them insofar as they are related to the request. The documentation presented by the State did not include any document relating to the "correction" made to the "certification" issued by the DGM, or a formal record or declaration that was valid and gave rise to legal effects of the alleged fraud committed when obtaining the identity card, or to the investigations conducted in 2000 or to a formal record or declaration of the supposed "identity theft"; although, as already mentioned, the State did indicate that the DGM had made a series of inquiries and that the documentation appeared in "annex 6 to the brief submitting the case." Instead, the State forwarded several documents issued between October 2013 and February 2014, and a report on the current investigations[94] relating to Willian Medina Ferreras and his three children. In other words, the State did not present the documents requested, but forwarded other documents instead. Nevertheless, the Court notes that these documents refer to actions that occurred following the presentation of the answering brief (*supra* para. 9), so that, even though the State did not indicate expressly that the documents related to supervening events, they refer to supervening facts. Consequently, the documents presented by the State are admissible, pursuant to Article 57(2) of the Rules of Procedure. For their part, the representatives forwarded various documents, all of which were already included in the body of evidence, except for the documents contained in annexes 9, 10, 13, 14 and 15.[95] Having examined them, the Court considers that annexes 9 and 10

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[94] Namely: Communication No. RE/14, of February 13, 2014, issued by the National Directorate of the Electoral Roll of the Central Electoral Board; Communication No. RE/295, of December 27, 2013, issued by the National Directorate of the Electoral Roll of the Central Electoral Board; Minutes No. 23-2013, of October 18, 2013, issued by the Registrar's Committee of the Central Electoral Board; Report on the investigation into the birth declaration in the name of Willian Medina Ferreras of October 10, 2013, issued by Inspectorate of the Central Electoral Board, together with the communication forwarding this to the president of the Central Electoral Board of October 15, 2013, with the document attached; Certification of February 19, 2014, issued by the Secretary General of the Central Electoral Board, certifying Minutes No. 23-2013, of October 18, 2013, issued by the Registrars' Committee of the Central Electoral Board; Communication No. 482/2013, of November 21, 2013, concerning the instructions of the National Director of the Civil Registry relating to the decisions taken in the said Minutes No. 23-2013 by the full Central Electoral Board; Communication No. 058-2014, of February 11, 2014, concerning the instructions of the Legal Adviser with regard to the decisions taken in relation to the said Minutes No. 23-2013 of the full Central Electoral Board; Certified copies of the information of the Central Electoral Board, based on its master list of those registered, on the following individuals: (1) Willian Medina Ferreras; (2) Yaribe Medina Ramírez; (3) Luis Medina Ferreras; (4) Mario Medina Cuello; (5) Briseida Medina Ferreras, and (6) Argentina Medina Ferreras de Medina. According to the State "the latter document [was] forwarded so that the Court could verify that, contrary to the birth declaration of the said Willian Medina Ferreras, all the other birth declarations bear the signature of Abelardo Medina".

[95] Namely: Annex 9, Affidavit of Jorge Castillo Ferreras, prepared before the notary José Miguel Pérez Heredia in Pedernales on March 10, 2014; Annex 10, Affidavit of Alfredo Castillo Ferreras, prepared before the notary José Miguel Pérez Heredia in Pedernales on March 10, 2014; Annex 13, *Diario 7días.com*, "*JCE Querella*

contain statements made by relatives of Mr. Medina Ferreras that are unrelated to the Court's request; hence, it considers that their presentation is time-barred. Consequently, the Court does not admit the representatives' annexes 9 and 10 because it did not request them as helpful evidence, and their presentation was time-barred. Regarding annexes 13, 14 and 15, they refer to judicial proceedings opened following the submission of the motions and arguments brief. Therefore they are admissible under the said Article 57(2).

145. In addition, on May 7, 2014, the parties were asked to forward different documents.[96] On May 22, 2014, the representatives forwarded information and the documentation requested, which this Court admits. Meanwhile, the State, in relation to the proceedings held with regard to the members of the Medina family, only presented, on May 28 and 29, 2014, a copy "of the complaint and identification of the complainant of March 4, 2014, filed by the Central Electoral Board against […] Willia[n] Medina Ferreras." The State was asked to provide several clarifications, and these were submitted 10 days after the expiry of the non-extendible time limit granted (*supra* para. 20). The representatives and the Commission presented observations and the former contested the admissibility of the documentation (*supra* para. 20). Based on the assertions of the representatives and given that its submission was 10 days after the respective non-extendible time limit had expired, the Court considers that this documentation is inadmissible because its presentation was time-barred.

146. *Evidence obtained ex officio.* Under Article 58(a) of it Rules of Procedure "[t]he Court may, at any stage of the proceedings: (a) Obtain, on its own motion, any evidence it considers helpful and necessary." The Court considers that the following documents are helpful and necessary for the analysis of this case, and therefore incorporates them into the body of evidence *ex officio,* in application of the said regulatory provision: (a) Preliminary observations from the IACHR's Visit to the Dominican Republic, corresponding to the annex to the Press Release of December 6, 2013;[97] (b) Committee on the Elimination of Racial Discrimination: Thirteenth and fourteenth periodic reports of the Dominican Republic of March 7, 2012, and Concluding observations on the thirteenth and fourteenth periodic reports of the Dominican Republic of April 19, 2013;[98] (c) 2005 Human Development Report of the Dominican Republic, prepared by the Human Development Office of the United Nations Development Programme;[99] (d) First National Survey on

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contra William Medina Ferreras," March 4, 2014; Annex 14, *Listín Diario*, "*JCE se querella contra hombre demandó a RD*," March 5, 2014, and Annex 15, request to annul birth certificate due to fraudulent information provided, record No. 162/2014.

[96] The representatives were asked to forward, by May 22, 2014, at the latest, "copies of the identity cards" of two of the presumed victims or, if not, to "provide the corresponding explanations." The State was asked to send, by the same date at the latest, "a true and full copy of [certain] administrative or judicial procedures or proceedings."

[97] Inter-American Commission on Human Rights, Annex to the Press Release, Preliminary observations from the visit of the IACHRs Visit to the Dominican Republic, December 6, 2013. Available at http://www.oas.org/es/cidh/prensa/comunicados/2013/097A.asp.

[98] Committee on the Elimination of Racial Discrimination, Thirteenth and fourteenth periodic reports due in 2010 of the Dominican Republic, Doc. CERD/C/DOM/13-14, March 7, 2012. Available at: http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.DOM.13-14_en.doc.

United Nations, Committee on the Elimination of Racial Discrimination, Concluding observations on the thirteenth and fourteenth periodic reports of the Dominican Republic, adopted by the Committee at its eighty-second session (11 February-1 March 2012) on 19 April 2013, CERD/C/DOM/CO/13-14. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fDOM%2fCO%2f13-14&Lang=en (admitted as supervening evidence (*supra* para. 135).

[99] Human Development Report, Dominican Republic, Human Development Office of the United Nations Development Programme, 2005, p. 152. Available at: http://odh.pnud.org.do/sites/odh.onu.org.do/files/0620Capitulo20Naciones.pdf

Immigrants in the Dominican Republic of April 2013;[100] (e) National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1 – Dominican Republic and Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1 – Dominican Republic;[101] (f) "Repatriations in the Dominican Republic," document issued by the Human Rights Observatory, *Centro Bonó*;[102] (g) copy of Decree No. 250-14, regulating Law 169-14,[103] and (h) World Bank Report "Dominican Republic – Poverty assessment: poverty in a high-growth economy 1986-2000."[104] In addition, since they are well-known public facts, the Court will take the following laws into consideration: the 1955 Constitution of the Dominican Republic, the 1966 Constitution of the Dominican Republic, the 1957 Constitution of Haiti, and Haiti's Nationality Decree of November 6, 1984.

C) Admission of the statements of the presumed victims and of the testimonial and expert evidence

147. With regard to the statements of the presumed victims, the witness, and the expert witnesses provided by affidavit and during the public hearing, the Court finds them pertinent only insofar as they are in keeping with the purpose defined by the President of the Court in the order requiring them (*supra* para. 12).

C.1. Considerations on the statements of the presumed victims

148. *The State's observations on the statements of the presumed victims in its final written arguments.* The State, when referring to the statements of the presumed victims alleged: (a) that the statements of Willian Medina Ferreras and Awilda Medina Ferreras were prepared outside the time frame established in Article 41(1) of the Rules of Procedure, and it was not until the final written arguments that it was able to rule on their oral statement and affidavit. Consequently, on that occasion, based on the content of these statements, it presented a "preliminary objection on the Court's lack of competence *ratione temporis*." Secondly, if the objection was rejected, it asked that "Willia[n] Medina Ferreras and [Aw]ilda Medina Ferreras be excluded from the file" of the case, because "there was a high probability that they were not the same persons as those referred to by the representatives" and, otherwise, "that "the affidavit of [Aw]ilda Medina be excluded and also the statement made during the hearing of the person who calls himself Willia[n] Medina Ferreras, because […] it has been proved that the presumed victims has committed perjury, which has perverted the truth of all his statements and, consequently,

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[100] First National Survey of Immigrants in the Dominican Republic (ENI-2012) Santo Domingo, Dominican Republic, Abril 2013. Available at: http://media.onu.org.do/ONU_DO_web/596/sala_prensa_publicaciones/docs/0565341001372885891.pdf

[101] United Nations, National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 – Dominican Republic, UN Doc A/HRC/WG.6/6/DOM/1, 27 August 2009. Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/151/40/PDF/G0915140.pdf?OpenElement and Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 – Dominican Republic, A/HRC/WG.6/6/DOM/3, of 27 July 2009, Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/146/89/PDF/G0914689.pdf?OpenElement

[102] Centro Bonó, Action and reflection mechanism. Human Rights Observatory, January-June 2012, Repatriaciones en República Dominicana. Available at http://bono.org.do/wp-content/uploads/2011/11/ODH12-13definitivo.pdf.

[103] The State forwarded this decree to the Court on August 13, 2014, but without indicating that it was forwarding it to the Court in relation to the processing of the instant case.

[104] World Bank, Report No. 21306-RD, "Dominican Republic – Poverty assessment: poverty in a high-growth economy 1986-2000", December 17, 2001. Available at: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2002/04/05/000094946_02032804010356/Rendered/PDF/multi0page.pdf

has deprived them of any probative value"; (b) "contradictions" in the affidavit prepared by Janice Midi on September 24, 2013, and filed for the first time a preliminary objection of the Court's lack of competence *ratione temporis* to examine the presumed facts and acts established in the factual framework with regard to the "Fils-Aimé Midi family." Secondly, if the objection was rejected, it requested the "exclusion from the case file of […] Marilobi Fils-Aimé, Andren Fils-Aimé, Carolina Fils-Aimé, […] Juan Fils-Aimé and Nené Fils-Aimé" and "reiterate[d] its request to close the case with regard to this family"; (c) regarding the statements of Antonio Sensión and Ana Lidia Sensión of September 29, 2013, it repeated its position that the Court "lacks competence *ratione temporis* to examine the factual framework of the presumed violations to the detriment of the members of the [Sensión] family, and formally requested that both affidavits be excluded from the case file"; (d) considerations concerning the affidavits of Bersson Gelin of September 24, 2013, and of Rafaelito Pérez Charles and Marlene Mesidor of September 29, 2013, without contesting their admissibility, and (e) that the affidavit of September 29, 2013, with the statement of Markenson Jean "indirectly introduces the statements of Miguel Jean, Victoria Jean and Natalie Jean, which is inadmissible"; hence it asked that "the reference to those persons be excluded when examining the affidavit."

149. As already indicated, the preliminary objections filed by the State in its final written arguments are inadmissible, pursuant to Article 42(1) of the Court's Rules of Procedure (*supra* para. 48). As regards the State's requests to "exclude from the case file" Willian Medina Ferreras, Awilda Medina Ferreras, Marilobi Fils-Aimé, Andren Fils-Aimé, Carolina Fils-Aimé and Juan Fils-Aimé and Nené Fils-Aimé, the Court refers back to the respective decisions already taken with regard to these individuals in the Court's considerations with regard to the preliminary objections and in the section on the determination of the presumed victims (*supra* paras. 78, 83 to 87, 92 and 93). In the case of Bersson Gelin, Rafaelito Pérez Charles, Markenson Jean and Marlene Mesidor, the State's observations refer to the probative value of their statements and are therefore not directly linked to the admissibility of the evidence. As for the other observations presented in its final arguments relating to the statements of Willian Medina Ferreras and Awilda Medina, the State indicated various "contradictions" in the statements; also, that they had committed "perjury" and that the statements were "completely invalid." In this regard, the Court also considers that the State was referring to assessments of the statements and not to their admissibility. Regarding the statements of Antonio Sensión and Ana Lidia Sensión, the State based its arguments on a preliminary objection (*supra* paras. 35 to 37) and did not contest their admissibility as evidence. Consequently, the Court admits the respective statements.

C.2. Considerations on the expert evidence

150. *The State's observations on the expert opinions in its final written arguments.* Regarding the expert opinion of Carlos Quesada, the State affirmed that "the content [of this expert opinion] had been totally discredited and was devoid of any persuasive power" and, in response to a question posed by one of the judges, according to the State, "he lied." In the expert opinion of Bridget Wooding, the State also contested the content included under the sub-headings: "(1) The Hatillo and Palma incidents and their aftereffects (2005), pp. 6-8; and (2) The immigration system, pp. 8-12," considering that they did not correspond to the purpose of her expert opinion.[105] The Court notes that the State's observations with regard to the expert opinion of Carlos Quesada relate to opinions on the significance of its content, and not on its admissibility. Regarding the comments on the expert opinion of Bridget Wooding, the Court will consider the content of the expert

[105] In addition, with regard to the expert opinions provided during the public hearing, the State submitted considerations on the expert opinion of Pablo Ceriani Cernadas, without contesting it.

opinion insofar as it is in keeping with the purpose for which it was requested (*supra* para. 12).

151. In view of the State's observations, the Court will consider the content of the expert opinions to the extent that they are in keeping with the purpose for which they were requested. Lastly, the Court considers that these observations by the State do not affect the admissibility of the expert opinions, and therefore admits them.

152. It should also be placed on record that the State referred to the power of attorney of Victor Jean, Marlene Mesidor and Markenson Jean and argued that Victor Jean had placed his fingerprint on the power and that, "his signature appears on the alleged sworn statement of January 11, 2001"; accordingly, it considered that one of the two documents was "false." In addition, the State affirmed that the power of attorney "had not been notarized, so that it lacked authentication," and that this irregularity encompasses the "deponents that have supposedly endorsed it: Marlene Mesidor and Markenson […] Jean." Given the contradiction, it asked that "both documents be excluded from the body of evidence." Regarding the said power of attorney, the Court has mentioned similar considerations as those made by the State under the alleged "Absence of powers of attorney in favor of the representatives" (*supra* para. 88). In relation to the State's comments on the statement of January 11, 2001, this Court refers back to its previous considerations in this regard (*supra* para. 124).

VII
FACTS

A) Context

153. The Commission and the representatives have argued, linking it to the facts of this case, the existence of a context of discrimination against the Haitian population and those of Haitian descent in the Dominican Republic. They also indicated that this includes the practice of collective expulsions and, with regard to individuals of Haitian descent born in Dominican territory, the denial of access to personal identification documents. The State rejected these accusations. Based on the arguments of the parties and the Commission, and their alleged relevance with regard to the facts of the case, the Court deems it pertinent to examine the said context.

154. The Court recalls that, in the exercise of its contentious jurisdiction, it has examined different historical, social and political contexts that have allowed it to situate the facts that were alleged to have violated the American Convention within the context of the specific circumstances in which they occurred. In addition, in some cases, the context made it possible to characterize the facts as part of a systematic pattern of human rights violations[106] and/or was taken into account to determine the international responsibility of the State.[107] Bearing in mind the pertinent aspects of this case, the Court will refer to: (a) the socio-economic situation of Haitians and those of Haitian descent in the Dominican Republic and the alleged discriminatory concept held of them;[108] (b) the problem that has

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[106] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits,* paras. 126, 147 and 148, and Case of *J. v. Peru*, para. 53.

[107] *Cf. Case of Goiburú et al. v. Paraguay. Merits, reparations and costs*. Judgment of September 22, 2006. Series C No. 153, paras. 61 and 62, and *Case of Veliz Franco v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of May 19, 2014. Series C No. 277, para. 65.

[108] The Commission has referred to the existence in the Dominican Republic of "[a]nti-Haitianism and […] tensions […] over the flow of Haitian immigrants into [that country]." The representatives have said that "[t]he phenomenon of discrimination against Haitians or those of Haitian descent is deeply-rooted in Dominican society, mainly against those whose traits reveal African descent." The State denied these accusations (*infra* para. 159).

been described for Dominicans of Haitian descent to obtain identity documents,[109] and (c) the alleged existence of a systematic practice of collective expulsions[110] of Haitians and Dominicans of Haitian descent.[111] The Court will consider the information provided on the background to these practices, and their application during the period over which it is alleged that the facts of this case occurred.

A.1. The socio-economic situation of Haitians and those of Haitian descent and the alleged discriminatory concept held of them

A.1.1 The socio-economic situations of Haitians and those of Haitian descent in the Dominican Republic

155. The Court has verified previously that the first major migratory flows of Haitians towards the Dominican Republic occurred during the first third of the twentieth century, when around 100,000 people went to work in the Dominican sugar plantations that were initially controlled by private corporations and then most of them passed into the control of the State Sugar Council. Many Haitian migrants went to live permanently in the Dominican Republic, established a family in this country, and now live with their children and grandchildren (second and third generation Dominicans of Haitian descent), who were born and have lived in the Dominican Republic.[112] Regarding the second half of the twentieth century, expert witness Manuel Núñez Asencio stated that "from the 1950s to the 1980s, […] most of the Haitian immigrants [went to the Dominican Republic] to work in agriculture, mainly in the sugar plantations.[113]

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[109] The Commission indicated that "mechanisms to deny documentation to Haitians and Dominicans of Haitian descent […] have been verified." The representatives alluded to the "difficulties and obstacles faced by those of Haitian descent born in Dominican territory to obtain documents proving their nationality." The State, before the Court, referred to laws that regulate birth registration in the Dominican Republic. Regarding "supposed obstacles that [some of the presumed victims have allegedly faced] to register, although belatedly, the births of [those] born in Dominican territory, [… it] recall[ed] that Law No. 659, of July 17, 1944, established the procedure to be following in order to register late declarations." It also mentioned that "Law No. 182 of November 7, 1980, […] established that Registry Office officials would receive late declarations of the birth of children […] up to 10 years of age, without charge, for one year as of promulgation of the law," and also indicated "Law No. 13-93 of June 22, 1993, which […] increased the time limit for the immediate registration of births from 60 to 90 days, and granted a grace period of one year for late declarations to all children of less than 15 years of age, without charge." Lastly, it indicated that "the Executive had promulgated Law No. 218-07 of August 14, 2008, granting an amnesty for late birth declarations, which accorded a grace period for the late registration of children of up to 16 years of age even for a three-year period."

[110] For practical effects, without this implying a ruling on the validity or grounds of the definitions adopted in the domestic and international sphere for terms such as "deportation" or "expulsion," this Judgment will use the term "expulsion" since this is the word used in Article 22 of the American Convention. In this regard, the Court, in *Advisory Opinion OC-21/14* adopted a functional definition according to which it "understands expulsion as any decision, order, procedure or proceeding by or before the competent administrative or judicial organ, irrespective of the name given in national law, related to the obligatory departure of a person from the receiving State, which results in the person abandoning the territory of this State or being transferred beyond its borders. Thus, when referring to expulsion, this also includes what in specific or domestic terms may consist in deportation." (*Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No. 21, para. 269). This definition is also applicable to the expulsion of nationals referred to in Article 22(5) of the Convention.

[111] The Commission stated that "situations of mass expulsion or deportation have been verified." The representatives alleged that, since the beginning of the 1990s, Haitian immigrants and numerous Dominicans of Haitian descent had been victims of collective expulsions and deportations." The State contested these assertions (*infra* para. 167).

[112] *Case of the Yean and Bosico Girls v. Dominican Republic*. *Preliminary objections, merits, reparations and costs. Judgment of* September 8, 2005, Series C No. 130, para. 109.1, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs*. Judgment of October 24, 2012, Series C No. 251, para. 38.

[113] Expert witness Manuel Núñez Asencio explained that "[t]his was possible owing to the agreement of November 14, 1966, on the hiring in Haiti and entry into the Dominican Republic of temporary unskilled labor and, prior to this, the bi-national agreement on Haitian temporary unskilled labor of January 5, 1952." He added

156. The Haitian temporary agricultural workers (*braceros*) who came to the Dominican Republic and all the members of their families who accompanied them were lodged in barracks, in settlements known as "*bateyes*." Over time, the character of the *bateyes* changed and they became permanent communities, because the sugar corporations hired a certain number of agricultural workers on a permanent basis so that they could work year long, and other workers, including Dominican men and women, went to live in them. The *bateyes* became the home of first, second, and even third-generation families of Haitian descent.[114] However, according to documents published around the time of the events, it was common that individuals and sectors of the country's population assumed that all the workers in the sugar cane plantations and all those who lived in *bateyes* were Haitians.[115] The Court has verified, based on documents published in 1996, 2001 and 2002, that basic public services in the *bateyes* were limited and the conditions of the highways were very poor, which meant that during the rainy season communication between the *bateyes* and the town could be cut off for several days.[116] Similarly, information covering the years 1986 to 2000 indicates that the rates of poverty and extreme poverty were much higher in the *bateyes* than the national average in the Dominican Republic.[117] Regarding more recent times, in 2013, the Inter-American Commission has stated that, during a visit, it verified the conditions of poverty, exclusion and discrimination endured by the inhabitants of the *bateyes*. It indicated that poverty affected the Dominicans of Haitian descent disproportionately, and that this was related to the obstacles they faced to access their identity documents[118] (*infra* paras. 163 to 166).

157. Expert witness Manuel Núñez Asencio explained that "[w]ith the decline in the sugar industry, the system […] gradually collapsed"; that, "in the 1990s, […] the Dominican Republic applied regulations reducing rates for construction workers, and this became a disincentive for Dominican workers, […] opening up a niche for the Haitians,"[119] and that, during that decade, as well as "in the [twenty-first] century, irregular Haitian migration [towards the Dominican Republic] has continued." In 2000, Haitians and individuals born in Dominican territory of Haitian descent represented approximately 6% of the population of the Dominican Republic; this group is, in turn, divided into four sub-groups: "temporary workers, undocumented Haitians living permanently in the Dominican Republic, the children of Haitian immigrants born in the Dominican Republic, and political refugees."[120]

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that this agreement "established the temporary nature of the work" and that "the Haitian State assumed the responsibility for registering the children of temporary workers who were in the Dominican Republic as its nationals." Expert opinion provided by Manuel Núñez Asencio by affidavit on September 30, 2013 (file of preliminary objections, merits and reparations, tome III, fs. 1677 to 1696).

114 Amnesty International, A life in transit - The plight of Haitian migrants and Dominicans of Haitian Descent, AMR 27/001/2007 (file of annexes to the Merits report, annex 53, fs. 561 to 596). Similarly, expert witness Manuel Núñez Asencio, indicated that "[t]here are more than 500 *bateyes* in the Dominican Republic, basically villages with a Haitian population without any kind of documentation" (expert opinion provided by Manuel Núñez Asencio, provided by affidavit).

115 *Human Rights Watch*, Illegal People: Haitians and Dominico-Haitians in the Dominican Republic, April 4, 2002, p.10 (file of annexes to the motions and arguments brief, annex A01, fs. 2596 to 2629).

116 *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 109.2.

117 World Bank, Report No. 21306-RD, "Dominican Republic – Poverty assessment: poverty in a high-growth economy 1986-2000."

118 Inter-American Commission on Human Rights, Annex to the Press Release, Preliminary observations from the visit of the IACHRs Visit to the Dominican Republic, December 6, 2013.

119 The expert witness added, citing Labor Ministry documents from 2012, that "53% of construction workers are Haitians, compared to 47% Dominicans. On banana export plantations 63% of the workers are Haitians, compared to 37% Dominicans. *Cf.* Expert opinion provided by Manuel Núñez Asencio by affidavit.

120 National Coalition for Haitian Rights *"Beyond the Bateyes,"* August 1995 (file of annexes to the notions and arguments brief, annex A02, fs. 2631 to 2677). In his testimony, Samuel Martínez asserted that "[f]or

The Court has noted that, in recent times, according to different estimates, the population of Haitians and Dominicans of Haitian descent who live in the Dominican Republic is from 900,000 to 1.2 million.[121]

158. The Court, in a previous judgment in a case the facts of which took place starting in June 2000, noted that many of the Haitians in the Dominican Republic "live in conditions of poverty [and] marginality resulting from their legal status and lack of opportunities."[122] The Court has also noted that the United Nations Development Programme has indicated that the Haitians "live in very precarious conditions and extreme poverty."[123]

A.1.2. The alleged discriminatory concept in relation to Haitians and those of Haitian descent in the Dominican Republic

159. During the public hearing in this case, the State indicated that "it cannot be thought that […] a country such as the Dominican Republic, […] 80% of whose population is of African descent, is a country that discriminates against its own ethnic origins […]; there is not a single piece of factual evidence that this kind of discrimination exists." Nevertheless, the Dominican Republic presented information to the Committee on the Elimination of Racial Discrimination for the period from April 2008 to September 2011, and alleged that "the Dominican Republic inherited a culture with a history of slavery and racially discriminatory practices [… and that] the failure of a long line of Dominican

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generations, undocumented immigrants and workers hired from the rural areas of Haiti provided the labor force for the sugar harvest in the Dominican Republic and, in recent decades, dozens of thousands of Haitian men and women have taken on the most lowly jobs in other sectors of the Dominican economy." He also indicated that "[t]here is no contradiction between […] a 'tendency to return' and the observation […] that most of the Haitians who live on the Dominican side of the border have lived there for many years and have put down roots. […] Even though most of the immigrants have tried to return to Haiti as soon as possible, over the years, a population of several hundreds of thousands has gradually accumulated on the Dominican side. […] Even though there is a significant flow of Haitians returning to Haiti, most of the emigrants who set up home in the Dominican Republic end up losing contact with their families in Haiti and seldom return." (*Cf.* Testimony of Samuel Martínez in the case of the *Yean and Bosico Girls v. Dominican Republic*, on February 14, 2005. File of preliminary objections, merits and reparations, fs. 938 to 964).

121 *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs*. Judgment of October 24, 2012, Series C No. 251, para. 39, and United Nations, National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1, Dominican Republic, para. 6. The absence of official figures has been mentioned as one of the main problems to examine the phenomenon of discrimination in the Dominican Republic; various organizations have noted the absolute refusal of the Dominican Republic to accept that there is discrimination against the Haitian population and Dominicans of Haitian descent. The report of the Special Rapporteur and the independent expert indicates that the "the absence of a policy framework that expressly relates to people of African descent and the lack of disaggregated quantitative and qualitative data on the economic, social and political representation of Dominicans of African descent within society was considered as a major problem and a major challenge in combating racism and racial discrimination." United Nations, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Dième, and the independent expert on minority issues, Gay McDougall, Mission to the Dominican Republic, A/HRC/7/19/Add.5 and A/HRC/7/23/Add.4, 18 March 2008, para. 35 (file of annexes to the Merits report, annex 45, fs. 421 to 456). In its 2007 report to the Committee on the Elimination of Racial Discrimination, the Government of the Dominican Republic stated that approximately one million Haitians lived in the country (United Nations, Committee on the Elimination of Racial Discrimination, Ninth periodic report of the Dominican Republic to the Committee on the Elimination of Racial Discrimination, CERD/C/DOM/12, 8 June 2007, para. 3 (file of annexes to the motions and arguments brief, annex A04, fs. 3083 to 3090). Expert witness Samuel Martínez stated that the figure of "a million or more Haitians" in the Dominican Republic "could be considered plausible if all the children and grandchildren of Haitian citizens are included in the total for the 'Haitian' population" (testimony of Samuel Martínez in the case of the *Yean and Bosico Girls v. Dominican Republic*). Expert witness Núñez Asencio, citing a 2013 document: "First National Survey of Immigrants in the Dominican Republic" (SD, 2013, ONE, European Union, UNHCR, UN), indicated that "the Haitian population [in the Dominican Republic is] in excess of 668,144 persons" (expert opinion provided by Manuel Núñez Asencio by affidavit).

122 *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 39.

123 *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 109.3.

Administrations to remedy the damage caused […] apparently permitted the […] proliferation of racism."[124] Furthermore, in observations on this report, this Committee stated that persons of African origin "are one of the poorest population groups among the poor" in the Dominican Republic, and expressed its concern owing to what, in its considerations, it referred to as "structural and widespread racism within Dominican society, and in particular discrimination based on colour or national origin."[125] Furthermore, several international agencies have referred to the problem of discrimination against the Haitian population and those of Haitian descent in the Dominican Republic. The Office of the United Nations Development Programme has indicated that Haitians in the Dominican Republic "must face a political and social attitude that is generally hostile."[126] In this regard, the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, and the independent expert on minority issues have underscored information from the Dominican Republic's past indicating racial discrimination towards Haitians.[127] It has also been mentioned that this problem was also ongoing even around the time of the facts of this case.[128]

160. The said Special Rapporteur and the independent expert found that the dominant perception among most Dominicans is that their mulatto skin tones distinguish them from darker-skinned Dominicans and Haitians. In this regard, they noted the use of the term "black" as an insult in the Dominican Republic, added to references made to "blacks" as being ignorant or unhygienic, or the frequent association of "blacks" with both illegal status and criminality. According to these experts, in the Dominican Republic the term "black" and, by extension, traits or elements related to African descent are associated with Haitians, whether or not they are documented, such as the Dominicans of Haitian

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[124] United Nations, Committee on the Elimination of Racial Discrimination, Reports submitted by States parties under article 9 of the Convention, Thirteenth and fourteenth periodic reports due in 2010, Dominican Republic, para. 31. The representatives attached to their final written arguments the "*Concluding observations on the thirteenth and fourteenth periodic reports of the Dominican Republic*" CERD/C/DOM/CO/13-14, of March 1, 2013 (file of preliminary objections, merits and reparations, fs. 3147 to 3155). In his testimony, Samuel Martínez affirmed that "[m]any Dominicans have attitudes towards Haitians that are openly in contrast to the open welcome that they have offered to other immigrant groups." He also observed that "the very concept of Dominican national identity is formulated in terms of race; the Dominicans, implicitly and explicitly, consider the Haitians to be 'real blacks'" (*cf.* Testimony of Samuel Martínez in the case of the *Yean and Bosico Girls v. Dominican Republic*). For his part, expert witness Manuel Núñez Asencio explained that "[t]he Dominican has his own connection to his African origins that are very different from those that have predominated in Haiti. The supposition that Haitians and Dominicans have a common black culture is false. Race does not determine culture." Expert opinion provided by Manuel Núñez Asencio by affidavit.

[125] United Nations, Committee on the Elimination of Racial Discrimination, Concluding observations on the thirteenth and fourteenth periodic reports of the Dominican Republic, paras. 8 and 15

[126] *Case of the Yean and Bosico Girls Vs Dominican Republic*, para. 109.3.

[127] Thus, they indicated that, from 1930 to 1961 [Dominican Republic] was governed by Rafael Leónidas Trujillo, and that over this period adopted a policy of racism and promoted a European and Hispanic identity, built around the development of "anti-Haitian" sentiments and the use of violence against Haitians (United Nations, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, and the independent expert on minority issues, Gay McDougall, Report on the Mission to the Dominican Republic, A/HRC/7/19/Add.5 para. 7. Without denying this information, expert witness Fernando I Ferrán Brú highlighted that the Dominican Republic "has had at least five presidents of Haitian descent," and that, "since the fall of Trujillo, the ongoing tendency […] has been to elucidate any incident that involves excesses that prejudice the protection of human rights for racist or any other reasons of anyone, whether Dominican or foreign" (*Cf.* Expert opinion provided by Fernando Ignacio Ferrán Brú by affidavit on September 30, 2013, file of preliminary objections, merits and reparations, fs. 1498 to 1676).

[128] Thus, in 2002, *Human Rights Watch*, indicated that "In light of this troubled history [between Haiti and Dominican Republic] – and of distorted versions of it disseminated through the schools and through state-controlled media since the time of Trujillo – some Dominicans are still quick to perceive a Haitian threat to the territorial integrity of their country," and "racial prejudice in the Dominican Republic runs deep." (*Cf. Human Rights Watch,* Illegal People: Haitians and Dominico-Haitians in the Dominican Republic, p. 8.)

descent.[129] Similarly, in 2005, the Human Development Office of the United Nations Development Programme (UNDP) issued a National Human Development Report on the Dominican Republic in which it stated that:

> [As a result of migration and the transformation of the economic model,] the [Dominican] national identity and regional identities are undergoing profound changes […]. These processes are influenced by aspects [such as] the Haitian immigration, which can be represented by the following equivalent: Haitian – cheap labor – rejected negritude – an element that can be expelled.[130]

For its part, in 1999, the Inter-American Commission reported, based on pre-1983 sources,[131] that "historically it has been denounced that Haitian workers who cross the border to work in the sugarcane harvest […] have been the victims of a whole array of abuse by the authorities, from assassinations, abusive treatment, mass expulsions, exploitation, deplorable living conditions, and the failure to recognize their labor rights."[132]

161. On other aspects, the evidence provided to the Court reveals that, in the Dominican Republic, Haitians or those of Haitian descent enjoy their own cultural life, religious freedom, and access to services provided by the State or public entities, such as health care, education, and justice, although this is not a restrictive assertion. Thus, for example, expert witness Ferrán Brú stated the following:

> In 2011, at least 12,000 Haitians were enrolled in Dominican universities and, of these, many attend the Universidad Autónoma de Santo Domingo. The State allows different radio stations to broadcast in Creole and French. Religious ceremonies take place that are non-Christian, although they are syncretic, in other words *gagá* and voodoo rites, in which Haitians and Dominicans take part indiscriminately. There are no cultural or, in particular state, prohibitions against people speaking Haitian Creole, and there is no law that, by its application, makes a distinction among Dominicans based on their racial characteristics. To the contrary, acts of discrimination are penalized.

Also, expert witness Bridget Frances Wooding admitted that "Haitian immigrants" have "access to services," in relation to "health care, […] education [and] justice."

162. Nevertheless, some factors that are relevant owing to their relationship to the facts of this case should be examined in greater detail: the alleged difficulties for Haitians or those of Haitian descent to register births and to obtain documents, as well as the alleged existence, in such cases, of systematic practices of collective expulsions of Haitians and persons of Haitian descent. These aspects are examined below.

A.2. The alleged problem for Haitians and Dominicans of Haitian descent to obtain official documents

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[129] United Nations, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, and the independent expert on minority issues, Gay McDougall, Mission to the Dominican Republic, A/HRC/7/19/Add.5, p. 2 and paras. 7, 37 and 46.

[130] National Human Development Report on the Dominican Republic, Human Development Office of the United Nations Development Programme, 2005, p. 152.

[131] The Commission cited: "ILO Report, 1983; Manuel Mandruga, *Trabajadores Haitianos en la República Dominicana,*" in "1991 Annual Report of the Commission, OEA. Ser.L/V/II. 81, doc. 6, rev. 1, of February 14, 1992. In general, it indicated that its report was "the result of information and opinions […] that the Commission had gathered before, during and after the on-site observation mission carried out in June 1997." (Inter-American Commission on Human Rights, Report on the situation of human rights in the Dominican Republic, October 7, 1999. OAS/Ser.L/V/II.104, para. 317. Available at http://www.cidh.org/countryrep/Rep.Dominicana99sp/indice.htm).

[132] Inter-American Commission on Human Rights, Report on the situation of human rights in the Dominican Republic, October 7, 1999. OAS/Ser.L/V/II.104, para. 317.

163. The President of the Dominican Republic, in the statement of reasons for Law No. 169-14 of May 23, 2014 (*infra* para. 180), asserted that "Dominican Republic has a long history of shortcomings with regard to the registration, documentation and identification of both nationals and aliens" and that "many people are born on national territory who are not duly registered and therefore lack a juridical identity, which] reveals an unacceptable institutional weakness." Similarly, based on different sources of information published between 1991 and 2005, the Court has noted that the birth of most children of Haitians and Dominicans of Haitian descent born in Dominican territory was not registered, at least around the time of birth.[133] In addition, these shortcomings are also mentioned in the *consideranda* of Law No. 169-14, as well as in judgment TC/0168/13 of the Constitutional Court. Similarly, the connection between these difficulties and what expert witness Ferrán Brú referred to as the "irregular conditions of the Dominican Civil Registry" should be noted. Although he did not indicate that the problem affects those of Haitian descent exclusively, he stated that "the indiscriminate flow of Haitians towards [the Dominican Republic,] together with [these conditions of irregularity] lead to chaos." He also affirmed the existence of "pernicious effects of the irregularities of [the said] Civil Registry," concluding that "the purging of the Dominican civil registers has been a necessary process."[134]

164. In February 2005, Samuel Martínez stated that:

> Dominican law and the interpretation that the highest civil registry authorities have made of its requirements for citizenship support the presumption of the exclusion of Haitians [*sic*] from citizenship at the level of the local civil registers. […] The official refusal to grant citizenship to children of Haitian immigrants born in the Dominican Republic has created a broad category of *de facto* stateless persons.[135]

165. In view of the foregoing, one of the main difficulties faced by children of Haitian descent when trying to obtain Dominican nationality is obtaining a certificate of their birth in Dominican territory from a Civil Registry Office. Thus, added to the statement of reasons for Law No. 169-14 (*supra* para. 163), the Court has observed, based on information from 1991 to 2005, that mothers usually give birth to their children at home, in view of the difficulty to travel from the *bateyes* to the hospitals in the towns, their limited financial resources, and the fear of meeting hospital officials, police agents, or officials from the local municipality and being expelled.[136] However, these are not the only problems. Thus, the Court notes that it has been reported that there have been cases in which the Dominican public authorities have made it difficult to obtain the birth certificates of children of Haitian descent,[137] and that parents who are Haitian immigrants or

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133 *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 109.10. In this regard, the *National Coalition for Haitian Rights* has described the fear of being deported usually felt by the parents of children of Haitian descent if they go to register their children, and indicated that frequently the parents do not have identity documents even though they have lived in the Dominican Republic for numerous years. The widely-held opinion is that the identity cards of Haitians are false. Similarly, Samuel Martínez stated that "late civil registration is frequently the only mechanisms that the Dominico-Haitians have to obtain an official certification that they were born in the Dominican Republic. Many Haitians decide to give birth to their children at home instead of going to a health clinic, for lack of money, difficulties in finding adequate transport from the remote rural settlements, or fear that the hospital staff or the police agents will denounce them as illegal residents. In recent years, hospital staff have refused birth certificates even to Haitians born in hospitals" (*cf.* Testimony of Samuel Martínez in the case of the *Yean and Bosico Girls v. Dominican Republic*).

134 Expert opinion provided by Fernando Ignacio Ferrán Brú by affidavit.

135 *Cf.* Testimony of Samuel Martínez in the case of the *Yean and Bosico Girls v. Dominican Republic.*

136 *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 109.10 and footnote 47. Expert witness Samuel Martínez testified similarly (*Cf.* Testimony of Samuel Martínez in the case of the *Yean and Bosico Girls v. Dominican Republic*).

137 *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 109.11.

Dominicans of Haitian descent usually face discriminatory practices in the offices of the Civil Registry,[138] which prevent them from registering the birth of their children. Suspicions about the authenticity of the documents presented for the registration, disparaging comments and disdainful attitudes are obstacles faced by most Haitian parents, or those who are considered Haitian.[139]

166. The difficulties do not end once personal or identity documents have been obtained, but extend to the use of these documents – and this is not a recent problem. In this regard, in 2008, the Committee on the Elimination of Racial Discrimination issued its concluding observations on the reports submitted by the Dominican Republic in 2000, 2002, 2004 and 2006 and expressed its concern about the numerous cases of Dominicans of Haitian descent whose birth certificates, identity cards and electoral identity documents had been confiscated and destroyed, or issue of duplicates had been refused owing to their ethnic origin.[140]. Similarly, the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the independent expert on minority issues stressed that, without exception, the individuals of Haitian descent born in the Dominican Republic who they interviewed during their visit to the Dominican Republic from 23 to 29 October 2007, reported that, because of their color or their Haitian looks or name, it is virtually impossible to obtain identity documents or even copies or renewals of previously issued documents. The Special Rapporteur and the independent expert also underlined that without identity documents verifying their lawful presence in the country they are left vulnerable to deportation or expulsion to Haiti.[141]

A.3. The alleged existence of a systematic practice of collective expulsions of Haitians and Dominicans of Haitian descent

167. Although the State indicated that it "did not carry out collective or mass deportations of Haitians,"[142] this Court has previously established that: (a) the Dominican Republic has carried out expulsions of Haitians and Dominicans of Haitian descent irrespective of their migratory status in the country; (b) in the case of these expulsions, decisions were taken without a prior investigation procedure, and (c) in some cases in the 1990s the expulsions

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138 First National Survey on Immigrants in the Dominican Republic, p. 19.

139 Amnesty International, A life in transit - The plight of Haitian migrants and Dominicans of Haitian Descent.

140 United Nations, Committee on the Elimination of Racial Discrimination, Concluding observations on the thirteenth and fourteenth periodic reports of the Dominican Republic, para. 19.

141 United Nations, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance Doudou Diène, and the independent expert on minority issues, Gay McDougall, para. 55.

142 The State added that this "was supported […] by official statistics on repatriations," and that it had "never repatriated a Dominican who had been detained and who, during the verification process, had been able to document his status as a national." Regarding the said official data, the State did not present official documents with details of the said statistical information, but referred to a brief of July 19, 2000, which the Dominican Republic had presented to the Court in the context of the provisional measures, and which the Commission had included as an annex to the Merits report. In this brief it had referred to a specific period of some months (although it did not specify which months), and indicated that "the statistics for repatriations of illegal Haitians towards their country of origin carried out by the General Directorate of Immigration for June [2000], show an average of 717 persons repatriated each month; repatriations never amounted to 1,000 persons in any of these months" (file of annexes to the Merits report, annex 6, fs. 121 to 154). The State also presented files on expulsion proceedings for both Haitians and individuals from other countries (*supra* para. 138). In any case, the Court notes that the information provided by the State refers to expulsions recorded and carried out under legal procedures. Other probative elements, as well as aspects established in previous case law of this Court reveal expulsions that, owing to the method used, were not necessarily recorded. Consequently, the information provided by the State does not preclude the Court from taking these other previous probative elements and information into account.

involved many thousands of persons.[143] In this regard, it has been pointed out that, during that decade, the Dominican Republic expelled to Haiti thousands of Haitians and an unknown number of Dominicans of Haitian descent. On several occasions, "the Dominican authorities have conducted mass expulsions of Haitians and Dominico-Haitians, rounding up thousands of people in a period of weeks or months and forcibly expelling them from the country."[144] In its 1991 Annual Report published in February 1992, the Inter-American Commission reported that "starting on June 18, 1991, the Dominican Government has conducted mass expulsions of Haitians, involving many thousands to date [and, in this regard,] practices of the Dominican Government and its agents have been reported that violate the Convention." Also, in 2009, the Office of the United Nations High Commissioner for Human Rights underlined information indicating that "between 20,000 and 30,000 immigrants are expelled each year with no chance to appeal as a result of systematic discrimination because of race, skin colour, language and nationality, despite the fact that many have valid work permits and visas and some are in fact Dominicans with no family ties in Haiti." Moreover, the representatives have provided documents which mention that the last "wave" of mass expulsions took place in 1991, 1996, 1997 and 1999, when deportations of 35,000, 5,000, 25,000 and 20,000 Haitians respectively were recorded.[145]

168. Meanwhile, the State "affirm[ed] that a national immigration policy based on racial profiling or skin color would be inoperable, because the Haitian physiognomy is very similar to [that of] a large part of the Dominican population." In this regard, the Court notes that several international organizations have indicated otherwise, and have referred to the alleged racism not only on the strict basis of phenotypic traits that reveal African descent, but also on the basis of perceptions relating to the general aspect of those with dark skins. According to the report of the United Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the independent expert on minority issues, "anti-Haitianism," which has a strong racial component, has played a very important role in the expulsion process.[146] Thus, they indicated that "These procedures were noted to be particularly targeting those who are presumed to be "Haitians", a determination that would be mainly based on skin colour, without distinguishing between Haitians, Dominicans of Haitian descent and black

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143 *Case of the Yean and Bosico Girls Vs Dominican Republic*, para. 109.10. Expert witness Bridget Wooding referred to "several peaks" of "mass expulsions" during the 1990s, stating, in particular, that "there were numerous abuses in a single month'; for example, in November 1999, 20,000 persons were expelled" (*cf.* Expert opinion provided by Bridget Frances Wooding before the Court during the public hearing).

144 Human Rights Watch indicated in its report that "[o]fficial statistics indicate that the government returned 14,639 Haitians in 2000, 17,524 in 1999, and 13,733 in 1998" (Human Rights Watch, Illegal People: Haitians and Dominico-Haitians in the Dominican Republic, p. 17). In this regard, expert witness Bridget Wooding, referring to the "predominant migratory model" since "at least the 1960s," asserted that this is a "model known as 'mass regulative deportations'," which is a category for sociological analysis. She explained that this signified that "there is no effective regulation at the point of entry [of migrants into the State's territory] and yet the authorities, the State, try to regulate through a process of mass regulative deportations" (*cf.* Expert opinion provided by Bridget Wooding during the public hearing).

145 *Cf.* 1991 Annual Report of the Inter-American Commission on Human Rights; United Nations, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1 – Dominican Republic, A/HRC/WG.6/6/DOM/3, of 27 July 2009, Available at: http://daccess-ddsny.un.org/doc/UNDOC/GEN/G09/146/92/PDF/G0914692.pdf? OpenElement, and Minority Rights Group International, "Migration in the Caribbean: Haiti, the Dominican Republic and Beyond," James Ferguson, July 2003 (file of annexes to the motions and arguments brief, annex A06, fs. 3099 to 3143).

146 United Nations, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance Doudou Diène, and the independent expert on minority issues, Gay McDougall, para. 91. According to these sources "ill-treatment and abuse during deportation is common." The authorities who conduct deportation 'sweeps' confiscate legitimate identification documents, including identity cards and birth certificates.

Dominicans with no ties at all with Haiti."[147] The Special Rapporteur and the independent expert heard statements by Haitians and Dominicans of Haitian descent indicating that "[…] "the most important passport is skin colour. Those with light skin rarely have a problem. Those who are black and look poor face problems all the time, no matter whether Haitian or Dominican. If you are black, you are Haitian."[148] The Committee on the Elimination of Racial Discrimination has also expressed its concern regarding the detention of documented and undocumented migrants of Haitian origin, and their collective deportations to Haiti, without any guarantees of due process.[149] Meanwhile, the Inter-American Commission has advised that it has received reports that, before they are removed from Dominican territory, deportees are held in establishments in which they receive little or no food during their time of confinement and, in some case, have been beaten by Dominican authorities.[150] The Commission has also stated that the expulsions conducted by the Dominican Republic were based on identity control on the basis of the racial profile of those detained, and that the Dominican authorities merely observe the way of walking, the lifestyle and the color of the skin, which they consider to be darker, to determine whether individuals are Haitians or descendants of Haitians.[151]

169. The specific characteristics of these expulsions have been described. For example, it has been pointed out that, even when they are decided on an individual basis, they are carried out with such haste that individuals are not given the chance to contact family members or contest the expulsion order. The mass expulsions have frequently been conducted in overcrowded buses; these bus journeys create unsafe conditions that, at times, have resulted in serious injuries.[152]. Those expelled from Dominican Republic are given no opportunity to contact their families, retrieve their belongings, collect their paychecks, or in any way prepare for departure. Dropped off at the border and told to walk to the other side, they typically arrive in Haiti with little or no money, indeed, often with nothing more than the clothes on their back. They may have to beg for food and for a place to sleep.[153]

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147 United Nations, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance Doudou Diène, and the independent expert on minority issues, Gay McDougall, para. 44.

148 United Nations, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance Doudou Diène, and the independent expert on minority issues, Gay McDougall, para. 44. The Special Rapporteur and the independent expert were informed of cases where black aliens, with no ties at all with the Dominican Republic or Haiti, but happening to be in the border area had also been threatened, just because of the color of their skin, with deportation to Haiti.

149 United Nations, Committee on the Elimination of Racial Discrimination, Concluding observations of the Committee on the Elimination of Racial Discrimination on the ninth periodic report of the Dominican Republic, para. 13. CERD/C/DOM/CO/12, 8 June 2007, para. 13 (file of annexes to the motions and arguments brief, annex A04, fs. 3083 to 3090).

150 Inter-American Commission on Human Rights, Report on the situation of human rights in the Dominican Republic, October 7, 1999, para. 328.

151 In this regard, even though he did not present information that would confirm or deny a practice of immigration control based on racial profiles, expert witness Fernando I. Ferrán Brú stated that "it must be recognized that, owing to the geographical situation [of the country], most of those entering [the Dominican Republic] come from Haiti, whose population has predominantly black phenotypic traits. Since Haitian migration to Dominican territory is massive, and most immigrants arrive clandestinely and without documents, it is logical that the immigration authorities focus on that group of foreign immigrants. […] *Contrario sensu,* it would be impractical for the State's immigration policy to address its efforts to limit illegal and undocumented immigration towards groups with phenotypic traits of Orientals or white Caucasians" (*cf.* Expert opinion provided by Fernando Ignacio Ferrán Brú by affidavit).

152 Amnesty International, A life in transit - The plight of Haitian migrants and Dominicans of Haitian Descent. Expert witness Bridget Wooding stated that, during the expulsions, "there is no due process, those who are going to be expelled are not allowed a hearing. People can be taken from their homes in the middle of the night, without a court order" (*cf*. Expert opinion provided by Bridget Wooding during the public hearing).

153 *Human Rights Watch*, Illegal People: Haitians and Dominico-Haitians in the Dominican Republic, p. 11

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170. With regard to the foregoing, the Court notes that the State's arguments[154] are insufficient to disprove the facts that this Court has verified previously in other cases, or the documents and expert opinions included in these proceedings before the Court. Moreover, as indicated (*supra* paras. 159 and 163), the State itself has confirmed some aspects of the alleged context before international organizations or in domestic legislation.

171. Based on the above, the Court observes that, at the time of the events of this case, a situation existed in the Dominican Republic in which Haitians and persons born in Dominican territory of Haitian descent, who were usually undocumented and living in poverty, frequently suffered abuse or discrimination, including from the authorities, which exacerbated their situation of vulnerability. This was also linked to the difficulty of the members of the Haitian population or those of Haitian descent to obtain personal identification documents. The Court also notes the existence in the Dominican Republic at the time of the events of this case, during the 1990s, of a systematic pattern of expulsions of Haitians and persons of Haitian descent, including through collective actions or procedures that did not involve an individualized analysis, that were based on a discriminatory concept.

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[154] As previously indicated, Dominican Republic stated that a large percentage of its population are of African descent and that their physiognomy is very similar to that of many members of the Haitian population; thus "it cannot be believed" that it would "discriminate against its own ethnic group" and that there is no evidence of such discrimination. The State also denied, based on "official statistics on repatriations," that it had carried out "mass [or] collective deportations." The Court has already examined these arguments (*supra* paras. 159, 167 and 168). Nevertheless, the Court wishes to place on record other similar assertions by the State. The Dominican Republic has affirmed that it had "never [expelled] a Dominican who had been detained and who, during the verification procedure, has produced documents to prove his status as a national." It also "refute[d] the presumed pattern of immigration control operations or 'sweeps' leading to the arrest and subsequent deportation of Haitians and Dominicans of Haitian origin," indicating that "at the time of the supposed facts and acts, it applied a three-stage procedure, consisting of: (a) arrest and identification; (b) investigation and filtering, and (c) verification and confirmation." In addition, "regarding the supposed deportations during the 1990s and 2000s," it stated that "Dominican Republic and Haiti had signed a bi-national agreement, [on the] hiring of temporary workers for the sugar harvest, and when this agreement ended, these workers were supposed to return to their country, and those are the supposed deportations; those are the inflated numbers." Regarding these assertions, the Court refers to its previous considerations (*supra* para. 167 and footnote 142). The State also asserted that "the number of Haitians, undocumented or in an irregular migratory situation, who are deported, as well as those who are simply returned at the border, bears no relationship of any kind to the number of Haitians who enter the country"; however, this assertion does not contradict the Court's considerations on the contextual situation (*infra* para. 171). The Dominican Republic also pointed out that the Court, in the fifth *considerandum* of its Order on provisional measures related to this case of August 18, 2000 (*supra* para. 22), indicated that "it ha[d] not been proved […] that the Dominican Republic ha[d] a State policy of mass expulsions and deportations in violation of the express provisions of the Convention." In this regard, the Court notes that the Court's observations, within the limited and specific framework of the procedure on provisional measures, was not based on the examination of evidence and arguments inherent in a contentious case, because this was not appropriate given the nature of the said procedure. Rather, as stated in the fifth *considerandum* of the said Order, the Court only took into account the information that had been provided to it during "the public hearing of August 8, 2000, [and in] the briefs [that had been] presented to [the Court]." Lastly, it is pertinent to refer to assertions made by the State in relation to the arguments concerning the existence of discrimination towards Haitians or those of Haitian descent. Dominican Republic stated that "there is no structural, and especially institutional, discrimination towards immigrants who are Haitian or of Haitian descent," and that "Dominican society is not racist and, above all, not xenophobic." In addition, it asked, rhetorically, "how can a State be accused of racial discrimination that […] provides immigrants with health care, education and access to the courts." It also stated that "[t]he State authorities, particularly those of the Judiciary, do not discriminate against Haitians, irrespective of their migratory status, or against Dominicans of Haitian descent." Furthermore, it pointed out that, in its 1999 "Report on the situation of human rights in the Dominican Republic," the Commission had indicated that "the problems that affect the full observance of human rights in the Dominican Republic do not respond to a state policy aimed at violating those rights." Without this implying a ruling on the truth or inexactitude of the State's assertions, the Court considers it sufficient to note that the Dominican Republic's assertions do not contradict the Court's observations on the contextual situation (*supra* para. 161 and *infra* para. 171).

A.4. Pertinent domestic legal framework

172. In this case it is pertinent to refer to certain domestic laws.

A.4.1. Laws on Dominican nationality

A.4.1.1. Laws in force at the time of the facts

173. The Constitution of the Dominican Republic in force at the time of the facts was the 1994 Constitution, promulgated on August 14, 1994.[155] Acquisition of nationality was regulated in article 11 of the Constitution. This established the principle of *ius soli* in order to obtain nationality, with two constitutional exceptions relating to the children of diplomats, and to persons in transit in the country (*infra* para. 280).

174. The 1994 Constitution was in force when some of the presumed victims were born[156] and, in some cases, previous Constitutions such as the Constitutions of 1955[157] and 1966[158] (*supra* para. 146), which included the rule in similar wording.[159]

175. Article 10(c) of Immigration Law No. 95 of April 14, 1939,[160] in force at the time of the facts, established that "[p]ersons born in the Dominican Republic are considered nationals of the Dominican Republic, whether or not they are nationals of other countries" (*infra* footnote 330).

176. Section V of Immigration Regulations No. 279 of May 12, 1939,[161] in force at the time of the facts, defines "transients" as aliens who try to enter the Republic with the main purpose of continuing across the country towards another country, and establishes a limit of 10 days to this end.[162]

A.4.1.2. Innovations in legislation and jurisprudence after 2004

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155 Constitution of the Dominican Republic promulgated on August 14, 1994, and published in Official Gazette of the Dominican Republic No. 9890 on August 20, 1994 (file of annexes to the answering brief, fs. 5174 to 5215).

156 Namely: Luis Ney Medina, Carolina Isabel Medina, Miguel Jean, Victoria Jean and Natalie Jean.

157 Namely: Antonio Sensión and Victor Jean.

158 Namely: Awilda Medina, Willian Medina, Ana Lidia Sensión, Reyita Antonia Sensión, Rafaelito Pérez Charles, Bersson Gelin, and Markenson Jean, Diane Fils-Aimé, Antonio Fils-Aimé and Endry Fils-Aimé.

159 1955 Constitution, Article 12(2), and 1966 Constitution, Article 11(1) (*infra* para. 280 and footnote 330).

160 Immigration Law No. 95 of April 14, 1939, published in Official Gazette No. 5299, in force since June 1, 1939 (file of annexes to the motions and arguments brief, annex 14, fs. 3286 to 3296 and file of annexes to the answering brief, fs. 5689 to 5698).

161 Immigration Regulations No. 279 of May 12, 1939, enacted in conformity with Immigration Law No. 95 (file of annexes to the motions and arguments brief, fs. 3308 to 3318). It should be noted that the representatives and the State refer to the same regulations, but present different versions of the document. In the version provided by the representatives the implementing regulations are entitled "Migration Regulations," and in the one presented by the State, they are entitled "Immigration Regulations" (file of annexes to the answering brief, fs. 6045 to 6056). In this Judgment they will be referred to as "Migration Regulations."

162 Expert witness Cristóbal Rodríguez Gómez stated that the "new" Migration Law was promulgated on August 15, 2004, however, its implementing regulations were only adopted recently, "merely a few months ago" (at the time of his opinion), which meant that, "in many cases, immigration issues […] were managed on the basis of the implementing regulations for a law that had been repealed: the 1939 Law (expert opinion of Cristóbal Rodríguez Gómez provided by affidavit on October 1, 2013, file of preliminary objections, merits and reparations, fs. 1723 to 1729).

177. On August 27, 2004, General Migration Law No. 285-04[163] was published, repealing Immigration Law No. 95 of 1939. Also, the Central Electoral Board issued Circular No. 017 on March 29, 2007,[164] and, on December 10, 2007, adopted Resolution 12-2007.[165] These norms will be examined below (*infra* paras. 326 to 329).

178. On January 26, 2010, the amendment to the Constitution of the Dominican Republic was published.[166] It included a third exception to the acquisition of Dominican nationality by *ius soli* in its article 18(3), which stipulated that persons born on national territory of aliens "who are in transit or who are residing illegally in Dominican territory" will not be Dominican.

179. Judgment TC/0168/13 of the Constitutional Court of September 23, 2013,[167] when ruling on the appeal filed by a woman born in the Dominican Republic in 1984 of Haitian parents against the refusal of the Central Electoral Board to issue her Dominican identity and voter registration cards, interpreted the exception contained in the 1966 Constitution (in force at the date of her birth, art. 11(1)), regarding children born in the country of foreign parents in transit. It considered that the appellant's case corresponded to the constitutional exception to the principle of *ius soli*, because her parents were Haitian citizens who, at the time of her birth, did not possess identity cards, and must be considered as "temporary unskilled workers" (*jornaleros*), a group that Immigration Law No. 95 of 1939 included in the category of "non-immigrant aliens." According to the Constitutional Court, the category of "aliens in transit" that had appeared in all the Dominican constitutions since 1929 corresponded to all four groups called "non-immigrant foreign workers."[168] In this regard, the broader category of "aliens in transit" should not be confused with that of "transient aliens," which is merely the second of the said four groups of persons who compose the category of "non-immigrant foreign workers" ("persons who cross the territory of the Republic towards another country"). In addition, of the four groups included in the concept of "aliens in transit" under article 11(1) of the 1966 Constitution, the Constitutional Court referred to the specific situation of aliens who remain in the country without a legal residence permit or those who have entered the country illegally: "[i]n this regard, such persons may not claim that their children born in the country have the right to obtain Dominican nationality under the said article 11(1) of the 1966 Constitution, because it is juridically inadmissible to found the inception of a right on a *de facto* illegal situation."[169] In short, since it has not been proved that at least one of the parents was legally resident in the Dominican Republic at the time of the birth of their daughter or following this, in the Constitutional Court's opinion, the appellant did not comply with the requirements established in the said article 11(1) of the 1966

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163 General Migration Law No. 285-04 of August 15, 2004, published in Official Gazette No. 10291 of August 27, 2004 (file of annexes to the motions and arguments brief, annex A18, fs. 3324 to 3364 and file of annexes to the 5-answering brief, fs. 5928 to 5969). In addition, Implementation Regulations No. 631-11 were issued, which are the regulations for the implementation of General Migration Law No. 285-04 (file of annexes to the motions and arguments brief, annex 24, fs. 3404 to 3475).

164 Circular No. 017 of March 29, 2007, issued by the Central Electoral Board (file of annexes to the motions and arguments brief, annex A20, fs. 160 and 161).

165 Resolution No. 12-2007 of December 10, 2007, issued by the Central Electoral Board (file of annexes to the motions and arguments brief, annex A21, fs. 3377 to 3381).

166 Constitution of the Dominican Republic of January 26, 2010, published in Official Gazette No. 10561 (file of annexes to the answering brief, fs. 5289 to 5389).

167 Judgment of the Constitutional Court TC/0168/13 of September 23, 2013 (file of preliminary objections, merits and reparations, fs. 2654 to 2800). Presented by the representatives as a "supervening fact" on October 2, 2013.

168 According to the text of article 3 of Immigration Law No. 95 of 1939.

169 The Constitutional Court referred to the judgment of the Supreme Court of Justice of December 14, 2005.

Constitution concerning acquisition of Dominican nationality. The Constitutional Court ordered, *inter alia*, "[a] thorough audit of the birth records of the Office of the Civil Registry of the Dominican Republic from June 21, 1929, to date […] in order to identify and make a list, either on paper and/or by computer of all the aliens registered in the birth records of the Civil Registry Office of the Dominican Republic." Relevant aspects of this decision will be examined below (*infra* sections C.5.2 and C.5.3 of Chapter VIII).

180. On November 29, 2013, Decree No. 327-13[170] was issued. According to its article 1, its purpose was to institute the "National Plan to regularize aliens in an irregular migratory situation in the Dominican Republic." Also, on May 23, 2014, Law No. 169-14[171] was enacted, and its preambular paragraphs indicate that it is founded on the provisions of judgment TC/0168/13 and establish the "regulariza[tion] of the civil registry records." These norms will be examined below (*infra* para. 320 to 325). On July 23, 2014, Decree No. 250-14 was issued, regulating Law No. 169-14; it refers to the procedure for "immigration registration and regularization of the children of foreign parents in an irregular migratory situation who, having been born on the territory of the Dominican Republic, do not appear registered in the records of the Office of the Civil Registry." It granted persons "subject to the sphere of implementation of the regulation to benefit from […] Law 169-14" a 90-day period to submit their application.[172]

A.4.2. Legal framework applicable to deprivation of liberty and to expulsion or deportation procedures

181. Article 8(2) of the 1994 Constitution, in force at the time of the facts, established the different criteria to be taken into account for deprivation of liberty (*infra* para. 365).

182. Article 1 of Law No. 5353 on *Habeas Corpus* of October 22, 1914,[173] in force at the time of the facts, stipulated that:

> Anyone who has been deprived of his liberty for any reason in the Dominican Republic has the right, either at his own request or that of any other person, unless he has been detained based on a ruling of a competent judge or court, to a writ of *habeas corpus* in order to determine the reasons for his imprisonment or deprivation of liberty and so that, in the appropriate cases, his liberty is restored.
> The writ of *habeas corpus* may be requested, issued and delivered at any time; but the case will not be examined until a working day or a day specially authorized to this end.

183. Furthermore, article 2 of Law No. 5353 established that the application for the writ "must be made in writing, signed by the person whose liberty is at issue, or on his behalf by another person, and must be presented to any of the judges [of the categories listed in article 2]" and, pursuant to article 3 of this law, should include the following elements:

> a) Statement that the person in whose favor the writ is requested is imprisoned or deprived of his liberty; the location of the prison, arrest or detention; the name or title of the official, employee or person who imprisoned him or deprived him of liberty; that of the prison guard, employee, officials, agent or officers who are in charge of the prison, barracks or place where he is imprisoned, detained or arrested.

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170 Decree No. 327-13 of November 29, 2013 (file of preliminary objections, merits and reparations, fs. 3776 to 3794). Presented by the State as a "supervening fact" on June 9, 2014 (*supra* para. 13).

171 Law No. 169-14 of May 23, 2014 (file of preliminary objections, merits and reparations, fs. 3799 to 3808). Presented by the State as a "supervening fact" on June 9, 2014 (*supra* para. 13).

172 On August 13, 2014, Dominican Republic forwarded the implementing regulations to Law No. 169-14 (Decree No. 250-14) to the Court, without referring to this case (*supra* para. 146).

173 Law No. 5353 on *Habeas Corpus* of October 22, 1914 (file of annexes to the answering brief, fs. 5679 to 5688).

b) Statement that this person has not been arrested, detained or imprisoned by a ruling of a competent judge or court.
c) The reason or pretext for the imprisonment, detention, arrest or deprivation of liberty.
d) If the imprisonment or deprivation of liberty is based on a court order, judicial decision or decree, a copy of this shall be attached to the request, unless the applicant guarantees that, owing to the transfer or the concealment of the person imprisoned or deprived of liberty, prior to the application, this copy cannot be requested, or that this was requested and was a refused.
e) If it is alleged that the imprisonment or deprivation of liberty is unlawful, the applicant shall indicate the grounds of the alleged unlawfulness.
If the applicant is unaware of any of the circumstances indicated in this article, he must also expressly indicate this.

184. Article 4 of this law indicated that: "[t]he judge or court authorized to examine the writ, shall grant it promptly, provided that the application is in keeping with this law is presented."

185. Lastly, article 7 of the *Habeas Corpus* Act also establishes that: "[w]hen a judge has evidence that any person within his jurisdiction is illegally detained or deprived of liberty, he shall issue a writ of *habeas corpus* to assist that person, even though the latter has not applied for this."

186. Article 13 of Immigration Law No. 95 of April 14, 1939, set out the reasons for which aliens could be "arrested and deported by order of the Secretary of State for Internal Affairs and Police, or another official appointed by the Secretary of State to this end."

187. Also, paragraph (f) of that article established the conditions for detention prior to deportation:

In cases of deportation, the alien in question may be arrested for up to three months by order of the Secretary of State for Internal Affairs and Police or the Director General of Immigration. If the deportation cannot be implemented within this period because a passport, or visa for a travel document, has not been obtained, the alien may be referred to the prosecutor and the authorized correctional court will order by a judgment that he remain in prison for six months to two years, according to the gravity of the case. However, if, following the proceedings or the judgment, the alien obtains a passport, or visa for the travel document, from the corresponding authority, making it possible for him to leave the country, the prosecutor shall release him for this purpose at the request of the Secretary of State for Internal Affairs and Police or of the Director General of Immigration, and the proceedings shall be dismissed or the ruling annulled. There shall be no appeal against the rulings.

188. Similarly, Law No. 4658 of March 24, 1957,[174] established:

Art. 1. Notwithstanding the attributes that correspond to the Secretary of State for Internal Affairs and Police, the courts of the Republic may order the deportation of any alien who commits one of the offenses established in article 13 of Immigration Law No. 95 of April 14, 1939, as the main penalty, when the case is filed by the Director of the National Investigations Department. The courts of the Republic may also order deportation as a supplementary punishment when the alien has committed a crime or offense the gravity of which, in the opinion of the respective Court, warrants this punishment.
Art. 2. When deportation has been ordered, as either the main penalty or a supplementary punishment, the alien may be arrested for up to three months by order of the competent prosecutor. The judgment ordering the deportation shall always establish that, if the deportation cannot be implemented during that time because a passport, or a visa for a travel document, has not been obtained, the alien shall remain in prison for from six months to two years, according to the gravity of the case. However, if following the judgment, the alien obtains a passport or visa for the travel document, making it possible for him to leave the country, the prosecutor shall release him for this purpose.

[174] Law No. 4658 of March 24, 1957, published in Official Gazette No. 8105. Both the Commission in its Merits report and the representatives in their motions and arguments brief, fs. 27 and 186, respectively, mentioned a link to this document.

189. In addition, section XIII of Immigration Regulations No. 279 of May 12, 1939, on deportation, stipulated:

> Immigration inspectors and officials who act in this capacity shall conduct a complete investigation of any alien, whenever there are reliable reports or there is any reason to believe that the alien is in the Republic in violation of the Immigration Law. If the investigation reveals that the alien should be deported, the Immigration Inspector will request the General Directorate of Immigration for an arrest warrant. The request for the warrant must indicate the facts and specific reasons why the alien should be deported. [...]
>
> The information regarding the alien shall be recorded on form G-1, when he is heard, unless it has been recorded previously. If the alien accepts any of the charges that make him liable to deportation, a memorandum to this end shall be prepared and shall be signed by the Inspector and also the alien, if possible. If the alien does not accept any of the charges in the arrest warrant, evidence to support the charges shall be sought, the alien shall be summoned again, and be given another opportunity to make a statement, as well as to introduce evidence contesting his deportation. In cases relating to the entry of an alien into the Republic, the alien shall have the burden of proof to demonstrate that he entered legally and, to this end, the alien shall have the right to an arrival declaration, as appears in any record of the Immigration Department.
>
> After the hearing, the relevant information shall be sent by the Immigration Inspector to the Director General of Immigration for consideration and a decision by the Secretary of State for Internal Affairs and Police. If a deportation order is issued, the alien shall be deported, unless the Secretary of State for Internal Affairs and Police decides to grant him the opportunity to leave the country voluntarily within a certain period, and the alien does this. If the Secretary of State for Internal Affairs and Police finds that the alien should not be deported, the proceedings shall be annulled.
>
> In cases of deportation under articles 10(1) and 13(3) of the Immigration Law, the deportation may be decided by the Secretary of State for Internal Affairs and Police or by the Director General of Immigration, unless otherwise decided by the Secretary of State in the case in question without the need for the requirements indicated in the three preceding paragraphs of this section. The corresponding order shall be communicated to the alien who has violated the Immigration Law and to all the police authorities to ensure its implementation.

190. Meanwhile, the Memorandum of Understanding on repatriation mechanisms signed by the Dominican Republic and the Republic of Haiti on December 2, 1999,[175] also applicable at the time of the facts, established the following:

> The Haitian Government recognizes that the Dominican Government has the legitimate right to repatriate Haitian citizens who are in Dominican territory illegally and, to this end, both parties agree the following to improve the procedure for these repatriations:
> a) The Dominican immigration authorities undertake not to carry out repatriations during night hours; that is, between 6:00 p.m. and 8:00 a.m., also, they will not carry out repatriations on Sundays and the official holidays of the two countries, except between 8:00 a.m. and 12:00 m.
> b) The Dominican immigration authorities shall avoid the separation of family units (parents and underage children) in the repatriation procedures.
> c) The Dominican immigration authorities undertake to carry out any repatriations to Haitian territory exclusively through the border posts of Jimaní/Malpasse, Dajabón/Ouanaminthe, Elías Piña/Belladere, and Pedernales/Anse-à-Pitres. For its part, the Haitian Government undertakes to reinforce and/or establish immigration inspection posts at these border points that will receive those repatriated.
> d) The Dominican immigration authorities recognize the inherent human rights of those repatriated and shall adopt specific measures to ensure that they are accompanied by their personal effects, and shall not retain their personal documents, unless, in the opinion of these authorities, they reveal legal defects, in which case they shall be retained and subsequently forwarded to the Haitian diplomatic mission in the Dominican Republic.
> e) The Dominican immigration authorities shall hand every person repatriated a copy of the individual form with the order for his repatriation.
> f) The Dominican immigration authorities undertake to inform the Haitian diplomatic or consular authorities accredited in Dominican territory, with reasonable advance notice, of the list of persons in the process of being repatriated. These authorities may exercise their function of

[175] Memorandum of Understanding on repatriation mechanisms signed by the Dominican Republic and the Republic of Haiti on December 2, 1999 (file of annexes to the motions and arguments brief, annex A17, fs. 3320 to 3322 and file of annexes to the answering brief, fs. 5676 to 5678).

consular assistance.
g) The Haitian authorities shall proceed to establish immigration control posts along the Dominico-Haitian border to avoid the illegal flow of its citizens towards the Dominican Republic.
h) The Haitian Government undertakes to increase its efforts to furnish its nationals with Haitian identity documents in the context of the potential migratory flow towards the Dominican Republic.

191. Lastly, the respective part of Law No. 1494 of August 9, 1947, which institutes the contentious-administrative jurisdiction[176] in force at the time of the facts, established:

> Art. 1. Anyone, whether natural or juridical, with a legitimate interest, may file the contentious-administrative remedy established below in the cases, manner and within the time frames established in this law: (1) against the judgments of any contentious-administrative court of first instance or a court that is essentially of this nature, and (2) against illegal administrative acts, regulations and decrees, that meet the following requirements:
> a) That they are acts against which all hierarchical claims within the administration or the autonomous administrative bodies have been exhausted;
> b) That they emanate from the administration or from the autonomous administrative bodies in the exercise of their authority regulated by laws, regulations or decrees;
> c) That they violate a right, of an administrative nature, established previously in favor of the appellant by law, regulation or decree, or an administrative contract;
> d) That they constitute an excessive or distorted exercise of their own legitimate purpose, or of discretional authority conferred by laws, regulations or decrees.
> [...]
>
> Art. 9. The time limit for filing an appeal before the Secretaries of State or before the autonomous administrative bodies against the decision of a contentious-administrative nature issued by the directors, administrators or heads of the offices that are subordinate to them, is 10 days from the date of the receipt by the party concerned of the communication that must be transmitted by the said directors, administrators or heads by special delivery registered mail.
> Paragraph I. The time limit to appeal before the Superior Administrative Court is 15 days as of the day on which the appellant has received the judgment of the contentious-administrative court of first instance, in the case of an appeal, or of the day on which he has received notification of the act appealed, or the day of the official publication of the act appealed by the authority that issued it, or the day the time limit set in article 2 of this law expires, in the case of an appeal due to delay.

B) Facts of the case

B.1. Introduction

192. The Court will now refer to the facts relating to the presumed victims in this case who were determined in paragraph 78 of this Judgment. In view of the fact that, in this case, the dispute focuses mainly on the alleged situation concerning the identity of some presumed victims, their nationality, and whether or not they have been expelled, in the following section, the Court will describe the identity and what happened to the members of each family, taking into consideration, on the one hand, the official documents forwarded or other sources such as the statements of the presumed victims themselves, as well as the arguments of the parties and of the Commission, and on the other hand, the findings in the chapter on evidence, and in the chapter on the preliminary issues in relation to the determination of the presumed victims.

193. In this regard, the Court considers it relevant to recall its case law regarding the criteria applicable to the assessment of the evidence. Since its first contentious case, the Court has indicated that, for an international court, the criteria used to assess the evidence are different from those used by domestic legal systems, and has asserted that it

[176] Law No. 1494 of August 9, 1947, published in Official Gazette No. 6673 (file of annexes to the answering brief, fs. 5751 to 5765).

is able to evaluate the evidence freely,[177] abiding by the principle of sound judicial discretion.

194. In view of its particularities of this case, especially the situation of poverty and insecurity of the presumed victims, it is pertinent to apply special standards in the assessment of the evidence, because it has been argued that the characteristics of the factual circumstances have resulted in the absence of documentation or registration. Thus, for example, it has been argued that some presumed victims were born in Dominican territory and that they do not have personal identification documentation, and that others were expelled from the country without the legal procedure being followed. Thus, although the lack of personal documentation or records of administrative or judicial proceedings would normally indicate that the alleged facts did not occur, this cannot be considered to be so in this case, because this absence of documentation or records is part of the factual framework submitted to the Court's consideration and is consistent with the proven context, which also included a systematic pattern of expulsions, even by means of collective deportations or proceedings that did not entail an individualized analysis (*supra* paras. 171).

195. Inasmuch as the facts related by the presumed victims are inserted in that context, the said expulsions were not documented and this omission can be attributed to the State authorities. Similarly, the difficulties encountered to register births in the Dominican Republic are a factor that can be attributed to the State, because it is the State that has the means and the authority to adopt the respective measures. The lack of evidence cannot be assessed as proof that the facts alleged by the presumed victims did not occur, because they originated precisely from deficiencies in the actions or policies of the State. Consequently, an assessment of the evidence in that sense would be contrary to the principle that courts must reject any argument based on the negligence of the party presenting it (*Nemo auditur propiam turpitudinem alegans).*

196. Based on the above, the Court finds that, in this case, it would be disproportionate to place on the victims the burden of proving positively, with documentary or other types of proof, the occurrence of events relating to omissive acts of the State. The Court notes that, owing to the nature of the alleged facts, the State was able to obtain proof of them. In this regard, it is interesting to noted that, during the public hearing in the case, the State was asked whether it had conducted "any investigation […] at least of an administrative type, […] to determine […] whether the presumed [irregular] expulsions had occurred," and Dominican Republic failed to present any information in this regard, either on that occasion or subsequently.[178]

197. In addition, the Court notes that the State, when referring to the statements made by the presumed victims during the procedure before the Commission, had indicated that it "observe[d] with great concern that all the supposed facts and acts presented by the Commission […] and the representatives were established, and it is sought to prove them,

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[177] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, paras. 127 and 128, and *Case of Veliz Franco et al. v. Guatemala*, para. 179.

[178] In its written arguments, the State merely asserted that "the investigations came to a halt owing to the granting of the provisional measures," but did not indicate the investigations to which it referred, or how the orders given by this Court in relation to provisional measures prevented the continuation of the investigations. Furthermore, when answering the question, it merely referred to "annex 6 of the Merits report" which contains several documents. Among these documents, one dated July 19, 2000, issued by the DGM refers to only four of the presumed victims, in a paragraph concerning each one, indicating that several persons had commented on the supposed names, nationality and place of residence of the presumed victims and, also, indicates that "there is no record that Berson Gelim was deported." The State did not mention that the "inquiries" leading to the said comments formed part of formal administrative or judicial proceedings, or their eventual result.

by the statements of the presumed victims, which obviously lack any objectivity."[179] In this regard, added to the foregoing, the Court considers that it is pertinent to take into account in the instant case that the presumed victims form part of a population whose members, as indicated, "usually lived in poverty and were undocumented (*supra* para. 171). Owing to this situation of vulnerability, it can be inferred that the presumed victims have encountered difficulties to file complaints, to institute and to promote investigations and proceedings, or in any way to obtain evidence that would prove reliably the events that allegedly occurred to them. In this context, it is possible that activities of non-State entities (such as universities or civil society organizations), have been the means that, in the absence of others, have been accessible to the presumed victims in order to recount the alleged facts of this case. In addition, in view of this situation, the Court finds it understandable that there can be differences or contradictions in the statements of the presumed victims and considers that, in the instant case, this does not affect the overall credibility of the statements. On this basis, the Court must, as required, examine the statements meticulously.

198. Bearing in mind the above, the Court finds it admissible, in this case, to assess the statements made by the presumed victims during the processing of this case before the Court, to the extent that they narrate facts that are in agreement with the contextual situation that has been established (*supra* paras. 153 to 171). Other statements given by the presumed victims, admitted as documentary evidence (*supra* paras. 124), will be considered in a subsidiary or complementary manner. And this is, evidently, without prejudice to the consideration of other types of evidence provided to the Court.

B.2. Facts regarding the members of the different families

B.2.1. Medina family

199. Willian Medina Ferreras was born in Cabral, Dominican Republic, on November 14, 1966, and has a Dominican identity card.[180]

200. Mr. Medina lived in Oviedo, Pedernales, Dominican Republic, where he worked as a farmer.[181] He lived with his companion Lilia Jean Pierre, also known as Lilia Pierre or Lilia Pérez or Liliana Pérez or Lilia Jean (*supra* para. 83), who was born in Haiti,[182] and his three children, born in the Dominican Republic: Awilda Medina Pérez born on February 7, 1989,[183] Luis Ney Medina born on June 14, 1990,[184] and Carolina Isabel Medina, who was

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[179] The State added that "the case file lacks any probative element that supports beyond a reasonable doubt a declaration of international responsibility for facts and acts related to the factual framework of the case." The representatives, for their part, alleged that "most of the [presumed] victims […] are illiterate and live in rural areas, in a situation of extreme poverty," and that "[d]espite the conditions in which they live, the [presumed] victims have maintained their story of what happened for 15 years and have persisted in their search to obtain justice. Their accounts were always credible and consistent with the general context in which the facts occurred."

[180] *Cf.* identity card of Willian Medina Ferreras issued by the Central Electoral Board (file of annexes to the Merits report, annex 7, f. 156); birth certificate of Willian Medina Ferreras; extract from birth certificate of Willian Medina Ferreras, issued by the National Directorate of Civil Registries, Central Electoral Board (file of annexes to the motions and arguments brief, annex B01, f. 3493), and sheet with general information on Willian Medina Ferreras, issued by the Central Electoral Board, based on its master list of those registered, on December 2, 1999 (file of annexes to the Merits report, annex 38, f. 341).

[181] *Cf.* identity card of Willian Medina Ferreras; Statement made by Willian Medina Ferreras during the public hearing held before the Court on October 8, 2013, and sheet with general information on Willian Medina Ferreras.

[182] *Cf.* Electoral identity document and Haitian birth certificate of Lilia Jean Pierre, and Statement made by Willian Medina Ferreras during the public hearing.

[183] *Cf.* Certification of birth declaration of Awilda Medina, issued by the Central Electoral Board, Civil Registry (file of annexes to the Merits report, annex 9, f. 161); extract from birth certificate of Awilda Medina, and sheet with general information on Awilda Medina.

a child at the time of the expulsion and died in Haiti in 2004.[185] All three have birth certificates, and the first also has a Dominican identity card (*infra* para. 207*)*.

201. In November 1999 or January 2000,[186] during the early morning hours,[187] State officials from Pedernales came to the Medina family's home[188] and all the members were taken, together with other persons, to a prison in Oviedo where they were detained for several hours, without prior verification of their documentation.[189] According to Willian, he presented his documents, a "photocopy of [his] identity card and [one] of [his] birth [certificate …] and gave them to the immigration people," but "they tore them up and [he] had [his] original birth certificate."[190] Later they were put in a van with other people and

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184 *Cf.* Certification of birth declaration of Luis Ney Medina issued by the Central Electoral Board, Civil Registry (file of annexes to the Merits report, annex 10, f. 163), and extract from birth certificate of Luis Ney, issued by the National Civil Registry Directorate, Central Electoral Board, on October 17, 1999 (file of annexes to the motions and arguments brief, annex B03, f. 3497). It should be noted that the birth certificate is handwritten and records that Luis Ney is the son of Willian Medina, but the second surname is illegible. In addition, in the extract from the birth certificate and in the full birth record of Luis Ney, he appears as the son of Willian Medina "Taveras," so that the Court, in the absence of evidence indicating the contrary, understands that this is a clerical error in the transcription of the surname.

185 *Cf.* Certification of birth declaration of Carolina Isabel issued by the Central Electoral Board, Civil Registry (file of annexes to the Merits report, f. 165). The document indicates that the child was born on September 21, 1995, and the name of the father is Willian Medina. It should be noted that the representatives attached an extract from the birth certificate of Carolina Isabel, issued by the National Civil Registry Directorate, Central Electoral Board, indicating that she was born on November 21, 1999 (file of annexes to the motions and arguments brief, f. 3499). In addition, it should be noted that the birth certificate is handwritten and records that Carolina Isabel is the daughter of Willian Medina, but the second surname is illegible, and in the extract from the birth certificate she appears as the daughter of Willian Medina "Herrera"; consequently, in the absence of evidence indicating the contrary, the Court understands that this is a clerical error in the transcription of the surname. The Court does not have the child's death certificate, but the representatives reported her decease in their motions and arguments brief.

186 *Cf.* Affidavit made by Awilda Medina on September 24, 2013 (file of preliminary objections, merits and reparations, f. 1705), and statement made by Willian Medina to Columbia University on April 1, 2000 (file of annexes to the Merits report, annex 14, f. 186). In his statement to Columbia University, Willian Medina indicated that the facts had occurred in November 1999. Meanwhile, Awilda Medina stated that they took place in January 2000. Also, it should be noted that, during the public hearing before the Court, Willian Medina Ferreras stated that the expulsion took place in 1990. In this regard, the State indicated that, if the expulsion had occurred in 1990, it would have been implemented at a time when the Court did not have jurisdiction. However, the statement made by Willian Medina during the public hearing reveals that he was expelled together with his companion and their three children, and according to the information received, in 1990, his daughter Carolina Isabel had not been born; consequently, the Court finds that it was not possible that the expulsion took place in 1990. Based on the foregoing, and in view of the statement of Awilda Medina, the Court considers that the expulsion occurred subsequently, in November 1999 or January 2000.

187 *Cf.* Affidavit made by Awilda Medina, and statement made by Willian Medina during the public hearing.

188 It should be noted that, in her statement, Awilda indicated that, on the said day "a Mrs. Maribel [arrived] and ordered them to board a "*guagua*" (bus) (*cf*. Affidavit made by Awilda Medina). Also, Mr. Medina Ferreras stated that: "[t]he immigration officials came to [his] house at 3 a.m.; [he] didn't have problems with anyone. They knocked on the door; when [he] opened the door the yard was full of soldiers. There [he saw] a woman who was the Head of Immigration, her name was Maribel, and from there they sent [him] to the garrison. […] When [he] reached the garrison, [he saw] someone and asked, who are these people? And they told [him] that those people are from immigration and have come to collect up the Haitians and repatriate them" (statement of Willian Medina Ferreras during the public hearing). However, Carmen Maribel Ferreras Mella, in her affidavit, stated that "it is not true that, as Head of Deportations, she went at 3 a.m., accompanied by seven officials of the Dominican Marines, knocking on the door of the Medina Ferreras family's home, and that in November 2000, she no longer occupied that post" (Affidavit made by Maribel Ferreras Mella on September 16, 2013 (file of preliminary objections, merits and reparations, fs. 1697 and 1698.

189 *Cf.* Affidavit made by Awilda Medina, and Statement made by Willian Medina Ferreras during the public hearing.

190 Statement made by Willian Medina Ferreras during the public hearing. In its response, the State denied categorically that "a solider destroyed the photocopies of the Dominican identity card and birth certificate of Willian Medina Ferreras," because "there is no evidence, either direct or circumstantial, that substantiates that anything like that could have occurred. Not even the name or nickname of the soldier who allegedly committed

taken to the border with Haiti. The five members of the family remained together.[191] The State noted that there is no record of the deportation of these persons.[192]

202. According to Awilda Medina, during their detention they received no food or water, and they were treated very badly throughout the expulsion process; they were told "Haitians, go home!" When they reached Haiti, Awilda and Luis Ney did not speak Creole, but they learned it as a result of the expulsion.[193]

203. Following the expulsion from Dominican Republic, Awilda was run over by a vehicle in Anse-à-Pitres, Haiti, and the family tried to obtain medical assistance for her by several trips to the Dominican Republic, where they had no problem in crossing the border because they had papers from the hospital.[194] The State indicated that "even though the members of this family lived in Anse-à-Pitres, […] it provided them with the necessary health care services to respond to the medical needs of young Awilda Medina."

204. Following their expulsion, the Medina Ferreras family continued to live in Anse-à-Pitres, Haiti, because they feared returning to the Dominican Republic and being expelled once again.[195]

205. On March 20, 2002, safe-conducts were issued to members of the Medina family, as a result of the agreement reached during the processing of the provisional measures before the Inter-American Court.[196] Subsequently, on April 10, 2010, as part of the provisional measures procedure, the State renewed and granted new safe-conducts to members of the Medina family.[197]

206. On March 3, 2014, the State advised the Court that "after what transpired during the public hearing before the Court on October 8 and 9, 2013," the Central Electoral Board "provisionally suspended" the birth certificate of Willian Medina Ferreras, and that "the Legal Office of the Central Electoral Board was instructed to request the annulment of his birth declaration. It also proceeded to cancel [his] identity and voter registration cards."[198] At that time, it also presented documentation substantiating events that had occurred after September 12, 2013.

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this act is mentioned; nor was his physical description provided or any other information that would allow him to be identified."

191 *Cf.* Statement made by Willian Medina Ferreras during the public hearing before the Court.

192 *Cf.* Note No. 044-13 issued by the General Directorate of Immigration of the Ministry of the Interior and Police of January 23, 2013, certifying that there is no record of the deportation of, among other persons mentioned on a list attached as an annex to the note: Willian Medina, [Aw]ilda Medina Luis Ney Medina and Lilia Jean Pierre (file of annexes to the answering brief, fs. 6371 to 6373). The State argued that "there is no evidence whatsoever […] proving […] that the members of that family were really expelled from national territory."

193 *Cf.* Affidavit made by Awilda Medina.

194 *Cf.* Affidavit made by Awilda Medina.

195 *Cf.* Affidavit made by Awilda Medina and Statement made by Willian Medina Ferreras during the public hearing. In her affidavit Awilda stated that she "wanted to return to live in the Dominican Republic, but her father did not let them because he said they would be expelled."

196 *Cf.* safe-conducts granted to Willian Medina Ferreras, Awilda Medina and Luis Ney Medina issued on March 20, 2002, by the General Directorate of Immigration (file of annexes to the Merits report, annex 17, f. 200).

197 *Cf.* safe-conducts of Willian Medina Ferreras, Lilia Jean Pierre, Awilda Medina and Luis Ney Medina, issued on April 10, 2010, by the General Directorate of Immigration (file of annexes to the motions and arguments brief, annex B06, fs. 3516 to 3519).

198 *Cf.* Minutes No. 23-2013 of the Central Electoral Board, "Minutes of the regular meeting of the Registrars' Committee held on October 18, 2013" (file of preliminary objections, merits and reparations, fs. 3478 to 3490).

207. The documentation presented by the State shows that, on September 12, 2013, based on a request, the "Director General of the Inspectorate" of the Central Electoral Board was provided with information on the "origin" and "renewal of the identity and voter registration cards […] in the name of […] Willian Medina Ferreras." On September 26 and 27, 2013, an inspector from the Central Electoral Board recorded an interview with several persons[199] and examined various documents.[200] The respective record shows that the inspector intervened because she, along with other persons that she did not mention, had been "entrusted with the investigation of the birth declarations in the name of Willian Medina Ferreras […] because he had lodged a petition against the Dominican State before the Inter-American Commission." The Central Electoral Board inspector concluded that "the annulment of the birth declaration in the name of Willian Medina Ferreras" and of "Awilda, Luis Ney and Carolina Isabel, children of the person calling himself Willian Medina Ferreras, should be required before the corresponding civil courts, as well as the "cancellation" of these documents, and also the "cancel[lation] of the identity and voter registration cards […] of Willian Medina Ferreras [and] Awilda Medina Pérez."[201]

208. On October 18, 2013, the "Registrars' Committee" of the Central Electoral Board decided, *inter alia*: "[t]o authorize the provisional suspension […], except for judicial purposes, […] of the issue of records relating to the birth registrations" of Willian Medina Ferreras and of his children Awilda, Luis Ney and Carolina Isabel; that "the competent courts be required to annul the birth declarations" of the said persons; "[t]o recommend [… the] cancellation of the identity and voter registration cards [of] Willian Medina Ferreras [and] Awilda Medina Ferreras", and "[t]o prosecute […] Winet" (the individual who had presumably identified himself as Willian Medina Ferreras).[202] On February 13, 2014, it was recorded that "the number" of the "identity and voter registration card […] in the name of Willia[n] Medina Ferreras was being cancelled due to falsification of information."[203] On March 4, 2014, the Central Electoral Board, represented by its president, "formally became a complainant […], through the Public Prosecution Service, […] and civil party," "requested that criminal sanctions be imposed and reparations required of […] Willian Medina Ferreras," and accusing him of having taking steps "to obtain a false identity." The complaint cited the investigation conducted as of September 26, 2013. On March 5, 2014, Willian Medina Ferreras was notified of an "action to annul

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199 According to the inspector of the Central Electoral Board, these were "Argentina Medina Ferreras de Medina, Luis Medina Ferreras, Javiel Medina Ferreras[…], Carlos Manuel Medina Ferreras, Oscar Medina Cuello and Mario Medina Cuello" (Report on the investigation into the birth declarations in the name of Willian Medina Ferreras, on folio No. 44, volume No. 147, entry No. 44 of 1994, of the Cabral Civil Registry, signed by Kathia María Sánchez, Inspector, transmitted by Juan Bautista Tavárez Gómez, Director of the Inspectorate to Roberto Rosario Márquez, President of the Central Electoral Board on October 15, 2003. File of preliminary objections, merits and reparations, fs. 3545 to 3553). The Court notes that these interviews were the same as those that appeared in the video shown by the State during the public hearing and, as already decided, the Court will not consider this presentation (*supra* paras. 128 and 132). Nevertheless, reference is now made to the said interviews based on documents provided by the State following the hearing relating to supervening facts consisting in the institution and progress of certain domestic proceedings (*supra* paras. 20, 140 and 144).

200 Namely: "records of the children of Abelardo Medina", "[c]ertification of […] October 2, 2012," establishing that "Willian Medina Ferreras […] exercised his right to vote in […] 2002, 2006, 2008, 2010 and 2012," "identity and voter registration cards […] in the name of Willian Medina Ferreras" with which the "birth declarations […] of Awilda, Luis Ney and Carolina (children of the persons calling himself Willian Medina Ferreras) were made" (*cf*. Report on the investigation into the birth declarations in the name of Willian Medina Ferreras).

201 Report on the investigation into the birth declarations in the name of Willian Medina Ferreras.

202 Minutes No. 23-2013 of the "regular meeting of the Registrars' Committee [of the Central Electoral Board] held on […] October 18, 2013."

203 Note RE/14, of February 13, 2014, signed by Luis Mariano Matos, National Director of Electoral Registration and addressed to Rosario Altagracia Graciano De Los Santos, Member and Coordinator of the Cancellation and Disqualification Committee (file of preliminary objections, merits, reparations and costs, f. 3476).

[his] birth certificate due to falsification of information."[204] At the date of this Judgment, the Court has not received further information on the progress of the said proceedings.

B.2.2. Fils-Aimé family

209. Jeanty Fils-Aimé lived with his companion Janise Midi, who was born in Haiti, and had a Haitian identity card.[205] According to Jeanty Fils-Aimé himself and to Janise Midi, he was born in Las Mercedes, Dominican Republic, lived there, and carried out agricultural labors,[206] and died in 2009.[207] However, a copy of a Haitian identity card in the name of Mr. Fils-Aimé issued on July 26, 2005, was provided to the Court.[208] Mrs. Midi explained that her children Antonio, Diane and Endry were present at the time of the expulsion. She added that, "at that time, she had three children with [her] husband, but [he] had more [children] and that a son of [her] husband called Nené lived with [them]." Although she affirmed that her children Diane and Endry were born in the Dominican Republic,[209] she stated that she "registered [her] children in Haiti because they needed documents to go to school."[210]

210. On November 2, 1999,[211] Jeanty Fils-Aimé was arrested near the market, and later the same day State agents went to his home and also arrested Janise Midi and her three children who were forced to board a "truck," which already held many other people, and taken to the "Pedernales Garrison," near the Customs House," where they were counted and expelled together with other persons at around 8 p.m.[212] When they arrived in Anse-à-Pitres, Haiti, Mrs. Midi contacted the GARR, which received her and her children in its offices that night and the following six days. Afterwards, they found out that Jeanty Fils-Aimé was in the same place, but there were so many people, that she had been unable to find him at first. The State indicated, in this regard, that it had no record of registrations corresponding to Nené Fils-Aimé, Diane Fils-Aimé, Antonio Fils-Aimé and Endry Fils-Aimé, in the opportune and late birth registrations of the Pedernales Civil Registry, or of Jeanty Fils-Aimé.[213] It added that there is no record of their deportation.[214]

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[204] Record No. 162/2014, of March 5, 2013, (*sic*) drawn up by Ángel Luis Rivera Acosta, Court Bailiff of the Supreme Court of Justice (file of preliminary objections, merits, reparations and costs, fs. 3702 to 3707).

[205] *Cf.* Affidavit made by Janise Midi, and safe-conduct of Janise Midi issued on April 10, 2010, by the General Directorate of Immigration (file of annexes to the motions and arguments brief, annex B06, f. 3517).

[206] *Cf.* Affidavit made by Janise Midi, and statement made by Jeanty Fils-Aimé to Columbia University.

[207] Affidavit made by Janise Midi. In her statement, Mrs. Midi indicated that Jeanty Fils-Aimé died in 2009. The body of evidence does not contain his death certificate.

[208] *Cf.* identity card of Jeanty Fils-Aimé issued on July 26, 2005, by the Republic of Haiti (file of preliminary objections, merits and reparations, f. 3750). According to the representatives this document was provided by Mr. Fils-Aimé himself, so that it has not had the opportunity clarify it before the Court.

[209] *Cf.* Affidavit made by Janise Midi. Similarly, Jeanty Fils-Aimé stated that Diane was born in 1991, Antonio in 1988 and Endry in 1993 (*Cf.* Statement made by Jeanty Fils-Aimé to Columbia University).

[210] *Cf.* Affidavit made by Janise Midi.

[211] *Cf.* Affidavit made by Janise Midi on September 24, 2013 (file of preliminary objections, merits and reparations, f. 1711), and Statement made by Jeanty Fils-Aimé to Columbia University of April 1, 2000 (*Cf.* Statement made by Jeanty Fils-Aimé to Columbia University, of April 1, 2000. File of annexes to the Merits report, Annex 19, fs. 212 to 219). In her affidavit, Janise Midi stated that the expulsion took place in 1999 without indicating the day and month in which it occurred. The State questioned the event, owing to the lack of certainty about the exact date of the expulsion. However, the statements made by Jeanty Fils-Aimé to Columbia University indicated that they were expelled on November 2, 1999.

[212] *Cf.* Affidavit made by Janise Midi.

[213] *Cf.* Certification issued by the Pedernales Civil Registry Office on July 18, 2012, stating, *inter alia*, that "Nené Fils-Aimé Midi," "Diane Fils-Aimé Midi," "Antonio Fils-Aimé Midi" and "Endry Fils-Aimé Midi" "are not registered in the opportune or late birth records of this Civil Registry Office" (file of annexes to the answering brief, f. 6221), and certification issued on July 17, 2012, by the Central Electoral Board (file of annexes to the

211. From 1999 to date, the Fils-Aimé family has lived in Anse-à-Pitres, Haiti. Mrs. Midi is afraid and does not want to return to the Dominican Republic, but indicated that perhaps when her children are grown they may want to return. She would like her children who were born in the Dominican Republic to have Dominican documents, because they could then return to that country, look for work, and make a life for themselves there.[215]

212. On March 20, 2002, safe-conducts were issued to the members of the Fils-Aimé family as a result of the agreement reached when the provisional measures were being processed before the Inter-American Court.[216] In addition, a damaged copy of Jeanty Fils-Aimé's safe-conduct was provided to the Court.[217] Subsequently, on April 10, 2010, as part of the provisional measures procedure, the State renewed and granted new safe-conducts to all the members of the family.[218]

B.2.3. Bersson Gelin

213. Bersson Gelin stated that he was born in Mencía, Pedernales, Dominican Republic, and does not have a Dominican birth certificate or identity card, but does have a Haitian birth certificate and identity document.[219] He has lived in Haiti since 1999 with his companion and his three children.[220] Bersson Gelin stated that he was expelled on two occasions, the second in 1999, which falls within the Court's competence. He stated that, on December 5 that year, while he was going to work, he was stopped, made to board a "*guagua,*"[221] and then taken to Haiti.[222]

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answering brief, f. 6222). This latter certification indicates that "after a thorough search in the archives for which [it] is responsible from 1958 to 2012, […]: Nene, Diane, Antonio and Endry are not registered in this Registry Office." The Court will understand that, as established in article 39 of Law No. 659 of the Dominican Republic, the opportune and late declarations are the birth declarations of natural children made before the Civil Registrar in the place where the birth took place within 30 days if they are opportune and within 60 days if they are late (*Cf.* Law No. 659 of July 17, 1944, on Civil Status Procedures, which includes provisions on death certificates and registrations. File of annexes to the answering brief, fs. 5705 to 5750).

214 Note No. 044-13 of the General Directorate of Immigration, certifying that there is no record of the deportation of Nené, Diane, Antonio, and Endry, all surnamed Fils-Aimé, or of Janise Midi, among other persons mentioned on a list.

215 *Cf.* Affidavit made by Janise Midi.

216 Safe-conducts of: Janise Midi, Antonio Fils-Aimé, Endry Fils-Aimé, Diane Fils-Aimé and Jeanty Fils-Aimé, issued on March 20, 2002, by the General Directorate of Immigration (file of annexes to the Merits report, annex 22, fs. 229 to 237).

217 *Cf.* Safe-conduct of Jeanty Fils-Aimé, damaged, issued on March 20, 2002, by the General Directorate of Immigration (file of annexes to the Merits report, annex 23, f. 253).

218 Safe-conducts of: Janise Midi, Antonio Fils-Aimé, Endry Fils-Aimé, Diane Fils-Aimé, issued on April 10, 2010, by the General Directorate of Immigration (file of annexes to the motions and arguments brief, annex B06, fs. 3517 and 3518). A safe-conduct in the name of Jeanty Fils-Aimé was also provided, and this Court notes that it was issued after his death.

219 *Cf.* Birth certificate of the Republic of Haiti of Bersson Gelin (file of preliminary objections, merits and reparations, f. 3749), and Haitian identity card issued on July 29, 2005 (file of preliminary objections, merits and reparations, f. 3748).

220 *Cf.* Affidavit made by Bersson Gelin on September 24, 2013 (file of preliminary objections, merits and reparations, f. 1708).

221 For the effects of this Judgment, the Court understands "*guagua*" to mean an automotive vehicle that provides urban or interurban services.

222 *Cf.* Affidavit made by Bersson Gelin. In his affidavit, he stated that the expulsion took place in 1999, when he "was detained in La Romana, [he] was walking to work and the guards stopped him, ill-treated him, pointed a rifle at him," and "forced him to go to Anse-à-Pitres."

214. Mr. Gelin has a son called William Gelin,[223] who was born in the Dominican Republic, in La Romana, and has been separated from him. Bersson Gelin stated that, in 2009, he went to the Dominican Republic to receive treatment for a bullet wound in the leg, and that was the last time he was able to visit his son William; since then, he has not seen his son for almost four years. Bersson Gelin does not want to return to the Dominican Republic because he is afraid that he will be expelled again.[224] The State noted that it has no opportune or late declaration of his birth, and no record of his deportation.[225]

215. On March 20, 2002, safe-conducts were issued to Mr. Gelin and William Gelin[226] as a result of the agreement reached when processing the provisional measures before the Inter-American Court. However, Mr. Gelin stated that, in 2006, during a visit to his son William in Santo Domingo, the immigration officials destroyed it.[227] However, on April 7, 2010, he was issued another safe-conduct.[228]

B.2.4. Sensión Family

216. Antonio Sensión was born on December 24, 1958, in Savaneta de Cangrejo, Dominican Republic;[229] he has a Dominican identity card,[230] and lives with Ana Virginia Nolasco, whose Creole name is Ana Virgil Nolasco (*supra* para. 83), and who was born in Haiti, and has a Haitian identity card.[231] They have two daughters: Ana Lidia Sensión Nolasco, born on August 3, 1990, in the Ricardo Limardo Hospital in Puerto Plata, Dominican Republic, who has a Dominican identity card,[232] and Reyita Antonia Sensión

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223 *Cf.* Affidavit made by Bersson Gelin, and safe-conduct of William Gelin, son of Bersson Gelin, issued on March 20, 2002, by the General Directorate of Immigration (file of annexes to the Merits report, annex 25, f. 268).

224 *Cf.* Affidavit made by Bersson Gelin.

225 *Cf.* Certification of the Pedernales Civil Registry Office of June 20, 2012, noting that "the person named BER[S]SON GELIN is not registered in the opportune or late birth records of this Civil Registry Office" (file of annexes to the answering brief, f. 2204), and Note No. 044-13 of the General Directorate of Immigration, noting that there is no record of the deportation of Bersson Gelin, among other persons mentioned on a list.

226 *Cf.* Safe-conduct of Bersson Gelin issued on March 20, 2002, by the General Directorate of Immigration (file of annexes to the Merits report, annex 26, f. 255), and safe-conduct of William Gelin.

227 *Cf.* Affidavit made by Bersson Gelin.

228 *Cf.* Affidavit made by Bersson Gelin, and safe-conduct of Bersson Gelin issued on April 7, 2010, by the General Directorate of Immigration (file of annexes to the motions and arguments brief, annex B07, f. 3525).

229 *Cf.* identity card of Antonio Sensión (file of annexes to the Merits report, annex 28, f.274); extract from birth certificate of Antonio Sensión issued by the Central Electoral Board (file of annexes to the motions and arguments brief, annex B10, f. 3535), and Affidavit made by Antonio Sensión. Regarding the date of birth of Antonio Sensión, the different official documents all state that he was born on December 24, 1958, as determined in judgment No. 117 of January 9, 2001, of the Judicial Service of the Dominican Republic, that ordered the Registry Office official of the municipality of Sosua "to ratify the birth certificate" of Antonio Sensión (file of annexes to the Merits report, annex 27, f. 272). However, in his affidavit, Mr. Sensión stated that he was born on September 23, 1972. Despite this, the Court considers that the date of birth is the one that appears in the official documents.

230 *Cf.* Identity card of Antonio Sensión.

231 *Cf.* Extract from the birth certificate of Ana Lidia issued by the Central Electoral Board on a date that is not visible (file of annexes to the motions and arguments brief, annex B12, f.3539); sheet with general information on Ana Lidia Sensión issued by the Head Identity Document Official on September 23, 2009 (file of annexes to the Merits report, f. 2190), and extract from birth certificate of Reyita Antonia issued by the Central Electoral Board on a date that is not visible (file of annexes to the motions and arguments brief, annex B13, f. 3541). These documents record that Ana Virginia Nolasco, of Haitian nationality, is the mother of Ana Lidia and Reyita Antonia.

232 *Cf.* identity card of Ana Lidia Sensión Nolasco issued by the Central Electoral Board (file of annexes to the motions and arguments brief, annex B14, f. 3543); birth certificate of Ana Lidia, issued by the Central Electoral Board on August 20, 1990 (file of annexes to the Merits report, f. 2193); extract from birth certificate of Ana Lidia; certification of birth declaration of Ana Lidia issued by the Civil Registry on January 25, 2001 (file of

Nolasco, who was born on January 6, 1992, in the Eastern Santo Domingo Hospital, Dominican Republic, and has a Dominican identity card.[233] The State indicated that Ana Lidia Sensión and Reyita Antonia Sensión are Dominican citizens, as recorded in the corresponding Civil Registry Offices.[234]

217. The Sensión Family lived in Mata Mamón, Santo Domingo, Dominican Republic, and Mr. Sensión went to Puerto Plata seasonally to work.[235] Prior to the date on which the State accepted the Court's contentious jurisdiction, Mrs. Nolasco and her daughters were detained by immigration officials and transported in a "truck" with other persons to the border with Haiti. Then, once in Haiti, they were able to travel to the place where Ana Virginia Nolasco's family lived.[236] The State indicated that it had no record of the deportation of these persons.[237]

218. Subsequently, when Mr. Sensión returned to Mata Mamón in 1994 and went to his home to look for his family, he found out from the neighbors that they had been expelled to Haiti.[238] Eight years later, now within the sphere of the Court's temporal competence, Mr. Sensión found his family in the Las Cahobas market in Haiti, and returned to the Dominican Republic with his daughters. A week later, Mrs. Nolasco was also able to return to the Dominican Republic.[239] According to Ana Lidia, she is "always afraid of meeting immigration [personnel]."[240]

219. On August 13, 2002, safe-conducts were issued to the members of the Sensión Family, as a result of the agreement reached when processing the provisional measures before the Court.[241] Subsequently, in 2010, and as part of the proceedings on provisional measures, the State renewed and granted new safe-conducts to Antonio Sensión, Ana

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annexes to the Merits report, f. 2162); sheet with general information on Ana Lidia Sensión, baptism certificate of Ana Lidia Sensión issued on January 11, 2000, by the Parish of San Antonio de Padua (file of annexes to the Merits report, annex 29, f. 276); Affidavit made by Ana Lidia Sensión Nolasco on September 29, 2013 (file of preliminary objections, merits and reparations, f.1717), and Affidavit made by Antonio Sensión.

233 *Cf.* birth certificate of Reyita Antonia, issued by the Central Electoral Board of the Dominican Republic on February 5, 1992 (file of annexes to the Merits report, f. 2196); extract from birth certificate of Reyita Antonia; baptism certificate of Reyita Antonia Sensión issued on January 11, 2000, by the Parish of San Antonio de Padua (file of annexes to the Merits report, annex 30, f. 278); Affidavit made by Antonio Sensión, and full birth certificate of Reyita Antonia, issued by the Central Electoral Board on July 4, 2012 (file of annexes to the Merits report, f. 2195).

234 *Cf.* Report of the Government of the Dominican Republic on the measures adopted to comply with the recommendations of the Commission (file of annexes to the Merits report, f. 2164). The State also indicated in its answering brief that these persons were Dominicans.

235 *Cf.* Affidavit made by Antonio Sensión.

236 *Cf.* Affidavit made Ana Lidia Sensión Nolasco, and Affidavit made by Antonio Sensión. In his affidavit, Mr. Sensión stated that, in 1994, "Ana Virginia and the girls lived in Mata Mamón"; that his "mother died on September 30 that year and that, as they did not arrive, [he] went to look for them and, one week later, a neighbor told him that immigration had caught [them] and deported them to Haiti." Meanwhile, in her affidavit made on September 29, 2013, Ana Lidia Sensión Nolasco stated that the events took place around Christmas 1994. Accordingly, the Court notes that although the day and month are not the same, in their statements they both agree on the year, so that the date of the expulsion was prior to the State's acceptance of the Court's jurisdiction.

237 Note No. 044-13 issued by the General Directorate of Immigration of the Ministry of the Interior and Police, certifying that there is no record of the deportation of Ana Virginia Nolasco, Ana Lidia Sensión and Reyita Antonia Sensión, among other persons mentioned on a list.

238 *Cf.* Affidavit made by Antonio Sensión.

239 *Cf.* Affidavit made by Antonio Sensión, and Affidavit made by Ana Lidia Sensión Nolasco.

240 Affidavit made by Ana Lidia Sensión Nolasco.

241 *Cf.* Safe-conducts of Antonio Sensión, Ana Virgi[nia] Nolasco, Reyita Antonia Sensión and Ana Lidia Sensión, issued on August 13, 2002 (file of annexes to the Merits report, annex 34, fs. 290 and 291).

Virginia Nolasco and Ana Lidia Sensión.[242] Some of the members of this family, for example, Reyita Antonia Sensión, were unable to collect this document.[243]

B.2.5. Rafaelito Pérez Charles

220. Rafaelito Pérez Charles was born in the Dominican Republic on August 18, 1978, and has a Dominican identity card.[244] His parents are Clesineta Charles (*supra* para. 95) and Rafael Pérez.[245] The State indicated that Mr. Pérez Charles is a Dominican citizen, according to information that appears in its civil registers; therefore, it had no objection to replacing the corresponding documentation, either the birth certificate or the identity card.[246]

221. On July 24, 1999,[247] Mr. Pérez Charles was arrested by several immigration agents when he was leaving his place of work. The officials asked him for his documentation and he told them that it was at his home and asked to be given the opportunity to go and fetch it; but the officials did not permit this. The officials then made him board a "*guagua,*" in which there were a large number of people, and he saw how the officials hit some of them. The Dominican authorities took them to a detention center "where there were many Haitians there, prisoners," and then the authorities transported them to Jimaní, from where they were expelled to Haitian territory. During the transfer they were not given food or water. When Rafaelito Pérez Charles reached Haiti, he met a man who, after being paid, helped him to return on foot to the Dominican Republic; once there, he walked for several days until he reached his home again. Due to the expulsion, he lost his job in the sugar mill.[248] He is living with the fear that he will be expelled again.[249] According to Rafaelito "they arrest you because you are dark, because you are black."[250] The State noted that there is record of his deportation.[251]

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242 *Cf.* Safe-conducts of Antonio Sensión, Ana Virginia Nolasco, and Ana Lidia Sensión, issued on April 7, 2010 (file of annexes to the motions and arguments brief, annex B07, f. 3522).

243 Affidavit made by Antonio Sensión.

244 *Cf.* Identity card of Rafaelito Pérez Charles (file of annexes to the Merits report, annex 36, f. 296); birth certificate of Rafaelito Pérez Charles, and Affidavit made by Rafaelito Pérez Charles on September 29, 2013 (file of preliminary objections, merits and reparations, f. 1737).

245 *Cf.* Birth certificate of Rafaelito Pérez. The sheet with general information on Rafaelito Pérez Charles and his birth certificate note that his mother is Clesineta Charles and that his father is Rafael Pérez.

246 *Cf.* Report of the Dominican Government on the measures adopted to comply with the Commission's recommendations in relation to this case issued by the Permanent Mission of the Dominican Republic to the Organization of American States on July 6, 2012 (file of annexes to the Merits report, f. 216). Also, a note of the Central Electoral Board of July 5, 2012, reported that it attached the "printout from the master list of identity documents and of the birth declaration of Rafaelito Pérez Charles, which show that they are free of any impediment" and provided a certification of the Central Electoral Board from the master list of identity documents dated July 4, 2012 (file of annexes to the Merits report, fs. 2171, 2172 and 2199).

247 *Cf.* Affidavit made by Rafaelito Pérez Charles, and statement made by Rafaelito Pérez Charles to Columbia University of January 10, 2001 (annexes to the Merits report, annex 37, fs. 298 and 299), in which he stated that the expulsion was on July 24, 1999.

248 *Cf.* Affidavit made by Rafaelito Pérez Charles. In this statement he indicated that he walked for a week to reach his home. However, in the statement made on January 10, 2001, to Columbia University, he indicated that it was four days.

249 Affidavit made by Rafaelito Pérez Charles.

250 *Cf.* Affidavit made by Rafaelito Pérez Charles.

251 *Cf.* Certification issued by the National Prisons Directorate on February 4, 2013 (file of annexes to the answering brief, f. 6220); Note No. 044-13 issued by the General Directorate of Immigration of the Ministry of the Interior and Police, noting that there is no record of the deportation of Rafaelito Pérez Charles, among other persons mentioned on a list.

B.2.6. Jean family

222. Victor Jean and his son Markenson stated that Victor was born in Jimaní, Dominican Republic,[252] on April 13, 1958. Victor Jean lived in Villa Faro, Dominican Republic, with his family consisting of Marlene Mesidor, born in Haiti on July 3, 1972, who has a Haitian passport,[253] and his four children: Markenson Jean Mesidor, born on November 15, 1992, in Haiti, who has a Haitian passport;[254] Miguel Jean, born on November 13, 1994;[255] Victoria Jean, born on November 13, 1996, who died on April 20, 2014,[256] and Natalie Jean, born on July 20, 2000, in Villa Faro, Santo Domingo.[257] Victoria, Miguel and Natalie were born in the San Lorenzo de los Minas Maternal and Child Health Care Center, Santo Domingo, Dominican Republic.[258] The Jean family lives in the Dominican Republic at this time. The State indicated that there are no opportune or late birth declarations of Miguel Jean, Victoria Jean, and Natalie Jean.[259]

223. In December 2000, at around 7:30 a.m. State agents came to the Jean family's home and knocked loudly on the door; they then entered the home and ordered the family to leave and get into a "bus,"[260] to which Mrs. Mesidor and the couple's four

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[252] *Cf.* Affidavit made by Markenson Jean on September 29, 2013 (file of preliminary objections, merits and reparations, f. 1730), and Statement made by Victor Jean to Columbia University on January 11, 2001 (file of annexes to the Merits report, annex 39, f. 350). The State provided a document entitled Certification that there is no birth declaration for Victor Jean, issued by the Jimaní Registry Office, corresponding to Volume No. 18 of 1958, as well as a document entitled Non-declared Certification, issued by the Civil Registry of the municipality of La Descubierta on February 8, 2013, indicating that, following a thorough search in the opportune and late birth records in its archives from 1958 to 2000, it was not possible to find the name of Victor Jean, born on April 13, 1958 (file of annexes to the answering brief, f. 6550). Similarly the State provided other certifications that support this (*cf.* file of annexes to the answering brief, fs. 6551 to 6555. It should be noted that in some of the certifications provided, the name of Victor Jean appears as Jeam or Jan).

[253] *Cf.* Affidavit made by Marlene Mesidor. Affidavit made by Markenson Jean, and safe-conduct of Marlene Mesidor (file of annexes to the motions and arguments brief, annex B07, f. 3523).

[254] *Cf.* Birth certificate of Markenson Jean, affidavit made by Markenson Jean, and affidavit made by Marlene Mesidor. According to the statements of Marlene Mesidor and Markenson Jean, in 1991 Victor Jean and Marlene Mesidor had been expelled from Dominican Republic. They stated that, after a time spent in Haiti, Mr. Jean returned to the Dominican Republic to work, while Mrs. Mesidor, who was pregnant again, remained in Haiti, where her son Markenson was born. She returned to the Dominican Republic when her son was one year old, in 1993.

[255] *Cf.* Affidavit made by Marlene Mesidor, and male birth certification [Miguel] issued on March 8, 2010, by the San Lorenzo de los Minas Mother and Child Health Care Clinic of the Secretariat of Public Health and Social Assistance (file of annexes to the motions and arguments brief, annex B09, f. 3529).

[256] *Cf.* Affidavit made by Marlene Mesidor; certification of female birth [Victoria] issued on March 8, 2010, by the San Lorenzo de los Minas Mother and Child Health Care Clinic of the Secretariat of Public Health and Social Assistance (file of annexes to the motions and arguments brief, annex B09, f. 3530). In the death certificate, which was issued on April 20, 2014, by the Ministry of Public Health, it appears that she is of "Haitian" nationality (death certificate of Victoria Jean issued by the Ministry of Public Health of April 20, 2014. File of preliminary objections, merits and reparations, f. 3751).

[257] Affidavit made by Marlene Mesidor, and certification of female birth [Natalie] issued on March 8, 2010, by the San Lorenzo de los Minas Mother and Child Health Care Clinic of the Secretariat of Public Health and Social Assistance (file of annexes to the motions and arguments brief, annex B09, f. 3531).

[258] Affidavit made by Marlene Mesidor; affidavit made by Markenson Jean; certification of male birth (live birth) [Miguel], certification of female birth (live birth) [Victoria], and certification of female birth (live birth) [Natalie]. Marlene Mesidor stated that her children only have the live birth certifications, that they did not have birth certificates. She also stated that she once when to register them and was told that if she did not have Dominican documents, she could not register them.

[259] *Cf.* Certification of birth declaration issued by the Central Electoral Board on July 4, 2012, recording that there are no opportune or late birth declarations relating to: Miguel Jean, Victoria Jean and Natalie Jean (file of annexes to the answering brief, f. 2204).

[260] *Cf.* Affidavit made by Markenson Jean; affidavit made by Marlene Mesidor, and statement made by Marlene Mesidor to Columbia University on January 11, 2001 (file of annexes to the Merits report, annex 40, fs. 352 to 361). These statements reveal that the agents were "immigration" officials. However, on January 11,

children were taken. The bus was full of people, including some standing up. The State agents then went back to the house and returned with Mr. Jean who they forced to board the bus.[261] It was early, and they were not allowed to get dressed, or to take the milk of the new-born child. Nor were they allowed to call anyone; they were not given anything "to eat and [were not allowed] to buy" food. The officials asked Mr. Jean and Mrs. Mesidor for their documents, but they did not have them, and the children only had certificates of live birth; at that time Natalie was almost four months old. The Jean family was taken in a "*guagua*" or bus to the Jimaní border and left on Haitian territory in the afternoon at around 5 p.m.[262] The State noted that there is record of the deportation of any of these persons.[263]

224. On August 13, 2002, safe-conducts were issued to the members of the Jean family, as a result of the agreement reached when processing the provisional measures before the Court.[264] Subsequently, on April 7, 2010, and as part of the proceedings on provisional measures, the State renewed and granted new safe-conducts to all the members of the Jean family.[265]

VIII
RIGHTS TO JURIDICAL PERSONALITY, TO A NAME, TO NATIONALITY AND TO IDENTITY, IN RELATION TO THE RIGHTS OF THE CHILD, THE RIGHT TO EQUAL PROTECTION AND THE OBLIGATIONS TO RESPECT RIGHTS WITHOUT DISCRIMINATION AND TO ADOPT DOMESTIC LEGAL PROVISIONS

A) Introduction

225. In this chapter the Court will examine together the alleged violations of the rights to recognition of juridical personality,[266] to a name,[267], to nationality,[268] and to identity (*infra* paras. 266 to 268), because, in this case, the facts that presumably resulted in these violations overlap. Based on the arguments of the parties and the Commission *(infra* paras. 230 to 251), the Court will make this analysis, as pertinent, in relation to the rights

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2001, Marlene Mesidor stated that "members of the Army and inspectors from the General Directorate of Immigration had come to her home" (file of annexes to the Merits report, annex 40, f. 353).

261 *Cf.* Affidavit made by Marlene Mesidor.

262 *Cf.* Affidavit made by Marlene Mesidor, and Affidavit made by Markenson Jean.

263 Note No. 044-13 issued by the General Directorate of Immigration of the Ministry of the Interior and Police, noting that there is no record of the deportation of Miguel Jean, Victoria Jean, Natalie Jean, Victor Jean, Marlene Mesidor and "M[ar]kenson" Jean, among other persons mentioned on a list.

264 Safe-conducts granted to Victor Jean, Marlene Mesidor, Victoria Jean, Natalie Jean and "M[ar]kenson" Jean, issued on August 13, 2002, by the General Directorate of Immigration (file of annexes to the Merits report, annex 41, fs.363 and 364).

265 *Cf.* Safe-conducts granted to Marlene Mesidor, Victor Jean, "M[ar]kenson" Jean, Miguel Jean, Victoria Jean, and Natalie Jean, and issued on April 7, 2010, by the General Directorate of Immigration (file of annexes to the motions and arguments brief, annex B07, fs. 3521 to 3524).

266 Article 3 of the American Convention establishes that: "Every person has the right to recognition as a person before the law."

267 Article 18 of the Convention indicates that: "Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary."

268 Article 20 of the American Convention stipulates: "1. Every person has the right to a nationality. 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality. 3. No one shall be arbitrarily deprived of his nationality or of the right to change it."

of the child[269] and the right to equality before the law,[270] as well as to the obligations to respect and ensure the rights without discrimination[271] and to adopt domestic legal provisions.[272]

226. Two types of arguments have been presented, and will be evaluated separately. The first situation alleged is the destruction of identity documents of Dominicans, or the authorities' failure to take them into account at the time of the expulsions, and the second is the failure to register persons of Haitian descent born in Dominican territory.

227. In addition, regarding the arguments relating to the obligation to adopt domestic legal provisions, and the right to a name, the Court notes that the Commission did not allege the violation of Articles 2[273] and 18 of the Convention, whereas the representatives did.[274] In this regard, the Court reiterates that "the presumed victims or their representatives may cite rights other than those included by the Commission, based on the facts that the Commission has presented";[275] hence, it is admissible to examine the alleged violation of Article 2 of the Convention.

228. Lastly, regarding the necessary preliminary clarifications, it is pertinent to recall that the Court has determined that it is not possible to consider that the birthplace of Bersson Gelin, Jeanty Fils-Aimé, Nené Fils-Aimé, Diane Fils-Aimé, Antonio Fils-Aimé and Endry Fils-Aimé has been proved (*supra* paras. 86 and 87). This prevents the Court from analyzing arguments about the nationality of these persons, or presumed violations of rights linked to this. Consequently, the Court will not describe or analyze the arguments related to the alleged violations, to the detriment of these persons, of the rights to nationality, recognition of juridical personality, and name and, in relation to these three rights taken as a whole, the right to identity; or the violation of the right to equal protection of the law inasmuch as this was alleged in relation to the preceding rights. Similarly, it will not

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269 Article 19 of the Convention establishes that: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State."

270 Article 24 of the American Convention stipulates: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."

271 Article 1(1) of the American Convention states: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

272 Article 2 of the Convention indicates: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

273 Nevertheless in the Merits report, the Commission recommended that the State adopt measures "including a review of domestic legislation on registering and granting nationality to persons of Haitian descent born in Dominican territory, and the repeal of those provisions that directly or indirectly have a discriminatory impact based on race or national origin, taking into account the principle of *ius soli* established by the State, the State obligation to prevent statelessness, and applicable standards of international human rights law."

274 Regarding Article 2, in their motions and arguments brief, when setting out arguments with regard to Articles 3, 18, 20 and 24 of the Convention, the representatives mentioned and transcribed Article 2, but failed to include arguments to justify its violation. However, it should be noted that, in answer to a question posed by the Court during the public hearing, the representatives indicated that the alleged violation of Article 2 was "linked to the violation of the right to nationality and the rights to juridical personality, of the family and to privacy, because [they] consider[ed] that the violation ar[o]se from the undue application of article 11 of the Constitution […], that, as [they] explain[ed] in [their] arguments has considered that 'in transit' is equal to 'an irregular migratory situation'; hence [their] allegation relating to Article 2." However, when including allegation

in their final written arguments, they indicated other norms (*infra* paras. 241 and 242)

275 *Cf. Case of the "Five Pensioners" v. Peru,* para. 155, and *Case of Veliz Franco v. Guatemala,* para. 132.

describe or examine the respective arguments when analyzing the alleged violation of the right to movement and residence (*infra* paras. 384 to 389).

229. Having made these clarifications, the Court will now describe the arguments of the Commission and of the parties, and then set out the considerations of the Court in this regard.

B) Arguments of the Commission and of the parties

230. The Commission**,** referring to Willian Medina Ferreras and Rafaelito Pérez Charles, as well as to the children at the time: Awilda Medina, Luis Ney Medina and Carolina Isabel Medina, Miguel Jean, Victoria Jean and Natalie Jean, argued that, according to the statements of the presumed victims and the documentation provided by the State, they were Dominican nationals and possessed the pertinent documentation to prove this. However, during their arbitrary detention and expulsion, they were not given the opportunity to present this documentation or it was destroyed by Dominican officials, and this resulted in the presumed victims being unable to prove their physical existence and juridical personality. The Commission alleged that "these practices" placed the victims in a situation of extreme risk, depriving them of the enjoyment and exercise of their rights, and signified de *facto* that the victims were arbitrarily deprived of the recognition and enjoyment of their nationality.

231. The Commission argued that, according to the evidence provided, Dominican officials "refused" to register Victor Jean as a citizen of the Dominican Republic, which resulted in his "exclusion from the State's legal and institutional order, refusing to recognize his very existence as a subject […] of law."

232. The Commission also "recall[ed] the Court's finding" that "a person's migratory status is not transmitted to his children,"[276] and added that, in any case, the exception to *ius soli* currently included in Dominican law, consisting in the "legal status of the parents," is not applicable to any of the presumed victims born in Dominican territory, because this exception was introduced in 2004 and constitutionalized in 2010. The Commission considered that, despite the fact that the State observes the principle of *ius soli,* the impediments that exist to granting nationality to persons born in the Dominican Republic constitute an arbitrary deprivation of nationality which contributes to the detention and possible deportation of Dominican nationals.

233. Consequently, it inferred that "based on the established context, and the laws and practices of the Dominican State at the time of the events, Haitian migrants had to contend with a number of obstacles that prevented them from legalizing their status in the country and registering their children born in Dominican territory." In addition, it noted that the State's laws and practices that led to the deprivation of nationality owing to the failure to register Dominicans of Haitian descent constituted a generalized practice specifically aimed at persons of Haitian descent and those with the darkest skin color. It considered that, although it was true that Dominican laws do not expressly establish provisions that prejudice Haitians and those of Haitian descent, "it is no less true that their interpretation and application reveal their discriminatory impact on this population."

234. "[T]he Commission […] consider[ed] that the obstacles that exist in the Dominican Republic to registering children of Haitian descent had been proved" and recalled the Court's observation in paragraph 109 of its judgment in the *Case of the Yean and Bosico*

[276] The Commission referred to the judgment of the Court in the case *of the Yean and Bosico Girls v. Dominican Republic*, also indicating other aspects of that decision included in its paragraph 157.

Girls v. Dominican Republic, as regards "the difficulty of [the mothers] to travel from the *bateyes* to the hospitals in the town, the limited financial resources, and the fear of meeting hospital officials, police agents, or officials from the local municipality and being deported.'" In this context, with regard to the presumed victims who were children at the time of the events,[277] the Commission indicated that "this case involves a sequence of events beginning with the refusal to register births, which made it impossible to obtain nationality and accede to basic services such as health and education; […] adversely affecting the normal and full development of their persona and their life project." Therefore, it concluded that the State had failed to comply with its international obligations, by not adopting the necessary measures that took into account the best interests of the child, guaranteeing his or her right to be heard, protecting the right to identity, and ensuring the protection of children on its territory.

235. The Commission indicated that the Constitutional Court's judgment TC/0168/13 of September 23, 2013:

> Could have the effect of retroactively denationalizing thousands of people who had acquired Dominican nationality in application of the Constitution in force at the time, [and] could represent an obstacle to the restitution of the right to nationality of the victims in this case, one of the essential measures of reparation.

Furthermore, on June 24, 2014, "without making a ruling on the content of [Law 169-14]," presented by the State as a supervening fact (*supra* paras. 13, 126, 180, and *infra* para. 251), it "consider[ed] that this law does not provide any evidence as regards whether or not a situation of structural discrimination existed. In addition, the Commission is unaware of how it could affect the [presumed] victims in this case."

236. The Commission concluded that the State had violated the right to juridical personality and the right to nationality recognized in Articles 3 and 20 of the American Convention, in relation to the obligation to respect rights without discrimination, and the principle of equality and non-discrimination established in Articles 1(1) and 24 of the Convention to the detriment of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina (deceased), Rafaelito Pérez Charles, Victor Jean, Victoria Jean (deceased), Miguel Jean and Natalie Jean, as well as the rights of the child, recognized in Article 19 of this instrument, to the detriment of the presumed victims who were children at the time of the facts.

237. The representatives argued that the officials who took part in the expulsions of Willian Medina Ferreras and Rafaelito Pérez Charles and of the children Awilda Medina, Carolina Isabel Medina and Luis Ney Medina disregarded their juridical personality, because, even though they had documentation that proved their identity and nationality, the officials did not request this. To the contrary, in the cases in which the victims showed this documentation it was not received or, in the worst case, it was taken from them. The representatives stated that this is also connected to a violation of the right to a name. They also asserted that all the alleged violations were especially egregious in the case of the victims who were children at the time of the events, because they were in a situation of special vulnerability.

238. The representatives also indicated that, although Victor Jean, Miguel Jean, Victoria Jean and Natalie Jean were born in the Dominican Republic, they do not have documents to substantiate their identity. The representatives argued that it was "impossible" for those of Haitian descent born in the Dominican Republic to obtain identity documents

[277] Among them, the Commission indicated Awilda Medina, Luis Ney Medina, Carolina Isabel Medina, Victoria Jean, Miguel Jean and Natalie Jean.

owing to the "incorrect application of article 11 of the Dominican Constitution [of 1994]"; specifically the application of the exception established in article 11(1) which excluded from the principle of acquisition of nationality based on *ius soli* the children of aliens "in transit." They pointed out that the Dominican authorities had classified the Haitians who were in Dominican territory, without considering the time that they had spent in this country, as aliens "in transit" and, consequently, their children did not have the right to acquire Dominican nationality even though they had been born in this territory. The representatives indicated that "[t]his was precisely the criterion that was applied to the victims in this case, which has meant that, at the present time, they lack identity and nationality documents." They also alleged a discriminatory application of the law, indicating that the application of article 11 of the Constitution, in the sense of considering that all Haitians were "in transit," created a differential treatment that was based solely on the race or ethnic origin of those affected and, therefore, lacked any justification. They noted that this definition had been incorporated textually into the new 2010 Constitution, which added a third exception excluding the children of those persons "who are residing illegally in Dominican territory" from the right to nationality under *ius soli.*

239. They also explained that, even though Haiti accepts *ius sanguinis*, "obstacles exist […] *de jure* and *de facto* to acquire the nationality of that country" for the presumed victims. They indicated that article 11 of the Haitian Constitution, according to the translation into Spanish made by the representatives, indicates that "[a]nyone born of a Haitian father or mother, who is also Haitian by birth and has never renounced their nationality, shall have the right to Haitian nationality as of birth." The representatives affirmed that, nevertheless, "in the case of the families [they] represent where the nationality of their children born in the Dominican Republic has been questioned, at least one of the parents is Dominican. This gives rise to the presumption that article 11 of the Haitian Constitution is not directly applicable to them." They added that "the 1984 law on access to Haitian nationality […] established [that] all those born abroad of Haitian mother and father will be Haitians of origin"; that article 7 of that law established (in the words of the representatives) that "children born abroad of a foreign father and a Haitian mother will have the foreign nationality until they achieve their majority, at which time they will have the right to acquire Haitian nationality," and that article 8 of this law indicates, according to the non-textual indication of the representatives, that "the person who is of age and who wishes to acquire Haitian nationality must live in that country and apply to the competent court of his or her place of residence."

240. They stressed that the situation of statelessness in which the said victims were kept and the failure to recognize their juridical personality and their name, denatured and denied the external or social projection of their persona and prevented them from having access to other rights.

241. The representatives also explained that their argument concerning the violation of Article 2 of the Convention, with regard to the obligation to adopt domestic legal provisions, was in relation to the fact that "the violation of the right to nationality […] results […] from the adoption and application of a series of State norms and practices." Although they referred to "the implementation […] at different times of the norms and practices of Dominican domestic law," they only expressed their disagreement with the 2004 Immigration Act, Resolution 02-07 of the Central Electoral Board that created and brought into effect the Birth Register for the children of a foreign mother in the Dominican Republic,[278] "Circular No. 017 […] of March 29, 2007, of the Administrative Chamber of

[278] The representatives indicated that, owing to that Resolution, "[i]n practice, the State […] by means of the [respective] registration, denies Dominican nationality to the child, seeking to grant it the nationality of another country by registering it in [the] 'aliens' register.'"

the Central Electoral Board, and Resolution No. 12-07 of December 10, 2007, of the plenary session of the Central Electoral Board." The first one because "it prohibited the Civil Registry officials from responding to any request relating to birth certificates that were possibly 'irregular,'" because "[w]hile their birth certificates are investigated, […] the Dominicans of Haitian descent concerned are trapped in a legal limbo." The second, because "it established the 'provisional suspension of civil status certificates that appeared to be irregular.'" They stated that "the measure, in addition to being discriminatory, was applied retroactively to those born before 2007." Lastly, when outlining their arguments on the violation of Article 2, they referred to judgment TC/0168/13, which will be examined below.

242. On October 2, 2013, the representatives informed the Court of judgment TC/0168/13 of the Constitutional Court of September 23, 2013 (*supra* para. 13). In this regard, they recalled that article 11 of "the 1994 Constitution (and its precedents since 1929) established that [… 'a]ll those born on the territory of the Republic, with the exception of the legitimate children of foreign diplomats resident in the country or aliens who are in transit," are Dominicans, and that this judgment "established that 'traditional Dominican jurisprudence recognizes as aliens in transit those who […] lack a legal residence permit."[279] They pointed out that this interpretation is "in open contrast" to the Court's decision in its judgment in the *Case of the Yean and Bosico Girls v. Dominican Republic* in relation to the concept of "in transit," because the Constitutional Court defined this as a status that may be permanent, irrespective of the time spent and the ties developed in the State's territory. In addition, they stressed that, in its fifth operative paragraph, the judgment ordered the Central Electoral Board to undertake a comprehensive review of the birth records since 1929 and to make a list of "aliens who were registered irregularly." They alleged that this "affects all the [presumed] victims of this case, because they were all born after 1929, […] and also jeopardizes the right to nationality of those who have been recognized as Dominicans."

243. Lastly, on June 17, 2014, the representatives referred to Decree No. 327-13 of November 29, 2013, and Law No. 169-14 of May 23, 2014, norms that the State presented as supervening facts (*supra* paras. 13, 126 and 180, and *infra* para. 251). They indicated that Decree No. 327-13, which establishes a regularization plan for aliens in an irregular situation who comply with a series of requirements that make this "impossible for a group in […] a vulnerable situation, […] such as the situation of most of the Haitian population in an irregular situation, so that [they] are unable to access the regularization plan." With regard to Law No. 169-14, the representatives asserted that, in the case of those born in Dominican territory who had obtained documentation and who are children of foreign parents in an irregular situation, the law "makes the granting of nationality conditional on an administrative requirement that was never previously established in any Constitution; in other words, the formal registration procedure." With regard to the persons who are in the same situation as the former, but who have never been registered, they indicated that Law No. 169-14, insofar as it establishes a "naturalization" procedure, treats them as aliens, ignoring *ius soli*. They "considered that the Court should analyze these norms in detail, applying the standards established in the inter-American system in relation to the right to non-discrimination, the right to nationality, and the obligation to eradicate and to prevent statelessness."

[279] They noted that, in this regard, the Constitutional Court had reiterated the interpretation of the concept of "aliens in transit" made by the Dominican Supreme Court in the judgment of December 14, 2005, that forms part of the probative framework in this case (Supreme Court of Justice, Judgment of December 14, 2005. No. 9, file of annexes to the motions and arguments brief, annex A19, fs. 3366 to 3373).

244. The representatives asked the Court to declare that the State was responsible for the violation of the rights to the recognition of juridical personality, to nationality, to a name, and to equal protection of the law (Articles 3, 20, 18 and 24 of the Convention, respectively), to the detriment of the same presumed victims mentioned by the Commission, together with non-compliance with the obligations contained in Articles 1(1) and 2 of this instrument, as well as with Article 19 of the treaty with regard to the presumed victims who were children at the time of the facts.[280]

245. For its part, the State denied its responsibility and asked the Court to declare that it had not violated the said rights to the detriment of the presumed victims mentioned. Similarly, it noted that "the procedure for the acquisition of nationality is a matter exclusively reserved to Dominican domestic law," because it is an "inalienable attribute of State sovereignty," only limited by respect for human rights and, specifically, the risk of statelessness and/or the existence of a discriminatory norm.

246. Regarding Willian Medina Ferreras, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina and Rafaelito Pérez Charles, in its answering brief the State indicated that it had accepted that they are Dominicans and had provided the corresponding documentation, so that the arguments with regard to them "had no purpose." Specifically with regard to the alleged violation of the right to a name of these individuals, the State indicated that this allegation was also meaningless, because they were all registered in the corresponding civil registry offices. Nevertheless, during the public hearing in this case, and subsequently (*supra* para. 89), the State also affirmed that the person presenting himself before the Court as Willian Medina Ferreras was not the person he said he was and, therefore, he was not Dominican (*supra* para. 63). It also presented information on administrative and judicial proceedings that questioned the validity of this man's personal documents, as well as those of Awilda Medina, Luis Ney Medina and Carolina Isabel Medina, in view of the determination it had made in this regard (*supra* para. 145).

247. Regarding the persons who, it argued, had not obtained Dominican identity documents,[281] it alleged that, in its opinion, it was not obliged to grant them nationality as they would not become stateless, because: (a) they were all of Haitian origin, and (b) the State of Haiti applied the system of *ius sanguinis* to the recognition of nationality.[282] As regards the principle of equality before the law and of non-discrimination, it indicated that the inclusion of requirements in order to acquire nationality by birth in the territory of the State was not discriminatory *per se*. It pointed out that there was no reliable evidence of

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[280] Although they did not formally ask that the Court declare its violation, the representatives referred to the "right to identity." They "affirm[ed] that the rights to juridical personality, to nationality and to a name, as well as the rights of the family […] compose the right to identity." However, they indicated that, regarding "the rights of the family," they would "refer to this in a later section" of the motions and arguments brief, and not in the one in which they were setting out their arguments on 'the rights to juridical personality, to a name, to nationality and to equal protection of the law." In other words, despite the conceptual indication that, in their understanding, "the right to identity" is linked to the "rights of the family," the representatives did not present specific arguments on the supposed violation of the "rights of the family" in relation to the "right to identity."

[281] The State indicated the following persons, among others: Victor Jean, Victoria Jean, Miguel Jean, and Natalie Jean.

[282] The State, in a report on the measures adopted to comply with the Commission's recommendations in relation to the case issued by the Permanent Mission of the Dominican Republic to the Organization of American States on July 6, 2012, indicated that "in the cases of Miguel Jean, Victoria Jean, Natalie Jean and Victor Jean […], the Dominican State is very willing to comply with the recommendations of the Commission […], provided that the petitioners present the documentation - not merely assertions – that prove their birth in Dominican territory before January 26, 2010" (file before the Commission, f. 2164). However, in its answering brief, the State indicated that "[a]lthough the State acknowledges that Victoria Jean, Miguel Jean and Nat[…]alie Jean were born in Dominican territory, there is no evidence whatsoever, beyond his own statement, proving that Victor Jean was born in Dominican territory."

the existence in the country of "institutional discrimination" against "Haitians who seek to obtain Dominican nationality," because this is not revealed by either the law or practice.

248. In addition, it recalled that, at the time of the presumed facts of the case, the acquisition of Dominican nationality had different elements[283] and indicated that the exceptions to the acquisition of Dominican nationality based on *ius soli* established in the Constitution were reasonable because, in keeping with the Court's case law, they were established by law, formally and materially, they sought a legitimate purpose, and they complied with the requirements of suitability, necessity and proportionality. The State also cited the principle that "irregularity does not give rise to a right," indicating that "[a]nyone who violates the established legal parameters to enter the country as an immigrant, lacks legitimacy […] to require this same institutional system to grant nationality," so that the children born of mothers who entered the country irregularly would not have the right to Dominican nationality.

249. In addition, in relation to the presumed violation of the right to a name, the State indicated that, in the case of the presumed "foreign victims," in principle, it was not for the Dominican Republic to guarantee them the right to a name.

250. The State also "consider[ed] that [judgment TC/0168/13 of the Constitutional Court of September 23, 2013] should be rejected as supervening evidence, because its content has no impact on the factual framework of this case," and "additionally," provided the "official position" with regard to that judgment. Thus, it indicated that, according to the text of article 184 the Constitution, decisions of the Constitutional Court are "binding for all the public powers and all the organs of the State." In this regard, it indicated that "[t]he Constitutional Court has established […] a series of procedures […] that will allow the persons concerned to regularize their status," and that "in order to execute the procedures [ordered by the Constitutional Court, the State] has implemented different measures." It clarified, however, that the contents of this judgment "do not affect all the children of immigrants who are born in the country. Those with at least one parent who is a legal resident are and will continue to be Dominican nationals."

251. In addition, on June 9, 2014, the State advised the Court, as "supervening facts," of "Decree No. 327-13, of November 29, 2013, creating the National Plan to regularize aliens in an irregular migratory situation in the Dominican Republic," and "Law No. 169-14, of May 23, 2014, which establishes a special regime for those born on national territory who are registered irregularly in the Dominican civil registry and with regard to naturalization" (*supra* paras. 13, 126 and 180).

C) Considerations of the Court

[283] The elements mentioned by the State were as follows: "(a) The State applies the hybrid system for obtaining nationality: *ius soli and ius sanguinis;* (b) The *ius soli* system for the acquisition of nationality was not automatic, but includes two important exceptions: (1) birth as a member of a family that was part of a diplomatic or consular mission, and (2) birth as a member of a family in transit in the country; (c) the addition of a third exception to the acquisition of nationality in the 2010 Constitution was aimed at clarifying the legal consequences established since the 1934 constitutional reform in relation to those born on national territory whose parents were in transit in the country. Therefore, this rule has been applicable from 1934 to date; (d) as indicated by the decision of the Dominican judicial authority, in functions as a Constitutional Court, *the status of a transient person presupposes a prior State authorization to enter the country and to remain there for a certain time.* Consequently, and following the same jurisprudential criteria, if nationality based on *ius soli* is not granted to the children of those in transit who have an official authorization to remain in the country, even though only temporally, pursuant to the said constitutional interpretation, still less can Dominican nationality based on *ius soli* be granted to the children of a foreign mother in an irregular situation in the country, and (e) the constitutional rule is *race-blind*; in other words, it is not the result of considerations of a racial, ethnic, cultural or any other *category prohibited* by the Constitution of the Republic or the American Convention" (italics in the original text).

252. To examine the arguments of the Commission and the parties, the Court finds it desirable to begin by indicating general standards relating to the arguments submitted on the relevant rights and obligations. It will then examine the alleged violations to the detriment of those whose personal documentation was ignored by the Dominican authorities and, after that, will analyze the alleged violations suffered by the presumed victims who lack this documentation. Lastly, it will consider the arguments on the obligation to adopt domestic legal provisions established in Article 2 of the American Convention.

C.1. Rights to nationality and to equality before the law

253. Regarding the right to nationality recognized in Article 20 of the American Convention, the Court has indicated that nationality, "as a legal and political bond that links a person to a particular State, allows the individual to acquire and to exercise the rights and responsibilities inherent in membership in a political community. As such, nationality is a prerequisite for the exercise of certain rights,"[284] and it is also a non-derogable right according to Article 27 of the Convention.[285] In this regard, it is pertinent to mention that nationality is a fundamental right of the human person that is established in other international instruments.[286]

254. Furthermore, it should be mentioned that the American Convention includes two aspects of the right to nationality: the right to a nationality from the perspective of endowing the individual with the basic legal protection for a series of relationships by establishing his connection to a specific State, and the protection of the individual against the arbitrary deprivation of his nationality because this would deprive him of all his political rights and of those civil rights that are based on a person's nationality.[287]

255. This Court has established that:

> Nationality, as it is mostly accepted, should be considered a natural condition of the human being. This condition is not only the very basis of his political status but also part of his civil status. Consequently, even though it has traditionally been accepted that the determination and regulation of nationality fall within the competence of each State, developments in this area reveal that international law has imposed certain limits on the State's margin of discretion.[288]

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[284] *Cf. Case of the Yean and Bosico Girls v. Dominican Republic,* para. 137.

[285] *Cf. Case of the Yean and Bosico Girls v. Dominican Republic*, para. 136. On this issue, the Court has recognized the rights that cannot be suspended as a non-derogable nucleus of rights; in this respect, *cf*. *Case of the Pueblo Bello Massacre v. Colombia*. *Merits, reparations and costs*. Judgment of January 31, 2006. Series C No. 140, para. 119, and *Case of González et al. ("Cotton Field")*, para. 244. The Court recalls that the right to nationality cannot be suspended according to Article 27 of the Convention. In this regard, *cf. Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*. Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 23.

[286] *Cf.* Among others, the American Declaration of the Rights and Duties of Man, Article XIX; the Universal Declaration of Human Rights, Article 15; the International Covenant on Civil and Political Rights, Article 24(3) (rights of the child); the Convention on the Rights of the Child, Article 7; the International Convention on the Elimination of All Forms of Racial Discrimination, Article 5 (d) (iii); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 29; the Convention on the Reduction of Statelessness, Article 1(1); the European Convention on Nationality, Article 4; the African Charter on the Rights and Welfare of the Child, Article 6.

[287] *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica.* Advisory Opinion OC-4/84 of January 19, 1984, Series A No. 4, para. 34, and *Case of Gelman v. Uruguay*. *Merits and reparations.* Judgment of February 24, 2011 Series C No. 221, para. 128.

[288] *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. OC-4/84, para. 32.

256. In this regard, the Court considers that the determination of its nationals continues to be subject to the internal jurisdiction of the States. Nevertheless, this State attribute must be exercised in conformity with the parameters that emanate from binding norms of international law which States, in the exercise of their sovereignty, have undertaken to abide by. Thus, in accordance with the current trend of international human rights law, when regulating the granting of nationality, States must take into account: (a) their obligation to prevent, to avoid and to reduce statelessness, and (b) their obligation to provide each individual with the equal and effective protection of the law without discrimination.[289]

257. Regarding its obligation to prevent, avoid and reduce statelessness, States have the obligation not to adopt practices or laws on the granting of nationality whose application contributes to increasing the number of stateless persons. Statelessness makes it impossible for individuals to enjoy their civil and political rights, and places them in a situation of extreme vulnerability.[290]

C.1.1. Nationality and the obligation to prevent, avoid and reduce statelessness

258. Regarding the moment at which the State's obligation to respect the right to nationality and to prevent statelessness can be required, pursuant to the relevant international law, this is at the time of an individual's birth. Thus, the International Covenant on Civil and Political Rights[291] establishes that children automatically acquire the nationality of the State in whose territory they are born if, to the contrary, they would be stateless. In this regard, the Human Rights Committee indicated, in relation to Article 24 of the Covenant (rights of the child),[292] that "[S]tates are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born."[293] Moreover, Article 7 of the Convention on the Rights of the Child[294] stipulates that:

> 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality […]
> 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

259. Article 20(2) of the American Convention indicates that "every person has the right to the nationality of the State in whose territory he was born if he does not have the right

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289 *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 140.

290 *Case of the Yean and Bosico Girls v. Dominican Republic,* para. 142.

291 In force since March 23, 1976. Ratified by the Dominican Republic on January 4, 1978.

292 Article 24 establishes: 1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality.

293 Genera Comment 17, Article 24 International Covenant on Civil and Political Rights, para. 8. This was also the interpretation followed by the African Committee of Experts on the Rights and Welfare of the Child, Institute for Human Rights and Development in *Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v. Kenya*, of March 22, 2011, para. 42: "a purposive reading and interpretation of the relevant provision strongly suggests that, as much as possible, children should have a nationality beginning from birth." In addition, Article 6(4) of the African Charter on the Rights and Welfare of the Child establishes that: "States Parties to the present Charter shall undertake to ensure that their constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws."

294 In force since September 2, 1990. Ratified by the Dominican Republic on June 11, 1991.

to any other nationality." This principle must be interpreted in light of the obligation to ensure the exercise of the rights to all persons subject to the State's jurisdiction, established in Article 1(1) of the Convention. Hence, a State must be certain that a child born in its territory may truly acquire the nationality of another State immediately after birth,[295] if he does not acquire the nationality of the State in whose territory he was born.

260. Taking the foregoing into account, the Court considers that Article 20(2) of the American Convention should be interpreted in the sense established in Article 7 of the Convention on the Rights of the Child (*supra* para. 258).[296] In the *Case of the Yean and Bosico Girls,* the Court had the occasion to point out that "the condition of being born in the territory of a State is the only one that needs to be proved in order to acquire nationality, in the case of those who would not have the right to another nationality if they did not acquire that of the State where they were born."[297]

261. Moreover, if the State cannot be certain that a child born in its territory can obtain the nationality of another State, for example the nationality of a parent by *ius sanguinis*, that State has the obligation to grant it nationality (*ex lege,* automatically), to avoid a situation of statelessness at birth, pursuant to Article 20(2) of the American Convention. This obligation also applies in the hypothesis that the parents cannot (owing to the existence of *facto* obstacles*)* register their children in the State of their nationality.[298]

C.1.2.Nationality and the principle of equality and non-discrimination

262. The Court has indicated that Article 1(1) of the American Convention, which establishes the obligation of the States to respect and ensure the free and full exercise of the rights and freedoms recognized therein "without any discrimination," is a general norm the content of which extends to all the provisions of this instrument. In other words, whatsoever its origin or form, any treatment that can be considered discriminatory in relation to the exercise of any of the rights ensured in the Convention is *per se* incompatible with it.[299] In addition, Article 24 recognizes the right to equal protection of

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[295] Similarly, see United Nations, Human Rights Committee, General Comment 1, Article 24 of the International Covenant on Civil and Political Rights, para. 8*;* African Committee of Experts on the Rights and Welfare of the Child, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v. Kenya*, of March 22, 2011, para. 51 (the Committee observed that the Government of Kenya had made no efforts to ensure that children of Nubian descent acquired the nationality of another State, in this case Sudan); UNHCR Executive Committee, *Guidelines on Statelessness No. 4* of 21 December 2012, para. 25. The UNHCR Executive Committee only considered it acceptable that States do "not grant nationality to children born in their territory if the child concerned can acquire the nationality of a parent immediately after birth and the State of nationality of the parent does not have discretion to refuse the grant of nationality." It is recommended to "States that do not grant nationality in such circumstances" that they "assist parents in initiating the relevant procedure with the authorities of their State or States of nationality."

[296] Article 1 of the Convention on the Reduction of Statelessness, which the Dominican Republic adhered to on December 5, 1961, stipulates that States must grant their nationality to a person born in their territory who would otherwise be stateless. In addition, it establishes that the nationality must be granted "at birth, by operation of law, or upon an application being lodged with the appropriate authority […] in the manner prescribed by the national law." In any case, based on the foregoing, the Court understands that the State, on ratifying the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child, undertook to observe a regime that obliges States to guarantee, both internally and in cooperation with other States, that a person has a nationality from the moment of his birth.

[297] *Cf. Case of the Yean and Bosico Girls v. Dominican Republic,* para. 156.

[298] UNHCR Executive Committee*, Guidelines on Statelessness No. 4* of 21 December 2012, para. 26. This must also be determined based on whether it can reasonably be expected that a person takes measures to acquire nationality in the circumstances of his or her specific case. For example, the children of refugees, see para. 27.

[299] *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, OC-4/84,* para. 53*; Case of the Afrodescendant Communities of the Cacarica River Basin (Operation Genesis) v. Colombia.*

the law, and is applicable if discrimination relates to unequal protection by domestic law or its application.[300]

263. The Court also reiterates "that international human rights law prohibits not only policies and practices that are deliberately discriminatory, but also those whose impact discriminates against certain categories of persons, even when it is not possible to prove the discriminatory intention."[301] In this regard:

> A violation of the right to equality and non-discrimination occurs also in situations and cases of indirect discrimination reflected in the disproportionate impact of laws, actions, policies or other measures that, even though their wording is or appears to be neutral, or has a general and undifferentiated scope, have negative effects on certain vulnerable groups.[302]

Thus, the Court has also stipulated: "States must abstain from implementing measures that, in any way, are addressed, directly or indirectly, at creating situations of discrimination *de jure* or *de facto,*"[303] and are obliged "to adopt positive measures to reverse or change discriminatory situations that exist in their societies that prejudice a specific group of persons."[304]

264. Regarding the right to nationality, the Court reiterates that the *jus cogens* principle of equal and effective protection of the law and non-discrimination[305] requires States, when regulating the mechanisms for granting nationality, to abstain from establishing discriminatory regulations or regulations that have discriminatory effects on different groups of a population when they exercise their rights.[306] In addition, States must combat

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Preliminary objections, merits, reparations and costs. Judgment of November 20, 2013. Series C No. 270, para. 332, and *Case of Veliz Franco et al. v. Guatemala*, para. 204.

300 *Cf. Case of Apitz Barbera et al. v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 209, and *Case of Veliz Franco et al. v. Guatemala*, para. 214.

301 *Case of Nadege Dorzema et al. v. Dominican Republic,* para. 234, *and* ECHR, *Case of D.H. and Others v. Czech Republic.* No. 57325/00. Judgment of 13 November 2007, paras. 184 and 194.

302 *Case of Nadege Dorzema et al. v. Dominican Republic,* para. 235. On that occasion, the Court referred to the comments of the Committee on Economic, Social and Cultural Rights, in its *General Comment No. 20 (Non-discrimination in economic, social and cultural rights, para. 10(b))*. In this judgment, the Court also recalled that the European Court has considered "that where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be regarded as discriminatory notwithstanding that it is not specifically aimed or directed at that group," in the following decision: ECHR. "*Hoogendijk v. The Netherlands*, No. 58641/00. First section. Decision on admissibility of 6 January 2005, p. 21."

303 *Juridical Status and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 103, *and Case of Veliz Franco et al. v. Guatemala*, para. 206.

304 *Juridical Status and Rights of Undocumented Migrants. OC-18/03*, para. 104, and *Case of Veliz Franco et al. v. Guatemala*, para. 206.

305 *Cf. Juridical Status and Rights of Undocumented Migrants. OC-18/03,* para. 101.

306 *Cf. Case of the Yean and Bosico Girls v. Dominican Republic,* para. 141. See also: *Case of Yatama*. Judgment of June 23, 2005. Series C No. 127, para. 135; *Juridical Status and Rights of Undocumented Migrants. OC-18/03*, para. 88, *and Juridical Status and Human Rights of the Child. Advisory Opinion* OC-17/02 of August 28, 2002. Series A No. 17, para. 44. See also, with regard to the principle of non-discrimination in the granting or denying of nationality, other international systems and instruments: ECHR, *Case of Genovese v. Malta,* No. 53124/09. Judgment of 11 October 2011 (Discrimination between legitimate and illegitimate children in relation to the acquisition of nationality by *jus sanguinis*); European Commission on Human Rights, *Slepcik v. The Netherlands and Czech Republic*, No. 30913/96, Decision of 2 September 1996 (Discrimination based on race or ethnic group); 1997 European Convention on Nationality, article 5; Convention on the Reduction of Statelessness, Article 9; Convention on the Rights of the Child, articles 2(2), 7 and 8; Committee on the Rights of the Child, General Comment No. 6 (Treatment of unaccompanied or separated children), 2005, para. 12, International Convention on the Elimination of All Forms of Racial Discrimination, article 5 (d) (iii); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, article 29; African Commission on Human and Peoples' Rights, 54/91-61/91-96/93-98/93-164/07-196/97-210/98, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricane des droits de l'homme and*

discriminatory practices at all their levels, especially in public entities and, lastly, they must adopt the necessary affirmative measures to ensure that everyone is truly equal before the law.[307] The Court has also established that States have the obligation to guarantee the principle of equality before the law and non-discrimination irrespective of a person's migratory status, and this obligation extends to the sphere of the right to nationality.[308] In this regard, the Court has established, when examining a case with regard to the Dominican Republic, that the migratory status of the parents cannot be transmitted to their children.[309]

C.2. Rights to recognition of juridical personality, to a name, and to identity

265. With regard to the right to juridical personality protected in Article 3 of the American Convention, the Court has stated that juridical personality "implies the ability to be a holder of rights (ability and enjoyment) and of obligations."[310] Consequently, the State must put in place and respect the means and legal conditions to ensure that the right to juridical personality can be exercised freely and fully by those with title to this right.[311] This recognition determines the effective existence of this right before society and the State, which allows the individual to be a holder of other rights and obligations, to exercise them and to be able to function, which constitutes a right inherent in the human person that, pursuant to the American Convention, can never be derogated by the State.[312] The Court has also asserted that "[a] stateless person, *ex definitione*, does not have a recognized juridical personality, because he has not established a juridical and political relationship with any State."[313]

266. Furthermore, the Court has determined that the right to nationality forms part of what has been called the right to identity, defined by this Court as "the series of attributes and characteristics that permit the individualization of the person in society and, thus, encompasses a number of other rights according to the specific subject of rights and the circumstances of the case."[314]

RADDHO, Collectif des Veuves et ayant-droit, et Association mauritanienne des droits de l'homme v. Mauritania, paras. 129 and 131 (denationalization of black Mauritanians).

307 *Cf. Case of the Yean and Bosico Girls v. Dominican Republic*, para. 141.

308 *Cf. Case of the Yean and Bosico Girls v. Dominican Republic,* paras. 155 and 156.

309 *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 156.

310 *Case of Bámaca Velásquez v. Guatemala. Merits*. Judgment of November 25, 2000, Series C No. 70, para. 179, and *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of September 4, 2012 Series C No. 250, para. 119.

311 *Cf. Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. *Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, para. 189, and *Case of Chitay Nech et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of May 25, 2010. Series C No. 212, para. 101.

312 *Cf.* Article 27 (Suspension of Guarantees) of the American Convention, and Case of *Chitay Nech et al. v. Guatemala,* para. 101.

313 *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 178.

314 *Case of Gelman v. Uruguay*, para. 122. The Court has also indicated that "the right to identity is not expressly established in the Convention. However, Article 29(c) of this instrument establishes that '[n]o provision of this Convention shall be interpreted as […] precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.' In this regard, […] an important source of reference regarding Article 29(c) of the American Convention and the *corpus juris* of international human rights law, is the Convention on the Rights of the Child, an international instrument that expressly recognizes the right to identity. Its Article 8(1) indicates that 'States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as acknowledged by law without unlawful interference.' From the regulation of the norm contained in the Convention on Rights of the Child, it can be deduced that identity is a right that encompasses several elements, including nationality, name and family relationships, included in the said article in a descriptive but not restrictive manner. In the same way, the Inter-American Juridical Committee has underlined that the 'right to identity is consubstantial to human

267. In this regard, the General Assembly of the Organization of American States (hereinafter "the OAS General Assembly") has indicated "that recognition of the identity of persons is one of the means through which observance of the rights to juridical personality, a name, a nationality, civil registration, and family relationships is facilitated, among other rights recognized in international instruments, such as the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights."[315] It has also determined that "the failure to recognize identity may signify that the individual has no legal record of his existence, making it difficult for him to exercise fully his civil, political, economic, social and cultural rights."[316] Similarly, the Inter-American Juridical Committee has stated that the "right to identity is consubstantial to human rights and dignity" that that, consequently, "it is a fundamental human right opposable *erga omnes* as an expression of a collective interest of the international community as a whole, which admits neither annulment nor suspension in the cases established in the American Convention."[317]

268. As revealed by the foregoing, the right to a name is also connected to identity. Regarding that right, recognized in Article 18 of the Convention, the Court has determined that it "constitutes a basic and essential element of the identity of each person, without which he cannot be recognized by society or registered by the State. [Thus,] States […] have the obligation not only to protect the right to a name, but also to provide the necessary measures to facilitate the registration of the individual immediately after his birth."[318] The Court has indicated that:

> States must ensure that the individual is registered with the name chosen by that person or by his or her parents, according to the moment of registration, without any type of restriction of the right or interference in the decision to choose the name. Once the individual has been registered, States must guarantee the possibility of preserving and re-establishing the name and surname. The name and surnames are essential to establish formally the relationship that exists between the different members of the family.[319]

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attributes and dignity,' and an autonomous right, possessing 'a core of clearly identifiable elements that include the right to a name, the right to nationality, and the right to family relations.' In fact, 'it is a basic human right enforceable *erga omnes* as an expression of a collective interest of the international community as a whole, that does not admit annulment or suspension in the cases established in the American Convention.' [Opinion adopted by the Inter-American Juridical Committee "on the scope of the right to identity," at the seventy-first regular session, CJI/doc.276/07 rev.1, of August 10, 2007, paras. 11(2), 12 and 18(3)(3), approved at the same session by resolution CJI/RES.137 (LXXI-O/07), of August 10, 2010, second operative paragraph]." *Case of Contreras et al. v. El Salvador. Merits, reparations and costs*. Judgment of August 31, 2011. Series C No.232, para. 112. Nevertheless, taking into consideration the way in which the pertinent arguments were indicated by the representatives (*supra* footnote 280 and *infra* footnote 346), in this case, the Court considers it appropriate to examine the right to identity together with the rights to juridical personality, to a name and to nationality.

315 *Cf.* OAS, "Inter-American Program for a Universal Civil Registry and 'the Right to Identity,'" resolution AG/RES. 2286 (XXXVII-O/07) of June 5, 2007; Resolution AG/RES. 2362 (XXXVIII-O/08) of June 3, 2008, and Resolution AG/RES. 2602 (XL-O/10) of June 8, 2010. On this aspect, the Inter-American Juridical Committee considered that the American Convention on Human Rights, although it does not recognize the right to identity under this specific name, does include, as mentioned, the right to a name, the right to nationality, and the right to protection of the family. In this regard, *cf.* Opinion adopted by the Inter-American Juridical Committee on the scope of the right to identity, on August 10, 2007, paras. 11(2), 12 and 18(3)(3). This was cited in the Court's judgment in the case of *Gelman v. Uruguay* (para. 123).

316 *Cf. Case of Gelman v. Uruguay*, para. 123.

317 *Cf. Case of Contreras et al. v. El Salvador. Merits, reparations and costs*. Judgment of August 31, 2011. Series C No.232, para. 112.

318 *Cf. Case of the Yean and Bosico Girls v. Dominican Republic*, paras. 182 and 183, and Case of *Contreras et al. v. El Salvador*, para. 110.

319 *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 184, and *Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2009. Series C No. 211, para. 192.

C.3. Rights of the child

269. The Court has emphasized that cases in which the victims of human rights violations are children are particularly serious,[320] because children are holders of the rights established in the American Convention, and also require the special measures of protection established in its Article 19, which must be defined according to the particular circumstances of each specific case.[321] The Court has affirmed that any State, social or family decision that entails any constraint to the exercise of any right of a child must take into account the principle of the best interests of the child and be rigorously adapted to the relevant legal provisions.[322] In this regard, the Committee on the Rights of the Child had indicated that the failure to register a child "can impact negatively on a child's sense of personal identity and children may be denied entitlements to basic health, education and social welfare."[323]

C.4. Obligation to adopt domestic legal provisions

270. With regard to the obligation to adopt domestic legal provisions established in Article 2 of the Convention, the Court has indicated that this provision imposes on the States Parties the general obligation to adapt their domestic law to the provisions of the Convention in order to ensure and make effective the exercise of the rights and freedoms recognized therein.[324] The Court has affirmed that this entails the adoption of two types of measures, namely: (a) the enactment of laws and the implementation of practices leading to the effective observance of these guarantees, and (b) the elimination of laws and practices of any kind that result in a violation of the guarantees established in the Convention,[325] because they fail to recognize those rights and freedoms or they prevent their exercise.[326]

271. As the Court has indicated on other occasions, the provisions of domestic law that are adopted to this end must be effective (principle of the practical effects or *effet utile*), which means that States are obliged to adopt and to establish in their domestic laws all the measures required to ensure that the provisions of the Convention are truly complied with and implemented.[327]

C.5. Application to this case

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320 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, paras. 146 and 191, and *Case of Veliz Franco et al. v. Guatemala*, para. 133.

321 *Cf. Case of Fornerón and daughter v. Argentina. Merits, reparations and costs.* Judgment of April 27, 2012. Series C No. 242, para. 44, and *Case of the Pacheco Tineo Family v. Bolivia*, para. 217.

322 *Cf. Juridical Status and Human Rights of the Child. OC-17/02,* para. 65*, and Case of the Pacheco Tineo Family v. Bolivia*, para. 218.

323 United Nations, Committee on the Rights of the Child, General Comment No. 7 (2005) "Implementing child rights in early childhood," CRC/C/GC/7/Rev.1, 20 September 2006, para. 25.

324 *Cf. Case of Albán Cornejo et al.. v. Ecuador. Merits reparations and costs.* Judgment of November 22, 2007. Series C No. 171, para. 118, *and Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile,* para. 175.

325 *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs*. Judgment of May 30, 1999. Series C No. 52, para. 207, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile,* para. 175.

326 *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, para. 113.

327 *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.)*. Judgment of February 5, 2001. Series C No. 73, para. 87; and *Case of Osorio Rivera and family members v. Peru,* footnote 332.

C.5.1. Regarding those whose identity documents were disregarded by the authorities at the time of their expulsion

272. In the case of the persons who, according to the representatives and the Commission, possessed documentation that proved their Dominican nationality at the time of their expulsion (*supra* paras. 230 and 237), it should be recalled that, as established in when determining the status as presumed victims of certain persons, the Court will not consider, for the effects of this Judgment, the questions raised by the State with regard to the identity of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina and Carolina Isabel Medina (*supra* paras. 78 and 91).

273. According to the facts of the case (*supra* para. 201), the personal documents of Willian Medina Ferreras were destroyed by Dominican officials during his expulsion, and Awilda Medina, Luis Ney Medina and Carolina Isabel Medina were not given the opportunity to show their documents to the officials, because they were expelled without proper examination of their documents and their nationality. Meanwhile, Rafaelito Pérez Charles was detained and expelled by several agents who did not allow him to show his identity documents, even though Mr. Pérez Charles informed them that these were at his home (*supra* para. 221).

274. The actions of the State agents signified failure to acknowledge the identity of the victims by not allowing them to identify themselves or not considering the documents they presented. This situation affected other rights, such as the right to a name, to recognition of juridical personality, and to nationality that, taken as a whole, impaired the right to identity. In addition, the Court considered that, in this case the State, by ignoring the documentation of Awilda Medina, Luis Ney Medina and Carolina Isabel Medina, who were children at the time of the events, did not take the best interests of the child into consideration.

275. In addition, considering the context in which the facts of the case occurred, the Court found that, in violation of the obligation not to discriminate, the said violations were the result of derogatory treatment based on the personal characteristics of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina and Rafaelito Pérez Charles that, in the opinion of the authorities who intervened, denoted their Haitian origin.

276. Based on the above, the Court considers that the disregard of the documentation of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina and Rafaelito Pérez Charles by State agents at the time of their expulsion constituted a violation of their rights to recognition of juridical personality, to a name, and to nationality, as well as, owing to all these violations taken as a whole, to the right to identity. This entailed the violation of Articles 3, 18 and 20 of the American Convention, respectively, in relation to non-compliance with the obligation to respect rights without discrimination, established in Article 1(1) of this instrument and, in addition, in relation to the rights of the child recognized in Article 19 of the Convention, to the detriment of Awilda Medina, Luis Ney Medina and Carolina Isabel Medina (deceased).

C.5.2. Regarding those born in Dominican territory who were not registered and did not have documentation

277. It should be explained that, as revealed by the foregoing, the Commission, contrary to the representatives, affirmed that Victoria, Natalie and Miguel, all surnamed Jean, who were children at the time of the facts, were Dominican nationals and possessed the pertinent documentation to prove this (*supra* paras. 230 and 238). However, the facts of the case and the State's assertions (*supra* para. 222 and footnote 282) reveal that,

although the State acknowledged that these persons were born in Dominican territory, they did not have documentation that proved their Dominican nationality. To the contrary, the State affirmed that they have the right to Haitian nationality so that, it understood that they would not become stateless if they were not granted Dominican nationality (*supra* para. 247). With regard to Victor Jean, the facts of the case (*supra* para. 222) reveal that he was born in the Dominican Republic,[328] despite which he did not have documentation to prove his nationality of that country. The Court notes that, even though some of the said individuals were born before the acceptance of the Court's temporal competence, the lack of documentation continued following the acceptance of the Court's jurisdiction and therefore the Court is competent to examine that circumstance.

278. Regarding the above-mentioned individuals, the fact that must be examined is an omission, as of March 25, 1999, consisting in the said lack of documentation to prove their identity and nationality. In response, the State has argued that this does not constitute a violation of the American Convention because, for legal reasons, these individuals are not entitled to that documentation. Thus, the Court must now examine the State's arguments in order to determine whether the State is responsible for this omission.

279. The Court notes that the State has argued that, based on its domestic laws, the presumed victims were not entitled to Dominican nationality by the application of *ius soli*, and that the State has no obligation to grant it to them because, in its opinion, they would not be made stateless (*supra* paras. 247, 248 and 277, and *infra* para. 293). In view of the State's assertion that, in this case, the presumed victims, for legal reasons, were not Dominican, the Court finds that it is not necessary to verify factual aspects relating to the alleged obstacles to obtain documents, or the alleged "refusal" of the authorities to grant these.

280. Regarding the alleged legal aspects, the Court finds it relevant to begin by recalling that the regulation of nationality in the Constitutions in force at the time of the birth of the said presumed victims, which were the 1955 and the 1994 Constitutions, was governed by the principle of *ius soli,*[329] with two exceptions. Thus, articles 12(2) and 11(1),

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[328] According to the criteria for the assessment of the evidence (*supra* paras. 193 to 198), based on the evidence available, the Court understands that Victor Jean was born in Dominican territory in 1958.

[329] In this regard, it should be pointed out that the Court has observed that the laws of most States Parties to the American Convention are based on a system that combines the principle of the acquisition of nationality by *ius soli* with elements of *ius sanguinis.* It is interesting to note that Chile has a regulation similar to that of the 1955, 1966 and 1994 Dominican Constitutions; article 10 of the 1980 Constitution of the Republic of Chile stipulates: "The following are Chileans: 1. Those born in the territory of Chile, with the exception of the children of aliens who are in Chile in the service of their own Government, and of the children of transient aliens, all of whom may, however, opt for Chilean nationality." In this regard, it should be emphasized that the Supreme Court of Chile has affirmed that the concept of "children of transient aliens" should be understood in its "natural and obvious" sense, referring to the *Diccionario de la Real Academia,* which defines a "transient" as "a person who travels or passes through a place, who is passing through, who is only residing temporarily in a place." According to the Supreme Court of Chile, "in Chile it is possible to distinguish between persons domiciled and transients, because domicile is residence accompanied by the real or presumptive intention of remaining there." On this basis, the Supreme Court of Chile has considered that foreign citizens in an irregular migratory situation who have remained in the country with the intention of remaining there cannot be classified as mere "transient aliens," so that the exception to the acquisition of Chilean nationality based on the principle of *ius soli* established in article 10(1) of the Constitution could not be applied to their children born in Chilean territory. See, for example: judgment of December 28, 2009, of the Supreme Court of Chile, Case file 6073/2009. This case law has been reiterated: judgment of January 22, 2013, of the Supreme Court of Chile, Case file 7580/2012. In addition, it should be noted that article 96.1(a) of the 1991 Colombian Constitution indicates that: "[t]he following are Colombian nationals […b]y birth: the people of Colombia who meet one of two conditions: that the father or mother is a Colombian national or indigenous person, or that, in the case of children of aliens, one of their parents was domiciled in the Republic at the time of the birth." The Colombian courts have interpreted "domicile" as legal residence or domicile. The Council of State has indicated that "domicile, as a legal concept, supposes the legal entry into country." The Constitutional Court of Colombia has understood that aliens for whom "it has not been found that a visa has been issued" by Colombia, and who "do not appear in any records as aliens

respectively, of these Constitutions established in very similar wording that the following were Dominicans: "[e]veryone born in the territory of the Republic, with the exception of the legitimate children of aliens resident in the country as part of a diplomatic mission or of persons in transit" (1955 Constitution), and that "Dominicans are: 1. [e]veryone born in the territory of the Republic, with the exception of the legitimate children of aliens resident in the country as part of a diplomatic mission or of persons in transit" (1994 Constitution).[330]

281. With regard to the interpretation of the constitutional exception relating to the children of "aliens in transit," the Court underscores that it has already noted that a judgment of the Civil Chamber of the Court of Appeal of the National District of October 16, 2003, established that "the illegal status of the alien cannot be compared to the concept of 'in transit,' because they are different notions."[331]

282. Meanwhile, article 36(10) of General Migration Law No. 285-04, published on August 27, 2004 (*supra* para. 177), states: "[n]on-residents are considered persons in transit for the purposes of the application of article 11 of the Constitution."

283. The Supreme Court of Justice, "acting as Constitutional Court," in a judgment of December 14, 2005, established that:

> When article 11(1) of the [1994] Constitution excludes the legitimate children of foreign diplomats resident in the country and aliens who are in transit from acquiring Dominican nationality by *ius soli*, this means that these persons, those in transmit, have in some way been authorized to enter the country and remain there for a certain time; that if by mandate of the Constitution, in these circumstances which are evidently legitimate, an alien gives birth in national territory, her child is not born a Dominican, all the more so, the child of a foreign mother who, at the moment of giving birth is in an irregular situation and, therefore, cannot justify her entry into and permanence in the Dominican Republic cannot be a Dominican.[332]

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resident in national territory [and for whom] no entries into and departures from the country are recorded by the authorized immigration control posts" "have never been domiciled in national territory" (Council of State of Colombia, File No. 1653, of June 30, 2005; Constitutional Court of Colombia, Judgment T-1060/10, of December 16, 2010).

330 Both texts are also similar to the wording of the 1966 Constitution, article 11(1) of which indicates that: "[t]he following are Dominican: 1. [a]ll those born in the territory of the Republic, with the exception of the legitimate children of aliens who are diplomats resident in the country or those who are in the country in transit." Also, article 10(c) of Immigration Law No. 95 of April 14, 1939, in force at the time of the facts, established that: "Those born in the Dominican Republic are considered nationals of the Dominican Republic, whether or not they are nationals of other countries." In addition, the State provided as evidence the Civil Code of August 2007, article 9 of which establishes that: "[t]he following are Dominicans: First – all those who were born or will be born in the territory of the Republic, whatever the nationality of their parents. For the effects of this provision, the legitimate children of the aliens who reside in it while representing or in the service of their own country shall not be considered as born in the territory of the Republic."

331 *Cf. Case of the Yean and Bosico Girls v. Dominican Republic,* para. 154. The citation corresponds to judgment No. 453 of the Civil Chamber of the Court of Appeal of the National District of October 16, 2003.

332 Supreme Court of Justice, acting as Constitutional Court, Judgment of December 14, 2005. Expert witness Gómez Pérez, when testifying during the public hearing, confirmed that "in 2005, […] the Supreme Court of Justice […] acting as Constitutional Court, interpreted that the concept of 'transit,' established in the Constitution refers to the attribution of Dominican nationality to those persons, children of aliens, whose situation in the Dominican Republic is regular […] and that, to the contrary, […] the children of aliens in transit in the Dominican Republic, do not qualify for Dominican nationality" (expert opinion provided by Cecilio Gómez Pérez before the Court during the public hearing). Meanwhile, expert witness Rodríguez Gómez indicated that "[t]he main effect of the judgment [of December 14, 2005,] of the Supreme Court of Justice is that, based on it, the Central Electoral Board began to apply administratively a policy of denationalization of an indeterminate number of Dominicans based on the position that they could not prove that, at the time of their birth, the situation of their parents was legal." He linked this to the issue and application of Circular 017 of the President of the Central Electoral Board (*supra* para. 177) (*cf.* Expert opinion of Cristóbal Rodríguez Gómez provided by affidavit).

284. On January 26, 2010, a constitutional amendment was published (*supra* para. 178) establishing that: "[t]he following are Dominicans: those born in national territory, with the exception of the children of aliens […] who are in transit or reside illegally in Dominican territory. A person in transit is considered to be any alien defined as such by Dominican laws." Later, article 68 of Migration Regulations No. 631-11 of 2011 (*supra* footnote 163) established that "for the purposes of application of the [Migration] Law and these regulations, non-resident aliens and aliens who enter or have entered and who live or have lived in Dominican territory without a legal immigration status under the immigration laws are considered persons in transit."

285. Also, the Constitutional Court in judgment TC/0168/13 of September 23, 2013, (*supra* paras. 13 and 179), reiterated the opinion of the Supreme Court in the said 2005 judgment with regard to the concept of "aliens in transit" and stated that:

> Aliens who remain in the country without a legal resident permit or those who have entered the country illegally, are in an irregular migratory situation and, therefore, are violating domestic law […]. Thus, such persons may not claim that their children born in the country have the right to obtain Dominican nationality under the said article 11(1) of the 1966 Constitution, because it is juridically inadmissible to found the inception of a right on a *de facto* illegal situation.[333]

286. In addition, in the same 2013 judgment, the Constitutional Court stipulated that:

> *The* ***aliens in transit*** who appear in all the Dominican Constitutions as of […] 1929 […] correspond to all the four groups that later were globally designated ***non-immigrant foreign workers*** in […] article 3 of Immigration Law [No.] 95 of 1939[334] and in the said second Section of Immigration Regulations […] [No.] 279 of the same year[335]. Thus, ***aliens in transit*** should not be confused with ***transient aliens*** […] who […] are only the second of the said four groups of persons who compose the category of the said ***non-immigrant foreign workers*** […]; in other words, of *the aliens in transit.* […]
>
> Children born in the country of parents who form part of these four groups of persons are excluded, as an exception, from the […] acquisition of Dominican nationality by application of the principle of *ius soli*. […] ***Aliens in transit*** who change their migratory situation and obtain a legal residence permit in the country then become part of the category of ***foreign immigrants,*** […] so that their children born in national territory do acquire Dominican nationality under the principle of *ius soli* (bold and italics in the original text).

287. The Constitutional Court also referred to paragraph 157 of the judgment of the Inter-American Court in the *Case of the Yean and Bosico Girls v. Dominican Republic*, which indicated the following:

> In addition to the foregoing, the [Inter-American] Court finds it desirable to refer to Section V of the Dominican Republic's Immigration Regulations No. 279 of May 12, 1939, […] which clearly establishes that the purpose of the transient is merely to pass through the territory and, to this end, sets a time frame of no more than 10 days.[336]

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333 Constitutional Court, Judgment TC/0168/13 of September 23, 2013, pp. 65 and 66.

334 Article 3 of Immigration Law No. 95 establishes: "Aliens who wish to be admitted into Dominican territory shall be considered immigrants or non-immigrants. Aliens who wish to be admitted shall be considered immigrants, unless they fall within one of the following categories of non-immigrants: 1. Visitors for purposes of business, study, recreation or sightseeing; 2. Persons who travel across the territory of the Republic on their way to another country; 3. Persons who are employed in ships or aircraft; 4. Temporary unskilled workers and their families.

335 Immigration Regulations No. 279, stipulates that: "(a) The following categories of aliens who try to be admitted to the [Dominican] Republic, are non-immigrants: 1. Visitors for purposes of business, study, recreation or sightseeing; 2. Persons who travel across the territory of the Republic on their way to another country; 3. Persons who are employed in ships or aircraft; 4. Temporary unskilled workers and their families. (b) All other aliens shall be considered immigrants, except those persons who occupy a diplomatic or consular post, as determined by article 16 of the Immigration Law."

336 Section V of Immigration Regulations No. 279 of May 12, 1939, establishes that: "(a) Aliens who try to enter the [Dominican] Republic for the main purpose of passing through the country to another country shall be

288. In this regard, the Constitutional Court stated that:

> [In the] paragraph transcribed, the [Inter-American] Court causes confusion by considering the time frame of 10 days granted to the ***transient alien*** as if it also corresponded to the ***alien in transit***, which is a flagrant error of interpretation, given the distinction that exists between the two categories of aliens, as explained previously (bold and italics in the original text)[337]

289. The foregoing reveals, first, that the Constitutions of 1955 and 1994, as well as that of 1966, did not state literally that those born in Dominican territory who were the children of aliens in an irregular situation could not acquire Dominican nationality based on this circumstance; nor that, in relation to the acquisition of Dominican nationality, there was a parallel between migratory irregularity and the concept of a person who "is in transit in [Dominican territory]." In addition, judicial interpretations existed prior to the enactment of the Migration Law of August 27, 2004, stating that the concept of "transit" was not the same as the "illegal status of the alien" (*supra* para. 281).

290. Second, the foregoing also reveals that, in 2005 and 2013 – in other words, following the birth of the presumed victims and, in general, the facts of this case – the Supreme Court of Justice and the Constitutional Court, respectively, interpreted article 11(1) of the Constitutions of 1994 and 1966, as well as the similar provision included in "all the Dominican Constitutions as of […] 1929" (*supra* paras. 283 and 285 to 288). According to these judicial interpretations, individuals whose parents are aliens residing irregularly in Dominican territory cannot acquire Dominican nationality. Thus, in the words of the Constitutional Court cited above, "these persons may not claim that their children born in the country have a right to obtain Dominican nationality under article 11(1) of the 1966 Constitution cited above" (*supra* para. 285), the wording of which is almost identical to that of the Constitutions of 1955 and 1994 (*supra* para. 280 and footnote 330). And this is, even though, as previously mentioned, the constitutional texts do not include an explicit statement in the sense indicated.[338]

291. Third, it should be underscored that the express inclusion in the Dominican constitutional provisions of the "illegal residence" of the parents of persons born in Dominican territory as grounds for denying them Dominican nationality was included only in 2010. Thus, article 18(3) of the Constitution, resulting from the constitutional amendment published on January 26, 2010, indicates that the persons born on national territory who are "children […] of aliens who are in transit or reside illegally in Dominican territory" shall not be Dominicans.[339]

292. Regarding the above, it should be pointed out that the Dominican Republic's assertion that the inclusion of requirements for the acquisition of nationality by birth in the State's territory is not discriminatory *per se* is true (*supra* para. 247). Nevertheless, as

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granted privileges of transients. These privileges shall be granted even though the alien is inadmissible as an immigrant, if his entry is not contrary to public health and order. The alien shall be required to declare his destination, the means he has chosen for his transport, and the date and place of his departure from the Republic. A 10-day period shall normally be considered sufficient to be able to pass through the Republic. (b) An alien admitted for the purpose of continuing his journey across the country shall be granted a Landing Permit valid for 10 days […]."

337 Constitutional Court, judgment TC/0168/13 of September 23, 2013, p. 70.

338 The 2004 Migration Law had established that "[n]on-residents are considered to be persons in transit for the purposes of the application of article 11 of the Constitution."

339 Even though this was a new exception, the State alleged before the Court that the purpose of the said "addition" "was to explain the legal consequences established following the 1934 constitutional reform in relation to persons born in national territory whose parents were in transit in the country. Therefore, [it considered that] this rule was applicable from 1934 to date."

the State has indicated, the State's "authority" concerning the regulation of nationality is limited by respect for human rights; in particular, by the obligation to avoid the risk of statelessness (*supra* para. 245). Expert witness Harrington made a similar observation.[340]

293. However, the State alleged that, in its opinion, the presumed victims referred to above (*supra* para. 277) "were not born Dominicans based on the application of the principle of *ius soli* […], because neither they nor their parents have proved that […] their migratory status was regular at the time of their birth." In addition, the State indicated that these persons would not be stateless, because Haiti recognized *ius sanguinis* and asserted that the establishment of requirements for acquiring nationality is not discriminatory and that there was no evidence of "institutional discrimination" against "Haitians who seek to obtain Dominican nationality" (*supra* para. 247).[341] The State's argument is consistent with the affirmation of the Supreme Court of Justice and the Constitutional Court in 2005 and 2013, respectively, understanding that, despite the absence of an explicit reference in the constitutional texts prior to the constitutional amendment published on January 26, 2010, based on the domestic constitutional and juridical regime in force prior to that year, those whose parents were aliens in an irregular situation do not have a right to acquire Dominican nationality.

294. In this regard, the Court finds it desirable to indicate that, irrespective of the legal terms of State laws and regulations, or their interpretation by the competent State organs, as indicated by this Court in the *Case of the Yean and Bosico Girls v. Dominican Republic*, basic standards of reasonableness must be followed in matters relating to the rights and obligations established in the American Convention. Thus, as the Inter-American Court indicated in that case, "to consider a person as a transient or in transit, irrespective of the classification used, the State must respect a reasonable time frame, and be coherent with the fact that an alien who develops ties in a State cannot be compared to a transient or to a person in transit."[342]

295. Moreover, the Court notes that, prior to the entry into force of the 2010 constitutional amendment or, at least before the enactment of the 2004 Migration Law, there was no consistent State practice or uniform judicial interpretation that denied nationality to the children of aliens in an irregular situation. Thus, it is illustrative to note the previously cited domestic judicial decision of October 16, 2003, that "the illegal status of the alien cannot be compared to the concept of 'in transit,'" (*supra* para. 281). Expert witness Rodríguez Gómez, in his expert opinion provided by affidavit on October 1, 2013, stated that, until the enactment of the Migration Law, "national case law […] was consistent and categorical on this issue" in the sense of the said judicial decision. Furthermore, the "*Consideranda"* of Law No. 169-14 (*supra* para. 180 and *infra* paras. 320 to 324) are also illustrative when noting, based on findings of the Constitutional Court in

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340 The expert witness added that, in addition to the deprivation of nationality on discriminatory grounds, and in case statelessness was caused, the deprivation of nationality without due process of law was also arbitrary. She indicated that the "deprivation of nationality" which is prohibited under international law, when it is arbitrary, "covers [both] situations in which persons who have previously been recognized as citizens of a State are subsequently deprived of the recognition of that nationality, [and] cases of persons who have a right to the nationality of a specific State based on a first reading of the domestic laws, but who cannot obtain recognition of that nationality as a result of local practices and customs or other aspects of the recognition process" (expert opinion of Julia Harrington provided by affidavit on October 1, 2013; file of preliminary objections, merits and reparations, fs. 1778 to 1733).

341 Regarding the State's argument, it should be noted that there is no dispute between the parties that the presumed victims mentioned here are of Haitian descent, and this has not been contested by the Commission either. In particular, it should be stressed that the State has indicated that they are all "of Haitian origin" (*supra* para. 247).

342 *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 157.

judgment TC/0168/13 that, from 1929 on, documentation had been granted that "presumed" the Dominican nationality of persons who, according to the legal interpretations made in that judgment, were not Dominicans. Thus, these "*Consideranda"* indicated that, in the said judicial ruling "the Constitutional Court referred […] to what it called 'the unanticipated legal issues of the Dominican immigration policy and the institutional and bureaucratic shortcomings of the Civil Registry,' indicating that these unanticipated issues 'go back to the time immediately after the proclamation of the Constitution of […] June 20, 1929,' which resulted in a number of persons born in Dominican territory receiving from the Dominican State documentation suggesting that they were Dominican nationals, as a result of which they had specific certainties and expectations in their life as citizens based on that condition." In addition, Cristóbal Rodríguez Gómez, in his expert opinion, stated that "the Central Electoral Board began, more than six years ago, to revoke the nationality of […] [persons] who had been born 15, 20, 30 and 40 years before the new General Migration Law 285-04 was enacted." The statement of the expert witness reveals that, prior to 2004, Dominican nationality had been granted to persons who, eventually and only as a result of legal criteria that was explicitly indicated subsequently, did not comply with the requirements to possess it.

296. In addition, as the State itself has admitted (*supra* para. 245), it is not possible to establish regulations that result in the risk of persons born in their territory being stateless. In this regard, the Court has indicated that "the condition of being born in the territory of a State is the only one that needs to be proved in order to acquire nationality, in the case of those who would not have the right to another nationality if they did not acquire that of the State where they were born."[343] Accordingly, it is relevant to examine the State's argument that the presumed victims would be able to acquire Haitian nationality because Haiti allegedly applies the system of *ius sanguinis* to grant nationality (*supra* para. 247).

297. On this point, the Court notes that the State's argument that is relevant to this case consisting in the mere assertion that, in Haiti, nationality is regulated by *ius sanguinis* is insufficient. This is because the State has not proved that the presumed victims who never obtained Dominican nationality are, in fact, able to obtain Haitian nationality.[344]

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[343] *Cf. Case of the Yean and Bosico Girls v. Dominican Republic*, para. 156.c.

[344] The State presented as evidence the expert opinion of Cecilio Gómez Pérez who indicated, referring to the 1987 Haitian Constitution, that "every child of a Haitian mother or father, regardless of his or her place of birth, is born a Haitian, is Haitian, and possesses by descent, by *ius sanguinis*, Haitian nationality; therefore, the fact of not benefiting from nationality by *ius soli*, owing to the Dominican constitutional exception, could never [result in the child] being stateless […]." Even though the expert opinion of Mr. Gómez Pérez related to Dominican law and not to Haitian law, the Court took note of his assertion insofar as it relates to the evaluation of the Dominican nationality regime, in aspects that may have an impact on the situation of the presumed victims. Despite this, the Court notes that when the expert witness was questioned in person by the representatives about whether he knew the "1984 Haitian Law on Nationality which establishes two restrictions in its articles 7 and 8," the State indicated that "[the law mentioned by the representative of the presumed victims does not form part of the purpose for which the expert witness was summoned." After the President of the Court had consulted the expert witness as to whether he could "respond to the clarification" requested by the representatives, Mr. Gómez Pérez made observations in which he failed to indicate whether he was aware of the said Haitian law. Consequently, the Court considers that the assertions of the expert witness concerning the supposed impossibility of statelessness were insufficient. Meanwhile, expert witness Julia Harrington, in considerations based, according to her, on "guidelines" of the United Nations High Commissioner for Refugees adopted, according to the expert witness, in relation to the "1954 Convention […] relating to the Status of Stateless Persons", indicated that "a *theoretical* nationality available in another State does not constitute citizenship of that State. Although it may be considered that a person possesses or can obtain another nationality owing to his ethnic or national background, it cannot be presumed that he has that nationality unless he possesses proof or recognition of this; in particular, the possibility of claiming another nationality does not, of itself, constitute nationality" (italics in the original text). The Court understands that the observations of the expert witness are appropriate also for the examination of the State obligations under Articles 1(1) and 20 of the American Convention. The expert witness referred to "guidelines," citing a document that she indicated was entitled "UNHCR, *Guidelines on Statelessness No. 1: The definition of 'Stateless Person' in Article I (1) of the 1954 Convention relating to the Status of Stateless Persons,*

Hence, to reveal the insufficiency of the State's arguments, it is enough to weigh them against certain well-known public information, such as that, at the date of birth of the presumed victims who were children on March 25, 1999, the 1987 Haitian Constitution was in force. In its article 11, this Constitution established that any individual born of a Haitian father or mother who had been born Haitian and had never renounced that nationality could acquire nationality by birth. However, articles 7 and 8 of the Decree-Law on nationality of November 6, 1984, established that children born abroad of a Haitian mother and a foreign father, as in the case of these presumed victims, could not acquire Haitian nationality until they came of age, at which time, they could choose between the foreign nationality and the Haitian nationality, provided that they were going to settle, or were already settled in Haiti. Regarding Victor Jean, the Haitian Constitution in force at the time of his birth, in 1958, was the 1957 Constitution, which, in its article 4(a) established that any child of a Haitian father may acquire nationality by birth.[345] In this regard, it should be clarified that this does not mean that the Court, in the context of this case, is examining the laws of Haiti; it is merely demonstrating, based on certain public information, that the State's argument that the presumed victims could acquire Haitian nationality would have required greater substantiation to support it. Thus, the information presented by the State in this regard does not allow the Court to be certain whether the State has taken measures to verify that the presumed victims in question could really obtain Haitian nationality.

298. The foregoing reveals that the presumed victims never obtained documentation proving their nationality. In this regard, the State's assertion that the presumed victims are not Dominicans relates to the interpretation of constitutional provisions in force prior to January 26, 2010, based on judicial decisions issued in 2005 and 2013 (*supra* paras. 283 to 288), following the birth of the individuals in question and, in general, the facts of this case. Thus, the said understanding of the applicable legal regime would mean, in practical terms, a retroactive application of norms, affecting legal certainty concerning the enjoyment of the right to nationality. In addition, in the circumstances of the case, this would entail the risk of statelessness for the presumed victims, because the State has not proved sufficiently that these persons would obtain another nationality. Consequently, the State has not proved sufficiently that there are valid legal arguments to justify that the State's omission to provide documentation to the said persons did not result in the deprivation of their access to nationality. Hence, the State's denial of the right of the presumed victims to Dominican nationality resulted in an arbitrary violation of that right.

299. Thus, it must be established that, as indicated previously, that the denial of nationality to the presumed victims gave rise also to a violation of the right to recognition of juridical personality and, similarly, the failure to obtain personal identification documentations led to a violation of the right to a name. Moreover, the close relationship between these three rights that were violated and the right to identity that, in

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UN Doc. HCR/GS/12/01, 20 February 2012". In addition, referring in general to "international law" and not to a specific international norm, the expert witness indicated that "[l]aws that make a distinction between groups of persons based on an unalterable characteristic, particularly when that characteristic is related to ethnic or national origin, cannot be tolerated in international law. The provisions that restrict access to nationality merely on the basis of the migratory situation of a person or their parents, [… i]n addition to constituting discrimination […] risk leaving children without access to any nationality, making them stateless" (opinion of Julia Harrington provided by affidavit).

345 Despite the general indication, with which the parties agree, that the presumed victims are of Haitian descent, the information with regard to Victor Jean's filiation has not been authenticated, so that it has not been proved whether his parents were both Haitians, or whether only his mother or only his father were. This gives rise to uncertainty about whether Victor Jean's situation is adapted to the hypothesis established in the said Haitian constitutional text.

consequence, was also violated, has already been pointed out (*supra* paras. 265 to 268).[346]

300. The Court also considers that, in this case, the State's actions did not take into consideration the best interests of the child by failing to grant documentation to Miguel Jean, Victoria Jean and Natalie Jean, who were children at the time of the facts and after March 25, 1999.

301. Based on the above, the Court considers that the State violated the rights to recognition of juridical personality, to a name, and to nationality recognized in Articles 3, 18 and 20 of the American Convention, as well as – owing to this series of violations – the right to identity, in relation to non-compliance with the obligations established in Article 1(1) of the Convention, to the detriment of Victor Jean, Miguel Jean, Victoria Jean and Natalie Jean, and also in relation to the rights of the child recognized in Article 19 of this instrument, to the detriment of the last three of these persons.

C.5.3. Regarding the alleged violation of Article 2 of the American Convention, in relation to its Articles 1(1), 3, 18, 20 and 24

302. The representatives also alleged the violation of Article 2 of the American Convention in relation to the right to nationality, based on different norms and decisions of the Dominican authorities issued following the expulsions (*supra* para. 241): General Migration Law No. 285-04 enacted in 2004; Resolution 02-07 of the Central Electoral Board; "Circular No. 017 […], of March 29, 2007, of the Administrative Chamber of the Central Electoral Board; Resolution No. 12-07 of December 10, 2007, of the plenary session of the Central Electoral Board," and judgment TC/0168/13. Meanwhile, the State presented as a supervening fact Law No. 169-14 of May 23, 2014 (*supra* para. 13), which is regulated by Decree No. 250-14 (*supra* para. 146).

303. Before examining the alleged violation of Article 2 of the Convention, the Court deems it pertinent to indicate that, in this Judgment, it has already analyzed the close relationship between the rights to nationality and to recognition of juridical personality, insofar as the former constitutes a prerequisite to exercise certain rights, and the latter, "involves the ability to be a holder of rights (ability and enjoyment) and of obligations," as well as its connection to the right to a name, which constitutes "a basic and essential element of a person's identity" (*supra* paras. 265 to 268), and concluded that the State was responsible for the violation of the said rights and, owing to this series of violations, of the right to identity (*supra* paras. 276 and 301).

304. However, the representatives only alleged non-compliance with Article 2 of the Convention in relation to the right to nationality. Neither the Inter-American Commission in its brief submitting the case or the Merits report, nor the representatives in their motions and arguments brief included arguments with regard to this non-compliance in

[346] Regarding the arguments of the Commission and the representatives in relation to the alleged discriminatory "impact" or "application" of "the law" or its "interpretation or application" (*supra* paras. 233 and 238), this Court refers to its analysis below (*infra* paras. 314 to 317 and 323). In addition, as already mentioned (*supra* footnote 280), the representatives indicated a connection between the right to identity and "the right to a family," without presenting specific arguments in this regard. This failure to present specific arguments on the "right to a family" prevents the Court from examining the supposed violation of that right. This is without prejudice to the analysis of Article 17 of the Convention that, based on other grounds, will be made in Chapter X.

relation to the rights to recognition of juridical personality and to a name.[347] However, this does not prevent the Court from analyzing whether this non-compliance with the obligation to adopt domestic legal provisions in relation to the said rights existed. It is relevant to examine this in the case *sub-judice* because the Court has declared the violation of those rights as a result of the State authorities disregarding personal documents or the impossibility of obtaining them in the case of some of the presumed victims (*supra* paras. 276 and 301). The Court will also make this analysis with regard to the right to equality before the law, the violation of which was alleged by the Commission and the representatives (*supra* paras. 236 and 244).

305. On this point, the Court reiterates that the *iura novit curia* principle, which is strongly supported by international jurisprudence, allows it to examine the possible violation of provisions of the Convention that have not been alleged in the briefs presented by the parties, provided that the latter have been able to state their respective positions in relation to the facts that support them.[348] In this regard, the Court has used this principle on several occasions since its first judgment,[349] in order to declare the violation of rights that had not been directly alleged by the parties, but that were revealed by the analysis of the facts in dispute, because this principle authorizes the Court to classify the legal situation or statement in conflict differently from that the way in which the parties classified it, provided that it respects the factual framework of the case.[350]

306. Accordingly, the Court, in application of the *iura novit curia* principle and based on the facts of the case, notes that the possible failure to comply with Article 2, owing to the indicated norms and decisions (*supra* para. 302), could also have implications on the said

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[347] Despite this, it should be noted that, during the public hearing, in answer to questions posed by Judges Ventura Robles and Ferrer Mac-Gregor Poisot on Article 2 of the Convention, the representatives stated that the alleged violation "is related to the violation of the right to nationality and the rights to juridical personality, of the family, and to privacy and family life, because [they] considered that the violation arose from the undue application of article 11 of the Dominican Constitution, and as [they had] explained, the State had sought to equate the term 'in transit' with migratory irregularity; hence, [their] allegation concerning Article 2." Subsequently, in their final written arguments they included a section entitled "violation of the right to juridical personality, to a name, to nationality and to equal protection of the law […] together with non-compliance with the obligations contained in Articles 1(1), 2 and 19 of this instrument," and mentioned that they had "explained why Article 2 had been violated" in answer to the question of the said judges during the public hearing. However, in the conclusion of the section they made no mention of Article 2, and did not refer to it in their final arguments. In this regard, the Court notes the lack of consistency and clarity in the arguments of the representatives with regard to the said alleged violation. Consequently, it is not possible to examine those arguments. As will be explained (*infra* para. 306), the Court examined the connection of the alleged violation of Article 2 of the convention to rights other than the right to nationality based on the *iura novit curia* principle.

[348] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits,* para. 163*, and Case of Furlan and family members v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 31, 2012. Series C No. 246, para. 55.

[349] For example, in the following cases, *inter alia*, the Court declared the violation of rights that were not cited by the parties in application of the *iura novit curia* principle: (i) in the case of *Velásquez Rodríguez v. Honduras* it declared the violation of Article 1(1) of the Convention; (ii) in the case of *Usón Ramírez v. Venezuela* it declared the violation of Article 9 of the American Convention; (iii) in the case of *Bayarri v. Argentina* it declared the violation of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture; (iv) in the case of *Heliodoro Portugal v. Panama* it declared the violation of Article I of the Convention on Forced Disappearance of Persons, in relation to Article II of that instrument; (v) in the case of *Kimel v. Argentina* it declared the violation of Article 9 of the American Convention; (vi) in the case of *Bueno Alves* it declared the violation of Article 5(1) of the American Convention to the detriment of the next of kin of Mr. Bueno Alves; (vii) in the case of the *Ituango Massacres v. Colombia* it declared the violation of Article 11(2) of the Convention; (viii) in the case of the *Sawhoyamaxa Indigenous Community v. Paraguay* it declared the violation of Article 3 of the American Convention; (ix) in the case of *Vélez Loor v. Panama* it declared the violation of Article 9 of the American Convention, and (x) in the case of *Furlan and family members v. Argentina* it declared the violation of Article 5 of this instrument.

[350] *Cf. Case of Bueno Alves v. Argentina. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 164, para. 70, and *Case of Furlan and family members v. Argentina*, para. 55.

rights (*supra* para. 303). Consequently, in this section, the Court will examine the arguments presented by the representatives on the right to nationality, extending its analysis to the other rights that have been mentioned, insofar as the Court has already examined them and declared that they have been violated.

307. The Court notes that there is no evidence that General Migration Law No. 285-04 enacted in 2004, and Resolution 02-07 of the Central Electoral Board which created and brought into effect the Birth Register for the children of a foreign mother in the Dominican Republic, norms indicated by the representatives (*supra* para. 241), were applied to the victims in this case or affected the enjoyment of their rights in any other way. Hence, the Court is unable to rule on their supposed incompatibility with the American Convention.

308. Nevertheless, the Court finds it necessary to rule on judgment TC/0168/13 of the Constitutional Court of September 23, 2013, and, owing to its close relationship with that judgment, on Law No. 169-14 (*infra* paras. 319 to 324). Also, for the reasons outlined below (*infra* paras. 326 to 328), it is pertinent that the Court examine Circular No. 017 of March 29, 2007, of the President of the Administrative Chamber of the Central Electoral Board, and Resolution 12-2007 of December 10, 2007, of the plenary session of the Central Electoral Board.

309. Regarding judgment TC/0168/13, the representatives presented this as a "supervening fact," which the State contested (*supra* paras. 13 and 250). In the case of the above-mentioned Circular and Resolution, it should be clarified that they were attached by the representatives to their motions and arguments brief as documentary evidence.[351]

310. The Court considers that, although judgment TC/0168/13 was not the result of proceedings in which the presumed victims were a party, and no one has indicated that it applied directly to them, it not only establishes the interpretation of norms that are relevant to their situation, because it referred to "all the Dominican Constitutions as of 1929," as mentioned (*supra* para. 286), and also ordered a general review policy as of 1929 in order to detect "aliens who are registered irregularly," which may affect the enjoyment of the right to nationality of the victims considered in this chapter.[352]

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[351] Regarding the said Circular and Resolution, expert witness Rodríguez Gómez stated that "[b]oth directives have resulted in a *de facto* process of denationalization that, in turn, has led to a situation of statelessness for an indeterminate number of descendants of Haitian immigrants." According to expert witness Rodríguez Gómez, Circular 017 was issued as a result of the judgment of the Supreme Court of Justice of December 14, 2005 (*supra* para. 283). The expert witness also stated that, based on this Circular, the Central Electoral Board began to revoke the nationality of Dominicans who were born before the new General Migration Law 285-04 had been enacted and the Supreme Court of Justice had delivered its judgment from which, in the opinion of the expert witness, "a mandate for retroactive application" cannot be inferred (*cf.* Expert opinion of Cristóbal Rodríguez Gómez provided by affidavit). Meanwhile, expert witness Gómez Pérez asserted that Resolution 12-2007 was issued because the inspection units of the Central Electoral Board had verified a series of anomalies in the issue of civil status certifications, particularly birth certificates, as a result of requests for identity and electoral cards made by numerous individuals [and that] it guarantees […] due process of law in favor of the holder of any civil status certification who is suspected of being irregular (*cf.* Expert opinion of Cecilio Gómez Pérez provided by affidavit).

[352] In this regard, even though judgment TC/0168/13 is not a law, the text reveals that the decisions made in it have general implications that go beyond the parties involved in the respective proceedings. Not only was this not contested by the State (or by the representatives or the Commission), but was also revealed by the Dominican Republic because it advised that it is "binding for all the public powers and organs of the State," and its words reveal that it affects those born in Dominican territory of foreign parents who do not have at least one parent who is a "legal resident" (*supra* para. 250). According to the Court's case law, the possibility of the Court examining a general law or norm, also including Resolution No. 12-07, Circular No. 017 and Law No. 169-14, is not narrowly restricted to their having been applied to the victims in a case because, depending on the case, it may also be in order for the Court to rule on norms or measures of a general nature when, even in the absence of a specific and actual action applying them to the presumed victims, their impact or effects on the validity,

Consequently, it is pertinent to consider judgment TC/0168/13 as a supervening fact and, therefore, to examine its juridical consequences for the case *sub examine.*[353]

311. Regarding judgment TC/0168/13, it should be recalled that, in its case law, the Inter-American Court has established that it is aware that the domestic authorities are subject to the rule of law and, therefore, are obliged to apply the laws that are in force.[354] However, when a State is a party to an international treaty such as the American Convention, all its organs, including its judges, are also subject to that treaty, which obliges them to ensure that the effects of the provisions of the Convention are not impaired by the application of norms that are contrary to its object and purpose. The judges and organs involved in the administration of justice at all levels are obliged to exercise *ex officio* a "control of conventionality" between domestic laws and the American Convention; evidently within the framework of their respective jurisdictions and the corresponding procedural regulations. In this task, they must take into account not only the treaty, but also its interpretation by the Inter-American Court, ultimate interpreter of the American Convention.[355]

312. In judgment TC/0168/13, the Constitutional Court indicated that it was legal, according to the text of article 11(1) of the 1966 Constitution (which, as already indicated is very similar to the provisions of the Constitutions of 1955 and 1994, *supra* para. 280 and footnote 330), and of Dominican constitutional law as of 1929, in general, to apply the fact that the parents of the persons born in Dominican territory were aliens living irregularly in the country as an exception to the acquisition of Dominican nationality by *ius soli*.[356] Based on this understanding, the Constitutional Court decided the following in the fifth operative paragraph of judgment TC/0168/13:

> **FIFTH: TO ESTABLISH**, also, that the Central Electoral Board implement the following measures:: *(i) Conduct a thorough audit of the birth records of the Civil Registry of the Dominican Republic from (June 21, 1929,) to date*, within one year of notification of this judgment (renewable for a further year at the discretion of the Central Electoral Board), to identify and to incorporate into a documentary and/or digital list, all the aliens registered in the birth records of the Civil Registry of the Dominican Republic; *(ii) Make a second list of the aliens who are registered irregularly because they lack or do not meet the requirements set out in the*

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exercise and enjoyment of the treaty-based rights of these persons is verified, or they represent an obstacle or an impediment to the due observance of the corresponding State obligations. (This is revealed by the analysis made by the Court in the *Case of García Lucero et al. v. Chile*, paras. 156, 157 and 160).

353 In addition, as already indicated, on June 9, 2014, the State presented as "supervening facts" norms relating to judgment TC/0168/13. These are "Decree No. 327-13 of November 29, 2013," and "Law No. 169-14 of May 23, 2014" (*supra* para. 13). First, it should be noted that the State's presentation of these facts to the Court means that the State considers them relevant to the case *sub examine*, even though it did not present arguments on how they impact it. The Court notes that the said norms consider judgment TC/0168/13 to be one of their justifications, and Law No. 169-14 accords it an important place in its "*Consideranda.*" This reaffirms that, even though, at one time the State was opposed to the Court examining this Constitutional Court judgment, it is relevant to this case.

354 *Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 154, para. 124, and *Case of García Cruz and Sánchez Silvestre v. Mexico. Merits, reparations and costs.* Judgment of November 26, 2013. Series C No. 273, footnote 76.

355 *Cf. Case of Liakat Alibux v. Suriname,* para. 87.

356 With regard to Dominican constitutional law, it should be placed on record that the representatives indicated that the criterion for interpretation of the term "in transit" in article 11 of the 1994 Constitution, which, in their opinion, created an unjustified distinction in treatment, was incorporated textually in the 2010 Constitution, which excludes the children of those who "reside illegally in Dominican territory" from the right to nationality (*supra* para. 238). Despite this, they did not argue that the Constitution has been applied to or has had any impact on the enjoyment of the rights of the presumed victims, and they have not alleged the possible violation of Article 2 of the American Convention, or of other provisions of this treaty, based on the 2010 Constitution. Moreover, the facts of the case do not reveal that a direct application of the 2010 Constitution to the presumed victims has been proved, or any other type of direct impact of this Constitution on their situation.

> *Constitution of the Republic for attribution of Dominican nationality through* ius soli, *which shall be called the List of aliens irregularly registered in the Civil Registry of the Dominican Republic*. (iii) Create special annual birth records for aliens from June 21, 1929, to April 18, 2007, date on which the Central Electoral Board brought into effect the *Birth Register of a child to a foreign mother non-resident in the Dominican Republic* by Resolution 02-2007; and, then*, to transfer administratively the births that appear on the List of aliens irregularly registered in the Civil Registry of the Dominican Republic to new birth records of aliens,* for the respective year. (iv) *Notify all births transferred* in accordance with the preceding paragraph *to the Ministry of Foreign Affairs, so that the latter may make the corresponding notifications*, to the person who the said birth concerns, and to the consulates and/or embassies or diplomatic delegations, as applicable, *for the pertinent legal effects*[357] (italics added).

313. The Court considers that this extract from the judgment reveals an order, mandated by the Constitutional Court, for a general policy to be applied retroactively to all those persons born in the Dominican Republic since June 21, 1929, who include the victims in this case.[358] In addition, the State has advised that this order is binding for all the public powers and organs of the State, and that the State had "taken different measures" to comply with it (*supra* para. 250).

314. The Court concludes, therefore, that judgment TC/0168/13 includes a general measure that would affect the presumed victims' enjoyment of their rights. Thus, it would deprive the following, who have Dominican nationality and possessed official documentation to prove this at the time that they were removed from Dominican Republic (*supra* paras. 201 and 221), of legal certainty regarding the enjoyment of their right to nationality: Willian Medina Ferreras, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina and Rafaelito Pérez Charles. This is because their birth certificates or their registration in the birth records will be subject to review by the Central Electoral Board and they may have been "registered irregularly." This also infringes the rights to recognition of juridical personality, and to a name, as well as the right to identity, owing to these violations taken as a whole.

315. Judgment TC/0168/13 has ordered a retroactive policy based on the understanding that, prior to 2010, domestic law envisaged the impossibility of those born in Dominican territory of parents who were aliens residing irregularly in the country acquiring Dominican nationality based on *ius soli*. Thus, given the resulting distinction between such persons and others also born in Dominican territory, it is necessary to verify whether the right of the presumed victims to equality before the law was violated.

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[357] In judgment TC/0168/13, the Constitutional Court noted: "Regarding the measures that must be adopted, the Constitutional Court finds the following: […] Migration Act No. 285 (of 2004) […and] Migration Regulations No. 631 (of 2011) […] replaced Immigration Law No. 95 of […] 1939, and its implementing Regulations No. 279, of the same year, that were in force for almost 70 years; which is an overlong period during which the absence of legal provisions encouraged the creation of conditions that have had a negative impact on the Dominican Civil Registry. However, fortunately, today the country has these two important legal instruments, whose provisions contain the solutions to the current migratory problem and restore the reliability of our registration system." After referring in detail to the contents of these (and other) new sources of law, the Constitutional Court proceeded to consider: "In this regard, it should be pointed out that the elements of this case oblige the Constitutional Court to adopt measures that go beyond the particular situation of Juliana Dequis (or Deguis) Pierre; conferring on this judgment effects *inter comunia*, because it tends to protect the fundamental rights of a very large group of individuals who are in situations that, from a factual and legal perspective, are the same or similar to that of the appellant. Thus, the [Constitutional] Court finds that, in cases such as this, the application for *amparo* goes beyond the sphere of the specific violation claimed by the appellant, and that its protective mechanism should have an expanded and binding authority that permits the protection of fundamental rights to be extended to other persons outside these proceedings who are in similar situations" (*cf.* Constitutional Court, judgment TC/0168/13, pp. 91 to 97).

[358] In this regard, expert witness Carlos Quesada stated that the judgment of the Constitutional Court "gives rise to […] the danger of the wholesale denationalization of Dominicans of Haitian descent in the Dominican Republic [because] birth records as of 1929 will be examined, and if they are found to be irregular, this could lead to the denationalization of persons who today have Dominican nationality" (*cf.* Expert opinion provided by Carlos Quesada Quesada before the Court during the public hearing).

316. The Court considers that, in view of the said difference in treatment among persons born in the territory of the Dominican Republic based on normative regulations (or on practices or decisions that determined their application or interpretation),[359] the State must prove that this differentiated treatment does not entail, with regard to the group of persons who, having been born in Dominican territory, are unable to acquire the nationality of this country, a violation of the right to equal protection of the law. In this regard, the Court has established that a difference in treatment is discriminatory when it does not have a reasonable and objective justification;[360] in other words, when it does not seek a legitimate purpose and there is no reasonable proportional relationship between the means used and the end sought.[361]

317. In this regard, the Court notes that, as already mentioned (*supra* para. 285), in judgment TC/0168/13 the Constitutional Court indicated that, contrary to the children of aliens who "obtain a legal residence permit," "[a]liens who […] are in an irregular migratory situation […] cannot claim that their children born in the country have the right to obtain Dominican nationality […] because it is legally inadmissible to found the inception of a right on a *de facto* illegal situation." The Inter-American Court notes that the argument concerning the "illegal situation" of the alien who "is in an irregular migratory situation," refers to aliens in an irregular situation, and not to their children. In other words, the difference between those born in Dominican territory who are children of aliens is not made based on a situation related to them, but based on the different situation of their parents as regards whether they are regular or irregular migrants. Thus, this distinction between the situations of the parents, in itself, does not explain the justification or purpose of the difference in treatment between individuals who were born in Dominican territory. Consequently, the Court understand that the arguments set forth in judgment TC/0168/13 are insufficient, because they do not explain the objective sought by the distinction examined and, therefore, they prevent an assessment of whether it is reasonable and proportionate.

318. As already mentioned (*supra* para. 264), the obligation to provide every individual with the equal and effective protection of the law without discrimination establishes a limit to the State's authority to determine those who are its nationals. The Court finds no reason to differ from its opinion in its judgment in the case of *the Yean and Bosico Girls v. Dominican Republic*, that "the migratory status of a person is not transmitted to his or her children."[362] Thus, the introduction of the standard of the irregular permanence of the parents as an exception to the acquisition of nationality by *ius solis* was discriminatory in the Dominican Republic, when it was applied in a context that has previously been

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[359] It should be emphasized that the said difference in treatment is between those born in the State's territory, and not with regard to their parents. The Court takes note that expert witness Gómez Pérez indicated that "regarding nationality, acquisitive prescription or usucaption does not exist; hence, regardless of the time that [a person] has allowed to elapse, first, violating a law; second, without regularizing his status, […] the fact that the [said] persons] let 5, 10, 15, 20, [or] 30 years go by, does not give them the right to […] acquire the right to nationality by acquisitive prescription." Nevertheless, the hypothesis examined is not that of the person who, being an alien, is in an irregular situation in the territory of the State, which is the one indicated by the expert witness, but rather that of those who were born on this territory. (*Cf.* Expert opinion provided by Cecilio Gómez Pérez before the Court during the public hearing).

[360] *Cf. Juridical Status and Human Rights of the Child. OC-17/02*, para. 46; *Juridical Status and Rights of Undocumented Migrants. OC-18/03*, para. 84, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 200.

[361] *Cf. Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 200. (This judgment cites the following case law: ECHR, *Case of D.H. et al. v. Czech Republic,* No. 57325/00. Judgment of 13 November 2007, para. 196, and ECHR, *Case of Sejdic and Finci v. Bosnia and Herzegovina*, Nos. 27996/06 and 34836/06. Judgment of 22 December 2009, para. 42.)

[362] *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 156.

described as discriminatory towards Dominicans of Haitian origin. In addition, this group was disproportionately affected by the introduction of the differentiated criteria.[363] The foregoing results in a violation of the right to equality before the law recognized in Article 24 of the Convention.

319. Furthermore, as indicated, on June 9, 2014, the State presented "Law No. 169-14 of May 23, 2014," as a "supervening fact" (*supra* para. 13),[364] which is regulated by Decree No. 250-14 (*supra* para. 146). In view of the close relationship between these norms and judgment TC/0168/13, the Court finds it necessary to refer to them.

320. The *consideranda* of Law No. 169-14 indicate that the law is based on the provisions of judgment TC/0168/13 and that, in this regard, "regularizing civil status records does not involve a denial or questioning of the interpretation provided by the Constitutional Court." The articles of the law make a distinction between the situation of certain persons registered in the Civil Registry and others who are not registered.

321. Regarding the former, article 2 of Law No. 169-14 orders the "regulariza[tion of] […] the records of the persons who" as indicated in paragraph (a) of the preceding article, are "children born in national territory during the period between June 16, 1929, and April 18, 2007, of foreign non-resident fathers and mothers, who were registered in the records of the Dominican Civil Registry based on documents that were not recognized by the relevant norms in force at the time of the registration." The Court has not been provided with sufficient evidence to verify that the presumed victims are in this situation, so that the analysis of articles 2 to 5 of Law No. 169-14 in relation to the persons mentioned in paragraph (a) of its article 1 is not relevant.[365]

322. With regard to the children "of foreign parents in an irregular migrator situation who, having been born in national territory do not appear registered in the Dominican Civil

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[363] In this regard, added to the reference made to the context of this case (*supra* para. 171), it should be indicated that, in its judgment TC/1068/13 the Constitutional Court indicated not only that Haitian immigration in the Dominican Republic is greater than that from other countries, but also that a very high percentage of this Haitian immigration is irregular. Thus, it stated in this judgment that "[t]here are 100,638 foreigners from countries other than Haiti, while those of Haitian origin amount to 668,145. […] Haitian immigrants and their descendants […] represent 6.87% of the population living in national territory. According to information published by the Dominican press, the General Directorate of Immigration of the Dominican Republic has only legally registered 11,000 Haitian immigrants, which represents a very small percentage, 0.16%, of the total." In the Dominican Republic, the population of Haitians and those of Haitian descent is greater that the population of aliens or those of foreign descent from other countries and, also, a percentage of Haitian migrants are not "legally registered." In addition, contextual references have been made to the difficulties encountered to obtain personal documentation and the vulnerability of Haitians and those of Haitian descent in the Dominican Republic (*supra* para. 171).

[364] On the same occasion, the State also submitted as a supervening fact Decree No. 327-13, which indicates that it has been issued by order of the Constitutional Court in the said judgment. The Decree establishes the "terms and conditions" for aliens who are living irregularly in Dominican territory to acquire a "documented legal status under […] General Migration Law No. 285-04." Its provisions with regard to "aliens" and the conditions for regularizing their permanence in Dominican territory are not related to the question of the right to nationality and, therefore, cannot have an impact on the presumed victims in this regard. Consequently, it is not relevant for the Court to examine the norm in question.

[365] Thus, on June 17, 2014, when presenting their respective observations, the representatives only indicated that "some of the [presumed] victims in this case [were in the situation described], and even if at one time they had an identity document, they were unable to register their children owing to the situation of discrimination and arbitrariness that existed. One of Antonio Sensión's daughters was in that situation." Although they referred to "some" of the presumed victims, the representatives did not clarify who they were referring to. Furthermore, the reference to one of Antonio Sensión's daughters is confusing; not only does it not indicate which daughter is referred to, but it is also unclear whether she is in the "situation" of "being unable" "to register her children," or whether it is she herself who could not be "registered." The indications provided by the representatives are insufficient to allow the Court to examine the matter.

Registry," Law No. 169-14 establishes in its sixth article (article 6, in conformity with article 1(b)) that they "may register in the register for aliens established by General Migration Law No. 285-04." According to article 6 of Law No. 169-14 and article 3 of its implementing regulations (Decree No. 250-14), those interesting in submitting an application in order to "benefit from the registration of aliens" have 90 days from the entry into force of these regulations. Once they have complied with certain conditions, and following this registration, these persons may "take advantage of the provisions of Decree No. 327-13," which regulates the "National Plan for the regularization of aliens in an irregular migratory situation." Article 8 of the law also establishes the "[n]aturalization" of "children of aliens born in the Dominican Republic and regularized pursuant to the provisions of Decree No. 327-13. Lastly, article 11 establishes that the provisions relating to the said persons who are not registered in the Dominican Civil Registry and to "naturalization" will be valid "during the execution of the National Plan for the regularization of aliens in an irregular migratory situation. Furthermore, article 3 of Decree No. 327-13 indicates that "[t]he alien who wishes to avail himself of the Plan must file his application within 18 months of the date that it comes into force."[366]

323. The Court notes that Law No. 169-14, in the same way as judgment TC/0168/13 on which it is based, is founded on considering that those born in Dominican territory, who are the children of aliens in an irregular situation, are aliens. In practice, this understanding, applied to persons who were born before the 2010 constitutional reform, entails a retroactive deprivation of nationality; and, in relation to some presumed victims in this case, it has already been determined that this is contrary to the Convention (*supra* paras. 298 to 301). Accordingly, the Court must examine the provisions of Law No. 169-14 in relation to the possible violation of the rights of Victor Jean, Miguel Jean, Victoria Jean (deceased) and Natalie Jean, who never benefited from the registration established in the law.

324. The Court notes that Law No. 169-14 created an impediment to the full exercise of the victims' right to nationality. Thus, the law considered them aliens not only conceptually, but also established the possibility that, if they presented the corresponding request within 90 days, (*supra* para. 322), they could benefit from a plan to "regularize aliens" established by the said Decree No. 327-13. This could lead to a "naturalization" process that, by definition, is contrary to the automatic acquisition of nationality based on having been born on the State's territory. Even though the foregoing could result in the individuals in question "acquiring" Dominican nationality, this would be the result of treating them as aliens, which is contrary to full respect for the right to nationality to which they should have had access since birth. Consequently, submitting the said individuals, for a limited time only, to the possibility of acceding to a process that could eventually result in the "acquisition" of a nationality that, in fact, they should already have, entailed establishing an impediment to the enjoyment of their right to nationality. Therefore, in this aspect, articles 6, 8 and 11 of Law No. 169-14 violated treaty-based obligations, including the duty to adopt domestic legal provisions, in relation to the rights to recognition of juridical personality, to a name, and to nationality, as well as, in relation to these rights, the right to identity, to the detriment of Victor Jean, Miguel Jean, Victoria

[366] Other provisions of Law No. 169-14, such as articles 9 and 10, establish, respectively, "sanctions" for "false information" when filing an application to the aliens registry, or "false information in an official document or any other criminal offense committed by Civil Registry officials." Article 12 indicates that "[t]he Executive shall issue the regulations to implement the provisions of chapters II and III of this law [regarding "registration of children of aliens born in the Dominican Republic," (articles 6 and 7), and "naturalization" (article 8)], within 60 days at most of the date of its promulgation; regulations that, among other provisions, shall include the mechanism for authenticating the birth, as well as the necessary amendments to the National Plan for the regularization of aliens in an irregular migratory situation for these persons." Lastly, article 13 of Law No. 169-14 establishes that "[t]he provisions of this law shall not result in any cost or charge for the beneficiaries."

Jean and Natalie Jean. Also, for similar reasons to those already indicated (*supra* paras. 316 and 317), they violate the right to equal protection of the law.

325. In conclusion, given its general scope, judgment TC/0168/13 constitutes a measure that fails to comply with the obligation to adopt domestic legal provisions, codified in Article 2 of the American Convention, in relation to the rights to recognition of juridical personality, to a name, and to nationality recognized in Articles 3, 18 and 20 of this instrument, respectively, and in relation to these rights, the right to identity, as well as the right to equal protection of the law recognized in Article 24 of the American Convention; all in relation to failure to comply with the obligations established in Article 1(1) of this instrument. This non-compliance violated the said rights of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina (deceased) and Rafaelito Pérez Charles. In addition, as indicated (*supra* paras. 323 and 324), the State violated these same articles of the Convention to the detriment of Victor Jean, Miguel Jean, Victoria Jean (deceased) and Natalie Jean owing to articles 6, 8 and 11 of Law No. 169-14.

326. The Court must now refer to the other norms indicated by the representatives: Circular No. 017 and Resolution 12-07 (*supra* paras. 241 and 302).

327. Circular No. 017, by establishing a retroactive policy, and also Resolution 12-07, by including provisions relating to "civil status certifications" issued prior to the publication of the Resolution, could eventually affect the presumed victims and must therefore be examined.

328. Circular No. 017 contains a directive to "Civil status officials" to examine "birth records when issuing copies or any document relating to civil status (paragraph 1), in order to detect "any irregularity" (paragraph 3). This is because the "Administrative Chamber has received reports that, in the past, some Civil Registry Offices issued birth certificates irregularly to foreign parents who had not proved their legal residence or status in the Dominican Republic." The Court observes that Circular No. 017, in the same way as judgment TC/0168/13, establishes a policy with retroactive application. However, since it does not explain the criteria that the Administrative Chamber must use to "proceed," in does not appear that, of itself, Circular No. 017 can affect the rights of the victims in this case,[367] and the representatives have not presented sufficient arguments to the contrary. Consequently, in the understanding that, should the need arise, the Administrative Chamber may act in conformity with the American Convention and the standards established in this Judgment, the Court does not consider that this norm, in itself, is contrary to the American Convention.

329. The *consideranda* of Resolution No. 12-07 indicate that the Central Electoral Board, "generally […] on request," "carries out […] permanent verifications of civil status records in the files of the civil registry offices and the Central Civil Registry Office," and that it has "frequently" noted "serious irregularities" in the records, but that judicial proceedings are required in order to annul them. Consequently, the Central Electoral Board "must implement a mechanism […] that prevents the issue of certifications based on irregular civil status records or entries that are evidently illegal, without the need to exhaust the corresponding judicial proceedings, unless these documents are issued for reasons that

[367] In this regard, expert witness Gómez Pérez indicated that "under [Resolution 12-2007]" the "falsity" of the "civil status certifications […] suspected of being false," would eventually be decided by the courts of justice, and added that "the person concerned" can "have recourse to the corresponding court to contest the decision or the opinion of the Central Electoral Board, and in oral public and adversarial proceedings, the Court will decide whether it accepts the recommendation of the Central Electoral Board or the petition of the person concerned" *(cf.* expert opinion of Cecilio Gómez Pérez provided during the public hearing).

are exclusively judicial." On this basis, the first paragraph of the Resolution orders the "provisional suspension of the issue of civil status certifications containing irregularities or flaws that make their issue legally impossible, and only to issue them for reasons that are strictly judicial." Other paragraphs of the Resolution establish procedural norms relating to provisional suspension or final annulment, determining the intervention of the courts in the latter case, and also, in the former, the intervention of "[t]hose interested in the lifting of the provisional suspension of the issue of civil status certifications." However, the operative paragraphs of the Resolution, as well as its preambular paragraphs and *consideranda*, do not make a direct reference to aspects relating to nationality or migratory status as grounds for the suspension or annulment of the records or the civil status certifications.[368] Therefore, as in the case of Circular No. 017, the Court notes that, in the understanding that, when applying Resolution 12-07, the respective authorities may interpret it in conformity with the American Convention and the standards established in this Judgment, the representatives' argument is not sufficiently substantiated to consider that the said resolution, in itself, is incompatible with the Convention in a way that has prejudiced or violated the rights of the victims in this case. The Court also notes that the State has advised that the Central Electoral Board, "by means of Circular No. 32-2011 of October 19, 2011, has annulled Resolution No. 12-07 issued by the plenary session of the Board."

IX
RIGHTS TO PERSONAL LIBERTY, TO JUDICIAL GUARANTEES, TO FREEDOM OF MOVEMENT AND RESIDENCE, AND TO JUDICIAL PROTECTION, IN RELATION TO THE RIGHTS OF THE CHILD AND THE OBLIGATION TO RESPECT RIGHTS WITHOUT DISCRIMINATION

A) Arguments of the Commission and of the parties

330. The Commission argued that, in violation of the Constitution and the laws that apply to repatriation procedures, State agents arbitrarily detained certain presumed victims while they were out and about or else in their homes, without an arrest warrant issued by a competent authority or administrative of judicial proceedings instituted with regard to these persons, who were not individualized or informed of the charges that led to their detention. Then, in less than 24 hours, the presumed victims were expelled from the territory of the Dominican Republic to the territory of Haiti. It added that the facts "occurred in the tense climate of mass collective expulsions," that "specifically involved" individuals considered "to be Haitians," and the phenotypic characteristics and skin color were "determinant elements" when selecting the persons who would be detained and then expelled. It alleged that the expulsions affected nationals and aliens alike, both documented and undocumented who had established "permanent residency in the Dominican Republic where they had close ties of family and work." It added that "the [presumed] victims' expulsion meant the automatic and *de facto* loss of all those effects that were left behind in Dominican territory, which represented an unlawful deprivation of their property for which they received no compensation." Regarding the presumed victims of Dominican nationality, the Commission indicated that some of them lacked documentation, while others had official identity documents and some of the latter were

[368] In this regard, one of the *consideranda* of the Resolution indicates that "the following are the most typical cases of irregularity: records contained on inserted folios, records registered after the books have been closed; records altered illegally with data such as the name of the person registered, dates, name of the parents or the declarant changed; duplications of birth declarations, and omission of substantial information, among others."

prevented from proving their nationality while, in other cases, the Dominican authorities examined, retained and destroyed their documentation.

331. The Commission also indicated that the presumed victims were not given the possibility of their cases being subject to an individual, objective and reasonable examination by the Dominican authorities. It underscored that the State has presented no evidence or information proving that it made a "detailed analysis of the particular circumstances of each of the presumed victims." According to the Commission, the presumed victims "did not have sufficient time or means to be able to prove their nationality or their legal status in the Dominican Republic; they were not provided with legal assistance; they were unable to appeal the decision taken, and there was no order from a competent, independent and impartial authority that decided their deportation." It also indicated that "there were significant obstacles to access to justice in this case" relating to the speed with which the expulsions took place; moreover "the geography made access to a competent judge or court difficult, and there was no way to prove their identity." The Commission indicated that the presumed victims "did not even have guarantees of due process […] and there was no effective judicial remedy in domestic law that would have allowed them to contest the decision of the Dominican authorities to expel them." Proceedings resulting in the detention and return of aliens to the territory of a State by exclusion, expulsion or extradition entail the obligation to subject them to the same basic and non-derogable procedural protections that are applicable to proceedings of a criminal nature. Lastly, the Commission referred to the principle whereby detention for immigration issues must be the exception, when affirming "immigration policy must be premised on a presumption of liberty and not on a presumption of detention. Immigration detention must be the exception and justified only when lawful and non-arbitrary."

332. The Commission considered that the State had violated the right to personal liberty (Article 7), the right to freedom of movement and residence (Article 22(1)),[369] the prohibition to expel nationals (Article 22(5)), the prohibition of the collective expulsion of aliens (Article 22(9)), the right to equal protection of the law (Article 24), and the rights to judicial guarantees and to judicial protection (Articles 8(1) and 25(1)), of the American Convention, in relation to the obligation to respect the rights of the Convention without discrimination, established in Article 1(1) of this instrument, to the detriment of certain presumed victims,[370] and also, the rights of the child (Article 19) of the Convention, to the detriment of the presumed victims who were children at the time of the events.

333. The representatives argued that the presumed victims were detained because of their physical characteristics, based on their race or ethnic origin, owing to which they were identified as Haitians or of Haitian descent, and treated as irregular migrants, without the existence of an arrest warrant or a prior investigation to comply with the formalities established in Dominican laws for the "detention" of individuals for migratory reasons. They indicated that the legal requirements were not met in any of the cases; hence, the detentions of the said individuals had been illegal and arbitrary. They added that the presumed victims were not informed of the reasons for their detention, or brought before a judicial authority, or provided with an effective remedy to request a review of the lawfulness of their detention. Following their detention, they were taken to

[369] The Commission argued this in general, without specifying how the violation of this right had affected each of the presumed victims.

[370] Among others, the Commission named: Willian Medina Ferreras, Lilia Jean Pierre, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina, Jeanty Fils-Aimé, Janise Midi, Diana Fils-Aimé, Antonio Fils-Aimé, Endry Fils-Aimé, Nené Fils-Aimé, Bersson Gelin, Ana Virginia Nolasco, Ana Lidia Sensión, Reyita Antonia Sensión, Rafaelito Pérez Charles, Victor Jean, Marlene Mesidor, Markenson Jean, Victoria Jean, Miguel Jean and Natalie Jean, as applicable.

the border with Haiti by different means and obliged to stay on the Haitian side. According to the representatives, the expulsions occurred in a context of mass collective detentions and expulsions of Haitians and Dominicans of Haitian descent, which affected many thousands of persons and were carried out in groups. They indicated that although some of the victims returned to the Dominican Republic, they did so by their own means and without the assistance of the Dominican authorities. Based on the way in which the expulsions were carried out, and even on the expressions used by the authorities who implemented them, it is evident that the intention was that those concerned would not be able to return to that country. The representatives added that the presumed victims were not given the opportunity to take their possessions with them, and were unable to return to their place of origin for a long time. In other cases, the victims were divested of any possessions they had with them by the authorities who detained them.

334. The representatives also indicated that the procedure established by domestic law was not respected in any of the cases. They argued that "[t]he victims were not informed of the charges against them, and were not given the opportunity to defend themselves. Much less were they given access to a lawyer to assist them in the defense of their rights." They added that the presumed victims were unable to have recourse to the domestic remedies, because: (a) they were expelled collectively without a court order, so that there was no judicial decision to contest, and the immediate expulsion from Dominican territory prevented them from having access to any remedy, and (b) once expelled, the presumed victims were outside Dominican territory and, therefore, did not have access to an effective remedy.

335. Consequently, the representatives asked the Court to declare the violation of the rights to personal liberty, to judicial guarantees, to freedom of movement and residence and to judicial protection recognized in Articles 7, 8(1), 22(1), 22(5), 22(9) and 25(1), of the American Convention, in relation to Article 1(1), to the detriment of several victims,[371] and Article 19 of this instrument, because the violations are "particularly serious in the case of the victims who were children at the time of the events," because the State had also failed to comply with its obligation to adopt special measures of protection in their favor.

336. In addition, without linking it to a specific article of the American Convention, the representatives, in their brief of June 17, 2014, stated, in relation to the proceedings relating to the documentation of Willian Medina and the members of his family, that "[t]he State has not proved that it has ensured the right to defense of Mr. Medina Ferreras and his family or that the State authorities have conducted an impartial investigation in the course of which they have proved the responsibility of Mr. Medina Ferreras in the irregularities of which he is accused."

337. The State, for its part, refuted the "presumed pattern" of the immigration control operations or "sweeps" for the detention and subsequent deportation of Haitians and Dominicans of Haitian origin, and reiterated that the General Directorate of Immigration at the time of the supposed actions and facts applied a procedure consisting of three stages: (a) arrest and identification; (b) investigation and filtering, and (c) verification and confirmation.

[371] The representatives indicated, among others, as presumed victims: Willian Medina Ferreras, Lilia Jean Pierre, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina, Jeanty Fils-Aimé, Janise Midi, Nené Fils-Aimé, Diane Fils-Aimé, Antonio Fils-Aimé, Endry Fils-Aimé, Bersson Gelin, Rafaelito Pérez Charles, Victor Jean, Marlene Mesidor, Markenson Jean, Victoria Jean, Miguel Jean and Natalie Jean, as applicable.

338. In relation to certain presumed victims regarding whom it was alleged that they were in detention centers,[372] it provided two certifications issued by the General Directorate of Prisons indicating that these persons were not detained in the said prisons at the time of the events. Accordingly, and in view of the supposed lack of evidence of the alleged "retention" of the presumed victims, the State considered it unnecessary to refer to the supposed non-compliance with the guarantees established in Article 7 of the American Convention.

339. The State also rejected all the arguments related to the collective expulsions of Haitian nationals, affirming that it "does not carry out collective or mass deportations of Haitians." According to the State, in "agreement with the […] version of the Commission […] and the representatives," "all the presumed victims […] had been questioned by the immigration agents regarding their identity document and none of them showed this, either at the time or subsequently. […] Consequently, the State agents would have investigated the legality of their permanence in the country, so that the deportation process had been individualized. If any of the foreign presumed victims had shown a Haitian passport with a visa, or a work permit authorized by the General Directorate of Immigration, they would not have been deported." Furthermore, regarding the expulsions of Dominican nationals of Haitian origin or descent, the State asserted that it had "never repatriated a Dominican who had been detained and who, during the verification procedure, had produced documents to prove his condition as a national."

340. In addition, the State stressed that, after they had supposedly been deported or expelled, the presumed victims returned to the country without any type of impediment, either hidden in a bus that transported migrant workers or crossing the guarded border on foot. According to the State, given the ease with which individuals could enter national territory, it could not be proved reliably with circumstantial situations that the State's immigration agents had really deported or expelled any of the presumed victims. Regarding a national immigration policy based on racial profiling or skin color, the State rejected the allegations and indicated that it would be ineffective, because the Haitian physiognomy was extremely similar to that of a large part of the Dominican population.

341. The State also argued that, at the time of the events, several effective domestic remedies existed: the application for *amparo*, the possibility of *habeas corpus* established by Law No. 5353 of October 22, 1914, and the contentious-administrative proceeding established by Law No. 1494 of August 9, 1947, that would have allowed any of the presumed victims to question the lawfulness of their detention and the decision of the Dominican authorities to deport or expel them. The State indicated that the presumed victims "had the real and effective opportunity to file" the remedies and that there is no evidence in the case file to prove that any of them filed any of the remedies established by the contentious-administrative jurisdiction. Lastly, the State asserted that "there is no evidence in the case file to substantiate the material losses of the [presumed] victims," or "that, at any time, they had possessed such objects, money or household goods."

342. Based on the above and "the lack of evidence in the file of this case," the State asked the Court to declare that it had not violated the rights recognized in Articles 7, 8, 19, 22(1), 22(5) and 22(9) and 25 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of certain presumed victims.[373]

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[372] The State indicated this in its answering brief in relation to "the supposed detentions" of Willian Medina Ferreras, Lilia Jean Pierre, Awilda Medina, Luis Ney Medina and Carolina Isabel Medina (deceased) were in the prison of Oviedo, Pedernales; Rafaelito Pérez Charles in the prison of San Cristóbal; Jeanty Fils-Aimé (deceased) in the Pedernales prison, and "Bers[s]on Gelin" in the Barahona prison.

[373] The State indicated the following, among others: Willian Medina Ferreras, Lilia Jean Pierre, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina, Jeanty Fils-Aimé, Janise Midi, Nené Fils-Aimé, Diane Fils-Aimé, Antonio

B) Considerations of the Court

343. In this chapter the Court is examining together the alleged violations of the rights to personal liberty,[374] freedom of movement and residence,[375] judicial guarantees,[376] and judicial protection,[377] in relation to the rights of the child, and the obligation to respect rights without discrimination, owing to the concurrence of the facts that could have given rise to these violations.

344. But first, bearing in mind the characteristics of this case, the Court underlines that ten of the presumed victims who were deprived of liberty and then expelled were children at the time of the events, namely: Luis Ney Medina, Awilda Medina, Carolina Isabel Medina, Antonio Fils-Aimé, Endry Fils-Aimé, Diane Fils-Aimé, Markenson Jean, Miguel Jean, Victoria Jean and Natalie Jean. In this regard, the facts of the case do not reveal that the State took special measures of protection in favor of the children concerned based on the principle of the best interests of the child. The said children were treated the same as the adults during the deprivation of liberty and subsequent expulsion, without any consideration for their special condition.

345. In addition, with regard to the presumed victims Bersson Gelin, Jeanty Fils-Aimé, Nené Fils-Aimé, Diane Fils-Aimé, Antonio Fils-Aimé and Endry Fils-Aimé, the Court is unable to determine with certainty where they were born (*supra* para. 86), so that, in their case, it is unable to examine the alleged violation of any of the paragraphs of Article 22 of the Convention. Nevertheless, with the exception of Nené Fils-Aimé, the Court has already established that these presumed victims were effectively deprived of their liberty and expelled from Dominican territory to Haiti, so that it will examine the presumed violation of Articles 7, 8 and 25 of the Convention, with regard to them. In the case of Nené Fils-Aimé, insufficient factual evidence has been provided to analyze the presumed violation of these articles to his detriment.

Fils-Aimé, Endry Fils-Aimé, Bersson Gelin, Rafaelito Pérez Charles, Victor Jean, Marlene Mesidor, Markenson Jean, Victoria Jean, Miguel Jean and Natalie Jean, as appropriate.

[374] Article 7 stipulates: "1. Every person has the right to personal liberty and security. 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. 3. No one shall be subject to arbitrary arrest or imprisonment. 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him. 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial. 6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies."

[375] The pertinent part of Article 22 of the Convention establishes: "1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law. [...] 5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it. 9. The collective expulsion of aliens is prohibited."

[376] Article 8(1) of the Convention indicates: "Every person has the right 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 nature."

[377] Article 25(1) of this instrument establishes: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his 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."

B.1. Basic guarantees in immigration proceedings that may involve deprivation of liberty and expulsion or deportation

B.1.1. General considerations

346. It should be recalled that the Court has affirmed that Article 7 of the American Convention contains a general rule, established in its first paragraph, according to which: "[e]very person has the right to personal liberty and security," and also another rule, of a specific nature, that consists of guarantees that protect the right not to be deprived of liberty illegally (Art. 7(2)) or arbitrarily (Art. 7(3)), to be informed of the reasons for the detention and of the charges (Art. 7(4)), to judicial control of the deprivation of liberty (Art. 7(5)), and to contest the lawfulness of the detention (Art. 7(6)).[378] Regarding the general obligation, the Court has reiterated that "any violation of paragraphs 2 to 7 of Article 7 of the Convention necessarily results in the violation of Article 7(1) thereof."[379]

347. The Court has also indicated that any restriction of the right to personal liberty must only be for the reasons and in the conditions previously established by the Constitution or the laws enacted in accordance with this (material aspect), and also strictly subject to proceedings objectively defined in it (formal aspect).[380] In addition, the Court has reiterated that any detention, regardless of the reasons or duration, must be duly recorded in the pertinent document, indicating clearly, at least, the reasons for the detention, who made the arrest, the time of the arrest and the time of the release, as well as a record that the competent judge was advised, in order to protect against any illegal or arbitrary interference with physical liberty.[381] If this is not done, the rights recognized in Articles 7(1) and 7(2) of the American Convention, in relation to Article 1(1) of this instrument, have been violated.[382]

348. Furthermore, the Court has indicated that programmed collective detentions and roundups, which are not based on the individualization of wrongful actions and that lack judicial control are incompatible with respect for fundamental rights; among others, they are contrary to the presumption of innocence, unduly curtail personal liberty, and transform preventive detention into a discriminatory mechanism; consequently, the State may not implement them under any circumstance.[383]

349. In addition, the Court has indicated that the right to judicial guarantees, recognized in Article 8 of the American Convention, refers to the series of requirements that must be observed at the different procedural stages to ensure that the individual is able to defend his rights adequately vis-à-vis any act of the State, adopted by any public authority,

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[378] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, para. 51, and *Case of J. v. Peru*, para. 125.

[379] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 54*, and Case of J. v. Peru*, para. 125.

[380] *Cf. Case of Gangaram Panday v. Suriname. Merits, reparations and costs.* Judgment of January 21, 1994. Series C No. 16, para. 47*,* and *Case of García and family members v. Guatemala. Merits, reparations and costs.* Judgment of October 24, 2012. Series C No. 258, para. 100.

[381] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 53, *and Case of García and family members v. Guatemala,* para. 100.

[382] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 54, *and Case of García and family members v. Guatemala*, para. 100.

[383] *Cf. Case of Bulacio v. Argentina. Merits, reparations and costs.* Judgment of September 21, 2006. Series C No. 152, paras. 93 and 96.

whether administrative, legislative or judicial, that may affect them.[384] Thus, in its consistent case law, the Court has reiterated that "although Article 8 of the American Convention is entitled "Right to a Fair Trial" [Note: Right to judicial guarantees in the Spanish version], its application is not limited strictly to judicial remedies."[385] Rather, the "series of basic guarantees of due process of law" are applicable in the determination of rights and obligations of a "civil, labor, fiscal or any other nature."[386] In other words, "any act or omission of the State's organs in the course of proceedings, whether these are administrative, punitive, or jurisdictional, must respect due process of law."[387]

B.1.2. Standards for expulsion proceedings

350. In relation to immigration matters, the Court has indicated that, in the exercise of its authority to establish immigration policies,[388] States may establish mechanisms to control the entry into and departure from its territory of non-nationals, provided that these policies are compatible with the norms for the protection of the human rights established in the American Convention. In other words, although States have a margin of discretion when determining their immigration policies, the objectives of such policies must respect the human rights of migrants.[389]

351. In this regard, the Court has affirmed that "due process must be guaranteed to everyone, regardless of their migratory status," because "the broad scope of the intangible nature of due process applies not only *ratione materiae* but also *ratione personae* without any discrimination,"[390] and in order that "migrants may assert their

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[384] *Cf. Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 69, *and Case of the Pacheco Tineo Family v. Bolivia,* para. 130.

[385] *Cf. Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87* of October 6, 1987. Series A No. 9, para. 27, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2013. Series C No. 268, para. 166.

[386] *Cf. Case of the Constitutional Court v. Peru. Merits, reparations and costs*, para. 70, *and Case of the Pacheco Tineo Family v. Bolivia*, para. 130.

[387] *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, para. 124, and *Case of the Pacheco Tineo Family v. Bolivia,* para. 130.

[388] A State's immigration policy is composed of any institutional act, measure or omission (laws, decrees, resolutions, directives, administrative acts, etc.) that relates to the entry into, departure from, or permanence in its territory of the national or foreign population. *Cf. Juridical Status and Rights of Undocumented Migrants.* OC-18/03, para. 163, and *Case of Vélez Loor v. Panama*, para. 97.

[389] *Cf. Juridical Status and Rights of Undocumented Migrants. Advisory Opinion OC-18/03* of September 17, 2003. Series A No. 18, para. 168; *Case of Vélez Loor v. Panama*, para. 97, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. OC-21/14*, para. 39. See also: Expert opinion of Pablo Ceriani Cernadas provided before the Court, in which, among other matters, he stated that "[r]egardless of the different immigration categories that a State devises (wherein, in principle, there is a margin of discretion to grant a residence permit when implementing these categories), this definition of categories and the way in which they are implemented differs significantly from the *de facto* reality of migratory flows, which results in – and this is the experience not only of the countries of the region, not only of Latin America, but it is the situation in the United States, in many countries of the European Union, and of Asia – a significant number of people in an irregular migratory situation, which, without doubt, will have a negative impact as regards the human rights of these persons, in addition to the impact that it may have for policies, for example, of human development and other kinds of social integration policies that a country wishes to implement" (expert opinion of Pablo Ceriani Cernadas before the Court during the public hearing held on October 7 and 8, 2013).

[390] *Cf. Juridical Status and Rights of Undocumented Migrants.* OC-18/03, para. 122, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 159.

rights and defend their interests effectively and in conditions of procedural equality with others who are justiciable."[391]

352. The Court considers it desirable to stress that the international organs and norms for the protection of human rights all indicate basic guarantees applicable to such proceedings.[392]

353. Thus, for example, under the universal system for the protection of human rights, Article 13 of the International Covenant on Civil and Political Rights[393] indicates that:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

354. The Human Rights Committee, interpreting this article, determined that "[t]he particular rights of [the said] article 13 only protect those aliens who are lawfully in the territory of a State party. […] However, if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13."[394]

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391 *Cf. The Right to Information on Consular Assistance within the Framework of the Due Guarantees of Process of Law.* Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, paras. 117 and 119; *Case of Nadege Dorzema et al. v. Dominican Republic,* para. 159, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.* OC-21/14, para. 113.

392 *Mutatis mutandi*, Case of *Nadege Dorzema et al. v. Dominican Republic*, para. 160.

393 Dominican Republic ratified the International Covenant on Civil and Political Rights on January 4, 1978.

394 Human Rights Committee, General Comment 15: The position of aliens under the International Covenant on Civil and Political Rights; adopted at the twenty-seventh session, 1986, para. 9. Regarding the regional systems for the protection of human rights, the African Commission on Human and Peoples' Rights has considered that: "it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter [African Charter on Human and Peoples' Rights] and international law." (African Commission on Human and Peoples' Rights, Communication No. 159/96, 22nd Ordinary Session, 11 November 1997, para. 20.). Consequently, in expulsion proceedings during which the basic guarantees of due process of law are not observed, the African Commission has frequently decided a violation of the rights protected in Article 7(1)(a) of the African Charter on Human and Peoples' Rights ("Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force") and, in some cases, Article 12(4) of this treaty ("A non-national legally admitted in a territory of a State Party to the present Charter may only be expelled from it by virtue of a decision taken in accordance with the law.") (See, for example: African Commission on Human and Peoples' Rights, Communication No. 313/05, 47th Ordinary Session of 12 to 26 May 2010, para. 205; African Commission on Human and Peoples' Rights, Communications 27/89, 46/91, 49/91, 99/93, 20th Ordinary Session, 31 October 1996, para. 34: "By expelling these refugees from Rwanda, without giving them the opportunity to be heard by the national judicial authorities, the Government of Rwanda has violated Article 7(1) of the Charter." African Commission on Human and Peoples' Rights, Communication No. 71/92, 20th Ordinary Session, 31 October 1996, para. 30: "The Commission has already established that none of the deportees had the opportunity to seize the Zambian courts to challenge their detention or deportation. This constitutes a violation of their rights under Article 7 of the Charter and under Zambian national law"; African Commission on Human and Peoples' Rights, Communication No. 212/98, 25th Ordinary Session, 5 May 1999, para. 61: "The Zambian government by denying Mr. Chinula the opportunity to appeal his deportation order has deprived him of a right to fair hearing which contravenes all Zambian domestic laws and international human rights laws."). Under the European system for the protection of human rights, Article 1(1) of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes a series of specific procedural safeguards relating to expulsion of aliens lawfully resident in the territory of a State Member. Thus, the alien must be allowed: (a) to submit reasons against his expulsion; (b) to have his case reviewed, and (c) to be represented for these purposes before the competent authority. The European Court of Human Rights, in its consistent case law, has considered that: the right to an effective remedy (Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority

355. Lastly, the International Law Commission, in its draft articles on the protection of the human rights of persons expelled or in the process of being expelled, has stated that such persons must receive the following procedural guarantees: (a) basic detention conditions during the proceedings; (b) the right to receive notice of the expulsion decision; (c) the right to challenge the expulsion decision; (d) the right to be heard by a competent authority; (e) the right to be represented before the competent authority; (f) the right to have the free assistance of an interpreter, and (g) the right to consular assistance.[395]

356. Based on these standards and the obligations associated with the right to judicial guarantees, the Court has considered that proceedings that may result in the expulsion of an alien must be individualized, in order to evaluate the personal circumstances of each individual and to comply with the prohibition of collective expulsions. Also, these proceedings must not discriminate for reasons of nationality, color, race, sex, language, religion, political opinion, social origin, or other condition, and the persons subject to them must have the following basic guarantees:[396] (a) to be informed expressly and formally of the charges against them and the reasons for the expulsion or deportation. This notice must include information on their rights, such as: (i) the possibility of explaining their reasons and contesting the charges against them, and (ii) the possibility of requesting and receiving consular assistance,[397] legal advice and, if appropriate, translation or interpretation services; (b) if an unfavorable decision is taken, the right to request a review of their case before the competent authority and to appear before this authority in that regard, and (c) to receive formal legal notice of the eventual expulsion decision, which must be duly reasoned pursuant to the law.

357. The Court finds it necessary to reiterate that, in expulsion proceedings involving children, the State must also observe the guarantees indicated above, and others whose purpose is to protect the best interests of the child, in the understanding that these interests are directly related to the child's right to the protection of the family and, in particular, to the enjoyment of family life, maintaining family unity insofar as possible.[398] Hence, any ruling of an administrative or judicial organ that must decide on family separation owing to the migratory status of one or both parents must take into

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notwithstanding that the violation has been committed by persons acting in an official capacity"), and the possible violation of other rights protected by the Convention owing to expulsion, such as the right to life (Article 2), to personal integrity (Article 3) and to respect for private and family life (Article 8), require States to "make available to the individual [subject to an expulsion decision] the "effective" possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality" (See, ECHR, *Case of Al-Nashif v. Bulgaria,* Application No. 50963/99, Final judgment of 20 September 2002, para. 133).

395 International Law Commission. Expulsion of aliens. Text of draft articles 1-32 provisionally adopted on first Reading by the Drafting Committee at the sixty-fourth session, A/CN.4/L.797, 24 May 2012, articles 19 and 26; *cf. Case of Nadege Dorzema et al. v. Dominican Republic,* para. 163, and *Case of the Pacheco Tineo Family v. Bolivia,* footnote 157.

396 *Cf. Case of Nadege Dorzema et al. v. Dominican Republic*, para. 175, and *Case of the Pacheco Tineo Family v.* Bolivia*,* para. 133. See also, expert opinion of Pablo Ceriani Cernadas, in which he referred to the different guarantees of due process that must be ensured in the context of expulsion proceedings. Specifically, he indicated that "[t]he nature of an expulsion is evidently punitive and thus the need to ensure all the procedural guarantees in order to respect and guarantee the rights that may be at risk in each case. In addition, based on the principle of legality, which makes it obligatory to regulate the proceedings to be followed in such cases by law, a key element is the adoption of the mechanisms to be applied in each individual case in order to examine in detail the offense attributed to the person, the evidence and other elements of the case and, evidently, to ensure the person's right of defense." Expert opinion of Pablo Ceriani Cernadas provided during the public hearing.

397 *Cf.* Vienna Convention on Consular Relations, Article 36.1.b, and *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law.* OC-16/99, para. 103.

398 *Cf. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. OC-21/14*, para. 275.

consideration the particular circumstances of the specific case, thus ensuring an individual decision;[399] it must seek to achieve a legitimate purpose pursuant to the Convention, and it must be suitable, necessary and proportionate.[400] To achieve this, the State must analyze the particular circumstances of each case as regards: (a) the immigration record, the length of the stay, and the extent of the ties of the parent and/or the family to the receiving State; (b) consideration of the nationality,[401] custody and residence of the children of the person it is intended to deport; (c) the implications of the breakup of the family owing to the expulsion, including of the persons with whom the child lives, as well as the time that the child has lived in this family unit, and (d) the extent of the disruption of the child's daily life if the family situation changes owing to the expulsion of a person in charge of the child, so that these circumstances are rigorously weighed in light of the best interests of the child against the essential public interest that it is sought to protect.[402]

358. Regarding proceedings or measures that affect fundamental rights, such as personal liberty, and that may result in expulsion or deportation, the Court has considered that "the State may not make administrative decisions or adopt judicial decisions without respecting certain basic guarantees the content of which is substantially the same as those established in Article 8(2) of the Convention."[403]

B.1.3. Standards related to the deprivation of liberty, including that of children, in immigration proceedings

359. The Court has established the incompatibility with the American Convention of the punitive deprivation of liberty in order to control migratory flows, in particular those of an irregular nature.[404] Thus, it has determined that the detention of persons for non-compliance with the immigration laws should never be for punitive reasons, so that the deprivation of liberty should only be used when necessary and proportionate in the specific case in order to ensure the appearance of the person in the immigration proceedings or to ensure the application of a deportation order, and only for the least possible time.[405] Consequently, "immigration policies whose central focus is the obligatory detention of irregular migrants will be arbitrary, if the competent authorities do not verify, in each particular case and by an individualized evaluation, the possibility of using less restrictive measures that are effective to achieve those ends."[406] In this regard, the Working Group on Arbitrary Detention has stated that:

> If there has to be administrative detention, the principle of proportionality requires it to be the last resort. Strict legal limitations must be observed and judicial safeguards be provided for. The

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399 *Cf. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. OC-21/14*, para. 281.

400 *Cf. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. OC-21*/14, para. 153.

401 *Cf. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. OC-21/14*, para. 279.

402 *Cf. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.* OC-21/14, para. 279.

403 *Case of the Pacheco Tineo Family v. Bolivia*, para. 132. See also, *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 157, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.* OC-21/14, para. 112.

404 *Cf. Case of Vélez Loor v. Panama*, para. 167, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.* OC-21/14, para. 151.

405 *Cf. Case of Vélez Loor v. Panama,* para. 171, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. OC-21/14, para. 151.

406 *Case of Vélez Loor v. Panama***,** para. 171*, and Case of the Pacheco Tineo Family v. Bolivia*, para. 131.

> reasons put forward by States to justify detention […] must be clearly defined and exhaustively enumerated in legislation. […] The detention of minors […] requires even further justification.[407]

360. Furthermore, in the Court's opinion, States may not use the deprivation of liberty of children who are with their parents, or those who are unaccompanied or separated from their parents as a precautionary measure for the purposes of immigration proceedings; nor may they base this measure concerning non-compliance with the requirements to enter or remain in a country on the fact that the child is alone or separated from his or her family, or on the purpose of ensuring family unity, because States can and should order less harmful alternatives and, at the same time, protect the rights of the child comprehensively and as a priority.[408]

B.1.4. The prohibition of collective expulsions

361. In addition, the inadmissibility of collective expulsions stems from the considerations on due process of law in immigration proceedings (*supra* paras. 356 to 358), and is established in Article 22(9) of the Convention, which expressly prohibits them.[409] This Court has found that the fundamental factor to determine the "collective" nature of an expulsion is not the number of aliens included in the expulsion order, but that this order is not based on an objective analysis of the individual circumstances of each alien.[410] The Court, referring to the observations of the European Court of Human Rights, has determined that a collective expulsion of aliens is "any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group."[411]

362. Similarly, in its General Recommendation No. 30, the United Nations Committee on the Elimination of Racial Discrimination indicated that the States parties to the International Convention on the Elimination of All Forms of Racial Discrimination[412] must "[e]nsure that non-citizens are not subject to collective expulsion in particular in situations where there are insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account."[413]

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[407] United Nations, Report of the Working Group on Arbitrary Detention, A/HRC/13/30, 18 January 2010, paras. 59 and 60.

[408] *Cf. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. OC-21/14*, para. 160.

[409] In this regard, different international human rights treaties are consistent in prohibiting collective expulsions in terms similar to the American Convention, *Cf.* Protocol 4 to the European Convention, article 4: "The collective expulsion of aliens is prohibited"; the African Charter on Human and Peoples' Rights, article 12(5): "The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups," and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 22(1): "Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually."

[410] *Case of Nadege Dorzema et al. v. Dominican Republic*, paras. 171 to 172.

[411] *Cf. Case of Nadege Dorzema et al. v. Dominican Republic,* para. 171. *Cf.* ECHR, *Case of Andric v. Sweden.* Application No. 45917/99. First Chamber. Decision of 23 February 1999, para. 1, *Case of Conka v. Belgium.* Application No. 51564/99. Third Chamber. Judgment of 5 February 2002, para. 59. Also *cf.* Committee of Ministers of the Council of Europe, "*Twenty Guidelines on Forced Return*." Guideline No. 3 establishes the prohibition of collective expulsion. It indicates that "A removal order shall only be issued on the basis of a reasonable and objective examination of the particular case of each individual person concerned."

[412] Dominican Republic ratified the International Convention on the Elimination of All Forms of Racial Discrimination on May 25, 1983.

[413] *Cf.* Committee on the Elimination of Racial Discrimination, General recommendation No. 30, para. 26.

363. Furthermore, the Office of the United Nations High Commissioner for Human Rights, in its report on "The Rights of Non-citizens," underlined that "the procedure for the expulsion of a group of non-citizens must afford sufficient guarantees demonstrating that the personal circumstances of each of those non-citizens concerned has been genuinely and individually taken into account."[414]

B.2. Legal qualification of the facts of this case

B.2.1. Right to personal liberty

B.2.1.1. Alleged illegal and arbitrary nature of the deprivations of liberty (Article 7(2) and 7(3))

364. With regard to Article 7(2) of the Convention, the Court has emphasized that the restriction of physical liberty, "even for a brief period, and even merely for identification purposes,"[415] must be "strictly in keeping with the relevant provisions of the American Convention and domestic laws, provided that the latter are compatible with the Convention."[416] Consequently, the alleged violation of Article 7(2) must be examined in light of the previously mentioned domestic legal and constitutional provisions (*supra* paras. 181 to 189), and "any requirement established therein that is not complied with will make the deprivation of liberty illegal and contrary to the American Convention."[417] As for the arbitrary nature of the detention, Article 7(3) of the Convention establishes that "[n]o one shall be subject to arbitrary arrest or imprisonment." Regarding this provision, on other occasions the Court has considered that no one may be subject to arrest or imprisonment for reasons and by methods that – although classified as lawful – may be deemed incompatible with respect for the fundamental rights of the individual because they are, among other matters, unreasonable, unpredictable, or disproportionate.[418]

365. In this regard, article 8(2) of the 1994 Constitution (*supra* para. 181), in force at the time of the facts, stipulated that:

> […]
> b. No one shall be imprisoned or have his liberty restricted without a reasoned written order issued by a competent judicial official, except in cases of *flagrante delicto*.
> […]
> d. Anyone deprived of his liberty shall be brought before the competent judicial authority within forty-eight hours of his detention or released.
> […]
> f. It is strictly prohibited to transfer any detainee from a prison to another place without a reasoned written order issued by the competent judicial authority.
> […]

366. In addition, article 13 of Immigration Law No. 95 of 1939 (*supra* para. 186), in force at the time of the events, established the specific reasons for which an alien could be "arrested and deported" by order of the Secretary of State for Internal Affairs and Police or of another official designated by him. Nevertheless, it indicated that "[n]o alien shall be deported without having been informed of the specific charges that justified his

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414 Office of the United Nations High Commissioner for Human Rights. "The Rights of Non-citizens," 2006, p. 18

415 *Cf. Case of Nadege Dorzema et al. v. Dominican Republic*, para. 126.

416 *Case of Torres Millacura et al. v. Argentina, Merits, reparations and costs.* Judgment of August 26, 2011. Series C No. 229, para. 76, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 126.

417 *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 57, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 126.

418 *Cf. Case of Gangaram Panday v. Suriname*, para. 47*, and Case of J. v. Peru*, para. 127*.*

deportation, or without having been given a fair opportunity to refute these charges […]."[419]

367. Lastly, Immigration Regulations No. 279 of 1939 (*supra* para. 189), in force at the time of the facts, required a complete investigation to be conducted, whenever there were indications of a violation of the Immigration Act, based on which, if pertinent, the Immigration Inspector could request the Director General of Immigration to issue an arrest warrant. The said request had to state the facts and indicate the specific reasons why the alien should be deported.[420] The regulation also indicated that, if the arrest warrant was issued:

> The Immigration Inspector shall summon the alien to be heard with regard to the charges set forth in the arrest warrant. The information on the alien shall be recorded on the G-1 form when he is heard, unless it has been recorded previously. […] If the alien does not accept any of the charges included in the warrant, evidence shall be sought to support the charges; then the alien shall be summoned again, and given another opportunity to speak as well as to submit evidence contesting his deportation."

368. Nevertheless, the Court notes that the facts do not reveal that the deprivations of liberty of the members of the Jean,[421] Fils-Aimé[422] and Medina[423] families, as well as of Rafaelito Pérez Charles[424] and Bersson Gelin,[425] prior to their expulsion from Dominican territory to Haiti, were carried out in accordance with the procedure established by domestic law. Thus, they were illegal and violated Article 7(2) of the Convention. Furthermore, the detentions were not carried out in order to implement formal immigration proceedings.[426] It is obvious that the way in which the presumed victims were

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[419] According to article 13(e). In addition, according to Law No. 4658 of 1957, the deportation of an alien "who has committed any of the misdemeanors established in article 13" of Immigration Law No. 95, or "has committed a crime or offense the gravity of which, in the opinion of the respective court, warrants that penalty," may also be ordered by the Dominican courts (article 1). In that case, the alien "may be arrested for up to three months by order of the competent prosecutor (article 2).

[420] In this regard, it indicates: "[i]f the arrest warrant is issued, the Immigration Inspector shall summon the alien to be heard with regard to the charges set forth in the arrest warrant. The information on the alien shall be recorded on the 'G-1 form'[…]. If the alien does not accept any of the charges included in the warrant, evidence shall be sought to support the charges; then the alien shall be summoned again, and he shall be given another opportunity to speak, as well as to submit evidence contesting his deportation."

[421] The Jean family consisting, at the time of the events, of Victor Jean, Marlene Mesidor, the girls Victoria Jean (deceased) and Natalie Jean, and the boys Miguel Jean and Markenson, who, in December 2000, at around 7.30 a.m., were arrested by State agents in their home, made to get into a bus and taken to Haitian territory, where they arrived at around 5 p.m. (*supra* paras. 222 and 223).

[422] First Jeanty Fils-Aimé, and then the rest of the family, Janise Midi and their daughter Diane Fils-Aimé and their sons Antonio Fils-Aimé and Endry Fils-Aimé, were detained and taken to the "Pedernales garrison," and then expelled to Haiti at around 8 p.m. (*supra* paras. 209 and 210).

[423] The Medina family, consisting of Willian Medina Ferreras, the boy Luis Ney Medina, and the girls Awilda Medina and Carolina Isabel Medina (deceased), Dominican nationals with official documentation, and Lilia Jean Pierre, a Haitian national, were arrested in November 1999 or January 2000 in their home and taken to a prison in Oviedo, where they remained until they were expelled to Haiti (*supra* paras. 200 and 201).

[424] Mr. Pérez Charles was arrested on July 24, 1999, by immigration agents and taken to a detention center where he remained for a short time. He was then taken to Jimaní, from where he was expelled to Haitian territory (*supra* para. 221).

[425] Mr. Gelin was arrested on December 5, 1999, and then expelled to Haiti (*supra* para. 213).

[426] To the contrary, the Court observes that the said deprivations of liberty were not formally justified or recorded. The State has not proved, in any of these cases, that the deprivations of liberty of the presumed victims were carried out based on a written and reasoned order issued by a competence authority, as required by article 8.2.b) of the 1994 Constitution. As for the requirements of the immigration norms, the State has not proved that, in any of these cases, immigration proceedings were underway and that, with regard to the said persons, a complete investigation had been conducted into a possible violation of immigration laws, or that an arrest warrant had been requested or issued, as established in section 13 of Immigration Regulations No. 279. In addition, at no time during the deprivation of liberty were the presumed victims brought before a competent

deprived of their liberty by the State agents indicates that this was due to racial profiling related to the fact that they apparently belonged to the group of Haitians or Dominicans of Haitian origin or descent (*supra* para. 168 and *infra* paras. 403 and 404), which is evidently unreasonable and therefore arbitrary and thus violated Article 7(3) of the Convention. Consequently, the Court finds that the deprivations of liberty were illegal and arbitrary and that the State violated paragraphs 2 and 3 of Article 7 of the Convention.

B.2.1.2. Notice of the reasons for the deprivations of liberty (Article 7(4))

369. With regard to Article 7(4) of the American Convention, the Court has stated that "the facts must be examined in relation to domestic law and the provisions of the Convention, because the information on the 'reasons' for the detention must be provided 'promptly' at the time of the detention, and because the right contained in that paragraph entails two obligations: (a) the need for written or oral information on the reasons for the detention, and (b) notice, in writing, of the charges."[427]

370. In the case *sub judice*, both Immigration Law No. 95 and Immigration Regulations No. 279 require that aliens detained for deportation purposes be informed of the specific reasons why they must be deported. According to the Immigration Regulations, the specific charges against them had to be included in the arrest warrant issued by the Director General of Immigration. However, as indicated above, the established facts do not reveal that the members of the Medina, Fils-Aimé and Jean families, Rafaelito Pérez Charles and Bersson Gelin were ever informed of the reasons for the deprivation of their liberty, either orally or in writing. Moreover, there is no document proving that they were advised in writing about the existence of any kind of charge against them, as required by the domestic laws in force at the time of the facts. This leads to the conclusion that the State failed to observe the guarantee established in Article 7(4) of the Convention.

B.2.1.3. Presentation before a competent authority (Article 7(5))

371. With regard to Article 7(5) of the Convention, which establishes that any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial functions, the Court has underlined that "it is for the judge to guarantee the rights of the detainee, to authorize the adoption of precautionary or coercive measures when strictly necessary, and to ensure, in general, that the detainee is treated in a manner consistent with the presumption of innocence," as a "guarantee to avoid arbitrary or illegal detention,[428] as well as to ensure the rights to life and to personal integrity."[429]

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authority, such as the Immigration Inspector, nor were they given the opportunity to respond to the charges supposedly set forth in the arrest warrant, pursuant to this regulation. To the contrary, there is no evidence that the presumed victims were ever informed of the reasons for their arrest or detention, either orally or in writing, or that they were able to contest their detention, in evident violation of the Immigration Law and the Immigration Regulations. The Court also observes that the authorities did not comply with the obligation to record the information on the aliens arrested or detained for the purpose of their deportation. This information was not recorded on the "G-1 form" established in section 10.d) of the Immigration Regulations. Lastly, the transfer of those who were detained to the border with Haiti without a reasoned order contravened the prohibition to transfer detainees from a prison to another place without a reasoned written order from the competent judicial authority established in article 8.2.f) of the 1994 Constitution.

427 *Cf. Case of Cabrera García and Montiel Flores v. Mexico*. *Preliminary objections, merits, reparations and costs.* Judgment of November 26, 2010. Series C No. 220, para. 106, *and Case of J. v. Peru,* para. 149.

428 *Case of Bulacio v. Argentina*, para. 129, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 135.

429 *Case of Tibi v. Ecuador*. *Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 118, *and Case of Nadege Dorzema et al. v. Dominican Republic,* para. 135.

372. Contrary to the European Convention for the Protection of Human Rights and Fundamental Freedoms[430] (hereinafter also "the European Convention"), the American Convention does not establish a limitation to the exercise of the guarantee established in Article 7(5) of the Convention based on the reasons or circumstances for which the person has been arrested or detained.[431] Consequently, "based on the *pro persona* principle, this guarantee must be observed, whenever anyone is arrested or detained due to his migratory situation, in keeping with the principles of judicial control and procedural immediacy."[432] This Court has considered that, in order to constitute a mechanism that truly counters illegal or arbitrary detentions, "the judicial review must be conducted promptly and in a way that guarantees compliance with the law and the detainee's effective enjoyment of his rights, taking into account his particular vulnerability."[433] In this regard, the United Nations Working Group on Arbitrary Detention has stated that "[a]ny […] immigrant placed in custody must be brought promptly before a judicial or other authority."[434]

373. In this regard, article 8.2.d) of the 1994 Constitution, in force at the time of the detentions, established that "[a]nyone deprived of his liberty shall be brought before the competent judicial authority within forty-eight hours of his detention or released."

374. The deprivations of the liberty of the members of the Jean, Fils-Aimé and Medina families, and of Bersson Gelin and Rafaelito Pérez Charles only lasted a few hours and, therefore, less than the 48 hours established by the Constitution for bringing the detainee before a competent judicial authority. However, the conclusion of the deprivation of liberty of the presumed victims was not brought about by their release in Dominican territory, but occurred at the time that the State agents expelled them from Dominican territory, without these persons being brought before a competent authority who could decide, as appropriate, on the eventual admissibility of their release. Consequently, in this case, Article 7(5) of the Convention was violated to the detriment of the members of the Jean, Fils-Aimé and Medina families, and of Bersson Gelin and Rafaelito Pérez Charles.

B.2.1.4. Judicial review of the lawfulness of deprivations of liberty (Article 7(6))

375. Lastly, Article 7(6) of the Convention protects the right of anyone who is arrested or detained to have recourse to a competent judge or court so that the judge or court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.

376. In this regard, the Court has indicated that "the authority that must decide on the lawfulness of the arrest or detention must be a judge or court. Thus, the Convention is

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[430] In the European Convention, the right to be brought promptly before a judge or other officer established in Article 5(3) is related exclusively to the category of detainee mentioned in paragraph 1(c) of this Article; that is, the person who is detained for the purpose of "bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offense or fleeing after having done so." *Cf. Case of Vélez Loor v. Panama,* footnote 106.

[431] *Cf. Case of Vélez Loor v. Panama,* para. 107, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 136.

[432] *Cf. Case of Tibi v. Ecuador,* para. 118, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 136.

[433] *Case of Bayarri v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of October 30, 2008. Series C No. 187, para. 67, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 136.

[434] United Nations, Working Group on Arbitrary Detention, Report of the Group, Annex II, Deliberation No. 5: Situation regarding immigrants and asylum-seekers, 1999, E/CN.4/2000/4, Principle 3. *Cf. Case of Vélez Loor v. Panama*, para. 107.

ensuring the judicial control of the deprivation of liberty."[435] In addition, in relation to the nature of such remedies at the domestic level, the Court has underscored that these "must not only exist formally by law, but must be effective; that is, they must comply with the purpose of obtaining a prompt decision on the lawfulness of the arrest or detention."[436]

377. In this specific case, the Court notes that article 8.2.g) of the 1994 Constitution established that:

> Anyone who has custody of a detainee shall be obliged to bring him before the competent authority as soon as that authority requires this.
> […]
> The *Habeas Corpus* Act shall determine the summary proceeding to comply with the requirements of paragraphs a), b), c), d), e), f) and g) and shall establish the respective penalties.

378. In addition, article 1 of Law No. 5353 on *Habeas Corpus* of 1914 (*supra* para. 182), in force at the time of the facts, established that:

> Anyone who has been deprived of his liberty for any reason in the Dominican Republic has the right, either at his own request or that of any other person, […] to a writ of *habeas corpus* in order to determine the reasons for his imprisonment or deprivation of liberty and so that, in the appropriate cases, his liberty is restored.

379. Regarding the arguments on the alleged violation of Articles 8 and 25 of the Convention, the State referred to Law No. 5353 on *Habeas Corpus* arguing that the law established the "effective domestic remedy" of *habeas corpus*, that would have allowed any of the presumed victims to question the lawfulness of their detention (*supra* para. 341). However, as indicated previously, the Court reiterates that remedies must not only exist formally by law, but they must also be effective. In this regard, the Court has ruled on Article 7(6) of the Convention indicating that it "signifies that the detainee effectively exercises this right, presuming that he is able to do so, and that the State effectively provides this remedy and decides it."[437] Nevertheless, bearing in mind the circumstances in which the deprivations of liberty occurred, especially owing to the expedited expulsion, the said presumed victims who were detained had no opportunity whatsoever to file an effective remedy that would examine the lawfulness of their detention. Therefore, the Court finds that the State violated Article 7(6) of the Convention, to the detriment of the members of the Jean, Medina and Fils-Aimé families and Rafaelito Pérez Charles and Bersson Gelin.

B.2.1.5. Conclusion

380. As indicated in the preceding paragraphs, the State violated the right to personal liberty, established in paragraphs 1, 2, 3, 4, 5 and 6 of Article 7 of the American Convention, in relation to non-compliance with the obligation to respect rights established in Article 1(1) of this instrument, to the detriment of Willian Medina Ferreras, Lilia Jean Pierre, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina (deceased), Jeanty Fils-Aimé (deceased), Janise Midi, Antonio Fils-Aimé, Diane Fils-Aimé, Endry Fils-Aimé, Rafaelito Pérez Charles, Bersson Gelin, Victor Jean, Marlene Mesidor, Markenson Jean, Victoria Jean (deceased), Miguel Jean and Natalie Jean, and also in relation to the rights of

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[435] *Case of Vélez Loor v. Panama***,** para. 126, and *Case of Nadege Dorzema et al. v. Dominican Republic,* para. 140**.**

[436] *Case of Vélez Loor v. Panama,* para. 129, and *Case of J. v. Peru,* para. 170.

[437] *Case of Yvon Neptune v. Haiti. Merits, reparations and costs.* Judgment of May 6, 2008. Series C No. 180, para. 114*, and Case of Nadege Dorzema et al. v. Dominican Republic*, para. 143.

the child recognized in Article 19 of the Convention, with regard to those victims who were children at the time of the expulsion.

B.2.2. Rights to freedom of movement and residence, to judicial guarantees and to judicial protection

B.2.2.1. Collective expulsions of Haitian nationals (Article 22(9))

381. As indicated above, the Court has indicated that, to comply with the prohibition of collective expulsions, proceedings that may result in the expulsion or deportation of an alien must be individual in order to assess the personal circumstances of each person, and this requires, at least, the identification of the person and the clarification of the particular circumstances of his migratory situation. In addition, such proceedings must not discriminate for reasons of nationality, color, race, sex, language, religion, political opinion, social origin or any other condition, and must observe the basic guarantees mentioned previously (*supra* paras. 356 to 358).[438]

382. However, the facts of the case *sub judice* reveal that Lilia Jean Pierre, Janise Midi, Marlene Mesidor and Markenson Jean, of Haitian nationality, were detained and expelled in less than 48 hours together with their family members and other persons, without any evidence that they had been submitted to an individualized evaluation of the kind mentioned above prior to being expelled (*supra* paras. 201, 210 and 223). The State has not provided any evidence proving that it had instituted formal proceedings to identify these individuals, or to evaluate the particular circumstances of their migratory situation.

383. Furthermore, the statements of the presumed victims reveal that the expulsions were carried out in a summary manner and as a group.[439] Thus, the Court recalls that the members of the Medina family, including Lilia Jean Pierre, were taken to the border with Haiti together with other persons (*supra* para. 201) Also, the bus that Marlene Mesidor and the other members of the Jean family were forced to board in order to be expelled to

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[438] *Cf. Case of Nadege Dorzema et al. v. Dominican Republic*, para. 175, *and Case of the Pacheco Tineo Family v. Bolivia*, para. 133. See also: Expert opinion of Pablo Ceriani Cernadas, In his statement he indicated that the term racial profiling, "especially when one observes the use of profiles in negative terms, relates to the program, practice, policy, specific measures by which law enforcement officials in general – in this case, we can speak of security forces with competence in the area of immigration – establish, explicitly or implicitly, certain criteria based on, it could be ethnic origin, or the language or nationality of origin of a person, to implement, above all, measures of investigation and control, in this case control or verification of immigration offenses, to provide a reasonable and objective justification to overcome those types of control mechanisms, and which subsequently, have a whole series of negative impacts, not only on migrants, but also on society." In addition, he stated that "a measure of collective expulsion, prohibited not only by the American Convention on Human Rights, but also by other regional and universal treaties such as the Convention on the Protection of the Rights of All Migrant Workers, refers to the decision to expel a person that is not the result of due process in which, with the appropriate guarantees, the different circumstances, especially the personal situation and the specific facts in each case, have been evaluated thoroughly and in sufficient detail, in order to eventually reach a decision on a sanction that could constitute an eventual expulsion. If these circumstances in terms of procedural guarantees are not present – which also signify the substantive guarantees that are being discussed during those proceedings – we would be speaking of what, in migratory terms, is usually referred to as automatic expulsion mechanisms that, in many cases, may constitute what is called collective expulsions." He added that "the number of persons is irrelevant as regards collective expulsion; the important point is how the proceedings functioned, how the decision was reached, and what were the procedural and substantive stages that resulted in the expulsion order and the implementation of those measures (expert opinion of Pablo Ceriani Cernadas provided during the public hearing).

[439] According to the statements of the presumed victims, they were deprived of liberty or taken from their homes without being given the opportunity to take some of their possessions with them, and without being able to return to their place of origin for a long time. According to the presumed victims, they had their home furnishings, personal effects, clothes, livestock, savings and cash or were owed wages, and in other cases, the presumed victims were deprived of possessions they had taken with them by the authorities who detained them.

Haitian territory was already "full of people" (*supra* para. 223). Even though these facts, *per se*, do not prove a collective expulsion of persons, they reinforce the belief that the facts relating to the victims were inserted in procedures involving collective deprivation of liberty that were not supported by the prior assessment of the situation of each person who was deprived of liberty.

384. Consequently, the Court concludes that the expulsions of Lilia Jean Pierre, Janise Midi, Marlene Mesidor and Markenson Jean were not carried out on the basis of individual evaluations of the particular circumstances of each of them, for the effects of Article 22(9) of the American Convention, so that their expulsions are considered to be collective expulsions of aliens in violation of this article.

B.2.2.2. The expulsions and the alleged violation of the freedom of movement and residence of the Dominican nationals (Articles 22(1) and 22(5))

385. The Court has indicated that the right to freedom of movement and residence of every person who is lawfully protected by Article 22(1) of the American Convention, "is an essential condition for the free development of the person, and includes, *inter alia*, the right of those who are lawfully in a State to move about it freely and also to choose their place of residence."[440] The Court has also indicated that "[t]his right can be violated formally or by restrictions *de facto* when the State has not established the conditions or provided the means that allow it to be exercised."[441]

386. In addition, Article 22(5) of the American Convention establishes the prohibition to expel a person from the territory of the State of which he is a national, as well as the prohibition to deprive anyone of the right to enter it. In this regard, it should be noted that several international instrument establish the prohibition to expel nationals.[442] Similarly, the European Court of Human Rights has affirmed that it is possible to speak about the expulsion of nationals when a person is obliged to abandon the territory of which he is a national, without being able to return,[443] and has found violation of the norm equivalent to Article 22(5) of the American Convention in the European system, Article 3(1) of Protocol 4 to the European Convention, in cases of expulsions of nationals.[444]

387. The Court notes that Rafaelito Pérez Charles, Willian Medina Ferreras and the children at the time, Awilda Medina, Carolina Isabel Medina and Luis Ney Medina, were Dominican nationals who had official identity documents at the time of the facts, and has already determined that it was precisely the disregard of these documents that violated their right to nationality (*supra* para. 276). In addition, the children, Victoria Jean, Natalie

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440 *Cf. Case of Ricardo Canese v. Paraguay*. *Merits, reparations and costs*. Judgment of August 31, 2004. Series C No. 111, para. 115*, and Case of Nadege Dorzema et al. v. Dominican Republic,* para. 169*.*

441 *Case of the Moiwana Community v. Suriname*, paras. 119 and 120, and *Case of Vélez Restrepo and family members v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of September 3, 2012. Series C No. 248, para. 220.

442 Protocol 4 to the European Convention, Article 3(1), which states that "[n]o one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national"; Arab Charter on Human Rights Carta, Article 27(b), which indicates that "[n]o one may be exiled from his country or prohibited from returning thereto," and International Covenant on Civil and Political Rights, Article 12(4): "No one shall be arbitrarily deprived of the right to enter his own country." *Cf.* In her expert opinion provided by affidavit, Julia Harrington mentioned Article 12(4) of the International Covenant on Civil and Political Rights, Article 22(5) of the American Convention, and Article 3 of Protocol 4 of the European Convention (expert opinion of Julia Harrington provided by affidavit).

443 ECHR, *Case of A.B. v. Poland.* Application no. 33878/96. Decision on admissibility, third section, 13 March 2003, para. 4.

444 ECHR, *Case of Slivenko v. Latvia.* Application no. 48321/99. Judgment of 9 October 2003, para. 120.

Jean and Miguel Jean, as well as Victor Jean were born in the Dominican Republic, but, at the time of the events, did not have official identity documents. With regard to these individuals, the Court has also determined that the absence of this documentation was related to a violation of the right to nationality (*supra* para. 301). Therefore, all these persons must be considered Dominican nationals for the purposes of the application of Article 22 of the Convention.

388. The State asserted that it had never repatriated a Dominican national who could prove his nationality. However, the evidence provided by the State does not prove that it took measures to identify and verify formally the nationality of the said presumed victims.

389. The Court considers that, although some of the presumed victims could, in fact, return to Dominican territory,[445] owing to the way in which the events occurred (*supra* paras. 221 and 222), the destruction or disregard of the documents of the Dominican nationals who did have documentation, as well as the expulsion of Dominicans who lacked official documentation, prevented the victims from being able to return to Dominican territory lawfully, and to move around and reside freely and lawfully in the Dominican Republic. Consequently, the Court considers that the State violated the right to enter the country of which they are nationals and to move around and live in it recognized in Articles 22(5) and 22(1) of the American Convention, in relation to failure to comply with the obligation to respect rights established in Article 1(1) of the Convention, to the detriment of Willian Medina Ferreras, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina (deceased), Rafaelito Pérez Charles, Victor Jean, Miguel Jean, Victoria Jean (deceased) and Natalie Jean.

B.2.2.3. Respect for the basic procedural guarantees (Article 8(1))

390. The Court notes that, in proceedings that may result in expulsion or deportation, respect for the right to judicial guarantees established in Article 8 of the American Convention is relevant, and includes the observance of a series of basic guarantees of due process (*supra* paras. 356 to 358).

391. The Court also recalls that the immigration norms in force at the time of the facts of this case were Immigration Law No. 95 of April 14, 1939, Law No. 4658 of March 24, 1957, and the Immigration Regulations No. 279 of May 12, 1939, which established a series of procedures for the expulsion or deportation process (*supra* paras. 186 to 189).

392. In addition, at the time of the facts, the procedures for the repatriation of Haitian immigrants were regulated by the "Memorandum of Understanding on Repatriation Mechanisms" signed by the Dominican Republic and the Republic of Haiti on […] December 2, 1999."[446] This agreement called for the Dominican authorities: (i) to recognize and respect the human rights of those repatriated; (ii) not to retain the personal documents of those repatriated; (iii) to provide each person repatriated with a copy of the individual form containing the repatriation order, and (iv) to provide, with reasonable advance notice, the list of individuals in the process of being repatriated to the Haitian diplomatic or consular authorities accredited in Dominican territory, so that they could exercise their function of consular assistance (*supra* para. 190).

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[445] According to the facts, Rafaelito Pérez Charles, and the Jean family returned to the Dominican Republic permanently in 2002. Furthermore, some members of the Medina family made several trips to the Dominican Republic for medical reasons related to the accident suffered by Awilda Medina (*supra* para. 203).

[446] The Court also noted this in its judgment in the case of *Nadege Dorzema et al. v. Dominican Republic*, para. 167 and footnote 234.

393. In this case, it is not necessary for the Court to rule on the conformity of the said domestic norms with the State's international obligations. However, it is sufficient to note that, specifically with regard to the expulsions that are the subject of this case, the Dominican Republic has not presented any evidence that it applied the procedure established in the said domestic norms, or took any other measures to ensure to the victims the basic guarantees of due process in order to comply with its obligations under international standards and the American Convention,[447] and this is quite apart from the prohibition to expel nationals established in Article 22(5) of the Convention.

394. Based on the above, the Court finds that the expulsion of the said persons did not respect the relevant international standards, or the procedures established in domestic law (*supra* paras. 356 to 358 and 391). Consequently, the victims were not granted the basic guarantees that corresponded to them as persons subject to expulsion or deportation, and this violated Article 8(1) of the American Convention, in relation to non-compliance with the obligation to respect rights established in Article 1(1), to the detriment of Willian Medina Ferreras, Lilia Jean Pierre, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina (deceased), Jeanty Fils-Aimé (deceased), Janise Midi, Diane Fils-Aimé, Antonio Fils-Aimé, Endry Fils-Aimé, Victor Jean, Marlene Mesidor, Markenson Jean, Miguel Jean, Victoria Jean (deceased), Natalie Jean, Rafaelito Pérez Charles and Bersson Gelin, and also, in relation to the rights of the child, protected by Article 19 of the Convention, with regard to those victims who were children at the time of the expulsion.

B.2.2.4. The existence of an effective remedy to contest the detention and expulsion (Article 25(1))

395. The Court recalls that the State had reiterated that, at the time of the facts, three domestic remedies existed under domestic law, the application for *amparo*, the *habeas corpus* (Law No. 5353 of *Habeas Corpus* of October 22, 1914), and the remedies of the contentious-administrative jurisdiction (Law No. 1494 of August 9, 1947) (*supra* paras. 182 to 185, 191 and 341), and had indicated that the presumed victims had the "real and effective opportunity" to file these remedies, which would have allowed them to question the lawfulness of their detention and the decision of the Dominican authorities to deport or expel them (*supra* para. 341).

396. The sudden deprivations of liberty and expulsions of the victims were carried out in less than 48 hours without prior notice. Consequently, in this case, it is not necessary for the Court to examine whether, in general terms, the remedies indicated by the State might be appropriate and effective in similar circumstances to those experienced by the presumed victims. Indeed, it is sufficient to note that, in view of the particular circumstances of this case, specifically the way in which the expulsions were implemented, the presumed victims were unable to file the remedies mentioned by the Dominican Republic, and no effective proceedings were available to them.

[447] To the contrary, the Court notes that the facts and evidence provided reveal that none of the said presumed victims were the subject of a complete investigation of their particular individual circumstances based on well-founded indications of a possible infringement of the Immigration Law. In addition, no arrest warrant was issued for any of them, and no formal proceedings were instituted to grant the presumed victims the possibility of being heard and contesting the decision to expel them and defending themselves from any charges against them. No final decision on deportation was taken by the Secretary of State for Internal Affairs and Police and communicated to the presumed victims, or any other type of official decision ordering the expulsions. Furthermore, the victims were not informed of the reasons for their expulsion or the specific charges against them, or of possible judicial remedies to contest the decision to expel them, and they were not provided with legal assistance. In addition, in the case of the presumed victims of Haitian nationality, Lilia Jean Pierre, Janise Midi, Marlene Mesidor and Markenson Jean, they were not provided with consular assistance, and did not receive a copy of their repatriation order (which did not exist) and the Haitian diplomatic or consular authorities were not informed of their expulsion.

397. Based on all the above, the Court concludes that, owing to the particular circumstances of this case, the victims did not have real and effective access to the right to appeal, which violated the right to judicial protection recognized in Article 25(1) of the American Convention, in relation to failure to comply with the obligation to respect rights established in Article 1(1) of the Convention, to the detriment of Willian Medina Ferreras, Lilia Jean Pierre, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina (deceased), Jeanty Fils-Aimé (deceased), Janise Midi, Diane Fils-Aimé, Antonio Fils-Aimé, Endry Fils-Aimé, Victor Jean, Marlene Mesidor, Markenson Jean, Miguel Jean, Victoria Jean (deceased), Natalie Jean, Rafaelito Pérez Charles and Bersson Gelin, and also in relation to the rights of the child recognized in Article 19 of the Convention, to the detriment of those previously indicated who were children at the time of the facts.

B.2.3. The discriminatory nature of the expulsions (Article 1(1))

398. As already indicated (*supra* para. 262), the Court has determined that Article 1(1) of the Convention "is a general norm the content of which extends to all the provisions of the treaty, and establishes the obligation of the States Parties to respect and ensure the full and free exercise of the rights and freedoms recognized therein without any discrimination." In other words, whatever the origin or form it takes, any treatment that may be considered discriminatory in relation to the exercise of any of the rights ensured in the Convention is *per se* incompatible with this instrument.[448] Consequently, the State's failure to comply, by any discriminatory treatment, with the general obligation to respect and ensure rights gives rise to its international responsibility.[449] This is why the Court has affirmed that there is an indissoluble connection between the obligation to respect and to ensure human rights and the principle of equality and non-discrimination.[450] Article 24 of the Convention recognizes a right that also entails the State obligation to respect and ensure the principle of equality and non-discrimination in order to safeguard other rights and in all the domestic laws that it enacts,[451] because this protects the right to "equal protection of the law,"[452] so that discrimination resulting from an inequality that stems from domestic law or from its application is also prohibited.[453]

399. In this case, the representatives and the Commission argued that the deprivations of liberty and the expulsions were based on racial motives; that is to say on discriminatory acts or on a discriminatory practice by State agents (*supra* paras. 330 and 333).

400. In this regard, the State argued that it had not carried out the deprivation of liberty and subsequent expulsion of the presumed victims (*supra* paras. 337 to 339). The Court reiterates that it has already established that, at the time of the events there existed in Dominican Republic a context of expulsions, including collective expulsions, of Haitians

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448 *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica. OC-4/84*, para. 53, *and Case of Veliz Franco et al. v. Guatemala*, para. 204.

449 *Cf. Juridical Status and Rights of Undocumented Migrants. OC-18/03,* para. 85, and *Case of Veliz Franco et al. v. Guatemala*, para. 204.

450 *Cf. Juridical Status and Rights of Undocumented Migrants. OC-18/03,* para. 53, and *Case of Veliz Franco et al. v. Guatemala*, para. 204.

451 *Cf. Case of Yatama v. Nicaragua*, para. 186, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile,* para. 199.

452 *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84*, para. 54*, and Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile,* para. 199.

453 *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, para. 209, *and Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile,* para. 199.

and Dominicans of Haitian descent (*supra* paras. 171). The facts related to the presumed victims conform to this context and the *modus operandi* applied in those practices (*supra* paras. 167 to 169, 201, 210, 213, 221 and 223).

401. Regarding racial discrimination,[454] the Court has recognized "the difficulty for those who are the object of discrimination to prove cases of racial prejudice" and agrees with the European Court that, in certain cases of human rights violations motivated by discrimination, the burden of proof falls on the State, which controls the means to clarify events that occurred in its territory.[455]

402. In addition, with regard to the rights of migrants, the Court has established that it is permissible for the State to grant a different treatment to documented migrants in relation to undocumented migrants, or to immigrants in relation nationals, "provided that this treatment is reasonable, objective and proportionate, and does not harm human rights."[456] However, "the obligation to respect and to ensure the principle of equality before the law and non-discrimination is independent of the migratory status of a person in a State." In other words, States have the obligation to ensure this fundamental principle to their citizens and to any alien who is in their territory, without any discrimination based on their regular or irregular presence, their nationality, race, gender or any other condition.[457]

403. Furthermore, the Court has already established that the deprivations of liberty were not implemented in order to conduct a formal immigration proceeding, and the way in which the presumed victims were detained while they were out and about or in their home indicates a presumption by the State agents that, based on their physical characteristics, the presumed victims must belong to the specific group of Haitians or individuals of Haitian origin.

404. Based on the foregoing, the Court considers that the established facts and the context in which the facts of this case occurred reveal that the victims were not deprived of liberty in order to conduct formal immigration proceedings, but were detained and expelled mainly owing to their physical characteristics and the fact that they belonged to a specific group; that is, because they were Haitians or of Haitian origin. This constituted a discriminatory action to the detriment of the victims due to their condition as Haitians and Dominicans of Haitian descent, which impaired the enjoyment of the rights that the Court found had been violated. Consequently, the Court concludes that, regarding the rights whose violation has been declared, the State failed to comply with the obligation

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[454] In this regard, the Article 1(1) of the American Convention establishes respect for and guarantee of the rights recognized therein, "without any discrimination for reasons of race, color, […] national or social origin, economic status, […] or any other social condition." In addition, the International Convention on the Elimination of All Forms of Racial Discrimination defines discrimination as: "[…] any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." International Convention on the Elimination of All Forms of Racial Discrimination of January 4, 1969, Article 1. *Cf. Case of Nadege Dorzema et al. v. Dominican Republic,* para. 231.

[455] *Cf. Case of González Medina and family members v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of February 27, 2012 Series C No. 240, para. 132, *and Case of Nadege Dorzema et al. v. Dominican Republic*, para. 229.

[456] *Cf. Juridical Status and Rights of Undocumented Migrants OC-17/02,* para. 119; *Case of Nadege Dorzema et al. v. Dominican Republic,* para. 233*, and Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. OC-21/14*, footnote 74.

[457] *Cf. Juridical Status and Rights of Undocumented Migrants. OC-18/03,* para. 118, and *Case of the Yean and Bosico Girls v. Dominican Republic*, para. 155.

established in Article 1(1) of the American Convention to respect the rights without discrimination.

B.3. Conclusion

405. As established, the State violated the right to personal liberty (*supra* paras. 364 to 380 and 400 to 404) established in paragraphs 1, 2, 3, 4, 5 and 6 of Article 7 of the American Convention, in relation to its failure to comply with the obligation to respect rights without discrimination established in Article 1(1) of this instrument, to the detriment of the persons who were deprived of liberty: Willian Medina Ferreras, Lilia Jean Pierre, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina (deceased), Jeanty Fils-Aimé (deceased), Janise Midi, Antonio Fils-Aimé, Diane Fils-Aimé, Endry Fils-Aimé, Rafaelito Pérez Charles, Bersson Gelin, Victor Jean, Marlene Mesidor, Markenson Jean, Victoria Jean (deceased), Miguel Jean and Natalie Jean, and also in relation to the rights of the child recognized in Article 19 of the Convention, to the detriment of the victims who were children at the time of the events.

406. The Court also concludes that, for the reasons described (*supra* paras. 381 to 389 and 400 to 404), the State violated the prohibition of the collective expulsion of aliens recognized in Article 22(9) of the American Convention, in relation to failure to comply with the obligation to respect rights without discrimination established in Article 1(1) of the Convention, to the detriment of the victims of Haitian nationality: Lilia Jean Pierre, Janise Midi, Marlene Mesidor and Markenson Jean, and also in relation to the rights of the child recognized in Article 19 of the Convention, to the detriment of Markenson Jean who was a child at the time of the events. In addition, the Court considers that the State violated the right to freedom of movement and residence recognized in Article 22(1) and 22(5) of the American Convention, in relation to failure to comply with the obligation to respect rights without discrimination established in Article 1(1) of the Convention, to the detriment of the victims of Dominican nationality: Willian Medina Ferreras, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina (deceased), Rafaelito Pérez Charles, Victor Jean, Victoria Jean (deceased), Miguel Jean and Natalie Jean, and also in relation to the rights of the child recognized in Article 19 of the Convention, to the detriment of the victims who were children at the time of the events.

407. Lastly, based on the foregoing considerations (*supra* paras. 390 to 397 and 400 to 404), the Court concludes that the State violated the rights to judicial guarantees and to judicial protection, recognized in Articles 8(1) and 25(1) of the American Convention, in relation to failure to comply with the obligation to respect the rights of the Convention without discrimination established in Article 1(1) of the Convention, to the detriment of Willian Medina Ferreras, Lilia Jean Pierre, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina (deceased), Jeanty Fils-Aimé (deceased), Janise Midi, Diane Fils-Aimé, Antonio Fils-Aimé, Endry Fils-Aimé, Victor Jean, Marlene Mesidor, Markenson Jean, Miguel Jean, Victoria Jean (deceased), Natalie Jean, Rafaelito Pérez Charles and Bersson Gelin, as well as its obligations arising from the rights of the child, protected in Article 19 of the Convention, to the detriment of the victims who were children at the time of the events.

X
RIGHT TO THE PROTECTION OF PRIVACY AND RIGHTS OF THE FAMILY,[458] IN RELATION TO THE RIGHTS OF THE CHILD AND THE OBLIGATION TO RESPECT RIGHTS

A) Arguments of the Commission and of the parties

408. The Commission observed that the expulsion of the presumed victims left them unable to communicate with their families and broke up the family unit, which took a direct toll on the family roles and dynamics. According to the Commission, in the cases of Bersson Gelin, Ana Virginia Nolasco, Ana Lidia Sensión, Reyita Antonia Sensión and Rafaelito Pérez Charles, their expulsion entailed, *ipso facto,* the rupture of their ties with their family unit: in the case of Mr. Gelin, the separation from his son William Gelin and, in the case of Ana Lidia and Reyita Antonia Sensión, the separation from their father, Antonio Sensión. Furthermore, the Commission considered it proved that Ana Virginia Nolasco, Ana Lidia Sensión and Reyita Antonia Sensión faced serious difficulties to meet their basic needs, and none of the children could continue their schooling. With regard to the Medina family and the Fils-Aimé family, the Commission indicated that their expulsion meant that the families found themselves in a foreign country, without resources of any kind and without documentation. The adult members of the family were unable to find work to be able to feed and educate their children, while the children were unable to continue their studies. Consequently, the Commission considered that the State had violated the rights of the family, recognized in Article 17 of the American Convention, in relation to Article 1(1) of this instrument, as well as in relation to the rights of the child, recognized in Article 19 of the Convention, in the case of the children.

409. The representatives indicated that the Sensión, Fils-Aimé, Gelin and Pérez Charles families were separated as a result of the expulsion of some of their members from Dominican territory. Regarding the Sensión family, they indicated that when Ana Virginia Nolasco and her daughters, Ana Lidia Sensión and Reyita Antonia Sensión, were expelled from Dominican territory in 1994, they were unable to inform the girls' father Antonio Sensión about what was happening, so that he was unaware of their whereabouts, and it was only eight years later, having taken various steps to try and locate his family, that he was able to find them and reunite with them. This separation continued following the date on which Dominican Republic accepted the Court's jurisdiction on March 25, 1999, so that the Court is competent to rule on it. Lastly, the representatives alleged that although it is true that Mr. Sensión did not live with his family permanently, he had a family relationship with it, proved by the fact that he searched for them for years until he found them. They alleged that Janise Midi, and her children were expelled separately from Jeanty Fils-Aimé, Mrs. Midi's husband and the children's father, and they remained separated for eight days until they were able to reunite in Haiti. The representatives also noted that Bersson Gelin has remained separated from his son, William Gelin, who was born in the Dominican Republic and has lived in that country since 1999. Meanwhile, at the time of his expulsion, Rafaelito Pérez Charles was separated from his mother and siblings, who lived in the Dominican Republic. They were unaware of what had occurred for around five days. The representatives argued that the consequences of the expulsion of the Sensión and Fils-Aimé families and of Mr. Gelin were particularly serious, because they involved the separation of the children from their fathers for different lengths of time.

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[458] The pertinent part of Article 11 of the American Convention (Right to Privacy), states: […] 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. […]. While the relevant part of Article 17 of the American Convention (Rights of the Family) indicates: "1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

410. The representatives also asserted that the expulsion of the victims constituted abusive and arbitrary interference in the right to privacy of the Medina Ferreras, Fils-Aimé, Sensión, Jean, Gelin and Pérez Charles families. In this regard, they argued that the members of these families had been born in the Dominican Republic or had lived in that country for many years, so that they had close ties with the persons around them and with the different communities in which they lived, and Dominican Republic was the only reality they knew. Their expulsion meant that they were exposed to a new reality, a place with a different culture, in which another language was spoken, and where they had no support network. In addition, the expulsions had a significant impact on their living conditions and, in many cases, even on their health. The representatives alleged that this violation had been particularly severe in the case of the children affected by the expulsion, given their particular situation of vulnerability and the obligation of the State to adopt special measures of protection in their favor, which it failed to comply with.

411. Based on the above, the representatives considered that the State had violated the rights of the family and to family life of the members of the said families who were separated, as well as the right to privacy of all the victims who were expelled in violation of Articles 11(2) and 17 of the American Convention, in relation to Articles 1(1) and 19 of this instrument.

412. For its part, the State denied the facts relating to the expulsions. Regarding the presumed separations, the State indicated that, in a communication of August 21, 2001, the representatives had indicated that: "Berson Gelin has been reunited in Haiti with his youngest son, William, and therefore there is no need to insist on the measures of the Inter-American Court in that regard." It had also been indicated that Mr. Gelin was currently living in the Dominican Republic. In the case of Rafaelito Pérez Charles, who had alleged a supposed separation from his mother and siblings for five days due to his presumed expulsion, the State understood that this lapse could not be considered an unreasonable time in order to establish that the State had violated the right to protection of the family. Regarding the members of the Medina, Fils-Aimé and Jean Mesidor families, the State emphasized that they had alleged that they were deported together so that there was no violation of the rights of the family owing to the supposed family separation. With regard to the situation of the Sensión Family, the State, in its answering brief, indicated that Antonio Sensión was working in Puerto Plata at the time of the supposed deportation of Ana Virginia Nolasco and her daughters, Ana Lidia Sensión and Reyita Antonia Sensión, so that he was already living apart from his family; moreover, Antonio Sensión became aware of the presumed deportation months after it occurred. In addition, the State indicated that only three years passed from March 25, 1999, until 2002, and that, in March 2002, the State had proceeded to grant safe-conducts, which were renewed in 2010. Consequently, the State indicated that it had not violated the rights recognized in Articles 11 and 17 of the Convention, in relation to Article 1(1) of this instrument, to the detriment of the said presumed victims.

B) Considerations of the Court

B.1. Family separation (Article 17(1))

413. The Court observes that some of the arguments of the Commission and of the representatives concerning the presumed violation of the rights of the family, recognized in Article 17 of the American Convention, in relation to the rights of the child, recognized in Article 19 thereof, refer to the impact of the expulsions, for example on the living conditions of the victims who were expelled, and not to obligations related to the rights of the family *stricto sensu*. Regarding the alleged violations of Article 17 of the Convention,

in relation to Article 19 of this instrument, the Court considers it in order, based on the facts that have been established, to refer only to the family separation of the members of the Fils-Aimé, Sensión, Gelin and Pérez Charles families.

414. With regard to the obligations relating to the rights of the family, the Court has underscored that these rights entail not only that the State must order measures of protection for children and implement them directly, but that it must also encourage as comprehensively as possible the development and strengthening of the family unit,[459] because the mutual enjoyment of the harmonious relations between parents and children is a fundamental aspect of family life.[460] Added to this, the Court has indicated that, in certain circumstances, the separation of children from their family constitutes a violation of the right in question.[461] This is because "[c]hildren have the right to live with their family, which is required to meet their material, affective and psychological needs."[462]

415. The provisions of the Convention on the Rights of the Child, which are part of the *corpus juris* of childhood rights, reveal the obligation to prevent family separation and preserve family unity.[463] In addition, the State must not only abstain from interfering unduly in the private or family relationships of the child, but must also, depending on the circumstances, take positive measures to ensure the full enjoyment and exercise of the child's rights.[464] This requires that the State, given its responsibility for the common good, safeguard the predominant role of the family in the protection of the child, and provide assistance to the family by public authorities, by adopting measures that promote family unity.[465]

416. With regard to possible family separation for migratory reasons, the Court recalls that States have the authority to elaborate and execute their own immigration policies,

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459 *Cf. Juridical Status and Human Rights of the Child. OC-17/02,* para. 66, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 404.

460 *Cf. Juridical Status and Human Rights of the Child. OC-17/02,* para. 72, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. OC-21/14*, para. 264.

461 *Cf. Juridical Status and Human Rights of the Child. OC-17/02,* paras. 71 and 72*, and Case of the Pacheco Tineo Family v. Bolivia*, para. 226.

462 *Cf. Juridical Status and Human Rights of the Child. OC-17/02*, para. 71; *Case of Chitay Nech et al. Vs Guatemala*, para. 157, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. OC-21/14*, para. 158. In this regard, "[t]he European Court has established that the mutual enjoyment of harmonious relations between parents and children is a fundamental component of family life and that, even when the parents are separated, harmonious family relations must be ensured. Measures that impede this enjoyment are an interference with the right protected by Article 8 of the Convention. The Court itself has pointed out that the essential content of this precept is protection of the individual in the face of arbitrary action by public authorities. One of the most grave interferences is that which leads to the division of the family" (*cf. Juridical Status and Human Rights of the Child. OC-17/02*, para. 72).

463 Convention on the Rights of the Child, Article 9.1: "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence." Cf. Committee on the Rights of the Child, General comment 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/CG/14, May 29, 2013, para. 60. *Cf. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. OC-21/14*, para. 273.

464 *Cf. Case of Contreras et al. v. El Salvador,* para. 107, referring to Articles 7, 8, 9, 11, 16, and 18 of the Convention on the Rights of the Child

465 *Cf. Juridical Status and Human Rights of the Child.OC-17/02*, para. 88, and *Case of Contreras et al. v. El Salvador,* para. 107. See also Articles 9(3) and 9(4) of the Convention on the Rights of the Child.

including control of the entry, residence and expulsion of aliens.[466] However, when a State takes a decision that involves a limitation to the exercise of any right of a child, it must take the child's best interests into account and adhere strictly to the relevant provisions.[467] In this regard, it should be stressed that a measure of expulsion or deportation may have prejudicial effects on the life, well-being and development of the child, so that his or her best interests should be an overriding consideration.[468] Thus, "[a]ny decision concerning the separation of the child from his or her family must be justified by the best interests of the child."[469] Specifically, the Court has affirmed that "the child must remain in its family unit, unless there are determining reasons, based on the child's best interests, to decide to separate him or her from the family."[470] Consequently, the legal separation of the child from his or her family is only admissible if it is duly justified by the best interests of the child, if it is exceptional and, insofar as possible, temporary.[471]

417. Nevertheless, the Court considers that the child's right to family life does not transcend *per se* the sovereign authority of the States Parties to implement their own immigration policies in conformity with human rights. In this regard, it should be noted that the Convention on the Rights of the Child also refers to the possibility of family separation owing to the deportation of one or both parents.[472]

418. The Court will now apply the jurisprudential principles described above. Bersson Gelin was expelled from Dominican Republic to Haitian territory in 1999, resulting in his separation from his son, William Gelin, who was a child at the time. Mr. Gelin's deprivation of liberty and expulsion were actions taken in non-compliance with the State's obligation to respect the treaty-based rights without discrimination; they were not carried out within the framework of immigration proceedings under domestic law, the basic procedural guarantees required by domestic law were not followed, nor were the international obligations of the State (*supra* paras. 213, 405 and 407). Consequently, the measure did not seek a lawful purpose and it was not in keeping with the legal requirements, hence it is not necessary to weight the protection of the family against the measure, and converts the separation of Bersson Gelin from his son, William Gelin, into an unjustified family

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[466] *Cf. Case of Vélez Loor v. Panama*, para. 97, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. *OC-21/14*, para. 273.

[467] *Cf. Juridical Status and Human Rights of the Child. OC-17/02,* para. 65*, and Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. OC-21/14, para. 273.

[468] *Cf.* Committee on the Rights of the Child, *General Comment 14* on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/CG/14, para. 60, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. OC-21/14*, para. 278.

[469] *Cf. Juridical Status and Human Rights of the Child*. OC-17/02, para. 73, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. OC-21/14, para. 273.

[470] *Cf. Juridical Status and Human Rights of the Child.* OC-17/02, para. 77, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection. OC-21/14*, para. 273.

[471] *Cf. Juridical Status and Human Rights of the Child. OC-17/02*, para. 77; *Case of Gelman v. Uruguay*, para. 125, and *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. *OC-21/14*, para. 273.

[472] Article 9(4) indicates the following: "Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned." *Cf. Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*. *OC-21/14*, para. 274.

separation. Furthermore, the Court considers that, from the moment of the separation in 1999, the State had the positive obligation to take measures aimed at family reunification to ensure that the child William Gelin could live with his father. In this regard, the Court notes that there is no record that the State took steps to ensure that Bersson Gelin and his son could meet again from 1999 until March 2002 when Mr. Gelin obtained a safe-conduct. However, in its arguments, the State affirmed that the representatives had supposedly indicated that Bersson Gelin had been reunited with his son and currently lived in the Dominican Republic (*supra* para. 412). The Court considers that this does not change the unjustified nature of the separation and the absence of measures taken by the State to facilitate family reunification between 1999 and 2002.[473] Based on the foregoing, the Court finds that the State violated the right to protection of the family, recognized in Article 17(1) of the Convention, in relation to failure to comply with the obligation to respect rights without discrimination established in Article 1(1) of the Convention, to the detriment of Bersson Gelin and William Gelin, and also in relation to the rights of the child, recognized in Article 19 of this instrument, to the detriment of the child, William Gelin.

419. Regarding the separation of the Sensión family, the Court recalls that, in 1994, before the State had accepted the Court's contentious jurisdiction, Ana Virginia Nolasco and her daughters Ana Lidia Sensión and Reyita Antonia Sensión were detained and expelled to Haiti, while the girls' father, Antonio Sensión, was working in Puerto Plata. Mr. Sensión found out about the expulsion of his wife and daughters when he returned home and began his search, which lasted eight years, until 2002, when he found them and was reunited with them (*supra* para. 218). The Court reiterates that, even though it does not have competence to rule on the expulsion of Ana Virginia Nolasco and her daughters, it can rule on the State's obligation to adopt measures aimed a reuniting the members of the Sensión family from the time of the State's acceptance of the Court's jurisdiction on March 25, 1999. In this regard, the State argued that, on the one hand, Virginia Nolasco and the girls Ana Lidia and Reyita Antonia, both surnamed Sensión, were already living apart from Mr. Sensión before their expulsion because he worked in Puerto Plata, and that Mr. Sensión only became aware of the expulsion of his family three months later. On the other hand, the State asserted that, "only three years" had passed between the time it accepted the Court's jurisdiction in 1999 and 2002 when it proceeded to grant safe-conducts to the members of the Sensión family (*supra* para. 412). The Court considers that the fact that Antonio Sensión worked in another place and did not live with his family permanently does not mean that the Sensión family did not have a family life before the expulsion. Furthermore, the State's assertion reaffirms that, from 1999 to 2002, it took no measures aimed at facilitating the reunification of the members of the Sensión family.

420. Consequently, the State failed to comply with its obligation to take measures aimed at reuniting the members of the Sensión family, the Court considers that the State violated its obligations relating to the right to protection of the family recognized in Article 17(1) of the Convention, in relation to non-compliance with its obligations established in Article 1(1) of the Convention, to the detriment of Antonio Sensión, Ana Virginia Nolasco, Ana Lidia Sensión and Reyita Antonia Sensión, and also in relation to the rights of the child, protected in Article 19 of this treaty, to the detriment of children at the time, Ana Lidia Sensión and Reyita Antonia Sensión.

421. According to the facts, Jeanty Fils-Aimé was detained separately from Janise Midi, Diane Fils-Aimé, Antonio Fils-Aimé and Endry Fils-Aimé (*supra* para. 210). However, the Court does not have sufficient probative elements to determine with certainty the exact

[473] However, it should be noted that although Mr. Gelin has been able to visit his son several times, to date permanent family reunification has not been achieved, because, according to the statements of Bersson Gelin, he continues to live in Haiti for fear of being expelled again.

nature and duration of the family separation, and is therefore unable to rule in this regard. This impossibility to rule owing to insufficient evidence includes the circumstances surrounding Nené Fils-Aimé, regarding whom it has not been proved that he was expelled, or the circumstances of the hypothetical family separation.

422. Regarding the separation of Rafaelito Pérez Charles from María Esthel Matos Medina and from Jairo Pérez Medina and Gimena Pérez Medina, the Court recalls that the family relationship allegedly connecting the former with the other three persons has not been proved; moreover, the latter are not considered presumed victims (*supra* para. 95). In addition, the Court notes that the representatives failed to explain how the separation of Rafaelito Pérez Charles for a period of one week at the time of the facts would have affected the supposed family ties of Mr. Pérez Charles with these other persons. Consequently, the Court finds that it is not necessary to rule on the alleged violation of the right to protection of the family to the detriment of Mr. Pérez Charles.

B.2. Interference in the family home (Article 11(2))

423. The Court observes that the representatives argued that the expulsion of the presumed victims constituted an unlawful and arbitrary interference in their right to privacy, protection by Article 11(2) of the American Convention. The Commission did not allege the violation of Article 11 of the Convention and the State did not make a specific comment in this regard. However, the Court reiterates that "the presumed victims or their representatives may cite rights other than those included by the Commission, based on the facts presented by the latter" (*supra* para. 227).

424. The Court recalls that Article 11 of the American Convention, entitled "Right to Privacy," requires the State to protect the individual from arbitrary acts by State entities that affect private and family life. It prohibits any arbitrary or abusive interference in the private life of the individual, specifying different spheres of this, such as the private life of the family. In this regard, the Court has affirmed that the sphere of privacy is characterized by being free and immune from abusive or arbitrary interference or invasion by third parties or by the public authorities.[474] In addition, the Court has indicated that, "under Article 11(2) of the Convention, everyone has the right to receive protection against arbitrary and abusive interference in the family, especially children because the family plays an essential role in their development."[475]

425. The Court now finds it pertinent to examine whether, in relation to the State's actions with regard to the members of the Medina, Jean and Fils-Aimé families who were detained in their homes in order to be expelled, the interference in the home constituted an arbitrary or abusive interference in their private life, in violation of Article 11(2) of the Convention.

426. In this case, State agents went to the homes of the Jean, Medina and Fils-Aimé families without an arrest warrant issued by the court, reasoned and in writing, and without the subsequent deprivation of liberty and expulsion of the victims being part of ordinary immigration proceedings pursuant to domestic law. It should be recalled that, in the case of the Jean family, the officials went to the family home in December 2000, at around 7.30 a.m., beat on the door and forced the members of the family to leave the house and get into a bus. Later, the State officials returned to the house and arrested Mr.

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474 *Cf. Case of Artavia Murillo et al. (In vitro fertilization) v. Costa Rica. Merits, reparations and costs.* Judgment of November 28, 2012, para. 142.

475 *Cf. Juridical Status and Human Rights of the Child. OC-17/02*, para. 71*, and Case of Contreras et al. v. El Salvador*, para. 106.

Jean who was still there and also forced him to get into a bus (*supra* para. 223). Regarding members of the Medina Ferreras family, in November 1999 or January 2000 during the early morning hours, State officials from Pedernales went to their home and took them, together with other people, to the "Oviedo prison" (*supra* para. 201). Lastly, regarding the Fils-Aimé family, State agents went to the family home on November 2, 1999, where they found Janise Midi and her children Antonio, Diane and Endry Fils-Aimé; the agents obliged them to leave the house, forced them to get into a truck, and took them to the "Pedernales Garrison" (*supra* para. 210).

427. In view of the fact that the above-mentioned interferences in the homes of the Jean, Medina Ferreras and Fils-Aimé families were not justified, because they were not in keeping with the procedure established by domestic law, the Court finds that they should be considered arbitrary interferences in the private life of these families, in violation of Article 11(2) of the Convention. Furthermore, they were linked to acts that involved a violation of the obligation to respect rights without discrimination (*supra* paras. 400 to 407).

428. These arbitrary interferences were particularly grave in the case of the children involved. Given their special situation of vulnerability, the State had the obligation to adopt special measures of protection in their favor under Article 19 of the Convention. However, the facts reveal that, despite the presence and special needs of the children, in the case of the three families, the State agents did not allow them to get dressed or to take anything with them. In the case of the Jean family, they were not allowed to take milk for Natalie Jean, who was approximately four months (*supra* para. 223).

B.3. Conclusion

429. Based on the foregoing, in the terms indicated (*supra* para. 418), the Court concludes that the State violated the right to protection of the family, recognized in Article 17(1) of the Convention, in relation to its failure to comply with the obligation to respect the treaty-based rights without discrimination established in Article 1(1) of the Convention, to the detriment of Bersson Gelin and William Gelin, and also in relation to the rights of the child, recognized in Article 19 of this instrument, to the detriment of the child, William Gelin. In addition, in the terms indicated (*supra* para. 420), the Court finds that the State violated its obligation related to the right to protection of the family, recognized in Article 17(1) of the Convention, in relation to its failure to comply with the obligations established in Article 1(1) of the Convention, to the detriment of Antonio Sensión, Ana Virginia Nolasco, Ana Lidia Sensión and Reyita Antonia Sensión, and also in relation to the rights of the child, protected in Article 19 of this treaty, to the detriment of children at the time, Ana Lidia Sensión and Reyita Antonia Sensión.

430. In addition, as indicated (*supra* paras. 427 and 428), the Court considers that the State violated the right to privacy, owing to the violation of the right not to be the object of arbitrary interference in private and family life, recognized in Article 11(2) of the American Convention, in relation to its failure to comply with the obligation to respect rights without discrimination established in Article 1(1) of the Convention, to the detriment of Victor Jean, Marlene Mesidor, Markenson Jean, Victoria Jean (deceased), Miguel Jean, Natalie Jean, Willian Medina Ferreras, Lilia Jean Pierre, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina (deceased), Jeanty Fils-Aimé (deceased), Janise Midi, Diane Fils-Aimé, Antonio Fils-Aimé and Endry Fils-Aimé, and in addition in relation to the rights of the child recognized in Article 19 of the Convention, to the detriment of the children Victoria Jean (deceased), Natalie Jean, Markenson Jean, Miguel Jean, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina (deceased), Diane Fils-Aimé, Antonio Fils-Aimé and Endry Fils-Aimé.

XI
RIGHT TO PERSONAL INTEGRITY[476]

A) Arguments of the Commission and of the parties

431. The Commission alleged that the presumed victims were detained in an unlawful and arbitrary manner and that, while in custody, they received no water, food, or medical attention; in addition, they were unable to communicate with anyone, and could not contact their family members to advise them of their arrest and expulsion. It added that, during their detention, they were subjected to verbal abuse by the State agents. The foregoing, added to the uncertainty about the reasons for the detention, the failure to bring them before a competent authority, and the subsequent expulsion had a profound impact on the mental integrity of the presumed victims. According to the Commission, these circumstances led to "mental or psychological suffering which, given the particular situation [of Haitians and Dominicans of Haitian descent], is unjustifiable." In addition, it indicated that, in some cases, the destruction of identity documents was aimed at depriving the holders of their juridical personality, while, in other cases, it was designed to break the legal bond of nationality that linked them to the State, in an attempt to make these persons deportable. The Commission considered that the arbitrary and deliberate destruction of identity documents[477] by the State authorities was inserted in the context of discrimination of which Haitians and Dominicans of Haitian descent in the Dominican Republic are victims, and constituted degrading treatment.

432. It also argued that the next of kin who remained in the Dominican Republic suffered from not knowing the whereabouts of their expelled family members, and that the effect of the expulsion of the presumed victims was to sever family ties and break up the family unit, and adversely affected the normal development of family relations, even for the new members of the family.

433. Based on the above, the Commission considered that the State had violated the right to personal integrity and the prohibition of cruel, inhuman or degrading treatment recognized in Article 5(1) and 5(2) of the American Convention, in relation to Article 1(1), to the detriment of the presumed victims,[478] and also that it had violated the right to personal integrity recognized in Article 5(1) of the Convention, in relation to Article 1(1), to the detriment of the next of kin of the presumed victims.[479]

434. For their part, the representatives argued that many of the presumed victims were taken from their homes or arrested while they were out and about, and were not informed of the reasons for their detention, or allowed to communicate with their family members, or with a lawyer to obtain assistance. They indicated that the presumed victims were obliged to get into vehicles transporting other people with the same physical

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476 The pertinent part of Article 5 (Right to Humane Treatment) of the Convention stipulates: "1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

477 The identity documents of Willian Medina Ferreras, and the safe-conducts of Jeanty Fils-Aimé and Bersson Gelin.

478 The presumed victims regarding whom the violations were alleged include: Willian Medina Ferreras, Lilia Jean Pierre, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina, Jeanty Fils-Aimé, Janise Midi, Diana Fils-Aimé, Antonio Fils-Aimé, Endry Fils-Aimé, Bersson Gelin, Ana Virginia Nolasco, Ana Lidia Sensión, Reyita Antonia Sensión, Rafaelito Pérez Charles, Victor Jean, Marlene Mesidor, Markenson Jean, Victoria Jean, Miguel Jean, and Natalie Jean.

479 Including: William Gelin and Antonio Sensión.

characteristics, in some cases, to detention centers for ordinary prisoners – even if they were accompanied by young children – without knowing what would happen to them. In addition, the representatives alleged that the presumed victims saw how the authorities mistreated other people detained in similar circumstances, and also that they themselves were subject to verbal abuse. This caused the presumed victims to feel anguish and helplessness together with a well-founded fear that they, or one of their family members, could be a victim of violence and ill-treatment by the authorities. Several family groups were taken to detention centers without appropriate conditions before their deportation, even though they had not committed a wrongful act and it was never proved that they had committed an immigration offense, and this caused profound suffering. The representatives also stated that the presumed victims were transported to the border in inadequate conditions; they were not given food or water.

435. Like the Commission, the representatives indicated that the identity documents of some of the presumed victims were seized, and others had been unable to obtain identity documents for themselves and their children, owing to the context of discrimination towards Dominicans of Haitian descent that reigns in the Dominican Republic. Accordingly, they lived in a situation of uncertainty because they did not possess any proof of their identity or juridical personality. The representatives added that those expelled suffered profoundly because they were obliged to live in a country that they did not know. Furthermore, they referred to the opinion of expert witness Rosa Del Rosario Lara, who explained the different symptoms of anxiety and depression suffered by the presumed victims in relation to the events that occurred during the expulsions, and the situation that they faced during the time before they were able to reunite with their family members. In addition, the representatives indicated that the different violations committed to the detriment of the presumed victims in this case caused profound suffering to the members of their families.

436. Lastly, the representatives asked the Court to declare the violation of the right to personal integrity, recognized in Article 5 of the Convention, with regard to the members of the Medina, Fils-Aimé, Sensión, Jean, Gelin and Pérez Charles families who were detained or expelled, in relation to the failure to comply with the obligations established in Article 1(1) of the Convention and the obligations contained in Article 19 of this instrument, in the case of the children.

437. The State indicated that the arrest of individuals who will be deported is part of the usual deportation process and that they are taken to “special shelters” for undocumented migrants. This deportation process is governed by Immigration Law No. 95 of 1939.[480] The State also argued that the case file does not contain any medical certificate, photograph or other document proving that the presumed victims were caused any physical harm. Furthermore, there is no record that they were, in fact, subject to verbal abuse, which would determine whether the arrest was truly an arbitrary detention; in other words, that it was not in keeping with the legitimate exercise of the State’s sovereignty to maintain public order. Based on the legal arguments presented, the Court’s

[480] Article 13 of this law established that: "[t]he following aliens shall be arrested and deported by order of the Secretary of State for Internal Affairs and Police or of other officials designated to this end: 1. Any alien who enters the Republic following the date of publication of this law, by means of false or misleading declarations or without inspection and admission by the immigration authorities at one of the indicated ports of entry; […] 7. Any alien who remains in the Republic in violation of any restriction or condition under which he was admitted as a non-immigrant; […] 10. Any alien who has entered the Republic before the date of the entry into force of this law who does not possess a residence permit and who, within three months of this date, does not request a residence permit, as required by this law.”

case law and, in particular, the lack of evidence in the case file, the State concluded that it had not violated the right to personal integrity with regard to the presumed victims.[481]

B) Considerations of the Court

438. In the case *sub judice,* the Court considers it desirable to point out that it has already established the international responsibility of the State for the violation of the rights to nationality, recognition of juridical personality, a name, personal liberty, judicial guarantees and protection, freedom of movement and residence, and protection of the family with regard to different victims and, in the case of the children, the rights of the child, in relation to the situation of vulnerability of the victims because, according to the facts of this case, their situation is inserted in a context of collective expulsions or deportations. Some of the victims were expelled from the Dominican Republic, even though they had Dominican nationality and had their birth certificate and/or identity card, which were disregarded or destroyed by the State authorities. In other cases, the State had not granted the victims the corresponding documentation, even though they were born in the Dominican Republic, and had faced difficulties trying to obtain it. Consequently, the State did not recognize their nationality, or their juridical personality, or their name, and also, owing to this series of violations, their right to identity. Also, some victims who were Haitian nationals were expelled. Additionally, the victims were detained unlawfully and arbitrarily without knowing the reasons for the deprivation of liberty, and without being brought before a competent authority, and were expelled in less than 48 hours, without the basic guarantees of due process having been observed. Also, in the case of some of the victims, the State failed to comply with its obligation to protect the family, and to safeguard the family from arbitrary interference in its private or family life. The Court notes that most of the arguments of the Commission and the representatives are related to the facts have already been examined. Consequently, the Court finds that, in this case, it is not in order to rule on arguments referring to facts that have already been analyzed in light of other obligations under the Convention.

XII
RIGHT TO PROPERTY[482]

A) Arguments of the Commission and of the parties

439. The Commission considered that "the victims' expulsion meant the automatic and *de facto* loss of all those personal effects that were left behind in Dominican territory, which is an unlawful deprivation of their property for which they received no compensation." It added that the presumed victims had household furnishings, personal effects, clothing, livestock, savings and cash, or unpaid wages. In addition, it observed that, in deportation cases, the confiscation of personal effects was not permitted under Dominican law and that, despite the domestic laws in force, the presumed victims did not have the opportunity to retrieve their belongings, personal effects, and cash at the time of their expulsion. Consequently, it considered that the State had violated the right to property

[481] The State referred, among others, to the following presumed victims: Willian Medina Ferreras, Lilia Jean Pierre, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina (deceased), Jeanty Fils-Aimé (deceased), Janise Midi, Nené Fils-Aimé, Diane Fils-Aimé, Antonio Fils-Aimé, Endry Fils-Aimé, Carolina Fils-Aimé, Bersson Gelin, William Gelin, Antonio Sensión, Rafaelito Pérez Charles, Victor Jean, Marlene Mesidor, Markenson Jean, Victoria Jean, Miguel Jean and Natalie Jean.

[482] The pertinent part of Article 21 establishes: "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 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."

established in Article 21 of the American Convention, in relation to Article 1(1), to the detriment of some presumed victims.[483]

440. The representatives referred to the fact that some of the presumed victims were forced from their home without having the opportunity to take their possessions with them, and without being able to return to their place of origin for a long time. In other cases, they indicated that the presumed victims were deprived of the possessions that they had taken with them by the authorities who detained them. The representatives considered that "the expulsion of the presumed victims entailed, for all of them, interference in the enjoyment of the right to property in relation to several of their belongings." Consequently, they asked the Court to declare that the State had violated Article 21 of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Willian Medina Ferreras, Jeanty Fils-Aimé, Victor Jean, Bersson Gelin and Rafaelito Pérez Charles.

441. For its part, the State asserted that there was no evidence in the case file to prove material losses, "not even documentary or circumstantial proof, other than the statements of the presumed victims themselves that, at some time, they had possessed these objects, money or household goods." Accordingly, the State indicated that it was not responsible for the presumed violations of the right contained in Article 21 of the Convention, in relation to Article 1(1) of this instrument, to the detriment of some presumed victims.[484]

B) Considerations of the Court

442. The Court has already determined that the expulsion of Ana Virginia Nolasco and her daughters, Ana Lidia and Reyita Antonia, both surnamed Sensión, falls outside the temporal competence of the Court; hence, it is not pertinent to examine the alleged violation of the right to property recognized in Article 21 of the Convention, in relation to them.

443. As regards the members of the Medina, Jean, Fils-Aimé, Bersson Gelin and Rafaelito Pérez Charles families, although both the Commission and the representatives argued the loss of household furnishings, personal effects, clothing, livestock (pigs, hens, cows, horses), savings and cash or wages owed to the presumed victims, the Court considers that the facts described and alleged by the Commission and the representatives are related to facts that have already been examined in Chapter IX of this Judgment, so that there is no need to rule on this.

XIII
REPARATIONS
(Application of Article 63(1) of the American Convention)

444. Based on Article 63(1) of the American Convention, the Court has indicated that any violation of an international obligation that has caused harm entails the duty to make adequate reparation, and that this provision reflects a customary norm that constitutes

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[483] Including: Willian Medina Ferreras, Lilia Jean Pierre, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina, Jeanty Fils-Aimé, Janise Midi, Nené Fils-Aimé, Diana Fils-Aimé, Antonio Fils-Aimé, Endry Fils-Aimé, Bersson Gelin, Ana Virginia Nolasco, Ana Lidia Sensión, Reyita Antonia Sensión, Rafaelito Pérez Charles, Victor Jean, Marlene Mesidor, Markenson Jean, Victoria Jean, Miguel Jean and Natalie Jean.

[484] Including: Willian Medina Ferreras, Lilia Jean Pierre, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina (deceased), Jeanty Fils-Aimé, Janise Midi, Nené Fils-Aimé, Diane Fils-Aimé, Antonio Fils-Aimé, Endry Fils-Aimé, Bersson Gelin, Rafaelito Pérez Charles, Victor Jean, Marlene Mesidor, Markenson Jean, Victoria Jean, Miguel Jean and Natalie Jean.

one of the fundamental principles of contemporary international law on State responsibility.[485] In this case, the Court has considered it necessary to award different measures of reparation in order to ensure the violated rights and to redress the harm integrally.

445. It should be noted that this Court has established that reparations should have a causal nexus with the facts of the case, the violations declared, the harm proved, and the measures requested to repair the respective harm. Therefore, the Court will observe the concurrence of these factors to rule correctly and pursuant to law.[486]

446. In light of the foregoing considerations on the merits of the case and the violations of the American Convention declared in Chapters VIII, IX and X, the Court will proceed to analyze the claims presented by the Commission and the representatives, as well as the arguments of the State, in light of the criteria established in its case law with regard to the nature and scope of the obligation to make reparation, in order to establish measures aimed at redressing the harm caused to the victims.[487]

A) Injured party

447. The Court reiterates that, in the terms of Article 63(1) of the Convention, those who have been declared victims of the violation of any right recognized in this instrument are considered to be the injured party. Therefore, the Court considers that the "injured party" are: Willian Medina Ferreras, Lilia Jean Pierre, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina, Jeanty Fils-Aimé, Janise Midi, Antonio Fils-Aimé Midi, Diane Fils-Aimé Midi, Endry Fils-Aimé Midi, Victor Jean, Marlene Mesidor, Markenson Jean, Victoria Jean, Miguel Jean, Natalie Jean, Antonio Sensión, Ana Virginia Nolasco, Reyita Antonia Sensión, Ana Lidia Sensión, Rafaelito Pérez Charles, Bersson Gelin and William Gelin, and, as victims of the violations declared in Chapters VIII, IX and X, they will be considered beneficiaries of the reparations ordered by the Court.

B) Measures of integral reparation: restitution, satisfaction, and guarantees of non-repetition

448. International case law, and in particular that of the Court, has established repeatedly that the judgment constitutes *per se* a form of reparation.[488] Nevertheless, considering the circumstances of the case and the harm to the victims arising from the violations of the American Convention that have declared to their detriment, the Court finds it pertinent to decide the following measures of reparation.

B.1. Measures of restitution

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485 *Cf. Case of Velásquez Rodríguez v. Honduras. reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 412.

486 *Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 414.

487 *Cf. Case of Velásquez Rodríguez v. Honduras. reparations and costs,* paras. 25 to 27, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 415.

488 *Cf. Case of Neira Alegría et al. v. Peru. reparations and costs.* Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 394.

B.1.1. Recognition of nationality to the Dominicans and residence permits for the Haitians

B.1.1.1. Willian Medina Ferreras and the members of his family

449. The Commission asked the State to permit all the victims who are still in Haitian territory to return to the territory of the Dominican Republic and to take the measures required: (a) to recognize the Dominican nationality of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina, Miguel Jean, Victoria Jean and Natalie Jean and to provide or to replace all the necessary documentation proving that they are Dominican nationals; (b) to provide "Bersson Gelin and Victor Jean with the necessary documentation certifying that they were born Dominican territory, and to facilitate the procedures corresponding to the recognition of their Dominican nationality," and (c) to allow Lilia Jean Pierre, Janise Midi, Ana Virginia Nolasco, Marlene Mesidor and Markenson Jean, Haitian nationals, to live with their families in Dominican territory as legal residents.

450. The representatives asked the Court to order the State to grant, as soon as possible, "the official documents recognized by the State to certify the identity of the Dominicans, so that they may use these documents for the relevant purposes." They also asked that the State "grant the appropriate immigration status to each of the victims, who are Haitian citizens, so that they may remain lawfully in Dominican territory with the members of their families."

451. The State asserted that "[r]egarding the recognition of the Dominican nationality of the presumed victims, […] it is only able to act in accordance with the domestic laws that are in force, and […] is unable to circumvent the legal requirements for granting nationality." It indicated that, as appropriate and based on the decisions reached by the Court, it "will proceed accordingly, provided that the presumed victims agree to comply with the requirements established by domestic law for the granting of Dominican nationality, if this is in order."

452. The Court has determined that the authorities' disregard of the personal documentation of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina and Carolina Isabel Medina (deceased), entailed the violation, *inter alia*, of their right to nationality (*supra* para. 276). The Court also recalls that, in its answering brief, the State underscored that it had "indicate[d] opportunely that 'Willia[n] Medina Ferreras, [A]wilda Medina [and] Luis Ney Medina […] are Dominican citizens […] so that there is no objection to replacing the corresponding documentation, either the birth certificate or the identity card, as appropriate." Therefore, the Court considers that, within six months, the Dominican Republic must adopt the measures required to ensure that Willian Medina Ferreras, Awilda Medina and Luis Ney Medina have the necessary documentation to prove their identity and their Dominican nationality, and must, if necessary, proceed to replace or restore documentation, as well as to take any other measure required in order to comply with this decision, free of charge.

453. The Court notes that Law No. 169-14 institutes a procedure to regularize documentation and has determined that articles 6, 8 and 11 of this law are contrary to the Convention, but not that the law as a whole is contrary to this instrument. Having established this, it must be indicated that it is not pertinent for the Inter-American Court to rule on whether or not the articles of this law that have not been declared contrary to the Convention by the Court are appropriate to comply with the measure ordered in the preceding paragraph. However, it is pertinent to indicate that Law No. 169-14, or any other procedure, must be implemented in keeping with the decisions made in this Judgment and, in particular, with the provisions of the preceding paragraph.

454. The Court also underlines that article 3 of Law No. 169-14 excludes the possibility of regularizing "records based on false information, identity theft, or any other act that constitutes falsifying a public deed, provided that the act can be attributed directly to the beneficiary." The Court has been informed of administrative and judicial proceedings to decide on the annulment of records and documentation of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina, and Carolina Isabel Medina (deceased), as well as on the criminal sanction of presumed wrongful acts in this regard. These proceedings originated from an administrative investigation arising from the fact that Willian Medina Ferreras was a plaintiff, under the inter-American system, requiring that the Court declare the international responsibility of the Dominican Republic (*supra* para. 208). Thus, the facts reveal that the actions and interviews on September 26 and 27, 2013, that resulted in other proceedings, including of a judicial nature (*supra* para. 207), were conducted "because this person is suing the Dominican State before the Inter-American Commission on Human Rights" (*supra* para. 207).

455. Consequently, it should be recalled that Article 53 of the Court's Rules of Procedure establishes that "States may not prosecute […] presumed victims, or […] implement reprisals against them […] on account of their statements […] or their legal defense before the Court."[489]

456. It should be recalled that States have the power to institute proceedings to penalize or annul acts contrary to their laws. However, Article 53 of the Rules of Procedure prohibits, in general, the "prosecut[ion]" or the implementation of "reprisals" on account of "statements or [the] legal defense" before the Court. The purpose of this norm is to ensure that those who intervene in the proceedings before the Court may do so freely, in the certainty that it will not prejudice them. Hence, regardless of whether or not the documentation relating to Willian Medina Ferreras and the members of his family is null and void, or whether or not an offense was committed (matters that the State may investigate), in this case the explicit reason behind certain administrative investigations relating to some victims, which resulted in judicial proceedings, was the fact that the State was being sued in the international sphere, In these circumstances, the Court notes that the State's conduct has impaired the safety of the procedural activity that Article 53 seeks to protect. Thus, the Court cannot consider that legal proceedings arising from a violation of Article 53 of the Rules of Procedure are valid, because this provision could not achieve its purpose if proceedings instituted in violation of the provision were found to be legitimate. Therefore, notwithstanding the State's power to take measures under its domestic laws and its international undertakings to punish acts that are contrary to domestic law, the above-mentioned administrative and judicial proceedings cannot represent an obstacle to compliance with any of the measures of reparation ordered in this Judgment, including that related to the adoption of measures aimed at providing Willian Medina Ferreras, Awilda Medina and Luis Ney Medina with the documentation required to prove their identity and Dominican nationality.[490]

457. Based on the above, the Dominican Republic must also adopt, within six months, the necessary measures to annul the said administrative investigations, as well as the civil

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[489] It should be placed on record that, in their observations of April 10 and 14, 2014 (*supra* para. 19), respectively, both the representatives and the Commission asserted that the judicial proceedings related to the documentation of Willian Medina Ferreras and his family members "could be a retaliation […] for having recourse to the organs of the [inter-American] system," or the State could be "violating the regulatory norm according to which States may not take reprisals against those who testify before the Court."

[490] Thus, if eventually applicable, the administrative and judicial proceedings underway in relation to the said persons cannot result in the application of Article 3 of Law No. 169-14 (*supra* para. 454).

and criminal proceedings that are underway (*supra* para. 208), relating to records and documentation of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina and Carolina Isabel Medina. The eventual continuation, and possible results, shall have no effects with regard to the said victims as regards compliance with this Judgment.

B.1.1.2. Victor Jean, Miguel Jean, Victoria Jean and Natalie Jean

458. The Court has also determined that the absence of records and documentation of Victor Jean, Miguel Jean, Victoria Jean (deceased) and Natalie Jean, violated, *inter alia*, the rights to recognition of juridical personality, a name, and nationality of these persons, as well as the right to identity, owing to these violations taken as a whole. Therefore, the State must adopt, within six months, the measures required to ensure that Victor Jean, Miguel Jean, Victoria Jean and Natalie Jean are, as appropriate, duly registered and have the necessary documentation to prove their identity and Dominican nationality; that is, their birth certificate and, as appropriate, also their identity card. The State may not make compliance with this decision dependent on the opening or continuation of any procedure or proceedings by the victims or their representatives, and may not require any cost for this.

B.1.1.3. Marlene Mesidor

459. The Court notes that Marlene Mesidor has children who are Dominicans, including a daughter who is still a child and a victim in this case: Natalie Jean. Therefore, taking into account the rights of the family, and also the rights of the child,[491] the Court finds that the State must adopt, within six months, the necessary measures to ensure that Marlene Mesidor may reside or remain lawfully in the territory of the Dominican Republic, together with her children, some of whom are still children (*supra* footnote 69), in order to keep the family unit together in light of the protection of the rights of the family.

B.2. Measures of satisfaction

B.2.1. Publication of the Judgment

460. The Court orders, as it has in other cases,[492] that the State must publish, within six months of notification of this Judgment: (a) the official summary of this Judgment prepared by the Court, once, in the Official Gazette of the Dominican Republic and (b) the official summary of this Judgment prepared by the Court, once, in a national newspaper with widespread circulation. In addition, this Judgment, in its entirety must remain available for one year on an easily accessible official website of the State.

B.3. Guarantees of non-repetition

461. In cases such as this one, the guarantees of non-repetition acquire increased relevance to ensure that similar events are not repeated and to contribute to prevention.[493] In this regard, the Court recalls that the State must prevent the recurrence

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[491] It should be borne in mind that the Convention on the Rights of the Child establishes, as part of the regime for the integral protection of the child, the obligation to prevent family separation and preserve family unity. *Cf.* Committee on the Rights of the Child, General comment 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/CG/14, May 29, 2013, para. 60.

[492] *Cf. Case of Cantoral Benavides v. Peru. reparations and costs*. Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 428.

[493] *Cf. Case of Pacheco Teruel et al. v. Honduras. Merits, reparations and costs.* Judgment of April 27, 2012. Series C No. 241, para. 92, and *Case of Veliz Franco et al. v. Guatemala*, para. 260. See also, "Guarantees of

of human rights violations such as those described in this case and, to this end, adopt all the legal, administrative and other types of measures necessary to make the exercise of human rights effective, pursuant to the obligations to respect and ensure rights established in Articles 1(1) and 2 of the Convention.[494]

B.3.1. Human rights training for State agents

462. The Commission asked the Court to order the State "to ensure that the Dominican authorities who perform immigration functions receive an intensive training in human rights to ensure that, when performing their functions, they respect and protect the fundamental rights of everyone, without any discrimination for reasons of race, color, language, national or ethnic origin, or other social condition." In addition, it asked that the Court order the State to adopt measures of non-repetition "that ensure the cessation of the practice of collective expulsions and deportations, adjust repatriation procedures to conform to international human rights standards […] guaranteeing the principle of equality and non-discrimination and observing the State's specific obligations towards children and women." It added that the State should implement effective measures to eradicate the practice of "sweeps" or immigration control operations based on racial profiling, and also establish effective judicial remedies for cases of human rights violations committed in the course of expulsion of deportation procedures.

463. Meanwhile, the representatives asked the Court to order the State to implement "an intensive education and training program for State agents, including immigration and civil registry officials at all levels, on standards for equality and non-discrimination." They indicated that this program should have a "component dedicated to the incompatibility of racial profiling as a mechanism for making arrests based on either immigration or criminal grounds" and that it should be accompanied by "a national awareness-raising campaign, focused principally on the fundamental nature of the principles of non-discrimination and equal protection of the law and its relationship to respect for human dignity. They also indicated that, in order to avoid a repetition of events such as those referred to in this case it was essential that the Court order the State to adjust deportation and expulsion procedures to international human rights law. To this end, the State should adopt any administrative or legislative measures that might be necessary to ensure the absolute prohibition of collective expulsions and establish penalties for the authorities who implement them. It should also ensure respect for the guarantees of due process of individuals subject to expulsion and deportation procedures.

464. The Court has considered that the effectiveness and impact of human rights education programs for public officials is crucial in order to generate guarantees of non-repetition of human rights violations.[495]

465. Based on the facts and the violations declared in the case *sub judice*, the Court considers it relevant to enhance respect for and to ensure the rights of the Dominican population of Haitian descent and the Haitian population by training those involved in immigration matters, such as members of the Armed Forces, border control agents, and

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non-repetition […] will also contribute to prevention." United Nations, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution adopted by the General Assembly of the United Nations, UN Doc. A/Res/60/147, 16 December 2005, principle 23.

494 *Cf. Case of Velásquez Rodríguez. Merits,* para. 166, and *Case of Veliz Franco et al. v. Guatemala*, para. 260.

495 *Cf. Case of the Las Dos Erres Massacre v. Guatemala,* para. 252, and *Case of Nadege Dorzema et al. v. Dominican Republic,* para. 269.

agents responsible for immigration and judicial proceedings, so that events such as those of this case are not repeated. To this end, the Court finds that the State must implement, within a reasonable time, continuous and permanent training programs on topics that concern this population in order to ensure: (a) that racial profiling never constitutes a reason for detention or expulsion; (b) strict observance of the guarantees of due process during any proceedings related to the expulsion or deportation of aliens; (c) that Dominican nationals are never, in any circumstance, expelled, and (d) that collective expulsions of aliens are never executed.

B.3.2. Adoption of domestic legal measures

466. The Commission considered that the State should "adopt measures […] including a review of domestic legislation on registration and granting of nationality to persons of Haitian descent born in Dominican territory, and the repeal of those provisions that directly or indirectly have a discriminatory impact based on race or national origin, taking into account the principle of *ius soli* established by the State, the State obligation to prevent statelessness, and the applicable international human rights law standards."

467. The representatives asked the Court to order the State to adapt its domestic laws and practices concerning registration and the granting of nationality to international human rights law and, more specifically, to adopt administrative and legislative measures to eliminate the distinction established in Dominican law that prevents the children of aliens born in the Dominican Republic from acquiring this nationality.

468. The Court has established that judgment TC/0168/13 and articles 6, 8 and 11 of Law No. 169-14 violate the American Convention (*supra* para. 325). Consequently, the Dominican Republic must, within a reasonable time, take the necessary measures to avoid these laws continuing to produce legal effects.

469. The Court has established that, in the Dominican Republic, considering the irregular migratory status of parents who are aliens as grounds for an exception to the acquisition of nationality based on *ius soli* is discriminatory and, therefore, violates Article 24 of the Convention, and "has found no reason […] to differ from its finding in its judgment in the *Case of the Yean and Bosico Girls v. Dominican Republic*, that an individual's immigration status is not transmitted to his or her children" (*supra* paras. 318). In addition, the Court has indicated that the application of this criterion deprives an individual of legal certainty in the enjoyment of the right to nationality (*supra* paras. 298 and 314), which violates Articles 3, 18 and 20 of the Convention, and owing to these violations taken as a whole, the right to identity (*supra* paras. 301 and 325). Therefore, in keeping with the obligation established in Article 2 of the American Convention, the State must adopt, within a reasonable time, the necessary measures to annul any type of norm, whether administrative, regulatory, legal or constitutional, as well as any practice, decision or interpretation that establishes or has the effect that the irregular status of parents who are aliens constitutes grounds for denying Dominican nationality to those born on the territory of the Dominican Republic, because such norms, practices, decisions or interpretations are contrary to the American Convention.

470. In addition to the foregoing, in order to avoid a repetition of facts such as those of this case, the Court finds it pertinent to establish that the State must adopt, within a reasonable time, the legislative and even, if necessary, constitutional, administrative or any other type of measures required to regulate a simple and accessible procedure to register births, to ensure that all those born on its territory may be registered immediately

after birth, regardless of their descent or origin, and the migratory situation of their parents.[496]

471. Lastly, the Court finds it pertinent to recall, without prejudice to the measures that it has established, that, in their sphere of competence, "all the authorities and organs of a State Party to the Convention have the obligation to exercise a 'control of conventionality.'"[497]

B.3.4. Other measures

472. In the circumstances of this case, the Court finds it pertinent that the State adopt other measures in order to implement the expulsion or deportation procedures in strict compliance with the guarantees of due process, and not to carry out collective detentions or expulsions of aliens.

B.3.5. Other measures requested

473. The Commission asked the Court to order the State to "investigate the facts of this case, determine who is responsible for the violations that have been proved, and establish the necessary sanctions."

474. The representatives indicated that "the victims were detained, in an illegal and arbitrary manner, and subsequently expelled from Dominican territory." Accordingly, they asked that the Court order the State: (a) "to investigate the facts and to punish those responsible. This should include conducting the necessary administrative and criminal proceedings, which should encompass all those who took part in the [facts]"; (b) to organize an act of "public acknowledgement of the State's responsibility"; (c) to provide "free medical and psychosocial assistance to the victims and the members of their families ensuring that they can have access to a State medical center in which they are provided with appropriate and personalized treatment that will help them heal their physical and psychological wounds arising from the violations they suffered." The treatment should "include the cost of any medicines that are prescribed" and should follow an "individual assessment" of each victim. The representatives also requested that the medical center that provides the necessary attention "should be in a place accessible to the victims' homes." Lastly, they indicated that, for the victims who live in Haiti, the State should "provide a reasonable sum of money to cover the costs corresponding to medical and psychological treatment, and the purchase of any medicines they are prescribed."

475. The Court has already determined that, in this case and based on the respective arguments that have been presented, it is not in order to examine the alleged failure to observe the obligation to investigate the facts of the case. Regarding the psychosocial

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[496] *Case of the Yean and Bosico Girls v. Dominican Republic,* para. 239 to 241. In this regard, paragraph 240 establishes that "[t]his Court considers that the State, when establishing the requirements for the late registration of births, should take into account the particularly vulnerable situation of Dominican children of Haitian descent. The requirements should not represent an obstacle to obtain Dominican nationality and should be only those that are essential to establish that the birth took place in the Dominican Republic. In this regard, the identification of the father or the mother of the child should not be restricted to the presentation of the identity and electoral card, but, to this end, the State should accept any other appropriate public document, because the said identity card is exclusive to Dominican citizens. Also, the requirements must be standard and clearly established, so that the application is not subject to the discretion of State officials, thus ensuring the legal certainty of those who use this procedure, and in order to effectively ensure the rights established in the American Convention, pursuant to Article 1(1) of the Convention."

[497] *Cf. Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits and reparations.* Judgment of November 30, 2012. Series C No. 259, para. 142, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 436.

treatment requested by the representatives, the Court considers that the said measures are not intrinsically related to the violations declared in this Judgment; therefore, it does not deem it pertinent to order them. Furthermore, it does not find it necessary to order the act of public acknowledgement of responsibility. Nevertheless, the Court reiterates that the delivery of this Judgment constitutes *per se* a form of reparation, and considers that the reparations ordered in this chapter are sufficient and adequate to redress the violations suffered by the victims.

C) Reparations for pecuniary and non-pecuniary damage

476. The Commission has requested the payment of "full compensation to the victims, or their heirs where applicable, that includes the pecuniary and non-pecuniary harm caused, and the property that the victims left in the Dominican Republic at the time of their expulsion.

477. The representatives requested that, when establishing the pecuniary damage, the Court take into account the consequential damage and loss of earnings. They argued that "the victims were detained without being allowed to take with them any type of property, and especially documents that proved their possession or ownership of this." They also indicated that, "owing to the way in which the expulsions were carried out, the victims had to abandon the few possessions they had, and could not recover them subsequently." On this basis they asked the Court to "establish the sum that the State should pay [the victims] in […] equity." They also alleged that "the victims in this case and the members of their family lost their income as a result of the violations suffered due to different circumstances," and therefore asked that the Court establish a sum, in equity, in their favor. In addition, they asked the Court to order the State to "compensate the non-pecuniary damage caused to the members of the Medina Ferreras, Fils-Aimé, Jean, Gelin and Pérez Charles families who were detained and expelled, owing to the violations of their rights." In this regard, they asked the Court to establish "the sum of US$10,000.00 (ten thousand United States dollars) [for] each beneficiary" and the sum of US$5,000.00 (five thousand United States dollars) for the family members of the presumed victims who were affected by the expulsion of their loved ones.

478. The State asked the Court to reject all the reparations, "because the assessment of the evidence in the case file, the arguments of the parties, and the Court's consistent case law does not reveal that the State has incurred international responsibility and, thus, the right to reparation of any of the presumed victims has not arisen. It also argued that, "other than the statements of each victim, the representatives of the victims have not submitted evidence to substantiate the existence or the value of the property that they owned at the time of the events, or their occupations." The State also considered that the assessment of eventual non-pecuniary damage by the representatives of the presumed victims was exaggerated and asked the Court to determine this based on its case law in this type of case. In addition, the State indicated that "when establishing the amounts for pecuniary compensation, the economic reality of the Dominican State should be taken into account, [because] following the global financial crisis, the country's economic development has fallen behind, and this is why the amounts requested by the representatives of the presumed victims are not necessarily in keeping with the economic reality of the State."

C. 1. Pecuniary damage

479. The Court has developed the concept of pecuniary damage in its case law and has established that it supposes "the loss of, or detriment to, the income of the victims, the

expenses incurred because of the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case."[498]

480. The information provided reveals that, owing to the detention and expulsion, the Medina family lost a horse valued at RD$3,400 Dominican pesos, a mule valued at RD$2,800 Dominican pesos, four cows valued at RD$5,000 Dominican pesos each, 43 hens valued at RD$200 Dominican pesos each, their house in Oviedo, which was worth approximately RD$50,000 Dominican pesos, and two beds, one table, four chairs, valued at RD$10,500 Dominican pesos. The Fils-Aimé family lost two beds, eight chairs, clothing, 19 pigs, one donkey, one goat, several hens, 36 turkeys valued at RD$500 Dominican pesos each, and a lot where Jeanty Fils-Aimé planted corn, pigeon peas and yam, all with an approximate value of RD$50,000 Dominican pesos. The Jean Mesidor family lost two beds, one table, four chairs, a refrigerator, a stove, a gas tank, fans, a television, a radio, clothing, and sheets for six people, and Victor Jean was unable to collect RD$1,000 Dominican pesos. Bersson Gelin lost approximately RD$3,000 Dominican pesos that were stolen from him during the expulsion, and, owing to the detention and expulsion, he was unable to collect three months of wages that his employer owed him, amounting to RD$42,000 Dominican pesos. Regarding the supposed disbursements made by the Medina family for the medical treatment of the child Awilda Ferreras Medina, the evidence provided to the Court does not reveal a causal nexus between the problems suffered by the child and the violations declared in this Judgment.

481. In this regard, the Court considers, based on the facts, that the victims were summarily expelled by the State without being able to take their belongings with them or to collect them or to dispose of them. Consequently, it can be presumed that they suffered financial losses on being expelled and, owing to the factual situation, it is evidently impossible for them to have probative elements to prove this. Taking into account that the Medina, Fils-Aimé and Jean Mesidor families, and Bersson Gelin were expelled when the Court had temporal competence, the Court establishes, in equity, the sum of US$8,000.00 (eight thousand United States dollars) for each family for pecuniary damage. The amount corresponding to each family must be delivered, respectively, to Willian Medina Ferreras, Janise Midi, Bersson Gelin, and Victor Jean. With regard to the request relating to the transport and accommodation expenses for the journeys made by Antonio Sensión and Rafaelito Pérez Charles, the Court rejects them, because it has not been proved that these expenses are connected to the violations declared to their detriment.

482. Furthermore, with regard to the alleged loss of earnings of Antonio Sensión, Bersson Gelin, Rafaelito Pérez Charles, Jeanty Fils-Aimé, Willian Medina Ferreras and Victor Jean on losing their Jobs and their means of subsistence, although the representatives referred to the different activities they carried out, they failed to submit any evidence relating to the income that the victims received, or to possible future income, or information relating to their wages. Consequently, the Court does not have sufficient elements to make this determination and therefore rejects this request.

C.2. Non-pecuniary damage

483. The Court has developed the concept of non-pecuniary damage in its case law and has established that this "may include both the suffering and afflictions caused by the violation, and also the impairment of values that are very significant for the individual and

[498] *Case of Bámaca Velásquez v. Guatemala. Reparations and costs.* Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 441.

any change of a non-pecuniary nature, in the living conditions of the victims."[499] Since it is not possible to assign a precise monetary equivalent to the non-pecuniary damage, this can only be compensated, in order to ensure full reparation for the victim, by the payment of a sum of money or the delivery of goods or services with a monetary value determined by the Court in reasonable application of judicial discretion and based on equity.[500] In addition, the Court reiterates the compensatory nature of damages, the nature and amount of which depend on the harm caused, so that they should not result in the enrichment or impoverishment of the victims or their heirs.[501]

484. This Court has affirmed that non-pecuniary damage is evident, because it is inherent in human nature that any person whose human rights are violated endures suffering.[502] In relation to the victims in this case, the Court has declared the international responsibility of the State for various violations, depending on the specific situation of each victim. Thus, it has established the violation of the rights to nationality, to recognition of juridical personality, to a name (and owing to these violations taken as a whole, to identity), to personal liberty, to personal integrity, to judicial guarantees and protection, to protection of the family, to privacy in relation to the interference in the home, to movement and residence, to equality before the law and the prohibition of discrimination with regard to different victims, as well as in relation to the rights of the child with regard to the children in this case.

485. Based on the foregoing, the Court establishes, in equity, the following amounts for non-pecuniary damage:

a) *Medina Ferreras family*

Willian Medina Ferreras, Lilia Jean Pierre, Awilda Medina, Luis Ney Medina, and Carolina Isabel Medina (deceased): the sum of US$10,000.00 (ten thousand United States dollars) each. The amount corresponding to Carolina Isabel Medina shall be delivered, in equal parts, to the other victims from her family.

b) *Fils-Aimé family*

Jeanty Fils-Aimé (deceased), Janise Midi, Endry Fils-Aimé, Antonio Fils-Aimé and Diane Fils-Aimé: the sum of US$10,000.00 (ten thousand United States dollars) each. The amount corresponding to Jeanty Fils-Aimé shall be delivered, in equal parts, to the other victims from his family.

c) *Gelin family*

Berson Gelin and William Gelin: the sum of US$10,000.00 (ten thousand United States dollars) each.

d) *Sensión Family*

Antonio Sensión, Ana Virginia Nolasco, Ana Lidia Sensión and Reyita Antonia Sensión: the sum of US$10,000.00 (ten thousand United States dollars) each.

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499 *Cf. Case of the "Street Children" (Villagrán Morales et al.),* para. 84, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 441.

500 *Cf. Case of Cantoral Benavides v. Peru. reparations and costs*, para. 53, and *Case of Veliz Franco et al. v. Guatemala*, para. 295.

501 *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. reparations and costs*. Judgment of May 25, 2001. Series C No. 76, para. 79, and *Case of Veliz Franco et al. v. Guatemala*, para. 295.

502 *Cf. Case of Reverón Trujillo v. Venezuela,* para. 176, and *Case of Veliz Franco et al. v. Guatemala*, para. 299.

e) *Jean family*

Victor Jean, Marlene Mesidor, Markenson Jean, Miguel Jean, Victoria Jean (deceased), and Natalie Jean: the sum of US$10,000.00 (ten thousand United States dollars) each. The amount corresponding to Victoria Jean shall be delivered, in equal parts, to the other victims from her family.

f) *Pérez Charles family*

Rafaelito Pérez Charles: the sum of US$10,000.00 (ten thousand United States dollars).

D) Costs and expenses

486. The representatives indicated that CEJIL, MUDHA, GAAR and Columbia University have represented the presumed victims and the members of their families during the proceedings before the Court. Consequently, they stated that "CEJIL has represented the victims […] since 2009," and that "while exercising this representation it has incurred expenses that include travel, accommodation, communications, photocopies, stationery and mailings." They also indicated that "CEJIL has incurred expenses corresponding to legal work specifically related to this case and to investigating, gathering and presenting evidence." On this basis, they asked that the Court establish the sum of US$8,927.00 (eight thousand nine hundred and twenty-seven United States dollars). In their final written arguments, they argued that, following the presentation of the motions and arguments brief, CEJIL had incurred expenses relating to a trip for two persons from Washington D.C. to the Dominican Republic and a trip by three persons from Washington D.C. to Mexico, among their expenses were plane tickets, land transport, accommodation, communications, photocopies, stationery, and mailings. They indicated that the estimate of the expenses incurred amounts US$9,742.00 (nine thousand seven hundred and forty-two United States dollars).

487. With regard to the expenses incurred by MUDHA, the representatives stated that this organization has represented the victims "for around a decade, taking different steps at the national and international level." However, they indicated that "it does not have vouchers for all the expenses incurred," and therefore asked the Court to establish, in equity, the sum of RD$200,000.00 (two hundred thousand Dominican pesos) for expenses. They added in the brief with final arguments that MUDHA had paid all the expenses of its team that attended the public hearing and would send the corresponding vouchers to the Court, but it did not indicate any amount in this regard.

488. Regarding the expenses incurred by GARR, the latter asked "the Court to determine, in equity, the representation expenses in this case." The representatives indicated that GARR had paid the expenses of one person to attend the public hearing held in Mexico.

489. Lastly, with regard to the expenses incurred by the Human Rights Clinic of Columbia University, they indicated that it "had made at least nine trips to meet with the victims, to take their statements, and to discuss the progress in the case, including the friendly settlement procedure." They indicated that, although they did not have vouchers for each of these trips, "the records show that at least 23 round trips from New York to the Dominican Republic were bought, at an approximate cost of US$650 [(United States dollars)] each, which represents around US$14,950.00 [(fourteen thousand nine hundred and fifty United States dollars)]." They also indicated that the Clinic "incurred additional costs associated with the trips […] including accommodation in the Dominican Republic." Accordingly, they requested that the Court "recognize the sum of US$20,000.00 (twenty thousand United States dollars) for the expenses incurred by this organization." They

alleged that following the motions and arguments brief, the Human Rights Clinic had supported several measures taken at the national level and on the border with Haiti, in order to document evidence for the public hearing and paid the expenses of its team to attend the public hearing, indicating that the Clinic would forward the vouchers directly to the Court.

490. The State indicated that "none of the members of the representatives' team has specified or argued when they incurred the expenses corresponding to the vouchers provided, or their relationship to the case." In the case of CEJIL, the State indicated that "it had provided at least 116 pages with photocopies of presumed receipts […] many of which [contain] deletions, [are] unsigned and/or not stamped, and this undermines their authenticity." In addition, it indicated that "this representative does not provide a logical, detailed and illustrative account of the use of the financial resources supposedly disbursed […] so that the State has reasonable doubts that all these expenses were associated with this case" and asked the Court to reject them. Nevertheless, it indicated that, if the Court denied its request, it considered that the amount requested by CEJIL was "exorbitant" and therefore asked that the Court "establish, in equity, the amount to be reimbursed for the expenses that can be proved."

491. Regarding the Human Rights Clinic, the State indicated that "it has not provided all the documents that support the expenses it alleges it incurred, such as, for example, for the supposed international travel," and "it has not provided a logical, detailed and illustrative account of the use of the resources," and asked the Court to reject the amount requested by the Clinic. In addition, it considered that "it was unheard of that this Clinic would request recognition of more than double to costs requested by CEJIL, because it has only taken part in the proceedings since 2001, while the NGO has worked on the case since 1999." Consequently, it asked the Court "to "establish, in equity, the amount of the costs."

492. Lastly, with regard to the expenses of MUDHA and GARR, the State asked the Court "to reject them, purely and simply, because they are not supported by any document or voucher and they had not even provided a detailed and specific account to justify these disbursements." In addition, it affirmed that the Court "should not even apply recognition of costs in equity, because these representatives have not provided a single voucher for their monetary disbursements."

493. Regarding future expenses, the State asserted that it reserved the right to make observations on these when the representatives, jointly or individually, provided vouchers for expenses incurred with the appropriate explanation of the connection of such expenses to this case.

494. In its observations on the annexes presented by the representatives with their final written arguments, the State submitted different "objections" to the documents presented. In this regard, it indicated: (1) that the documents relating to the hotel reservations, "whether or not they had been used, could never prove the amount of money that was in fact paid"; the document relating to the Hotel Francés in Santo Domingo does not mention who the reservation was made for, and the other reservations refers to a presumed witness whose expenses were not covered by the Fund, but does not specify which witness; (2) regarding transportation expenses, there is an invoice for a taxi fare to and from a meeting with Tahira Vargas on July 10, 2013; the State observed that the representatives withdrew the opinion of this expert witness and, therefore, it could not accept the said expense, because the evidence was never provided to the proceedings. Also CEJIL had never provided an invoice supporting the alleged expense for transport to Pedernales from July 7 to 9, 2013; therefore, the State did not accept the supposed

disbursement, and (3) with regard to the communication expenses (office inputs and expenses, photocopies), CEJIL had not provided the invoices that supported these supposed disbursements, and had not substantiated these supposed disbursement on the basis of its work of legal representation in this case. Hence, the State did not accept the said supposed disbursements. Consequently, it asked the Court to exclude them from its examination of the file, or to reject the representatives' request to reimburse the said costs and expenses, because they lacked probative support. It rejected any other claim that the other three representatives, MUDHA, GARR and the Human Rights Clinic of Columbia University, might present because they had not submitted any claims to the Court.

495. The Court reiterates that, pursuant to its case law,[503] costs and expenses form part of the concept of reparation, because the activity deployed by the victims in order to obtain justice at both the national and the international level, entails disbursements that must be compensated when the international responsibility of the State is declared in a judgment.

496. The Court also reiterates that it is not sufficient to forward probative documents, but the parties must include arguments that relate the evidence to the fact that it is supposed to represent and, in the case of alleged financial disbursements, the items and their justification must be clearly established.[504]

497. In this case, based on the arguments of the representatives concerning the request for costs and expenses and the evidence provided in this regard, the Court has verified that, in some cases, the amounts requested were not justified completely. Furthermore, the Court takes into account the State's observations on the inconsistency between the amounts requested and the vouchers provided and, in other cases, the failure to provide vouchers, and lastly the State's discrepancy with regard to the presentation of certain disbursements that it considered unjustified. Consequently, the Court will now examine separately the arguments of each organization that represents the victims.

498. In the case of CEJIL, having examined the vouchers presented as annexes to the motions and arguments brief and to the brief with final arguments, the Court has verified that, as the State indicated, there are vouchers that cannot be taken into account because the expenses have not been duly justified,[505] or did not arise from an evidentiary activity in this case,[506] or refer to expenses that were covered by the Victims' Legal Assistance Fund,[507] or their existence has simply not been proved owing to the absence of invoices to support them.[508] In addition, CEJIL presented a list of different expenses incurred and

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503 *Cf. Case of Garrido and Baigorria v. Argentina. reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 79, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 449.

504 *Cf. Case of Chaparro Álvarez and Lapo Iñiguez v. Ecuador*, para. 277, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 451.

505 Invoices have been attached without any description of the activity or the date: fs. 3572, 3590, 3602, 3604 and 3599.

506 Namely: payment of round trip by taxi to meet with Tahira Vargas in 2013; the representatives subsequently withdrew her presentation as an expert witness (*supra* para. 112) (file of preliminary objections, merits and reparations, f. 3581)

507 Namely: Per diems for expert witnesses Carlos Quesada and Bridget Wooding (file of preliminary objections, merits and reparations, fs. 3423 to 3438).

508 Documents unsupported by invoices that mention expenses incurred by CEJIL in relation to travel to the Dominican Republic, accommodation, meals, and transportation in the Dominican Republic (file of annexes to the motions and arguments brief, fs. 3570, 3571, 3585, 3586, 3593, 3594, 3595, 3596, 3598, 3600, 3601, 3603,

indicated that 30% of each item corresponded to activities in this case. Consequently, and owing to the inconsistencies between the amounts requested and the amounts substantiated, the Court establishes, in equity, the sum of US$10,000.00 (ten thousand United States dollars), that must be delivered to CEJIL.

499. In the case of MUDHA and GARR, these organizations asked the Court to establish, in equity, the amount corresponding to costs and expenses and did not present vouchers to justify the alleged disbursements, but merely listed them. The Court considers that the case file reveals that the two organizations carried out various procedural activities, both in the domestic jurisdiction and before the organs of the inter-American system during the processing of this case. Consequently, the Court establishes, in equity, the sum of US$3,000.00 (three thousand United States dollars) to be delivered to MUDHA and the sum of US$3,000.00 (three thousand United States dollars) to be delivered to GARR.

500. With regard to the Human Rights Clinic of Columbia University, the Court establishes, in equity, the sum of US$3,000.00 (three thousand United States dollars) to be delivered to this Clinic.

501. At the stage of monitoring compliance with this Judgment, the Court may order the State to reimburse the victims or their representatives for subsequent reasonable and duly substantiated expenses.[509]

E) Reimbursement of expenses to the Victims' Legal Assistance Fund

502. In 2008, the General Assembly of the Organization of American States established the Legal Assistance Fund of the inter-American human rights system, "in order to "facilitate access to the inter-American human rights system by persons who currently lack the resources needed to bring their cases before the system."[510] In this case, the Orders of the President of March 1 and September 6 and 11, 2013 (*supra* paras. 10 and 12) authorized access to the Legal Assistance Fund to cover the reasonable and necessary expenses that consisted in: (i) purchase of plane tickets for Willian Medina Ferreras, Bridget Frances Wooding and Carlos Enrique Quesada Quesada; (ii) a per diem to cover accommodation and meals in Mexico City D.F., on October 7, 8 and 9, 2013, for the first two, and on October 7 and 8, 2013, for the third, as well as these expenses for Mr. Medina Ferreras in the Dominican Republic, and (iii) airport expenses for these three persons.

503. In a note of the Secretariat dated January 31, 2014, the State was given the procedural opportunity to present its observations on the disbursements made in application of the Victims' Legal Assistance Fund, but did not submit them during the time granted for this purpose.[511]

3613, 3619, 3620, 3621, 3623, 3624, 3625, 3626, 3627, 3628, 3649, 3650, 3651, 3655, 3659, 3668, 3670, 3671, 3674, 3678, 3680 and 3682); and also expenses included in the table of expenditures that are not properly justified: f. 3569 (communication and administrative expenses).

509 *Cf. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs.* Judgment of September 1, 2010. Series C No. 217, para. 291, and *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v. Chile*, para. 454.

510 AG/RES. 2426 (XXXVIII-O/08), Resolution adopted by the thirty-eighth General Assembly of the OAS, during the fourth plenary session, held on June 3, 2008, *"Creation of the Legal Assistance Fund of the Inter-American Human Rights System,"* operative paragraph 2(b), operative paragraph 2(a), and CP/RES. 963 (1728/09), Resolution adopted by the OAS Permanent Council on November 11, 2009, *"Rules of Procedure for the Legal Assistance Fund of the Inter-American Human Rights System,"* article 1(1).

511 However, in its observations on the annexes presented as evidence by the representatives together with their final written arguments, the State presented "objections" with regard to some vouchers related to the expenses paid by the Victims' Fund. In this regard, when establishing the amount disbursed in application of the

504. As a result of the violations declared in this Judgment, the Court orders the State to reimburse the sum of US$5,661.75 (five thousand six hundred and sixty-one United States dollars and seventy-five cents) to this Fund for the expenses incurred. This sum must be reimbursed to the Inter-American Court within ninety days of notification of this Judgment.

F) Method of complying with the payments ordered

505. The State must pay the compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses established in this Judgment directly to the persons indicated herein, within one year of notification of this Judgment, in accordance with the following paragraphs.

506. In the case of the beneficiaries who are deceased, Jeanty Fils-Aimé, Carolina Isabel Medina and Victoria Jean, the compensation established in their favor must be delivered to the persons indicated in paragraph 484 of this Judgment.

507. The State must comply with its monetary obligations by payment in United States dollars. If, for reasons that can be attributed to the beneficiaries of the compensation or their heirs, it is not possible to pay the amounts established within the indicated time frame, the State shall deposit these amounts in their favor in an account or certificate of deposit in a solvent Dominican financial institution in United States dollars, and in the most favorable financial conditions allowed by banking law and practice. If the corresponding compensation is not claimed, after ten years the amounts shall be returned to the State with the interest accrued.

508. The amounts allocated in this Judgment as compensation and to reimburse costs and expenses must be delivered to the persons and organizations indicated integrally, as established in this Judgment, without any deductions arising from possible charges or taxes.

509. If the State should incur in arrears, it must pay interest on the amount owed corresponding to banking interest on arrears in the Dominican Republic.

510. In keeping with its consistent practice, the Court reserves the authority inherent in its attributions and also derived from Article 65 of the American Convention to monitor complete compliance with this Judgment. The case will be concluded when the State has complied fully with its provisions.

511. Within one year of notification of this Judgment, the State must provide the Court with a report on the measures adopted to comply with it.

XIV
OPERATIVE PARAGRAPHS

512. Therefore,

THE COURT

DECIDES,

Fund, the Court has only taken into account those vouchers attached to the report that was forwarded to the State at the appropriate time (*supra* para. 21).

unanimously:

1. To reject the preliminary objections filed by the State concerning the failure to exhaust domestic remedies and the lack of competence *ratione personae*, in the terms of paragraphs 30 to 34 and 52 to 57 of this Judgment.

2. To admit partially the preliminary objection of lack of competence *ratione temporis* of the Court in relation to certain facts and acts, in the terms of paragraphs 40 to 47 of this Judgment.

DECLARES,

unanimously that:

3. The State violated the rights to recognition of juridical personality, to nationality and to a name recognized in Articles 3, 20 and 18 of the American Convention on Human Rights, as well as the right to identity, owing to the said violations taken as a whole, in relation to the obligation to respect rights without discrimination established in Article 1(1) of the Convention, to the detriment of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina and Rafaelito Pérez Charles, and also in relation to the rights of the child recognized in Article 19 of the Convention to the detriment of the victims who were children at the time of the facts, in the terms of paragraphs 272 to 276 of this Judgment.

4. The State violated the rights to recognition of juridical personality, to nationality and to a name recognized in Articles 3, 20 and 18 of the American Convention on Human Rights, as well as the right to identity, owing to the said violations taken as a whole, in relation to the obligation to respect rights without discrimination established in Article 1(1) of the Convention, to the detriment of Victor Jean, Miguel Jean, Victoria Jean and Natalie Jean, and also in relation to the rights of the child recognized in Article 19 of this instrument to the detriment of the victims who were children at the time of the facts and after March 25, 1999, in the terms of paragraphs 277 to 301 of this Judgment.

5. The State violated the right to personal liberty recognized in paragraphs 1, 2, 3, 4, 5 and 6 of Article 7 of the American Convention on Human Rights, in relation to the failure to comply with the obligation to respect rights without discrimination established in Article 1(1) of the Convention, to the detriment of Willian Medina Ferreras, Lilia Jean Pierre, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina, Jeanty Fils-Aimé, Janise Midi, Antonio Fils-Aimé, Diane Fils-Aimé, Endry Fils-Aimé, Rafaelito Pérez Charles, Bersson Gelin, Victor Jean, Marlene Mesidor, Markenson Jean, Victoria Jean, Miguel Jean and Natalie Jean, and also in relation to the rights of the child recognized in Article 19 of the Convention to the detriment of the victims who were children at the time of the facts, in the terms of paragraphs 364 to 380, and 400 to 405 of this Judgment.

6. The State violated the prohibition of the collective expulsion of aliens established in Article 22(9) of the American Convention on Human Rights, in relation to the failure to comply with the obligation to respect rights without discrimination established in Article 1(1) of the Convention, to the detriment of the victims of Haitian nationality: Lilia Jean Pierre, Janise Midi, Marlene Mesidor and Markenson Jean, and also in relation to the rights of the child recognized in Article 19 of the Convention to the detriment of Markenson Jean who was a child at the time of the facts, in the terms of paragraphs 381 to 384, 400 to 404 and 406 of this Judgment. In addition, the State violated the right to freedom of movement and residence, and the prohibition to expel nationals recognized in Articles

22(1) and 22(5) of the American Convention on Human Rights, in relation to the failure to comply with the obligation to respect rights without discrimination established in Article 1(1) of the Convention, to the detriment of the victims with Dominican nationality: Willian Medina Ferreras, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina, Rafaelito Pérez Charles, Victor Jean, Victoria Jean, Miguel Jean and Natalie Jean, and also in relation to the rights of the child recognized in Article 19 of the Convention to the detriment of the victims who were children at the time of the facts, in the terms of paragraphs 385 to 389, 400 to 404 and 406 of this Judgment.

7. The State violated the rights to judicial guarantees and to judicial protection, recognized in Articles 8(1), and 25(1) of the American Convention on Human Rights, in relation to the failure to comply with the obligation to respect rights without discrimination established in Article 1(1) of the Convention, to the detriment of Willian Medina Ferreras, Lilia Jean Pierre, Luis Ney Medina, Awilda Medina, Carolina Isabel Medina, Jeanty Fils-Aimé, Janise Midi, Diane Fils-Aimé, Antonio Fils-Aimé, Endry Fils-Aimé, Victor Jean, Marlene Mesidor, Markenson Jean, Miguel Jean, Victoria Jean, Natalie Jean, Rafaelito Pérez Charles and Bersson Gelin, and also in relation to the rights of the child recognized in Article 19 of the Convention to the detriment of the victims who were children at the time of the facts, in the terms of paragraphs 390 to 397, 400 to 404 and 407 of this Judgment.

8. The State violated the right to protection of the family recognized in Article 17(1) of the Convention, in relation to the failure to comply with the obligation to respect the treaty-based rights without discrimination established in Article 1(1) of the Convention, to the detriment of Bersson Gelin and William Gelin, and also in relation to the rights of the child recognized in Article 19 of this instrument to the detriment of the child William Gelin, in the terms of paragraphs 413 to 418 and 429. In addition, the State violated the right to protection of the family, recognized in Article 17(1) of the Convention, in relation to failure to comply with the obligations established in Article 1(1) of the Convention, to the detriment of Antonio Sensión, Ana Virginia Nolasco, Ana Lidia Sensión and Reyita Antonia Sensión, and in also in relation to the rights of the child recognized in Article 19 of this treaty to the detriment of the children at the time, Ana Lidia Sensión and Reyita Antonia Sensión, in the terms of paragraphs. 413 to 417, 419 420 and 429.

9. The State violated the right to protection of privacy owing to the violation of the right not to be the object of arbitrary interference in private and family life recognized in Article 11(2) of the American Convention on Human Rights, in relation to the failure to comply with the obligation to respect rights without discrimination established in Article 1(1) of the Convention, to the detriment of Victor Jean, Marlene Mesidor, Markenson Jean, Victoria Jean, Miguel Jean, Natalie Jean, Willian Medina Ferreras, Lilia Jean Pierre, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina, Jeanty Fils-Aimé, Janise Midi, Diane Fils-Aimé, Antonio Fils-Aimé and Endry Fils-Aimé, and also in relation to the rights of the child recognized in Article 19 of the Convention to the detriment of the victims who were children at the time of the facts, in the terms of paragraphs 423 to 428 and 430 of this Judgment.

10. The State failed to comply, in relation to judgment TC/0168/13, with its obligation to adopt domestic legal provisions established in Article 2 of the American Convention on Human Rights, in relation to the rights to recognition of juridical personality, to a name, and to nationality, as well as the right to identity owing to the said violations taken as a whole, and the right to equality before the law, recognized in Articles 3, 18, 20 and 24 of the Convention, in relation to the failure to comply with the obligations established in Article 1(1) of the Convention, to the detriment of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina, Carolina Isabel Medina and Rafaelito Pérez Charles, in the terms of paragraphs 302 to 325 of this Judgment. The State also failed to comply, owing to articles

6, 8 and 11 of Law No. 169-14, with its obligation to adopt domestic legal provisions, established in Article 2 of the American Convention on Human Rights, in relation to the rights to recognition of juridical personality, to a name, and to nationality, as well as the right to identity, owing to the said violations taken as a whole, and the right to equality before the law, recognized in Articles 3, 18, 20 and 24 of the Convention, in relation to the failure to comply with the obligations established in Article 1(1) of the Convention, to the detriment of Victor Jean, Miguel Jean, Victoria Jean and Natalie Jean, in the terms of paragraphs 302 to 325 of this Judgment.

11. It is not necessary to rule on the alleged violation of the rights to personal integrity and to property recognized in Articles 5(1) and 21(1) of the American Convention on Human Rights, in the terms of paragraphs 438, 442 and 443 of this Judgment.

AND ESTABLISHES

unanimously that:

12. This Judgment constitutes *per se* a form of reparation.

13. The State must adopt, within six months of notification of this Judgment, the necessary measures to ensure that Willian Medina Ferreras, Awilda Medina and Luis Ney Medina have the necessary documentation to prove their Dominican nationality and identity, in the terms of paragraph 452 of this Judgment. In addition, the State must adopt the necessary measures to annul the administrative investigations, as well as the civil and criminal judicial proceedings underway relating to the records and documentation of Willian Medina Ferreras, Awilda Medina, Luis Ney Medina and Carolina Isabel Medina, in the terms of paragraphs 457 of this Judgment.

14. The State must adopt, within six months of notification of this Judgment, the necessary measures to ensure that Victor Jean, Miguel Jean, Victoria Jean and Natalie Jean are duly registered, as appropriate, and have the necessary documentation to prove their Dominican nationality and identity, in the terms of paragraphs 458 of this Judgment.

15. The State must adopt, within six months of notification of this Judgment, the necessary measures to ensure that Marlene Mesidor may reside or remain lawfully in the territory of the Dominican Republic, in the terms of paragraphs 459 of this Judgment.

16. The State must make the publications ordered and that are indicated in paragraph 460 of this Judgment, within six months of its notification. In addition, the State must keep this Judgment available for one year on an official website of the State, in the terms of paragraph 460 of this Judgment.

17. The State must implement, within a reasonable time, continuous and permanent training programs on topics related to the said population in order to ensure: (a) that racial profiling is never the reason for detention or expulsion; (b) strict observance of the guarantees of due process of law during any proceedings related to the expulsion or deportation of aliens; (c) that, under no circumstances are Dominican nationals expelled, and (d) that collective expulsions of aliens are never carried out, in the terms of paragraph 465 of this Judgment.

18. The State must adopt, within a reasonable time, the measures required to prevent judgment TC/0168/13 and the provisions of articles 6, 8 and 11 of Law No. 169-14 from continuing to have legal effects, in the terms of paragraph 468 of this Judgment.

19. The State must adopt, within a reasonable time, the measures required to annul any law or regulation of any nature, whether administrative, regulatory, legal or constitutional, as well as any practice or decision or interpretation that establishes or results in the irregular situation of the parents who are aliens being used as a reason to deny Dominican nationality to those born in the territory of the Dominican Republic, in the terms of paragraph 469 of this Judgment.

20. The State must adopt, within a reasonable time, the necessary measures of an administrative, legislative – even constitutional if required – or any other nature to regulate a simple and accessible birth registration procedure, in order to ensure that all those born in its territory may be registered immediately after birth, regardless of their descent or origin and the migratory situation of their parents, in the terms of paragraph 470 of this Judgment.

21. The State must pay, within one year of notification of this Judgment, the amounts stipulated in paragraphs 481, 485 and 498 to 500 of this Judgment as compensation for pecuniary and non-pecuniary damage, reimbursement of costs and expenses, and to reimburse the Victims' Legal Assistance Fund, in the terms of paragraph 504 of this Judgment.

22. The State must, within one year of notification of this Judgment, provide the Court with a report on the measures taken to comply with it.

23. The Court will monitor full compliance with this Judgment, in exercise of its attributes and in fulfillment of its obligations under the American Convention on Human Rights, and will consider this case concluded when the State has complied fully with its provisions.

Done, at San José, Costa Rica, on August 28, 2014, in the Spanish language.

Humberto Antonio Sierra Porto
President

Roberto F. Caldas

Manuel E. Ventura Robles

Eduardo Vio Grossi

Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Secretary

So ordered,

Humberto Antonio Sierra Porto

President

Pablo Saavedra Alessandri
Secretary

Annex 53

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF VELIZ FRANCO *ET AL. v.* GUATEMALA

JUDGMENT OF MAY 19, 2014

(Preliminary objections, merits, reparations and costs)

In the case of *Veliz Franco et al.*,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") composed of the following judges:

Humberto Antonio Sierra Porto, President
Roberto F. Caldas, Vice President
Manuel E. Ventura Robles, Judge
Diego García-Sayán, Judge
Alberto Pérez Pérez, Judge
Eduardo Vio Grossi, Judge, and
Eduardo Ferrer Mac-Gregor Poisot, Judge;

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter also "the American Convention" or "the Convention") and to Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court (hereinafter also "the Rules of Procedure"), delivers this Judgment structured as follows:

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On May 3, 2012, in accordance with the provisions of Articles 51 and 61 of the American Convention and Article 35 of the Court's Rules of Procedure, the Inter-American Commission on Human Rights (hereinafter also "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Court (hereinafter "submission brief") the case of *Veliz Franco et al. v. the Republic of Guatemala* (hereinafter also "the State" or "Guatemala"). According to the Commission, this case concerns the absence of an effective response by the State to the complaint filed on December 17, 2001, by Rosa Elvira Franco Sandoval (hereinafter also "Rosa Elvira Franco" or "Mrs. Franco Sandoval" or "Mrs. Franco") before the Public Prosecution Service reporting the disappearance of her 15-year old daughter, María Isabel Veliz Franco (hereinafter also "María Isabel Veliz" or "María Isabel" or "the child" or "the presumed victim"), as well as the subsequent irregularities in the investigation of the facts. In the said complaint, Mrs. Franco Sandoval stated that, on December 16, 2001, her daughter left their home at 8 a.m. to go to work and never returned. The Commission observed that there is no record that any effort was made to find the victim between the time the complaint was filed, and the time the body was found at 2 p.m. on December 18, 2001. It also indicated that a series of irregularities occurred during the investigation into the disappearance and subsequent death[1] of María Isabel Veliz Franco, in particular the failure to take immediate steps when she was reported missing, as well as errors in the preservation of the crime scene and the handling and analysis of the evidence collected.

2. *Proceedings before the Commission*. The proceedings before the Commission were as follows:

a. *Petition*. On January 26, 2004, the Commission received the petition lodged by Mrs. Franco Sandoval, the Center for Justice and International Law (hereinafter "CEJIL") and the *Red de No Violencia contra las Mujeres en Guatemala* (hereinafter "REDNOVI").

b. *Admissibility Report.* On October 21, 2006, the Commission approved Admissibility Report No. 92/06[2] (hereinafter also "the Admissibility Report").

c. *Merits Report.* On November 3, 2011, the Commission approved Merits Report No. 170/11 (hereinafter also "the Merits Report") under Article 50 of the Convention, in which it reached a series of conclusions and made several recommendations to the State.

i. *Conclusions.* The Commission concluded that, to the detriment of María Isabel Veliz Franco, the State was responsible for:

> Violations of the rights to life and to personal integrity, and the rights of the child, recognized in Articles 4, 5, and 19 of the American Convention, all in relation to Article 1(1) thereof. It also conclude[d] that the State had violated the rights of María Isabel Veliz Franco under Article 7 of the Convention of Belém do Pará, in relation to Article 24 of the American Convention, as

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[1] When referring to the act perpetrated against María Isabel in the brief submitting the case and in the Merits Report, the Commission used the terms "*death," "homicide"* and *"murder"* indistinctly. Specifically, in the section on Recommendations of the Merits Report, the Commission recommended to the State that it "clarify the *murder* of María Isabel Veliz Franco." *Cf.* Brief submitting the case of May 3, 2012 (file of preliminary objections, merits, reparations and costs, fs. 2 to 6), and Merits Report No. 170/11, Case 12,578, María Isabel Veliz Franco *et al.,* Guatemala, November 3, 2011 (file of preliminary objections, merits, reparations and costs, fs. 7 to 51).

[2] In which it admitted the complaint for the presumed violation of the rights recognized in Articles 4, 8(1), 11, 19, 24 and 25 of the American Convention, in relation to Article 1(1) thereof, to the detriment of María Isabel Veliz Franco, as well as the obligation established in Article 7 of the Convention of Belém do Pará. In addition, it concluded that the petition was admissible in relation to Articles 5(1), 8(1), 11 and 25 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Rosa Elvira Franco Sandoval. It declared the petition inadmissible with regard to the rights recognized in Articles 5 and 7 of the American Convention, in the case of María Isabel. *Cf.* No. 92/06, Petition 95-04, María Isabel Veliz Franco, Guatemala, October 21, 2006 (file before the Commission, fs. 804 to 818).

> required by the general obligation to respect and ensure rights established in Article 1(1) of the American Convention

The Commission also concluded that the State had:

> Violated the right to personal integrity recognized in Article 5(1) of the Convention, in relation to the obligation established in Article 1(1) thereof, to the detriment of Rosa Elvira Franco Sandoval de Veliz (mother), Leonel Enrique Veliz Franco (brother), José Roberto Franco (brother), Cruz Elvira Sandoval Polanco de Franco (grandmother, deceased) and Roberto Franco Pérez (grandfather, deceased), as well as the right to judicial guarantees and protection recognized in Articles 8(1) and 25 of the American Convention, in relation to Article 24 of this instrument, and in relation to the obligation imposed on the State in Article 1(1).

ii. *Recommendations.*

> 1. Complete a timely, immediate, serious and impartial investigation to clarify the murder of María Isabel Veliz Franco and to identify, prosecute and, as appropriate, punish those responsible.
> 2. Make full reparations to the next of kin of María Isabel Veliz Franco for the human rights violations […] established.
> 3. As a measure of non-repetition, introduce a comprehensive and coordinated State policy, supported by sufficient public funds, to ensure that the specific cases of violence against women are properly prevented, investigated, prosecuted and redressed.
> 4. Introduce reforms in the State's educational programs, starting in the early, formative years, so as to promote respect for women as equals and observance of their rights to non-violence and non-discrimination.
> 5. Investigate the irregularities committed by agents of the State in their investigation of the case and punish those responsible.
> 6. Enhance the institutional capacity to combat impunity in cases of violence against women, through effective criminal investigations conducted from a gender perspective and that have constant judicial oversight, thereby ensuring proper punishment and redress.
> 7. Take measures and launch campaigns designed to make the general public aware of the duty to respect and ensure the human rights of children.
> 8. Adopt comprehensive public policies and institutional programs designed to eliminate discriminatory stereotypes about a woman's role and to promote the eradication of discriminatory socio-cultural patterns that prevent women's full access to justice; this should include training programs for public officials in all sectors of government, including education, the various sectors involved in the administration of justice, and the police, as well as comprehensive policies on prevention

3. *Notification of the State.* The Merits Report was notified to the State on January 3, 2012, and the State was given two months to provide information on compliance with the recommendations. On March 13, 2012, Guatemala presented a report on progress with compliance and requested a one-month extension. The Commission granted this extension, requiring the State to present its report by March 25, 2012. The State did not submit its report by the said date. On May 2, 2012, the petitioners informed the Commission that, on March 30, 2012, the State had proposed a friendly settlement agreement to Mrs. Franco Sandoval. On April 19, 2012, the petitioners had responded to the State that "in view of the considerably delay in obtaining justice, […] they did not consider it appropriate to sign an agreement on compliance with recommendations." Subsequently, in response to the Merits Report, the State presented information on the investigation and on general public policies. Finally, the Commission concluded that the State had not presented information expressly related to the recommendations.

4. *Submission to the Court.* On May 3, 2012, the Commission submitted all the facts and human rights violations described in the Merits Report to the Court's jurisdiction. The Commission appointed Commissioner Dinah Shelton and its Executive Secretary at the time, Santiago A. Canton, as its delegates before the Court. It also indicated that Elizabeth Abi-Mershed, Deputy Executive Secretary, Isabel Madariaga and Fiorella Melzi, would act as legal advisers, as well as the then legal adviser, Karla I. Quintana Osuna.

5. *The Inter-American Commission's requests.* Based on the foregoing, the Commission asked the Court to declare the international responsibility of the State for the violation of:

(a) Article 4 of the Convention; (b) Article 5 of the Convention; (c) Article 19 of the Convention, and (d) Article 24 of the Convention and Article 7 of the Convention of Belém do Pará, all in relation to Article 1(1) of the Convention, to the detriment of María Isabel Veliz Franco. It also asked that the Court declare the violation of: (a) Article 5(1) of the Convention; (b) Article 8 of the Convention, and (c) Article 25 of the Convention, in relation to Articles 24 and 1(1) of this instrument, to the detriment of María Isabel's mother, brothers and grandparents. Lastly, it asked the Court to order different measures of reparation.

II
PROCEEDINGS BEFORE THE COURT

6. *Notification to the State and the representatives.* The submission of the case was notified to the State and to the representatives of the presumed victims by a communication of July 3, 2012.[3]

7. *Brief with motions, arguments and evidence.* On September 4, 2012, CEJIL and REDNOVI submitted[4] their brief with motions, arguments and evidence (hereinafter "motions and arguments brief") to the Court, in accordance with Article 40 of the Court's Rules of Procedure. They stated that, basically, they endorsed the Commission's presentation of the facts, and indicated that they would describe the context in which these facts occurred in greater detail. They added that the State had failed to comply with its obligation of prevention under Article 7 (Right to Personal Liberty), and alleged non-compliance with Article 2 (Domestic Legal Effects) of the Convention. They did not allege the violation of Article 24 (Equal Protection). In addition, they asked the Court to order different measures of reparation. Lastly, the mother and brothers of María Isabel requested access to the Victims' Legal Assistance Fund of the Court (hereinafter also "the Victims' Legal Assistance Fund" or "the Fund"). Subsequently, on March 8, 2013, the representatives advised the Court that only REDNOVI would act as the representative (hereinafter also "the representative").

8. *Answering brief.* On December 18, 2012,[5] the State presented its brief filing a preliminary objection, answering the submission of the case and with observations on the motions and arguments brief (hereinafter "answering brief"). In this brief, it filed "the preliminary objection of failure to exhaust domestic remedies," denied each of the alleged violations presented by the Commission and the representative, and asked the Court to rule that the State was not internationally responsible. Furthermore, the State made a "preliminary analysis of competence," in which it indicated that "it did not recognize the competence of the Inter-American Court to examine the supposed violation of Article 7 of the Convention of Belém do Pará." It also raised a question concerning the determination of the "victims" in the Commission's Merits Report in its "[l]egal analysis of the supposed violations that had been alleged." Lastly, the State rejected the measures of reparation that had been requested. The State appointed Rodrigo Villagrán Sandoval as Agent,[6] and Ema Estela Hernández Tuy de Iboy as Deputy Agent.

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[3] The Commission's submission brief and annexes were forwarded to the parties by courier. The representatives received them on July 4, 2012, and the State received them on July 11, 2012.

[4] On that date, CEJIL, represented by Viviana Krsticevic, Alejandra Nuño, Marcela Martino and Adeline Neau, and REDNOVI, represented by Giovana Lemus and Sonia Acabal, were the representatives of the presumed victims.

[5] On October 2, 2012, the Court sent the State by courier the brief with motions, arguments and evidence, together with its annexes and a USB device and two compact discs with the documents presented by the representatives, granting the State two months, non-extendible, to present its answer. On October 17, 2012, the State advised the Court that the USB device had not been received. On October 18, 2012, the Court again sent the State a compact disc with the missing documentation contained on the USB, and granted the State a new time frame to present its answer calculated from the date of reception of this compact disc.

[6] On March 15, 2013, the State advised that it had appointed Rodrigo Villagrán Sandoval as the State's Agent, in substitution of María Elena de Jesús Rodríguez López.

9. *Access to the Legal Assistance Fund.* In an Order of the President[7] of the Court (hereinafter "the President") of January 8, 2013, the request submitted by the presumed victims, through their representatives (*supra* para. 7), for access to the Court's Assistance Fund was declared admissible.

10. *Observations on the preliminary objections.* On February 21 and 22, 2013, the representative and the Commission, respectively, presented their observations on the preliminary objection presented.

11. *Summons to a public hearing.* By an order of April 10, 2013, the President convened the parties to a public hearing, which took place on May 15, 2013, during the ninety-ninth regular session of the Court, held at its seat,[8] and ordered the reception of diverse statements in this case.

12. *Amici curiae.* On Mary 30, 2013, the Court received two *amicus curiae* briefs*:* (a) one submitted by Sorina Macricini, Cristian González Chacó and Bruno Rodríguez Reveggio, of *Notre Dame Law School*, of which section VIII and the following parts were in English. The Court received the corresponding translation on June 10, 2013, and (b) one submitted by Christine M. Venter, Ana-Paolo Calpado and Daniella Palmiotto, of *Notre Dame Law School*, in English.

13. *Final written arguments and observations.* The representative forwarded its final written arguments on June 15, 2013, and the State on June 15 and 18, 2013. In addition, at that time, the State responded to the questions posed by the judges during the public hearing and the representative referred, in general, to the context. On June 15 also, the Commission transmitted its final written arguments. On June 18, 2013, the State advised that, "owing to a clerical error in the numbering and citations of the footnotes," it had amended its brief with final arguments, which it had first uploaded to the "Dropbox" internet site, and therefore asked the Court to verify that the new document appeared on that site. On June 19, 2013, in a communication of the Secretariat of the Court (hereinafter "the Secretariat"), the State was informed that the President would be advised for the pertinent effects, and advised "that once a document has been presented to the Court it cannot continue to be amended." On June 20, 2013, the State advised that both versions of the final written arguments were available on the internet site that had been provided so that the Court could compare the two briefs, and repeated that a clerical error had been made. The briefs with arguments and observations were forwarded to the parties and to the Inter-American Commission on July 2, 2013, and the President granted them until July 15, 2013, at the latest, to submit any observations they deemed pertinent on the annexes to the said briefs. In this case, the Court admits the second brief with final arguments uploaded to the "Dropbox" internet site, because the changes made are of a clerical nature relating to the numbering of the footnotes, and will take this into consideration for the effects of this Judgment.

14. *Observations on the annexes attached to the final arguments.* On July 15, 2013, both the Commission and the representative presented their observations on the annexes submitted by the State together with the final written arguments; however, they also made other observations. In a communication of the Secretariat of July 17, 2013, on the instructions of the President, the representative and the Commission were advised that, in the case of aspects that exceeded the observations on the documents annexed to the State's arguments, the pertinence of considering them would be decided by the Court at the appropriate procedural opportunity. In addition, on July 15, 2013, the State presented,

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[7] Judge Diego García-Sayán's mandate as President ended on December 31, 2013.

[8] There appeared at this hearing: (a) for the Inter-American Commission: Dinah Shelton, Commissioner, Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán, legal adviser; (b) for the representative of the presumed victims: Giovana Lemus Pérez, Pamela González Ruiz and Sonia Acabal Del Cid of REDNOVI, and (c) for the State: Rodrigo Villagrán Sandoval and Irini Villavicencio Papahiu.

through the "Dropbox" site, a brief in which it made general observations on the final written arguments of the representative and on the final written observations of the Commission. In the said communication of the Secretariat of July 17, 2013, the State was advised that the respective time frame did not represent "a new opportunity to present allegations or arguments." It was pointed out that the observations presented by the State had not been requested by the Court or its President, and were not contemplated in the Court's Rules of Procedure, and the State was advised that "their admissibility w[ould] be decided by the Court at the appropriate procedural opportunity." In this regard, the Court does not admit those other considerations of the parties and the Commission that were presented together with the observations on the documents provided with the final written arguments because they refer to other matters.

15. *Objections to the amici curiae*. On June 15 and July 23, 2013, the State submitted various arguments to contest the *amici curiae* that had been presented, considering that "they do not comply with the purpose of this type of brief that the Court has accepted previously." The basis for its arguments was that "the authors have no knowledge of the case and in their desire to categorize the facts of this case as violence against women, they do not contribute any new element that would be helpful to the Court when delivering judgment" and "they have no legitimacy, *locus standi*, to submit briefs."

16. *Disbursements in application of the Assistance Fund.* On August 28, 2013, the Secretariat, on the instructions of the President, forwarded information to the State on the disbursements made in application of the Victims' Legal Assistance Fund in this case and, as established in article 5 of the Rules of the Court for the Operation of this Fund, accorded it a time frame to present any observations it deemed pertinent. On September 30, 2013, the State forwarded its observations on the report on the disbursements made in application of the Assistance Fund.

III
PRELIMINARY CONSIDERATIONS

A. The State's acknowledgement of the facts in the proceedings before the Commission

A.1) Arguments of the parties and of the Commission

17. During the public hearing held before the Inter-American Commission on March 20, 2009,[9] the State "acknowledge[d …] several irregularities and flaws in the investigation procedure corresponding to structural problems of the Guatemalan State." On that occasion, Guatemala stated that:

> At the time of the facts in 2001, […] there were no guidelines for the investigation and prosecution of crimes; [these] were established by the Public Prosecution Service in February 2006. [… I]rrespective of the reasons why the pertinent tests and the autopsy were not performed, or not performed correctly in keeping with international standards, […] the guidelines established in 2006 are the ones that are providing guidance for the investigation procedures and the hypotheses that the Public Prosecution Service is using now.

18. During this hearing, the State added that in 2001, a "structural situation of impunity and fear prevailed among the people of Guatemala, as well as of an increase in […] violent deaths." Furthermore, in a brief of August 12, 2009, presented to the Commission,[10] the State indicated that it had:

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[9] *Cf.* "IACHR. Audio recording of public hearing in Case 12,578, María Isabel Veliz Franco, Guatemala, March 20, 2009" (file of attachments to the Merits Report, tome I, annex 32.4). This annex was provided to the Court in an audio recording of the said hearing submitted by means of a link to a website: http://www.oas.org/es/cidh/audiencias/Hearings.aspx?Lang=En&Session=8).

[10] The document, Ref. P 1008-09 RDVC/LZ/eh, was transmitted to the Commission under a note dated August 21, 2009, received on August 24 (file before the Commission, tome III, fs. 2105 and 2106). The State's

> Acknowledged responsibility for the lack of due diligence in the investigation into the death of María Isabel Veliz Franco, owing to the failure to perform any forensic tests on the corpse; due also to the delay in the investigation as a result of a dispute over territorial jurisdiction and because an effective precautionary measure was not ordered to ensure the presence of [a person identified as] suspected of committing the murder.

19. During the proceedings before the Court, the State affirmed that, during the processing of the case before the Commission, it had "acknowledged its responsibility" for three "circumstances." First, "for failing to perform some forensic tests on the corpse"[11]; "second, […] owing to the delay in the investigation as a result of a dispute over territorial jurisdiction," and "third, […] because it had not ordered an effective precautionary measure to ensure the presence of [a person] suspected of committing the murder." Regarding the first element, it explained that, at the time of the facts, "the tests carried out on corpses" were performed in accordance with the "procedures" and the "possibilities of the State at that time." In relation to the jurisdictional dispute, it indicated that it had "acknowledged its responsibility for the delay that occurred, but only with regard to some of the evidence that required a judge's authorization." Nevertheless, it stated that other steps had been taken "while the interlocutory issue was resolved." Lastly, as regards the third element indicated, it asserted that it had "acknowledged its responsibility, […] even though there had been no factual evidence to connect [the said person] to the death of María Isabel," and that "without evidence, no one can be deprived of their liberty."

20. The Commission and the representative indicated that, during the processing of the case before the Commission, the State had acknowledged its responsibility for shortcomings in the investigation. They stated that this acknowledgement included the delay in the investigation owing to a jurisdictional dispute. The Commission clarified that it also included "the failure to perform some forensic tests on the corpse" and "failing to establish an effective precautionary measure to ensure the presence of a person suspected of committing the murder."[12] The representative added that the acknowledgement covered "the inexistence in 2001 of guidelines for the investigation and prosecution of crimes," and

> Also, […] that, […] at the time the events occurred, domestic law did not contain any specific provisions on gender, or legislation or directives for the removal of the body, the preservation of the crime scene, [and] the collection of evidence and that, to date, there is no legislation specifically designed for the search for disappeared women.

21. Both the Commission and the representative cited the principle of estoppel. In this regard, the Commission affirmed that what the State had indicated before the Commission "had effects in the proceedings before the Court." Meanwhile, the representative indicated that "Guatemala cannot assume a position [before the Court] that would be contrary to this previous position."

A.2) Considerations of the Court

22. The arguments described refer to statements made by Guatemala during the processing of the case before the Commission. In this regard, although the State made these statements during that procedural stage, the Court considers that Guatemala made them in the context of the international processing of a contentious case; hence they have

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brief was forwarded by the Permanent Mission of Guatemala to the Organization of American States, signed by Ambassador Lionel Maza Luna, accompanied by a COPREDEH report signed by Mrs. del Valle Cóbar; the fact that a copy was sent to Róger Haroldo Rodas Melgar, Minister for Foreign Affairs at the time, is noted at the foot of the brief.

[11] The State affirmed that this was indicated in the following document: Report dated August 12, 2009, identified as Ref. P 1008-09 RDVC/LZ/eh sent by COPREDEH to the C[ommission] in the context of case 12,578, pp. 2-7."

[12] The Commission referred to the following document as evidence of this assertion: "Record of Hearing No. 5, Case 12,578, María Isabel Veliz Franco, Guatemala, March 20, 2009."

implications for the proceedings before the Court and it cannot be considered that their effects are reserved to the internal or administrative sphere.

23. The statements made by the State before the Commission (*supra* paras. 17, 18 and 19) reveal that it did not relate its "responsibility" to the violation of specific norms; nevertheless, it is clear that it has accepted the following as factual elements: (a) "in 2001, […] there were no guidelines for investigating and prosecuting crimes"; (b) in that year, a structural situation of impunity existed and fear among the population of Guatemala"; (c) in the same year there was an "increase in […] violent deaths"; (d) during the investigation into what happened to María Isabel Veliz Franco "[certain tests] and the autopsy were not performed, or not performed correctly in keeping with international standards," and (f) there was a "lack of due diligence in the investigation procedure […] owing to[: (i)] the failure to perform some forensic tests on the corpse[; (ii)] the delay resulting from the dispute on territorial jurisdiction, and [(iii)] because an effective precautionary measure was not ordered to ensure the presence of [a person identified as] suspected of committing the murder."

24. Consequently, the Court will take into account the pertinent facts accepted by the State when analyzing the preliminary objections filed, and also, as appropriate the substantive elements or those relating to the merits of the alleged human rights violations.

B. The factual framework

25. The Court recalls that the factual framework of the proceedings before the Court is constituted by the facts contained in the Merits Report submitted to its consideration. Consequently, it is not admissible for the parties to allege facts that differ from those contained in the said report, even though they may indicate elements that explain, clarify or reject the facts that are mentioned in this report and have been submitted to the Court's consideration (also called "complementary facts").[13]

26. Some of the representative's arguments relating to the alleged violation of Article 5 of the Convention refer to the fact that, in her efforts to obtain justice for her daughter, Rosa Elvira Franco "has been exposed to numerous threats and harassment that have caused anguish and distress, not only to her, but also to María Isabel's brothers and grandparents, owing to the possibility that their personal integrity or even their life could be jeopardized […]." During the proceedings before the Court, the representative indicated that, following María Isabel's murder, Mrs. Franco Sandoval and the members of her family, have been subjected to continuing acts of intimidation and harassment.[14]

27. The Court has verified that the Commission, in its Merits Report, indicated that, on June 27, 2005, Rosa Elvira Franco asked the Commission to grant precautionary measures,

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[13] *Cf. Case of "Five Pensioners" v. Peru. Merits, reparations and costs*. Judgment of February 28, 2003. Series C No. 98, para. 153, and *Case of J. v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 27, 2013. Series C No. 275, para. 27.

[14] In the section on facts of the motions and arguments brief, the representative specifically mentioned acts of intimidation and harassment that Mrs. Franco Sandoval had suffered; namely that, in February 2002, Mrs. Franco Sandoval reported that she had frequently observed suspicious individuals around her home or on her son's path to school; in August 2002, Mrs. Franco Sandoval reported that she was receiving telephone calls in which unknown persons told her that her whole family would die; in September 2004, agents of the Guatemala City Public Prosecution Service verified the presence of armed individuals around Mrs. Franco Sandoval's home, as well as vehicles with polarized windows and without license plates; in April 2006, an individual who had previously been prowling around the house was following Mrs. Franco Sandoval in the street and intimidating her; in August 2007, one of the agents responsible for Mrs. Franco Sandoval's safety was shot while he returned from having lunch near Mrs. Franco Sandoval's workplace; in December 2011, Mrs. Franco Sandoval again observed the man who had followed her in April 2006 accompanied by another unknown person, the two men remained in a car parked almost in front of Mrs. Franco Sandoval's home for some time talking on the telephone and observing the house. Lastly, Leonel Enrique Veliz Franco, María Isabel's brother, stated that, on several occasions, he had been followed by cars and that he "continually s[aw] strange cars in front of [his] house." *Cf.* Affidavit prepared by Leonel Enrique Veliz Franco on April 26, 2013 (file of preliminary objections, merits, reparations and costs, fs. 816 to 822).

alleging that the members of her family were the victims of harassment, persecution and threats, and that, on November 16, 2005, it granted precautionary measures in favor of Elvira Franco Sandoval, Leonel Enrique Veliz Franco, José Roberto Franco Sandoval and Cruz Elvira Sandoval Polanco.[15] Nevertheless, the Merits Report reveals that the said indication appeared in a section describing the "proceedings before the C[ommission]," and not as part of the facts considered pertinent in relation to the merits of the matter. Thus, the Court considers that the above-mentioned factual allusions of the representative do not explain, clarify or reject the facts presented by the Inter-American Commission in its Merits Report, but rather introduce new elements that are not part of the factual framework of this case. Consequently, the Court will not take these facts into consideration.

C. Determination of the presumed victims

28. In the submission brief, the Commission asked the Court to declare the international responsibility of the State for the violation of the rights of María Isabel Veliz Franco; her mother, Rosa Elvira Franco Sandoval; her brothers, Leonel Enrique Veliz Franco and José Roberto Franco, and her now deceased grandparents, Cruz Elvira Sandoval Polanco de Franco and Roberto Franco Pérez. In the Merits Report, the Commission declared violations to rights of all those mentioned. The representative also asked the Court to establish violations to rights of these six persons. In the context of its arguments on the alleged violations, the State indicated that:

> The [initial] petition [lodged before the Commission] referred to and presented María Isabel Veliz Franco and her mother, Rosa Elvira Franco Sandoval, as victims; in the Admissibility Report, the Commission declared that it would examine the case for violations presumably committed against them[. …] Surprisingly, […] the Merits Report […] declared that the State had violated […] rights of [the above-named members of María Isabel Veliz Franco's family]. This violates the State's right to defense, because it was not aware from the start of the arguments on the basis of which, supposedly, there were other collateral victims.

29. The presumed victims must be indicated in the Merits Report issued by the Commission under Article 50 of the Convention.[16] Article 35(1) of the Court's Rules of Procedure establishes that the case shall be submitted to the Court by the presentation of this report, which must contain "the identification of the presumed victims." According to this article, it is for the Commission and not the Court to identify the presumed victims in a case before the Court precisely and at the appropriate procedural opportunity.[17]

30. The Court notes that María Isabel Veliz Franco's brothers and grandparents were indicated as victims in the Merits Report, pursuant to the said Article 35(1) of the Rules of Procedure (*supra* para. 2.c.i). Consequently, the State's argument concerning the failure to identify the victims is inadmissible. Furthermore, it should be indicated that although some members of María Isabel's family were not named in the initial petition or in the Admissibility Report,[18] violations to the detriment of her two brothers and her grandparents were alleged in several of the representative's briefs that were forwarded to the State during the processing of the case before the Commission,[19] and the State was made aware

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[15] *Cf.* Merits Report No. 170/11, *supra*.

[16] This has been the Court's consistent case law since the *Case of García Prieto et al. v. El Salvador. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2007. Series C No. 168, paras. 65 to 68, and the *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. *Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, paras. 224 and 225. These judgments were adopted by the Court during the same session. In application of the Court's new Rules of Procedure, this criterion has been ratified since the case of the *Barrios Family v. Venezuela. Cf. Case of the Barrios Family v. Venezuela. Merits, reparations and costs*. Judgment of November 24, 2011. Series C No. 237, footnote 215, and *Case of J., supra*, para. 23.

[17] *Cf. Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2006. Series C No. 148, para. 98, and *Case of J., supra*, para. 23.

[18] *Cf.* Admissibility Report No. 92/06, *supra*.

[19] In this regard, the briefs of the representatives (at the time, the petitioners) of May 31, 2008, and June 4, 2009, may be cited as an example. During the proceedings before the Commission, the State also examined and presented arguments on the representatives' claim that the said six persons be considered victims. This is revealed

of this on those occasions. The Court also notes that the said arguments were related to the factual framework considered in the Admissibility Report. In addition, before the Court, the State has been made aware of this information and was accorded the right to defend itself.

31. Consequently, the Court finds that the presumed victims in this case are María Isabel Veliz Franco, Rosa Elvira Franco Sandoval, Leonel Enrique Veliz Franco, José Roberto Franco, Cruz Elvira Sandoval Polanco de Franco and Roberto Franco Pérez.

IV
COMPETENCE

32. The Inter-American Court is competent, under Article 62(3) of the American Convention, to hear this case, because Guatemala has been a State Party to the American Convention since May 25, 1978, and accepted the contentious jurisdiction of the Court on March 9, 1987. Furthermore, Guatemala has been a party to the Convention of Belém do Pará since April 4, 1995. The State's objections to the Court's competence in relation to that treaty are analyzed in the following chapter.

V
PRELIMINARY OBJECTIONS OF LACK OF COMPETENCE AND FAILURE TO EXHAUST DOMESTIC REMEDIES

A. Preliminary objection of lack of material competence in relation to Article 7 of the Convention of Belém do Pará[20]

A.1) Arguments of the parties and of the Commission

33. The State affirmed that, "taking into consideration the reservations that [Guatemala] made when […] accepting […] the contentious jurisdiction" of the Court,[21] the latter is competent to hear the case concerning the "presumed violations that have been alleged to the rights protected by the American Convention." "However, […it] does not recognize the competence" of the Court "to examine the supposed violation of Article 7 of the Convention of Belém do Pará." It indicated that Article 62 of the American Convention "defines the competence of the Court in relation to cases concerning the interpretation or application of [the said] Convention." It also indicated that "[a]lthough Article 12 of the 'Convention of Belém do Pará'" establishes the possibility that anyone "may lodge petitions with the Inter-American Commission on Human Rights containing denunciations or complaints of violations of Article 7 of this Convention by a State Party," this does not mean that the Court has competence *ratione materiae* to examine […] complaints based on [that treaty]," because "neither the good faith of the States, nor the justifiable object and purpose of the numerous

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by the State's brief received by the Commission on August 24, 2009 (file before the Commission, tome 3, fs. 2109, 2110, 2260 to 2269, 2133 to 2138, and 2107 to 2113, respectively).

[20] Even though the State did not expressly mention that its argument on lack of competence was a "preliminary objection," that is indeed its nature. And this is because this argument clearly reveals that Guatemala seeks an objective that, as the Court has indicated, is in keeping the nature of a preliminary objection: "to obtain a decision that prevents or impedes the analysis of the merits of the contested aspect." *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2010. Series C No. 219, para. 11. As revealed by the Court's case law, in order to consider whether or not an argument is a preliminary objection, the relevant aspect is that it has been clearly filed with this objective. *Cf. Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs.* Judgment of October 13, 2011. Series C No. 234, para. 56.

[21] In is argument, the State did not elaborate on how, in its opinion, "reservations should be considered" in relation to its position on the lack of material competence. The Court notes that, when ratifying the American Convention, the State made a reservation with regard to the death penalty, which was withdrawn by Governmental Decision No. 281-86, of May 20, 1986. Evidently, this has no impact on the case *sub examine*. Also, Guatemala made no declarations or reservations when ratifying the Convention of Belém do Pará.

conventions are sufficient […] to delegate competence tacitly and automatically to the Court." Thus, the State considered:

> That the ruling of the Court is reasonable in the judgment it delivered in the case of *González et al. ("Cotton Field") v. Mexico,* in relation to the possibility of exercising contentious competence with regard to […] instruments […] other than the American Convention; […] but, as Mexico had asserted, it indicated that each inter-American treaty requires a prior specific declaration granting the Court competence.

34. The representative affirmed that the State's position was "inadmissible" and referred to the Court's case law.

35. The Commission stated that "the Court has declared violations of Article [7 of the Convention of Belém do Pará], in the understanding that Article 12 of this instrument incorporates a general clause of competence accepted by the States when ratifying or adhering to [the Convention]." It "consider[ed] that there was no reason for the Court to depart from its reiterated criterion."

A.2) Considerations of the Court

36. The State ratified the Convention of Belém do Pará on April 4, 1995, without reservations or limitations (*supra* para. 32). Article 12 of this treaty indicates the possibility of lodging "petitions" before the Commission relating to "denunciations or complaints of violations of [its] Article 7," and establishes that "the Commission shall consider such claims in accordance with the norms and procedures established by the American Convention on Human Rights and the Statute and Regulations of the Inter-American Commission." As indicated by this Court in the case of *González et al. ("Cotton Field") v. Mexico*, "it appears evidence that the literal meaning of Article 12 of the Convention of Belém do Pará grants competence to the Court, by not excepting from its application any of the norms and procedures for individual communications."[22] It should be underlined that, in other contentious cases against Guatemala,[23] this Court has declared the State's responsibility for the violation of Article 7 of the Convention of Belém do Pará and the State has even acknowledged its responsibility for the violation of this precept without questioning the Court's competence in this regard.

37. Furthermore, the Court notes that Article 7 of the Convention of Belém do Pará refers to measures "to prevent, punish and eradicate" violence against women and, in this regard, is closely related to the rights to life and to personal integrity established in Articles 4 and 5 of the American Convention. Thus, previous considerations of the Court in relation to the *pro persona* principle support what it has indicated with regard to its competence:

> The system of international protection should be understood as a whole, [in keeping with the] principle established in Article 29 of the American Convention, which imposes a protection framework that always gives preference to the interpretation or the norm that is most favorable to the rights of the individual, the cornerstone for the protection of the whole inter-American system. Thus, the adoption of a restrictive interpretation with regard to the scope of this Court's competence would not only be contrary to the object and purpose of the [American] Convention, but would also have an impact on the practical effects of this treaty and on the guarantee of protection that it establishes.[24]

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[22] *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 41. In the paragraph of this judgment cited, the Court explained that the "wording" of Article 12 of the Convention of Belém do Pará "does not exclude any provision of the American Convention; thus it must be concluded that, in the petitions under Article 7 of the Convention of Bélem do Pará, the Commission will act 'pursuant to the provisions of Articles 44 to 51 of [the American Convention],' as established in Article 41 of this instrument. Article 51 of the Convention […] refers […] expressly to the submission of cases the Court."

[23] *Cf. Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of September 4, 2012. Series C No. 250, para. 17, and *Case of Gudiel Álvarez (Diario Militar) v. Guatemala. Merits, reparations and costs.* Judgment of November 20, 2012. Series C No. 253, para. 17.

[24] *Cf. Case of Vélez Loor v. Panamá. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010 Series C No. 218, para. 34; *Case of González et al. ("Cotton Field"), supra*, operative paragraphs 4 and 5; *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and*

38. Therefore, the Court rejects the preliminary objection of lack of competence of the Court to rule on Article 7 of the Convention of Belém do Pará in relation to this contentious case.

B. Preliminary objection of failure to exhaust domestic remedies

B.1) Arguments of the parties and the Commission

39. The State indicated that it understood that the "domestic remedies […] had not yet been exhausted," because "criminal proceeding [No.] 105–2002 […] was still active. It explained that "[t]he second paragraph [of Article 46 of the Convention] establishes the circumstances in which the requirement [of exhaustion of domestic remedies] is not applicable," and that the respective presumptions are not present in this case. In this regard, it affirmed: (a) "the situation described in Article 46(2)(a) does not arise in this case because Guatemala has domestic legislation establishing the legal procedure to protect the violated rights"; (b) the "situation included in Article 46(2)(b) […] does not arise either because […] the victim's next of kin were never denied access to exercise the remedies before the domestic courts, and (c) regarding the presumption under Article 46(2)(c), there has not been an unwarranted delay because, "since no pre-trial detention or substitutive measures were ordered during the investigation stage, it has no time limit." The State also indicated that "numerous measures have been taken to clarify the facts," and that "it is sufficient to observe and analyze these measures […] to conclude that, at no time, has there been […] negligence, unwarranted delay or lack of diligence by the investigating body." In this regard, the State indicated that "the Public Prosecution Service has continued its inquiries, but cannot bring charges if it does not obtain convincing evidence or indications," and pointed out that, "on different occasions, the judge has requested the Public Prosecution Service to issue the relevant decision ending the investigation, and the latter has asked that the investigation remain open in order to achieve positive results." The State noted that, to conclude that there had not been an unwarranted delay, the investigation should be evaluated based on the criteria used by the Court to assess the reasonableness of the duration of domestic proceedings.[25] Lastly, it asserted that, if there was an unwarranted delay, the law established ways for "the victims […] to deal with this circumstance," and these were not used.[26]

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costs. Judgment of August 30, 2010. Series C No. 215, operative paragraphs 3 and 7; *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of August 31, 2010. Series C No. 216, operative paragraphs 3 and 6; *Case of the Río Negro Massacres, supra*, operative paragraph 6; *Case of the Massacres of El Mozote and nearby places v. El Salvador. Merits, reparations and costs*. Judgment of October 25, 2012. Series C No. 252, operative paragraph 7, and *Case of Gudiel Álvarez et al. (Diario Militar), supra*, operative paragraph 5. Moreover, with regard to Guatemala, in the above-mentioned cases of the *Río Negro Massacres* and *Gudiel Álvarez (Diario Militar)*, the State did not contest the Court's competence in relation to Article 7 of the Convention of Belém do Pará. Paragraph 17 in the two judgments indicates that, in the said cases, Guatemala acknowledged its responsibility for the violation of this article of that treaty.

[25] In this regard, the State indicated that the Court has referred to the pertinence of considering "three elements to determine the reasonableness of the duration […]: "(a) the complexity of the matter; (b) the procedural activity of the interested party, and (c) the conduct of the judicial authorities."

[26] The State explained that, "Decree 7-2011 of the Congress of the Republic" amended "Decree No. 51-92 of the Congress of the Republic, Code of Criminal Procedure: 'Article 5. A second paragraph is added to article 108, which shall read as follows: *In the exercise of its functions, and no more than fifteen (15) days after having received the complaint, the Public Prosecution Service shall inform the victim of the measures that have been taken and about the possible decision. The victim who is not informed within this time frame may have recourse to the judge so that the latter may urgently require that, within forty-eight hours, the prosecutor report to him on the progress made in the proceedings. If, from this report, or when it has not been provided, the judge considers that the preparation of the criminal action is insufficient, he shall order the prosecutor to report on additional progress within thirty (30) days at the most or, if not, on the circumstances that prevent the latter from making further progress in the investigation, on pain of his non-compliance being reported to the disciplinary regime of the Public Prosecution Service, and constituting a serious offense.'"* (In italics in the original.)

40. The representative indicated that "the Commission […] reached the conclusion that the exception contained in Article 46(2)(c) of the Convention was applicable" and, according to the representative, this "is closely related to the merits of the matter." It considered that, since the State's position "concerns the admissibility of the case," the Court, "respecting the principles of procedural economy and equality before the law," should "support Admissibility Report [No.] 92/06 issued by the […] Commission." It added that, before the Court, "the State seeks to refer the discussion back to admissibility […] and, in doing so, disregards the principle of estoppel." It also clarified that the State's argument "was not presented […] opportunely" because, prior to the Commission's decision on the admissibility of the case, "the State presented [… seven] briefs," and "in none of them […] expressly filed the objection of failure to exhaust domestic remedies." Furthermore, it affirmed that, before the Commission, "[t]he State did not identify the remedies to be exhausted or describe their effectiveness." In this regard, it underscored that "during the proceedings before the […] Commission, the State [… had] acknowledged its responsibility for […] the delay in the investigation." Consequently, the representative argued that it was admissible to "apply the principle of estoppel" to the "analysis] of the preliminary objection." It pointed out that, "if the Court should decide to revise the Commission's decision on admissibility, [… it] ask[ed] that […] the Court analyze the unwarranted delay in the domestic investigation in light of possible violations of Articles 8 and 25 of the American Convention." Despite the foregoing, it also stated that "[w]hen the Admissibility Report was issued […] almost [five] years had passed since the disappearance and subsequent murder of the child, María Isabel Veliz Franco and the […] criminal proceedings […] were still at the investigation stage"; and asserted that "[t]he numerous omissions and the negligence in which the authorities incurred from the initial stages of the investigation are the real causes of the delay."

41. The Commission argued that "the American Convention attributes decisions on admissibility to [the Commission] in the first place, and such decisions are adopted based on the information available when the [respective] ruling is made." Accordingly, it considered that "the Court should maintain some degree of deference to the decisions of the Commission in this regard." It indicated that in "the Admissibility Report, […] it had first observed that there had been an unwarranted delay of almost seven months owing [to a] jurisdictional dispute." It added that, "in any case, […] the evidence taken into account at the admissibility stage was confirmed fully at the merits stage," and concluded that "the preliminary objection […] is inadmissible."

B.2) Considerations of the Court

42. Article 46(1)(a) of the American Convention establishes one of the requirements for "[a]dmission by the Commission of a petition or communication," which is "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." One of the exceptions to this requirement, established in paragraph 2(c) of this article, arises when "there has been unwarranted delay in rendering a final judgment under the aforementioned remedies."

43. As revealed by Admissibility Report No. 92/06 dated October 21, 2006, on January 26, 2004, the Commission received a "complaint in [relation to] the investigation into the death of María Isabel Veliz Franco, […] who disappeared on December 17, 2001," and "forwarded [this …] to the State on September 24, 2004."[27] The Court notes that, between September 24, 2004, and October 21, 2006, in addition to requests for an extension, the State sent the Commission a total of six communications concerning the case.[28] In the first brief, submitted to the Commission on December 16, 2004, the State described measures corresponding to the investigation that was being conducted by the Public Prosecution Service in order "to open criminal proceedings against the guilty parties," and observed that

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[27] Admissibility Report No. 92/06, *supra*.

[28] *Cf.* Communications from the State received by the Inter-American Commission on December 16, 2004; April 12, 2005, and April 3 repeated on April 5; May 24 and July 13, 2006 (file before the Commission, tome I, fs. 1067 to 1080; 969 to 973; 899 to 901; 891 to 893; 863 to 868, and 830 to 834, respectively).

"[t]he case of M[aría] I[sabel] V[eliz] F[ranco] was still at the investigation stage." When admitting the case, the Commission concluded the existence of an unwarranted delay pursuant to Article 46(2)(c) of the Convention.[29] In doing so, it took into account a "jurisdictional dispute of almost seven months [that] was had contributed to the unwarranted delay."[30]

44. It has already been noted that the State has acknowledged the delay caused by the jurisdictional dispute that occurred between March 11 and November 21, 2002 (*supra* para. 19 and *infra* para. 107) – in other words, before the initial petition was lodged. Consequently, and considering that, at that time as well as when the initial petition was lodged and when the Admissibility Report was issued, the investigation into the facts remained in its initial stages, there appears to be no error in the Commission's decision. Moreover, this is related to the rights established in Articles 8 and 25 of the Convention, which stipulate that proceedings and remedies must be conducted "within a reasonable time" and "prompt[ly]," respectively. Thus, any delay in implementing them could constitute a violation of judicial guarantees.

45. The preliminary objection of failure to exhaust domestic remedies filed by Guatemala is therefore rejected.

VI
EVIDENCE

46. Pursuant to the pertinent regulatory norms,[31] and its consistent case law,[32] the Court will examine and assess the probative elements provided to the case file, whether documentation, statements or expert opinions, based on the principles of sound judicial discretion and taking into account the body of evidence and the arguments submitted in the proceedings.

A. Documentary evidence, statements of the presumed victims, and testimonial and expert evidence

47. The Court received diverse documents presented as evidence by the Inter-American Commission, the representative and the State. It also received the statements of the presumed victims proposed by the representative, namely: Rosa Elvira Franco, Leonel Enrique Veliz Franco and José Roberto Franco, of the witness Luisa María de León Santizo, proposed by the representative, and of the expert witnesses Ana Carcedo Cabañas, María Eugenia Solís García, Rodolfo Kepfer Rodríguez and José Mario Nájera Ochoa, proposed by the representative. On April 15, 2013, the Commission advised that it withdrew the expert evidence of Elizabeth Salmón, because, owing to prior professional commitments that could not be postponed, she would be unable to appear at the public hearing.

B. Admission of the documentary evidence

48. In this case, as in others,[33] the Court admits those documents provided by the parties at the appropriate procedural opportunity that were not contested or challenged, and the authenticity of which was not questioned, exclusively to the extent that they are pertinent and useful for determining the facts and their eventual legal consequences.

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29 *Cf.* Admissibility Report No. 92/06, *supra*.

30 Admissibility Report No. 92/06, *supra*.

31 *Cf.* Articles 46, 57 and 58 of the Rules of Procedure.

32 *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Reparations and costs*. Judgment of May 25, 2001. Series C No. 76, para. 51*, and Case of Liakat Ali Alibux v. Suriname. Preliminary objections, merits and reparations*. Judgment of January 30, 2014. Series C No. 277, para. 23.

33 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Liakat Ali Alibux, supra*, para. 25.

49. With regard to newspaper articles, the Court has considered that they may be assessed when they refer to well-known public facts or declarations by State officials, or when they corroborate aspects related to the case. Therefore, it decides to admit those documents that are complete or that, at least, allow their source and date of publication to be verified, and will assess them taking into account the body of evidence, the observations of the parties, and the rules of sound judicial discretion.[34]

50. Regarding some documents indicated by the parties by means of electronic links, the Court has established that if a party provides, at least, the direct electronic link to the document it cites as evidence and the document can be accessed, neither legal certainty nor procedural balance is affected, because the document can be found immediately by the Court and by the other parties.[35] In this case, the other parties did not oppose or make observations on the content and authenticity of such documents.

51. In addition, together with their final written arguments, the representative[36] and the State[37] forwarded several documents as evidence, and provided electronic links for some of them. In this regard, the parties and the Commission were granted an opportunity to present any observations they deemed pertinent (*supra* para. 14). The Court incorporates the documents indicated in the footnotes as evidence based on Article 58(a) of the Court's Rules of Procedure, considering them useful for deciding the case. The respective documentation will be assessed as pertinent, taking into account the body of evidence, the rules of sound judicial discretion, and the pertinent observations of the representative and the Commission.

52. During the public hearing, expert witness María Eugenia Solís presented a written opinion, which was handed to the parties and the Commission at the hearing. The Court admits it in the terms indicated with regard to the expert opinion that she provided at the public hearing (*infra* para. 63).

C. Evidence obtained by the Court *ex officio*

53. Under Article 58(a) of its Rules of Procedure, "[t]he Court may, at any stage of the proceedings: (a) [o]btain, on its own motion, any evidence it considers helpful and necessary." The Court finds that the following documents are useful and necessary for the analysis of this case and, therefore, incorporates them, *ex officio*, to the body of evidence in

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[34] Namely: BBC News/Americas. "Murderers prey on Guatemalan women", December 6, 2003, internet (file before the Commission, tome I, fs. 1143 and 1144); "Killing sprees terrorize Guatemalan women. Hundred slain in 2 years—only a handful arrested." Jill Replogle, Chronicle Foreign Service, December 30, 2003 (file before the Commission, tome I, fs. 1147 to 1149); *Crónicas del MP*. "*MP captura a implicados en crímenes contra mujeres*" [Public Prosecution Service captures those implicated in crimes against women]. *Evidencia,* Guatemala, October 2003 (file before the Commission, tome I, fs. 1223), and *Diálogo* "*La Red de Derivación creará un nuevo paradigma de asistencia a las víctimas*" [The Referral Network will establish a new model of assistance for victims]. *Evidencia*. Guatemala, October 2003 (file before the Commission, tome I, fs. 1224 and 1225).

[35] *Cf. Case of Escué Zapata v. Colombia*. *Merits, reparations and costs.* Judgment of July 4, 2007. Series C No. 165, para. 26, and *Case of J., supra*, para. 42.

[36] Namely: the Committee of Experts of the Follow Up Mechanism of the Convention of Belém do Pará. Declaration on Femicide. Approved at the fourth meeting of the Committee of Experts (CEVI) held on August 15, 2008; Information on attention provided to women survivors of violence in the first quarter of 2013, and Governmental Decision 46-2012, Creation of the Presidential Commission to tackle Femicide in Guatemala (COPAF) (file of preliminary objections, merits, reparations and costs, f. 1702), and the link to a website: http://www.ine.gob.gt/np/snvcm/index. The Court admits the document provided by the representative in its final written arguments by means of an electronic link because, as the representatives clarified, it supports the answers to questions posed by the Court's judges during the public hearing, and because the Court deems it useful.

[37] Namely: Judicial case file; File of the Public Prosecution Service (in three different parts: "Folios 1–170; Folios 171-400, and Folios 401–476"); Comparison of affidavits, and indication of an electronic link: *Affidávits*, http://www.ine.gob.gt/np/snvcm/index (*infra* para. 276). Regarding the case files, these had already been provided as evidence; consequently, the Court only admits those pages that were presented for the first time on this occasion.

this case in application of the said regulatory provision: (a) Report: "*Guatemala: Memoria del Silencio*" published by the Commission for Historical Clarification in 1999;[38] (b) Guatemala's answers to the 2008 questionnaire of the Mechanism to Follow Up on the Implementation of the Convention of Belém do Pará (MESECVI) to evaluate the implementation of the provisions of the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará);[39] (c) 2007 Statistical report on Violence in Guatemala of the United Nations Development Programme (UNDP);[40] (d) Final Report of the United Nations Verification Mission in Guatemala (MINUGUA) dated November 2004;[41] (e) Third year report of the Guatemalan International Commission against Impunity in Guatemala (CICIG);[42] (f) Sixth report of the International Commission against Impunity in Guatemala (CICIG);[43] (g) Report: "10 years without war… waiting for peace," a report on compliance with the Peace Accord on Strengthening Civilian Power and the Role of the Armed Forces in a Democratic Society, by Peace Brigades International (PBI) dated August 2007;[44] (h) 2008 Report: "Recognizing the Past: Challenges for the Combat of Impunity in Guatemala" by *Impunity Watch;*[45] (i) Concluding observations with regard to Guatemala of the Committee for the Elimination of Discrimination against Women, June 2, 2006;[46] (j) Decree No. 51-92 Code of Criminal Procedure and its amendments, issued on September 18, 1992,[47] and (k) Message of the President of the Republic of Guatemala, Ramiro De León Carpio, to the Fourth World Conference on Women on September 11, 1995.[48] In addition, the Inter-American Commission on Human Rights did not forward the complete text of the following two reports

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[38] Commission for the Historical Clarification: "*Guatemala: Memoria del Silencio*", tome III, June 1999. Available at: http://www.iom.int/seguridad-fronteriza/lit/land/cap2_2.pdf.

[39] Follow Up Mechanism of the Convention of Belém do Pará (MESECVI). Second Conference of States parties. July 9 and 10, 2008. OEA/Ser.L/II.7.10, MESECVI-II/doc.31/08, 24 June 2008. Available at: http://www.oas.org/ es/mesecvi/docs/Questionnaire1-GuatemalaResponse.doc.

[40] United Nations Development Program (UNDP), Armed Violence Prevention programme of UNDP Guatemala, "*Informe estadístico de la violencia en Guatemala*" [Statistical Report on Violence in Guatemala,] Guatemala, 2007. Available [in Spanish only] at: http://www.who.int/violence_injury_prevention/violence/national_activities/Report_estadistico_violencia_guatemala.pdf.

[41] United Nations Verification Mission in Guatemala (MINUGUA), Final Report: "*Asesoría en Derechos Humanos,*" 15 November 2004. Available at: http://www.derechoshumanos.net/lesahumanidad/Reports/guatemala/Report-Final-Minugua.pdf.

[42] International Commission against Impunity in Guatemala (CICIG), *"Tercer año de labores".* Available at: http://www.cicig.org/uploads/documents/Reports/INFOR-LABO_DOC05_20100901_ES.pdf.

[43] International Commission against Impunity in Guatemala (CICIG), "*Sexto Informe de labores de la Comisión Internacional contra la Impunidad en Guatemala (CICIG). Período septiembre 2012 – agosto 2013."* Available at: http://www.cicig.org/uploads/documents/2013/COM-045-20130822-DOC01-ES.pdf.

[44] Peace Brigades International (PBI), "10 years without war… waiting for peace," a report on compliance with the Peace Accord on Strengthening Civilian Power and the Role of the Armed Forces in a Democratic Society, Guatemala, August 2007. Available at: http://www.peacebrigades.org/fileadmin/user_files/projects/guatemala/files/english/ 10years.pdf.

[45] *Impunity Watch*, "*Reconociendo el pasado: desafíos para combatir la impunidad en Guatemala*", November 2008. Available at: http://www.impunitywatch.org/docs/BCR_Guatemala_Spanish.pdf. ["Recognizing the Past: Challenges for the Combat of Impunity in Guatemala" (summary in English) http://www.impunitywatch.org/docs/Guatemala_BCR_Summary_English.pdf]

[46] Committee for the Elimination of Discrimination against Women, Concluding observations of the Committee for the Elimination of Discrimination against Women: Guatemala, thirty-fifth session, 15 May to 2 June 2006, UN Doc. CEDAW/CE/GUA/CO/6, 2 June 2006. Available at: http://www.un.org/womenwatch/daw/cedaw/35sess.htm.

[47] Congress of the Republic of Guatemala. Code of Criminal Procedure. Decree 51-92 and its amendments, issued on September 18, 1992. Available at: http://www.lexadin.nl/wlg/legis/nofr/oeur/arch/gua/CodigoProcesalPenal.pdf.

[48] Message of the President of the Republic of Guatemala, Ramiro De León Carpio, to the Fourth World Conference on Women. Address by Ambassador Julio Armando Martini Herrera. Permanent Representative to the United Nations. Beijing, 11 September 1995. Available at: http://www.un.org/esa/gopher-data/conf/fwcw/conf/gov/950914133159.txt.

to the Court: (a) the Fifth Report on the Situation of Human Rights in Guatemala" of 2001,[49] and (b) "Justice and Social Inclusion: the Challenges of Democracy in Guatemala" of 2003.[50] Nevertheless, since these documents have been published, the Court has verified the complete texts on the Commission's official website.

D. Admission of the statement of the presumed victims, and testimonial and expert evidence presented by affidavit

54. In its brief with final arguments, the State maintained that the statements ordered "should be subject, from the start, to the Order of the Court of April 18, 2013," and that "it was not optional to answer the questions posed by the State." It indicated that, since the representative had forwarded the affidavits within the stipulated time frame, the deponents had failed to answer more than half the questions sent by the State, "hence, the Court should expand the statements, so that the answers could be provided belatedly in a separate document." It added that it was not the first time that the victims' representatives "commit errors that appear to be of a material nature in the delivery of document to the Court. However, this specific situation prejudiced the State's right of defense and procedural equality at the time of the public hearing […], because it did not have the allotted time to analyze and compare the said documents, while the representative has had all the documents and information requested of the State within the stipulated time frames." Consequently, it asked the Court to take its arguments into account, because the situation described placed the State at a disadvantage and was even more prejudicial owing to the inconsistencies and contradictions in the documents in question.

55. The representative presented the affidavits on April 29, 2013, as required in the Order of the President of April 10, 2013. However, as the deponents failed to answer certain questions posed by the State, extra time was granted for the presentation of expansions to the affidavits, and these were presented within the said period.[51] As indicated in the Order of April 10, 2013, the State was given the procedural opportunity to present its observations on the affidavits and did so in its final written arguments. Consequently, the Court finds that the presentation of the said statements was not time-barred and neither was the State's right to defense violated, as alleged by Guatemala.

56. Regarding the State's allegation that the deponents failed to refer to the questions posed by the State,[52] the Court reiterates that the fact that the Rules of Procedure establish the possibility of the parties posing written questions to the deponents offered by the other party and, when appropriate, the Commission, imposes the corresponding obligation on the party that offered the statement to take the necessary steps to ensure that the questions are forwarded to the deponents and that the respective answers are included. Under certain circumstances, the failure to answer some questions may be incompatible with the obligation of procedural cooperation and with the principle of good faith that regulates the

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[49] Inter-American Commission on Human Rights "Fifth Report on the Situation of Human Rights in Guatemala", OEA/Ser.L/V/II. 111, Doc. Rev., April 6, 2001 (file of attachments to the Merits Report, annex 32, fs. 266 to 310). Complete document available at: http://www.cidh.org/countryrep/Guate01eng/TOC.htm.

[50] Inter-American Commission on Human Rights, "Justice and Social Inclusion: the Challenges of Democracy in Guatemala." OEA/Ser.L/V/II.118, 29 December 2003 (file of attachments to the Merits Report annex 32, fs. 266 to 310). Complete document available at: http://www.cidh.org/countryrep/Guatemala2003eng/TOC.htm.

[51] In this regard, according to the Secretariat's communication of May 2, 2013, acknowledging receipt of the affidavits corresponding to the following deponents: Leonel Enrique Veliz Franco, José Roberto Franco, Luisa María de León Santizo, Ana Carcedo Cabañas, Rodolfo Kepfer Rodríguez and José Mario Nájera Ochoa, they only answered the questions regarding which clarifications had been made about the way in which they should be answered, and did not respond to all the State's questions that should have been answered. Consequently, on the instructions of the President, each affidavit was expanded to include the answers to the previously unanswered questions. On April 9, 2013, the representative presented the expanded statements of the said persons.

[52] Namely: Leonel Enrique Veliz Franco, José Roberto Franco, Luisa María de León Santizo, Ana Carcedo Cabañas, Rodolfo Kepfer Rodríguez and José Mario Nájera Ochoa.

international proceedings.[53] Nevertheless, the Court considers that the fact that the questions of the other party are not answered does not affect a statement's admissibility; rather, it is a factor that, owing to the implications of a deponent's silences, could have an impact on the weight give to the evidence provided by a statement or an expert opinion; an aspect that must be assessed when examining the merits of the case.[54]

57. Meanwhile, with regard to the statement of Leonel Enrique Veliz Franco, the State considered that "the witness has no proof of any of the steps taken by his mother; rather, he knows about them because of what she has told him"; it raised questions as to the "steps [for which] he accompanied his mother," and about some of the statements relating to the investigation and the facts of the case, and the contradiction of the answers to the State's questions. It added, in relation to the statement by José Roberto Franco, that "the State makes the same observations as those made with regard to his brother, Leonel Enrique Veliz Franco, with regard to the general aspects," and pointed out some contradictions between the latter's statement and that of his mother, and between his own statement and his answers to the questions posed by the State. It asserted that "as their name indicates, testimonial statements are a probative means in which individuals who have witnessed an act testify about it because they have first-hand knowledge of the said act." It affirmed that, in this case, "the preparation of the witnesses is evident and also, instead of only referring to the facts that they know first-hand, they give personal opinions that favor the party that has proposed them without these opinions having any basis." In this regard, the Court understands that both these individuals gave their statement in their capacity as presumed victims and this Court's case law has established that the statements of the presumed victims cannot be assessed in isolation, but rather within the body of evidence of the proceedings, because they are useful to the extent that they can provide further information on the alleged violations and their consequences.[55] The other observations of the State refer to the content of the statements, which does not cause problems as regards their admissibility, and will be considered when assessing each statement together with the body of evidence and in keeping with the rules of sound judicial discretion.

58. Regarding the affidavit prepared by witness Luisa María de León, the State repeated some of the observations it had made on the final list of deponents for the public hearing, because she was offered as a witness and not as an expert witness. On this matter, the Court refers to the Order of the President of the Court of April 10, 2013. It also refers to its previous considerations in this Judgment concerning the failure of this witness to answer certain questions posed by the State (*supra* para. 56). In relation to her statement, the State questioned the legal analysis she had made. The Court considers that the State's observations refer to the content of the statement; thus they do not affect its admissibility and, in any case, the observations will be taken into account when assessing the statement together with the body of evidence and in keeping with the rules of sound judicial discretion.

59. As regards the expert opinions presented by affidavit, the State affirmed, in general, that "most of the expert witnesses did not provide their expert opinion pursuant to the oath established in Article 51(4) of the Court's Rules of Procedure," and also that "nor did the statements adhere to the purpose assigned to them by the Court in the corresponding Order, but rather they were in keeping with the purpose for which their expert opinions were offered." It considered that what interested the expert witnesses was "to express their opinions and disclose the information that interested them, either personally or professionally, or worse still, without any objectivity, but rather to favor those who had

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[53] *Case of Cantoral Benavides v. Peru. Preliminary objections*. Judgment of September 3, 1998. Series C No. 40, para. 30, and *Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of June 26, 2012. Series C No. 224, para. 33

[54] *Case of Díaz Peña, supra*, para. 33, and *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica, Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2012. Series C No. 257, para. 56.

[55] *Cf. Case of Loayza Tamayo v. Peru. Merits*. Judgment of September 17, 1997. Series C No. 33, para. 43, and *Case of Liakat Ali Alibux, supra*, para. 31.

proposed them." In this case, the Court finds no grounds for considering that the admission of the expert opinions affects the legal certainty or the procedural balance of the parties owing to the absence of the oath in the terms of Article 51(4) of the Court's Rules of Procedure. In each opinion, the deponents included an oath and their signature certified by notary public attests to the fact that they are the authors of the said statement, and assume the corresponding legal consequences. Consequently, the Court considers that this observation does not represent a defect that makes the expert opinions inadmissible.

60. With regard to the State's observations on the purpose of the expert opinions of Ana Carcedo Cabañas,[56] Rodolfo Kepfer Rodríguez, and José Nájera Ochoa, the Court understands that they do not contest the admissibility of the said opinions, but rather are designed to question their probative value. Regarding the State's argument that the expert witnesses did not provide their expert opinion in keeping with the purpose established in the Order of the President, the Court will consider the content of these opinions to the extent that they are adjusted to the purpose for which they were required[57] (*supra* para. 11).

61. Based on above, the Court admits the above-mentioned expert opinions, and will assess them together with the rest of the body of evidence, taking into account the State's observations and in keeping with the rules of sound judicial discretion.

E. Admission of the statement of the presumed victim and expert evidence provided at the public hearing

62. Regarding the statement made by Rosa Elvira Franco Sandoval, the State, in its observations, pointed out some inconsistencies in order to question the probative value of the statement when recounting the facts of this case, but did not object to the statement or request that it be found inadmissible.[58] The Court finds it pertinent to admit the presumed victim's statement insofar as it is adapted to the purpose defined by the President in the Order requiring it, and will take the State's observations into account (*supra* para. 11). The Court also reiterates its considerations concerning the assessment of this statement since Mrs. Franco Sandoval is a presumed victim (*supra* para. 57).

63. As regards the expert opinion provided by María Eugenia Solís, the State referred to the content of the statement, as well as to her written opinion to invalidate its probative value, but did not contest its admissibility. In this opinion, Ms. Solís did not provide references for the statistical information, bibliography, case files, prosecution cases, cases, judgments and persons she mentioned, and failed to clarify the number of cases she had consulted. The Court admits and will assess the expert opinion together with the rest of the body of evidence, insofar as it corroborates and complements information revealed by other evidence provided to the Court, taking into account the State's observations and in keeping with the rules of sound judicial discretion.

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[56] The State reiterated that she was not sworn in, and referred to what had been decided previously in this regard; also, that she gave an expert opinion that disregarded the Court's Order, because she provided this opinion as proposed in the representative's brief of March 8, 2013. In this regard, the Court reiterates that it will consider the content of the expert opinion to the extent that it is adapted to the purpose established for it. Thus, it will take into account the allegations that the expert witness made about Guatemala, but only to the extent that the indications made about the Central American region were presented in the expert report as data that was comparative or inclusive of the situation in Guatemala.

[57] *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 42, and *Case of Liakat Ali Alibux v. Suriname, supra*, para. 31.

[58] It added that Mrs. Franco Sandoval used an "inappropriate" approach when addressing the State's representatives that was "unjustified […] and should not […] be accepted just because she considers herself a victim."

64. In the case of the *amici curiae*, these were presented on May 30, 2013, within the time frame established in Article 44 of the Rules of Procedure, but in a language other than the official language in this case, the translation into Spanish of the brief of Christine M. Venter, Ana-Paolo Calpado and Daniella Palmiotto was not provided, so that it is declared inadmissible.[59] As regards the brief of Sorina Macricini, Cristian González Chacó and Bruno Rodríguez Reveggio, the translation of the complete *amicus curiae* was sent on June 10, 2013; in other words, 11 days after the time frame for its presentation had expired (*supra* para. 12). In this regard, the State asked the Court not to admit the brief, and argued that it disagreed with the opinion given in the brief. Based on Article 44(3) of the Court's Rules of Procedure establishing that *amicus curiae* briefs may be submitted "at any time during contentious proceedings for up to 15 days following the public hearing," and given that, in the instant case, the complete translation of the *amicus curiae* was presented outside the time frame indicated in this article, the Court will only admit the part of the brief that was presented in Spanish within the time frame, and does not admit the Spanish translation of the remaining part, because its presentation was time-barred.

VII
FACTS

A. Context

A.1) Introduction

65. As on previous occasions, the Court recalls that, in the exercise of its contentious jurisdiction, it "has examined diverse historical, social and political contexts which situate the facts that are alleged to have violated [human rights] within the framework of the specific circumstances in which they occurred."[60] Furthermore, in some cases, the context made it possible to characterize the facts as part of a systematic pattern of human rights violations[61] and/or were taken into account to determine the international responsibility of the State.[62] Thus, with regard to the State's alleged failure to comply with its obligation to prevent what happened to María Isabel Veliz Franco (*supra* para. 7), taking into consideration contextual information – together with the pertinent factual elements of the case – will help clarify the degree to which the State could be required to consider the existence of a risk for the child, and to act in consequence. In addition, this aspect, together with the actions of the State in the investigation of the facts, will allow a better understanding of the alleged violations and the relevance of certain measures of reparation.

66. The Commission and the representative asserted that this case was inserted in a context of high levels of violence against women and girls in Guatemala, as well as of the general impunity of such acts. The State indicated that it was "false" that it had "ignore[d]" the "growing trend of violence against women in the region"; rather, it had "implemented measures […] to prevent, punish and eradicate this." It affirmed that there was "no evidence […] confirm[ing] the connection" of this case "to a supposed systematic pattern of deaths of women." It also maintained that "not all violent deaths of women are gender-based." It asserted that the representative and the Commission "want" "to insert this case [into] a supposed context of violence against women within the socio-cultural patterns of the Guatemalan population"; "however, this has never been the result of a public policy of the State and, particularly, [of its] tolerance or acquiescence."

67. Based on above, the Court will now refer to aspects relating to the contextual evidence and, then, to the situation in Guatemala with regard to gender-based murders,

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[59] *Cf. Case of Artavia et al. ("In vitro fertilization"), supra*, para. 15.

[60] *Cf. Case of J., supra*, para. 53.

[61] *Cf. Case of Goiburú et al. v. Paraguay. Merits, reparations and costs*. Judgment of September 22, 2006. Series C No. 153, paras. 61 and 62, and *Case of J., supra*, para. 53.

[62] *Cf. Case of Goiburú et al.,* supra*,* paras. 53 and 63, and *Case of J., supra*, para. 53.

violent acts against women, and impunity in the investigation and eventual punishment of such acts. However, before examining these matters, it will refer to the invisibility of violence against women in the case of Guatemala, because this situation allows the absence of official statistical date on gender-based crimes to be understood, and also constitutes a contextual element of the homicidal violence that specifically affects women victims.

68. The report "*Guatemala: Memoria del Silencio*" states that "[w]omen were victims of every type of human rights violation during the armed conflict, but they also suffered from specific forms of gender-based violence."[63] The Commission for Historical Clarification became convinced that the belittlement to which women were subject was absolute and permitted members of the Army to assault them with total impunity,[64] and concluded that, during the armed conflict, the courts of justice revealed themselves incapable of investigating, processing, trying and punishing those responsible.

69. This situation has persisted following the end of the armed conflict, and is reflected today in a culture of violence that has continued over the years, and which has its own substratum of violence that affects women in particular. Despite this, such violence has gone unnoticed, among other reasons, owing to the absence of official figures until recently, so that it is especially difficult to find reliable statistics that provide trustworthy data on the magnitude of the violence perpetrated against women in Guatemala. Consequently, "[t]he almost complete absence of gender-disaggregated data in official documents means that, in general, less gender violence is recorded than the proportion it truly represents, and even that frequently it is scarcely mentioned."[65]

A.2) The evidence on the contextual situation

70. The State, in its answering brief, indicated, in general, that it "rejected several accusations included in the Merits Report […], because in section 'IV. Established Facts,' the Commission outlined what it found to be true and, in the State's opinion, some facts have been disproved by the petitioners, or have been misinterpreted by the Commission." Despite this assertion, and although it made observations and presented evidence on the contextual situation, the State did not indicate that it directly contested specific aspects of the data and opinions included in the Merits Report and in the motions and arguments brief regarding the existence of a context of gender-based murders and of impunity.[66] Accordingly, the Court will assess the information provided by the Commission and the representative, as well as the evidence provided by the latter. Both the Commission and the representative refer mainly to contextual elements related to the situation of women and, to a lesser degree, to elements relating to girls. The Court will also take into consideration the observations and evidence provided by the State.

71. The Court also takes into account that, although several State agencies have produced some information on homicidal violence against women, there are no official figures, at least in relation to acts that occurred before 2008[67] that allow disaggregating

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[63] Commission for the Historical Clarification, "*Guatemala: Memoria del Silencio*", *supra*, p. 13.

[64] Commission for the Historical Clarification, "*Guatemala: Memoria del Silencio*", *supra*, p. 27.

[65] Amnesty International, "Guatemala. No protection, no justice: killings of women," June 2005, p. 2 (file of attachments to the Merits Report, annex 33, fs. 312 to 356).

[66] These statements are found, respectively, in the Merits Report in the subsection entitled "The context: violence against women and girls" (paras. 58 to 66), which can be found in the section on "Established Facts" (paras. 37 to 72), and in the motions and arguments brief in the section entitled "Context," which begins on page 27 of that brief and ends on page 45 (file of preliminary objections, merits, and reparations and costs, fs. 20 to 23 and 118 to 136, respectively).

[67] In its final written arguments, the State indicated "the creation and implementation of the National Information System on Violence against Women. […] This system can be verified on its web page: http://www.ine.gob.gt/np/snvcm/index." The Court has confirmed that this internet site contains information on acts that have occurred since 2008.

gender-based murders from cases of the violent death of women.[68] In this regard, in 2008, the State informed the Mechanism to Follow Up on the Implementation of the Convention of Belém do Pará (MESECVI), in relation to "the statistical data," that "this is difficult to access, and owing to budgetary restrictions, information has been collected, but this has not been processed and/or information has been processed but has not been published."[69] The MESECVI indicated that the State information was insufficient (*infra* footnote 244).[70]

72. The Court will examine the observations of the parties and the Commission with regard to the context, as well as the evidence that exists, taking into account everything that has been alleged. It should be clarified that it will also consider the expert evidence, and the following type of documentary evidence: (a) documents from State entities; (b) documents from international entities of both the United Nations and the inter-American systems; (c) documents elaborated by non-governmental organizations, and (d) a document prepared under the coordination of one of the expert witnesses who intervened in the case other than her expert opinion. In addition, all the texts and opinions referred to were produced based on data from Guatemalan State sources.

A.3) Homicidal violence in Guatemala in 2001 and its specificity and evolution in relation to women victims

73. The Court notes that, in December 2001, Guatemala was experiencing an escalation of homicidal violence with a high rate in comparison with other countries. In this context, starting in 2000 or 2001, there was an increase in the number of murders in general and, together with this, a proportionally significant increase in the murder of women. Furthermore, there is data indicating that some of the attacks suffered by women, even in

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[68] The Court notes that, in May 2008, Guatemala approved Decree No. 22-2008 or the Law against Femicide and Other Forms of Violence against Women, which defines crimes subject to public prosecution, including that of "femicide." Article 3 of the decree states that this consists in the "[v]iolent death of a woman in exercise of gender-based power against women in the context of the unequal power relations between men and women." Furthermore, expert witnesses Ana Carcedo Cabañas and María Eugenia Solís stated that the violent deaths of women in Guatemala could be classified as "femicide." *Cf.* Expert opinion of Ana Carcedo Cabañas provided by affidavit received on April 30, 2013 (file of preliminary objections, merits, and reparations and costs, fs. 896 to 906) and expert opinion of María Eugenia Solís García provided at the public hearing held on May 15, 2013. In addition, in the judgment in the case of *González et al. ("Cotton Field") v. Mexico*, this Court used the expression "'gender-based murder of women,' also known as feminicide" (*Case of González et al. ("Cotton Field"), supra*, para. 143). The Court clarifies that, for the purposes of this Judgment, it will use the expression "gender-based murder of women," to refer to "feminicide" or "femicide." It should also be understood, as regards the Law against Femicide, that it was not in force in Guatemala at the time of the events that occurred to María Isabel Veliz Franco, and that the Court's reference to this law does not entail a ruling on its application to the case.

[69] Follow-up Mechanism on the Convention of Belém do Pará (MESECVI). Second Conference of the States parties, *supra*, p. 79.

[70] Similarly, the Coordinating Body for the Prevention, Punishment and Eradication of Family Violence and Violence against Women (CONAPREVI), a State agency, indicated that "[i]t is difficult to quantify the magnitude of the problem [of family violence and violence against women] in Guatemala, owing to the absence of reliable and up-to-date records." Coordinating Body for the Prevention, Punishment and Eradication of Family Violence and Violence against Women (CONAPREVI), PLANOVI 2004-2014: National Plan for the Prevention and Eradication of Family Violence and Violence against Women, June 2006, p. 6 (file of annexes to the answering brief, annex 10, fs. 14,073 to 14,093). For her part, expert witness Ana Carcedo Cabañas stated that "[t]he first significant finding on femicide in relation to Guatemala is the difficulty to find the necessary information […]. It is the Central American country in which, at least up until 2006, this problem was most frequent. […] In 2003, it was quantified; while in other countries of the region it is difficult to obtain information in 20% of the murders or less, in Guatemala this percentage ascends to 70%." The expert related this to the actions of the "police and judicial" system, when stating that social research […] considers the State institutions a privileged source, and it would be difficult to fill in [… t]he gaps in the information [of that system] from other sources." *Cf.* Expert opinion of Ana Carcedo Cabañas, *supra*. Meanwhile, expert witness María Eugenia Solís García stated that, "[i]n 2001 no statistical data [on gender-based murders] were produced and, nowadays, it is produced but it is inconsistent. [… T]he Public Prosecution Service and the [National Institute of Forensic Science of Guatemala] INACIF come closest, but their figures do not agree. The National Police provide one figure, the Public Prosecution Service another, the Judiciary another, and the press another […]." *Cf.* Expert opinion of María Eugenia Solís García, *supra*.

2001, were gender-based murders. These assertions are based on the information described below.

74. In Guatemala, homicidal violence increased by 120% between 1999 and 2006, at an average rate that amply exceeded population growth. According to the United Nations Development Programme (UNDP), this increase in murders resulted in "position[ing] Guatemala [in 2006] as one of the most violence countries in the world that were officially at peace."[71] The greatest proportional increase of this violence between 1986 and 2006 was concentrated in the country's largest urban centers.[72]

75. In this context, according to the Guatemalan Judiciary, "official figures" revealed a "sustained increase of violent deaths of women throughout the country level from 2001 to 2011."[73] Similar information was presented by the National Institute of Statistics (*infra* para. 76), and reports of international agencies reveal a sustained increase in cases of the violent death of women as of 2000.[74]

76. The Inter-American Commission affirmed that "State authorities confirmed that, since 2001 [to 2004], 1,188 women have been murdered. [… and that] several sources stated that […] there has also been an increase in the degree of violence and cruelty displayed against the bodies of many of the victims."[75] According to data from the National Institute of Statistics consulted by the MESECVI, the evolution of the number of murders of women in the country was as follows: 1995: 150; 1996: 163; 1997: 249; 1998: 190; 1999: 179; 2000: 213; 2001: 215; 2002: 266; 2003: 282; 2004: 286.[76]

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[71] *Cf.* The United Nations Development Programme stated, indicating that it did so based on data of the National Civil Police, that "the homicidal violence [in Guatemala] has increased more than 120%, from 2,655 murders in 1999 to 5,885 in 2006. This upsurge equals an increase of more than 12% a year since 1999, amply exceeding the growth of the population which is less than 2.6% a year." United Nations Development Programme (UNDP), Armed Violence Prevention programme of UNDP Guatemala, "*Informe estadístico de la violencia en Guatemala*" [Statistical report on violence in Guatemala], *supra*, p. 9. It should also be recalled that the State acknowledged that, in 2001, there was an "increase in […] violent deaths" and "fear among […] Guatemalan society" (*supra* para. 18).

[72] *Cf.* Conflict Analysis Resource Center (CERAC), "*Guatemala en la encrucijada. Panorama de una violencia transformada*" [Guatemala at the Crossroads: An Overview of Violence Transformed], Geneva, 2011 (file of annexes to the motions and arguments brief, annex 57, fs. 7480 to 77007).

[73] This document indicates that "according to a report," in 2012, "Guatemala occupied the third place at the global level for violent deaths of women, with a rate of 9.7 femicides for every 100,000 inhabitants." Judiciary of Guatemala, "*Primer Informe sobre Juzgados and Tribunales Penales de Delitos de Femicidio y otras Formas de Violencia Contra la Mujer*" [First report on criminal courts for crimes of femicide and other forms of violence against women], 2012 (file of annexes to the motions and arguments brief, annex 101, fs. 10854 to 10917).

[74] *Cf.* Economic Commission for Latin America and the Caribbean (ECLAC), "*Si no se cuenta, no cuenta. Información sobre la violence contra las mujeres*," Santiago de Chile, Chile, 2012, p. 246 (file of annexes to the motions and arguments brief, annex 59, fs. 7815 to 8210), United Nations Economic and Social Council. Commission on Human Rights, sixty first session, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk. Mission to Guatemala. UN Doc. E/CN.4/2005/72/Add.3, 10 February 2005, para. 28 (file of attachments to the Merits Report, annex 31, fs. 240 to 264). It should be underscored that, within the framework of the situation described, between 2000 and 2002, there was an increase in the reports of acts of violence perpetrated against women that were dealt with by the Public Prosecution Service: according to documentation of the United Nations Committee for the Elimination of Discrimination against Women, data from State sources indicate that while there were 130,561 complaints in 2000, 222,436 complaints were recorded in 2001, and 238,936 in 2002; in other words, between 2000 and 2002, this type of complaint increased by 83%. *Cf.* Committee for the Elimination of Discrimination against Women. Pre-session working group. Thirty-fifth session, 15 May to 2 June 2006. Responses to the list of issues and questions for consideration of the sixth periodic report. Guatemala. UN Doc. CEDAW/C/GUA/Q/6/Add.1, 27 March 2006 (file of attachments to the Merits Report, annex 28, fs. 151 to 202). The document indicates that the source of the data is the Guatemala Presidential Human Rights Commission (COPREDEH) (file of attachments to the Merits Report, annex 28, fs. 161 to 202).

[75] Inter-American Commission on Human Rights, Press Communiqué 20/04, "The IACHR Special Rapporteur evaluates the effectiveness of the right of women in Guatemala to live free from violence and discrimination," September 18, 2004, para. 7 (file of attachments to the Merits Report, annex 32, fs. 266 to 310).

[76] Follow-up Mechanism on the Convention of Belém do Pará (MESECVI). Second Conference of States parties, *supra,* p. 74.

77. Over and above the increase in the number of murders of women, the Court has been provided with information on the proportion of women murdered compared to the murder of men, and on the increase in that proportion. The Court has been informed that, between 2001 and 2006, almost 10% of murders were committed against women.[77] This percentage is similar to the period from 1986 to 2008,[78] or from 2002 to 2012.[79] It exceeded 10%, at least in 2003 and 2004, years in which it was in excess of 11% and 12%, respectively.[80] Moreover, there is also information that, from 1995 to 2004, the increase in the rate of growth of the murder of women was almost double the increase in the murder of men,[81] and that, in 2004, "the number of violent deaths of women had increased by 20[%] more than that of men."[82]

78. It has been said that it was mainly in urban areas such as Guatemala City or Escuintla that this type of incident took place,[83] and that the women victims generally lived

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[77] Expert witness María Eugenia Solís García stated that National Civil Police data indicates that, in 2001, there were 2,967 murders, of these 303 involved women and that, in 2006, there were 5,885 murders 602 of which corresponded to women. In other words, according to these figures, the murders of women represented 10.21% of the total in 2001 and 10.22% of the total in 2006. The UNDP has indicated similar, although not identical, figures, stating that, "on average, the percentage of women murdered between 2001 and 2006 has been 9.9%." United Nations Development Programme (UNDP), Armed Violence Prevention programme of UNDP Guatemala, "*Informe estadístico de la violencia en Guatemala,*" *supra*, p. 31, and Expert opinion of María Eugenia Solís García, *supra.*

[78] One report indicates that, based on the "average percentage of murders of men in relation to the total number of murders from […] 1986 to 2008," "91% of the murders in the country […] relate to the male population." Conflict Analysis Resource Center (CERAC), "*Guatemala en la encrucijada. Panorama de una violencia transformada*", *supra*, pp. 59 and 106.

[79] Expert witness María Eugenia Solís García indicated that, according to information from the Guatemalan National Institute of Forensic Science (INACIF), in the decade between 2002 and 2012, women were victims of 11% of all violent deaths.

[80] The UNDP indicated that "[A] sustained growth in the total number of [murders of women] recorded can be noted. In six years […] it has almost doubled, from 303 in 2001 to 603 in 2006, [but] the percentage of [murders of women] in relation to the total number of murders has not increased as greatly as the total frequency. […] The increase in the percentage of murdered women recorded in 2004 (12.4%) is striking." United Nations Development Programme (UNDP), Armed Violence Prevention programme of UNDP Guatemala, "*Informe estadístico de la violencia en Guatemala,*" *supra*, pp. 30 and 31. Amnesty International, in a document dealing with the situation between 2001 and 2005, explained that "[m]en have also been affected by the general level of violence, […] and there has been a significant increase in the murder rate in general." It also stated that, "according to police data, in 2002, of the total number of murders, 4.5% were women; in 2003, 11.5%, and in 2004, 12.1%." Amnesty International, "Amnesty International, "Guatemala. No protection, no justice: killings of women," *supra*, p. 2.

[81] Regarding the connection between the general situation in relation to violent deaths, and the deaths of women, expert witness Ana Carcedo Cabañas indicated an "uncontrolled increase in the number of violent deaths of women, which has meant that the rates increased from somewhat less than 4 for every 100,000 women in 2000, to almost 10 women for every 100,000 in 2006. […] Over this period, the murder of men also increased. However, […] while the murder of men increased by 68% between 1995 and 2004, the murder of women increased by 141%; in other words, such murders are increasing more than twice as fast as the murder of men." *Cf.* Expert opinion of Ana Carcedo Cabañas, *supra*. Similarly, Carcedo, Ana, "*No olvidamos ni aceptamos: Femicidio en Centroamérica 2000-2006,*" San José, Costa Rica, 2010, p. 41 (file of annexes to the motions and arguments brief, annex 55, fs. 6,313 to 7,320).

[82] International Federation for Human Rights. International Investigation Mission, "*El femicidio en Mexico y Guatemala*", April 2006 (file of attachments to the Merits Report, annex 34, fs. 358 to 399). This document states: "In Guatemala, over the period from 2000 to 2005, there has been an increase of violent deaths among the general population. [..] Data from the National Civil Police (PNC) reveals that[, in 2004,] while the number of violent deaths of men increased by 36%, that of women grew by 56.8%. This trend has continued in 2005."

[83] Amnesty International, in a document dealing with the situation between 2001 and 2005, stated that most of the murders of women have been committed in urban areas, where violent crime has increased in recent years, often linked to organized crime […] as well as to the activities of bands of street youths known as '*maras*.'" Amnesty International, "Guatemala. No protection, no justice: killings of women", *supra,* p. 2. Similarly, regarding the fact that most of the corpses were found on vacant lots near Guatemala City: United Nations Economic and Social Council. Commission on Human Rights sixty-first session, Report of the Special Rapporteur on violence

in poor neighborhoods, were engaged in low-income activities, or were students.[84] The "brutality of the violence used," the presence of "signs of sexual abuse" on the corpses or their mutilation has also been indicated as "characteristic of many of the cases of the women victims of murder."[85] Also that "[m]any of [the] women were kidnapped and, in some cases, were retained for hours, or even days, before being murdered."[86] Expert witness Ana Carcedo Cabañas indicated that the "Guatemala Judiciary acknowledge[d] the existence of this disproportionate cruelty in the deaths of women."[87]

79. In keeping with the above, the Inter-American Commission's April 2001 report stated that, at that time, violence against women was "a serious problem in the country," and that "although [at that time it was] difficult to estimate the depth and breadth of the problem with precision, it [was] reported that violence based on gender [was] a leading cause of death and disability among women between 15 and 44 years of age."[88] The State indicated that the "statistics may be correct."

80. It is also worth noting that the Office of the Ombudsman, a State body, has linked the existence of violent acts perpetrated against women in 2001 to "the discrimination that is culturally-rooted in Guatemalan society," and has considered that this violence is inserted in the context of discrimination against women in Guatemala in different spheres.[89] The

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against women, its causes and consequences, Yakin Ertürk, *supra*, para. 28. With regard to the observation on Guatemala City and Escuintla, the number of incidents that occurred in the former, at least in 2003, quadrupled that of the latter. *Cf.* Office of the Guatemalan Ombudsman, "*Informe Anual Circunstanciado 2003*," Guatemala, January 2004, p. 16 (file of annexes to the motions and arguments brief, annex 106, fs. 11,153 to 11,878).

84 Amnesty International, "Guatemala. No protection, no justice: killings of women", *supra*, p. 7.

85 *Cf.* Amnesty International, "Guatemala. No protection, no justice: killings of women", *supra*, p. 8. It should also be indicated that, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions recognized the constant increase in murdered women since 2001, and stated that "[a] study by the [Office of the Ombudsman] […] showed that, among those murder victims who experienced torture or abuse, the acts committed by the perpetrators were generally similar whether the victim was male or female.[…] The one notable distinction was that while 15 per cent of the female corpses showed signs of sexual abuse, none of the male corpses did. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston. Mission to Guatemala, UN Doc. A/HRC/4/20/Add.2, 19 February 2007, paras. 22 and 26 (file of annexes to the motions and arguments brief, annex 75, fs. 10,463 to 10,489). The Guatemalan Ombudsman, when establishing a profile for the violent deaths of women (in which he did not include gender-based murders), indicated that they were "[d]eaths with extrajudicial characteristics or characteristics of social cleansing" "because the corpses bear signs of torture, coup de grâce, ropes around feet and hands, and reveal a professional *modus operandi*. […] A specific characteristic is that the corpses appear in a place other than that of the victim's residence. They are committed by illegal clandestine groups linked directly or indirectly to State agencies or to gangs involved in organized crime." Guatemalan Ombudsman, "*Compendio 'muertes violentas de mujeres' 2003 a 2005*," p. 22 (file of attachments to the Merits Report, annex 36, fs. 581 to 718).

86 Amnesty International, "Guatemala. No protection, no justice: killings of women", *supra*, p. 8.

87 The expert witness stated that the Guatemalan Judiciary considered that "this perpetration of excessive violence, before, at the time of, or after the criminal act […] reveals special cruelty towards the body of the women, which constitutes an element that differentiates it from simple murder."

88 Inter-American Commission on Human Rights, "Fifth Report on the Situation of Human Rights in Guatemala," *supra,* para. 41. Regarding the age of the victims, expert witness María Eugenia Solís García stated that "[m]ost of the victims are adolescents and women under 40 years of age." *Cf.* Expert opinion of María Eugenia Solís García, *supra*.

89 *Cf.* Office of the Ombudsman of Guatemala, "*Informe Anual Circunstanciado 2001*", Guatemala, January 2002, pp. 44 to 46 (file of annexes to the motions and arguments brief, annex 105, fs. 10,968 to 11,151). This document indicates that discrimination "historically […] has excluded [women] from the enjoyment of fundamental rights and, therefore, they are victims of harassment, ill-treatment and violence." In addition, "the existence of social, economic and political conditions that keep women in a condition of inequality in relation to men" has been indicated as a possible explanation for the increase in the murder of women in Guatemala. Conflict Analysis Resource Center (CERAC), "*Guatemala en la encrucijada. Panorama de una violencia transformada,*" *supra*, p. 106. Similarly, Amnesty International, in a report that refers to data for 2000 to 2003, considers "the patriarchal culture to be a specific cause [of the] phenomenon [of the violence]" in Guatemala. The report explains that "[t]he patriarchal system established by a pattern of a mainly masculine exercise of power and domination easily places women in a vulnerable position." Amnesty International, "*Informe de crímenes contra mujeres en Guatemala*", August 2004, pp. 11 and 13 (file of annexes to the motions and arguments brief, annex 52, fs. 5,512 to 5,525).

Coordinating Body for the Prevention, Punishment and Eradication of Family Violence and Violence against Women (CONAPREVI), another State agency, has made similar observations.[90]

81. Based on the above, it can be concluded that, in the series of violent deaths of women that occurred in Guatemala in 2001, the existence of gender-based murder was not exceptional.[91] This conclusion is supported by an assessment of the expert and documentary evidence relating to dates around December 2001.[92] In this regard, it is opportune to consider that the type of phenomenon examined here has some degree of continuity over time and that, although it is difficult to define with complete certainty the moment at which it began, at any rate, at the time at which the facts of this case occurred a context existed of an increase in homicidal violence against women in Guatemala.

A.4) The State's actions in the investigation of the murder of women

82. It should be emphasized that the State, before[93] and after the facts of this case, has taken diverse measures to deal with the discrimination and violence against women and the

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[90] It stated that "manifestations of violence [against women] reveal the historically asymmetrical relations between women and men, product of a social organization structured on the basis of inequality, and the oppression of, and discrimination against, women." Coordinating Body for the Prevention, Punishment and Eradication of Family Violence and Violence against Women (CONAPREVI), PLANOVI 2004-2014: National Plan for the Prevention and Eradication of Family Violence and Violence against Women, *supra*, p. 6.

[91] This does not mean finding it proved that the growth in the number of murders of women is due, exclusively and mainly, to gender-based violence, or gender-based murder in Guatemala, in 2001 or subsequently, as a generalized or growing phenomenon. In this regard, reference should be made to evidence provided by the representatives: a report indicates that two explanations stand out for the increase in the murder of women in Guatemala; one related to "the overall climate of violence experienced by Guatemala that affects both men and women," and the other related to women's inequality in relation to men. In the document it is asserted that "[e]ven though violence against women has increased significantly, the available data does not allow it to be concluded that, in Guatemala, femicide is a generalized phenomenon in the country or that it is increasing." Conflict Analysis Resource Center (CERAC), "*Guatemala en la encrucijada. Panorama de una violencia transformada*," *supra*, p. 59.

[92] Expert witness Ana Carcedo Cabañas indicated that "owing to the problems concerning information already mentioned (*supra* footnote 70), 40% of the murders of women were classified as femicides and 19% more as cases in which femicide was suspected." In this regard, Amnesty International has stated that "[i]n its 2003 report, the Office of the Ombudsman stated that, from a sample of 61 cases examined in detail, the conclusion could be reached that 22 of the women had died in a context of sexual abuse." Amnesty International, "Guatemala. No protection, no justice: killings of women", *supra*, p. 8. The Court notes that the opinion of expert witness Ana Carcedo Cabañas would lead to the conclusion that, in 2003, an estimated 59% of the murders of women in Guatemala were committed based on the victim's gender. Furthermore, the information presented by Amnesty International, based on State data, would suggest that, the same year, 36.06% of the deaths of women were associated with a context of sexual abuse. The Court, on the basis of the criteria indicated, finds it possible to conclude that a significant number of the murders of women in 2003 were committed based on the victims' gender.

[93] Also, with regard to that initial time, the Court notes that, prior to December 2001, the State had taken steps related to the problem of violence against women. In 1996, the Law to Prevent, Punish and Eradicate Family Violence, Decree No. 97-1996, November 28, 1996, Guatemala, was promulgated (file of annexes to the answering brief, annex 20, fs. 14,172 to 14,177). In 2000 and 2001, this was supplemented by regulations and by the creation of the Coordinating Body for the Prevention, Punishment and Eradication of Family Violence and Violence against Women (CONAPREVI). In 2000, the Presidential Secretariat for Women (SEPREM) was created and the National Policy for the Promotion and Development of Guatemalan Women was established for the period from 2001 to 2006 with its Equal Opportunities Plan. In addition, the Law for the Comprehensive Promotion and Dignification of Women was enacted in March 1999 and the Social Development Act in 2001, by congressional Decrees No. 7-99 and No. 42-2001, respectively. Article 16 of the latter establishes that "social development" and "population" policies shall include measures and actions designed, *inter alia,* to eradicate and to punish any type of individual or collective violence, abuse and discrimination against women in keeping with the international conventions and treaties ratified by Guatemala. Coordinating Body for the Prevention, Punishment and Eradication of Family Violence and Violence against Women (CONAPREVI), PLANOVI 2004-2014: National Plan for the Prevention and Eradication of Family Violence and Violence against Women, *supra*, p. 12. In this regard, in August 2001, the United Nations Human Rights Committee "welcome[d] the positive legislative measures adopted [by Guatemala] on behalf of women and the establishment of various bodies intended to promote and protect women's

Court takes these into account. In this regard, the Law to Prevent, Punish and Eradicate Family Violence of November 28, 1996, and the Law against Femicide and Other Forms of Violence against Women (hereinafter also "Law against Femicide") adopted in 2008 should be underlined (*supra* footnotes 68 and 93).

83. Despite the importance of the above, it is worth indicating that, in December 2001, and over the following years, there was a high level of general impunity in Guatemala in relation to different types of offenses and victims. In this context, most of the violent acts that resulted in the death of women remained unpunished. In this regard, in 2004, the United Nations Verification Mission in Guatemala (MINUGUA) stated that:

> [d]espite the efforts made to strengthen the justice administration system, now that the Mission's work has ended, it can be concluded that there is no proportionality between that investment and the results obtained. Impunity continues to be a systematic and transversal phenomenon and despite the changes that have been described in different reports, the population continues to perceive that there is a situation of defenselessness and impunity.[94]

84. The evidence provided to the Court does not reveal that this situation (both the general and the specific one with regard to violent acts against women) have changed substantially to date. Thus, although there is data that indicates a decrease in the level of impunity in recent years, this continues to be very high (*infra* para. 86). This is pertinent in the instant case, because the information that the Court has shows that the investigation has been conducted in the years following 2001; it has not concluded, and it remains at the initial stage (*infra* para. 119). This is evident from the information described below.

85. As the State has indicated, in 2001, "a structural situation of impunity prevailed," and "there were no guidelines for the investigation and prosecution of crimes" *(supra* paras. 17 and 18). For its part, in April 2001, the Inter-American Commission stated that prior to the period between 1998 and October 2000, "impunity persisted in many cases of human rights violations and common crime […] which is most worrying to the Commission, because it signifies that, with few exceptions, human rights are not subject to the judicial protection required under the American Convention."[95] Moreover, in 2003, citing documents prepared by the United Nations Verification Mission in Guatemala (MINUGUA), the Inter-American Commission indicated that "[b]etween October 1, 1999 and June 30, 2000, there were 2,991 verified violations of due process; between July 1, 2000 and June 30, 2000, the

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rights." Concluding observations of the Human Rights Committee, Republic of Guatemala. UN Doc. CCPR/CO/72/GTM, 27 August 2001, para. 6 (file of annexes to the motions and arguments brief, annex 61, fs. 8339 to 8345). With regard to CONAPREVI and SEPREM, the following merits clarification: The State indicated that CONAPREVI was created by Government Decision 831-2000 and its amendments: Government Decisions 868-2000 and 417-2003. Its mandate is based on Article 13 of the Convention of Belém do Pará and on article 17 of the Law against Femicide and Other Forms of Violence against Women." However, notwithstanding the information provided on its creation in 2000, CONAPREVI indicated that "[i]t was created in January 2001 as the highest-level institution responsible for promoting, assessing, and coordinating public policies aimed at reducing violence against women." Coordinating Body for the Prevention, Punishment and Eradication of Family Violence and Violence against Women (CONAPREVI), CONAPREVI Report to the Presidential Human Rights Commission (COPREDEH) in response to the request of the Inter-American Commission in the case of Claudina Isabel Velásquez Paiz, March 22, 2012, p. 2 (file of annexes to the answering brief, annex 9, fs. 14,055 to 14,071). SEPREM was created by Government Decision 200-2000, of May 17, 2000. According to the State, this agency of the Executive "assesses and coordinates public policies to promote the comprehensive advancement of women." Expert witness Ana Carcedo Cabañas considered that "the mandates of CONAPREVI and SEPREM overlap," and that this "problem" became more "complicate[d]" when "[t[he President subsequently appointed an 'Anti-Femicide Commissioner.'" *Cf.* Expert opinion of Ana Carcedo Cabañas, *supra*. Despite the foregoing, the State indicated, in its answering brief of December 18, 2012, that, "at the time the facts [of the case] occurred [n December 2001,] there was no specific legislation or procedures for cases of violence against women, but [that in December 2012,] such legislation and procedures exist."

[94] United Nations Verification Mission in Guatemala (MINUGUA), Final Report: *"Asesoría en Derechos Humanos,"* *supra*.

[95] Inter-American Commission on Human Rights "Fifth Report on the Situation of Human Rights in Guatemala," *supra,* para. 19.

number was 3,672 (55% of which were prompted by government failure to investigate and punish); and between July 1, 2000, and June 30, 2002, the number was 4,719."[96]

86. Data for subsequent years reveals a similar situation. Indeed, in September 2007, "[o]wing to the extremely high level of impunity, the State […] requested the support of the international community to deal with this problem, specifically, by the establishment of the International Commission against Impunity in Guatemala (CICIG)."[97] The problem described is reflected in other data. Thus, for example, it has been said that, in 2006, "about 40% of the cases filed at the divisional prosecution offices [were] shelved."[98] There is also information stating that, in 2008, "[a]ccording to official statistics, Guatemala has an average rate of 5,000 killings per year, while the criminal justice system is unable to shed light on or bring to trial even 5% of these cases."[99] Subsequently, according to CICIG data, a 95% impunity rate was recorded for the clarification of murders in judicial proceedings in 2009, decreasing to 72% in 2012.[100]

87. This situation must be examined, taking into account also that a high percentage of crimes are not reported. Thus, it is pertinent to note that a 2007 report, which focused on information from 2005 but also considered previous and subsequent years, indicated based on information from an official source that "surveys on victimization in every kind of crime in Guatemala resulted in a rate of 75% unreported crimes."[101] The report concluded that "this percentage is probably even higher in cases of sexual offenses."[102]

88. This situation includes cases involving violent acts committed against women, including violent deaths. In 2001, as well as in adjacent periods, most trials did not result in the handing down of convictions.[103] In this regard, expert witness María Eugenia Solís García stated that "[o]n November 2, 2004, the Ombudsman […] indicated that, of 1,118 cases of girls and women murdered between 2001 and 2004, only 9% were investigated." Furthermore, there is information indicating that, of the 591,933 reports of violent acts against women handled by the Public Prosecution Service in 2000, 2001 and 2002, only

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96 Inter-American Commission on Human Rights, "Justice and Social Inclusion: the Challenges of Democracy in Guatemala," *supra*, para. 27.

97 International Commission against Impunity in Guatemala (CICIG), "*Tercer año de labores", supra*, p. 13.

98 Peace Brigades International (PBI), "10 years without war… waiting for peace," a report on compliance with the Peace Accord on Strengthening Civilian Power and the Role of the Armed Forces in a Democratic Society, *supra*, p. 16.

99 *Impunity Watch*, "Recognizing the past: Challenges for the Combat of Impunity in Guatemala," *supra*, p. 14.

100 International Commission against Impunity in Guatemala (CICIG), *Sexto Informe de labores*, *supra*, p. 6.

101 In this regard, the said report (*infra* footnote 102) refers to a "report prepared by the congressional Committee for Women's Affairs, cited by *Siglo XXI,* April 24, 2007".

102 The document, according to page 17, "focuses on 2005; however, some aspects are supplemented by information from previous years and from 2006 and 2007. The qualitative information refers to perceptions that are not restricted to a specific or delimited period, but transcend this and reveal more permanent cultural ideas and practices." Guatemalan Institute for Comparative Studies in Criminal Science (ICCPG). "*Por ser mujer. Limitantes del sistema de justicia ante las muertes violentas de mujeres y víctimas de delitos sexuales,*" Guatemala, November 2007, p. 3 (file of annexes to the motions and arguments brief, annex 74, fs. 9,703 to 10,461).

103 The Inter-American Commission stated that "the statistics from the Office of the Public Prosecutor for matters concerning women reveal that more than half the cases denounced over a recent period of time [2003] were closed without prosecution and very few ever went to trial." Inter-American Commission on Human Rights, "Justice and Social Inclusion: the Challenges of Democracy in Guatemala," *supra*, para. 297. It has also been said, based on a report of the United Nations Special Rapporteur on violence against women, its causes and consequences, that "the Office of the Public Prosecutor for matters concerning women and the special section of the National Civil Police indicated that 40% of cases are shelved and never investigation." Amnesty International, "Guatemala. No protection, no justice: killings of women," *supra*, p. 13.

2,335 went to trial; in other words, 0.39%.[104] The Inter-American Commission has indicated that "[i]t has been stated that, of the 8,989 complaints received by the Office of the Prosecutor for matters concerning women at the end of 2001, only three concluded with convictions."[105] Similarly, it has been indicated that, "of the 1,227 cases of the murder of women reported between 2002 and 2004, only seven have achieved a conviction";[106] that is, 0.57%. The general situation described, of a high rate of failure to punish violent acts against women, continued at least until the beginning of 2012.[107]

89. The absence of effective punishment of crimes in general may be related to shortcomings in the investigations. Nevertheless, State agencies, as well as national and international civil society organizations have indicated that it is usual for investigations into violent attacks on women to have certain defects, such as the absence of measures to protect, examine, and preserve the crime scene;[108] errors in the chain of custody of the evidence, and failure to examine signs of violence.[109] In this regard, the State indicated

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[104] Committee for the Elimination of Discrimination against Women. Pre-session working group. Thirty-fifth session, 15 May to 2 June 2006. Responses to the list of issues and questions for consideration of the sixth periodic report. Guatemala, *supra*.

[105] Inter-American Commission on Human Rights, "Fifth Report on the Situation of Human Rights in Guatemala," *supra*. In addition, the Inter-American Commission's Special Rapporteur on the Rights of Women has stated that "[o]ne serious outcome of the cycle of violence against women is the impunity associated with those violations of the fundamental rights of women. Both state authorities as well as representatives of civil society said repeatedly […] that the system for administering justice had not responded effectively to those crimes […]. The delegation [of the Special Rapporteur…], after visits to the civil police, the Prosecutor's Office (Office for Crimes against Women, Office for Care of Victims), the morgue, and to the judiciary, [… verified] that the justice required is not found. Inter-American Commission on Human Rights, Press communiqué 20/04, "The IACHR Special Rapporteur evaluates the effectiveness of the right of women in Guatemala to live free from violence and discrimination," *supra*, para. 17. In 2006, the United Nations Committee for the Elimination of Discrimination against Women expressed its "concern" owing to the "deeply-rooted culture of impunity for" crimes of the "disappearance, violation, torture and murder" of women. Committee for the Elimination of Discrimination against Women, thirty-fifth session, 15 May to 2 June 2006, *supra*, para. 23.

[106] International Federation for Human Rights. International Investigation Mission, "*El femicidio en Mexico y Guatemala*", *supra*.

[107] According to the National Judicial Documentation and Analysis Center (CENADOJ), in 2005, 488 cases of violent deaths of women and children entered the system, 65 judgments were delivered and a conviction was handed down in 46 of these. In 2006, there were 482 cases, 70 judgments were delivered more than half of which handed down a conviction. In 2009, there were 635 cases and 82 judgments were delivered, 44 of them handing down a conviction. In addition, between September 2008, when the Law against Femicide entered into force (*supra* footnote 68), and March 2012, 69,909 cases for the offenses established in that law (femicide, violence against women, and economic violence) were filed in the criminal courts. Over the same period, 772 judgments were delivered for these offenses; in other words, 1.10%. *Cf.* National Judicial Documentation and Analysis Center (CENADOJ), Judicial Statistics and Documentation Section, Report on cases filed and judgments delivered by the criminal courts, Tables of cases filed for offenses establish in the Law against Femicide, corresponding to 2008 – 2010, 2011 and January to March 2012 (file of annexes to the motions and arguments brief, annexes 88, 89 and 90, fs. 10,760 to 10,763, 10,765, 10,766, 10,768 and 10,769, respectively). Despite the above, it should be stressed that, according to uncontested data presented by the State in its answering brief, in 2011 and 2012, there was a decrease in "complaints [or] indictments" relating to sexual offenses against women and, in parallel, an increase in the judgments concerning such cases from 227 to 168. *Cf.* "Table of proceedings for sexual offenses, women and children, 2011-2012" (file of annexes to the answering brief, annex 7, f. 14,013). In the latter document, the State also presented data on indictments and judgments on "sexual matters" concerning "girls [and] boys." Indicating that, in 2011, there were 523 "indictments" and 302 judgments, and that, during 2012, up until December 18 that year (the date of the answering brief), these figures were 499 and 305, respectively.

[108] The expert witnesses José Mario Nájera Ochoa Eugenia Solís García expressed a similar opinion. *Cf.* Expert opinion of José Mario Nájera Ochoa provided by affidavit dated April 23, 2013 (file of preliminary objections, merits, reparations and costs, fs. 873 to 878), and Expert opinion of María Eugenia Solís García, *sup*ra.

[109] Expert witness María Eugenia Solís García made a similar observation. *Cf.* Expert opinion of María Eugenia Solís García, *supra.* Meanwhile, expert witness José Mario Nájera Ochoa indicated that "[t]here are no specific protocols for recovering the corpses of women; this is done on the basis of general instructions that are used for both women and men, with the sole addition of taking swabs, scraping under the nails, and determining whether the victim was pregnant. This is significant because the violent deaths of women have […] special aspects that should be taken into account when processing the scene." *Cf.* Expert opinion of José Mario Nájera Ochoa, *supra*.

that, in 2001, "there were no pre-established circumstances in which forensic physicians were obliged to perform examinations for signs of sexual abuse." The State also indicated that:

> In 2001, the laws in force did not include autopsy guidelines or protocols. [The performance of autopsies] was not standardized […] and they were not aimed at obtaining or producing scientific evidence, but rather at the identification and individualization of the corpse and the possible cause of death.

90. In addition, other information of different types provided to the Court explains that, within the framework of investigations into crimes against women is was frequent that the authorities behaved in a way that has been called "biased" or "discriminatory." In this regard, some reports and testimonies of women survivors and their family members indicate a "tendency of the investigators to doubt the victims and to blame them for their lifestyle, or [clothes]." Similarly, expert witness María Eugenia Solís García stated that "there is a discriminatory bias" in the investigations because they inquire into aspects of the conduct and personal relationships of the victims, basically with regard to their "sexual activities," which "creates […] a series of prejudices [and] stereotypes that lead to the conclusion that these women […] were responsible for what happened to them." She clarified that the fact that the investigators "ask questions regarding [the victim's conduct or relationships] is not a problem, [but rather] that prejudices and stereotypes are developed based on this information," and that this has an impact on the effectiveness of the investigation. This is because "the discriminatory bias" leads "the agents of justice to consider that the investigation is unimportant and not a priority."

B. The facts of the case

91. The account of the facts provides a description of the most relevant procedures and actions carried out in the course of the investigation into the murder of María Isabel Veliz Franco included in the case files.[110] It should be noted that the murder investigation has been conducted by Agency No. 5 of the Municipal Prosecutor's Office of the Public Prosecution Service of the municipality of Mixco (hereinafter also "Mixco Agency No. 5") and Agency No. 32 of the Metropolitan District Prosecutor's Office of Guatemala City (hereinafter also "Guatemala City Agency No. 32"), and by the Eighth Court of First Instance for criminal matters, drug-trafficking and crimes against the environment of Guatemala City (hereinafter also "Eighth Court of Guatemala City") and the First Court of First Instance for criminal matters, drug-trafficking and crimes against the environment of the municipality of Mixco (hereinafter also "First Court of Mixco"). The presentation of the facts describes measures taken by these entities.

B.1) María Isabel Veliz Franco

92. María Isabel Veliz Franco was born in Guatemala City, Guatemala, on January 13, 1986.[111] At the time of her death she was 15 years old; she was a student and had just completed the third year of basic studies; she was on vacation and working as a temporary employee of "*Almacén Taxi*" located in Zone 1 of the Guatemalan capital. María Isabel lived with her mother, Rosa Elvira Franco Sandoval,[112] her brothers Leonel Enrique Veliz Franco[113] and José Roberto Franco,[114] and her maternal grandparents, Cruz Elvira Sandoval[115] and Roberto Franco Pérez.[116]

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[110] According to the evidence, the State forwarded two files relating to the investigation conducted by the Public Prosecution Service and to the proceedings before the First Court of First Instance for criminal matters, drug-trafficking and crimes against the environment of the municipality of Mixco. However, they are described together when examining the measures taken.

[111] *Cf.* Birth certificate of María Isabel Veliz Franco issued by the National Civil Registry Office of Guatemala on January 24, 1986 (file of annexes to the motions and arguments brief, tome I, annex 1, fs. 5,294 and 5,295).

[112] *Cf.* Identity document of Rosa Elvira Franco Sandoval (file of annexes to the motions and arguments brief, tome I, annex 2, f. 5,297).

[113] *Cf.* Birth certificate of Leonel Enrique Veliz Franco issued by the National Civil Registry Office of Guatemala on July 10, 1987 (file of annexes to the motions and arguments brief, tome I, annex 3, fs. 5,299 and 5,300).

B.2) Report of disappearance and initial steps

93. ***The report.*** On December 17, 2001, at 4 p.m., Rosa Elvira Franco Sandoval visited the Bureau of Criminal Investigation of the National Civil Police of Guatemala (hereinafter "PNC Investigation Service"), to report the disappearance of her daughter, María Isabel Veliz Franco. In the report, Mrs. Franco stated that:

a) On December 16, 2001, her 15-year old daughter left the house at 8 a.m. to go to work at "*Almacén Taxi*" and, unexpectedly, did not return at 8 p.m. that day;

b) On December 17, 2001, at 10 a.m., she went to the store to look for [María Isabel] and a friend of her daughter's told her that, on December 16, 2001, at around 7 p.m., a rough-looking fellow had asked for her and then waited for her, and presumably the two left together;[117] [Mrs. Franco Sandoval] said she knew the name of this suspicious individual, because her daughter's friends told her that [María Isabel] had mentioned the name frequently,[118] and

c) According to Rosa Elvira Franco's statement, she had authorized her daughter María Isabel to work in this store during her school vacations as she had in previous years.

94. ***Subsequent statements by Rosa Elvira Franco Sandoval.*** On subsequent occasions, Mrs. Franco Sandoval provided further details:

a) On December 19, 2001, at 10.20 a.m., when she was interviewed by the investigators assigned to the case at *Funerales Mancilla S.A*., where she was keeping vigil over her daughter's body, she made the following statement:

> [Her] daughter had not come to have lunch at home as she usually did so, at around 2 p.m., [she] went to leave her some food and, when [she] arrived, [she] asked [María Isabel] why she had not come home to have lunch, and she answered that she had not had time and that a male friend was coming to collect her when she finished work; [she] asked her who this was, but [María Isabel] did not answer. Regarding her daughter's attackers, she suspect[ed] someone who [she] only knew by his first name, [and she knew that he was] around 38 years old, because, about a year ago, this individual was harassing her daughter; [she] was aware of this individual because he came looking for [her] daughter almost every day. On one occasion, [her] daughter commented that she had met [this individual] in a discotheque in Zone 10, through some friends. When [she] realized that [her] daughter had not come home, [she] went to the store where María Isabel worked and spoke to one of her workmates. In answer to [her] questions, the latter indicated that at around 8 p.m. on 16-12-2001 an individual came to the said store to buy a shirt and was attended by María Isabel, and [the workmate] said that it appeared that [her] daughter knew him; she also commented that other unknown individuals were hanging around the store. The characteristics that [María Isabel's workmate] described coincided with the characteristics of [the person who had harassed María Isabel]; this is why [Rosa Elvira Franco] suspects the said individual.[119]

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114 *Cf.* Birth certificate of José Roberto Franco, issued by the National Civil Registry Office of Guatemala on August 4, 1992 (file of annexes to the motions and arguments brief, tome I, annex 4, f. 5,302).

115 *Cf.* Death certificate of Cruz Elvira Sandoval Polanco issued by the National Civil Registry Office of Guatemala on February 25, 2011 (file of annexes to the motions and arguments brief, tome I, annex 5, fs. 5,304 and 5,305).

116 *Cf.* Death certificate of Roberto Franco Pérez issued by the National Civil Registry Office of Guatemala on June 21, 2004 (file of annexes to the motions and arguments brief, tome XI, annex 6, fs. 5,307 and 5,308).

117 *Cf.* Report of the disappearance of María Isabel filed by Rosa Elvira Franco Sandoval before the Bureau of Criminal Investigation, Disappeared Children's Section, National Civil Police of Guatemala on December 17, 2001 (file of attachments to the Merits Report, annex 1, f. 55).

118 *Cf.* Report of the disappearance of María Isabel filed by Rosa Elvira Franco Sandoval, *supra*.

119 *Cf.* Report of the Homicide Section of the Bureau of Criminal Investigation of the National Civil Police of February 21, 2002 (file of attachments to the Merits Report, annex 16, fs. 105 to 110).

b) On January 14, 2002, in her expanded report, she added that María Isabel had dated a youth who belonged to a *mara* (youth gang) and was thinking of ending the relationship. Mrs. Franco recounted that she did not know with which of the two men she was suspicious of her daughter had gone on the day she disappeared. She also indicated that she suspected one of her daughter's girlfriends, because María Isabel's co-workers had told her that she had called her the day she disappeared,[120] and

c) During the public hearing before the Court on May 15, 2013, she mentioned for the first time that the last person who saw her daughter alive was "one of her co-workers [in the store], who saw when they took her, they forced her into a car." She also stated that at midday on December 17, 2001, she went to the disappeared persons' section of the PNC, in order to report her daughter's disappearance. However, according to her, the State officials did not allow her to make an official report; they told her to come back later, and then stated that they could not attend her because she had to wait from 24 to 72 hours before filing a report.[121] These elements are not found within the factual framework of the Merits Report.

95. ***The State's inaction.*** There is no record in the case files provided by the parties that State officials or agencies made an effort to look for María Isabel Veliz Franco on December 17, 2001. In particular, there is no record that this was done after Mrs. Franco filed an official report at 4 p.m. on December 17, 2001. Furthermore, the body of evidence does not show that any actions were taken the following day, other than those carried out as a result of the discovery of the corpse. The only record in the case file is the report filed by Rosa Elvira Franco before the PNC Investigation Service on December 17, 2001.

96. ***Discovery of the corpse.*** On December 18, 2001, the operator on duty received an anonymous telephone call indicating that there was a corpse on Avenue 21 in front of 4-48, Zone 8 of Mixco, San Cristóbal II; accordingly, she sent out a message through the central dispatch service of the 16th Precinct for the pertinent authorities to go there. At 2 p.m. police agents arrived at the said address and, at 2.15 p.m., they found the body of a woman in the undergrowth of a vacant lot at that address and therefore telephoned the authorities of the Public Prosecution Service. These authorities arrived at 2.30 p.m. and, subsequently, at 3.20 p.m., Site Inspection Unit I-005 arrived to take the corresponding steps, completing this procedure with the transfer of the corpse to the morgue in police vehicle No. 16-045 at 3.45 p.m., according to the State agents.[122]

97. ***Removal of the corpse.*** At 2.30 p.m. on December 18, 2001, the Assistant Prosecutor arrived to supervise the removal of the corpse, and at 2.45 p.m., proceeded to try to identify the corpse which, according to the authorities who intervened, showed signs of violence (*infra* para. 99). The body was not identified immediately, but was called "XX" because no identify document was found.[123] The Assistant Prosecutor's record of the

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120 *Cf.* Expansion of statement and ratification of complaint of Rosa Elvira Franco Sandoval before Agency No. 32 of the Public Prosecution Service of Guatemala City of January 14, 2002 (file of attachments to the Merits Report, annex 7, fs. 75 to 82).

121 *Cf.* Statement made by Rosa Elvira Franco Sandoval during the public hearing held before the Court on May 15, 2013.

122 *Cf.* Note No. 1,131-2001 of December 18, 2001, issued by the Head of Sub-Station 1651 of the National Civil Police addressed to the Assistant Prosecutor of the Public Prosecution Service of the municipality of Mixco (file of attachments to the Merits Report, annex 2, f. 57). Although the evidence does not reveal a specific document recording the first telephone call, there is no dispute between the State and the representatives that it was received. The evidence includes Note. No. 1,131-2001, recording the communication made to the central dispatch service of the 16th Precinct about the discovery of the body. In addition, during the public hearing, both the representatives and the State referred to the first telephone call that informed the authorities of the existence of a corpse. It should be noted, in relation to this first anonymous call, that, in its Merits Report, the Commission stated that "what the case file does not reveal is why the authorities went to the place where the body was found: specifically how did the central dispatch service of the 16th Precinct learn that a body had been discovered." Merits Report, *supra*, f. 33.

123 *Cf.* Note No. 1,131-2001, *supra.*

removal of the corpse, and the report of the PNC agents present where it was found, both indicate that the body was transferred by a PNC vehicle, and that the autopsy order was handed to an agent of the PNC. This procedure ending at 3.45 p.m., while the report of the Site Inspection Unit of December 18, 2001, indicates that it ended at 4.15 p.m.[124]

98. ***Identification of the corpse.*** On December 18, 2001, María Isabel's mother, on seeing the news that a body had been found on television, went to the morgue where she verified that it was the body of her daughter.[125] Mrs. Franco Sandoval then indicated, as revealed by a document in the judicial case file, that:

> When [she] had to go to the morgue to identify [her] daughter, who was labelled XX, she went mad with grief, [she] yelled, cried, collapsed; but at some moment [she] asked the pathologist for his opinion [and] he told [her] that [her] daughter had been raped and, in his opinion, had been murdered during the night of December 17.[126]

99. **Record of the recovery of the corpse.** On December 18, 2001, the record of the recovery of the corpse was prepared. Also, note No. 1,131-2001, of the same date, indicates the following:

> It was verified that the [corpse's] face was covered with a green towel and a black towel; there was a brown plastic cord around her neck; the head was covered with a black nylon bag. When the body was discovered, the mouth and nose were full of food (vomit); the body was lying flat, with the face look west, and the legs east; the arms were at the side, the legs were extended, and the body was face down […] CLOTHING: blue denim trousers, short-sleeved black cotton blouse brand Bobil Shirr; white underpants with purple figures; white socks, black leather shoes, beige brassiere. […] THE FOLLOWING INJURIES: one wound to the front of the head, in the left parietal region near the pinna, presumably inflicted with a knife. The above-described objects are in the custody of the assistant prosecutor […].[127]

Other documents prepared in the context of the investigation contain similar assertions and explicitly mention the presence of signs that the corpse had been strangled.[128]

100. ***Testimony of a witness.*** The agents of the PNC Bureau of Criminal Investigation, Homicide Section, interviewed a witness at the scene of the crime, who stated that he was a guard at a house under construction near that sector. He refused to provide his personal information for fear of reprisals and, with regard to the case, stated the following:

> [On December 18, 2001, he] heard a neighbor's dogs barking for about 10 minutes; possibly, at that time they killed the girl. [He] found out about her death at about 11 a.m. from some construction

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124 *Cf.* Record of the removal of the corpse by the first Assistant Prosecutor of Mixco Agency No. 5 of December 18, 2001 (file of attachments to the Merits Report, annex 3, fs. 59 and 60); Note No. 1,131-2001, *supra,* and Site inspection report of December 18, 2001, issued by an expert from the Site Inspection Section of the Bureau of Criminal Investigation of the National Civil Police (file of attachments to the Merits Report, annex 5, fs. 70 and 71).

125 *Cf.* Expansion of statement of Rosa Elvira Franco Sandoval and ratification of complaint, *supra*.

126 *Cf.* Brief of Rosa Elvira Franco Sandoval of August 28, 2004, addressed to the Prosecutor General and Head of the Public Prosecution Service (file before the Commission, judicial case file, part I, fs. 2,869 to 2,872).

127 *Cf.* Note No. 1,131-2001, *supra*. Regarding the green towel and the black towel that appeared with the body when it was found, the case file reveals some confusion as a blue towel is mentioned later. Nevertheless, the parties have not contested the fact that it was in fact a green towel and a black towel. See also, Expert opinion No. BIOL-01-15-12 of the Biology Section of the Bureau of Criminal Investigations of January 7, 2002 (file of attachments to the Merits Report, annex 14, fs. 99 to 101), and Report of the criminal investigation expert of December 29, 2001 (file of attachments to the Merits Report, annex 13, fs. 96 and 97).

128 *Cf.* Record of the removal of the corpse by the first Assistant Prosecutor of Mixco Agency No. 5, *supra*; Record of the transfer of the corpse of María Isabel Veliz Franco addressed by the Assistant Prosecutor I of Mixco Agency No. 5 to the forensic physician for the autopsy of December 18, 2001 (file of attachments to the Merits Report, annex 4, fs. 66 and 67); Site inspection report issued by an expert from the Site Inspection Section of the Bureau of Criminal Investigation of the National Civil Police, *supra, and* Medical certificate recording the death of María Isabel Veliz Franco dated December 18, 2001 (file of annexes to the motions and arguments brief, tome I, annex 9, f. 5,321).

> workers and therefore went to the house of the man where the dogs were barking in the early morning hours, and think[s] that it was possibly this man who advised the Fire Department.[129]

The investigator's record mentions: "as pending measures, the need to interview the guard again because, at the time, he did not provide a great deal of information, possibly owing to the number of curious onlookers and that, perhaps, he would say more if he was alone."[130]

101. ***Other actions.*** PNC agents, investigators and the Assistant Prosecutor of Mixco Agency No. 5 also went to the scene and contacted the person who lives in the building located beside the lot where the corpse was found. Subsequently, officials of the PNC and the Public Prosecution Service searched the area with negative results, and asked the Criminalistics Bureau to compare the fingerprints in the post-mortem file of the corpse with the database to establish its identity.[131] Also, on December 18, 2001, an order was drawn up referring the corpse to the pathologist, but it did not request tests to determine whether the deceased had been sexually abused (*supra* para. 97). In addition, a site inspection was made and the respective report determined that, the crime scene had been contaminated prior to this inspection (*supra* footnote 124). The day the body was found, it was reported that several items were confiscated, and were being kept by the Site Inspection Unit.[132]

102. ***Cause of death according to the death certificate.*** The death certificate, prepared by a professional of the Judiciary's Forensic Medicine Service on December 18, 2001, established as the cause of death "fourth-degree trauma to the cranium caused by a knife wound."[133]

103. ***Anonymous telephone call.*** On December 18, 2001, at 10.30 p.m., a telephone call was received through the 110 confidential information system from an anonymous informant who said he was a messenger and that, during the evening of December 17, 2001, on 6th street 5-24, Colonia Nueva Monserrat, Zone 7, he had seen a woman get out of a vehicle and drop a black sack in some bushes; the sack turned out to be the body of a woman. He therefore followed the vehicle and saw when it turned into a house in the same locality. He also said that he called the police when he saw on the evening news that the body of a woman had been found in the place where he had seen the sack dropped the previous evening.[134]

104. ***Other interviews***. On December 19, 2001, at 9:10 a.m., María Isabel's grandmother, some employees of "*Almacén Taxi,*"[135] and neighbors of the building where the vehicle used to transfer the body supposedly entered were interviewed.

105. ***Appointment of a team of experts.*** Also, on December 19, 2001, the Assistant Prosecutor of the Metropolitan District Prosecutor's Office contacted the Head of the Bureau

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[129] *Cf.* Report of December 18, 2001, on inquiries concerning the death (file of attachments to the Merits Report, annex 4, fs. 63 to 65). Regarding the alert reportedly given to the Fire Department, the case file contains no record of the presence of the Fire Department at any time.

[130] *Cf.* Report on inquiries concerning the death, *supra*.

[131] *Cf.* Report on inquiries concerning the death, *supra*.

[132] *Cf.* Report of the Homicide Section of the Bureau of Criminal Investigation of the National Civil Police, *supra*.

[133] *Cf.* Death certificate of María Isabel Veliz Franco, *supra*.

[134] *Cf.* Report of the 110 confidential information system of the National Civil Police of December 18, 2001 (file of attachments to the Merits Report, annex 6, f. 73). According to the annexes presented by the State, a PNC report indicated that "the 110 system received a telephone call from an anonymous informant. The 110 number is the number for emergencies and reports to the PNC; it operates 24 hours a day all year round. The address of the place where the corpse was found differed in the first call that the PNC received and the second received by the 110 system. In the first anonymous call the following address was given: avenue 21, in front of 4-48, Zone 8 of Mixco, San Cristobal II. During the second telephone call, the address received was: in 6th Street 5-24, Colonia Nueva Monserrat, Zone 7.

[135] *Cf.* Report of the Homicide Section of the Bureau of Criminal Investigation of the National Civil Police, *supra*.

of Criminal Investigations asking him to "appoint a team of crime scene experts in order to collect evidence (clothes), in the hands of the victim's mother," in order to conduct the corresponding tests, looking for samples of blood, hair, pubic hair, semen and any other element that could be incorporated into the file as a probative element. The collection of the evidence found at the site where the corpse appeared was carried out at "*Funerales Mancilla S.A.*", where the members of María Isabel's family were keeping vigil over her body, and her mother had her clothes.[136]

B.3) Subsequent actions

106. Subsequently, measures to investigate the facts have continued, but have been unsuccessful. Consequently, at the date of this Judgment, the respective actions are still at the preparatory or investigative stage.

107. ***Jurisdictional dispute.*** At the initial stage, there was a delay of several months owing to a jurisdictional dispute between two courts:

a) At the beginning, the court hearing the case was the Eighth Court of Guatemala City;
b) On March 11, 2002, this court disqualified itself from hearing the case, presuming that the incident had occurred at 2nd avenue and 4th Street of San Cristóbal, Zone 8, Mixco, because María Isabel's body was found there, and forwarded the proceedings to the Mixco First Court for the latter to hear the matter;[137]
c) The Mixco First Court took over the proceedings on March 26, 2002, and decided to authorize that information be obtained from telecommunication companies as requested by the Public Prosecution Service;[138]
d) On May 17, 2002, the prosecutor of Guatemala City Agency No. 32 recused himself from examining the case because, on March 11, 2002, the Eighth Court of Guatemala City had also disqualified itself from examining it; the case file was therefore forwarded to the Deputy District Prosecutor of the Mixco Municipal Prosecutor's Office together with a detailed report;[139]
e) On July 12, 2002, the prosecutor of Mixco Agency No. 5 ruled on the recusal by the Eighth Court of Guatemala City, explaining to the First Instance Judge of Mixco, to whom the proceedings had been forwarded, that, in his opinion, the competent judge was the Guatemala City judge, because the report on the disappearance of María Isabel had been filed in that jurisdiction;[140]
f) Based on this concern of the prosecutor of Mixco Agency No. 5, on September 2, 2002, the Mixco First Court issued a decision in which it indicated that, from Rosa Elvira Franco's statement it could be inferred that the murder of María Isabel had occurred in Guatemala City and that, on these legal grounds, the First Court of Mixco would not be competent to hear the case, and again referred the case to the Eighth Court of Guatemala City;[141]

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136 *Cf.* Note No. 2727-01/SIC of December 19, 2001, from the Assistant Prosecutor of the Public Prosecution Service to the Bureau of Criminal Investigations of the Public Prosecution Service (file of attachments to the Merits Report, annex 12, f. 94).

137 *Cf.* Note issued by the Eighth Court of Guatemala City on March 11, 2002 (file of attachments to the Merits Report, annex 18, fs. 114 and 115).

138 *Cf.* Note C-105-2002/6º issued by the Mixco Court of First Instance on March 26, 2002 (file of annexes to the answering brief, annex 2, fs. 12,864 to 12,868).

139 *Cf.* Note from the prosecutor of Agency No. 32 to the Deputy District Prosecutor of the Mixco Municipal Prosecutor's Office dated May 17, 2002 (file of annexes to the motions and arguments brief, tome I, Annex 15, fs. 5,351 and 5,352).

140 *Cf.* Note REF. M.P. 7897-01 C 105-02-of6 issued by the prosecutor of Mixco Agency No. 5 on March 11, 2002 (file of annexes to the answering brief, annex 2, fs. 12,878 to 12,890).

141 *Cf.* Note issued by the First Court of Mixco on September 2, 2002 (file of attachments to the Merits Report, annex 20, fs. 122 and 123). It should be noted that an agent of the Mixco Prosecutor's Office addressed a note

g) The Eighth Court of Guatemala City filed the jurisdictional dispute before the Supreme Court of Justice on September 25, 2002,[142] and

h) On November 21, 2002, the Criminal Chamber of the Supreme Court decided that the competent court to hear the case was the First Court of Mixco.[143] During the jurisdictional dispute, several actions other than those described were taken (*infra* para. 108.c).

108. ***Examination of mobile telephone calls.*** Part of the investigation related to telephone calls made with a mobile telephone:

a) On December 3, 2002, the investigator forwarded to the Assistant Prosecutor of Guatemala City Agency No. 32 a report on the analysis of the incoming and outgoing calls made on María Isabel's mobile telephone and indicated that "attached to the report [he was sending] the victim's telephone directory [and] four photographs of the place where the body was found";[144]

b) The report of February 20, 2002, issued by the criminal investigations experts provided information on the interviews conducted with a girlfriend and a former boyfriend of María Isabel. Following the interviews and other measures, they recommended to the prosecutor of Guatemala City Agency No. 32 that he ask the telephone company "*Telecomunicaciones de Guatemala*" (Telgua) for the address recorded for the telephone number of one of the suspects;[145]

c) On March 3, 2002, the prosecutor asked the Mixco First Court for a court order to request the report of the telephone calls made from the mobile telephone carried by the presumed victim.[146] On April 1, 2002, based on the authorization of the Mixco First Court dated March 26, 2002, the prosecutor asked the General Manager of Telgua to provide the list of telephone calls made and received by María Isabel's telephone number.[147] On May 9, 2002, the Telgua Legal Department sent the information requested, which was forwarded to the investigator of the case on September 4, 2002, and

d) In June 2005 the telephone records of two suspects with whom María Isabel had been in communication on the day she disappeared were examined.[148]

109. ***Examination of vehicles.***

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dated September 16, 2002, to the Deputy Executive Secretary of the Public Prosecution Service indicating that he had received the case file on June 3, 2002, but had not continued with the investigation because he had received instructions from his superior that he should not continue because the case did not correspond to that office. He indicated that once the judge decided the recusal of jurisdiction, the file would be send to Mixco Agency No. 5. He also indicated that he had been cautioned for attending to the victim's mother. *Cf.* Note sent by the agent of the Mixco Prosecutor's Office to the Deputy Executive Secretary of the Public Prosecution Service on September 16, 2002 (file of attachments to the Merits Report, annex 19, fs. 117 to 120).

142 *Cf.* Note issued by the Eighth Court of Guatemala City on September 25, 2002 (file of attachments to the Merits Report, annex 21, fs. 125 and 126).

143 *Cf.* Ruling on jurisdictional dispute No. 93-2002 issued by the Supreme Court of Justice, Criminal Chamber, on November 21, 2002 (file of attachments to the Merits Report, annex 22, fs. 129 to 132).

144 *Cf.* Report of the criminal investigations expert addressed to Guatemala City Agency No. 32 on December 3, 2002 (file of annexes to the motions and arguments brief, tome I, annex 18, f. 5,378).

145 *Cf.* Report of the criminal investigation experts addressed to Guatemala City Agency No. 32 on February 20, 2002 (file before the Commission, judicial case file, part I, fs. 2,805 to 2,810).

146 *Cf.* Note 3.18.01/3 issued by the prosecutor of Guatemala City Agency No. 32 on March 3, 2002 (file of annexes to the answering brief, annex 2, fs. 12,856 to 12,860).

147 *Cf.* Court order addressed to the General Manager of *Telecomunicaciones de Guatemala S.A.* dated April 1, 2002 (file of attachments to the Merits Report, annex 24, fs. 139 and 140), and Note C-105-2002/6 issued by the Mixco Court of First Instance, *supra*.

148 *Cf.* Report of telephone calls provided by Telgua on June 8, 2005 (file of annexes to the Merits Report, annex 27, fs. 148 and 149), and Request for an investigation by the Bureau of Criminal Investigations of June 20, 2005 (file before the Commission, judicial case file, part I, fs. 2,843 to 2,846).

a) On December 20, 2001, following a request to the Land Register Department of the municipality of Mixco, the investigators of the Bureau of Criminal Investigation of the PNC Homicide Section in charge of the case obtained the name of the owner of the building indicated by the anonymous informant as the place where the vehicle from which the corpse had been taken had entered.[149] On January 8, 2002, the investigator tried to interview the owner of the building, but was unable to find him. Subsequently, on January 18, 2002, a site inspection was conducted and the investigator went to the house again and observed that there was no vehicle with the characteristics described by the anonymous informant.[150] On July 8, 2003, Assistant Prosecutor I searched the building and reported that the vehicle described by the anonymous informant had not been found, or any other evidence related to the murder,[151] and

b) In June and August 2005, the vehicles owned by two suspects with whom María Isabel had been in communication the day she disappeared were examined.[152]

110. ***Analysis of clothes and other items of evidence.*** On December 29, 2001, the criminal investigations expert reported that the evidence collected on December 19, 2001, in *Funerales Mancilla S.A.* had subsequently been sent to the laboratory of the Scientific and Technical Department of the Public Prosecution Service for different analyses to be carried out.[153] The results of the analyses were as follows:

a) On January 4, 2002, the expert witness from the Biology Section of the Public Prosecution Service issued a report on the analyses performed on the clothes,[154] and concluded that the denim trousers, black shirt, two towels, underpants, brassiere, socks and nylon bag had traces of blood, but not of toxic substances or semen.[155] The same day, a test was also carried out to determine the blood group of a cloth sample with blood;[156]

b) On January 7, 2002, the expert witness issued a report on the analysis of the clothes[157] and indicated that the elements of hair found on the denim trousers, and on the blue towel were of animal origin, and on the other clothes they were of human origin;[158]

c) On February 19, 2002, the Toxicology Section of the Bureau of Criminal Investigations transmitted expert appraisal TOXI 01-2886 carried out on the trousers and socks and on one towel that was found by the body. The results were negative

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149 *Cf.* Report of the Homicide Section of the Bureau of Criminal Investigation of the National Civil Police, *supra.*

150 *Cf.* Report of the Homicide Section of the Bureau of Criminal Investigation of the National Civil Police, *supra*, and Request for authorization for a search of June 26, 2006 (file of annexes to the motions and arguments brief, tome I, annex 20, f. 5,383).

151 *Cf.* Report of Assistant Prosecutor I of Mixco Agency No. 5 of July 8, 2003 (file of attachments to the Merits Report, annex 17, f. 112), and Decision of the Mixco Court of First Instance of October 8, 2009 (file of annexes to the motions and arguments brief, tome I, annex 27, f. 5,411).

152 *Cf.* Report of telephone calls provided by Telgua, *supra;* Request for an investigation by the Bureau of Criminal Investigations, *supra*, and Note of the District Prosecutor of the municipality of Mixco of August 5, 2005 (file of annexes to the motions and arguments brief, tome I, annex 24, f. 5,405).

153 *Cf.* Report of the criminal investigation expert, *supra.*

154 According to the expert appraisal presented, the analyses performed on María Isabel's clothes consisted in phenolphthalein tests, a test to determine the origin of the species, a test to determine the blood group of the dry blood, luminescence tests with ultraviolet lamp and acid phosphatase test, and test to detect seminal protein P-30.

155 *Cf.* Expert opinion No. BIOL-01-1512 of the Biology Section of the Bureau of Criminal Investigations of January 4, 2002 (file of annexes to the motions and arguments brief, tome I, annex 11, fs. 5,330 to 5,332).

156 *Cf.* Expert opinion No. BIOL-01-1510 of the Biology Section of the Bureau of Criminal Investigations of January 4, 2002 (file of attachments to the Merits Report, annex 15, f. 103).

157 According to the expert appraisal presented, the hairs were measured and then fixed with chemical elements on glass slides to observe their microscopic characteristics.

158 *Cf.* Expert appraisal No. BIOL-01-15-12 of the Biology Section of the Bureau of Criminal Investigations, *supra*.

for the presence of pesticides, and it was mentioned that the stains of stomach contents were dry when they were analyzed.[159] The report BIOL-01-1512 documents and concludes, among other matters, that "[t]he lower part of the blouse was torn," and that the "lower part of the white underpants was torn,"[160] and

d) On February 27, 2002, Assistant Prosecutor I of Mixco Agency No. 5 sent a note to the forensic physician asking him "whether, when vaginal and anal swabs and nail scraping tests are not requested, these are still carried out automatically."[161] On March 9, 2006, the forensic physician informed Assistant Prosecutor I that the said tests were not performed automatically.[162]

111. ***Autopsy report***

a) The Autopsy Report issued by the Legal Unit of the Forensic Medicine Service on February 13, 2002, stated that the cause María Isabel's death was "epidural hematoma resulting from a fourth-degree trauma to the cranium"; it also concluded that there was a "cerebral edema, fracture of the cranium, signs of asphyxiation, among other findings and injuries," and indicated that the genital organs were "normal."[163] There is no record in the case file that any other test was performed to determine whether Isabel had been raped, and

b) On August 2, 2011, the Assistant Prosecutor of Mixco Agency No. 5 asked the Head of the INACIF to appoint a forensic expert to make a complete interpretation of the autopsy performed on María Isabel Veliz Franco on December 18, 2001.[164] On August 4, 2011, an INACIF medical professional provided an expert opinion interpreting the autopsy and establishing that, based on the findings of the autopsy, it would not be possible to rule on the time or manner of her death; nevertheless, he indicated that: (i) "the cause of death was an "epidural hematoma following a fourth-

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159 *Cf.* Report of the Toxicology Section issued by the pharmaceutical chemist of the Public Prosecution Service on February 19, 2002 (file of annexes to the motions and arguments brief, tome I, annex 12, f. 5,334).

160 *Cf.* Expert appraisal No. BIOL-01-15-12 of the Biology Section of the Bureau of Criminal Investigations, *supra*.

161 Note sent by Assistant Prosecutor I of Mixco Agency No. 5 to the forensic physician dated February 27, 2006 (file of attachments to the Merits Report, annex 10, f. 90).

162 *Cf.* Note sent by the forensic physician to Assistant Prosecutor I of the Mixco Municipal Prosecutor's Office dated March 9, 2006 (file of attachments to the Merits Report, annex 11, f. 92).

163 Autopsy Report No. 2865/2001 of February 13, 2002 (file of attachments to the Merits Report, annex 4, f. 62), which indicates:

"EXTERNAL EXAMINATION: […] Lividity: on the dorsal region of the body. Rigor mortis: generalized. Putrefaction: apparently not initiated. INJURIES: wound with bruising of six by six centimeters with irregular edges on the left parietal area of scalp, another wound with bruising of four by six centimeters with irregular edges that caused a fracture to the left temporal-occipital area. Violaceous-colored scratches on the right shoulder and neck, on the back of the neck (nape), violet-colored ecchymosis throughout this area with hemorrhagic infiltration, as well as abrasions on the shoulder, right posterior thorax and left bilateral; there is a dislocation of the right posterior thorax and the posterior part of the right arm, ecchymosis and an area of bruising in the left outer ear, the abrasions on the neck and right arm are repetitive suggesting bite marks. CRANIUM: blood infiltration over the whole scalp with subaponeurotic hematoma in the left temporal-parietal area with fracture of the right occipito-temporal lobe and fracture of the base on the right side. BRAIN: bruised, hemorrhagic, epidural hematoma on the left side, cut section reveals firm consistency. Cerebellum: bruised, hemorrhagic. […] GENITAL ORGANS: normal. NOTE. Samples were sent to the Toxicology Laboratory for an analysis of the blood and internal organs. CONCLUSIONS: (a) fourth degree trauma to the cranium; (b) epidural hematoma; (c) Cerebral edema; (d) fracture of the cranium; (e) syndrome of asphyxiation; (f) findings described. CAUSE OF DEATH: epidural hematoma following fourth degree trauma to the cranium."

164 *Cf.* Note with request to the Head of the Institute of Forensic Science dated August 2, 2011 (file of annexes to the motions and arguments brief, tome I, annex 46, f. 5,461).

degree cranium trauma," and (ii) "the time of death was from six to twelve hours."[165]

112. **Measures taken with regard to the suspects:** Several measures were taken with regard to the suspects, namely:

a) On January 11, 2002, the investigator in charge of the case provided information on the interrogation that day of a male acquaintance of María Isabel[166] (*supra* para. 94.b). During the interrogation, the suspect recounted that he had known María Isabel. He stated that, on December 17, 2001, he had been in the municipality of Petén and had heard of María Isabel's death through a friend, but when he went to present his condolences to Mrs. Franco Sandoval, she told him that she suspected him. On January 15, 2002, the investigator interviewed the friend mentioned by the suspect who confirmed that he had informed the latter of María Isabel's death;[167]

b) On March 15, 2002, Criminal Investigations I expert sent a note to the prosecutor in charge of the investigation with a "photofit picture" of a suspect, elaborated on the basis of a description provided by someone or worked in the store next door to "*Almacén Taxi*";[168]

c) On April 10, 2002, the experts expanded their report and indicated that one of the suspects, known as "the Cuban," was a young wrestler and, according to the Technical Director of the Wrestling Federation, his appearance was similar to the "photofit picture" he had been shown. Also, according to an analysis of the relationship between María Isabel and the suspect, and the indications that could suggest that he might be responsible for [her] murder, […] they suggested that he should be captured in view of the risk that he would escape";[169]

d) On April 15, 2002, the suspect known as "the Cuban" was summoned to make a statement before the Public Prosecution Service and indicated that he knew María Isabel.[170] Subsequently, on April 30, 2002, the report sent on February 20, 2002, was expanded and concluded establishing that, observing the "photofit picture" the suspect was very different from this photo, so that his responsibility should be ruled out.[171] The expanded report indicated that another friend of María Isabel had been interviewed, and she recounted that, the Saturday before the disappearance, she had been to a discotheque with María Isabel who had met a young man similar in appearance to the person in the "photofit picture." It was then stated that this individual could be a suspect. In this report the investigator mentioned that when the

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165 *Cf.* Expert report provided by the medical professional of the Institute of Forensic Science of August 4, 2011 (file of annexes to the motions and arguments brief, tome I, annex 47, f. 5,463).

166 *Cf.* Report of the investigator of the Bureau of Criminal Investigation, Homicide Section, of the National Civil Police of January 11, 2002 (file of annexes to the answering brief, annexes 3-3b, fs. 13,047 and 13,048).

167 *Cf.* Report of Homicide Section of the Bureau of Criminal Investigation of the National Civil Police, *supra*.

168 *Cf.* Report No. 169A-2002-Fotorobot issued by Criminal Investigation Expert I (file of annexes to the answering brief, annexes 3-3b, fs. 13,146 to 13,148).

169 *Cf.* Report of Criminal Investigation Expert I of April 10, 2002 (file before the Commission, judicial case file, part I, fs. 2,838 to 2,840).

170 *Cf.* Statement of the suspect known as "the Cuban" of April 15, 2002 (file of annexes to the answering brief, annexes 3-3b, fs. 13,155 and 13,156).

171 However, on June 21, 2006, the experts and professionals of the Bureau of Criminal Investigation, forwarded to the Deputy District Prosecutor of the Prosecution Service of the municipality of Mixco the second report on the investigation into the murder of María Isabel, which indicates that an attempt was made to find the suspect known as "the Cuban" in the Wrestling Federation, but an employee of the Federation advised them, by telephone, that the suspect had visited the Federation's facilities for around two years, but that, since 2003, he had not seen him anymore and was unaware of his whereabouts. The investigators indicated that they had asked the General Directorate of Immigration for a report on the migratory movements of the suspect. *Cf.* Second investigation report prepared by the Bureau of Criminal Investigations of the Public Prosecution Service dated June 21, 2006 (file before the Commission, judicial case file, part I, fs. 2,847 to 2,849).

victim's body was recovered, no one asked that the autopsy include the tests necessary to establish whether she had been drugged or raped before her death;[172]

e) In March, June and July 2003, and in September 2004, more interviews were held and suspects were summoned to make statements; but they stated that they had nothing to do with the murder.[173] On May 19, 2004, the District Prosecutor of the municipality of Mixco sent a report to the General Secretariat of the Public Prosecution Service concluding that it had not been possible to identify the perpetrator, but that the investigations continued;[174]

f) On October 4, 2005, Mixco Agency No. 5 conducted a psychological test on the first suspect indicated by Mrs. Franco Sandoval, and inquiries were made to verify his statement as regards his whereabouts on the day of the incident;[175]

g) On August 31, 2006, another possible suspect was summoned to make a statement;[176]

h) During the second half of 2006 several actions were taken with regard to the vehicle and building mentioned by the anonymous informant in 2001, as well as in relation to individuals who had been considered suspects; among other matters, requests for information and interviews;

i) In February 2007, the Public Prosecution Service continued to request residential and migratory information with regard to those suspected of María Isabel's murder,[177] and

j) In December 2010, a DNA test was performed on one of the suspects[178] and, on May 16, 2011, the expert appraisal was issued comparing the DNA and the evidence in the case file, establishing that the trousers, socks, and one of the towels were missing so that no comparison could be made with them. The appraisal determined that the blood of a female was to be found on several items of clothing, and there was no genetic material on the other clothing that could usefully be tested.[179]

113. ***Photographic report.*** On March 3, 2002, an investigator of the Site Inspection Section of the PNC Bureau of Criminal Investigation sent the Assistant Prosecutor of Guatemala City Agency No. 32 the photographic report of the body of María Isabel and of the area where it was found.[180]

114. ***Changes in the investigators and prosecutors.*** In the course of the prolonged but unsuccessful procedures conducted, there were changes in the personnel involved:

a) On May 21, 2004, the chief investigator issued a report on the investigations and actions of Mixco Agency No. 5, in which she explained to the Assistant

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172 *Cf.* Expansion and conclusion of the report prepared by the criminal investigation expert of April 30, 2002 (file of attachments to the Merits Report, annex 9, fs. 86 to 88).

173 *Cf.* Statements by two suspects before Mixco Agency No. 5 on July 21, 2003 (file of annexes to the answering brief, annexes 3-3b, fs. 13,326 to 13,333)

174 *Cf.* Detailed report issued by the Mixco District Prosecutor on May 19, 2004 (file of annexes to the answering brief, annex 3-3b, fs. 13,387 to 13,395).

175 *Cf.* Report of February 8, 2007, of the criminal investigations expert addressed to the District Prosecutor of the municipality of Mixco (file of annexes to the motions and arguments brief, tome I, annex 26, f. 5,409).

176 *Cf.* Statement given by a suspect before Mixco Agency No. 5 on August 31, 2006 (file of annexes to the answering brief, annex 3c, fs. 13,701 and 13,702).

177 *Cf.* Note requesting information of the Assistant Prosecutor of Mixco Agency No. 5 dated February 8, 2007 (file of annexes to the answering brief, annex 3c, f. 13,732).

178 *Cf.* Record of hearing on pre-trial evidence of December 16, 2010 (file of annexes to the motions and arguments brief, tome I, annex 36, fs. 5,435 and 5,436).

179 *Cf.* Expert appraisal of May 16, 2011 (file of annexes to the motions and arguments brief, tome I, annex 42, fs. 5,449 to 5451).

180 *Cf.* Photographic report No. 4791-2001 (file of annexes to the motions and arguments brief, tome I, annex 8, fs. 5,313 to 5319).

Prosecutor "that [in] relation to the death of MARÍA ISABEL VELIZ FRANCO, investigations had been conducted [by] the investigators of the Public Prosecution Service, but that the human rights [authorities] and oversight officials of the Public Prosecution Service [had asked] that the investigation be carried out again in order to elucidate this act," and asked that further interviews be conducted with individuals who had already testified.[181] On September 3, 2004, one of María Isabel's female friends was interviewed;[182]

b) On August 24, 2004, the Assistant Prosecutor of Mixco Agency No. 5 issued a note indicating that, on August 23, 2004, Mrs. Franco had come to the Agency and stated that the "investigation had not been conducted appropriately" and requested that the Assistant Prosecutor in charge of the case be changed.[183] On September 8, 2004, the Assistant Prosecutor asked that another prosecutor be assigned.[184] On September 13, 2004, the Assistant Supervisor of the Public Prosecution Service decided Mrs. Franco's complaint concluding that an administrative disciplinary proceeding would not be opened[185] and, on October 28, 2004, a new Assistant Prosecutor was appointed,[186] and

c) In January 2006, the Deputy District Prosecutor of Mixco Agency No. 5 requested full-time investigators in order to make progress in finding those responsible for María Isabel's death, and the elaboration of new guidelines for the investigation.[187]

115. ***Complaint filed before the Guatemalan Ombudsman.*** On January 31, 2003, Rosa Elvira Franco filed a complaint before the Guatemalan Ombudsman (hereinafter "the Ombudsman") "concerning the violation of the human right to due process of law by the Assistant Prosecutor [...] of Prosecution Agency [No. 5] of the Mixco municipality of the department of Guatemala" because the investigation into her daughter's murder was not advancing and had come to a standstill.[188] On November 2, 2004, the Ombudsman issued a decision in which he indicated that there had been a violation of Mrs. Franco Sandoval's right to certainty and to due process because "the Public Prosecution Service had not proceeded based on the principle of objectiveness in the exercise of the criminal action [...] within the time frames established by law" and the prosecutors of Guatemala City Agency No. 32 and Mixco Agency No. 5 had "delayed justice by requesting and processing the recusal to hear the case based on territorial jurisdiction that was finally declared inadmissible." He recommended to the Prosecutor General and Head of the Public Prosecution Service that greater control should be exercised to ensure that actions were taken promptly and efficiently.[189]

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[181] *Cf.* Report of the investigator of the National Civil Police dated May 21, 2004 (file of annexes to the motions and arguments brief, tome I, annex 22, fs. 5388 to 5390).

[182] *Cf.* Expansion of the statement of a friend of María Isabel of September 3, 2004 (file of annexes to the answering brief, annex 3-3b, f. 13,427). She stated that none of María Isabel's boyfriends and acquaintances that she had known bore a similarity to the face of the "photofit picture."

[183] *Cf.* Note issued by Assistant Prosecutor I of Mixco Agency No. 5 on August 24, 2004 (file of annexes to the answering brief, annex 3-3b, fs. 13,417 and 13,418).

[184] *Cf.* Note issued by Assistant Prosecutor I of Mixco Agency No. 5 requesting a change of Assistant Prosecutor dated September 8, 2004 (file of annexes to the answering brief, annex 3-3b, f. 13,430).

[185] *Cf.* Report No. 534-2004 issued by the Assistant Supervisor of the Public Prosecution Service on September 13, 2004 (file of annexes to the answering brief, annex 3-3b, fs. 13,439 to 13,441).

[186] *Cf.* Note issued by the prosecutor of Mixco Agency No. 5 granting a change of Assistant Prosecutor dated October 28, 2004 (file of annexes to the answering brief, annex 3-3b, f. 13,443).

[187] *Cf.* Note of request issued by the Deputy District Prosecutor of Mixco Agency No. 5 on January 31, 2006 (file of annexes to the answering brief, annex 3c, f. 13,671), and Note of guidelines issued by the Deputy District Prosecutor of Mixco Agency No. 5 of January 31, 2006 (file of annexes to the answering brief, annex 3c, f. 13,672).

[188] *Cf.* Order of the Ombudsman of January 31, 2003 (file of annexes to the motions and arguments brief, tome I, annex 23, f. 5,392).

[189] *Cf.* Decision of the Guatemalan Ombudsman of November 2, 2004 (file of attachments to the Merits Report, annex 23, fs. 135 to 137).

116. ***Request for reports from the Fire Department and the police.*** During July 2009, the Assistant Prosecutor of Mixco Agency No. 5 requested information from the Head of the Fire Department and from a police agent in relation to actions taken on December 18, 2001[190] (*infra* para. 196.d).

117. ***Unsuccessful search for mislaid evidence.*** Several pieces of evidence that were mislaid have been sought unsuccessfully:

a) On January 5, 2011, the Assistant Prosecutor of Agency No. 1 of the Mixco Municipal Prosecutor's Office sent a note to the Head of the Evidence Warehouse of the Public Prosecution Service requesting information on the whereabouts of the evidence that could not be found;[191]

b) The same January 5, the Head of the Evidence Warehouse responded that the denim trousers, the two towels and the sock had not entered the warehouse and, subsequently, repeated his reply on January 24, 2011, indicating that the three pieces of evidence had remained in the hands of a pharmaceutical chemist of the Technical and Scientific Sub-Directorate, which later became the National Institute of Forensic Science (hereinafter INACIF);[192]

c) On January 14, 2011, the prosecutor of Agency No 1 of the Mixco Municipal Prosecutor's Office sent a request to the Head of the Central Evidence Warehouse of the Public Prosecution Service to carry out "an exhaustive search for the [mislaid] evidence, as the case was important,"[193] and

d) In view of the repeated request for this evidence by the prosecutor of Agency No 1 of the Mixco Municipal Prosecutor's Office, on June 10[194] and on July 11, 2011, the INACIF General Secretariat sent a communication to the prosecutor of the Mixco Municipal Prosecutor's Office, advising him that "INACIF initiated its crime laboratory work[195] on November 12, 2007, […] so that, unfortunately, it could not respond to the request."[196] To date, there is no indication in the case file that the mislaid clothes have been found.

118. ***Aspects related to the allegations of discrimination.*** It has been alleged that, in this case, there has been a discriminatory bias that impeded any progress in the investigations. The following facts can be indicated in this regard:

a) On February 20, 2002, the criminal investigations experts responsible for the case issued a report on the result of the preliminary measures taken with regard to María Isabel's murder. Among other matters, the experts stated that María Isabel's nickname was "*la loca*" [the crazy one] and referred to aspects of her behavior, the way she dressed, her social life and her night life, and her religious beliefs, as well as

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190 *Cf.* Note issued by the Assistant Prosecutor of Agency No. 1 of the Mixco Municipal Prosecutor's Office addressed to the Chief of the Municipal Fire Department of Guatemala City on July 13, 2009 (file of annexes to the motions and arguments brief, annex 113, f. 12,644).

191 *Cf.* Note issued by the Assistant Prosecutor of Agency No. 1 of the Mixco Municipal Prosecutor's Office to the Head of the Evidence Warehouse of the Public Prosecution Service dated January 5, 2011 (file of annexes to the motions and arguments brief, tome I, annex 37, f. 5,438).

192 *Cf.* Note of the Head of the Evidence Warehouse of the Public Prosecution Service of January 24, 2011 (file of annexes to the motions and arguments brief, tome I, annex 39, f. 5,442).

193 *Cf.* Request to obtain evidence of January 14, 2011 (file of annexes to the motions and arguments brief, tome I, annex 38, f. 5,440).

194 *Cf.* Repetition of the request for evidence of June 10, 2011 (file of annexes to the motions and arguments brief, tome I, annex 43, f. 5,454).

195 This is a unit of the Scientific and Technical Department of the General Directorate of the Guatemalan National Institute of Forensic Science.

196 *Cf.* Note of the Secretariat General of the Guatemalan National Institute of Forensic Science dated July 11, 2011 (file of annexes to the motions and arguments brief, tome I, annex 45, f. 5,459).

to the lack of supervision by her family.[197] On February 21, 2002, the investigator of the PNC Bureau of Criminal Investigation, Homicide Section, presented a report on the actions taken up until that time, and concluded that the motive for María Isabel's murder had been "possible infidelity in the case of a boyfriend";"[198]

b) On March 18, 2003, the chief investigator issued a report for the Assistant Prosecutor of Mixco Agency No. 5 in which he recommended that María Isabel's mother should be summoned in order to question her about her daughter's life, especially about "her nocturnal activities, her relationship with members of *maras*, addiction to any drugs and relationship with her stepfather";[199]

c) On August 30, 2004, Mrs. Franco Sandoval sent a brief to the Prosecutor General and Head of the Public Prosecution Service informing him that the Assistant Prosecutor of Mixco Agency No. 5 had told her that María Isabel "was a tart," and asked that the slurs against her daughter's reputation should cease.[200] In the Merits Report, the Commission referred to the testimony of Rosa Elvira Franco during the hearing before the Commission, and to the communication she sent to the Commission on April 27, 2007, in which she stated that approximately one week before August 28, 2004, she went to inquire about the progress made in the investigation; the Assistant Prosecutor, "took out [her] daughter's file from the bottom of one of the drawers in her filing cabinets, in the presence of the person who was her boss at the time and told [her] 'they killed your daughter because she was a tart, a prostitute'; she even made gestures with her shoulders and head, laughing at my daughter and my pain. [Her boss] lowered his head, but didn't apologize; he just watched, and [the Assistant Prosecutor] began to laugh loudly," [201] and

d) On September 14, 2011, an expert of the Guatemalan National Institute of Forensic Science issued a report on a psychological assessment conducted on one of María Isabel's girlfriends, in which he concluded that the victim had revealed "emotional instability because she went out with several boyfriends and male friends."[202]

119. ***Current status of the investigation.*** As already indicated (*supra* para. 106), the investigative measures have not been successful. More than 12 years after María Isabel's murder, the investigation has not gone beyond the preparatory or investigation stage. The latest steps taken in this regard are as follows:

a) On October 12, 2009, the First Court of Mixco asked for information from the prosecutor on "what else needs to be investigated" and "what had been investigated to date"[203] and, on October 21, 2009, the Assistant Prosecutor requested that the case be left in the situation that it was, "because the [investigation] is being processed by the Inter-American Court" and the Presidential Human Rights Commission (COPREDH) and the Center for Justice and International Law (CEJIL)

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197 *Cf.* Report of the experts in criminal investigation addressed to Guatemala City Agency No. 32, *supra.*

198 *Cf.* Report of the Homicide Section of the Bureau of Criminal Investigation of the National Civil Police, *supra*.

199 *Cf.* Report of the criminal investigation expert of March 18, 2003 (file of annexes to the motions and arguments brief, annex 19, f. 5,380).

200 *Cf.* Brief of Rosa Elvira Franco Sandoval addressed to the Prosecutor General and Head of the Public Prosecution Service, *supra.*

201 *Cf.* Brief of Rosa Elvira Franco Sandoval of April 27, 2007, addressed to the Inter-American Commission (file before the Commission, judicial case file, part I, fs. 2,811 to 2,815).

202 *Cf.* Expert opinion issued by the Psychiatric Unit of the Guatemalan National Institute of Forensic Science dated September 14, 2011 (file of annexes to the motions and arguments brief, tome I, annex 48, fs. 5,466 to 5,469).

203 *Cf.* Decision of the Mixco Court of First Instance of October 12, 2009 (file of annexes to the motions and arguments brief, tome I, annex 29, f. 5,415).

were aware of this[,] so that, at this moment, [it was] one of the cases of Guatemalan Femicides in Impunity";[204]

b) On May 16, 2012, the Mixco Municipal Prosecutor's Office asked the Secretary General of the Public Prosecution Service to assign three investigators to the office in order to follow up on the case, because "the office no longer had the investigators who were working on it";[205]

c) On February 8, 2012, the Mixco Court of First Instance issued an order to end the investigation and gave the Public Prosecution Service eight days to rule in this regard. On February 23, 2012, the prosecutor asked the judge not to close the case and repeated this request in a hearing held on March 29, 2012,[206] and

d) On September 27, 2012, "an oral hearing to end the investigation" was held in which the Public Prosecution Service requested that the "proceedings continue with the investigation stage, because [a] statement [was] pending." The judge "decided that the request was admissible," and "set the date of December [3,] [2012,] for the hearing to end the investigation."[207]

VIII
RIGHTS TO LIFE, PERSONAL INTEGRITY AND PERSONAL LIBERTY, IN RELATION TO THE RIGHTS OF THE CHILD, AND THE OBLIGATIONS TO RESPECT AND ENSURE RIGHTS WITHOUT DISCRIMINATION, AND TO PREVENT VIOLENCE AGAINST WOMEN

A. Arguments of the Commission and of the parties

120. The Inter-American Commission indicated that respect for Article 4 of the Convention, in relation to Article 1(1) of this instrument, presupposes not only that no person may be deprived of his life arbitrarily, but also requires the States to adopt all appropriate measures to protect and preserve the right to life, and added that:

> Protection of the right to life is a critical component of a State's due diligence obligation to protect women from acts of violence, [and that this] obligation pertains to the entire State apparatus, and also includes any obligations the State may have to prevent and to respond to actions of non-State actors and private parties.

121. It also considered that the States must "have an appropriate legal framework of protection that is enforced effectively, and prevention policies and practices that allow effective measures to be taken in response to complaints." In this regard, it indicated that the Convention of Belém do Pará establishes obligations for the States "to adopt reasonable and diligent measures to prevent violence against women and girls, regardless of whether this occurs in the home, the community or the public sphere."

122. It also indicated that:

> In cases of violence against women, an obligation of strict due diligence arises with regard to reports of missing women, in relation to search operations during the first hours and days, [which] demands

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[204] *Cf.* Report of the Assistant Prosecutor of Agency No. 1 of the Mixco Municipal Prosecutor's Office of October 21, 2009 (file of annexes to the motions and arguments brief, tome I, annex 30, fs. 5,417 and 5,418).

[205] *Cf.* Note issued by the prosecutor of Agency No. 1 of the Mixco Municipal Prosecutor's Office of May 16, 2012 (file of annexes to the motions and arguments brief, tome I, annex 50, f. 5,473).

[206] *Cf.* Note dated March 21, 2012, from the prosecutor of Agency No. 1 of the Mixco Municipal Prosecutor's Office to the Mixco First Court (file of annexes to the motions and arguments brief, annex 120, fs. 12,660 and 12,661).

[207] Record of the hearing of September 29, 2012 to end the investigation (annexes to the brief with final arguments of the State, f. 14,729). In its answer, the State advised that "[o]n December 3, 2012, a hearing was held because the judge had summoned the parties in order to hold a hearing to end the investigation. Once again the Public Prosecution Service requested that the proceedings remain open because the investigation was ongoing."

> an immediate and effective response on the part of the authorities when complaints of disappearance are filed, to prevent adequately the violence against women.

123. The Commission also stated that "in cases of violence against girls, the State's duty to protect the right to life is particularly strict."[208] It affirmed that "States have the obligation to ensure that missing girls are found as soon as possible, once their family has reported that they are missing. Accordingly, it must set in motion all resources to mobilize the different institutions and to deploy domestic mechanisms to obtain information in order to locate the girls rapidly."

124. In this particular case it asserted that "the State had an enhanced duty to protect the rights of María Isabel Veliz Franco because she was a minor, and an obligation to adopt special measures of protection, prevention and guarantee." Specifically, it indicated that "given the fact that the State was aware that María Isabel Veliz Franco was in peril from the moment she was reported missing, its duty was to take immediate steps to search for her." It also affirmed that State authorities had told Rosa Elvira that "they could not receive her complaint because 48 hours had not passed since the disappearance" of her daughter. The Commission stressed that "no statement was taken from [Rosa Elvira Franco] that might have shed light on investigative leads to follow; no one went to the place where [María Isabel] was last seen alive; and the last persons to see her alive on the day of her disappearance and/or those persons closest to the victim were not interviewed."

125. Based on the foregoing, it concluded that the State has failed to show that reasonable measures were taken to find [María Isabel]." Furthermore, it underscored that "t]his failure to comply with the obligation to ensure rights is particularly serious in a context of violence against women and girls of which the State was aware." In addition, it considered that "the State did not show that it had adopted the norms or implemented the measures required under the Convention of Belém do Pará, to enable the authorities to offer an immediate and effective response to complaints of missing persons and adequately prevent violence against women at the time of these events." The Commission concluded that, consequently, the State had violated Articles 4, 5, 19 and 24 of the Convention, in relation to Article 1(1) thereof, and also Article 7 of the Convention of Belém do Pará.

126. The representative indicated that the "State failed entirely to comply with its obligation to prevent violations of the rights to personal liberty, integrity and life of the child, María Isabel Veliz Franco, despite its awareness of her situation of real and imminent danger." In this regard, it indicated that, in response to the complaint presented by María Isabel's mother, the State "failed to take a single measure to protect María Isabel and to prevent what happened." According to the representative, this "was particularly serious owing to the protection that the State was obliged to provide to María Isabel due to her condition as a minor and the increase in the murder of women recorded at the time of the events according to information provided by the National Police, the agency that received the report of her disappearance."

127. The representative also indicated that the "State failed to comply with its procedural obligations in relation to ensuring the rights to liberty, integrity, and life of the minor María Isabel Veliz Franco." In this regard, it argued that "the authorities in charge of the investigation have flagrantly violated the obligation of due diligence from the initial stages of the investigation."

128. Owing to the said "failure to comply with the obligation of prevention" and "failure to conduct an effective investigation into the events relating to [the] disappearance, ill-treatment and death" of María Isabel Veliz Franco, the representative affirmed that the

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[208] It added that "[t]his stems, on the one hand, from the broadly-recognized international obligation to provide special protection to children, due to their physical and emotional development. On the other, it is linked to the international recognition that the due diligence obligation of States to protect and prevent violence has special connotations in the case of women, owing to the discrimination they have historically faced as a group."

State had violated, to her detriment, Articles "7, 5 and 4 of the [American] Convention, together with [..] Articles 1(1), 2 and 19 of this instrument, and 7 of the Convention of Belém do Pará."

129. The State indicated that "the right to life is respected and ensured by […] Guatemala, because it is recognized in Guatemalan law, and in the policies of the Republic" and that Guatemala is "aware that the obligation of States to protect the right to life is both negative and positive." Accordingly, it indicated that it "has taken the pertinent measures to ensure the life of its population, giving everyone access to justice to obtain either safety or investigative measures from the Public Prosecution Service in order to prosecute anyone accused who it is possible to identify."

130. The State also indicated that, in the instant case, it had not violated the right to life of María Isabel Veliz Franco, because, "in compliance with its obligations to respect and protect the said right, and aware of the phenomenon of violence, it had established child welfare and protection institutions by law." In addition, it indicated that it "had […] created institutions that supervise and monitor the full enjoyment of human rights, as well as institutions to which recourse can be had in order to gain access to the system of justice." The foregoing is designed "to share supervision of respect for and guarantee of the rights of the child with parents and guardians […], paying special attention to safeguarding the respect for and guarantee of the right to life of María Isabel." It explained that:

> In principle, the family should provide the best protection of children against abuse, neglect and exploitation and, when the State was advised of María Isabel's disappearance, that was when its obligation to intervene in the direct protection of the child started, because her effective safeguard was no longer in the hands of her family, and the State had established adequate policies and measures for the mother to request the help of the State.

131. Guatemala also asserted that:

> If it had been possible to identify the person or persons responsible for the tragic result of María Isabel's disappearance, [it] would have applied the laws in force at the time the offense was committed in order to punish them; however, this has not been possible, despite the extensive efforts made by the investigating body […]; moreover, it is not possible to convict someone arbitrarily, even though the State repudiates what happened to the girl.

B. Considerations of the Court

132. The Court notes that the representative has alleged, *inter alia*, failure to observe Article 2 of the Convention American.[209] The Inter-American Commission did not indicate that this article had been violated in its submission brief or in the Merits Report. In this regard, the Court reiterates that "the presumed victims or their representatives may cite rights other than those included by the Commission, based on the facts presented by the latter."[210] The representative also alleged the violation of the rights to personal integrity and liberty recognized, respectively, in Articles 5 and 7 of the American Convention,[211] to the detriment of María Isabel Veliz Franco. The Court notes that, in relation to the initial petition lodged before the Commission, the alleged violation of these two articles to the detriment of the minor had been declared inadmissible in the respective Admissibility Report.

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[209] This article stipulates: "[w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

[210] *Cf. Case of the "Five Pensioners", supra*, para. 155, and *Case of the Pacheco Tineo Family v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 25, 2013. Series C No. 272, para. 22.

[211] The pertinent part of Article 5 of the American Convention establishes: "1. Every person has the right to have his physical, mental, and moral integrity respected." Article 7 of the Convention establishes: "1. Every person has the right to personal liberty and security. 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto."

Nevertheless, this was based on a *prima facie* assessment of the facts by the Commission. Later on, in the Merits Report, although it did not consider that Article 7 had been violated to the detriment of María Isabel, it concluded that she had been the victim of the violation of Article 5. In the instant case, in view of the grounds indicated by the Commission in the Admissibility Report, it is in order for the Court to examine the alleged failure to respect these norms.[212] In this regard, the Court finds it pertinent to make a joint analysis of the alleged violations of the rights to life,[213] personal integrity, and personal liberty, in relation to the rights of the child,[214] the right to equal protection of the law,[215] and the obligations to ensure the rights without discrimination,[216] to adopt domestic legal provisions, and to prevent, punish and eradicate violence against women.[217] This is because the specific circumstances of the events that occurred in this case reveal the interrelation of the said violations of different rights and obligations making it appropriate to examine them together.

B.1) Guarantee obligations

133. Based on the characteristics of the case *sub examine*, it should be noted that, with regard to children, the above-mentioned rights and obligations must be observed within the framework of compliance with Article 19 of the American Convention and, when pertinent, based on the provisions of the Convention of Belém do Pará. As the Court has stated on other occasions, Article 19 of the Convention establishes the right of "children to […] special measures of protection [that] must be defined in accordance with the particular circumstances of each specific case."[218] The Court has also indicated that "[a]doption of

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[212] In its decision on admissibility, the Commission considered "that the facts described [in the petition] do not provide sufficient grounds to characterize a violation of the right to personal integrity […], or the right to personal liberty […] with regard to María Isabel Veliz Franco." Despite this, the Commission also stated "that, at this stage of the proceedings, it is not incumbent on the Commission to determine whether or not the alleged violations occurred."

[213] The pertinent part of Article 4 of the American Convention establishes: "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. […]".

[214] Article 19 of the American Convention stipulates: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State."

[215] Article 24 of the American Convention establishes: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."

[216] Article 1(1) of the American Convention stipulates:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, "person" means every human being.

[217] Article 7 of the Convention of Belém do Pará indicates : "The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: (a) refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation; (b) apply due diligence to prevent, investigate and impose penalties for violence against women; (c) include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary; (d) adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property; (e) take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women; (f) establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures; (g) establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and (h) adopt such legislative or other measures as may be necessary to give effect to this Convention."

[218] *Case of Gelman v. Uruguay. Merits and reparations.* Judgment of February 24, 2011. Series C No. 221, para. 121, and *Case of Pacheco Tineo*, *supra*, para. 277.

[such] measures […] is a responsibility both of the State, and of the family, the community and the society to which the [child] belongs."[219] In addition, the Court has "reiterated that cases in which the victims of human rights violations are children are especially egregious"[220] because, "[o]wing to their level of development and vulnerability, they require protection that ensures the exercise of their rights within the family and society and with regard to the State."[221] Thus, the "[a]ctions taken by the State and by society regarding protection of children and promotion and preservation of their rights should follow [the criteria of the best interests of the child]."[222] Furthermore, Article 7 of the Convention of Belém do Pará, over which the Court has competence (*supra* para. 32), establishes the State's duties "to prevent, punish and eradicate violence [against women],"[223] which specify and complement the rights established in the American Convention, such as those established in Articles 4, 5 and 7.[224]

134. From the above it can be inferred that, in keeping with this normative framework concerning violence against women, the obligation to ensure rights acquires special significance in relation to girl children. This is so because the intrinsic vulnerability of childhood[225] may be enhanced, due to the fact that they are female. In this regard, it should be noted that girls are, as has been stated, "particularly vulnerable to violence."[226] The special significance mentioned translates into the State's obligation to act with greater and more rigorous diligence to protect and ensure the exercise and enjoyment of the rights of girl children in response to the fact or the mere possibility of their vulnerability in the presence of acts that actually or potentially involve gender-based violence or could result in this type of violence.

135. The obligation of prevention is one aspect of the obligation to ensure rights that, as the Court has stated:

> Includes all those measures of a juridical, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as wrongful acts that, as such, may lead to the punishment of those responsible, and the obligation to

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219 *Juridical Status and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 62, and *Case of Mendoza et al. v. Argentina. Preliminary objections, merits and reparations*. Judgment of May 14, 2013. Series C No. 260, *supra*, para. 141.

220 *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 146, and *Case of the Pacheco Tineo Family*, *supra*, para. 217.

221 *Cf. Juridical Status and Human Rights of the Child, supra*, para. 93, and *Case of Mendoza et al., supra*, para. 144.

222 *Cf. Juridical Status and Human Rights of the Child, supra*, para. 59, and *Case of Mendoza et al., supra,* para. 143.

223 Regarding the concept of "violence against women" established in the treaty, it is pertinent to refer to Article 3 of the Convention of Belém do Pará, which indicates the right of "[e]very woman to be free from violence in both the public and private spheres."

224 *Cf. Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs.* Judgment of November 25, 2006. Series C No. 160, para. 346, and *Case of Gudiel Álvarez (Diario Militar), supra*, para. 275.

225 The Committee on the Rights of the Child has indicated that "[a]t a universal level all children aged 0-18 years are considered vulnerable until the completion of their neural, psychological, social and physical growth and development." Committee on the Rights of the Child. General Comment No. 13: *The right of the child to freedom from all forms of violence*. UN Doc. CRC/C/GC/13, 18 April 2011, para. 72. María Isabel Veliz Franco, who was 15 years of age at the time of her disappearance and death, is considered to be a child, because neither the arguments nor the evidence provided to the Court reveal that domestic law provides for a different age of majority.

226 The Beijing Declaration and Platform for Action, adopted at the sixteenth plenary session of the Fourth World Conference on Women on 15 September 1995, para. 116. Similarly, the former United Nations Commission on Human Rights had stated that "some groups of women, such as […] the girl child, […] are especially targeted and vulnerable to violence." *Cf.* The elimination of violence against women. Resolution 1998/52 of the Commission on Human Rights. Fifty-second session, 17 April 1998, sixth preambular paragraph. More recently, the Committee on the Rights of the Child has indicated that "[b]oth girls and boys are at risk of all forms of violence, but violence often has a gender component." *Cf.* Committee on the Rights of the Child. General Comment No. 13: *The right of the child to freedom from all forms of violence*, *supra*, para. 19

> compensate the victims for the harm caused. […] Evidently, while the State is obliged to prevent human rights abuses, the existence of a specific violation does not, in itself, prove the failure to take preventive measures.[227]

136. The obligation of prevention has been indicated specifically with regard to women, and also girl children, since before 2001, and by instruments other than the Convention of Belém do Pará,[228] a treaty that expressly establishes this in the above-mentioned Article 7(b). In addition, girl children, including those who are adolescent, require special measures of protection.[229] The Court has already had the occasion to state, with regard to women and girls, that:

> The strategy of prevention must be comprehensive; in other words, it must prevent risk factors and also strengthen institutions so that these can respond effectively to cases of violence against women. Furthermore, States must adopt preventive measures in specific cases in which it is clear that certain women and girls may be victims of violence.[230]

137. Moreover, as the Court has indicated:

> It is clear that a State cannot be responsible for every human rights violation committed among private persons. Indeed, the States' treaty-based obligation to ensure rights does not entail an unlimited responsibility of States in the case of any act or fact of private persons, because its duty to adopt measures of prevention and protection for individuals in their interrelations is conditioned to awareness of a situation of real and imminent danger for a specific individual or group of individuals, and to the reasonable possibilities of preventing or avoiding that danger. In other words, even though an act or omission of a private person has the legal consequence of the violation of certain human rights of another private person, this cannot be automatically attributed to the State, because the

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[227] *Cf. Case of Velásquez Rodríguez. Merits, supra,* para. 175; *Case of González et al. ("Cotton Field"), supra*, para. 252, and *Case of Luna López v. Honduras. Merits, reparations and costs*. Judgment of October 10, 2013. Series C No. 269, para. 118.

[228] Thus, the Court has already noted that "CEDAW established that 'States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence and to provide compensation." (*Case of González et al. ("Cotton Field"), supra*, para. 254. The respective document was cited by the Court: "CEDAW, General Recommendation 19: Violence against women (Eleventh session, 1992), UN Doc. HRI\GEN\1\Rev.1 at 84 (1994), para. 9." In addition, article 4 of the Declaration on the Elimination of Violence against Women (adopted by the General Assembly of the United Nations at its eighty-fifth plenary meeting on 20 December 1993) indicates, *inter alia*, that "States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: […] (c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons." Furthermore, in 1995, the twenty-ninth paragraph of the Beijing Declaration, adopted at the sixteenth plenary session of the Fourth World Conference on Women on 15 September 1995, indicated the determination of Governments to "prevent and eliminate all forms of violence against women and girls." In addition, subparagraphs (b) and (d) of paragraph 124 of the Platform for Action indicate the obligation of Governments to adopt measures to prevent and investigate acts of violence against women, including when they are perpetrated by private persons. Guatemala took part in this Conference, and stated that it "did not accept […] any form of violence against women" and also that "the State has the obligation to protect women and to provide the conditions to ensure that they may enjoy their rights on an equal basis." *Cf.* Message of the President of the Republic of Guatemala, Ramiro De León Carpio to the Fourth World Conference on Women, *supra*. Furthermore, the United Nations Special Rapporteur on violence against women, its causes and consequences observed that customary international law establishes the State's responsibility for violations of human rights of women by private persons. (Inter-American Commission of Women (CIM) of the Organization of American States, the International Centre for Criminal Law Reform and Criminal Justice Policy (*ICCLR*), and the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD), Women, Justice and Gender Program: Violence in the Americas – A Regional Analysis Including a Review of the Implementation of the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará) Final Report, July 2001, p. 33. The document cites the following text: "Coomaraswamy, Radhika (1995). Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45. Geneva: United Nations Commission on Human Rights, fiftieth session (E/CN.4/1995/42)."

[229] The Committee on the Rights of the Child has indicated that "adolescents up to 18 years old are holders of all the rights enshrined in the Convention [on the Rights of the Child]; they are entitled to special protection measures." Committee on the Rights of the Child. General Comment No. 4: *Adolescent health and development in the context of the Convention on the Rights of the Child*. UN Doc. CRC/GC/2003/4, 21 July 2003, paras. 1 and 2.

[230] *Case of González et al. ("Cotton Field"), supra*, para. 258.

> particular circumstances of the case must be taken into account, and the implementation of the said guarantee obligations.[231]

138. In this case, there are two key moments at which the obligation of prevention must be analyzed. The first is before the disappearance of the presumed victim, and the second is before the discovery of her body.

139. Regarding the first moment – before the victim's disappearance – the Court, as it has in the past,[232] considers that the eventual failure to prevent the disappearance does not entail *per se* the international responsibility of the State because, even though it was aware or should have been aware (*supra* para. 79) of a situation where violent acts, including acts committed against women and even girl children, were perpetrated, it has not been established that it knew of a real and immediate danger for the victim in this case. Despite the fact that the context of this case and the "international obligations impose on the State an increased responsibility as regards the protection of women,"[233] especially girls, which includes the obligation of prevention (*supra* para. 136), the State does not have an unlimited responsibility in relation to any illegal act against them. Furthermore, regarding this first moment, the Court notes that, prior to December 2001, the State had implemented actions in relation to the problem of violence against women (*supra* para. 82).

140. In the instant case, the Court observes that the arguments of the representatives and the Commission related to the second moment indicated above; in other words, the time that elapsed between the report filed by Mrs. Franco Sandoval and the discovery of her daughter's body. Thus, they argue that the State was aware of a risk as of the report filed before the authorities by María Isabel's mother (*supr*a para. 93).

141. Regarding this moment – before the discovery of the body – it must be decided whether, in view of the particular circumstances of the case and the context in which they occurred, the State was aware that a real and immediate danger existed that María Isabel would be attacked and whether, consequently, an obligation of due diligence arose that, since it was more rigorous, required the implementation of a thorough search. In particular, the prompt and immediate action of the police, prosecution and judicial authorities is necessary ordering prompt and necessary measures aimed at discovering the victim's whereabouts. Adequate procedures should exist for reports and these should lead to an effective investigation from the very start. The authorities should presume that the missing person is still alive until the uncertainty about his or her fate has been resolved.[234]

142. Based on the above, in order to determine if the State is internationally responsible, the Court must decide whether, in this specific case, the girl was in a dangerous situation and whether, in this regard, the State, acting within its sphere of competence, could have adopted measures that could reasonably have been expected to prevent or to avoid that situation. To this end, the Court must assess: (a) whether the State was, or should have been, aware of the situation of real and immediate danger of María Isabel Veliz Franco;[235] (b) whether, being aware, it had a reasonable possibility of preventing or avoiding the perpetration of the crime and, if so,[236] (c) whether it exercised due diligence with measures or actions to avoid the violation of the rights of this child.[237]

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231 *Case of the Pueblo Bello Massacre v. Colombia.* Judgment of January 31, 2006. Series C No. 140, para. 123; *Case of González et al. ("Cotton Field"), supra*, para. 280, and *Case of Luna López, supra*, para. 120.

232 *Case of González et al. ("Cotton Field"), supra*, para. 282.

233 *Case of González et al. ("Cotton Field"), supra*, para. 282.

234 *Case of González et al. ("Cotton Field"), supra*, para. 283.

235 *Case of the Pueblo Bello Massacre, supra*, para. 123, and *Case of Luna López, supra*, para. 112.

236 *Case of the Pueblo Bello Massacre, supra*, para. 123, and *Case of the Afro-descendant Communities of the Cacarica River Basin (Operation Genesis) v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2013. Series C No. 270, para. 224.

237 *Case of Durand and Ugarte v. Peru. Merits.* Judgment of August 16, 2000. Series C No. 68, para. 122, and *Case of Mendoza et al., supra*, para. 214.

143. This analysis must be made taking into consideration what has been said about the State's duty to act with strict diligence to ensure the rights of girl children (*supra* para. 134). Also, as established by this Court's case law, in order to determine that a violation of the rights recognized in the Convention has occurred, it is not necessary to prove the State's responsibility beyond any reasonable doubt or to identify individually the agents to whom the violations are attributed;[238] rather it is sufficient to prove that acts or omissions have been verified that have allowed the perpetration of these violations or that, with regard to them, the State had an obligation which it has failed to meet.[239]

B.1.1. Existence of a dangerous situation for María Isabel Veliz Franco

144. Having established the foregoing, it should be underlined that it must be assumed as a real possibility that, when the State became aware of the disappearance of María Isabel Veliz Franco, she was alive and in great danger. In this regard, the body of evidence does not reveal that the time of her death was determined during the investigation, and the only indications in this regard suggest that she had not died before 4 p.m. on December 17, 2001, when the PNC Investigation Service formally received the report presented by the girl's mother (*supra* para. 95). To the contrary, inconclusively, the existing evidence indicates that she died during the early hours of December 18, 2001 (*supra* para. 98 and 111).

145. In addition, given the characteristics of the events and the circumstances in which the body was found, it can be assumed that María Isabel Veliz Franco suffered ill-treatment before she succumbed to a violent death. Nevertheless, there is no conclusive evidence that she remained deprived of liberty prior to the moment at which she suffered the acts that resulted in her death. Therefore, the Court finds no evidence to justify the arguments connecting acts or omissions by the State to the alleged violation of her right to personal liberty protected by Article 7 of the American Convention.

146. In relation to the State's awareness of this dangerous situation, it is necessary to consider the particular circumstances of the case as regards the way in which the State was informed of the relevant facts. The proven facts reveal that, based on the report filed by Rosa Elvira Franco on December 17, 2001, the authorities knew that María Isabel was missing and that almost 20 hours had passed, including a whole night, since the time at which she should have returned home. They also knew, owing to this report, that the girl's mother had already looked for her unsuccessfully. Mrs. Franco Sandoval had also indicated that, according to the information she had been able to obtain, it was probable that, during the evening of the day before the report, her daughter had met up with a man who she (Rosa Elvira Franco) did not know, but only had suggestions about his possible name.

147. Based on the account given in the report filed by Mrs. Franco Sandoval, and also considering that María Isabel was a girl child and that, as indicated (*supra* para. 74), the incident took place during a time when the annual figures for homicidal violence in Guatemala were increasing more that the population growth, the Court concludes that the State authorities should have understood the events reported by Rosa Elvira Franco as an indication that the child's rights would probably be violated. Even though this report did not indicate explicitly that María Isabel had been the victim of an illegal act, it was reasonable to infer that she was in danger. The Court understands that, in the context of the strict due diligence that the State should observe in order to ensure the rights to life and to personal integrity of girl children (*supra* para. 134), in the circumstances of the case, the information provided by Rosa Elvira Franco should have been considered an indication of the real possibility that María Isabel's life would be in danger in order to implement preventive actions.

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238 *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits*. Judgment of March 8, 1998. Series C No. 37, para. 91, and *Case of J., supra,* para. 305.

239 *Cf. Case of Velásquez Rodríguez. Merits, supra*, para. 173, and *Case of Luna López, supra*, para. 118.

148. In this regard, it should be noted that, in July 2001, the United Nations Committee on the Rights of the Child stated with regard to Guatemala that it was "deeply disturbed by information that violence against children is increasing," and recommended to Guatemala that it "take, as a matter of the highest priority, all the necessary steps to prevent these serious violations of children's rights and to ensure that they are properly investigated."[240]

149. In view of the context in which the events of the case occurred, the fact that María Isabel was female is a factor in the above-mentioned conclusion. Thus, as indicated (*supra* para. 81), in December 2001, in the context of the increase in the number of murders, the occurrence of the murder of women for reasons of gender was not exceptional. In this regard it should be emphasized that, in April 2001, the Inter-American Commission issued a report in which it expressed its concern due to the gender-based violence in Guatemala. On that occasion, the Commission also made recommendations to Guatemala in order to achieve for the "victims" of gender-based violence," an increase in "the sensitivity and effectiveness of the response" of "the officials" who "were responsible for receiving the complaints," "particularly [of] the National Civil Police and of the Public Prosecution Service."[241]

150. The insufficiency of statistical information on violence against women has even been indicated by the Coordinating Body for the Prevention, Punishment and Eradication of Family Violence and Violence against Women (CONAPREVI), a State entity (*supra* para. 71, and *infra* footnote 244). This does not necessarily signify that the State was unaware of this context in December 2001, because the evidence includes relevant data, from both State databases and those of State entities, as well as the ruling of an international agency working in this area (*supra* paras. 76 and 79). Furthermore, prior to 2001, the State had adopted measures relating to the situation and to discrimination against women, and the creation of CONAPREVI in November 2000 (*supra* footnote 93) was especially relevant for the problem of violence against women. In addition, despite what CONAPREVI indicated, Guatemala has reported that it had agencies created before December 2001 whose functions included "monitoring the implementation" of the Convention of Belém do Pará.[242]

151. In addition, it should be pointed out that, even before December 2001, the State had the obligation to take the necessary measures to obtain sufficient information on the situation of the rights of girl children in Guatemala, at least at the minimum level required to be able to meet satisfactorily its obligations at that time. Because it is evident that in order to comply satisfactorily with the obligations established in Articles 1(1) and 2 of the American Convention, States must obtain pertinent information on the situation of the treaty-based rights, since this is necessary to be able to evaluate the measures or actions that must be taken. This is relevant in relation to the rights of girl children.[243] It also

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[240] Concluding observations of the Committee on the Rights of the Child: Guatemala. Twenty-seventh session CRC/C/15/Add.154, 9 July 2001, paras. 30 and 31.

[241] IACHR, Follow-up Report on the compliance by the State of Guatemala with the recommendations made by the Commission in the Fifth Report on the Situation of Human Rights in Guatemala, of December 18, 2002, para. 53.

[242] In response to the question posed by MESECVI of whether "[a] domestic mechanism has been established to follow up on the implementation of the Convention of Belém Do Pará," the State reported that "[p]ursuant to article 13 of the Law to Prevent, Eradicate and Punish Family Violence, Decree 97-96 of the Congress of the Republic, the Attorney General's Office is the entity responsible for monitoring compliance with the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women. According to article 11(c) of the regulations to the Law to Prevent, Eradicate and Punish Family Violence, Government decision No. 831-2000, the Coordinating Body for the Prevention, Punishment and Eradication of Family Violence and Violence against Women [(CONAPREVI)], is responsible for monitoring compliance with the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women." Convention of Belém do Pará. MESECVI-II/doc.31/08. Second Conference of States parties. June 24, 2008. Doc. OEA/Ser.L/II.7.10, pp. 56 and 57.

[243] The Committee on the Rights of the Child has said that the implementation of the Convention on the Rights of the Child requires "rigorous monitoring" and, *inter alia,* the elaboration of a "rights-based national strategy, rooted in [that] Convention," and that this "strategy will need to include arrangements for monitoring and continuous review, for regular updating and for periodic reports to parliament and to the public." It has also stated

corresponds to the "measures of protection" that Article 19 requires the State to take with regard to children. Regarding the State's duties in relation to dealing with violence against women, the said obligation is also clear in the sphere of application of the Convention of Belém do Pará.[244] Hence, it is also necessary in order to implement the measures and "policies" referred to in Article 7 of this treaty. Furthermore, the said obligation to obtain relevant information also arises from the stipulations in the respective treaties in relation to the international mechanisms to monitor the situation of different rights. Thus, the American Convention and the Convention of Belém do Pará, independently of the system of individual petitions, establish in their Articles 41 to 43, and 10, respectively, the submission by the States of reports to international bodies. This is also true of other international treaties in force and to which Guatemala is a party, such as the Convention on the Rights of the Child (article 44);[245] the Convention on the Elimination of All Forms of Discrimination against Women (article 18), and the International Covenant on Civil and Political Rights (Article 40).

152. Evidently, it is not for the Court to evaluate whether Guatemala collected and systematized information regarding the situation of children's rights, or whether the information that the State possesses is sufficient and appropriate to comply with its obligations. In terms of what concerns the Court and is pertinent for the analysis of the case *sub examine,* it is sufficient to note that the State has the duty to collect the basic information required to comply with its treaty-based obligations in relation to the rights of girl children and, in order to ensure such rights, it has an obligation to act with the greatest and most rigorous due diligence. Consequently, when there are clear indications of the existence of the said context and that the State was aware of it, the eventual lack of sufficient State information cannot adversely affect the binding nature of the above-mentioned obligation to ensure rights. In this regard, the considerations mentioned above (*supra* paras. 73 to 81) reveal that, in December 2001, a context existed of an increase in violent criminality in Guatemala, including the murder of women, and there is evidence that the State knew about this.

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that "collection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realization of rights, is an essential part of implementation [of the treaty]." Committee on the Rights of the Child. General Comment No. 5: *General measures of implementation of the Convention on the Rights of the Child*. UN Doc. CRC/GC/2003/5, November 27, 2003, paras. 27, 28, 33 and 48. Then, on June 2000, the General Assembly of the United Nations established a special Ad Hoc Committee to examine the evaluation of the progress made in the implementation of the Beijing Platform for Action. This Committee reaffirmed the commitment to the goals and objectives adopted in Beijing and indicated that Government should "continue to undertake research to develop a better understanding of the root causes of all forms of violence against women in order to design programmes and take measures towards eliminating those forms of violence." Report of the Ad Hoc Committee of the Whole of the twenty-third special session of the General Assembly. General Assembly. Official records. Twenty-third special session. Supplement No. 3 (A/S-23/10/Rev.1).

[244] In this regard, the Follow-up Mechanism on the Convention of Belém do Pará (MESECVI), has indicated with regard to Guatemala, in relation to the monitoring of the implementation of the Convention of Belém do Pará that: "[t]he greatest obstacle is the lack of well-organized information as required by the Mechanism; specifically in the first section on the chapter about Information and Statistics." It also stated that, when it was asked about "femicide," Guatemala forwarded a "report [that] shows a statistical table by type of crime. The figures seem too low compared to the actual situation, and the table does not show figures for killings of women or femicides. […] Practically all agencies fail to submit the requested data, holding that they have the information but have not processed it, or their information is not public." Convention of Belém do Pará (MESECVI). MESECVI-II/doc.31/08. Second Conference of States parties, *supra*, pp. 56 and 57.

[245] It is worth pointing out that, in 1994, the Committee on the Rights of the Child drew up guidelines for the presentation of the 1994 State reports. *Cf.* Committee on the Rights of the Child. Seventh session. "Overview of the reporting procedures." UN Doc. CRC/C/33. 24 October 1994. In July 2001, the same Committee expressed, with regard to Guatemala, its "concern that the collection of data is still focused on health and education and does not include all areas covered by the Convention [on the Rights of the Child]. It "recommend[ed] that the State party continue to develop a system to collect data and indicators reflecting the provisions of the Convention [on the Rights of the Child], disaggregated by gender, age, indigenous and minority groups, urban or rural area. This system should cover all children up to the age of 18 years, with specific emphasis on those who are particularly vulnerable." Concluding observations of the Committee on the Rights of the Child: Guatemala. Twenty-seventh session, 09/07/2001. CRC/C/15/Add.154, paras. 16 and 17.

153. Furthermore, this context, or at least its general aspects, cannot be separated from the general impunity existing in the country (*supra* para. 83). Consequently, the existence of this circumstance is an additional factor that contributes to the State's awareness of a situation of risk.

154. Based on the above, the Court concludes that, as of the official report filed by Rosa Elvira Franco Sandoval, the State was aware of the dangerous situation of her daughter, María Isabel Veliz Franco. The State also knew, or should have known, that it was possible that the events described in the complaint were inserted in a context that increased the possibility of harm to the rights of that girl child.

B.1.2. Possibilities of a diligent action by the State to prevent the risk and its implementation

155. Added to the foregoing, it has been established that there was a real possibility that María Isabel Veliz Franco was alive when her mother reported her disappearance to the authorities (*supra* para. 144). The lack of certainty in this regard can also be attributed to the State's failure to determine the precise time of her death during the investigation. After receiving the report, and until the discovery of the body, the State did not take any substantive action to investigate what had happened or to avoid possible violations of the girl's rights. In view of the uncertainty that existed at that time about María Isabel Veliz Franco's situation, and in view of the risk that she ran, it was urgent to act diligently to ensure her rights.[246]

156. This conclusions is not changed by the State's arguments concerning the guarantee of the right to life by its legal recognition, by regulation of the "mechanisms of paternal authority and guardianship" and by access to justice. The Court notes that the legal recognition of the right to life is, indeed, of fundamental importance, as well as the regulation of paternal authority and guardianship in relation to, *inter alia*, the rights of girl children.[247] Despite this, States are not exempted from taking other necessary measures, in keeping with the circumstances, to ensure these rights.[248] As the State itself has noted, it was when the State was advised of María Isabel's disappearance that its obligation to intervene in her direct protection began.

157. Regarding access to justice, the representative has indicated that the State failed to comply with its "procedural obligations" in relation to the rights of María Isabel Veliz Franco owing to the lack of due diligence in the investigation since the outset, which has resulted in the above-mentioned facts remaining unpunished. Moreover, this includes the State's actions in the initial hours following the report of the child's disappearance. As regards the other measures taken during the investigation, these will be considered when analyzing the alleged violations of the rights to judicial guarantees[249] and judicial protection[250] in the case (*infra* para. 178 to 226).

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246 In this regard, the Court has indicated that following a report of a disappearance or kidnapping, States must act promptly during the first hours and days. *Cf. Case of González et al. ("Cotton Field"), supra*, para. 284, and *Case of Palma Mendoza et al. v. Ecuador. Preliminary objection and merits*. Judgment of September 3, 2012. Series C No. 247, para. 91.

247 In this regard, the Court has asserted that "States Parties undertake to ensure children such protection and care as is necessary for their well-being, taking into account the rights and duties of their parents, legal guardians, or other individuals legally responsible for them and, to this end, shall take all appropriate legislative and administrative measures." *Cf. Juridical Status and Human Rights of the Child*, *supra*, para. 63.2.

248 The Court has indicated that "[i]n principle, the family should provide the best protection of children against abuse, abandonment and exploitation. And the State is under the obligation not only to decide and directly implement measures to protect children, but also to favor, in the broadest manner, development and strengthening of the family unit." Nevertheless, on the same occasion, the Court asserted that the State, also, must provide measures of protection for children and implement them directly. *Cf. Juridical Status and Human Rights of the Child. Advisory Opinion OC-17/07, supra,* para. 66.

249 Article 8(1) of the Convention stipulates:

B.2) Conclusion

158. Based on the above, the Inter-American Court concludes that Guatemala violated its obligation to ensure the free and full exercise of the rights to life and to personal integrity recognized in Articles 4(1) and 5(1) of the American Convention, in relation to the rights of the child established in Article 19 of the Convention and to the general obligation to ensure rights without discrimination, established in Article 1(1) of this instrument, as well as the obligations contemplated in Article 7(b) of the Convention of Belém do Pará, to the detriment of María Isabel Veliz Franco.

IX
JUDICIAL GUARANTEES, EQUAL PROTECTION AND JUDICIAL PROTECTION, IN RELATION TO THE GENERAL OBLIGATION TO RESPECT AND ENSURE RIGHTS AND TO ADOPT DOMESTIC LEGAL PROVISIONS, AND TO THE OBLIGATION TO PREVENT, PUNISH AND ERADICATE VIOLENCE AGAINST WOMEN

A. Arguments of the Commission and of the parties

159. In its Merits Report, the Commission indicated that the Convention of Belém do Pará "stipulates that the obligation to act with due diligence, has a special connotation in cases of violence against women," and its Article 7 establishes a series of immediate and supplementary State obligations in order to achieve effective prevention, investigation, punishment and reparation in cases of violence against women. The Commission also referred to the judgment in the case of *González et al. ("Cotton Field"),* which indicated that "the lack of due diligence that leads to impunity engenders further incidents of the very violence that was to be targeted, and is itself a form of discrimination in access to justice." In the instant case, it stated that "[w]hile the State has taken and continues to take measures, it has not complied with its obligation to act with due diligence to identify the persons responsible for the disappearance and murder of María Isabel Veliz Franco. Thus, no one has been made to answer for this act of violence, which has the effect of creating a climate conducive to chronic recidivism of acts of violence against women."

160. The Commission argued that, from the time the report that María Isabel was missing was presented, the State authorities did not act with due diligence to investigate her disappearance and subsequent death as a case of gender-based violence, contrary to the obligations imposed by the Convention of Belém do Pará in this type of case. It considered that this lack of due diligence represented a form of discrimination, as well as a violation of the right to equal protection. It indicated that, despite the efforts made by the State in recent years to address the problem of violence against women, "at the time the events occurred, the State had not adopted the necessary measures and policies, in keeping with the obligations it undertook upon its ratification of the Convention of Belém do Pará, to ensure effective investigation and punishment of violent acts committed against the women of Guatemala."

161. It stated that, in this case, a series of irregularities occurred during the investigation into the disappearance and subsequent death of María Isabel owing to the lack of due

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Every person has the right 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 nature.

[250] Article 25(1) of the Convention establishes:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his 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.

diligence, and referred to the facts of the case.[251] It also indicated that the authorities should have preserved specific evidence if rape was suspected in keeping with the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions; hence the State had not complied with the minimum standards established in this Manual and by the case law of the Court. In addition, it mentioned that, in the proceedings before the Commission, the State had acknowledged its responsibility "for the lack of due diligence in the investigation into the death of María Isabel Veliz Franco, specifically by virtue of its failure to conduct certain forensic tests on the body, the unwarranted delay in the investigation caused by the dispute over jurisdiction, and because no effective precautionary measure was taken to secure the presence of [the] suspect in the murder." In this regard, it underscored that, for nine months, from March to December 2002, the investigation was brought to a halt owing to a jurisdictional dispute among the authorities.

162. The Commission also indicated that the attitudes of the State officials, as reflected in their behavior toward Rosa Elvira Franco, are evidence of stereotyping and would have contributed to the lack of due diligence in the investigation. The Commission concluded that, "in the instant case, the State failed to comply with its duty to act with due diligence to conduct a proper investigation of the facts surrounding the death of María Isabel Veliz Franco, to punish those responsible, and thereby avoid impunity" in violation of Articles "7 of the Convention of Belém do Pará in relation to Article 24 of the American Convention, together with […] Article 1(1) of this international instrument," as well as in violation of Articles 8(1) and 25 of the Convention, in relation to Articles 1(1) and 24 of this treaty to the detriment of her family members.

163. The representative indicated that main errors and omissions of the authorities in the investigation into what happened to María Isabel Veliz Franco relate to the stigmatization of the victim. In this regard, it referred to this Court's case law and considered that the guidelines established in cases of violence against women such as this one "constitute irrevocable standards to ensure access to justice for women and girls." The representative also referred to the report of the Inter-American Commission on "Access to Justice for Women Victims of Sexual Violence in Mesoamerica," and to various experts and international organizations[252] that have documented the problem of sexual violence, prejudices and discriminatory stereotypes that tend to make the judicial response biased. It considered that the investigation into what happened to María Isabel was paradigmatic in relation to [such] practices, as well as the consequences that they have for the investigation and punishment of those responsible." It added that "the discriminatory bias with which the investigators in this case acted resulted in the inquiry into María Isabel's death being considered a very low priority, which was reflected in the negligent way in which the initial steps were taken, and the numerous acts and omissions of the authorities that, to date, have resulted in the facts remaining in the most absolute impunity."

164. The representative asserted that the other error was that the State "did not act with

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[251] Among others, relating to the removal of the body, in the site inspection report which indicates that the crime scene had already been contaminated, that the inspection was not conducted with the necessary rigor, as important details are missing about how the body was found, the condition of the clothing, and whether there were bloodstains, fibers, threads or other clues. The inspection report does not say whether the site was examined for footprints or any other relevant evidence; nor does it indicate the measures taken by the investigators and the nature of the evidence collected. The police report documented that there was a large black plastic bag, but this was not reported by the Assistance Prosecutor; the chain of custody of the evidence was not respected; there were contradictions and omissions in the description of the position of the body; the autopsy was incomplete and did not indicate the means, place and time of death; if rape was suspected, specific evidence was not preserved; there was no follow up on a telephone call made by an anonymous informant who provided information on the murder, and it was not until July 18, 2003, that a building was searched; the report of the calls made from the telephone that María Isabel was carrying was not examined diligently, and the testimony of witnesses was not obtained promptly.

[252] Namely: Inter-American Commission of Women (CIM), the International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR), and the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD), and Amnesty International.

due diligence in investigating the facts"; but rather "incurred in acts and omissions that led to the loss of useful – and, in some case, essential – evidence to determine the truth of what happened, which cannot be reconstituted." It indicated that the State incurred in irregularities in the preservation of the scene where the body was discovered; that the investigation failed to collect and handle the evidence properly; committed omissions and irregularities in conducting essential appraisals, and has not examined all the violations committed against María Isabel, because "it only examined the [presumed] victim's murder, even though the body had injuries and showed other signs indicating that she could have been a victim of sexual abuse. The complete failure to investigate the acts of sexual violence and cruelty to the child […] is especially egregious owing to the context in which the facts of this case are inserted." Lastly, it argued that "[t]his omission not only prevents the eventual punishment of those responsible in keeping with the gravity of their actions, but also sends a clear message that the State tolerates violations of the integrity of women and this have no consequences for the perpetrators."

165. The representative also stated that the proceedings were not conducted within a reasonable time, because the events took place in December 2001, and more than 10 years had passed without anyone having been prosecuted. It acknowledged that "this case is rather complex, [but that] the delay must be attributed totally to the State […] owing to the acts and omissions of its agents at the start of the investigation, which had an adverse impact on the possibilities of obtaining essential evidence that could not be reconstituted" and who, subsequently, "took measures that led to additional delays, with the result that the proceedings are still at the investigation stage." It also asserted that María Isabel's mother "has not only cooperated with the investigation, but the case file shows [that] she has suggested and contributed evidence to the proceedings and has taken numerous steps to advance it ever since the events occurred." It indicated that, to the contrary, the conduct of the authorities "has been characterized by periods of inaction, the implementation of belated and reactive measures, and by the mechanical reiteration of procedures without an investigation plan or well-defined hypotheses." Thus, among other matters, it indicated that a jurisdictional dispute arose only three months after the events had occurred, "on March 11, 2002, that was only decided in December 2002, seven months later." This contributed to the fact that the authorities did not take essential steps until months or even years later, leading to a delay in the proceedings at, at times, causing the measures taken to be unsuccessful. The representative concluded that the delay in the investigations can be attributed solely to the actions of the State.

166. The representative also mentioned that the analysis of the calls to María Isabel's mobile telephone "was only made in June 2005, [… and] most of the statements made before the Public Prosecution Service and the other evidence […] were obtained months or years after [María Isabel's murder], reducing the possibility of clarifying what happened." It also argued that "the measures [implemented] were only taken in order to show procedural activity, because the interviews conducted by the authorities were not thorough, and there is no evidence that they were the result of a pre-defined line of investigation."

167. The representative indicated that, in keeping with the Court's standards, the investigation undertaken by the State should have "included a gender perspective;[253] follow up on specific lines of investigation relating to sexual violence, including lines of investigation on the respective patterns in the geographical area, […], and should have been carried out by officials who were highly trained in similar cases involving victims of discrimination and gender-based violence."

168. Lastly, the representative referred to the failure to sanction the public authorities responsible for the irregularities in the processing of the domestic proceedings in this case. It indicated that the failure to investigate this conduct "causes […] concern because, during the international proceedings, the State has acknowledged some of these errors, and this

[253] The representative did not make an individual analysis of Article 7 of the Convention of Belém do Pará, but referred to this article together with several articles of the American Convention.

has not led to any action to sanction those responsible and to prevent their repetition within the framework of the problematic context of violence against women that exists in Guatemala." It added that no investigation was undertaken even though "the Ombudsman issued a decision determining that there had been a violation of due process and holding the prosecutors in charge of the case directly responsible."

169. Based on the above, the representative asked the Court to declare the State responsible for the violation, to the detriment of the next of kin of María Isabel Veliz Franco, of the rights contained in Articles 8 and 25 of the American Convention and of non-compliance with the obligations contained in Article 1(1) of this instrument, and Article 7 of the Convention of Belém do Pará, because it had not investigated the different irregularities incurred by the authorities in charge of the investigations. It also argued that Articles 4, 5, and 7 of the American Convention "had been violated to the detriment of María Isabel Veliz Franco, in relation to non-compliance with the obligations contained in Articles 1(1), 2 and 19 of this instrument, and 7 of the Convention of Belém do Pará."

170. The State indicated that it cannot be accused of omission or lack of diligence in the investigation, because "the case files […] and the facts investigated show […] that numerous steps have been taken to clarify the events; [n]evertheless, […] it has not been possible to advance towards the trial established in Articles 8 and 25 of the [Convention], because it has been impossible to attribute the abduction and subsequent death of María Isabel to any specific individual." It also indicated that "if the State should bring charges against anyone, or against any of the suspects indicated by [María Isabel's] mother, the accusation would be arbitrary and illegal" because "the State cannot prosecute unless it can substantiated its charges on sound factual grounds." It also reiterated that "the State, through its investigating agency, […] has done everything possible to clarify the events and it has never denied [the members of María Isabel's family] access to the relevant information or legal remedies."

171. Furthermore, regarding the supposed irregularities in the preservation of the scene where the body was found, and the improper collection and handling of evidence, the State explained that, during the processing of the case before the Commission, it had acknowledged its international responsibility for the lack of due diligence owing to some omissions in the investigation. However, it indicated that "at the time of the events, the examinations carried out on the corpses of both men and women were performed in accordance with the procedures requested by the prosecutors and judges at that time and, according to [the] possibilities." The State added that "with the passage of time, the State has been overcoming these shortcomings over the last 10 years, adopting a series of measures that, today, make the procedure for recovering a corpse and the way in which evidence is collected more uniform and methodical"; consequently, it cannot be held internationally responsible for "failing to collect evidence that can only be obtained since the creation of the National Institute of Forensic Science" in 2007. The State explained that "at the time of the facts [of the case, in December 2001,] there were no specific laws or procedures for cases of violence against women, but [by December 2012] these had been established."

172. In its final written arguments, the State indicated that the autopsy performed on María Isabel established that the main cause of death was "the trauma to the cranium" and several examinations were performed: "an external examination establishing the injuries revealed by the corpse; an examination of the cranium, of the cervical and thoracic organs, and of the thorax, abdomen and genital region, where it was established that these were normal, which did not reveal rape." It indicated that, in 2001, the laws in force did not establish autopsy guidelines or protocols, so that "each autopsy was carried out according to the criteria and requests of the prosecutors" in charge of the investigation, above all in order to "identify [… the] corpses and [establish the cause of] death." Also, at that time, "only an external examination of the body was carried out," "based only on a visual procedure." "No pre-established circumstances had been defined in which forensic physicians were obliged to perform tests for sexual violence." It added that, "in the cases in which other tests were performed, this was because the prosecutors in charge of the

investigation into the death had requested them." Even though some forensic tests were not performed, the autopsy was carried out, and also luminescence tests with ultraviolet lamp and acid phosphatase test, a biological analysis of the underwear and of two towels, which identified the presence of blood and hairs, but did not find semen, and the procedure of comparing the hairs has not been carried out, because the presumed perpetrator has not been identified.

173. Despite what it had indicated in the proceedings before the Commission (*supra* para. 19), the State denied that it had incurred in an unjustified delay in the investigations due to the jurisdictional dispute, because this was "legitimate under domestic law and must be decided by the Supreme Court of Justice"; moreover, "it was not that the judges responsible for overseeing the investigation did not want to supervise it, but rather they must be authorized and competent to do so." It emphasized 'that the obligation of the Public Prosecution Service is to conduct an objective investigation, and although investigations take time, despite the said jurisdictional dispute, the investigation has progressed over time." It also indicated the different steps taken while the "interlocutory issue" was underway and, therefore, stressed that this lapse "does not mean that the State did not obtain any evidence at that time."

174. The State also asserted that arguing the violation of Article 7 of the Convention of Belém do Pará "is meaningless, because the State […] condemns all forms of violence against women and has attempted to adopt policies guided by the principles of the relevant legal norms promptly and using all appropriate means." It argued that both the Commission and the representatives are seeking to attribute María Isabel's death to [the State] based on an omission; however, it rejected this accusation, because "the State bodies responsible for investigating her whereabouts, did this."

175. The State argued that, "although it does not accept or in any way approve of violence against women, not all crimes committed against individuals of the female gender are perpetrated against them because they are women." Specifically, it indicated that, in the instant case, neither the Commission nor the representatives had proved or even stated "that María Isabel disappeared and was murdered because she was female." Accordingly, it asked the Court to "rule in this regard because, even though the case relates to someone's life, there is no evidence that those responsible killed her because she was female."

176. With regard to the accusations that the investigation was conducted in a biased and discriminatory manner, the State asserted that "there is no record anywhere that the authorities acted arbitrarily in this regard; [t]o the contrary, they have performed their work within the framework of the law in force at the time of the events." In addition, regarding the allegations of the representatives and the Commission that the reports drawn up by the authorities contained some biased or discriminatory statements, it indicated that these were made by third parties, who "stated what they knew and provided the information that, in their opinion, was necessary" and that, therefore, "it is clear that the officials in charge of the investigation had never attacked the honor and dignity of the victim or dealt with the case on an unequal footing because the victim was a woman, and they have not discriminated against her mother on that basis." It added that "in no way had María Isabel been afforded an unequal treatment because she was a female victim, or because she was a girl." The State also maintained that neither had it accorded the presumed victim's mother unequal treatment in her search to obtain justice, and that the latter had freely exercised all her rights with the full equal protection of the law, even though the result of the investigation had not been satisfactory.

177. Regarding the allegation that the State had not investigated or sanctioned the respective public officials, it indicated that "although Mrs. Franco Sandoval has expressed her disagreement with the proceedings and with the persons in charge of the corresponding entities, this does not mean that the matter was not investigated to determine whether any sanction was in order." It repeated that the State agents "acted in keeping with the law in force at the time the events occurred and, consequently, these persons cannot be reproached for the way in which they performed their task."

B. Considerations of the Court

178. The Court has already determined that, even though it cannot be asserted that every murder of a woman that occurred at the time of the events was gender-based, it is probable that this was true of María Isabel's murder based on how the girl's body was found. Indeed, it has been said that women victims of gender-based murder frequently show signs of cruelty during the violence perpetrated against them, as well as signs of sexual abuse or mutilation (*supra* para. 78). In line with these characteristics, María Isabel's body was found with clear signs of violence, including signs of strangulation, a wound to the head, a cut on one ear and bites on her upper arms; her head was covered by towels and a plastic bag, and she had food in her mouth and nose (*supra* para. 99); in addition, the bottom part of her blouse and underpants were torn (*supra* para. 110). This is relevant and sufficient for applying Article 7 of the Convention of Belém do Pará to the case.[254] It should be noted that the lack of absolute certainty in this regard is a result of the failure to complete the domestic investigation, as well as the way in which, to date, this has been conducted. Thus, for example, significant elements, such as the presence of sexual violence in the incident, has not been determined with certainty (*supra* para. 111 and *infra* para. 196.b).

179. The Court also finds it relevant to recall its case law with regard to the criteria applicable to the assessment of the evidence in a case. Since its first contentious case, this Court has indicated that, for an international court, the criteria for assessment of evidence are less strict that under domestic legal systems, and has maintained that it may assess the evidence unreservedly. The Court must assess the evidence in a way that takes into account the significance of attributing international responsibility to a State and that, despite this, is able to establish conviction about the truth of the alleged facts.[255]

180. With regard to the alleged impediments to the correct implementation of certain procedures at the time of the events (*supra* para. 171), the Court recalls that it is a basic principle of international law, supported by international jurisprudence, that States are bound to observe their treaty-based obligations in good faith (*pacta sunt servanda*) and, as this Court has already indicated and as established in Article 27 of the 1969 Vienna Convention on the Law of Treaties, States may not invoke the provisions of their internal law as justification for failure to do so.[256] Hence, the State cannot excuse failure to comply with its obligation to investigate with the due diligence by affirming that, at the time of the events, there were no laws, procedures or measures for conducting the initial investigative measures properly in keeping with the standards of international law that are evident in the applicable treaties in force at the time of the events, and that this Court has indicated in its case law (*infra* para. 188 and 189). Nevertheless, the Court has noted that Guatemala has

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[254] Article 1 of the Convention of Belém do Pará defines violence against women as "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere." The Court has stated that "CEDAW […] has indicated that '[v]iolence against women is a form of discrimination that creates a significant impediment to their enjoyment of rights and freedoms on an equal footing with men." *Case of González et al. ("Cotton Field"), supra*, paras. 143, 401 and 395. Furthermore, the Court has also indicated that "not every violation of a human right committed against a woman necessarily results in a violation of the provisions of the Convention of Belém do Pará." *Case of Ríos et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of January 28, 2009. Series C No. 194, para. 279. This does not mean that, in relation to the investigation of acts committed against women, application of the Convention of Belém do Pará depends on the absolute certainty about whether or not the act to be investigated constitutes violence against women in the terms of that Convention. In this regard, it should be stressed that it is by compliance with the duty to investigate established in Article 7 of the Convention of Belém do Pará that, in different cases, certainty can be reached on whether or not the act investigated constituted violence against the woman. Consequently, compliance with the obligation cannot be made dependent on this certainty. Consequently, it is sufficient that the act in question has material characteristics that, reasonably considered, indicate the possibility that it was an act of violence against a woman in order to give rise to the obligation to investigate in the terms of the Convention of Belém do Pará,

[255] *Cf. Case of Velásquez Rodríguez. Merits, supra,* paras. 127, 128 and 129, and *Case of J., supra*, para. 305.

[256] *Cf. International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights).* Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 35, and *Case of J., supra*, para. 349.

made progress, with the laws now in force and the creation of several agencies, such as the INACIF, which have allowed measures to be taken in a scientific and technical manner (*infra* para. 267).

181. The Court also recalls that, during the proceedings before the Commission, Guatemala acknowledged the lack of due diligence in the investigation conducted into the death of María Isabel Veliz Franco based on the following facts: failure to perform some forensic tests on the corpse relating to the recovery of the corpse; the delay in the investigation owing to the jurisdictional dispute, and failure to establish an effective precautionary measure to ensure the presence of a persons suspected of María Isabel's murder (*supra* para. 19).

182. Based on the foregoing, and considering the arguments of the parties and the Commission, the Court must examine whether or not the alleged irregularities in the investigation underway for the events that occurred to María Isabel constitute a violation of the obligations derived from rights established in Articles 8(1) and 25(1) of the American Convention, in relation to Articles 24 and 1(1) of this instrument, and to Article 7 of the Convention of Belém do Pará.

183. The Court reiterates that the obligation to investigate human rights violations is one of the positive measures that the State must take to ensure the rights recognized in the Convention.[257] The obligation to investigate is an obligation of means and not of results. However, it must be assumed by the State as an inherent legal obligation and not as a simple formality preordained to be ineffective, or as a step taken by private interests that depends on the procedural initiative of the victims or their family or upon their offer of probative elements.[258] In light of this obligation, once the State authorities become aware of an incident, they should open a serious, impartial and effective investigation *ex officio* and immediately.[259] This investigation should be conducted using all legal means available and be designed to determine the truth. The State's obligation to investigate must be fulfilled diligently in order to avoid impunity and a repetition of this type of act. Thus, the Court recalls that impunity encourages the repetition of human rights violations.[260] The Court has also noted that this obligation persists "whosoever the agent to whom the violation may eventually be attributed, even private persons, because, if their acts are not genuinely investigated, they would, to some extent, be aided by the public authorities, which would involve the international responsibility of the State."[261]

184. The Court has also indicated that it is clear from Article 8 of the Convention that the victims of human rights violations, or their next of kin, should have extensive possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and the punishment of those responsible, and to seek satisfactory redress.[262] The Court has also established that the obligation to investigate, and the corresponding right of the presumed victims or their next of kin is evident not only from the treaty-based norms of international law that are binding for the States parties, but also arise from domestic laws concerning the duty to investigation *ex officio* certain unlawful conducts, and from norms that allow the

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[257] *Cf. Case of Velásquez Rodríguez. Merits, supra,* paras. 166 and 176, and *Case of Luna López, supra*, para. 153.

[258] *Cf. Case of Velásquez Rodríguez. Merits, supra,* para. 177, and *Case of Osorio Rivera and family members v. Peru.* Preliminary objections, merits, reparations and costs. Judgment of November 26, 2013. Series C No. 274*,* para. 178.

[259] *Cf. Case of the Mapiripán Massacre v. Colombia. Merits, reparations and costs.* Judgment of September 15, 2005. Series C No. 134, paras. 219, 222 and 223, and *Case of J., supra*, para. 342.

[260] *Cf. Case of the Ituango Massacres, supra*, para. 319*; Case of González et al. ("Cotton Field"), supra*, para. 289, and *Case of García and family members v. Guatemala. Merits, reparations and costs.* Judgment of November 29, 2012 Series C No. 258, para. 132.

[261] *Cf. Case of Velásquez Rodríguez. Merits, supra*, para. 177, and *Case of Luna López, supra*, para. 155.

[262] *Cf. Case of the "Street Children" (Villagrán Morales et al.). Merits, supra*, para. 227, and *Case of Luna López, supra,* para. 155.

victims or their next of kin to file complaints or submit claims, evidence or petitions or take any other step in order to play a procedural role in the criminal investigation to establish the truth of the events.[263]

185. The Court recalls that, in cases of violence against women, the general obligations established in Articles 8 and 25 of the American Convention are supplemented and enhanced for those States that are a party to it by the obligations arising from the specific inter-American treaty, the Convention of Belém do Pará.[264] Article 7(b) of this Convention specifically obliges the States parties to use due diligence to prevent, punish and eradicate violence against women.[265] Article 7(c) of the Convention of Belém do Pará obliges the States parties to adopt the necessary laws to investigate and punish violence against women.[266] In such cases, the State authorities should open a genuine, impartial and effective investigation *ex officio* as soon as they are made aware of acts that constitute violence against women, including sexual violence.[267] Thus, in the case of an act of violence against a woman, it is particularly important that the authorities in charge of the investigation conduct it in a determined and effective manner, taking into account society's duty to reject violence against women and the State's obligation to eradicate this and to ensure that victims have confidence in the State institutions established to protect them.[268]

186. The Court has also indicated that the duty to investigate has additional implications in the case of women who are killed or suffer ill-treatment or constraint of their personal liberty within the framework of a general context of violence against women.[269]

187. This standard is wholly applicable when analyzing the scope of the obligation of due diligence in the investigation of cases of gender-based violence.[270] In practice, it is often difficult to prove that a murder or act of violent aggression against a woman is gender-based. At times this impossibility stems from the absence of a thorough and effective investigation of the violent incident and its causes by the authorities. This is why the State authorities are bound to investigate *ex officio* the possible gender-based discriminatory connotations of an act of violence perpetrated against a woman, especially when there are specific indications of sexual violence or some type of evidence of cruelty towards the body of the woman (for example, mutilations), or when such an act takes place in a context of violence against women in a specific country or region.

188. Furthermore, the Court has established that, in cases when gender-based murder is suspected, the State's obligation to investigate with due diligence includes the duty to order, *ex officio*, the pertinent expert appraisals and examinations aimed at verifying whether the murder was sexually motivated or whether some kind of sexual violence occurred. Thus, the investigation into a supposed gender-based murder should not be limited to the death of the victim, but should include other specific violations of personal integrity such as torture and acts of sexual violence. In a criminal investigation into sexual violence, the investigative procedures must be coordinated and documented, and the evidence handled diligently, taking sufficient samples, performing tests to determine the possible authors of the act, obtaining other evidence such as the victim's clothes, the immediate inspection of the crime scene, and ensuring the correct chain of custody.[271] In

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263 *Cf. Case of García Prieto et al., supra*, para. 104, and *Case of Mendoza et al., supra*, para. 217.

264 *Cf. Case of Fernández Ortega et al., supra*, para. 193, and *Case of the Massacres of El Mozote and nearby places, supra*, para. 243.

265 *Cf. Case of Fernández Ortega et al., supra*, para. 193, and *Case of J., supra*, para. 350.

266 *Cf. Case of the Miguel Castro Castro Prison, supra*, para. 344, and *Case of González et al. ("Cotton Field"), supra*, para. 287.

267 *Cf. Case of the Miguel Castro Castro Prison, supra*, para. 378, and *Case of J., supra*, para. 342.

268 *Cf. Case of Fernández Ortega et al., supra,* para. 193, and *Case of J., supra*, para. 342.

269 *Cf. Case of González et al. ("Cotton Field"), supra,* para. 293.

270 *Cf. Case of González et al. ("Cotton Field"), supra,* para. 293.

271 *Cf. Case of Fernández Ortega et al., supra*, para. 194, and *Case of J., supra*, para. 344.

this regard, the first stages of the investigation can be especially crucial in cases of the gender-based murder of a woman, because any errors that occur in procedures such as the autopsy and the collection and preservation of physical evidence can result in preventing or obstructing the possibility of proving relevant aspects such as sexual violence. With regard to the autopsies performed in a case of gender-based murder, the Court has stipulated that the genitalia should be examined carefully for signs of sexual abuse, and oral, vaginal and rectal fluids should be preserved, as well as foreign hairs and the pubic hair of the victim.[272] Also, in cases where acts of violence against women are suspected, the criminal investigation should include a gender perspective and be carried out by officials with training in similar cases and in attending to victims of discrimination and gender-based violence.[273]

189. In addition, the Court indicates that, pursuant to Article 2 of the American Convention and Article 7(c) of the Convention of Belém do Pará, States have the obligation to adopt laws or implement the necessary measures to allow the authorities to investigate with due diligence in cases where violence against women is suspected.[274]

190. In this section, the Court will examine the following aspects: B.1) Irregularities following the discovery of the body of María Isabel, and subsequent actions of State officials (preservation of the crime scene, site inspection, removal of the body, chain of custody of the evidence, autopsy, and expert appraisals); B.2) Tracing of telephone calls; B.3) Failure to adopt precautionary measures for a suspect; B.4) Discrimination and absence of gender-based investigation, and B.5) Reasonable time.

B.1) Irregularities following the discovery of the body of María Isabel, and subsequent actions of State officials (preservation of the crime scene, site inspection, removal of the body, chain of custody of the evidence, autopsy and expert appraisals)

191. On other occasions this Court has established that the proficient determination of the truth, in accordance with the obligation to investigate a death, must be demonstrated meticulously starting with the very first procedures.[275] Thus, the Court has described the guiding principles that must be observed in an investigation into a violent death. The State authorities who conduct an investigation of this type should try, at least to: (i) identify the victim; (ii) recover and preserve the probative elements related to the death in order to assist any potential criminal investigation of those responsible; (iii) identify possible witnesses and obtain their statements concerning the death investigated; (iv) determine the cause, manner, place and time of death, as well as any pattern or practice that may have resulted in the death, and (v) distinguish between natural or accidental death, suicide and murder. It is also necessary to carry out a thorough investigation of the scene of the crime, and rigorous autopsies and analyses of human remains must be performed by competent professionals, using the most appropriate procedures.[276] The Court has established that the

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[272] *Cf. Case of González et al. ("Cotton Field"), supra*, para. 310, and United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions - Model Protocol for a Legal Investigation of Extra-legal, Arbitrary and Summary Executions (Minnesota Protocol), UN Doc. E/ST/CSDHA/.12 (1991).

[273] *Cf. Case of González et al. ("Cotton Field"), supra*, para. 455.

[274] *Cf. Case of González et al. ("Cotton Field"), supra,* para. 388. This can be done by standardizing the protocols, manuals, and expert and justice services, used to investigate any crime related to the disappearance, sexual violence or murder of women, in keeping with the Istanbul Protocol, the United Nations Model Protocol for a Legal Investigation of Extra-legal, Arbitrary and Summary Executions, and international standards for searching for missing persons, based on a gender perspective.

[275] *Cf. Case of Servellón García et al. v. Honduras. Merits, reparations and costs*. Judgment of September 21, 2006. Series C No. 152, para. 120; *Case of González et al. ("Cotton Field"), supra*, para. 300, and *Case of Luna López, supra*, para. 159.

[276] *Cf. Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations and costs.* Judgment of June 7, 2003. Series C No. 99, para. 127; *Case of González et al. ("Cotton Field"), supra*, para. 300, and *Case of Luna López, supra*, footnote 256.

failure to protect the scene of a crime properly can impair the investigation, since this is an essential element to enable it to be successful.[277]

192. In addition, international standards indicate that, with regard to the crime scene, the investigator must, at least, photograph the scene, any other physical evidence and the body as it was found and after it has been moved; collect and preserve any samples of blood, hair, fibers, threads or other evidence; examine the area for footprints or any other impressions of an evidentiary nature, and draw up a report detailing any observations at the scene, actions of investigators, and location of all the evidence recovered.[278] One of the most delicate actions at the site of the discovery is the handling of the corpse; this must only be done in the presence of professionals who should examine and move it correctly, based on the condition of the body.[279] Among other obligations, the Minnesota Protocol establishes that, when investigating the scene of a crime, the area around the body should be closed off, and only the investigators and their staff should be allowed entry into the area.[280] Until this has been done, any contamination of the area should be avoided and it should be guarded permanently.[281] The Minnesota Protocol also establishes that it is essential that "[l]aw enforcement personnel and other non-medical investigators should co-ordinate their efforts […] with those of medical personnel."[282]

193. Furthermore, due diligence in a forensic investigation of a death requires maintaining the chain of custody of all forensic evidence.[283] This consists in keeping a precise record, supplemented when appropriate by photographs and other graphic elements, to document the background to the evidence as it passes through the hands of different investigators responsible for the case.[284]

194. Regarding autopsies, as the Court has indicated, their purpose is to collect, at least, information to identify the deceased, the time, date, cause and manner of death. They should observe certain basic formalities, such as recording the date, starting and finishing times, and place where they are performed, and also the name of the professional who performs them. In addition, it is necessary, *inter alia*, to photograph the body adequately; to radiograph the body before it is removed from its pouch or wrappings; X-rays should be repeated both before and after undressing the body and any injury documented. Any absence, looseness or damage to the teeth should be documented, as well as all dental work, and the genitalia carefully examined looking for signs of sexual assault (*supra* para. 188). The United Nations Manual indicates that, at the scene of the crime, autopsy protocols should note the position of the body and its condition, including whether it is warm or cool, flexible or rigid; protect the deceased's hands; note the ambient temperature, and collect

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277 *Cf. Case of Myrna Mack Chang v. Guatemala. Merits, reparations and costs.* Judgment of November 25, 2003. Series C No. 101, para. 166, and *Case of Luna López, supra*, para. 164.

278 *Cf.* United Nations Model Protocol for a Legal Investigation of Extra-legal, Arbitrary and Summary Executions (Minnesota Protocol), *supra*, and *Case of González et al. ("Cotton Field"), supra*, para. 301.

279 Office of the United Nations High Commission for Human Rights. *Modelo de protocolo latinoamericano de investigación de las muertes violentas de mujeres por razones de género,* MEX/00/AH/10, p. 58.

280 *Cf.* United Nations Model Protocol for a Legal Investigation of Extra-legal, Arbitrary and Summary Executions (Minnesota Protocol), *supra*, and *Case of González et al. ("Cotton Field"), supra*, para. 301.

281 *Cf.* United Nations Model Protocol for a Legal Investigation of Extra-legal, Arbitrary and Summary Executions (Minnesota Protocol), *supra, and* Office of the United Nations High Commission for Human Rights. *Modelo de protocolo latinoamericano de investigación de las muertes violentas de mujeres por razones de género, supra*.

282 *Cf.* United Nations Model Protocol for a Legal Investigation of Extra-legal, Arbitrary and Summary Executions (Minnesota Protocol), *supra.*

283 *Cf.* United Nations Model Protocol for a Legal Investigation of Extra-legal, Arbitrary and Summary Executions (Minnesota Protocol), *supra,* and *Case of González et al. ("Cotton Field"), supra*, para. 305.

284 *Cf. Case of González et al. ("Cotton Field"), supra*, para. 305.

any insects present.[285]

195. In its case law, the Court has also indicated that a State may be held responsible for failing "to order, obtain or assess evidence that would have been extremely important for the proper elucidation of a murder."[286]

196. The Court has verified the following:

a) The State authorities failed to take adequate measures to safeguard the site where María Isabel's body was found and to avoid the loss of evidence and the contamination of areas near the crime scene from which useful evidence might have been collected (*infra* para. 197). The same authorities indicated that the scene was "contaminated" and that, when the site inspection was carried out, it was already contaminated[287] (*supra* para. 101);

b) When removing the body, in view of the existence of the evident signs of abuse or violence on the victim's body, the authorities failed to request that the pertinent tests be performed during the autopsy (such as vaginal and rectal swabs)[288] to determine whether María Isabel Veliz Franco had been a victim of sexual assault[289] (*supra* para. 110), this omission was later classified as "unfortunate"[290] by the State agents in charge of investigating the case. There was also a failure to verify the existence of semen in her body. The autopsy report dated February 13, 2002, merely indicated with regard to the examination of the abdominal area that the genital organs were "normal" (*supra* para. 111). Even though the victim's clothes were examined by the expert with negative results for the presence of semen, this examination was performed after the clothes had been in her mother's possession, so that they had been contaminated (*supra* para. 105 and *infra* para. 197);

c) The site inspection report and the record of the removal of the corpse[291] prepared by Assistant Prosecutor I of Mixco Agency No. 5 are incomplete and

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[285] *Cf.* United Nations Model Protocol for a Legal Investigation of Extra-legal, Arbitrary and Summary Executions (Minnesota Protocol), *supra*; and *Case of González et al. ("Cotton Field"), supra*, para. 310, and *Case of Luna López, supra*, footnote 261.

[286] *Case of the "Street Children" (Villagrán Morales et al.). Merits, supra*, para. 349.

[287] During the site inspection carried out on December 18, 2001, the expert determined that the scene of the crime had been processed and contaminated. *Cf.* Site inspection report issued by the expert of the Site Inspection Section of the Bureau of Criminal Investigation of the National Civil Police, *supra*. Expert witness José Mario Nájera Ochoa referred to the way in which forensic procedures were carried out and indicated that: (a) the Public Prosecution Service reported the crime (to the monitoring unit in the case of the Metropolitan area or directly to the prosecutors in the district prosecution offices), and (b) the team went to the scene of the crime; when they arrived, other individuals were already present: firemen, police etc. and they had usually contaminated the crime scene. *Cf.* Expert opinion provided by José Mario Nájera Ochoa, *supra*.

[288] On February 27, 2006, Assistant Prosecutor I of Mixco Agency No. 5 sent a note to the Judiciary's forensic physician who performed the autopsy, indicating that, when the record of the removal of the body was prepared, "he was not asked to take vaginal and rectal swabs or nail scraping from the deceased," and asking whether he had done so *ex officio;* to which the latter replied negatively and indicated that he had not been asked to do this. *Cf.* Note sent by Assistant Prosecutor I of Mixco Agency No. 5 to the forensic physician, *supra*. Also, on August 2, 2011, the Assistant Prosecutor asked the forensic physician who signed the autopsy to interpret it and, on August 4, 2011, the physician responded "that it was not possible to rule on the time and manner of the victim's death based on the autopsy findings" (*supra* para. 111). *Cf.* Request sent to the Head of the Institute of Forensic Science, *supra*, and expert appraisal provided by the medical expert of the Institute of Forensic Science, *supra*.

[289] This is true for cases of sexual assault and rape, in which a medical examination does not necessarily confirm that they have occurred, because not all cases of rape and/or sexual assault cause physical injuries or disease that can be verified by a medical examination. *Cf. Case of Fernández Ortega et al., supra*, para. 124, and *Case of J., supra*, para. 329. See also, EHCR, *M.C. v. Bulgaria,* no. 39272/98, 4 December 2003, para. 166.

[290] *Cf.* Expansion and conclusion of report issued by Criminal Investigation Expert I, *supra.*

[291] Regarding the procedures carried out in this case, expert witness José Mario Nájera Ochoa indicated that "a forensic physician was not present during the removal of the corpse, owing to the area in which it took place

inconsistent.[292] The report indicates that a sketch was made of the site, but this is not attached; there is no record of the position of the body in relation to the place where it appeared, or who moved it prior to its recovery (*supra* para. 97). There is no record of whether the victim's hands were protected for subsequent examination; how the evidence was positioned; the condition of the clothes and whether they had blood stains, hairs, fibers; whether a search was made for footprints or other evidence. Also, the corpse was taken to the morgue in a police vehicle. Moreover, the "Photographic Report" sent to the Public Prosecution Office in March 2002 (*supra* para. 113), almost three months after María Isabel's body was found, contains eight photographs that do not portray satisfactorily what is described in the above-mentioned reports in relation to the scene of the crime (*supra* paras. 96 and 97);

d) In view of the omissions in the report, in 2009, eight years after it was prepared, the Public Prosecution Service tried to locate the police agents who had taken part in the procedures in order to establish factual aspects related to the position of the body and evidence at the time the body was found; specifically, if the victim was in a bag. In this regard, a police agent testified before the Public Prosecution Service on July 21, 2009, and indicated that "when [… he] arrived at the crime scene" he moved away the "curious onlookers" and "the deceased was covered, but [he did] not remember the position of the body owing to the time that ha[d] passed."[293] In addition, on July 13, 2009, the Assistant Prosecutor of Agency No 1 of the Mixco Municipal Prosecutor's Office asked the Head of the Municipal Fire Department of Guatemala City about the "procedures they were involved in on December 18, 2001, on the site where the body of María Isabel Veliz Franco was

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and, at that time, no forensic physician was assigned to the Prosecutor's Office." It should be added that, in his expert report, he stated that if a forensic physician is not present for the removal of the body, "when the forensic autopsy is performed, the forensic physician does not have important information such as: the original position of the body, the condition of the body, indications and/or evidence found, amount of blood, data that should be assessed in the final autopsy report." He considered that "one of the main limitations in […] this case is that the group that carried out the procedures of removing bodies did not include a forensic physician. *Cf.* Expert opinion provided by José Mario Nájera Ochoa, *supra*. Similarly, the State acknowledged that, at the time of the events, there was no forensic physician in the Mixco Municipal Prosecutor's Office; consequently, "owing to the lack of a forensic physician at the scene of the crime (for budgetary reasons)," the State, "to the best of its ability and in keeping with the procedures in force at the time of the events, did everything possible with regard to the recovery of the body."

[292] For example, the record of the recovery of the body on December 18, 2001, prepared by Assistant Prosecutor I of Mixco Agency No. 5 merely includes a description of the physical conditions of how the girl's body was found, the clothes she was wearing, and different objects that were found in the pockets of the clothing (*supra* para. 99). The site inspection report makes no mentioned of the position of the corpse but, in the record of the removal of the body, the Assistant Prosecutor indicated that the corpse was in position "ventral decubitus" "face downwards," while, in the respective photographs, the body appears on its back (*supra* para. 113). In addition, the expert describes the nylon cord as "white, black, brown and green," but the Assistant Prosecutor describes it as "black" (*supra* para. 99). Also, the Assistant Prosecutor describes "a cut on the upper part of the ear possibly caused by a knife, […] bite marks on the upper arms," and "abundant remains of food in the mouth and nose," aspects that were not described by the expert who carried out the site inspection. The same is true with regard to "the large black nylon bag decorated with a picture of a kangaroo"; in the site inspection report, the expert indicates that he "observed a large black nylon bag decorated with a picture of a white kangaroo about 25 centimeters to the southwest of the deceased's head," and in the same report he indicates that the Assistant Prosecutor said that "it was placed […] on the face of the deceased." However, this Court points out that the latter observation was not mentioned by the Assistant Prosecutor in the record of the recovery of the corpse. The site inspection report indicates that photographs were taken and a sketch was made of the site. These photographs appear in the four-page PNC Photographic Report No. 1791-200, which contains eight photographs and which was issued by the Site Inspection Service of the PNC Bureau of Criminal Investigation on March 3, 2002. However, this photographic report is not accompanied by the sketch mentioned in the site inspection report issued by the expert, according to the files provided by the parties. *Cf.* Site inspection report issued by an expert of the Site Inspection Section of the Bureau of Criminal Investigation of the National Civil Police, *supra;* Report on recovery of the corpse prepared by Assistant Prosecutor I of Mixco Agency No. 5, *supra,* and Photographic Report No. 4791-2001, *supra.*

[293] Testimony of an agent of the National Civil Police of July 21, 2009 (file of annexes to the motions and arguments brief, annex 112, fs. 12,641 and 12,642).

found."[294] On July 27, 2009, the Executive Secretary of the Municipal Fire Department responded that his files did not contain any information on the incident in question (*supra* footnote 190);[295]

e) The initial procedures were reported inconsistently by the authorities. Thus, the site inspection report indicates that the procedure ended at 4.15 p.m., but, according to the PNC agents who went to the crime scene, the site inspection experts of the Homicide Unit arrived at 3.20 p.m. Moreover, the record of the recovery of the corpse indicates that it was taken to the morgue in police vehicle No. 16-045 at 3.45 p.m., after the procedure had been completed[296] (*supra* para. 97);

f) The police report indicates that the objects found were handed over to the Assistant Prosecutor of the Public Prosecution Service, but the record that she drew up does not report what happened to them. Moreover, María Isabel's clothes and a transparent nylon bag, described in the record of the handing over of evidence, were given to the girl's mother and, on December 19, 2001, were collected from her at the place where she was keeping vigil over her daughter's body. The said objects were packed up that same day, with nine identified pieces of evidence, and sent to the laboratory of the Scientific and Technical Department of the Public Prosecution Service (*supra* para. 110). However, subsequently, "a pair of denim trousers, two towels and a pair of socks" were mislaid. On January 14, 2011, the prosecutor asked that a thorough search be made to locate them; but, at least, up until July 2011, they had not been found, and

g) The autopsy does not include either the date or time of María Isabel's death and an interpretation of the autopsy was subsequently requested, in which it was merely estimated that the time of death was "from six to twelve hours" (*supra* para. 111), without indicating whether this is prior to the discovery of the body, or prior to the autopsy; and, according to the doctor who signed the autopsy, it was not possible to determine "the time and manner in which [María Isabel] died" (*supra* para. 111). In addition, no examinations were made to establish whether the child had been subjected to sexual violence.[297] Expert witness José Mario Nájera Ochoa stated that: "the description of the condition of the corpse [was] incomplete," even though it was indicated that the corpse had "signs of bites, there was no mention of obtaining samples of these areas in order to carry out DNA testing,"[298] "there was no information compatible with mechanical asphyxia,"[299] and even though "remains of food were found in the stomach, there was no record that these had been sent to the laboratory." He therefore concluded that, in this case, "the forensic examination was deficient." In this regard, the State indicated that, "[i]n 2001, the laws in force did not establish guidelines or protocols for performing autopsies."

197. As revealed with regard to María Isabel's clothes and the two towels, the chain of

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294 *Cf.* Note issued by the Assistant Prosecutor of Agency No. 1 of the Mixco Municipal Prosecutor's Office addressed to the Head of the Municipal Fire Department of Guatemala City, *supra*.

295 *Cf.* Report of the Fire Department of July 27, 2009 (file of annexes to the motions and arguments brief, annex 114, f. 12,646).

296 *Cf.* Note No. 1,131-2,001 issued by the Head of Sub-Station 1651 of the National Civil Police addressed to the Assistant Prosecutor of the Public Prosecution Service of the municipality of Mixco, *supra;* Site inspection report issued by an expert of the Site Inspection Section of the Bureau of Criminal Investigation of the National Civil Police, *supra,* and Report on recovery of the corpse prepared by Assistant Prosecutor I of Mixco Agency No. 5, *supra*.

297 As revealed by the facts, the tests were not requested and, when consulted, the respective forensic physician stated that he had not performed them *ex officio* (*supra* para. 110).

298 *Cf.* Expert opinion provided by José Mario Nájera Ochoa, *supra*.

299 The expert witness stated that signs of asphyxia are mentioned among the conclusions, and the report on recovery of the corpse indicates that it "[s]hows signs of strangulation with a black plastic cord around the neck." *Cf.* Expert opinion provided by José Mario Nájera Ochoa, *supra*.

custody was not safeguarded, so that they were exposed and may have been contaminated. This evidence was later subjected to different tests to determine the existence of blood, semen and hairs, among other elements and, as indicated in the section on the facts (*supra* para. 110), the result of the tests on some of the clothes was negative for the presence of blood and semen. The vomit on the clothes was also subjected to toxicological testing, and the report reveals that the sample provided was insufficient or was already dry (*supra* para. 110), which shows that, since the evidence was not properly safeguarded, the analyses were unsuccessful. Subsequently, and only in 2011, DNA tests have been carried out and a comparison was made between the DNA of a suspect and some of María Isabel's clothes, since there is no DNA sample of the child herself.[300] The expert report underlines that "in some of the clothes there was no genetic material that could usefully be compared" (*supra* para. 112). In this regard, the State alleged that "although it acknowledged its responsibility for not having performed all the tests on the corpse, it did what was possible in light of the possibilities as of 2007 when the [INACIF] had been established, so that the State's acknowledgement should not be interpreted in the sense that it had not performed the tests that were available at the time of the events." Expert witness Nájera Ochoa stated that, when "the incident occurred, DNA testing was not done in Guatemala and the samples were sent abroad,"[301]and the State did not contest this. Nevertheless, although the State did not have this evidence, it should at least have observed the minimum international standards for the collection and preservation of evidence. The above-mentioned shortcomings in the investigation could hardly be rectified by the belated and insufficient probative measures that the State has tried to take. It is obvious that the appropriate protocols were not followed in accordance with the standards established by this Court in light of different international instruments to ensure the chain of custody of the evidence and preserve this for later tests, and this had an impact on the expert appraisals. The loss of evidence may have prevented the identification of the true perpetrator of the acts.

198. The foregoing reveals that the State did not carry out essential procedures following the discovery of María Isabel's body on December 18, 2001. Different irregularities occurred during this first stage that have had repercussions on the investigation and that it would be difficult to rectify by belated procedures. These irregularities were: (a) failure to secure the site where the body was found; (b) lack of rigor in the site inspection; (c) shortcomings in the preparation of the record of the recovery of the corpse; (d) inadequate transport of the corpse; (e) inadequate collection and improper handling of evidence; (f) failure to safeguard the chain of custody of the evidence, and (g) incomplete autopsy.

B.2) Tracing of telephone calls

199. In relation to tracing the telephone call made by an anonymous informant on December 18, 2001, in which he provided information on María Isabel's death, the State indicated that a "search" had been carried out at the address he provided (*supra* para. 109).[302] However, this was done on July 8, 2003; in other words, more than eighteen months after the said call. Neither this action nor the site inspection (*supra* para. 109) yielded positive results.

200. As regards the list of calls made from the mobile telephone that María Isabel was

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[300] In April 2006, the International Federation for Human Rights presented the report of its International Investigation Mission, "*El femicidio en Mexico y Guatemala,*" in which it indicated, as an example of the lack of technical means to carry out effective investigations, the inexistence of databases to compare fingerprints or DNA samples, among other factors. It also indicated that, despite the existence of patterns in the case of the corpses of women, the absence of profiles of attackers prevented making the necessary crosschecks, and that a serious shortcoming at the investigative stage was that, in many cases when a woman is found murdered, no tests were performed to determine if she had been raped. "*El Feminicidio en Mexico y Guatemala*, No. 446/3 (2006) (file of attachments to the Merits Report, annex 34, f. 438).

[301] *Cf.* Expert opinion provided by José Mario Nájera Ochoa, *supra*.

[302] The State also clarified that it had not gone to the wrong place, as the Commission and the representatives had indicated, because the search was carried out in the building located in Zone 3 of the municipality of Mixco, and is no longer part of Zone 7, but adjoins it.

carrying on the day of the events, the case file reveals that, on March 26, 2002, authorization was granted to request the list of telephone calls from several telecommunications companies in order to establish to whom certain telephone numbers belonged, the address where the owner of the number could be located, and the incoming and outgoing calls between December 15 and 24, 2001.[303] Nevertheless, it was only on June 8, 2005, that the criminal investigations expert sent the Assistant Prosecutor the report on the telephone calls with a description and an analysis of their pattern (*supra* footnote 148). Some additional inquiries were made based on this report.

201. Notwithstanding the pertinence of the steps taken, the foregoing shows that, in the case *sub judice,* the State did not act with the promptness required in order to ensure that certain procedures aimed at clarifying the events were effective, because the search was carried out more than eighteen months after reception of the anonymous telephone call on December 18, 2001, and the analysis of the mobile telephone calls was examined more than three years after the information had been obtained.

B.3) Failure to adopt precautionary measures for a suspect

202. The Court has verified that the April 10, 2002, expansion of a report provided on February 20, 2002, contains an analysis of the relationship between María Isabel and one of the suspects, and indications that could suggest that he might be responsible for María Isabel's murder. The investigators therefore suggested that the suspect should be captured in view of "the danger of his flight." Subsequently, on June 21, 2006, the Bureau of Criminal Investigations indicated in its report that it had not been possible to find him (*supra* footnote 171).

203. The State acknowledged its responsibility on this point (*supra* para. 19). According to the case files provided to the Court, no precautionary measure was issued for the suspect and, when another effort to find him was made four years later, it was unsuccessful. Based on the State's acknowledgement, the Court finds that the State did not follow up appropriately on the evidence or circumstances of the suspect that could have provided grounds for the need to adopt a precautionary measure. This prevented a proper investigation of the suspect, which adversely affected the investigation.

B.4) Discrimination and absence of a gender-based investigation

204. The Court has established in its case law that Article 1(1) of the Convention is a general norm, the content of which extends to all the provisions of this treaty because it establishes the obligation of the States Parties to respect and ensure the full and free exercise of the rights and freedoms recognized therein "without any discrimination." In other words, whatever its origin or form, any treatment that can be considered discriminatory in relation to the exercise of any of the rights ensured in the Convention is, *per se,* incompatible with this instrument.[304] A State's failure to comply with the general obligation to respect and ensure rights, due to any type of discriminatory treatment, results in its international responsibility.[305] Hence there is an indissoluble link between the obligation to respect and ensure human rights and the principle of equality and non-discrimination.[306]

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303 *Cf.* Note C-105-2002/6º issued by the Mixco Court of First Instance, *supra*.

304 *Cf. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica.* Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 53, and *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis), supra*, para. 332.

305 *Cf. Juridical Status and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 85, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs.* Judgment of October 24, 2012. Series C No. 251, para. 236.

306 *Cf. Juridical Status and Rights of Undocumented Migrants, supra,* para. 53, and *Case of Nadege Dorzema et al., supra*, para. 224.

205. The principle of equal and effective protection by the law and non-discrimination is an salient element of the system for the protection of human rights established in numerous international instruments and developed by legal doctrine and case law.[307] At the actual stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens.* The juridical structure of national and international public order is based on this principles and it permeates the whole legal system.[308]

206. The Court has also established that States must abstain from actions that, in any way, are addressed, directly or indirectly, at creating situations of discrimination *de jure* or *de facto.*[309] States are obliged to adopt positive measures to reverse or change any discriminatory situations which exist in their societies that prejudice a specific group of individuals. This entails the special duty of protection that the State must exercise with regard to the acts and practices of third parties that, with its tolerance or acquiescence, maintain or encourage discriminatory situations.[310]

207. The Court considers that gender-based violence – that is, violence directed against a woman because she is a woman, or violence that affects women disproportionately – is a form of discrimination against women, as indicated by other international bodies involved in the protection of human rights, such as the European Court of Human Rights and CEDAW.[311] Both the Convention of Belém do Pará (preamble and Article 6) and the Convention for the Elimination of All Forms of Discrimination against Women (preamble) have recognized the connection that exists between violence against women and discrimination. Similarly, the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul, 2011) recognizes that "violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full development of women," and also "the structural nature of violence against women as gender-based violence."[312]

208. The Court reiterates that the ineffectiveness of the courts in individual cases of violence against women encourages an environment of impunity that facilitates and promotes the general repetition of such acts of violence and sends a message that violence against women can be tolerated and accepted, which encourages its perpetuation and society's acceptance of the phenomenon, the perception and sensation of insecurity for women, and also their continued lack of confidence in the system for the administration of justice.[313] This ineffectiveness or indifference is, in itself, discrimination against women in access to justice.[314] Consequently, when there are specific indications or suspicions of gender-based violence, the failure of the authorities to investigate the possible

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307 *Cf. Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010. Series C No. 214, para. 269, and *Case of Nadege Dorzema et al., supra*, para. 225.

308 *Cf. Juridical Status and Rights of Undocumented Migrants, supra,* para. 101, and *Case of Nadege Dorzema et al., supra*, para. 225.

309 *Cf. Juridical Status and Rights of Undocumented Migrants, supra*, para. 103, and *Case of Nadege Dorzema et al., supra*, para. 236.

310 *Cf. Juridical Status and Rights of Undocumented Migrants, supra*, para. 104, and *Case of Nadege Dorzema et al., supra*, para. 236.

311 *Cf. Case of the Miguel Castro Castro Prison, supra,* para. 303, and *Case of González et al. ("Cotton Field"), supra,* paras. 394 to 402. See also, EHCR, *Opuz v. Turkey,* Judgment of 9 June 2009, para. 200, and CEDAW, General recommendation 19: Violence against women (1992), paras. 1 and 6.

312 Preamble to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul, 2011). This Convention has not entered into force yet due to insufficient ratifications (10 ratifications are required).

313 *Cf. Case of González et al. ("Cotton Field"), supra,* paras. 388 and 400.

314 *Cf. Case of González et al. ("Cotton Field"), supra,* and United Nations Development Programme, *supra*, para. 400.

discriminatory motives for an act of violence against a woman may constitute, in itself, a form of gender-based discrimination.

209. According to certain international standards concerning violence against women and sexual violence,[315] evidence relating to the sexual history of the victim is inadmissible, in principle; hence, opening lines of investigation into the previous social or sexual behavior of the victims in cases of gender violence is merely a manifestation of policies or attitudes based on gender stereotypes.

210. As already demonstrated in this case, the authorities in charge of the investigation failed to obtain pertinent evidence to determine that sexual violence had occurred, or obtained this belatedly when the probative elements, whose chain of custody had not been safeguarded, had been contaminated (*supra* para. 196.b). In addition, the Court considers that the lack of due diligence in the investigation of the victim's murder is closely related to the absence of specific norms or protocols for the investigation of cases of the gender-based murder of women and violence against women in general. As the State has acknowledged, at the time of the events, there were no specific laws or procedures for investigating cases of violence against women. The State adopted most of the laws and measures for combating this phenomenon after the events of this case,[316] so that it has not been possible to apply them to it, and they have not helped to make the investigation into the death of María Isabel Veliz Franco more effective. The foregoing could partly explain the State's negligence, but cannot justify it or exempt the State from international responsibility. And this is because the norms on which the rights and obligations examined herein are based require their full and immediate observance by the State as of the entry into force of the respective treaties. Consequently, the Court cannot admit the State's argument that it is exempted from responsibility because the State authorities took all the pertinent measures under the laws in force at the time and to the best of their ability.

211. Additionally, the difficulties to establish whether María Isabel Veliz Franco was a victim of violence against women according to the Convention of Belém do Pará result, in part, from the absence of a thorough and effective investigation by the State authorities into the violent incident that led to the victim's death, as well as its possible causes and motives. The Court has already indicated that, in 2001, at the time of the events, a context of an increase in murders involving acts against women existed in Guatemala (*supra* para. 81); to this can be added the fact that, in this case, there was sufficient evidence to suspect that the victim's murder could have had a discriminatory motive, owing to hatred or contempt based on her condition as a woman, or that it was perpetrated with some kind of sexual violence (*supra* paras. 178 and 196.b and *infra* para. 225). In addition, the judicial case file reveals that Rosa Elvira Franco Sandoval informed the Prosecutor General and Head of the Public Prosecution Service that when she went to the morgue to identify her daughter, the forensic physician "told her that her daughter had been raped" (*supra* para. 98).

212. This failure to comply with the obligation of non-discrimination was increased in this

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[315] Article 54 of the Council of Europe Convention on preventing and combating violence against women and domestic violence establishes that: "Parties shall take the necessary legislative or other measures to ensure that, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary." *Cf.* Council of Europe Convention on preventing and combating violence against women and domestic violence *supra*, art. 54. In its Rules of Procedure and Evidence, the International Criminal Court has also ruled on the importance that consent cannot be inferred from the victim in cases of sexual violence. Thus, for example, "[c]redibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim" and "a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim." *Cf.* International Criminal Court, Rules of Procedure and Evidence.

[316] Law against Femicide and all forms of Violence against Women (2008); Law against Sexual Violence, Exploitation and People Trafficking (2009); creation of courts and tribunals with competence in cases of femicide and all forms of violence against women (2010), and specific protocols for the proper recovery of corpses (used by the National Institute of Forensic Science).

case by the fact that some officials in charge of the investigation of the case made statements that denote the existence of prejudices and stereotypes about the role of women in society. The body of evidence reveals that, in some investigation reports, explicit reference was made to María Isabel's way of dressing, her social and night life, her religious beliefs, and also her family's lack of concern or supervision. According to a brief of the victim's mother dated April 27, 2007 (*supra* para. 118), the Assistant Prosecutor of Mixco Agency No. 5 had told her that María Isabel "was a tart, a prostitute."[317] Also, based on information provided in a psychological appraisal of one of María Isabel's friends, the expert, without any grounds, concluded in his report that the victim had suffered from "emotional instability because she went out with several boyfriends and male acquaintances" (*supra* para. 118). Even though, as the State argues, it is true that some of these statements come from testimony provided by witnesses or individuals who were interviewed during the investigation (friends and acquaintances of the victim), the fact that, during the interrogations and in the reports, relevance was given to certain aspects of the private life and prior behavior of María Isabel reveals the existence of gender stereotypes. This conclusion is in keeping with the context referred to in several reports and the testimony of women survivors and their family members, as well as of expert witness Solís García, about the "tendency of the investigators to discredit the victims and blame them for their lifestyle, or clothes," and to inquire into aspects relating to the personal relationships and sexuality of the victims (*supra* para. 90).

213. In this case, gender stereotypes had a negative influence on the investigation of the case, insofar as they transferred the blame for what happened to the victim and to her family members, closing other possible lines of investigation into the circumstances of the case and the identification of the perpetrators. In this regard, the Court has already had the occasion to indicate that the creation and use of stereotypes becomes a cause and consequence of gender-based violence against women.[318]

214. The Court, referring to Articles 1(1) and 24 of the Convention, has indicated that "the difference between the two articles stems from the fact that the general obligation of Article 1(1) refers to the State's obligation to respect and ensure, 'without discrimination,' the rights contained in the American Convention. In other words, if a State discriminates in the respect or guarantee of a treaty-based right, it would violate Article 1(1) and the substantive right in question. If, to the contrary, the discrimination refers to unequal protection of domestic law or its application, the fact must be examined in light of Article 24."[319]

215. The facts of the instant case include both types of discrimination and, therefore, it is not necessary make a distinction; accordingly the Court finds that both the right to equal protection of the law (Article 24) and the obligation to respect and ensure the rights contained in the American Convention (Article 1(1)) have been violated.

216. Consequently, the Court considers that the investigation into the murder of María Isabel has not been conducted with a gender perspective in keeping with the special obligations imposed by the Convention of Belém do Pará. Therefore, in the context of the investigation in this case, the State violated the right to equal protection of the law contained in Article 24 of the American Convention, in relation to the obligation of non-discrimination contained in Article 1(1).

B.5) Reasonable time

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317 *Cf.* Brief of Rosa Elvira Franco Sandoval addressed to the Inter-American Commission, *supra*.

318 *Cf. Case of González et al. ("Cotton Field"), supra,* paras. 400 and 401, and IACHR, *Access to justice for women victims of violence in the Mesoamerica,* OEA/Ser.L/V/II. Doc. 68, January 20, 2007.

319 *Cf. Case of Apitz Barbera et al. v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 209, and *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis), supra*, para. 333.

217. Meanwhile, regarding the alleged violation of reasonable time argued by the representatives, the Court refers back to previous rulings in which it has indicated that, for the investigation to be conducted seriously, impartially and as an inherent legal duty, the right of access to justice requires that the events investigated are clarified within a reasonable time.[320] The Court has stated that the "reasonable time" referred to in Article 8(1) of the Convention must be assessed in relation to the total duration of the proceedings up until the final judgment is handed down.[321] The Court considers that, in principle, a prolonged delay, such as the one that occurred in this case, constitutes, of itself, a violation of judicial guarantees.[322]

218. In the instant case, the Court underlines that, as the State itself has acknowledged, the investigation was delayed for at least eight months at the start during the jurisdictional dispute between March 11 and November 21, 2002 (*supra* para. 19). It should be pointed out that, although it is permissible to raise a concern about jurisdiction[323] as this is regulated in the Guatemalan Code of Criminal Procedure,[324] it is also essential that a dispute of this type be decided promptly in order to avoid delays in the investigation or the criminal proceedings. The case files provided by the parties show that, while the jurisdictional dispute lasted, only one substantive investigative measure was ordered by the Mixco First Court and various communications were processed.[325] However, a note signed by an agent of the Mixco Prosecutor's Office indicates that this Office had not continued the investigation because it had received instructions from its superior not to proceed with it, because it did not have competence to do so, and indicated that when the judge had decided the jurisdiction dispute, the file would be sent to Mixco Agency No. 5.[326] Based on the State's acknowledgement and on the foregoing, the Court finds that the jurisdictional dispute led to a period of inactivity in the investigation of around eight months.

219. There were also other prolonged periods of inactivity. Thus, the facts reveal that

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320 *Cf. Case of Hilaire, Constantine and Benjamín et al. v. Trinidad and Tobago. Merits, reparations and costs.* Judgment of June 21, 2002. Series C No. 94, para. 14, *and Case of García and family members, supra*, para. 152.

321 *Cf. Case of Suárez Rosero v. Ecuador. Merits*. Judgment of November 12, 1997. Series C No. 35, paras. 70 and 71, and *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 22, 2013. Series C No. 265, para. 171.

322 *Cf. Case of Hilaire, Constantine and Benjamín et al., supra,* para. 229, and *Case of Osorio Rivera and family members, supra*, para. 192.

323 Matters relating to competence are regulated in articles 56 to 61 of the Fifth Section of the Guatemalan Code of Criminal Procedure. *Cf.* Congress of the Republic of Guatemala. Code of Criminal Procedure. Decree 51-92 and its amendments, *supra*.

324 The pertinent part of article 332 indicates that "[t]he purpose of the intermediary stage is for the judge to assess whether or not there are grounds to subject a person to a public and oral trial, based on the probability of participation in a crime or to verify the substantiation of the other requests of the Public Prosecution Service". *Cf.* Congress of the Republic of Guatemala. Code of Criminal Procedure. Decree 51-92 and its amendments, *supra*.

325 Ruling of March 26, 2002, issued by the First Instance Court of Mixco indicating that it "has before it for a decision the memorandum presented by the prosecutor of the Public Prosecution Service […], in which he requests […] that the Court require the list of telephone calls from [several] telecommunications companies," and indicating that "after examining this case, the judge who supervises the investigation considers that it is in order to grant this request, and this consists in GRANTING AUTHORIZATION to request the list of telephone calls to the telecommunications companies." In other words, the judge only ordered one procedure, even though different notes were processed. *Cf.* Note C-105-2002/6º issued by the First Instance Court of Mixco, *supra*. In addition, there are requests by the Prosecutor of Guatemala City Agency No. 32 to the Bureau of Criminal Investigation of the Public Prosecution Service that it send investigators to this Agency to give them new guidelines and more details of the investigation. *Cf.* Note of September 26, 2002, of the Assistant Prosecutor of Guatemala City Agency No. 32 (file of annexes to the answering brief, annexes 3-3b, f. 13,228).

326 *Cf.* Note of an agent of the Mixco Agency to the Deputy Executive Secretary of the Public Prosecution Service, *supra*. It should also be noted that Article 312 established that the "request concerning lack of competence does not exempt the Public Prosecution Service from the duty of conducting urgent investigation procedures." *Cf.* Congress of the Republic of Guatemala. Code of Criminal Procedure. Decree 51-92 and its amendments, *supra*. The State referred to the Code of Criminal Procedure of Guatemala, Decree 51-92, and also to the Organic Law of the Public Prosecution Service, Decree 40-94, and to the Law of the Judiciary, Decree 2-89.

there was no substantive investigative action between July 21, 2003, and May 19, 2004, between September 2004 and June 2005, between February 2007 and July 2009, and between that month and December 2010. Also, the Court has not received any information on investigation activities during 2013. In this case, it is clear that, since investigating is an obligation *ex officio* that must be complied with by the State authorities, the inactivity during the said periods is a result of their conduct. Consequently, the Court considers that it is not necessary to analyze the above-mentioned criteria, because it is clear that the time that elapsed can be attributed to the State's conduct, and surpasses excessively the duration that could be considered reasonable for the State to investigate the events of this case. Therefore, the more than 12 years that the investigation has lasted exceeds what is reasonable,[327] especially considering that, at the present time, the case is still at the preparatory or investigation stage.[328] This absence of investigation during such a long period of time constitutes a flagrant denial of justice and a violation of the victims' right of access to justice.

220. This is revealed because, owing to the time that has passed – more than 12 years – the Mixco Court of First Instance asked the Public Prosecution Service for information on the status of the investigation so as to hold a hearing to end the investigation in order to bring charges or request that the case go to trial.[329] In response to this, on October 21, 2009, the Public Prosecution Service stated that it had "asked [the Court] to leave the case at the stage [of the investigation] in which it was," because it was being processed before the Inter-American Court, and both the Presidential Human Rights Commission (COPREDEH) and the Center for Justice and International Law (CEJIL) were involved, and that, at that time, "[it was] one of the leading cases of unpunished femicide in Guatemala." As can be observed, the reasons indicated by the Public Prosecution Service are unrelated to issues of an investigative nature. In response to another request from the said judge, in 2012, the Public Prosecution Service requested that the proceedings be kept open because "the investigation was ongoing" (*supra* footnote 207). The body of evidence reveals that, to date, the investigation has not identified any of those responsible and no investigative strategy is being followed based on the evidence and indications that have been obtained and that would allow the case to be resolved. Although this Court has established that the duty to investigate is an obligation of means and not of results,[330] this does not mean that the investigation can be undertaken as "a mere formality preordained to be ineffective."[331] In this regard, the Court has established that "every action of the State during the investigative procedures, as well as the investigation as a whole, must have a specific objective, the establishment of the truth and investigation, pursuit, capture, prosecution and punishment, as appropriate, of those responsible for the facts."[332]

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327 *Cf. Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of September 22, 2009. Series C No. 202, para. 156. In this case, the Court determined that Article 8(1) of the American Convention establishes, as one of the elements of due process, that the courts must decide cases submitted to them within a *reasonable time.*

328 Although the State argued that it had carried out numerous different investigation procedures, it is also aware that the investigation should be conducted within specific time limits. In this regard, it affirmed that, "[o]wing to the time that had elapsed, and since the laws of Guatemala establish guidelines and time frames within which an investigation may and should remain open, the Mixco Prosecutor asked for the collaboration with this case of full-time investigators in order to make progress, within the State's possibilities, in the identification of the perpetrator of María Isabel's death." Request issued by the Deputy District Prosecutor of Mixco Agency No. 5, *supra*.

329 Article 324 of the Code of Criminal Procedure establishes "[w]hen the Public Prosecution Service considers that the investigation has provided firm grounds to try the accused, it shall submit a written request to the judge for a decision to go to trial. Charges shall be brought on opening the trial stage." *Cf.* Congress of the Republic of Guatemala. Code of Criminal Procedure. Decree 51-92 and its amendments, *supra*.

330 *Cf. Case of Velásquez Rodríguez. Merits, supra*, para. 177, and *Case of Liakat Ali Alibu, supra*, para. 39.

331 *Cf. Case of Velásquez Rodríguez. Merits, supra*, para. 177, and *Case of Gutiérrez and family v. Argentina*. Merits, reparations and costs. Judgment of November 25, 2013. Series C No. 271, para. 98.

332 *Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 10, 2007. Series C No. 167, para. 131, and *Case of the Río Negro Massacres, supra*, para. 192.

221. The Court has also noted that Rosa Elvira Franco has had access to the investigation and has played an active role in it by making statements, filing briefs, presenting information, and consulting officials in charge of the case, among other actions. However, the State has argued that Mrs. Franco's intervention has obstructed the investigation by providing contradictory or inconsistent information that, in its opinion, has not been useful. In this regard, the Court considers that this argument by the State is inadmissible to justify an undue delay in the proceedings because, in the domestic jurisdiction, it is for the competent organs to direct the investigation and to channel it in keeping with the strategies or lines of investigation that they have identified in order to clarify the facts and, in any case, the investigation must be advanced, *ex officio*, without the victims or their next of kin having to assume this initiative,[333] which corresponds to the State.

222. From the foregoing, the Court concludes that the period of more than 12 years that domestic justice has taken merely at the stage of investigating the events is greatly in excess of a period that can be considered reasonable for the State to conduct the corresponding investigative procedures, and constitutes a flagrant denial of justice. Consequently, this case is in a situation of impunity in which those responsible for María Isabel's murder have not been identified or punished, and the members of her family have been unable to know the truth about the events. The State's obligation to investigate must be fulfilled diligently to avoid impunity and the repetition of this type of incident (*supra* para. 183).

223. Added to the above, the Court underlines that gender-based violence against women is a historical, social and cultural problem that is deeply-rooted in Guatemalan society. This is because, during and after the armed conflict, women suffered specific forms of gender-based violence, while the perpetrators remained in total impunity due to the inability of the courts of justice to investigate, prosecute and punish those responsible, as appropriate (*supra* paras. 68, 69, 81,83 and 84). Even though Guatemala was one of the first States to ratify the Convention of Belém do Pará, owing to these historical reasons, violence against women has remained invisible, a situation that is reflected in the failure to investigate murders from a gender perspective, because the death of women is investigated as simple homicide, keeping such acts in impunity. In addition, there are no official statistics on gender-based offenses before 2008 that allow the situation of women to be made visible, so that the State authorities are made aware of the problem and adopt the necessary public policies to combat this type of act.

224. Furthermore, regarding the alleged failure to sanction the public officials responsible for the irregularities in the processing of the investigation, in some of the previous sections, the Court has already considered the said irregularities or negligence in the investigations, so that this allegation has been examined, and it unnecessary to rule in this regard,

C. Conclusion

225. Based on the above, the Court finds that, despite the evidence that María Isabel's murder could have been committed for reasons of gender, the investigation was not conducted with a gender perspective; it has also been proved that there was a lack of due diligence and that it included actions of a discriminatory nature. The investigation has greatly exceeded a reasonable time and the initial investigative stage is still underway. In addition, as the State has acknowledged, the lack of diligence in the case was linked to the inexistence of norms and protocols for investigating this type of incident. Consequently, the Court concludes that the domestic investigation has not ensured the access to justice of the next of kin of María Isabel Veliz Franco, and this constitutes a violation of the rights to judicial guarantees and to judicial protection recognized in Articles 8(1) and 25(1) of the American Convention, and the right to equality before the law established in Article 24 of

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[333] *Cf. Case of González et al. ("Cotton Field"), supra,* para. 368, and *Case of Osorio Rivera and family members, supra,* para. 228.

the Convention, in relation to the general obligations contained in Articles 1(1) and 2 of the American Convention, and in Articles 7(b) and 7(c) of the Convention of Belém do Pará, to the detriment of Rosa Elvira Franco Sandoval, Leonel Enrique Veliz Franco, José Roberto Franco, and of the grandparents who are now deceased, Cruz Elvira Sandoval Polanco and Roberto Franco Pérez.

226. The Court considers that the arguments relating to the violation of Article 19 of the Convention were already examined in the preceding chapter. Moreover, the Court does not find that there were special measures that the State should have adopted in the investigation following the discovery of the body based on the victim's condition as a child. Therefore, the Court will not rule in this regard in this section. Also, in relation to the alleged violation of the obligation to ensure the rights of María Isabel Veliz Franco owing to the absence of investigation, the pertinent elements relating to the State's conduct up until the moment the body was discovered have already been examined (*supra* para. 157).

X
RIGHT TO PERSONAL INTEGRITY OF THE FAMILY MEMBERS, IN RELATION TO THE OBLIGATIONS TO RESPECT AND ENSURE RIGHTS

A. Arguments of the Commission and of the parties

227. The Commission indicated in its Merits Report that the State had violated Article 5(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Rosa Elvira Franco Sandoval, Leonel Enrique Veliz Franco, José Roberto Franco Sandoval, Cruz Elvira Sandoval Polanco and Roberto Franco Pérez, because: "it this case, the irregularities and delays on the part of the […] State in the prevention and in the investigation into the disappearance of María Isabel Veliz Franco and her subsequent murder [had] caused her next of kin profound suffering and anguish, and despite the seriousness of the crimes, nine years ha[d] passed since the body of the murder victim [had been] found and yet those responsible ha[d]not been punished." It also observed "the little importance State officials attached to the concerns and suffering of the mother of María Isabel Veliz Franco, […] when she tried to move the investigation forward."

228. The representative agreed with the Commission's observations and indicated that her mother, grandparents and brothers "lived with María Isabel at the time of her death and had close ties to her, so that they suffered anguish and uncertainty owing to the inaction of the authorities once the disappearance had been reported." It added that "[…] throughout the investigation process, it was said that María Isabel was someone who "had connections with *maras*," "had numerous boyfriends," and she was even referred to as "*la loca*" (the crazy one). Furthermore, her mother was described as being negligent […]"; these characterizations "increased the profound suffering that the members of María Isabel's family were already enduring."

229. It also argued that "[i]n her efforts to obtain justice for her daughter, Rosa Elvira has been exposed to numerous threats and harassment that have caused anguish and pain, not only to her, but also to María Isabel's brothers and grandparents, given the possibility that her personal integrity or even her life could be harmed […]." Lastly, the representative mentioned that "[t]he facts of this case leave no doubt about the suffering that the child María Isabel suffered. These facts also had a profound effect on her mother, brothers, grandmother and grandfather who, in addition to experiencing the anguish of her disappearance and the suffering for the loss of a loved one, had to face the denigration of María Isabel and attacks on her memory."

230. The State argued that "the content of the investigation files proves that it did not violate the rights of the victim or of her mother," and affirmed that "it regrets, and sympathizes with [María Isabel's family] for the suffering that her tragic death has caused them; however, the suffering caused by the events is a consequence of those events and is not caused by the State." It added that "in the respective public institutions, the State

provides psychological care and the petitioners could have used this if they had considered that some type of treatment was necessary to protect their mental and moral integrity; however, there is no record that they requested this support at any time."

231. Regarding the treatment accorded to María Isabel and her mother throughout the investigation process, the State argued that "State officials had never treated Rosa Elvira Franco Sandoval without humanity and respect." During the public hearing before the Court, the State affirmed that "there is no evidence to prove acts of public disparagement, persecution or discrimination towards [the] next of kin [of María Isabel]."

232. Lastly, with regard to the threats and harassment of the members of María Isabel's family, the State indicated that it "had abided by the order to provide special protection to the life and integrity of the next of kin of [María Isabel] by means of the precautionary measures [of the Inter-American Commission]."

B. Considerations of the Court

233. In numerous cases, the Court has considered that the next of kin of victims of human rights violations may, in turn, be victims.[334] In this regard, the Court has understood that the right to mental and moral integrity of some of the family members of victims has been violated owing to the additional suffering that they have endured as a result of the specific circumstances of the violations perpetrated against their loved ones, and owing to the subsequent acts and omission of the State authorities in relation to the events.[335]

234. In the case *sub judice,* the Court considers it appropriate to indicate that it has established the international responsibility of the State for lack of prevention in relation to the deprivation of life and personal integrity, as well as for the lack of judicial guarantees and judicial protection in relation to the lack of due diligence in the investigations. In particular, it has been proved that the State was aware of the danger to the child following the report and failed to adopt measures to prevent this and to avoid its implementation; moreover, the State authorities did not take prompt and diligent measures to investigate the murder of María Isabel Veliz Franco within a reasonable time. Consequently, the Court will examine the arguments concerning the effects on the personal integrity of the members of María Isabel's family caused by the lack of diligence in preventing the incident and by the biased investigations, as well as by the harassment and the threats received.

235. In the statement made by Rosa Elvira Franco Sandoval during the public hearing before this Court, she stated that:

> I came in contact with the callousness of those who work in the system of justice – of injustice – of Guatemala […]; they treated me badly, they treated my daughter badly […]; there were many attacks, persecution against me from the very start, against my two sons […]; I have suffered so much […]; at the start I did not want to live any longer, and if it were not for the fact that I have two sons, I would have no interest in living […]; I am ill because of this, because there is no justice in Guatemala.

236. Meanwhile, in his affidavit, Leonel Enrique Veliz Franco stated that:

> In the beginning, my mother's fight worried us […] because it was dangerous […]. There were family problems because they told [my mother] that she should leave it […]. My life changed forever after [María Isabel's murder]; it affected me emotionally, psychologically and financially. The fact that my sister's murder has not been clarified to date leads to feelings of impotence and frustration because we cannot obtain justice. It affected my nerves; my hands and legs tremble and I have a tic in my eye; I am a different person; my temperament changed, […] I consider myself to be violent; […] I frequently have problems breathing and health problems. My mother is a walking pharmacy; this has

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334 *Case of the "Street Children" (Villagrán Morales et al.). Merits, supra*, para. 174, and *Case of Osorio Rivera and family members, supra,* para. 228.

335 *Case of Blake v. Guatemala. Merits*. Judgment of January 24, 1998. Series C No. 36, para. 114, and *Case of Fernández Ortega et al., supra*, para. 143.

> affected me; she has medicines for everything, because she is ill. [The search to obtain justice] has affected the family finances, because by mother stopped doing things.[336]

237. And, in his affidavit, José Roberto Franco stated as follows:

> I remember that I was very afraid that someone would hurt me. […] It affected me greatly because I am afraid that they may do something to those that I love most. […] my mother [has been greatly affected with] profound depression that has even led her to want to take her own life. […] God saved her from this [and] also [from] many illnesses. […] I have felt fearful that someone may want to do something against us, because my mother has tried to clarify the death of my sister.[337]

238. Furthermore, in his expert opinion, Rodolfo Kepfer Rodríguez analyzed the problems suffered by Rosa Elvira Franco Sandoval, Leonel Enrique Veliz Franco and José Roberto Franco and, in this regard, stated:

> The life of Mrs. Franco [Sandoval] was subject to frustration and indignation, owing to the lack of response to her need to obtain justice. […] The offhandedness, negligence and passivity demonstrated by the State authorities in the face of [Mrs. Franco's] persistent, unfailing and decided attitude in search of justice were crucial in the development of attitudes and feelings that, over time, would adversely affect Mrs. Franco's health. […] The specific effects on Mrs. Franco and her sons, Leonel and José Roberto, have evolved over the years: the first two years were especially troubling for the younger son because they changed the whole life project of an 11-year old child, causing him problems at school, shyness, and a period of social inhibition of around one year. Meanwhile, the elder brother, Leonel, was forced to develop confrontational abilities to take on the demands of his adolescence, thus developing an energetic and forceful character, which was reinforced by his involvement in religion.[338]

239. Based on the foregoing testimony and the expert opinion, and on the facts of the case, the Court considers that the lack of prevention in this case, together with the failure of the State authorities to act diligently in the investigation of María Isabel's murder, and the impunity in which the facts and the investigation remain, caused suffering to Rosa Elvira Franco Sandoval. In addition, it has been proved that, during the investigation, Mrs. Franco Sandoval was treated disdainfully and disrespectfully by State agents, both with regard to herself and to her daughter, María Isabel, which resulted in an added violation of her personal integrity.

240. Regarding Leonel Enrique Veliz Franco, José Roberto Franco, Cruz Elvira Sandoval Polanco de Franco and Roberto Franco Pérez, the Court finds that there is insufficient evidence to prove that their personal integrity was affected owing to non-compliance with the obligation of prevention, the lack of due diligence, and the delay in the investigations that are underway in the domestic jurisdiction.

241. As regards the allegation that the State is responsible for the violation of Article 5 of the Convention owing to the harassment and threats against Rosa Elvira Franco Sandoval, Leonel Enrique Veliz Franco and José Roberto Franco, following the death of her daughter and their sister (*supra* para. 26), the Court will not refer to this because, as already indicated (*supra* para. 27), these incidents exceed the factual framework of the Merits Report in this case.

242. Consequently, the Court finds that the State is responsible for the violation of the right to personal integrity established in Article 5(1) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Rosa Elvira Franco Sandoval.

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336 Testimony of Leonel Enrique Veliz Franco, *supra*.

337 Testimony of José Roberto Franco provided by affidavit dated April 16, 2013 (file of preliminary objections, merits, reparations and costs, fs. 823 to 828).

338 Testimony provided by Rodolfo Kepfer Rodríguez by affidavit dated April 26, 2013 (file of preliminary objections, merits, reparations and costs, fs. 838 to 854).

XI
REPARATIONS
(Application of Article 63(1) of the American Convention)

243. Pursuant to the provisions of Article 63(1) of the American Convention,[339] the Court has indicated that any violation of an international obligation that has caused harm entails the obligation to redress this adequately, and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[340] In the instant case, the Court has considered the need to grant different measures of reparation in order to ensure the violated right and to redress the harm fully.

244. It should also be indicated that the Court has established that reparations should have a causal nexus to the facts of the case, the violations declared, the harm proved, and the measures requested to repair the respective harm. Accordingly, the Court must observe this concurrence in order to rule appropriately and in accordance with the law.[341]

245. Based on the considerations on the merits and on the violations of the American Convention declared in Chapters VIII, IX and X, the Court will proceed to examine the claims presented by the Commission and the representative, as well as the arguments of the State, in light of the criteria established in its case law concerning the nature and scope of the obligation to make reparation, in order to establish measures aimed at redressing the harm caused to the victims.[342]

A. Injured party

246. The Court reiterates that, under Article 63(1) of the Convention, the injured party is considered to be the persons declared a victim of the violation of any right recognized in the Convention. Therefore, the Court considers that the following are the "injured party": María Isabel Veliz Franco, Rosa Elvira Franco Sandoval, Leonel Enrique Veliz Franco, José Roberto Franco, Cruz Elvira Sandoval Polanco and Roberto Franco Pérez and, in their capacity as victims of the violations that have been declared in Chapters VIII, IX and X, as applicable, they will be considered beneficiaries of the reparations ordered by the Court.

B. Obligation to investigate the facts and identify and punish, as appropriate, those responsible

B.1) Arguments of the Commission and of the parties

247. The Inter-American Commission asked that the State be ordered to "[c]omplete a timely, immediate, serious and impartial investigation to solve the murder of María Isabel Veliz Franco and to identify, prosecute and punish, as appropriate, those responsible."

248. Meanwhile, the representative, like the Commission, asked that the State be ordered to investigate the events that occurred to the child, María Isabel Veliz Franco. To this end, it indicated that "the State should remove all obstacles *de jure* or *de facto* that prevent the

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339 Article 63(1) of the Convention stipulates that: "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

340 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs.* Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Liakat Ali Alibux, supra*, para. 137.

341 *Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Liakat Ali Alibux, supra*, para. 139.

342 *Cf. Case of Velásquez Rodríguez. Reparations and costs, supra*, paras. 25 to 27, and *Case of Liakat Ali Alibux, supra*, para. 138.

proper investigation of the events and judicial proceedings," and also that the investigation should include "a perspective of gender and the human rights of women," so that the State should "establish specific lines of investigation with regard to the acts of violence committed against the victim." Lastly, it asked that "[t]he results of the investigations be publicized widely, so that Guatemalan society is informed of them."

249. The State "reiterate[d] that it had carried out a thorough investigation to clarify María Isabel's murder and that, unfortunately, it had not been able to identify the presumed perpetrator or perpetrators." Nevertheless, it stated that:

> It would keep the investigation open, while it considers that it is legally possible to obtain a positive result, and if this happens, it will prosecute and punish those responsible, if and only if, it is possible to establish the participation of one of the suspects in the tragic death of the child.

B.2) Considerations of the Court

250. The Court considers that the State is obliged to combat impunity by all available means, because impunity encourages the chronic repetition of the violation of human rights.[343] The absence of a complete and effective investigation into the events constitutes a source of additional suffering and anguish for the victims, who have the right to know the truth of what happened.[344]

251. Consequently, the Court establishes that the State must conduct the investigation properly and, when appropriate, initiate the corresponding criminal proceedings and, if pertinent, any others that are required to identify, prosecute and punish, as appropriate, those responsible for the abuse and deprivation of the life of the child María Isabel Veliz Franco, in keeping with the guidelines in this Judgment, in order to avoid the repetition of acts that are the same or similar to those of this case. This investigation should be conducted with a gender-perspective, follow up on specific lines of investigation related to sexual violence, provide the victim's family members with information on progress in the investigation in accordance with domestic law, and ensure that they can participate effectively in the criminal proceedings. In addition, the investigation should be conducted by officials trained in similar cases and in attending to victims of gender-based violence and discrimination. Lastly, it should be ensured that those in charge of the investigation and of the criminal proceedings, as well as any other persons involved as witnesses, expert witnesses or members of the victims family, have satisfactory guarantees for their safety.

C. Measures of satisfaction

252. International case law and, in particular that of the Court, has established repeatedly that the judgment constitutes *per se* a form of reparation.[345] Nevertheless, based on the circumstances of the case and the harm to the victims arising from the violations of the American Convention that have been declared, the Court finds it pertinent to examine the arguments of the Commission and of the parties concerning the award of measures of satisfaction.

C.1) Arguments of the Commission and of the parties

253. The Inter-American Commission asked, in general, that the State "make full reparation to the next of kin of María Isabel Veliz Franco for the human rights violations." However, it did not submit any explicit request as regards the measures of satisfaction.

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343 *Cf. Case of the "White Van" (Paniagua Morales et al.). Merits, supra*, para. 173*, and Case of Liakat Ali Alibux, supra*, para. 42.

344 *Cf. Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of August 12, 2008. Series C No. 186, para. 146, and *Case of Osorio Rivera and family members, supra*, para. 288.

345 *Cf. Case of Neira Alegría et al. v. Peru. Reparations and costs.* Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Liakat Ali Alibux, supra*, para. 147.

254. The representative asked the Court to order the following measures of satisfaction: (a) publication of the chapters on "context and proven facts, as well as the operative paragraphs of the Judgment" handed down by the Court in "the official gazette and in a national newspaper with widespread circulation"; (b) organization of a public act to acknowledge international responsibility and to apologize to the members of María Isabel Veliz Franco's family; (c) "construction of a monument in memory of the women victims of femicide, including María Isabel Veliz Franco"; (d) establishment of a scholarship fund for young survivors of violence in honor of María Isabel Veliz Franco,"[346] and (e) award of a study grant to Leonel Enrique Veliz Franco and José Roberto Franco.[347]

255. For its part, in relation to the measures of satisfaction requested by the representative, the State opposed the following: (a) organization of a public act to acknowledge international responsibility and to apologize; (b) construction of a monument in memory of the women victims of femicide, including María Isabel; (c) establishment of a scholarship fund for young survivors of violence in honor of María Isabel Veliz Franco[348] and (d) award of a study grant to María Isabel's brothers.[349]

C.2) Considerations of the Court

C.2.1. Publication of the Judgment

256. The Court orders that, within six months of notification of this Judgment, the State publish: (a) the official summary of this Judgment prepared by the Court, once, in the official gazette of Guatemala; (b) the official summary of this Judgment prepared by the Court, once, in a national newspaper with widespread circulation, and (c) this Judgment in its entirety, to be available for one year on an official website of the Judiciary, as well as on official websites of the Public Prosecution Service and the National Civil Police.

C.2.2. Public apology

257. The Court considers that the State should make a public apology in relation to the facts of this case that occurred to María Isabel Veliz Franco and their subsequent investigation. During this act the State should refer to the human rights violations declared in this Judgment. The apology should be made in a public ceremony and be widely divulged. The State must ensure the participation of Rosa Elvira Franco Sandoval, Leonel Enrique Veliz Franco and José Roberto Franco, if they so wish, and invite the organizations that have

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346 The representative asked that, "in order to preserve the memory of María Isabel, who had often expressed her desire to pursue higher education, [… the Court] order the State to establish a fund in her memory to award scholarships of at least five years, so that women survivors of violence may pursue a career in the field they choose in a public higher education establishment." Lastly, they indicated that "the participation of Mrs. Franco [Sandoval] and her representatives in the implementation of this measure of reparation should be ensured."

347 The representative indicated that, "on different occasions, the Inter-American Court has considered, as a measure of satisfaction to redress the violation and its consequences, the award of study grants to victims or their next of kin when, as a result of the human rights violations, they have had to face hardship and suffering in order to complete their primary and secondary education or pursue university studies." It understood that, in the case of María Isabel's brothers, "their educational opportunities were affected not only because of the loss of their sister, but also due to the effects of the search for justice and truth undertaken by their mother." Accordingly, it asked that the State be ordered to award Leonel Enrique Veliz Franco and José Roberto Franco "grants so that they could pursue advanced studies in the field, career or profession that they wished to study."

348 In this regard, the State indicated that "among its institutional resources, it has different scholarship programs for young people. However, establishing a new fund entails expenditure that the Government is not in a position to cover."

349 The State indicated that it "has institutions that have been created to provide scholarships to underprivileged youths who need help to pay for their studies." It also noted that the reparation requested "does not indicate the type of studies to which it refers. The State therefore urges María Isabel's brothers to apply to the said scholarship programs, and if they meet the respective requirements, they can benefit from them." It also indicated that "[i]n this case, no evidence of any kind has been presented leading to the conclusion that María Isabel's brothers have suffered constraints to their education as a result of what happened to their sister."

represented María Isabel's family before the national and international organs to the event. The organization and other details of this public ceremony should be consulted previously and adequately with Rosa Elvira Franco. If there is any disagreement between her and the State, the Court will decide this. The State has one year from notification of this Judgment to comply with this obligation.

258. With regard to the State authorities who should attend or participate in this ceremony, as it has on other occasions, the Court indicates that they should be senior State officials. It is for the State to define who is designated for this task.

C.2.3. Other measures requested

259. The Court considers that the measures of satisfaction granted are sufficient and, therefore, does not find the other requests made by the representative admissible. Regarding the request that a study grant be awarded to María Isabel Veliz Franco's brothers, the Court considers that the compensation ordered is sufficient and adequate to redress the violations suffered by the victims and does not find it necessary to order such a measure. In addition, the Court takes note of the State's observations concerning the available scholarship programs.

D. Guarantees of non-repetition

260. In cases such as this one, guarantees of non-repetition acquire greater relevance as a measure of reparation to ensure that similar events are not repeated and to help prevent them.[350] In this regard, the Court recalls that the State must prevent the recurrence of human rights violations such as those described in this case and take all pertinent legal, administrative and other measures to this end.[351]

261. Both the Inter-American Commission and the representative asked the Court to order the State to implement different guarantees of non-repetition. However, the representative did not request several measures claimed by the Commission, but asked for others that the Commission had not claimed. Consequently, the Court will proceed to examine, first, the measures requested only by the Inter-American Commission; then the measures requested by both the representative and the Commission and, lastly, those that have been requested only by the representative.

D.1) Request to enhance the institutional capacity to combat impunity in cases of violence against women and to ensure that such cases are adequately prevented, investigated, punished and redressed

D.1.1. Arguments of the Commission and the State

262. The Commission considered that the Court should order the State to adopt a "comprehensive and coordinated policy, supported by sufficient public resources to ensure that the specific cases of violence against women are adequately prevented, investigated, punished and redressed." In addition, it asked that "the institutional capacity to combat impunity in cases of violence against women [be enhanced], through effective criminal investigations conducted from a gender perspective and that have constant judicial oversight, thereby ensuring proper punishment and redress."

263. The State indicated that it "already has programs aimed at enhancing the institutional capacity to combat impunity in case of violence against women, [whose] focus is to prevent, punish and eventually eradicate this." It also indicated that "in compliance

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350 *Cf. Case of Pacheco Teruel et al. v. Honduras. Merits, reparations and costs.* Judgment of April 27, 2012. Series C No. 241, para. 92, and *Case of Luna López, supra*, para. 234.

351 *Cf. Case of Velásquez Rodríguez. Reparations and costs, supra*, para. 166, and *Case of the Pacheco Tineo Family, supra,* para. 265.

with the obligation to respect and ensure human rights […] it has taken the [following] measures": (a) adoption of decrees such as the Law against Femicide […] and the Law against Sexual Violence, Exploitation and People Trafficking"; (b) creation of the Coordinating Body for the Prevention, Punishment and Eradication of Family Violence and Violence against Women (CONAPREVI), the Presidential Secretariat for Women (SEPREM), the Secretariat against Sexual Violence, Exploitation and People Trafficking (SVET), the Presidential Commission to tackle Femicide in Guatemala (COPAF), the Ombudsman for Indigenous Women of the Presidency of the Republic, the Task Force against Femicide under the Bureau for Women's Affairs of the Ministry of the Interior (GEM), the Program for the Prevention and Eradication of Family Violence (PROPEVI), the Judiciary's Unit for Women's Affairs and Gender Analysis (based on Decision 69/2012 of April 30, 2012, of the Presidents of the Judiciary and of the Supreme Court of Justice of the Republic of Guatemala, entitled Secretariat for Women's Affairs and Gender Analysis of the Judiciary), "courts and tribunals with competence in cases of femicide and all forms of violence against women, the Committee for Women's Affairs of the Legislature, the Special Prosecutor's Office for Women's Affairs, special prosecution offices for "the crimes of femicide," and the Department of Sexual Offenses, People Trafficking, Minors, Children, Adolescents and Missing Persons (DESEXTRANA); (c) formulation of the following public policies: National Policy for the Promotion and Comprehensive Advancement of Women (PNPDIM), Equity and Opportunities Plan (PEO), and National Plan for the Prevention and Eradication of Family Violence and Violence against Women (PLANOVI), and (d) actions of the Attorney General in "coordination with the early warning system of the Alba-Kenneth Law, [which] seeks to protect children and adolescents from kidnapping, trafficking and exploitation for any purpose or of any kind to the greatest extent possible."

D.1.2. Considerations of the Court

264. The Court appreciates the efforts made by the State to establish laws, other legal instruments, public institutions, and policies aimed at combating gender-based violence, as well as its efforts to adapt its criminal investigation system.[352] This progress provides

[352] It should be noted that the body of evidence and non-contested affirmations reveal that the State has created the Presidential Commission to tackle Femicide, "coordinate by the Presidential Secretariat for Women's Affairs and composed of representatives of human rights and security agencies, and of the Executive, Legislature and Judiciary, as well as of the Public Prosecution Service." The Commission was officially created on March 8, 2006 (file of annexes to the motions and arguments brief, annex 97, f. 10,810 to 10,824). On October 6 that year, according to the Inter-American Commission, the Supreme Court of Justice created the Judiciary's Unit for Women's Affairs and Gender Analysis, actually the Secretariat for Women's Affairs and Gender Analysis of the Judiciary (Merits Report, *supra)*, an entity whose creation was also described by the State. Also, as indicated by the Inter-American Commission, on November 23, 2007, the Congress of the Republic in plenary session adopted Resolution 15-2007 in which it condemned femicide in Guatemala (Merits Report, *supra*). In 2008, the Law against Femicide and Other Forms of Violence against Women was enacted (*supra* footnote 68). In addition to introducing offenses subject to public prosecution, this law established a series of State obligations such as training public officials on gender violence and the creation of a national information system on violence against women. The law also established the creation of "centers to provide comprehensive support to women survivors of violence," and that "CONAPREVI shall be responsible for creating them" (Law against Femicide, *supra*, articles 18, 20 and 16, respectively; file of annexes to the motions and arguments brief, annex 93, fs. 10,776 to 10,786.). In the judicial sphere, according to information provided by Guatemala (*supra* para. 263), and also the Commission (Merits Report, *supra*), the State has a Unit for Women's Affairs and Gender Analysis. Furthermore, information presented by the State indicates that, at the end of 2012, it had other agencies involved in the problem of violence against women, such as the Task Force against Femicide, attached to the Ministry of the Interior, or the GEM (*supra* para. 263). In addition, as already mentioned, Guatemala indicated the existence of the PLANOVI and the PEO (*supra* para. 263), adopted by Government Agreement No. 302-2009, of November 11, 2009 (file of annexes to the answering brief, annex 26, fs. 14,272 to 14,471). The State indicated that one of the elements of the PNPDIM and the PEO is "the 'eradication of violence against women' and, as a specific objective, 'to prevent, punish and eradicate the different manifestations of violence: physical, economic, social, psychological, and sexual violence and discrimination.'" It also mentioned the enactment, by Decree No. 9-2009, of the Law against Sexual Violence, Exploitation and People Trafficking, creating a Secretariat in this regard, the SVET (*supra* para. 263). Furthermore, it indicated that, the working committees of the "Legislature" include the Committee for Women's Affairs (*supra* para. 263) and, according to the State, its "functions [include …] recommending the approval of norms and procedures to the different State entities in matters that fall within its terms of reference." Moreover, as regards criminal investigations in general, according to the representative and as revealed by the body of evidence, the

structural indicators as regards the adoption of measures that, in principle, are aimed at confronting violence and discrimination against women, or whose application contributes to this.

265. In this context, as regards the indication of the different measures adopted by the State, with the exception of what is indicated below (*infra* paras. 267 to 269), the Court does not have sufficient and recent information to be able to assess the possible insufficiency of the said laws, institutions and policies. In particular, the Court is unable to rule on the existence of a comprehensive policy to overcome the situation of violence against women, discrimination and impunity, without information on the possible structural deficiencies of these policies, the potential problems in their implementation and, where applicable, their results on the effective enjoyment of rights by the victims of such violence.

266. In general, and with the exception of the following considerations, this lack of information on the different measures adopted by the State prevents the Court from ruling on the need for different or supplementary norms, actions or public policies in order to ensure the non-repetition of the facts of this case.

267. The Court observes that the State has indicated that INACIF entered into operation at the end of 2007 (*supra* para. 171). The work of this institute does not relate only to cases of violence against women or girls, but does include such cases. In this regard, the State indicated that the tests that were omitted in the investigation into the facts of the case "could only be conducted after [INACIF] had been created" (*supra* para. 171). Also, article 21 of the Law against Femicide ordered that "[t]he Ministry of Finance […] allocate resources in the State's Budget of Income and Expenditure to […]: strengthen […] INACIF." Hence, it can be inferred, based on the State's assertions and the text of the said law, that the satisfactory functioning of this entity is essential for ensuring that cases of assaults on women can be properly investigated. Nevertheless, information from 2012 has been verified indicating the need for INACIF to receive increased resources, and this was also indicated by INACIF authorities in 2010.[353] This information has not been contested and the Court has not been provided with information to show that this situation has changed. In addition, expert witness María Eugenia Solís was of a similar opinion and indicated also that INACIF "has a weakness, because it is not present throughout the country."

268. Based on the above, the Court finds it pertinent to order the State, within a reasonable time, to draw up a plan with a specific timetable to reinforce INACIF, which includes the allocation of adequate resources to allow it to expand its activities throughout national territory and to fulfill its mandate.

269. The evidence also reveals that article 15 of the Law against Femicide, approved in 2008, established the "creation of the specialized jurisdictional organs." Furthermore, its article 14 established that "the Public Prosecution Service shall create the Prosecutor's Office for Offenses against the Life and Physical Integrity of Women, specialized in the investigation of the offenses established by [the said] law, with the budgetary, physical, material, scientific and human resources that allow it to meet its objectives." The State has advised that, "by decision 1-2010, the Supreme Court of Justice of Guatemala approved the

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State has adopted some measures to improve their effectiveness: on February 1, 2006, the Public Prosecution Service issued "General Instructions" establishing guidelines for criminal investigations (file of annexes to the motions and arguments brief, annex 100, fs. 10,833 to 10,852).

353 *Cf. El Observador Judicial*. No. 87. Year 12. March-April 2010. Guatemalan National Institute of Forensic Science. *Estado de Situación 2012*, p. 15 (file of annexes to the motions and arguments brief, annex 73, fs. 9667 to 9701). This indicates that "it can be concluded that the budget allocated and in effect must be increased by 38.6% for the allocated budget to correspond to the executed budget and to recover the budget level at 2006 prices, which should be an institutional management objective over the next periods"), and *El Periódico*, Guatemala, Thursday, March 11, 2010, "*I[NACIF] suspende el 80% de servicios*" [INACIF suspends 80% of its services] and Noticiasguate.com - *Noticias de Guatemala,* April 19, 2010, "*El I[NACIF] podría desaparecer*" [INACIF could disappear], newspaper articles cited by the representative, available, respectively, at http://www.elperiodico.com.gt/es/20100311/pais/141753/ and http://noticiasguate.com/el-inacif-podria desaparecer/.

creation of the specialized jurisdictional organs in some of the country's departments, but the information provided to the Court does not reveal what it has done with regard to the remaining departments.[354] In addition, the information presented to the Court concerning the lack of an adequate budget to establish the Prosecutor's Office for Offenses against the Life and Physical Integrity of Women, which was noted by a decision of the Prosecutor General's Office of July 3, 2008, has not been contested.[355] The Court has not been informed that this situation has changed. Furthermore, it is pertinent to indicate that article 21 of the 2008 Law against Femicide established that "[t]he Ministry of Finance shall allocate the resources in the State's Budget of Income and Expenditure for[, *inter alia,* the c]reation of the Prosecutor's Office for Offenses against the Life and Physical Integrity of Women, [and the c]reation of specialized jurisdictional organs to hear offenses against the life and physical integrity of women." In addition, articles 22 and 23 of the law establish a time frame of 12 months for the "establishment" of "[t]he specialized jurisdictional organs referred to in article 15 […] throughout the Republic," and "[t]he prosecutor's office referred to in article 14." Also, in its first report on criminal courts and tribunals for crimes of femicide and other forms of violence against women," issued in 2012, the Judiciary recognized that "[f]ollowing the entry into force of the Law against Femicide, […] the State's capacity to respond has not been proportionate as regards the investigation, punishment and redress of the harm." CONAPREVI has expressed a similar opinion.[356]

270. Based on the foregoing, and taking into account the provisions of the Law against Femicide, the Court finds it pertinent to order the State, within a reasonable time, to implement the full functioning of the "specialized jurisdictional organs […] throughout the Republic," as well as of the special prosecutor's office indicated in this law.

D.2) Adoption of integrated public policies and institutional programs aimed at eliminating discriminatory stereotypes regarding the role of women and promoting the eradication of discriminatory socio-cultural patterns that prevent their full access to justice

D.2.1. Arguments of the Commission and of the parties

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[354] In 2010, the Supreme Court of Justice approved the creation of "courts and tribunals for femicide and other forms of violence against women," in the departments of Guatemala, Chiquimula and Quetzaltenango. Subsequently, in 2012, it approved the creation of another two specialized courts and tribunals in the departments of Huehuetenango and Alta Verapaz. *Cf.* Judiciary. Guatemala. "*Primer Informe. Juzgados y Tribunales Penales de Delitos de Femicidio y otras Formas de Violencia contra la Mujer*", *supra*. There is no record that specialized jurisdictional organs have been created in the other 17 departments of Guatemala.

[355] The State indicated, without mentioning the dates when they initiated their functions, the "creation of special prosecutor's offices of the Public Prosecution Service." In this regard, it indicated the existence of the "Office of the Prosecutor for Women," responsible for the "criminal prosecution" in cases of "family violence and […] violence against women," and "specialized prosecutors" in Guatemala City, in the municipalities of Villa Nueva and Mixco, and in the Departments of Chiquimula, Quetzaltenango, Coatepeque and Huehuetenango that "exclusively hear crimes of femicide." Information presented by the representative specifies that, at September 4, 2012, the date of the motions and arguments brief, "the Office of the Prosecutor of Crimes against the Life and Physical Integrity of Women, contemplated in the Law against Femicide, had not yet been created, because [the Public Prosecution Service] does not have the budgetary capacity to do this." However, at that date, the Office of the Prosecutor for Women had been established in six municipalities (Mixco, Villa Nueva, Quetzaltenango, Chiquimula, Coatepeque and Huehuetenango). A decision of the Prosecutor General's Office of July 3, 2008, established the competence of the prosecutor's offices that existed at that date "to hear" "crimes of femicide, as well as attempted femicide […] until the necessary budget is available for the establishment of the specialized agencies referred to in article 14 of the Law against Femicide and other Forms of Violence against Women." Decision No. 70-2008, of July 3, 2008, issued by the Prosecutor General and Head of the Public Prosecution Service (file of annexes to the motions and arguments brief, annex 98, fs. 10,826 and 10,827).

[356] In a document dated March 22, 2012, provided by the State, this State entity indicated that "[t]he system of justice has collapsed owing to the number of judicial proceedings requested in the context of crimes of violence against women." Report of CONAPREVI to the Presidential Human Rights Commission (COPREDEH), in response to a request of the Inter-American Commission in the case of Claudina Isabel Velásquez Paiz, *supra*, p. 2.

271. The Commission indicated that such public policies and institutional programs should include "training programs for public officials from all sectors of the State, including the education sector, the branches of the administration of justice and the police, and comprehensive prevention policies."

272. In this regard, the representative indicated that the State should "adopt a series of measures in order to promote the elimination of discriminatory socio-cultural patterns and stereotypes and to ensure full access to justice for women victims of violence." Among such measures, it indicated: (a) the "creation of a protocol for immediate action in cases of the disappearance of girl children and adolescents, and women"; (b) the "adoption of standardized protocols for joint action to respond to and investigate cases of violence against women, from the perspective of the human rights of women"; (c) the "creation of an analysis and support unit for investigations of cases of the violent death of women"; (d) the "implementation of education and training programs for public officials," as a "permanent training program on standards of due diligence in the investigation from the perspective of the human rights of women," and a "program of permanent training on standards for the prevention, punishment and eradication of violence against women"; (e) "ensuring the operation of the institutions responsible for public policies aimed at preventing and eliminating violence against women and responding to cases of violence," and (f) "guaranteeing a reliable and accessible system for the data collection and the production of statistics."

273. The State reiterated that "it has not been proved that this case is a gender-based illegal act [and] that it had taken measures leading to changes in the way in which cases of violence against women are handled compared to when the events of the case occurred." It also indicated that the measures it had taken "have been implemented […] to ensure the most prompt and effective response of the State to acts of violence against women."

D.2.2.Considerations of the Court

274. Regarding the request for a protocol for immediate action in cases of the disappearance of girl children and adolescents, and women, the Court takes note of what the State has indicated concerning the "early warning system" enacted by the Law on the Alba-Kenneth Alert in order to locate missing children (*supra* para. 263).[357] Consequently, and since the facts of the case are related to the disappearance of a girl child, the Court does not find it in order to require the State to adopt a specific protocol.

275. With regard to the implementation of education and training programs for State officials, the Court establishes that the State must, within a reasonable time, implement programs and courses for public officials who are members of the Judiciary, the Public Prosecution Service, and the National Civil Police, and who are involved in the investigation of the murder of women, on standards with regard to prevention, and the eventual punishment and eradication of the murder of women, and provide them with training on the proper application of the relevant laws and regulations.

276. As for guaranteeing a reliable and accessible system for the data collection and the production of statistics, the Court takes into account that article 20 of the Law against Femicide stipulates that the National Institute of Statistics is obliged to generate indicators and statistical information, and to set up a national information system on violence against women. In its final arguments, the State provided the address of the website on which the

[357] *Cf.* Law on the Alba-Keneth Alert System. Decree No. 28-2010 (file of annexes to the answering brief, annex 12, fs. 14,097 to 14,102). The State also has other laws relating to childhood, including a "Law on the Comprehensive Protection of Children and Adolescents" (Decree No. 27-2003) which was "issued" on July 4, 2003. The State also provided the Court with a copy of articles 5, 20 and 51 of the Constitution of the Republic of Guatemala, entitled, respectively, "Freedom of action", "Minors," and "Protection of minors and the elderly" (file of annexes to the answering brief, annexes 22 and 23, respectively, fs. 14,189 to 14,259 and 14,261).

National Information System may be consulted: http://www.ine.gob.gt/np/snvcm/index,[358] and the Court has verified that the site contains data and information concerning violence against women in Guatemala. Consequently, the Court finds that it is not necessary to order the creation of a system for data collection and the production of statistics.

277. With regard to the other measures of reparation that have been requested, the Court considers that the measures granted are sufficient; accordingly it does not find it necessary to order the adoption of other measures. In relation to the Commission's request that the State be ordered "[t]o introduce reforms in the State's education programs, starting with the early, formative years, so as to promote respect for women as equals, and observance of their rights to non-violence and non-discrimination" and to "take measures and launch campaigns designed to make the general public aware of the duty to respect and ensure the human rights of children," it has not been demonstrated to the Court that the obligation to respect and ensure the human rights of women and children cannot be guaranteed by the continuation of the existing programs and the diffusion of measures that, as indicated by the State, are already included among its activities. Moreover, the Court does not find it pertinent to order such measures for the reasons stated previously.

E. Appropriate medical and psychological care and treatment

E.1) Arguments of the representative and of the State

278. The representative asked that the State be ordered "to provide immediately and free of charge, adequate and effective medical and psychological treatment to the next of kin of María Isabel Veliz Franco: her mother, Rosa Elvira Franco Sandoval, and her brothers, Leonel Enrique Veliz Franco and José Roberto Franco." It specified that:

> This treatment should be provided on the basis of a comprehensive diagnosis of the medical and psychological conditions of each of them by specialized professionals who have sufficient training and experience to treat both the problems of physical health that they suffer from and the psychological traumas resulting from the gender-based violence, the absence of a response from the State, and the impunity.

And that this should be "provided for as long as necessary and include the provision of any medicines that are eventually required."

279. The State indicated that:

> If they had asked for it, [the State] would have provided Rosa Elvira Franco and her sons […], with the State's services of psychology and attention to victims within its public institutions, as part of or as a complement to the precautionary measures that they were accorded on the instructions of the Commission. However, at no time have the next of kin indicated that they wish to receive psychological support for any member of the family unit.

E.2) Considerations of the Court

280. The Court notes the State's argument about the possibility of requesting the relevant services provided by the State, and appreciates what Guatemala has indicated as regards its willingness to provide the necessary care. Nevertheless, the measures of reparation that the Court can order are based directly on the harm resulting from the human rights violations declared in this case. Therefore, as it has in other cases,[359] the Court orders the State to provide adequate and effective medical or psychological care free of charge and immediately, through the State's specialized health care institutions to Rosa Elvira Franco Sandoval, owing to the effects on her personal integrity declared by this Court in the case

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[358] The Court has verified that, when the State presented its final written arguments (*supra* para. 13), this electronic page was in operation and contained the indicated information. The Court has not been able to verify that this electronic page is functioning at the time this Judgment is delivered.

[359] *Cf. Case of Barrios Altos v. Peru. Reparations and costs.* Judgment of November 30, 2001. Series C No. 87, paras. 42 and 45, and *Case of J., supra*, para. 344.

sub judice, if she so wishes. The State must ensure that the professionals of the specialized health care institutions assigned to treat victims make a proper assessment of the victim's psychological and physical conditions and have sufficient training and experience to treat both her physical health problems and also the psychological traumas resulting from the lack of State response, the impunity, and the treatment received during the investigation (*supra* para. 239). The care must be provided for as long as necessary and include the provision of any medicines eventually required free of charge.

F. Compensation for pecuniary and non-pecuniary damage

F.1) Introduction

281. The Court takes into consideration that, in general, the Commission recommended that the State "provide adequate redress for the human rights violations declared in [its Merits] report from both the pecuniary and the non-pecuniary perspective" without providing specific arguments. The representative requested compensation based on the arguments described below. The State rejected these requests with arguments that are also described below. In this case, the Court finds it pertinent to refer jointly to the determination of the compensation for pecuniary and the non-pecuniary damage.

F.2) Arguments of the parties

282. The representative indicated that the death of María Isabel Veliz Franco "led to unexpected expenditures; first, the need to give her a decent burial. The corresponding funeral expenses were paid entirely by her family." However, it indicated that Rosa Elvira Franco "does not have all the receipts for the expenses which were incurred more than 10 years ago" and, consequently, asked the Court to "determine the amount for this item based on equity criteria."

283. It also stated that, "from the moment of María Isabel's death […], and throughout the more than 10 years that have passed since then, her mother has taken numerous steps to obtain justice and to establish the truth about what happened, and she has dedicated many hours to this." In this regard, it indicated that, during the time she invested in such steps, "Mrs. […] Franco [Sandoval] has not kept the receipts for the" expenses and, therefore, asked that the Court "determine, based on the equity principle, the amount that should be delivered to Mrs. […] Franco [Sandoval]."

284. The representative also indicated that "the profound pain and anguish that Rosa Elvira Franco felt and continues to feel as a result [of the events], has led to serious health problems such as depression, hypertension, hyperthyroidism, and a hernia." Consequently, it asked that the Court "determine, based on the equity principle, the amount that the State should award Mrs. […] Franco [Sandoval] in this regard."

285. With regard to loss of earnings, it indicated that María Isabel Veliz Franco was 15 years old when she was murdered and that, in "2001, life expectancy for women in Guatemala was 72 years, so that she could have lived a further 57 years approximately." It also indicated that she "had expressed her wish to pursue higher education studies" and that, since "there is no possibility of calculating the salary that she would have earned […] on completing her studies," it asked that, based on the precedents "established in the judgment in [the case of] *González et al. v. Mexico* [… the Court] establish, in equity, the sum of US$145,000.00" (one hundred and forty-five thousand United States dollars).

286. The representative also referred to the non-pecuniary harm. For non-pecuniary damages to the detriment of María Isabel Veliz Franco, she asked that the State pay the sum of US$40,000.00 (forty thousand United States dollars). This was for "the failure to ensure the rights to life, personal integrity and personal liberty, […] as well as the State's failure to comply with its obligation to provide her with special protection owing to the fact

that she was a child." It indicated that this sum "should be delivered to the members of her family in accordance with the inheritance laws in force in Guatemala."

287. Regarding the members of María Isabel Veliz Franco's family, it indicated that, "in this case, the intense suffering is evident" because "they experienced profound anguish and pain owing to [the] disappearance, the abuse she suffered and the murder" of María Isabel. In addition, it indicated that María Isabel's mother and brothers continue "suffering owing to the effects on their mental and moral integrity of the negligence of the public officials who took part in the investigations, and the accusations and insults they expressed against María Isabel, as well as the impunity in which the events of this case remain. It stated that "María Isabel's murder had a profound impact on her mother's life project because the burden of the search for justice and the advance of the investigations fell, above all, on her." It also indicated that a psychological appraisal had been provided to prove the suffering of María Isabel's grandparents, and of her brothers. Consequently, the representative asked that "based on the equity principle and pursuant to the case law" of the Court, a sum be established for the non-pecuniary harm suffered by the mother, brothers and grandparents of María Isabel Veliz Franco. It asked that the amounts awarded in favor of the grandparents "be delivered to their legitimate heirs in keeping with the laws of Guatemala."

288. The State, for its part, referring to the funeral expenses, underlined that there was a contradiction in the representative's request as regards "Mrs. […] Franco [Sandoval] does not have all the receipts" because, "among the documents attached to the [motions and arguments brief], the attachment identified as Annex 127 [*sic*] includes vouchers for the funeral expenses, which were verified by State agents." In this regard, the State pointed out the difference between the "certification issued as a proof for the funeral service of María Isabel" and "the cash receipt" presented by the representative. The former indicates a total of "GTQ 2,500.00 (two thousand five hundred quetzals)," while the latter indicates that "GTQ 10,500.00 (ten thousand five hundred quetzals) were paid for sandwiches and the embalming of María Isabel Veliz Franco." The State indicated that, on noting the inconsistency, it "approached the funeral home that had issued the said certification and the cash receipt that appears in the case file, to verify the authenticity of the said documents and the legitimacy of their content." It found that "Rosa Elvira Franco had committed an offense under domestic law" because "the value of the cash receipt, according to the representatives of the funeral home […] is GTQ 1,050.00 (one thousand and fifty quetzals)." The State also asserted:

> Although the embalming and additional sandwiches were paid for, the cost of embalming a body today is GTQ 2,000.00 (two thousand quetzals), and the cost of this service has not decreased over recent years, but rather has increased, and that, in 2001, it cost GTQ 850.00 (eight hundred and fifty quetzals).

Lastly, it indicated that "there is a note on the lower left hand corner of the cash receipt presented by the victim's mother reading for the 'Case of María Isabel Veliz Franco *et al.*' [so that] it is clear that this text was added" and that this is an "example of the bad faith with which the victim's mother and, if applicable, her representative, have acted in order to obtain financial benefits from the tragic death of the child."

289. It also indicated, with regard to the alleged expenses in order to obtain justice, that it "had absolutely no confidence in the truth of what the representative has said; however, [it] recalls […] that none of the expenses incurred by Mrs. Franco to date were necessary in order to obtain justice."

290. The State also indicated that "the petitioners and their […] representative [… have] ask[ed] for reimbursement of medical and psychological expenses, but in the section in which they claim the reimbursement of medical expenses incurred, there is no mention of any kind that they have received any type of psychological treatment."

291. As regards the alleged loss of earnings, the State indicated that:

> It is possible to calculate the salary that María Isabel would have earned on completing her studies. To this end, the State can provide information, if the Court requires this, on average salaries of individuals with academic diplomas in activities related to commerce, since María Isabel worked as a salesperson in a store and it can be assumed that this was a sphere of interest.

Lastly, it considered that it was:

> Exaggerated that [the representative] establishes, in equity, for the supposed loss of earnings a sum of US$145,000.00 [(one hundred and forty-five thousand United States dollars)], because, over 10 years, this sum would represent US$14,500.00 [fourteen thousand five hundred United States dollars] a year, which would be around US$1,200.00 [one thousand two hundred United States dollars] a month.

292. Based on the foregoing and taking into account that "the minor was not yet a professional, it would be difficult for the State to recognize legitimately that, in some way, she would have earned, if she had continued her studies, almost three times the minimum wage established in the country nowadays, from the time she left college until she died of natural causes."

293. Regarding the compensation for non-pecuniary damage in favor of María Isabel, the State indicated that it "had conducted a genuine and diligent investigation […] to establish what happened; [however,] it has not been possible to identify and punish those responsible." It also indicated that it "took all the appropriate measures to help determine her whereabouts, because it forwarded the report to the relevant office for the search for minors and, when the body appeared, it issued a communication to determine whether the characteristics of the body that had been found corresponded to those of any female whose disappearance had been reported."

294. The State also affirmed that "no type of monetary reparation is owed for non-pecuniary damage to any of the supposed victims in this case (either María Isabel or her next of kin), because the State has not failed to comply with any of the conditions to which the criteria of the Court refer to establish that non-pecuniary harm is evident." It also indicated that "the State authorities had conducted a genuine and diligent investigation to determine what had happened"; however, "the results of the investigation had not made it possible to identify and punish those responsible; also, insofar as possible and owing to the very short time between the moment it was informed of the danger to the minor and she appeared dead, it took the appropriate steps to try and establish her whereabouts." Lastly, it indicated that "11 years have passed since the death of the child and, during all this time, the next of kin have never requested psychological help or indicated to the State that there have been obstacles to their emotional recovery."

F.3) Considerations of the Court

295. In its case law, the Court has developed the concept of pecuniary damage and has established that this supposes "the loss of or detriment to the income of the victims, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus to the facts of the case."[360] Similarly, it has developed the concept of non-pecuniary damage in its case law and has established that this "may include both the suffering and afflictions caused by the violation, and also the impairment of values that are very significant to the individual, as well as any change of a non-pecuniary nature in the living conditions of the victims."[361] Since it is not possible to allocate a precise monetary equivalent to non-pecuniary damage, it can only be compensated, in order to make full reparation to the victim, by the payment of a sum of money or the delivery of goods or services with a monetary value, determined by the Court in reasonable application of

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[360] *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Liakat Ali Alibux, supra*, para. 153.

[361] *Cf. Case of the "Street Children" (Villagrán Morales et al.). Reparations and costs.* Judgment of May 26, 2001. Series C No. 77, para. 224, and *Case of Liakat Ali Alibux, supra*, para. 156.

judicial discretion and based on equity.[362] Furthermore, the Court reiterates the compensatory character of the payment of damages, the nature and amount of which depend on the harm caused, so that they may not signify either the enrichment or the impoverishment of the victims of their heirs.[363]

296. From the information provided on the funeral expenses, the Court takes note of the contradiction of the representative, and also of the State's observations that, on the one hand, vouchers were provided for the funeral expenses incurred by the victim's family and, on the other hand, the Court was asked to establish the respective amount based on the equity principle because there were no receipts. Moreover, the State presented a certification issued by the funeral home hired for María Isabel's funeral, and questioned the vouchers presented by the representative because it considered that the amount had supposedly been altered. Despite this, the Court presumes, as it has in previous cases,[364] that the family incurred different expenses as a result of María Isabel's death. Likewise, it takes into consideration the representative's arguments on the expenses that Mrs. Franco incurred to obtain justice in order to establish the corresponding compensatory amount (*supra* para. 283).

297. However, the Court rejects the representative's request with regard to the medical expenses incurred because the evidence that has been provided to the Court does not reveal a causal nexus between the specific ailments that Mrs. Franco has suffered from and the violations declared in this Judgment. Nevertheless, the Court places on record that reparation is ordered by the provision of the respective treatment with regard to the harm related to the declaration of the violation of Mrs. Franco Sandoval's personal integrity, (*supra* para. 280)

298. Regarding María Isabel's alleged loss of earnings, the Court notes that the representative asked that compensation for this concept be established based on the relevant provision in the judgment in the case of *González et al. v. Mexico*. In this regard, in that case, the Court concluded that "the offer made by the State to compensate the loss of earnings […] was satisfactory" and took it into account to establish the compensation in favor of the victims for this concept.[365] In the instant case, the representative did not present any evidence related to the possible future earnings of the victim or even information on her wages in her temporary job, or about her life expectancy.

299. However, in the case of non-pecuniary damage, this Court has affirmed that non-pecuniary damage is evident, because it is inherent in human nature that any person who suffers a violation of his or her human rights experiences suffering.[366] With regard to María Isabel Veliz Franco, in this case the Court has established the international responsibility of the State for the deficiencies in the prevention of the acts that violated the entitlements protected by the rights of the child to life and personal integrity. It has also been established that different shortcomings in the investigation of these acts affected her family's access to justice and, in the case of her mother, also affected the latter's personal integrity (*supra* paras. 225 and 242). In this regard, the non-pecuniary damage suffered by María Isabel's grandparents will be taken into account to determine the corresponding compensation.

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362 *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs.* Judgment of December 3, 2001. Series C No. 88, para. 53, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2013. Series C No. 268, para. 301.

363 *Cf. Case of the "White Van" (Paniagua Morales et al.)*. Reparations and costs, *supra*, para. 79, and *Case of the Constitutional Tribunal (Camba Campos et al.), supra, para. 302.*

364 *Cf. Case of the Gómez Paquiyauri Brothers v. Peru. Merits, reparations and costs.* Judgment of July 8, 2004. Series C No. 110, para. 207, *and Case of Luna López, supra*, para. 50.

365 *Cf. Case of González et al. ("Cotton Field"), supra,* para. 577.

366 *Cf. Case of Reverón Trujillo, supra*, para. 176, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador, supra,* para. 344.

300. Based on the above, the Court establishes, in equity, the sum of US$220,000.00 (two hundred and twenty thousand United States dollars) for pecuniary and non-pecuniary damage. This sum must be distributed as follows: for Rosa Elvira Franco, the sum of US$120,000.00 (one hundred and twenty thousand United States dollars), and for Leonel Enrique Veliz Franco and José Roberto Franco, the sum of US$50,000.00 (fifty thousand United States dollars) each.

G. Costs and expenses

G.1) Arguments of the representative and of the State

301. The representative indicated that two organizations, CEJIL and REDNOVI, have represented the presumed victim and her next of kin. It indicated that "CEJIL acted as their representative […] as of 2005" and that, in exercise of this representation, incurred expenses that included "travel, accommodation, communications, photocopies, stationery, and the mailing of documents." Consequently, it asked that, in equity, the Court establish a sum of US$8,251.63 (eight thousand two hundred and fifty-one United States dollars and sixty-three cents), and that this amount be reimbursed by the State directly to CEJIL.

302. For its part, the representative alleged that REDNOVI:

> Has been following up on the case since 2003 [and] since then has taken numerous steps to support María Isabel's family during the proceedings before the Commission, such as the periodic verification of the judicial file, procedures, obtaining photocopies of documents, participation in meetings with authorities, and expenses for the preparation of statements and the certification of documents.

In addition, "expenditure has been incurred for travel […] to Washington D.C. [… and] San José." The representative also indicated that "it does not have receipts for the expenditure incurred" and, therefore, asked the Court to "establish, in equity, a sum of US$10,000.00 (ten thousand United States dollars)." It asked that "the amount relating to expenses incurred by REDNOVI be reimbursed directly by the State to the *Asociación Nuevos Horizontes*, a member organization of REDNOVI."

303. Lastly, it asked that:

> An additional sum to the expenses described previously be paid for future expenses [including] those related to compliance with the judgment; expenses that will be required by the proceedings of monitoring compliance with the judgment; travel expenses to ensure compliance with the judgment and, if applicable, expenses in Guatemala in order to verify compliance with the judgment.

304. The State indicated that:

> In view of the situation verified in this case in relation to the alteration of documents that contain supposed expenses incurred for funeral services, the State would greatly appreciate it if [the Court] would not condemning the State of Guatemala for the supposed expenses and costs of its opposing party in these proceedings.

In particular, with regard to the amount requested for CEJIL, the State indicated that "it did not accept payment of any of the expenses described because its participation in these proceedings was voluntary [since] the petitioners were already represented by REDNOVI." Lastly, regarding the expenses incurred by REDNOVI, the State indicated that "it would not be held responsible for expenses that have not been authenticated."

G.2) Considerations of the Court

305. The Court reiterates that, according to its case law,[367] costs and expenses are included in the concept of reparation, because the activity deployed by the victims in order to obtain justice, at both the national and international level, entails disbursements that

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[367] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs.* Judgment of August 27, 1998. Series C No. 39, para. 79, and *Case of Liakat Ali Alibux, supra*, para. 418.

must be compensated when the international responsibility of the State has been declared in a Judgment.

306. The Court also reiterates that it is not sufficient merely to provide probative documentation; rather the parties are required to submit arguments that relate the evidence to the fact that it is considered to represent and that, with regard to alleged financial disbursements, the items and their justification are clearly established.[368]

307. In the instant case, the evidence provided by the representative and the corresponding arguments do not justify fully the amounts requested. In addition, the Court notes that, in the motions and arguments brief, CEJIL requested the payment of the costs of the proceedings, but, in a communication of February 8, 2013, indicated that "as of that day, it [would] not continue providing legal representation to Rosa Elvira Franco Sandoval and her family"; nevertheless, it did not submit a request for costs and expenses for itself. Consequently, the Court will not rule in this regard. Taking this into account, the Court establishes, in equity, the sum of US$10,000.00 (ten thousand United States dollars), which must be delivered to REDNOVI, based on the expenses for the processing of the proceedings before the inter-American human rights system. This amount must be delivered to the representative. At the stage of monitoring compliance with this Judgment, the Court may establish the reimbursement by the State to the victims or their representatives of subsequent reasonable and duly authenticated expenses.[369]

H. Reimbursement of expenses to the Victims' Legal Assistance Fund

308. In 2008, the General Assembly of the Organization of American States established the Legal Assistance Fund of the inter-American human rights system, "in order to "facilitate access to the inter-American human rights system by persons who currently lack the resources needed to bring their cases before the system."[370] In the instant case, the orders of the President of January 8 and April 10, 2013 (*supra* paras. 9 and 11), authorized access to the Legal Assistance Fund to cover reasonable and necessary expenses, which, in this case, consisted in: (i) the necessary travel and accommodation expenses for Rosa Elvira Franco Sandoval and María Eugenia Solís to attend the public hearing, and (ii) the expenses of the preparation and delivery of the affidavits of the victims, Leonel Enrique Veliz Franco and José Roberto Franco.

309. Later, in a note of the Secretariat dated August 28, 2013, the State was given the procedural opportunity to present observations on the report of the disbursements made in application of the Victims' Legal Assistance Fund. In its brief with observations, and previously in its answering brief, the State indicated that: (a) "it cannot accept that [the Court] convict it in this case […] because it does not consider itself responsible for any of the presumed violations; (b) because the main purpose of having recourse to the Court […] is not for the supposed victims to be able to enrich themselves at the expense of the State"; (c) and because the representative altered "the accounting documents related to the expense incurred for funeral services" and that "the principles of truth and good faith, and procedural economy have been infringed," it was opposed to reimbursing any sum of money to the supposed victim and to her representative, and (d) it did not consider it fair to have to reimburse sums of money to the Victims' Legal Assistance Fund because [according to the State,] as they were going to be covered by the Fund, there was an unnecessary and unjustified increase in the expenses."

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368 *Cf. Case of Chaparro Álvarez and Lapo Iñiguez, supra*, para. 277, and *Case of J.*, *supra*, para. 421.

369 *Cf. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs.* Judgment of September 1, 2010. Series C No. 217, para. 291 and *Case of Liakat Ali Alibux, supra*, para. 165.

370 AG/RES. 2426 (XXXVIII-O/08), Resolution adopted by the thirty-eighth General Assembly of the OAS, during the fourth plenary session, held on June 3, 2008, *"Creation of the Legal Assistance Fund of the Inter-American Human Rights System,"* operative paragraph 2(b), operative paragraph 2(a), and CP/RES. 963 (1728/09), Resolution adopted by the OAS Permanent Council on November 11, 2009, *"Rules of Procedure for the Legal Assistance Fund of the Inter-American Human Rights System,"* article 1(1).

310. According to the information that appears in the report on the disbursements made in this case, these amounted to US$2,117.99 (two thousand one hundred and seventeen United States dollars and ninety-nine cents). In application of article 5 of the Rules for the Operation of the Fund, it is for the Court to evaluate the admissibility of ordering the defendant State to reimburse the Legal Assistance Fund for any disbursements made.

311. In this regard, the Court reiterates the considerations in the order of its President of January 8, 2013, in which it was indicated that the request to access the Assistance Fund was made at the appropriate time in the motions and arguments brief and that the representative had indicated precisely the assistance that the presumed victim required from the Fund (*supra* para. 9). In addition, as indicated in the said order, the Court reiterates that the purpose of access to the Assistance Fund was to cover reasonable and necessary expenses related to the production of evidence before the Court, specifically for the presentation of a maximum of four statements, either by affidavit or at the public hearing.

312. The State opposes reimbursing the Victims' Fund because "there was an unnecessary increase in the cost" in relation to the affidavits provided because, according to the State this would be covered by the Fund. The Court notes that the State has not questioned the authenticity or truth of the expense vouchers, but has asserted that the affidavits could have cost less.

313. The representative, in its observations on the final arguments of the State, indicated that "at the time the quote was obtained, the activities of CONAPREVI had been halted for approximately one year" and that it "did not know why the lawyer had established a different amount to the quote provided by the lawyer Irini Villavicencio (on behalf of CONAPREVI), a situation that is not the responsibility of the representative."

314. In this regard, the Court notes that there is a difference of Q 800.00 (eight hundred quetzals) between the voucher for the cost of the affidavits presented by the representative, and the vouchers presented by the State. However, this circumstance does not affect the expense that was effectively incurred; thus, it does not find it pertinent to examine further this point or the other disbursements relating to the travel and accommodation expenses to ensure appearances before the Court. Regarding the other arguments of the State concerning the amounts claimed for funeral expenses, this has already been decided in this Judgment and, in any case, this item was not paid by the Victim's Fund. Furthermore, regarding Guatemala's opposition to being condemned to pay because it does not consider itself responsible for any violation, this is a matter related to the merits of the case that has already been decided.

315. Based on the violations declared in this Judgment, the Court orders the State to reimburse the said Fund the sum of US$2,117.99 (two thousand one hundred and seventeen United States dollars and ninety-nine cents) for the expenses incurred. This amount must be reimbursed to the Inter-American Court within ninety days of notification of this Judgment.

I. Method of complying with the payments ordered

316. The State must pay the compensation for pecuniary and non-pecuniary damage and reimbursement of costs and expenses established in this Judgment directly to the persons indicated herein, within one year of notification of this Judgment in accordance with the following paragraphs.

317. If the beneficiaries should die before the respective compensation is delivered to them, it must be delivered directly to their heirs pursuant to the applicable domestic laws.

318. The State must comply with its monetary obligations by payment in quetzals or the equivalent in United States dollars, using the exchange rate in force on the New York

(United States of America) stock market the day before the payment. If, for causes that can be attributed to the beneficiaries of the compensation or their heirs it is not possible to pay the said amounts within the indicated time frame, the State shall deposit the said amounts in their favor in an account or certificate of deposit in a solvent Guatemalan financial institution, in United States dollars, and in the most favorable financial conditions allowed by banking practice and law. If the corresponding compensation is not claimed, after ten years the amounts shall be returned to the State with the interest accrued.

319. The amounts allocated in this Judgment as compensation and reimbursement of costs and expenses must be delivered to the persons indicated in full, as established in this Judgment, without any reductions due to eventual taxes or charges.

320. If the State should fall in arrears, it shall pay interest on the amount owed corresponding to banking interest on arrears in the Republic of Guatemala.

321. In accordance with its consistent practice, the Court reserves the authority inherent in its powers and also derived from Article 65 of the American Convention, to monitor full compliance with this Judgment. The case will be concluded when the State has complied fully with the provisions of this Judgment.

322. Within one year of notification of this Judgment, the State must provide the Court with a report on the measures taken to comply with it.

XII
OPERATIVE PARAGRAPHS

323. Therefore,

THE COURT

DECIDES,

unanimously,

1. To reject the preliminary objection filed by the State concerning the lack of material competence of the Inter-American Court of Human Rights to examine Article 7 of the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women, in the terms of paragraphs 36 to 38 of this Judgment.

2. To reject the preliminary objection filed by the State concerning the failure to exhaust domestic remedies, in the terms of paragraphs 42 to 45 of this Judgment.

DECLARES,

unanimously, that:

1. The State has violated its obligation to ensure the free and full exercise of the rights to life and to personal integrity recognized in Articles 4(1) and 5(1) of the American Convention on Human Rights, in relation to the rights of the child recognized in Article 19 of the Convention, and to the general obligation to ensure rights without discrimination, established in Article 1(1) of this instrument, as well as the obligations established in Article 7(b)) of the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women, to the detriment of María Isabel Veliz Franco, in the terms of paragraphs 132 to 158 of this Judgment.

2. The State has violated the rights to judicial guarantees and to judicial protection, recognized in Articles 8(1) and 25(1) of the American Convention on Human Rights, and the right to equal protection recognized in Article 24 of the Convention, in relation to the general obligations contained in Articles 1(1) and 2 thereof, and to Articles 7(b)) and 7(c)) of the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women, to the detriment of Rosa Elvira Franco Sandoval, Leonel Enrique Veliz Franco, José Roberto Franco, Cruz Elvira Sandoval Polanco and Roberto Pérez, in the terms of paragraphs 178 to 225 of this Judgment.

3. The State has violated the right to personal integrity recognized in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Rosa Elvira Franco Sandoval, in the terms of paragraphs 233 to 242 of this Judgment.

4. It is not incumbent on the Court to rule on the alleged violation of the right to personal liberty recognized in Article 7 of the American Convention on Human Rights, in the terms of paragraph 145 of this Judgment.

5. It is not incumbent on the Court to rule on the alleged violation of the rights of the child, established in Article 19 of the American Convention on Human Rights, in relation to the conduct of the investigation following the discovery of the body of María Isabel Veliz Franco, in the terms of paragraph 226 of this Judgment.

AND ESTABLISHES

unanimously, that:

6. This Judgment constitutes *per se* a form of reparation.

7. The State must conduct the investigation effectively and, as appropriate, open the corresponding criminal proceedings and, if pertinent, any others that are required to identify, prosecute and punish, as appropriate, those responsible for the abuse and deprivation of the life of the child María Isabel Veliz Franco, in the terms of paragraph 251 of this Judgment.

8. The State must, within six months of notification of this Judgment, publish the official summary of this Judgment once in the official gazette of Guatemala and in a national newspaper with widespread circulation. The State must also, within the same time frame, publish this Judgment in its entirety on official websites of the Guatemalan Judiciary, Public Prosecution Service, and National Civil Police for one year. Al this in the terms of paragraph 256 of this Judgment.

9. The State must, within one year of notification of this Judgment, make a public apology, in the terms of paragraphs 257 and 258 of this Judgment.

10. The State must, within a reasonable time, draw up a plan to reinforce the INACIF with a specific timetable, which includes the allocation of adequate resources to allow it to expand its activities throughout national territory and to fulfill its functions, in the terms of paragraph 268 of this Judgment.

11. The State must, within a reasonable time, bring into operation the “specialized jurisdictional organs” and the special prosecutor’s office, in the terms of paragraph 270 of this Judgment.

12. The State must, within a reasonable time, implement programs and courses for public officials who are members of the Judiciary, the Public Prosecution Service and the National Civil Police and who are involved in the investigation of the murder of women on standards with regard to prevention, and the eventual punishment and eradication of the murder of

women, and provide them with training on the proper application of the relevant laws and regulations, in the terms of paragraph 275 of this Judgment.

13. The State must provide immediate, adequate and effective medical and psychological treatment, free of charge, through the State's specialized health care institutions to Rosa Elvira Franco Sandoval, if she so wishes, in the terms of paragraph 280 of this Judgment.

14. The State must, within one year of notification of this Judgment, pay the amount established in paragraph 300 of this Judgment as compensation for pecuniary and non-pecuniary damage, and reimbursement of costs and expenses, in the terms of paragraph 307, and also reimburse the Victims' Legal Assistance Fund the amount established in paragraph 315 of this Judgment.

15. The State must, within one year of notification of this Judgment, provide the Court with a report on the measures taken to comply with it.

16. The Court will monitor full compliance with this Judgment in exercise of its functions and in compliance with its obligations under the American Convention on Human Rights, and will close this case when the State has complied fully with its provisions.

Done, at San José, Costa Rica, on May 19, 2014, in the Spanish language.

Humberto Antonio Sierra Porto
President

Roberto F. Caldas

Manuel E. Ventura Robles

Diego García-Sayán

Alberto Pérez Pérez

Eduardo Vio Grossi

Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Secretary

So ordered,

Humberto Antonio Sierra Porto
President

Pablo Saavedra Alessandri
Secretary

Annex 54

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF NORÍN CATRIMÁN *ET AL.* (LEADERS, MEMBERS AND ACTIVIST OF THE MAPUCHE INDIGENOUS PEOPLE) *v.* CHILE

JUDGMENT OF MAY 29, 2014
(MERITS, REPARATIONS AND COSTS)

In the case of *Norín Catrimán et al.,*

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges:[1]

Humberto Antonio Sierra Porto, President
Roberto F. Caldas, Vice President
Manuel E. Ventura Robles, Judge
Diego García-Sayán, Judge
Alberto Pérez Pérez, Judge, and
Eduardo Ferrer Mac-Gregor Poisot, Judge;

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and to Articles 31, 32, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure" or "the Court's Rules of Procedure"), delivers this Judgment structured as follows:

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[1] Judge Eduardo Vio Grossi, a Chilean national, did not take part in the examination and deliberation of this Judgment, in accordance with the provisions of Article 19(1) of the Court's Rules of Procedure.

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I - INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On August 7, 2011, in accordance with Articles 51 and 61 of the American Convention and Article 35 of the Court's Rules of Procedure, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted to the jurisdiction of the Inter-American Court the case of "*Segundo Aniceto Norín Catrimán, Juan Patricio Marileo Saravia, Víctor Ancalaf Llaupe et al. (Lonkos,*[2] *leaders and activists of the Mapuche indigenous people) with regard to the Republic of Chile"* (hereinafter, "the State" or "Chile"). According to the Commission the case refers to the alleged "violation of the rights enshrined in Articles 8(1), 8(2), 8(2)(f), 8(2)(h), 9, 13, 23 and 24 of the American Convention on Human Rights, in relation to the obligations established in Articles 1(1) and 2 of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe, owing to their prosecution and conviction for terrorist offenses, in application of a criminal law that was inconsistent with the principle of legality, and also involved a series of irregularities that affected due process, including unjustified and discriminatory consideration of their ethnic origin." According to the Commission, the case took place against "a well-known backdrop of selective implementation of anti-terrorist legislation to the detriment of members of the Mapuche indigenous people in Chile."

2. *Proceedings before the Commission.* The proceedings before the Commission were as follows:

a) *Petitions.* This case includes four petitions[3] that, at the explicit request of the State, the Commission decided jointly in Merits Report 176/10.[4] The petitions were as follows:

i. Petition presented on August 15, 2003, by Segundo Aniceto Norín Catrimán, represented by the lawyers Jaime Madariaga De la Barra and Rodrigo Lillo Vera (Case 12,576, Petition No. 619/03).

ii. Petition presented the same day by Pascual Huentequeo Pichún Paillalao (with the same case and petition numbers as the previous petition).

iii. Petition presented on April 13, 2005, by Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles (Case 12,611, Petition No. 429/05).

iv. Petition presented on May 20, 2005, by 69 leaders of the Mapuche indigenous people and by the lawyers Ariel León Bacian, Sergio Fuenzalida Bascuñán and José Alywin Oyarzún, on behalf of Víctor Manuel Ancalaf Llaupe (Case 12,612, Petition No. 581/05).

b) *Admissibility Reports.* On October 21, 2006, and May 2, 2007, the Commission approved Admissibility Reports No. 89/06 (Petition No. 619/03), No. 32/07 (Petition No. 429/05) and No. 33/07 (Petition No. 581/05), in which it determined that it was competent to examine the claims presented by the petitioners with regard to the presumed violations of Articles 8, 9 and 24 of the Convention, in relation to the general obligations established in Articles 1(1) and 2

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[2] "Lonkos" are the highest traditional authorities of the Mapuche communities. See *infra* para. 78.

[3] *Cf.* Petition 619-03 Aniceto Norín Catrimán and Pascual Pichún Paillalao; Petition 429-05 Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, Patricia Roxana Troncoso Robles, José Benicio Huenchunao Mariñán and Juan Ciriaco Millacheo Licán, and Petition 581-05 Víctor Manuel Ancalaf Llaupe and other Mapuche leaders (file of annexes to the Merits Report 176/10, appendix 1, folios 96 to 126, 1734 to 1775 and 2536 to 2578).

[4] *Cf.* Merits Report No. 176/10, Case of Segundo Aniceto Norín Catrimán, Juan Patricio Marileo Saravia, Víctor Ancalaf Llaupe *et al. v.* Chile, November 5, 2010 (merits file, tome I, folios 9 to 109).

of this instrument, and that the petitions were admissible as they met the requirements established in Articles 46 and 47 of the Convention.[5]

c) *Merits Report.* Pursuant to Article 50 of the Convention, on November 5, 2010, the Commission issued Merits Report No. 176/10 (hereinafter also "the Merits Report" or "Report No. 176/10"),[6] in which it reached a series of conclusions and made several recommendations to Chile:

- *Conclusions.* The Commission concluded that the State was responsible for the violation of the following rights recognized in the American Convention:

(i) "the principle of legality recognized in Article 9 of the American Convention, in relation to the obligations set forth in Articles1(1) and 2 thereof, to the detriment of [the eight presumed victims in this case]";

(ii) "the right to equal protection of the law and non-discrimination recognized in Article 24 of the American Convention, in relation to Article 1(1) thereof, to the detriment of [the eight presumed victims in this case]";

(iii) "the right to freedom of expression and political rights established in Articles 13 and 23 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of [the eight presumed victims in this case]";

(iv) "the principle of individual criminal responsibility and the presumption of innocence under Articles 8(1), 8(2) and 9 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of [the eight presumed victims in this case]";

(v) "the right of defense of *Lonkos* Aniceto Norín and Pascual Pichún, and of *Werken* Víctor Ancalaf, specifically their right to question the witnesses present in the court, in keeping with Article 8(2)(f) of the American Convention, in relation to the obligations set forth in Articles 1(1) and 2 of this instrument";

(vi) "the right to appeal a judgment recognized in Article 8(2)(h) of the American Convention, in relation to the obligations set forth in Articles 1(1) and 2 of this instrument, to the detriment of [the eight presumed victims in this case]";[7]

(vii) "the right to an impartial judge recognized in Article 8(1) of the Convention, in relation to Article 1(1) thereof, to the detriment of [the eight presumed victims in this case]," and

viii) "the violations of the human rights recognized in Articles 8, 9, 24, 13 and 23 had a resulting impact on the socio-cultural integrity of the Mapuche people as a whole."

In addition, the Commission established that "Chile did not violate the rights to a competent and independent judge or the principle of *non bis in idem,* recognized in Article 8(1) and 8(4) [of the American Convention] respectively."

The Commission determined that the presumed victims were the following eight persons: Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe.

- *Recommendations.* The Commission made the following recommendations to the State:

(i) "Eliminate the effects of the terrorism convictions imposed on [the eight presumed victims in this case]";

(ii) "If the [presumed] victims so choose, they shall have the opportunity to have their convictions reviewed in a proceeding conducted in accordance with the principle of legality, the prohibition of discrimination and the guarantees of due process, in the terms described in th[e Merits] report";

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[5] *Cf.* Admissibility Report No. 89/06 (Petition 619-03), Aniceto Norín Catrimán and Pascual Pichún Paillalao *v.* Chile, October 21 2006; Admissibility Report No. 32/07 (Petition 429-05), Juan Patricio Marileo Saravia *et al. v.* Chile, May 2, 2007, and Admissibility Report No. 33/07 (Petition 581-05), Víctor Manuel Ancalaf Llaupe *v.* Chile, May 2, 2007 (file of annexes to the Merits Report 176/10, appendix 1, folios 629 to 646, 1608 to 1620 and 2337 to 2349).

[6] *Cf.* Merits Report No. 176/10, *supra* nota 4 (merits file, tome I, folios 9 to 109).

[7] In a brief of August 16, 2013, the Commission clarified that "in its Merits Report, it had analyzed the application of articles 373 and 374 of the Code of Criminal Procedure, establishing that this had violated the right to appeal the judgment. In this regard, since these articles were not applied to Mr. Ancalaf [Llaupe] , the conclusion in the Merits Report should be understood with regard to the other victims in the case" (merits file, tome IV, folio 2285).

(iii) "Make adequate reparations to the [presumed] victims for the pecuniary and non-pecuniary damage caused by the violations declared in the […] report";

(iv) "Adapt the Counter-Terrorism Act embodied in Law 18,314, so that it is compatible with the principle of legality recognized in Article 9 of the American Convention";

(v) "Adapt the domestic laws governing criminal procedure so that they are compatible with the rights recognized in Article 8(2)(f) and 8(2)(h) of the American Convention," and

(vi) "Adopt measures of non-repetition to eradicate the discriminatory prejudices based on ethnic origin in the exercise of public power and, especially, in the administration of justice."

d) *Notification of the State.* On December 7, 2010, the Commission notified the Merits Report to the State and asked it to provide information on compliance with the recommendations within two months. At the request of Chile, this time frame was extended one month until April 1, 2011. On that date, the State presented a report on the measures taken to comply with some of the recommendations made in the Merits Report and contested some of the report's conclusions. On April 7, 2011, Chile asked for another extension, and this was granted by the Commission for four months. On July 7, 2011, the State submitted a report and on August 5, 2011, it presented "another report, which, in substance, repeated its report of July 7, 2011."

e) *Submission to the Court.* On August 7, 2011, the Commission submitted all the facts and human rights violations described in the Merits Report to the jurisdiction of the Inter-American Court because of "the need to obtain justice for the [presumed] victims owing to non-compliance with the recommendations by the Chilean State." The Commission appointed Commissioner Dinah Shelton and then Executive Secretary Santiago A. Canton as its delegates, and Elizabeth Abi-Mershed, Deputy Executive Secretary, Silvia Serrano Guzmán, María Claudia Pulido and Federico Guzmán Duque, lawyers of the Executive Secretariat, as legal advisers. The Commission provided the names of the representatives of the eight presumed victims together with the respective powers of attorney and contact information.[8]

3. *Request of the Inter-American Commission.* Based on the above, the Inter-American Commission asked the Court to declare the international responsibility of Chile for the violations indicated in the above-mentioned conclusions of its Merits Report (*supra* para. 2). It also asked the Court to order the State to implement specific measures of reparation.

II – PROCEEDINGS BEFORE THE COURT

4. *Designation of two common interveners of the representatives of the presumed victims*. The representatives of the eight presumed victims failed to reach an agreement on the designation of one common intervener. The Court therefore authorized the designation of more than one common intervener in application of Article 25(2) of its Rules of Procedure. The representatives advised that the Center for Justice and International Law (hereinafter "CEJIL") and the International Federation for Human Rights (hereinafter "the FIDH") would act as common interveners representing all the presumed victims.[9]

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[8] (1) "Jaime Madariaga De la Barra and Ylenia Hartog, representing Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao"; (2) "José Aylwin Oyarzún, Sergio Fuenzalida and the Center for Justice and International Law (CEJIL), representing Víctor Manuel Ancalaf Llaupe," and (3) "[the] International Federation for Human Rights and Alberto Espinoza Pino, representing Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles." *Cf.* Brief submitting the case to the Inter-American Court.

[9] They also forwarded copies of powers of attorney granted by presumed victims Pascual Huentequeo Pichún Paillalao and Segundo Aniceto Norín Catrimán to the FIDH.

5. *Notification of the State and the representatives*. The Court notified the Commission's submission of the case to the State on October 28, 2011, and to the two common interveners (CEJIL and FIDH) on October 31, 2011.

6. On December 30, 2011, Ylenia Hartog submitted a request to participate as a third common intervener and that the Court grant a new time limit for presenting a brief with motions, arguments and evidence. The Inter-American Court decided to deny these requests, taking into account the stage of the proceedings at which they were presented: after the notification of the submission of the case to the two designated common interveners, and a day before the expiry of the time frame for the common interveners to present their motions and arguments briefs.[10]

7. *CEJIL brief with motions, arguments and evidence*. – On December 30, 2011, CEJIL, common intervener of the representatives of the presumed victims, submitted its brief with motions, arguments and evidence (hereinafter "the CEJIL motions and arguments brief") to the Court, under Article 40 of the Court's Rules of Procedure. CEJIL agreed in substance with the Commission's allegations, asked the Court to declare the international responsibility of the State for the alleged violation of the same articles of the American Convention as those indicated by the Inter-American Commission, and added that Chile had also violated the rights contained in Articles 5, 8(1) (obligation to substantiate an accusation), 8(2)(c), 8(2)(d), 8(5) and 17 of the American Convention, in relation to Article 1(1) of this instrument, and the contents of Articles 7(1), 7(3), 7(5) in relation to "the principle of innocence [Article 8(2)]" and Articles 1(1) and 2 of the said instrument, to the detriment of Víctor Manuel Ancalaf Llaupe. CEJIL also affirmed that the violation of the rights contained in Articles 5 and 17 of the Convention had also been to the detriment of "Mr. Ancalaf Llaupe's wife,] Karina Prado and his five children," who the Commission had not included as presumed victims in its Merits Report. Consequently, it asked the Court to order diverse measures of reparation, as well as the payment of costs and expenses. In addition, in this brief, it presented the request of presumed victim Ancalaf Llaupe to access the Victims' Legal Assistance Fund of the Inter-American Court (hereinafter "the Court's Assistance Fund").

8. *FIDH brief with motions, arguments and evidence*. On December 31, 2011, FIDH, common intervener of the representatives of the presumed victims, submitted its brief with motions, arguments and evidence (hereinafter "the FIDH motions and arguments brief") to the Court. The FIDH agreed, in substance, with the Commission's allegations, asked the Court to declare the international responsibility of the State for the alleged violation of the same articles of the American Convention as those indicated by the Inter-American Commission, and added that Chile had also violated the rights contained in Articles 5 and 7 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Ciriaco Millacheo Licán, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia and José Benicio Huenchunao Mariñán. The FIDH also affirmed that the violation of the rights contained in Article 5 had also been to the detriment of the next of kin of the presumed victims, who the Commission had not included in its Merits Report. Consequently, it asked the Court to order diverse measures of reparation, as

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[10] On December 28, 2011, the presumed victims Patricia Roxana Troncoso Robles and Segundo Aniceto Norín Catrimán informed the Court of their decision to substitute the power of representation they had given to the FIDH and presented new powers of attorney in favor of the lawyer, Ylenia Hartog. With regard to the requests made by the lawyer, Ylenia Hartog on December 30, 2011, the Court considered that, based on the principles of procedural promptness and preclusion, it was not appropriate to accept these requests at the stage of the proceedings at which they were presented, because this would have reopened the decision to authorize the participation of more than one common intervener adopted by the Court at the proper procedural moment, and would have also entailed extending the non-extendible time frame established in the Court's Rules of Procedure for the stage of submission of the briefs with motions, arguments and evidence of the common interveners. The Court recalled, *inter alia*, the obligation of the two common interveners authorized to intervene in this case to provide the other representatives with information on the status of the proceedings before the Court, and to receive and channel any motions, arguments and evidence that they might wish to forward to the Court.

well as the payment of costs and expenses. On the same date, the FIDH also sent a brief in which it presented the request of the presumed victims Pichún Paillalao and Jaime Marileo Saravia to access the Court's Assistance Fund.

9. *Access to the Court's Legal Assistance Fund.* – On May 18, 2012, the President of the Court (hereinafter "the President") issued an Order,[11] declaring admissible the requests of three presumed victims to access the Victims' Legal Assistance Fund (*supra* paragraphs 7 and 8) and took decisions in this regard.

10. *Answering brief.* On May 25, 2012, Chile submitted to the Court its brief answering the submission of the case, and with observations on the motions and arguments briefs (hereinafter "answering brief").[12] In this brief, it "reject[ed], each and every one of the human rights violations attributed to it in the Commission's Merits Report and in the briefs with motions, arguments and evidence of the representatives of the presumed victims." The State appointed Miguel Ángel González Morales, Ambassador of the Republic of Chile to the Republic of Costa Rica, and Juan Francisco Galli Basili as its Agents, and Luis Petit-Laurent Baldrich, Jorge Castro Pereira and Alejandro Rojas Flores as Deputy Agents.[13]

11. *Briefs of supposed "waiver."* On September 13, 2012, the Secretariat advised that the Court had decided "not to accord legal effects" to the briefs received on June 19, 2012, supposedly signed on May 7, 2012, by presumed victims Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao, in which they supposedly communicated their "waiver of any action related to this case." Before taking this decision, the Court had received observations from the said presumed victims, their representatives, and the State in which the representatives questioned the validity of the supposed waiver documents and Messrs. Norín Catrimán and Pichún Paillalao stated that they did not wish to waive their status as presumed victims in these proceedings. The Court determined that Messrs. Norín Catrimán and Pichún Paillalao would continue to be considered presumed victims taking into account this ambiguity and according primacy to their last indication of their wishes of July 2012, which allowed it to be affirmed with certainty that it was not their desire to waive their status of presumed victims in these proceedings.[14]

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[11] *Cf. Case of Norín Catrimán et al. (Lonkos, leaders and activists of the Mapuche indigenous people) v. Chile*. Order of the President of the Court of May 18, 2012, which can be consulted on the Court's website at: http://corteidh.or.cr/docs/merits_victimas/norin_fv_12.pdf.

[12] Under the provisions of Article 41 of the Court's Rules of Procedure, States have a non-extendible time frame of two months to present the answering brief. However, since the representatives appointed more than one common intervener in this case, the President of the Court decided that, pursuant to Articles 25(2) and 41(1) of the Court's Rules of Procedure, and in order to safeguard the procedural equality of the parties, Chile had the right to present its answering brief within the non-extendible time frame of three months.

[13] Subsequently, in a brief of May 16, 2013, Chile also appointed Hernán Quezada Cabrera as the State's agent.

[14] On July 30 and August 28, 2012, Ylenia Hartog, representative of the presumed victims Segundo Aniceto Norín Catrimán and Patricia Roxana Troncoso Robles, presented two briefs in which, *inter alia*, she asked that she be allowed to participate as a common intervener, "[o]wing to the situation of defenselessness and the change of circumstances" owing to the "supposed waiver that had been presented." In notes of the Secretariat of September 13, 2012, on the instructions of the Court Ms. Hartog was again advised what the President of the Court had indicated previously; that, pursuant to Article 31(3) of the Court's Rules of Procedure, the decisions of the Court may not be contested in any way and, therefore, the Court's decision, communicated in notes of the Court's Secretariat of February 20, 2012, in which Ms. Hartog's request to participate as a third common intervenor in this case was refused, could not be reconsidered. Furthermore, on the instructions of the Court, the Secretariat of the Court advised Ms. Hartog that when the Court had given her the opportunity to present observations on the supposed withdrawal of Mr. Norín Catrimán, this had been done exceptionally, because the Court had considered it pertinent and useful to know her opinion on this specific matter. Consequently, she was reminded that communications addressed to the Court should be forwarded through the common interveners of the representatives of the presumed victims.

12. *Decease of presumed victim Pascual Huentequeo Pichún Paillalao*. On March 31, 2013, the FIDH advised the Court, among other matters, that Pascual Huentequeo Pichún Paillalao had died on March 20 that year.

13. *Summons to a hearing.* On April 30, 2013, the President of the Court issued an Order,[15] in which he summoned the Inter-American Commission, the common interveners of the representatives and the State to a public hearing (*infra* para. 15) to receive the final oral arguments of the common interveners and of the State, and the final oral observations of the Commission, on the merits and eventual reparations and costs. He also summoned two presumed victims, two witnesses and three expert witnesses to testify at the public hearing. In addition, the President defined the specific destination and purpose of the assistance of the Victims' Legal Assistance Fund (*supra* para. 9). The President also ordered that statements be received by affidavit from five presumed victims, two of whom were summoned *ex officio* by the Court, and also from twenty-nine witnesses and eleven expert witnesses.

14. On May 21 and 22, 2013, CEJIL forwarded the expert opinion of Ruth Vargas Forman with regard to Víctor Manuel Ancalaf Llaupe, and also the expert opinions of Mauricio Duce Julio, Claudio Fierro Morales and Manuel Cancio Meliá, and the testimony of the witnesses Matías Ancalaf Prado and Karina del Carmen Prado. On May 22 and 24, 2013, the FIDH sent the statements of three presumed victims (Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and José Benicio Huenchunao Mariñán), and of seventeen witnesses,[16] and the expert opinions of Carlos Felimer del Valle Rojas, Fabien Le Bonniec, and Ruth Vargas Forman with regard to the presumed victims Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia and Juan Ciriaco Millacheo Licán. On May 27, 2013, Ylenia Hartog, representative of the presumed victims Segundo Aniceto Norín Catrimán and Patricia Roxana Troncoso Robles,[17] submitted their written statements.[18] On May 23 and 27, 2013, the Secretariat of the Court received the expert opinions of Ruth Vargas Forman with regard to the presumed victims Mr. Norín Catrimán and Ms. Troncoso Robles. On May 28, 2013, the Commission presented the expert opinions of Jan Perlin and Rodolfo Stavenhagen.

15. *Public hearing*. The public hearing took place on May 29 and 30, 2013, during the ninety-ninth regular session of the Court held at its seat.[19] During the hearing, the Court

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[15] *Cf. Case of Norín Catrimán et al. (Lonkos, leaders and activists of the Mapuche indigenous people) v. Chile*. Order of the President of the Court of April 30, 2013, which can be consulted on the Court's website at: http://www.corteidh.or.cr/docs/asuntos/norincatriman_30_04_2013.pdf.

[16] On May 22, 2013: Flora Collonao Millano, Carlos Pichún, Rafael Pichún, Pascual Alejandro Pichún Collonao, Claudia Espinoza Gallardo, Soledad Angélica Millacheo Licán, Lorenza Saravia Tripaillán, Freddy Johnatan Marileo Marileo, Juvelina Ñanco Marileo, Juan Julio Millacheo Ñanco, Gloria Isabel Millacheo Ñanco, Luis Hernán Millacheo Ñanco, Zulema Marta Mariñán Millahual, and Mercedes Huenchunao Mariñán. On May 24, 2013: Sandra Jelves Mella, Pablo Ortega Manosalva and Luis Rodríguez-Piñero Royo.

[17] Ylenia Hartog is the representative of the presumed victims Segundo Ancieto Norín Catrimán and Patricia Roxana Troncoso Robles, but her participation in these proceedings as a common intervener was not accepted (*supra* para. 6 and footnotes 10 and 12). In view of the fact that the President ordered, *ex officio,* that the statements of these two presumed victims be presented, Ms. Hartog submitted this evidence.

[18] On May 29, 2013, representative Ylenia Hartog presented a brief and its annexes in which she requested certain measures of reparation for the presumed victims, Segundo Ancieto Norín Catrimán and Patricia Roxana Troncoso Robles, and also requested the admission of several documents and a CD.

[19] There appeared at this hearing: (a) for the Inter-American Commission: Commissioner Rose Marie B. Antoine, Delegate, Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán, Secretariat legal adviser; (b) for the common interveners of the representatives of the presumed victims; for CEJIL: Liliana Tojo, Juliana Bravo Valencia, Gisela de León and Sergio Fuenzalida Bascuñan; for the FIDH: Myriam del Pilar Reyes, Jimena Reyes and Jaime Madariaga de la Barra, and (c) for the State: Miguel Ángel González, Ambassador of the Republic of Chile to Costa Rica, Agent, Juan Francisco Galli, lawyer, Co-agent, Milenko Bertrand-Galindo Arriagada, lawyer of the Ministry of Justice, Jorge Castro, Bernardita Vega, Paula Badilla, Camila Palacios, Felipe Rayo, María Jaraquemada and Alejandro Rojas.

received the statements of two presumed victims, the testimony of two witnesses, and the expert opinions of three expert witnesses, as well as the final oral arguments and observations of the parties and of the Inter-American Commission.[20] Also during the hearing, the Court asked the parties and the Commission to submit specific helpful information.

16. *Request for helpful evidence and explanations*. On June 10, 2013, on the instructions of the President, the State and the Commission were asked to submit specific helpful documentation, information and explanations.[21]

17. *Amici curiae briefs*. Under Article 44 (*Amicus curiae* presentations) of the Court's Rules of Procedure, the following five *amici curiae* briefs were presented: (i) on March 2, 2012, the lawyer Vicente Laureano Bárzana Yutronic presented a brief; (ii) on May 24, 2012, Minority Rights Group International presented a brief;[22] (iii) on June 14, 2013, the Human Rights Center of the *Universidad Diego Portales* presented a brief;[23] (iv) on June 14, 2013, Claudia Gutiérrez Olivares, Professor of Ethics and Political Philosophy of the *Universidad de Chile*, presented a brief, and (v) on June 14, 2013, Osvaldo Javier Solís Mansilla, lawyer and researcher, presented a brief.

18. *Final written arguments and observations, and helpful evidence and explanations.* On June 28 and 29, 2013, the common interveners forwarded their final written arguments[24] and presented the information requested by the Court during the public hearings as helpful evidence, together with information on costs and expenses.[25] On June 28, 2013, the State presented its final written arguments, and included its answer to the request for helpful information and evidence, and on July 10, it presented some of the documents requested. On June 30, 2013, the Inter-American Commission presented its final written observations. On August 16, 2013, the Commission responded to the request for helpful explanations and clarifications made by the Court and its President. On August 16, September 6, 16, 23 and 27, and October 17 and 23, 2013, in response to the requests of the Court or its President, the

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[20] The recording of the public hearing held on May 29 and 30, 2013, is available at: https://vimeo.com/album/2409874

[21] The Inter-American Commission was asked to clarify whether the copy of the judicial case files in the proceedings before the domestic courts against Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao and Patricia Roxana Troncoso and against José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia and Patricia Roxana Troncoso Robles, provided in the file of the proceedings before the Commission (appendix 1), included all the files that the State had listed and forwarded to the Commission under a note of November 3, 2008, and, if necessary, to provide a complete copy of this documentation. The State was asked, *inter alia*: (a) for a complete copy of the case files of the criminal proceedings against seven of the presumed victims; (b) regarding the case file of the proceedings against Víctor Manuel Ancalaf Llaupe, to review the copy of the confidential case records provided by the Commission and, if any part of the case file is missing, to provide a complete copy; (c) to provide a complete copy of certain documents corresponding to the said proceedings; (d) to provide certain documents and explanations in relation to the measures taken to conceal the identity of witnesses in the criminal proceedings held against Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao and Patricia Roxana Troncoso Robles, and against Víctor Manuel Ancalaf Llaupe; (e) to provide a copy of some of Chile's domestic laws; (f) to provide certifications that confirm the time that the presumed victims in this case were held in pre-trial detention and the total time that they served their prison sentences and also the ancillary penalties, as well as documents that substantiate its indications in the answering brief regarding the "prison benefits."

[22] The brief was presented by Carla Clarke, Head of Law of Minority Rights Group International with the collaboration of Answer Styannes and Javier Dávalos.

[23] The brief was presented by Judith Schönsteiner, Director of the Human Rights Center of the *Universidad Diego Portales*, and Camila de la Maza, lawyer, of the University's Clinic for Public Interest Litigations.

[24] On July 2, 2013, representative Hartog transmitted a brief with final arguments. In a note of the Secretariat of the Court dated July 22, 2013, she was advised that the Court would determine the admissibility of this document at the proper procedural moment.

[25] On July 22, 2013, the FIDH presented "the annex of the expenses" it had incurred.

State transmitted another part of the helpful documents and explanations that had been required[26] (*supra* paras. 15 and 16).

19. *Request to incorporate documents into the body of evidence.* On August 2 and 16 and September 6, 2013, based on Article 57(2) of the Court's Rules of Procedure, the two common interveners requested the incorporation into the body of evidence of the preliminary report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism issued on July 30, 2013, in relation to the visit he made to Chile from July 17 to 30 that year, and the Concluding observations on the combined nineteenth to twenty-first periodic reports of Chile, adopted by the Committee on the Elimination of Racial Discrimination, at its eighty-third session held from August 12 to 30, 2013, and provided the electronic links to these documents.[27] On September 6, 17 and 19, 2013, the State and the Commission forwarded their observations of this proposal of the common interveners. On October 2, 2012, CEJIL presented observations on certain "arguments" included by the State in these observations. Subsequently, on May 9, 2014, 2014, the FIDH asked the Court, based on Article 57(2) of the Rules of Procedure, to "incorporate into the body of evidence the report of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism […] concerning the Special Rapporteur's visit to Chile [in July 2013], published on April 14, 2014." CEJIL and Chile presented observations on this request.

20. *Observations on the helpful evidence and explanations.* On August 2 and 16, 2013, CEJIL and the FIDH, respectively, submitted their observations on the documentation presented by the State on June 28, 2013, in response to the request for helpful evidence (*supra* paras. 15, 16 and 18). On August 30, 2013, the common interveners submitted their observations on the documentation, information and explanations presented by the State on August 16, 2013. On September 1 and 6, 2013, CEJIL submitted its observations on the documentation, information and explanations presented by the State on September 6, 2013. On September 19, 2013, the Commission presented its observations on the helpful evidence provided by the State on August 16 and September 6, 2013, and on September 26, 2013 indicated that "it ha[d] no additional observations to make" concerning the documentation presented by the State on September 16 and 23, 2013. On October 2, 2013, the FIDH presented its observations on the helpful evidence presented by the State on September 16 and 23, 2013, and on October 9, 2013, advised that it had "no additional observations concerning the documents presented by the State […] on September 27, 2013."

21. *Disbursements from the Assistance Fund.* Chile did not submit observations on the information on the disbursements from the Victims' Legal Assistance Fund, which had been forwarded to the State as stipulated in article 5 of the Court's Rules for the Operation of this Fund.

III – COMPETENCE

22. The Inter-American Court is competent to hear this case pursuant to Article 62(3) of the Convention, because Chile has been a State Party to the American Convention since August 21, 1990, and accepted the contentious jurisdiction of the Court on that date.

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[26] In its brief of August 16, 2013, the State also submitted general observations on the final arguments of the FIDH.

[27] In its brief, the FIDH also included general observations on the final arguments of the State.

IV – PRELIMINARY CONSIDERATIONS

23. Before examining the pertinent facts and the application of the norms of the American Convention to those facts, some preliminary considerations must be made concerning the determination of the presumed victims, the delimitation of the factual framework, and certain arguments that were presented belatedly.

A) Determination of the presumed victims

24. The common interveners of the representatives asked the Court to consider as presumed victims persons who had not been considered as such by the Inter-American Commission in the Merits Report. The Court will now summarize the arguments of the parties in this regard and explain why the Court will only consider as victims the persons mentioned as such in the Merits Report.

1. Arguments of the parties

25. In its motions and arguments brief, CEJIL included as presumed victims the wife and children of presumed victim Víctor Manuel Ancalaf Llaupe, considering that Chile had violated their rights recognized in Articles 5 (Right to Humane Treatment) and 17 (Rights of the Family) of the Convention. Regarding the fact that the Commission had not included these family members as presumed victims, CEJIL indicated that "approximately two years before the Merits Report was approved, […] the petitioners for Víctor Ancalaf Llaupe had advised the Inter-American Commission that the members of the Ancalaf family had been affected by the facts of this case, […] describing the problems that each one had suffered" and requesting that they be considered presumed victims. In its final written arguments, CEJIL insisted that it had provided the Commission with this information at the appropriate procedural opportunity and that it had repeated it when requesting that the case be submitted to the Court. It added that "[t]he Inter-American Court has the opportunity to rectify the Commission's serious omission," and maintained that the State's right of defense had not been breached because "it has been able to examine and respond to – if it so wished – the arguments of this party in relation to the status as victims of [Mr.] Ancalaf's family."

26. In its motions and arguments brief, the FIDH stated that "the next of kin of the [presumed] direct victims of the case […] are also [presumed] victims, owing to the [supposed] violation of Article 5 of the American Convention, which was alleged with regard to them at the appropriate opportunity." The FIDH submitted to the Court a list in which it individualized the family members of six of the presumed victims. The FIDH also stated that, "[i]f the next of kin identified above are not considered victims in this case, it asked […] the Court to urge the State to make reparation to them." In addition, the FIDH asked that "Juan Carlos Huenulao Llelmil, a Mapuche who was convicted of the same facts that are the grounds for the instant case be considered a beneficiary of reparations." It indicated that, "even though [Mr. Huenulao Llelmil] was not considered a victim before the Inter-American Commission, this does not prevent him from being considered a victim before the Court," in view of the fact that "the State is fully aware of his existence and his situation," because "he was deprived of liberty in the same way as the other victims in this case and for the same events on which this case is founded."

27. The State did not present any arguments in relation to the determination of the presumed victims in this case before the Court.

2. Considerations of the Court

a. Family members of the presumed victims

28. In its Merits Report the Commission named Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, Víctor Manuel Ancalaf Llaupe and Patricia

Roxana Troncoso Robles as presumed victims. In the brief submitting the case to the Court the Commission referred to these same eight persons as the presumed victims.

29. Article 35(1) of the Court's Rules of Procedure establishes that the case shall be submitted by the presentation of the Merits Report, which must "identify the presumed victims." Thus, it corresponds to the Commission to identify the presumed victims in a case before the Court precisely and at the proper procedural moment.[28] Consequently, it is not possible to add new victims following the Merits Report, save in the exceptional circumstances established in Article 35(2) of the Court's Rules of Procedure,[29] which are not applicable in this case, because they refer to situations in which "it has not been possible to identify one or more of the alleged victims of the facts of the case because the case concerns massive or collective violations." Therefore, in application of Article 35, the content of which is unequivocal, it has been the Court's consistent case law that the presumed victims must be indicated in the Merits Report established in Article 50 of the Convention.[30]

30. There are no valid arguments that would provide grounds for deviating from the unambiguous text of the Court's Rules of Procedure or from its consistent case law.

31. In particular, it is not sufficient that evidence was submitted opportunely to the Commission that would have allowed considering other persons as presumed victims (as regards Víctor Ancalaf Llaupe's family,[31] but not the families of the other seven presumed victims), because the Commission did not include them in its Merits Report.

32. The mention made by this Court in previous cases of the representatives' obligation "to indicate all the presumed victims during the proceedings before the Commission and to avoid doing so following the issue of the Merits Report"[32] is not an exception to the above-mentioned consistent case law because, far from recognizing that this is not in keeping with the provisions of Article 35(1) of the Rules of Procedure, it means that the representatives may only ask that certain persons be considered presumed victims before the Merits Report is issued. Once the Commission has issued this Report, only the persons included in it can be considered presumed victims. These considerations are applicable to the situation of the family members of Víctor Manuel Ancalaf Llaupe because, although the Commission was provided with evidence that sought to substantiate their condition of presumed victims, they were not included in the Merits Report, even in the summary of the position of the petitioners concerning the different violations that were alleged.

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[28] *Cf. Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2006. Series C No. 148, para. 98, and *Case of J. v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of November 27, 2013. Series C No. 275, para. 23.

[29] Article 35(2) of the Court's Rules of Procedure stipulates that "[w]hen it has not been possible to identify one or more of the alleged victims of the facts of the case because it concerns massive or collective violations, the Court shall decide whether to consider those individuals as victims." *Cf. Case of García and family members v. Guatemala. Merits, reparations and costs*. Judgment of November 29, 2012 Series C No. 258, para. 34, and *Case of J. v. Peru*, para. 23. *Mutatis mutandi,* under the Court's previous Rules of Procedure: *Case of Radilla Pacheco v. Mexico, Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 110, and *Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs*. Judgment of October 13, 2011. Series C No. 234, para. 42.

[30] *Cf. Case of García Prieto et al. v. El Salvador. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2007. Series C No. 168, para. 65, and *Case of J. v. Peru*, para. 23.

[31] Following the issue of Admissibility Report No. 33/07, and more than two years before the issue of the Merits Report, Víctor Manuel Ancalaf Llaupe's representative forwarded evidence to the Commission for its consideration in relation to why the members of Mr. Ancalaf's family should be considered presumed victims of a possible violation of human rights in a brief that the Commission asserts was forwarded to Chile, and the State has not contested this (file of annexes to the Merits Report 176/10, appendix 1, folios 2095 to 2099).

[32] *Case of García and family members v. Guatemala*, para. 35, and *Case of J. v. Peru*, para. 24.

33. Consequently, the Court decides that it will only consider as presumed victims the eight persons that the Commission included as such in Merits Report No. 176/10: Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, Víctor Manuel Ancalaf Llaupe and Patricia Roxana Troncoso Robles. Consequently, the Court will not rule on the arguments presented by common interveners concerning the alleged violations of Articles 5 and 17 of the Convention to the detriment of the next of kin of the presumed victims.

34. The above does not preclude the State, at its own discretion, from adopting measures of reparation in their favor if the pertinent facts are verified.

b. The person convicted for similar acts to those of the presumed victims

35. Furthermore, there are also insufficient grounds to admit the request of the FIDH that Juan Carlos Huenulao Llelmil be considered a presumed victim (*supra* para. 26) because, as indicated, he was convicted for the same acts as the presumed victims in this case. None of the petitions before the Commission that gave rise to this case (*supra* para. 2.a) was lodged by Mr. Huenulao Llelmil or on his behalf, and the said petitions did not allege that Chile was responsible for the presumed violations of his human rights. None of the three Admissibility Reports (*supra* para. 2.b) referred to Juan Carlos Huenulao Llelmil, and neither did the Commission identify him as a presumed victim in the Merits Report. From the evidence to which the FIDH refers,[33] the Court has verified that, in the same way as five of the presumed victims in this case, Juan Carlos Huenulao Llelmil was convicted of the offense of terrorist arson[34] in relation to the fire that occurred on December 19, 2001, on the "Poluco Pidenco" property (*infra* para. 81.e). However, Juan Carlos Huenulao Llelmil was sentenced in a later judgment, and not in the judgment sentencing these presumed victims (*infra* para. 126).

36. Previously the Court has declared that the fact that other persons are in some way connected to the facts of the case is not sufficient for the Court to be able to consider them presumed victims and eventually declare violations of their rights.[35] Although it is true that proceedings under international human rights law cannot abide by a rigid formalism, because their main and determining mandate is the due and complete protection of such rights,[36] it is also true that specific procedural elements preserve the necessary conditions to ensure that the procedural rights of the parties are not reduced or unequal.[37] Consequently, it is not possible to dispense with the procedure before the Commission established in Articles 48 to 50 of the

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[33] *Cf.* Judgment delivered on May 3, 2005, by the Angol Oral Criminal Trial Court (file of annexes to the FIDH motions and arguments brief, annex 42, folios 1544 to 1595).

[34] As stipulated in article 476.3 of the Criminal Code, and articles 1(1), 2(1) and 3 bis of Law No. 18,314 ("Counter-terrorism Act").

[35] *Cf. Case of González et al. ("Cotton Field") v. Mexico.* Order of the Inter-American Court of January 19, 2009. Request to expand the list of presumed victims and refusal of submission of documentary evidence, *considerandum* 35.

[36] *Cf. Case of Castillo Petruzzi et al. v. Peru. Preliminary objections.* Judgment of September 4, 1998. Series C No. 41, para. 77; *Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177, para. 12, and *Case of González et al. ("Cotton Field") v. Mexico*. Order of the Inter-American Court of January 19, 2009. Request to expand the list of presumed victims and refusal of submission of documentary evidence, *considerandum* 45.

[37] *Cf. Case of Velásquez Rodríguez, Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, paras. 33 and 34; *Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of August 6, 2008. Series C No. 184, para. 41, and *Case of González et al. ("Cotton Field") v. Mexico.* Order of the Inter-American Court of January 19, 2009, *considerandum* 45.

Convention, because it fulfills specific functions that benefit both the individual petitioners and the States.[38]

37. Based on the foregoing, the Court considers that the request to consider Juan Carlos Huenulao Llelmil a presumed victim in this case is inadmissible. Nevertheless, this does not preclude the State, at its own discretion, from adopting measures of reparation in his favor if it verifies the similarity with the facts of this case.[39]

B) Determination of the factual framework

38. Under Article 35(1) of the Court's Rules of Procedure, the Commission presents the case "by the submission of the report to which article 50 of the Convention refers, which must establish *all the facts that allegedly give rise to a violation,"* and that "for the case to be examined, the Court shall receive the following information: […] (e) the evidence received, including the audio and the transcript, indicating the alleged facts and the arguments that refer to them." Consequently, the factual framework of the proceedings before the Court is constituted by the facts contained in the Merits Report submitted to its consideration. Legally, the presumed victims and their representatives may cite the violation of rights other than those included in the Merits Report, provided they abide by the facts contained in the said document, because the presumed victims are the holders of all the rights recognized in the Convention.[40]

39. Nevertheless, as regards the factual framework, it is not admissible for the parties to allege new facts that differ from those contained in the Merits Report, although they may describe those that explain, clarify or reject the facts mentioned in this Report and submitted to the Court's consideration.[41] In the instant case, in their arguments, the common interveners cited facts that were not included in the Merits Report or, if they were, were not described in detail. In the following sections the Court will analyze whether it can consider that the facts cited in this way explain, clarify or reject the facts contained in the Merits Report.

1. The pre-trial detention measures

40. In the motions and arguments briefs, the common interveners of the representatives argued the violation of the rights to personal liberty and to the principle of the presumption of innocence, protected in Articles 7 and 8(2) of the Convention, in relation to the pre-trial detention measures to which the presumed victims were subject.

41. The Commission did not rule on the right to personal liberty in its Merits Report, merely referring to the "pre-trial detention" imposed on Pascual Huentequeo Pichún Paillalao and Segundo Aniceto Norín Catrimán. In the motions and arguments briefs, CEJIL referred to the pre-trial detention of Víctor Manuel Ancalaf Llaupe, and the FIDH to that of José Benicio Huenchunao Mariñán, Florencio Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán, Pascual Huetequeo Pichún Paillalao and Segundo Aniceto Norín Catrimán.

42. Chile did not present arguments or preliminary objections, or substantial objections in relation to the factual framework of the case. In its answering brief, it indicated, in general, that it rejected "each and every one of the human rights violations attributed to it in the

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[38] *Cf. Matter of Viviana Gallardo et al*. Decision of the Court of November 13, 1981. Series A No. 101/81, paras. 22 to 25, and Case of *González et al. ("Cotton Field") v. Mexico*. Order of the Inter-American Court of January 19, 2009, *considerandum* 45.

[39] *Cf. Case of Radilla Pacheco v. Mexico*, para. 111, and *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2010. Series C No. 219, para. 252.

[40] *Cf. Case of the "Five Pensioners" v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 153, and *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of May 21, 2013. Series C No. 261, para. 19.

[41] *Cf. Case of the "Five Pensioners" v. Peru*, para. 153, and *Case of J. v. Peru*, para. 27.

Commission's Merits Report, and in the briefs with motions, arguments and evidence of the representatives of the presumed victims," and did not present arguments to contest the alleged violation of Article 7 of the Convention. In its final written arguments, the State referred to Chile's criminal procedural law which regulates pre-trial detention, without referring to the specific cases of the presumed victims. In addition, the State did not raise any objection related to the expert evidence proposed by the common interveners the purpose of which included the issue of pre-trial detention.[42]

43. A particularity of this case is that, in the Merits Report, the Inter-American Commission decided the four petitions included in the case submitted to the Court jointly and, therefore, in the said report, it included a brief description of the criminal proceedings against the eight presumed victims. This description was completed by the common interveners in more detail. In the Court's opinion, the facts described by the common interveners in their motions and arguments briefs regarding the pre-trial detention measures to which the presumed victims were subject constitute facts that complement and provide details in relation to the factual determinations included in the Merits Report, insofar as the pre-trial detentions were ordered within the framework of the criminal proceedings against the presumed victims described by the Inter-American Commission. Consequently, these facts will be considered part of the factual framework, and the Court will examine them in relation to the eight presumed victims taking into account the documentary evidence in the three domestic criminal case files.

2. The initial arrests and their judicial control

44. The statements made by presumed victims Florencio Jaime Marileo Saravia and Víctor Manuel Ancalaf Llaupe during the public hearing in this case include affirmations concerning the facts relating to the legality of the initial arrests of some of the presumed victims and the time that elapsed between these arrests and the respective judicial control.

45. The Merits Report made no mention of these factual aspects, and neither the Commission nor the common interveners presented specific arguments in relation to the legality of the initial arrest. Moreover, it should be stressed that, even though the initial arrests were ordered in the context of the investigations that formed part of the criminal proceedings in this case, in order to analyze whether violations of the rights recognized in Articles 7(2) and 7(4) of the Convention were possibly constituted, it would be necessary to examine compliance with the formal requirements and the Court was not provided with sufficient probative elements in this regard to make this analysis. Consequently, these facts are not part of the factual framework of this case and the Court will not rule on them.

3. Allegations of violence during the initial arrests and inhumane detention conditions

46. Some of the arguments of the common interveners concerning the alleged violation of Article 5 of the Convention refer to supposed facts relating to the "arrest [of the presumed victims] during vast police operations" and to the supposed "violent raids on the communities," as well as to the supposed "violent way" in which the "first arrest [of Víctor Manuel Ancalaf Llaupe] was made by the Chilean Police Force (*Carabineros de Chile*)." In addition, in its arguments on the alleged violation of this article, CEJIL included general facts concerning the "inhumane detention conditions to which the persons […] kept" in the El Manzano Prison, where

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[42] *Cf.* Affidavit prepared on May 17, 2013, by expert witness Claudio Alejandro Fierro Morales on: "the [alleged] impairment of due process of law and the judicial guarantees of the persons prosecuted under the regime regulated in the Counter-terrorism Act; the characteristics of the former criminal procedure system, and the compatibility of the said legal frameworks with the relevant international standards," and Affidavit prepared on May 15, 2013, by expert witness Mauricio Alfredo Duce Julio on "the scope of the constitutional and legal rules concerning pre-trial detention in Chile and their use in the practice by the courts of justice. In particular, [he referred to] the legal ground of 'danger to the security of society'" (file of statements of the presumed victims, witnesses and expert witnesses, folios 3 and 37 to 80).

Mr. Ancalaf Llaupe was confined, were subject. CEJIL did not describe specific facts in relation to Mr. Ancalaf Llaupe's detention conditions, or explain in its arguments how the general conditions of this prison that it described had affected the presumed victim.

47. In its Merits Report, the Commission did not refer to the way in which the initial arrests of the presumed victims were made and there is no reference to their detention conditions in the prisons. Consequently, it cannot be considered that the supposed acts of violence in the initial arrest of the presumed victims and the alleged raids on the communities during their detention explain, clarify or reject the facts presented in the Merits Report; rather they introduce new elements. Therefore, they do not form part of the factual framework of this case.

C) Time-barred arguments

48. The Court has verified that, in their final arguments and observations, as well as in subsequent briefs, the Commission and the parties presented new arguments on the alleged violations of Articles 2, 9, 8(2)(f) and 24 of the Convention.[43] Since their presentation was time-barred, the Court will not rule on them.[44]

V – EVIDENCE

49. As established in Articles 50, 57 and 58 of the Rules of Procedure and in keeping with its consistent case law concerning evidence and its assessment,[45] the Court will examine and assess the documentary evidence forwarded by the parties and the Commission on different procedural occasions, the statements of the presumed victims and witnesses made during the public hearing before the Court, by affidavit or by a written statement, the expert opinions provided at the said hearing or by affidavit or by a written statement, together with the helpful evidence requested by the Court and by its President (*supra* paras. 15 and 16), and the documents obtained and incorporated by the Court *ex officio*. The Court will abide by the principles of sound judicial discretion, within the corresponding legal framework when making its assessment.[46]

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[43] In its final written arguments, the FIDH introduced a new argument on the presumed violation of the principle of legality in relation to the supposed application of a norm on the anonymity of witnesses even though this was not in force at the time of the events for which the presumed victims were tried. Also, following the presentation of its final arguments, the FIDH forwarded a new argument relating to the fact that "the decision taken by the Public Prosecution Service to conceal the identity of a witness cannot be appealed (merits file, tome V, folio 2247). In their final arguments, the Commission and CEJIL presented, for the first time, arguments on the alleged violation of the principle of legality owing to the imposing of the ancillary penalties established in article 9 of the Chilean Constitution (merits file, tome IV, folios 1937 and 1938 and tome V, folios 2092 and 2093). In its final written arguments, the FIDH asked the Court "to take into account, in particular in relation to the guarantees of non-repetition, that discriminatory criminal prosecution by the application of the Counter-terrorism Act to the Mapuche continues [in force]" in order to take legal action against social protests" and made an analysis of the years from 2005 to 2013. Regarding the alleged failure to comply with the obligation to adopt domestic legal provisions in relation to the right of the defense to examine witnesses (Article 8(2)(f) of the Convention), the FIDH affirmed this violation in its motions and arguments brief, but it was only in its final arguments that it included specific substantiation in this regard.

[44] *Cf. Case of González Medina and family members v. Dominican Republic*. *Preliminary objections, merits, reparations and costs*. Judgment of February 27, 2012. Series C No. 240, para. 280, and *Case of J. v. Peru*, para. 282.

[45] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala*. *Merits*. Judgment of March 8, 1998. Series C No. 37, paras. 69 to 76, and *Case of Liakat Ali Alibux v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of January 30, 2014. Series C No. 276, para. 23.

[46] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits*, para. 76, and *Case of Liakat Ali Alibux v. Suriname*, para. 23.

A) Documentary, testimonial and expert evidence

50. The Court received various documents presented as evidence by the Inter-American Commission and the parties, attached to their main briefs (*supra* paras. 1, 7, 8 and 10) or in answer to the Court's requests for helpful evidence at the public hearing, or by its President (*supra* paras. 15 and 16).

51. In addition, affidavits were received from: Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán, presumed victims proposed by the FIDH; Carlos Felimer del Valle Rojas, Fabien Le Bonniec, Federico Andreu-Guzmán, expert witnesses proposed by the FIDH; Manuel Cancio Meliá, Claudio Alejandro Fierro Morales, Mauricio Alfredo Duce Julio, expert witnesses proposed by CEJIL, and Ruth Vargas Forman expert witness proposed by both common interveners; Flora Collonao Millano, Carlos Patricio Pichún Collonao, Rafael Genaro Pichún Collonao, Pascual Alejandro Pichún Collonao, Claudia Ximena Espinoza Gallardo, Soledad Angélica Millacheo Licán, Lorenza Saravia Tripaillán, Freddy Jonathan Marileo Marileo, Jovelina Rosario Ñanco Marileo, Juan Julio Millacheo Ñanco, Gloria Isabel Millacheo Ñanco, Luis Hernán Millacheo Ñanco, Zulema Marta Mariñán Millahual, Sandra Jelves Mella, Mercedes María Huenchunao Mariñán, Pablo Osvaldo Ortega Manosalva and Luis Rodríguez-Piñero Royo, witnesses proposed by the FIDH; Matías Ancalaf Prado and Karina del Carmen Prado Figueroa witnesses proposed by CEJIL; as well as the written statements of Rodolfo Stavenhagen expert witness proposed by the Inter-American Commission and the FIDH, and of Jan Perlin expert witness proposed by the Inter-American Commission. In addition, written statements were received from the presumed victims Segundo Aniceto Norín Catrimán and Patricia Roxana Troncoso Robles required by the President of the Court *ex officio*.

52. Regarding the evidence provided during the public hearing, the Court received the statements of the presumed victims Florencio Jaime Marileo Saravia proposed by the FIDH and Víctor Manuel Ancalaf Llaupe proposed by CEJIL; of the witnesses Juan Pichún Collonao proposed by the FIDH and Juan Domingo Acosta Sánchez proposed by the State, and of the expert witnesses Martin Scheinin proposed by both common interveners, Jorge Contesse proposed by CEJIL, and Claudio Fuentes Maureira proposed by the State.

53. The FIDH did not present eleven statements that it had proposed and that, as decided by the President of the Court (*supra* para. 13), should have been provided by affidavit.[47] The State desisted from the statement of the witness Jaime Arellano Quintana convened by the President to testify by affidavit.

B) Admission of the evidence

1. Documentary evidence

54. In the instant case, the Court grants probative value to those documents presented by the parties and the Commission at the proper procedural opportunity that were not contested or opposed, and the authenticity of which was not challenged,[48] to the extent that they are pertinent and useful for determining the facts and the possible legal consequences.[49]

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[47] Testimony of Juan Carlos Huenulao Llelmil, José Necul Cariqueo, Margarita Ester Millacheo Nanco, Patricia Raquel Millacheo Nanco, Cristina Rosalía Millacheo Nanco, José Pedro Millacheo Nanco, Belén Catalina Huenchunao Reinao, Juan Lorenzo Huenchunao Santi and José Fernando Díaz Fernández, and expert opinions of Raúl David Sohr Bliss and Eduardo Mella Seguel.

[48] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4 para. 140, and *Case of Liakat Ali Alibux v. Suriname*, para. 25.

[49] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, para. 140, and *Case of the Pacheco Tineo Family v. Bolivia. Preliminary objections, merits, reparations and costs.* Judgment of November 25, 2013. Series C No. 272, para. 45.

a) *Response to requests for information and helpful evidence*

55. Regarding the documentation presented by the parties with their final written arguments and by the State in briefs of July 10, August 16, September 6, 17, 23 and 27, and October 17 and 23, 2013, in answer to the Court's requests for information and helpful evidence during the public hearing, and those of its President in the Secretariat's notes dated June 10, August 23 and September 11, 2013 (*supra* paras. 15, 16 and 18), the Court finds it in order to admit the documents provided by the parties under Article 58(b) of the Rules of Procedure and they will be assessed in the context of the body of evidence.

b) *Objections to evidence provided by the State*

56. CEJIL and the FIDH presented objections to certain evidence provided by the State when responding to the request for helpful information concerning its lack of a direct relationship with the purpose of this case.[50] They also made observations on the reliability of the source and the errors and omissions in the information provided by the State in relation to the statistical data on trials held in application of the Counter-terrorism Act between 2000 and 2013. The Court finds it in order to admit this part of the documents provided by the State under Article 58(b) of the Rules of Procedure, and it will be assessed in the context of the body of evidence, bearing in mind the observations of the common interveners and the rules of sound judicial discretion.

c) *Extracts from judgments presented with arguments*

57. In the briefs presenting helpful evidence and with observations on this, the State and the FIDH, made observations on the final written arguments of the opposing party. These observations are inadmissible because they have no regulatory basis and were not requested by the Court or its President. With those briefs, the common interveners and the State also included extracts from domestic judgments deciding appeals for annulment filed in other cases that would be useful for ruling on the alleged violations of Articles 8(2)(h) and 2 of the Convention. Therefore, in application of Article 58(a) of its Rules of Procedure, the Court admits these extracts from judgments.

d) *Newspaper articles*

58. The common interveners also presented newspaper articles. The Court has considered that newspaper articles may be assessed when they refer to well-known public facts or declarations of State officials, or when they corroborate aspects related to the case.[51] Therefore, the Court decides to admit the documents of this type that are complete or that, at least, allow the source and date of publication to be verified, and will assess them taking into account the body of evidence and the rules of sound judicial discretion.[52]

e) *Documents indicated by electronic links*

59. The parties and the Commission have also indicated some documents by means of electronic links. In its case law, the Court has determined that if one of the parties or the Inter-American Commission provides, at least, the direct electronic link to the document that it cites as evidence and it is possible to access it, neither legal certainty nor procedural balance are affected, because it can be located immediately by the Court and by the other parties.[53] Consequently, documents indicated in this way are admitted.

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[50] Evidence presented by the State "to prove full implementation" of Convention 169 of the International Labour Organization (ILO), and on the laws in force on issues relating to indigenous peoples.

[51] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits,* para. 146, and *Case of Liakat Ali Alibux v. Suriname*, para. 27.

[52] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits,* para. 146, and *Case of Liakat Ali Alibux v. Suriname*, para. 27.

[53] *Cf. Case of Escué Zapata v. Colombia. Merits, reparations and costs.* Judgment of July 4, 2007. Series C No. 165, para. 26, and *Case of J. v. Peru*, para. 42.

f) *Documents issued after the presentation of the motions and arguments briefs*

60. According to Articles 35(1), 36(1), 40(2) and 41(1) of the Court's Rules of Procedure, evidence must be presented or offered together with the briefs submitting the case, or with motions, arguments and evidence, or the answering brief, as applicable. It will not be admissible outside these procedural opportunities, save in the exceptional cases established in Article 57(2). In other words, if satisfactory justification is provided that, owing to *force majeure* or serious impediment, such evidence was not presented or offered on those procedural occasions, or if it refers to an event that occurred after the procedural occasions indicated.[54]

61. On November 19, 2012, CEJIL asked that, based on the provisions of Article 57(2) of the Court's Rules of Procedure, the book "*Seminario internacional: terrorismo y estándares en derechos humanos*"[55] "accompany the documentary evidence that has already been provided, taking into account its importance and usefulness for the discussion and analysis of [this] case," and explained that "although the procedural time frames for providing evidence ha[d] already expired, it had been materially impossible to provide the book [with its motions and arguments brief], owing to the publication date," because "the seminar was held in November 2011, and it was not until June 2012 that the first edition was published." CEJIL indicated the electronic link at which the book was available. The State asked that this evidence be rejected because "in this particular case, the basic requirements of Article 57(2) of the Rules of Procedure had not been met for the Court to authorize, exceptionally, the belated incorporation of additional evidence to the proceedings." The Court notes that the book on the said seminar was published after CEJIL had presented its motions and arguments brief, so that this documentary evidence meets the formal requirements for admissibility under Article 57(2) of the Rules of Procedure, and will incorporate it into the body of evidence in order to assess it according to the rules of sound judicial discretion.

62. CEJIL and the FIDH asked, in their brief with observations on the helpful evidence presented by the State and in a communication of September 6, 2013 (*supra* para. 19), that the Court incorporate two documents: the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on his visit to Chile issued on July 30, 2013, and the Concluding observations on the combined nineteenth to twenty-first periodic reports of Chile, adopted by the Committee on the Elimination of Racial Discrimination, at its eighty-third session (12 to 30 August 2013).[56] The common interveners cited Article 57(2) of the Rules of Procedure and founded their offer on "the recent publication of [the documents], their public dissemination, and their evident usefulness and relevance for the analysis of the events that have been debated in the proceedings."

63. The State opposed the offer of this evidence on the basis that it referred to "preliminary documents that should follow the usual procedure before becoming a final document." It also affirmed that, since they were preliminary documents, "they only contain impressions that, following their normal course, must subsequently be crosschecked with data and comments of the State and other actors during the procedure of preparing the final [document]." The Commission presented time-barred arguments in this regard. CEJIL presented observations on

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[54] *Cf.* Case of *Gudiel Álvarez et al. (Diario Militar) v. Guatemala. Merits, reparations and costs.* Judgment of November 20, 2012. Series C No. 253, para. 40, and *Case of Liakat Ali Alibux v. Suriname*, para. 28.

[55] This book was the result of the "collection and dissemination of eleven conference papers by national and international academics and experts, State authorities, and members of civil society" who took part in a seminar on terrorism and human rights standards organized by "the National Institute of Human Rights of Chile and the Regional Office of the United Nations High Commissioner for Human Rights, and held on November 15, 2011."

[56] UN Doc. CERD/C/CHL/CO/19-21, Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined nineteenth to twenty-first periodic reports of Chile*, adopted by the Committee at its eighty-third session (12-30 August 2013), para.5.

the State's opposition, which will not be admitted because they were not requested by the President and are not contemplated in the Court's Rules of Procedure.

64. Subsequently, on May 9, 2014, the FIDH asked the Court, based on Article 57(2) of the Rules of Procedure, to "incorporate into the body of evidence the Report of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism […] on his mission to Chile [in July 2013], published on April 14, 2014." In its observations, CEJIL stated that it "had no objection to the inclusion [of this report] in the body of evidence, because […] the situation is in keeping with the requirement indicated in Article [57(2) of the Court's Rules of Procedure." In its observations, Chile asked the Court not to incorporate the said document, because the FIDH had not justified the incorporation of the document and, "of itself, it does not constitute evidence […] because it does not refer to the events that are the subject of these proceedings." The State also indicated that, if the Court found it pertinent and useful to incorporate this document, it considered it "extremely relevant that it should also incorporate the missing elements of the constructive dialogue relating to the visit of Special Rapporteur Emmerson, which were: Chile's response to this report, and the oral intervention when the report was adopted."

65. The two reports issued by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on his visit to Chile from July 17 to 30, 2013, are official documents issued following the presentation by the common interveners of the representatives of their motions and arguments briefs. The document issued on July 30, 2013, contains the Special Rapporteur's "preliminary evaluation" of this visit and, subsequently, in April 2014, the corresponding final report was issued.[57] Consequently, this documentary evidence meets the formal requirements for its admissibility as evidence concerning a supervening fact, in accordance with Article 57(2) of the Rules of Procedure, and it will be incorporated into the body of evidence for assessment in keeping with the rules of sound judicial discretion and taking into consideration the observations made by Chile.[58] Regarding these observations, it should be noted that the Court can take into account this report owing to the probative elements that it may provide for the necessary understanding of the context in order to analyze this case, even though its purpose was not to refer to the application of the Counter-terrorism Act in the criminal proceedings against the eight presumed victims in the case, but rather it had a broader and more general purpose related to "the use of anti-terrorism legislation in connection with protests by Mapuche activists aimed at reclaiming their ancestral lands and asserting their right to collective recognition as an indigenous people and respect for their culture and traditions."[59] The Court considers that the State's request to incorporate its

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[57] *"Preliminary report" of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism on the visit he made to Chile from 17 to 30 July 2013,* 30 July 2003, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/134/89/PDF/G1413489.pdf?OpenElement. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson,* Addendum, Mission to Chile (merits file, tome V, folios 2566 to 2587). This was presented to the Human Rights Council of the United Nations on March 10, 2014, at the twenty-fifth session. This visit to Chile of the Special Rapporteur focused on "the use of anti-terrorism legislation in connection with protests by Mapuche activists aimed at reclaiming their ancestral lands and asserting their right to collective recognition as an indigenous peoples and respect for their culture and traditions."

[58] *Cf. Case of the "Five Pensioners" v. Peru*, para. 84, and *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2013. Series C No. 270, para. 49.

[59] UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*. Addendum, Mission to Chile, para. 9 (merits file, tome V, folios 2566 to 2587).

answer to this report into the body of evidence is appropriate, and will do this in application of Article 58(a) of its Rules of Procedure.[60]

66. Regarding the request to incorporate the Concluding observations on the combined nineteenth to twenty-first periodic reports of Chile, adopted by the Committee on the Elimination of Racial Discrimination, at its eighty-third session held from August 12 to 30, 2013 (*supra* para. 19), the Court has verified that these are observations adopted following the presentation of the motions and arguments briefs by the common interveners of the representatives. Therefore this document complied with the formal requirements for its admissibility as evidence concerning a supervening fact, in accordance with Article 57(2) of the Rules of Procedure, and it will be incorporated into the body of evidence for assessment in keeping with the rules of sound judicial discretion and taking into consideration the observations made by Chile.[61] It should be added that, although the Committee on the Elimination of Racial Discrimination asked the State to "present information on the follow up to the recommendations" made in the said concluding observations, the latter, as their name indicates, are not of a preliminary nature, but make a conclusive analysis of the combined nineteenth to twenty-first periodic reports that Chile presented to this Committee.

g) *Briefs presented directly by representative Ylenia Hartog*

67. With regard to the briefs presented to the Court directly by representative Ylenia Hartog on May 29 and July 2, 2013, and the attachments to the former (*supra* footnotes 18 and 24), the Court reiterates that it is for CEJIL and the FIDH, the two common interveners authorized to intervene in this case, to receive and channel the motions, arguments and evidence that the other representatives wish to forward to the Court. Consequently, since they were not presented through the common interveners and had not been requested as helpful evidence by the Court or its President, the Court will not consider these briefs and attachments in its decision.

h) *Documents obtained* ex officio *by the Court*

68. Under Article 58(a) of the Rules of Procedure, "[t]he Court may, at any stage of the proceedings: (a) obtain, on its own motion, any evidence it considers helpful and necessary." The Court considers that the following documents are helpful and necessary for the analysis of this case, and therefore incorporates them *ex officio* into the body of evidence of this case in application of the said regulatory provision: (a) "*Síntesis de resultados del XVII Censo de Población y VI de Vivienda*" [Summary of the results of the XVII Population Census and VI Housing Census], carried out in Chile in 2002;[62] (b) Study of the Problem of Discrimination Against Indigenous Populations, by José R. Martínez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Third Part, Conclusions, proposals and recommendations;[63] (c) report presented by the Government of Chile to the Human Rights Committee in 2008 concerning the observations made on Law No.

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[60] UN Doc. A/HRC/25/59/Add.3, 11 March 2014, Human Rights Council, Comments of the State of Chile on the *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*. Addendum, Mission to Chile.

[61] *Cf. Case of "Five Pensioners" v. Peru*, para. 84, and *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia*, para. 49.

[62] Available at the website of the National Institute of Statistics (INE), XVII National Population and Housing Census carried out in April 2002, "*Síntesis de Resultados*," Santiago of Chile, March 2003, p. 23, at the following link: http://www.ine.cl/cd2002/sintesiscensal.pdf.

[63] José R. Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, Third Part, Conclusions, proposals and recommendations (UN Doc. E/CN.4.Sub.2/1983/21/Add.8).

18,314,[64] and (d) comments of the State of Chile on the report on his July 2013 visit by the Special Rapporteur for the promotion and protection of human rights while countering terrorism.[65]

2. Admission of the statements of presumed victims, and testimonial and expert evidence

69. As regards the statements of the presumed victims and the witnesses and the expert opinions provided at the public hearing and by affidavit, the Court finds them pertinent only insofar as they are in keeping with the purpose defined by the President of the Court in the order requiring them (*supra* para. 13).

70. Pursuant to the Court's case law, the statements made by presumed victims cannot be assessed in isolation, but must be evaluated in the context of all the evidence in the proceedings, because they are useful to the extent that they can provide further information on the presumed violations and their consequences.[66] On this basis, the Court admits the said statements, and they will be assessed in keeping with the criteria indicated.

71. Based on the above, the Court admits the expert opinions indicated, to the extent that they are in keeping with the purpose required, and will assess them together with the rest of the evidence and pursuant to the rules of sound judicial discretion.[67]

72. After the public hearing had been held, expert witness Claudio Fuentes Maureira forwarded a written version of the opinion he gave during this hearing, and the common interveners were given the opportunity to present their respective observations in their final written arguments if they deemed this pertinent. The Court notes that the said document relates to the purpose defined by its President for this expert opinion (*supra* para. 13), and admits it because it finds it useful for these proceedings; moreover, it was not contested, and no questions were raised as to its authenticity or truth.

VI – FACTS

73. In this chapter, the Court, based on the body of evidence in these proceedings, will establish the main facts that it finds proved. Furthermore, in the chapters on merits it will examine the facts in further detail as necessary to assess the alleged violations.

A) The presumed victims in this case

74. The eight presumed victims in this case are: Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Juan Ciriaco Millacheo Licán, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia and Patricia Roxana Troncoso Robles. They are all Chilean nationals. Seven of them are, or were at the time of the events of the case, traditional authorities or members of the Mapuche indigenous people, and the other is an activist working to defend the rights of this people. Criminal proceedings were held against them for events that occurred in 2001 and 2002 in

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[64] UN Doc. CCPR/C/CHL/CO/5/Add.1, 22 January 2009, Human Rights Committee, Consideration of reports presented by States Parties under Article 40 of the Covenant. *Chile. Information provided by the Government of Chile on the implementation of the concluding observations of the Human Rights Committee*, 21 October 2008, p. 7.

[65] UN Doc. A/HRC/25/59/Add.3, 11 March 2014, Human Rights Council, Comments of the State of Chile on the *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson. Addendum, Mission to Chile*.

[66] *Cf. Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 43, and *Case of Liakat Ali Alibux v. Suriname*, para. 31.

[67] *Cf. Case of Loayza Tamayo v. Peru. Merits*, para. 43, and *Case of J. v. Peru*, para. 49.

Chile's Regions VIII and IX (*infra* paras. 81 and 106 to 151), as a result of which they were convicted as perpetrators of offenses that were categorized as terrorism (*infra* paras. 116 to 118, 126, 128, 146 and 151) in application of Law 18,314 – known as the "Counter-terrorism Act" – that "[d]efines acts of terrorism and establishes the corresponding punishments." None of the acts for which they were tried (relating to setting fire to a wooded property, threat of arson, and setting fire to a private company's truck) affected anyone's physical integrity or life.

B) Context

1. The Mapuche indigenous people

75. Socially, the Mapuche indigenous people is organized in communities called *Lof* composed of family groups, assembled in different territorial areas.[68] Geographically, the Mapuche are concentrated in the south of the country, especially in Regions VIII (Biobío), IX (Araucanía) and X (Los Lagos, from which the province of Valdivia was separated in 2007 in order to form the actual Region XIV of Los Ríos),[69] and a sizeable contingent also lives in the metropolitan area of Santiago. Nowadays, Region VIII (Biobío) is divided into the provinces of Arauco, Biobío, Concepción and Ñuble and the capital is Concepción; and Region IX (Araucanía) is divided into the provinces of Cautín and Malleco and the capital is Temuco. According to data from the 2002 census,[70] it was considered that 4.6% of the total population of Chile belonged to an ethnic group and, of this percentage, 87.31% (or slightly more than 4% of the total population) corresponded to the Mapuche indigenous people.[71]

76. At the time of the events, the socio-economic situation of the Mapuche was below the national average and also below that of Chile's non-indigenous population, with a poverty level that was also revealed by difficulties in access to services such as education and health care.[72]

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[68] *Cf.* UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum, Mission to Chile* (file of annexes to the Merits Report 176/10, annex 5, folios 250 and 252 to 254), and Report of the Historical Truth and New Deal Commission, Volume III, Tome II, Chapter II, p. 717 (file of helpful evidence presented by the State on July 10, August 16, September 17, 23 and 27, 17, and October 23, 2013, folio 766).

[69] Region VIII: Biobío (provinces of Arauco, Biobío, Concepción and Ñuble; capital: Concepción); Region IX: Araucanía (provinces of Cautín and Malleco; capital: Temuco); Region X: Los Lagos (provinces of Chiloé, Llanquihue, Osorno and Palena; capital: Puerto Montt). Up until October 2, 2007, Region X: Los Lagos also included the province of Valdivia, which was segregated to form the actual Region XIV: Los Ríos.

[70] *Cf.* National Institute of Statistics (INE), XVII National Population and Housing Census carried out in April 2002, "*Síntesis de Resultados*," Santiago of Chile, March 2003, p. 23. Available at: http://www.ine.cl/cd2002/sintesiscensal.pdf.

[71] Data from the 2012 census reveal a strong increase (approximately 150%) in the number of persons who consider themselves of indigenous origin. 11.1% of Chileans over 5 years of age (1,714,677) consider that they are part of one of the 11 ethnic groups included on the questionnaire, and most of these (84.11%, in other words, approximately 1,442,215) stated that they are Mapuche. At the present time, this information does not appear on the official page of the National Institute of Statistics (http://www.censo.cl/), which includes a "public statement" indicating that "since March 27, 2014, […] it has proceeded to disable access to information from the 2012 Population and Housing Census," because, owing to certain questions that had been raised, it had decided to carry out a "technical audit of the census database."

[72] *Cf.* UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum, Mission to Chile* (file of annexes to the Merits Report 176/10, annex 5, folios 247 and 248); UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Addendum, The situation of indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur*, paras. 7 and 8 (file of annexes to the Merits Report 176/10, annex 12, folios 429 and 430), and Report of the Constitutional, Legislative and Justice Committee on the Senate's mandate "regarding the Mapuche conflict in relation to public order and security in certain regions," Bulletin No. S-680-12, July 9, 2003, p. 144 (file of annexes to the Merits Report 176/10, annex 4, folio 226).

In his 2009 report,[73] James Anaya, the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, indicated that although at that time there had been some "progress in the socio-economic situation of the indigenous peoples," in Chile, "serious inequality […] still persisted in the enjoyment of economic rights, and the rights to health care and education of [these] peoples," as well as "significant discrimination between the income of indigenous and non-indigenous persons."

77. Regarding "[t]he current problems facing indigenous peoples," Rodolfo Stavenhagen, in his report as United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, emphasized that these "cannot be understood without reference to the history of their relations with Chilean society," because "[t]he present situation of indigenous people in Chile is the outcome of a long history of marginalization, discrimination and exclusion, mostly linked to various oppressive forms of exploitation and plundering of their land and resources that date back to the sixteenth century and continue to this day."[74]

78. The leadership of the Mapuche communities is exercised by *"Lonkos"* and *"Werken,"* traditional authorities elected to represent one or several communities. The *Lonkos* are the foremost leaders of their respective communities for both administrative and spiritual matters; they are considered to be the depositaries of ancestral wisdom and head the decision-making processes as well as presiding important religious ceremonies. The *Werken*, whose name signifies "messenger," assist the *Lonkos* and play a complementary leadership role; they are spokespersons on diverse issues, such as political and cultural matters, before other Mapuche communities and before non-Mapuche society.[75] The presumed victims Aniceto Norín Catrimán and Pascual Pichún were *Lonkos* and the presumed victim Víctor Ancalaf was a *Werken*.

2. The social protest of the Mapuche indigenous people

79. At the beginning of the decade of 2000, when the events occurred for which the presumed victims in this case were convicted, a social situation existed in the south of Chile (Regions VIII, IX and X), above all in Region IX (Araucanía), in which members of the Mapuche

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[73] UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Addendum, The situation of indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur*, paras. 7 and 8 (file of annexes to the Merits Report 176/10, annex 12, folios 429 and 430).

[74] The said Special Rapporteur explained, among other matters, that at the time of the Spanish conquest agreements were reached "respecting their territorial sovereignty south of the Biobío river," and that, although "[t]he Chilean Republic maintained the same relationship with the Mapuche nation during the first half of the nineteenth century, […] forays into the region gradually weakened indigenous sovereignty and led to several conflicts." He indicated that "[f]inally, in 1888, Chile embarked upon the military conquest of Araucanía in what became known in the official history books as the 'pacification of Araucanía'"; the main outcome of this "was the gradual loss of their territories and resources, as well as their sovereignty, and an accelerated process of assimilation imposed by the country's policies and institutions, which refused to recognize the separate identities of indigenous cultures and languages." He added that "Chilean society as a whole, and the political classes in particular, ignored, if not denied, the existence of native peoples within the Chilean nation[, … which] became more pronounced with the construction of a highly centralized State and lasted, with a few exceptions, until the late 1980s." *Cf.* UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum, Mission to Chile,* paras. 8 to 10 (file of annexes to the Merits Report 176/10, annex 5, folio 251 and 252).

[75] *Cf.* Statements made by presumed victim Víctor Manuel Ancalaf Llaupe and by witness Juan Pichún Collonao before the Inter-American Court during the public hearing held on May 29 and 30, 2013; affidavit prepared on May 17, 2013, by expert witness Fabien Le Bonniec, and written statement made on May 26, 2013, by expert witness Rodolfo Stavenhagen (file of statements of presumed victims, witnesses and expert witnesses, folios 321 and 698), and Mella Seguel, Eduardo and Le Bonniec, Fabien, *"Movimiento mapuche y justicia chilena en la actualidad: reflexiones acerca de la judicialización de las reivindicaciones mapuche en Chile*" in Aylwin, José (Editor), "*Derechos Humanos y Pueblos Indígenas: Tendencias Internacionales y Contexto Chileno,*" Institute for Indigenous Studies, Universidad de la Frontera, Temuco, 2004 (file of annexes to the CEJIL motions and arguments brief, annex C 10, folio 2356).

indigenous people, its leaders and organizations, were involved in numerous demands, demonstrations, and social protests seeking attention to and settlement of their claims, relating above all to the recovery of their ancestral lands, and to respect for the use and enjoyment of these lands and their natural resources.[76]

80. The social protest in the area increased because, towards the end of the twentieth century, permission had been granted for increased exploitation by forestry companies and the construction of development projects on some of the lands that the Mapuche communities considered part of their traditional lands.[77] As a result, "[c]ommunal lands have gradually been getting smaller and have been cut off in the middle of private properties, [affecting] access to the woods, and thus to the Mapuche people's traditional means of sustenance."[78] In addition, the construction of "major development projects" in the first decade of the twenty-first century, such as hydroelectric projects and highways, has given rise to "a number of social conflicts [...] in connection with the impact on the human rights of indigenous people."[79] The construction of the Ralco hydroelectric plant in the province of Bío Bío, Region VIII, had a special impact on the indigenous communities and aroused their particular opposition because thousands of hectares of land would be flooded and the communities moved.[80]

81. In the context of this social protest, the level of unrest in these regions increased. Apart from the social movements and other types of pressure such as the occupation of disputed land, additional actions and violent acts occurred which were classified as "serious," such as the occupation of land that was not the object of any ongoing legal claim, the setting of fires to forest plantations, crops, buildings, and the owners' homes, the destruction of equipment, machinery and fences, or the blocking of communication routes and clashes with the police.[81] It

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[76] *Cf.* Report of the Historical Truth and New Deal Commission, Volume III, Tome II, Chapter II: *Territorio y Tierras Mapuche* (file of helpful evidence presented by the State, folios 999 and 1000); affidavit prepared on May 24, 2013, by witness Luis Rodríguez-Piñero Royo (file of statements of the presumed victims, witnesses and expert witnesses, folios 337-338); acquittal issued on November 9, 2004, by the Second Chamber of the Temuco Oral Criminal Trial Court (file of annexes to the FIDH motions and arguments brief, annex 50, folio 1839 and 1840); written statement made on May 27, 2013, by expert witness Rodolfo Stavenhagen (file of statements of the presumed victims, witnesses and expert witnesses, folio 697); Milla Seguel, Eduardo, *"Los mapuche ante la justicia. La criminalización de la protesta indígena en Chile"*, Chile, Santiago. LOM Ediciones, 2007, p. 145 (file of annexes to the CEJIL motions and arguments brief, annex D5, folios 3286-3288); UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, Addendum, Mission to Chile,* paras. 27 and 49 (merits file, tome V, folios 2566 to 2587), and UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum, Mission to Chile* (file of annexes to the Merits Report 176/10, annex 5, folio 260).

[77] *Cf.* UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Addendum, The situation of indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur* (file of annexes to the Merits Report 176/10, annex 12, folio 437), and affidavit prepared on May 24, 2013, by witness Luis Rodríguez-Piñero Royo (file of statements of presumed victims, witnesses and expert witnesses, folio 338).

[78] *Cf.* UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum, Mission to Chile*, para. 22 (file of annexes to the Merits Report 176/10, annex 5, folio 255).

[79] *Cf.* UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum, Mission to Chile*, para. 22 (file of annexes to the Merits Report 176/10, annex 5, folio 255); Report of the Historical Truth and New Deal Commission, Volume III, Tome II, Chapter II, p. 950 and 951 (file of helpful evidence presented by the State, folios 999 and 1000), and affidavit prepared on May 24, 2013, by witness Luis Rodríguez-Piñero Royo (file of statements of presumed victims, witnesses and expert witnesses, folios 337 to 339).

[80] *Cf.* Affidavit prepared on May 24, 2013, by witness Luis Rodríguez-Piñero Royo (file of statements of presumed victims, witnesses and expert witnesses, folio 338, and Report of the Historical Truth and New Deal Commission, Volume III, Tome II, Chapter II, pp. 950 and 951 (file of helpful evidence presented by the State, folios 999 and 1000).

[81] *Cf.* UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission*

was in this context that the acts occurred for which the eight presumed victims in this case were criminally prosecuted:

a) A fire in the Nancahue forest plantation and in the house of the administrator of the plantation on December 12, 2001, of which the *Lonkos* Segundo Aniceto Norín Catrimán and Pascual Pichún Paillalao were acquitted (*infra* paras. 106, 112 and 116);

b) "Threats" to set fire to the San Gregorio plantation that "occurred during 2001" for which *Lonko* Segundo Aniceto Norín Catrimán was convicted (*infra* paras. 106, 116 and 118);

c) A fire that occurred on December 16, 2001, in the San Gregorio forestry plantation, of which the *Lonkos* Segundo Aniceto Norín Catrimán and Pascual Pichún Paillalao were acquitted (*infra* paras. 106, 112 and 116);

d) "Threats" to set fire to the Nancahue forest farm that "occurred during 2001" for which *Lonko* Pascual Pichún Paillalao was convicted (*infra* paras. 106, 112 and 116);

e) A fire that occurred on December 19, 2001, at the Poluco and Pidenco farms, owned by the forestry company, Mininco S.A., for which Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José-Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles were convicted (*infra* paras. 120, 126 and 128);

f) The setting fire to three trucks and a backhoe owned by the Fe Grande company (that worked on the construction of the Ralco dam) on September 29, 2001, and March 3, 2002, in the Alto Bío Bío sector, of which *Werken* Víctor Ancalaf Llaupe was acquitted (*infra* paras. 133 and 147), and

g) The setting fire to a truck owned by the construction company, Brotec S.A. (that worked on the construction of the Ralco dam), on March 17, 2002, in the Alto Bío Bío sector, of which *Werken* Víctor Ancalaf Llaupe was convicted (*infra* paras. 133, 147, 150 and 151).

82. In this regard, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, indicated, in relation to his visit to Chile in 2003, that around that time there had been a "growing number of conflicts in the Mapuche area, including Regions VIII, IX and X." He stated that:

> Most of the conflicts reported stem from Mapuche land claims and generally involve one of three types of protest:
>
> (a) The organization of pressure groups acting on behalf of those who have unsuccessfully applied for additional land or for the restitution of their land;
>
> (b) The occupation of disputed land, as a means of applying direct pressure and gaining publicity;
>
> (c) The occupation of land that is not the object of any ongoing legal claim, involving actions that are serious by definition (such as setting fire to forest plantations or buildings, destroying equipment and fences or blocking communication routes) and clashes with the police.

He added that:

> [T]he distinctions between these three types of protest are not clear-cut and in some cases a transition from one to another can be observed, depending on whether there are delays or problems in finding solutions to the demands for additional land and for restitution of land. It should also be pointed out that the third, and most serious, type of conflict occurs mostly in the provinces which have higher

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resolution 2003/56, Addendum, Mission to Chile, para. 28 (file of annexes to the Merits Report 176/10, annex 5, folio 257), and UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Addendum, The situation of indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur*, para. 57 (file of annexes to the Merits Report, Annex 12, folio 443).

concentrations of indigenous people and higher poverty rates and which were adversely affected between 1973 and 1990 by the reversal of the measures taken to implement land reform.[82]

83. As of 2001, the number of leaders and members of Mapuche communities investigated and tried for committing ordinary offenses in relation to violent acts associated with the above-mentioned social protest increased significantly. In a few cases they have been investigated and/or convicted of offenses of a terrorist nature in application of Law 18,314 (Counter-terrorism Act) (*infra* paras. 98 and 99).[83] In his final report on his visit to Chile in July 2013, the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism emphasized that "political opinion" in Chile agreed that the use of the anti-terrorism legislation against the Mapuche in this context of social protest is "unsatisfactory and inconsistent."[84] Also, between 2000 and 2013, the Public Prosecution Service held a total of 19 proceedings under the Counter-terrorism Act, 12 of which were related to the land claims of the Mapuche indigenous people (*infra* para. 217).

84. In 2003, the Constitutional, Legislative and Justice Committee, mandated by the Chilean Senate, drew up a report on "public order and security, above all in Regions VIII and IX, in

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[82] *Cf.* UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum, Mission to Chile,* para. 28 (file of annexes to the Merits Report 176/10, annex 5, folio 257). The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, also referred to the issue and said, among other matters, that he "disapproves of resorting to acts of violence as a means of protest, even in situations related to legitimate claims of the indigenous peoples and communities," but that "the perpetration of eventual acts of violence does not in any way justify the violation of human rights of the indigenous population by the State's police agents." *Cf.* UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Addendum, The situation of indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur*, para. 40 (file of annexes to the Merits Report 176/10, annex 12, folio 439).

[83] *Cf.* UN Doc. CCPR/C/CHL/C0/5, 17 April 2007, Human Rights Committee, *Consideration of reports presented by States Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee, Chile*, para. 7 (file of annexes to the Merits Report 176/10, annex 8, folio 312); UN Doc. A/HRC/6/17/Add.1, 28 November 2007, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Communications with Governments*, para. 9 (file of annexes to the Merits Report 176/10, annex 10, folio 370); UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Addendum, The situation of indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur*, para. 46 (file of annexes to the Merits Report 176/10, annex 12, folio 441); UN Doc. CERD/C/CHL/C0/15-18, 7 September 2009, Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, Chile*, para. 15 (file of annexes to the Merits Report 176/10, annex 14, folio 502); Aylwin Oyarzún, José Antonio, Law report, "*La aplicación de Ley No. 18.314 que 'determina conductas terroristas y fija su penalidad' a las causas que involucran a integrantes del pueblo mapuche por hechos relacionados con sus demandas por tierras y sus implicaciones desde la perspectiva de los derechos humanos"* [The application of Law No. 18,314 which 'defines terrorist acts and establishes the corresponding punishments' in proceedings that involve members of the Mapuche people for acts related to their demands for lands and the implications from the perspective of human rights], August 2010 (file of annexes to the CEJIL motions and arguments brief, annex C 2, folios 2080 to 2086); Statement made by expert witness Jorge Contesse before the Inter-American Court during the public hearing held on May 29 and 30, 2013; document provided by the State indicating that it is a "List with a historical record of those indicted under the Counter-terrorism Act between 2000 and 2013 throughout Chile" (file of helpful evidence presented by the State, folios 52 to 55); and Article by Víctor Toledo Llancaqueo, "*Prima ratio Movilización mapuche y política penal. Los marcos de la política indígena en Chile 1990-2007,*" in the journal *Observatorio Social de América Latina*, Year VIII, No. 22, September 2007, Buenos Aires (Annex No. 9 of the FIDH brief with motions, arguments and evidence), page 263 of the journal includes a "Table" entitled "Regions VIII and IX. Complaints filed by the Government owing to Mapuche acts of protest, 1997-2003" indicating that the source of the information is a "Note of the Ministry of the Interior based on a report of the Senate (2003) and INE judicial statistics."

[84] *Cf.* UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, Addendum, Mission to Chile,* paras. 20 and 22 (merits file, tome V, folios 2566 a 2587).

relation to the reiterated acts of violence committed by some Mapuche organizations." Among its conclusions, the Committee stated that:

> In spite of the difficulties of their situation, the immense majority of Mapuche communities are composed of peaceful honest hardworking citizens, who respect the law, democracy and the elected authorities and, despite the serious social problems and deficiencies they endure and their legitimate right to demand respect for their traditions, culture and identity, they reject violence as a way of making known or realizing their aspirations, the achievement of which they demand vehemently at times, but without violence.[85]

85. The actions of the State's law enforcement agents (members of the *Carabineros de Chile* and of the Police Investigation Unit) in this context of social protest have resulted in allegation of abuse, violence (physical and verbal) and mistreatment against the members of the Mapuche indigenous people (including children, women and the elderly) when they conduct searches or raids, or execute arrest warrants against suspects. Deaths and injuries have occurred, even including of children. In this regard, the United Nations Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism stated that "it is an undeniable fact that some members of the *Carabineros* […] employ an excessive and potentially lethal use of force during the operations carried out in the Mapuche communities," which he considered to be a "usual and even systematic practice," added to "the almost total absence of accountability for the crimes supposedly committed by law enforcement agents."[86]

86. On January 18, 2001, by Supreme Decree of the President of the Republic Ricardo Lagos Escobar, the Commission for the Historical Truth and New Deal with the Indigenous Peoples was created, mandated "to advise the President […] on the vision of the indigenous peoples [of Chile] with regard to the historical events of the country, and to make recommendations for a new State policy that paves the way to progress towards a new treatment of Chilean society and its rapprochement with the indigenous peoples"[87] (*infra* para. 87). To carry out its task, the Commission organized "thematic and territorial working groups," including the "Autonomous Mapuche Commission." The research conducted by the latter reveals that, at the start of the twenty-first century, "in Regions VIII and IX a significant number of land disputes and demands of the Mapuche communities from different communes in [certain] provinces had been resolved, […] by the purchase of land," but that there remained "different conflicts and demands for land that had not been resolved." These were related to "the history of usurpation and loss of lands to which the communities had been subject […]." The Commission also affirmed that, "among the demands for lands," "the recovery of those that formed part of the

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[85] *Cf.* Report of the Constitutional, Legislative and Justice Committee on the Senate's mandate "regarding the Mapuche conflict in relation to public order and security in certain regions," Bulletin No. S-680-12, July 9, 2003, p. 144 (file of annexes to the Merits Report 176/10, annex 4, folios 225 and 226).

[86] *Cf.* UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Addendum, The situation of indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur*, paras. 42, 43 and 62 (file of annexes to the Merits Report 176/10, annex 12, folios 440 and 444); UN Doc. CERD/C/CHL/C0/15-18, 7 September 2009, Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination, Chile,* para. 19 (file of annexes to the Merits Report 176/10, annex 14, folio 503), and UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, Addendum, Mission to Chile,* paras. 69 to 79 (merits file, tome V, folios 2566 to 2587).

[87] Articles 2 and 3 of this decree set out the tasks and composition of the Commission for the Historical Truth and New Deal for the Indigenous Peoples. *Cf.* Supreme Decree No. 19, of January 18, 2001, creating the Historical Truth and New Deal Commission, contained in the Report of the Commission for the Historical Truth and New Deal for the Indigenous Peoples handed to Ricardo Lagos Escobar, President of the Republic at the time, on October 28, 2003, published by the Presidential Commissioner for Indigenous Affairs, first edition, Santiago of Chile, October 2008, pp. 16 to 18. Available at: http://www.corteidh.or.cr/tablas/27374.pdf.

Mapuche communities during the agrarian reform and those that are claimed as part of the ancestral lands prior to the reduction process" stood out.[88]

87. In its 2003 Report, the Commission for the Historical Truth and New Deal with the Indigenous Peoples made various "proposals and recommendations" related to the claims of the Mapuche people, among which it indicated that "reparation mechanisms should be created and, insofar as possible, for restitution of the Mapuche lands when, based on the background information, this is justified," and also that "[i]t is the duty of the State […] to institute mechanisms for evaluating these demands and meeting them when they are justified," and "[s]ettling the claims of the indigenous peoples while respecting the integrity of the personal assets of the actual owners." In this regard, the Commission insisted that "the land claims of the indigenous peoples and communities" must be dealt with promptly; to the contrary, "frequent and permanent conflict would be encouraged."[89]

88. At the beginning of the decade of 2000, Law No. 19,253, the so-called "Indigenous Peoples Act" was in force; it had been enacted in 1993 and established norms "for the protection, promotion and development of the indigenous peoples." Matters relating to property, culture, education, political participation and development, as well as mechanisms for access to indigenous lands and waters were regulated by this law, as well as the creation of the National Development Corporation (CONADI), responsible for the administration of the indigenous peoples' land and water fund. The fund "operates through two mechanisms […]: (a) subsidizing the purchase of lands in order to extend them, and (b) the direct purchase of "disputed lands.'"[90]

89. On September 15, 2008, Chile ratified Convention 169 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries. According to the report of James Anaya, as United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, the ratification and entry into force of this Convention "help[ed] to strengthen the legal framework to guarantee rights and guide the State's public policies concerning the indigenous peoples."[91]

90. Despite the existence of this legal framework and of the actions that the State undertook within it such as purchasing land and delivering it to Mapuche communities, several bodies and special procedures of the United Nations and the above-mentioned Commission for the Historical Truth and New Deal for the Indigenous Peoples, as well as different types of evidence have all indicated that the State's response to the Mapuche indigenous people's land claims has been slow and lacks an effective mechanism.[92] In this regard, in his final report on his visit to

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[88] *Cf.* Report of the Historical Truth and New Deal Commission, Volume III, Tome II, Chapter II, p. 717 (file of helpful evidence presented by the State, folio 958).

[89] *Cf.* Report of the Historical Truth and New Deal Commission delivered to Ricardo Lagos Escobar, President of the Republic at the time, on October 28, 2003, pp. 575, 576 and 578.

[90] *Cf.* Report of the Constitutional, Legislative and Justice Committee on the Senate's mandate "regarding the Mapuche conflict in relation to public order and security in certain regions," Bulletin No. S-680-12, July 9, 2003, p. 144 (file of annexes to the Merits Report 176/10, annex 4, folios 226 and 227), and UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Addendum, *The situation of indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur,* para. 24 (file of annexes to the Merits Report 176/10, annex 12, folio 434).

[91] *Cf.* UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Addendum, *The situation of indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur,* para. 6 (file of annexes to the Merits Report 176/10, annex 12, folio 429).

[92] *Cf.* UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Addendum, The situation of indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur,* para. 24 (file of annexes to the Merits Report 176/10, annex 12, folios 434 and 435); UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special*

Chile in July 2013, the United Nations Special Rapporteur for the promotion and protection of human rights while countering terrorism underlined that it was urgent for the State to find a solution to the manifestations of violence in the region of Araucanía, and also its causes. He stressed that "[s]ince the restoration of democracy in Chile, no Government of either political hue has given the issue the priority it deserves," and that the State "has a duty to promote a peaceful and just solution to the Mapuche questions." According to the Special Rapporteur, representatives of commercial interests in the region have complained about the lack of political will within central Government to seek and deliver a lasting solution to the problem.[93]

91. In December 2011, CONADI paid the price agreed for the acquisition of approximately 2,500 hectares, which were divided between three indigenous communities: the Ricardo Nahuelpi Ñu Choyun community, the Antonio Ñirripil community and the Didaico community. Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao, respectively, were *Lonkos* of the last two of these communities, and they were present in the ceremony of the "handing over of the land."[94]

92. In addition to the criminal proceedings relating to the instant case before the Inter-American Court, the presumed victims Patricia Troncoso Robles, Pascual Pichún Paillalao and Segundo Aniceto Norín Catrimán and another five persons were tried for the offense of "conspiracy to commit a terrorist act." They were accused of having formed an organization to carry out terrorist offenses acting "under the aegis" of the indigenous organization, "*Coordinadora Arauco-Malleco*" (CAM). The Temuco Criminal Trial Court acquitted them on November 9, 2004, and in its judgment, among other matters, it concluded that:

> […] In this case there has never been a body or organization, with its own exclusive features, characteristics and particularities that differentiate it from the *Coordinadora Arauco-Malleco* regarding which it can be affirmed that it operated under the latter's aegis. To the contrary, all the evidence provided by the plaintiffs reveals that it refers a single and unique entity, which is only the oft-named *Coordinadora Arauco-Malleco,* which has been operating in both Regions XVIII and IX of the country as of 1998, and whose ideology, procedures and actions are those that it has disclosed on its web page, in its publication Weftun, and through social media. […].[95]

Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56, Addendum, Mission to Chile (file of annexes to the Merits Report 176/10, annex 5, folio 247); UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council*, Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*, *Addendum, Mission to Chile*, paras. 10, 25 and 16; UN Doc. CCPR/C/CHL/C0/5, 17 April 2007, Human Rights Committee, *Consideration of reports presented by States Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee, Chile,* para. 19 (file of annexes to the Merits Report 176/10, annex 8, folios 310 to 315); UN Doc. CERD/C/CHL/CO/19-21, Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined nineteenth to twenty-first periodic reports of Chile, adopted by the Committee at its eighty-third session (12-30 August 2013*), paras. 12 to 14; Report of the Historical Truth and New Deal Commission, Volume III, Tome II, Chapter II, pp. 950 to 954 (file of helpful evidence presented by the State, folios 999 to 1003); Aylwin Oyarzún, José Antonio, Law Report, *"La aplicación de Law No. 18.314 que 'determina conductas terroristas y fija su penalidad' a las causas que involucran a integrantes del pueblo mapuche por hechos relacionados con sus demandas por tierras y sus implicaciones desde la perspectiva de los derechos humanos,"* August 2010 (file of annexes to the CEJIL motions and arguments brief, annex C 2, folio 2080), and affidavit prepared on May 24, 2013, by witness Luis Rodríguez-Piñero Royo (file of statements of the presumed victims, witnesses and expert witnesses, folio 337).

93 *Cf.* UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*, Addendum, Mission to Chile, paras. 24 to 28 (merits file, tome V, folios 2566 to 2587).

94 *Cf.* Ownership titles issued on January 25, 2012, by the Notary and Real Estate Registrar José Apolonio Peña Meza in relation to the contracts for the purchase of land in favor of the Antonio Ñirripil, Didaico, and Ricardo Nahuelpi Ñi Po Choyún Indigenous Communities drawn up by the same notary in deeds dated December 23, 2011 (file of annexes to the answering brief, folios 137 to 157). The State also provided photographs of the delivery of land to the indigenous communities and plans of the land handed over (file of annexes to the answering brief, folios 125 to 136).

95 *Cf.* Judgment delivered on November 9, 2004, by the Second Chamber of the Temuco Criminal Trial Court, nineteenth *considerandum* (file of annexes to the FIDH motions and arguments brief, annex 50, folios 1721 to 1852).

93. The Court received expert,[96] testimonial[97] and documentary[98] evidence, as well as reports of United Nations experts,[99] which reveal the existence in social media and in parts of Chilean society of unfavorable stereotypes and the concept of what is called "the Mapuche question," the "Mapuche problem," or the "Mapuche conflict," which delegitimize the claims concerning the territorial rights of the Mapuche indigenous people or, in general, describe their social protest as violent or present it as creating conflict between this people and the other inhabitants of the area.[100]

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[96] *Cf.* Statement made by expert witness Jorge Contesse before the Inter-American Court during the public hearing held on May 29 and 30, 2013; affidavits prepared on May 17, 2013, by expert witness Carlos del Valle Rojas; on May 17, 2013, by expert witness Fabien Le Bonniec; on May 15, 2013, by expert witness Ruth Vargas Forman, and written statement prepared on May 26, 2013, by expert witness Rodolfo Stavenhagen, (file of statements of the presumed victims, witnesses and expert witnesses, folios 288 to 298, 327, 328, 400, 407, 697 and 698).

[97] *Cf.* Statement made by presumed victim Víctor Manuel Ancalaf Llaupe before the Inter-American Court during the public hearing held on May 29 and 30, 2013; affidavits prepared on May 17, 2013, by presumed victim José Benicio Huenchunao Mariñán; on May 24, 2013, by witness Luis Rodríguez Piñero; on May 17, 2013, by Matías Ancalaf Prado; on May 14, 2013, by presumed victim Juan Patricio Marileo Saravia; on May 14, 2013, by presumed victim Juan Ciriaco Millacheo Licán; on May 16, 2013, by Carlos Pichún; on May 17, 2013, by Pascual Alejandro Pichún Collonao; on May 20, 2013, by Claudia Ximena Espinoza Gallardo; on May 24, 2013, by Freddy Jonathan Marileo Marileo, and written statements prepared on May 27, 2013, by presumed victims Patricia Roxana Troncoso Robles and Segundo Aniceto Norín Catrimán (file of statements of the presumed victims, witnesses and expert witnesses, folios 35, 183, 196, 204, 221, 235, 238, 256, 339, 430, 638 and 642).

[98] *Cf.* Eduardo Milla Seguel, *"Los mapuche ante la justicia. La criminalización de la protesta indígena en Chile"*, Chile, Santiago. LOM Ediciones, 2007, p. 145 (file of annexes to the CEJIL motions and arguments brief, annex D5, folio 3359); Pablo A. Segovia Lacoste, *"Semántica de la guerra en el conflicto mapuche"* (file of annexes to the FIDH motions and arguments brief, annex 12, folios 443 to 455); Myrna Villegas Díaz, *"El Mapuche como enemigo en el Derecho (Penal). Consideraciones desde la biopolítica y el derecho penal del enemigo"*, Portal Iberoamericano de las Ciencias Penales (file of annexes to the CEJIL motions and arguments brief, annex C 6, folios 2181, 2182 and 2187); Eduardo Mella Seguel and Le Bonniec, *"Movimiento mapuche y justicia chilena en la actualidad: reflexiones acerca de la judicialización de las reivindicaciones mapuche en Chile"* in Aylwin, José (editor), *Derechos Humanos y Pueblos Indígenas: Tendencias Internacionales y Contexto Chileno*, Temuco, Institute for Indigenous Studies and Universidad de la Frontera, 2004 (file of annexes to the CEJIL motions and arguments brief, annex C 10, folios 2357-2361), and Human Rights Watch. *"Undue Process: Terrorism trials, military courts, and the Mapuche in Southern Chile,"* October 2004 (file of annexes to the FIDH motions and arguments brief, annex 14, folios 528 and 529); Newspaper article published in "*El Mercurio*," digital edition on March 2, 2000, entitled "*Conflicto Mapuche Bordea el Terrorismo"*; Newspaper article published in "Emol.Chile" on January 23, 2001, entitled "*Piden aplicar la ley antiterrorista en la Aracucanía*"; Newspaper article published in "Emol.Chile" on February 2, 2001, entitled *"Pérez Walker: Gobierno no se impone ante conflicto mapuche";* Newspaper article published in "*El Mercurio*," digital edition on December 14, 2000, entitled *"Atentados de grupos armados: Zaldívar, partidario de la ley antiterrorista"*; Newspaper article published in "*El Mercurio*," digital edition on July 15, 2002, entitled *"Sólo un mapuche cumple presidio"*; Newspaper article published in "*El Mercurio*," digital edition on December 6, 2002, entitled "*Conflicto en la IX Región: Ejecutivo pide la ley antiterrorista contra mapuches*"; Newspaper article published in "*El Mercurio*" digital edition on July 30, 2005, entitled *"Juicio a Mapuches";* Newspaper article published in "*El Mercurio,"* digital edition on November 6, 2004, entitled *"Víctimas contra fallo absolutorio de Mapuches: ellos quedan como inocentes y nosotros con casas quemadas"* (file of annexes to the FIDH motions and arguments brief, annexes 60.3, 60.4 60.5, 60.7, 60.8, 60.10, 60.19 and 60.21, folios 1968 to 1973, 1975, 1976, 1977, 1979, 1988, 1990), and Newspaper article published in "*piensaChile.com*" on March 19, 2008, entitled "*Jueza y fiscal avalan tortura y montajes en juicio por atentado contra Forestal Mininco"* (file of annexes to the Merits Report 176/10, appendix 1, folios 2822 to 2824).

[99] *Cf.* UN Doc. E/CN.4/2004/80/Add.3, 17 November 2003, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2003/56*, Addendum, Mission to Chile (file of annexes to the Merits Report 176/10, annex 5, folio 259); UN Doc. A/HRC/12/34/ Add.6, 5 October 2009, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Addendum, The situation of indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur*, paras. 7 and 8 (file of annexes to the Merits Report 176/10, annex 12, folio 259), and UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*, Addendum, Mission to Chile, paras. 27 and 49 (merits file, tome V, folios 2566 a 2587).

[100] In this regard, the book by Eduardo Milla Seguel, presented by CEJIL, states, among other matters, that "the media have established a forceful discourse, based on prejudices and in defense of the private property of the forestry companies and farmers settled on Mapuche ancestral territory, which tends to deny 'the rights of the indigenous peoples' influencing national and regional society and the judicial proceedings that, nowadays, affect members of Mapuche communities." *Cf.* Eduardo Milla Seguel, *"Los mapuche ante la justicia. La criminalización de la protesta indígena*

C) Domestic legal framework

94. During the criminal proceedings against the presumed victims in this case, norms of the Constitution, criminal law (Criminal Code and special criminal law on terrorism) and criminal procedural law (1906 Code of Criminal Procedure and 2000 Criminal Procedural Code, and Code of Military Justice) were applied, and they will be described below, before examining them in the corresponding chapters on the merits.

1. Constitution

95. Article 9 of the Constitution of the Republic of Chile[101] contains provisions for the criminal prosecution of "acts of terrorism" and penalties in addition to imprisonment. In addition, article 19(7)(e) contains regulations concerning the right to personal liberty and "preventive or pre-trial detention."

> Article 9. Terrorism, in any of its forms, is intrinsically contrary to human rights.
>
> Those found guilty shall be disqualified for 15 years from discharging public duties or holding public office, regardless of whether or not the appointment is by popular election; from being the rector or director of an educational establishment or performing teaching activities therein; from operating a social communications media outlet or being a director or manager thereof, or performing therein functions connected with the broadcast or dissemination of opinions or information; and from being the leader of a political organization, an organization associated with education, or a neighborhood, professional, business, labor, student, or trade association, during that time. It is understood that the foregoing is without prejudice to other disqualifications or those that last longer according to the law.
>
> The offenses referred to in the preceding paragraph shall always be considered common and not political offenses for all legal effects, and a private pardon shall not be admissible, unless this is to commute the death penalty for life imprisonment.

Article 19(7)(e) and (f) establishes the following:

> Article 19. The Constitution ensures to everyone:
>
> [...]
>
> (7). The right to personal liberty and individual safety.
>
> Consequently:
>
> [...]
>
> (e) Pre-trial release shall be in order, unless the judge considers that detention or pre-trial detention is necessary for the preliminary investigations or for the safety of the victim or of society. The Law shall establish the means and requirements for obtaining this.

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en Chile", Chile, Santiago. LOM Ediciones, 2007, p. 145 (file of annexes to the CEJIL motions and arguments brief, annex D5, folio 3325). Similarly, the *amicus curiae* brief presented by Claudia Gutiérrez Olivares, Professor of Ethics and Political Philosophy of the Universidad of Chile, when referring, *inter alia*, to "the opinion" and "the discourse" of the mass media in relation to the Mapuche people, stated that "very frequently, [...] the media use a discriminatory language that marginalizes the Mapuche people," by presenting them as "small groups that obstruct development" owing to their "social mobilization" based on "opposition to production and energy projects that it is sought to develop on indigenous lands or nearby." Thus, she indicated that "[n]ewspaper coverage of the Mapuche issue usually takes the approach of the *Mapuche conflict*," dealing with news concerning this situation "clearly in favor of one of the parties," which is the "businessmen" or "owners of forestry company [or of] farms." In this regard, she referred to an article by Fresia Andrea Amolef Gallardo entitled "*La alteridad en el discurso mediático: Los Mapuches y la prensa Chilena*", indicating that, in the article, the author summarizes the treatment given to the Mapuche in a major Chilean newspaper that uses "concepts and expressions" based "almost exclusively" on "negative, pejorative and discriminatory characteristics," as well as a description of "the negative consequences" of "the actions taken by" the Mapuche. She affirmed that this author shows that "the press creates a climate that is hostile to the social demands of the Mapuche people, contributing to delegitimize them, as well as to producing distrust and fear among the population" (merits file, tome IV, folios 1854 to 1864).

[101] *Cf.* Constitution of Chile of August 8, 1980, and its amendments. The State indicated that the version of the "Constitution of Chile in force at the time of the acts for which the presumed victims of this case were prosecuted" is available at: http://www.leychile.cl/Navegar?idNorma=7129&idVersion=2001-08-25.

> The decision granting pre-trial release to the accused of the offenses referred to in article 9 must always be consulted with a higher authority. This and the appeal against the decision issued on the release shall be heard by the corresponding higher court composed exclusively of full-time members. The decision that approves or grants the release must be taken unanimously. During the pre-trial release period, the accused shall always be subject to measures of supervision by the authority established by law.
>
> (f) […] The release of the accused shall be in order unless the judge considers that pre-trial detention is necessary for the investigations or for the safety of the victim or of society. The Law shall establish the means and requirements for obtaining this.

2. Criminal law

a) Criminal Code

96. The Chilean Criminal Code (which dates from 1874 and has been amended several times) is pertinent insofar as the Counter-terrorism Act refers to various types of crime established therein, as well as the corresponding punishments.[102]

97. Among the punishments established in its article 21 are "[a]bsolute and permanent disqualification from public office and positions, and titled professions" and that of "[a]bsolute and temporary disqualification from public office and positions, and titled professions."

b) Counter-terrorism Act

98. In 1984, Law 18,314 (Counter-terrorism Act) was enacted, which "[d]efines acts of terrorism and establishes their punishments."[103] This law was amended in 1991, 2002, 2003, 2005, 2010 and 2011.[104] The 2010 amendment eliminated the part of the text of article 1

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[102] *Cf.* Criminal Code of Chile of November 12, 1874, and its amendments. The State indicated that the "Criminal Code in force at the time of the acts for which the presumed victims in this case were tried" is available at: http://www.leychile.cl/Navegar?idNorma=1984&idVersion=2001-06-05

[103] *Cf.* Law No. 18,314 that "defines terrorist acts and establishes the corresponding punishments," published in the official gazette on May 17, 1984 (file of annexes to the Merits Report 176/10, annex 1, folios 5 to 11, file of annexes to the CEJIL motions and arguments brief, annex B 1.1, folios 1740 to 1746, file of annexes to the FIDH motions and arguments brief, annex 27, folios 817 to 823, and annexes to the State's answering brief, annex 3, folios 84 to 87). This law is also available at: http://www.leychile.cl/Navegar?idNorma=29731&tipoVersion=0

[104] Law No. 18,314 was amended by the following laws:

i) **Law No. 19,027** of January 24, 1991, which "[a]mends Law No.18,314 that que defines terrorist acts and establishes the corresponding punishments" (file of annexes to the FIDH motions and arguments brief, annex 29, folios 825 to 827).

ii) **Law No. 19,806** of May 31, 2002, on "[n]orms to adapt the Chilean legal system to the reform of criminal procedure," which regulates witness anonymity (file of annexes to the CEJIL motions and arguments brief, annex B.2, folios 1776 to 1829 and file of annexes to the FIDH motions and arguments brief, annex 30, folios 828 to 881);

iii) **Law No. 19,906** of November 13, 2003, which "[a]mends Law No.18,314, on terrorist acts, in order to sanction the financing of terrorism more effectively in keeping with the provisions of the International Convention for the Suppression of the Financing of Terrorism" (file of annexes to the FIDH motions and arguments brief, annex 31, folio 882);

iv) **Law No. 20,074** of November 14, 2005, which "[a]mends the Code of Criminal Procedure and the Criminal Code" (file of annexes to the CEJIL motions and arguments brief, annex B.1.2, folios 1747 to 1758);

v) **Law No. 20,467** of October 8, 2010, which "[a]mends provisions of Law No.18,314 that defines terrorist acts and establishes the corresponding punishments." This law, *inter alia*, eliminates the presumption of terrorist motives owing to the use of certain methods ,and expressly establishes "the exclusion of minors from the application of the Counter-terrorism Act" by stipulating that "[i]f the acts were executed by persons under 18 years of age, based on the speciality principle the proceedings and the reduced penalties established in Law No. 20,084 which creates a system of adolescent criminal responsibility, shall always be applied" (file of annexes to the Merits Report 176/10, annex 2, folios 12 to 15, file of annexes to the CEJIL motions and arguments brief, annex B.1.3, folios 1759 to 1774, file of annexes to the FIDH motions and arguments brief, annex 32, folios 883 to 1309 and file of annexes to the answering brief of the State, annex 4, folios 84 to 87), and

vi) **Law No. 20,519** of June 21, 2011, which "[a]mends provisions of Law No.18,314 and other laws, excluding from their application acts executed by minors." As indicated by the State in its answering brief, "in order to avoid certain

which established a presumption of "the objective of producing […] fear in the general population." At the time of the acts for which the presumed victims in this case were tried, and in relation to criminal matters, articles of the law applied in this case stipulated the following:

> Article 1. The offenses listed in article 2 shall constitute terrorist offenses when any of the following circumstances exist:
>
> 1. That the offense is committed in order to produce in the population, or in part of it, the justified fear of being a victim of offenses of the same type, due either to the nature and effects of the means used, or to the evidence that it is part of a premeditated plan to attack a specific category or group of persons.
>
> Unless the contrary is verified, the intent of causing fear among the general population shall be presumed when the offense is committed using explosive or incendiary devices, weapons of great destructive power, toxic, corrosive or infectious substances or others that can cause major devastation, or by sending letters, packages or similar objects with explosive or toxic effects.
>
> 2. That the offense is committed to force decisions from the authorities or to impose demands.
>
> Article 2. The following shall constitute terrorist offenses when they comply with any of the characteristics indicated in the preceding article:
>
> 1. Homicides penalized in Articles 390 and 391; injuries penalized in Articles 395, 396, 397 and 399; abductions, either in the form of detention or confinement, or holding someone as a hostage, and the kidnapping of minors, penalized in Articles 141 and 142; mailing of explosive devices established in Article 403 bis; arson and destruction penalized in Articles 474, 475, 476 and 480; infringements of public health of Articles 313(d), 315 and 316, and derailments established in Articles 323, 324, 325 and 326, all of the Criminal Code.
>
> 2. Attacking or hijacking a ship, aircraft, train, bus or other means of public transport in service, or carrying out acts that endanger the life, physical integrity or health of their passengers or crew.
>
> 3. An attempt on the life and physical integrity of the Head of State or another political, judicial, military, police or religious authority, or persons under international protection, owing to their function.
>
> 4. Placing, throwing or firing bombs or explosive or incendiary devices of any type that affect or can affect the physical integrity of persons or cause harm.

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interpretations of the norm [on the exclusion of minors from the application of the Counter-terrorism Act included in Law No. 20,467,] that are not necessarily consistent with its spirit," it had to issue this new law which establishes this exclusion and adapts the Counter-terrorism Act to "the principles of special criminal law for adolescents" (file of annexes to the CEJIL motions and arguments brief, annex B.1.11, folio 1775, file of annexes to the FIDH motions and arguments brief, annex 33, folio 1310 and file of annexes to the answering brief of the State, annex 5, folios 88 to 112).

These laws are also available at: http://www.leychile.cl/Navegar?idNorma=29731&tipoVersion=0

Regarding the amendments to the Counter-terrorism Act, see also: affidavits prepared on May 21, 2013, by expert witness Manuel Cancio Meliá, and on May 27, 2013, by expert witness Federico Andreu-Guzmán (file of statements of presumed victims, witnesses and expert witnesses, folios 115 to 166 and 601 to 624).

The hunger strikes carried out between 2002 and 2007 by Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán and Patricia Roxana Troncoso Robles for different reasons related to their detention and prosecution and to the application of the Counter-terrorism Act influenced the presentation of a bill to amend this law, which was adopted in October 2010, with the promulgation of Law No. 20,467, which eliminated the presumption of a terrorist objective due to the use of certain methods. *Cf.* Note 09.01.03.55/02 of August 7, 2002, signed by the Head of the Traiguén Preventive Detention Center and addressed to the Head of the Security Department of Genchi, Santiago; Note 09.01.01-223/02 of February 16, 2002, signed by the Head of the Angol Preventive Detention Center and addressed to the judge of the Traiguén Guarantees Court; Note 09.01.03.23/02 of March 20, 2002, signed by Head of the Traiguén Preventive Detention Center and addressed to the Head of the Security Department of Genchi, Santiago; Note 08 of October 13, 2003, signed by the Head of the Victoria Prison Sentences Center (file of annexes to the Merits Report 176/10, appendix 1, folios 4391, 4438, 4541, 9196); affidavits prepared on May 14, 2013, by presumed victim Juan Patricio Marileo Saravia, and on May 24, 2013, by witness Luis Rodríguez-Piñero Royo; written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles (file of statements of presumed victims, witnesses and expert witnesses, folios 191, 342 650 to 652), and statement made by presumed victim Florencio Jaime Marileo Saravia before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

5. Unlawful association when its purpose is to commit offenses that should be classified as terrorist offenses in accordance with the preceding paragraphs and with article 1.

Article 3. The offenses indicated in paragraphs 1 and 3 of article 2 shall be penalized with the punishments established for them in the Criminal Code, or in Law No. 12,927, as appropriate, increased by one, two or three levels.
The offenses established in Article 2(2) shall be penalized with long-term rigorous imprisonment at any of its levels. If, as a result of such offenses, any of the crew or passengers of any of the means of transport mentioned in that paragraph should die or be seriously injured, the offense shall be considered as one of destruction and shall be penalized pursuant to Articles 474 and 475 of the Criminal Code, as appropriate, and the first paragraph of this article.
The offenses indicated in article 2(4) shall be penalized with long-term rigorous imprisonment at any of its levels.
The offense of unlawful association to commit acts of terrorism shall be penalized pursuant to articles 293 and 294 of the Criminal Code, and the punishments established therein shall be increased by two levels, in the cases of article 293 and by one level in those of Article 294. The provisions of article 294 bis of this Code shall also be applicable.

Article 3 bis. In order to increase the punishments established in the preceding article, the court shall first determine the punishment that would have corresponded to the authors in the circumstances of the case if terrorist offenses had not been involved, and shall then increase it by the corresponding number of levels.
Within the limits of the punishments that may be imposed, in addition to the general rules of the Criminal Code, the court shall give special consideration when making a final decision on the punishment, to any unnecessary cruelty used in the perpetration of the offense and the greater or lesser probability of the perpetration of other similar offenses by the accused, based on his record and personality, and the information arising from the proceedings on the circumstances and motives of the offense.

[…]

Article 5. Notwithstanding the ancillary penalties that are in order under the general norms for those convicted of any of the offenses established in articles 1 and 2, they shall be subject to the disqualifications referred to in article 9 of the Constitution of the State.
[…]

Article 7. The attempt to commit one of the terrorist offenses established in this law shall be penalized with the minimum punishment indicated by the law for the offense if it had been perpetrated. If that punishment has only one level, the provisions of article 67 of the Criminal Code shall be applied and the minimum level shall be imposed on the attempt.
The genuine and serious threat of committing any of the above-mentioned offenses shall be punished as an attempt to commit it.
Conspiracy to commit any of these offenses shall be penalized with the punishment corresponding to the perpetration of the offense, reduced by one or two levels.

99. In addition, article 10 established that investigations into acts classified as terrorist acts "shall be opened *ex officio* by the courts of justice or based on a report or a complaint, in accordance with the general norms, [or] can be opened by a request or complaint of the Minister of the Interior, of the Regional Prefects, the Provincial Governors, and the Garrison Commanders." This article made certain provisions of Law 12,927 on State Security applicable, which referred back to procedural norms of the Code of Military Justice.[105]

100. The presumed victims in this case were convicted as perpetrators of terrorist offenses in application of Law 18,314 in force at the time of the acts for which there were tried (*infra* paras. 116, 118, 126, 128, 147, 150 and 151).

[105] *Cf.* Decree 890 which "establishes the updated and rewritten text of Law 12,927, on State security" of August 26, 1975 (file of annexes to the CEJIL motions and arguments brief, annex B.4., folio 1845 to 1857).

3. Criminal procedural laws

101. Chile modernized its criminal procedural laws in 2000. On September 29 that year, Congress promulgated Law No. 19,696, which established the Criminal Procedural Code to replace the 1906 Code of Criminal Procedure.[106]

102. According to the evidence in the case file, the new Code meant passing from a criminal procedural system of an inquisitorial nature to one of an adversarial nature.[107] This system is characterized by the central role of the oral public trial before oral criminal trial courts.[108] The principles of the oral and public nature of trials are regulated in articles 291 and 289 of this Code respectively. In addition, the evidentiary activity is governed by the principle of immediacy, which means that, as a general rule, it must be submitted during the hearing of the oral trial, save for the exceptions established by law.

103. The new Code gradually entered into force in the different regions of Chile. Its article 484 established the dates as of which it would enter into force for each region. The criminal proceedings held against Víctor Ancalaf Llaupe were processed under the 1906 Code of Criminal Procedure (Law No. 1853), because the acts for which he was tried occurred in the Region of Bío Bío before the entry into force of the new Criminal Procedural Code in that region. In contrast, the criminal proceedings held against the other seven presumed victims in this case were governed by the 2000 Criminal Procedural Code (Law No. 19,696), because the acts for which they were tried occurred in the Region of Araucanía following the entry into force of the said code in that region.

104. Article 78 of the 1906 Code of Criminal Procedure[109] established the confidentiality of the preliminary proceedings, and its article 189 contained provisions on the confidentiality of the identity of witnesses "with regard to third parties" and "special measures designed to protect the safety of the witness" (*infra* para. 235). Article 182 of the 2000 Criminal Procedural Code established the confidentiality of "certain actions, records or documents […] with regard to the accused or others who intervene in the proceedings." In addition, articles 307 and 308 regulate, respectively, the authority of the "court" to order the "prohibition" "to disclose" the "identity" of the witness and "to order special measures designed to protect the safety of the witness" who requests this (*infra* para. 232.a). Article 15 of Law No. 18,314 in force at the time of the events of this case regulated the authority of the Public Prosecution Service to order "special measures of protection [… t]o protect the identity of those who intervene in the proceedings," which can be reviewed by the judge responsible for ensuring that the rights of the accused are respected (*juez de garantía*) at the request of those who intervene in the proceedings; and article 16 regulated the authority of the court "to decree the prohibition to reveal […] the identity of protected witnesses or expert witnesses" (*infra* para. 232.b).

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106 *Cf.* Law No. 19,696 which "[e]stablishes the Criminal Procedural Code," published in the official gazette on October 12, 2000 (file of helpful evidence presented by the State, folio 1067), available at: http://www.leychile.cl/Navegar?idNorma=176595&buscar=19696, and Law No. 1853 "Code of Criminal Procedure," published on February 19, 1906 (file of annexes to the CEJIL motions and arguments brief, annex B.5., folios 1858 to 2006), available at: http://www.leychile.cl/Navegar?idNorma=22960&buscar=ley+1853

107 *Cf.* Statement made by expert witness Claudio Fuentes Maureira before the Inter-American Court during the public hearing held on May 29 and 30, 2013, and affidavit prepared on May 17, 2013, by expert witness Claudio Alejandro Fierro Morales (file of statements of presumed victims, witnesses and expert witnesses, folio 3). Similarly: *Case of Palamara Iribarne v. Chile*. *Merits, reparations and costs*. Judgment of November 22, 2005. Series C No. 135, para. 122.

108 These are collegiate courts where decisions are taken by three judges. *Cf.* Judgments delivered on September 27, 2003, April 14, 2003, and August 22, 2004, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annexes 15, 16 and 18, folios 508 to 554, 555 to 574 and 607 to 687), and statement made by expert witness Claudio Fuentes Maureira before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

109 Code of Criminal Procedure promulgated on February 13, 1906 (file of annexes to the CEJIL brief with motions, arguments and evidence, annex B5, folios 1858 to 2006).

105. Regarding the appeal against the criminal judgment, Title IV of the 2000 Criminal Procedural Code establishes the "appeal for annulment" "to invalidate the oral trial and the final judgment, or only the latter, for the causes expressly indicated" in the code (*infra* paras. 271-273).

D) The criminal proceedings held against the presumed victims

1. The criminal proceedings against Lonkos Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao, and against Patricia Roxana Troncoso Robles

Accusation

106. Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao, *Lonkos* of the communities of "Lorenzo Norín" of Didaico and "Antonio Ñirripil" of Telememu, respectively, and Ms. Troncoso Robles were subjected to criminal proceedings in which they were accused of committing the following offenses:[110]

a) The offense of "terrorist arson" based on fire that occurred on December 12, 2001, in the house of the administrator of the Nancahue forest farm;

b) The offense of "threats of terrorist arson" based on threats to set fire to the Nancahue plantation "during 2001" to the detriment of the owners and administrators of this plantation;

c) The offense of "terrorist arson" based on the fire that occurred on December 16, 2001, in the San Gregorio forestry plantation;

d) The offense of "threats of terrorist arson" based on threats to set fire to the San Gregorio plantation "during 2001" to the detriment of the owners and administrators of this plantation.

Investigation, confidentiality of proceedings and identities

107. An investigation was conducted during which the Public Prosecution Service decreed the confidentiality of some of the proceedings under article 182 of the Criminal Procedural Code and dictated measures to ensure the anonymity of witnesses pursuant to articles 15 and 16 of Law No. 18,314. This investigation was closed on August 24, 2002.[111]

Pre-trial detention and preceding detention

108. Mr. Norín Catrimán was detained on January 3, 2002, and subjected to pre-trial detention from January 11 that year until April 9, 2003. Mr. Pichún Paillalao was detained from December 21 to 24, 2001, and subjected to pre-trial detention from March 4, 2002, to April 9, 2003. Patricia Troncoso Robles was subjected to pre-trial detention from September 13, 2002, to February 21, 2003.[112]

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[110] *Cf.* Charges brought by the chief prosecutor of the local Prosecutor's Office of Traiguén against Pascual Huentequeo Pichún Paillalao and Segundo Aniceto Norín Catrimán; charges brought by the chief prosecutor of the local Prosecutor's Office of Traiguén against Patricia Roxana Troncoso Robles (file of helpful evidence presented by the State, folios 357 to 424); judgments handed down on April 14 and September 27, 2003, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annexes 15 and 16, folios 509 to 511 and 556 to 558).

[111] *Cf.* Decisions issued on February 15, August 29, and September 3, 2002, by the Traiguén guarantees judge (file of annexes to the Merits Report 176/10, appendix 1, folios 4427 to 4434, 4408 to 4414 and 4424), and Note of August 24, 2002, issued by the Traiguén chief prosecutor in relation to the closure of investigation Ruc 0100083503-6 (file of annexes to the Merits Report 176/10, appendix 1, folios 4406 and 4407).

[112] *Cf.* Certification issued on April 17, 2008, by the Traiguén Guarantees Court regarding the duration of the pre-trial detention of Patricia Roxana Troncoso Robles; Decision issued on March 4, 2002, by the Traiguén Guarantees Court "ordering the pre-trial detention" of Pascual Huentequeo Pichún Paillalao; Arrest warrant for Pascual Huentequeo Pichún Paillalao of December 21, 2001, signed by the Chilean Police Investigations Unit and addressed to the Traiguén Guarantees

Charges

109. The Public Prosecution Service brought charges[113] against Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao and Patricia Roxana Troncoso Robles, requesting the following punishments: for Mr. Norín Catrimán, ten years and one day of mid-level rigorous imprisonment, with the legal ancillary penalties and costs for the offense of terrorist arson of the San Gregorio plantation, plus five years and one day of rigorous imprisonment at the lowest level, with the legal ancillary penalties and costs for the offense of threat of terrorist attack against the owners and administrators of the San Gregorio plantation. With regard to Mr. Pichún Paillalao, it requested the punishment of ten years and one day of mid-level rigorous imprisonment, with the legal ancillary penalties and costs for the offense of terrorist arson of the house of the administrator of the Nancahue forest farm, plus five years and one day of rigorous imprisonment at the lowest level, with the legal ancillary penalties and costs for the offense of threat of terrorist attack against the owners and administrators of the Nancahue forest farm, and with regard to Ms. Troncoso Robles, it requested the same punishments for the same offenses as for the other two accused, but not for the offense of threats of terrorist attack against the owners and administrators of the San Gregorio plantation and the corresponding penalty.

Oral trial

110. The oral trial began on March 31, 2003, and continued on April 2 and 9. The Public Prosecution Service, and the complainants the Office of the Regional Prefect for the Region XI (Araucanía), the Malleco Provincial Governor's Office, and Juan Agustín Figueroa Elgueta, administrator of the Nancahue forest farm, appeared for the prosecution.[114] The defense counsel of the defendants stated that the charges lacked factual grounds and were imprecise about the acts attributed to each of the accused; moreover, it was unclear in what capacity they took part in the acts. The defense also argued that the acts did not meet the necessary legal requirements to be classified as terrorist offenses under Law No. 18,314.

111. During the proceedings the evidence offered by the prosecution was submitted and authenticated. The defense counsel abstained from offering evidence during the proceedings.[115]

Court; Decision issued on December 21, 2001, by the Traiguén Guarantees Court regarding the detention of Pascual Huentequeo Pichún Paillalao; Decision issued el December 24, 2001, by the Traiguén Guarantees Court ordering the release of Pascual Huentequeo Pichún Paillalao because charges had not been brought against him; Arrest warrant for Segundo Aniceto Norín Catrimán of January 3, 2003, signed by the Chilean Police Investigations Unit addressed to the Traiguén Guarantees Court; Decision issued on January 3, 2002, by the Traiguén Guarantees Court regarding the detention of Segundo Aniceto Norín Catrimán; Decision issued on January 11, 2002, by the Traiguén Guarantees Court "maintaining the pre-trial detention" of Segundo Aniceto Norín Catrimán (file of annexes to the Merits Report 176/10, appendix 1, folios 4853, 4469 to 4481, 5037, 5038, 5040 to 5044, 5047 to 5053, 5071, 5072, 5075 to 5080, 5105 to 5127), and Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annex 15, folio 553).

[113] *Cf.* Charges brought by the head prosecutor of the Traiguén Local Prosecutor's Office against Pascual Huentequeo Pichún Paillalao and Segundo Aniceto Norín Catrimán; Charges brought by the head prosecutor of the Traiguén Local Prosecutor's Office against Patricia Roxana Troncoso Robles (file of helpful evidence presented by the State, folios 357 to 424), and Judgment delivered on April 14, 2003, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annex 16, folios 558 and 559).

[114] *Cf.* Judgment of April 14, 2003, delivered by the Angol Oral Criminal Trial Court, third *considerandum* (file of annexes to the Merits Report 176/10, Appendix 1, folios 262 to 265).

[115] *Cf.* Summary of recordings of the hearings in the oral trial held between March 31 and April 8, 2001, before the Angol Oral Criminal Trial Court (file of helpful evidence presented by the State, folios 425 to 444), and Judgment delivered on April 14, 2003, by the Angol Oral Criminal Trial Court, seventh *considerandum* (file of annexes to the Merits Report 176/10, annex 16, folio 566).

a) Acquittal issued by the Angol Oral Criminal Trial Court on April 14, 2003[116]

112. On April 14, 2003, the Angol Oral Criminal Trial Court[117] delivered an acquittal with regard to three of the accused in relation to all the charges. The court declared that, based on the evidence, it could conclude that the criminal acts had occurred and that they had a terrorist objective, indicating, *inter alia*, that:

> […] the action that resulted in these wrongful acts reveals that the form, methods and strategies used had the criminal purpose of causing a generalized state of fear in the region; […] they relate to a serious dispute between part of the Mapuche ethnic group and the rest of the population [and these wrongful acts] are inserted in a process of recovery of lands of the Mapuche people […] that has been carried out by acts of violence, without respecting the legal and institutional order, resorting to previously planned acts of violence, coordinated and prepared by radicalized groups that seek to create a climate of insecurity, instability and fear in different sectors of Regions XIII and IX.

113. The court then examined the possible participation of Messrs. Pichún Paillalao and Norín Catrimán and of Ms. Troncoso Robles in the facts and concluded that the evidence "did not meet the necessary evidentiary standards in relation to its degree of quality, certainty and sufficiency, to affect the constitutional and legal presumption of innocence that protects the accused, a circumstance that allows these judges to reach the peremptory conviction that the participation of the aforementioned Pichún, Troncoso and Norín as perpetrators of the offenses of which they were accused has not been proved, in accordance with […] the charges brought against them."

b) The appeal for annulment before the Supreme Court of Justice

114. On April 23 and 24, 2003, the complainants and the assistant prosecutor of the Public Prosecution Service of Traiguén, respectively, filed appeals for annulment against the acquittal decided by the Angol Oral Criminal Trial Court (*supra* paras. 112 and 113). Among other matters, they alleged the failure to weigh the evidence proving the participation of the accused in the events, and the existence of contradictions and inconsistencies in the appealed judgment. In addition, they argued that "the final judgment rejected or concluded that the testimony of anonymous witness No. 1 was 'entirely unreliable,' without indicating its reason or reasons for reaching this conclusion." In the three appeals the Supreme Court was asked to annul the oral trial and the acquittal and to order that a new oral trial be held. By a decision of June 3, 2003, the appeals were declared admissible and they were examined during a public hearing on June 11 and 12, 2003.[118]

115. On July 2, 2003, the Second Chamber of the Supreme Court of Justice delivered judgment, and, by a majority vote, admitted the appeals for annulment based on the grounds for absolute nullity defined in article 374(e) of the Criminal Procedural Code, decreed the nullity of the judgment of April 14, 2003 (*supra* paras. 112 and 113), and established the admissibility of a new trial. The Chamber considered that the decision of the Angol Oral Criminal Trial Court had not complied "even remotely" with the requirements of analyzing the evidence and providing grounds for the decision that are required of judges under articles 297 and 36 of the

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116 Angol is a city and commune, capital of the province of Malleco in the Region of Araucanía, Chile.

117 *Cf.* Judgment delivered by the Angol Oral Criminal Trial Court on April 14, 2003, tenth and eleventh *consideranda* and first operative paragraph (file of annexes to the Merits Report 176/10, annex 16, folios 569, 571 and 574).

118 *Cf.* Appeal for annulment filed on April 23, 2003, by the complainant Juan Agustín Figueroa Elgueta against the acquittal issued on April 14, 2003, by the Angol Oral Criminal Trial Court; Appeal for annulment filed on April 24, 2003, by the Office of the Regional Prefect and the Office of the Provincial Governor of Malleco against the acquittal issued on April 14, 2003, by the Angol Oral Criminal Trial Court; Appeal for annulment filed on April 24, 2003, by the assistant prosecutor of the Public Prosecution Service of Traiguén against the acquittal issued on April 14, 2003, by the Angol Oral Criminal Trial Court (file of helpful evidence presented by the State, folios 445 to 515), and Judgment delivered on July 2, 2003, by the Second Chamber of the Supreme Court of Justice (file of annexes to the Merits Report 176/10, annex 17, folios 575 to 606).

Criminal Procedural Code, and had examined some pertinent probative elements superficially.[119]

c) Partial conviction issued on September 27, 2003, by the Angol Oral Criminal Trial Court

116. The Angol Oral Criminal Trial Court heard the proceedings against Messrs. Norín Catrimán and Pichún Paillalao and Ms. Troncoso in a new trial. The court was composed of three different judges from those who decided the acquittal of April 14, 2003 (*supra* paras. 112 and 113). On September 27, 2003, the court delivered judgment.[120] Regarding Patricia Troncoso, it declared that the presumption of her innocence had not been invalidated, that "there was no direct evidence that connected her with possible authorship of the offenses of which she was accused" and, consequently, acquitted her of the offenses she was charged with. The court reached the same conclusion with regard to the alleged criminal responsibility of Messrs. Pichún Paillalao and Norín Catrimán for the offenses of "terrorist arson," but convicted them as perpetrators "of the offenses of threat of terrorist [arson]" applying the legal presumption of intent to instill fear.[121] It convicted Mr. Pichún Paillalao "as perpetrator of the offense of terrorist threats against the administrator and owners of the Nancahue forest farm," and Mr. Norín Catrimán "as perpetrator of the offense of terrorist threats against the owners of the San Gregorio plantation," "both acts having occurred during 2001 and thereafter in the Traiguén commune."

117. The court imposed the following punishments on each of them:

a) Five years and one day of long-term rigorous imprisonment (*presidio*) at the lowest level;[122]

b) The ancillary penalties of "[a]bsolute and permanent disqualification from public office and positions, and absolute disqualification from titled professions for the duration of the sentence";

c) The ancillary penalties of "disqualification for 15 years from discharging public duties or holding public office, regardless of whether or not the appointment is by popular election; from being the rector or director of an educational establishment or performing teaching activities therein; from operating a social communications media outlet or being a director or manager thereof, or performing therein functions connected with the broadcast or dissemination of opinions or information; and from being the leader of a political organization, an

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[119] *Cf.* Judgment delivered on July 2, 2003, by the Second Chamber of the Supreme Court of Justice (file of annexes to the Merits Report 176/10, annex 17, folios 575 to 606).

[120] *Cf.* Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annex 15, folios 508 to 554).

[121] In its thirteenth *considerandum*, the Angol Oral Criminal Trial Court indicated that "[t]he foregoing is substantiated by the legal presumption established in the second subparagraph of Article 1(1) of Law 18,314, currently amended by the new principles on the assessment of evidence indicated in articles 295 and *ff.* of the Criminal Procedural Code. Thus, today, and based on the principle of logic, the justified fear of the population or part of it of being victims of offenses of the same type is proved by the fact that the latter has been threatened of being harmed by the perpetration of an offense by means of incendiary devices." *Cf.* Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court, thirteenth *considerandum* (file of annexes to the Merits Report 176/10, annex 15, folio 540).

[122] According to article 32 of the Chilean Criminal Code, the punishment of imprisonment (*presidio*) differs from the punishments of confinement (*reclusión*) and incarceration (*prisión*), because the former signifies that the prisoner must perform tasks established in the rules of the respective detention center.

organization associated with education, or a neighborhood, professional, business, labor, student, or trade association, during that time,"[123] and

d) In addition, the court condemned them to pay the trial costs and dismissed the civil complaint filed by the complainant Juan Agustín Figueroa Elgueta.[124]

118. The appeals for annulment filed against this judgment were denied by the Second Chamber of the Supreme Court of Justice in a ruling of December 15, 2003 (*infra* paras. 276 and 277), which maintained the judgment delivering a partial conviction against Messrs. Norín Catrimán and Pichún Paillalao.[125]

d) Serving of the prison sentences

119. Mr. Pichún Paillalao began to serve his prison sentence on January 14, 2004, and was granted an allowance for time served in pre-trial detention. Mr. Norín Catrimán began to serve his sentence on January 16, 2004,[126] and was granted an allowance for time served in pre-trial detention. In June, September and November 2006, they were granted the following prison benefits: "Sunday release," "weekend release," and "supervised release." Decree No. 132 of January 9, 2007, of the Ministry of Justice granted Mr. Norín Catrimán a nine-month reduction of his initial sentence, so that he was released on January 13, 2007. Decree No. 648 of February 15, 2007, of the Ministry of Justice granted Pichún Paillalao a nine-month reduction of his initial sentence, so that he was released on March 4, 2007.[127]

2. The criminal proceedings against Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles

Accusation

120. Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán and Juan Ciriaco Millacheo Licán, all members of the Mapuche people, and Patricia

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123 *Cf.* Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annex 15, folios 217 and 218), and statement made por Juan Pichún Collonao before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

124 "[T]he complainant [...] filed a civil complaint against Pascual Pichún Paillalao and Patricia Roxana Troncoso Robles and [...] asked that they each be sentenced to pay $10,000,000 based on their responsibility for the losses suffered as a result of their participation in the offenses that were the grounds for [the said] trial." *Cf.* Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annex 15, folio 513).

125 Messrs. Norín Catrimán and Pichún Paillalao filed an appeal for annulment against the judgment of September 27, 2003, that partially convicted them, requesting the annulment of the trial with regard to the offenses of which they had been convicted and that a new trial be held. In addition, they made the following requests: for annulment of the judgment and the delivery of a replacement judgment acquitting them; that the court declare that the offenses were not of a terrorist nature, and that the punishment be amended. *Cf.* Appeals for annulment filed on October 8, 2003, by Pascual Huentequeo Pichún Paillao and Aniceto Segundo Norín Catrimán against the judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court (file of helpful evidence presented by the State, folios 543 to 601), and Judgment delivered el December 15, 2003, by the Second Chamber of the Supreme Court of Justice (file of annexes to the Merits Report 176/10, folios 58 to 68 and file of helpful evidence presented by the State, folios 602 to 609).

126 *Cf.* Copy of record of technical committee session No. 19 held on November 24, 2006; Copy of record of special technical committee session No. 9 held on June 21, 2006; Copy of record of technical committee session No. 15 held on September 15, 2006, and Decree 132 of January 9, 2007, issued by the Chilean Ministry of Justice (file of helpful evidence presented by the State, folios 1203 to 1222).

127 *Cf.* Copy of record of special technical committee session No. 9 held on June 21, 2006; Copy of record of technical committee session No.15 held on September 15, 2006; Copy of record of technical committee session No.19 held on November 24, 2006; Decree No. 132 of January 9, 2007, issued by the Chilean Ministry of Justice; Decree No. 648 of February 15, 2007, issued by the Chilean Ministry of Justice; Report on prison conditions of the persons involved in the *Case of Norín Catrimán et al. v. Chile* (file of helpful evidence presented by the State, folios 63 to 66, 1203 to 1222, 1422 and 1423), and Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court, third operative paragraph (file of annexes to the Merits Report 176/10, annex 15, folio 553).

Roxana Troncoso Robles, activist, were tried by the Angol Oral Criminal Trial Court. They were accused of perpetrating the offense of terrorist arson owing to the fire that occurred on December 19, 2001, in the Poluco Pidenco property, owned by the private forestry company, Mininco S.A., and located in the commune of Ercilla, Region IX,[128] which affected 107 hectares "covered by pine forest, eucalyptus nitens, undergrowth and protected areas."[129]

Investigation, pre-trial detention and preceding detention

121. On January 28, 2003, a hearing was held to open the investigation into José Benicio Huenchunao Mariñán, Florencio Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles and, at that time, their pre-trial detention was ordered (*infra* para. 328). With regard to Juan Patricio Marileo Saravia, the hearing to control his detention and to open the investigation was held on March 16, 2003, and, at that time, his pre-trial detention was ordered (*infra* para. 329).[130]

Charges

122. On June 23, 2003, the Public Prosecution Service brought charges against Juan Patricio and Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, as perpetrators of the offense of arson established in Law No. 18,314 (offense of terrorist arson) in relation to the events that occurred on December 19, 2001 (*supra* para. 120), pursuant to article 476.3 of the Criminal Code and articles 1.1 and 2.1 of Law No. 18,314, and asked that they be sentenced to ten years and one day of mid-level rigorous imprisonment. The Office of the Malleco-Angol Provincial Governor endorsed the charges brought by the Public Prosecution Service. Forestal Mininco S.A. filed a private complaint.[131]

123. Regarding the events that occurred on December 19, 2001, in the Poluco Pidenco property (*supra* para. 120), charges were also brought against persons other than the presumed victims in this case, and their trials concluded with separate judgments.[132] Juan Carlos Huenulao Lielmil was convicted in May 2005 as perpetrator of the offense of terrorist arson. José Belisario Llanquileo Antileo was convicted in 2007 as perpetrator of the offense of arson, without reference to its terrorist nature, because "[i]n the opinion of the judges, the proven facts do not fall within any of the hypotheses of terrorism established by law."[133]

Oral trial

124. The order to open an oral trial was issued on May 28, 2004. The oral public hearing was held on July 29 and 30, 2004, before the Angol Oral Criminal Trial Court in the proceedings

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[128] *Cf.* Decision to hold the oral trial issued on May 28, 2004, by the guarantees judge (file of helpful evidence presented by the State, folios 67 to 127).

[129] *Cf.* Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, fourteenth *considerandum* (file of annexes to the Merits Report 176/10, annex 18, 608 to 610).

[130] *Cf.* Decision on "hearing to open the investigation" issued on January 28, 2008, by the Collipulli judge, and Decision on "hearing on the control of the detention and to open the investigation" issued on March 16, 2003, by the Collipulli judge (file of annexes to the Merits Report 176/10, appendix 1, folios 8652 to 8677 and 7804 to 7808).

[131] *Cf.* Decision to hold an oral trial issued on May 28, 2004, by the guarantees judge (file of helpful evidence presented by the State, folios 67 to 127), and Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, second and third *consideranda* (file of annexes to the Merits Report 176/10, annex 18, 608 to 611).

[132] *Cf.* Decision to hold an oral trial issued on May 28, 2004, by the guarantees judge (file of helpful evidence presented by the State, folios 67 to 127).

[133] *Cf.* Judgment delivered on May 3, 2005, by the Angol Oral Criminal Trial Court, first operative paragraph, and Judgment delivered on February 14, 2007, by the Angol Oral Criminal Trial Court, first operative paragraph, and seventeenth *considerandum* (file of annexes to the FIDH motions and arguments brief, annexes 41 and 42, folios 1467 to 1596).

against Juan Patricio and Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles. The Public Prosecution Service, the complainant Forestal Mininco S.A., owner of the Poluco Pidenco plantation, and the complainant Office of the Malleco Provincial Governor, intervened as plaintiffs. Public defenders and private lawyers participated for the defense of the accused and, among other matters, denied the participation of the accused in the events. The parties offered testimonial, documentary and expert evidence.[134]

125. The accused had been held in pre-trial detention from January 28, 2003, to February 13, 2004, with the exception of Juan Patricio Marileo, whose pre-trial detention had been ordered on March 16, 2003 (*supra* para. 121), and José Huenchunao Mariñán who, despite having benefited from an "order for immediate release" as of February 13, 2004 (*infra* para. 332), was detained until February 20, 2004. In addition, Ms. Troncoso Robles and the Marileo Saravia brothers were detained from August 17 to 22, 2004, the date on which execution of the judgment commenced. The time they had already served was deducted from the prison sentence.[135]

a) Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court

126. On August 22, 2004, the Angol Oral Criminal Trial Court delivered judgment,[136] in which it convicted the accused as "perpetrators of the offense of terrorist arson" for the "act committed on December 19, 2001, on the Poluco Pidenco property, in the Ercilla commune."[137] The court imposed the punishment of 10 years and one day of medium-level rigorous imprisonment and the ancillary penalties of "[a]bsolute and permanent disqualification from public office and positions, and absolute disqualification from titled professions for the duration of the sentence." It also admitted the civil complaint and sentenced the accused jointly to pay Forestal Mininco S.A. the sum of $424,964,798 Chilean pesos for pecuniary damage.

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134 *Cf.* Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, first, second and fifth *considerandum* (file of annexes to the Merits Report 176/10, annex 18, folios 607 to 687).

135 *Cf.* Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, third operative paragraph (file of annexes to the Merits Report 176/10, annex 18, folios 607 to 687); Decision on "hearing to open the investigation" issued on January 28, 2008, by the Collipulli judge; Decision on "hearing on the control of the detention and to open the investigation" issued on March 16, 2003, by the Collipulli judge; Release order issued on February 13, 2004, by the guarantees judge of the Combined Court of Collipulli; Note No. 179 issued on February 17, 2004, by the judge of the Combined Court of Alcazar, Collipulli, addressed to the Head of the Angol Preventive Detention Center advising that he "had been mandated to inform him that José Benicio Huenchunao Mariñán […] must remain in the center"; Decision issued on February 20, 2004, by the Collipulli judge in relation to the urgent request of the defense counsel of José Benicio Huenchunao Mariñán, and Note No. 201 issued on February 20, 2004, by the judge of the Combined Court of Collipulli addressed to the Head of the Angol Preventive Detention Center informing him of the " annulment of Note 179 of February 17, 2004" concerning José Benicio Huenchunao Mariñán (file of annexes to the Merits Report 176/10, appendix 1, folios 8652 to 8677, 7804 to 7808, 9671 to 9677, 9681, 9697 to 9699, and 9733 to 9736).

136 *Cf.* Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, first and fifth operative paragraphs (file of annexes to the Merits Report 176/10, annex 18, folios 607 to 687).

137 The court found it had been proved that "on December 19, 2001, a group composed of around 50 persons from the Mapuche communities of Tricauco, San Ramón and Chequenco, entered the Poluco Pidenco property […] and proceeded to light more than 80 small fires in two sectors of the plantation." This resulted in "two major fires in this plantation," one of which affected an area of approximately 18 hectares of […] pine and eucalyptus nitens forest, undergrowth and protected areas," and the other "an area of approximately 89 hectares composed of pine and eucalyptus nitens forest, and protected areas. In addition, the court found it proved that the firefighters and members of the police who arrived at the plantation to extinguish the fire were obstructed and attacked, and that the accused had been seen starting some of the said small fires and, specifically, that José Benicio Huenchunao Mariñán "directed and indicated how to start the fires and where do so this." *Cf.* Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, fourteenth *considerandum* (file of annexes to the Merits Report 176/10, annex 18, folios 673 and 674).

b) Judgment delivered on October 13, 2004, by the Temuco Court of Appeal

127. The five condemned men filed individual appeals for annulment against the judgment declaring them guilty of the offense of terrorist arson on the Poluco Pidenco property.[138] They asked that the trial be annulled and a new trial ordered or else, that the judgment be annulled and another one delivered declaring that the offense of arson is not of a terrorist nature, and applying a punishment of five years and one day.

128. On October 13, 2004, the Temuco Court of Appeal delivered judgment in which it denied the appeals for annulment and maintained all the provisions of the judgment convicting them. Regarding the terrorist intent, the guilty verdict was founded on the legal presumption of the intent to instill fear in the general population. In the judgment deciding the appeal for annulment filed by the defense based on the erroneous establishment of the terrorist nature of the acts that they were accused of, the Temuco Court of Appeal stated that the charges were brought based on the presumption of terrorist intent of article 1 of Law No. 18,314, thus explaining the absence of motivation by the oral court that delivered the judgment convicting them.[139]

c) Serving the incarceration sentences

129. Florencio Jaime and Juan Patricio Marileo Saravia began to serve their sentence on August 17, 2004,[140] receiving an allowance for time served in pre-trial detention. While serving their sentence, they were awarded certain prison benefits, such as: "Sunday release" (for Juan Patricio Marileo Saravia), "weekend release" and "supervised release" (for Florencio Jaime Marileo Saravia). On December 20, 2010, they both obtained the benefit of "parole" by Decision No. 456 of the Regional Secretariat of the Ministry of Justice of the Region of Araucanía. Lastly, by Decrees Nos. 3928 and 3929 of the Ministry of Justice of September 5, 2011, the initial sentence of the Marileo Saravia brothers was reduced by 14 months, and they were released on September 10, 2011.[141]

130. Ms. Troncoso Robles began to serve her sentence on August 17, 2004, and received an allowance for the time spent in pre-trial detention. While serving her sentence, she was

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138 *Cf.* Appeals for annulment filed by Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles against the judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court (file of helpful evidence presented by the State, folios 208 to 321 and 1166 to 1199), and Judgment delivered on October 13, 2004, by the Temuco Court of Appeal denying the appeal for annulment (file of annexes to the Merits Report 176/10, annex 19, folios 688 to 716).

139 *Cf.* Judgment of October 13, 2004, of the Temuco Court of Appeal (file of annexes to the Merits Report 176/10, Annex 19, folio 695).

140 *Cf.* Transcript of the minutes of the special meeting of the technical committee of the Angol Preventive Detention Center on March 14, 2008; Transcript of the minutes of the regular meeting of the technical committee of the Angol Preventive Detention Center of July 31, 2008; Decree 3928 of September 5, 2011 issued by the Chilean Ministry of Justice (file of helpful evidence presented by the State on July 10, August 16 and September 6, 2013).

141 *Cf.* Transcript of the minutes of the technical committee of the Angol Preventive Detention Center of March 14, 2008; Transcript of the minutes of the technical committee of the Angol Preventive Detention Center of July 31, 2008; Transcript of the minutes of the technical committee of the Vicún Education and Employment Center of August 30, 2007; Transcript of the minutes of the technical committee of the Vicún Education and Employment Center of December 13, 2007; Transcript of the minutes of the technical committee of the Victoria Semi-open Education and Employment Center of August 22, 2008; Decision No. 456 issued on December 20, 2010, by the Regional Secretariat of the Ministry of Justice of the Region of Araucanía; Decree No. 3928 of September 5, 2011, issued by the Chilean Ministry of Justice; Decree No. 3923 of September 5, 2011, issued by the Chilean Ministry of Justice; Report on the prison conditions of the persons involved in the *Case of Norín Catrimán et al. v. Chile* (file of helpful evidence presented by the State, folios 63 to 66, 1232 to 1235, 1237 to 1252, 1479 to 1484, 1485 to 1487, 1488 to 1491, 1445 to 1447, 1494,1495), and Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, third operative paragraph (file of annexes to the Merits Report 176/10, annex 18, folios 608 to 687).

awarded the prison benefits of "weekend release" and "supervised release." She was granted parole by Decision No. 379 of December 14, 2010, issued by the Regional Secretariat of the Ministry of Justice of the Region of Aucaranía; and in a communication of the same date, the Captain of Gendarmerie, Head of the Angol Education and Employment Center declared that her parole would be supervised by the Angol Pre-trial Detention Center. By Decree No. 2857 of the Ministry of Justice dated June 15, 2011, the original sentence was reduced by 14 months, and she was released on July 1, 2011.[142]

131. Mr. Huenchunao Mariñán was a fugitive from justice for approximately two years and seven months, between August 2004 and March 2007.[143] He began to serve his sentence on March 20, 2007, receiving an allowance for the time spent in pre-trial detention. On June 4, 2009, he was granted "trimestral release" as a "prison benefit." Then, on March 17, 2011, he was granted the benefit of "weekend release." By Decision No. 217 of the Regional Secretariat of the Ministry of Justice of the Region of Araucanía dated June 23, 2011, he was granted the benefit of "parole." Lastly, by Decision No. 311 of the same authority, issued on August 24, 2011, authorization was given for the weekly control of his parole to be carried out by the *Carabineros* of the commune of Tirúa and in the Los Dominicos *Carabineros* Sub-Station of the commune of Las Condes, Santiago, where his family lives. His sentence is supposed to end on March 4, 2016.[144]

132. Juan Ciriaco Millacheo Licán was a fugitive from justice for approximately nine years, from February 2004 to February 2013, when he was arrested in Argentina and transferred to Chile to serve the sentence imposed on him in these proceedings.[145] In a hearing held on February 27, 2013, the Judge of the Collipulli First Instance Court of Guarantees decided, based on articles 103 and 100 of the Criminal Code, that in the case of Mr. Millacheo Licán "half the statute of limitations would be applied to the sentence, since the time frame for the case had

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142 *Cf.* Transcript of the minutes of the technical committee of the Angol Education and Employment Center of March 13, 2008; Transcript of the minutes of the technical committee of the Angol Education and Employment Center of April 23, 2009; Decision No. 379 issued on December 14, 2010, by the Regional Secretariat of the Ministry of Justice of the Region of Araucanía; Communication of December 14, 2010, signed by the Head of the Angol Education and Employment Center addressed to the Regional Director of the Chilean Prison Service, Region of Araucanía; Decree No. 2857 of June 15, 2011, issued by the Chilean Ministry of Justice; Report on the prison conditions of the persons involved in the *Case of Norín Catrimán et al. v. Chile* (file of helpful evidence presented by the State, folios 63 to 66 and 1505 to 1521), and Judgment of the Angol Oral Criminal Trial Court of August 22, 2004, third operative paragraph (file of annexes to the Merits Report 176/10, annex 18, folios 608 to 687).

143 Mr. Huenchunao Mariñán testified: "[i]n August 2004, after the oral trial, during which he had attended all the hearings as one of the accused, [he] decided not to attend the reading of the judgment. [He] always thought that the highest court of Chile would decide in [their] favor annulling the trial and that [he] would not be in hiding for very long, but unfortunately, this was not the case; so [he] had to remain illegal and in hiding for a long time. […] In March 2007, he was caught in order to serve his sentence […]." *Cf.* Affidavit prepared on May 17, 2013, by José Benicio Huenchunao Mariñán (file of statements of presumed victims, witnesses and expert witnesses, folios 201 to 211).

144 *Cf.* Minutes of the meeting of the technical committee of the Angol Education and Employment Center of June 4, 2009; Minutes of the meeting of the technical committee of the Angol Education and Employment Center of March 17, 2011; Decision No. 217 issued on June 23, 2011, by the Regional Secretariat of the Ministry of Justice of the Region of Araucanía; Decision No. 311/2011 issued on August 24, 2011, by the Regional Secretariat of the Ministry of Justice of the Region of Araucanía; Report on the prison conditions of the persons involved in the *Case of Norín Catrimán et al. v. Chile* (file of helpful evidence presented by the State, folios 63 to 66 and 1256 to 1284), and Judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, third operative paragraph (file of annexes to the Merits Report 176/10, annex 18, folios 608 to 687).

145 Mr. Millacheo Licán testified that he "left before the judgment, because [he] had not taken part in the fire and […] thought that [he] would be sentenced to imprisonment; [he] therefore left the proceedings. [… He] spent 10 years in hiding [and] was arrested again in Argentina. Following the arrest in Argentina, [they took him] quickly to Chile, to the court and to prison. 20 days later there was another hearing and [his] defense counsel explained why the sentence should be reduced. Consequently, they released [him] and ordered him to go and sign in […] once a month." *Cf.* Affidavit prepared on May 14, 2013, by Juan Ciriaco Millacheo Licán (file of statements of presumed victims, witnesses and expert witnesses, folios 194 to 200).

expired"; this modified the punishment imposed and granted him the benefit of a conditional sentence that involved appearing monthly to sign in before the prison authorities during the time that remained of the sentence.[146]

3. The criminal proceedings against Víctor Manuel Ancalaf Llaupe[147]

Accusation

133. Víctor Ancalaf Llaupe was a *Werken* of several Mapuche indigenous communities at the time of the events for which he was tried. Mr. Ancalaf Llaupe was accused of the following offenses:[148]

a) Perpetrator of the "terrorist offense established in article 2.4 of Law No. 18,314, in relation to article 1 of this law" for setting fire to two trucks owned by the Fe Grande Company (that worked on the construction of the Ralco dam) on September 29, 2001, in the Las Juntas sector, Alto Bío Bío;

b) Perpetrator of the "terrorist offense established in article 2.4 of Law No. 18,314, in relation to article 1 of this law" for setting fire to a truck owned by the Fe Grande company on March 3, 2002, in the Las Juntas sector, Alto Bío Bío, and

c) Perpetrator of the "terrorist offense established in article 2.4 of Law No. 18,314, in relation to article 1 of this law" for setting fire to a truck owned by Brotec S.A. on March 17, 2002, in the Las Juntas sector, Alto Bío Bío.[149]

134. On November 19, 2001, the alternate judge of the Santa Bárbara Criminal Court issued the first order to investigate Víctor Manuel Ancalaf Llaupe and also issued a summons for him to make a statement in the investigation that was being conducted into the events of September 29, 2001. On February 26, 2002, Mr. Ancalaf Llaupe appeared before the Santa Bárbara First Instance Court to make a statement, indicating that he was "unaware of the reason why [he had] been summoned to [that] court, [and that he had] played no part in the events that [the court was] informing [him] about."

135. On March 19, 2002, the Provincial Governor of Bío Bío filed a complaint before the Concepción Court of Appeal based on "violation of Law 18,314 on acts of terrorism" against "those who are found responsible as either perpetrators, accomplices or accessories after the fact of the events [that occurred on March 3, 5 and 17, 2002,] and considering that "during September 2001, an attack similar to those [that occurred in March 2002] had been executed." On March 22, 2002, case number No. 1-2002 was assigned to the proceedings, which were heard by the investigating judge of the Concepción Court of Appeal, and "case file No. 3466-2 together with the joindered cases of the Santa Bárbara Criminal Court were added [to these proceedings]."

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146 *Cf.* Transcript of part of the hearing held on February 27, 201, before the judge of the Collipulli First Instance Court of Guarantees; Order for the release of Juan Ciriaco Millacheo Licán issued on February 27, 2013, by the judge of the Collipulli First Instance Court of Guarantees, and Report on the prison conditions of the persons involved in the *Case of Norín Catrimán et al. v. Chile* (file of helpful evidence presented by the State, folios 63 to 66 and 1497 to 1502).

147 The evidence concerning the facts relating to the criminal proceedings against Víctor Manuel Ancalaf Llaupe, established in paragraphs 133 to 151 can be found in the judicial case file of the domestic criminal proceedings against Mr. Ancalaf Llaupe, copy of which was provided to these proceedings as annexes to Merits Report 176/10 (appendix 1), to the CEJIL motions, arguments and evidence brief, as well as among the helpful evidence presented by the State.

148 *Cf.* Indictment (file of helpful evidence presented by the State, folios 2617 to 2621).

149 Regarding the events that occurred on March 17, 2002, the criminal court established that the truck owned by Brotec S.A. had been intercepted by a group of hooded individuals, one of whom carried a firearm, and that by firing into the air, they obliged the driver of the truck to leave the area, and proceeded to shatter the truck's headlights with sticks and then to throw a lighted rag into the cabin, causing a fire that destroyed it. *Cf.* Judgment delivered on December 30, 2003, by the investigating judge of the Concepción Court of Appeal, fourteenth *considerandum* (file of annexes to the Merits Report 176/10, annex 20, folios 718 to 759).

136. In June 2002, Víctor Ancalaf Llaupe was summoned to make a statement before the Concepción Court of Appeal. On July 5, 2002, he made a statement before that court.

Indictment and confidentiality of the proceedings

137. On October 17, 2002 the investigating judge of the Concepción Court of Appeal issued an indictment against Víctor Manuel Ancalaf Llaupe and "issue[d] an arrest warrant against" him for the events that had occurred on September 29, 2001, and March 3 and 17, 2002. Mr. Ancalaf Llaupe was arrested on November 6, 2002, and entered the "El Manzano" Prison in Concepción.

138. On January 8, 2003, before the preliminary stage had concluded, Víctor Ancalaf Llaupe's defense counsel asked to examine the case file. On the same date, the investigating judge denied this request considering that "at this time it is essential to keep the preliminary proceedings confidential to ensure the success of the investigation, because important steps remain pending." On January 13, 2003, the defense counsel appealed that decision. On February 5, 2003, the Concepción Court of Appeal confirmed the decision denying examination of the file of the preliminary proceedings.

139. In a brief dated January 21, 2003, Karina Prado, Mr. Ancalaf Llaupe's wife, requested his transfer to the Temuco prison, indicating, among other matters, that the duration and cost of transport to the prison where he was in Concepción "[…] entailed a physical and financial burden, because [they did] not have any income, as the family's only support was provided by [her] husband working […] and both [she] and [her] children were in a critical financial situation." On January 24 that year, the investigating judge of the Concepción Court of Appeal issued an order in which he denied the request indicating merely "[n]ot admissible at this time." Mr. Ancalaf Llaupe was transferred to a prison nearer his home just one month before he had served his sentence.[150]

140. On April 17, 2003, the preliminary stage concluded. On April 24 that year the defense again asked to examine the case file and also requested Mr. Ancalaf Llaupe's release on parole. That same day, the investigating judge of the Concepción Court of Appeal refused the request to examine the case file of the preliminary proceedings and, the following day, declared that release on parole was not admissible. On April 30, 2003, an appeal was filed against the decision refusing release on parole, but this was confirmed by the Concepción Court of Appeal by a decision of May 5, 2003.

141. On May 15, 2003, Mr. Ancalaf Llaupe reiterated his wife's request (*supra* para. 139) for a transfer to the Temuco Detention Center, because his "family [was] experiencing a very difficult social and financial situation," and if he was transferred he "could receive more frequent visits," because the Temuco Prison was very near his place of residence. On the same day, the Head of the Concepción Detention Center forwarded this request to the Regional Director of the Chilean Prison Service, Bío Bío Region, Concepción, indicating that "there [were] no obstacles to the transfer of the inmate to the Temuco Prison, because […] he lives and has family support in that city." The petition was denied by a decision of the investigating judge of the Concepción Court of Appeal of May 23, 2003, indicating that "for the time being the transfer request made by the prisoner is inadmissible."

142. On May 23, 2003, the prosecutor of the First Prosecutor's Office filed formal charges before the Concepción Court of Appeal against Mr. Ancalaf Llaupe "as perpetrator of the terrorist offenses committed on September 29, 2001, and March 3 and 17, 2002, established in article 2.4 of Law 18,314 in relation to article 1 of this law." The indictment was notified to Mr. Ancalaf

[150] In addition to the judicial case file of the domestic criminal proceedings against Víctor Manuel Ancalaf Llaupe see: Statement made by presumed victim Víctor Manuel Ancalaf Llaupe before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

Llaupe's defense on June 9, 2003. On June 12, 2003, Mr. Ancalaf Llaupe's defense again requested copies of all the proceedings in the case file, a petition that was granted, handing over copies of the case file, with the exception of the "confidential records" that contained the statements made by anonymous witnesses.

143. On July 7, 2003 Mr. Ancalaf Llaupe's defense submitted the answer to the indictment, requesting an "acquittal of all the offenses attributed to him" and again requesting parole for the accused considering that the "investigation had concluded." By a decision of July 8, 2003, the investigating judge of the Concepción Court of Appeal declared that "the parole requested was inadmissible."

a) Judgment issued on December 30, 2003, by the investigating judge of the Concepción Court of Appeal

144. On December 30, 2003, the investigating judge of the Concepción Court of Appeal issued a judgment convicting Mr. Ancalaf Llaupe "as perpetrator of terrorist offenses" pursuant to the provisions of article 2.4 of Law No. 18,314, in relation to Article 1 of this law (*supra* para. 98), based on the incidents that occurred on September 29, 2001, and March 3 and 17, 2002. He imposed the punishment of "ten years and one day of medium-level rigorous imprisonment," payment of trial costs, and the following ancillary penalties:[151]

> […] permanent and absolute disqualification from public office or positions and political rights, and absolute disqualification from titled professions for the duration of the sentence […].
>
> Also under article 9 of the Constitution of the Republic, the condemned man, Ancalaf Llaupe is disqualified for 15 years from discharging public duties or holding public office, regardless of whether or not the appointment is by popular election; from being the rector or director of an educational establishment or performing teaching activities therein; from operating a social communications media outlet or being a director or manager thereof, or performing therein functions connected with the broadcast or dissemination of opinions or information; and from being the leader of a political organization, an organization associated with education, or a neighborhood, professional, business, labor, student, or trade association, during that time.

b) Judgment deciding a partial annulment delivered on June 4, 2004, by the Concepción Court of Appeal

145. Víctor Ancalaf Llaupe and his lawyer filed separate appeals against the judgment convicting him (*supra* para. 144). On December 30, 2003, during the procedure of personal notification of the judgment, Mr. Ancalaf Llaupe "indicated that he was filing an appeal against […] the Judgment." His defense filed the appeal on January 3, 2004. In a decision of January 2, 2004, the alternate investigating judge granted the appeal filed by Mr. Ancalaf Llaupe. On January 5, 2004, the alternate investigating judge issued an order in which he rejected the appeal filed by the defense counsel on the grounds that "[p]ursuant to the provisions of article 27(g) of Law 12,927, the appeal against the final judgment was inadmissible […] owing to the statute of limitations."

146. On January 6, 2004, Karina Prado, Mr. Ancalaf Llaupe's wife, reiterated the request for a complete copy of the case file. The same day, the investigating judge of the Concepción Court of Appeal granted a copy of the case file, but did not allow access to the "confidential records."

147. On June 4, 2004, the Concepción Court of Appeal delivered the judgment in second instance, in which it:[152]

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[151] *Cf.* Judgment delivered on December 30, 2003, by the investigating judge of the Concepción Court of Appeal, thirteenth and fourteenth *consideranda* (file of annexes to the Merits Report 176/10, annex 20, folios 718 to 759).

[152] *Cf.* Judgment delivered on June 4, 2004, by the Third Chamber of the Concepción Court of Appeal (file of annexes to the CEJIL motions and arguments brief, annex A, folios 1723 to 1733).

a) Annulled the part of the Judgment of December 30, 2003, that sentenced Mr. Ancalaf Llaupe to ten years and one day of medium-level rigorous imprisonment, as perpetrator of the terrorist offenses committed on September 29, 2001, and March 3, 2002, and, instead, acquitted him "of the said charges made in the indictment," and

b) Confirmed the conviction of Mr. Ancalaf Llaupe "only as perpetrator of the terrorist offense established in article 2.4 of Law 18,314 in relation to article 1 of this law, committed on March 17, 2002," and sentenced him to the punishment of five years and one day of minimum-level rigorous imprisonment," and to the other ancillary penalties established in the first instance judgment (*supra* para. 144).

148. Regarding the ancillary penalties, it should be mentioned that the State provided, as part of the helpful evidence, a report issued by the Regional Director of the Chilean Prison Service, Araucanía Region, which contains a table describing the ancillary penalties imposed on the presumed victims in this case. In this table, Víctor Manuel Ancalaf Llaupe appears without ancillary penalties. This does not concur with the judgments or with the statement made by Mr. Ancalaf Llaupe during the public hearing held before the Inter-American Court on May 29, 2013, in which he stated as follows: "For example, I will never be able to hold public office; I have not been able to exercise the civil right to head any board in any company, or […] to assume positions in any municipality or in any other State entity." He also testified that he is unable to vote ("even though one would like to take part in the elections, one cannot do this either").[153] Therefore, the Court understands that the judgment of the Concepción Court of Appeal confirmed the ancillary penalties established in the first instance judgment (*supra* paras. 144 and 147 *in fine*).

149. Regarding terrorist intent, the sentence convicting Mr. Ancalaf Llaupe was founded on the legal presumption of intent to instill fear in the general population. Although the wording of the decisions issued by the investigating judge of the Concepción Court of Appeal, in first instance, and by the Concepción Court of Appeal, in second instance, does not appear to indicate expressly that the presumption of terrorist intent has been applied, it can be inferred from the references to article 1 of Law No. 18,314 and the context in which that provision was adopted, that the subjective element of terrorism was presumed owing to the means used to commit the act.

c) *The remedies of cassation and complaint before the Supreme Court of Justice*

150. On June 22, 2004, Mr. Ancalaf Llaupe's defense filed "an appeal for annulment" against the judgment delivered by the Third Chamber of the Supreme Court of Justice on June 4, 2004 (*supra* para. 147).[154] On August 2, 2004, the Second Chamber of that court declared the appeal for annulment inadmissible, concluding that it was "inadmissible pursuant to the reference made in article 10 of Law 18,314 to article 27(j) of Law 12,927, in force at the time of the proceedings [held against Mr. Ancalaf Llaupe], pursuant to the provisions of the transitory article of Law 19806."

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[153] *Cf.* Note of the Regional Director of the Chilean Prison Service, Araucanía Region addressed to the Deputy Technical Director of the National Directorate, forwarding the procedural and prison records (pre-trial detention, total time of the sentence and ancillary penalties) of the presumed victims in this case (file of helpful evidence presented by the State, folios 1376 to 1381), and statement made the presumed victim Víctor Manuel Ancalaf Llaupe before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[154] In the appeal, Mr. Ancalaf Llaupe's defense affirmed that "the judgment appealed contain[ed] errors of law," because, "[i]n violation of the norms that regulate evidence, it ha[d] determined the supposed participation of [Mr.] Ancalaf Llaupe in the wrongful acts committed, in circumstances in which he played no part in them, and […] also in violation of the norms that regulate evidence, an ordinary offense was classified, with full awareness, as a special offense, with a harsher punishment and subject to special proceedings that were more restrictive to the rights of the defense."

151. On August 19, 2004, the parties were informed that Mr. Ancalaf Llaupe's defense had filed a remedy of complaint before the Supreme Court of Justice requesting the invalidation of the sentence convicting him owing to serious error or abuse when adopting the decision. On November 22, 2004, the Supreme Court of Justice rejected the appeal on the grounds that "the judges ha[d] not incurred in the serious errors or abuses that were alleged and that could be rectified by […] [a remedy of complaint]."

d) Prison sentence served

152. Mr. Ancalaf Llaupe began to serve his sentence on November 16, 2002; he was granted an allowance for the time spent in pre-trial detention, from November 6, 2002, until the judgment of June 4, 2004. While serving his sentence, he was granted the prison benefits of "weekend release" and "supervised release." On February 15, 2007, the Ministry of Justice issued Decree No. 633, reducing Mr. Ancalaf Llaupe's intimal sentence by eight months, which meant that he was released on March 7, 2007.[155]

VII – MERITS

153. The instant case refers to alleged violations suffered by the eight presumed victims related to their criminal prosecution and conviction for offenses of a terrorist nature. The presumed victims were leaders, members or an activist of the Mapuche indigenous people. The Court must decide whether the criminal law applied to them (the Counter-terrorism Act) violated the principle of legality and must also rule on whether, during the criminal proceedings, various judicial guarantees were violated, and whether the pre-trial detention ordered violated their right to personal liberty. The Court must also rule on the allegations made by the Inter-American Commission and the common interveners that the ethnic origin of the presumed victims was supposedly taken into consideration in order to apply the said criminal law to them in a discriminatory manner within the context of an alleged pattern of "selective application of the anti-terrorist law to members of the Mapuche indigenous people," as a result of which the social protest of members of this indigenous people was allegedly criminalized.[156]

154. The analysis of the presumed violations of the American Convention will be divided into the following four parts, related to the articles indicated in each case:

VII.1: Principle of legality and presumption of innocence (Articles 9 and 8(2) of the Convention),

VII.2: Equality before the law (Article 24 of the Convention) and judicial guarantees (Article 8(1), 8(2)(f) and 8(2)(h) of the Convention);

VII.3: Right to personal liberty in relation to the pre-trial detention (Articles 7(1), 7(3), 7(5) and 8(2) of the American Convention), and

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[155] *Cf.* Minutes of the meeting of the technical committee of the Victoria Prison held on December 22, 2006; Minutes of the meeting of the technical committee of the Victoria Prison held on January 17, 2007; Decree No. 633 of February 15, 2007, issued by the Chilean Ministry of Justice; Report on the prison conditions of the persons involved in the *Case of Norín Catrimán et al. v. Chile* (file of helpful evidence presented by the State, folios 63 to 66 and 1523 to 1531), and judgment delivered on December 30, 2003, by the investigating judge of the Concepción Court of Appeal, thirteenth and fourteenth *consideranda* (file of annexes to the Merits Report 176/10, annex 20, folios 718 to 759).

[156] Merits Report 176/10, paras. 1, 5, 211 and 289; CEJIL brief with motions, arguments and evidence, and FIDH brief with motions, arguments and evidence (merits file, Tome I, folios 2, 10, 11, 67, 76, 97, 269, 270, 351, 352, 401, 425, 507, and 515).

VII.4: Freedom of thought and expression, political rights, right to personal integrity and right to the protection of the family (Articles 13, 23, 5(1) and 17 of the American Convention).

When appropriate, the said rights will be related to the obligation to respect and ensure rights, as well as to the obligation to adopt domestic legal provisions (Articles 1(1) and 2 of the American Convention).

155. The Court underlines that, in this case against Chile, the alleged violation of the right to communal property in relation to Article 21 of the American Convention has not been submitted to its consideration. However, the Court recalls the importance of the criteria it has developed in its case law in judgments in cases against Nicaragua,[157] Paraguay,[158] Suriname[159] and Ecuador[160] concerning the content and scope of the right to communal property, taking into account the close relationship of the indigenous peoples with their land. The Court has ruled on the State obligations to ensure this right, such as the official recognition of ownership by land delimitation, demarcation and titling, the return of indigenous lands, and the establishment of an effective remedy to decide the corresponding claims.[161] The Court has also indicated that "the obligation to consult [the indigenous and tribal communities and peoples], in addition to constituting a treaty-based norm, is also a general principle of international law" and has emphasized the importance of the recognition of that right as "one of the fundamental guarantees to ensure the participation of the indigenous communities and peoples in the decisions concerning measures that affect their rights and, in particular, their right to communal property."[162] These are criteria that States must observe when respecting and ensuring the rights of the indigenous peoples and their members in the domestic sphere.

VII.1 – PRINCIPLE OF LEGALITY (ARTICLE 9 OF THE AMERICAN CONVENTION) AND RIGHT TO THE PRESUMPTION OF INNOCENCE (ARTICLE 8(2)) OF THE AMERICAN CONVENTION, IN RELATION TO THE OBLIGATION TO RESPECT AND ENSURE RIGHTS AND THE OBLIGATION TO ADOPT DOMESTIC LEGAL PROVISIONS

A) Arguments of the Commission and of the parties

156. The Commission affirmed that criminal laws must be worded in precise and unambiguous language that narrowly defines the wrongful offense and exactly determines its elements and the factors that distinguish it from other acts that do not constitute wrongful

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157 This began, above all, with the 2001 judgment in the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, in which, using an evolutive interpretation of Article 21 of the American Convention, the Court affirmed that this article protects the right to communal property of the members of indigenous communities. *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs*. Judgment of August 31, 2001. Series C No. 79.

158 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, paras. 125 and 137; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. *Merits, reparations and costs.* Judgment of March 29, 2006. Series C No. 146, paras. 118 and 121, and *Case of the Xákmok Kásek Indigenous Community. v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010 Series C No. 214, paras. 85 to 87.

159 *Cf. Case of the Moiwana Community v. Suriname. Preliminary objections, merits, reparations and costs.* Judgment of June 15, 2005. Series C No. 124, para. 131, and *Case of the Saramaka People v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of November 28, 2007. Series C No. 172, paras. 87 to 91.

160 *Cf. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*. *Merits and reparations.* Judgment of June 27, 2012. Series C No. 245, paras. 145 to 147.

161 *Cf. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, reparations and costs,* para. 153; *Case of the Moiwana Community v. Suriname,* para. 209; *Case of the Yakye Axa Indigenous Community v. Paraguay*, paras. 95 and 96; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, para. 108, and *Case of the Xákmok Kásek Indigenous Community. v. Paraguay*, para. 131.

162 *Cf. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador,* paras. 160 and 164.

offenses or that are may be penalized as other crimes. It indicated that the lack of precision in the definition of crimes creates the opportunity for "abuse of authority," and may "restrict due process guarantees, as depending on which category of crime is charged, the effect may be to change the penalty imposed." Article 1 of the Counter-terrorism Act "does not explain what means employed may have the effect of transforming a common crime into a terrorist crime," and that "it cannot be considered that this imprecision is rectified [by the list of …] some means that entail a presumption [of terrorist intent]." It asserted that there is no exact definition of terrorism under international law; but there is a consensus about "some basic elements" that States should use in order to define such offenses. The Commission included some considerations on the impossibility of determining when an act constitutes a terrorist or an ordinary offense based on the special subjective elements of terrorism and also referred to the incompatibility of the presumption of terrorist intent with the principle of legality and other guarantees such as the presumption of innocence. It considered that "the use of presumptions in the definition of offenses was not only incompatible with the principle of strict legality, but also with […] the presumption of innocence." It stated that Law No. 18,314 defines acts that would not be considered of a terrorist nature and seriousness under international law and indicated that all the foregoing considerations extend to the "description of the crimes of 'attempting' or 'threatening' to commit terrorist offenses" and that the imprecision of the latter had an impact in the case of Messrs. Norín Catrimán and Pichún Paillalao. The Commission also indicated that the 2010 amendment of the Counter-terrorism Act did not involve a substantial modification that made it compatible with the principle of legality, that it was a structural change which kept the same wording as the previous version, and that the changes were merely in the phrases and connecting words used to combine the three hypotheses that would lead to the "presumption of terrorist intent." It also affirmed that article 1 of the Counter-terrorism Act, which was applied to the presumed victims, established, along with the purpose of instilling fear, another intent consisting in "to pressure the authorities to take a certain decision or to make demands on them." It asserted that this intent could "stand on its own," "irrespective of the means used or their effects," and this could result in including "a multiplicity of hypotheticals that are not necessarily associated with terrorist violence *per se*" and make it difficult to differentiate it from offenses "that come under the heading of extortion or are aggravated by [that] purpose." It also stated that the offenses and acts established in article 2 of this law are not necessarily the most serious and that include offenses that exclusively affect property, which runs counter to the international consensus that terrorist "violence is mainly an attack upon human life." In addition, the Commission stated that there had been a violation of the principle of individual responsibility because in the three judgments convicting the presumed victims, "the courts made reference to acts committed by third parties before or at the same time as the offenses with which the [presumed] victims were charged," and because during the criminal proceedings held against them "a series of witnesses were summoned to testify who described […] facts unrelated to the [presumed] victims," which "were decisive factors in the conclusions reached by the judges with respect to the subjective element of the offense of terrorism," even though the "only link between these third party acts and the [presumed] victims [was] the ethnic origin of those who reportedly committed them."

157. The two common *interveners* stated that Law No. 18,314, which was applied to the presumed victims, violates the principle of legality protected by Article 9 of the Convention. They also raised objections concerning the imprecision of the definition of the offense and the consequent possibility that it include events in which the special terrorist intent had not existed.

a) The FIDH affirmed that articles 1, 2, 3 and 7 of the Counter-terrorism Act are "vague and imprecise, which [leaves] room for the use of discretion and the introduction of factual presumptions that do not emerge from the legal description," and considered that certain terms used in this law were indeterminate and did not allow the acts that are penalized under the law to be distinguished from ordinary criminal law; hence, the Counter-terrorism Act did not offer legal certainty to the individual. In addition, it

affirmed that all its considerations also related to the offense of terrorist threats. Furthermore, it indicated that "the existence of an imprecise definition of a criminal offense […] is confirmed by the existence of at least three subsequent trials for the same fire as in the Poluco Pidenco case," citing other offenses. It considered that the wording of article 1 "does not refer [to its] content," and that "what is involved are criminal offenses that are open to the use of judicial discretion over and above […] the proper exercise of interpretation." It explained that any ordinary offense can instill fear so that, by not differentiating that intent from one of "producing terror or intimidating a population or similar wording," the intent established in article 1 of the Counter-terrorism Act does not allow ordinary offenses to be distinguished from those of a terrorist nature, because the law should have established the level of fear required for an offense to be of a terrorist nature. It asserted that the definition of the offense did not establish "the [means] that should be punished," and that "the law does not clarify the level of premeditation and planning that converts an ordinary offense into a terrorist offense." It also indicated that "only the intent to cause death or severe bodily injury should be included as intent in terrorist offenses." Furthermore, the FIDH argued that, since the convictions were based "on contextual presumptions about terrorist intent," they were incompatible with the principle of individual criminal responsibility, because the presumed victims were held responsible "for acts carried out by unknown persons, and [their] guilt was inferred because they belonged […] to the Mapuche people."

b) CEJIL affirmed that definitions of terrorist offenses should be worded "so as to avoid arbitrary and subjective interpretations." It stated that international law does not include a definition of terrorism, but rather "basic elements" that allow "certain acts related to different dimensions of this international crime to be described," which, based on the "necessary technical precision, will exclude the possibility of a distorted application of the term "terrorism," using it, for example, as a response to social demands or movements." It also included some considerations on the incompatibility with the principle of legality of the offense of "[t]o place, throw or fire bombs, or explosive or incendiary devices of any type that affect or may affect the physical integrity of persons or cause damage" and its relationship to the presumption of a terrorist intent of article 1 of Law 18,314. It affirmed that the presumption of intent to instill fear had the effect of inverting the burden of proof "and freed the Chilean State from its obligation to prove […] the guilt of the accused," and that this "does not ensure […] legal certainty." It stated that linking "the nature and effects of the means used" leaves to the "criterion of the prosecutor the *ad hoc* determination of the means [that are terrorist means]." It also indicated that "the definition in article 2 of the law of the other circumstances that determine that an offense is terrorist in nature […] is not consistent with the principle of legality either." CEJIL also included specific considerations on the act described in article 2.4 of Law No. 18,314, the criminal act of which Víctor Ancalaf Llaupe was convicted, and affirmed that the expression "incendiary devices of any type" is imprecise, and that it is not consistent with the model wording proposed by the United Nations Special Rapporteur which "focuses on the protection of life and personal integrity." It stated that, insofar as any fire causes damage "however limited," if the presumption under article 1 of the Counter-terrorism Act is applied, the effect of this article is that "any fire would necessarily constitute a terrorist offense."

158. The State affirmed that the Counter-terrorism Act complies with the principle of legality and that, under its article 1, a "terrorist criminal intent" is required, expressed by a "special purpose" of the perpetrator "to instill justified fear in the population or part of it that it may fall victim to offenses of the same type," and that it is this subjective terrorist element, added to the perpetration of any of the criminal acts described in article 2 of the law, that constitutes a terrorist offense. It indicated that, even though there is no "consensus in legal doctrine or in international law on a definition of […] terrorism," the one most accepted is that

of Resolution 1566 of the United Nations Security Council. It considered that it was an accepted fact that offenses defined in the ordinary criminal law, when committed concurrently with other elements or circumstances, constitute "a different and more serious offense, called terrorism." It included considerations on the rights protected by the offense of terrorist arson, as well as on the wording "nature of the means and their effects," and the "premeditated plan" used in the definition, and the difference from the definition of other criminal offenses. Chile affirmed that "[t]he principle of legality and the legal definition of an offense […] recognize that there are concepts that are subject to judicial interpretation, because it is impossible to legislate purely on a case-by-case basis," but that this did not imply arbitrariness. It asserted that the "actual text" of article 1 of Law No. 18,314 "meets the requirements of international law as regards the legal definition of the acts and the punishment; thus, respecting the principle of legality." In this regard, the State referred to the amendments made to the Counter-terrorism Act in 2010 concerning the presumption of terrorist intent and the applicability of the law to minors, and indicated that the elimination of the presumption of intent to instill fear was done in order "to protect the principle of the presumption of innocence […] so that […] any accusation of terrorism must be proved by whoever makes it and not, as before the legal amendment, that those accused of such offenses had to disprove the presumption of terrorist intent." It added that the actual definition of terrorism in Chile respects the principle of legality and is more restrictive that in other countries and that the 2010 amendment of the Counter-terrorism Act entailed changes in punishments and the "elimination of presumptions," but that the amendment was not due to failure to comply with international standards. It also indicated that "Chilean case law has progressed towards an interpretation of the Counter-terrorism Act that is completely in line with international standards [and that] the 2010 amendment merely reinforced [this]." It asserted also that the offense of terrorist arson "involves several offenses," which means that the law protects "various rights, one of them the right to property, [in addition to] life and personal integrity."

B) Considerations of the Court

159. Before making a ruling, the Court recalls that, with regard to the criminal laws applied to the presumed victims in this case in the criminal proceedings to which they were subjected, Chile has defined terrorist offenses in a special law (Law No. 18,314 that "[d]efines terrorist acts and establishes their punishment") (*supra* paras. 98 and 99). At the time of the acts they were accused of, this law included the following definitions:

a) Article 1 of the law established aspects relating to the subjective element of the offense; in other words, the special terrorist intent (*supra* para. 98), and included a presumption of the intention of instilling fear in the general population when the act had been committed, *inter alia*, "by means of explosive or incendiary devices";

b) Article 2 established the objective element of the offense; that is the criminal acts or actions that, when perpetrated together with the said special intent or purpose, would be considered terrorist offenses (*supra* para. 98). In order to establish this objective element, article 2 contained:

b.i) On the one hand, the first paragraph (article 2.1) established a specific list of ordinary offenses defined in the Criminal Code,[163] including the offense of

[163] "1. Acts of homicide penalized in articles 390 and 391; injury penalized in articles 395, 396, 397 and 399; abduction, either in the form of confinement or detention, or retention of a person as a hostage, and of the kidnapping of minors, penalized in articles 141 and 142; sending explosive devices penalized under article 403 bis; arson and destruction, penalized in articles 474, 475, 476 and 480; offenses against public health in articles 313(d), 315 and 316, and derailment established in articles 323, 324, 325 and 326, all of the Criminal Code".

arson codified in article 476.3 of the Criminal Code,[164] which defines the act of "to set fire to […] forests, standing crops, pastures, woodland, hedges or plantations." Juan Patricio and Florencio Jaime Marileo Saravia, Messrs. Huenchunao Mariñán and Millacheo Licán and Ms. Troncoso Robles were convicted as perpetrators of the offense of terrorist arson based on a fire on the Poluco Pidenco property (*supra* paras. 126 and 128). The *Lonkos* Norín Catrimán and Pichún Paillalao were convicted of the "threat"[165] to commit arson ("threat of terrorist arson") (*supra* paras. 116 and 118), and

b.ii) On the other hand, paragraphs 2 to 5 of article 2 (article 2.2 to 2.5) codified a series of acts or conducts as offenses without referring to pre-existing offenses defined in the Criminal Code (*supra* para. 98). Mr. Ancalaf Llaupe was considered to be responsible for the criminal acts described in paragraph 4 ("To place, throw or fire bombs or explosive or incendiary devices of any type that affect or may affect the physical integrity of persons or cause damage").

160. The Court will make some considerations on the content of the principle of legality, with special emphasis on the necessary distinction between ordinary offenses and terrorist offenses, and will then rule on the allegations of the violation of this principle owing to the definitions contained in the Counter-terrorism Act, as most relevant in order to decide this case.

1. The principle of legality in general and in relation to the codification of terrorist acts

161. The principle of legality according to which "[n]o one shall be convicted of any act or omission that did not constitute a criminal offense under the applicable law at the time it was committed" (Article 9 of the American Convention) constitutes a central element of criminal prosecution in a democratic society.[166] The classification of an act as illegal and the establishment of its legal effects must pre-exist the action of the person who is considered the wrongdoer because, otherwise, the individual would be unable to adapt their actions to a legal order in force and certain that expresses social condemnation and the consequences of this.[167]

162. The classification of offenses requires a clear definition of the criminalized act that establishes its elements and allows it to be distinguished from acts that are not penalized or illegal acts that may be punished by non-criminal measures.[168] The sphere of application of

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[164] Article 476 of the Criminal Code in force at the time of the acts for which the presumed victims in this case were prosecuted established that: "The following shall be punished with long-term rigorous imprisonment at any of its levels:

1. Anyone who shall set fire to a building destined to serve as a home that was not inhabited at the time.

2. Anyone who, in a village, shall set fire to any building or premises, even though this was not ordinarily destined to serve as a dwelling.

3. Anyone who shall set fire to woods, standing crops, pastures, woodlands, hedges or plantations."

[165] The pertinent part of Article 7 of the Counter-terrorism Act established that "the serious and credible threat of the perpetration of one of the said offenses shall be punished as an attempt to commit it."

[166] *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs.* Judgment of February 2, 2001. Series C No. 72, para. 107, and *Case of Mohamed v. Argentina. Preliminary objection, merits, reparations and costs.* Judgment of November 23, 2012 Series C No. 255, para. 130.

[167] *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*, para. 106, and *Case of Mohamed v. Argentina*, para. 131.

[168] *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs.* Judgment of May 30, 1999. Series C No. 52, para. 121, *and Case of Pacheco Teruel et al. v. Honduras. Merits, reparations and costs.* Judgment of April 27, 2012 Series C No. 241, para. 105.

each offense must previously be delimited as clearly and precisely as possible,[169] in an explicit, precise, and taxative manner.[170]

163. When defining offenses of a terrorist nature, the principle of legality requires that a necessary distinction be made between such offenses and ordinary offenses, so that every individual and also the criminal judge have sufficient legal elements to know whether an action is penalized under one or the other offense. This is especially important with regard to terrorist offenses because they merit harsher prison sentences, and ancillary penalties and disqualifications with major effects on the exercise of other fundamental rights are usually established – as in Law No. 18, 314. In addition, the investigation of terrorist offenses has procedural consequences that, in the case of Chile, may include the restriction of certain rights during the investigation and prosecution stages.[171]

164. Consensus exists at the international level and, in particular, in the Americas about "the threat that terrorism poses to democratic values and international peace and security, [as well as for …] the enjoyment of human rights and fundamental freedoms."[172] Terrorism is a phenomenon that jeopardizes the rights and freedoms of the persons subject to the jurisdiction of the States Parties to the American Convention. Consequently, Articles 1(1) and 2 of this Convention oblige the States Parties to take all those measures that are adequate, necessary and proportionate to prevent and, as appropriate, to investigate, prosecute and punish these types of acts. According to the Inter-American Convention against Terrorism, "the fight against terrorism must be undertaken with full respect for national and international law, human rights, and democratic institutions, in order to preserve the rule of law, liberties, and democratic values in the Hemisphere."[173]

165. In particular, when States take the necessary measures to prevent and punish terrorism by defining acts of this nature as offenses, they are obliged to respect the principle of legality in the terms mentioned above (*supra* paras. 161 to 164). Different United Nations bodies and experts have underlined that domestic codification and definitions relating to terrorism should not be formulated in an imprecise way that facilitates broad interpretations under which conduct is punished that does not have either the nature or the gravity of that type of offense.[174]

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[169] *Cf. Case of Fermín Ramírez v. Guatemala. Merits, reparations and costs.* Judgment of June 20, 2005. Series C No. 126, para. 90, and *Case of Liakat Ali Alibux v. Suriname*, para. 61.

[170] *Cf. Case of Kimel v. Argentina*, para. 63, and *Case of Liakat Ali Alibux v. Suriname*, para. 61.

[171] Articles 3, 3 bis, 5, 11, 13, 15, 16 and 21 of Law No. 18,314 which "define terrorist acts and establish their punishment." *Cf.* Law No. 18,314, which defines terrorist acts and establishes their punishment, published in the official gazette on May 17, 1984 (file of annexes to the Merits Report 176/10, annex 1, folios 5 to 11, file of annexes to the CEJIL motions and arguments brief, annex B 1.1, folios 1740 to 1746, file of annexes to the FIDH motions and arguments brief, annex 27, folios 817 to 823, and annexes to the State's answering brief, annex 3, folios 84 to 87); Law No. 19,027 of January 24, 1991, which "[a]mends Law No.18,314, which defines terrorist acts and establishes the corresponding punishments" (file of annexes to the FIDH motions and arguments brief, annex 29, folios 825 to 827); affidavits prepared on May 21, 2013, by expert witness Manuel Cancio Meliá, and on May 27, 2013, by expert witness Federico Andreu-Guzmán (file of statements of presumed victims, witnesses and expert witnesses, folios 158 to 165, and 621 to 624).

[172] *Cf.* Inter-American Convention against Terrorism, AG/RES. 1840 (XXXII-O/02), adopted at the second plenary session held on June 3, 2002, second and sixth paragraphs of the preamble. Available at: http://www.oas.org/juridico/english/ga02/agres_1840.htm.

[173] *Cf.* Inter-American Convention against Terrorism, *supra*, eighth paragraph of the preamble.

[174] *Cf.* UN Doc. CCPR/C/CHL/C0/5, 17 April 2007, Human Rights Committee, *Consideration of reports presented by States Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee*, Chile, para. 7 (file of annexes to the Merits Report 176/10, annex 8, folios 310 to 315), and UN Doc. A/HRC/6/17/Add.1, 28 November 2007, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin,* Addendum, para. 20 (file of annexes to the Merits Report 176/10, annex 10, folios 369 to 373).

166. When providing their expert opinions before this Court, expert witnesses Scheinin and Andreu-Guzmán referred to Resolution 1566(2004) of the United Nations Security Council[175] and the "model definition of terrorism" developed in 2010 by Martin Scheinin as Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism and maintained by Ben Emmerson, the following Special Rapporteur for this issue.[176] Both experts considered it necessary to develop relevant standards to evaluate national definitions of terrorist offenses, because this would allow identifying basic or characteristic elements that determine egregious conduct of a terrorist nature.[177]

167. However, these expert witnesses and expert witness Cancio Meliá[178] agreed that international law does not contain a definition of terrorism that is complete, concise and accepted universally.[179]

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[175] Resolution 1566 (2004) of the United Nations Security Council of 8 October 2004, paragraph 3:

> *Recalls* that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.

Cf. UN Doc. S/RES/1566 (2004), Security Council, Resolution 1566 (2004), adopted by the Security Council at its 5053rd meeting on 8 October 2004.

[176] In his report on "*Ten areas of best practices in countering terrorism*", the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while combatting terrorism, Martin Scheinin gave the following "model definition" as "a best practice in the fight against terrorism." He indicated that "[t]errorism means an action or attempted action where:

> 1. The action:
>
> (a) Constituted the intentional taking of hostages; or
>
> (b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
>
> (c) Involved lethal or serious physical violence against one or more members of the general population or segments of it; and
>
> 2. The action is done or attempted with the intention of:
>
> (a) Provoking a state of terror in the general public or a segment of it; or
>
> (b) Compelling a Government or international organization to do or abstain from doing something; and
>
> (3) The action corresponds to:
>
> (a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
>
> (b) All elements of a serious crime defined by national law."

He also emphasized that: "laws and policies must be limited to the countering of offences that correspond to the characteristics of conduct to be suppressed in the fight against international terrorism, as identified by the Security Council in its resolution 1566 (2004), paragraph 3," and stated that: "individual States affected by purely domestic forms of terrorism may also legitimately include in their terrorism definitions conduct that corresponds to all elements of a serious crime as defined by the national law, when combined with the other cumulative characteristics of resolution 1566 (2004)." *Cf.* UN Doc. A/HRC/16/51, December 21, 2010, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Ten areas of best practices in countering terrorism,* paras. 23, 27 and 28.

[177] *Cf.* Affidavit prepared on May 27, 2013, by expert witness Federico Andreu-Guzmán (file of statements of presumed victims, witnesses and expert witnesses, folios 601 to 624), and statement made by expert witness Martin Scheinin before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[178] *Cf.* Affidavits prepared on May 21, 2013, by expert witness Manuel Cancio Meliá, and on May 27, 2013, by expert witness Federico Andreu-Guzmán (file of statements of presumed victims, witnesses and expert witnesses, folios 114 to

2. Application to this specific case

168. In order to decide the dispute in this case as to whether a law (Law No. 18,314) was applied to the eight presumed victims that was incompatible with Article 9 of the Convention, the Court finds it essential to rule on the arguments relating to whether the presumption of the intent "to instill [...] fear in the general population" stipulated in article 1 of this law entails a violation of both the principle of legality and the presumption of innocence.

169. As indicated previously (*supra* para. 98), article 1 of Law No. 18,314 regulated the subjective elements of the offense as follows:

> Article 1. The offenses listed in article 2 shall constitute terrorist offenses when any of the following circumstances exist:
>
> 1. That the offense is committed in order to produce in the population, or in part of it, the justified fear of being a victim of offenses of the same type, due either to the nature and effects of the means used, or to the evidence that it is part of a premediated plan to attack a specific category or group of persons.
>
> **Unless the contrary is verified, the intent of causing fear to the general population shall be presumed when the offense is committed using explosive or incendiary devices**, weapons of great destructive power, toxic, corrosive or infectious substances or others that can cause major devastation, or by sending letters, packages or similar objects with explosive or toxic effects.
>
> 2. That the offense is committed to force decisions from the authorities or to impose demands. *[Bold added]*

170. The Court must decide whether the legal presumption of the subjective element of the definition emphasized in the said article 1, which establishes that, "unless the contrary is

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166, and 601 to 624); statement made by expert witness Martin Scheinin before the Inter-American Court during the public hearing held on May 29 and 30, 2013, and UN Doc. A/HRC/16/51, December 21, 2010, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Ten areas of best practices in countering terrorism,* para. 27.

[179] Nevertheless, numerous international instruments classify certain conducts as terrorist acts. This is the case of the Inter-American Convention against Terrorism, adopted on June 3, 2002, by the OAS General Assembly, which does not define terrorism, but considers as terrorist offenses those contained in ten international conventions on this matter. Article 2(1) (Applicable international instruments) of this Convention that: "For the purposes of this Convention, "offenses" means the offenses established in the international instruments listed below:

a. Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970.

b. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971.

c. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on December 14, 1973.

d. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 17, 1979.

e. Convention on the Physical Protection of Nuclear Material, signed at Vienna on March 3, 1980.

f. Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on February 24, 1988.

g. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988.

h. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on March 10, 1988.

i. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15, 1997.

j. International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on December 9, 1999.

Cf. Inter-American Convention against Terrorism, AG/RES. 1840 (XXXII-O/02), adopted at the first plenary session on June 3, 2002.

verified, the intent of causing fear to the general population shall be presumed" when the offense is committed by using the means or devices indicated (including "explosive or incendiary devices") entails a violation of the principle of legality and the principle of the presumption of innocence.

171. The Court reiterates that the codification of offenses means that the criminalized conduct is delimited as clearly and precisely as possible (*supra* para. 162). In this definition, the special intent or purpose of instilling "fear in the general population" is a fundamental element to distinguish conduct of a terrorist nature from conduct that is not, and without which the conduct would not meet the definition. The Court considers that the said presumption that this intent exists when certain objective elements exist (including "the fact of committing an offense with explosive or incendiary devices") violates the principle of legality established in Article 9 of the Convention, and also the presumption of innocence established in Article 8(2) of this instrument. The principle of the presumption of innocence that, as the Court has determined, constitutes a cornerstone for judicial guarantees,[180] signifies that judges should not commence the proceedings with a preconceived idea that the accused has committed the offense that he is charged with, so that the burden of proof rests on the accuser and not on the accused, and any doubt must be used to the benefit of the accused.[181] The authoritative demonstration of guilt is an essential requirement for criminal punishment.[182]

172. In this regard, the State indicated that, with the 2010 amendment of Law No. 18,314, "the presumption of the intent to instill fear was eliminated" in order "to protect the principle of the presumption of innocence […,] so that […] any accusation of terrorism must be proved by the accuser and not, as before the amendment of the law, when those charged with such offenses had to disprove the presumption of terrorist intent." Witness Acosta Sánchez, proposed by Chile, explained this amendment similarly, indicating during the public hearing that this presumption "to a great extent, infringed the principle of innocent until proved guilty."[183] Expert witness Scheinin,[184] proposed by the Commission, the FIDH and CEJIL, gave a similar opinion, indicating that, in definitions of offenses, presumptions work to the detriment of the accused and invert the court's reasoning that all the elements of the offense must be proved beyond a reasonable doubt. Expert witness Cancio Meliá, proposed by CEJIL, considered that this presumption "extend[ed] the scope of terrorism without any restriction, by […] inverting the burden of proof and establishing the […] principle that any act carried out with an incendiary device […] was, in principle, considered a terrorist act," which, in his opinion, was "absolutely incompatible not only with the principle of legality, (because it makes […] it unpredictable to know when it would be considered that 'the contrary has been proved' – in other words, the absence of the intent [of instilling fear]), but also with the most elementary principles of due process of law."[185] Furthermore, expert witness Andreu-Guzmán, proposed by the FIDH,

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[180] *Cf. Case of Suárez Rosero v. Ecuador*. *Merits*. Judgment of November 12, 1997. Series C No. 35, para. 77, and *Case of López Mendoza v. Venezuela. Merits, reparations and costs.* Judgment of September 1, 2011. Series C No. 233, para. 128.

[181] *Cf. Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 26, 2010. Series C No. 220, para. 184, and *Case of López Mendoza v. Venezuela*, para. 128.

[182] *Cf. Case of Ricardo Canese v. Paraguay. Merits, reparations and costs.* Judgment of August 31, 2004. Series C No. 111, para. 204, *and Case of López Mendoza v. Venezuela*, para. 128.

[183] The said witness testified about "his participation" in the amendments to the Counter-terrorism Act in Chile and the process of adapting it to international standards. *Cf.* Statement made by witness Juan Domingo Acosta Sánchez before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[184] *Cf.* Statement made by expert witness Martin Scheinin before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[185] *Cf.* Affidavit prepared on May 21, 2013, by expert witness Manuel Cancio Meliá (file of statements of presumed victims, witnesses and expert witnesses, folio 161).

indicated that the presumption of article 1 of Law No. 18,314 "runs counter to the principle of the presumption of innocence, because it considers proved *prima facie* the specific criminal intent based merely on the use of certain means or weapons," and that it is "a clear and deeply-rooted principle of contemporary criminal law that criminal intent, and *a fortiori,* specific criminal intent, is an element of the illegal conduct that must be proved and cannot be presumed." In addition, he clarified that "the wording of article 1, by establishing presumptions of the intentionality (specific criminal intent), places the burden of proof on the accused to prove that he did not have the said intention."[186]

173. The legal recognition of this presumption may have influenced the criteria used by the domestic courts to analyze and confirm the existence of intent during the criminal proceedings. This Court finds that it has been proved that the said presumption of the subjective element of the terrorist offense was applied in the judgments that decided the criminal responsibility of the eight presumed victims in this case: (a) to convict Messrs. Norín Catrimán and Pichún as perpetrators of the offense of threat of terrorist arson (*supra* para. 116); (b) to convict Messrs. Millacheo Licán and Huenchunao Mariñán, the Marileo Saravia brothers, and Ms. Troncoso Robles as perpetrators of the offense of terrorist arson (*supra* para. 128), and (c) to convict Mr. Ancalaf Llaupe as perpetrator of the terrorist act consisting in "[t]o place, send, activate, throw, detonate or fire bombs or explosive or incendiary devices of any type, weapons or devices of great destructive power, or with toxic, corrosive or infectious effects," for acts during which, after forcing the driver to get out of his truck, a "lighted rag" was thrown at this vehicle (*supra* para. 149).

174. Consequently, *the Court concludes that the application of the presumption of terrorist intent with regard to Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe violated the principle of legality and the right to the presumption of innocence, established in Articles 9 and 8(2) of the American Convention, in relation to the obligation to respect and ensure rights, established in Article 1(1) of this instrument.*

3. *Obligation to adopt domestic legal provisions (Article 2 of the American Convention), in relation to the principle of legality (Article 9 of the Convention) and the right to the presumption of innocence (Article 8(2))*

175. Article 2 of the American Convention establishes the general obligation of States Parties to adapt their domestic law to the provisions of the Convention in order to ensure the rights recognized therein. The Court has established that this obligation entails the adoption of two types of measure. On the one hand, the elimination of laws and practices of any nature that result in a violation of the guarantees established in the Convention; on the other, the enactment of laws and the implementation of practices leading to the effective observance of those guarantees.[187]

176. The Court has concluded that, at the time of the events, a criminal norm included in the Counter-terrorism Act was in force that was contrary to the principle of legality and to the right to the presumption of innocence, as indicated in paragraphs 169 to 174. This norm was applied to the victims in this case in order to determine their criminal responsibility as perpetrators of offenses of a terrorist nature.

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[186] *Cf.* Affidavit prepared on May 27, 2013, by expert witness Federico Andreu-Guzmán (file of statements of presumed victims, witnesses and expert witnesses, folio 622).

[187] *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs*, para. 207, and *Case of Mendoza et al. v. Argentina. Preliminary objections, Merits and reparations.* Judgment of May 14, 2013 Series C No. 260, para. 293.

177. Therefore, *the Court concludes that Chile violated the obligation to adopt domestic legal provisions, established in Article 2 of the American Convention, in relation to Articles 9 (principle of legality) and 8(2) (right to the presumption of innocence) of this instrument, to the detriment of Víctor Manuel Ancalaf Llaupe, Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles*.

178. The Court does not find it necessary in this case to rule on the other alleged violations related to the subjective element of the offense,[188] or on the arguments relating to the objective element of the definition of a terrorist offense,[189] because it has already concluded that the presumption of the intention of instilling fear in the general population is incompatible with the Convention, and that this presumption was applied in the proceedings against the presumed victims in this case.

179. However, the Court emphasizes that the acts for which the victims in this case were tried and convicted did not entail harm to anyone's physical integrity or life. The Court finds it relevant to point out that the offense of arson or threat of arson of which seven of the victims were convicted relates to conduct defined in article 476.3 of the Criminal Code (*supra* para. 159.b.i). In the Chilean Criminal Code, the definition of arson offenses to which the Counter-terrorism Act refers (*supra* footnotes 163 and 164) includes different situations, ranked in order of importance according to the severity of the effects on different rights,[190] and the one included in the said article 476.3 is among the least severe.[191] Similarly, Víctor Manuel Ancalaf Llaupe was convicted as perpetrator of the offense established in article 2.4 of the Counter-

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[188] Regarding the alleged scope and lack of precision of the subjective element of the offense, and also the alternative text of the elements of the subjective aspect of the offense.

[189] Regarding the insufficient gravity of the conducts considered criminal in article 2 of Law 18,314, and the lack of precision in the description of the actions defined as offenses of which the presumed victims were convicted (the offense of "terrorist arson" defined in article 2.1 of the Counter-terrorism Act in relation to article 476.3 of the Criminal Code, and the action described in article 2.4 of Law 18,314 – the relationship with the presumption of terrorist intent, on the one hand, and the alleged "imprecision" of the expression "incendiary devices," on the other).

[190] Art. 474. Anyone who sets fire to a building, railway train, boat or any other type of place, causing the death of one or more persons whose presence there could be anticipated, shall be punished with long-term rigorous imprisonment at the highest level to life imprisonment.

The same penalty shall be imposed when the fire does not result in death but rather in mutilation of a major limb or serious injuries of those included in article 397.1.

The penalties under this article shall be applied, respectively, at their lowest level if, as a result of explosions due to the fire, death or serious injuries are caused to persons who were at any distance from the place of the incident

Art. 475. The arsonist shall be punished with medium-level long-term rigorous imprisonment to life imprisonment.

1. When the fire is set in inhabited buildings, train, boat or place or in which, at the time, there were one or more persons, provided that the accused could have anticipated this circumstance.

2. When the fire is set in merchant vessels loaded with explosive or inflammable objects, in warships, dockyards, shipyards, warehouses, factories or storage places for gunpowder or other explosive or inflammable substances, arsenals, repair shops, museums, libraries, archives, public offices or monuments or places similar to those listed.

Art. 476. The punishment shall be long-term rigorous imprisonment at any of its levels:

1. For anyone who sets fire to a building destined to serve as a dwelling which was not inhabited at the time.

2. For anyone who, within a village, sets fire to any building or place, even if this was not normally destined to serve as a dwelling.

3. For anyone who sets fire to woods, standing crops, pastures, undergrowth, fences or plantations.

[191] The conduct described in article 476.3 is differentiated from the other actions criminalized as arson by the Criminal Code owing to its subject matter and by not including the requirement that the fire produce a specific result.

terrorism Act for the conduct consisting in throwing "a lighted rag" into a truck of a private company after forcing the driver to abandon it.

180. The Court reiterates the importance that the special criminal offense of terrorism is not used in the investigation, prosecution and punishment of criminal offenses when the wrongful act could be investigated and tried as an ordinary offense because it is a less serious conduct (*supra* para. 163).

181. In addition, several probative elements provided to the Court relate to inconsistency in the application of the Counter-terrorism Act in Chile. As already indicated (*supra* para. 83), the Special Rapporteur for the promotion and protection of human rights while countering terrorism has stated that "political opinion" in Chile is in agreement that the application of this criminal law to the Mapuche in the context of their social protest is "unsatisfactory and inconsistent." In addition, in her "Law Report" presented as documentary evidence by both common interveners, Cecilia Medina Quiroga made a comparative analysis of similar criminal cases that she considered had been decided by the Chilean courts "in a totally different way," even though "the underlying events, the import of the accusations and the context in which both cases took place had numerous similarities." She indicated that these cases occurred "in the context of social conflict arising from the unresolved demands of the Mapuche communities concerning their ancestral lands," in which individuals who were members and leaders of these communities were charged with committing terrorist acts linked to setting fire to property.[192] Likewise, the Court has noted that, in another criminal trial held for the fire on the Poluco Pidenco property on December 19, 2001, for which five of the victims in this case were convicted as perpetrators of the offense of terrorist arson, the Angol Oral Court Oral applied the ordinary offense of arson established in article 476.3 and not the offense of terrorist arson (*supra* para. 123).

182. The Court notes that several international bodies and experts have stated that Chile has not dealt effectively with the causes of the Mapuche social protest in the regions of Bío Bío and Araucanía (*supra* para. 90). In this regard, Ben Emmerson, Special Rapporteur for the promotion and protection of human rights while countering terrorism stated that when the State raises expectations that it will resolve the Mapuche indigenous land claims "that then remain unfulfilled, […] there is an ever-present risk that the protests will escalate."[193] In this regard, it is essential that the State guarantee adequate and effective attention to and resolution of these claims in order to protect and ensure the rights of both the indigenous people and the other members of society in those regions.

VII.2 – RIGHT TO EQUAL PROTECTION (ARTICLE 24 OF THE AMERICAN CONVENTION) AND JUDICIAL GUARANTEES (ARTICLE 8(1), 8(2)(F) AND 8(2)(H) OF THE AMERICAN CONVENTION), IN RELATION TO ARTICLE 1(1)

183. The pertinent provisions of Article 8 of the Convention establish the following:

> **Article 8**
> **Right to a Fair Trial**
>
> 1. Every person has the right 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

[192] *Cf.* Law report prepared by Cecilia Medina Quiroga at the request of the Chilean Ombudsman, in order "to analyze the adaptation to international human rights treaties of Law No. 18,314, which punishes terrorist actions, and its application in the context of the so-called 'Mapuche conflict'" (annexes to the CEJIL motions and arguments brief, annex C, folios 2007 to 2061, and annexes to the FIDH motions and arguments brief, annex 13, folios 456 to 510).

[193] *Cf.* UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*, Addendum, Mission to Chile, para. 25 (merits file, tome V, folios 2566 to 2587).

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 nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[...]

f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

[...]

h) the right to appeal the judgment to a higher court.

184. Article 1(1) of the Convention stipulates that:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

185. Article 24 (Right to Equal Protection) of the American Convention provides that:

> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

186. The elucidation of whether or not the State has violated its international obligations owing to the actions of its judicial organs may make it necessary for the Court to examine the respective domestic proceedings[194] to establish their compatibility with the American Convention;[195] but this does not convert it into a court for the review of judgments delivered in domestic proceedings,[196] nor does it make it act as a criminal court in which the criminal responsibility of the individual can be examined. Its function is to determine the compatibility of the actions of the above-mentioned proceedings with the American Convention[197] and, in particular, to analyze the acts and omissions of the judicial organs in light of the guarantees protected in Article 8 of this treaty.[198]

187. To ensure real respect for the judicial guarantees protected in Article 8 of the Convention during a trial, all the requirements that "serve to protect, ensure or assert the ownership or exercise of a right" must be observed;[199] in other words, the "prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination."[200] The said Article 8 includes a system of guarantees that condition the exercise

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194 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 222, and *Case of Mohamed v. Argentina*, para. 79.

195 *Cf. Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of July 2, 2004. Series C No. 107, para. 146, and *Case of Mohamed v. Argentina*, para. 79.

196 *Cf. Case of Fermín Ramírez v. Guatemala*, para. 62, and *Case of Mohamed v. Argentina*, para. 81.

197 *Cf. Case of Castillo Petruzzi et al. v. Peru. Preliminary objections*, para. 83; *Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs*, para. 90, and *Case of Mohamed v. Argentina*, para. 81.

198 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*, para. 220, and *Case of Mohamed v. Argentina*, para. 81.

199 *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs.* Judgment of June 21, 2002. Series C No. 94, para. 147, and *Case of Mohamed v. Argentina*, para. 80.

200 *Cf. Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)*. Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 28, and *Case of Mohamed v. Argentina*, para. 80.

of the State's *ius puniendi* and seek to ensure that the accused or the defendant is not submitted to arbitrary decisions.[201]

188. The examination of the alleged violations of judicial guarantees will be divided into three parts:

a) Right to equal protection and right to be tried by an impartial court, in relation to the alleged violations to the detriment of the eight presumed victims

b) Right of the defense to examine witnesses, in relation to the alleged violations to the detriment of Messrs. Norín Catrimán, Pichún Paillalao and Ancalaf Llaupe;

c) Right to appeal the judgment before a higher court, in relation to the alleged violations to the detriment of seven of the presumed victims.

A) Right to equal protection (Article 24 of the Convention) and right to be tried by an impartial court (Article 8(1) of the Convention), in relation to Article 1(1) of the Convention

1. Arguments of the Commission and of the parties

189. The Commission affirmed that Chile had violated Articles 8(1) and 24 and of the Convention, in relation to Article 1(1) thereof, based on the following reasons:

a) It considered that there had been a selective application of the criminal law against the members of the Mapuche indigenous people. In its Merits Report it stated that "a number of international human rights organizations ha[d] expressed concern over the existence of a pattern of selective enforcement of Chile's anti-terrorism laws to members of the Mapuche indigenous people" and referred to those concerns. It affirmed that "this was the context at the time the [presumed] victims were prosecuted and convicted" and emphasized that "if a person's race or ethnic origin is a factor taken into account to make what would ordinarily be a common crime a terrorist offense, then this would be a case of selective application of the criminal law." It stated that "a difference in treatment based on their ethnic origin and/or link to the Mapuche people [had been proved], inasmuch as the consideration of these elements had the effect of influencing the decision," without the State having justified this difference in treatment;

b) In addition, in particular in its final written arguments (in which it indicated that, in this case, "the methodology used to determine whether or not discrimination existed should focus on the analysis of the reasoning of the judgment in question"), it affirmed that, in this case, the discrimination "occurred in the judgments" and asked the Court to analyze the reasoning given in them. It stated that there had been a violation of the right to an impartial court, protected in Article 8(1) of the Convention, because the courts "assessed and classified the acts based on pre-conceived ideas relating to the context in which they took place, and […] adopted their decision to convict the accused applying these prejudices." It asserted that Chile had incurred in "direct […] discrimination because this was explicitly present in the judgments convicting the victims." It indicated that, in itself, Law No. 18,314 was not discriminatory, and that there was no need to analyze "whether it had been applied to other persons who were not members of the Mapuche indigenous people." When analyzing "whether the prosecution and conviction of the [presumed] victims under the Counter-terrorism Act was discriminatory," the Commission affirmed that the three judgments convicting the

[201] *Cf. Exceptions to the Exhaustion of Domestic Remedies (Arts. 46.1, 46.2.a and 46.2.b, American Convention on Human Rights).* Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11, para. 28, and *Case of Mohamed v. Argentina*, para. 80.

victims contain "explicit and direct" discriminatory references and referred to each of them. It underscored, among other matters, that "the motivation [of the judgments] incorporates elements relating to ethnic origin, traditional leadership and links with the Mapuche indigenous people" in the domestic court's analysis of the subjective element or the terrorist intent, and

c) There had been a violation of impartiality, because the judges who delivered the judgments convicting the eight presumed victims "assessed and classified the acts based on pre-conceived ideas concerning the context in which they took place, and by adopting their decision to convict the accused applying these prejudices." According to the Commission, "the judges of the Oral Criminal Court held preconceived ideas about the situation of public order associated with the so-called 'Mapuche conflict,' a bias that caused the judges to consider it proved that Region IX was the scene of violent activities, which included the acts investigated in the case; it also caused them to copy, almost verbatim, the very same reasoning used in assessing individual conduct in an earlier criminal proceeding."

190. The FIDH argued that Chile had "violated the right to equal protection of the law and non-discrimination established in Article 24 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán." It also asserted that Chile had "violated the right to an impartial judge established in Article 8(1) of the Convention in relation to Article 1(1) of this instrument," to the detriment of these presumed victims.

a) In relation to the principle of equality and non-discrimination, it referred to the prosecution of these presumed victims and stressed that the judgments against them "were based on reasoning of a discriminatory nature owing to their ethnic affiliation," referring to several considerations in the said reasoning. Regarding the alleged selective application of Law No. 18,314, the FIDH indicated that "[t]he evidence of the difference in treatment" arose from "the application of harsher and inappropriate punishments." It affirmed that "all the powers of the Chilean State were involved in the decision not to apply ordinary law but rather emergency law […] to members of the Mapuche people" without an objective and reasonable justification. It indicated that "criminal justice statistics, the disproportion between the offense and the punishment, failure to respect the presumption of innocence, the biased assessments by the judges, the discourse of the Prosecution Service and the Ministry of the Interior, reveal a clear pattern of ethnic discrimination." Regarding the "statistical data" on the application of the said law between 2000 and 2005, it asked that this be "interpreted together with the effect of the undue application of terrorism offenses to the persons [it] represented." It also argued that "even nowadays the Counter-terrorism Act continues to be applied in a discriminatory manner to the Mapuche" and that "although this regime is applied in the investigation and trial stage, the judge then delivers a conviction for offenses under ordinary law."

b) Regarding the alleged violation of the right to an impartial court, it argued that "there was a subjective impartiality *(sic*) in the judgments convicting the victims in the case of the *Lonkos* and in the Poluco Pidenco case" and that it endorsed the Commission's conclusion in its Merits Report. It also affirmed that "the application of an inappropriate punishment to the *Lonkos* also reveals the bias." It argued also that the reference in the sentences to concepts such as "notorious public fact" and "it is public knowledge" shows that the domestic courts "approached the case with a bias or stereotype" and that the domestic court had copied the part relating to the classification of the acts as terrorist actions of the acquittal judgment in the case of Messrs. Norín

Catrimán and Pichún Paillalao in the judgment with the guilty verdict in the Poluco Pidenco case.

191. *CEJIL* alleged the violation of the "right to equal protection […] in relation to the general obligation to respect rights" (Articles 24 and 1(1) of the Convention), and of judicial guarantees (Articles 8(1), 8(2)(c), 8(2)(d) and 8(5) of the Convention), to the detriment of Víctor Manuel Ancalaf Llaupe:

a) Regarding the principles of equality and non-discrimination, it indicated that it "endorsed" the observations made in this regard by the Commission. Referring to the criminal proceedings against Mr. Ancalaf, it argued that "the existence of a discriminatory bias was evident during its processing," and that his case "illustrated the State's practice" of "selectively applying […] the anti-terrorist legislation against the members of the Mapuche people." It argued that "[t]he stereotype of the Mapuche was revealed not only during the investigation [in the case of Mr. Ancalaf], but was also reflected in the judgments delivered by the domestic courts as a decisive element for convicting the *Lonkos*, the *Werken* and, in general, the Mapuche leaders and activists." It affirmed that "[t]aking into account a person's membership in an ethnic group and, on this basis, classifying an act as a terrorist action" without the "difference in treatment" being justified, constitutes "an act of racial discrimination." It indicated that it was "the application of the Counter-terrorism Act that produced the discrimination and not the law in itself." It argued that its application in Mr. Ancalaf's case should "necessarily be understood in a context of the criminalization of the Mapuche people's claims," and that "different national and international bodies have recognized the existence of this context of discrimination." It affirmed that the State "has used 'ethnic origin' as a criterion to establish differences between individuals, inasmuch as the selective application was addressed at the members of a specific ethnic group" without justification;

b) With regard to these judicial guarantees, CEJIL argued that the criminal proceedings against Víctor Ancalaf Llaupe violated his guarantees contained in Article 8(1) (right to be heard by an impartial court and obligation to substantiate the accusation), 8(2)(c) (adequate means for the preparation of his defense), 8(2)(d) (right to be assisted by legal counsel of his own choosing) and 8(5) (the public nature of the proceedings) of the Convention, as well as the obligation established in Article 2 of this instrument. It set out the reasons why it considered that "the trial and subsequent conviction of Mr. Ancalaf Llaupe under a regime with inquisitorial characteristics – such as the one that was in force at the time of the events – resulted in a series of violations of the guarantees of due process." Regarding the alleged violation of Article 8(1), in relation to Articles 1(1) and 2 of the Convention, it argued that, under this regime, "[t]he structure and regulation" of this inquisitorial criminal system did not guarantee his right to be heard by an impartial judge or court, because "the charges were brought by a judicial decision of the judge who had headed the preliminary investigation and who then delivered the judgment." It affirmed that, in the criminal proceedings against Mr. Ancalaf Llaupe, the judge who conducted the investigation, then presided the trial, and delivered the judgment convicting him. It also indicated that the Concepción Court of Appeal "failed to comply […] with the obligation to provide sufficient reasoning to safeguard the right [of Víctor Ancalaf] to due process," because it decided that he had taken part in the facts and established his criminal responsibility for them "based above all on the testimony of anonymous witnesses." The arguments of CEJIL with regard to the alleged violation of Article 8(2)(c) and 8(5), in relation to Articles 1(1) and 2 of the Convention, refer to the confidentiality of the preliminary proceedings established in the former Code of Criminal Procedure and to the fact that all the proceedings in the trial were in writing. Regarding the alleged violation of Article 8(2)(d) in relation to Article 1(1) of the Convention, CEJIL stated that on the two occasion on which Mr. Ancalaf Llaupe made a statement before

the order to prosecute him was issued, he was never advised "in what capacity he had been summoned to appear before the court or made to appear accompanied by defense counsel, even though, at that time, procedural steps were being taken to investigate him."

192. The State, when contesting the alleged "selective application" of the Counter-terrorism Act, affirmed that "to acknowledged an error, *ex post*, in a judgment, or in the application of a procedural norm does not signify assigning to this error a certain hidden motivation shared not only by the person who has committed the error (a judge, prosecutor or lawyer) but by all the powers of the State." It also indicated that "[i] has been sought to assert, based on the judgments handed down in these cases and their negative impact on those who were directly prejudiced by them – natural and to be expected for anyone who is a victim of a judicial or administrative error – that the State of Chile has incurred in the said errors (if they exist) in a voluntary and planned manner." It affirmed that "[n]o State apparatus exists that is focused on repressing and convicting members of the Mapuche communities under the Counter-terrorism Act, in order to criminalize and stifle their ancestral claims," and that "[i]f this was true, each time that the organs responsible for criminal prosecution open proceedings under this law, the accused would be convicted," which was not the case. It affirmed that "seeking social peace, the Ministry [of the Interior and Public Safety] has ceased to prosecute acts of violence committed in the area of Araucanía as terrorist offenses." It maintained that "confronted with acts that have the characteristics of ordinary offenses or offenses under the Counter-terrorism Act […], whether committed by members of Mapuche communes or any other citizen, it is not feasible to require the State […] not to file criminal proceedings based on the argument that such acts could be inspired by an 'ancestral claim.'" It indicated that this law is not "an anti-Mapuche law" and that, "therefore, [t]he reasons for applying it do not respond to a desire to prosecute or to prejudice a specific group of the population, but to the conviction of the criminal prosecutor" that the characteristics of the acts indicate a terrorist intent. The State did not submit arguments on the alleged violation of the right to an impartial judge or court.

2. Considerations of the Court

193. The impartiality of the courts that intervened in the different cases has been questioned by two types or arguments. The first refers exclusively to the proceedings against Víctor Manuel Ancalaf Llaupe, the only one in which the former 1906 Code of Criminal Procedure was applied. The Court does not find it necessary to make a special ruling on these arguments and those relating to Article 8(2)(c), 8(2)(d) and 8(5) (*supra* para. 191.b), but will take them into account, as pertinent, when ruling on the right to defend oneself (Article 8(2)(f) of the Convention) (*infra* paras. 253 to 260) and on the alleged violation of personal liberty in relation to the pre-trial detention to which Mr. Ancalaf Llaupe was subjected (Article 7 of the Convention) (*infra* paras. 313 to 327).

194. The second group of arguments relates to the alleged discrimination based on ethnic origin against the presumed victims, either because of the supposed existence of a "selective application of the Counter-terrorism Act" against members of the Mapuche indigenous people, or because the domestic criminal judgments contain statements that are considered to constitute or to reveal discrimination of the type indicated.

195. In order to decide the disputes in this regard, the Court will structure its considerations in the following order::

a) General considerations:
   i. The principle of equality and non-discrimination and the right to equal protection of the law;
   ii. The right to an impartial judge or court;
b) Application to this case:

i. Alleged discriminatory and selective application of the Counter-terrorism Act to members of the Mapuche indigenous people, and
ii. Alleged use of stereotypes and social prejudices in the domestic criminal judgments.

a) General considerations

a.i) The principle of equality and non-discrimination and the right to equal protection of the law

196. As already indicated, Article 1(1) of the Convention establishes that the States Parties "undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." Meanwhile, Article 24 stipulates that "[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law" (*supra* paras. 184 and 185).

197. Regarding the principle of equality before the law and non-discrimination, the Court has indicated that "the notion of equality springs directly from the oneness of the human family, and is linked to the essential dignity of the individual." Thus, any situation is incompatible with this concept that, by considering one group superior to another group, leads to treating it in a privileged way; or, inversely, by considering a given group to be inferior, treats it with hostility or otherwise subjects it to discrimination in the enjoyment of rights that are accorded to those who are not so classified.[202] The Court's case law has also indicated that, at the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the sphere of *jus cogens*. It constitutes the foundation for the legal framework of national and international public order and permeate the whole legal system.[203]

198. Regarding the concept of discrimination, the definitions contained in Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination[204] and Article 1(1) of the Convention on the Elimination of All Forms of Discrimination Against Women[205] lead to the conclusion that discrimination is any distinction, exclusion, restriction or preference based on the prohibited reasons which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field.[206]

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[202] *Cf. Proposed Amendment to the Naturalization Provisions of the Constitution of Costa Rica.* Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 55, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 79.

[203] *Cf. Juridical Status and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 101, *Case of the Xákmok Kásek Indigenous Community. v. Paraguay*, para. 269, and *Case of Atala Riffo and daughters v. Chile*, para. 79.

[204] Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination establishes that: "[i]n this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

[205] Article 1(1) of the Convention on the Elimination of All Forms of Discrimination Against Women establishes that: "[f]or the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

[206] This definition is similar to the one established by the Human Rights Committee, which has defined discrimination as: "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose

199. Article 24 of the American Convention prohibits any discrimination, *de facto* or *de jure* not only in relation to the rights established in this treaty, but with regard to all the laws enacted by the State and their application.[207] In other words, it does not simply repeat the provisions of Article 1(1) of this instrument with regard to the obligation of States to respect and ensure the rights recognized in this treaty without discrimination, but, additionally, establishes a right that also gives rise to the State's obligation to respect and ensure the principle of equality and non-discrimination in order to safeguard other rights and in all domestic laws that it enacts,[208] because it protects the right to "equal protection of the law,"[209] so that it also prohibits discrimination resulting from any inequality derived from domestic law or its application.[210]

200. The Court has determined that a difference of treatment is discriminatory when is has no objective and reasonable justification;[211] in other words, when it does not seek a legitimate purpose and when the means used are disproportionate to the purpose sought.[212]

201. In addition, the Court has established that States must abstain from carrying out actions that are in any way directly or indirectly designed to create situations of discrimination *de jure* o *de facto.*[213] States are obliged to take affirmative action in order to reverse or change any discriminatory situations in their societies that prejudice a specific group of persons. This involves the special obligation of protection that the State must exercise with regard to the actions and practices of third parties who, with its tolerance or acquiescence, create, maintain or encourage discriminatory situations.[214]

202. Taking into account the interpretation criteria stipulated in Article 29 of the American Convention and in the Vienna Convention on the Law of Treaties, the Court considers that ethnic origin is a one of the prohibited criteria for discrimination that is included in the expression "any other social condition" of Article 1(1) of the American Convention. The Court has indicated that, when interpreting the content of this expression, "the rule most favorable to the protection of the rights recognized in this treaty must be chosen, based on the principle of

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or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms." *Cf.* UN Doc. CCPR/C/37, Human Rights Committee, *General Comment No. 18, Non-discrimination,* 10 November 1989, para. 7.

207 Cf. *Case of Yatama v. Nicaragua. Preliminary objections, merits, reparations and costs*. Judgment of June 23, 2005. Series C No. 127, para. 186, and *Case of Atala Riffo and daughters v. Chile*, para. 82.

208 *Cf. Case of Yatama v. Nicaragua*, para. 186.

209 *Cf.* Advisory Opinion OC-4/84 of January 19, 1984, para. 54, and *Case of Atala Riffo and daughters v. Chile*, para. 82.

210 *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182, para. 209, and *Case of Atala Riffo and daughters v. Chile*, para. 82.

211 *Cf. Juridical Status and Human Rights of the Child. Advisory Opinion OC-17/02* of August 28, 2002. Series A No. 17, para. 46; *Advisory Opinion OC-18/03* of September 17, 2003, para. 84, and *Case of Yatama v. Nicaragua*, para. 185.

212 *Cf.* ECHR, *Case of D.H. and Others v. the Czech Republic*, No. 57325/00. Judgment of 13 November 2007, para. 196, and ECHR, *Case of Sejdic and Finci v. Bosnia and Herzegovina*, Nos. 27996/06 and 34836/06. Judgment of 22 December 2009, para.42.

213 *Cf.* Advisory Opinion OC-18/03 of September 17, 2003, para. 103, and Case of *Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs.* Judgment of October 24, 2012 Series C No. 251, para. 236.

214 *Cf.* Advisory Opinion OC-18/03 of September 17, 2003, para. 104, and *Case of Nadege Dorzema et al. v. Dominican Republic*, para. 236. The United Nations Human Rights Committee had stated this previously in its *General Comment No. 18, Non-discrimination* of 10 November 1989, CCPR/C/37, para. 10.

the rule most favorable to the individual."[215] The specific criteria for which discrimination is prohibited in this article are not a taxative or exclusive list, but merely declarative. The wording of this article "leaves the criteria open-ended with the inclusion of the expression 'any other social condition,' to incorporate other categories that had not been explicitly indicated."[216]

203. Several international treaties expressly prohibit discrimination based on ethnic origin.[217] Moreover, other international instruments reaffirm that indigenous peoples should not be subjected to any form of discrimination.[218]

204. The Court takes into account that ethnic group refers to communities of individuals who share, among other aspects, characteristics of a socio-cultural nature, such as cultural, linguistic, spiritual affinities and historical and traditional origins. The indigenous peoples fall within this category, and the Court has recognized that they have specific characteristics that constitute their cultural identity,[219] such as their customary law, their economic and social characteristics, and their values, practices and customs.[220]

205. In Chile, the Mapuche indigenous people are recognized as an indigenous ethnic group under article 1 of Law No. 19,253 ("Indigenous Peoples' Act"), promulgated in September 1993 (*supra* para. 88), which establishes that:

> The State recognizes that the indigenous peoples of Chile are the descendants of the groups of humans who have lived on national territory since pre-Colombian times, who conserve their own cultural and ethnic characteristics and for whom the land is the bedrock of their existence and culture.
>
> The State recognizes as the main indigenous ethnic groups of Chile: **the Mapuche**, Aimará, Rapa Nui or Easter Islanders, that of the Atacaman, Quechuas and Collas communities in the northern part of the country, and the Kawashkar or Alacalufe and Yámana or Yagán communities in the austral fjords. The State values their existence, because they are an essential element of the origins of the Chilean nation, as well as their integrity and development, in accordance with their customs and values.

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[215] *Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights).* Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 52, and *Case of Atala Riffo and daughters v. Chile*, para. 84.

[216] *Cf.* Case of *Atala Riffo and daughters v. Chile*, para. 85.

[217] For example, article 2 of the International Convention for the Elimination of All Forms of Racial Discrimination establishes the obligation of the States parties "to engage in no act or practice of racial discrimination against persons, groups of persons or institutions" and, in its article 1, determines that "the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." Article 2 of the Convention on the Rights of the Child establishes that States "shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status," thus including the category of "race" separately from "national, ethnic or social origin." Article 1 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families stipulates that "[t]he [said] Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status."

[218] The fifth paragraph of the preamble to the United Nations Declaration on the Rights of Indigenous Peoples reaffirms "that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind" and, in article 2, stipulates that "indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity." *Cf.* UN Doc. A/RES/61/295, 13 September 2007, *United Nations Declaration on the Rights of Indigenous Peoples*, Resolution 61/295 of the General Assembly of the United Nations.

[219] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 51, and *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia*, para. 354.

[220] *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 63, and *Case of the Afro-descendant Communities Displaced from the Río Cacarica Basin (Operation Genesis) v. Colombia*, para. 354.

> It is the duty of society in general and of the State in particular, through its institutions, to respect, protect and promote the development of the indigenous peoples, their cultures, families and communities, taking appropriate measures to achieve these objectives, and to protect indigenous lands, supervise their satisfactory exploitation and their ecological balance, and promote their expansion. [*Bold added*]

206. Article 1(1) of the American Convention prohibits discrimination in general, and includes categories who may not be discriminated against (*supra* para. 196). Taking into account the criteria described previously, this Court places on record that the ethnic origin of an individual is a category protected by the Convention. Hence, the American Convention prohibits any discriminatory norm, act or practice based on an individual's ethnic origin. Consequently, no norm, decision or practice of domestic law, applied by either State authorities or by private individuals, may reduce or restrict in any way the rights of an individual based on his ethnic origin.[221] This is equally applicable to the prohibition, under Article 24 of this instrument, of unequal treatment based on ethnic origin under domestic law or in its application.

a.ii) The right to an impartial judge or court

207. Article 8 of the American Convention is entitled "Right to a Fair Trial" ["Judicial Guarantees" in the Spanish version]. The first of these guarantees is that of Article 8(1), which establishes the following:

> 1. Every person has the right 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 nature.

208. In the instant case, allegations have been submitted to the Court's consideration concerning the supposed lack of impartiality of the judges or courts that handed down the judgments convicting the presumed victims in this case. In this regard, the Court has established that personal impartiality requires that a judge who intervenes in a specific dispute must approach the events of the proceedings without any subjective bias and, also, offering sufficient guarantees of objectivity that eliminate any doubt that the accused or the community may have concerning the absence of impartiality. The Court has emphasized that personal impartiality is presumed unless there is evidence to the contrary consisting, for example, in the demonstration that a member of a court or a judge has personal prejudices or biases against the litigants. The judge must appear to be acting without being subject to direct or indirect influence, incentive, pressure, threat or interference, but only and exclusively in accordance with – and inspired by – the law.[222]

209. The Court has also determined that "a violation of Article 8(1) owing to the presumed lack of judicial impartiality of the judges must be established based on specific, concrete probative elements that indicate the presence of a case in which the judges have clearly let themselves be influenced by aspects or criteria other than legal norms."[223]

210. Effective measures to combat terrorism must be complementary and not contradictory to the observance of the norms for the protection of human rights.[224] When adopting measures

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[221] The same is true with regard to the prohibition of discrimination based on sexual orientation. *Cf. Case of Atala Riffo and daughters v. Chile*, para. 91.

[222] *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*, para. 56, and *Case of Atala Riffo and daughters v. Chile*, para. 189.

[223] *Cf.* Case of *Atala Riffo and daughters v. Chile*, para.190.

[224] *Cf.* UN Doc. A/HRC/16/51, December 21, 2010, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Ten areas of best practices in countering terrorism,* paras. 12 and 13. Similarly: *Case of Loayza Tamayo v. Peru*. *Merits*, paras. 44 and 57; *Case of Cantoral Benavides v. Peru. Merits*. Judgment of August 18, 2000. Series C No. 69, para. 95; *Case of Lori Berenson Mejía v. Peru*. *Merits, reparations and costs*. Judgment of November 25, 2004. Series C No. 119, para. 91, and *Case of the Miguel Castro Castro Prison v. Peru*. *Interpretation of the judgment on merits, reparations and costs.* Judgment of August 2, 2008 Series C No. 181, paras. 76 to 80.

that seek to protect the persons subject to their jurisdiction against acts of terrorism, States have the obligation to ensure that the criminal justice system and respect for procedural guarantees abide by the principle of non-discrimination.[225] States must ensure that the objectives and effects of the measures taken in the criminal prosecution of terrorist actions are not discriminatory, allowing individuals to be subjected to ethnic stereotypes or characterizations.[226]

b) Application to this specific case

b.i) Alleged discriminatory and selective application of the Counter-terrorism Act to members of the Mapuche indigenous people

211. When the common interveners argued that there had been "selective application of the Counter-terrorism Act," they were referring to statistical data corresponding to the time of the events. In addition, the Commission and the representatives have mentioned a "context" of "selective application" of the Counter-terrorism Act "to individuals belonging to the Mapuche indigenous people" and to the "criminalization of the social protest" of this people (*supra* paras. 189 to 191).

212. Starting with the latter point, the Court understands that it is necessary to make a distinction between the attitudes towards the demonstrations in favor of the Mapuche people's claims disseminated by a major segment of the mass media (*supra* para. 93), and the ways in which the Ministry of the Interior and Public Security, and the Public Prosecution Service acted[227] when deciding in which cases to call for the application of the Counter-terrorism Act and the arguments on which this was based, and the final decisions adopted by the Chilean courts in this regard. The Court must focus its attention on the decisions of the courts, while taking into consideration the possibility that the way in which the media presented the so-called "Mapuche conflict" or the submissions of the Public Prosecution Service may have unduly influenced these decisions.

213. In particular, it should be stressed that, at the time of these trials, a legal presumption was in effect in Law No. 18,314 – that this Court has already declared incompatible with the principles of legality and presumption of innocence (*supra* paras. 168 to 177) – which established that the intention of instilling fear in the general population (special terrorist intent), would be presumed "based on the fact that the offense was committed using explosive or incendiary devices, weapons of great destructive powers, toxic, corrosive or infectious substances, or others that can cause major devastation, or by sending letters, packages or similar objects with explosive or toxic effects."

214. Regarding the second point, even though it was not, perhaps, the common interveners' intention that the Court analyze whether the alleged violations that affected the presumed victims in this case resulted from indirect discrimination arising from the disproportionate impact or indirect discriminatory effects of the said criminal law, the Court will examine, with the means available to it, the so-called "context" of "selective application" of the Counter-

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[225] *Cf.* UN Doc. A/57/18, 8 March 2001, Committee on the Elimination of Racial Discrimination, *Statement on racial discrimination and measures to combat terrorism*, adopted following the terrorist acts perpetrated in the United States of America on September 11, 2001, p. 102.

[226] *Cf.* UN Doc. HRI/GEN/1/Rev.9 (Vol.II), International Human Rights Instruments, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, *General recommendation No. XXX of the Committee on the Elimination of Racial Discrimination (2005)*, para. 10.

[227] In its answering brief, the State explained that "the Ministry of the Interior and Public Security and the Public Prosecution Service are the only public bodies legitimized to file actions against persons who, in their opinion, have committed offenses defined in the Counter-terrorism Act." See also: Table of criminal proceedings in Chile presented by the State as helpful evidence (file of helpful evidence presented by the State, folio 61).

terrorism Act "to individuals belonging to the Mapuche indigenous people" and the "criminalization of the social protest."

215. It is evident that members of the Mapuche indigenous people or activists linked to their cause have been prosecuted and, at times, convicted for actions that the law presumed to be terrorist acts under the legal framework in force at the time.[228] Several trials did conclude with an acquittal and, in this regard, the acquittal of Ms. Troncoso Robles and Messrs. Pichún Paillalao and Norín Catrimán and another five persons is particularly noteworthy. They were tried for the offense of conspiracy to commit a terrorist offense and accused of having formed an organization to commit offenses of a terrorist nature that acted "under the aegis" of the indigenous organization "*Coordinadora Arauco-Malleco*" (CAM) (*supra* para. 92).

216. Both the representatives and the State used or presented evidence relating to statistics on the application of the Counter-terrorism Act that covered different geographical areas and time periods or that analyzed the data from different perspectives. For example, regarding the periods of time, one piece of evidence refers to the period 1997 to 2003,[229] another to 2000 to 2013,[230] another to 2005 to 2012,[231] another to 2008 to 2012,[232] and another to 2010 and 2011.[233] Regarding the different purposes of the analysis, the Court points out that, for example: (a) one document refers to the number of complaints filed by the Ministry of the Interior and Public Security "for Mapuche protest actions" in "Regions VIII and IX" between 1997 and 2003, and reveals the application of the Counter-terrorism Act as of 2002,[234] but does not include information on the results of these proceedings or on proceedings in which this law

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[228] As indicated by Chile in its final written arguments presented in June 2013, "[s]ince 2004, only one person has been convicted of terrorist offenses; in 2009, in a case in which the accused himself acknowledged the acts simply in order to receive a lesser punishment." Also, in the information that Chile provided to the Human Rights Committee on October 21, 2008, the State affirmed that "[n]ine individuals of indigenous origin were convicted under [Law 18,314]." *Cf.* UN Doc. CCPR/C/CHL/CO/5/Add.1, 22 January 2009, Human Rights Committee, *Consideration of reports presented by States Parties under Article 40 of the Covenant,* Addendum, Information provided by the Government of Chile on the implementation of the concluding observations of the Human Rights Committee, 21 October 2008, para. 22.b).

[229] *Cf.* Article by Víctor Toledo Llancaqueo, "Prima ratio *Movilización mapuche y política penal. Los marcos de la política indígena en Chile 1990-2007,*" in the journal *Observatorio Social de América Latina*, Year VIII, No. 22, September 2007, Buenos Aires (file of annexes to the FIDH motions and arguments brief, annex 9, folios 66 to 105). Page 263 of this journal includes a "Table" entitled "Regions VIII and IX. Complaints filed by the Government for Mapuche acts of protest, 1997-2003," which indicates that the source of the information is a "note of the Ministry of the Interior based on a report of the Senate (2003) and INE judicial statistics."

[230] *Cf.* Document provided by the State indicating that it is a "List with a historical record of proceedings instituted throughout Chile under the Counter-terrorism Act between 2000 and 2013." The table provided does not have a heading (file of helpful evidence presented by the State, folios 52 to 55).

[231] The document was provided by the State indicating that it is a "List of proceedings in which the Counter-terrorism Act was used" (file of annexes to the answering brief, annex 8, folios 180 to 190). The probative elements offered do not allow the source of this document to be verified conclusively.

[232] The State provided this document indicating that it was a "Document with information on the investigations in the region of Araucanía (Source: Public Prosecution Service)" (file of helpful evidence presented by the State, folios 56 to 60).

[233] During the public hearing, expert witness Jorge Contesse stated that, "the 2011 annual report of the National Human Rights Institute indicates that, between 2010 and 2011, of [the] 48 individuals who were subjected to the special regime of the law that penalizes terrorist actions [Law No. 18,314], 32 of them […] belonged to the Mapuche people or were linked to it. *Cf.* Statement made by expert witness Jorge Contesse before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[234] *Cf.* Article by Víctor Toledo Llancaqueo, "Prima ratio *Movilización mapuche y política penal. Los marcos de la política indígena en Chile 1990-2007,*" in the journal *Observatorio Social de América Latina*, Year VIII, No. 22, September 2007, Buenos Aires (file of annexes to the FIDH motions and arguments brief, annex 9, folios 66 to 105). Page 263 of the journal includes a "Table" entitled in "Regions VIII and IX. Complaints filed by the Government owing to Mapuche acts of protest, 1997-2003" indicating that the source of the information is a "Note of the Ministry of the Interior based on a report of the Senate (2003) and INE judicial statistics."

was applied in relation to acts that were not related to the said protest; (b) other information refers to the proceedings instituted by the Ministry of the Interior and Public Security from 2005 to June 2012 (without specifying whether this refers to those instituted throughout Chile), from which it is possible to determine in how many the Counter-terrorism Act was cited and also to note that it appeared to have been cited for facts that *prima facie* – based on the description in the document – would have no relation to the context of the Mapuche social protest,[235] and (c) other information consists in tables relating to the investigations conducted by the Public Prosecution Service for offenses established in the Counter-terrorism Act between 2000 and July 2013[236] and between 2000 and April 2013[237] that – contrary to the two documents mentioned above include information on the status or result of the proceedings, but do not disaggregate the information by ethnic origin.[238] Also, with regard to the geographical areas that the evidence refers to, some of it covers data only from the Region of Araucanía,[239] without comparing it with references to and application of the Counter-terrorism Act in the rest of the country; some of it covers the whole of the State of Chile without disaggregating the information by ethnic origin,[240] and some of it does not mention the geographical area covered.[241] These same differences with regard to the use of statistics are present in the reports of the Special Rapporteurs and of the international human rights bodies.

217. Nevertheless, the Court pays particular attention to the information contained in the "comments of the State of Chile on the report of the visit of the Special Rapporteur" for promotion and protection of human rights while countering terrorism,[242] according to which, between 2000 and 2013 "the Public Prosecution Service had conducted a total of 19 proceedings under the Counter-terrorism Act, 12 of which related to land claims by Mapuche groups."[243]

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235 The document was provided by the State indicating that it was a "List of proceedings in which the Counter-terrorism Act has been cited" (file of annexes to the answering brief, annex 8, folios 180 to 190).

236 Document offered by the State as a "List with a historical record of [investigations] instituted under the Counter-terrorism Act between 2000 and 2013 throughout Chile (Source: Public Prosecution Service)." The table provided does not have a heading (file of helpful evidence presented by the State, folios 52 to 55). The Court has noted the assertion made by the FIDH in its observations on this evidence presented by Chile that the information provided in this document is incomplete, because, among other matters, it does not contain information on the proceedings held against Victor Manuel Ancalaf Llaupe.

237 *Cf.* document forwarded by the Public Prosecution Service in answer to the request for access to public information made by the representative Sergio Fuenzalida on April 8, 2013 (annex provided by CEJIL with its final arguments).

238 In this regard, see footnote 243.

239 The State provided this document indicating that it is a "Document with information on the investigations in the Region of Araucanía (Source: Public Prosecution Service)" (file of helpful evidence presented by the State, folios 56 to 60).

240 Document provided by the State indicating that it was a "List with a historical record of proceedings instituted under the Counter-terrorism Act between 2000 and 2013 throughout Chile." The table provided does not have a heading (file of helpful evidence presented by the State, folios 52 to 55).

241 The document was provided by the State indicating that it was a "List of proceedings in which the Counter-terrorism Act has been used" (file of annexes to the answering brief, annex 8, folios 180 to 190).

242 *Cf.* UN Doc. A/HRC/25/59/Add.3, 11 March 2014, Human Rights Council, *Comments of the State of Chile on the Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*. Addendum, Mission to Chile, para. 12.

243 This statistic is similar to the information provided by the parties in these proceedings:

a) The document forwarded by the Public Prosecution Service in response to the request for access to public information made by the representative Sergio Fuenzalida on April 8, 2013 (annex provided by CEJIL with its final arguments), which consists in a table with information on a total of 21 proceedings instituted by the Public Prosecution Service in which the Counter-terrorism Act was used between 2000 and April 2013 throughout Chile. This document does not contain information on the defendants disaggregated by ethnic origin. However, in its brief

218. Based on this information it is possible to note that, in most proceedings this law was used against members of the Mapuche indigenous people: of the 19 proceedings in which the criminal investigation was conducted under the Counter-terrorism Act, in 12 of them, the accused were of Mapuche origin or the proceedings were related to land claims by this people. In this regard, several of the reports of the United Nations Special Rapporteurs and Committees have expressed concern owing to the application of the Counter-terrorism Act to members of the Mapuche indigenous people in relation to offenses committed in the context of the social protest[244] or have mentioned a "disproportionate" application of the said law to the Mapuche.[245]

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with final arguments, CEJIL advised the Court that it had verified directly the files of these proceedings and found that in 11 of the 21 cases the accused were "members of the Mapuche people." The State did not contest this evidence or this statement by CEJIL, but ratified the latter, indicating in its final arguments that "the cases instituted by the Public Prosecution Service for terrorist offenses that were related to the Mapuche conflict between 2000 and 2013 numbered 11 throughout Chile."

b) The document that the State provided to the Inter-American Court in response to the request for helpful evidence indicating that it was a "List with a historical record of cases filed under the Counter-terrorism Act between 2000 and 2013 throughout Chile," consists of a table with information on 17 proceedings instituted by the Public Prosecution Service in which the Counter-terrorism Act was used between 2000 and July 2013 throughout Chile, but does not contain information on the defendants disaggregated by ethnic origin (file of helpful evidence presented by the State, folios 52 to 55). The Court asked Chile to supplement the information presented in this document indicating "in which cases the defendants or those convicted were of Mapuche origin." However, the State responded that this information had not been disaggregated and it was not possible to do this within the time frame accorded by the Court. When presenting its observations on this evidence, the FIDH stated that 12 of the 17 cases "are related to the Mapuche protest." Chile did not contest this.

[244] The 2007 report of the Human Rights Committee (CCPR/C/CHL/CO/5) expressed its concern that "charges of terrorism had been brought against members of the Mapuche community in connection with social protests or demands for protection of their land rights," but did not refer to the selective application of the Counter-terrorism Act, but rather to the concern owing to the excessively broad definition of terrorism in Law No. 18,314 and to the restriction of procedural guarantees under this law.

The 2007 report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin – who also provided an expert opinion before the Court in this case – expressed concern about the sentencing and conviction of nine members of the Mapuche community between 2003 and 2005 for offenses related to acts of social protest associated with the claims for indigenous traditional lands, owing to the definition of terrorism found in Chilean legislation.

In 2009, following his visit to Chile from April 5 to 9, 2009, the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, considered "a matter of some concern" the "application, especially in recent years, of the Counter-terrorism Act (Law No. 18314) to prosecute and convict members of the Mapuche community for offenses committed in the context of the social protest".

In 2009, in its concluding observations on Chile, the Committee on the Elimination of Racial Discrimination "note[d] with concern that the Counter-Terrorism Act (No. 18,314) ha[d] been mainly applied to members of the Mapuche people for acts that took place in the context of social demands relating to the defence of their rights to their ancestral lands." In this respect, this Committee recommended, *inter alia*, that Chile: "ensure that the Counter-Terrorism Act is not applied to members of the Mapuche community for acts of protest or social demands," and that it put into practice the recommendations made in this regard by the Human Rights Committee in 2007 and by the special rapporteurs on the situation of human rights and fundamental freedoms of indigenous people, following their visits to Chile in 2003 and 2009." The Committee also drew the State party's "attention to its General recommendation No. XXXI (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system (sect. B, para. 5 (e))." In its observations with regard to Chile of September 2013, the same Committee stated that "it remains concerned by reports that this law [No. 18,314] continues to be applied to a disproportionate extent to members of the Mapuche people in respect of acts that have taken place in connection with their assertion of their rights, including their rights to their ancestral lands," and again recommended to the State that it "[e]nsure that the Counter-Terrorism Act is not applied to members of the Mapuche community for acts that take place in connection with the expression of social demands," and that it "[i]mplement the recommendations made in this respect by the Human Rights Committee (2007) and by the Special Rapporteur on the rights of indigenous peoples (2003 and 2007) and take into account the preliminary recommendations made by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (2013), and also "[m]onitor the application of the Counter-Terrorism Act and related practices in order to identify any discriminatory effect on indigenous peoples." *Cf.* UN Doc. CCPR/C/CHL/C0/5, 17 April 2007, Human Rights Committee, *Consideration of reports presented by States Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee*, Chile, para. 7 (file of annexes to the Merits Report 176/10, annex 8, folio 312); UN Doc. A/HRC/6/17/Add.1, 28 November 2007, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin,* Addendum, para. 9 (file of annexes to the Merits Report 176/10, annex 10, folio 370); UN Doc.

219. The Court considers that the fact that this criminal law codifying terrorist acts has been mostly applied to members of the Mapuche indigenous people does not, in itself, lead to the conclusion that there has been the alleged "selective" application of a discriminatory nature. Furthermore, the Court was not provided with sufficient information on the universe of violent or criminal acts of a similar nature at the time of the events of this case supposedly perpetrated by individuals who were not members of the Mapuche indigenous people, to whom, using the criteria based on which the Counter-terrorism Act was applied in the cases of Mapuche defendants, this law should also have been applied.

220. The information provided by the Government of Chile on one of the observations made by the Human Rights Committee in April 2007 should be taken into account. This referred, among other matter, to the amendment of Law No. 18,314:

> **Amendment to Law 18,314 to bring it into line with article 27 of the [International] Covenant [on Civil and Political Rights]**
>
> 22. While the content of this Act is exceptional, it is a regular law in that it applies to all citizens without distinction, and no discrimination was exercised against the Mapuche individuals prosecuted under it. Quite apart from the specific case of these individuals, it is necessary to understand the context of this situation, which in no way constitutes political persecution of the indigenous or Mapuche movements. The following background information must be taken into consideration:
>
> (a) Minority groups linked to the claims over indigenous land rights began an offensive in 1999 against forestry and agricultural companies in some provinces of regions VIII and IX (Biobío and Araucanía). They carried out illegal occupations and committed robbery and theft; set fire to forests, crops, employer's buildings and houses, agricultural and forestry machinery and vehicles; attacked workers, forestry police, *carabineros* and property owners and their families; and even assaulted and threatened members of Mapuche communities who would not accept their methods. Their action bore no resemblance to that of the vast majority of indigenous organizations, which did not resort to violence to assert their legitimate aspirations;
>
> (b) The Act has been applied in situations of the utmost seriousness in nine prosecutions since 2001. The last occasion was in July 2003, in the case of the attack on the witness Luis Federico Licán Montoya, which left him disabled for life. Nine individuals of indigenous origin were convicted under the Act;
>
> (c) The legal action taken aimed to punish the perpetrators of the crimes, not the Mapuche people; punishing those who commit crimes does not constitute "criminalizing" a social demand, and much less an entire community;

A/HRC/12/34/ Add.6, 5 October 2009, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Addendum, The situation of indigenous peoples in Chile: follow-up to the recommendations made by the previous Special Rapporteur*, para. 46 (file of annexes to the Merits Report 176/10, annex 12, folio 441); UN Doc. CERD/C/CHL/C0/15-18, 7 September 2009, Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination,* Chile, para. 15 (file of annexes to the Merits Report 176/10, annex 14, folio 502), and UN Doc. CERD/C/CHL/CO/19-21, Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined nineteenth to twenty-first periodic reports of Chile, adopted by the Committee at its eighty-third session (12-30 August 2013*, para. 14.

[245] In his preliminary evaluation of his visit to Chile from July 17 to 30, 2013, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism stated that the protests by members of the Mapuche people related to "reclaiming their ancestral lands," "have typically been characterised by land occupation as well as arson and other forms of physical attacks directed against agricultural, logging and industrial property associated with the commercial settlement of Mapuche territory," and that "[t]he anti-terrorism legislation has been invoked by the local public prosecutors and by the Ministry of the Interior and Public Security in a relatively defined number of emblematic cases, mostly involving multiple accused. The statistics demonstrate that Mapuche protests account for the vast majority of prosecutions under the anti-terrorism legislation." In his final report on the said visit, the Special Rapporteur stated that "there can be no doubt that the anti-terrorism law has been used disproportionately against persons accused of crimes in connection with the Mapuche land protests." *Cf.* Statement by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism of 30 July 2013 on his visit to Chile from 17 to 30 July 2013, and UN Doc. A/HRC/25/59/Add.2, 14 April 2014, Human Rights Council, *Report of the Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson,* Addendum, Mission to Chile, para. 54 (merits file, tome V, folios 2566 to 2587).

(d) Chile has recognized the legitimacy of the indigenous peoples' claims, particularly those of the Mapuche; these claims have always been taken up by the democratic governments and channeled through the institutional machinery. Accordingly, the protection of the right to land has been enshrined in the Indigenous Peoples Act since 1993, enabling the transfer of land as detailed in paragraph 20 above.

23. Nevertheless, the President of the Republic has taken the policy decision not to apply this legislation to cases in which indigenous individuals are involved on account of their ancient demands and grievances, if it is possible to try them under ordinary law in future. It should be noted that in the specific case of the crime of arson, the penalty provided for under the Criminal Code is as high as that under the Counter-terrorism Act.[246]

221. The foregoing reveals that the Court has no evidence that would allow it to determine that the Counter-terrorism Act has been applied in a discriminatory manner against the Mapuche people or its members.

b.ii) Alleged use of stereotypes or social prejudices in the domestic criminal judgments

222. The Commission and the representatives indicated (*supra* paras. 189 to 191) that in various parts of the judgments convicting the presumed victims stereotypes and ethnic prejudices were evident, and asserted that this had constituted a violation of the principle of equality and of the right to an impartial judge or court. In its Merits Report, the Commission concluded in this regard that the State had violated the "right to equality before the law and non-discrimination established in Article 24 of the American Convention, in relation to Article 1(1) of this instrument" and "the defendants' right to an impartial judge established in Article 8(1) of the Convention in relation to Article 1(1) thereof" (*supra* para. 189).

223. Criminal law may be applied in a discriminatory manner if the judge or court convicts an individual on the basis of reasoning founded on negative stereotypes that associate an ethnic group with terrorism in order to determine any element of criminal responsibility. It is incumbent on the criminal judge to verify that all the elements of the offense have been proved by the accuser, because, as this Court has stated, the irrefutable proof of guilt is an essential requirement for criminal punishment; thus, the burden of proof evidently falls on the accuser and not on the accused.[247]

224. Stereotypes are pre-conceptions of the attributes, conducts, roles or characteristics of individuals who belong to a specific group.[248] The Court has indicated that discriminatory conditions "based on stereotypes […] that are socially dominant and socially persistent, […] are increased when the stereotypes are reflected, implicitly or explicitly, in policies and practices, particularly in the reasoning and the language of [the authorities]."[249]

225. Several of the expert witnesses made important contributions in this regard.[250] Expert witness Stavenhagen, proposed by the Commission and the FIDH, indicated that "[t]he discriminatory application of a law may arise from the grounds for its application, or if the reasons cited in order to apply it are not objective or contain some discriminatory element."

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246 *Cf.* UN Doc. CCPR/C/CHL/CO/5/Add.1, 22 January 2009, Human Rights Committee, *Consideration of reports presented by States Parties under Article 40 of the Covenant*, Addendum, Information provided by the Government of Chile on the implementation of the concluding observations of the Human Rights Committee, 21 October 2008, paras. 22 and 23.

247 *Cf. Case of Cabrera García and Montiel Flores v. Mexico*, para. 182, and *Case of J. v. Peru*, para. 233.

248 *Cf. Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 401, and *Case of Atala Riffo and daughters v. Chile*, para. 111.

249 *Cf. Case of González et al. ("Cotton Field") v. Mexico*, para. 401.

250 *Cf.* Written statement made by expert witness Rodolfo Stavenhagen on May 26, 2013, and affidavit prepared on May 17, 2013, by expert witness Carlos del Valle Rojas (file of statements of presumed victims, witnesses and expert witnesses, folios 288 a 290, 296 and 696).

Expert witness Carlos del Valle Rojas, proposed by the FIDH, analyzed the "juridical-judicial discourse" in order to determine the possible "existence of stereotypes, prejudices and discrimination in the criminal judgments" against the presumed victims in this case. In this regard, the expert witness concluded that the judgments "used discursive terms the judgmental, moral and/or political weight of which denotes the acceptance and reproduction of stereotypes that include strong social and cultural prejudices against the Mapuche communities and negative elements in favor of the prosecution." The expert witness indicated that "a significant part of the legal arguments" of these judicial decisions reveals "stereotypes and prejudices that reflect negatively on these communities, […] even though this is not revealed by the facts proved during the proceedings." He also affirmed that "different parts of the judgments […] use arguments that discriminate against the Mapuche communities" and that, "on various occasions, legal decisions that prejudice Mapuche leaders or community members are substantiated by a series of reasonings that, in turn, are supported by discriminatory terms, stereotypes or preconceived prejudices, in relation to the case examined." The expert witness analyzed different extracts from the domestic judgments that he considered "reveal" this "assimilation of stereotypes and prejudices and the recurrent use of discriminatory reasoning" by the domestic courts.

226. In order to establish whether a difference in treatment is based on a suspect category and to determine whether this constituted discrimination, it is necessary to examine the arguments adduced by the domestic judicial authorities, their actions, the language used, and the context in which th judicial decisions were handed down.[251]

227. The following are among the terms that the Commission and the common interveners of the representatives indicated, in particular, as being discriminatory and, with some variations, they appear in the different judgments:

> "[…] the actions that resulted in these wrongful acts reveal that the form, methods and strategies used had the criminal purpose of causing a generalized state of fear in the region.
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> The said wrongful acts are inserted in a process of recovery of Mapuche lands carried out committing acts of violence, without respecting the legal and institutional order, resorting to the use of force, planned, coordinated and prepared in advance by radicalized groups that seek to create a climate of insecurity, instability and fear in different sectors of Regions XIII and IX. These actions can be summarized in the formulation of excessive demands, made under pressure by belligerent groups to the owners and proprietors, who are warned that they will suffer different consequences if they do not accede to the groups' demands. Many of these threats have materialized in the forms of attacks on physical integrity, robberies, theft, arson, vandalism and occupation of land, which have affected both the personnel and the property of various owners of agricultural properties and logging companies in this part of the country.
>
> The objective is to instill in the population a justified fear of falling victim to similar attacks and, thereby, to force the owners to cease any further exploitation of their properties and, ultimately, to force them to abandon their properties. The feeling of insecurity and unease that these attacks cause has led to a decrease in the availability of labor and an increase in its cost, an increase in costs and loans both for hiring machinery for exploiting the properties and in the cost of policies to insure the land, the installations and the crops. Furthermore, it is increasingly common to see workers, machinery, vehicles and operations on the different properties under police protection to safeguard operations, all of which affects rights protected by the Constitution.
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> The foregoing is revealed by – although not necessarily with the same characteristics – the corroborating testimonies of Juan and Julio Sagredo Marín, Miguel Ángel Sagredo Vidal, Mauricio Chaparro Melo, Raúl Arnoldo Forcael Silva, Juan Agustín Figueroa Elgueta, Juan Agustín Figueroa Yávar, Armín Enrique Stappung Schwarzlose, Jorge Pablo Luchsinger Villiger, Osvaldo Moisés Carvajal Rondanelli, Gerardo Jequier Shalhlí and Antonio Arnoldo Boisier Cruces, who stated that they had been direct victims or knew of threats and attacks against individuals or property perpetrated by individuals belonging to the Mapuche ethnic group, witnesses who expressed in different ways the feeling of fear that these acts caused them. The foregoing is related to the words of expert witness José Muñoz Maulen, who stated that he had backed up on a compact disc information from his computer obtained

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[251] *Cf.* Case of *Atala Riffo and daughters v. Chile*, para. 95.

from the website "http/fortunecety.es/," which describes different activities related to the land claim movement that some of the members of the Mapuche ethnic group are carrying out in the eighth and ninth region of the country; the information contained in the report of the July 1, 2002, session of the Constitution, Legislation, Justice and Regulation Committee of the Senate of the Republic, which concluded with the finding of lack of service by the State; the information that has not been disproved and contained in part C, pages 10 and 11 of the edition of *El Mercurio* of March 10, 2002, on the number of conflicts caused by Mapuche groups by terrorist acts, online publications of *La Tercera*, *La Segunda* and *El Mercurio*, published on March 26, 1999, December 15, 2001, March 15 and June 15, 2002, respectively, and three tables taken from the webpage of the Chile's Foreign Investment Committee, divided into sectors and by regions, based on the political and administrative division of the country, that allow comparisons to be made between dollars invested in the other regions and in the Ninth, and show that private investment in the region has decreased.[252]

* * *

[…] Regarding the participation of both accused, the following must be considered:

1. As general background and from the evidence that the Public Prosecutor and the private accusers introduced at trial, it is a public and notorious fact that *de facto* organizations have existed within the area for some time that commit acts of violence or incite violence on the pretext of their territorial claims. Their *modus operandi* includes various acts of force targeted at the lumber businesses, small- and medium-size farmers, all of whom have one thing in common: they are owners of properties that are adjacent to, neighbor or are nearby indigenous communities that are asserting historical claims to those properties. The purpose of the measures is to reclaim lands that they believe are their ancestral lands. The illegal occupation of those lands is the means to accomplish the most ambitious goal. Through these actions, they believe they will gradually recover a portion of their ancestral territory and thereby strengthen the territorial identity of the Mapuche people. This is what the court learned from the testimony of victims Juan and Julio Sagredo Marin, Juan Agustin Figueroa Elgueta and Juan Agustin Figueroa Yávar, supported by the testimony of Armin Stappung Schwarzlose, Gerardo Jequier Salí, Jorge Pablo Luchsinger Villiger, Antonio Arnaldo Boisier Cruces and Osvaldo Moisés Carvajal Rondanelli, examined previously.

2. It has not been sufficiently established that these acts were caused by persons outside the Mapuche communities, since they were clearly intended to create a climate of harassment towards the property owners in the sector, in order to instill fear and make the owners accede to their demands. Their rationale relates to the so-called "Mapuche problem," because the perpetrators knew the territory that was claimed and no Mapuche community or property has been harmed.

3. It has been established that the defendant, Pascual Pichú, is a *Lonko* of the "Antonio Ñirripil" community and Segundo Norín is a *Lonko* of the "Lorenzo Norín" community, and this means that they have authority within the community and some degree of leadership and control over it.

4. It should also be emphasized that the defendants Pichún and Norín have been convicted of other offenses related to land occupation committed prior to these events and against wooded properties located near their respective communities. This is revealed by case file No. 22,530 and joindered cases in which Pascual Pichún was sentenced to four years of medium-term rigorous imprisonment at the maximum level, and Segundo Norín to 800 days of medium-term rigorous imprisonment at the medium level and, in both cases, to the legal ancillary penalties and costs for the offense of *[sic]*. In addition, Pichún Paillalao was also sentenced to 41 days' imprisonment at the maximum level and to the payment of a fine of 10 monthly tax units as perpetrator of the offense of driving under the influence. This is revealed from the respective extracts from his identity documents and record and from the copies of the final judgments duly certified and incorporated.

5. The Mapuche communities of Didaico and Temulemu adjoin the Nancahue forest farm, and

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[252] Thirteenth *considerandum* of the judgment delivered on September 27, 2003, convicting Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao. This passage is almost identical to one included in the previous judgment acquitting them, which was annulled (*supra* paras. 112 to 118); and to another passage contained in the nineteenth *considerandum* of the Judgment delivered on August 22, 2004, by the same court convicting Juan Patricio and Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán, and Patricia Roxana Troncoso Robles in the criminal proceedings relating to the act of arson on the Poluco Pidenco property (*supra* para. 126). *Cf.* judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court, thirteenth *considerandum*; judgment delivered on April 14, 2003, by the Angol Oral Criminal Trial Court, tenth *considerandum*, and judgment delivered on August 22, 2004, by Angol Oral Criminal Trial Court, second and nineteenth *consideranda* (file of annexes to the Merits Report 176/10, annex 15, 16 and 18, folios 537 to 540, 569 to 571, 679 and 680).

> 6. According to the testimony of Osvaldo Carvajal, both of the defendants are members of the *Coordinadora Arauco Malleco* C.A.M, a *de facto* organization – he repeated – and one of a violent nature.[253]
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> * * *
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> That the facts described in the preceding *considerandum* constitute the terrorist offense established in article 2.4 of Law No 18,314, in relation to article 1 of that law. This is because they reveal that actions were taken in order to instill in some of the population a justified fear of falling victim to such crimes, bearing in mind the circumstances, and also the nature and effects of the means employed, as well as the evidence that they were the result of a premeditated plan to attack the property of third parties engaged in work relating to the construction of the Ralco Power Plant of Alto Bío Bío, all with the purpose of forcing the authorities to take decisions that would prevent the construction of this plant.[254]
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> * * *
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> 19. That the evidence relating to the first, seventh and thirteenth conclusions of the first instance ruling constitute judicial presumptions that, carefully assessed, prove that the trucks and the backhoe were set on fire in the context of the Pehuenche conflict, in Region 8, province of Bío Bío, Santa Bárbara commune, in the sector of the cordillera known as Alto Bío Bío, which is related to the opposition to the construction of the Ralco Hydroelectric Plant, and where, also, it is well-known that the sisters, Berta and Nicolasa Quintremán Calpán are opposed to the Endesa project because their land – which contains their ancestors, their origins, their culture and their traditions – will be flooded when the Plant is built.
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> The acts took place in this context as a way of compelling the authorities to take decisions, or of imposing demands to halt the construction of the Plant.
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> 20. That, to this end, on September 29, 2001, and March 3 and 17, 2002, two trucks and a backhoe were set on fire and, subsequently, two more trucks; all vehicles working for Endesa. The first incident involved several individuals all except one of whom wore hoods; they fired a shotgun and hit the truck driver with a stick. The second incident involved at least two individuals with their faces covered, one of them, armed with a shotgun, fired two shots into the air. On the third occasion, a group of hooded individuals was involved, one of whom carried a firearm and fired shots into the air. In all these incidents, inflammable fuel, such as gasoline or a similar product, was used.
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> The illegal acts described above were carried out violently without observing the legal and institutional order in force, resorting to previously planned acts of violence. Considering how the events occurred, the place and the *modus operandi*, they were perpetrated to create situations of insecurity, instability and anxiety, instilling fear in order to present demands to the authorities under criminal pressure imposing conditions in order to achieve their objectives.[255]

228. The Court considers that the mere use of this reasoning, which reveals stereotypes and biases, as grounds for the judgments constituted a violation of the principle of equality and non-discrimination and the right to equal protection of the law, recognized in Article 24 of the American Convention, in relation to Article 1(1) of this instrument.

229. The allegations of a violation of the right to an impartial judge or court, established in Article 8(1) of the American Convention, are closely linked to the presumption of the terrorist intent "to instill […] fear in the general population" (a subjective element of the definition) that, as the Court has already declared (*supra* paras. 168 to 177), violates the principle of legality and the guarantee of presumption of innocence established in Articles 9 and 8(2) of the Convention, respectively. The alleged violation of Article 8(1) should be considered subsumed in the previously declared violation of Articles 9 and 8(2). Consequently, the Court considers that it is not necessary to rule in this regard.

230. *The Court concludes that the State has violated the principle of equality and non-discrimination and the right to equal protection of the law recognized in Article 24 of the*

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253 Fifteenth *considerandum* of the Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annex 15, folios 513 and 514).

254 Fifteenth *considerandum* of the Judgment delivered on December 30, 2003, by the investigating judge of the Concepción Court of Appeal (file of annexes to the Merits Report 176/10, annex 20, folios 751 and 752).

255 Nineteenth and twentieth *consideranda* of the Judgment delivered on June 4, 2004, by the Third Chamber of the Concepción Court of Appeal (file of annexes to the CEJIL motions and arguments brief, annex A, folios 1730 and 1731).

American Convention, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe.

B) Right of the defense to examine witnesses (Article 8(2)(f) of the Convention) in relation to the criminal proceedings against Messrs. Norín Catrimán, Pichún Paillalao and Ancalaf Llaupe

1. Pertinent facts

231. In the criminal proceedings against Messrs. Norín Catrimán, Pichún Paillalao and Ancalaf Llaupe the identity of certain witnesses was kept secret.

a. Proceedings against Messrs. Norín Catrimán and Pichún Paillalao

232. In the proceedings against Messrs. Norín Catrimán and Pichún Paillalao, the Traiguén guarantees judge, at the request of the Public Prosecution Service, ordered that the identity of two witnesses be kept secret and prohibited taking photographs of them or recording their image by any other means,[256] based on articles 307 and 308 of the Criminal Procedural Code and articles 15 and 16 of Law No. 18,314.

a) The 2000 Criminal Procedural Code establishes the obligation of the witness to identify himself and provide all his personal data,[257] except when the "public indication of his address could entail danger for [him] or another person," in which case "the President of the chamber or the judge, as applicable, may authorize the witness not to answer this question." Moreover, if the witness avails himself of this right, "the disclosure, in any form, of his identity or information that would lead to this, shall be prohibited," and this shall be ordered by the court (Article 307). Also, the Code stipulates that the court may order "special measures designed to protect the safety of the witness who requests this" in "specific serious cases," which "may be renewed as often as necessary" and, similarly, establishes that "the Public Prosecution Service, *ex officio* or at the request of the interested party, shall adopt any measures required in order to provide the witness, before or after he has given his testimony, with appropriate protection" (Article 308).

b) Article 15 of Law No. 18,314 contains norms that supplement "the general rules on witness protection of the Criminal Procedural Code."[258] They establish that "if, during the investigation stage, the Public Prosecution Service considers that, owing to the circumstances of the case, there is a real risk to the life or physical integrity of a witness or an expert witness" or of certain individuals to whom such persons are related by blood or marriage, or through ties of affection, "it shall order, *ex officio* or at the request of the interested party, any special measures of protection that are required […] to protect the identity of those who intervene in the proceedings, their home, profession and place of

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256 *Cf.* Application by the Public Prosecution Service, Traiguén local prosecutor, of September 2, 2002, addressed to the Traiguén guarantees judge, requesting, among other matters, "[t]hat no mention is made in the investigation files of the first name, last name, profession or trade, place of work, or any other information that could serve to identify the witnessed who appear in the investigation as 'Witness No.1 RUC 83503-6 and 'Witness No.2 RUC 83503-6,' using these codes as a mechanism to verify their identity and eliminating their personal data from the said records," and Decision issued on September 3, 2002, by the Traiguén guarantees judge (file of annexes to the Merits Report 176/10, appendix 1, folios 4422 to 4424).

257 Article 307 of the Criminal Procedural Code establishes that: "[t]he statement of the witness shall commence be indicating his personal information, especially his first names, last names, age, place of birth, civil status, profession, trade or employment, and residence or domicile […]."

258 Article 15 of Law No. 18,314 establishes that: "[n]otwithstanding the general rules on witness protection of the Criminal Procedural Code […]."

work." Article 16 of the Counter-terrorism Act grants the court the authority "to order the prohibition to reveal, in any way, the identity of protected witnesses or expert witnesses, or any information that would lead to their identification," as well as "the prohibition for them to be photographed, or their image to be recorded by any other means."

233. The Public Prosecution Service founded its request on the fact that it was "absolutely necessary to adopt these measures to guarantee the proper protection of the witnesses, as well as of their family members and other persons connected to them by ties of affection, owing to the nature of the illegal acts under investigation and, in particular, considering their characteristics; circumstances that mean that the case investigated is particularly serious." The Public Prosecution Service also asserted that "these measures do not impair the right of defense, because the prosecution has already provided the defense with the records of the investigation so that they can make the corresponding arguments in the hearing prior to the oral trial and prepare the respective cross-examinations for the oral trial." The Traiguén guarantees judge admitted all aspects of this request.[259]

234. Two anonymous witnesses testified at the public hearings held in the trials against Messrs. Norín Catrimán and Pichún Paillalao. They did this behind a "screen" that hid their faces from all those present except the judges and with a "voice distorter." The defense was able to examine them in these conditions. In the second trial, which was held because the first one was annulled, the defense counsel were allowed to know the identity of the said witnesses, but under the express prohibition to transmit this information to the defendants. Mr. Norín Catrimán's defense counsel refused to be informed of the identity of the witnesses because he was unable to tell the defendant. In both the initial acquittal judgment and in the later judgment that delivered a guilty verdict, the testimony of the anonymous witnesses was taken into account and assessed.[260] This factual framework makes it relevant to refer to the fact that, at the date of these proceedings, the last paragraph of Article 18 of the Counter-terrorism Act established that "[t]he testimony of a protected witness or expert witness may never be received and introduced in the trial without the defense having been able to exercise its right to cross-examine him in person."

b. Proceedings against Mr. Ancalaf Llaupe

235. The criminal proceedings against Víctor Ancalaf Llaupe were conducted under the 1906 Code of Criminal Procedure and its amendments and had two stages, the preliminary and the plenary proceedings, both of them of a written nature (*supra* para. 104). According to articles 76 and 78 of this Code, during the preliminary proceedings, which was confidential, "the investigation of the acts that constitute[d] the offense" was conducted and also the "measures to prepare the trial." According to article 449 of this Code, during the plenary adversarial proceedings, it was not necessary to re-submit the evidence collected during the preliminary proceedings if the defendant waived the submission of evidence at that stage and agreed that the judge could deliver his ruling, "without any more formalities than the indictment and the answer to this." In addition, article 189 established the "right' of "[e]very witness" "to request" the "*Carabineros*, the Police Investigation Unit, or the court" to "keep his identity secret from third parties" and "in specific serious cases," the judge could "order special measures to protect the safety of the witness who requests this" that would remain in place for "the reasonable time established by the court and c[ould] be renewed as often as necessary."

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[259] *Cf.* Application by the Public Prosecution Service, Traiguén local prosecutor, of September 2, 2002, addressed to the Traiguén guarantees judge, and Decision issued on September 3, 2002, by the Traiguén guarantees judge (file of annexes to the Merits Report 176/10, appendix 1, folios 4422 to 4424).

[260] *Cf.* Summary of the audio recordings of the oral trial held on March 31 and on April 8, 2001, before the Angol Oral Criminal Trial Court (file of helpful evidence presented by the State, folios 424 to 444), Judgment delivered on April 14, 2003, by the Angol Oral Criminal Trial Court, and Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court (file of annexes to the Merits Report 176/10, annex 15 and 16, folios 509 to 574).

236. In the proceedings against Mr. Ancalaf Llaupe the identity of certain witnesses was kept secret during the two stages, and even in the plenary proceedings, the defense did not have access to all the proceedings, because secret files were established. The corresponding measures were based on the mere citing of the norms applied, without any specific grounds in relation to the case in question.[261]

2. Arguments of the Commission and of the parties

237. The Commission alleged the violation of Article 8(2)(f) of the Convention, in relation to Articles 1(1) and 2 of this instrument with regard to Messrs. Norín Catrimán, Pichún Paillalao and Ancalaf Llaupe, citing case law of the European Court of Human Rights in this regard. It argued that the justification for exceptional measures, such as the anonymity of deponents in criminal proceedings, arises from the nature of a certain kind of case and to the extent that the life and personal integrity of the deponents may be at risk; nevertheless, they should be "counterbalanced by other measures […] so as to compensate for the handicap under which the defense is laboring." Regarding the proceedings against Mr. Ancalaf Llaupe, it affirmed that the testimony of anonymous witnesses was received during an inquisitorial proceeding that "was kept secret for most of the investigation," so that it was not possible to examine these witnesses when they were giving their testimony. It added that, even though the testimony of these witnesses was assessed together with other evidence, they were "decisive" in establishing the existence of the offenses and the responsibility of the defendants. It considered that "the restrictions to the right of defense […] were not sufficiently counterbalanced by other measures in the proceedings that would have offset the handicap that the anonymity caused for the defense."

238. The FIDH stated that Chile had "violated the right of defense of the *Lonkos* Aniceto Norín and Pascual Pichún, specifically their right to examine the witnesses present in the court under Article 8(2)(f) of the American Convention, in relation to the obligations established in Articles 1(1) and 2 of this instrument." They asserted that the new criminal procedural system established witness protection mechanisms "other than the 'faceless' witnesses" established in the Counter-terrorism Act, which was applied in the case of Messrs. Norín Catrimán and Pichún Paillalao. They indicated that it was very serious that the secret identity regime ensures "the impunity [of the] witness who does not tell the truth and prevents cross-examination." It stated that the refusal to lift the anonymity in the case of one of these witnesses was a "strategy" to ensure that he could "lie with impunity." It asserted that "no measure was taken to counterbalance the anonymous witnesses," even though, "during the second trial, an attempt was made to rectify the violation of due process committed in the first trial that was annulled, [and in which] it had been totally prohibited to give out the names of the [anonymous] witnesses, and their identity had only been revealed to the lawyers with the express prohibition to advise the *Lonkos* of their names." It alleged that the right to carry out a "genuine cross-examination" was curtailed, since "it was not permitted to ask questions that would make it possible to infer the identity of the witness." It also affirmed that Law No. 18,314 does not establish that this measure is exceptional; it merely defends the need for it based on the severity of the offenses presumably committed, which constitutes a "circular argument." It also stated that this measure is not subject to judicial control and that the witnesses could come forward to testify with illegitimate interests owing to the authorization under Law 18,314 that they can be paid sums of money.

239. CEJIL affirmed that Chile had violated Article 8(2)(f) of the Convention to the detriment of Mr. Ancalaf Llaupe, within a broader argument on the "access to an effective

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[261] *Cf.* Judicial file of the domestic criminal proceedings held against Víctor Manuel Ancalaf Llaupe (file of annexes to the CEJIL motions and arguments brief, annex A, folios 1203, 1204, 1235, 1236, 1246, 1435, 1444 to 1446, 1455, 1461 and 1477 to 1482).

defense," stating that the adversarial principle entails the right of the defendant to examine the witnesses who testify for and against him, under the same conditions. It indicated that "[t]he inquisitorial procedure held against [Mr. Ancalaf Llaupe] prevented him from examining the witnesses who incriminated him when they were testifying, leaving the defense in a situation of evident procedural imbalance," which "was aggravated by the use of anonymous witnesses," and because he was "convicted based on testimony provided in secret files." It stated that "there is no evidence in the case file" that the defense of Víctor Ancalaf Llaupe were able to examine and cross-examine witnesses who had testified during the preliminary proceedings. It indicated that "the use of anonymous witnesses must be duly justified and counterbalance adequately [in order to] protect the right of defense." It affirmed that "[n]either the exceptional use of the mechanism [of anonymous witnesses], nor the existence of a real danger was proved during the proceedings." CEJIL also affirmed that the State had violated Article 8(2)(f) of the Convention to the detriment of Mr. Ancalaf Llaupe because the possibility of his defense counsel "obtaining evidence during the plenary proceedings was almost inexistent" and "he did not have a real and effective right to answer the charges and evidence against him."

240. The State indicated that "the possibility of establishing measures of protection for certain witnesses in criminal cases is consequent with the obligation to safeguard the right to life and physical integrity of [the] individual." Nevertheless, "to ensure that [this] cannot affect the right of defense substantively, it must observe certain conditions that also allow this right to be safeguarded." It affirmed that both general procedural laws and the Counter-terrorism Act permit "the cross-examination of witnesses and expert witnesses, even those whose identity is kept confidential," with the restrictions imposed by article 18 of the latter to the effect that questions may not be asked that "entail a risk of revealing the identity [of the witness]," and indicated that the courts "know the identity of the witness and are able to assess the reliability of his testimony, [because, based on the] principle of immediacy that governs the criminal procedural system, every witness or expert witness is examined before [the courts]." It also affirmed that this measure is subject to "prior control," because a request must be made to the guarantees judge together with the respective justification "based on the risk to the safety of the witness or his family." It indicated that this type of testimony is assessed by the oral trial court under its obligation to provide the reasoning for its conclusions, and that "it is possible that the respective court may rely on the testimony of one or more anonymous witnesses, together with other evidence provided, if applicable, to convince it fully of the participation of the defendant in the acts that he is accused of, without this being, in itself, contrary to the right to due process or to the international standards."

3. Considerations of the Court

241. On previous occasions the Court has ruled on violations of the right of the defense to examine witnesses in cases dealing with measures that, under the military criminal justice system, imposed an absolute prohibition to cross-examine witnesses for the prosecution,[262] others in which there were not only "faceless witnesses" but also "faceless judges,"[263] and another that referred to a political trial held before Congress in which the defendant judges were not allowed to cross-examine the witnesses on whose testimony their dismissal was based.[264]

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[262] *Cf. Case of Palamara Iribarne v. Chile*, paras.178 and 179.

[263] *Cf. Case of Castillo Petruzzi et al. v. Peru, Merits, reparations and costs*, paras. 153 to 155; *Case of Lori Berenson Mejía v. Peru*, para.184; *Case of García Asto and Ramírez Rojas v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 25, 2005. Series C No. 137, para.152, and *Case of J. v. Peru*, paras. 208 a 210.

[264] *Cf. Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 83.

242. Subparagraph (f) of Article 8(2) of the Convention establishes the "minimum guarantee" of "the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts," which underlies the adversarial principle and the principle of procedural equality. The Court has indicated that, among the guarantees recognized to the accused, is that of examining the witnesses for and against them, under the same conditions in order to defend themselves.[265] The anonymity of the witness restricts the exercise of this right, because it prevents the defense from asking questions related to the possible hostility, prejudice and reliability of the deponent, as well as other that would allow arguing that the testimony is untruthful or erroneous.[266]

243. The State's duty to ensure the rights to life and to personal integrity, liberty and safety of those who testify in criminal proceedings may justify the adoption of measures of protection. In this regard, the laws of Chile include both procedural measures (such as maintaining the confidentiality of personal information or physical characteristics that identify a person), and extra-procedural (such as protection of personal safety).

244. In the instant case, the Court will limit its analysis to deciding whether the procedural measure of preserving the anonymity of witnesses, which was applied in the criminal proceedings held against three of the presumed victims (*supra* paras. 232 to 236), entailed a violation of the right of the defense to examine the witnesses. This measure is regulated in Chile as described in paragraph 232 and, in this regard, the Supreme Court has stated that:

> [...] such a serious decision may only be taken in each particular case and with complete awareness of the specific circumstances. These are exceptional measures for exceptional situations and are always adopted with absolute control over those who intervene so that the harm to the exercise of any of the rights of the defense in a trial are minimum, and that it never obstructs or limits the exercise of the essence of this guarantee.[267]

245. The Court will now examine whether, in the above-mentioned trials of these three presumed victims in this case, the measure of preserving witness anonymity was adopted subject to judicial control,[268] based on the principles of necessity and proportionality, taking into account that this is an exceptional measure and verifying the existence of a situation of risk for the witness.[269] When making this assessment, the Court will bear in mind the impact that the measures had on the right of defense of the accused.

246. In order to rule in the instant case, the Court will also take into consideration whether, in the specific cases, the State ensured that the effects on the right of defense of the accused that results from the use of the measure of preserving the anonymity of witnesses was sufficiently offset by counterbalancing measures, such as:[270] (a) the judicial authority must be aware of the

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265 *Cf. Case of Castillo Petruzzi et al. v. Peru, Merits, reparations and costs*, para. 154, and *Case of J. v. Peru*, para. 208.

266 *Cf.* ECHR, *Case of Kostovski v. The Netherlands*, No. 11454/85. Judgment of 20 November 1989, para. 42.

267 In its brief with final arguments, the State transcribed parts of a ruling of the Supreme Court of Justice of March 22, 2011, "on the application for a declaration of nullity of the judgment delivered by the Cañete Oral Criminal Court" (merits file, folio 2140 to 2142).

268 *Mutatis mutandi,* ECHR, *Case of Doorson v. The Netherlands*, No. 20524/92. Judgment of 26 March 1996, paras. 70 and 71; *Case of Visser v. The Netherlands*, No. 26668/95. Judgment of 14 February 2002, paras. 47 and 48; *Case of Birutis and Others. v. Lithuania*, Nos. 47698/99 and 48115/99. Judgment of 28 June 2002, para. 30, and *Case of Krasniki v. the Czech Republic*, No. 51277/99. Judgment of 28 May 2006, paras. 79 to 83.

269 *Cf.* ECHR, *Case of Krasniki v. The Czech Republic*, No. 51277/99. Judgment of 28 May 2006, para. 83, and *Case of Al-Khawaja and Tahery v. The United Kingdom*, Nos. 26766/05 and 22228/06. Judgment of 15 December 2011, paras. 124 and 125.

270 *Cf.* ECHR, *Case of Doorson v. The Netherlands*, para. 72; *Case of Van Mechelen and Others v. The Netherlands*, Nos. 21363/93, 21364/93, 21427/93 and 22056/93. Judgment of 23 April 1997, paras. 53 and 54, and *Case of Jasper v. The United Kingdom*, No. 27052/95. Judgment of 16 February 2000, para. 52.

identity of the witness and be able to observe his demeanor under questioning in order to form its own impression of the reliability of the witness and of his testimony,[271] and (b) the defense must be granted every opportunity to examine the witness directly at some stage of the proceedings on matters that are not related to his identity or actual residence; this is so that the defense may assess the demeanor of the witness while under cross-examination in order to be able to dispute his version or, at least, raise doubts about the reliability of the testimony.[272]

247. Even when counterbalancing procedures have been adopted that appear to be sufficient, a conviction should not be based either solely or to a decisive extent on anonymous statements.[273] To the contrary, it would be possible to convict the accused by the disproportionate use of a probative measure that was obtained while impairing this right of defense. Since this is evidence obtained in conditions in which the rights of the accused have been limited, the testimony of anonymous witnesses must be used with extreme caution,[274] must be assessed together with the body of evidence, the observations and objections of the defense, and the rules of sound judicial discretion.[275] The decision as to whether this type of evidence has weighed decisively in the judgment convicting the accused will depend on the existence of other types of supportive evidence so that, the stronger the corroborative evidence, the less likely that the testimony of the anonymous witness will be treated as decisive evidence.[276]

a. Criminal proceedings against Messrs. Norín Catrimán and Pichún Paillalao

248. The Court will now examine the judicial control exercised with regard to the adoption of the mechanism of witness anonymity, the counterbalancing measures taken to offset the effects on the right of defense of the accused and, lastly, whether the testimony of the anonymous witnesses, in the specific circumstances of the proceedings, had a decisive impact on the sentencing and conviction of Messrs. Norín Catrimán and Pichún Paillalao.

249. The judicial control of the anonymity of witnesses was insufficient. The judicial decision that ordered it does not contain any explicit justification, and merely admits a request of the Public Prosecution Service that only refers to the "nature," the "characteristics," and "seriousness" of the case, without specifying the objective criteria, the reasoning, and the verifiable evidence that, in the specific case, would substantiate the alleged risk for the witnesses and their families (*supra* paras. 232 and 233). The Court understands that this

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271 *Cf.* ECHR, *Case of Kostovski v. The Netherlands* (no. 11454/85), Judgment of 20 November 1989, para. 43; ECHR, *Case of Windisch v. Austria*, (no. 12489/86), Judgment of 27 September 1990, para. 29, and ECHR, *Case of Doorson v. The Netherlands*, para. 73.

272 *Cf.* International Criminal Tribunal for the Former Yugoslavia (ICTFY), Prosecutor *v.* Dusko Tadic a/k/a "Dule", Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, paras. 67 and 72; ECHR, *Case of Kostovski v. The Netherlands*, No. 11454/85. Judgment of 20 November 1989, para. 42; *Case of Windisch v. Austria*, No. 12489/86. Judgment of 27 September 1990, para. 28; *Case of Doorson v. The Netherlands*, para. 73; *Case of Van Mechelen and Others v. The Netherlands*, Nos. 21363/93, 21364/93, 21427/93 and 22056/93. Judgment of 23 April 1997, paras. 59 and 60.

273 *Cf.* ECHR, *Case of Doorson v. The Netherlands*, para. 76, and *Case of Van Mechelen and Others v. The Netherlands*, Nos. 21363/93, 21364/93, 21427/93 and 22056/93. Judgment of 23 April 1997, paras. 53 a 55.

274 *Cf.* ECHR, *Case of Doorson v. The Netherlands*, para. 76, and *Case of Visser v. The Netherlands*, No. 26668/95. Judgment of 14 February 2002, para. 44.

275 *Mutatis mutandis, Case of Velásquez Rodríguez v. Honduras*. *Merits*, para. 146, and *Case of the Santo Domingo Massacre v. Colombia. Preliminary objections, merits and reparations.* Judgment of November 30, 2012. Series C No. 259, para. 44.

276 *Cf.* ECHR, *Case of Al-Khawaja and Tahery v. The United Kingdom*, Nos. 26766/05 and 22228/06. Judgment of 15 December 2011, para. 131.

decision did not constitute effective judicial control because it did not include criteria that would reasonably justify the need for the measure based on a situation of risk for the witnesses.

250. The counterbalancing measures implemented were adequate to safeguard the right of the defense to examine witnesses. The defense had access to the statements made by these witnesses during the investigation stage, so that they could be contested and, in the case of "witnesses for the prosecution whose testimony had not been recorded during the investigation, [this] motivated a divided accessory decision by the judges noting that their statements would be considered insofar as they did not violate due process and would be assessed freely."[277] The request by the Public Prosecution Service was accompanied by a sealed envelope containing information on the identity of the witnesses for whom anonymity was requested;[278] their statements were made in the hearing before the Oral Trial Court with the consequent immediacy in the reception of the evidence, and the defense was given the opportunity to examine them during the hearing and to know their identity, with the reservation that they could not inform the accused (*supra* para. 234).

251. On the vital point of whether the convictions were based solely or to a decisive extent on these statements (*supra* para. 247), there are differences between each of those convicted:

a) Regarding the sentencing of Mr. Norín Catrimán, the testimony of anonymous witnesses was not used as grounds for the declaration of his responsibility as perpetrator of the offense of threat of terrorist arson against the owners of the San Gregorio property. Although witness anonymity was allowed at the investigation stage, without effective judicial control (*supra* para. 249), in this case it did not lead to a violation of the guarantee established in Article 8(2)(f) of the Convention, because the testimony of this witness was not decisive and, at the trial stage, specific counterbalancing measures were guaranteed so that the defense could examine the anonymous witness and contest his testimony (*supra* paras. 234 and 250).

b) To the contrary, the criminal conviction of Mr. Pichún Paillalao as perpetrator of the offense of threat of terrorist arson against the administrator and owners of the Nancahue forest farm was based decisively on the testimony of an anonymous witness ("anonymous witness No. 1"), because, even though reference is made to other types of evidence, these alone would not have been sufficient to convict him, since the other three persons who testified only knew about the events indirectly. Furthermore, the judgment referred to an undated letter with supposed threats signed by Mr. Pichún, and a cheque signed by the administrator of the Nancahue forest farm and made out to the accused.[279] It also mentioned a testimonial statement indicating that the *Coordinadora*

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[277] *Cf.* Judgment delivered on April 14, 2003, by the Angol Oral Criminal Trial Court, thirteenth *considerandum* (file of annexes to the Merits Report 176/10, annex 16, folios 556 to 574).

[278] *Cf.* Application of the Public Prosecution Service, Traiguén local prosecutor of September 2, 2002, addressed to the Traiguén guarantees judge (file of annexes to the Merits Report 176/10, appendix 1, folios 4422 to 4424).

[279] In the sixteenth *considerandum* of the judgment handed down on September 27, 2003, the Angol Oral Criminal Trial Court indicated that "the following information indicates that the accused Pascual Pichún is guilty as the perpetrator of the offense of threats against the owners and administrator of the Nancahue forest farm: […] [u]ndated letter signed by Pascual Pichún Paillalao, as President of the Antonio Ñirripil community, addressed to Juan Agustín and Aída Figueroa Yávar, requesting permission to thin out their pine forest, to pasture the community's animals in the clearings in the forest and, if there were no trees that needed to be thinned out, permission was requested to exploit 100 hectares of closed forest; the letter added that some companies had agreed to grant this benefit, and it was well-known that some that had refused had suffered harm that has caused alarm in the Lumaco sector, and they 'did not want this to happen between us' for any reason. Also copy of cheque No. 1182177 on account No. 62300040301 of Juan A. Figueroa Yávar, signed by Juan A. Figueroa Elgueta in favor of Pascual Pichún for the sum of $130,000 issued on February 26, 2001." The other place in this judgment where reference is made to the letter and the cheque is in subparagraph (C) of the eighth *considerandum* on the evidence provided concerning the "threats of terrorist arson against the owners and administrators of the Nancahue forest farm." In the eighth *considerandum*, when referring to "[t]he documentary evidence […] incorporated," it repeats the content of the sixteenth *considerandum*. With regard to the cheque, there is no record of whether the court analyzed the

Arauco-Malleco was a *de facto* terrorist organization, and that Mr. Pichún belonged to it, without analyzing the impact of this on the perpetration of the offense.[280]

252. Based on the above, *the Court concludes that, when delivering a guilty verdict, a decisive significance was accorded to the testimony of an anonymous witness, which constitutes a violation of the right of the defense to examine witnesses, established in Article 8(2)(f) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Pascual Huentequeo Pichún Paillalao.*

b. Criminal proceedings against Mr. Ancalaf Llaupe

253. Regarding the criminal proceedings against Mr. Ancalaf Llaupe, the Court will analyze the second instance judgment convicting him delivered by the Concepción Court of Appeal on June 4, 2004, which revoked partially the first instance judgment delivered by the investigating judge of the Concepción Court of Appeal on December 30, 2003 (*supra* paras. 144 to 147), as well as the pertinent parts of the first instance judgment. In both judgments the testimony of three anonymous witnesses was taken into account.

254. The Court will also take into account the specific impact that the inquisitorial nature of the criminal proceedings under the former Code of Criminal Procedure applicable to the case had in this regard (*supra* paras. 101 to 104). In particular, Mr. Ancalaf Llaupe was not only unaware of the identity of the said witnesses, but also had no knowledge of the content of their testimony because the preliminary proceedings were of a confidential nature and because, when he was provided with information on those proceedings, he was refused access to the confidential files. It was only on June 12, 2003, almost two month after the preliminary proceedings had ended and three days after he had been notified of the indictment, that his request for copies of the case file was granted, but access to the confidential files was expressly excluded, without the investigating judge offering any justification in this regard (*supra* paras. 138 a 146). Obviously, this made it impossible to exercise control over the adoption and retention of the anonymity.

255. Furthermore, the regulation of this measure under article 189 of the Code of Criminal Procedure in juxtaposition with articles 76 and 78 of this code, which established the confidential nature of the preliminary proceedings (*supra* para. 235), had an impact on the obligation to submit the adoption and retention of the measure to judicial control because, since the accused was even unaware of the existence of the testimony, he was prevented from requesting control of its legality until he had access to the preliminary proceedings.

256. Accordingly, Víctor Ancalaf Llaupe's defense was only able to know the content of the testimony of the anonymous witnesses indirectly and partially based on the references to it in the judgment of December 30, 2003, convicting Mr. Ancalaf. The summary did not copy the statements completely, but merely those parts that served as evidence to sentence and convict Víctor Manuel Ancalaf Llaupe for the perpetration of a terrorist offense.[281]

257. Regarding the right of Mr. Ancalaf Llaupe's defense to obtain the appearance of proposed witnesses, on December 10, 2002, the defense asked that the testimony of seven witnesses be ordered "in order to clarify the defendant's situation." The same day, the investigating judge denied the request without providing the reasons for his decision, merely indicating that "[n]ot

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relationship of this document to the legal analysis of the perpetration of the supposed threats by Mr. Pichún Paillalao. *Cf.* Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court, eighth and sixteenth *considerandum* (file of annexes to the Merits Report 176/10, annex 15, folios 509 to 554).

[280] *Cf.* Judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court, sixteenth *considerandum* (file of annexes to the Merits Report 176/10, annex 15, folios 509 to 554).

[281] *Cf.* Judgment delivered on December 30, 2003, by the investigating judge of the Concepción Court of Appeal (file of annexes to the Merits Report 176/10, annex 20, folios 718 to 759).

admissible for the time being."[282] Subsequently, on July 7, 2003, the defense asked that "[two] witnesses [who he identified] be ordered to appear in order to bring some balance to [Mr. Ancalaf Llaupe's] evidentiary situation," so that they could be questioned as to whether they had seen directly and personally, or whether they knew by some direct and personal means, that Mr. Ancalaf Llaupe had set fire to the trucks in the Alto Bío Bío. The following day, the investigating judge ordered that the said witnesses be summoned.[283] However, on July 28, 2003, the captain of the *Carabineros* of Sipolcar Concepción informed the investigating judge that one of the witnesses had been summoned to appear to testify but the other could not be summoned because "he refused to sign the summons, stating that he did not have the money to travel to Concepción."[284] The body of evidence does not show that the said statements were taken and the Court notes that the State did not provide any explanation or refer to specific evidence in this regard.

258. In this case, the presumed victim had no available means of proof. His arguments are of a negative nature, because they indicate the inexistence of an act. The Court has established on other occasions that, "in proceedings on human rights violations, the State's defense cannot be based on the defendant's impossibility of providing evidence that, in many cases, cannot be obtained without the cooperation of the State."[285] Consequently, the burden of proof fell on the State, and the latter has not proved that the requested measures were taken to allow the defense to obtain the appearance of the proposed witnesses.

259. The evidence that was considered to be "sufficient" to prove the participation of Mr. Ancalaf Llaupe in the acts of which he was convicted consists of four testimonial statements, three of which were provided by anonymous witnesses, to whom his defense did not have access.[286] This means that a decisive significance was given to the statements of anonymous witnesses, which is inadmissible based on the considerations set forth previously.

260. Based on the foregoing, *the Court concludes that Chile violated the right of the defense to examine witnesses and to obtain the appearance of witnesses who might have thrown light on the facts, protected in Article 8(2)(f) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Víctor Manuel Ancalaf Llaupe*.

* * *

261. The Court notes that, even though the Commission and the FIDH[287] asserted the violation of Article 8(2)(f) of the Convention, in relation to Articles 1(1) and 2 of this instrument, and the Commission recommended to the State that it "adapt domestic laws governing criminal procedure so that they are compatible with [that right]" (*infra* para. 434), they did not submit legal arguments on the violation of the general obligation to adapt domestic

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[282] *Cf.* Judicial case file of the domestic criminal proceedings against Víctor Manuel Ancalaf Llaupe (file of annexes to the CEJIL motions and arguments brief, annex A, tome III, folios 1146 to 1148).

[283] *Cf.* Judicial case file of the domestic criminal proceedings against Víctor Manuel Ancalaf Llaupe (file of annexes to the CEJIL motions and arguments brief, annex A, tome IV, folios 1507 to 1520).

[284] *Cf.* Judicial case file of the domestic criminal proceedings against Víctor Manuel Ancalaf Llaupe (file of annexes to the CEJIL motions and arguments brief, annex A, tome IV, folio 1526).

[285] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, para. 135, and *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of November 21, 2007. Series C No. 170, para. 73.

[286] *Cf.* Judgment delivered on June 4, 2004, by the Third Chamber of the Concepción Court of Appeal, first, sixteenth and seventeenth *consideranda* (file of annexes to the CEJIL motions and arguments brief, annex A, folios 1723 to 1733), and judgment delivered on December 30, 2003, by the investigating judge of the Concepción Court of Appeal, seventeenth *considerandum* (file of annexes to the Merits Report, annex 20, folios 753 and 754).

[287] Regarding the arguments submitted by the FIDH concerning the violation of Article 2 of the Convention only in their final arguments, the Court considers that they are time-barred (*supra* para. 49).

law that would have allowed this Court to examine the merits of these arguments in relation to a violation of Article 2 of the Convention.

C) Right to appeal the judgment to a higher court (Article 8(2)(h) of the Convention), in relation to the obligations under Articles 1(1) and 2 of this treaty, with regard to Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles

262. Violations of the right to appeal the judgment before a higher court have only been alleged in relation to the two proceedings applying the new Criminal Procedural Code, which establishes that the means to contest a criminal judgment is the appeal for annulment. Neither the Commission nor the representatives alleged a violation of Article 8(2)(h) of the Convention with regard to Mr. Ancalaf Llaupe, in whose proceedings the 1906 Code of Criminal Procedure was applied, which established the remedy of appeal, as well as the possibility of filing a remedy of cassation.

1. Arguments of the Commission and of the parties

263. The Commission offered several "[g]eneral comments on the right to appeal a court ruling." It stated that "in the case of criminal procedural systems […] which operate mainly by the principles of the orality and immediacy of the proceedings, States are required to ensure that those principles do not involve exclusions or restrictions of the scope of the review that the courts have the authority to perform" and, at the same, it affirmed that "the review of a ruling by a higher court should not impair the effectiveness of [these] principles." It pointed out that the Criminal Procedural Code of Chile excluded the remedy of appeal in the case of criminal judgments delivered by an oral trial court and established that the only remedy against such judgments was the appeal for annulment for the reasons expressly indicated in the law. The Commission affirmed also that the right to appeal the criminal judgment convicting the victims "was violated by Chile's justice system, by the manner in which the courts that heard their cases applied that right." In addition, it considered that the domestic courts, "gave a particularly narrow interpretation of their competence to rule on the said judgments, which was that they could only address matters of law, and then on the grounds strictly prescribed by law." In its Merits Report, the Commission offered general considerations on the two judgments that rejected the appeals for annulment, without analyzing them individually. In answer to a question by the Court in this regard, it clarified that "in its Merits Report it [had] analyzed the application of articles 373 and 374 of the Criminal Procedural Code" and "[i]n this regard, given that the said norms were not applied to Mr. Ancalaf, the conclusion in the Merits Report should be understood in relation to the other victims in the case."

264. In its motions and arguments brief, the FIDH affirmed that Chile had violated Article 8(2)(h) of the Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of six of the presumed victims.[288] It indicated that the system for appealing criminal judgments in Chile was "not consistent with Article 8(2)(h)" of the Convention, because it excluded the remedy of appeal against the judgments of oral criminal courts, and established the appeal for annulment as the sole remedy against such judgments, which "correspond merely to a formal review of the decision [but, u]nder no circumstances is it possible to assess the facts fully." The

[288] Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia and Juan Ciriaco Millacheo Licán. The FIDH submitted arguments on the judgment relating to Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, Huenchunao Mariñán, Millacheo Licán and Ms. Troncoso Robles, but did not analyze the judgment that denied the appeals for annulment filed by Messrs. Norín Catrimán and Pichún Paillalao.

FIDH considered that the right to appeal a judgment had been violated "because the real possibility of a complete review of the facts did not exist." It referred to the grounds for nullity established in article 374.e of the Criminal Procedural Code, indicating that even though "[s]ome authors of legal doctrine" affirm that these grounds allow the existence of errors in the reception or assessment of evidence to be evaluated and, consequently, could meet the obligations of Article 8(2)(h), "practice reveals the contrary." It stated that, even when this norm is usually used "to expand the scope of the appeal for annulment of a judgment of an oral criminal court, this does not provide grounds for a review of the facts," and that "serious legal uncertainty" exists as to its scope. The FIDH asserted that the judgment delivered by the Temuco Court of Appeal, denying the appeals for annulment filed by each of those convicted, failed to make a comprehensive review of the judgments convicting them because: in response to the complaint of omission and improper assessment of the evidence based on the cause for nullity of the said article 374.e, it made "a formal analysis of the judgment," and an interpretation in order to clarify and give "legal validity" to the terms in which the oral trial court had rejected certain evidence that the defense considered to be exculpatory, and failed to rule on the complaint relating to the violation "of the equality of the parties" in relation to the application of criteria for the assessment of evidence.

265. CEJIL did not allege the violation of Article 8(2)(h) of the Convention.

266. The State asserted that the appeal system under the Criminal Procedural Code "is in line" with Article 8(2)(h) of the Convention and affirmed that the appeal for annulment is only one of the mechanisms to avoid judicial error.[289] It indicated that the Convention recognizes those criminal procedural systems "of an accusatory nature, based on the principles of orality, immediacy and concentration, *inter alia*, where deciding the case in a single instance is an essential element of the model" and that "the right to a remedy" does not mean an "appeal" in which both the facts and the law are examined. It pointed out that the grounds for the appeal for annulment allow a comprehensive review "that includes both the legal and factual merits of the judgment," which "supposes an analysis of both the proven facts and the reasons why those facts were considered true; in other words, a control of the assessment of the evidence." It maintained that the grounds included in article 374.e of the Criminal Procedural Code permit, "[i]n practice, the review of factual issues." It indicated that, even if it is considered that the judgments denying the appeals for annulment filed by the presumed victims "contained insufficient reasoning," the evolution of domestic case law on the grounds included in article 374.e "opens the way for the appeal for annulment to allow a higher court to review the facts […] by examining [the] reasoning behind the ruling" and cited extracts from judgments of 2009, 2012 and 2013 to justify this statement. Regarding the ruling issued by the Temuco Court of Appeal on October 13, 2004, it asserted that "the reasoning of the review may indeed appear inadequate," but that "even though the [said] ruling can be questioned, this cannot be a reason for requesting the legal amendment of the remedy."

2. Considerations of the Court

267. The dispute on the alleged violation of Article 8(2)(h) of the Convention refers, fundamentally, to the effectiveness of the appeal for declaration of nullity. The examination of this issue will be divided into three parts: (a) scope and content of the right to appeal the judgment; (b) appeal system established in the Criminal Procedural Code of Chile, and (c) analysis of the judgments denying the appeals for annulment in light of Article 8(2)(h) of the Convention.

[289] It also referred to the oral trial, to the collegiate composition of the oral criminal court, and to the adoption of the standard that the court must be convinced "beyond all reasonable doubt."

a) Scope and content of the right to appeal the judgment

268. The pertinent provision is contained in Article 8(2)(h) of the Convention, which stipulates the following:

> **Article 8**
> **Right to a Fair Trial**
>
> [...]
> 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
> [...]
> h) the right to appeal the judgment to a higher court.

269. The scope and content of the right to appeal the judgment have been specified in numerous cases decided by this Court.[290] In general, the Court has determined that it is an essential guarantee that must be respected within the framework of due process of law in order to permit a guilty verdict to be reviewed by a different and higher judge or court.[291] Anyone subjected to an investigation and to criminal proceedings must be protected at the different stages of the process, which include the investigation, indictment, trial and sentencing.[292]

270. In particular, considering that the American Convention must be interpreted taking into account is object and purpose,[293] which is the effective protection of human rights, the Court has determined that it must be an ordinary, accessible and effective remedy that permits a comprehensive review or examination of the appealed ruling, that is available to anyone who has been convicted, and that observes basic procedural guarantees:

a) *Ordinary:* the right to file an appeal against the judgment must be guaranteed before the judgment becomes *res judicata*, because it seeks to protect the right of defense by avoiding the adoption of a final decision in flawed proceedings involving errors that unduly prejudice the interests of an individual.[294]

b) *Accessible:* the filing of the appeal should not be so complex that it makes this right illusory.[295] The formalities for its admission must be minimal and should not constitute an obstacle for the remedy to comply with its purpose of examining and deciding the errors claimed by the appellant.[296]

c) *Effective:* it is not sufficient that the remedy exists formally; rather it must permit obtaining results or responses in order to achieve the purpose for which it was conceived.[297] Regardless of the appeal regime or system adopted by the States Parties and the name given to the means of contesting the adverse judgment, it must constitute

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290 *Cf. Case of Castillo Petruzzi et al. Merits, reparations and costs*, para. 161; *Case of Herrera Ulloa v. Costa Rica*, paras. 157 to 168; *Case of Barreto Leiva v. Venezuela. Merits, reparations and costs.* Judgment of November 17, 2009. Series C No. 206, paras. 88 to 91; *Case of Vélez Loor v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2010. Series C No. 218, para. 179; *Case of Mohamed v. Argentina*, paras. 88 to 117; *Case of Mendoza et al. v. Argentina*, paras. 241 to 261, and *Case of Liakat Ali Alibux v. Suriname*, paras. 83 to 111.

291 *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 158, and *Case of Liakat Ali Alibux v. Suriname*, para. 84.

292 *Cf. Case of Mohamed v. Argentina*, para. 91, and *Case of Liakat Ali Alibux v. Suriname*, para. 47.

293 According to Article 31(1) of the Vienna Convention on the Law of Treaties, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

294 *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 158, and *Case of Liakat Ali Alibux v. Suriname*, para. 85.

295 *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 164, and *Case of Liakat Ali Alibux v. Suriname*, para. 55.

296 *Cf. Case of Mohamed v. Argentina*, para. 99, and *Case of Liakat Ali Alibux v. Suriname*, para.86.

297 *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 161, and *Case of Liakat Ali Alibux v. Suriname*, para. 52.

an appropriate mechanism to rectify an erroneous conviction.[298] This requirement is closely related to the following.

d) *Allowing a comprehensive review or examination of the judgment appealed:* it must ensure the possibility of a comprehensive examination of the decision appealed.[299] Therefore, it must permit an analysis of the factual, probative and legal issues on which the contested judgment was based because, in jurisdictional activities, the determination of the facts and the application of the law are interdependent, so that an erroneous determination of the facts entails an erroneous or inappropriate application of the law. Consequently, the grounds for the admissibility of the appeal should make it possible to carry out a comprehensive examination of the contested aspects of the adverse judgment.[300] In this way, it is possible to obtain a two-stage judicial ruling, because the comprehensive review of the judgment permits the reasoning to be confirmed and grants greater credibility to the State's jurisdictional action, while providing greater security and protection to the rights of the person who has been convicted.[301]

e) *Available to anyone who has been sentenced and convicted:* the right to appeal the judgment cannot be effective if it is not guaranteed to everyone who has been sentenced and convicted, because the sentence is the expression of the exercise of the State's punitive powers. It must be ensured even to the individual who has been sentenced in a judgment that revokes an acquittal.[302]

f) *Observing the minimum procedural guarantees:* appeal regimes must respect the minimum procedural guarantees that, pursuant to Article 8 of the Convention, are pertinent and necessary to decide the errors asserted by the appellant, without this entailing the need to conduct a new oral trial.[303]

b) The appeal system under the Criminal Procedural Code of Chile (Law No. 19,696 of 2000)

271. The Criminal Procedural Code also introduced substantial variations in the appeals regime adopted. It determined that "decisions issued by an oral criminal trial court could not be appealed" (Article 364) and established the appeal for annulment as the only means of contesting ("to invalidate") the oral trial and the final judgment (Article 372).

272. The main pertinent provisions concerning appeals are transcribed below, as well as article 342 of the Criminal Procedural Code, which establishes the contents required of a judgment under pain of nullity, and article 297 on the assessment of the evidence, referred to article 342.c of this code:

> Article 297. Assessment of the evidence. The courts shall assess the evidence freely, but may not disregard the principles of logic, the lessons of experience, and scientifically established knowledge.
>
> The Court must refer in its reasoning to all the evidence produced, even the evidence that it may have rejected, in that case indicating why it rejected it.
>
> The assessment of the evidence in the judgment shall require an indication of the evidence used to substantiate each of the facts and circumstances that were found proved. This substantiation shall allow the reasoning used in order to reach the conclusions arrived at in the judgment to be reproduced.

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298 *Cf. Case of Mohamed v. Argentina*, para.100, and *Case of Liakat Ali Alibux v. Suriname*, para. 86.

299 *Cf. Case of Herrera Ulloa v. Costa Rica*, para. 165, and *Case of Liakat Ali Alibux v. Suriname*, para. 56.

300 *Cf. Case of Mohamed v. Argentina*, para.100, and *Case of Liakat Ali Alibux v. Suriname*, para. 86.

301 *Cf. Case of Barreto Leiva v. Venezuela*, para. 89, and *Case of Liakat Ali Alibux v. Suriname*, para. 49.

302 *Cf. Case of Mohamed v. Argentina*, para.92, and *Case of Liakat Ali Alibux v. Suriname*, para. 84.

303 *Cf. Case of Mohamed v. Argentina*, para.101, and *Case of Liakat Ali Alibux v. Suriname*, para. 87.

[…]

Article 342. Content of the judgment. The final judgment shall contain:

a) The name of the court and the date judgment is delivered; identification of the accused and of the accuser or accusers;

b) A brief description of the facts and circumstances that were the object of the accusation; if appropriate, the harm whose reparation is claimed in the civil action and the claim for redress, and the exculpatory arguments alleged by the accused;

c) A clear, cogent and complete description of each of the facts and circumstances that the court found proved, whether favorable or unfavorable to the accused and an analysis of the evidence that supports those conclusions in accordance with article 297;

d) The legal and doctrinal reasons used in the legal classification of each of the facts and circumstances, and to found the judgment;

e) The decision to either convict or acquit each of the accused of each of the offenses they were accused of in the indictment; the ruling on any civil liability the accused may have and on the amount of compensation, if appropriate;

f) The ruling on the costs of the proceedings, and

g) The signature of the judges who delivered the judgment.

The judgment shall always be drawn up by a designated member of the collegiate court, and the dissenting or separate opinion shall be prepared by its author. The judgment shall indicate the name of the judge who prepared it, and that of whoever dissents or provides a separate opinion.

Article 372. Appeal for annulment. The appeal for annulment is granted to invalidate the oral trial and the final judgment, or only the latter, for the reasons expressly indicated by law.

It shall be filed in writing within ten days of notification of the final judgment before the court that conducted the oral trial.

Article 373. Reasons for the appeal. The declaration of nullity of the oral trial and of the judgment shall be admissible:

a) When rights or guarantees recognized in the Constitution or international treaties in force in Chile have been violated during the trial or in the judgment, and

b) When there has been an erroneous application of the law in the judgment that has substantially affected the outcome.

Article 374. Absolute grounds for annulment. The trial and the judgment shall be annulled, whenever:

a) The judgment has been delivered by a court lacking jurisdiction, or one that was not composed by legally appointed judges; when it has been delivered by a guarantee judge or with the presence of a judge of an oral criminal trial court who is involved with the law, or whose disqualification was pending or has been declared by a competent court, and when it has been decided by fewer votes or delivered by fewer judges that required by law, or by judges who have not attended the trial;

b) The hearing of the oral trial took place in the absence of any of the persons whose continued presence is required, under pain of nullity, by articles 284 and 286;

c) The defense has been prevented from exercising the rights that the law grants him;

d) The legal provisions on the continuity and the public nature of the trial have been violated during the oral trial;

e) The judgment has omitted any of the requirements established in article 342, subparagraphs (c), (d) or (e);

f) When the judgment has been delivered infringing the provisions of article 341, and

g) When the judgment delivered is contrary to another criminal judgment that is *res judicata*.

(…) [304]

Article 381. Information to be provided once the appeal has been admitted. When the appeal has been admitted, the court shall forward to the higher court a copy of the final judgment, the record of the hearing of the oral trial or the specific actions during the trial that are being contested, and the brief in which the appeal was filed..

(…)

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[304] Articles 376 to 383 of the Criminal Procedural Code regulate the requirements for, and the filing of, the appeal brief, the determination of the competent court, the causes of inadmissibility, the effects of admission of the appeal, the background information to be forwarded to the higher court once the appeal is admitted, and the actions to be taken before it is decided.

Article 384. Ruling on the appeal. The court shall rule on the appeal within 20 days of the date on which it has concluded its examination of the appeal.

In the judgment, the court must describe the grounds on which its decision is based; rule on the contested issues, unless it upholds the appeal, in which case it may merely rule on the grounds that it would have found sufficient, and declare whether or not the oral trial and final judgment that have been appealed are null, or whether only the said judgment is null, in the cases indicated in the following article.

The ruling on the appeal shall be announced in the hearing indicated to this end, with the reading of its operative paragraphs or a brief summary of the judgment.[305]

Article 385. Nullity of the judgment. The court may invalidate the judgment alone, and deliver the replacement judgment, which must meet the legal requirements, without a new hearing but separately if the grounds for annulment are not related to the trial formalities or to the facts and circumstances that were considered proved, but rather to the fact that the judgment classified as an offense an act that the law does not consider so, applied a punishment when it was not in order to apply any punishment, or imposed a punishment greater than the one required by law.

The replacement judgment shall include the factual considerations, the legal grounds, and the decisions of the ruling that was annulled, which do not refer to the issues that were appealed or that were incompatible with the decision taken on the appeal, as established in the judgment appealed.[306]

Article 386. Nullity of the oral trial and of the judgment. With the exception of the cases mentioned in article 385 if the court upholds the appeal, it shall annul the judgment and the oral trial, determine the situation in which the proceedings are left, and order that the case files be forwarded to the corresponding competent court so that it may order that a new oral trial be held.

The fact that the appeal was accepted owing to an error or defect in the judgment shall not be an obstacle to the ordering of a new oral trial.

Article 387. Inadmissibility of appeals. The decision on an appeal for annulment shall not be open to any type of appeal, without prejudice to the review of the final judgment sentencing an individual referred to in this Code.[307]

In addition, the judgment delivered in the new trial held as a result of the ruling that accepted the appeal for annulment shall not be open to any type of appeal. However, if the judgment convicts an individual, while the one annulled would have acquitted him, the appeal for annulment in favor of the accused shall be admissible, in accordance with the general rules.

273. In summary, the appeal regime under the Criminal Procedural Code is as follows:

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[305] This final subparagraph of article 384 of the Criminal Procedural Code was added by a modification of Law No. 20,074 published on November 14, 2005, that "amends the Criminal Procedural and the Criminal Codes." Available at: http://www.leychile.cl/Navegar?idNorma=243832&buscar=20074

[306] This second subparagraph of article 384 of the Criminal Procedural Code was added by a modification of Law No. 20,074 published on November 14, 2005, that "amends the Criminal Procedural and the Criminal Codes." Available at: http://www.leychile.cl/Navegar?idNorma=243832&buscar=20074

[307] This refers to the appeal for review established in articles 473 and *ff.* (Article 473 is transcribed below, for information only):

Article 473. Admissibility of the review. Exceptionally, the Supreme Court may review final judgments that have convicted someone of a crime or simple offense, in order to annul them, in the following cases; whenever:

a) As a result of contradictory verdicts, two or more individuals are convicted of the same offense which could only have been committed by one of them;

b) Anyone has been convicted as the perpetrator of, or the accomplice or accessory to, the murder of a person who is found to be alive following the verdict;

c) Anyone who has been convicted as the result of a judgment based on a document or on testimony of one or more persons, if the said document or testimony has been declared to be false by a final verdict in criminal proceedings;

d) Following the guilty verdict, an action occurs or is discovered or a document appears that was unknown during the trial that is sufficient to establish the innocence of the condemned man, and

e) The guilty verdict has been pronounced as the result of malfeasance or the bribery of the judge who delivered it or of one or more of the judges who assisted in its delivery, the existence of which has been declared in a final judgment.

a) A distinction is made between the "reasons for the appeal" for annulment in general (Article 373) and the "absolute grounds for annulment" (Article 374). In the latter, the trial and the judgment will always be annulled. In the other situations, even though, in general, it is established that "[t]he declaration of the nullity of the oral trial and of the judgment shall be admissible," article 385 authorizes the court to "invalidate the judgment alone."

b) If both the oral trial and the judgment are invalidated, article 386 is applicable and the case will be forwarded to the corresponding competent oral court for a new oral trial to be held.

c) If the judgment alone is invalidated and the requirements of article 385 are met, the higher court must deliver another judgment to replace it.

d) The ruling declaring the annulment must (article 384.2) "describe the grounds on which its decision is based; rule on the contested issues, unless it upholds the appeal, in which case it may merely rule on the grounds that it would have found sufficient, and declare whether or not the oral trial and final judgment that have been appealed are null, or whether only the said judgment is null, in the cases indicated" in Article 385.

e) The replacement judgment "shall repeat the factual considerations, the legal grounds and the decisions of the ruling that was annulled, that do not refer to the issues that were the object of the appeal or that were incompatible with the decision taken on the appeal, as established in the judgment appealed " (article 385.2).

c) Analysis of the judgments denying the appeals for annulment in light of Article 8(2)(h) of the Convention

274. The Court must now analyze whether the appeal system under the Criminal Procedural Code, as it was applied in this case, is consistent with the requirements of Article 8(2)(h) of the Convention. To this end, The Court is not required to rule on each of the aspects contested in the appeals for annulment, but rather to evaluate whether the examination made by the higher courts that decided the appeals was compatible with the requirement of an effective remedy established in the American Convention. Nor does the Court have to rule on other aspects in which an abstract examination of the norms on remedies in criminal proceedings in force in Chile might reveal some contradiction with the minimum procedural guarantees established in the American Convention.

c.i) Criminal proceedings against Norín Catrimán and Pichún Paillalao (judgment delivered by the Second Chamber of the Supreme Court of Justice on December 15, 2003, denying the appeals for annulment)

275. Messrs. Norín Catrimán and Pichún Paillalao filed separate appeals for annulment against the partially guilty verdict of the Angol Oral Criminal Trial Court of September 27, 2003, requesting the annulment of the trial with regard to the offenses for which they had been convicted and the holding of a new trial. In addition, they asked that the judgment be annulled and that a replacement judgment be delivered acquitting those who had been convicted; that it be declared that the offenses were not of a terrorist nature, and that the punishment be amended (*supra* para. 118).

276. On December 15, 2003, the Second Chamber of the Supreme Court of Justice delivered a judgment in which it rejected all the flaws described by the appellants and upheld the partially guilty verdict with regard to Messrs. Pichún Paillalao and Norín Catrimán (*supra* para. 118).

277. In the judgment rejecting the appeals, the Second Chamber summarized the flaws described by the appellants Norín Catrimán and Pichún Paillalao, and indicated that, "basically,

they both complain about the following aspects: (a) violation of constitutional guarantees and international treaties; (b) certain formal errors they believe they see in the judgment; (c) they disagree that the facts that were considered proved constitute the offense of threats, and (d) that these threats are not of a terrorist nature." It concluded that none of the foregoing was substantiated; hence, it could not be admitted. It added that "the evidence provided in the hearing on the appeals had no procedural significance that could change the decision." Consequently, it rejected the appeals and declared that the appealed judgment "is not annulled."

278. There is no evidence that, in any part of its verdict, the Second Chamber examined the facts of the case or the legal considerations regarding the definition of the offense to verify that the statements on which the appealed judgment was founded were based on convincing evidence and on correct legal analysis. It merely sought to analyze the internal coherence of the judgment, indicating that:

> […] The statements analyzed above were made by individuals linked directly to the facts or who knew about them for different reasons, and whose testimony is consistent with the expert opinions and documentary evidence incorporated during the hearing that constitute the background information and that, taken as a whole and freely assessed, lead to the conviction that the facts contained in the private and the prosecutor's indictment have been proved beyond any reasonable doubt. […]

It also indicated that:

> […] The standard of conviction beyond any reasonable doubt pertains to Anglo-Saxon law and not to that of continental Europe; thus, it is a novelty for the Chilean legal system. However, it is a useful concept, because it is sufficiently evolved and eliminates discussions regarding the degree of conviction required, revealing that is it not an absolute conviction, but one that excludes the most important doubts. Accordingly, the phrase of 'sufficient conviction' was replaced by the phrase of 'beyond any reasonable doubt.' (E. Pfeffer U. *Código Procesal Penal, Anotado y Concordado*, Editorial Jurídica of Chile, 2001, p. 340). […]

On these grounds, it concluded that:

> […] it is not found that the judgment contested by the appeals fails to meet the requirements of paragraphs (c) and (d) of article 342 of the Criminal Procedural Code, because a clear, cogent and complete description of the facts can be appreciated, together with the reasons used to define each act legally, beyond any reasonable doubt. […]

279. It can be seen that, after making a descriptive reference to the facts that the Oral Criminal Trial Court considered proved, and to the opinion on how they were codified, and citing parts of the analysis of the evidence by the said court, the Second Chamber merely concluded the four lines indicated in paragraph 278. The Court has verified that the Second Chamber's ruling did not make a comprehensive analysis to conclude that the guilty verdict met the legal requirements to consider that the facts had been proved, or of the legal grounds that supported their classification under the law. The simple description of the lower court's arguments, without the higher court that decided the appeal setting out its own reasoning that would logically support the operative paragraphs of its decision, means that the latter did not comply with the requirement of an effective remedy protected by Article 8(2)(h) of the Convention, which establishes that the appellants' complaints and disagreements must be decided; that is, that they have effective access to the two-stage judicial ruling (*supra* para. 270.d). These flaws make the guarantee protected by Article 8(2)(h) of the Convention illusory and prejudice the right of defense of anyone who has been criminally convicted.

280. The foregoing clearly reveals that the judgment of the Second Chamber did not make a comprehensive examination of the ruling appealed, because it did not analyze all the contested factual, evidentiary and legal issues on which the guilty verdict against Messrs. Norín Catrimán and Pichún Paillalao was based. This means that it did not take into account the interdependence that exists between the factual determinations and the application of the law, so that an erroneous determination of the facts entails an erroneous or incorrect application of the law. Consequently, the remedy of appeal for annulment available to Messrs. Norín Catrimán

and Pichún Paillalao was not adapted to the basic requirements needed to comply with Article 8(2)(h) of the American Convention, thus violating their right to appeal the guilty verdict.

c.ii) Criminal proceedings against Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán and Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles (judgment delivered by the Temuco Court of Appeal on October 13, 2004, denying the appeals for annulment)

281. The five persons convicted of the offense of terrorist arson (*supra* para. 128) filed separate appeals for annulment. The five appeals were rejected together by the Temuco Court of Appeal in a judgment of October 13, 2004 (*supra* paras. 126 to 128).

282. The appellants submitted arguments relating to both the incorrect assessment of the evidence and the erroneous application of the law. Specifically, they affirmed that several testimonies offered by the prosecution had not been assessed, or had not been assessed in an independent manner, and that certain evidence proposed by the defense had been rejected unduly. They also argued that the subjective element of the definition of the offense of terrorism had not been proved and that the principle of guilt had been violated because the classification of the acts as terrorism had been concluded based on acts carried out by third parties.[308]

283. The judgment of the Temuco Court of Appeal, when ruling on the arguments cited by the appellants, stated that the court that decided the appeal for annulment:

> […] by law, must restrict itself to evaluating whether the judgment […] of the oral trial court […] was sufficient in itself; whether it had made an appropriate assessment of the evidence on which its conclusions were founded, and whether it indicated the reasons why it rejected the evidence that had not been assessed, *without reviewing the facts that were established therein* because, to the contrary, the principle of immediacy would be violated and *the appeal for annulment would be impaired, which does not have an impact on the factual aspects* as they were established by the oral criminal trial court. (*Considerandum* 5) *[Italics added]*

In another passage, it stated that a certain conclusion of the oral trial court appeared:

> […] in subparagraphs one, two and three of the fourteenth *considerandum*, *which establishes the facts, and thus cannot be examined by this court.* (*Considerandum* 20) *[Italics added]*

284. It also stated that:

> […] The judgment must be sufficient in itself, and to this end must contain a coherent and explicit analysis of the result of the assessment of evidence, and have the necessary clarity to be comprehensible to the reader, which may be another court that hears the case by means of an appeal, without the latter having to re-examine the proceedings and make a new assessment, due to ignorance of the elements on which the decision was based […]. (Third *considerandum*)
>
> However, this requirement does not signify that all the evidence must be assessed, because what art. 342.c of the Criminal Procedural Code expressly requires is that the court make an assessment of the evidence that substantiates its conclusions, and this is according to article 297 of this code, when it establishes that the assessment of the evidence in the judgment shall require an indication of the evidence taken into account in order to substantiate each of the facts and circumstances that was considered proved.
>
> Similarly, not all the evidence is subject to assessment, but only the evidence that serves as grounds for the conclusions reached by the court. Regarding the remainder of the evidence provided during the proceedings, and which is not subject to assessment, art. 297 of the Criminal Procedural Code establishes that the court must indicate the reasons why it was rejected. (Fourth *considerandum*)

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[308] *Cf.* Appeals for annulment filed by Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles against the judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court (file of helpful evidence presented by the State, folios 208 to 321 and 1166 to 1199), and Judgment delivered on October 13, 2004, by the Temuco Court of Appeal (file of annexes to the Merits Report 176/10, annex 19, folios 688 to 716).

285. Regarding the argument of the appellants that the exculpatory testimonial evidence was not assessed, the court of appeal stated that the complaints expressed in this regard "correspond to evidence that was not used by the court to substantiate its conclusions" and that, "therefore, it is evidence […] that the court is not required to assess, but only to state the reason why it was rejected."

286. Expert witness Claudio Fuentes Maureira, proposed by the State, indicated that the fifth *considerandum* of the judgment of the court of appeal (*supra* para. 283) involved "an over-restrictive interpretation of the norms of the Criminal Procedural Code."[309]

287. The Inter-American Court is not required to analyze whether a judgment of a domestic court interpreted and applied domestic law correctly or incorrectly, but only to determine whether or not this violated a provision of the American Convention. The foregoing reveals with absolute clarity that the Temuco Court of Appeal did not make a comprehensive examination of the decision appealed, because it did not analyze all the contested factual, probative and legal aspects on which the guilty verdict was based. This means that it did not take into account the interdependence that exists between the factual determinations and the application of the law, so that an erroneous determination of the facts entails an erroneous or improper application of the law (*supra* para. 270.d).

288. In addition, this Court notes that the judgment that denied the appeal made an interpretation of the Criminal Procedural Code (*supra* para. 284) that permitted evidence that the appellants considered relevant to support their defense not to be assessed, merely indicating the reasons why it was "rejected." In this regard, it should be emphasized that, when deciding the objections submitted by the appellant, the higher court hearing the appeal to which a person convicted has the right under Article 8(2)(h) of the American Convention must ensure that the guilty verdict provides clear, complete and logical grounds in which, in addition to describing the content of the evidence, it sets out its assessment of this and indicates the reasons why it considered – or did not consider – it reliable and appropriate to prove the elements of criminal responsibility and, therefore, to disprove the presumption of innocence.

289. It is also possible to note that, with regard to the argument of the defense regarding the improper assessment of the evidence (alleging that numerous testimonies were not assessed individually, so that the conclusions derived from them did not take into account the particularities of each of these statements and the supposed contradictions between them), the Court of Appeal stated that it "agreed with the Public Prosecution Service that the law makes it obligatory to analyze all the evidence, but not to analyze each piece of evidence individually, thus the criterion of the court was correct in setting out the testimony on those aspects on which the statements corroborated each other." By proceeding in this way, the higher court did not resolve the appellants' complaint or disagreement regarding the evidence, which referred not only to the alleged obligation to make an individual assessment of the evidence, but also to specific objections and comments on the content of explicit evidence and the conclusions that the lower court had derived from this evidence. In this regard, this Court underlines that, when a guilty verdict is appealed and in order not to make the right to be heard in equal conditions illusory, the higher court that decides an appeal must ensure that the lower court has complied with its obligation to describe an assessment that takes into account both the inculpatory and the exculpatory evidence. Even if the lower court chooses to assess the evidence together, it has the duty to explain clearly the points on which agreement exists and those on which there is disagreement, as well as to refer to any objections that the defense may have raised on specific points or aspects of this evidence. These aspects raised by the defense in the appeal against the guilty verdict were not sufficiently decided by the higher court in this case.

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[309] *Cf.* Statement made by expert witness Carlos Fuentes Maureira before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

290. Consequently, the appeal for annulment available to Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Florencio Jaime Marileo Saravia, Juan Patricio Marileo and Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles was not adapted to the basic requirements needed to comply with Article 8(2)(h) of the American Convention, and thus their right to appeal a judgment convicting them was violated.

* * *

291. Based on the above, *the Court concludes that the State violated the right to appeal the judgment, established in Article 8(2)(h) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán and Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles*.

3. Obligation to adopt domestic legal provisions

292. The Court observes that the dispute concerning the legislative framework of the appeal for annulment is circumscribed to the grounds for this remedy established in the Criminal Procedural Code (*supra* paras. 263 to 266). Chile affirmed that, under Article 374.e) of this code, the factual aspects may be examined by a review of the assessment of the evidence made by the lower court, without this entailing the possibility of the higher court re-establishing the facts.[310] Additionally, in its final arguments brief, the State also affirmed that the purpose of the grounds established in Article 373.b) is to ensure the correct application of the law and to permit "the review of factual aspects; for example, when the Court examines the facts that have already been proved and gives them a different legal classification." For their part, the representatives understood that the grounds established in Article 374.e) of this code do not permit the review of "facts or factual presumptions of judgments," and are limited to "legal aspects." The Commission did not offer specific arguments on the compatibility of the grounds for the appeal for annulment with the right to appeal the judgment.

293. Regarding the State's argument concerning article 373.b) of the Criminal Procedural Code, the Court observes that, under the said grounds for nullity, it is possible to contest the judgment based on "erroneous application of the law." From an analysis of the text of this provision, the Court is unable to conclude that it meets the requirement of an effective remedy, because the way it is worded does not impose on the judge or court the obligation to make an analysis that would allow it to make a ruling on the arguments of the appellants about the assessment of the acts that those convicted were accused of, which constitutes the basic presumption for the criminal punishment imposed on them by the State. Even though these grounds could have indirect implications for the factual framework of the case, due to the interdependence that exists in the jurisdictional activity between the determination of the facts and the application of the law (*supra* para. 270.d), owing to the way the subparagraph is drafted, they do not ensure legal certainty to the person who is found guilty as regards the possibility of filing complaints about factual issues.

294. In relation to whether the grounds for nullity established in paragraph (e) of article 374 of the Criminal Procedural Code is consistent with the criterion of an effective remedy to which

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[310] It asserted that this subparagraph permits, "[i]n practice, a review of factual questions [by means of the] control of the assessment of the evidence and of the probative reasoning made by the lower court," both by reading the judgments that transcribe the statements of witnesses and expert witnesses in their entirety, and by the possibility of presenting evidence of the grounds cited, which results in the "higher court, among other practices, listening to the audio recordings that constitute the official record of the hearing of the oral trial." According to the State, the grounds established in Article 374.e) signify a "control of the probative reasoning," in the sense of making an "opinion about the opinion," rather than an "opinion about the fact," particularly with regard to "the substantiation," which "consists rather in a legal admonition relating to the absence of, or inadequate, substantiation of the facts, based among other provisions, on the rules of sound judicial discretion and the duty of the court to provide the reasoning for its decision, but with an evident relationship to the facts."

anyone who has been convicted has a right under Article 8(2)(h) of the Convention, the Court notes that the expert opinions in the case file on the scope of these grounds reach contradictory conclusions.[311] It can be observed that these grounds make it possible to contest the verdict when the judgment does not observe the requirements that article 342 of the code imposes on the judge. These include the obligation to include a "clear, cogent and complete description of each of the facts and circumstances that the Court found proved, whether favorable or unfavorable to the accused, and [that] of the assessment of the evidence that would substantiate these conclusions in accordance with article 297" (*supra* para. 272). Meanwhile, article 297 of the Criminal Procedural Code establishes as criteria for assessing the evidence, "the principles of logic, the lessons of experience, and scientifically established knowledge"; stipulates the obligation to "refer in its reasoning to all the evidence produced, even the evidence that it may have rejected, in that case indicating why it was rejected," and imposes the need to "indicate the evidence used to substantiate each of the facts and circumstances that were found proved" and that "[t]his substantiation shall allow the reasoning used to reach the conclusions arrived at in the judgment to be reproduced" (*supra* para. 272).

295. The Court notes that the text of Article 374.e) of the Criminal Procedural Code establishes grounds for absolute nullity based on the obligations to assess the evidence and to justify this assessment established in the same procedural code. In addition, this Court is aware that, under article 381 of the Criminal Procedural Code, it is necessary to forward to the higher court that decides the appeal not only the judgment that is appealed and the brief filing the appeal, but also the measures that are contested or the recording of the hearing of the oral trial (*supra* para. 272) which, according to expert witness Fuentes Maureira, corresponds to the audio recordings of the public hearing. Thus, under article 374.e of this code the appellant is allowed to file arguments that not only refer to the rigor of the reasoning of the guilty verdict and its determination based on the evidence, but also allow him to offer as a parameter to support these arguments the actions and evidence during the oral trial that, according to the appellant, were unduly assessed and the conclusions unduly substantiated in the guilty verdict.

296. With regard to the position held by the parties in relation to the interpretation that the domestic courts have accorded to the grounds for absolute nullity of article 374.e) of the Criminal Procedural Code, the extracts from judgments cited by the State[312] show that, in those

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311 On the one hand, expert witness Fuentes Maureira, proposed by the State, affirmed that, under the said grounds, "if a judge […] should cite a criterion for assessment [of the evidence] contrary to sound judicial discretion [… or] if he should derive irrational conclusions from the evidence presented," that are contrary to "the lessons of experience, and scientifically established knowledge according to the rules of logic," and this "leads to an improbable or impossible conclusion," it is possible to obtain "the annulment of the trial." He explained that, "in Chile, more and more case law exists in which, increasingly, the oral trial courts are being required to write all that the witnesses have said in the context of the trial in greater detail; in other words, one can find in the judgments, not only the decision based on an assessment of the evidence, but also a complete and detailed description of everything that the witnesses have said, together with the possibility of attaching the relevant part of the audio recording of the hearing. From this perspective […] the higher court, by reading the judgment and listening to the recordings, is able to review certain evidentiary aspects of the trial hearing." To the contrary, expert witness Fierro Morales, proposed by the FIDH, stated that "the very conception of the appeal for annulment […] as a remedy of a "special" and strictly legal nature, with grounds that are specifically set forth in the law, with a series of requirements for filing it that the case law of the higher courts of justice has used in an overly formal way to declare the appeals inadmissible and, especially, the idea that it is not possible, either directly or indirectly, to review any aspect relating to the facts, since this is the exclusive attribution of the trial court, are some of the objections that are being increasingly raised against the appeal for annulment as an appropriate and sufficient remedy to guarantee the right to appeal of the person who has been convicted." *Cf.* Statement made by expert witness Carlos Fuentes Maureira before the Inter-American Court during the public hearing held on May 29 and 30, 2013, and affidavit prepared on May 17, 2013, by expert witness Claudio Alejandro Fierro Morales (file of statements of presumed victims, witnesses and expert witnesses, folio 20).

312 Both the State and the representatives cited extracts from domestic judgments deciding appeals for annulment in support of their respective positions. The appeals related to the scope of the said grounds in relation to the possibility of examining matters of a factual nature in the context of trials on criminal acts. The Court will take this information on domestic decisions into account, inasmuch as the parties did not contest the veracity of its content, but recalls that the

cases, the higher court made an analysis that went beyond matters that were strictly juridical and that, to the contrary, involved an examination that compared the body of evidence in the case to the assessment made, and the legal consequences derived from it by the lower court. In this regard, the Court notes that these are recent judgments from 2009, 2012 and 2013. The Court notes that the representatives called attention to the existence of other domestic rulings in which the scope of the above-mentioned grounds for annulment is restrictive on this point and affirmed that it was impossible to analyze matters relating to the establishment of the facts in the oral trial. These decisions date from 2010, 2011 and 2012. In these judgments, an interpretation was made that reduced the scope of the review to questions that were, above all, related to the appropriate application of the rules of evidentiary law.

297. The Court considers that the elements provided are not sufficient to conclude that the grounds under article 374.e) of the Criminal Procedural Code do not comply with the standard of an effective remedy guaranteed in Article 8(2)(h) of the Convention as regards the possibility of contesting factual matters by means of arguments relating to the lower court's assessment of the evidence. Taking into account that there is an interrelationship between the factual, evidentiary and legal dimensions of the criminal judgment (*supra* para. 270.d), the Court considers that, since it is not a conclusion that can be derived from the text of the said grounds, it has not been proved that, based on these grounds, it is not possible to contest matters relating to the factual framework of the judgment by examining the assessment of the evidence in it. Therefore, the Court concludes that, in the instant case, the State did not violate the obligation to adopt domestic legal provisions, established in Article 2 of the American Convention, in relation to the right to appeal the judgment established in Article 8(2)(h) of this instrument, to the detriment of the eight presumed victims in this case.

298. Nevertheless, the Court insists that the interpretation that the domestic courts make of the said grounds must ensure that the content and criteria developed by this Court regarding the right to appeal the judgment are guaranteed (*supra* para. 270). The Court reiterates that the grounds for the admissibility of the appeal ensured by Article 8(2)(h)) of the Convention must make it possible to contest matters that have an impact on the factual aspect of the guilty verdict, because the appeal should allow an extensive control of the contested aspects, and this calls for the possibility of analyzing the factual, evidentiary and legal issues on which the guilty verdict is based.

VII.3 – RIGHTS TO PERSONAL LIBERTY AND TO THE PRESUMPTION OF INNOCENCE (ARTICLES 7(1), 7(3), 7(5) AND 8(2)[313] OF THE AMERICAN CONVENTION)

A) Arguments of the Commission and of the parties

299. The Commission did not refer to this matter.

300. The FIDH alleged the violation of the right to personal liberty of Aniceto Norín Catrimán, Pascual Pichún Paillalao, Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Huenchunao Mariñán and Juan Ciriaco Millacheo Licán, referring jointly to the arbitrary nature of the pre-trial detention, the violation of the right to be tried within a reasonable time or released, and the violation of the principle of the presumption of innocence. It indicated that the fact that they were "incarcerated for more than a year, because they were considered a danger to the security of society, constitutes arbitrary imprisonment" and that "[t]he proceedings do not include a decision referring to the danger to the investigation or the danger of flight of the accused."

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complete text of these decisions was not provided, but rather citations from parts of them; thus they will be assessed with all the evidence before the Court.

[313] The pertinent provisions of the American Convention are transcribed *infra* para. 307.

301. CEJIL alleged that the violation of the right to liberty occurred owing to the arbitrary nature of the arrest and pre-trial detention ordered against Víctor Ancalaf Llaupe, and affirmed that this resulted in a violation of the principle of the presumption of innocence and the violation of the right to be tried within a reasonable time or be released. It stated that "the arrest and pre-trial detention ordered against Víctor Ancalaf Llaupe suffered from two fundamental irregularities: (i) no reasons were given for the measure ordered, and (ii) the pre-trial detention did not respond to procedural purposes." It argued that his arrest was ordered "without justifying a legitimate purpose, and without identifying the evidence that warranted the adoption of such a restrictive measure as the deprivation of liberty of someone who has been indicted." It also argued that the indictment "was supported by evidence produced during secret preliminary proceedings, in violation of the adversarial principle." CEJIL argued that the indictment of Mr. Ancalaf and the denials of the requests for pre-trial release were based solely on the grounds of "danger to the security of society," which implied "an absolute legal presumption of dangerousness" that "violates the American Convention, making the measure arbitrary" and that, since it is a "non-procedural criterion," it "violated the principle of the innocence of Mr. Ancalaf and turned the pre-trial detention ordered against him into an arbitrary measure." It indicated that the pre-trial detention was "an automatic consequence of the indictment," reflecting "the particularity of the inquisitorial system where the notions of proceedings and punishment are not clearly separated." In addition, it argued that "the proceedings under the Counter-terrorism Act convert the ordering and implementing of pre-trial detention into the general rule," "a practice [that] violates the guarantee of presumption of innocence." CEJIL alleged that Article 2 of the Convention had been violated in relation to the regulation of the grounds of "danger to the security of society."

302. The State did not refer specifically to the pre-trial detention of the presumed victims, but referred in general terms to the domestic law in force that regulates pre-trial detention and its application in Chile. It indicated that this precautionary measure "does not infringe the principle of the presumption of innocence, in view of its exceptional and preventive nature, constituting, also, an essential measure to safeguard the security of the investigation, of the victim, and of society, in certain cases." It asserted that "the judge is not obliged to order pre-trial detention, even in the case of serious offenses with severe punishments," "including terrorist offenses," and that the "high standard of evidence that must be presented to the court in order to warrant pre-trial detention is a sufficient argument to reject the allegations that have been made with regard to this precautionary measure." It affirmed that "the Counter-terrorism Act does not contain any special norm that permits ordering pre-trial detention." It referred to the grounds for pre-trial detention relating to the "danger to the security of society or of the victim" (*infra* para. 359).

B) Domestic legal framework

303. *Constitution.* Article 19.7 subparagraphs (e) and (f), of the Constitution of the Republic of Chile establishes:

> e) Pre-trial release shall be in order unless the judge considers that pre-trial detention or custody is necessary for the preliminary investigations or for the safety of the victim or of society. The law shall establish the requirements and methods to obtain it.
>
> The decision granting pre-trial release to those accused of the offenses referred to in article 9 shall always be consulted with a higher authority. This and the appeal against the decision issued on the release shall be heard by the competent higher court composed exclusively of full-time members. The decision that approves or grants the release must be taken unanimously. While the pre-trial release lasts, the accused shall always be subject to supervisory measures by the legally-established authority;
>
> f) In criminal cases the accused cannot be obliged to testify under oath with regard to an act that he has committed; nor can his relatives in the ascending or descending lines, his spouse and other persons who, according to the case and circumstances, are indicated by law, be obliged to testify against him.

304. *Code of Criminal Procedure*. The pre-trial detention of Víctor Ancalaf Llaupe was regulated by the provisions of the 1906 Code of Criminal Procedure. Article 274 of this code regulated bringing the accused to trial and article 363 of the code regulated the grounds on which "pre-trial release could be denied" and the grounds or purposes for which "it was understood that pre-trial detention or custody [was] necessary."[314] Furthermore, article 277 of this code stipulated that "during the proceedings, custody becomes pre-trial detention." The relevant articles of the code are transcribed below.

> 2. DETENTION
>
> I. General regime
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> Art. 251. To ensure the action of justice, the judges may order the detention of a person in the way and in the cases determined by law.
>
> Art. 252. The detention deprives of liberty for a short time an individual against whom there are well-founded suspicions that he is responsible for an offense, or one against whom there is reason to believe that he has not provided the timely cooperation with justice required by law for the investigation of a wrongful act.
>
> Art. 253. No inhabitant of the Republic may be detained unless it is by order of a public official expressly authorized by law and after this order has been legally notified, unless he is surprised *in flagrante delicto* and, in that case, solely in order to take him before a competent judge.
>
> Art. 254. The detention may be carried out: 1) by order of the judge conducting the preliminary investigation or hearing the offense;
>
> (...)
>
> Art. 255. The judge conducting the preliminary investigation may order the detention:
>
> 1) When, following the establishment of the existence of an act that has the characteristics of an offense, the judge has well-founded suspicions to identify the perpetrator, accomplice, accessory after the fact, or the person whose detention is ordered;
>
> (...)
>
> 3. PROSECUTION AND PRE-TRIAL DETENTION
>
> Article 274. After the judge has examined the accused, he shall bring him to trial if, from the case file, it is clear that:
>
> 1) The existence of the offense investigated is validated, and
>
> 2) There are well-founded presumptions to consider that the accused has participated in the offense as perpetrator, accomplice or accessory after the fact.
>
> The judge shall try the accused for each of the wrongful acts that he is accused of, when the said circumstances are present.
>
> Article 275. The decision by which the accused is sent to trial or released shall be reasoned and shall indicate whether or not the conditions established in article 274 have been met.
>
> The authority who sends the accused to trial shall also state the background information taken into consideration and shall give a brief description of the acts that constitute the criminal offenses attributed to the accused.
>
> In the same decision, the judge shall include the particulars of the accused for the corresponding department, and shall grant the release of the accused, establishing if appropriate the amount of the

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[314] Expert witness Mauricio Duce explained that article 10.2 of Law 18,314 made the provisions of Title VI of Law 12,927 (on State Security of August 26, 1975) applicable to the case and, in its article 27.2, Law 18,314 makes Title II of Volume II of the Code of Military Justice, in force at the time, applicable. Lastly, this Code, in its articles 137, 138, 140 and 142, made certain provisions of the Code of Criminal Procedure applicable, related, *inter alia*, to the indictment and to pre-trial release. Article 140 of the Code of Military Justice made article 274 of the Code of Criminal Procedure applicable, while article 142 of the Code of Military Justice made the provisions of the Code of Criminal Procedure applicable with regard to pre-trial release. *Cf.* Affidavit prepared on May 15, 2013, by expert witness Mauricio Alfredo Duce Julio (file of statements of presumed victims, witnesses and expert witnesses, folio 38). Additionally, the Court notes that the investigating judge referred to article 275 of the Code of Criminal Procedure in the indictment issued against Mr. Ancalaf Llaupe.

surety, when the offense for which he is being tried makes this benefit admissible in any of the forms established in articles 357 or 359, unless there is a reason to keep him in pre-trial detention, which must be indicated.

If necessary, the decision referred to in the preceding paragraph may be issued in separate resolutions.

Article 276. The decision to bring the accused to trial shall be notified to the person deprived of liberty as established in article 66.

If the accused is at liberty and has an official legal representative in the proceedings, the latter shall be notified by certified writ. If he does not have such a representative, the court shall decide the measures to notify him personally as soon as possible.

Article 277. During the proceedings, arrest becomes pre-trial detention

4. PROVISIONS COMMON TO ARREST AND PRE-TRIAL DETENTION

Art. 280. (302) All orders for arrest or prison shall be issued in writing, and to implement them, the judge or authority who issued them shall issue a signed warrant in which this order is transcribed literally.

Art. 281. (303) The warrant for arrest or prison shall contain:

1) The name and title of the official who issues it;

2) The name of the person responsible for executing it, if the instructions are not issued in a general way to the law enforcement personnel represented by the security police or an army unit, or in another way;

3) The first and last name of the person to be arrested or, if unavailable, the circumstances that individualize him or determine his identity;

4) The reason for the arrest or prison, unless it is advisable to omit this for a genuine reason;

5) The determination of the prison or public place of detention where the person arrested should be taken, or of his home when this has been decided.

6) An indication of whether or not he should be kept incommunicado, and

7) The signature of the official and of the secretary, if applicable.

[ ]

Title IX

PRE-TRIAL RELEASE

Art. 356. Pre-trial release is a right of every person detained or imprisoned. This right may always be exercised in the way and under the conditions established in this Title.

Pre-trial detention shall only last the time necessary to meet its purposes. The judge, when deciding a request for release, shall always give special consideration to the time that the detainee or prisoner has been subject to pre-trial detention.

The detainee or prisoner shall be released at any stage of the case at which his innocence emerges.

All the officials who intervene in a proceeding are obliged to extend the detention of those found guilty and the pre-trial detention of the accused for the shortest time possible.

(...)

Art. 363. Pre-trial release can only be denied, by a reasoned decision, based on proven information from the proceedings, when the judge considers that the detention or prison is necessary for the success of the preliminary investigations, or when the release of the detainee or prisoner would be dangerous for the security of society or of the victim.

It shall be understood that the arrest or pre-trial detention is necessary for the success of the investigations only when the judge considers that there is a serious and well-founded suspicion that the accused may obstruct the investigation, by actions such as the destruction, modification, concealment or falsification of probative elements; or when he may induce co-accused, witnesses, expert witnesses or third parties to provide false information or to conduct themselves in a disloyal or reticent manner.

To consider whether the release of the accused may be dangerous for the security of society, the judge must consider, in particular, any of the following circumstances: the severity of the punishment assigned to the offense; the number of offense he is charged with and their nature; the existence of pending proceedings; the fact that he is subject to a precautionary measure, on parole, or serving one

of the alternative punishments established in Law 18,216; the existence of prior sentences that he has not yet served, based on the gravity of the offenses in question, and having acted as part of a group or gang.

It shall be understood that the safety of the victim of the offense is in danger owing to the release of the detainee or prisoner when proven information allows it to be presumed that the latter may attack the former or his family. In order to apply this norm, it shall be sufficient that the judge has verified this information by any means.

The court must include a detailed record in the proceedings of the information that has precluded pre-trial release, when it cannot mention them in the decision because this would affect the success of the investigation.

(…)

Art. 364.[315] Pre-trial release can be requested and granted at any stage of the trial.

305. *Criminal Procedural Code*. Pre-trial detention is regulated in articles 139 to 154 of the Criminal Procedural Code of 2000 (*supra* para. 101). The pre-trial detention of Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán, Florencio Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán, Patricia Roxana Troncoso Robles, Aniceto Norín Catrimán and Pascual Pichún Paillalao was governed by this code. The following are the relevant provisions for this case:

Article 139. Admissibility of pre-trial detention. Everyone has the right to personal liberty and safety. Pre-trial detention shall only be admissible when other precautionary measures are insufficient to ensure the objectives of the proceedings.

Article 140. Requirements for ordering pre-trial detention. Once the investigation is underway, the court, at the request of the Public Prosecution Service or of the complainant, may order the pre-trial detention of the accused provided that the applicant substantiates that the following requirements are met:

a) That there is information supporting the existence of the offense investigated;

b) That there is information leading to a well-founded presumption that the accused has participated in the offense as perpetrator, accomplice or accessory after the fact, and

c) That there is information allowing the court to consider that pre-trial detention is essential for the success of specific and precise investigation measures, or that the release of the accused is dangerous for the security of society and of the victim.

It shall be understood that pre-trial detention is essential for the success of the investigation when there is a serious and well-founded suspicion that the accused may obstruct the investigation by the destruction, modification, concealment or falsification of probative elements; or when he may induce co-accused, witnesses, expert witnesses or third parties to provide false information or to conduct themselves in a disloyal or reticent manner.

To consider whether the release of the accused may be dangerous for the security of society, the court must consider, in particular, any of the following circumstances: the severity of the punishment assigned to the offense; the number of offense he is charged with and their nature; the existence of pending proceedings; the fact that he is subject to a precautionary measure, on parole, or serving one of the alternative punishments established by law; the existence of prior sentences that he has not yet served, based on the gravity of the offenses in question, and having acted as part of a group or gang.

Article 141. Inadmissibility of pre-trial detention. Pre-trial detention may not be ordered when it appears to be disproportionate to the seriousness of the offense, the circumstances in which this was committed, and the probable punishment. Pre-trial detention may not be ordered: […]
c) When the court considers that, if he is convicted, the accused may be eligible for an alternate measure to the deprivation or restriction of liberty established in the law and the accused verifies that he has permanent ties to the community, through his social and family roots. […].

Article 142. Processing of the request for pre-trial detention. The request for pre-trial detention may be made verbally in the hearing to open the investigation, during the hearing to prepare the oral trial, or in the hearing of the oral trial. It may also be requested at any stage of the investigation with regard to the accused against whom this is being conducted, in which case the judge shall set a hearing to decide the request, summoning to it the accused, his defense counsel, and the other parties. The presence of

[315] Text established in Decree Law 2,185, of April 12, 1978.

the accused and his defense counsel is a requirement for the validity of the hearing in which the request for pre-trial detention is decided. Once the grounds for the request have been indicated by the person making it, the court must always hear the defense counsel, the other parties if they are present and wish to intervene, and the accused.

Article 143. Decision on pre-trial detention. At the conclusion of the hearing, the court shall rule on the pre-trial detention by a reasoned decision, in which it states clearly the information that justifies the decision.

Article 144. Modification and revocation of pre-trial detention. The decision that orders or rejects pre-trial detention may be modified *ex officio* or at the request of any of the parties at any stage of the proceedings. When the accused requests the revocation of pre-trial detention, the court may reject it outright; also, it may summon all the parties to a hearing in order to discuss whether the circumstances that authorized the measure subsist. In any case, it shall be obliged to conduct the latter procedure when two months have passed since the last oral hearing in which the pre-trial detention was ordered or maintained. […]

Article 145. Substitution of pre-trial detention and review *ex officio*. At any time during the proceedings, the court, *ex officio* or at the request of one of the parties, may substitute pre-trial detention by any of the measures that are established in the provision of paragraph 6 of this Title [Other personal precautionary measures]. When six months has passed since pre-trial detention was ordered or since the last oral hearing in which this was decided, the court shall *ex officio* convene a hearing in order to consider whether to conclude them or to continue them.

Article 146. Surety to replace pre-trial detention. When the pre-trial detention has been or must be imposed in order to ensure the appearance of the accused at the trial and the eventual execution of the sentence, the court may authorize its replacement by a sufficient financial surety, and shall establish the amount.. […]
[…]

Article 149. Remedies related to the measure of pre-trial detention. The decision that orders, maintains, denies its admissibility or revokes pre-trial detention may be appealed when it has been delivered in a hearing. In the other cases, it shall not admit any remedy.

Article 150. Execution of the measure of pre-trial detention. […] The accused shall be treated as if he were innocent at all times. Pre-trial detention shall be implemented so that it does not acquire the characteristics of a punishment, or lead to restrictions other than those that are necessary to avoid flight and to ensure the safety of the other inmates, and of the persons who carry out functions or for any other reason are on the premises. […]
[…]

Article 154. Court order. All orders for pre-trial detention or arrest shall be issued in writing by the court and shall contain: […] (b) the reason for the arrest or detention […].

C) Considerations of the Court

306. The legal analysis of this alleged violations will be divided into the following parts:

a) General considerations on personal liberty, pre-trial detention, and presumption of innocence, and

b) Examination of the alleged violations:

i. Pre-trial detention imposed on Víctor Manuel Ancalaf Llaupe;

ii. Pre-trial detention imposed on Jaime Marileo Saravia, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo, José Huenchunao Mariñán and Patricia Troncoso Robles

iii. Pre-trial detention imposed on Aniceto Norín Catrimán and Pascual Pichún Paillalao.

1. General considerations on personal liberty, pre-trial detention, and presumption of innocence

a) Pre-trial detention in the American Convention

307. The pertinent provisions of the American Convention are as follows:

Article 7. Right to Personal Liberty

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

[...]

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

[...]

Article 8. Right to a Fair Trial

[...]

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.

[...]

308. Thus, paragraph 1 of Article 7 establishes the right to personal liberty and security in general, and the other paragraphs establish specific aspects of this right. The violation of any of those paragraphs entails the violation of Article 7(1) of the Convention, "because the failure to respect the guarantees of the individual deprived of liberty results in the failure to protect this person's right to liberty."[316]

309. The general principle in this regard is that liberty is always the rule, and its limitation or restriction always the exception.[317] This is the effect of Article 7(2), which stipulates that: "[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto." But mere compliance with the legal formalities is not sufficient, because Article 7(3) of the American Convention, by establishing that "[n]o one shall be subject to arbitrary arrest or imprisonment," prohibits arrest or imprisonment by means that may be legal, but that, in practice, are unreasonable, unpredictable, or disproportionate.[318]

310. The application of this general principle to cases of pre-trial detention or custody arises from the combined effect of Articles 7(5) and 8(2). Based on these articles, the Court has established that the general rule must be the liberty of the accused while his criminal responsibility is being decided,[319] because he enjoys a legal status of innocence and this requires that the State accord him a treatment in keeping with his situation of someone who has not been convicted. In exceptional cases, the State may resort to a measure of preventive incarceration in order to avoid situations that jeopardize achieving the objectives of the

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316 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 54, and *Case of Barreto Leiva v. Venezuela*, para. 116.

317 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 53; *Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 106, and *Case of Barreto Leiva v. Venezuela*, para. 121.

318 *Cf. Case of Gangaram Panday v. Suriname. Merits, reparations and costs.* Judgment of January 21, 1994. Series C No. 16, para. 47, and *Case of J. v. Peru*, para.127.

319 *Cf. Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 67, and *Case of J. v. Peru*, para.157.

proceedings.[320] For a measure of deprivation of liberty to be in accordance with the guarantees established in the Convention, its application must be exceptional in nature and respect the principle of the presumption of innocence, and also the principles of legality, necessity and proportionality that are essential in a democratic society.[321]

311. The Court has also indicated the characteristics that a measure of pre-trial detention or custody should have in order to adhere to the provisions of the American Convention:

> **a)** *It is a precautionary rather than a punitive measure:* it must be aimed at achieving legitimate purposes that are reasonably related to the criminal proceedings underway. It cannot become a premature punishment or be based on general or special preventive objectives that could be attributed to the punishment.[322]
>
> **b)** *It must be based on sufficient evidence:* To order and maintain measures such as pre-trial detention, there must be sufficient evidence that permits the reasonable supposition that the individual subjected to trial has taken part in the unlawful act under investigation.[323] The verification of this important presumption is a necessary first step in order to restrict the right to personal liberty by means of a precautionary measure, because if there is not the slightest evidence linking the individual to the wrongful act investigated, there will be no need to safeguard the objectives of the proceedings. In the Court's opinion, the suspicion must be founded on specific facts; that is, not on mere conjectures or abstract intuitions.[324] Thus, it is evident that the State must not arrest someone in order to then investigate him; rather, it is only authorized to deprive a person of his liberty when it has sufficient information to be able to bring him to trial.[325]
>
> **c)** *It is subject to periodic review:* The Court has underscored that pre-trial detention should not be continued when the reasons for its adoption no longer exist. The Court has also observed that the domestic authorities are responsible for assessing the pertinence of maintaining any precautionary measures they issue pursuant to their own laws. In this regard, the domestic authorities must provide sufficient reasons to justify why the restriction of liberty has been maintained,[326] and these must be based on the need to ensure that the detainee will not impede the efficient implementation of the investigations or evade the action of justice; to the contrary, it becomes an arbitrary deprivation of liberty according to Article 7(3) of the American Convention.[327] The Court also emphasizes that the judge does not have to wait until an acquittal is delivered for a person who has been detained to recover his freedom, but must periodically assess whether the grounds for the measure remain, as well as its necessity and proportionality, and also if the duration of the detention has exceeded the legal and

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320 *Cf. Case of Suárez Rosero v. Ecuador. Merits*, para. 77; *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of November 20, 2009. Series C No. 207, para. 144, and *Case of J. v. Peru*, para. 157.

321 *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*. Preliminary objections, merits, reparations and costs. Judgment of September 2, 2004. Series C No. 112, para. 228, and *Case of J. v. Peru*, para. 158.

322 *Cf. Case of Suárez Rosero v. Ecuador. Merits*, para. 77; *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 103; *Case of Barreto Leiva v. Venezuela*, para. 111, and *Case of J. v. Peru*, para. 159.

323 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 101 and 102; *Case of Barreto Leiva v. Venezuela*, para. 111 and 115, and *Case of J. v. Peru*, para. 159.

324 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 103.

325 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 103.

326 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 107; and *Case of J. v. Peru*, para. 163.

327 *Cf. Case of Bayarri v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of October 30, 2008. Series C No. 187, para. 74, and *Case of J. v. Peru*, para. 163.

reasonable limits. Whenever it appears that the pre-trial detention does not meet these conditions, the release of the detainee should be ordered, without prejudice to the continuation of the respective proceedings.[328]

312. Pursuant to the above, it is not sufficient that the pre-trial detention is legal; it is essential that it is not arbitrary, which means that the law and its application must respect the following requirements:

a) *Purpose compatible with the Convention:* the purpose of measures that deprive or restrict liberty must be compatible with the Convention (*supra* para. 311.a). The Court has indicated that "the deprivation of liberty of the accused cannot be based on general or special preventive objectives that can be attributed to the punishment, but can only be based […] on a legitimate objective, namely: to ensure that the accused will not obstruct the implementation of the proceedings or evade the action of justice."[329] Thus, the Court has indicated repeatedly that the personal characteristics of the supposed perpetrator and the seriousness of the offense he is accused of are not, in themselves, sufficient justification for pre-trial detention.[330] It has also stressed that risks to the proceedings cannot be presumed, but must be verified in each case, based on the objective and precise circumstances of the specific case.[331]

b) *Suitability:* the measures adopted must be suitable to achieve the objective sought.[332]

c) *Necessity:* they must be necessary; in other words, they must be absolutely essential to achieve the objective sought and there is no less onerous measure as regards the right affected among all those that are equally suitable to achieve this objective.[333] Thus, even when the aspect relating to sufficient evidence that allows it to be supposed that the accused has taken part in the illegal act has been determined (*supra* para. 311.b), the deprivation of liberty must be strictly necessary to ensure that the accused will not obstruct the said procedural objectives.[334]

d) *Proportionality:* they must be strictly proportionate, so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or disproportionate in relation to the advantages obtained by this restriction and the achievement of the objective sought.[335]

e) Any restriction of liberty that does not contain sufficient justification that allows an assessment of whether it is in keeping with the above conditions will be arbitrary and, therefore, violate Article 7(3) of the Convention.[336] Thus, in order to respect the presumption of innocence when ordering precautionary measures that restrict liberty, in

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328 *Cf. Case of Bayarri v. Argentina*, para. 76.

329 *Cf. Case of Suárez Rosero v. Ecuador. Merits*, para. 77, and *Case of J. v. Peru*, para. 157.

330 *Cf. Case of López Álvarez v. Honduras. Merits, reparations and costs.* Judgment of February 1, 2006. Series C No. 141, para. 69, and *Case of J. v. Peru*, para. 159.

331 *Cf.* Case of *Barreto Leiva v. Venezuela*, para. 115, and *Case of J. v. Peru*, para.159.

332 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 93.

333 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 93.

334 *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 103, and *Case of Barreto Leiva v. Venezuela*, para. 111.

335 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 93.

336 *Cf. Case of García Asto and Ramírez Rojas v. Peru*, para. 128, and *Case of J. v. Peru*, para.158.

each specific case the State must justify and prove, precisely and in detail, the existence of the said requirements established by the Convention.[337]

2. Examination of the alleged violations

a) Pre-trial detention de Víctor Ancalaf Llaupe[338]

a.i) Pertinent facts

313. As already indicated (*supra* para. 137), on October 17, 2002, the investigating judge of the Concepción Court of Appeal issued the indictment against Víctor Ancalaf Llaupe and also "issue[d] an arrest warrant against [him]." Mr. Ancalaf Llaupe was arrested on November 6, 2002, and, as he was already being processed, he was kept in pre-trial detention. No specific reasons were given for the pre-trial detention which was a result of the proceedings.

314. The indictment included a list of evidence gathered and a summary of the acts investigated and, with regard to the implication of Víctor Manuel Ancalaf Llaupe in the said acts, it indicated the following in the seventh paragraph:

> 7. That, these same events and the preliminary statements of Víctor Manuel Ancalaf Llaupe himself, on folios 318 and 967, reveal well-founded presumptions to consider that he participated as perpetrator in the three offenses described above. On this basis and also in view of the provisions of articles 15 of the Criminal Code, 274, 275 and 276 of the Code of Criminal Procedure, and 10 and 14 of Law No 18,314, it is declared that Víctor Manuel Ancalaf Llaupe is brought to trial as perpetrator of the terrorist offenses described in the preceding *consideranda*, committed on September 29, 2001, and March 3 and 17, 2002, established in article 2.4 of Law No. 18,314 in relation to article 1 of the same law.

315. On April 24, 2003, Mr. Ancalaf Llaupe's defense filed a request for his pre-trial release, "[c]onsidering the time that [Mr. Ancalaf] had been deprived of liberty and that it cannot be considered that his release may interfere with the measures taken in the preliminary proceedings." The investigating judge denied this request the following day.[339] On April 30, 2003, Mr. Ancalaf's defense filed an appeal against this decision, which was denied on May 5, 2003, by the Concepción Court of Appeal without any explicit justification.

316. Eight months after the start of the deprivation of liberty, on July 7, 2003, Mr. Ancalaf's defense filed another request for pre-trial release considering that "[t]he investigation had concluded." The following day, the investigating judge denied this request in the same terms as the denial of April 25, 2003.

317. Mr. Ancalaf remained in pre-trial detention until December 30, 2003, the date on which the judgment convicting him was delivered (*supra* para. 144).

a.ii) Considerations of the Court

318. Having examined the indictment of Víctor Ancalaf Llaupe issued on October 17, 2002, based on which he was deprived of liberty, the Court notes that this decision did not comply

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337 *Cf. Case of Palamara Iribarne v. Chile*, para. 198, and *Case of J. v. Peru*, para. 159.

338 The evidence relating to the facts established in this chapter regarding the pre-trial detention of Mr. Ancalaf Llaupe is in the file of the domestic criminal proceedings against Víctor Manuel Ancalaf Llaupe, a copy of which was provided to the Court in these proceedings (file of annexes to the CEJIL motions and arguments brief, annex A, folios 990 to 1018, and 1444 to 1520), and with the helpful evidence presented by the State with briefs of October 17 and 23, 2013, with which it provided a copy of the file of the criminal proceedings held against Mr. Ancalaf Llaupe. This evidence was also provided during the processing of the case before the Commission (file of annexes to the Merits Report, annex 6 and appendix 1).

339 "With regard to the fourth petition, based on the merits of this case, the number of offenses that the accused is charged with and their nature, and pursuant to article 363.1 and 3 of the Code of Criminal Procedure, and articles 142 of the Code of Military Justice and 27 of Law 12,927, the pre-trial release requested by the accused Victor Manuel Ancalaf is not admissible as he is considered to be a danger to the security of society." *Cf.* Decision issued on April 25, 2003, by the investigating judge of the Concepción Court of Appeal (file of annexes to the CEJIL motions and arguments brief, annex A, folio 1446).

with the first element required to restrict the right to personal liberty by means of a precautionary measure, which is that it should indicate the existence of sufficient evidence about participation in the illegal act investigated (*supra* para. 311.b). The list of evidence gathered and the statement that the background information and "the preliminary statements of Víctor Manuel Ancalaf Llaupe" constitute "well-founded presumptions to consider that he had participated as a perpetrator of the three offenses" investigated (*supra* para. 314), does not allow it to be verified that this requirement had been met. It should be recalled that Mr. Ancalaf Llaupe was unable to examine the case file until June 2003, months after the conclusion of the preliminary proceedings, which had been kept confidential under article 78 of the Code of Criminal Procedure (*supra* paras. 138 to 140). It was only at the stage of the plenary proceedings that he could have access to the case file; however, he remained without access to the confidential files (*supra* paras. 142 to 144).

319. The European Court of Human Rights, when ruling on a detention in a case related to the investigation of a terrorist offense, stated that a situation is possible in which a suspect may be arrested "on the basis of information which is reliable but which cannot be disclosed to the suspect or produced in court without jeopardizing the informant." The European Court decided that even though, owing to the difficulties inherent in the investigation and processing of terrorist crimes, the "reasonableness" cannot always be evaluated using the same standards as in ordinary crime, "the exigencies of dealing with a terrorist crime cannot justify stretching the notion of 'reasonableness' to the point where the safeguard secured by Article 5 § 1 (c) [of the European Convention] is impaired."[340]

320. In the instant case, there is no evidence that the secrecy of everything relating to the preliminary proceedings (or the "confidential files" even after this) responded to a measure that was necessary in order to protect information that could affect the investigation. Consequently, the accused's defense was not given the opportunity to examine any of the documents and evidence on which his deprivation of liberty was based. In addition, the investigating judge's assertion in the indictment that there were "well-founded presumptions to consider that [Mr. Ancalaf] participated as perpetrator of the three offenses" investigated, was not accompanied by specific information that the accused and his defense could contest.[341] Consequently, the Court decides that the State did not comply with the requirement of establishing the existence of sufficient evidence that would allow a reasonably presumption of the identity of those who had taken part in the offense investigated (*supra* para. 312.b).

321. Furthermore, the pre-trial detention de Víctor Ancalaf Llaupe was not ordered to achieve a legitimate objective, because the indictment did not refer to the need for deprivation of liberty

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340 ECHR, *Case of O'Hara v. The United Kingdom*, No. 37555/97. Judgment of 16 October 2001, paras. 33 to 35.

341 ECHR, *Case of A. and Others. v. The United Kingdom,* No. 3455/05. Judgment of 19 February 2009, para. 220. The European Court Europeo has indicated that: "[t]he Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations." "Where, however, the open material consisted purely of general assertions and [the competent organ's] decision to [...] maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5 § 4 would not be satisfied." In this case, the European Court considered that some detainees were not in a position effectively to challenge the allegations against them and, therefore, found that there had been a violation of Article 5.4 of the European Convention.

or to the purpose sought by this in the specific case. The objective sought with the pre-trial detention became clear when all the requests for pre-trial release made by Mr. Ancalaf Llaupe, and the corresponding appeals, were denied. The only justification for the adverse decisions was that the requests were denied "because he was considered a danger to the security of society," "[t]aking into account the number of offenses the accused is charged with and their nature." The appeals were rejected outright and without any justification.

322. The Court considers that this objective of denying the release of the accused because he would be a danger "to the security of society" has an open-ended meaning that can permit objectives that are not in keeping with the Convention. In this regard, expert witness Duce, proposed by CEJIL, explained that these grounds are open to different interpretations that may include not only legitimate procedural objectives, but also objectives that the Court, in its case law, has considered illegitimate for ordering and maintaining pre-trial detention.[342]

323. This makes it essential to verify whether, in this specific case, the reference to the liberty of the accused being a danger "to the security of society" was supported by any factor or reason that could be considered to seek a preventive objective and that justified the need for the measure in the specific case. Thus, in this case, when referring to the danger, reference was made to only two of the criteria that article 363 of the Code of Criminal Procedure established must be taken into account "in particular": "the severity of the punishment assigned to the offense" and "the number of offenses that the accused is charged with and their nature." The Court reiterates that the use of these criteria alone are insufficient to justify pre-trial detention (*supra* para. 312.a).

324. In addition, the failure to provide the reasoning for the judicial decisions, aggravated by the confidentiality of the preliminary proceedings, prevented the defense from knowing why the pre-trial detention had been maintained and this precluded the defense from presenting evidence and arguments to challenge decisive inculpatory evidence or to achieve his pre-trial release.[343] In this regard, expert witness Fierro Morales indicated that "[i]t is in this context, and in absolute secret, that the investigating judge decided that, with regard to Mr. Ancalaf, there were well-founded presumptions that implicated him as perpetrator in the acts investigated as terrorist offenses."[344]

325. Furthermore, in neither the indictment nor the denials of the requests for pre-trial release was it assessed positively that Víctor Ancalaf Llaupe had come forward voluntarily when he was summoned to testify and that, when his defense filed the second request, the investigation against him had concluded.

326. Since his criminal responsibility had not been established legally, Mr. Ancalaf Llaupe had the right to be presumed innocent under Article 8(2) of the American Convention. On this basis, the State had the obligation not to restrict his liberty more than strictly necessary, because pre-trial detention is a precautionary rather than a punitive measure. Consequently, the State restricted the liberty of Mr. Ancalaf without respecting the right to presumption of innocence and violated his right not to be subject to arbitrary arrest established in Article 7(3) of the Convention.

327. *Based on the above, it must be concluded that the State violated the right to personal liberty, not to be subject to arbitrary arrest, and not to suffer pre-trial detention in conditions that were not adapted to international standards, recognized in Article 7(1), 7(3) and 7(5) of*

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342 *Cf.* Affidavit prepared on May 15, 2013, by expert witness Mauricio Alfredo Duce Julio (file of statements of presumed victims, witnesses and expert witnesses, folios 70 and 71).

343 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 118.

344 Affidavit prepared on May 17, 2013, by expert witness Claudio Alejandro Fierro (file of statements of presumed victims, witnesses and expert witnesses, folio 8).

the American Convention, and the right to presumption of innocence, established in Article 8(2) of the American Convention, all in relation to Article 1(1) of the American Convention, to the detriment of Víctor Manuel Ancalaf Llaupe.

b) Pre-trial detention of Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán and Patricia Roxana Troncoso Robles[345]

b.i) Pertinent facts

a) Pre-trial detention of Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán and Patricia Troncoso Robles

328. On January 28, 2003, the hearing to open the investigation with regard to, among others, Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán and Patricia Troncoso Robles was held in the Collipulli Guarantees Court. During the hearing, the Public Prosecution Service requested their pre-trial detention and the judge ordered this. She based her decision on the consideration that "the confidential testimony seen by this judge constitutes well-founded presumptions of the participation of the accused in the said acts" and that "at the present time, since the accused are subject to personal precautionary measures in other pending proceedings, without prejudice to the subsequent review of such measures, it was in order to grant the pre-trial detention requested by the Public Prosecution Service." The precautionary measure to which they were already subject was also that of pre-trial detention.[346]

b) Pre-trial detention of Juan Patricio Marileo Saravia

329. During the hearing to monitor the detention and to open the investigation with regard to Juan Patricio Marileo Saravia, held in the competent court on March 16, 2003, the Public Prosecution Service requested his pre-trial detention and, in a decision issued the same day, the Collipulli Alternate Guarantees Court ordered this. It founded its decision as follows: "based on the information provided, this judge finds that both the existence of the offense to be investigated, and the participation and responsibility in it that can be attributed to the accused have been proved sufficiently at this procedural stage." He also indicated that "based on the form and circumstances of the perpetration of the wrongful act investigated, the importance of the harm caused by it, and the punishment that it entails, this judge finds that, at this procedural stage, the release of the accused would be a danger to the security of society; thus, this make the precautionary measures of pre-trial detention admissible in his regard." In addition, he indicated that "none of the circumstances established by the provisions of article 141 of the Criminal Procedural Code to exclude pre-trial detention are present in this case" and that "nor have the social and family ties indicated in the said article as a condition for the exclusion of pre-trial detention been proved during this hearing."

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[345] The evidence relating to the facts established in this chapter on the pre-trial detention of Jaime Marileo Saravia, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán and Patricia Roxana Troncoso Robles can be found in the file of the domestic criminal proceedings, a copy of which was provided during the processing of the case before the Commission (file of annexes to the Merits Report, appendix 1, folios 7804 to 10016).

[346] The text of the decision indicates that "the respective defense counsel opposed the precautionary measure of pre-trial detention indicating that article 140.b) of the Criminal Procedural Code had not been proved; in other words, that the participation of each of them in [the] events had not been proved." After referring to the information presented by the Public Prosecution Service, which included testimony from anonymous witnesses, the judge considered that the existence of the offense had proved and that "the secret testimony examined by this judge gave rise to well-founded presumptions of the participation of the accused in [the] events." She added "that, at this stage of the proceedings, it is not necessary to assess this background material as evidence, and it will be open to discussion at the pertinent procedural opportunity," in other words, "during the oral trial." Lastly, she took into account that the accused were already in pre-trial detention as a result of other pending proceedings (file of annexes to the Merits Report 176/10, appendix 1, folios 8666 and 8667).

c) Review of the need to maintain the five presumed victims in pre-trial detention

330. Acting separately or together, on reiterated occasions (April 1, May 30, June 18, September 12 and 24, October 7 and 13, and November 24, 2003), the presumed victims requested the Collipulli First Instance Guarantees Court to review the precautionary measure of pre-trial detention. In all the cases, the court denied the requests, and the corresponding appeals were also denied. In general, the denials were based on the argument that the release would be "dangerous for the security of society" or that the circumstances that made the pre-trial detention advisable had not changed. In one case, the court added, "furthermore, […] at this time there is no other precautionary measure that would ensure the objectives of the proceedings."[347] Regarding the requests of September 12, 2003, and thereafter, no decision was taken because, at the request of the Public Prosecution Service, the Temuco Court of Appeal had ordered that no change be made in the situation.

331. In a brief of January 8, 2004, the defense of the five presumed victims requested a hearing to review their precautionary measures "as ordered by article 145.2 of the Criminal Procedural Code, because six months had passed since the last time that this onerous precautionary measure had been revised [and their] clients had been deprived of liberty for more than a year." The following day, the Collipulli Guarantees Court of First Instance with combined jurisdiction decided that "[s]ince an order that no change be made has been issued in these proceedings, the request is inadmissible at this time." On January 28, 2004, the Supreme Court of Justice of Chile decided that "there is no reason to annul the "no change" order, although this should be restricted to the processing of background information, without this precluding a decision on the pre-trial detention of the accused." The court set the date of February 13, 2004, for the hearing to review the precautionary measure imposed on the five accused.

332. After this hearing, citing among other grounds, "the international treaties referred to by the Public Criminal Defender," the court decided to substitute the pre-trial detention by other precautionary measures consisting in the obligation to appear before the corresponding authority periodically, and the prohibition to leave the country, and an "order of immediate release" was issued. On February 18, 2004, the prosecutor and two complainants filed an appeal against the said decision and, on February 24, 2004, a hearing was held before the Temuco Court of Appeal which, citing among other grounds, Articles 7(1) and 7(2) "of the Pact of San José, Costa Rica," decided unanimously to confirm the decision appealed and impose on the accused, also, the "precautionary measures of night-time house arrest […] with the obligation to appear […] personally before the authority responsible for monitoring compliance with the measure that had been decided."

b.ii) Considerations of the Court

333. The Court considers that the decisions to adopt and maintain the pre-trial detention were not in accordance with the requirements of the American Convention that they be based on sufficient probative elements – with the exception of the decision regarding Juan Patricio Marileo Saravia which did comply with this requirement (*infra* para. 336) – and seek a legitimate objective, as well as the obligation to conduct periodic reviews.

a) Insufficient probative elements

334. The judicial decision that initially ordered the pre-trial detention of Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Troncoso Robles did not comply with the requirement that it be based on sufficient probative elements reasonably to suppose that the said individuals had taken part in the criminal act investigated,

[347] Decision issued on June 23, 2003, by the Collipulli court on the hearing to review the precautionary measure held that same day (file of annexes to the Merits Report 176/10, Appendix 1, Annex 7, folios 8421-8424).

because it was based merely on "confidential testimony," without including elements that could corroborate this conclusion (*supra* para. 328). This testimony relates to statements whose contents could not be examined by the defense, because at the stage of the investigation at which the pre-trial detention was requested and ordered, the secrecy of the investigation proceedings had been decreed for 40 days pursuant to article 182 of the Criminal Procedural Code. Moreover, when the judge evaluated the request for pre-trial detention filed by the Public Prosecution Service during the hearing, the defense pointed out that information was being used "which he ha[d] been unable to access."

335. This reference to "confidential testimony" was not accompanied by additional arguments or explanations that, without revealing information that had to be temporarily kept confidential with regard to a probative element, would have provided more information allowing the justification for the judicial decision to be known and enabling the accused and their defense to contest the adoption of the precautionary measure of pre-trial detention. Consequently, the defense of the accused had no knowledge of the evidence and no information concerning the elements that this supposedly gave the judge for basing her considerations regarding possible participation in the criminal act.

336. Regarding Juan Patricio Marileo Saravia, the judicial decision to adopt the measure of pre-trial detention (*supra* para. 329) provided sufficient evidence to conclude that it complied with the first requirement to indicate the evidence that resulted in a reasonable presumption that the person had taken part in the wrongful act investigated.

b) Lack of a legitimate purpose

337. With regard to the requirement that the need for pre-trial detention must be justified by a legitimate purpose (*supra* para. 312.a), the decisions ordering the pre-trial detention were not in keeping with the American Convention:

> a) The decision with regard to Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Troncoso Robles did not refer to whether the precautionary measure sought some procedural objective and was necessary in relation to the investigation, but merely ordered it on the basis that the accused were subject to this type of measure in relation to other proceedings. This reasoning does not substantiate the need for the measure in relation to the investigation and prosecution in the specific case.
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> b) The grounds for the decision with regard to Juan Patricio Marileo was that his release would represent a "danger to the security of society," an open-ended reason that, as already indicated (*supra* paras. 322 and 323), makes it essential to verify whether, in the specific case, the reference to these grounds was accompanied by a factor or criterion that could be considered to seek a precautionary objective and that would justify the measure, in the specific case. In this regard, the decision that ordered pre-trial detention merely indicated that it was considered necessary "during [the actual] procedural stage" of the case "based on the manner and circumstances of the perpetration of the wrongful act investigated, the importance of the harm caused by this, and the punishment it entailed." With regard to the criterion or factor relating to "the manner [and] circumstances of the perpetration of the wrongful act investigated," the Court notes that this factor was not accompanied by an explanation about how it might entail a procedural risk. The judge did not justify whether it would have any effects on the obstruction of specific measures that were pending at that stage of the proceedings. Regarding the reference to criteria such as the punishment and the "harm caused by the offense," the Court reiterates that the seriousness of the offense is not, in itself, sufficient justification for pre-trial detention (*supra* para. 312.a). Consequently, the Court finds that the domestic court did not justify the need to order pre-trial detention based on a procedural risk in the specific case.

338. The decisions that denied the request for review did not cite any legitimate purpose to maintain the pre-trial detention, so that the situation indicated in the preceding paragraphs remained unchanged.

339. Consequently, the Court finds that the judges failed to justify the decision to impose or maintain the pre-trial detention based on a legitimate purpose such as the existence of a procedural risk in the specific case.

c) Inadequate periodic review

340. The judicial decisions denying the requests for review did not comply adequately with the function of analyzing whether it was pertinent to maintain the detention measures. The statements that "there is no new information to review" and that "there is no information that would allow it to be presumed that the circumstances have changed that made pre-trial detention advisable," reveal an erroneous notion based on considering that it would be necessary to prove that the initial circumstances had changed, instead of understanding that it is the judge's task to analyze whether circumstances subsist that mean that the pre-trial detention should be maintained and is a proportionate measure to achieve the procedural objective sought. The judicial decisions ignored the need to justify and to provide the reasons for maintaining the precautionary measure imposed, and failed to mention any procedural objective that would have required maintaining it. Moreover, in one case, the decision to maintain the pre-trial detention was adopted without any justification.

341. With regard to the judicial decision of June 23, 2003, that maintained the pre-trial detention of Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán, Juan Patricio Marileo and Patricia Troncoso Robles, it did not contain an explanation of the information to which it refers that "does not change the circumstances that made the pre-trial detention advisable," and disregarded the fact that the review of the pre-trial detention imposed entailed justifying and providing the reasons for the need to maintain it. This was particularly serious in the instant case, because the initial adoption of the precautionary measure did not comply with any of the treaty-based requirements (*supra* paras. 334, 335 and 337). Furthermore, when maintaining the measure, the court did not explain which procedural objectives it was referring to and why there was no other precautionary measure that "permitted ensuring the objectives of the proceedings." In this regard, article 155 of the Criminal Procedural Code, to which the defense referred, established another seven personal precautionary measures that could be imposed either separately or together, among other matters, "to ensure the success of the investigation" and "to ensure the appearance of the accused at the different stages of the proceedings or for the execution of judgment," which, it would seem, were not considered by the judicial authority.

d) Presumption of innocence

342. In view of the fact that their criminal responsibility had not yet been established legally, the presumed victims had the right to be presumed innocent, pursuant to Article 8(2) of the American Convention. This gave rise to the State's obligation not to restrict their freedom more than strictly necessary, because pre-trial detention is a precautionary rather than a punitive measure. Consequently, the State restricted the freedom of Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán, Florencio Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles without respecting the right to the presumption of innocence and violated their right not to be subject to arbitrary imprisonment established in Article 7(3) of the Convention.

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343. *Based on the above, it must be concluded that the State violated the rights to personal liberty, not to be subject to arbitrary arrest, and not to suffer pre-trial detention in conditions that were not adapted to international standards, established in Article 7(1), 7(3) and 7(5) of*

the American Convention, and the right to the presumption of innocence, established in Article 8(2) of the American Convention, all in relation to Article 1(1) of the American Convention, to the detriment of Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán, Florencio Jaime Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles.

c) Pre-trial detention of Aniceto Norín Catrimán and Pascual Pichún Paillalao[348]

344. The pre-trial detention of Messrs. Norín Catrimán and Pichún Paillalao was also governed by the provisions of articles 139 to 154 of the Criminal Procedural Code of 2000 (*supra* para. 305). They were both investigated and tried in relation to two offenses of terrorist arson and for the offense of threats of terrorist arson. They were sentenced and convicted as perpetrators of the offense of threats and acquitted of the offenses of terrorist arson (*supra* paras. 106 to 119).

c.i) Pertinent facts

a) *Pre-trial detention of Aniceto Norín Catrimán Pascual and Pascual Pichún Paillalao*

345. On January 11, 2002, a hearing was held before the Traiguén Guarantees Court to monitor the detention and open the investigation with regard to Aniceto Norín Catrimán, during which the Public Prosecution Service requested that the court order his pre-trial detention. The defense pointed out, among other matters, that "the prosecutor ha[d] not justified this and c[ould] not base his request on the fact that the relevant information he possessed ha[d] been declared secret, because, it [was] precisely on this information that the court must base its decision." The prosecutor asserted that "regarding the participation, there are a series of testimonies that, at this time, are confidential, but if [the judge] wishes to examine them [he could] make them available to her," and the judge ordered a recess "in order to examine the information." The same day, the court ordered the measure requested, on the basis that:

> The requirements established in article 140 have been met; the offense has been proved, there is well-founded information that allows it to be presumed that the accused participated as perpetrator. In addition, there is also information from the court that reviewed and examined the information contained in the file of the investigation proceedings which the prosecutor showed me that allows it to be considered that pre-trial detention is essential for the success of the investigation and also considering that the release of the accused at this time would constitute a grave danger for society, especially because of the number of offenses of which he has been indicted and the severity of the punishment assigned to at least one of them: the offense of arson that is penalized by medium-term rigorous imprisonment at any of its levels for more than five years and one day.

346. On January 14, 2002, Mr. Norín Catrimán's defense appealed the ruling issued on January 11, 2002, alleging that "[i]t has been argued that some information has been declared confidential, but it has never been indicated whether this contains information against my client" and that "by not disclosing the information that justifies such a severe precautionary measure, the possibilities of contesting it are impaired." On January 18, 2002, a hearing was held to decide the said appeal, following which the Temuco Court of Appeal decided to confirm the decision appealed, with the exception of the argument "that the pre-trial detention would be essential for the success of the investigation," which it ordered should be "eliminated."

347. On March 4, 2002, a hearing was held before the Traiguén Guarantees Court to monitor the arrest and indictment of Pascual Pichún Paillalao, during which the Public Prosecution Service requested pre-trial detention. The court granted this, on the basis that "there is information that justifies the existence of the offense; also, there are well-founded presumptions that the accused participated in it and also there is specific information that allows the court to consider that pre-trial detention is essential for the success of the

[348] The evidence relating to the facts established in this chapter on the pre-trial detention of Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao are to be found in the file of the domestic criminal proceedings, a copy of which was provided during the processing of the case before the Commission (file of annexes to the Merits Report, appendix 1, folios 4319 to 5159).

investigation." On March 9, 2002, Mr. Pichún Paillalao's defense appealed the decision of March 4, 2002. On March 13, a hearing was held to decide this appeal, following which the Temuco Court of Appeal decided to confirm the decision appealed, as follows:

> Based on the circumstances of the act, the testimony of those present in the court, the seriousness of the offense investigated, and the personal history of the accused, and also taking into consideration the provisions of article 140 of the Criminal Procedural Code, the appealed decision of March 4 this year is confirmed, considering that the release of the accused Pascual Pichún Paillalao would be dangerous for society.

b) *Review of the need to maintain the pre-trial detention*

348. Acting separately or jointly, the presumed victims requested repeatedly (February 22, June 14, July 4, and August 9, 2002) the review of the precautionary measure of pre-trial detention before the Traiguén Guarantees Court. The ruling was always adverse and the appeals filed were denied by the Temuco Court of Appeal (except in one case in which it was declared abandoned owing to the defense's failure to appear[349]). The arguments on which the denials were based were, basically, that the danger to the security of society persisted owing to the egregious nature of the offenses attributed to the accused. In one of the adverse decisions, it was also asserted that "as the defense has said, the Guarantees Court must safeguard the innocence of the accused; however, this court must also safeguard the rights of the victim."[350] In another it explained that "in this regard the requirements of the three paragraphs of article 140 are met: the offense has been proved, there are well-founded presumptions to consider that they are the perpetrators, and also owing to the seriousness of the offenses for which they are in pre-trial detention and the severity of the punishment assigned to the offense."[351] In a subsequent decision, the court indicated that "having analyzed what has been said and also the information which it has seen in the case file, the requirements for maintaining the detention have not changed, because [the accused] have been indicted of an offense under Law No 18,314 that merits a severe punishment and, therefore, release would constitute a danger to society."[352]

c.ii) Considerations of the Court

349. The Court considers that the decisions to adopt and to maintain pre-trial detention were not in keeping with the requirements of the American Convention that it should be based on sufficient evidence and seek a legitimate objective, and must be reviewed periodically.

a) Insufficient probative elements

350. The decision to impose pre-trial detention on Aniceto Norín Catrimán (*supra* paras. 345 and 346) was based on testimony that was "confidential" because it had been decided that some of the investigation procedures would be closed. Moreover, additional arguments or explanation were not provided that, without revealing information regarding the evidence that needed to be kept confidential temporarily, would have provided more information that would have allowed the grounds for the judicial decision to be known and enabled the accused and his defense to contest the adoption of the precautionary measure of pre-trial detention. Therefore, it was not consistent with the requirements of the American Convention.

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[349] Decision issued on June 28, 2002, by the Temuco Court of Appeal (file of annexes to the Merits Report 176/10, appendix 1, folio 4370).

[350] Decision issued on July 11, 2002, by the Traiguén Guarantees Court (file of annexes to the Merits Report 176/10, appendix 1, folios 4354 to 4364).

[351] Decision issued on April 8, 2002, by the Traiguén Guarantees Court (file of annexes to the Merits Report 176/10, appendix 1, folio 4551).

[352] Decision issued on June 19, 2002, by the Traiguén Guarantees Court (file of annexes to the Merits Report 176/10, appendix 1, folio 4345).

351. The judicial decision ordering the pre-trial detention of Pascual Pichún Paillalao was based on the existence of elements and "presumptions" concerning the perpetration of the criminal act and the accused's participation in it (*supra* para. 347). Even though the written judicial decision does not provide details of the evidence on which this conclusion was based, during the hearing reference was made to elements that, at that stage, could be considered to implicate Mr. Pascual Pichún in the incident investigated. The defense did not contest this aspect in the appeal. Consequently, the Court does not find that the State failed to comply with this first requirement of the measure being based on the existence of sufficient element implicating the accused in the wrongful act under investigation.

b) Lack of a legitimate objective

352. It has been proved that the grounds for the decision to impose and maintain the pre-trial detention of Messrs. Norín Catrimán and Pichún Paillalao was that their release would constitute a "grave danger for society," or "considering [their release] dangerous for the security of society" (*supra* paras. 345 to 347). To this end, criteria such as the "number of offenses investigated," the "severity of the punishment," the "seriousness of the offense investigated" and the "personal history of the accused," were taken into account that, in themselves, do not justify pre-trial detention, and that were not assessed when evaluating the need for the measure in the circumstances of the specific case. Even though the decision ordering the pre-trial detention of Mr. Pascual Pichún indicated that it was "essential for the success of the investigation," this assertion was not justified in a way that allowed it to be known if it was considered that the release of the accused would in some way affect the implementation of specific measures.

c) Inadequate periodic review

353. None of the judicial decisions adopted in relation to the requests to review the maintenance of the pre-trial detention of Messrs. Norín Catriman and Pichún Paillalao (*supra* para. 348) analyzed the need to provide the reasons that justified the maintenance of the precautionary measure. Nor was any reference made to any legitimate procedural objective that made it necessary to maintain them. None of the judicial decisions assessed factors or criteria that could be related to a legitimate objective that would have justified the need for the measure in the specific case.

d) Presumption of innocence

354. Since their criminal responsibility had not yet been established, the presumed victims had the right to be presumed innocent under Article 8(2) of the American Convention. This gave rise to the State's obligation not to restrict their freedom more than strictly necessary, because pre-trial detention is a precautionary rather than a punitive measure.[353] Consequently, the State restricted the liberty of the presumed victims without respecting the right to the presumption of innocence, and violated their right not to be subject to arbitrary imprisonment established in Article 7(3) of the Convention.

* * *

355. Based on the above, it must be concluded that the State violated the rights to personal liberty, not to be subject to arbitrary imprisonment, and not to suffer pre-trial detention in conditions that were not consistent with international standards established in Article 7(1), 7(3) and 7(5) of the American Convention, and the right to the presumption of innocence, established in Article 8(2) of the American Convention, all in relation to Article 1(1) of the American Convention, to the detriment of Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao.

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[353] *Cf. Case of Suárez Rosero v. Ecuador. Merits*, para. 77, and *Case of J. v. Peru*, para. 371.

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356. In view of the fact that the pre-trial detention to which the presumed victims were subjected was arbitrary, the Court does not find it necessary to consider whether the time of more than one year, in each case, during which they were in pre-trial detention exceeded reasonable limits.[354]

357. To all the foregoing, it should be added that, in none of the cases, the condition of seven of the presumed victims as members of an indigenous people was taken into account and, in particular, the positions of traditional authority occupied by Messrs. Norín Catrimán and Pichún Paillalao as *Lonkos* and Mr. Ancalaf Llaupe as *Werken* of their respective communities. In order to ensure effectively the rights established in Article 7 of the Convention, in relation to Article 1(1) of this instrument, when interpreting and applying their domestic laws, State must take into consideration the inherent characteristics that differentiate members of the indigenous peoples from the general population and that constitute their cultural identity.[355] The prolonged duration of pre-trial detention may have different effects on members of indigenous peoples owing to their economic, social and cultural characteristics and, in the case of community leaders, may also have negative consequences on the values, practices and customs of the community or communities in which they exercise their leadership.[356]

358. For the reasons set out in this chapter, *the Court concludes that the State violated the rights to personal liberty, not to be subject to arbitrary imprisonment, and not to suffer pre-trial detention in conditions that are not consistent with international standards recognized in Article 7(1), 7(3) and 7(5) of the American Convention, and the right to the presumption of innocence, established in Article 8(2) of the American Convention, all in relation to Article 1(1) of the American Convention, to the detriment of Víctor Ancalaf Llaupe, Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán, Patricia Troncoso Robles, Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao.*

3. Alleged non-compliance with the obligation established in Article 2 of the American Convention (Domestic legal effects)

359. CEJIL alleged that Article 2 of the Convention had been violated in relation to the regulation of "[t]he grounds of danger to the security of society," because it considered that "it violates the treaty-based guarantees, owing both to its implications and to the failure to adapt it to the relevant international standards." CEJIL referred to the 2008 reform of the Criminal Procedural Code in relation to these grounds, but affirmed that "the ambiguity of the grounds […] was not rectified" and, rather, that "certain hypotheses [were included] where the judge was obliged to presume they existed (article 140.3, Criminal Procedural Code)." The FIDH did not allege a violation of Article 2 of the Convention, but asked the Court to order that "the grounds of danger to the security of society be eliminated" from domestic law (*infra* para. 462). Meanwhile, Chile contested these allegations, arguing that "with regard to the admissibility of pre-trial detention owing to danger to society or to the victim, it is […] irresponsible to allege that safeguards should not be ordered in cases where past events indicate that a person could, if in liberty, not only flee or affect the investigation, but also endanger the victim of the offense investigated or other persons." The State affirmed that it "did not understand why the safety of the investigation would be a legal right that had sufficient value to provide grounds for ordering

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354 *Cf. Case of Tibi v. Ecuador*, para. 120, and *Case of Chaparro Álvarez and Lapo Íñiguez. v. Ecuador*, para. 142.

355 *Cf. Case of the Yakye Axa Indigenous Community v. Paraguay*, paras. 59 and 60, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 162.

356 *Mutatis mutandis*, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, para. 154, and *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of September 4, 2012 Series C No. 250, para. 177.

a precautionary measure involving the pre-trial detention of an accused, but not the safety of persons."

360. In order to rule on the alleged violation of Article 2 of the Convention, as it has in other cases,[357] the Court will only refer to the domestic laws applied to the presumed victims and will not examine the 2008 reform of the Criminal Procedural Code referred to by CEJIL and expert witness Duce.[358] Furthermore, the Court will only rule on the grounds of "danger to the security of society," because this is where the dispute lies in the instant case. The Court notes that these grounds are stipulated in article 363 of the Code of Criminal Procedure, applied to Mr. Ancalaf, which regulates the reasons why "pre-trial release [could be] denied" and the reasons or purposes for which it was "understood that arrest or pre-trial detention [was] necessary" (*supra* para. 304). Under the 2000 reform of criminal procedure, this reason was maintained in article 140.c) of the Criminal Procedural Code as possible grounds for ordering pre-trial detention (*supra* para. 305). The text of the grounds is almost identical in both codes. Expert witness Duce referred to the regulation of the grounds of "danger to the security of society" in Chile and its interpretation by the courts.[359]

361. The Court considers that the wording of the grounds of "danger to the security of society" admits several interpretations in relation to achieving both legitimate and non-precautionary objectives. Regarding the latter interpretation, the Court reiterates its consistent case law concerning the standards that should regulate pre-trial detention as regards its exceptional and limited temporal nature, strict necessity and proportionality and, above all, the standards relating to the fact that its objectives should be inherent in its precautionary nature (the objectives of protecting the proceedings according to the needs that are justified in specific proceedings) and cannot constitute a premature punishment that violates the principle of the presumption of innocence which protects the accused (*supra* paras. 307 to 312). The Court considers that it is not in discussion that States Parties may adopt domestic legal provisions to prevent crime, at times by means of its legal system, particularly criminal law, by imposing punishment, but it should be emphasized that this is not a function of pre-trial detention.

362. Furthermore, the Court notes that, when stipulating these grounds in the said article 140.c) of the Criminal Procedural Code, it was established that, in order to consider whether they had been constituted, "the judge must give special consideration to some of the [...] circumstances" described in the norm (*supra* para. 305). Based on the evidence provided to this Court, it is possible to maintain that this regulation did not prohibit the possibility of the judge

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357 *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*, para. 214*, and Case of Mohamed v. Argentina*, para. 162.

358 *Cf.* Affidavit prepared on May 15, 2013, by expert witness Mauricio Alfredo Duce Julio (file of statements of presumed victims, witnesses and expert witnesses, folio 39).

359 Among other points, expert witness Duce explained that "although the grounds 'danger to the security of society' admitted the possibility of an interpretation consistent with international human rights law, the way in which it was traditionally interpreted and applied in the context of the inquisitorial system in force, and particularly in this case in which [he is] giving this expert opinion, reveals a problem of compatibility with international human rights law." In addition, regarding the way the courts apply the said grounds, he explained that "the courts usually understand that 'danger to the security of society' will be constituted by the objective presence of one or some of the circumstances listed in the third and fourth paragraphs of article 140 of the Code of Criminal Procedure (for example, that the offense in question warrants a criminal sentence, in other words that it is a serious crime as in this case), without the need to justify exactly how, in the specific case that is the object of the decision, the liberty of the accused will constitute this danger to the security of society. [...] Indeed, if it is interpreted that, in the case of serious offenses or those that warrant criminal sentences, there is necessarily a danger to the security of society (without any precise explanation), the appropriate decision would be to apply pre-trial detention in all these cases, regardless of their specific circumstances." He also indicated that "[s]ince no specific meaning is given to the exact scope of these grounds in the cases examined, the defense is prevented from contesting the reasons why this precautionary measure has been requested or ordered, and a rather formal justification of the judges' decisions is also fostered." *Cf.* Affidavit prepared on May 15, 2013, by expert witness Mauricio Alfredo Duce Julio (file of statements of presumed victims, witnesses and expert witnesses, folios 37 to 80).

taking other criteria into account that allowed him to assess the need for the measure in a specific case in order to achieve procedural objectives. However, the Court takes into account the clarification made by expert witness Duce to the effect that "the [Chilean] courts usually understand that the danger to the security of society will be constituted by the objective presence of one or some of [these] circumstances," which is particularly serious if it is recalled that they include "the severity of the punishment assigned to the offense" and "the nature of the [offenses involved]." The Court reiterates that neither of these criteria are, in themselves, sufficient justification for pre-trial detention (*supra* para. 312.a) and adds that to base pre-trial detention solely on these criteria results in a violation of the presumption of innocence. Criteria of this nature must be assessed in the context of evaluating the need for the measure in the circumstances of the specific case.

363. By ordering and maintaining the measures of pre-trial detention of the eight victims in this case, the grounds of "danger to the security of society" was applied repeatedly in the way indicated by expert witness Duce, without justifying the need for the measure in the circumstances of the specific case, and based above all on criteria relating to the seriousness of the offense investigated and the severity of the punishment (*supra* paras. 321 to 327, 337 to 339 and 352).

364. Based on the foregoing, the Court finds that article 363 of the Code of Criminal Procedure applied to Mr. Ancalaf and article 140.c of the Criminal Procedural Code of 2000 applied to the other seven presumed victims, which established the grounds for pre-trial detention concerning "danger to the security of society," were not *per se* contrary to the American Convention, because they could be interpreted in a way that was consistent with it, provided that they were applied seeking a procedural objective and the criteria taken into account were assessed in relation to the evaluation of whether there was a procedural risk in the circumstances of the specific case. Consequently, Chile did not violate the obligation to adopt domestic legal provisions, established in Article 2 of the American Convention, in relation to Article 7 of the American Convention, to the detriment of the eight presumed victims of this case. The violation of their right to personal liberty resulted from the judicial interpretation and application of these norms.

VII.4 – FREEDOM OF THOUGHT AND EXPRESSION, POLITICAL RIGHTS, AND RIGHTS TO PERSONAL INTEGRITY AND TO THE PROTECTION OF THE FAMILY (ARTICLES 13, 23, 5(1) AND 17 OF THE AMERICAN CONVENTION)

365. The alleged violations examined in this chapter are a result of the pre-trial detention and the main and ancillary punishments imposed on the presumed victims. The Court must determine whether these consequences have constituted autonomous violations of the American Convention.

A) Arguments of the Commission and of the parties

366. The Commission affirmed that Chile violated the rights established in Articles 13 and 23 of the Convention, in relation to Article 1(1) of this instrument, to the detriment of the eight presumed victims owing to "the impact [of the] classification of an offense as a terrorist act" on "the imposition of the [ancillary] punishments […] which, owing to their content, affect the exercise of other rights recognized in Articles 5 and 17 of the Convention.

367. With regard to the alleged violations of the right to freedom of thought and expression and political rights, the common interveners submitted the following arguments:

> **a)** CEJIL indicated that the State had violated these rights to the detriment of Víctor Manuel Ancalaf Llaupe, in relation to Articles 1(1), 2 and 8 of this instrument. It affirmed that "punishments restricting freedom of expression […] are the result of a sentence

imposed arbitrarily." It also indicated that article 9 of the Chilean Constitution establishes "grounds for general and absolute prior censure for all those who are convicted of a terrorist offense, because it prohibits *a priori* emitting or disseminating information or opinions." The application of this norm to Mr. Ancalaf Llaupe, who "performed tasks relating to the diffusion and distribution of information in his community and as its spokesperson," resulted in "a violation of the social dimension of freedom of expression." It also asserted that the imposing punishments on Mr. Ancalaf Llaupe under the Counter-terrorism Act resulted in an "indirect violation of [the right to] the freedom of expression of the Mapuche people, because it had an intimidating and inhibiting effect on its members, preventing them from the full exercise" of this right. In addition, it affirmed that the arbitrary conviction of Mr. Ancalaf Llaupe also meant that "ancillary penalties were imposed on him that still restrict the full exercise of his political rights" and, therefore, as regards the communities that he represents, their "political relationship with the State authorities has been impaired and, consequently, their ability to take part in public decisions that concern them."

b) The FIDH endorsed the arguments presented by CEJIL regarding the alleged violation of Articles 13 and 23 of the Convention in relation to the application of ancillary penalties,[360] and added that "the expression of claims for the recovery of ancestral lands is a right protected by Article 13(1) […] and the discriminatory use of emergency criminal laws with the effect of limiting this expression violates [the provisions of] Article 13(3) [of the Convention]" because, by obstructing "the free discussion of ideas and opinions, it limits freedom of expression and the effective development of the democratic process." According to the FIDH, "[t]he sentences, and the policy of applying the anti-terrorism legislation" restricted the right to freedom of expression by "obstructing the expression of claims for the expansion of the indigenous lands" and by "stigmatizing […] as terrorists, Mapuche activists in favor of respect for indigenous rights and access to their territorial rights," as well as because "they harmed the Mapuche protest in order to silence it."

368. As regards the rights to personal integrity and to the protection of the family, the common interveners argued as follows:

a) CEJIL stated that Chile had incurred in a violation of Articles 5 and 17 of the Convention to the detriment of Víctor Ancalaf Llaupe. It indicated that "by treating him as a terrorist, the State placed him under a special legal regime that affected and still today radically affects his life, that of his family and his community, as well as the exercise of his role as a traditional authority of the Mapuche people." It also indicated that Mr. Ancalaf "remained during all the time he was deprived of liberty, which lasted more than four years," in a prison located "more than 300 kilometers" from his community and this "had been denounced by various human rights organizations owing to the inhuman detention conditions," which "had both physical and mental effects on [Mr.] Ancalaf." These effects were increased "by the distance that separated the detention center from his community," because "it was almost impossible for him to receive visits and the emotional and material support of his friends and family during his years of imprisonment; [and …] also, his children and his wife were deprived of contact with their father and husband," because they had very limited resources and had to overcome serious obstacles in order to visit him. This situation was aggravated by the State authorities' refusal of the requests that he and his wife made for his transfer to a prison nearer to his community.

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[360] The FIDH argued the violation to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles.

b) The FIDH affirmed that the State had violated the right to personal integrity protected in Article 5 of the Convention because "the sentences and the trials held against its clients" affected their personal integrity. It indicated that "[t]he pursuit, arrest and imprisonment" and, in the case of some of them, life in hiding, caused them "suffering and harm to their physical and moral integrity." These effects on their integrity were based, among other factors, on "physical and psychological health problems" resulting from their "arrest during vast police raids," their identification by the press, the political authorities and the Public Prosecution Service as dangerous terrorists," the "detention conditions," the distance of the prisons from their families and communities, and the financial difficulties of their families to be able to visit them, as well as the direct consequences of the deprivation of liberty on them and on the family dynamics and, in some cases, the "hunger strikes" carried out to "demand their release and the non-application of the Counter-terrorism Act." The FIDH did not allege the violation of the right to the protection of the family.

369. The State did not submit specific arguments to contest these alleged violations. It merely indicated, in general, that it "rejected […] each and every one of the human rights violations attributed to it."

B) Considerations of the Court

1. Right to freedom of thought and expression

370. Article 13 of the Convention establishes the following:

> Article 13
>
> Freedom of thought and expression
>
> 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
>
> 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
>
> a) respect for the rights or reputations of others; or
>
> b) the protection of national security, public order, or public health or morals.
>
> 3. 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.
>
> 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
>
> 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

371. In its case law, the Court has referred to the broad content of the right to freedom of thought and expression established in Article 13 of the Convention. This norm protects the right to seek, receive and impart information and ideas of all kinds.[361] The Court has indicated that freedom of expression has an individual dimension and a social dimension, based on which it

[361] *Cf.* Advisory Opinion OC-5/85 of November 13, 1985, para. 30; *Case of Kimel v. Argentina*, para. 53, and *Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265, para. 119.

has understood that a series of rights are protected by this article.[362] The two dimensions are equally important and must be fully ensured simultaneously in order to make the right to freedom of expression completely effective in the terms of Article 13 of the Convention.[363] Thus, in light of both dimensions, freedom of expression requires, on the one hand, that no one be arbitrarily prevented from expressing his own opinions and therefore represents a right of each individual, but, on the other hand, it also entails a collective right to receive any type of information and the expression of the opinions of others.[364]

372. The individual dimension of freedom of expression includes the right to use any appropriate means to disseminate opinions, ideas and information so that it reaches the greatest number of persons. Thus, expression and diffusion are indivisible, so that a restriction of the possibilities of dissemination represents directly, and to the same extent, a limit to the right to express oneself freely.[365]

373. In the instant case, the ancillary penalties established in Article 9 of the Chilean Constitution were imposed on Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao and Víctor Manuel Ancalaf Llaupe (*supra* paras. 117 and 144). Thus, among other matters, "for 15 years, they were disqualified from […] exploiting a social communication medium or from being a director or administrator of one, or from performing functions related to the emission and diffusion of opinions and information."

374. The Court considers that this ancillary penalty entailed an undue restriction of the exercise of the right to freedom of thought and expression of Messrs. Norín Catrimán, Pichún Paillalao and Ancalaf Llaupe, not only because it was imposed based on judgments that applied a criminal law that violated the principle of legality and several procedural guarantees (*supra* Chapter VII.1 and VII.2), but also because, in the circumstances of this case, it is contrary to the principle of the proportionality of the punishment. As the Court has determined, this principles signifies "that the State's response to a wrongful act of the perpetrator of an offense must be proportionate to the right affected and to the responsibility of the perpetrator, so that it should be established based on the different nature and seriousness of the acts."[366]

375. The Court has verified that, as traditional authorities of the Mapuche indigenous people, Messrs. Norín Catrimán, Pichún Paillalao and Ancalaf Llaupe played a decisive role in communicating the interests, and in the political, spiritual and social guidance, of their respective communities (*supra* para. 78). The imposition of the above-mentioned ancillary penalty has restricted their possibility of taking part in the diffusion of opinions, ideas and information by performing functions in social media, and this could limit the sphere of action of their right to freedom of thought and expression in the exercise of their functions as leaders or representatives of their communities. This, in turn, has a negative impact on the social dimension of the right to freedom of thought and expression, which, as the Court has

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362 *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, reparations and costs.* Judgment of February 5, 2001 Series C No. 73, para. 65, and *Case of Mémoli v. Argentina*, para. 119.

363 *Cf. Case of Ivcher Bronstein v. Peru. Merits, reparations and costs.* Judgment of February 6, 2001. Series C No. 74, para. 149, and *Case of Mémoli v. Argentina*, para. 119.

364 *Cf. Case of Ivcher Bronstein v. Peru. Merits, reparations and costs*, para. 146, and *Case of Mémoli v. Argentina*, para. 119.

365 *Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*, para. 65, and *Case of Vélez Restrepo and family members v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of September 3, 2012. Series C No. 248, para. 138.

366 *Cf. Case of Vargas Areco v. Paraguay. Merits, reparations and costs.* Judgment of September 26, 2006. Series C No. 155, para. 108, and *Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 163, para. 196.

established in its case law, involves the right of everyone to receive the opinions, reports, and news of third parties.[367]

376. In addition, it could have produced an intimidating and inhibiting effect on the exercise of freedom of expression, derived from the specific effects of the undue application of the Counter-terrorism Act to members of the Mapuche indigenous people. In other cases, the Court has previously referred to the intimidating effect on the exercise of freedom of expression that may result from the fear of being subject to a civil or criminal sanction that is unnecessary or disproportionate in a democratic society, and that may lead to the self-censorship of the person on whom the punishment is imposed, and on other members of society.[368] In the instant case, the Court considers that the way in which the Counter-terrorism Act was applied to members of the Mapuche indigenous people could have instilled a reasonable fear in other members of this people involved in actions related to the social protest and the claim for their territorial rights, or who would eventually want to participate in this.

377. Nevertheless, the Court is not persuaded by the argument of CEJIL that the restriction of freedom of expression stipulated in article 9 of the Chilean Constitution constitutes prior censorship prohibited by Article 13 of the Convention (*supra* para. 367.a). The argument appears not to have taken into account that this was an ancillary penalty established by law, which was imposed by a sentence in a criminal trial.

378. Based on the foregoing, *the Court concludes that Chile violated the right to freedom of thought and expression protected in Article 13(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao and Víctor Manuel Ancalaf Llaupe.*

2. Political rights

379. The Court reiterates that, in the instant case, the presumed victims were sentenced in criminal proceedings that were held in conditions that violated the American Convention (*supra* Chapter VII.1 and VII.2) and, in addition, it has verified that ancillary penalties were imposed that restricted their political rights (*supra* paras. 117, 126 and 144). Based on the arguments presented in this regard, the Court will rule on the alleged violation of Article 23 of the Convention to the detriment of the presumed victims.

380. Article 23 of the Convention stipulates the following:

> Article 23.
> Right to Participate in Government
>
> 1. Every citizen shall enjoy the following rights and opportunities:
>
> a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
>
> c) to have access, under general conditions of equality, to the public service of his country.
>
> 2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

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[367] *Cf. Case of Ivcher Bronstein v. Peru. Merits, reparations and costs*, para. 148, and *Case of Vélez Restrepo and family members v. Colombia*, para. 138.

[368] *Mutatis Mutandi, Case of Tristán Donoso v. Panama. Preliminary objection, merits, reparations and costs.* Judgment of January 27, 2009. Series C No. 193, para. 129, and *Case of Fontevecchia and D'Amico v. Argentina. Merits, reparations and costs.* Judgment of November 29, 2011. Series C No. 238, para. 74.

381. Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao and Víctor Manuel Ancalaf Llaupe were subject to ancillary penalties that restricted their political rights, as established in articles 28 of the Criminal Code and 9 of the Constitution. The other five presumed victims, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, were only subject to the ancillary penalties, which also restricted their political rights, established in article 28 of the Criminal Code.

382. Article 9 of the Chilean Constitution establishes, among other matters, that those responsible for terrorist offenses "shall be disqualified for 15 years from discharging public duties or holding public office, regardless of whether or not the appointment is by popular election; from being the rector or director of an educational establishment or performing teaching activities therein; from operating a social communications media outlet or being a director or manager thereof, or performing therein functions connected with the broadcast or dissemination of opinions or information; and from being the leader of a political organization, an organization associated with education, or a neighborhood, professional, business, labor, student, or trade association, during that time." It added that this "is understood […] without prejudice to other disqualifications or those that last longer according to the law." In this regard, article 28 of the Criminal Code establishes the penalties of "absolute and permanent disqualification from public office or functions and political rights, as well as absolute disqualification from titled professions for the duration of the sentence."

383. To the extent that the effective exercise of political rights constitutes an end in itself and, also, a fundamental means that democratic societies have to ensure the other human rights established in the Convention,[369] the Court considers that, in the circumstances of this case, the imposition of the said ancillary penalties, which affected the right to vote, direct participation in public affairs, and access to public office, of an absolute and perpetual nature or for a fixed but prolonged term (15 years), is contrary to the principle of the proportionality of the punishment (*supra,* para. 374) and constituted a very serious impairment of the political rights of Segundo Aniceto Norín Catrimán, Pascual Huetequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles.

384. The foregoing is particularly serious in the case of Messrs. Ancalaf Llaupe, Norín Catrimán and Pichún Paillalao, due to their status as traditional leaders of their communities (*supra* para. 78). Thus, the imposition of the said penalties also had an impact on the representation of the interests of their communities in relation to other communities, as well as in relation to the rest of Chilean society. Specifically, the Court underlines that, owing to these penalties, they were prevented from taking part in or guiding public activities in State entities that seek to promote, coordinate and execute actions to develop and protect the indigenous communities they represented, which constituted a concrete violation of the rights protected by Article 23 of the Convention. These conclusions, which the Court derives from the nature of the penalties imposed, are confirmed, *inter alia*, by the testimony of Mr. Ancalaf Llaupe,[370] Ms. Troncoso Robles[371] and Juan Pichú,[372] the son of Pascual Pichún Paillalao.

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369 *Cf. Case of Castañeda Gutman v. United Mexican States*, para. 143, and *Case of López Mendoza v. Venezuela*, para. 108.

370 Mr. Ancalaf Llaupe stated that he "was subject […] to a life-long prohibition to exercise public office [or] the civil right of presiding any department in a company or […] taking office in a municipality or any other State entity." *Cf.* Statement made by presumed victim Víctor Manuel Ancalaf Llaupe before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

371 Ms. Troncoso Robles indicated that, owing to the judgment convicting her, she was "forever disqualified from public office [and] from political rights." *Cf.* Written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles (file of statements of presumed victims, witnesses and expert witnesses, folio 657).

385. It should also be emphasized that, owing to their status as Mapuche leaders, Messrs. Norín Catrimán and Pichún Paillalao (*Lonkos*), and Mr. Ancalaf Llaupe (*Werken*), the restriction of their political rights also affected their communities because, owing to the nature of their functions and their social position, not only their individual rights were affected, but also those of the members of the Mapuche indigenous people they represented.

386. Based on the above considerations, *the Court concludes that the State violated the political rights protected by Article 23 of the American Convention, in relation to Article 1(1) of this instrument to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and Víctor Manuel Ancalaf Llaupe and Patricia Roxana Troncoso Robles.*

3. Right to personal integrity

387. Article 5(1) of the Convention establishes the following:

> **Article 5**
> **Right to Humane Treatment**
>
> 1. Every person has the right to have his physical, mental, and moral integrity respected.

388. The Court has established that "the violation of the right to physical and mental integrity of the individual has different levels and encompasses torture and other types of abuse or cruel, inhuman or degrading treatment, the physical and mental aftereffects of which vary in intensity according to endogenous and exogenous factors that must be demonstrated in each specific situation."[373] The former refer to the characteristics of the treatment, such as the duration, method used or the way in which the suffering was inflicted, as well as the physical and mental effects that these may cause. The latter refer to the conditions of the individual who endures this suffering, including age, sex, health, and any other personal situation.[374]

389. The Court has indicated in its case law that criminal sanctions are an expression of the punitive powers of the State and entail the impairment, deprivation or alteration of the rights of the individual as a result of a wrongful act.[375] Accordingly, in a democratic system, great care must be taken to ensure that these measures are adopted with strict respect for the basic rights of the individual and include a careful verification of the effective existence of the wrongful act.[376] This last point has already been considered in other chapters of this Judgment, in which it has been concluded that several rights have been violated. It must now be determined whether the treatment received by the presumed victims entailed a disregard of the "basic rights of the individual," or whether it was the usual result of deprivation of liberty.

390. The Court has also determined in its case law that, often, an inescapable consequence of the deprivation of liberty are effects on the enjoyment of human rights, in addition to the right

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[372] Juan Pichún stated that when his father had served his term of imprisonment, he could not exercise "the citizen's right to participate, [because] he was denied the right to vote, [and any] participation [...] to be able to assume public office." *Cf.* Statement made por Juan Pichún before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[373] *Cf. Case of Loayza Tamayo v. Peru. Merits*, para. 57, and *Case of Mendoza et al. v. Argentina*, para. 201.

[374] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*, para. 74, and *Case of Mendoza et al. v. Argentina*, para. 190.

[375] *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*, para. 106, and *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs.* Judgment of November 25, 2006. Series C No. 160, para. 314.

[376] *Cf. Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*, para. 106, and *Case of J. v. Peru*, para. 278.

to personal liberty, such as the right to privacy and to family life.[377] Nevertheless, this restriction of rights – the result of the deprivation of liberty or a collateral effect – must be limited strictly, because any restriction of a human right can only be justified in international law when it is necessary in a democratic society.[378] Although the Court has also stated that the restriction of the right to personal integrity, among others, is not justified based on the deprivation of liberty and is prohibited by international law,[379] an examination of the judgments in the cases heard by this Court in this regard reveals that these were cases in which the conditions of the deprivation of liberty were cruel, inhuman or degrading, and even caused death or injuries, often serious, to a large number of prisoners.[380]

391. In this case, it has not been alleged, nor does it appear in the case file, that the presumed victims were subject to cruel, inhuman or degrading treatment, or to abuse or differentiated treatment that harmed them. The allegations in relation to the violations of personal integrity refer to what the Court has called a collateral effect of the situation of deprivation of liberty.[381]

392. Between 2002 and 2007, while they were being prosecuted for terrorist offenses, Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio and Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán and Patricia Roxana Troncoso Robles went on hunger strike several times.[382] It could be considered that these hunger strikes could have been undertaken in order to protest against inhuman prison conditions and as a measure to get these changed. However, the case file shows that these hunger strikes had different motives related to the detention and prosecution of the presumed victims and to the fact that the Counter-terrorism Act had been applied to them.[383] They were undertaken in order to be heard by the authorities, to denounce the irregularities in their judicial proceedings and to demand their release or, otherwise, to obtain prison benefits, as well

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377 *Cf. Case of the Gómez Paquiyauri Brothers v. Peru. Merits, reparations and costs*. Judgment of July 8, 2004. Series C No. 110, para. 108, and *Case of Vélez Loor v. Panama*, para. 209.

378 *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*, para. 154. Similarly, *Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela. Merits, reparations and costs.* Judgment of July 5, 2006. Series C No. 150, para. 113, and *Case of Vélez Loor v. Panama*, para. 209.

379 *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*, para. 155, and *Case of Fleury et al. v. Haiti. Merits and reparations.* Judgment of November 23, 2011. Series C No. 236, para. 84.

380 *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*, para. 170, and *Case of Pacheco Teruel et al. v. Honduras*, para. 60.

381 *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*, para. 154, and *Case of Vélez Loor v. Panama*, para. 209.

382 *Cf.* Note 09.01.03.55/02 of August 7, 2002, signed by the Head of the Traiguén Preventive Detention Center and addressed to the Head of the Genchi Security Department, Santiago; Note 09.01.01.229/02 of February 16, 2002, signed by the Head of the Angol Preventive Detention Center and addressed to the judge of the Traiguén Guarantees Court; Note 09.01.03.23/02 of August 20, 2002, signed by the Head of the Traiguén Preventive Detention Center and addressed to the Head of the Genchi Security Department, Santiago; Note 09.01.01.1384/03 of August 21, 2003, signed by the Head of the Angol Preventive Detention Center and addressed to the judge of the Collipulli Court with combined jurisdiction (file of annexes to the Merits Report 176/10, appendix 1, folios 4391, 4438, 4541 and 9131); written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles, and affidavit prepared on May 17, 2013, by presumed victim José Benicio Huenchunao Mariñá*)* (file of statements of presumed victims, witnesses and expert witnesses, folios 191 and 207), and statement made by presumed victim Florencio Jaime Marileo Saravia before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

383 *Cf.* Written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles (file of statements of presumed victims, witnesses and expert witnesses, folio 652); affidavit prepared on May 14, 2013, by presumed victim Juan Patricio Marileo Saravia (file of statements of presumed victims, witnesses and expert witnesses, folio 191), and Note No. 06 of October 13, 2003, signed by the Head of the Victoria Prison Sentences Center addressed to the Head of the Security Department, Chilean Prison Service (file of annexes to the Merits Report 176/10, appendix 1, folio 9196).

as to prevent the continued application of the Counter-terrorism Act.[384] This had a bearing on the presentation of a bill to amend the act that, in October 2010, culminated in the promulgation of Law No. 20,467[385] (*supra* para. 98 and footnote 104).

393. It is undeniable that these hunger strikes, which lasted from 30 to 112 days, caused serious emotional and physical consequences for the presumed victims.[386] Expert witness Vargas Forman explained that "[h]unger strikes are used to call the attention of the legal and the political system to the fact that members of the Mapuche people are treated as terrorists, to denounce irregular legal proceedings, […] to obtain prison benefits, to reveal discriminatory treatment." She also stated that "[h]unger strikes constitute extreme experiences of emotional pain" with "long-term physical and mental consequences," and that, in the case of the presumed victims in this case, "the experience caused extreme individual, family and cultural traumas."[387]

394. However, the effects on the personal integrity of those who undertake hunger strikes with the above-mentioned characteristics and objectives cannot be attributed to the State.

395. In statements made both during the public hearing and by affidavit, the presumed victims referred, among other matters, to the impact of the conviction for terrorist offenses and having served a prison sentence on different dimensions of their life (*supra* paras. 119, 129, 130 and 152) or, in the case of Juan Ciriaco Millacheo Licán and José Benicio Huenchunao Mariñán, to the time they spent as fugitives from justice (*supra* paras. 131 and 132). They referred to their feelings of "injustice," "pain," and "mistrust" owing to the application of the Counter-terrorism Act, and to the discrimination and stigmatization suffered by both themselves and by their family members and their communities, because they had been branded as terrorists.[388]

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[384] *Cf.* Written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles (file of statements of presumed victims, witnesses and expert witnesses, folios 650 and 651); affidavit prepared on May 14, 2013, by presumed victim Juan Patricio Marileo Saravia (file of statements of presumed victims, witnesses and expert witnesses, folio 191), and statement made by presumed victim Florencio Jaime Marileo Saravia before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[385] *Cf.* Affidavit prepared on May 24, 2013, by witness Luis Rodríguez-Piñero Royo, and written statement made on May 26, 2013, by expert witness Rodolfo Stavenhagen (file of statements of presumed victims, witnesses and expert witnesses, folios 342 and 702).

[386] *Cf.* Affidavits prepared on May 17, 2013, by presumed victims Juan Patricio Marileo Saravia and José Benicio Huenchunao Mariñán, and written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles (file of statements of the presumed victims, witnesses and expert witnesses, folios 191, 207 and 650).

[387] *Cf.* Affidavit prepared on May 15, 2013, by expert witness Ruth Vargas Forman (file of statements of the presumed victims, witnesses and expert witnesses, folios 400 and 401).

[388] In this regard, Mr. Norín Catrimán explained that "[s]omething like this had never been seen before; it has caused so much suffering. We were treated like extremely dangerous people; we never hurt another person. […] We all changed owing to the way the State of Chile treated us, treating the Mapuche like terrorists. This has never happened in the history of our people; there were always serious injustices to take our land away from us, but treating us as terrorists harmed our people and our families, the members of my community," and he indicated that "[i]f you consider this, we are being tried for something that has never been seen before. Prosecution based on something that had never been heard before, and paying a price that was so unjust, so painful. We don't even know what a terrorist is and having to pay for something so unjust hurts. That is painful, that hurts." Similarly, Mr. Huenchunao Mariñán testified on the "profound feeling of injustice that [he] and [his] people suffered owing to the application of the Counter-terrorism Act, and the arbitrary proceedings conducted by institutions of the State of Chile against [him], arresting [him] and convicting [him] as a terrorist." *Cf.* Written statement made on May 27, 2013, by presumed victim Segundo Aniceto Norín Catrimán, and affidavit prepared on May 17, 2013, by presumed victim José Benicio Huenchunao Mariñán (file of statements of the presumed victims, witnesses and expert witnesses, folios 210 and 636). See also: Affidavits prepared on May 15, 2013, by expert witness Ruth Vargas Forman; on May 17, 2013, by presumed victims Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and José Benicio Huenchunao Mariñán; written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles (file of statements of presumed victims, witnesses and expert witnesses, folios 391, 554, 183, 193, 197, 201, 205, 630, 637, 640, 642, 647 and 657), and statements made by presumed victims Florencio Jaime Marileo Saravia and Víctor Manuel Ancalaf Llaupe before the Inter-American Court during the public hearing held on May 29 and 30, 2013 .

396. In this regard, expert witness Vargas Forman, who gave her expert psycho-social opinions by affidavit, noted that "[t]he application of the Counter-terrorism Act is perceived as an extreme indication of discriminatory persecution [against the Mapuche] that concluded with long sentences, imprisonment and significant losses at the individual, family and community level." She also stated that the prison terms had a considerable impact on the presumed victims at both the personal level and in relation to their family and community.[389]

397. In addition, the presumed victims referred to the difficulties resulting from their criminal record and branding as "terrorists" in their reincorporation into society after serving their sentences, especially in the search for work.[390]

398. The presumed victims also referred to the personal changes, the suffering and other consequences of the time spent in prison. For example, the psychological report records that Mr. Ancalaf Llaupe stated that "[a]ll the problems have arisen due to the imprisonment; I realize that one changes."[391] Also, Mr. Huenchunao Mariñán stated that "imprisonment is a harsh punishment, when one is convicted because of social protest, considering it a criminal act."[392] The Court understands that this refers to consequences of the deprivation of liberty or collateral effects (*supra* para. 391).

399. There is evidence in the case file, including the statements made by presumed victims, complemented by helpful evidence presented by the State, that Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles were progressively granted certain "prison benefits" while serving their sentences, such as "Sunday release," "weekend release" and "supervised release," and also that some of them benefited from a remission of sentence (*supra* paras. 119, 129 to 132 and 152). The Court assesses positively that the State implemented this type of measures; however, it does not eliminate the human rights violations that the Court has determined in other parts of this Judgment.

400. The Court understands the harm that the deprivation of liberty may have caused to the presumed victims, but considers that there has not been an autonomous violation of Article 5(1) of the American Convention. As indicated, this harm was the consequences of the deprivation of liberty or the collateral effects (*supra* para. 391).

4. Right to the protection of the family

401. Article 17(1) of the American Convention establishes the following:

Article 17
Rights of the Family

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

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389 *Cf.* Affidavit prepared on May 15, 2013, by expert witness Ruth Vargas Forman (file of statements of the presumed victims, witnesses and expert witnesses, folios 372 and 390).

390 *Cf.* Affidavit prepared on May 17, 2013, by presumed victim Juan Patricio Marileo Saravia; written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles (file of statements of presumed victims, witnesses and expert witnesses, folios 193 and 658), and statement made by presumed victim Florencio Jaime Marileo Saravia before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

391 *Cf.* Psychological and psychosocial report on presumed victim Víctor Manuel Ancalaf Llaupe and his family, prepared by expert witness Ruth Vargas Forman (file of statements of the presumed victims, witnesses and expert witnesses, folio 96).

392 *Cf.* Affidavit prepared on May 17, 2013, by presumed victim José Benicio Huenchunao Mariñán (file of statements of presumed victims, witnesses and expert witnesses, folio 205).

402. CEJIL alleged the violation of Article 17 to the detriment of Víctor Manuel Ancalaf Llaupe, adducing that the significant distance between his family home and community and the detention center where he was confined made it impossible to receive visits from his wife and children, and their emotional support, and this was aggravated by the State's refusal to transfer him to a prison nearer to his community. The FIDH did not allege the violation of this article in relation to the other victims.

403. Mr. Ancalaf Llaupe was confined in the "El Manzano" Prison in Concepción, situated more than 250 kilometers from Temuco where his community and family were located. From the onset of his imprisonment, both Mr. Ancalaf Llaupe and his lawyer raised the issue of the need to transfer him to a prison nearer to his place of residence. In addition, his wife, Karina Prado, requested her husband's transfer to the Temuco prison, owing to the obstacles to travelling with her five children to Concepción to visit her husband and their father, and the high costs involved. However, the Concepción Court of Appeal denied Mrs. Prado's request and the subsequent request by Mr. Ancalaf Llaupe without justifying the denial and without taking into consideration a report of the Chilean Prison Service indicating that there were "no problems for the inmate [… to be] transferred to the Temuco prison, because the individual mentioned lives and has family support in that city" (*supra* paras. 139 and 141). This situation had a negative influence on the frequency of the visits and the contact that Mr. Ancalaf Llaupe had with his family, increasing his feelings of concern and helplessness, as well as the deterioration of his relations with the members of his family.[393]

404. The Court has established that the State is obliged to encourage the development and strength of the family unit.[394] It has also asserted that this entails the right of everyone to receive protection from arbitrary or illegal interference in his or her family,[395] and also that States have positive obligations in favor of effective respect for family life.[396] The Court has also recognized that the mutual enjoyment of coexistence between parents and children is a fundamental element of family life.[397]

405. In the case of persons deprived of liberty, rule 37 of the United Nations Standard Minimum Rules for the Treatment of Prisoners recognizes the importance of the contact of prisoners with the world outside when establishing that "[p]risoners shall be allowed under

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[393] Víctor Ancalaf's wife, Karina Prado, testified that: "[t]he first three years when we travelled to Concepción were very difficult and complicated, because in order to go with the five children, [she] needed to pay for three adults and sometimes she did not have the money; sometimes she went alone and had to leave them in someone's care. […] Concepción is […] eight hours away." *Cf.* Affidavit prepared on May 17, 2013, by Karina del Carmen Prado Figueroa (file of statements of presumed victims, witnesses and expert witnesses, folio 84). Similarly, his son, Marías Ancalaf Prado, testified about "[h]ow far away the prison was" and indicated that "[a]t one time it was more difficult to go, around the middle of my father's imprisonment, then our visits were less frequent; we went every two months; sometimes only two siblings went with my mother. It was a matter of money; my mother didn't have enough to pay for the travel costs of so many children and for herself; it was complicated to travel with all her children. Every time we went to visit my father it cost a lot of money and the financial situation, the time, everything was difficult." *Cf.* Affidavit prepared on May 17, 2013, by Matías Ancalaf Prado (file of statements of presumed victims, witnesses and expert witnesses, folios 30 and 31). See also: Psychological and psycho-social report on presumed victim Víctor Manuel Ancalaf Llaupe and family prepared by expert witness Ruth Vargas Forman (file of statements of presumed victims, witnesses and expert witnesses, folios 96, 97, 100, 107 and 108).

[394] *Cf. Juridical Status and Human Rights of the Child, supra*, para. 66, and *Case of the Pacheco Tineo Family v. Bolivia*, para. 226.

[395] *Cf. Juridical Status and Human Rights of the Child, supra*, para. 72, and *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, para. 312.

[396] *Cf. Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 24, 2009. Series C No. 211, para. 189, and *Case of Vélez Restrepo and family members v. Colombia*, para. 225. Also, ECHR, *Case of Olsson v. Sweden No. 1, No. 10465/83.* Judgment of 24 March 1988, para. 81.

[397] *Cf. Juridical Status and Human Rights of the Child, supra*, para. 47, and *Case of Vélez Restrepo and family members v. Colombia*, para. 225. Also, ECHR, *Case of Johansen v. Norway, No. 17383/90.* Judgment of 7 August 1996, para. 52, and *Case of K. and T. v. Finland, No. 25702/94.* Judgment of 27 April 2000. Final, 12 July 2001, para. 151.

necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits." Moreover, rule 79 recognizes that "special attention shall be paid to the maintenance and improvement of [...] relations between a prisoner and his family."[398] Similarly, Principle XVIII of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas recognizes the right of such persons "to maintain direct and personal contact through regular visits with members of their family, [...] especially their parents, sons and daughters, and their respective partners."[399]

406. The State occupies a special position of guarantor with regard to persons deprived of liberty, because the prison authorities exercise a strong or special control over those who are in their custody.[400] Thus, there is a special relationship and interaction of subjection between the individual deprived of liberty and the State, characterized by the particular intensity with which the State can regulate his rights and obligations, and by the circumstances inherent in imprisonment, where the inmate is impeded from satisfying a series of basic needs that are essential for the development of a decent life for himself.[401]

407. The visits by family members to individuals deprived of liberty is an essential element of the right to the protection of the family both of the person deprived of liberty and for the family members, not only because it represents an opportunity for contact with the outside world, but also because the support of the family members for those deprived of liberty while they serve their sentence is fundamental in many aspects, ranging from affective and emotional support to financial support. Therefore, based on the provisions of Articles 17(1) and 1(1) of the American Convention, States, as guarantors of the rights of individuals in their custody, have the obligation to adopt the most appropriate measures to facilitate and to implement contact between the individuals deprived of liberty and their families.

408. The Court emphasizes that one of the difficulties in keeping up relationships between those deprived of liberty and their family members may be their confinement in prisons that are very far from their homes, or of difficult access because the geographical conditions and communication routes make it very expensive and complicated for members of the family to make frequent visits, which could eventually result in a violation of both the right to protection of the family and other rights, such as the right to personal integrity, depending on the particularities of each case. Therefore, State must, insofar as possible, facilitate the transfer of prisoners to prisons nearer to the place where their family lives. In the case of indigenous people deprived of liberty, the adoption of this measure is especially important given the significance of the ties that these individuals have with their place of origin or their community.

409. Consequently, it is clear that, by confining Mr. Ancalaf Llaupe in a prison that was very far from his family home and arbitrarily denying the repeated requests to transfer him to a prison that was nearer, to which the Prison Service had agreed (*supra* para. 403), the State violated the right to protection of the family.

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[398] *Cf. Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. Available at: https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf

[399] *Cf.* Inter-American Commission on Human Rights, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* Resolution 1/08, approved during its 131st regular period of sessions, held from March 3 to 14, 2008. Available at: http://www.cidh.org/Basicos/English/Basic21.a.Principles%20and%20Best%20Practices%20PDL.htm

[400] *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*, para. 152, and *Case of Mendoza et al. v. Argentina*, para. 188.

[401] *Cf. Case of the "Children's Rehabilitation Institute" v. Paraguay*, para. 152, and *Case of Mendoza et al. v. Argentina*, para. 188.

410. Based on the above, *the Court concludes that the State violated the right to protection of the family established in Article 17(1) of the American Convention, in relation to the obligation to ensure rights established in Article 1(1) of this treaty, to the detriment of Víctor Manuel Ancalaf Llaupe.*

411. With regard to the other presumed victims, since no violations in this regard were alleged (even though in the arguments of the FIDH and in the statements of the presumed victims and their family members there are some references to the distance that the family members had to travel and the difficulties faced by the latter to visit them in prison), there is insufficient evidence to allow this Court to substantiate that, in those cases, there has been non-compliance with the State's duty to protect the family.

VIII – REPARATIONS
(Application of Article 63(1) of the American Convention)

412. Pursuant to Article 63(1) of the American Convention,[402] the Court has indicated that any violation of an international obligation that has caused harm entails the obligation to make adequate reparation,[403] and that this provision reflects a customary norm that constitutes one of the basic principles of contemporary international law on State responsibility.[404]

413. Reparation of the harm caused by the violation of an international obligation requires, when possible, full restitution (*restitutio in integrum*), which consists in re-establishment of the previous situation. If this is not feasible, as in most cases of human rights violations, the Court will determine other measures to ensure the rights that have been violated and to redress the consequences of the violations.[405] Accordingly, in this case, the Court has considered the need to award different measures of reparation in order to ensure the violated right and redress the harm fully.[406]

414. The Court has established that reparations must have a causal nexus with the facts of the case, the violations declared, the harm proved, and the measures requested to redress the respective harm. Therefore, the Court must take these factors into consideration in order to rule appropriate and in accordance with the law.[407]

415. According to the considerations on the merits, and the violations of the American Convention declared in Chapter VII of this Judgment, the Court will proceed to analyze the claims presented by the Inter-American Commission and the common interveners of the representatives of the victims in light of the criteria established in its case law in relation to the nature and scope of the obligation to make reparation, in order to establish measures aimed at

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[402] Article 63(1) of the American Convention establishes that: "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

[403] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs.* Judgment of July 21, 1989. Series C No. 7, para.25, and *Case of Liakat Ali Alibux v. Suriname*, para. 137.

[404] *Cf. Case of Aloeboetoe et al. v. Suriname. Reparations and costs.* Judgment of September 10, 1993. Series C No. 15, para. 43, and *Case of Liakat Ali Alibux v. Suriname*, para. 137.

[405] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, para.26, and *Case of Osorio Rivera and family members v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 26, 2013. Series C No. 274, para. 236.

[406] *Cf. Case of the Las Dos Erres Massacre v. Guatemala*, para. 226, and *Case of Osorio Rivera and family members v. Peru*, para. 236.

[407] *Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Liakat Ali Alibux v. Suriname*, para. 139.

redressing the harm caused to the victims.[408] The Court will also take into consideration the observations made by the victims Segundo Aniceto Norín Catrimán and Patricia Roxana Troncoso Robles with regard to reparations in their written statements before this Court.[409] The State did not present specific arguments concerning the reparations requested, but when contesting some of the violations it referred to aspects that are related to the reparations requested in this case concerning amendments to domestic law.

A) Injured party

416. The Court considers that, in the terms of Article 63(1) of the Convention, the injured party is anyone who has been declared a victim of the violation of any right recognized therein. Consequently, the Court finds that the "injured party" are: Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles.

B) Measures of restitution, rehabilitation and satisfaction, and guarantees of non-repetition

1. Measure of restitution: nullify the criminal convictions imposed on the victims

417. The Commission asked the Court to order the State to "[eliminate the effects of the terrorism convictions imposed on Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, Patricia Roxana Troncoso Robles and Víctor Ancalaf Llaupe." In addition, it indicated that, "[i]f the victims so choose, they shall have the opportunity to have their convictions reviewed in a proceeding conducted in accordance with the principle of legality, the prohibition of discrimination, and guarantees of due process."

418. CEJIL asked that "the Court […] order the State to eliminate immediately all the effects of the conviction imposed on the *Werken* Víctor Ancalaf Llaupe, in the proceedings under case file 1-2002, Concepción Court of Appeal." It indicated that, in view of the fact that Mr. Ancalaf had "served the prison sentence imposed on him, it did not seek a review of the judgment delivered in violation of the rights and guarantees protected by the American Convention, but rather the elimination of the effects that it continues to have and which do not allow him to live his life fully."

419. The FIDH indicated that the effects of all the convictions should be annulled, including "all the disqualifications that affect the victims." It asked the Court to order the State to "eliminate any annotation in any public record of the trial and sentencing of the victims, […] especially from the criminal records, and records of the police and the Public Prosecution Service, as well as the elimination of the DNA samples obtained from the victims under Law

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[408] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*, paras. 25 and 26, and *Case of Liakat Ali Alibux v. Suriname*, para. 138.

[409] In the statements they made on May 27, 2013, Mr. Norín Catrimán and Ms. Troncoso Robles stated that they "should […] receive full reparation," "based on the principle of equity" and, to this end, they asked that the Court order "measures of non-repetition, such as the restitution, protection and titling of land," "measures of satisfaction, [such as] the act of public acknowledgement of international responsibility, and the publication and dissemination of the Judgment," "measures of rehabilitation, [such] as the provisions of basic goods […] and services," "guarantees of non-repetition, [such as] the implementation of programs to record, document and monitor cases and situations with similar characteristics; the monitoring of compliance with the judgment of the Court; adaptation of the laws, [and] education and training of those responsible for the selective application of the law that gave rise to the violations," as well as "compensation for the [pecuniary and non-pecuniary] damage caused" and reimbursement of "costs and expenses" (file of statements of presumed victims, witnesses and expert witnesses, folios 663 and 664).

19,970."[410] In particular, with regard to José Benicio Huenchunao Mariñán and Juan Ciriaco Millacheo Licán, it requested the annulment of the execution of their criminal sentences.

420. The State, without contesting the arguments submitted by the common interveners, indicated that the Counter-terrorism Act had been "amended towards the end of 2010 by the enactment of Law No. 20,467," in relation to "the definition and punishment of terrorist offenses, which restricted the offense and, in some cases, reduced the punishments applicable to [such] offenses." Furthermore, without referring specifically to the judgments convicting the victims in this case, it explained that, "considering the fundamental changes introduced [in this] law, Chile's domestic legislation contains certain legal mechanisms to review criminal judgments delivered based on laws that are more onerous for those convicted, ensuring strict compliance with the principles of equality before the law for those who benefit from a new more favorable law enacted before their conviction and those who have been subject to final judgments for similar acts." It indicated that "the principle of the imperative and retroactive application to the accused or the person who has been convicted of the most favorable criminal law is absolute and of constitutional rank" and that, according to article 18 of the Criminal Code, "it applies to ongoing cases and also to those that have concluded in a judicial sentence, which can be modified [*ex officio* or at the request of the interested party] at any time, in order to adjust it to the new more favorable law, waiving the authority of a final judgment."

421. As indicated in this Judgment, the sentences convicting the eight victims in this case – determining their criminal responsibility for terrorist offenses – were delivered based on a law that violated the principle of legality and the right to the presumption of innocence (*supra* paras. 168 to 177), and imposed ancillary penalties that entailed undue and disproportionate restrictions to the right to freedom of thought and expression (*supra* para. 374) and to the exercise of political rights (*supra* para. 383). The Court also found that, in the substantiation of the judgments, reasoning was used that revealed stereotypes and prejudices, which constituted a violation of the principle of equality and non-discrimination and the right to equal protection of the law (*supra* paras. 223 to 228 and 230). Added to this, in the case of Messrs. Pichún Paillalao and Ancalaf Llaupe, there were violations of the right of defense protected in Article 8(2)(f) of the Convention (*supra* paras. 248 to 259) and, with regard to seven of the victims in this case, the right to appeal these adverse criminal judgments was violated (*supra* paras. 274 to 291). This means that the sentences were arbitrary and incompatible with the American Convention.

422. Therefore, in view of the characteristics of this case, and as it has on previous occasions,[411] the Court establishes that the State must adopt, within six months of notification of this Judgment, all the administrative, judicial or any other type of measure necessary to nullify all the effects of the criminal judgments convicting Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán and Patricia Roxana Troncoso Robles that the Court has referred to in this Judgment. This includes: (i) annulling the declaration that the eight victims in this case were perpetrators of terrorist offenses; (ii) annulling the prison sentences and ancillary penalties, consequences and records, as soon as possible, as well as any civil sentences imposed on the victims, and (iii) ordering the release of the victims who are still on parole. In addition, the State must, within six months of notification of this Judgment, eliminate the judicial, administrative, criminal or police

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[410] In its final written arguments, the FIDH clarified that although the DNA samples "are not part of the judgments, they do form part of their effects, because following [the delivery] of the judgments, Law 19,970 was enacted [...] which imposed the obligation to register the DNA of those convicted of terrorist offenses" and indicated that the DNA of José Benicio Huenchunao, Juan Patricio Marileo Saravia and Florencio Jaime Marileo Saravia had been recorded."

[411] *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88; *Case of Herrera Ulloa v. Costa Rica*; *Case of Palamara Iribarne v. Chile*; *Case of Kimel v. Argentina*; *Case of Tristán Donoso v. Panama; Case of Usón Ramírez v. Venezuela,* and *Case of López Mendoza v. Venezuela*.

records that exist against the eight victims in relation to the said judgments, and also annul their registration in any type of national or international records that link them to terrorist acts.

2. Measures of rehabilitation: medical and psychological treatment

423. The FIDH asked that "any future medical expenses that the victims and their family members have to incur as a result of the violations of the rights under the Convention be compensated." It did not indicate any specific amount for this compensation. It indicated that "access to specialized health care services (psychological and physical treatment) for [the victims] and their family unit was required, based on inter-cultural criteria." It affirmed that, under Chile's public health care system, "they only receive basic services" and do not have access to mental health care. It alleged that all the victims have suffered from a series of illnesses or physical ailments following their detention, derived mainly from the hunger strikes they undertook, or following their time in hiding during which they "did not have access to professional health care services." It referred to these physical and mental problems. In addition to this compensation, it requested "the inclusion of all the victims and the members of their family in the Program of Reparation and Comprehensive Care in the Field of Health and Human Rights (PRAIS)," which "would give them preferential access to the public health care system."

424. Based on the testimony of the victims and on the expert appraisal of psychologist Vargas Forman, the Court has verified that the violations declared in this Judgment had a psychological impact on the victims. Thus, this expert witness concluded that "the symptoms suffered by [the eight victims in this case] fall within the sphere of post-traumatic stress syndrome," "the symptoms of which are the expression of the contextual events that they have undergone" that have caused them "severe emotional suffering, which has had an impact on their individual functioning and [on] the family dynamics." She also stated that these symptoms of "emotional suffering arise from the arrest, pre-trial detention, hearings and subsequent sentencing of each one."[412] The victims and also some of their family members referred to specific physical ailments they had suffered as a result of the facts.[413]

425. The Court finds, as it has in other cases,[414] that the State must provide immediately and free of charge, through its specialized health care institutions or personnel, the necessary and appropriate medical and psychological or psychiatric treatment to Segundo Aniceto Norín Catrimán, Víctor Manuel Ancalaf Llaupe, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, following their informed consent, including the provision of any medicines they may eventually require, also free of charge, based on the ailments of each of them related to this case; as well as, if appropriate, the transport and other expenses that are strictly necessary and directly related to the medical and psychological treatment.

426. If the State does not have the institutions or personnel who are able to provide the level of care required, it must resort to specialized private institutions or those of civil society. Furthermore, the respective treatment must be provided, insofar as possible, in the centers

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412 *Cf.* Affidavit prepared on May 15, 2013, by expert witness Ruth Elizabeth Vargas Forman (file of statements of presumed victims, witnesses and expert witnesses, folios 374 and 375).

413 *Cf.* Affidavits prepared on May 14, 2013, by presumed victim Juan Ciriaco Millacheo Licán, by witness Soledad Angélica Millacheo Licán, and by witness Lorenza Saravia Tripaillán; on May 16, 2013, by witness Flora Collonao Millano; on May 17 by presumed victims Juan Patricio Marileo Saravia and José Benicio Huenchunao Mariñán, and written statement made on May 27, 2013, by presumed victim Patricia Roxana Troncoso Robles (file of statements of presumed victims, witnesses and expert witnesses, folios 191, 196 to 198, 208, 215, 216, 233, 247, 248, 650 and 651).

414 *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs*, paras. 51.d) and e), operative paragraph 8, and *Case of J. v. Peru*, para. 397.

nearest to their places of residence[415] in Chile for as long as necessary. When providing this treatment, the particular circumstances and needs of each victim must also be considered, as well as their customs and traditions, as agreed with each of them and following an individual assessment.[416] To this end, the victims must advise the State if they wish to receive this medical, psychological or psychiatric treatment within six months of notification of this Judgment.

3. Measures of satisfaction

a) Publication and broadcasting of the Judgment

427. CEJIL asked that the Court order Chile: (i) "to publish the pertinent parts of the judgment once in the official gazette […] and the summary of the judgment prepared by the Court in another national newspaper with widespread circulation" within "six months of the date of notification of the Judgment"; (ii) "to publish immediately the complete text [of the Judgment] on the official websites of the Presidency of the Republic, the Ministry of Foreign Affairs, the Ministry of Social Development, and the National Indigenous Development Corporation (CONADI), until it has been complied with fully," and (iii) "to broadcast, within six months of notification of the judgment, the official summary on a radio station with broad coverage in Region IX" and, to this end, "the State must translate the [official summary] into the Mapudungun language" so that "the Mapuche people may be made aware of it." The FIDH requested the "publication of part of the judgment in the media," and also the "broadcasting of an official summary of the judgment by radio, in Spanish and in Mapudungun, taking special care to ensure that it is broadcast in areas with a high concentration of Mapuche people." It also requested that the judgment be aired "simultaneously on all television stations at the time of the main news program."

428. The Court establishes, as it has in other cases,[417] that the State must publish, within six months of notification of this Judgment: (a) the official summary of this Judgment prepared by the Court, once, in the official gazette; (b) the official summary of this Judgment prepared by the Court, once, in a national newspaper with widespread circulation, and (c) this Judgment in its entirety, available for one year, on an official website of the State, taking into consideration the characteristics of the publication ordered.

429. The Court also finds it appropriate as it has in other cases,[418] to establish that the State must broadcast the official summary of the Judgment, in Spanish and in Mapudungun, using a radio station with broad coverage in Regions VIII and IX. The broadcast must be made on the first Sunday of the month on at least three occasions. The State must advise the common interveners, at least two weeks in advance, of the date, time and station of this broadcast. The State must comply with this measure within six months of notification of the Judgment.

430. The two common interveners of the representatives asked that the Court order the State to make a "public acknowledgement of responsibility" and a public apology to the victims. The Court considers that the delivery of this Judgment, the measure to annul all the effects of the criminal judgments (*supra* para. 422), as well as the measures for the publication and publicity

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[415] *Cf. Case of the Las Dos Erres Massacre v. Guatemala,* para. 270, and *Case of Osorio Rivera and family members v. Peru*, para. 256.

[416] *Cf. Case of the 19 Tradesmen v. Colombia. Merits, reparations and costs.* Judgment of July 5, 2004. Series C No. 109, para. 278, and *Case of Osorio Rivera and family members v. Peru*, para. 256.

[417] *Cf. Case of Cantoral Benavides v. Peru. Reparations and costs*, para. 79, and *Case of Liakat Ali Alibux v. Suriname*, para. 147.

[418] *Cf.* Case of the Yakye Axa Indigenous Community *v. Paraguay*, para. 227, and *Case of Pueblo Indígena Kichwa de Sarayaku v. Ecuador*, para. 308.

of this Judgment (*supra* paras. 428 and 429), are measures of reparation that are sufficient and adequate to remedy the violations against the victims in this case.

b) Award of scholarships

431. CEJIL asked that, in order to redress the non-pecuniary harm caused by the facts of this case, "additional compensation be provided by the award of scholarships [to the children of Víctor Manuel Ancalaf Llaupe] so that they may continue and/or complete their studies" if they so wish. The FIDH asked that the Court order the State to "adopt measures of educational reinsertion for the victims and their families, […] in particular, the Indigenous Peoples Scholarship for all the children of the victims, from the start of their education until their academic training has been completed, whether this be at the university, technical or professional level."

432. The Court has verified that the prosecution, arbitrary pre-trial detention and criminal conviction of the victims based on the application of a law that violates the Convention (*supra* paras. 168-177) meant that they could not contribute to the maintenance and care of their families as they were doing prior to the events of this case, and this had repercussions on the financial situation of their family unit and, consequently, on the possibility that their children could attend school or complete their studies.[419] Therefore, and taking the representatives' request into account, as it has in other cases,[420] the Court finds it appropriate to order, as a measure of satisfaction in this case, that the State award scholarships in Chilean public establishments to the children of the eight victims in this case that cover all the costs of their education until the conclusion of their advanced studies, whether these are of a technical or academic nature. The State's compliance with this obligation means that the beneficiaries must take certain steps in order to exercise their right to this measure of reparation.[421] Therefore, those who request this measure of reparation, or their legal representatives, have six months as of notification of this Judgment to advise the State of their scholarship requirements.

4. Guarantee of non-repetition: adaptation of domestic law in relation to the right of the defense to examine witnesses

433. Both the Inter-American Commission and the common interveners requested the adoption of measures relating to the adaptation of domestic law. The Court will now rule on the measure related to the right of the defense to examine witnesses and will then rule on other measures requested in relation to the adaptation of domestic law (*infra* paras. 455-464).

434. The Commission asked the Court to order the State to "[a]dapt domestic laws governing criminal procedure so that they are compatible with the right recognized in Article 8(2)(f)) […] of the American Convention." Meanwhile, the FIDH asked that the Court "order […] the adaptation of the Counter-terrorism Act to international standards" and "the elimination of anonymous or faceless witnesses, establishing ways to protect witnesses that are consistent with due process."

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[419] *Cf.* Affidavits prepared on May 14, 2013, by presumed victim Juan Ciriaco Millacheo Licán, by witnesses Freddy Jonathan Marileo Marileo and Gloria Isabel Millacheo Ñanco; on May 15, 2013, by expert witness Ruth Elizabeth Vargas Forman in relation to Víctor Manuel Ancalaf Llaupe and family, and in relation to Pascual Huantequeo Pichún Paillalao, Juan Ciriaco Millacheo Licán, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia and José Benicio Huenchunao Mariñán; on May 16, 2013, by witnesses Matías Ancalaf Prado, Karina del Carmen Prado Figueroa and Flora Collonao Millano; on May 17, 2013, by presumed victim José Benicio Huenchunao Mariñán, and written statement made on May 27, 2013, by Segundo Aniceto Norín Catrimán (file of statements of presumed victims, witnesses and expert witnesses, folios 29, 30, 82, 83, 109, 110, 197, 199, 200, 209, 213, 255, 256, 265, 418 and 637).

[420] *Cf. Case of the Gómez Paquiyauri Brothers v. Peru*, para. 237, *and Case of Osorio Rivera and family members v. Peru*, para. 267.

[421] *Cf. Case of Escué Zapata v. Colombia*, paras. 27 and 28, and *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2010 Series C No. 216, para. 257.

435. When determining that Chile had violated the right of the defense to examine witnesses, protected in Article 8(2)(f) of the Convention, to the detriment of Pascual Huentequeo Pichún Paillalao, the Court noted that witness protection measures consisting of their anonymity were adopted without effective judicial control (*supra* para. 249), and testimony obtained under these conditions was used decisively to justify the guilty verdict. Also, even though, in the criminal proceedings against Mr. Pichún Paillalao, the protection measure of witness anonymity was accompanied in specific cases with counterbalancing measures (*supra* para. 250), the failure to regulate the latter led to legal uncertainty regarding their adoption.[422]

436. The Court finds that, in the context of the Chilean laws applied in this case, it is appropriate to order Chile to regulate clearly and rigorously the procedural measure of witness protection consisting in anonymity in order to avoid violations such as those declared in this Judgment. It must ensure that this is an exceptional measures, subject to judicial control based on the principles of necessity and proportionality, and that this type of evidence is not used decisively to justify a guilty verdict, and must also regulate the corresponding counterbalancing measures which ensure that the impairment of the right of defense is sufficiently offset, as established in this Judgment (*supra* paras. 242 to 247). In addition, the Court recalls that, in order to ensure the right of the defense to examine witnesses, the judicial authorities must apply the criteria or standards established by the Court (*supra* paras. 242 to 247) in exercise of conventionality control.

C) Compensation for pecuniary and non-pecuniary damage

437. In its case law the Court has established repeatedly that a judgment constitutes *per se* a form of reparation.[423] Nevertheless, considering the circumstances of the case *sub judice*, the consequences of the violations committed for the victims, in the personal, family and community spheres, as well as the change in their living conditions following their deprivation of liberty, the Court also finds it pertinent to analyze the payment of compensation, established on the basis of equity, for pecuniary and non-pecuniary damage.

438. The Commission asked the Court "[t]o award pecuniary and non-pecuniary reparation to the victims […] for the violations declared in the […] report."

439. Regarding the request to compensate the pecuniary damage, the common interveners of the representatives of the victims submitted the following arguments:

> **a)** CEJIL indicated that "[t]he prosecution, arrest and subsequent sentencing for 'terrorist' acts of *Werken* Ancalaf affected the family's production arrangements." The community to which Víctor Manuel Ancalaf Llaupe and his family belonged "carried out agricultural and cattle-raising activities" with a "family-based form of production," which was substantially affected by his deprivation of liberty, because "Víctor's absence reduced the family's participation in community production since he was unable to contribute to the workforce." It also affirmed that this situation meant that Mr. Ancalaf Llaupe's wife "not only had to take care of the children, […] but also had to try and occupy his role in the family and the community." Taking into account that, "[a]t the time of his arrest, the surplus production that Víctor sold at the market was around 7,600 dollars a month, and that "he was deprived of liberty for four years and four

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422 While, during the first trial, the identity of the anonymous witnesses was not revealed to either the accused or their defense, during the second trial – held owing to the annulment of the first one – the identity of these witnesses was revealed to the defense counsel with the express prohibition to communicate this information to their clients, which shows that the granting of this measure was subject to the criterion of the court that presided each trial.

423 *Cf. Case of Neira Alegría et al. v. Peru. Reparations and costs.* Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Liakat Ali Alibux v. Suriname*, para. 147.

months," CEJIL asked the Court to recognize "loss of earnings of 43,000 United States dollars." It stressed that this amount "had not been contested by the State."

b) The FIDH asked the Court to determine a "reparation in equity" corresponding to the compensation for pecuniary damage in this case that included: (i) loss of earnings;[424] (ii) consequential damage;[425] (iii) damage to the family wealth,[426] and (iv) the effects on the life project of the direct victims and the members of their family.[427]

440. Regarding the request for compensation for pecuniary damage, the common interveners of the representatives of the victims submitted the following arguments:

a) CEJIL affirmed that "[t]he violations committed by the State to the detriment of Víctor Ancalaf Llaupe and his family have caused adverse non-pecuniary effects that must be repaired." In this regard, it indicated that Mr. Ancalaf Llaupe "was subject to a criminal proceedings under an emergency law and criminal norms that violated guarantees of due process; he was deprived of his liberty in conditions that prevented contact with his family, affecting his relationship with his wife and children and with his community." In this regard, it stated that "the judicial proceedings changed the family roles and dynamics and led to a precarious financial situation for the family as well as harassment and discrimination […] owing to their stigmatization as terrorists." It also indicated that "as a *Werken* […] the stigmatizing effect of his conviction as a 'terrorist'" caused him "profound moral suffering." It also considered that the sentence "prejudiced his life project, because it curtailed his relationships with his community, within which he played a leading role […] affecting him particularly." It added that "the prosecution and sentencing of Víctor Ancalaf Llaupe resulted in a significant clinical ailment that he still suffers from, and he has been diagnosed with post-traumatic stress syndrome and major depression." Consequently, it asked the Court to award compensation for non-pecuniary damage in equity for Víctor Ancalaf Llaupe.

b) The FIDH affirmed that "[t]he sentencing under the Counter-terrorism Act with serious violations of due process, the discrimination, the years of imprisonment or remaining in hiding, the separation from family members and the community, the humiliation of being stigmatized as a terrorist and, in the case of the *Lonkos*, of being

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424 The FIDH calculated the loss of earnings of Pascual Huentequeo Pichún Paillalao, Segundo Aniceto Norín Catrimán, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán and Juan Ciriaco Millacheo Licán. To this end, it took into account "the day on which the victims were captured or sentenced and the income they failed to earn from that day until they were released," plus the "accrued interest" which could be added to the calculation made. In this regard, they indicated that: (i) Mr. Pichún Paillalao was deprived of liberty for 4 years and 2 months, and his loss of earnings was calculated at 9,100,000 Chilean pesos; (ii) Mr. Norín Catrimán was deprived of liberty for 4 years and a half, and his loss of earnings was calculated at 9,828,000 Chilean pesos; (iii) Florencio Jaime Marileo Saravia was deprived of liberty for 7 years and a half and his loss of earnings was calculated at 16,380,000 Chilean pesos; (iv) Juan Patricio Marileo Saravia was deprived of liberty for 7 years and 3 months and his loss of earnings was calculated at 15,834,000 Chilean pesos; (v) Mr. Huenchunao Mariñán was deprived of liberty for 7 years and 8 months, and his loss of earnings was calculated at 16,744,000 Chilean pesos, and (vi) Mr. Millacheo Licán was convicted and was "in hiding" for 7 years and a half, and his loss of earnings was calculated at 16,380,000 Chilean pesos.

425 The FIDH requested compensation for consequential damages based on: (a) "the direct expenses arising from the violation suffered," which included the "important financial effort in order to seek justice and to publicize the violations they suffered"; (b) the "expenses incurred by the family members, such as expenses to visit" the victims in the detention centers, and (c) "future medical expenses […] for treatment related to the violations."

426 Regarding the damage to the family wealth, the FIDH indicated that the families of Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán and Segundo Aniceto Norín Catrimán suffered "important financial losses" owing to their detentions, because the victims "contributed to the family income with their agricultural labors." It therefore asked the Court to "decide, in equity, based on the information in the expert appraisals and the information provided during the hearings."

427 Regarding the "effects on the life project of the direct victims and the members of their family," it indicated that "the facts on which this case is based […] signified an interruption of their life projects and that of their family members."

unable to play their spiritual role, have caused profound suffering to Pascual Huentequeo Pichún Paillalao, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, Juan Ciriaco Millacheo Licán, José Benicio Huenchunao Mariñán and Aniceto Norín [Catrimán]." It added that "almost 10 years have passed since […] they were first detained, without obtaining any acknowledgement of these violation, or any redress." It indicated also that "the life project" of these victims "was profoundly altered" because "it was a time during which people usually start a family life," or "they already had numerous children to educate." It affirmed that all this "also had serious consequences for the family unit" and, in this regard, referred "to the psychological impact it has had on each member of the families" and on the communities. In its brief with final arguments, the FIDH indicated that, in the case of the victim Pascual Huentequeo Pichún Paillalao, "his wives and children should be able to benefit from the reparation that he would have received […] if he was still alive."

441. The Court has developed in its case law the concept of pecuniary damage and has established that this supposes "the loss or detriment to the income of the victims, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case."[428] The Court has also developed the concept of non-pecuniary damage and has established that this "may include both the suffering and afflictions caused to the direct victim and his family, the impairment of values that have great significance for the individual, as well as the changes of a non-pecuniary nature, in the living conditions of the victim or his family."[429]

442. With regard to the compensation requested by the common interveners for loss of earnings, the Court notes that, in their motions and arguments briefs, they included an estimate of the income that the victims failed to receive while they were deprived of liberty or in hiding (*supra* para. 439). In this regard, the Court observes that it has no probative elements that substantiate the said calculation, or information on the income that the victims received before the events that resulted in the human rights violations declared in this case. However, the Court notes, based on the statements made by the victims and by the members of their families that, prior to the events, the victims carried out agricultural and animal-raising activities, mainly in a collective manner with their communities, which were affected following their prosecution and deprivation of liberty, with a significant impact on the economy and subsistence of the families, who faced financial difficulties, a deterioration in their living conditions, and changes in the roles of family members.[430]

443. The Court observes that, owing to the activity carried out by the victims, it is not possible to determine their precise monthly income. However, bearing in mind the activity carried out by the victims as their means of subsistence, the particularities of the instant case, the violations declared in this Judgment, as well as the time the victims remained deprived of liberty or in hiding, it is possible to infer that, while the prosecution and deprivation of liberty lasted, they were unable to devote themselves to their usual remunerative activities or provide for their families as they did prior to the events.

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[428] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Liakat Ali Alibux v. Suriname*, para. 153.

[429] *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs*. Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Liakat Ali Alibux v. Suriname*, para. 156.

[430] *Cf.* Affidavits prepared on May 14, 2013, by witnesses Freddy Jonathan Marileo Marileo and Lorenza Saravia Tripaillán; on May 16, 2013, by witnesses Matías Ancalaf Prado, Karina del Carmen Prado Figueroa and Flora Collonao Millano, on May 17, 2013, by presumed victim José Benicio Huenchunao Mariñán and by witness Pascual Alejandro Pichún Collonao; written statement made on May 27, 2013, by Segundo Aniceto Norín Catrimán (file of statements of presumed victims, witnesses and expert witnesses, folios 29, 30, 82, 83, 213, 235, 237, 248, 255, 256 and 639), and statement made by Víctor Manuel Ancalaf Llaupe before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

444. The common interveners also indicated that the victims' family members incurred expenses arising from the violations that affected the victims, particularly the expenses resulting from their visits to the victims while they were deprived of liberty. In this regard, the Court notes that it has no evidence to prove the exact amounts that the family members disbursed in this regard. However, the Court is able to determine, based on the statements made by the victims and their family members, that the latter incurred expenses when travelling to the prisons to visit the victims and to provide them with food and other necessary items.[431] The Court also considers it reasonable to presume that, owing to the facts of this case and, fundamentally, owing to the deprivation of liberty, the family members had to incur different expenses.

445. Regarding the non-pecuniary damage, the Court has verified the psychological and moral impact on the eight victims of this case owing to the prosecution and sentencing for offenses of a terrorist nature and to having to serve a prison sentence and comply with ancillary penalties based on criminal judgments delivered in application of a law that was contrary to the Convention, in violation of guarantees of due process, the principle of equality and non-discrimination, and the right to equal protection of the law. The Court has verified, by means of the statements of the victims and their family members and of the psychological appraisals prepared by Ms. Vargas Forman, the consequences for the victims of having been declared responsible as perpetrators of terrorist offenses in violation of the Convention on different aspects of their personal, community and family life,[432] the effects of which continue even after having served – most of them – their prison sentences.[433] At the personal level, the effects are related to personal changes, the suffering, and the consequences of the prosecution for terrorist offenses, as well as the time they remained in confinement. In addition, the arbitrary measures of pre-trial detention and the said criminal convictions had effects on the participation of the victims in their communities, especially in the case of Messrs. Norín Catrimán, Pichún Paillalao

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[431] *Cf.* Affidavits prepared on May 14, 2013, by presumed victims Juan Ciriaco Millacheo Licán and Juan Patricio Marileo Saravia, by witnesses Soledad Angélica Millacheo Licán and Juan Julio Millacheo Ñanco; on May 16, 2013, by witnesses Matías Ancalaf Prado, Karina del Carmen Prado Figueroa and Flora Collonao Millano; on May 17, 2013, by presumed victim José Benicio Huenchunao Mariñán, and on May 20, 2013, by witness Claudia Ximena Espinoza Gallardo (file of statements of presumed victims, witnesses and expert witnesses, folios 29, 31, 82, 83, 187, 188, 197, 231, 232, 238, 240, 255 and 260) and statement made por Víctor Manuel Ancalaf Llaupe before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[432] *Cf.* Affidavits prepared on May 14, 2013, by presumed victims Juan Patricio Marileo Saravia and Juan Ciriaco Millacheo Licán, and by witnesses Soledad Angélica Millacheo Licán, Freddy Jonathan Marileo Marileo, Juan Julio Millacheo Ñanco and Gloria Isabel Millacheo Ñanco; on May 15, 2013, by expert witness Ruth Elizabeth Vargas Forman with regard to Víctor Manuel Ancalaf Llaupe and his family, in relation to Pascual Huentequeo Pichún Paillalao, Juan Ciriaco Millacheo Licán, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia and José Benicio Huenchunao Mariñán, in relation to Segundo Aniceto Norín Catrimán, and in relation to Patricia Roxana Troncoso Robles; on May 16, 2013, by witnesses Matías Ancalaf Prado, Karina del Carmen Prado Figueroa and Carlos Patricio Pichún Collonao, and on May 17, 2013, by presumed victim José Benicio Huenchunao Mariñán and by witness Mercedes Huenchunao Mariñán (file of statements of presumed victims, witnesses and expert witnesses, folios 96 to 33, 35, 84, 86, 99, 106 to 109, 192, 193, 197, 200, 205 to 210, 222, 233, 234, 256, 260, 267, 277, 416 to 424, 569 to 573, 589 to 592, 636 to 639, 657 and 658), and statements made by Víctor Manuel Ancalaf Llaupe, Florencio Jaime Marileo Saravia and Juan Pichún Collonao before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

[433] *Cf.* Affidavits prepared on May 14, 2013, by presumed victims Juan Patricio Marileo Saravia and Juan Ciriaco Millacheo Licán, by witnesses Soledad Angélica Millacheo Licán, Freddy Jonathan Marileo Marileo and Isabel Millacheo Ñanco; on May 15, 2013, by expert witness Ruth Elizabeth Vargas Forman in relation to Víctor Manuel Ancalaf Llaupe and family, in relation to Pascual Huantequeo Pichún Paillalao, Juan Ciriaco Millacheo Licán, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia and José Benicio Huenchunao, in relation to Segundo Aniceto Norín Catrimán, and in relation to Patricia Roxana Troncoso Robles; on May 16, 2013, by witnesses Matías Ancalaf Prado and Karina del Carmen Prado Figueroa; on May 17, 2013, by witness Mercedes Huenchunao Mariñán, and written statements prepared on May 27, 2013, by Segundo Ancieto Norín Catrimán and Patricia Roxana Troncoso Robles (file of statements of presumed victims, witnesses and expert witnesses, folios 33 to 35, 84, 96 to 99, 106 to 109, 192, 193, 199, 200, 233, 234, 267, 277, 416 to 424, 569 to 573, 589 to 592, 636 to 639, 657 and 658), and statements made by Víctor Manuel Ancalaf Llaupe, Florencio Jaime Marileo Saravia and Juan Pichún Collonao before the Inter-American Court during the public hearing held on May 29 and 30, 2013.

and Ancalaf Llaupe as regards the exercise of their role as indigenous leaders of Mapuche communities. In addition, at the level of the family, the statements of the victims and the members of their families reveal the breakdown of family ties as a result of the trials and the years of deprivation of liberty, added to the victims' concern and anguish because they could not provide for their families financially or fulfill their parental duties during the time they were imprisoned.

446. Based on all the above, the Court finds it pertinent to order compensation in favor of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, which includes both the pecuniary damage, and the non-pecuniary damage that has been verified and, to this end, determines, in equity, the sum of US$50,000.00 (fifty thousand United States dollars) or the equivalent in local currency, for each of them.

D) Costs and expenses

447. CEJIL argued that "[s]ince it incorporated the case as the representative of [Víctor Ancalaf Llaupe, it] had assumed a series of expenses connected with this task, which included travel, hotels, communications, photocopies, stationery and mailings," as well as those "corresponding to the time dedicated by the lawyers to specific attention to the case and to research, obtaining and presenting evidence, conducting interviews, and preparing briefs." In its motions and arguments brief, it asked the Court to order the State to reimburse US$10,899.99 for costs and expenses. With its final written arguments it presented "a list of the expenses incurred since the presentation of the [motions and arguments brief] and up until the public hearing at the seat of the Court," amounting to US$17,816.77. In total, CEJIL asked the Court for reimbursement of US$28,716.76 for costs and expenses. In addition, it asked the Court, "based on equity, […] to order the deposit of an additional amount" for future expenses that included "those related to compliance with the judgment," as well as "the expenses of trips from Argentina to Chile […], to advance compliance with the judgment, and the other expenses that the proceedings could entail […] following notification of the Judgment."

448. The FIDH described the expenses it had incurred by "accompany […] the victims in this case"; among these, it referred to expenditure on plane tickets, accommodation and *per diem* for "a visit to Washington to the Inter-American Commission by three lawyers and one representative of the FIDH," as well as "trips to Chile to inform the victims about the progress of the case; to hold meetings with Chilean lawyers, and to obtain evidence," and a trip to San José, Costa Rica, to attend the hearing before the Court. It calculated that these expenses amounted to US$32.000,00. In addition, it referred to the expenses "incurred by the lawyers and by the victims," because "two lawyers [Jaime Madariaga and Myriam Reyes] have represented the victims from the start of the proceedings on a voluntary basis" and it therefore asked the Court to recognize "honoraria for their work" because "[f]rom the moment that the FIDH incorporated the case, they began to provide technical and professional support, […] but have not receive any remuneration."[434] In addition, it asked that the State "pay the amount for costs and expenses directly to the representatives of the victims."

449. The Court reiterates that, in keeping with its case law,[435] costs and expenses form part of the concept of reparation established in Article 63(1) of the American Convention, because the activity deployed by the victims in order to obtain justice at both the domestic and the

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[434] In this regard, the FIDH indicated that this case "has required a significant effort [by the national lawyers], including the filing of the complaint, visits to the prisons to interview the victims, establishing trust and agreements that allowed the case to be constructed," all of which "has entailed personnel expenses" and time working on the case.

[435] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs.* Judgment of August 27, 1998. Series C No. 39, para. 79, and *Case of Liakat Ali Alibux v. Suriname*, para. 162.

international level entails disbursements that must be compensated when the international responsibility of the State has been declared in a judgment convicting it.

450. With regard to their reimbursement, it is for the Court to make a prudent assessment of their scope, which may include the expenses arising before the authorities of the domestic jurisdiction, as well as those generated during the proceedings before the Court, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the principle of equity and taking into account the expenses indicated by the parties, provided that the *quantum* is reasonable.[436]

451. In this regard, the Court has indicated that "the claims of the victims or their representatives for costs and expenses, and the evidence that supports such claims must be presented to the Court at the first procedural opportunity granted them; that is, in the motions and arguments brief, without prejudice to those claims being updated subsequently based on the new costs and expenses incurred owing to the proceedings before this Court."[437] In addition, the Court reiterates that it is not sufficient merely to forward probative documents, but rather the parties must submit arguments that relate the evidence to the fact that it is considered to represent and, in the case of alleged financial disbursements, the items and their justification must be clearly established.[438]

452. In the instant case, the Court takes into account that the common interveners incurred expenses during the processing of the case before the Inter-American Commission and before the Court. In this regard, it has verified that CEJIL presented vouchers for expenses for approximately US$26,425.00 (twenty-six thousand four hundred and twenty-five United States dollars) corresponding to travel, accommodation and transport. Meanwhile, the FIDH presented expense vouchers for approximately US$25,820.00 (twenty-five thousand eight hundred and twenty United States dollars) corresponding to travel, accommodation and transport. Consequently, the Court finds it appropriate to establish for reimbursement of costs and expenses in favor of the FIDH the sum requested of US$32,000.00 (thirty-two thousand United States dollars) or the equivalent in local currency, and in favor of CEJIL the amount requested of US$28,700.00 (twenty-eight thousand seven hundred United States dollars) or the equivalent in local currency. The State must pay these amounts within one year.

453. In addition, the Court considers that Ylenia Hartog, representative of the victims Segundo Aniceto Norín Catrimán and Patricia Roxana Troncoso Robles, incurred expenses in the proceedings before the Court, and therefore decides to establish in her favor, in equity, for costs and expenses the sum of US$5,000.00 (five thousand United States dollars). With regard to the FIDH request to recognize a sum for "honoraria" to Jaime Madariaga and Myriam Reyes for having "represented the victims from the start of the proceedings" (*supra* para. 448), the Court has verified that they have intervened in the processing of the proceedings at both the domestic and the international level and, therefore, finds it pertinent to establish, in equity, the sum of US$5,000.00 (five thousand United States dollars) or the equivalent in local currency, for each of them, for costs and expenses. The State must pay these amounts within one year.

454. The Court considers that, during the proceeding on monitoring compliance with this Judgment, it may establish that the State must reimburse the victims or their representatives any reasonable expenses they incur during that procedural stage.

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[436] *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs*, para. 82 and *Case of Osorio Rivera and family members v. Peru*, para. 293.

[437] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 275, and *Case of J. v. Peru*, para.421.

[438] *Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, para. 277, and *Case of Liakat Ali Alibux v. Suriname*, para. 163.

E) Other measures of reparation requested

a) *Adaptation of domestic law in relation to the Counter-terrorism Act*

455. The Commission asked the Court to order the State to "[a]dapt the anti-terrorist legislation embodied in Law 18,314, so that it is compatible with the principle of legality recognized in Article 9 of the American Convention," and indicated that the 2010 reform of the Counter-terrorism Act did not entail a substantial modification that made it compatible with this article, because it was a structural change that kept the identical wording to the previous version, and that the changes were merely in phrases and connecting words used to unite the three hypotheses relating to the terrorist intent.

456. The FIDH asked that the Court order the "repeal of Law 18,314" or, "[s]ubsidiarily," its adaptation "and that of other domestic laws to international standards," and indicated that it shared the Commission's opinion that the amendments to Law No. 18,314 had not been substantive as regards the principle of legality. CEJIL requested "the adaptation of the legal framework applicable to cases of presumed terrorist acts to the standards of international human rights law," and recognized the progress made by the amendments to the Counter-terrorism Act insofar as the legal presumption of terrorist intent had been eliminated and the non-applicability of this law to minors had been established. Nevertheless, it considered that the obstacles as regards international standards had not been overcome, "especially [those related to] the definition of the offenses included in the law."

457. The State indicated that, in 2010, a reform of the Counter-terrorism Act was approved in which its articles 1 and 2 were amended, eliminating the presumption of terrorist intent and the applicability of this law to minors. It indicated that "[t]he definition of terrorist offense […] complies with the principle of legality" and that "[t]here are no references in this law that could lead to an erroneous interpretation of the offense by either the general population or the courts of justice."

458. The Court has determined that the State maintained in force a criminal norm included in the Counter-terrorism Act that was contrary to the principle of legality and the principle of the presumption of innocence, as indicated in paragraphs 168 to 177. This norm was applied to the victims in this case to determine their criminal responsibility as authors of terrorist offenses and, consequently, the Court found that Chile had violated the principle of legality in criminal matters (Article 9) and the principle of the presumption of innocence (Article 8(2)), in relation to the obligation to respect and ensure rights (Article 1(1)) and the obligation to adopt domestic legal provisions (Article 2), to the detriment of Víctor Manuel Ancalaf Llaupe, Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, all in the terms established in this Judgment.

459. The Court notes that the case file reveals that, under Law No. 20,467,[439] the legal presumption of terrorist intent that was applied to the presumed victims in this case was eliminated. Since it has been proved by the State that the said provision is not in force, it is not necessary to order a measure concerning the adaptation of domestic law on this specific point. The Court will not make abstract considerations on Chilean laws in relation to the current definition of offenses contained in the Counter-terrorism Act. The fact that, when ruling on the merits, the Court did not consider it pertinent to analyze, in this case, other alleged violations derived from the regulation of other aspects of the subjective element of the definition of the

[439] *Cf.* Law No. 20,467 of October 8, 2010, which "[a]mends provisions of Law No.18,314 that define terrorist acts and establish the corresponding punishments" (file of annexes to the Merits Report 176/10, annex 2, folios 12 to 15, file of annexes to the CEJIL motions and arguments brief, annex B.1.3, folios 1759 to 1774, file of annexes to the FIDH motions and arguments brief, annex 32, folios 883 to 1309, and file of annexes to the answering brief of the State, annex 4, folios 84 to 87).

offense or those supposedly derived from the objective element of the definition (*supra* para. 178), does not preclude Chile, if it considers it necessary, from amending its legislation to take into account the relevant aspects indicated by international experts and organs.

b) Adaptation of domestic law in relation to the right to appeal the judgment before a higher court

460. The Commission asked the Court to order that the State "[a]dapt its domestic procedural laws to make them compatible with [the] right established in Article 8(2)(h)) […] of the American Convention." The FIDH requested "an amendment of the Criminal Procedural Code in order to ensure the right of those convicted to appeal, either by amending the current remedy, or by establishing a new remedy that guaranteed a full review of judgments convicting the accused." The State indicated that the appeals system of the Criminal Procedural Code "complies with all the international standards," and indicated that "an unjustified order to amend the criminal procedural system, would only, paradoxically, weaken due process, allowing a less appropriate court to examine the facts outside the context of the oral hearing – which is the highest expression of the guarantees of the public, immediate and adversary nature of the proceedings – and to take a decision, free of the scrutiny of the interested parties, on no less than the possibility of the criminal conviction of an individual."

461. In view of the fact that, in the instant case, the Court concluded that a violation of Article 2 of the Convention had not been proved, but rather that the violation of the right to appeal an adverse criminal judgment was a result of the actions of the courts in the specific cases (*supra* paras. 275 to 297), the Court does not find it necessary to order Chile to adapt its domestic laws in this regard. However, the Court recalls the importance that the judicial authorities apply the criteria or standards established in the Court's case law in relation to the content of the right to appeal a criminal judgment in exercise of control of conventionality in order to ensure this right (*supra* para. 298).

c) Adaptation of domestic law in relation to the grounds for pre-trial detention

462. CEJIL affirmed, with regard to the adaptation of the norms on pre-trial detention, that "Chilean regulations […] retain the grounds of a danger to society in force that […] are incompatible with the procedural criteria established in the Convention." It indicated that both the grounds and their interpretation by the courts "tend towards the automatic application of this coercive measure," "without the need to justify precisely how, in the specific case that is the object of a decision on liberty, the accused would be a danger to the security of society." In this regard, it mentioned that this way of interpreting the grounds "is supported […] by the administrators of justice and was reinforced by the National Congress by the promulgation of Law No. 20,253," which establishes "a system of presumptions of danger to the security of society" "increasing the automatic nature of the establishment […] of pre-trial detention" on these grounds. It considered that the following norms should be amended: (a) article 19.7.e of the Constitution of the Republic of Chile; (b) article 363.1 and 3 of the Code of Criminal Procedure (Law No 1853), and (c) article 140.c of the Criminal Procedural Code (Law No. 19,696). The FIDH requested "the modification of the law on pre-trial detention, in order to eliminate the grounds of danger to the security of society, retaining only those relating to the danger to the investigation and the risk of flight."

463. The State indicated that it was "irresponsible to alleged that measures of protection should not be taken in cases where proven past events indicate that a person could, if at liberty, not only flee or affect the investigation, but also endanger the victim of the offense investigated or other persons" and that it "did not see why the security of the investigation would be a sufficiently important right to justify […] a precautionary measure involving the pre-trial detention of an accused, but not the security of individuals."

464. When ruling on the violations verified in this case in relation to the measures of pre-trial detention to which the victims were subject, the Court took into account that the grounds of danger to "the security of society" stipulated in article 363 of the former Code of Criminal Procedure and in article 140.c of the Criminal Procedural Code of 2000, which are open-ended, were applied to the eight victims without an analysis of the need that justified the measure based on a procedural risk in the specific case (*supra* paras. 363 and 364). Consequently, the Court does not find it pertinent to order Chile to adapt its domestic law, because the violations of the right to personal liberty verified in this Judgment resulted from the judicial interpretation and application of the said norms. Nevertheless, the Court recalls that the judicial authorities should apply the criteria and standards established in the Court's case law (*supra* paras. 307 to 312) in exercise of control of conventionality, in order to ensure that the measure of pre-trial detention is always adopted in keeping with these parameters.

d) Other measures requested

465. The Commission asked the Court to order the State to "[a]dopt measures of non-repetition to eradicate the discriminatory prejudices based on ethnic origin in the exercise of public power and, most especially, in the administration of justice." CEJIL asserted that, given that "[s]ome of the violations […] in this case are explained by the unfamiliarity with the standards of international law of the administrators of justice," the State should "increase substantially the training offered to the agents of the security forces – in particular, the members of the Investigative Police of the *Carabineros* – the members of the Judiciary and the Public Prosecution Service, and other State officials, on the rights of the indigenous peoples in order to avoid the repetition of discriminatory biases in the application of the law." In addition, it requested "that the legal reforms be complemented by education and training activities on the implications of the Judgment and the standards derived from it, for the different agents involved in the protection of rights," and that this "should include the National Human Rights Institute as the State agency responsible for the design and implementation of this measure." It alleged that one way of reversing "[t]he historical situation of disadvantage of the indigenous peoples in Chile in general, and the Mapuche People in particular," as well as the prejudices and stereotypes that exist in the State with regard to the members of indigenous peoples, "is the design and implementation of an effective public policy that instills respect for the contribution of the indigenous peoples [and the Mapuche culture] to national development. To this end, it ask[ed] the Court to require the State to design and implement an awareness-raising campaign on the issue, including the National Human Rights Institute in its execution." The FIDH asked that the State be order to implement a "communication campaign that underscores the value of the Mapuche People and the importance of their survival."

466. The FIDH also asked the Court to order the State "to restitute the ancestral lands to the Mapuche people" in order "not to perpetuate the State's actions aimed at condemning representatives of the Mapuche people for their political demands."[440] It also asked that Chile be ordered "to investigate and sanction those responsible for these violations"; specifically, that it "sanction the judges and prosecutors who participated in the violation of the human rights of the victims." In addition, the FIDH, among its arguments on non-pecuniary damage, affirmed that "the only way to repair the consequences of [the] violations [in this case] is to seek measures that considers the Mapuche community as a whole," and to this end, it requested the "creation of a fund to be administered by the communities to which the petitioners belong, destined for the education of Mapuche children," because it considered that the harm to the cultural and moral integrity of the community "can be repaired by the transfer of ancestral knowledge to the children as a way of maintaining the cultural integrity of the people."

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[440] Specifically, they "requested the establishment of a plan for the restitution of land" to the José Guillón, José Millacheo, José María Cabul, Temulemu and Norín Communities, to which the victims and their families belong.

467. The Court considers that the delivery of this Judgment and the reparations ordered in this chapter are sufficient and adequate to remedy the violations declared and does not find it admissible to order additional measures.[441]

F) Reimbursement of the expenses of the Victims' Legal Assistance Fund

468. Both CEJIL and the FIDH presented, in representation of three of the presumed victims, requests for support from the Victims' Legal Assistance Fund of the Court to cover certain expenses relating to the presentation of evidence. In Orders of the President of the Court of May 18, 2012, and of April 30, 2013 (*supra* paras. 10 and 13), and a decision of May 24, 2013, the financial assistance of the Fund was authorized to cover the necessary travel and accommodation expenses for presumed victims Víctor Manuel Ancalaf Llaupe and Florencio Jaime Marileo Saravia, witness Juan Pichún Collonao and expert witness Jorge Andrés Contesse Singh to appear before the Court to testify at the public hearing.[442]

469. The State was given the opportunity to present its observations on the disbursements made in this case, which amounted to US$7,652.88 (seven thousand six hundred and fifty-two United States dollars and eighty-eight cents). Chile did not present observations in this regard. In application of article 5 of the Rules for the Operation of the Fund, it is for the Court to evaluate the admissibility of ordering the defendant State to reimburse the Legal Assistance Fund for any disbursements made.

470. Based on the violations declared in this Judgment, the Court orders the State to reimburse this Fund the sum of US$7,652.88 (seven thousand six hundred and fifty-two United States dollars and eighty-eight cents) for the expenditure incurred. This amount must be reimbursed to the Inter-American Court within ninety days of notification of this Judgment.

G) Method of complying with the payments

471. The State must pay the compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses established in this Judgment directly to the persons or organizations indicated herein, within one year of notification of this Judgment, in accordance with the following paragraphs. If any of the beneficiaries of the compensation are deceased (as in the case of the victim Pascual Huentequeo Pichún Paillalao) or die before they receive the respective compensation, this shall be delivered directly to their heirs, pursuant to the applicable domestic law.

472. The State must comply with the monetary obligations by payment in United States dollars or the equivalent in Chilean pesos, using the exchange rate between the two currencies in force on the New York Stock Exchange (United States of America) the day before the payment to make the respective calculation.

473. If, for reasons that can be attributed to the beneficiaries of the compensation or their heirs it is not possible to payment the specified amounts within the indicated time frame, the State shall deposit these amounts in their favor in an account or a certificate of deposit in a solvent Chilean financial institution, in United States dollars, and in the most favorable conditions allowed by banking law and practice. If, after ten years, the sum allocated has not been claimed, it shall be returned to the State with the interest accrued.

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441 *Cf. Case of Radilla Pacheco v. Mexico*, para. 359, and *Case of Gutiérrez and family v. Argentina. Merits, reparations and costs.* Judgment of November 25, 2013. Series C No. 271, para. 198.

442 In addition, the President *ex officio* approved assistance for the reasonable expenses entailed by providing the statements of the presumed victims Segundo Aniceto Norín Catrimán and Patricia Roxana Troncoso Robles by affidavit. The representative of these victims did not provide the Court with any voucher for expenses incurred in the preparation of these statements.

474. The amounts allocated in this Judgment as compensation for pecuniary and non-pecuniary damage, and to reimburse costs and expenses must be delivered to the persons indicated in full, as established in this Judgment, without any reductions arising from eventual taxes or charges.

475. If the State should fall in arrears, it must pay interest on the amount owed corresponding to banking interest on arrears in Chile.

476. In accordance with its consistent practice, the Court reserves the power inherent in its attributes and also derived from Article 65 of the American Convention to monitor full compliance with this Judgment. The case will be closed when the State has complied fully with all aspects of this Judgment.

477. Within one year of notification of this Judgment, the State must provide the Court with a report on the measures adopted to comply with it.

478. Therefore,

THE COURT

DECLARES,

unanimously that:

1. The State violated the principle of legality and the right to the presumption of innocence, established in Articles 9 and 8(2) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, in the terms of paragraphs 159 to 177 of this Judgment.

unanimously that:

2. The State violated the principle of equality and non-discrimination and the right to the equal protection of the law, established in Article 24 of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Ancalaf Llaupe, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, in the terms of paragraphs 222 to 228 and 230 of this Judgment.

unanimously that:

3. The State violated the right of the defense to examine witnesses, established in Article 8(2)(f) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Pascual Huentequeo Pichún Paillalao and Víctor Manuel Ancalaf Llaupe, in the terms of paragraphs 241 to 260 of this Judgment.

unanimously that:

4. The State violated the right to appeal the judgment before a higher court, established in Article 8(2)(h) of the American Convention on Human Rights, in relation to Article 1(1) of this

instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, in the terms of paragraphs 268 to 291 of this Judgment.

unanimously that:

5. The State violated the right to personal liberty, established in Article 7(1), 7(3) and 7(5) of the American Convention on Human Rights, and the right to the presumption of innocence, established in Article 8(2) thereof, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Troncoso Robles, in the terms of paragraphs 307 to 358 of this Judgment.

unanimously that:

6. The State violated the right to freedom of thought and expression, established in Article 13(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao and Víctor Manuel Ancalaf Llaupe, in the terms of paragraphs 370 to 378 of this Judgment.

unanimously that:

7. The State violated the political rights established in Article 23(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, in the terms of paragraphs 379 to 386 of this Judgment.

unanimously that:

8. The State violated the right to the protection of the family established in Article 17(1) of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Víctor Manuel Ancalaf Llaupe, in the terms of paragraphs 401 to 410 of this Judgment.

unanimously that:

9. It has insufficient evidence to allow it to conclude that the State violated the right to the protection of the family established in Article 17(1) of the American Convention on Human Rights, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, in the terms of paragraph 411 of this Judgment.

by four votes to two, that:

10. It is not incumbent on the Court to rule on the alleged violation of the right to an impartial judge or court, established in Article 8(1) of the American Convention on Human Rights, in the terms of paragraphs 193 and 229 of this Judgment.

Judges Ventura Robles and Ferrer Mac-Gregor Poisot dissenting.

unanimously that:

11. It is not incumbent on the Court to rule on the alleged violation of the obligation to adopt domestic legal provisions, established in Article 2 of the American Convention on Human Rights, in relation to the right of the defense to examine witnesses, protected in Article 8(2)(f) of this instrument, in the terms of paragraph 261 of this Judgment.

unanimously that:

12. The State did not violate the obligation to adopt domestic legal provisions, established in Article 2 of the American Convention on Human Rights, in relation to the right to appeal the judgment before a higher court, established in Article 8(2)(h) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, in the terms of paragraphs 292 to 298 of this Judgment.

unanimously that:

13. The State did not violate the obligation to adopt domestic legal provisions, established in Article 2 of the American Convention on Human Rights, in relation to the right to personal liberty, established in Article 7 of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, in the terms of paragraphs 360 to 364 of this Judgment.

unanimously that:

14. The State did not violate the right to personal integrity, established in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles, in the terms of paragraphs 387 to 400 of this Judgment.

AND ESTABLISHES

unanimously that:

15. This Judgment constitutes *per se* a form of reparation.

16. The State must adopt all the administrative, judicial, or any other type of measures required to annul all aspects of the criminal judgments convicting Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Víctor Manuel Ancalaf Llaupe, Florencio Jaime Marileo Saravia, Juan Patricio Marileo Saravia, José Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Troncoso Robles regarding which the Court has ruled in this Judgment, in the terms of paragraph 422 of this Judgment.

17. The State must provide, free of charge and immediately, medical and psychological or psychiatric treatment to the victims in this case who request this, as established in paragraphs

425 and 426 of this Judgment.

18. The State must broadcast and make the publications of the Judgment indicated in paragraphs 428 and 429 of this Judgment, as indicated in these paragraphs.

19. The State must award scholarships in Chilean public establishments to the children of the eight victims in this case who request this, in the terms of paragraph 432 of this Judgment.

20. The State must regulate, clearly and precisely, the procedural measure of witness protection involving anonymity, ensuring that this is an exceptional measures, subject to judicial control based on the principles of necessity and proportionality, and that this evidence is not used in a decisive manner as grounds for a conviction, and also to regulate the corresponding counterbalancing measures, in the terms of paragraphs 242 to 247 and 436 of this Judgment.

21. The State must pay each of the eight victims in this case the amount established in paragraph 446 of this Judgment, as compensation for pecuniary and non-pecuniary damage, in the terms of paragraphs 471 to 475 of this Judgment.

22. The State must pay the amounts established in paragraphs 452 and 453 of this Judgment as reimbursement of costs and expenses in the terms of the said paragraphs and of paragraphs 471 to 475 of this Judgment.

23. The State must reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights the amount disbursed during the processing of this case, as established in paragraph 470 of this Judgment.

24. The State must provide the Court with a report on the measures adopted to comply with this judgment within one year of its notification.

25. The Court will monitor full compliance with this Judgment, in exercise of its powers and pursuant to its obligations under the American Convention on Human Rights, and will close this case when the State has complied fully with its provisions.

Judges Manuel E. Ventura Robles and Eduardo Ferrer Mac-Gregor Poisot advised the Court of their joint dissenting opinion which accompanies this Judgment.

DONE, at San José, Costa Rica, on May 29, 2014, in the Spanish language.

Humberto Antonio Sierra Porto
President

Roberto F. Caldas

Manuel E. Ventura Robles

Diego García-Sayán Alberto Pérez Pérez

Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Secretary

So ordered,

Humberto Antonio Sierra Porto
President

Pablo Saavedra Alessandri
Secretary

JOINT DISSENTING OPINION OF JUDGES
MANUEL E. VENTURA ROBLES AND EDUARDO FERRER MAC-GREGOR POISOT

CASE OF NORÍN CATRIMÁN *ET AL.* (LEADERS, MEMBERS AND ACTIVIST OF THE MAPUCHE INDIGENOUS PEOPLE) *v.* CHILE

JUDGMENT OF MAY 29, 2014
(Merits, reparations and costs)

1. We issue this dissenting opinion in order to provide the grounds for the reasons we disagree with what was decided in operative paragraph 10 of the Judgment of May 29, 2014, in the *Case of Norín Catrimán et al. v. Chile* (hereinafter "the Judgment"), delivered by the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"), in which it declared that it was "not incumbent on the Court to rule on the alleged violation of the right to an impartial judge or court established in Article 8(1) of the American Convention on Human Rights" (hereinafter "the American Convention" or "the Pact of San José, Costa Rica"), based on the considerations in paragraph 229 of the Judgment.

2. In this opinion we will set out the reasons why we consider that the Court should have established that Chile incurred in a violation of Article 8(1) of the American Convention owing to the lack of impartiality of the courts that delivered criminal convictions against the victims in this case; above all, because these convictions were based on negative ethnic prejudices and stereotypes that had a decisive impact on the analysis of elements of the criminal responsibility.

3. For greater clarity, we will divide this opinion into the following sections: (1) object of the disagreement (paras. 4 to 11); (2) the right to an impartial judge or court in accordance with international case law (paras. 12-32); (3) the lack of impartiality of the judges who heard the criminal proceedings against the victims in this case (paras. 33-41), and (4) conclusion (paras. 42-45).

1. Object of the disagreement

4. First of all, we believe that the reason given by the majority opinion in paragraph 229 of the Judgment is insufficient, when it considers "that it is not necessary to rule" on the alleged violation of the right to an impartial judge. The reason given in the judgment is that the allegations of a violation "are closely linked to the presumption of the terrorist intent 'to instill fear [...] in the general population' (a subjective element of the definition), that as the Court has declared (*supra* paras. 168 to 177) violates the principle of legality and the guarantee of presumption of innocence established in Articles 9 and 8(2) of the Convention, respectively." On the basis of this reason, the majority opinion affirms that "[t]he alleged violation of Article 8(1) should be considered subsumed in the previously declared violation of Articles 9 and 8(2)."

5. In this regard, we consider it necessary to recall that the Court examined whether the legal presumption of the subjective element of the offense established in article 1 of the Counter-terrorism Act (Law No. 18,314) entailed a violation of the principle of legality and the principle of the presumption of innocence, by establishing that "[t]he objective of instilling fear in the general population shall be presumed,

save evidence to the contrary," when the offense is committed using the means or devices indicated in this same law (including "explosive or incendiary devices").[1] The Court concluded that the said presumption that the intent exists "to instill fear in the general population" when certain objective elements exist violates the principle of legality recognized in Article 9 of the American Convention and the presumption of innocence established in its Article 8(2); and concluded that its application in the judgments that determined the criminal responsibility of the eight victims in this case violated these rights protected in Articles 9 and 8(2) of the Convention.

6. The motive for our disagreement with regard to the said paragraph 229 of the Judgment is that it does not contain a reasoning of how that legal presumption, which is not even alleged to be discriminatory, had a negative impact on the impartiality of the judges. To the contrary, we consider that the impartiality of the judges who heard these criminal trials is indisputably called in question as regards their decisions in the judgments convicting the victims regarding which the Court declared the violation of Article 24 of the American Convention.

7. Indeed, the observations of the Inter-American Commission on Human Rights (hereinafter "the Commission") in its Merits Report should be recalled in relation to the violation of impartiality that occurred because the judges who delivered the guilty verdicts convicting the eight presumed victims "assessed and classified the facts on the basis of prefabricated concepts about the context that surrounded them, and […] convicted the defendants on the basis of those biases." According to the Commission, "the judges on the oral criminal trial court came to this case with preconceived notions about the law and order situation associated with the so-called "Mapuche conflict," biases that caused them to take as proven fact that Region IX was the scene of a series of violent activities and that the events in the case the court was hearing 'fit into' that string of violent activities; it also caused the judges to copy, virtually verbatim, the very same reasoning the court had already used in judging the individual conduct on trial in an earlier criminal proceeding."[2]

8. Similarly, in its motions and arguments brief, the International Federation for Human Rights (hereinafter "the FIDH") argued that "there was subjective impartiality *(sic*) in the judgments convicting the accused in the case of the *Lonko*s and in the Poluco Pidenco case" and that it endorsed the Commission's conclusion in its Merits Report, to which it added that "the application of an undue punishment to the *Lonkos* also reveals prejudice."[3] In its final arguments, the FIDH affirmed that "the use of concepts such as "well-known and notorious,' 'it is well-known' as basic elements to justify the serious conflict between the Mapuche ethnic group and the rest of the population, contained in the judgments in both the case of the *Lonkos* and the Poluco Pidenco Case, reveal that the victims were not tried by an impartial court, because the case was approached with a bias or a stereotype." Furthermore, it affirmed that "[t]hese preconceived notions […] are also reflected in the fact that the Angol Oral Court copied the judgment that it had delivered in the first trial against the *Lonkos* Pichún and Norín, in which it handed down an acquittal and then, in the judgment of August 24, 2004, delivering a guilty verdict against the victims in the Poluco Pidenco case, it copied

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1 Paras. 168 to 177 of the Judgment.

2 Merits Report No. 176/10, paras. 282 and 283.

3 The FIDH brief with motions, arguments and evidence (merits file, tome I, folios 497 and 498).

precisely the part relating to why it considered that the acts it was examining were terrorist offenses."

9. Therefore, we consider it contradictory that the Court did not rule on these allegations of the violation of the right to an impartial court, but did rule — in paragraphs 226, 227, 228 and 230 and in the second operative paragraph of the Judgment — on "the terms […] indicated, in particular, as being discriminatory [that], with some variations, appear in the different judgments"; concluding that "the mere use of this reasoning, which reveals stereotypes and prejudices, as grounds for the judgments constituted a violation of the principle of equality and non-discrimination and the right to equal protection of the law, recognized in Article 24 of the American Convention, in relation to Article 1(1) of this instrument,"[4] to the detriment of Segundo Aniceto Norín Catrimán, Pascual Huentequeo Pichún Paillalao, Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán, Patricia Roxana Troncoso Robles and Víctor Manuel Ancalaf Llaupe (underlining added).

10. We consider that, similarly, it is necessary to examine the allegation that the conduct of the judges entailed a lack of impartiality, analyzing whether these expressions and the reasoning in the guilty verdicts, which the Court itself indicated "reveal stereotypes and prejudices as grounds for the judgments," also constitute a violation of the guarantee of judicial impartiality in this case. This analysis is particularly important because these were criminal proceedings in which the accused were sentenced and convicted. In addition, the Judgment does not provide any reasoning as to how the said legal presumption could have had a negative influence on the aspect of the impartiality of the judges on which the alleged violation is centered, especially as it was not even alleged that it was discriminatory.[5]

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[4] Para. 228 of the Judgment.

[5] In its Merits Report No. 176/10 the Inter-American Commission stated, in both paragraph 283 and in the seventh conclusion (para. 289.7), that Chile had violated the right to an impartial judge or court to the detriment of the eight presumed victims in this case. Despite the fact that, in the said paragraph 283, the Inter-American Commission does not include arguments to support the alleged violation with regard to Víctor Ancalaf Llaupe and that the Center for Justice and International Law (hereinafter "CEJIL") — Víctor Ancalaf's representative — did not argue that his client's guarantee of impartiality had been violated in relation to the decisions made based on prejudices, we consider that its analysis would have been admissible in application of the *iura novit curia* principle, which has solidly support in international case law. This principle allows the Court to examine possible violations of the norms of the American Convention that have not been alleged by either the Commission or the victims or their representatives, provided that the latter have been able to express their respective positions in relation to the facts that support them. Thus, the Court has used this principle since its first judgment on merits and on other occasions to declare the violation of rights that had not been directly alleged by the parties, but that were revealed from the analysis of the facts in dispute, because this principle authorizes the Inter-American Court, provided that the factual framework of the case is respected, to classify the juridical situation or relation in dispute in a different way than the parties did. For example, the violation of rights that had not been cited by the parties was declared, in application of the *iura novit curia* principle in the following cases, *inter alia*: (i) in the Case of *Velásquez Rodríguez v. Honduras* the violation of Article 1(1) of the Convention was declared; (ii) in the Case of *Usón Ramírez v. Venezuela* the violation of Article 9 of the American Convention was declared; (iii) in the Case of *Bayarri v. Argentina* the violation of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture was declared; (iv) in the Case of *Heliodoro Portugal v. Panama* the violation of Article I of the Convention on Forced Disappearance, in relation to Article II of this instrument was declared; (v) in the Case of *Kimel v. Argentina* the violation of Article 9 of the American Convention was declared; (vi) in the Case of *Bueno Alves* the violation of Article 5(1) of the American Convention was declared to the detriment of the next of kin of Mr. Bueno Alves; (vii) in the Case of the Ituango Massacres *v. Colombia* the violation of Article 11(2) of the Convention was declared, and (viii) in the Case of the Sawhoyamaxa Indigenous Community *v. Paraguay* the violation of Article 3 of the American Convention was declared. *Cf. Case of Velásquez Rodríguez v. Honduras*. *Merits*. Judgment of July 29, 1988. Series C No. 4, para. 163*; Case of Furlan and family members*

11. Hence, we consider that, in this case, when declaring the violation of the principle of legality and the guarantee of the presumption of innocence, the Court ruled on aspects that differed from those that substantiated the alleged lack of judicial impartiality, because it is alleged that the latter occurred owing to the supposed exteriorization of prejudices in relation to the so-called "Mapuche conflict" that prevailed in the criminal judgments against the victims. Thus, it can be seen that the alleged causes of the lack of impartiality do not refer to the existence of the legal presumption or to its application in the guilty verdicts, *but rather to the exteriorization of negative ethnic prejudices and with regard to the so-called "Mapuche conflict" to found the decision in the guilty verdicts.*

2. The right to an impartial judge or court in international case law

12. The importance, in a democratic society, of the judges inspiring confidence should be emphasized and, particularly, that in the case of criminal proceedings they inspire the confidence of the accused.[6] Accordingly, in this case, it is necessary to analyze the questions raised about whether the criminal proceedings in which the victims were convicted violated the right to be tried by an impartial court, a fundamental guarantee of due process of law protected in Article 8(1) of the American Convention, which stipulates that: "*Every person has the right 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 nature*."

13. Based on the contents of this provision, the Court has determined that the right to a competent, independent, and impartial judge or court has several different facets. When the State has been obliged to protect the judiciary as a system, there is a tendency to guarantee its external independence. When it is obliged to provide protection to the person of a specific judge, there is a tendency to guarantee its internal independence.

14. Thus, independence and impartiality not only result in a right in favor of the individual who is being tried, but also as a guarantee for the judges; in other words, to ensure that they have the institutional and personal conditions to ensure compliance with this mandate. Thus, in its case law, the Inter-American Court has analyzed the issue of judicial independence and impartiality from both the *institutional* and the *personal* perspective.

15. With regard to the *institutional facet*, the Court has indicated that, in order to achieve the independence and impartiality of judges, it is essential that they have institutional guarantees. These guarantees include tenure in office, a secure remuneration, and the method and form of appointment to, and termination of, their

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v. Argentina, para. 55, *and Case of Bueno Alves v. Argentina. Merits, reparations and costs.* Judgment of May 11, 2007. Series C No. 164, para. 70.

[6] Among others, ECHR, *Case of Gregory v. The United Kingdom*, Judgment (Merits), Court (Chamber), Judgment of 25 February 1997, Application No. 22299/93, para. 43; and *Case of Sander v. The United Kingdom*, Judgment (Merits), Court (Third Section), Application No. 34129/96, Judgment of 9 May 2000, para. 23.

functions.[7] Likewise, it should be pointed out that judicial independence is inherent in the principle of the separation of powers established in Article 3 of the Inter-American Democratic Charter. Thus the separation and independence of the public powers is a fundamental element of the rule of law.

16. The Court has established that "one of the main purposes of the separation of public powers is to guarantee the *independence* of judges."[8] This autonomous exercise must be guaranteed by the State in both the previously mentioned institutional facet – in other words, in relation to the Judiciary as a system – and also in relation to its *individual* aspect – that is, in relation to the person of the specific judge.[9] The objective of protection is to prevent the judicial system in general, and its members in particular, from possibly being subject to undue constraints in the exercise of their function from organs outside the Judiciary or even from those judges who occupy functions relating to review or appeal.[10]

17. Closely related to the foregoing is the *principle of impartiality,* which "requires that the judge who intervenes in a specific dispute approach the facts of the case without any subjective prejudice, and also offering sufficient guarantees of an objective nature that allow any doubt that the accused or the community may have regarding the absence of impartiality to be eliminated."[11] On this basis, the Inter-American Court has indicated that "judges, contrary to other public officials, have greater guarantees owing to the necessary independence of the Judiciary."[12] In this regard, the Court has heard cases relating to Peru,[13] Venezuela,[14] and more recently, Ecuador.[15] The Court has emphasized that personal impartiality "is presumed unless

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7 Ernst, Carlos, "*Independencia judicial y democracia",* in Jorge Malem, Jesús Orozco and Rodolfo Vázquez (comps.), *La función judicial. Ética y democracia*, Barcelona, Gedisa, 2003, p. 236.

8 *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, para. 73, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2013. Series C No. 268, para.188.

9 *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*. *Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182. para. 55.

10 *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela*. *Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182. para. 55, and *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2013. Series C No. 268, paras. 188 and 198.

11 *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No.182, para. 43, para. 56, and *Case of J. v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of November 27, 2013. Series C No. 275, para. 182.

12 *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 67.

13 *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71.

14 *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No. 182; *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197; and *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2011. Series C No. 227.

15 *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs.* Judgment of August 23, 2013. Series C No. 266; and *Case of the*

there is proof to the contrary consisting, for example, in the demonstration that a member of a tribunal or a judge has personal prejudices or biases against the litigants."[16] It has affirmed that "[t]he judge must appear to be acting without being subject to influences, incentives, threats or interference, either directly or indirectly, but only and exclusively in accordance with – and motivated by – the law."[17]

18. In cases concerning proceedings under the military justice system, the Court has explored the *guarantee of judicial independence and impartiality as an obligation of the State and a right of the individual*.[18] In these cases, it has determined that both the prosecution of civilians by military courts, and the prosecution of military and police personnel for human rights violations under this system violates the right to an ordinary judge established in Article 8(1) of the American Convention. In such cases, the Inter-American Court has focused its analysis on both the independence and impartiality of the judges who intervene, and also their lack of material competence to hear this type of case.[19]

19. Similarly, the Inter-American Court has ruled on alleged violations of judicial independence and impartiality, over and above the concerns relating to prosecution by military courts. In recent years, the Court has done this in the cases of: *Apitz Barbera et al. v. Venezuela*, *Barreto Leiva v. Venezuela, Atala Riffo and daughters v. Chile, the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador, the Constitutional Tribunal (Camba Campos et al.) v. Ecuador,* and *J. v. Peru*.[20]

Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs. Judgment of August 28, 2013. Series C No. 268.

16 *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of August 5, 2008. Series C No.182, para. 56, and *Case of Atala Riffo and daughters v. Chile. Request for interpretation of the judgment on merits, reparations and costs*. Judgment of November 21, 2012. Series C No. 254, para. 189.

17 *Supra* footnote 16.

18 *Cf.,* among others*, Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs.* Judgment of May 30, 1999. Series C No. 52; *Case of Cantoral Benavides v. Peru. Merits*. Judgment of August 18, 2000. Series C No. 69; *Case of Palamara Iribarne v. Chile. Merits, reparations and costs.* Judgment of November 22, 2005. Series C No. 135; *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 26, 2010. Series C No. 220, and Case of *Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs.* Judgment of October 24, 2012. Series C No. 251.

19 In particular, see the "Foreword" by Diego García-Sayán, which provides an overview of the Inter-American Court's most important case law on this matter, in the volume by Ferrer Mac-Gregor, Eduardo and Silva García, Fernando, *Jurisdicción Militar y Derechos Humanos. El Caso Radilla ante la Corte Interamericana de Derechos Humanos,* Mexico, Porrúa-UNAM, 2011.

20 *Cf. Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, paras. 189 to 192 and 234 to 238; *Case of Barreto Leiva v. Venezuela. Merits, reparations and costs*. Judgment of November 17, 2009. Series C No. 206, paras. 94 to 99 and sixth operative paragraph; *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, paras. 54 to 67; *Case of the Supreme Court of Justice (Quintana Coello et al.) v. Ecuador. Preliminary objection, merits, reparations and costs*. Judgment of August 23, 2013. Series C No. 266, paras. 143 to 180 and third operative paragraph; *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2013. Series C No. 268, paras. 219 to 222 and second and third operative paragraphs, and *J v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 27, 2013. Series C No. 275, paras. 181 to 189 and third operative paragraph.

20. The Court has emphasized that one of the main purposes of the separation of public powers is the guarantee of the independence of judges, which is intended to avoid the judicial system in general, and its members in particular, possibly being subject to undue constraints in the exercise of their function from organs outside the Judiciary or even from those judges who occupy functions of review or appeal. The Inter-American Court has understood that the independence of the Judiciary is "essential for the exercise of the judicial function." In accordance with its consistent case law, the Inter-American Court has considered that the following guarantees arise from judicial independence: an adequate appointment procedure; tenure in office, and a guarantee against external pressure. The Court has referred to the right to an independent judge established in Article 8(1) of the Convention both with regard to the accused (right to be tried by an independent judge), and has also referred to the guarantees that the judge – as a public official – must have, in order to make judicial independence possible.[21]

21. In European case law, there is a close relationship between the guarantees of an "independent" court and an "impartial" court and, in some cases the two concepts have been dealt with as almost interchangeable.[22] Thus, without becoming analogous, for some experts the concepts of the independence and the impartiality of a court are evidently complementary, so that the European Court of Human Rights (hereinafter "the ECHR) has accepted this close relationship to the point of examining them together.[23]

22. The ECHR has recognized that judicial impartiality has two dimensions: one of a *personal character* related to the circumstances of the judge, to the formation of his own personal convictions in a specific case, and the other, of a *functional* nature, exemplified by the guarantees that should be offered by the court responsible for delivering judgment, and that are established based on organic and functional considerations.[24] The former must be presumed while the contrary has not been

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21 *Cf.* *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of August 28, 2013. Series C No. 268, paras. 188 to 196. See also: *Case of the Constitutional Court v. Peru. Merits, reparations and costs.* Judgment of January 31, 2001. Series C No. 71, paras. 66 to 85; *Case of Palamara Iribarne v. Chile. Merits, reparations and costs.* Judgment of November 22, 2005. Series C No. 135, paras. 145 to 161; *Case of Apitz Barbera et al. ("First Contentious Administrative Court") v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of August 5, 2008. Series C No. 182, para. 55; *Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, paras. 67 to 81; *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of July 1, 2011, paras. 95 to 111, and *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 186.

22 García Roca, Javier and Vidal Zapatero, José Miguel, "*El derecho a un tribunal independiente e imparcial (art. 6.1): Una garantía concreta de mínimos antes que una regla de justicia*" in García Roca, Javier and Santolaya, Pablo, *La Europa de los Derechos. El Convenio Europeo de Derechos Humanos,* 2ª ed., Madrid, Centro de Estudios Políticos and Constitucionales, 2009, p. 377.

23 Casadevall, Josep. *El Convenio Europeo de Derechos Humanos, el Tribunal de Estrasburgo y su Jurisprudencia,* Valencia, Tirant lo Blanch, 2012, p. 279.

24 In the text, we use the following terms when referring to the two aspects of impartiality analyzed by the ECHR: *functional impartiality* and *personal impartiality*. Also, in order to analyze these aspects of impartiality, we use two tests: the *objective test* and the *subjective test*. We are making this clarification because, at times, legal doctrine indicates that the applicable expressions would be "s*ubjective impartiality*" and "*objective impartiality*" to refer to the sphere of impartiality; on this occasion, we have decided not to use those terms. *Cf.* Valldecabres Ortíz, Ma. Isabel. *Imparcialidad del juez y medios de comunicación*, Valencia, Tirant lo Blanch, 2004, pp. 148 to 150.

shown. The latter call for sufficient guarantees to exclude any legitimate doubt about impartiality.[25]

23. In the case of the *personal character* of impartiality, this means, in short, that the judge has the ability to take the necessary distance, and that he resists succumbing to any subjective influences.[26] In this regard, the ECHR ha indicated that judges must even be careful about any expressions that might suggest a negative assessment of the claims of one of the parties.[27] The notion of an impartial court, interpreted in the sense of the absence of prejudice or of preconceptions, includes, in the first place, a subjective analysis in order to delimit the personal conviction and conduct of a judge in a specific case and, then, an objective analysis to ensure that there are sufficient guarantees to allow the accused to eliminate any legitimate doubt.[28] Personal impartiality is presumed unless there is proof to the contrary; however, owing to the significant difficulty of obtaining this type of evidence[29] – a circumstance that, in our opinion, is not present in this case – the contrary cannot always be proved.

24. Meanwhile, with regard to the *functional nature* of impartiality, it is necessary to verify whether, regardless of the personal attitude of the judge, there are verifiable objective circumstances that could cast suspicions on his impartiality. The point of view of the interested person, without constituting an essential factor, should be taken into account; but the decisive factor consists in assessing whether the accused's misgivings about the judge can be considered objectively justified.[30] With regard to impartiality, even appearances can have some importance and, consequently, "any judge regarding whom there is a legitimate reason to doubt his lack of impartiality should be disqualified."[31]

25. In European case law, the limits of both notions are open-ended, in view of the fact that a specific conduct of a judge — from the viewpoint of an external observer — may raise objectively justified doubts concerning his impartiality, but may also raise such doubts with regard to his personal conviction. Thus, in order to distinguish them, it should be understood that the first situation (the objective one) is of a functional nature and includes the hypothesis in which the personal conduct of the judge, without being called into question, shows signs that could raise justified doubts about the impartiality of the court that must try the case.[32] In this regard, appearances can be

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25 García Roca, Javier and Vidal Zapatero, José Miguel, *op. cit.* p. 378.

26 Casadevall, Josep, *op. cit.*, p. 282.

27 *Cf.* ECHR. *Case of Lavents v. Latvia*, Judgment (Merits and Just Satisfaction) Court (First Section), Application No. 58442/00, Judgment of 28 November 2002, para. 118.

28 *Cf.* ECHR. *Case of Piersack v. Belgium,* Judgment (Merits), Court (Chamber), Application No. 8692/79, Judgment of 1 October 1982, para. 30.

29 García Roca, Javier and Vidal Zapatero, José Miguel, *op. cit.* p. 381.

30 Casadevall, Josep, *op. cit*., p. 282.

31 ECHR. *Case of Piersack v. Belgium,* Judgment (Merits), Court (Chamber), Application No. 8692/79 8692/79, Judgment of 1 October 1982, para. 30; and *Case of Castillo Algar v. Spain*, Judgment (Merits and Just Satisfaction), Court (Chamber) Application No. 28194/95 28194/95, Judgment of 28 October 1998, para. 45.

32 Casadevall, Josep, *op. cit.* p. 286.

important, owing to the confidence that the courts of justice should inspire in the accused.[33]

26. Appearances are important in order to assess whether or not a court is "impartial." Thus, the ECHR has reiterated the famous aphorism "justice must not only be done; it must also be seen to be done."[34]

27. Likewise, the Human Rights Committee, in its General Comment on Right to equality before courts and tribunals and to a fair trial," stated that:

> 21. The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.[35]

28. In addition, the ECHR has underscored that, in order to prove that there has been a violation of the right to an impartial judge, it is not sufficient to make an analysis in abstract and *a priori* and, especially, a general analysis; rather, it is essential to analyze each specific case.[36]

29. Also, in the European sphere it has been determined that States parties are obliged to organize their legal system so as to ensure compliance with the requirements of Article 6.1 of the European Convention.[37]

30. In summary, the analysis of an alleged lack of judicial impartiality may include, on the one hand, the sphere of functional impartiality which refers to aspects such as the functions assigned to the judge within the judicial proceedings.[38] Then, on the

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[33] ECHR, *Case of Castillo Algar v. Spain*, Judgment (Merits and Just Satisfaction), Court (Chamber) Application No. 28194/95 28194/95, Judgment of 28 October 1998, para. 45.

[34] ECHR, *Case of Morice v. France*, Judgment (Merits and Just Satisfaction), Court (Fifth Section), Application No. 29369/10, Judgment of 11 July 2013, para. 71; and *Case of De Cubber v. Belgium*, Judgment (Merits), Court (Chamber), Application No. 9186/80, Judgment of 26 October 1984, para. 26. The existence of impartiality, for the purposes of Article 6.1, must be ascertained based on a subjective test; that is, on the basis of a personal conviction of a specific judge in a particular case, and also based on an objective test; that is, determining whether a judge offers sufficient guarantees to exclude any legitimate doubt in this regard. Personal impartiality may be presumed, unless there is proof to the contrary. Under the objective test, it should be considered whether, over and above the personal conduct of the judge, there are certain facts that could raise doubts about his impartiality. In this regard, even appearances could have a certain importance. What is at stake is the confidence that the courts should inspire in a democratic society in the population and, above all, in the case of criminal proceedings, in the accused. This means that, in order to examine whether a specific judge lacks impartiality, the point of view of the accused is important, although not decisive. The significant factor is whether the misgivings can be considered objectively justified. García Roca, Javier and Vidal Zapatero, José Miguel, *op. cit.* p. 382 and 383.

[35] Human Rights Committee, General comment No. 32. *Article 14.* ***Right to equality before courts and tribunals and to a fair trial,*** ninetieth session, Geneva, 9 to 27 July 2007

[36] García Roca, Javier and Vidal Zapatero, José Miguel, *op. cit.* p. 385.

[37] ECHR. *Case of Guincho v. Portugal*, Judgment (Merits and Just Satisfaction, Court (Chamber), Application. 8990/8Judgment of 10 July 1984, para.38.

[38] In this regard, see: ECHR, *Case of Kyprianou v. Cyprus*, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), Application No. 73797/01), Judgment of 15 December 2005, para. 121: "An analysis of the Courts case law discloses two possible situations in which the question of a lack of judicial

other hand, there is the aspect of personal impartiality, which refers to the conduct of the judge in relation to a specific case. The European Court of Human Rights has indicated that these aspects of impartiality may be analyzed from a subjective point of view *(*subjective test*)* or from an objective point of view *(*objective test*).* The question of the personal aspect of impartiality may be assessed by both tests and the question of the functional aspect of impartiality may be analyzed from the objective viewpoint. The Inter-American Court has stipulated that recusal is a procedural instrument that protects the right to be tried by an impartial and independent court.[39] It has also affirmed that the personal impartiality of a judge must be presumed, unless there is proof to the contrary.[40] Based on a subjective analysis, the proof requires endeavoring to ascertain the personal conviction or interest of a given judge in a particular case,[41] so that it may be addressed at establishing, for example, whether a judge has displayed any hostility, prejudice or personal bias or whether he has arranged to have the case assigned to himself for personal reasons.[42] Furthermore, the European Court has indicated that the personal impartiality of a judge can be ascertained, according to the specific circumstances of the case, from the conduct of the judge during the proceedings, the content, arguments and language used or the reasons to conduct the investigation, which indicate a lack of professional distance from the decision.[43]

31. Thus, the sphere or aspect of impartiality that may be called into question (personal or functional) and the type of analysis to be made (subjective or objective) will depend in each situation on the circumstances of the case and the causes of the misgivings of the interested party.

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impartiality arises. The first is functional in nature: where the judge's personal conduct is not at all impugned, but where for instance, the exercise of different functions within the judicial process by the same person (see Piersack, cited above), or hierarchical or other links with another actor in the proceedings […] objectively justify misgivings as to the impartiality of the Tribunal, which thus fails to meet the Convention standard under the objective test […]. The second is of a personal character and derives from the conduct of the judges in a given case. […]".

39 *Cf. Case of J. v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of November 27, 2013. Series C No. 275, paras. 182 and 186.

40 *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 234. Similarly, in European case law, see: ECHR, *Case of Kyprianou v. Cyprus*, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), Application No. 73797/01, Judgment of 15 December 2005, para. 119. ("In applying the subjective test, the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary"), citing ECHR, *Case of* Hauschildt v. Denmark , Judgment (Merits and Just Satisfaction), Court (Plenary) Application No. 10486/83, Judgment of 24 May 1989, para. 47.

41 *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs. Judgment of February 24, 2012. Series C No. 239*, para. 234. *Cf.* ECHR, *Case of Kyprianou v. Cyprus,* Judgment (Merits and Just Satisfaction), Court (Grand Chamber), Application No. 73797/01, Judgment of 15 December 2005, para. 118 ("a subjective approach, that is endeavoring to ascertain the personal conviction or interest of a given judge in a particular case").

42 Case of *Atala Riffo and daughters v. Chile. Merits, reparations and costs.* Judgment of February 24, 2012. Series C No. 239, para. 234. *Cf.* ECHR, *Case of Kyprianou v. Cyprus*, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), Application No. 73797/01, Judgment of 15 December 2005, para. 119 ("As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill-will or has arranged to have a case assigned to himself for personal reasons"). See also, ECHR, *Case of Bellizzi v. Malta*, Judgment (Merits and Just Satisfaction), Court (Third Section), Application No. 46575/09, Judgment of 21 June 2011, para. 52, and *Case of De Cubber v. Belgium*, Judgment (Merits), Court (Chamber), Application No.9186/80, Judgment of 26 October 1984, para. 25.

43 *Cf.* ECHR, *Case of Kyprianou v. Cyprus*, Judgment (Merits and Just Satisfaction), Court (Grand Chamber), Application No. 73797/01, Judgment of 15 December 2005, paras. 130 to 133.

32. In the instant case, the analysis of impartiality is related to [the aspect of] personal impartiality, because it concerns the conduct of the judges in the specific cases in which it is alleged that they explicitly based conclusions of the judgments on prejudices. This makes it essential to assess whether the courts exteriorized negative prejudices in the adverse judgments, which had a significant or decisive influence on the reasoning of the conclusions of the ruling. For the purpose of this analysis, when we refer to a "prejudice," we are referring to its negative connotation in the sense of a generalized unfavorable notion, perception or attitude towards individuals who belong to a group, owing to their membership in this group, which is characterized negatively. Thus, it is not related to the more general meaning relating to the ideas, notions and perceptions that a judge, like any other person, has acquired through experience and that do not exclude him from assessing, analyzing and reaching a rational conclusion in the specific case that he is deciding in the course of his jurisdictional functions.

3. The lack of impartiality of the judges who heard the criminal proceedings of the victims in this case

33. The eight victims in this case before the Inter-American Court were convicted in the domestic sphere as perpetrators of terrorist offenses in application of Law 18,314 that "[d]efines terrorist acts and establishes the punishments" (known as the "Counter-terrorism Act"). This case involves three criminal trials for events that occurred in 2001 and 2002 in Chile's Regions VIII and IX. None of the events for which they were tried harmed anyone's physical integrity or life. In summary, the result of these criminal proceedings was:

> c) *Lonkos Segundo Aniceto Norín Catrimán* and *Pascual Huentequeo Pichún Paillalao* were convicted – in a trial held after a previous trial in which they had been acquitted had been declared null and void – by the Angol Oral Criminal Trial Court in a judgment of September 27, 2003, as perpetrators of the offense of threat of terrorist arson.[44] In a judgment of December 15, 2003, the Second Chamber of the Supreme Court of Justice denied the appeals for annulment that had been filed;[45]
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> d) *Juan Ciriaco Millacheo Lican, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Patricio Marileo Saravia* and *Patricia Roxana Troncoso Robles* were convicted by the Angol Oral Criminal Trial Court in a judgment of August 22, 2004, as perpetrators of the offense of terrorist arson.[46] In a judgment of October 13, 2004, the Temuco Court of Appeal denied the appeals for annulment that had been filed,[47] and

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44 *Cf.* Judgment delivered by the Angol Oral Criminal Trial Court on September 27, 2003 (file of annexes to the Merits Report of the Commission 176/10, Annex 15, folios 509 to 554).

45 *Cf.* Judgment delivered by the Second Chamber of the Supreme Court of Justice of Chile on December 15, 2003 (file of annexes to the Merits Report of the Commission 176/10, Appendix 1, folios 58 to 68).

46 *Cf.* Judgment delivered by the Angol Oral Criminal Trial Court on August 22, 2004 (file of annexes to the Merits Report 176/10 of the Commission, Annex 18, folios 608 to 687).

47 *Cf.* Judgment delivered by the Temuco Court of Appeal on October 13, 2004 (file of annexes to the Merits Report of the Commission 176/10 of the Commission, Annex 19, folios 689 to 716).

c) *Víctor Manuel Ancalaf Llaupe* was convicted by the investigating judge of the Concepción Court of Appeal in a judgment of December 30, 2003, of three criminal acts as perpetrator of the terrorist act consisting in to "[t]o place, send, activate, throw, detonate, or fire bombs or explosive or incendiary devices of any type, weapons or devices of great destructive power, or with toxic, corrosive or infectious effects" (article 2.4 of Law 18,314).[48] On June 4, 2004, the Concepción Court of Appeal issued judgment in second instance, partially revoking the judgment; acquitting Mr. Ancalaf of two of the criminal acts, and confirming the conviction with the regard to one criminal act.[49]

34. As the Court has indicated in this Judgment, at the actual stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. The whole legal structure of national and international public order rests on it, and it permeates the whole legal system.[50] In this regard, Article 24 of the American Convention prohibits *de facto* or *de jure* discrimination, not only with regard to the rights recognized in this instrument, but with regard to all the laws adopted by the State and to their application. In other words, it does not merely repeat the provisions of Article 1(1) of this instrument as regards the obligation of State to respect and ensure the rights recognized in this treaty without discrimination, but it establishes a right that also entails the State's obligation to respect and ensure the principle of equality and non-discrimination in the safeguard of other rights and in all the domestic laws that it adopts, because it protects the right to "equal protection of the law" so that it also prohibits discrimination resulting from any inequality derived from domestic law or its application.[51] Article 1(1) of the American Convention proscribes discrimination, in general, and includes prohibited categories of discrimination. Taking into account the criteria developed previously, the Court established that the *ethnic origin* of an individual is a category protected by the American Convention. This also means that, under Article 24 of this instrument, unequal treatment based on ethnic origin under domestic law or its application is also prohibited.[52]

35. In the following paragraphs, we analyze the criminal judgments convicting the victims that we consider contain a language and reasoning that reveal that what is involved is not the application of the presumption of the terrorist intent defined in the Counter-terrorism Act in force at the time; rather, it is verified that these judgments contain *expressions or reasoning based on negative ethnic stereotypes and prejudices* and that this constitutes a violation of the guarantee of judicial impartiality.

A) The criminal judgment convicting Messrs. Norín and Pichún

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48 *Cf.* Judgment delivered by the investigating judge of the Concepción Court of Appeal on December 30, 2003 (file of annexes to the Merits Report of the Commission 176/10 of the Commission, Annex 20, folios 718 to 759).

49 *Cf.* Judgment delivered by the Concepción Court of Appeal on June 4, 2004 (file of annexes to the CEJIL brief with motions, arguments and evidence, annex A.6, folios 1723 to 1733).

50 Para. 197 of the Judgment. *Cf. Juridical Status and Rights of Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 101, and *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, reparations and costs.* Judgment of August 24, 2010, Series C No. 214, para. 269.

51 Para. 199 of the Judgment.

52 Para. 206 of the Judgment.

36. When analyzing the elements of the offense in the thirteenth *considerandum* of the criminal judgment that convicted the *Lonkos* Segundo Aniceto Norín Catrimán and Pascual Huentequeo Pichún Paillalao as perpetrators of the offense of threat of terrorist arson, the criminal court inferred the terrorist intent from stereotypes and prejudices concerning the violence of the Mapuche land claims and from witness statements concerning their "feeling of fear" resulting from acts other than those for which the victims were tried in those proceedings.[53] Here, the domestic court accorded fundamental worth to evidence that did not refer to the acts that were being prosecuted in the criminal proceedings, but to other acts that, moreover, were not attributed to the accused, and no reference is made to whether criminal judgments had been delivered with regard to them. When assessing the terrorist intent, the court substantiated its decision on the testimony of individuals who were referring to other supposed acts, without analyzing whether or not these were true, as well as on newspaper articles, without referring to the sources on which these were based, but rather indicating that the said information "had not been disproved."[54]

37. In our opinion, this assessment of the evidence, which gave rise to a prejudice as regards the terrorist intent based on the analysis made by the courts in the judgments, was decisive in the ruling on the terrorist nature of the offenses. Both in this regard, and when ruling on the participation of the two accused as perpetrators of

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53 *Cf.* para. 227 of the Judgment.

54 When analyzing the elements of the definition (objective and subjective) of the offense of threat of terrorist arson, in the judgment delivered on September 27, 2003, by the Angol Oral Criminal Trial Court, in the thirteenth *considerandum* it was affirmed that:

> […] the actions that resulted in these wrongful acts reveal that the form, methods and strategies used had the criminal purpose of causing a generalized state of fear in the region.
>
> The wrongful acts referred to above are inserted in a process of recovery of lands of the Mapuche people, that has been carried out by acts of violence, without respecting the institutional framework and the laws in force, resorting to previously planned acts of violence, coordinated and prepared by radicalized groups that seek to create a climate of insecurity, instability and fear in different sectors of Regions XIII and IX. These actions can be summarized by excessive demands that violent groups make of owners and landholders, warning them of the different consequences they will face if they do not accede to the groups' demands. Many of these threats have materialized in the form of assaults, robberies, theft, arson, vandalism and land occupation, which have affected individuals and also the property of various landowners and logging activities in this part of the country.
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> The objective sought is to instill in the population a justified fear of falling victim to similar attacks and, thereby, to oblige the owners to desist from exploiting their properties and, ultimately, force them abandon these properties. The feeling of insecurity and unease that these attacks cause has led to a reduction in the availability of labor and an increase in its cost, an increase in costs and loans both for hiring machinery for exploiting the properties and in the cost of policies to insure the land, installations, and crops. It is increasingly frequent to see workers, machinery, vehicles and operations in the different properties with police protection to safeguard operations, all of which affects rights guaranteed in the Constitution.
>
> The above emerges, although not necessarily with the same characteristics, from the corroborative testimony of [twelve deponents], who stated that they had been direct victims or were aware of threats and attacks on individuals or property perpetrated by individuals belonging to the Mapuche ethnic group; witnesses who stated in different ways the feeling of fear that these acts caused. [The foregoing is related to …] information that has not been disproved and that is contained in section C, pages 10 and 11, of the March 10, 2002, edition of the newspaper *El Mercurio*, on the number of conflicts caused by Mapuche groups by terrorist acts; online publications of *La Tercera*, *La Segunda* *El Mercurio* published on March 26, 1999, December 15, 2001, March 15 and June 15, 2002, respectively, and three tables taken from the web page of the Chile's Foreign Investment Committee, divided into sectors and by regions, based on the political and administrative division of the country, which allow comparisons to be made between dollars invested in the other regions and in the Ninth, and shows that private investment in the region has decreased.

the said offenses, the domestic court developed a reasoning that contains an assessment that delegitimizes the indigenous claims and associates them with planned actions carried out by means of violent and illegitimate acts, presuming a terrorist intent and establishing a relationship between the Mapuche origin of the accused, and the legal definition of the conduct. In addition, when the court ruled, in the fifteenth *considerandum*, on the participation of the two accused as perpetrators of the said offenses, it substantiated an important part of its legal arguments by references to contextual facts classified as of a "well-known and notorious" nature in relation to the so-called "Mapuche conflict," as well as to their ethnic origin and status as traditional leaders without specifically and explicitly relating this to the acts presumably committed by the accused, so that it made a causal nexus between the ethnic origin of the *Lonkos* as Mapuche leaders and their participation in the offenses of which they were accused.

38. Furthermore, it is particularly noteworthy that, in the said fifteenth *considerandum* analyzing the victims' participation, the criminal court affirmed that "[it] has not been sufficiently proved that these acts were committed by individuals from outside the Mapuche communities," referring in general terms to the "Mapuche problem." The acts and the responsibility of the accused were examined within the framework of land claims in the context of which the perpetration of violent acts was presumed, without further justification. In addition, the judgment considered as an element to establish the participation of the presumed victims in the offenses of terrorist threat, their membership in the *Coordinadora de Comunidades en Conflicto Arauco* Malleco (CAM) which the court referred to as "having violent tendencies." No objective evidence or proof was offered to confirm this organization's character or nature.[55] In this regard, it should be recalled that, in another proceeding, the

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[55] See the fifteenth *considerandum* of the judgment issued by the Angol Oral Criminal Trial Court on September 27, 2003, in which the domestic Court made an analysis: "[r]egarding the participation of the two accused" as authors of offenses "of terrorist threats":

> […] Regarding the participation of both accused, the following must be considered:
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> 1. As general background information and from the evidence provided during the trial by the Public Prosecution Service and the private complainants, it is a well-known and notorious fact that *de facto* organizations have been operating have existed in the area for some time that commit acts of violence or incite violence on the pretext of their land claims. Their methods include different types of acts of violence against logging companies, and small- and medium-scale farmers, all of whom have in common that they are owners of land that adjoins, is next to or near indigenous communities who claim to have historical rights to these properties. The said actions are aimed at reclaiming lands considered to be ancestral, and the illegal occupation is a means used to achieve the more ambitious goal: thereby recovering part of their ancestral lands and strengthening the territorial identity of the Mapuche people. […]
>
> 2. It has not been sufficiently proved that these acts were caused by individuals who do not belong to the Mapuche communities, because their purpose is to create a strong climate of harassment of the property owners in the sector in order to instill fear in them and, thus, force the owners to accede to their demands. The rationale relates to the so-called "Mapuche problem," because the perpetrators were aware of the areas claimed or because no Mapuche community or property has been harmed.
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> 3. It has been proved that the accused, Pascual Pichú, is *Lonko* of the "Antonio Ñirripil" community and Segundo Norín is *Lonko* of the "Lorenzo Norín" community, and this signifies status in the community and a certain degree of leadership and control over it.
>
> 4. It should also be emphasized that the accused Pichún and Norín have been convicted of other offenses involving land occupation committed prior to these events against forested properties near their respective communities, […].
>
> 5. The Mapuche communities of Didaico and Temulemu adjoin the Nancahue forest farm, and

presumed victims were acquitted of the offense of "conspiracy to commit a crime" in relation to their supposed membership "in a terrorist organization that operated under the aegis of this indigenous organization."[56]

B) The criminal judgment convicting Messrs. Marileo Saravia, Huenchunao Mariñán and Millacheo Licán, and Ms. Troncoso Robles

39. In the criminal judgment that convicted Juan Patricio Marileo Saravia, Florencio Jaime Marileo Saravia, José Benicio Huenchunao Mariñán, Juan Ciriaco Millacheo Licán and Patricia Roxana Troncoso Robles as perpetrators of the offense of terrorist arson, the criminal court, when analyzing both the participation and the terrorist nature of the offense, followed a line of reasoning in which, once again, it circumscribed conclusions regarding the special subjective element of the criminal responsibility of the presumed victims to contextual facts regarding which it makes no direct probative or legal connection to the accused.[57] Regarding the terrorist intent, in the nineteenth *considerandum*, the oral court resorted to references to the "Mapuche land conflict" and to the context of the land claims of the Mapuche indigenous people including reflections that make general observations on the use of violence and its illegal nature, by asserting that the process of land recovery of the Mapuche people "has been carried out by acts of violence, without respecting the institutional framework and the laws in effect, resorting to the use of force […]."[58] These contextual elements were not presented in a neutral

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6. According to the testimony of Osvaldo Carvajal, both of the accused belong to the *Coordinadora Arauco Malleco* C.A.M, a violent *de facto* organization.

56 *Cf.* para. 215 of the Judgment.

57 In the sixteenth *considerandum* of the judgment delivered on August 22, 2004, by the Angol Oral Criminal Trial Court, when referring to the "participation as direct authors of the fire at the Poluco Pidenco property," the Court affirmed:

> […] it has been proved that José Benicio Huenchunao Mariñan, Patricia Roxana Troncoso Robles, Juan Patricio Marileo Saravia, Juan Ciricao Millacheo Lican and Florencio Jaime Marileo Saravia, participated as direct perpetrators of the said fire at the Poluco Pidenco property because they acted immediately and directly in the execution of this fire, an illegal act inserted in the so-called Mapuche land conflict, committed with the intent of instilling a justified fear in the population of being victims of similar crimes.

58 When examining the terrorist nature of the offense of arson, the Angol Oral Criminal Trial Court stated the following in the nineteenth *considerandum*:

> NINETEENTH: Regarding the defense's assertion that the acts were not of a terrorist nature, it should be noted that the statements mentioned in the preceding considerations, provided by persons who were directly connected to the events or who knew about them for different reasons, are coherent with the expert opinions and documentary evidence provided by the claimants during the hearing. They constitute background information that, taken as a whole and freely assessed, lead these judges to establish that the fire which occurred at the Poluco Pidenco property on December 19, 2001, does qualify as a terrorist offense, inasmuch as the actions that underlie these crimes demonstrate that the form, methods and strategies employed had a malicious intent, which was to instill a generalized fear in the area, a situation that is a well-known and notorious fact that these judges cannot ignore; this is a serious conflict between part of the Mapuche ethnic group and the rest of the population, a fact neither argued by the parties nor unknown to them
>
> In effect, the offense established in *Considerandum* 16 must be viewed against the backdrop of a process of the recovery of Mapuche lands, in which the perpetrators took direct action, without respecting the existing legal and institutional order and by resorting to the use of force through measures that were planned, agreed and prepared in advance by radicalized groups that seek to create a climate of insecurity, instability and fear in the Province of Malleco, as most of the incidents, and the most violent ones, have occurred in communes of that province. These actions can be summarized as follows: excessive demands that violent groups make of owners and

manner, and created a causal nexus between the Mapuche origin of the presumed victims and the determination of their criminal responsibility. In the nineteenth *considerandum*, the terrorist intent was inferred from stereotypes and prejudices relating to the violence of the Mapuche land claims and from the testimony of witnesses concerning the "fear" they felt owing to actions other than those that were being tried in the proceedings.

40. The domestic court accorded fundamental significance to evidence that was unrelated to the acts that were being prosecuted in these criminal proceedings, but rather concerned other acts that, furthermore, were not even attributed to the accused. In addition, it did not mention whether criminal convictions had been handed down in relation to those acts. In our opinion, this evidence created a prejudgment as regards the terrorist intent and, based on the analysis made by the court in the judgment, it was decisive in the ruling that the act was a terrorist offense. The criminal court used expressions such as a "well-known and notorious" or it is "public knowledge" in order to found its reasoning. The use of the said expressions relates to more general reflections affirming that violent acts and crimes had been committed in the region where the criminal act was perpetrated in relation to the Mapuche claims. The undersigned consider that the domestic court used the said expressions as a substantial argument to establish that the members of the Mapuche community who were claiming ancestral lands were necessarily violent or that they had a greater propensity to commit offenses than the rest of the population.

C) The criminal judgment convicting Mr. Ancalaf Llaupe

41. In the criminal judgment that convicted Víctor Ancalaf as perpetrator of the offense established in article 2.4 of Law 18,314, the Court of Appeal included considerations on the fact that the acts occurred in the context of resistance to the construction of the hydroelectric plant, and the "Pehuenche conflict"[59] in order to

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landholders, under pressure, warning them of the different consequences they will face if they do not accede to the demands. Many of these threats have materialized in the form of attacks on physical integrity, robberies, theft, arson, vandalism and land occupation, which have affected both the personnel and property of various owners of agricultural properties and logging companies in this part of the country; during the oral proceedings the court heard numerous pieces of testimony and learned some of the background to this situation, notwithstanding the fact that this is public knowledge.

The obvious inference is that the objective is to instill in the population a well-founded fear of falling victim to similar crimes, and thereby to force the owners to cease any further exploitation of their properties and ultimately to force them to abandon their properties, because the feeling of insecurity and unease that these attacks cause has led to a decrease in the availability of labor and an increase in its cost, an increase in the costs of leasing farm equipment and insuring the properties, the installations and the crops. Furthermore, it is becoming increasingly common to see workers, machinery, vehicles and operations on the different properties under police protection, to safeguard operations, all of which affects rights protected by the Constitution.

The court's conclusion is a result of the testimony given by witnesses […] all of whom told the court that they were direct victims or knew of threats and attacks on persons or property perpetrated by individuals of Mapuche origin. Albeit in different ways, these witnesses all expressed the feeling of fear that those acts have instilled. This background information is in the report of the meeting of the Senate's Constitutional, Legislative and Justice Committee, paragraphs of which were read during the hearing

[59] According to the Report of the Commission on the Historical Truth and New Deal for the Indigenous Peoples, "at one point of the long [historical] process, the ancestral Pehuenche communities were part of a larger social community: the Mapuche People." This was "the result of the development of the different peoples and cultures that, for thousands of years, peopled the actual territory of Chile." *Cf.* Report of the

classify the offense attributed to Víctor Ancalaf as a terrorist offense, without referring to other more precise evidence concerning the conduct of the accused. Thus, instead of considering setting fire to a truck an ordinary offense, it was deemed to be a terrorist offense, since it was analyzed in the context of considerations regarding opposition to the construction of a hydroelectric plant by members of indigenous communities.[60] This revealed a certain prejudgment in relation to the actions taken by the indigenous peoples to resist the construction of a hydroelectric plant.

4. Conclusion

42. The authors of this opinion consider that this reasoning – established by the Court in paragraphs 227 and 228 of the Judgment — which is based on negative ethnic stereotypes and prejudices, reveals that the judges had personal prejudices with regard to the accused that were decisive in the establishment of their criminal responsibility (essentially their participation in the criminal act or the special terrorist

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Historical Truth and New Deal Commission, First part. *Historia de los Pueblos Indígenas de Chile y su relación con el Estado, IV. Pueblo Mapuche, Capítulo Primero: Los mapuche en la historia y el presente*, page 424, footnote 3 (file of annexes to the final written arguments of the State of Chile, folio 62, link: http://www.corteidh.or.cr/tablas/27374.pdf)

[60] The fifteenth *considerandum* of the judgment delivered on December 30, 2003, by the investigating judge of the Concepción Court of Appeal, when analyzing the terrorist intent (subjective element of the definition) of the offense established in article 2.4 of Law No 18,314, in relation to article 1 of that law, included the following reasoning:

> FIFTEENTH: That the facts described in the preceding *considerandum* constitute the terrorist offense established in article 2.4 of Law No 18,314, in relation to article 1 of that law. This is because they reveal that actions were taken in order to instill in some of the population a justified fear of falling victim to such crimes, bearing in mind the circumstances, and also the nature and effects of the means employed, as well as the evidence that they were the result of a premeditated plan to attack the property of third parties engaged in work relating to the construction of the Ralco Power Plant of Alto Bío Bío, all with the purpose of forcing the authorities to take decisions that would prevent the construction of this plant.

In second instance, the Concepción Court of Appeal, in its judgment delivered on June 4, 2004, considered that the subjective element of the terrorist offense had been proved, based on the following considerations:

> 19. That the evidence relating to the first, seventh and thirteenth conclusions of the first instance ruling constitute judicial presumptions that, carefully assessed, prove that the trucks and the backhoe were set on fire in the context of the Pehuenche conflict, in Region 8, province of Bío Bío, Santa Bárbara commune, in the sector of the cordillera known as Alto Bío Bío, which is related to the opposition to the construction of the Ralco Hydroelectric Plant, and where, also, it is well-known that the sisters, Berta and Nicolasa Quintremán Calpán are opposed to the Endesa project, because their land – which contains their ancestors, their origins, their culture and their traditions – will be flooded when the Plant is built.
> The acts took place in this context as a way of compelling the authorities to take decisions or of imposing demands to halt the construction of the Plant.
> 20. That, to this end, on September 29, 2001, and March 3 and 17, 2002, two trucks and a backhoe were set on fire and, subsequently, two more trucks; all vehicles working for Endesa. The first incident involved several individuals all except one of whom wore hoods; they fired a shotgun and hit the truck driver with a stick. The second incident involved at least two individuals with their faces covered, one of them, armed with a shotgun, fired two shots into the air. On the third occasion, a group of hooded individuals was involved, one of whom carried a firearm and fired shots into the air. In all these incidents, inflammable fuel, such as gasoline or a similar product, was used.
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> The illegal acts described above were carried out violently without observing the legal and institutional order in force, resorting to previously planned acts of violence. Considering how the events occurred, the place and the *modus operandi*, they were perpetrated to create situations of insecurity, instability and anxiety, instilling fear in order to present demands to the authorities under criminal pressure imposing conditions in order to achieve their objectives.

intent). In other words, these personal prejudices had a decisive impact on the analysis of the evidence of criminal responsibility. The facts described in the Judgment reveal that those judicial decisions were reached in a context in which the social media and segments of Chilean society had adopted unfavorable stereotypes and notions of what they called "the Mapuche question," the "Mapuche problem" or the "Mapuche conflict" that delegitimized the land claims of the Mapuche indigenous people and, in general, classified their social protest as violent or presented it as a cause of conflict between the Mapuche indigenous people and the other inhabitants of the region.[61]

43. This reasoning set out by the courts in the judgments, which reflects the said context, proves that the judges based their decisions on prejudices against the defendants relating to their Mapuche indigenous ethnic origin and how the judges perceived their social protest to claim their rights. This confirms that it was reasonable for the defendants to have the impression that the courts that convicted them in the specific cases lacked impartiality when handing down the guilty verdicts. In the instant case, we are faced with a discriminatory difference in treatment that has no objective and reasonable justification, does not seek a legitimate purpose and, in addition, there is no proportionality between the means used and the end sought; all of which violates the due process protected by Article 8(1) of the American Convention.

44. In the context of dispensing justice, the discrimination against the eight victims in this case — who were discriminated against based on negative ethnic stereotypes and prejudices in relation to the Mapuche indigenous people and their territorial claims — represents a serious violation of due process, because it deprived them of an impartial judge. Thus, it is inconsistent that, having made a thorough analysis of the content of the verdicts in the criminal trials and having verified these discriminatory attitudes in the Judgment — by declaring the violation of Article 24 of the Pact of San José — the majority opinion of the Inter-American Court did not proceed to conclude that these same proven facts also entailed an autonomous violation of Article 8(1) of the American Convention. We therefore consider that the Court should not have subsumed this violation in the violation of the principle of legality and the right to the presumption of innocence established in Articles 9 and 8(2) of this instrument.

45. For these reasons, we consider that the Inter-American Court should have declared the international responsibility of the Chilean State, by considering that the right to an impartial judge or court, protected by Article 8(1) of the American Convention, in relation to Article 1(1) of this instrument, had been violated to the detriment of the victims in this case.

Manuel E. Ventura Robles
Judge

Eduardo Ferrer Mac-Gregor Poisot
Judge

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61 *Cf.* para. 93 of the Judgment.

Pablo Saavedra Alessandri
Secretary