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Title/Style of Cause:	Santiago Gomez-Palomino v. Peru
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Decided by:	President: Sergio Garcia-Ramirez; Vice President: Alirio Abreu-Burelli; Judges: Oliver Jackman; Antonio A. Cancado Trindade; Cecilia Medina-Quiroga; Manuel E. Ventura-Robles; Diego Garcia-Sayan
Dated:	22 November 2005
Citation:	Gomez-Palomino v. Peru, Judgement (IACtHR, 22 Nov. 2005)
Represented by:	APPLICANT: the Asociacion Pro Derechos Humanos
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## In the Case of Gómez-Palomino

The Inter-American Court of Human Rights (hereinafter “the Court”, “the Inter-American Court” or “the Tribunal”), pursuant to Articles 29, 31, 53, 56 and 58 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure”), and Article 63(1) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) delivers the following Judgment.

### I. INTRODUCTION TO THE CASE

1. On September 13, 2004, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) filed before the Court an application against the State of Peru (hereinafter “the State” or “Peru”) originating in petition No. 11.062, received by the Secretariat of the Commission on October 8, 1992, by reason of the allegedly illegal arrest of Mr. Santiago Gómez-Palomino, which took effect on July 9, 1992 in Lima, Peru, and his forced disappearance presumptively resulting in his death, allegedly ascribable to agents of the State.

2. The Commission filed the application for the Court to determine whether the State failed to comply with its international duties and incurred in the violation of Articles 7 (Right to Personal Liberty), 4 (Right to Life), 5 (Right to Personal Integrity) 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention, all of them regarding Article 1(1) (Obligation to Respect Rights) of the aforementioned Convention, to the detriment of Mr. Santiago Gómez-Palomino. Likewise, the Commission alleged the violation of Article 5 (Right to Humane Treatment) of the American Convention, regarding Article 1(1) (Obligation to Respect Rights) of the aforementioned Convention, to the detriment of Mrs. Victoria Margarita Palomino-Buitrón, mother to Mr. Santiago Gómez-Palomino, and of Esmila Liliana Conislla-

Cárdenas, who was living with him; the violation of Articles 8 (Right to a Fair Trial), 25 (Right to Judicial Protection) and 7(6) (Right to Personal Liberty) of the American Convention, regarding Article 1(1) (Obligation to Respect Rights) of the aforementioned Convention, to the detriment of the family of Mr. Santiago Gómez-Palomino and of Mrs. Conislla-Cárdenas, and the failure to comply with the obligations imposed under Articles 2 (Domestic Legal Effects) of the American Convention, and I of the Inter-American Convention On The Forced Disappearance Of Persons (hereinafter “Inter-American Convention On The Forced Disappearance”), by enacting and not amending Article 320 of the Penal Code effective in Peru, wherein the crime of forced disappearance of persons is defined.

3. In the aforementioned application, the Commission pointed out that “the total impunity attending the forced disappearance of Mr. Santiago Gómez-Palomino has contributed to protract over time the suffering caused to his next of kin by the violation of their fundamental rights [for which reason] it is the duty of the State [...] to provide an adequate judicial response whereby the identity of those responsible for the forced disappearance Mr. Gómez-Palomino be established, his mortal remains be located and his next of kin be given adequate reparations.” Along those lines, the Commission prayed the Inter-American Court that the State be ordered to adopt pecuniary and non pecuniary reparation measures.

## II. JURISDICTION OF THE COURT

4. Peru ratified the American Convention on July 28, 1978 and accepted the contentious jurisdiction of the Court on January 21, 1981. Furthermore, the State ratified the Inter-American Convention On The Forced Disappearance on February 13, 2002.

## III. PROCEEDING BEFORE THE COMMISSION

5. On October 8, 1992 Mrs. Victoria Margarita Palomino-Buitrón filed a petition on account of the disappearance of her son, Mr. Santiago Gómez-Palomino, before the Inter-American Commission. On October 13, 1992 the Commission started processing the case under No. 11.062.

6. On March 11, 2004, during the 119th Regular Session, the Commission approved the Admissibility and Merits Report No. 26/04, wherein it made a set of recommendations to the State:

1. Perform a complete, unbiased, effective and immediate investigation of the facts, for the purpose of establishing responsibilities for the disappearance and the murder of Mr. Santiago Fortunato Gómez-Palomino, in order to identify all the persons who were involved therewith at the various decision and execution levels, to bring them to trial and to impose upon them whatever punishment[s] may be appropriate.

2. Perform a complete, unbiased and effective investigation of the persons who participated in the ineffective investigations and proceedings instituted heretofore on account of the disappearance of Santiago Fortunato Gómez-Palomino, in order to establish responsibility for the lack of results and the impunity attending such event.

3. To provide adequate reparation to Mrs. Margarita Palomino, mother to the victim and to his common-law wife Esmila Liliana C[o]nislla-Cárdenas and his son, including both the moral and the material damages caused by the violations of their human rights.<sup>4</sup> Institute whichever procedures may be necessary to search for the remains of the victim, to locate them, to identify them and to surrender them to his next of kin.

5. Adopt the measures necessary for amending Article 320 of the Penal Code, in such a way as to render it consistent with the American Convention on Human Rights and the Inter-American Convention On The Forced Disappearance Of Persons.

7. On September 12, 2004, the Inter-American Commission decided to submit the instant case to the jurisdiction of the Court. The Commission did not include the son of Mrs. Esmila Liliana Conislla-Cárdenas, who was so considered in the Admissibility and Merits Report No. 26/04, among the alleged victims in the of the instant case, for the mother filed information with the Commission, after the time the aforementioned report had been adopted, wherein she pointed out that the child is not the biological son of Mr. Santiago Gómez-Palomino nor bears any filial relation to him.

#### IV. PROCEEDINGS BEFORE THE COURT

8. On September 13, 2004, the Inter-American Commission decided to submit the instant case to the jurisdiction of the Court 1), together with documentary evidence and offered to submit testimonies of witnesses and expert witnesses as further evidence. The Commission appointed as delegates Messrs. Freddy Gutiérrez, Florentín Meléndez, Evelio Fernández Arévalo and Santiago A. Canton and as legal counsel Messrs. Ariel Dulitzky, Víctor Hugo Madrigal, Pedro E. Díaz and a la Mrs. Manuela Cuvi.

9. On October 13, 2004, the Secretariat of the Court (hereinafter “the Secretariat”), after a preliminary examination of the application by the President of the Court (hereinafter “the President”), served the said application and its annexes on the State and also notified the State of the term within which it had to answer the application and to appoint its agents in the proceedings. On the same date, pursuant to the provisions in Article 35 (1) (d) and (e) of the Rules of Procedure, the Secretariat served the application on the original petitioner, Mrs. Victoria Margarita Palomino-Buitrón, and on the representatives of the next of kin of the alleged victim (hereinafter “the representatives”), the Asociación Pro Derechos Humanos (APRODEH) (Pro Human Rights Association), and informed them they had a two-month time limit to file their brief of requests, arguments and evidence (hereinafter “the brief of requests and arguments”).

10. On November 12, 2004, the State appointed Manuel Álvarez-Chauca as Agent in the instant case.

11. On December 14, 2004, the representatives filed a brief of requests and arguments, and attached documentary evidence and offered testimonies of expert witnesses as evidence.

12. On February 11, 2005 the State files its answer to the application and its observations to the brief of requests and arguments (hereinafter “answer to the application”). On February 2005, the Secretariat received the documentary evidence attending the aforementioned answer to the

application. In such brief, the State acknowledged in part its international responsibility for the events in the instant case (infra paras. 24 and 43).

13. On March 3, 2005 the Secretariat, following instructions of the Inter-American Court in full, requested the State to clarify some points regarding the scope of the acknowledgement of international responsibility it had carried out (supra para. 12).

14. On April 7, 2005 the State, in response to the enquiry addressed it by the Inter-American Court, filed a brief clarifying the acknowledgment of responsibility it had carried out in the answer to the application.

15. On May 4, 2005 the representatives filed their observations to the acknowledgement of international responsibility carried out by the State in its answer to the application (supra para. 12) and in its attending clarification brief (supra para. 14). As regards the Commission, it filed its own observations on May 31, 2005, after a delay had been granted it.

16. On June 21, 2005 the Secretariat informed the parties that, after analyzing the main briefs filed by the Inter-American Commission, the representatives and the State, the Inter-American Court in full considered that in the instant case it was not necessary to convene a public hearing. On the same day, the Secretariat, for its part, following instructions by the President, requested the Inter-American Commission and the representatives to forward the final listings of the witnesses and of the expert witnesses each of them proposed.

17. On July 7, 2005 the Secretariat, following instructions by the President, requested the State, pursuant to Article 45(2) of the Rules of Procedure, to file, as evidence to facilitate adjudication of the case, the documents relating to the procedures undertaken at the domestic level in connection with the forced disappearance of Mr. Gómez-Palomino. Such request was reiterated to the State by means of notes issued by the Secretariat on August 25 and on September 20, 2005. Likewise, on August 25, 2005 the Secretariat, following instructions by the President, requested the representatives to cooperate by doing all they could to have the documents requested from Peru reach the Tribunal, as evidence to facilitate the adjudication of the case. Such request was repeated on October 3, 2005 (infra para. 20).

18. On August 19, 2005 the President issued an Order in which he deemed it fit to receive, by means of an affidavit, the testimonies of Mrs. Victoria Margarita Palomino-Buitrón and Mrs. Esmila Liliana Conislla-Cárdenas and the report by the expert witness Mrs. Sofía Macher, proposed by the Commission, as well as the report by the expert witness Mrs. María del Pilar Raffo-Lavalle de Quiñones, proposed by the representatives. Likewise, the President granted a strict ten-day delay, as from the reception of such affidavits, for the Commission, the representatives and the State to file the observations they might consider pertinent. Furthermore, in such Order the President informed the parties that they had a non-extendable time period up to October 7, 2005 to file their final written arguments on the merits and possibly reparations and costs.

19. On September 16, 2005 the representatives forwarded the report carried out before a public official whose acts command full faith and credit by of the expert witness María del Pilar

Raffo-Lavalle de Quiñones. Likewise, on September 19, 2005 the Inter-American Commission forwarded the affidavits by witnesses Mrs. Victoria Margarita Palomino-Buitrón and Esmila Liliana Conislla-Cárdenas, as well as the affidavit by the expert witness Sofía Macher, in compliance with the Order issued by the President on August 18, 2005 (supra para. 18).

20. On September 30, 2005 the Commission and the State each informed that they had no observations to make regarding the affidavits filed (supra para. 19).

21. On September 30, 2005 the State filed part of the evidence to facilitate adjudication of the case requested by the Tribunal. On October 4, 2005 the Secretariat, following instructions by the President, asked the State and the representatives once again to forward the remaining documents, requested in order to facilitate adjudication of the case (supra para. 17). Neither the State nor the representatives filed the documents required.

22. On October 6 and 7, 2005 the representatives and the Inter-American Commission each filed their final written arguments on the merits and possibly reparations and costs.

23. On November 11, 2005 the State filed a brief containing “some considerations to facilitate adjudication of the case”, in connection with the instant case. In such respect, the Court observes that in accordance with the Order of the President of August 19, 2005 (supra para. 18), the non-extendable term for the parties to file their final written arguments expired on October 7, 2005. Furthermore, the Tribunal observes that the aforementioned brief, which the State calls “considerations to facilitate adjudication of the case”, is no part of the procedure before this Tribunal under its Rules of Procedure. Indeed, after the term for filing the final written arguments has expired and once the proceedings are ready for a Judgment to be handed down, the Rules of Procedure do not countenance the performance of any other procedural acts aimed at advancing arguments. In view of the foregoing, the Court rejects the brief filed by Peru on November 11, 2005.

#### V. PRELIMINARY CONSIDERATIONS (ACKNOWLEDGMENT OF RESPONSIBILITY)

24. Hereinafter, the Court will proceed to determine the scope of the acknowledgment of international responsibility carried out by the State (supra paras. 12 and 14).

25. Article 38(2) of the Rules of Procedure provides 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.

26. Article 53(2) of the Rules of Procedure provides 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

27. The Inter-American Court, exercising its contentious jurisdiction, applies and interprets the American Convention, and when a case is submitted to its jurisdiction, the Court has the power and authority to determine the international responsibility of a State Party to the Convention for any violations to the provisions of the same. [FN1]

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[FN1] Cf. Case of the "Mapiripán Massacre". Judgment of September 15, 2005. Series C No. 134, para. 64.

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28. The Court, exercising its inherent powers for the international judicial protection of human rights, may determine if an acknowledgment of international responsibility carried out by a respondent State provides enough grounds, in the terms of the American Convention, to proceed or not to dispose of the merits and to determine possible reparations. To such effects, the Tribunal is to analyze the situation in each specific case. [FN2]

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[FN2] Cf. Case of the "Mapiripán Massacre", supra note 1, para. 65.

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29. In the answer to the application (supra para. 12) Peru acknowledged its international responsibility for having broken Articles 1(1), 4(1), 5(1), 5(2), 7(1), 7(2), 7(3), 7(4), 7(5) and 7(6) of the American Convention, to the detriment of Mr. Santiago Gómez-Palomino. Likewise, the State acknowledged "the damage caused to his family, to Mrs. Victoria Margarita Palomino-Buitrón and [to] her who was his common-law wife Esmila Liliana Conislla-Cárdenas" and requested the Court to:

- [c]onsider that the Peruvian State has made t[h]e necessary efforts aimed at reaching a friendly settlement[;]
- [c]onsider that the Peruvian State acknowledges international responsibility for the forced disappearance of Mr. Santiago Fortunato Gómez-Palomino[;]
- [c]onsider that the expression "duly proved" disappearance in the current wording of the criminal description of forced disappearance, provided and punished under Article 320 of the Penal Code is not a hindrance nor a hurdle for investigating and judging those who turn out to be responsible for the forbidden act[;]
- [c]onsider that the Peruvian State has set up a Comisión Especial Revisora del Código Penal (Special Commission for the Revision of the Penal Code) (Law Number 27837), now in the process of analyzing and redrafting criminal descriptions[. S]pecifically the crimes against humanity[...] which are being adapted to the Rome Statute[;]
- [t]ake into account that Peru is currently living in a democracy, where the Rule of Law is established, where the Due Process Principles and Effective Judicial Protection are respected[, and]

- PASS JUDGMENT DECLARING THE CLOSURE of the application filed by the Inter-American Commission on Human Rights.

30. In its brief clarifying the answer to the application (supra para. 14) Peru acknowledged, as regards the alleged breach of Article 5 of the American Convention, “that the direct family of the victim, in other words his mother, his daughter and his partner, had been affected”, and pointed out that “in the case of the brothers and sisters it is needed to show the degree of damage and the consequences they have suffered on account of the disappearance of their brother.” As regards the alleged breach of Articles 8 and 25 of the Convention, the State pointed out that it “extends from the date the event was committed up to the time of transition [towards] democracy, for it was only from November, 2000 on that the conditions of freedom and institutional independence of the Office of the Public Prosecutor and of the Judiciary were given so that the jurisdictional authorities could act free from pressure and interference by the political powers.” Finally, the State admitted “the infringement specified in the brief of requests [and] arguments”, concerning Article 2 of the Inter-American Convention to Prevent and Punish Torture, with the exception of such “aggravation affecting the direct family of the victim, and it is left to judicial investigation and punishment to determine whether the personal integrity of [Mr.] Santiago Fortunato Gómez-Palomino was damaged.”

31. On its part, the Commission requested the Court to, inter alia, admit the acknowledgment of international responsibility carried out by the State with respect to the points which have ceased to be contested, and that the proceedings continue with regard to some aspects of the alleged violation of the rights enshrined in Articles 5, 8 and 25 of the American Convention and the alleged breach of Article 2 thereof and of Article I of the Inter-American Convention on the Forced Disappearance of Persons, as well as regarding certain claims concerning reparations. Along the same lines, the representatives requested the Inter-American Court to determine the points not covered by the acknowledgment of responsibility carried out by the State.

On the acknowledgment of the State regarding the facts

32. In view of the acknowledgment of responsibility carried out by the State, the Tribunal considers that the facts in the application filed by the Inter-American Commission in the instant case (supra para. 1), that are deemed to be established according to paragraph 54(8) to 54(20) and 54(28) a 54(31) of the instant Judgment, have ceased to be in dispute.

33. The facts relating to the alleged violation of Article 5 of the Convention, to the detriment of Mrs. María Dolores Gómez-Palomino, Mrs. Luzmila Sotelo-Palomino, Mr. Emiliano Palomino-Buitrón, Mrs. Mercedes Palomino-Buitrón, Mrs. Mónica Palomino-Buitrón, Mrs. Rosa Palomino-Buitrón and Mrs. Margarita Palomino-Buitrón, sisters and brother to Mr. Santiago Gómez-Palomino, as well as the pecuniary and non pecuniary damages that would have been caused to the next of kin of Mr. Gómez-Palomino, as a result of his forced disappearance, are still in dispute.

34. Consequently, the Court considers it fit to open a chapter regarding the facts involved in the instant case, to cover both the facts acknowledged by the State and the facts that may have been proven by in the body of evidence appearing on the records of the case (infra para. 54).

On the acknowledgment of the State regarding the law

35. The Court deems it fit to admit the acknowledgment of international responsibility carried out by the State for having violated the Rights enshrined in Articles 4(1) (Right to Life), and 7(1), 7(2), 7(3), 7(4), 7(5) and 7(6) (Right to Personal Liberty) of the American Convention, regarding Article 1(1) (Obligation to Respect Rights) of the aforementioned Convention, to the detriment of Mr. Santiago Gómez-Palomino.

36. As regards the alleged violation of Article 5 (Right to Humane Treatment) of the American Convention, in the light of Article 2 of the Inter-American Convention to Prevent and Punish Torture, committed to the detriment of Mr. Santiago Gómez-Palomino, the Court holds the acknowledgment of responsibility carried out by the State in the answer to the application (supra para. 12) to be valid and rejects, on the grounds of estoppel [FN3] , the denial thereof in the subsequent brief clarifying the answer to the application (supra para. 14).

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[FN3] Cf. Case of the Moiwana Community. Judgment of June 15, 2005. Series C No. 124, para. 58; Case of Huilca-Tecse. Judgment of March 3, 2005. Series C No. 121, para. 56, and Case of Herrera-Ulloa. Judgment of July 2, 2004. Series C No. 107, para. 83.

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37. Likewise, the Inter-American Court admits the acknowledgment of international responsibility carried out by the State with respect to the alleged violation of Article 5 (Right to Humane Treatment) of the American Convention, to the detriment of Mrs. Victoria Margarita Palomino-Buitrón and Mrs. Esmila Liliana Conislla-Cárdenas and of the girl Ana María Gómez-Guevara.

38. The Court admits the acknowledgment of international responsibility carried out by the State with respect to the alleged violation of Articles 8(1) (Right to Fair Trial) and 25 (Right to Judicial Protection) of the American Convention, to the detriment of Mr. Santiago Gómez-Palomino and his next of kin, in connection with the events that took place from the date on which Mr. Santiago Gómez-Palomino was arrested up to the transition towards democracy which happened during the year 2000 in Peru (supra para. 30).

39. The Tribunal observes that part of the merits in the instant case is still in dispute. It will therefore address the alleged violations of Articles 5 (Right to Humane Treatment), 8(1) (Right to Fair Trial) and 25 (Right to Judicial Protection) of the American Convention (infra paras. 58 to 68 and 72 to 86), considering the claims of the Inter-American Commission and of the representatives that have not been acknowledged by the State. Likewise, the Court will decide on the alleged breach of Articles 2 of the American Convention and I of the Inter-American Convention on the Forced Disappearance of Persons (infra paras. 90 to 110).

On the acknowledgment of the State regarding reparations



40. The Inter-American Commission in its application (*supra* para. 1) requested the Court to order the State to “carry out a thorough judicial investigation of the facts of the instant case, wherein all those responsible, whether materially or intellectually, be identified and thereupon punished as criminals.” The same claim was advanced by the representatives in their brief of requests and arguments (*supra* para. 11).

41. On such matter, the State pointed out that the acknowledgment of international responsibility carried out “in no way excludes the civil and criminal liabilities which the authors and accessories of the violations of Mr. Santiago Gómez-Palomino’s rights could have to face [for which reason] it undertakes to perform a complete, unbiased, effective and immediate investigation in order to establish the identities and the degree of participation of those who may turn out to be responsible for the disappearance and execution of Mr. Santiago Gómez-Palomino, [...] for the purpose of becoming able to impose upon them the criminal punishment due under the law.”

42. The Court takes it that with such statement the State has acknowledged the aforementioned claims by the Commission and the representatives (*supra* para. 40). The remaining claims on reparations and costs will be addressed later by this Tribunal (*infra* paras. 118 to 160).

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43. To sum up, according to the terms stated by the parties, the Court deems the facts regarding the alleged violation of the right to humane treatment, to the detriment of the sisters and the brother of Mr. Santiago Gómez-Palomino, that would amount to a breach of Article 5 of the Convention; regarding the alleged violation of Articles 8(1) and 25 of the American Convention, to the detriment of Mr. Gómez-Palomino and his next of kin as from the period of transition towards democracy, which started in Peru as the year 2000 was ending; regarding the alleged infringement of Articles 2 of the American Convention and I of the Inter-American Convention on the Forced Disappearance of Persons; regarding the pecuniary and non pecuniary damages that would have been caused to the next of kin of Mr. Gómez-Palomino on account of his forced disappearance, as well as the matter of determining the reparations and costs, to be still in dispute among them.

## VI. EVIDENCE

44. Before examining the evidence tendered, the Court will state, in the light of the provisions set forth in Articles 44 and 45 of the Rules of Procedure, a number of general points applicable to the instant case, which mostly arise from precedents established in the Tribunal itself.

45. Evidence is governed by the adversary principle, which duly respects the right to defense the parties enjoy, such being the principle which underlies Article 44 of the Rules of Procedure, inasmuch as it refers to the time when evidence must be tendered, so that equality among the parties may prevail. [FN4]

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[FN4] Cf. Case of the “Mapiripán Massacre”, supra note 1, para. 71; Case of Raxcacó-Reyes. Judgment of September 15, 2005. Series C No. 133, para. 34, and Case of Gutiérrez-Soler. Judgment of September 12, 2005. Series C No. 132, para. 37.

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46. The Court has also pointed out before that, in taking and assessing evidence, the procedures observed before this Court are not subject to the same formalities as those required in domestic judicial actions and that admission of items into the body of evidence must be carried out paying special attention to the circumstances of the specific case, and bearing in mind the limits set by respect for legal certainty and for the procedural equality of the parties. The Court has further taken into account that international precedent, in upholding that international courts are deemed to have authority to appraise and assess evidence based on the rules of a reasonable credit and weight analysis, has always avoided rigidly setting the quantum of evidence required as the grounds for a decision. This criterion is especially valid with respect to international human rights courts, which, for the purpose of determining the international responsibility of a State for the violation of the rights of a person, enjoy ample flexibility when assessing the evidence submitted to them bearing on the pertinent facts, in accordance with the rules of logic and based on experience. [FN5]

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[FN5] Cf. Case of the “Mapiripán Massacre”, supra note 1, para. 73; Case of Raxcacó-Reyes, supra note 4, para. 35, and Case of Gutiérrez-Soler., supra note 4, para. 39.

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47. Based on the above, the Court will now proceed to examine and assess the set of elements making up the body of evidence in the instant case, within the legal framework discussed above.

A) DOCUMENTARY EVIDENCE

48. As part of the evidence produced, the parties have submitted the testimonies—in the form of affidavits before a notary public— given by Mrs. Victoria Margarita Palomino-Buitrón and Esmila Liliana Conislla-Cárdenas, and by expert witnesses María del Pilar Raffo-Lavalle de Quiñones and Sofía Macher, pursuant to the Order of the President of August 19, 2005 (supra para. 18). This Court considers it pertinent to transcribe below a summary of the relevant parts of said affidavits:

a) Testimony of Ms. Mrs. Victoria Margarita Palomino-Buitrón, mother of Mr. Santiago Gómez-Palomino.

The witness is 62 years old and lives with her daughters and her son in the city of Lima. When she learned about the detention and disappearance of her son Mr. Santiago Gómez-Palomino, which took place on July 9, 1992, she “did not know what to do.” Very early the following morning, she went to La Curva Police Department. There, she asked if her son had been taken in during the early hours, but only got negative answers. After questioning her about the details of

the incident, one of the officers told her that “if the men were hooded, then they were terrorists.” She burst into tears, did not know where to go or who to resort to. Next, she went to the Police Precincts in Chorrillos, Barranco and Miraflores, but she never got “any answer.” She looked for her son everywhere —the morgue, the Palace of Justice, and the hospitals, but again, nobody gave her any information on his whereabouts. She then resorted to the offices of “Human Rights” and “Disappeared Persons.” Her other children and Mr. Santiago Gómez-Palomino’s common-law wife accompanied her in her search.

She suffers a great deal because her son was quite affectionate with her and with his brother and sisters; he used to take them “[th]eir fruit and [th]eir chicken.” She has known no quiet ever since her son went missing and would like his body to be found so that she could take flowers to him and be able to say “he is lying there.” Santiago was the one who helped her financially, as most of her children were then minors and the witness only works once a week doing the laundry at other people’s home once a week. Her son would say, “My little wee girl, here is your money;” he used to help her get the food for her other children, if “he did not give [her] money, the children wouldn’t eat.” He worked at a “Chinese restaurant,” and as a gardener. Furthermore, Santiago paid maintenance to his former partner, who was expecting his baby, and at the same time supported Esmila Liliana (his current partner) and her son.

After Santiago’s disappearance, her family “went hungry.” Furthermore, the witness had to leave her little daughters alone in order to be able to search of her missing son. Her elder daughters would accompany her in her search for her son and gave her some support “paying for transportation fares and helping her feed [her] other four little children.” Her daughter Mónica had to ask for permission to skip classes.

Three months after her son’s disappearance, a baby girl was left at her door, wrapped in a blanket, with a note saying that the witness was the baby’s grandmother and that the baby’s mother was unable to support her baby girl. Ana María’s mother was never found. Today, the girl is 13 years old, she is called Ana María Gómez-Guevara and is the daughter of Santiago, born from a relationship he had before the one he had with Liliana. The girl has been told that her father is away on a trip, but that they do not know where he may be.

Two years ago, “Human Rights” officials told the witness that her son was buried on La Chira beach; however, he was never found. The witness thinks that “there is a big hole among the rocks, and that he has been thrown off into it.” After said communication, she went to the Office of the Prosecutor and stated before the authorities that her son was missing. She is still looking for him, because he “may be alive somewhere.”

Even today, the members of her family suffer a lot, and cry for the love Santiago once gave them. The witness states that she could only be comforted if she could get her son’s body back, and she demands justice.

b) Testimony of Esmila Liliana Conislla-Cárdenas, common-law wife of Mr. Santiago Gómez-Palomino.

She is 33 years old and lives in Chorrillos, Lima. She met Mr. Santiago Gómez-Palomino on the second Sunday of May, 1992, when she was visiting the city of Lima. During Esmila’s visit, Mrs. Victoria Margarita Palomino-Buitrón —Santiago’s mother— offered Esmila Liliana a room at Victoria’s home for Esmila to stay in the city and find a job. The witness agreed and after some time she returned to Lima, to stay at Mrs. Palomino-Buitrón’s place. There, she saw Mr. Santiago Gómez-Palomino once more.

At that time, the son of the witness was five or six months old, and she was looking for a job. Santiago “courted her—which the family did not like— because [she] was having problems with the father of [her] son.” For such reasons, the witness left Victoria Margarita’s home, and moved in with Mr. Santiago Gómez-Palomino, sharing a house in Chorrillos which belonged to a cousin of his, called María Elsa Chipana-Flores. Santiago found a job for Esmila as a charwoman across the street from where he worked as a gardener, and he used to accompany her back and forth from work every day.

Eight days after they had moved into María Elsa Chipana-Flores’ home, on or about 1 a.m., they were awakened by a noise apparently produced by something falling in the kitchen, for which reason the witness thought the house was being burglarized. A few moments later, with a strong blow, the door was knocked down and several persons with powerful flashlights and covered faces stomped in. They took Santiago by his head, threw him onto the floor and ordered him not to shout while pointing him with a long gun; another man pointed his gun at the witness and ordered her to turn round and not to shout, as he threatened her that he would have her disappeared; they tied her hands and her baby remained on the bed. The witness remembers how Santiago was beaten and insulted, and that they asked him for names of people he did not know. Later, they asked everybody for their identification documents, which they took from Santiago’s pants pocket and from the witness’s purse. Santiago told his inquirers that he was “Israelite”, but this only triggered more insults. Then, she heard a poignant cry of pain, but she could not turn round. At the end, there was nothing but silence. When she finally got untied, she went out and managed to see a white van speeding off. María Elsa Chipana-Flores and the witness remained in anguish because they did not know what could be done to Santiago and because they thought the perpetrators could come back for them both.

The following morning the witness asked for permission from the dwellers of the house where she worked to go and look for Santiago. She accompanied Victoria Margarita, mother of the victim, and his sisters in the first steps of the search. She resorted to the office of “Disappeared Persons”, hospitals, the police and the morgue. They all felt guilty for what had happened to Santiago. The witness stayed for only two more days at the Chipana-Flores home, because she did not feel at ease there. She then moved in with Victoria Margarita, hoping to find Santiago. Despite these efforts, she could no longer walk the streets without thinking that she was being followed.

Santiago was a good person, he took care of his brother and sisters and his mother; he was like a father for his family. His disappearance affected them much, as he was the main source of support, he always worried about food, clothing and education for his brother and sisters. He gave moral and financial support to the witness, he protected her and cared a lot for her little son. They had wished they could get married and become a family.

She expects that the individuals responsible for this will “pay for the disappearance” of Mr. Santiago Gómez-Palomino, and thus justice be served, especially on behalf of his mother, daughter, brother and sisters.

c) Expert opinion by María del Pilar Raffo-Lavalle de Quiñones, psychologist

The expert carried out a number of both individual and group interviews with three generations of the next of kin of Mr. Santiago Gómez-Palomino: his mother, his sisters, his brother and his daughter, in order to assess the psychological sequelae resulting from the forced disappearance of Mr. Gómez-Palomino on each of them, as well as the psychological damage caused to the

family group. The expert believes that in order to understand the psychological sequelae on this family resulting from the forced disappearance of Mr. Santiago Gómez-Palomino, it is necessary to understand first who he was and what he meant to his family. Mr. Santiago Gómez-Palomino was the eldest son, the only member of the family with a steady job. He lived with his mother and younger brother and sisters, performing a paternal role—he was active and caring.

Mrs. Victoria Margarita Palomino-Buitrón is a woman with Andean features and clothing. Quechua is her mother tongue, for which reason she prefers her children to speak this language inside the family, as if she felt they can express what she has had to live through in a better way, in spite of the fact that she also speaks Spanish. She lives in the city of Lima with her four children (three daughters and a son) and with the posthumous daughter of her late son Mr. Santiago Gómez-Palomino. She has got eight children by three different relationships, the fathers of whom have not lived together with her. Mrs. Victoria Margarita Palomino-Buitrón gives vent to her feelings by crying when the subject of her son's disappearance is brought up, evidencing her suffering to be still current at present. The disappearance of her son meant a valuable moral financial and family loss—his brother and sisters lost a supporting, stimulating father figure, who is emotionally present. At the time Mr. Santiago Gómez-Palomino was abducted, he was in charge of five of his brothers and sisters.

Both her children and Mrs. Victoria Margarita Palomino-Buitrón have pointed out that there has been a turning point in her personality, which evidences the mark left in her psyche and her subjectivity by the traumatic event. The death of a son overturns the order of generations and is always a cause of great psychological suffering. Hence, the disappearance of her son marked Mrs. Palomino-Buitrón with an extreme experience of suffering, which was converted into aggression and hostility, especially towards her other minor children. As a consequence, this also brought thoughts of suicide into the mind of Mrs. Victoria Margarita Palomino-Buitrón. The constant daily visits to clinics and hospitals for almost a year led her to abandon her minor children. The feeling of guilt that accompanies the whole mourning process has been increased owing to the fact that it was Mrs. Victoria Margarita Palomino-Buitrón who asked Santiago's common-law wife for them to leave her house, and this is why Mrs. Palomino-Buitrón feels that her request was the reason why her son was at his cousin's home, María Elsa Chipana-Flores. This prompts in her persecutory fantasies in connection with the daughter of Mr. Santiago Gómez-Palomino, as Mrs. Palomino-Buitrón thinks what was done to her son may be done to the girl, and this is why she isolates her and does not trust anyone who gets near her. Mrs. Victoria Margarita Palomino-Buitrón experiences three types of psychosomatic sequelae, such as three facial paralyses, rheumatism and osteoporosis. Likewise, the traumatic event caused her a chronic depression owing to an unelaborated mourning process, depression which she has passed on both to her own children and to Mr. Santiago Gómez-Palomino's daughter, thus evidencing a transgenerational chain transmitting non-resolved, non-elaborated suffering.

The girl Ana María Gómez-Guevara, posthumous daughter of Mr. Santiago Gómez-Palomino, is 13 years old and attends sixth grade at a primary school. Since she was fifteen days old, she has been brought up by her grandmother, who suffers from the disappearance of Mr. Santiago Gómez-Palomino and has educated her in denial and in the family mythology. The grandmother always used to tell her that the girl's father "will soon be coming back with money, and that he's at work." This has an impact on the girl Ana María, who gets all worked up when talking about her father as if he were alive. The main problem here is the lack of adequate support for the girl's development. Ana María must comply with the ideal she is presented with, and not having met her father, she has been nurtured on reminiscence shared with her aunts, uncles and grandmother.

The father figure is used as an extortion in her upbringing. They tell her that she has to obey, for her father to come back home and be happy. She then feels that her father's return it is up to her, and thus she is doomed to feel she is a "bad girl."

Mrs. María Dolores Gómez-Palomino, sister of Mr. Santiago Gómez-Palomino, is 42 years old, married, has four children and is a housewife. She is the only sister of Mr. Santiago Gómez-Palomino by the same father and mother. Before the forced disappearance of her brother, she had already formed a family with her husband and children. In spite of this, she was very close to her brother —she would usually have him visit her to talk about their minor brothers and sisters. The forced disappearance of Santiago did not affect her financially, as her husband had a steady job and supported the family. Thus far, Mrs. María Dolores Gómez-Palomino refuses to believe that her brother is dead. At present, she helps her mother, brother and sisters financially.

Mrs. Luzmila Sotelo-Palomino, sister of Mr. Santiago Gómez-Palomino, is 37 years old, married, has three children and is a housewife. She is the only one of all his brothers and sisters who holds a high school degree. At the time of the forced disappearance of her brother, she was enrolled in a vocational nursing program, of which she dropped out after the events.

Mr. Emiliano Palomino-Buitrón, brother of Mr. Santiago Gómez-Palomino, is 32 years old, unmarried, and pursued high school studies until third year. At the time of the forced disappearance of his brother he was 17 years old, and had been drafted into mandatory military service. After the events, he could not go back to his high school studies for financial reasons, as he had to help his mother support the family home and provide for the education of his younger sisters. After the disappearance of his brother, the figures of authority became a source of confusion and distortion for him, due to his disillusion and distrust regarding State institutions, which he previously looked up to and trusted. At present, he experiences feelings of resentment and hostility. On losing his only brother, he lost a very important identity figure, for he did not know his father. This has adversely affected his productivity and his ability to support himself. He does not have a steady job.

Mrs. Mónica Palomino-Buitrón, sister of Mr. Santiago Gómez-Palomino, is 28 years old, lives with her partner, has three children and is a housewife. When her brother disappeared, Mrs. Mónica Palomino-Buitrón was fourteen years old. Owing to the fact that her mother did not know how to read or write, she accompanied her mother in the search for her missing brother in order to read the documents for her mother, and also helped look after the girl Ana María Gómez-Guevara. She dropped out of school and started to work at an early age. Thus, she suddenly grew out of her role as daughter and younger sister to become the eldest sister, and devote her time and efforts to her younger siblings, setting aside the academic development she was achieving. She attempted suicide once, as she felt that with her brother missing there was nobody else in the world who could defend her and care for her. Both her siblings and her mother agree on the fact that of all the family members, she is the most affected by the forced disappearance of Mr. Santiago Gómez-Palomino.

When her brother disappeared, Mrs. Rosa Palomino-Buitrón was ten years old. She took classes until she reached first year at high school. At present, she is unemployed. Ms. Margarita Palomino-Buitrón, the youngest sister in the family, was seven years old at the time of the forced disappearance of Mr. Santiago Gómez-Palomino. She went to school until she reached first year at high school, and she is single. As they were very young children, their brother was a very important paternal referent. After his disappearance, they both were nurtured with their mother's depression and abandonment, which has negatively affected the formation of their personal identity.

All the members of the family of Mr. Santiago Gómez-Palomino experienced a depression at the family level which has become chronic, and was caused by the traumatic event that was the disappearance of a son, a father and a brother. This depression has caused family dysfunctions and psychological conflicts that have made this a chronic condition due to the stagnation of the mourning process. Such situation has barred the continuation of the family's life-projects, especially in connection with the younger siblings. This family's suffering was been deepened by the thirteen years of ongoing impunity that prevails in the instant case. Each circumstance or event evidencing such impunity triggers psychological suffering.

The expert recommended that the next of kin of Mr. Santiago Gómez-Palomino should undergo psychotherapy. In turn, the expert recommended encouraging and facilitating that the siblings of Mr. Gómez-Palomino should complete their primary and high school studies, which were interrupted as a result of the forced disappearance of their brother, and that the search for the remains of Mr. Gómez-Palomino should continue because while his body remains missing, the state of anxiety affecting the family will be perpetuated and the elaboration of the mourning process will be prevented.

Regarding Mrs. Esmila Liliana Conislla-Cárdenas, the expert conducted a one-hour-and-a-half interview in order to assess the psychological impact and sequelae affecting her as a result of the disappearance of the person who once was her common-law husband. Mrs. Conislla-Cárdenas suffered from a chronic post-traumatic stress disorder, in terms of the international classification used. Such condition lays emphasis on the alteration in her psychological economy as a result of a sudden traumatic event affecting the life of Mrs. Esmila Liliana Conislla-Cárdenas. In order to reach this diagnosis, an assessment was made on Mrs. Conislla-Cárdenas responses to the facts, which were characterized by intense fear and horror; persistent re-experiencing of the facts through memories or dreams causing distress; efforts to avoid thoughts, feelings or conversations about the traumatic event; avoidance of activities, places or people bringing back memories of the trauma; and the burden of a feeling of guilt that has led her to think that but for her, Mr. Santiago Gómez-Palomino would not have disappeared. She feels guilty towards the family of Mr. Gómez-Palomino. The expert recommends that Mrs. Esmila Liliana Conislla-Cárdenas should undergo both individual and family psychotherapy.

d) Report by Expert Sofía Macher, commissioner of the Comisión de la Verdad y Reconciliación del Perú (Truth and Reconciliation Commission of Peru)

The expert made reference to the work carried out by the Comisión de la Verdad y Reconciliación del Perú (Truth and Reconciliation Commission of Peru), particularly to the conclusions reached by the Commission on the patterns of violations to human rights existing at the time, the Colina Group and its relationship with the State.

The expert informed that the Comisión de la Verdad y Reconciliación del Perú (Truth and Reconciliation Commission of Peru) believed that forced disappearances in Peru were of a systematic nature, particularly between 1983-84 and 1989-93. This called for a standard *modus operandi*, a set of established procedures for the identification, selection and processing of victims, as well as for the elimination of evidence—particularly, the bodies of the victims—of the crimes committed throughout this procedure (violation of the due process principle, tortures and extrajudicial executions). In addition, the scale at which forced disappearances were used required the existence of a logistic setup providing for the means and personnel to implement them.

The expert pointed out that State agents used the procedure of forced disappearance of persons in a generalized and systematic manner as part of the mechanisms of anti-subversive struggle. Most of the cases of forced disappearance by State agents were not perpetrated randomly or as spontaneous responses implemented by low-rank agents.

According to the expert, there are many circumstances leading to the conviction that such acts were designed, organized and carried out by means of a structure that implied operational and functional coordination at higher levels than those of ordinary law-enforcement officials. The steps involved in forced disappearance called for a complex organization, for a structure and for delegating functions in different groups of operating agents. The Comisión de la Verdad y Reconciliación del Perú (Truth and Reconciliation Commission of Peru) reached the conclusion that forced disappearances were planned, carried or supervised by State officials and under encoded procedures. It implied coordination, which was needed to exert influence on other law-enforcing bodies, under different command but subordinated to the local political-military government in charge of the area. The Comisión de la Verdad y Reconciliación del Perú (Truth and Reconciliation Commission of Peru) concluded that the main bodies involved in cases of forced disappearances were, in order of importance: the Army, the police forces and the Navy.

The expert reported that the generalized impunity under which the agents responsible for these crimes operated reveals the existence of severe negligence, implied tolerance or, in the worst of cases, of policies or practices designed to ensure such impunity.

Regarding the “Colina Group,” the expert stated that this unit did not act separately from the military institution, but that it was an organic and functional military detachment within the Army structure, during the Alberto Fujimori administration, as the group made use of the human and logistic resources of the Dirección de Inteligencia del Ejército (DINTE) (Army Intelligence Bureau), Servicio de Inteligencia del Ejército (SIE) (Army Intelligence Service), and Servicio de Inteligencia Nacional (SIN) (National Intelligence Service). Owing to the preponderance acquired by the Servicio de Inteligencia Nacional (SIN) (National Intelligence Service), the service was eventually the executions instrumentality used by Vladimiro Montesinos —advisor to former President Alberto Fujimori, and Nicolás Hermoza-Ríos, Army General.

The “Colina Group” would be defined as an intelligence network. It was created by decision of the Army Command. Most of its members were non-commissioned officers who had had all sorts of problems, especially with military justice, on account of having committed ordinary offenses.

According to the report submitted by the expert, the Colina Group used terrorist tactics as a kind of special intelligence operations. Such operations were performed by a number of individuals in uniform, or in civilian clothes but clearly identifiable as Army members, heavily armed and in most of the cases wearing balaclavas over their faces.

## B) EVIDENCE ASSESSMENT

49. In the instant case, as in others, [FN6] the Court admits the evidentiary value of those documents that were submitted by the parties at the appropriate procedural time or as evidence to facilitate adjudication of the case, which were neither disputed nor challenged, and the authenticity of which was not questioned.

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[FN6] Cf. Case of the “Mapiripán Massacre”, supra note 1, para. 77; Case of Raxcacó-Reyes, supra note 4, para. 38, and Case of Gutiérrez-Soler, supra note 4, para. 43.

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50. Regarding the testimony rendered before an officer whose acts deserve full faith and credit (affidavits) by Mrs. Victoria Margarita Palomino-Buitrón and Mrs. Esmila Liliana Conislla-Cárdenas, victims in the instant case (supra paras. 37 and 38), this Court admits them to the extent they make reference to their subject-matter, as stated in the Order of August 19, 2005 (supra para. 18) and in light of the acknowledgment of international responsibility made by the State (supra paras. 12 and 14). This Court believes that the depositions made by the alleged victims, who have a direct interest in the instant case, should be weighed by the standards of reasonable credit and weight analysis and as part of the whole body of evidence of the proceeding. [FN7] Regarding the merits and reparations, the testimonies of the alleged victims and/or their next of kin are useful insofar as they can supply additional information on the alleged violations and their consequences. [FN8]

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[FN7] Cf. Case of the “Mapiripán Massacre”, supra note 1, para. 83; Case of Raxcacó-Reyes, supra note 4, para. 39, and Case of Gutiérrez-Soler, supra note 4, para. 47.

[FN8] Cf. Case of Gutiérrez Soler, supra note 4, para. 456; Case of Yatama. Judgment of June 23, 2005. Series C No. 127, para. 116, and Case of the of Yakye Axa Indigenous Community. Judgment of June 17, 2005. Series C No. 125, para. 43.

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51. Concerning the statements made before notary public (affidavits) by experts María del Pilar Raffo-Lavalle de Quiñones and Sofía Macher (supra para 48(c) and (d)), the Court will admit them to the extent they make reference to the subject-matter and will weigh them as part of the whole body of evidence of the case and pursuant to the standards of reasonable credit and weight analysis.

52. Regarding the documents submitted as evidence to facilitate adjudication of the case by the State (supra para. 21), the Court will admit them as part of the body of evidence of the case, pursuant to the provisions in Article 45(2) of the Rules of Procedure. Regarding other documents, requested as evidence to facilitate adjudication on several occasions and absent their submission to the Court by the State or the representatives (supra para. 21), the Court reiterates that in order to have as many elements of evidence in order to know the facts and justify its decisions, it is paramount that the parties should provide the Court with all the evidentiary elements either requested by the Court as evidence to facilitate adjudication of the case or upon request by the parties. [FN9] Specifically, in the cases of human rights violations the burden of this duty rests upon the States, as the States must provide the Tribunal with the evidence that can only be obtained with their cooperation. [FN10] (infra para. 84).

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[FN9] Cf. Case of the Girls Yean and Bosico. Judgment of September 8, 2005. Series C No. 130, para. 89; Case of Yatama, supra note 8, para. 134, and Case of Acosta Calderón. Judgment of June 24, 2005. Series C No. 129, para. 47.

[FN10] Cf. Case of Yatama, supra note 8, para. 134; Case of Acosta Calderón, supra note 9 para. 47, and Case of Tibi. Judgment of September 7, 2004. Series C No. 114, para. 83.

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53. Regarding the press copy submitted by the parties, this Court has found that even though it does not amount to documentary evidence per se, it could be assessed to the extent it gives an account of well-known public facts, statements by State officials, or they corroborate aspects relating to the instant case. [FN11] On the other hand, Law No. 25,926 of February 21, 1998, which introduced certain changes to the Peruvian Penal Code, is considered a useful document for determining the instant case, and it is therefore made part of the body of evidence in the instant case, pursuant to the provisions in Article 45(1) of the Rules of Procedure.

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[FN11] Cf. Case of the “Mapiripán Massacre”, supra note 1, para. 79; Case of the Girls Yean and Bosico, supra note 9, para. 96, and Case of Yatama, supra note 8, para. 119.

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## VII. PROVEN FACTS

54. In view of the acknowledgment of responsibility made by the State (supra paras. 32-4) and in accordance with the body of evidence of the instant case, the Court holds the following facts to have been proven:

a) The practice of forced disappearance of persons in Peru

54.1. Between the years 1989 and 1993, the forced disappearance of persons became a systematic and generalized practice implemented by the State as a mechanism of anti-subversive struggle. The victims of this practice have been individuals identified by police authorities, by the military forces and by the paramilitary commandos, as alleged members, collaborators or supporters of Sendero Luminoso (Shining Path) or the Movimiento Revolucionario Tupac Amará (Tupac Amará Revolutionary Movement). As from the coup d’etat on April 5, 1992, the implementation of this practice spawned, for it coincided with the lack of simple and expeditious judicial remedies such as habeas corpus, something which created an environment inconsistent with the effective protection of the right to life and other human rights in the country. [FN12]

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[FN12] Cf. Report by the Comisión de la Verdad y Reconciliación del Perú (Truth and Reconciliation Commission of Peru) signed on August 27, 2003, in the city of Lima, Peru, (Appendixes to the brief of requests and arguments, Appendix 13), and report rendered before an official whose acts command full faith and credit (affidavit) by the expert Sofía Macher, on September 2, 2005 (file on the merits, reparations and costs, Volume II, pages 520 to 548).

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54.2. Forced disappearance of persons was a complex practice which required a set of acts or stages to be carried out by different groups of persons. In many cases, this involved the physical elimination of the victim and the concealment of the victim’s body. The process comprised the

following stages, which were not necessarily consecutive: selection of the victim, detention of the individual, imprisonment in a confinement center, possible transportation to another confinement unit, interrogation, torture and the processing of the information thus obtained. On many occasions, the decision to eliminate the victim and to conceal of the victim's remains ensued. In order to destroy the evidence of such acts, the bodies of the victims were incinerated, mutilated, abandoned in inaccessible or isolated areas, were buried or parts of their remains were scattered in different places. [FN13]

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[FN13] Cf. Report by the Comisión de la Verdad y Reconciliación del Perú (Truth and Reconciliation Commission of Peru) signed on August 27, 2003, in the city of Lima, Peru, (Appendixes to the brief of requests and arguments, Appendix 13), and report rendered before an official whose acts command full faith and credit (affidavit) by the expert Sofía Macher, on September 2, 2005 (file on the merits, reparations and costs, Volume II, pages 520 to 548).

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54.3. Detention would be carried out by violent means, usually at the residence of the victim, in public places, in raids or in public institutions, by individuals with balaclavas and weapons, in numbers sufficient to overcome any possible resistance. Throughout the process, the common feature denying detention itself and withholding all information whatsoever about what was going on with the detainee. In other words, an individual was introduced into an established circuit of clandestine detention, from which they could escape alive only if they were very lucky. [FN14]

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[FN14] Cf. Report by the Comisión de la Verdad y Reconciliación del Perú (Truth and Reconciliation Commission of Peru) signed on August 27, 2003, in the city of Lima, Peru, (Appendixes to the brief of requests and arguments, Appendix 13), and report rendered before an official whose acts command full faith and credit (affidavit) by the expert Sofía Macher, on September 2, 2005 (file on the merits, reparations and costs, Volume II, pages 520 to 548).

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54.4. In cases of forced disappearance, breaking into the victims' residence with violence was the detention modality mostly used. These break-ins were usually carried out by patrols of ten or more persons wearing balaclavas, black turtle-neck pullovers, pants and dark boots. The break-ins would take place late at night while the victims and their next of kin were asleep. The use of flashlights, short guns, long guns and official vehicles was usual in this type of operations. [FN15]

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[FN15] Cf. Report by the Comisión de la Verdad y Reconciliación del Perú (Truth and Reconciliation Commission of Peru) signed on August 27, 2003, in the city of Lima, Peru, (Appendixes to the brief of requests and arguments, Appendix 13), and report rendered before an official whose acts command full faith and credit (affidavit) by the expert Sofía Macher, on September 2, 2005 (file on the merits, reparations and costs, Volume II, pages 520 to 548).

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b) The “Colina Group”

54.5. In 1991, military and political high command officers then holding office agreed that their Intelligence Operation Agents (IOA) reporting to the Servicio de Inteligencia del Ejército (SIE) (Army Intelligence Service) should form a commando reporting to the Dirección de Inteligencia del Ejército (DINTE) (Army Intelligence Bureau), which became known as the “Colina Group.” [FN16]

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[FN16] Cf. Report by the Comisión de la Verdad y Reconciliación del Perú (Truth and Reconciliation Commission of Peru) signed on August 27, 2003, in the city of Lima, Peru, (Appendixes to the brief of requests and arguments, Appendix 13), and report rendered before an official whose acts command full faith and credit (affidavit) by the expert Sofía Macher, on September 2, 2005 (file on the merits, reparations and costs, Volume II, pages 520 to 548).

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54.6. The so-called “Colina Group,” composed by members of the Peruvian Army, was probably one of the best known units specialized in forced disappearances and arbitrary executions. This group was created as part of the strategies used to confront terrorism by the then recently established administration of President Fujimori. The Colina Group, reporting to the Servicio de Inteligencia del Ejército (SIE) (Army Intelligence Service), was “created, organized and directed from the heart of the Presidency of the Republic and the Army Command.” [FN17] This unit was in charge of operations specially designed to identify, control and eliminate members of subversive organizations or their followers and/or collaborators, by means of indiscriminate extrajudicial executions, collective assassinations, forced disappearances and torture. [FN18]

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[FN17] Facts alleged by the Inter-American Commission on Human Rights, in its application of September 13, 2004, pages 23 and 25, which were not contested by the State.

[FN18] Cf. Report by the Comisión de la Verdad y Reconciliación del Perú (Truth and Reconciliation Commission of Peru) signed on August 27, 2003, in the city of Lima, Peru, (Appendixes to the brief of requests and arguments, Appendix 13), and report rendered before an official whose acts command full faith and credit (affidavit) by the expert Sofía Macher, on September 2, 2005 (file on the merits, reparations and costs, Volume II, pages 520 to 548).

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54.7. On June 14, 1995, the Congress of the Republic of Peru enacted Law No. 25,479, which became effective on June 15, 1995. The above mentioned law granted amnesty to members of the security forces and civilians who were subjected to police reports, investigations, proceedings or convictions, or who were serving prison terms on the grounds of violations to human rights committed between 1980 and 1995. A few days later, the Peruvian Congress passed a second bill of amnesty (Law No. 26492), which inter alia barred judges from rendering decisions on the legality or applicability of the first amnesty law. [FN19]

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[FN19] Cf. Case of Barrios-Altos. Judgment of March 14, 2001. Series C No. 75, para. 2, and Cf. Case of Barrios-Altos. Interpretation of the Judgment on the Merits. (Art. 67 of the American Convention on Human Rights). Judgment of September 3, 2001. Series C No. 83, paras. 41 to 44.

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c) Forced disappearance of Mr. Santiago Gómez-Palomino [FN20]

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[FN20] Paragraphs 54.8 to 54.20 and 54.28 to 54.31 of the instant Judgment are undisputed facts, which this Court holds to be established on the basis of the acknowledgement of responsibility carried out by the State.

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54.8. Mr. Santiago Gómez-Palomino was born in the city of Lima, Peru, on May 13, 1965. At the time of the event, he was 27 years old, single and had earned a high school degree. The victim lived with his common-law wife Esmila Liliana Conislla-Cárdenas and her son, in the residence of his cousin María Elsa Chipana-Flores, located at Block A, plot 2, “San Pedro de Chorrillos,” Lima. Mr. Gómez-Palomino worked in a Chinese food “chifa” restaurant situated in the locality of Chorrillos, and as a gardener in a private home. He was a member of the Asociación Israelita del Nuevo Pacto Universal (Israelite Association of the New Universal Pact), Church of Itillacta, Chorrillos, Lima.

54.9. At dawn, on July 9, 1992, a group of men and women stormed into the residence of María Elsa Chipana-Flores, where Mr. Santiago Gómez-Palomino had been living for about a fortnight, together with his common-law wife Esmila Liliana Conislla-Cárdenas and her son. The members of this group wore balaclavas over their faces, wore military boots and uniforms, carried flashlights and longarms (Light Automatic Rifles). They dragged Mr. Gómez-Palomino out of his room, battered and insulted him and asked him for names of persons, including one individual by the surname of Mendoza, who was supposed to be the owner of the house. Furthermore, they searched the whole property, tied up and gagged and threatened Mrs. Esmila Liliana Conislla-Cárdenas and Mrs. María Elsa Chipana-Flores with their guns. After searching the place, they withdrew taking Mr. Gómez-Palomino in a vehicle that was waiting outside the house, without showing a judicial warrant or administrative order or informing him of the reasons why he was being arrested or the place to which he was being taken.

54.10. After learning about such events, Mrs. Victoria Margarita Palomino-Buitrón started to look for her son in police facilities, judicial seats, hospitals and morgues without results. In her initial search, which lasted approximately one year, she was accompanied by her elder daughters and by Mrs. Conislla-Cárdenas (infra paras. 54.23 and 54.27).

54.11. On August 3, 1992, with the support of Mr. Francisco Soberón-Garrido, on behalf of Asociación Pro Derechos Humanos (APRODEH) (Pro Human Rights Association), Mrs. Victoria Margarita Palomino-Buitrón lodged a complaint about the forced disappearance of her son to the Fiscalía Suprema de Derechos Humanos (Office of the Supreme Prosecutor for Human

Rights) and to the Fiscalía General de la Nación (Office of the National Prosecutor General). However, she did not manage to obtain information on Mr. Gómez-Palomino's whereabouts.

54.12. A few days after filing the reports, on August 7, 1992, the Government passed Decree-Law No. 25,659, which barred issuing habeas corpus writs in connection with detainees, suspects or individuals involved with crimes of terrorism or high treason. This situation remained effective until November 25, 1993, when habeas corpus writs became available once more pursuant to Law No. 26,248.

54.13. The Séptima Fiscalía Provincial Penal de Lima (Office of the Provincial Criminal Prosecutor Number Seven) started an inquiry based on the complaint about the forced disappearance of Mr. Gómez-Palomino (supra para. 54.11). Mrs. Victoria Margarita Palomino-Buitrón was subpoenaed to appear in court and make her preliminary examination statement on June 11, 1993. There is no record of whether Mrs. Victoria Margarita Palomino-Buitrón actually appeared in court to make her statement. She remembers having gone to the Office of the Prosecutor on several occasions and always being told that she "should wait and come back" on the following day, so she decided to stop going there "for information". This inquiry did not yield any results.

54.14. In 2001, during the Government for the transition towards democracy of President Valentín Paniagua, investigation of the massacres (and other serious acts) attributed to the "Colina Group" were re-opened. Within the context of these investigations, a former member of the group, Mr. Julio Chuqui Aguirre, included, among the crimes committed by the unit, the disappearance of the "evangelist", whose description matched that of Mr. Santiago Gómez-Palomino.

54.15. These statements gave rise to an inquiry by the Fiscalía Provincial Especializada de Lima (Office of the Specialized Provincial Prosecutor of Lima). In the course of such inquiry, a statement was obtained from one of the members of the "Colina Group," collaborator 371-MCS, who had relied on the provisions of the law on efficient collaboration, wherein he told how the "evangelist" had been abducted and murdered, and he mentioned the possible location of the victim's remains. According to the preliminary examination statement made by collaborator 371-MCS on December 6, 2001, the "Colina Group" was responsible for the disappearance of Mr. Santiago Gómez-Palomino. In such statement, the deponent admitted his personal and direct involvement in the abduction and execution of the victim:

[o]ne day in the month of July or August of the year ninety-three (sic), I do not remember exactly, but it was at about 11 p.m. some members of the Colina Group, including Coral Coicochea, Chuqui Aguirre, Gamarra Mamani, José Alarcón, Ortíz Mantas, Sauñi Pomaya, Pretil Dámaso, Martín Rivas, Vera Navarrete, among others, using three motor vehicles, a cherry-colored van and a blue Toyota car, whose plate numbers I do not remember, drove out from the repair shop in Las Palmas, crossed the Human settlement called "Armatambo" and proceeded to the people's settlement called "Los Pescadores", where some weaponry had been allegedly buried, according to the collaborator who was traveling in one of the vehicles. When we were approaching our destination, there was a power failure, so we stopped to wait out the blackout. But after a couple of minutes or so, Major Martín Rivas told us to take advantage of the power

failure and to engage in the entry. When we reached the place, following the orders of Martín Rivas, we broke the door of the place open, and found nothing but a couple sleeping. After searching the place, we did not find any weapons. We stayed there for about twenty minutes, and then Major Martín Rivas told us to retreat and to take the male subject found inside the room with us, because —according to the collaborator— he should know something. Besides, the collaborator said that following the power cut, the other persons had gone out to find out what was happening with the electric power supply. Next, following the orders of Martín Rivas, we followed the route back to base, and on our way we interrogated the subject, but got no information at all, the only thing he said was that he was an evangelist and that he read the Bible. When we reached La Herradura beach, Major Martín Rivas told us to eliminate and bury the subject and “not to leave any loose ends,” so some of us left the group [...] got out of the vehicle and walked to La Chira beach, as Major Martín Rivas and the other members of the group went back to Las Palmas. After about half-an-hour walk with the subject, we reached our the above mentioned beach, where the subject was ordered to dig a hole in the sand, as he actually did, 1.20 meters deep approximately, and afterwards Gamarra Mamani shot him about three times, with the HK weapon Mamani was carrying; then Gamarra Mamani, Ortíz Mantas, Pretil Damaso, Alarcón, and Sauñi Pomaya buried him and we left the place [...]. [FN21]

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[FN21] Cf. testimony rendered before the Provincial Specialized Prosecutor’s Office, by collaborator 371-MCS, on December 6, 2001 (file with appendixes to the answer to the application, Appendix 2, pages 431-5).  
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54.16. The Fiscalía Provincial Especializada de Lima (Office of the Specialized Provincial Prosecutor of Lima) gathered other testimonies within the framework of this inquiry. Thus, Mrs. Victoria Margarita Palomino-Buitrón rendered her statement on April 30, 2002; Mr. Arcenio Antenor Gutiérrez-León, on July 19, 2002; Mrs. María Elsa Chipana-Flores, on May 20, 2002 and March 10, 2003; and Mrs. Esmila Liliana Conislla-Cárdenas, on January 20, 2003.

54.17. On December 11, 2002, Mrs. Victoria Margarita Palomino-Buitrón, supported by Asociación Pro Derechos Humanos (APRODEH) (Pro Human Rights Association), filed a complaint with the Fiscalía Provincial Especializada de Lima (Office of the Specialized Provincial Prosecutor of Lima) against Mr. Vladimiro Montesinos-Torres et al. on the alleged commission of the crimes of abduction and forced disappearance of her son Mr. Santiago Gómez-Palomino. In an resolution adopted on the same date, the Prosecutor ordered investigations instituted, referring the complaint to the División de Investigaciones Especiales de la Dirección contra el Terrorismo (Special Investigations Division of the Department of Counterterrorism).

54.18. Afterwards, the new prosecutor detailed to the investigations, Mrs. Ana Cecilia Magallanes, requested leave from the National Prosecutors Office to carry out the exhumation of the remains of alleged victims of the “Colina Group,” which included the body of Mr. Santiago Gómez-Palomino.

54.19. On November 12, 2003, Mrs. Victoria Margarita Palomino-Buitrón was notified by the Fiscalía Provincial Especializada de Lima (Office of the Specialized Provincial Prosecutor of Lima) that arrangements had been made to carry out excavation procedures in the area of La Chira beach in Chorrillos, where the body of Mr. Gómez-Palomino had been allegedly buried. On November 13 and 19, 2003, the excavation and exhumation procedures were actually performed over the specified area. However, the remains of Mr. Santiago Gómez-Palomino were not found.

54.20. The name Mr. Santiago Gómez-Palomino was included on the list of persons reported dead and disappeared by the Comisión de la Verdad y Reconciliación del Perú (Truth and Reconciliation Commission of Peru) in its final report of August 27, 2003. [FN22]

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[FN22] Cf. list of persons reported dead and disappeared by the Truth and Reconciliation Commission 1980-2000 in the Report by the Comisión de la Verdad y Reconciliación del Perú (Truth and Reconciliation Commission of Peru) signed on August 27 2003, in the city of Lima, Peru (file with appendixes to application, Appendix 17, pages 147-9).  
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d) Next of kin of Mr. Santiago Gómez-Palomino and the consequences suffered by them

54.21. Mr. Gómez-Palomino's mother is Mrs. Victoria Margarita Palomino-Buitrón; his father, Mr. Pascual Gómez-Mayo, [FN23] deceased on March 27, 1994, [FN24] had not had related much to him. [FN25] His brother and sisters are Mrs. María Dolores Gómez-Palomino, [FN26] Luzmila Sotelo-Palomino, [FN27] Emiliano Palomino-Buitrón, [FN28] Mónica Palomino-Buitrón, [FN29] Rosa Palomino-Buitrón [FN30] and Margarita Palomino-Buitrón. [FN31] His sister Mercedes Palomino-Buitrón died on April 5, 2003. [FN32] His daughter is Ana María Gómez-Guevara. [FN33]

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[FN23] Cf. Birth Certificate No. 5794 of Santiago Fortunato Gómez-Palomino, issued by the Birth Section of the Civil Status Registry of the Lima Provincial Council, on May 13, 1965 (file with appendixes to the application, Appendix2, page 39).

[FN24] Cf. Death Certificate No. A 159394 of Pascual Gómez-Mayo issued by the Civil Status Registry of the Municipality of Metropolitan Lima on September 7, 1994 (file with appendixes to the application, Appendix18, page 151).

[FN25] Cf. testimony rendered before an official whose acts command full faith and credit by Mrs. Victoria Margarita Palomino-Buitrón, on September 14, 2005 (file on the merits and possible reparation and costs, Volume II, pages 516 to 519), and expert witness report rendered before an official whose acts command full faith and credit by Mrs. María del Pilar Raffo-Lavalle de Quiñones on August 29, 2005 (file on the merits, reparations and costs, Volume II, pages 493 to 512).

[FN26] Cf. Birth Certificate of María Dolores Gómez-Palomino issued by the Civil Status Registry of the Cercado District of the Municipality of Metropolitan Lima on March 4, 1987 (file with appendixes to the application, Appendix 21, page 160).



[FN27] Cf. Birth Certificate No. 4248 of Luzmila Octavia Sotelo-Palomino issued by the Births Section of the Civil Status Registry of the Provincial Council in Lima, on May 21, 1968 (file with appendixes to the application, Appendix 22, page 164).

[FN28] Cf. Judicial Birth Certificate No. 49 of Emiliano Daniel Palomino-Buitrón issued by the Civil Status Registry in Chorrillos on February 4, 1988 (file with appendixes to the application, Appendix 23, page 168).

[FN29] Cf. Judicial Birth Certificate No. 50 of Mónica Benedicta Palomino-Buitrón issued by the Civil Status Registry in Chorrillos on February 4, 1988 (file with appendixes to the application, Appendix 24, page 172).

[FN30] Cf. Birth Certificate of Rosa Palomino-Buitrón issued by the Civil Status Registry of the Municipality of Chorrillos on August 11, 1995 (file with appendixes to the application, Appendix 25, page 177).

[FN31] Cf. Birth Certificate of Margarita Palomino-Buitrón issued by the Civil Status Registry of the Municipality of Chorrillos on August 11, 1995 (Appendix 26, page 180).

[FN32] Cf. Death Certificate of Mercedes Palomino-Buitrón issued by the Registry Office of Lima, District of San Juan de Miraflores On April 23, 2003 (file with appendixes to pleading of requests and arguments, Appendix 2, page 356).

[FN33] Cf. Birth Certificate No. 3901 of Ana María Gómez-Guevara issued by the Civil Status Registry of the Municipality of Metropolitan Lima on October 5, 1992 (file with appendixes to the application, Appendix 20, page 157).

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54.22. At the time of the events, Mr. Santiago Gómez-Palomino provided his family with a significant part of its financial support. [FN34] His forced disappearance had a seriously adverse impact on the financial position of Mrs. Victoria Margarita Palomino-Buitrón and his younger brother and sisters, Emiliano, Mercedes, Mónica, Rosa and Margarita Palomino-Buitrón, which caused them pecuniary damages. [FN35]

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[FN34] Cf. testimony rendered before an official whose acts command full faith and credit by Mrs. Victoria Margarita Palomino-Buitrón on September 14, 2005 (file on the merits, reparations and costs, Volume II, pages 516 to 519), and testimony rendered before an official whose acts command full faith and credit by Mrs. Esmila Liliana Conislla-Cárdenas on September 16, 2005 (file on the merits, reparations and costs, Volume II, pages 520 to 522).

[FN35] Cf. testimony rendered before an official whose acts command full faith and credit by Mrs. Victoria Margarita Palomino-Buitrón on September 14, 2005 (file on the merits, reparations and costs, Volume II, pages 516 to 519), and testimony rendered before an official whose acts command full faith and credit by Mrs. Esmila Liliana Conislla-Cárdenas on September 16, 2005 (file on the merits, reparations and costs, Volume II, pages 520 to 522).

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54.23. Likewise, the pecuniary damages caused by the forced disappearance of Mr. Gómez-Palomino affected in several ways the personal and professional development of his younger brother and sisters. Mr. Emiliano Palomino-Buitrón, who was then only seventeen years old, was not able to complete his high school studies, and Mrs. Mónica Palomino-Buitrón, who was then fourteen years old, had to drop out of school in order to accompany her mother in the search for

her missing brother and had to get a job. The youngest sisters of Mr. Santiago Gómez-Palomino—Rosa and Margarita Palomino-Buitrón—who were ten and seven years old at that time respectively, furthered their studies only up to their first year at high school. [FN36]

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[FN36] Cf. testimony rendered before an official whose acts command full faith and credit by Mrs. Victoria Margarita Palomino-Buitrón on September 14, 2005 (file on the merits, reparations and costs, Volume II, pages 516 to 519), and expert witness report rendered before an official whose acts command full faith and credit by Mrs. María del Pilar Raffo-Lavalle de Quiñones, on August 29, 2005 (file on the merits, reparations and costs, Volume II, pages 493 to 512).

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54.24. In spite of the extreme poverty affecting the family, three months after her son disappeared, Mrs. Victoria Margarita Palomino-Buitrón took care of her fifteen-day-old granddaughter, Ana María Gómez-Guevara, daughter to the late Mr. Santiago Gómez-Palomino and his former common-law wife, Mrs. Edisa Guevara-Díaz. [FN37]

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[FN37] Cf. testimony rendered before an official whose acts command full faith and credit by Mrs. Victoria Margarita Palomino-Buitrón on September 14, 2005 (file on the merits, reparations and costs, Volume II, pages 516 to 519).

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54.25. The next of kin of Mr. Santiago Gómez-Palomino have suffered emotionally and psychologically as a result of the forced disappearance occurred on July 9, 1992, and the impunity prevailing in the instant case, which has caused them non pecuniary damages. [FN38] The members of the family were exposed to a state of defenselessness, lack of support and absolute disregard by State authorities in the immediate search of Mr. Santiago Gómez-Palomino. The psychological impact of the disappearance of Mr. Gómez-Palomino could not be elaborated by the members of his family, who have been suffering this traumatic experience for over thirteen years. The family suffers from a generalized depression, which has been particularly revealed by the psychological and physical health condition of Mrs. Victoria Margarita Palomino-Buitrón and of Mrs. Mónica Palomino-Buitrón, who attempted suicide after the events. [FN39]

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[FN38] Cf. testimony rendered before an official whose acts command full faith and credit by Mrs. Victoria Margarita Palomino-Buitrón on September 14, 2005 (file on the merits, reparations and costs, Volume II, pages 516 to 519), and expert witness report rendered before an official whose acts command full faith and credit by Mrs. María del Pilar Raffo-Lavalle de Quiñones, on August 29, 2005 (file on the merits, reparations and costs, Volume II, pages 493 to 512).

[FN39] Cf. testimony rendered before an official whose acts command full faith and credit by Mrs. Victoria Margarita Palomino-Buitrón on September 14, 2005 (file on the merits, reparations and costs, Volume II, pages 516 to 519), and expert witness report rendered before an official whose acts command full faith and credit by Mrs. María del Pilar Raffo-Lavalle de Quiñones, on August 29, 2005 (file on the merits, reparations and costs, Volume II, pages 493 to 512).

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54.26. Ana María Gómez-Guevara's psychological and emotional development has been impaired by the forced disappearance of her father, which has caused her non pecuniary damages. [FN40]

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[FN40] Cf. testimony rendered before an official whose acts command full faith and credit by Mrs. Victoria Margarita Palomino-Buitrón on September 14, 2005 (file on the merits, reparations and costs, Volume II, pages 516 to 519), and expert witness report rendered before an official whose acts command full faith and credit by Mrs. María del Pilar Raffo-Lavalle de Quiñones, on August 29, 2005 (file on the merits, reparations and costs, Volume II, pages 493 to 512).

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54.27. Mrs. Esmila Liliana Conislla-Cárdenas has suffered from posttraumatic stress as a result of the events surrounding the forced disappearance of her partner, which she witnessed. She also joined Mr. Gómez-Palomino's mother and sisters in their pain and suffering, caused by the absolute lack of support and indifference shown by State authorities in the immediate search of him, and felt fear to carry on with said search as she might become the target of threats or attacks. All this has caused her non pecuniary damages. [FN41]

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[FN41] Cf. testimony rendered before an official whose acts command full faith and credit by Mrs. Esmila Liliana Conislla-Cárdenas on September 16, 2005 (file on the merits, reparations and costs, Volume II, pages 520-2), and expert witness report rendered before an official whose acts command full faith and credit by Mrs. María Pilar Raffo-Lavalle de Quiñones on August 29, 2005 (file on the merits, reparations and costs, Volume II, pages 493 to 512).

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e) Domestic legislation on forced disappearance of persons

54.28. Article 323 of the 1991 Peruvian Penal Code described the conduct punishable as forced disappearance of persons in the following terms:

Any public official or servant who deprives any person of their liberty by either ordering or carrying out actions for the disappearance of any such person shall be sentenced to no less than fifteen years' imprisonment and punished by disqualification. [FN42]

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[FN42] Cf. Article 323, Chapter II on Terrorism, Peruvian Penal Code, enacted on April 3, 1991 (file with appendixes to the answer to the application, Appendix 4, pages 447 and 448).

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54.29. On May 6, 1992, within the framework of the new anti-terrorism legislation adopted in Peru during the administration of President Alberto Fujimori, Decree-Law No. 25.475 was

passed, wherein Article 22 expressly abrogated, among others, Article 323 of the Peruvian Penal Code [FN43] (supra para. 54.28).

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[FN43] Cf. Article 22, Decree-Law No. 25,475 of May 6, 1992 (file with appendixes to the answer to the application, Appendix 5, page 450).

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54.30. Later, on July 2, 1992, a few days before Mr. Gómez-Palomino was abducted, Decree-Law No. 25.592 was promulgated, wherein the crime of forced disappearance of persons was reinstated in the following terms:

Article 1: Any public official or servant who deprives any person of their liberty by either ordering or carrying out actions leading to the duly proven disappearance of any such person, shall be punished by imprisonment for not less than fifteen years and disqualification from office, pursuant to Article 36(1) and (2) of the Criminal Code. [FN44]

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[FN44] Cf. Article 1, Decree-Law No. 25,592 of July 2, 1992 (file with appendixes to the answer to the application, Appendix 6, page 452).

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54.31. On February 21, 1998, Decree-Law No. 25,592 was repealed by Law No. 26,926, which incorporated Title XIV-A concerning “Crimes against Humanity” to the Penal Code. Article 320 of said law describes the crime of forced disappearance. [FN45] The aforementioned Article 320 of the Penal Code, still effective in Peru as of the date hereof, uses the same conduct description as Decree-Law No. 25,529, Article 1 (supra para. 54.30).

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[FN45] Cf. Article 320, Law No. 26,926 of February 21 1998.

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54.32. Law No. 27.837 entered in force on October 4, 2002, creating the Comisión Especial Revisora del Código Penal (Penal Code Special Review Commission) in order for this Commission to “review the text of the Penal Code, as modified, and its conformity with the crimes established under the Rome Statute of the International Criminal Court, ratified by Peru, and under other international instruments, for the purpose of preparing a ‘Draft Bill for the Reform of the Penal Code’ regarding such articles as it may be deemed pertinent to modify. To that effect, the Commission shall have powers to coordinate efforts with any sector, institution or person interested in communicating their opinions and suggestions.” [FN46] Article 2 of the above mentioned law granted a one-year term, as from the day after publication of said law in the Official Gazette “El Peruano”, for the Special Review Commission to complete the task assigned to it. [FN47] However, as of the date of the instant Judgment, said Article 320 of the Penal Code has not been modified.

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[FN46] Cf. Article 1, Law No. 27,837 of October 3, 2002, creating the Penal Code Special Review Commission (file with appendixes to the answer to the application, Appendix 8, page 465).

[FN47] Cf. Article 2, Law No. 27,837 of October 3, 2002, creating the Penal Code Special Review Commission (file with appendixes to the answer to the application, Appendix 8, page 465).

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f) Representation before domestic jurisdiction and the Inter-American System of Protection of Human Rights.

54.33 The next of kin of Mr. Santiago Gómez-Palomino were represented by Asociación Pro Derechos Humanos (APRODEH) (Pro Human Rights Association) in some judicial actions and proceedings undertaken before State authorities in order to determine the victim's whereabouts, investigate the facts and identify, try and punish those responsible [FN48] (supra para. 54.17 and 54.11). Likewise, Asociación Pro Derechos Humanos (APRODEH) (Pro Human Rights Association) was retained by the victim's next of kin as representative before the Inter-American system for the protection of human rights. [FN49]

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[FN48] Cf. submission filed by Asociación Pro Derechos Humanos (APRODEH) (Pro Human Rights Association) and Mrs. Victoria Margarita Palomino-Buitrón with the Office of the Supreme Prosecutor for Human Rights on July 30, 1992 (file with appendixes to the application, Appendix 4, page 45), and submission fled by Asociación Pro Derechos Humanos (APRODEH) (Pro Human Rights Association) and by Mrs. Victoria Margarita Palomino-Buitrón with the Office of the National Prosecutor on July 30, 1992 (file with appendixes to the application, Appendix 5, page 47).

[FN49] Cf. power-of-attorney granted by Mrs. Victoria Margarita Palomino-Buitrón for Asociación Pro Derechos Humanos (APRODEH) (Pro Human Rights Association) to act in her name, place and stead in connection with the proceedings instituted before the Inter-American system of protection of human rights (file with appendixes to the application, Appendix 19, pages 153 and 154); power-of-attorney granted by Mrs. Victoria Margarita Palomino-Buitrón on behalf of the minor child Ana María Gómez-Guevara for Asociación Pro Derechos Humanos (APRODEH) (Pro Human Rights Association) to act in her name place and stead in connection with the proceedings instituted before the Inter-American system of protection of human rights (file with appendixes to the application, Appendix 20, pages 157 to 159); power-of-attorney granted by Mrs. María Dolores Gómez-Palomino for Asociación Pro Derechos Humanos (APRODEH) (Pro Human Rights Association) to act in her name place and stead in connection with the proceedings instituted before the Inter-American system of protection of human rights (file with appendixes to the application, Appendix 21, pages 161 to 169); power-of-attorney granted by Mrs. Luzmila Octavia Sotelo-Palomino for Asociación Pro Derechos Humanos (APRODEH) (Pro Human Rights Association) to act in her name place and stead in connection with the proceedings instituted before the Inter-American system of protection of human rights (file with appendixes to the application, Appendix 22, pages 163 to 164); power-of-attorney granted by Mr. Emiliano Palomino-Buitrón for Asociación Pro Derechos Humanos (APRODEH) (Pro Human Rights Association) to act in his name place and stead in connection with the

proceedings instituted before the Inter-American system of protection of human rights (file with appendixes to the application, Appendix 23, pages 168 to 171); power-of-attorney granted by Mrs. Mónica Benedicta Palomino-Buitrón for Asociación Pro Derechos Humanos (APRODEH) (Pro Human Rights Association) to act in her name place and stead in connection with the proceedings instituted before the Inter-American system of protection of human rights (file with appendixes to the application, Appendix 24, pages 172 to 175); power-of-attorney granted by Mrs. Rosa Palomino-Buitrón for Asociación Pro Derechos Humanos (APRODEH) (Pro Human Rights Association) to act in her name place and stead in connection with the proceedings instituted before the Inter-American system of protection of human rights (file with appendixes to the application, Appendix 25, pages 177 to 179); power-of-attorney granted by Mrs. Margarita Palomino-Buitrón for Asociación Pro Derechos Humanos (APRODEH) (Pro Human Rights Association) to act in her name place and stead in connection with the proceedings instituted before the Inter-American system of protection of human rights (file with appendixes to the application, Appendix 26, pages 181 to 183).

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#### VIII. VIOLATION OF ARTICLE 5 OF THE AMERICAN CONVENTION (RIGHT TO HUMANE TREATMENT) IN RELATION TO ARTICLE 1(1) THEREOF WITH RESPECT TO THE VICTIM'S NEXT OF KIN

55. The Commission did not allege the violation of Article 5 of the American Convention to the detriment of Mr. Santiago Gómez-Palomino's sisters and brother.

##### Arguments by the representatives

56. In relation to the alleged violation of Article 5 of the American Convention to the detriment of the victim's sisters and brother, the representatives stated that:

- a) the term "victim's next of kin" should be understood in a broad sense encompassing the children, parents and siblings of the victim;
- b) although the State has acknowledged the violation of Article 5 of the Convention to the detriment of the mother, daughter and partner of Mr. Santiago Gómez-Palomino, referring to them as "close relatives", it has not acquiesced in the violation of said Article to the detriment of the brother and sisters of the victim, which conflicts with the position held by the Inter-American Court in the sense that it is reasonable to conclude that the suffering inflicted on the victim extends to the closest members of the family, particularly those who were deeply involved in their affections, and that there is no need to provide evidence in support of such conclusion.
- c) thus, the pain inflicted on the brother and sisters of Mr. Santiago Gómez-Palomino is presumed, the burden of proof in rebuttal of such presumption being consequently shifted to the State.

##### Arguments by the State

57. The State alleged that, in the case of the victim's sisters and brother, it was necessary to prove the extent of the damages and of the consequences suffered as a result of Mr. Gómez-Palomino's disappearance.

## Considerations of the Court

58. Article 5(1) of the Convention sets forth that:

[E]very person has the right to have his physical, mental, and moral integrity respected.

59. Before embarking on the analysis of the alleged violation of Article 5 of the American Convention, it is necessary to point out that although the Inter-American Commission did not allege the violation of this Article to the detriment of Mr. Gómez-Palomino's sisters and brother, the Court has held that alleged victims, their next of kin or their representatives may invoke different rights from those included in the application filed by the Commission, based on the facts presented by the latter. [FN50]

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[FN50] Cf. Case of the Girls Yean and Bosico, *supra* note 9, para. 181; Case of Yatama, *supra* note 8, para. 183; and Case of De La Cruz-Flores. Judgment of November 18, 2004. Series C No. 115, para. 122.

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60. This Court has asserted on several occasions [FN51] that the next of kin of the victims of human rights violations may, in turn, be victims. In this line of reasoning, the Court has considered that the mental and moral integrity of the victims' next of kin has been violated in light of the additional suffering experienced as a result of the specific circumstances surrounding the violations committed against their loved ones and of the subsequent acts or omissions by State authorities with respect to the incidents at issue here. [FN52]

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[FN51] Cf. Case of the "Mapiripán Massacre", *supra* note 1, paras. 144 and 146; Case of the Serrano-Cruz sisters. Judgment of March 1, 2005. Series C No. 120, paras. 113 and 114; and Case of 19 Tradesmen. Judgment of July 5, 2004. Series C No. 109, para. 210.

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[FN52] Cf. Case of the "Mapiripán Massacre", *supra* note 1, para. 144 and 146; Case of the Serrano-Cruz sisters, *supra* note 51, paras. 113 and 114; and Case of 19 Tradesmen, *supra* note 51, para. 210.

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61. In cases involving the forced disappearance of persons, the Court has stated that the violation of the mental and moral integrity of the next of kin is, precisely, a direct consequence of such forced disappearance, [FN53] which inflicts upon them great suffering, compounded by the constant refusal of State authorities to provide information about the victim's whereabouts or to conduct an effective investigation into the facts of the case.

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[FN53] Cf. Case of 19 Tradesmen, *supra* note 51, para. 211; Case of Bámaca-Velásquez. Judgment of November 25, 2000. Series C No. 70, para. 160; and Case of Blake. Judgment of January 24, 1998. Series C No. 36, para. 114.

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62. Taking into account its case law, the Inter-American Court admitted the acknowledgment of international responsibility made by the State in the instant case (*supra* paras. 12, 14, and 30), with respect to the violation of the right to humane treatment, enshrined in Article 5 of the American Convention, to the detriment of Mrs. Victoria Margarita Palomino-Buitrón, Esmila Liliana Conislla-Cárdenas and the girl Ana María Gómez-Guevara.

63. The Court appreciates the State's acknowledgment of the intense suffering endured for over thirteen years, especially by Mrs. Victoria Margarita Palomino-Buitrón, as a result of her son's forced disappearance and the subsequent denial of justice, which made it impossible to determine his whereabouts, all of which this Court has been able to establish on the basis of the evidence introduced in the instant case (*supra* para. 54.21).

64. There being no acknowledgment of responsibility by the State for the violation of Article 5 of the American Convention to the detriment of Mr. Gómez-Palomino's sisters and brother: María Dolores Gómez-Palomino, Luzmila Sotelo-Palomino, and Emiliano, Mónica, Mercedes, Rosa and Margarita Palomino-Buitrón, the Court must now decide whether these persons have been victims of said violation.

65. From the facts presented in the instant case, the Court notices that Mr. Santiago Gómez-Palomino's sisters and brother had a close bond of affection with him, and that he, on the other hand, had stood in a paternal role towards his younger sisters and brother (*supra* para. 48(c)). According to the report rendered by expert María del Pilar Raffo-Lavalle de Quiñones

Santiago was the eldest son of [Victoria] Margarita, who provided support for the family group, not only in financial terms [...]. He lived with his mother and younger siblings Emiliano, Mónica, Mercedes, Rosa and Margarita and played a paternal role in the family. With the children born from three different and absent fathers, this family was in an irregular situation. In the absence of a real, active, and protective father, the eldest brother had taken on this role.

66. Furthermore, in her statement before an official whose acts command full faith and credit (*supra* para. 48(a)), Mrs. Victoria Margarita Palomino-Buitrón said that:

she ha[s] looked for [his] son for thirteen years...[her] daughters, Dolores, Luzmila and Mónica have helped her in her search; Emiliano could not help because he was on military service; on the weekends he came to visit [her], he just cried, and [her] daughters, also crying, would tell him 'Santi does not come back'. [Her] children grieve over the loss of the love of Santiago to this day; they love him, he was like a father to them, he cared about them.

67. The Court finds that Mr. Gómez-Palomino's sisters and brother have endured intense suffering to the detriment of their mental and moral integrity as a result of their brother's forced disappearance and the circumstances related to it, such as the search they carried out in hospitals,



local police stations, detention centers and morgues, hoping to find him alive; the indifference and lack of information or support from government authorities in such search for the victim; the impossibility of giving their brother a decent burial according to their customs, as well as the inordinate delay in the investigation and possible punishment of those responsible for his disappearance, the effect of which is the impunity still attending the instant case (supra para. 54.25). Peru has failed to provide any worthy evidence to contradict these facts.

68. Based on the foregoing and in accordance with its case law, [FN54] the Court finds that the State violated the right to humane treatment enshrined in Article 5(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Gómez-Palomino's sisters and brother: María Dolores Gómez-Palomino, Luzmila Sotelo-Palomino, Emiliano, Mónica, Mercedes, Rosa and Margarita Palomino-Buitrón.

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[FN54] Cf. Case of the Serrano-Cruz sisters, supra note 51, paras. 113 and 114; and Case of 19 Tradesmen, supra note 51, para. 211; and Case of Molina-Theissen. Judgment of May 4, 2004, para. 44.

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#### IX. VIOLATION OF ARTICLES 8 AND 25 OF THE AMERICAN CONVENTION (RIGHTS TO A FAIR TRIAL AND JUDICIAL PROTECTION) IN RELATION TO ARTICLE 1(1) THEREOF

##### Arguments by the Commission

69. In relation to Articles 8 and 25 of the American Convention, the Commission alleged that:

- a) the State violated the rights to a fair trial and judicial protection of Mr. Santiago Gómez-Palomino and of his next of kin due to the lack of effectiveness of the remedy of habeas corpus at the time the victim was illegally detained, and because the State failed to conduct a proper investigation and court proceedings within a reasonable time to punish those responsible for the victim's forced disappearance;
- b) the lack of effectiveness of the remedy of habeas corpus and of the judicial investigation was acknowledged by the State within a specific time frame, including only the events occurred before the democratic transition. This time limit does not excuse the Court from examining all the judicial proceedings in order to have a comprehensive idea of them and to determine whether such proceedings are contrary to the standards regarding the rights to a fair trial and judicial protection as well as the right to an effective remedy;
- c) more than thirteen years after the events giving rise to the victim's forced disappearance, the investigation is still pending, currently before the Fiscalía Provincial Especializada en Delitos contra los Derechos Humanos (Special Provincial Office of the Prosecutor for Human Rights Crimes). Therefore, the case has not been referred to a court of competent jurisdiction in order to commence the relevant criminal proceedings;
- d) the findings obtained during the investigation, when it was reopened in 2002, should have set the course of the investigations and, for example —deploying a minimum of diligence—, the

statements of the persons implicated by collaborator 371-MCS as the instigators and actual perpetrators of the forced disappearance, torture and extrajudicial execution of the victim should have been taken. Nothing on the records of the case indicates that any action to such effect has been taken by the State;

e) although investigations of cases involving forced disappearance may be complex, the delays in the instant case do not stem from the complexity of the case but from the lack of action by the Office of the Prosecutor that is still unexplained;

f) the delays in performing the excavations in order to search for the remains of Mr. Gómez-Palomino caused by the lack of authorization by the Peruvian Public Prosecutor, or the halt to the investigation due to the replacement of the Human Rights Prosecutor are indicative of the State's failure to conduct a serious, impartial and effective investigation through its competent organs; and

g) after thirteen years of Mr. Gómez-Palomino's forced disappearance, the investigation of the facts is still at a preliminary stage and the State has not compensated his next of kin or identified the perpetrators.

#### Argument by the representatives

70. In relation to Articles 8 and 25 of the American Convention, the representatives have adhered to the allegations made by the Commission in its application. In this regard, they stated that Mr. Santiago Gómez-Palomino's relatives contacted the Office of the Attorney General to open an investigation and find the victim's whereabouts and, despite the time elapsed, no proceedings have been instituted against those responsible for his forced disappearance.

#### Arguments by the State

71. In relation to Articles 8 and 25 of the American Convention, the State alleged that the violations of the rights to a fair trial and judicial protection took place from the date the event was committed up to the time of transition towards democracy, for it was only from November, 2000 on that the conditions of freedom and institutional independence of the Office of the Public Prosecutor and of the Judiciary were given so that the jurisdictional authorities could act free from pressure and interference by the political powers. With respect to the investigation that was reopened by the Office of the Prosecutor in 2002, the State indicated that it is necessary to bear in mind that investigations into crimes against humanity, including forced disappearance, are of a complex nature, which explains for the delays in the investigations conducted in relation to the instant case, and that such delays were not the result of lack of willingness to investigate, prosecute, and punish the perpetrators.

#### Considerations of the Court

72. Article 8(1) of the American Convention sets forth that:

[E]very 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.

73. Article 25 of the Convention provides 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.
2. The State Parties undertake:
  - a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
  - b. to develop the possibilities of judicial remedy; and
  - c. to ensure that the competent authorities shall enforce such remedies when granted.

74. This Court has decided to accept the State's partial acknowledgement of international responsibility regarding the violation of the rights to a fair trial and judicial protection enshrined in Articles 8 and 25 of the American Convention. Said acknowledgment only covers those violations committed "from the date the event was committed up to the time of transition [towards] democracy," (supra paras. 30 and 38). Thus, as represented by Peru, "from November, 2000 on that the conditions of freedom and institutional independence of the were given so that the jurisdictional authorities could act free from pressure and interference by the political powers." Therefore, after said date no violation of the aforementioned Articles of the American Convention would have been committed in the instant case (supra para. 30).

75. The Commission alleged, however, that the investigation into Mr. Santiago Gómez-Palomino's forced disappearance has been characterized by "a lack of action by the Office of the Prosecutor that is still unexplained," inasmuch as over thirteen years after the victim's forced disappearance "the only steps taken by [the State] have been to receive the statements by Mr. Gómez-Palomino's mother, common-law wife, cousin and neighbor —only in mid-2000 and early 2003— in addition to the collaborator's [371-MCS-] statement and the performance of an unsuccessful excavation operation" (supra para. 69). Both the Commission and the representatives pointed out that, to this day, the criminal investigation is still at the preliminary stage; therefore, Mr. Gómez-Palomino's forced disappearance continues to be marked by impunity.

76. On several occasions, the Court has indicated that the State has a duty to prevent and combat impunity and has described the characteristics of such duty, [FN55] in relation to human rights violations such as those involving the forced disappearance of persons. In this regard, the Court has pointed out that:

[...]the State is obliged to combat such a situation by all available legal means, as impunity fosters the chronic repetition of human rights violations and renders victims and their next of kin completely defenseless. [FN56]

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[FN55] Cf. Case of the "Mapiripán Massacre", supra note 1, para. 237; Case of Moiwana Community, supra note 3, para. 203; and Case of Huilca-Tecse, supra note 3, para. 82.

[FN56] Cf. Case of the “Mapiripán Massacre”, supra note 1, para. 237; Case of Moiwana Community, supra note 3, para. 203; and Case of Huilca-Tecse, supra note 3, para. 82.

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77. In addition, the Inter-American Court has reaffirmed that the duty to investigate must be undertaken “in a serious manner rather than as a mere formality destined beforehand to be fruitless.” [FN57] The investigation conducted by the State in pursuance of this obligation “[m]ust have an objective and be assumed by [the State] as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the Government.” [FN58]

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[FN57] Cf. Case of the “Mapiripán Massacre”, supra note 1, para. 223; Case of Moiwana Community, supra note 3, para. 146; and Case of the Serrano-Cruz sisters, supra note 51, para. 61.

[FN58] Cf. Case of the “Mapiripán Massacre”, supra note 1, para. 219; Case of Moiwana Community, supra note 3, para. 146; and Case of the Serrano-Cruz sisters, supra note 51, para. 61.

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78. The Court has repeatedly stated that the family members of victims of serious human rights violations, have the right to know the truth about such violations. This right to the truth, once recognized and exercised in a specific situation, it constitutes an important means of reparation for victims and their next of kin and creates an expectation that the State must fulfill. On the other hand, knowing the truth enables Peruvian society to explore possible avenues to prevent this type of violations in the future. [FN59]

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[FN59] Cf. Case of the “Mapiripán Massacre”, supra note 1, para. 297; Case of Moiwana Community, supra note 3, para. 203 and 204; and Case of 19 Tradesmen, supra note 51, para. 259.

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79. Therefore, the victims’ next of kin have the right —and the State has the duty— to have what happened to them effectively investigated by government authorities, that the alleged perpetrators be prosecuted and, if applicable, punished as due, and that the damages sustained by such next of kin be redressed. [FN60]

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[FN60] Cf. Case of Moiwana Community, supra note 3, para. 205; Case of the Serrano-Cruz sisters, supra note 51, para. 64; and Case of 19 Tradesmen, supra note 51, para. 187.

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80. In response to Mr. Santiago Gómez-Palomino’s forced disappearance, the first remedy the State should have afforded was an effective investigation and judicial proceedings leading to discovery of the facts, punishment of those responsible and appropriate compensation. This

Court has established that the investigation States must initiate is to be undertaken ex officio, without delay and with due diligence, [FN61] which means that the investigating body must take, within a reasonable time, all such steps as may be necessary to, at least, ascertain the facts.

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[FN61] Cf. Case of the “Mapiripán Massacre”, supra note 1, para. 223; Case of Moiwana Community, supra note 3, para. 145; and Case of the Serrano-Cruz sisters, supra note 51, para. 65.  
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81. The State recognized that it failed to initiate an effective investigation as soon as Mr. Gomez-Palomino’s forced disappearance was reported, in violation of the obligation arising from Articles 8 and 25 of the American Convention (supra para. 71). Peru claimed that this state of affairs prevailed only until the commencement of the transition towards democracy (supra para. 71). However, according to the body of evidence and the acquiescence to the facts by the State (supra para. 30), the Court notices with great concern the very limited steps taken by the State since 2002, when the investigation was reopened by the Office of the Attorney General, to date.

82. The Court finds that it has been established (supra paras. 54.14 to 54.16 and 54.19) that, in 2001, the Fiscalía Provincial Especializada de Lima (Specialized Provincial Office of the Prosecutor of Lima) was ordered to reopen the investigation into Mr. Gómez-Palomino’s forced disappearance. In the course of said investigation the statement of one of the members of the “Colina Group” was taken, who deposed about the manner in which Mr. Gómez-Palomino was arrested and murdered, as well as about the possible location of his remains. Likewise, statements by Mrs. Victoria Margarita Palomino-Buitrón, Mrs. María Elsa Chipana-Flores, and Mrs. Esmila Liliana Conislla-Cárdenas and by Mr. Arcenio Antenor Gutiérrez-León were also received. The prosecutrix appointed to the investigation requested authorization from the National Public Prosecutrix to conduct excavations and to perform the exhumation of Mr. Santiago Gómez-Palomino’s remains, which were finally carried out on November 13 and 19, 2003 near La Chira beach in Chorrillos, approximately one year after the initial request. However, Mr. Santiago Gómez-Palomino’s remains were not found.

83. Likewise, it has been held as established that, on December 11, 2002, Mrs. Victoria Margarita Palomino-Buitrón filed a criminal complaint with the Fiscalía Provincial Especializada (Specialized Provincial Office of the Prosecutor) against Mr. Vladimiro Montesinos-Torres et al. for the alleged abduction and forced disappearance of her son, Mr. Santiago Gómez-Palomino, which was referred to the División de Investigaciones Especiales de la Dirección contra el Terrorismo (Special Investigations Division of the Department of Counterterrorism) (supra para. 54.17).

84. In the instant case, the documentation regarding the current status of the investigations or other proceedings conducted as part of them, other than those already established, has not been made available to the Court although such information was requested from the State and the representatives as evidence to facilitate adjudication of the case, pursuant to Article 45(2) of the Rules of Procedure (supra para. 17). In this regard, the Court recalls that it must have all the information regarding proceedings, in order to be able to conduct a thorough examination of all

domestic judicial proceedings as a whole, to reach a complete view thereof and to determine whether such proceedings are contrary to the standards regarding the rights to a fair trial, to judicial protection and to an effective remedy, enshrined in Articles 8 and 25 of the Convention. [FN62] Since the State has failed to provide evidence of any other steps taken over these past years as part of the investigation into Mr. Gómez-Palomino's forced disappearance, in support of its defense arguments, this Court finds that those before it are the only steps and inquiries undertaken by the State in the instant case, based on the proven facts (*supra* paras. 54.14 to 54.19) and the allegations made by the Commission and the representatives.

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[FN62] Cf. Case of the "Mapiripán Massacre", *supra* note 1, para. 198; Case of Moiwana Community, *supra* note 3, para. 143; and Case of the Serrano-Cruz sisters, *supra* note 51, paras. 57 and 58.

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85. Therefore, the Court finds that the investigation undertaken by the Fiscalía Provincial Especializada de Lima (Specialized Provincial Office of the Prosecutor of Lima) has not been conducted in a duly diligent manner so as to lead to discover the facts, to determine the location of the victim's remains and to prosecute those responsible for his forced disappearance, for which reasons it may not be deemed effective in terms of the Convention. Furthermore, the deficiencies in the investigation that occurred right after Mr. Gómez-Palomino's forced disappearance and that have been accepted as such by the State may hardly be cured by the belated and insufficient evidence gathering activities the State has carried out since 2002. Proof of that is the fact that thirteen years after the events that gave rise to the instant case and five years after the restoration of democracy in Peru, the investigation has not gone beyond its preliminary stage. Finally, this Court finds that such excessive delay amounts in itself to a violation of the right to a fair trial, [FN63] for which the State has failed to provide any justification.

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[FN63] Cf. Case of Moiwana Community, *supra* note 3, para. 160; Case of the Serrano-Cruz sisters, *supra* note 51, para. 69; and Case of Ricardo Canese. Judgment of August 31, 2004. Series C No. 111, para. 142.

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86. Based on the foregoing, the Inter-American Court finds that the State violated the rights enshrined in Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Santiago Gómez-Palomino, Mrs. Victoria Margarita Palomino-Buitrón, Mrs. Esmila Liliana Conislla-Cárdenas, Mrs. María Dolores Gómez-Palomino, Mrs. Luzmila Sotelo-Palomino, and Emiliano, Mónica, Mercedes, Rosa and Margarita Palomino-Buitrón and the girl Ana María Gómez-Guevara.

X. VIOLATION OF ARTICLE 2 OF THE AMERICAN CONVENTION (DOMESTIC LEGAL EFFECTS) AND I OF THE INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCE

### Arguments by the Commission

87. As regards Article 2 of the American Convention and Article I of the Inter-American Convention on Forced Disappearance, the Commission stated that:

a) the definition of forced disappearance under Article 320 of the Criminal Code requires that the crime be “duly proven.” Such requirement is foreign to the structure of the definition of a crime; it baffles construction at the time of determining the conduct of the alleged perpetrator at the respective stage of the criminal proceedings —commencement of investigation proceedings, custody pending trial, indictment— or when assessing the criminal liability at the time of sentencing. It makes it very difficult to determine whether the conduct meets the statutory definition of the crime insofar as the criminal provision requires a certain standard of proof as a condition precedent to the prosecution of crimes that typically leave no trace or evidence of the disappearance. Furthermore, it worsens the situation of the victim’s next of kin, who do not have the charge or duty to investigate the facts themselves and to duly establish the manner in which they occurred, or to identify the perpetrators, in order to set the State judicial system in motion, and

b) the description laid out in Article 320 includes only “public officials” as offenders, excluding private individuals who act with the support or acquiescence of the State, such as the paramilitary, the parapolice, or the private justice groups that operate with the complicity of State agents. In order to be consistent with international standards, this Article must be amended to include both government officials and non-government agents as possible offenders. Said obligation is embodied in Article 2 of the American Convention and in Article I of the Inter-American Convention on Forced Disappearance.

### Arguments by the representatives

88. The representatives stated that the Peruvian State has not complied with the obligations set out in Article 2 of the American Convention and in Article I of the Inter-American Convention on Forced Disappearance inasmuch as it failed to have Article 320 of the Criminal Code in force in Peru meet the standards set in the aforementioned conventions, in relation to the statutory definition of forced disappearance and the appropriate punishment of those responsible.  
Arguments by the State

89. In this regard, the State alleged the following:

a) the issues raised by the Commission regarding the difficulties posed by the expression “duly proven” included in the statutory definition of the crime under consideration, do not generate much controversy. Basically, because any condition or requirement regarding proof of the disappearance is foreign to the statutory description provided by the lawmaker. Otherwise, we would no longer be talking only about the occurrence of “forced disappearance” but about its concurrence with other criminal acts such as second-degree or first-degree murder (according to the concurrent circumstances);

b) what really matters, for the purposes of the classification of the act, is whether there has been an illegal deprivation of freedom of movement or transit and that such deprivation has been caused by a public official or servant. Apparently, this would amount to abduction, but it differs

from it in that forced disappearance also entails the refusal of information regarding the victim's detention or whereabouts;

c) in sum, according to the language used in the definition of forced disappearance under Article 320 of the Criminal Code there is no impediment or obstacle to the investigation or prosecution of an act that may be considered and punished as forced disappearance;

d) on October 4, 2002, the State created, by means of Law No. 27,837, the Comisión Especial Revisora del Código Penal (Special Commission for the Review of the Criminal Code) to review the text of the Criminal Code and to adapt its provisions to international standards. In April 2004, said Special Commission presented the citizenry with the "Anteproyecto de la Parte General del Código Penal" (Draft Bill on the General Provisions of the Criminal Code), which clearly includes a series of amendments resulting from the developments in case law and legislation on the matter as well as in domestic and international jurisprudence, and

e) the Special Commission is now debating a proposal to adapt legislation to the Rome Statute, specifically regarding forced disappearance of persons. The objections raised by the Inter-American Commission are no longer applicable to the language of the new Article, in other words, the objective element of a "duly proven" disappearance is no longer part of the statutory definition, if such difficulty were to be still at issue. Moreover, the new Article includes as a possible offender any person who, not being a public official or servant, commits —with the consent or acquiescence of the latter— the illegal act of forced disappearance.

#### Considerations of the Court

90. Article 2 of the American Convention sets forth that:

[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.

91. The general obligation imposed upon States to adapt domestic laws to the provisions of the American Convention in order to guarantee the rights enshrined therein includes the adoption of laws and the development of practices leading to the effective enforcement of said rights and freedoms, as well as the adoption of the necessary measures to abolish any laws and practices that entail a violation of the guarantees embodied in the Convention. [FN64] This general obligation by States Parties implies that domestic law measures must be effective (effet utile principle) and to this end the State must act in conformity with the protection provisions of the Convention. [FN65]

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[FN64] Cf. Case of Yatama, supra note 8, para. 170; Case of Caesar. Judgment of March 11, 2005. Series C No. 123, para. 91; and Case of Lori Berenson-Mejía. Judgment of November 25, 2004. Series C No. 119, para. 219.

[FN65] Cf. Case of Yatama, supra note 8, para. 170; Case of Lori Berenson-Mejía, supra note 64, para. 220; and Case of the "Juvenile Reeducation Institute" v. Paraguay. Judgment of September 2, 2004. Series C No. 112, para. 205.

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92. In relation to the forced disappearance of persons, the duty to adapt domestic law to the provisions of the American Convention, pursuant to Article 2, is of paramount importance in order to effectively eradicate this practice. Considering how particularly serious forced disappearance of persons is, [FN66] the protection afforded by existing criminal laws regarding manstealing or abduction, torture, and murder, among others, is not sufficient. [FN67] Forced disappearance of persons is a distinct phenomenon characterized by constant and multiple violations of several rights enshrined in the Convention insofar as it not only involves the arbitrary deprivation of liberty, but also violates the detained person's integrity and security, threatens his life, leaving him completely defenseless, and involves other related crimes as well.

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[FN66] In accordance with the Preamble of the Inter-American Convention on Forced Disappearance of Persons, forced disappearance "i[s] an affront to the conscience of the Hemisphere and a grave and abominable offense against the inherent dignity of the human being" and its systematic practice "constitutes a crime against humanity."

[FN67] Cf. United Nations Economic and Social Council. Report of the Working Group on Enforced or Involuntary Disappearances. General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance of January 15, 1996. (E/CN. 4/1996/38), para. 54.

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93. The State has recognized that Mr. Santiago Gómez-Palomino was arrested by government officials, that no information was given regarding his whereabouts, that he was executed and that his remains are missing to this day. Consequently, the State acknowledged its responsibility for the violation of Articles 4, 5, and 7 of the American Convention to the detriment of Mr. Gómez-Palomino, something which was admitted by the Court (*supra* paras. 35 and 36).

94. In relation to the phenomenon of forced disappearance, the Court considers that it must examine not only the possible violations of the American Convention, but also those that may have taken place in respect of the Inter-American Convention on Forced Disappearance given that, among other things, this latter Convention provides for the means to protect the human rights that are violated by the perpetration of this type of acts.

95. Article I of the Inter-American Convention on Forced Disappearance sets forth that "[t]he States Parties to [said] Convention undertake:

- a) Not to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees;
- b) To punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories;
- c) To cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons, and
- d) To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention."

96. This means that the States must ensure that the crime of forced disappearance is defined in their criminal codes or statutes. Such definition is to be enacted taking into account Article II of the aforesaid Convention, wherein the elements the domestic statutory definition of said crime must include are listed. The Article in question provides that forced disappearance is to be considered as:

the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

97. In a similar fashion, the United Nations Working Group on Enforced or Involuntary Disappearances has indicated that States are to incorporate into the statutory definition of forced disappearance the following cumulative minimum elements, embodied in the Declaration on the Protection of All Persons from Enforced Disappearance: a) deprivation of liberty against the will of the person concerned; b) involvement of governmental officials, at least indirectly by acquiescence, and c) refusal to acknowledge the deprivation of liberty and to disclose the fate and whereabouts of the person concerned. [FN68] The same elements may be found in the definition of enforced disappearance of persons under Article 2 of the Final Draft of the International Convention for the Protection of All Persons from Enforced Disappearance, adopted on September 23, 2005 by the United Nations Working Group responsible for the preparation of a legally binding draft normative instrument for the protection of all persons from enforced disappearance. [FN69] Finally, they are also listed in the definition under Article 7 of the Statute of the International Criminal Court, [FN70] ratified by Peru on November 10, 2001.

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[FN68] Cf. United Nations Economic and Social Council. Report of the Working Group on Enforced or Involuntary Disappearances. General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance of January 15, 1996. (E/CN. 4/1996/38), para. 55.

[FN69] Cf. Article 2 “For the purposes of this Convention, enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”(E/CN.4/2005/WG.22/WP.1/REV.4) Final Draft of the International Convention for the Protection of All Persons from Enforced Disappearance, adopted on September 23, 2005.

[FN70] Cf. Article 7(i) “Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”

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98. Article 320 of the Criminal Code in force in Peru provides that:

“[the] public official or servant who deprives any person of their liberty by either ordering or carrying out actions leading to the duly proven disappearance of any such person, shall be punished by imprisonment for not less than fifteen years and disqualification from office, pursuant to Article 36(1) and (2) of the Criminal Code.”

99. The Court notes that although such statutory definition permits the punishment of certain acts that constitute forced disappearance of persons, it will examine this provision in order to verify whether it fully complies with the international obligations of the State, in the light of Article II of the Inter-American Convention on Forced Disappearance. For such purposes, the Court will analyze the issue of those included as offenders, the refusal to acknowledge the deprivation of liberty and to disclose the fate or whereabouts of the detained person, and the phrase “duly proven disappearance” contained in the aforesaid Article (*supra* para. 98).

a) On Offenders

100. In accordance with the general obligation of protection, the States have the duty to investigate, prosecute, try and punish those responsible for human rights violations. This obligation is also applicable to any illegal act violating human rights that is not directly committed by a government official but, for example, by a private individual acting with the support or acquiescence of the State. Thus, criminal punishment must be imposed on all persons who commit acts that constitute forced disappearance.

101. In order to guarantee full protection against forced disappearance pursuant to Articles 1 and 2 of the American Convention and I(b) of the Inter-American Convention on Forced Disappearance, domestic criminal law must ensure that all “persons who commit the crime of forced disappearance of persons, their accomplices and accessories” are punished, whether they are agents of the state or “persons or groups of persons acting with the authorization, support, or acquiescence of the State.”

102. Article 320 of the Peruvian Criminal Code restricts forced disappearance offenders to “public officials or servants.” This statutory definition does not contain all forms of criminal involvement included in Article II of the Inter-American Convention on Forced Disappearance of Persons; therefore, it is incomplete.

b) Refusal to acknowledge the deprivation of liberty and to disclose the fate or whereabouts of the detained person

103. Forced disappearance is characterized by refusal to acknowledge the deprivation of liberty or to provide information about the fate or whereabouts of detained persons and by leaving no trace or evidence. [FN71] This element must be present in the statutory definition of the crime in order to distinguish it from others, to which it is usually related, such as manstealing or abduction and murder, so that appropriate standards of proof may be applied and punishment according to the seriousness of the offense may be imposed on all persons involved in the crime.

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[FN71] In effect, this Court has pointed out that “forced disappearance frequently involves the secret and extrajudicial execution of detained persons, followed by the concealment of the body to eliminate any material evidence of the crime and ensure the impunity of the perpetrators.”  
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104. In the instant case, the Court has noticed that Article 320 of the Peruvian Criminal Code does not include the aforesaid element; therefore, the State has the duty to adapt its domestic legislation so as to comply with its international obligations.

c) "due proof" of the forced disappearance

105. The specific language of Article 320 of the Criminal Code, which provides that the forced disappearance must be "duly proven", complicates statutory construction thereof. Firstly, it is not possible to know whether such “due proof” must precede the criminal report or complaint and, secondly, it is not clear therein who should produce such proof either.

106. This Court points out that forced disappearance is characterized by its clandestine nature, which requires the State to comply with its international obligations in good faith and to provide all necessary information insofar as it is the State which has control over the mechanisms to investigate incidents that took place within its territory. Consequently, any attempt to shift the burden of proof to the victims or their next of kin is contrary to the obligation imposed upon the State by Article 2 of the American Convention and Articles I(b) and II of the Inter-American Convention on Forced Disappearance.

107. In this regard, the Court agrees with the considerations put forward by the Peruvian Ombudsman, to the effect that:

the additional condition that the disappearance be “duly proven” —which has no precedent in international rules— lacks any reasonable justification in criminal policy. Said condition must not imply imposing the burden of producing previous proof on the person reporting the crime, something which is completely absurd given the clandestine nature of the practice, but only the exhaustion of police and administrative proceedings commonly used to locate any missing person. It may not be understood as a condition precedent to punishment or prosecution, for such construction would mean fostering impunity. [FN72]

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[FN72] Cf. Report on Forced Disappearance in Peru of December 2000. Defensoría de Pueblo y la Asociación Nacional de Familiares Secuestrados, Detenidos y Desaparecidos en Zonas en Estado de Emergencia (Office of the Ombudsman and the National Association of Relatives of Persons Kidnapped, Detained and Disappeared in Emergency Areas).  
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108. Therefore, the ambiguous requirement of “due proof” of the forced disappearance included in Article 320 of the Criminal Code cited above prevents the State from fully complying with its international obligations.

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109. The Court appreciates the efforts made by Peru regarding the amendment of Article 320 of the Criminal Code (*supra* paras. 54.32 and 89(d) and (e)). However, the Court observes that such measures have not been sufficient to achieve effective compliance with the international rules in force concerning forced disappearance of persons.

110. Based on the foregoing, the Inter-American Court finds that the State has failed to comply with the obligations binding it under Article 2 of the American Convention, in order to effectively guarantee Mr. Santiago Gómez-Palomino’s rights to life, personal liberty, and humane treatment and I(b) of the Inter-American Convention on Forced Disappearance.

#### XI. REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION)

##### Duty to make reparations

111. In the light of the partial acknowledgment of responsibility made by the State and pursuant to the considerations on the merits included in the preceding chapters, the Court declared the violation of the rights enshrined in Articles 7 (Right to Personal Liberty), 5 (Right to Humane Treatment) and 4 (Right to Life) of the American Convention, in connection with Article 1(1) thereof, to the detriment of Santiago Gomez-Palomino; the violation of the right protected by Article 5 (Right to Humane Treatment) of the American Convention, in relation to Article 1(1) of said Convention, to the detriment of Mrs. Victoria Margarita Palomino-Buitrón, Mrs. Esmila Liliana Conislla-Cárdenas, Mrs. María Dolores Gómez-Palomino, Mrs. Luzmila Sotelo-Palomino, Mr. Emiliano Palomino-Buitrón, Mrs. Mónica Palomino-Buitrón, Mrs. Mercedes Palomino-Buitrón, Mrs. Rosa Palomino-Buitrón, Mrs. Margarita Palomino-Buitrón and of the girl Ana María Gómez-Guevara, as well as the violation of the rights enshrined in Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Santiago Gómez-Palomino and his next of kin. Finally, the Court declared the failure of Peru in complying with the duty established in Articles 2 of the Convention and I (b) of the Inter-American Convention on Forced Disappearance of Persons.

112. This Court has established that it is a principle of International Law that the violation of an international obligation, attributable to the State, involves the obligation to provide adequate reparations of the damage inflicted and to have the consequences of the violation remedied. [FN73] Pursuant to Article 63(1) of the American Convention, wherein a rule of custom which is one of the fundamental tenets of contemporary International Law on the responsibility of States is codified,

[i]f the Court finds that there has been a violation of a right or freedom protected by [the] Convention, the Court shall rule that the party harmed 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 party harmed.

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[FN73] Cf. Case Raxcacó-Reyes, supra note 4, para. 114; Case Gutierrez-Soler, supra note 4, para. 61, and Case Acosta Calderón, supra note 9, para. 145.

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113. The reparation of the damage caused by the infringement of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of the return to the state of affairs prior to the infringement. If this is not feasible, as it happens in the majority of cases, the International Court shall determine the measures to be ordered to protect the rights that were affected, as well as to make reparations for the consequences the infringements brought about and shall determine a compensation for the damage caused. [FN74] It is necessary to add the positive measures that the State must adopt to prevent repetition of the harmful events such as those that occurred in the instant case. [FN75] The obligation to provide reparations, which is ruled in all its aspects (scope, nature, methods and determination of beneficiaries) by International Law, cannot be altered or eluded by the State on the allegation of its domestic law. [FN76]

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[FN74] Cf. Case of the “Mapiripán Massacre”, supra note 1, para. 244; Case of Raxcacó-Reyes, supra note 4, para. 115, and Case of Gutierrez-Soler, supra note 4, para. 63.

[FN75] Cf. Case of Raxcacó-Reyes, supra note 4, para. 115; Case of Gutierrez-Soler, supra note 4, para. 63, and Case of Acosta-Calderón, supra note 9, para. 147.

[FN76] Cf. Case of “Mapiripán Massacre”, supra note 1, para. 244; Case of Raxcacó-Reyes, supra note 4, para. 115, and Case of Gutierrez-Soler, supra note 4, para. 63.

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114. Reparations are measures tending to eliminate the effects of the violations committed. Their nature and amount depend on the harm inflicted and on both the pecuniary and non pecuniary damage caused. Such reparations shall not entail either the enrichment or the impoverishment of the victim or his/her successors. [FN77] In this sense, reparations to be established must bear relation to the violations declared hereinbefore.

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[FN77] Cf. Case of the “Mapiripán Massacre”, supra note 1, para. 245; Case of Raxcacó-Reyes, supra note 4, para. 116, and Case of Gutierrez-Soler, supra note 4, para. 64.

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115. On the basis of the evidence gathered during these proceedings and in the light of the abovementioned criteria, the Court will proceed to analyze the claims submitted by the Commission and the representatives regarding reparations, first, in order to determine the

beneficiaries of such reparations, then, to order the pertinent remedial measures to compensate both pecuniary and non pecuniary damages and to provide any other kind of reparations, and finally, to order any measure related to costs and expenses.

#### Arguments of the Commission

116. As regards reparations, the Inter-American Commission alleged that:

Regarding the beneficiaries:

- a) due to the nature of the instant case, the beneficiaries of the reparations this Court may order are the following: Mr. Santiago Gómez-Palomino, Mrs. Victoria Margarita Palomino-Buitrón, Mrs. Esmila Liliana Conislla-Cárdenas, Pascual Gómez-Mayo (late father), Mrs. María Dolores Gómez-Palomino, Luzmila Sotelo-Palomino, Mr. Emiliano Palomino-Buitrón, Mrs. Mónica Palomino-Buitrón, Mrs. Mercedes Palomino-Buitrón, Mrs. Rosa Palomino-Buitrón, Mrs. Margarita Palomino-Buitrón and the girl Ana María Gómez-Guevara. With respect to María Elsa Chipana-Flores, the victim's cousin, who was present when the events forming the subject matter of the instant case took place, the Commission requested that, in case evidence were introduced proving she had also been injured, the Court should consider her a beneficiary;
- b) Mrs. Victoria Margarita Palomino-Buitrón and Mrs. Esmila Liliana Conislla-Cárdenas have a double capacity, since they are also victims of the violation to Article 5 of the American Convention;

As regards pecuniary damage:

- c) the next of kin of Mr. Santiago Gómez-Palomino suffered pecuniary damages due to the forced disappearance of the victim, whose contribution to support his mother and his family was significant. Particularly, Mrs. Victoria Margarita Palomino-Buitrón had to absorb considerable and decisive pecuniary losses, and in addition she had also to assume responsibility for the upbringing and education of the posthumous daughter of Mr. Gómez-Palomino. The Court must determine, on equitable grounds, the amount of the corresponding pecuniary damages;

As regards non pecuniary damage:

- d) the instant case thoroughly reflects the significance of the suffering and distress the forced disappearance of a beloved person, and the uncertainty about his death, cause the next of kin;
- e) the next of kin of Mr. Santiago Gómez-Palomino suffered his loss under violent circumstances, with the attending anguish and uncertainty arising from their ignorance as to the whereabouts of their beloved one. In addition to the foregoing, the complete impunity following his forced disappearance, as well as the lack of effective measures aimed at identifying, prosecuting and punishing the perpetrators, magnifies the suffering of the victim's next of kin;
- f) the Court must order the State to pay a compensation for the non pecuniary damage, based on equitable principles and taking into account the characteristics which have attended the circumstances surrounding the forced disappearance of the victim, the significance of the

suffering inflicted by each of the events on the victim and on his next of kin, and the disturbance of the living conditions of the latter;

As regards other types of reparations

g) The Court must order the State:

i) to adopt any measures necessary to locate the place where Santiago Gomez-Palomino is interred, so that his next of kin may complete their mourning for the disappearance of their beloved, thus making it possible, to a certain extent, to make reparations for the damage inflicted;

ii) to complete a thorough court investigation of the issues of fact in the instant case, whereby all those responsible, whether actual perpetrators or instigators, be identified and punished;

iii) to communicate the outcome of the legal proceedings to the general public in order to allow the victim's next of kin and the whole of Peruvian society to exercise their right of to know the truth;

iv) to effect a symbolic recognition for the purpose of recovering the historical memory of Mr. Gómez-Palomino, in consultation with the victim's next of kin, and

v) to amend Article 320 of the Criminal Code, whereby the crime of forced disappearance is statutorily defined, so that it may be rendered consistent with the Inter-American Convention on Forced Disappearance.

As regards costs and expenses

h) the State must bear the costs and expenses, as duly shown by the beneficiaries, taking into account the particular characteristics of the case.

Arguments of the representatives

117. As regards reparations, the representatives alleged that:

With respect to the beneficiaries

a) the State must compensate Mr. Santiago Gómez-Palomino, Mrs. Esmila Liliana Conislla-Cárdenas, Mrs. Victoria Margarita Palomino-Buitrón, Mrs. María Dolores Gómez-Palomino, Mrs. Luzmila Sotelo-Palomino, and Emiliano, Mercedes, Mónica, Rosa and Margarita, all of them bearing the surname of Palomino-Buitrón, as well as the girl Ana María Gómez-Guevara;

As regards pecuniary damage:

b) as to the loss of profits, it should be taken into account that, at the time of his detention, Mr. Santiago Gómez-Palomino was 27 years old and his life expectancy was 66. Assuming he had continued to work as a cook in a Chinese food restaurant, he would have continued collecting a minimum salary plus two additional bonuses equivalent to a monthly salary each, one for Christmas and another one for national holidays;



c) bearing in mind the evolution of the minimum living wage since July 1992 to August 2004, according to the Instituto Nacional de Estadística e Informática (Information Science and Statistics Institute), and taking said figures as the basis for computing the amounts the victim would have collected until year 2031, when he would have turned 66 years old, the total amount of uncollected wages plus the respective bonuses, would add up to sixty-six thousand, eight hundred and eighty-one United States dollars (US\$ 66,881)). The payment that the Court may order the State to make on such grounds shall be made to the girl Ana María Gómez-Guevara and to Mrs. Victoria Margarita Palomino-Buitrón;

d) expenses incurred by the next of kin during their endeavors in search for the victim, which include whole days searching in hospitals, detention centers and court seats, must also be taken into account. The compensation to be fixed on the aforementioned equitable grounds shall be given to Mrs. Victoria Margarita Palomino-Buitrón, the victim's mother;

As regards non pecuniary damage:

e) The day after the detention and disappearance of Mr. Gómez-Palomino, Mrs. Victoria Margarita Palomino-Buitrón started, in the company of her two daughters, their pilgrimage through various detention centers, hospitals and morgues, in search for her son. Mrs. Palomino-Buitrón could not overcome the anguish of not knowing what has happened to her son, and this circumstance is still causing her great mental and emotional distress;

f) the Court must estimate the damage caused to the victim's partner, Esmila Liliana Conislla, who also suffered ill-treatment at the time of the illegal and arbitrary detention of Mr. Santiago Gómez-Palomino;

g) as regards the victim's siblings, the Court should take into account the degree of relationship and affection existing among them, as well as the suffering inflicted on them due to the forced disappearance of Santiago Gómez-Palomino;

As regards other types of reparation

h) the State must take certain steps aimed at repairing the damage inflicted to the next of kin of the victim and to avoid the repetition of the events occurred in the instant case; such as:

i) investigating the events and identifying, trying and punishing the actual perpetrators and the instigators of the violations of the rights enshrined in the Convention;

ii) locating and exhumating of the mortal remains of Santiago Gomez-Palomino, which should then be delivered to the next of kin so that they could bury them according to their religious beliefs;

iii) publishing the judgment the Inter-American Court will pronounce in general circulation newspapers in the country, as well as public apologies for the damage caused to the victim's next of kin;

iv) granting Mrs. Victoria Margarita Palomino-Buitrón and the girl Ana María Gómez-Guevara a decent dwelling, through the residential house program;

v) awarding a higher education grant to girl Ana María Gómez-Guevara, in order to assure her the possibility to study at the state-owned University or the National Technological Institute of Higher Education she may choose;

vi) providing free services in a health care center, without restrictions, covering all expenses, medicines and medical tests included, as well as psychological assistance for Mrs. Victoria Margarita Palomino-Buitrón and the girl Ana María Gómez-Guevara; and

vii) taking the action necessary to amend Article 320 of the Criminal Code, so as to render it consistent with the American Convention and with the Inter-American Convention on Forced Disappearance.

As regards costs and expenses

i) Asociación Pro Derechos Humanos (APRODEH) (Pro Human Rights Association) incurred expenses in connection with legal representation both in domestic and international proceedings, communications—including telephone, facsimile and Internet—and mail, the estimate of which will be made by the Court, on equitable grounds and at its own discretion.

Arguments of the State

118. As regards the reparations, the State alleged that the acknowledgement of international responsibility made did not in any way release perpetrators and accomplices in the violation of the rights of Mr. Santiago Gómez-Palomino from any of the criminal or civil liabilities that could be attributed them. In this sense, the State committed itself to actively urge a thorough, unbiased, effective and swift investigation in order to identify those persons who may be responsible for the disappearance and execution of Mr. Santiago Gómez-Palomino, to determine the level of their respective participation and to punish them pursuant to criminal law.

Considerations of the Court

119. The Court will now proceed to determine who are to be considered “party harmed” under the terms of Article 63(1) of the American Convention. In the first place, this Court considers Mr. Santiago Gómez-Palomino a party harmed, as a victim of the violations of his rights enshrined in Articles 4, 5, 7, 8(1) and 25 of the American Convention, in relation with Article 1(1) thereof, committed to his detriment (*supra* paras. 35 to 38 and 86). Likewise, Mrs. Victoria Margarita Palomino-Buitrón, Mrs. Esmila Liliana Conislla-Cárdenas, Mrs. María Dolores Gómez-Palomino, Mrs. Luzmila Sotelo-Palomino and Emiliano, Mercedes, Mónica, Rosa and Margarita, all of them bearing the surname of Palomino-Buitrón, and the girl Ana María Gómez are victims of the violation of the rights enshrined in Articles 5, 8(1) and 25 of the American Convention, in relation to Article 1(1) thereof (*supra* paras. 37, 38, 68 and 86). All said persons must be deemed harmed parties and are entitled to receive the reparations the Court may determine, regarding pecuniary as well as non pecuniary damage, if both are applicable.

120. In regards to Pascual Gómez-Mayo, the late father of Mr. Gómez-Palomino, the Inter-American Commission requested that he be included as beneficiary of the reparations that could be determined in the instant Judgment, but it neither made any further allegations in this respect, nor submitted any evidence showing, at the very least, that Mr. Gomez-Mayo suffered any pecuniary or non pecuniary damage, while he was alive, due to the forced disappearance of the victim and to the other facts of the instant case.

121. The distribution of reparations among the next of kin of Mr. Santiago Gómez-Palomino, for the pecuniary and non pecuniary damage inflicted upon the latter shall be carried out as follows:

- a) thirty percent (30%) of the compensation shall be paid to the victim's mother, Mrs. Victoria Margarita Palomino-Buitrón, and
- b) seventy percent (70%) of the compensation shall be given to the victim's daughter, Ana María Gómez-Guevara.

122. As regards the compensation to be paid to Mercedes Palomino-Buitrón, the late sister of Mr. Gómez-Palomino, the Court has no information on whether she had any children. Therefore, the Court decides that in case Mrs. Mercedes Palomino-Buitrón had had children, the compensation that should have been paid to her, should be given to each of her children, in equal shares, provided their parentage is shown through satisfactory evidence of identity or through the statement of the mother or any of the siblings of Mr. Gómez-Palomino. But in case Mercedes Palomino-Buitrón has had no issue, the compensation inuring to her should be fully given to her mother, Mrs. Victoria Margarita Palomino-Buitrón.

123. If any of the beneficiaries, to whom compensation is due in their capacity as victims, dies before receiving the corresponding compensation, the amount of said compensation will be distributed according to the applicable domestic law.

#### A) PECUNIARY DAMAGE

124. The Court shall herein address the pecuniary damage, which implies the loss of, or detriment to, the income of the victim, and the expenses incurred by the next of kin due to the events in the instant case, [FN78] for which the Court fixes a compensatory amount seeking to redress the financial consequences of the violations that were determined in the instant Judgment. In order to make a decision as to the pecuniary damage the Court shall take into account the body of evidence, its own precedents and the arguments submitted by the parties.

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[FN78] Cf. Case of Raxcacó-Reyes, supra note 4, para. 129; Case of Gutierrez-Soler, supra note 4, para. 74, and Case Acosta-Calderón, supra note 9, para. 157.  
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#### a) Loss of Income

125. This Court finds that sufficient evidence has been submitted showing that, at the time of the events forming the subject matter of the instant case, Mr. Santiago Gómez-Palomino was 27 years old, he held a high school degree and was working as a cook and, on occasion, as a gardener (supra para. 54(8)). In the light of the aforementioned, the Court deems it reasonable to assume that Mr. Santiago Gómez-Palomino would have worked during his whole productive life, and he would have collected, at least, a minimum wage, with the corresponding bonuses and benefits. In this respect, taking into account the average life expectancy in Peru [FN79] and bearing in mind the activities whereby the victim used to earn his living, as well as the

circumstances and particular characteristics of the case, the Court fixes on equitable grounds the amount of US \$50,000.00 (fifty thousand United States Dollars), or its equivalent in Peruvian currency, as the compensation of Mr. Santiago Gómez-Palomino for loss of income. Said amount shall be distributed between Mrs. Victoria Margarita Palomino-Buitrón and the girl Ana María Gómez-Guevara, as per paragraph 121 of this judgment.

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[FN79] During years 2000 to 2005 life expectancy average in Peru was 69.8 years of age. Table prepared by the Instituto Nacional de Estadística e Informática (Peruvian Institute of Information Technology and Statistics) (appendixes to the brief of requests and arguments. Appendix 6, p. 393).

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b) Consequential damages

126. With the purpose of learning about the fate and the whereabouts of Mr. Gómez-Palomino, his next of kin carried out many actions before governmental authorities, among which it is worth mentioning their visits to the courts, police stations and detention centers, hospitals and morgues (supra para. 54(10)). The Court deems that the State must pay compensation for said expenses, as they have a direct cause-effect link with the violations tried in the instant case. [FN80] The Court finds that no satisfactory evidence is included in the case file that may allow the accurate determination of the amount of the expenses in which the next of kin of Mr. Gómez-Palomino may have incurred when carrying out said activities. In view of the special circumstances of the case, the Court considers it proper to fix, on equitable grounds, the amount of US \$ 3,000 (three thousand United States dollars), or its equivalent in Peruvian currency, as compensation for the abovementioned damage. Said amount shall be paid, in equal shares, to Mrs. Victoria Margarita Palomino-Buitrón, Mrs. María Dolores Gómez-Palomino and Mrs. Luzmila Sotelo-Palomino.

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[FN80] Cf. Case of the Yakye Axa Indigenous Community, supra note 8, para. 194, and Case of the Serrano-Cruz Sisters, supra note 51, para. 152.

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127. Similarly, during the first year after the detention and forced disappearance of Mr. Gómez-Palomino, his mother, Mrs. Victoria Margarita Palomino-Buitrón, was exclusively devoted to search her son and, therefore, she had to quit her work. As she had not the financial support of Mr. Santiago Gómez-Palomino any more, her family endured great financial hardship, which was attenuated by the contributions made the elder sisters; Mrs. María Dolores Gómez-Palomino and Mrs. Luzmila Sotelo-Palomino (supra para. 48(a)). Besides, three months alter the disappearance of her son, Mrs. Victoria Margarita Palomino-Buitrón had to undertake full responsibility for the upbringing of her grand-daughter, Ana María Gómez-Guevara, who was only fifteen days old and the posthumous daughter of Mr. Santiago Gómez-Palomino (supra para. 54(24)), and therefore this Court presumes that such event generated expenses in which, had the forced disappearance of Mr. Gómez-Palomino not occurred, Mrs. Palomino-Buitrón would have never incurred.

128. Based on the foregoing, the Court considers that the financial standing of the members of the family of Mr. Santiago Gómez-Palomino was seriously affected due to the events in the instant case, and that Mrs. Victoria Margarita Palomino-Buitrón ceased to receive her regular income for a year, all of which resulted from the facts forming the subject matter of the instant case. Consequently, and bearing in mind the particular circumstances of the case sub judice, the Court fixes on equitable grounds, a compensation amounting US \$21,000.00 (twenty-one thousand United States dollars), or its equivalent in Peruvian currency, to be distributed, in equal shares, among Mrs. Victoria Margarita Palomino-Buitrón, Mrs. María Dolores Gómez-Palomino and Mrs. Luzmila Sotelo-Palomino.

129. Pursuant to the aforementioned, this Court fixes, on equitable grounds, the amount of compensation for pecuniary damage according to the following table:

Beneficiaries	Cantidad
Santiago Gómez-Palomino	US \$50,000.00
Victoria Margarita Palomino-Buitrón	US \$8,000.00
María Dolores Gómez-Palomino	US \$8,000.00
Luzmila Sotelo-Palomino	US \$8,000.00
Total amount	US \$74,000.00

#### B) NON PECUNIARY DAMAGE

130. Non pecuniary damage may include distress, suffering, tampering with the core values of the victim and of his next of kin, and changes of a non pecuniary nature in the person's or his family's everyday life. As it is impossible to ascertain the monetary value of the non pecuniary damage sustained, for the purposes of full reparation to the victims, it may be carried out in two ways. On the one hand, by paying the victim an amount of money or by delivering property or services the worth of which may be established in money, as the Court may determine exercising reasonably its judicial discretion and applying equitable standards; [FN81] and on the other hand by public actions or works such as the release of an official message of repudiation of the violations of the human rights involved in the instant case and the commitment to endeavor to avoid new violations of human rights, the effect of which will be to publicly recognize the victim's dignity and to comfort the victim's next of kin. The first aspect of the reparation of non pecuniary damage will be analyzed in this Article, and the second one, in Article C) of this chapter.

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[FN81] Cf. Case of the "Mapiripán Massacre", supra note 1, para. 282; Case of Gutierrez-Soler, supra note 4, para. 82, and Case of Acosta-Calderón, supra note 9, para. 158.  
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131. The judgment, according to repeated international precedents, constitutes, in and of itself, a form of reparation. [FN82] However, owing to the circumstances of the instant case, the suffering the events have caused the victim and his next of kin, the changes in their way of life and the other consequences of a non pecuniary nature they bore, the Inter-American Court

considers it must order the payment of a compensation for non pecuniary damage, on an equitable basis. [FN83]

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[FN82] Cf. Case of the “Mapiripán Massacre, supra note 1, para. 285; Case of Raxcacó-Reyes, supra note 4, para. 131, and Case of Gutierrez-Soler, supra note 4, para. 83.

[FN83] Cf. Case of the “Mapiripán Massacre”, supra note 1, para. 285; Case of Gutierrez-Soler, supra note 4, para. 83, and Case of Acosta-Calderón, supra note 9, para. 159.

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132. On the one hand, the Court considers that the circumstances surrounding the detention and subsequent disappearance of Mr. Santiago Gómez-Palomino (supra para. 54(9)) were such that caused great fear and suffering. In a previous case [FN84] the Inter-American Court deemed that similar circumstances had caused the victim a serious non pecuniary damage that had to be wholly assessed when determining the amount of the corresponding compensation. Therefore, the Court considers that Mr. Gómez-Palomino must be compensated for the non pecuniary damage suffered and order, on equitable grounds, the payment of US\$ \$100,000.00 (one hundred thousand United States dollars) or its equivalent in Peruvian currency. Said compensation should be paid to Mrs. Victoria Margarita Palomino-Buitrón and to the girl Ana María Gómez-Guevara, as per the terms in paragraph 121 of the instant Judgment.

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[FN84] Case of Aloeboetoe et al. Reparations (Article 63(1) American Convention on Human Rights) Judgment of September 10, 1993. Series C No. 15, paras. 51 and 52.

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133. On the other hand, the Court deems that Mrs. Victoria Margarita Palomino-Buitrón, Mrs. Esmila Liliana Conislla-Cárdenas, Mrs. María Dolores Gómez-Palomino, Mrs. Luzmila Sotelo-Palomino, Emiliano, Mercedes, Mónica, Rosa and Margarita, all of them bearing the surname of Palomino-Buitrón family, and the girl Ana María Gómez-Guevara, have borne great suffering due to the forced disappearance of Mr. Santiago Gómez-Palomino, and consequently this Court finds they are victims of the violation of Articles 5, 8(1) and 25 of the American Convention (supra paras. 68 and 86). Therefore, the Court fixes, on equitable grounds, the amount of US\$ 80,000.00 (eighty thousand United States dollars) or its equivalent in Peruvian currency, as compensation for the non pecuniary damage suffered by Mrs. Victoria Margarita Palomino-Buitrón; the amount of US\$ 80,000.00 (eighty thousand United States dollars) or its equivalent in Peruvian currency, as compensation for the non pecuniary damage suffered by the girl Ana María Gómez-Guevara, and the amount of US \$30,000.00 (thirty thousand United States dollars) or its equivalent in Peruvian currency for the non pecuniary damage suffered by each of the sisters of Mr. Gómez-Palomino: María Dolores Gómez-Palomino, Luzmila Sotelo-Palomino, Emiliano, Mercedes, Mónica, Rosa and Margarita, all of them bearing the surname of Palomino-Buitrón. As regards Mrs. Mercedes Palomino-Buitrón, her compensation shall be delivered to her as per the terms set forth in paragraph 122 of the instant Judgment.

134. Finally, and regarding Mrs. Esmila Liliana Conislla-Cárdenas, according to her testimony and the expert witness report rendered by María del Pilar Raffo-Lavalle de Quiñones (supra para.

48(b) and (c)), the Court fixes, on equitable basis, the amount of US\$ 10,000.00 (ten thousand United States dollars) or its equivalent in Peruvian currency, as compensation for the non pecuniary damage inflicted on her.

135. Accordingly, this Court determines, on equitable grounds, that the amount of the compensations for non pecuniary damage shall be those indicated in the following table:

Beneficiaries	Cantidad
Santiago Gómez-Palomino	US \$100,000.00
Victoria Margarita Palomino-Buitrón	US \$80,000.00
Ana María Gómez-Guevara	US \$80,000.00
María Dolores Gómez-Palomino	US \$30,000.00
Luzmila Sotelo-Palomino	US \$30,000.00
Emiliano Palomino-Buitrón	US \$30,000.00
Mercedes Palomino-Buitrón	US \$30,000.00
Mónica Palomino Buitrón	US \$30,000.00
Margarita Palomino-Buitrón	US \$30,000.00
Rosa Palomino-Buitrón	US \$30,000.00
Esmila Liliana Conislla-Cárdenas	US \$10,000.00
Total Amount	US \$480,000.00

c) OTHER FORMS OF REPARATION  
(Measures of Satisfaction and Non-Repetition Guarantees)

136. The Court will determine herein the measures of satisfaction aimed at redressing non pecuniary damage as well as other public or publicly noticeable measures.

a) Duty to investigate the events that resulted in violations in the instant case, and to identify, prosecute and punish those responsible

137. When answering the application, the State committed itself to “perform a complete, unbiased, effective and immediate investigation in order to establish the identities and the degree of participation of those who may turn out to be responsible for the disappearance and execution of Mr. Santiago Gómez-Palomino, for the purpose of becoming able to impose upon them the criminal punishment due under the law”.

138. In this respect, the Court has found, inter alia, that the investigation initiated in year 2002 by the Fiscalía Provincial Especializada de Lima (Provincial Specialized Prosecutor’s Office of Lima) has not been effective in finding the place where the mortal remains of Mr. Santiago Gómez-Palomino are, and to bring criminal actions against the persons responsible for said acts, in violation of Articles 8(1) and 25 of the American Convention (supra para. 85). Besides, in the criminal proceedings, which are still in the preliminary stage, the reasonable time principle enshrined in the American Convention has not been observed (supra para. 85).

139. Based on the foregoing considerations, the Court recognizes the value of the commitment undertaken by the State to effectively investigate the events reported in the instant case, as well

as the State's acknowledgment of its duty to earnestly adopt all necessary measures to identify, prosecute and punish the physical perpetrators and instigators of the violations committed against Mr. Gómez-Palomino for the purpose of criminal proceedings and any other purpose resulting from the investigation of the events. The next of kin of the victim or his representatives shall have full access to and participate in all stages and instances of the domestic criminal proceedings initiated in relation to the instant case, in accordance with domestic laws and the American Convention. The findings in such proceedings shall be publicly disseminated by the State in such manner as to enable the Peruvian society to know the truth regarding the facts of the instant case.

140. Finally, the Courts warns the State that it must guarantee the effectiveness of the domestic proceedings instituted to investigate the events related to the forced disappearance of Mr. Santiago Gómez-Palomino, and to identify, prosecute and punish the persons responsible for said events. The State shall abstain from resorting to amnesty laws, statutes of limitations and rules on limitation of liability, or to any measures aimed at preventing criminal prosecution or at voiding the effects of a conviction. [FN85]

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[FN85] Cf. Case of the "Mapiripán Massacre", supra note 1, para. 304; Case of Gutierrez-Soler, supra note 4, para. 97, and Case of Moiwana Community, supra note 3, para. 206.

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b) Obligation to conduct a search for the mortal remains of the victim and to deliver them to his next of kin

141. Pursuant to its precedents [FN86] and taking into account the requests made by the Commission and the representatives, this Court deems it is indispensable that the State duly performs all necessary actions aimed at finding the mortal remains of Mr. Santiago Gómez-Palomino and delivering them to his next of kin, so that they may bury him following the funeral rites consistent with their customs and beliefs. Besides, the State must ensure the conditions necessary to convey and bury said remains to the place that the victim's next of kin may elect, bearing all the expenses.

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[FN86] Cf. Case of "Mapiripán Massacre", supra note 1, paras. 305 and 310; Case of Moiwana Community, supra note 3, para. 208, and Case of 19 Tradesmen, supra note 51, para. 271.

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c) Publication of the pertinent parts of the Judgment of the Court

142. Moreover, and as ordered in other cases, [FN87] the Court considers that, as a measure of satisfaction, the State shall publish at least once in the Official Gazette and in other national daily newspaper, the Section entitled Proven Facts of Chapter VII, without the corresponding footnotes, and the operative paragraphs of the instant Judgment. Said publication shall be made within six months following notice of the instant Judgment.



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[FN87] Cf. Case of the “Mapiripán Massacre”, supra note 1, para. 318; Case of Raxcacó-Reyes, supra note 4, para. 136, and Case of Gutierrez-Soler, supra note 4, para. 105.

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d) Medical and Psychological Assistance

143. The Court finds that sufficient evidence has been submitted proving that the forced disappearance of Mr. Santiago Gómez-Palomino affected the physical and psychological health condition of his mother, his daughter, his sisters and brother, as well as that of his partner (supra paras. 54(25) to 54(27)). In order to contribute to the reparation of said suffering, the State shall provide all the victims with any medical and psychological treatment they may need, through its specialized health care centers and for as long as it may be necessary, as from the date notice of the instant Judgment be served. Said treatments shall be free of charge and shall comprise the provision of medicines and medical tests, as required. The consent of the beneficiaries of these treatments shall be sought.

e) Education Program

144. This Court finds that sufficient evidence has been submitted (supra para. 54(23)) proving that the events in the instant case impaired the life projects of the victim’s siblings who were minors, whose future became uncertain. After the disappearance of Mr. Gómez-Palomino, all of them had to quit their studies, due not only to financial reasons, but also, as pointed out by expert witness María del Pilar Raffo-Lavalle de Quiñones (supra para. 48(c)), to emotional factors such as depression, concern and sadness.

145. Therefore, this Court orders, as a measure of satisfaction, that the State shall provide all material resources necessary so that Emiliano, Mónica, Rosa and Margarita, all of them bearing the surname of Palomino-Buitrón, may participate —if they so desire— in special education programs for adults that may enable them to finish primary and secondary school, as the case may be. Such education programs shall be developed during adequate times, so as not to interfere, as far as possible, with the working activities of the beneficiaries.

146. The Court takes into account that serious violations of human rights as that at issue in the instant case, leave lingering after-effects on the victims and next of kin directly harmed, which also affect the new generations. Thus, the predicament of the current generations, directly affected by the violation of their human rights, affects future generations in different ways. In order to achieve an integral reparation in the light of the particular circumstances of the instant case, the Court decides that, if the siblings of Mr. Gómez-Palomino mentioned above do not desire to personally avail themselves of the education measures of reparation hereby awarded, they will be able to assign such benefits to their children. Then, the benefit shall be implemented through a grant covering all their primary and secondary education at a public school in the country. This education grant shall also be awarded to the children of late Mercedes Palomino-Buitrón, if any.

147. Furthermore, and pursuant to the evidence received in the instant case, the Court finds that Mrs. Victoria Margarita Palomino-Buitrón, due to her illiteracy, required the assistance of her daughters in order to carry out the necessary actions before governmental authorities in search of her son. This situation increased her sufferings during the search conducted and, at present, it also impairs her access to justice. Consequently, this Court orders the State to grant Mrs. Victoria Margarita Palomino-Buitrón all necessary resources so that, if she so desires, she may participate in a literacy program implemented by the corresponding public education entities, taking into account that she is bilingual, in Spanish and Quechua.

148. Moreover, the State must award, as a measure of satisfaction, a grant to the girl Ana María Gómez-Guevara, so that she may complete her education at the public secondary school she may choose. If she wants to continue and obtain a higher education, either at technical schools or at the university, the State shall award her a grant covering all expenses and costs involved in such higher education, at the Peruvian public higher education center she may elect.

f) Amendment to Article 320 of the Criminal Code

149. The State must adopt all measures necessary to amend, within a reasonable period of time, its criminal law in order to render it consistent with the international standards on forced disappearance of persons, paying special attention to the provisions of the American Convention and the Inter-American Convention on Forced Disappearance, pursuant to the criteria established in paragraphs 90 to 110 of the instant Judgment.

D) Costs and Expenses

150. As the Court has stated on previous occasions, [FN88] costs and fees are contemplated within the concept of reparations as enshrined in Article 63(1) of the American Convention, since the victim's endeavor to obtain justice in the domestic as well as at international levels, and that of his successors or their representatives, lead to expenses and liabilities that must be compensated. With regard to their reimbursement, the Court must prudently assess their extent, which involves the expenses incurred when acting before the authorities within the domestic jurisdiction, as well as those incurred in the course of proceedings before the Inter-American system, taking into account the particular circumstances of the specific case and the nature of international jurisdiction for the protection of human rights. Such estimate may be made on the grounds of equitable principles and taking in consideration the expenses reported and proved by the parties, provided they be reasonable. [FN89]

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[FN88] Cf. Case of the "Mapiripán Massacre", supra note 1, para. 322; Case of Raxcacó-Reyes, supra note 4, para. 137, and Case of Gutierrez-Soler, supra note 4, para. 116.

[FN89] Cf. Case of the "Mapiripán Massacre", supra note 1, para. 322; Case of Gutierrez-Soler, supra note 4, para. 116, and Case of the Girls Yean and Bosico, supra note 9, para. 248.

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151. As the Court has stated on previous occasions, the concept of costs encompasses those incurred in the legal proceedings before the domestic court system, as well as those pertaining to

proceedings before international jurisdictional systems, such as the Commission and the Court. [FN90] In the instant case, the representatives did not submit any evidence showing the amount of expenses they incurred during the proceedings both at national and international level, and requested the Court to determine, on an equitable basis, the amount of costs and expenses to be reimbursed.

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[FN90] Cf. Case of the “Mapiripán Massacre”, supra note 1, para. 323; Case of Raxcacó-Reyes, supra note 9, para. 137, and Case of Gutierrez-Soler, supra note 4, para. 116.

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152. For such purpose, the Court considers it proper to order the State to pay the sum of US \$5,000.00 (five thousand United States dollars) or its equivalent in Peruvian currency, to Mrs. Victoria Margarita Palomino-Buitrón, for costs and expenses incurred both at the domestic and the international levels when acting before the Inter-American system for the protection of human rights. Mrs. Palomino-Buitrón shall give her representatives the corresponding amount, depending on the assistance they provided her.

## XII. METHOD OF COMPLIANCE

153. To comply with the instant Judgment, the State shall pay compensations for pecuniary and non pecuniary damage and reimburse costs and expenses (supra paras. 129, 135 and 152) within the term of one year as from the date of service of the instant Judgment. In addition, the State must proceed to the publication of the instant Judgment within the term six months as from the date of service of the Judgment (supra para. 142). Medical and psychological treatments shall be provided as from the date of service of the instant Judgment (supra para. 143). The education program must begin within a term of six months after the service of the instant Judgment (supra paras. 144 to 148). The State shall adopt, as promptly as possible, the measures necessary to investigate the events, to identify, prosecute and punish the perpetrators, and to find the mortal remains of Mr. Santiago Gómez-Palomino (supra paras. 137 to 140). The State shall also amend its domestic criminal legislation within a reasonable time, taking into account the characteristics of the applicable legislative procedure (supra para. 149).

154. Compensations shall be directly paid to beneficiaries, pursuant to the provisions established in paragraphs 121, 122, 129 and 135 of the instant Judgment.

155. The State may discharge its pecuniary obligations by tendering United States Dollars or an equivalent amount in the currency of the State, at the New York, USA exchange rate between both currencies on the day prior to the day payment is made.

156. If the beneficiaries of compensations are not able to receive the payments within the timeframe of one year previously set out, due to reasons attributable to them, the State shall deposit said amounts in an account to the beneficiary’s name or draw a certificate of deposit from a reputable Peruvian bank, in United States dollars, under the most favorable financial terms the law in force and customary banking practice allow. If after ten years compensations were still unclaimed, the amount plus accrued interests shall be returned to the State.

157. As regards the compensations awarded to the girl Ana María Gómez-Guevara, the State shall deposit it with a solvent financial entity of Peru. The deposit shall be made within a one-year term, in United States Dollars and under the most favorable financial terms the current laws and customary banking practice allow, while the beneficiary is under age. The beneficiary shall be able to withdraw the amount so deposited once she is of age, or before reaching majority provided it is in the best interest of the minor and pursuant to the order of a competent judicial authority. If ten years after the date the beneficiary reaches majority, compensations are still unclaimed, the amount plus accrued interest shall be returned to the State.

158. Payments aimed at reimbursing costs and expenses incurred in proceedings at both levels, domestic and international, shall be made to Mrs. Victoria Margarita Palomino-Buitrón (supra para. 152), who shall make the corresponding payments pursuant to the agreements she may have reached with her representatives.

159. The amount awarded in the instant Judgment for costs, expenses and compensation for damages shall not be affected, reduced or conditioned by tax reasons, whether present or future. Therefore, beneficiaries shall receive the total amount pursuant to the provisions set forth herein (supra para. 152).

160. Should the State fall into arrears with its payments, Peru banking default interest rates shall be paid on the amount outstanding.

161. In accordance with its ongoing practice, and in furtherance of the fulfillment of its duties under the American Convention, the Court shall retain the authority emanating from its jurisdiction to monitor full compliance with the instant Judgment. The instant case shall be closed once the State implements the full provisions set forth in the instant Judgment. Within the term of one year as from the date of service of the instant Judgment, Peru must submit to the Court a report on the measures adopted in compliance herewith.

### XIII. OPERATIVE PARAGRAPHS

162. Therefore,

THE COURT,

DECIDES,

Unanimously,

1. To admit the acknowledgment of international responsibility made by the State of Peru under the terms of paragraphs 32, 35 to 38 and 42 of the instant Judgment.

DECLARES,

Unanimously that:

2. The State violated the rights enshrined in Articles 4 (Right to Life), 5(1), and 5(2) (Right to Humane Treatment), and 7(1), 7(2), 7(3), 7(4), 7(5) and 7(6) (Right to Personal Liberty) of the American Convention on Human Rights, in connection with Article 1(1) thereof (Obligation to Respect Rights), to the detriment of Mr. Santiago Gómez-Palomino, as per the acknowledgment of international responsibility made by the State and the terms of paragraphs 35 and 36 of the instant Judgment.

3. The State violated the rights enshrined in Articles 8.(1) (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention on Human Rights, in connection with Article 1(1) thereof, to the detriment of Mr. Santiago Gómez-Palomino, Mrs. Victoria Margarita Palomino-Buitrón, Mrs. Esmila Liliana Conislla-Cárdenas, Mrs. María Dolores Gómez-Palomino, Mrs. Luzmila Sotelo-Palomino, Mr. Emiliano Palomino-Buitrón, Mrs. Mercedes Palomino-Buitrón, Mrs. Mónica Palomino-Buitrón, Mrs. Rosa Palomino-Buitrón and Mrs. Margarita Palomino-Buitrón, and the girl Ana María Gómez-Guevara, as per the acknowledgment of international responsibility made by the State, and in the terms of paragraphs 38 and 74 to 86 of the instant Judgment.

4. The State violated the right enshrined in Article 5 (Right to Humane Treatment) of the American Convention on Human Rights, as regards Article 1(1) thereof, to the detriment of Mrs. Victoria Margarita Palomino-Buitrón, Mrs. Esmila Liliana Conislla-Cárdenas, Mrs. María Dolores Gómez-Palomino, Mrs. Luzmila Sotelo-Palomino, Mr. Emiliano Palomino-Buitrón, Mrs. Mercedes Palomino-Buitrón, Mrs. Mónica Palomino-Buitrón, Mrs. Rosa Palomino-Buitrón and Mrs. Margarita Palomino-Buitrón, and the girl Ana María Gómez-Guevara, as per the acknowledgment of international responsibility made the State and in the terms stated in paragraphs 37 and 59 to 68 of the instant Judgment.

5. The State has not complied with the duties set forth in Article 2 (Domestic Legal Effects) of the American Convention on Human Rights, in order to duly guarantee the right to life, to personal liberty and to humane treatment of Mr. Santiago Gómez-Palomino and Article I (b) of the Inter-American Convention on Forced Disappearance of Persons, in the terms of paragraphs 91 to 110 of the instant Judgment.

6. This Judgment is in itself a form of redress, as set forth in paragraph 131 hereof.

AND RULES,

Unanimously, that:

7. The State must comply with its duty to investigate the events in the instant case, and to identify, prosecute and punish those responsible for the violations committed against the victim in the instant case, in the terms set forth in paragraphs 137 to 140 and 153 of the instant Judgment.

8. The State must, within a reasonable time, take the necessary steps to find the mortal remains of Mr. Santiago Gómez-Palomino and deliver them to his next of kin, and provide the necessary means and conditions to convey and bury said mortal remains in the place the next of kin may elect, in the terms of paragraphs 141 and 153 of the instant Judgment.

9. Within a term of six months as from the date of service of the instant Judgment, the State must publish at least once in the Official Gazette and in another national daily newspaper, both

the Section entitled Proven Facts of Chapter VII, without the footnotes, as well as the operative paragraphs of the instant Judgment, in the terms of paragraphs 142 and 152 hereof.

10. The State must provide, free of any charge and through the public specialized health care institutions, medical and psychological treatment to Mrs. Victoria Margarita Palomino-Buitrón, Mrs. Esmila Liliana Conislla-Cárdenas, Mrs. María Dolores Gómez-Palomino, Mrs. Luzmila Sotelo-Palomino, Mr. Emiliano Palomino-Buitrón, Mrs. Mónica Palomino-Buitrón, Mrs. Rosa Palomino-Buitrón and Mrs. Margarita Palomino-Buitrón, and to the girl Ana María Gómez-Guevara, in the terms of paragraphs 143 and 153 of the instant Judgment.

11. The State must implement the education programs defined in the instant Judgment, in the terms of paragraphs 144 to 148 and 153 hereof.

12. The State must adopt the measures necessary to amend, within a reasonable time, its criminal legislation so as to adapt it to the international standards on forced disappearance of persons, in accordance with the terms set forth in paragraphs 149 and 153 of the instant Judgment.

13. The State must pay the amounts established in paragraph 129 of the instant Judgment as compensation for pecuniary damages, in the terms of paragraphs 124 to 129 and 153 hereof.

14. The State must pay the amounts fixed in paragraph 135 of the instant Judgment as compensation for non pecuniary damage, under the terms of paragraphs 130 to 135 and 153 hereof.

15. The State must pay the amount established in paragraph 152 of the instant Judgment, as reimbursement for costs and expenses, in the terms of paragraphs 150 to 153 hereof.

16. This Court shall monitor the full compliance with the instant Judgment and shall deem the instant case closed once the State has fully complied with the provisions herein. Within a term of one year as from the date notice hereof is served, the State shall submit to the Court a report on the measures adopted in order to comply with the instant Judgment, in the terms of paragraph 161 thereof.

Judges García-Ramírez and Cañado Trindade and Judge Medina-Quiroga submitted to the Court their Separate Opinions, which are attached hereto.

Sergio García-Ramírez  
President

Alirio Abreu-Burelli  
Oliver Jackman  
Antônio A. Cañado 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 OPINION OF JUDGE SERGIO GARCÍA-RAMÍREZ ON THE JUDGMENT  
RENDERED BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE CASE OF  
GÓMEZ-PALOMINO V. PERU ON NOVEMBER 22, 2005

1. In this Opinion, I will address a key aspect of the Case of Mr. Gómez-Palomino, to wit, the statutory development of the crime of forced disappearance in domestic law and its relation to the international system which the State has approved. Some of the most significant aspects of this matter have been often addressed in the case law of the Inter-American Court, under the Pact of San José, before the Inter-American Convention on the Forced Disappearance of Persons was adopted on June 9, 1994. This instrument was included in the regulatory framework of the matter, wherein it incorporated concepts and defined scopes, the core of which was already contemplated in the American Convention, under other items.

2. The issue of forced disappearance has come up, with an unfortunate frequency, in the cases examined by the Inter-American Court under its contentious jurisdiction. That crime has not disappeared from the “violation phenomenology,” though today most proceedings involve issues of a different nature. In that regard, we should take into account some judgments rendered during the first few years after the Court started to exercise its jurisdiction, including that rendered in the Case of Velásquez-Rodríguez, frequently quoted in the decisions of other national and international tribunals, and by legal scholars. The judgment rendered in Velásquez-Rodríguez oriented judicial thinking on this matter. The Inter-American Court, based on the American Convention, highlighted then the multiple violations involved in the crime of forced disappearance of persons. Indeed, a variety of legally protected interests and rights are affected by that criminal offense.

3. For some time now, we have devoted our efforts to develop a new international legal order, based on shared convictions and expectations, and as a result of a certain understanding on human dignity and the role of public —and other— authorities in relation to individuals. In this framework, certainty grew stronger regarding the need to develop definitions —that are later to support international and domestic actions— of conducts that seriously affect the most valued interests, and call for the adoption of means and methods to prosecute with the aim of preventing such behavior and punishing perpetrators. What is involved is the “other face” of human rights protection in the international scene, the role of which is similar the one played by criminal law in the domestic jurisdiction. Specific crime definitions identify the conducts that most severely affect paramount interests and attach legal consequences to them which, in turn, seriously affect human rights.

4. In this context, conventions and treaties have been signed which refer to certain illegal acts in general and that entrust the States with the task of specifying such acts in their domestic legislation, and providing sufficient and efficient prosecution measures. There are other instruments which move several steps forward in the same direction and go on to describe —i.e.

provide a legal definition, in the language of criminal law— such acts, in order to unify the legal reaction of the international community and to set up a protection and prosecution front line based on shared ideas about justice and security. This happens, for instance, in the Inter-American context regarding the definition of torture (Article 2 of the Inter-American Convention to Prevent and Punish Torture) and forced disappearance (Article II of the aforementioned Convention). In the context of criminal law systems, we would say that these precepts include the legal definitions of the crimes of torture and disappearance. In essence, both conventions fall under the definition of special criminal statutes, as far as the aspect I am now examining is concerned, and therefore have their place within a criminal corpus juris.

5. When States become parties to an international treaty on human rights, something which they do in the course of exercising their sovereignty right and not in spite of it or to its detriment, they undertake certain obligations regarding the other States belonging to the system inherent to the treaty and towards the individuals that are subject to the jurisdiction of the State party itself. This is a characteristic of human right treaties, as opposed to another type of instruments that are limited to defining legal relations between States, establishing their mutual rights and obligations.

6. Thorough analysis has been made as to the content of the general duties undertaken by a State upon ratifying the American Convention on Human Rights. These duties are specified in Articles 1 and 2 of the Pact: recognizing rights and, consequently, properly respecting and ensuring the exercise of those rights, adopting any appropriate measures. For the purposes of this Opinion, and the judgment I concur with, it is important to refer to the obligation set forth in Article 2, under the heading "Domestic Legal Effects": where the exercise of the rights and freedoms referred to in Article 1; i.e. those contained in the Convention, "is not already ensured by legislative or other provisions, the State Parties undertake to adopt [...] such legislative measures or other measures as may be necessary to give effect to those rights and freedoms."

7. Thus, the domestic legal order should be built or re-built in consonance with the international legal order that the State adopted and incorporated into its own. The provisions that govern the respect and safeguard of human rights and fundamental freedoms include criminal laws —general provisions, crime definitions and legal consequences— aimed at protecting interests and rights resorting to the most forceful means available to society and the State.

8. These general duties give rise to the specific commitment of States regarding certain provisions. Let's go back to the instruments mentioned before. Article 1 of the Convention against Torture sets forth that: "The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention;" and Article III of the Convention on Forced Disappearance of Persons provides as follows: "The State Parties undertake to adopt [...] such legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity."

9. The drafters and signatories of treaties —who are, at the same time, bound by said instruments— understand that the illegal conducts defined therein call for their own forms of prosecution, that the usual statutory definitions contained in domestic law applicable to similar or approximate hypothesis —such as battery, injuries or threats in the case of torture, and illegal



deprivation of freedom, abduction or obstruction of justice, in the case of forced disappearance of persons— will not suffice and they also understand that the definition provided by the international instrument is the appropriate and sufficient way to react when such crimes are committed, as the international community is interested in their punishment. Were it not so, it would be meaningless to establish binding descriptions and to impose specific obligations upon the States in such regard.

10. It is possible to assume that the States are free to adopt more severe mechanisms to prosecute these violations should they deem it fit, proper or fair for the better protection of human rights; provided, however, that upon doing so they do not infringe other principles or rules that cannot be passed over. The international definition of a crime constitutes the minimum prosecutable core, which may be improved —to further serve the purposes and the reasons that justify such definition— though not altered, conditioned or defused by eliminating the necessary elements from the form requiring prosecution or by introducing characteristics that reduce its meaning or efficiency, ultimately resulting in the impunity of conducts for which the international order, with the deliberate backing by the State, has defined appropriate punishment.

11. In some case, the Court has upheld the need for a State Party to the Convention on Forced Disappearance to incorporate the related criminal definition into its own legislation. In the judgment on reparations in the Case of Trujillo-Oroza, the Court held: “(...) it is also important to place on record that the failure to define the forced disappearance of persons as an offense has prevented the criminal prosecution in Bolivia to investigate and punish the crimes committed against José Carlos Trujillo Oroza from being carried out effectively, and allowed impunity to continue in the instant case” (para. 97). Consequently, the Court ordered the State “to define the forced disappearance of persons as an offense in its domestic legislation is in order” and considered “that reparation should only be considered complete when the draft becomes a law of the Republic and enters into force, and this should occur within a reasonable time after notification” of the judgment (para. 98).

12. We should now briefly examine the description of the crime of forced disappearance contained in Article II of the 1994 Convention. That instrument refers to various elements of the crime definition that, individually and as a whole, are part of the prosecutable core, that is the internationally accepted definition —which the State has approved and consented— which must be complied with in the domestic order, as indicated above (para. 10). The incorporation of these elements into the definition contained in domestic statute evidences compliance with the international commitment established in the American Convention (Articles 1 and 2) and the Convention on Forced Disappearance (Article III).

13. A) The illegal conduct consists in the “deprivation of freedom [...] in any manner [...] followed by a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person.” Deprivation of freedom consists in an impairment or loss of that freedom. The manner in which that deprivation occurred is irrelevant: it may be lawful or unlawful, violent or peaceful, etc.

14. The Statute of the International Court of Justice, which is mentioned by our Tribunal for the purposes of the instant case —recalling, for sure, that it has been ratified by Peru— is less

accurate in this regard: “arrest, detention or abduction.” The shortcomings in that text, which call for interpretations that will always be risky, consist in that it does not expressly include other types of deprivation of freedom that do not fall under formal descriptions: arrest or detention – unless detention is given a broad meaning, almost all inclusive- or do not include the basic elements of abduction.

15. Such indifference as to the form of the deprivation of freedom has provided the substance for the final draft of Article 2 for a convention on forced disappearance, adopted by the United Nations ad hoc Working Group on Enforced or Involuntary Disappearances on September 23, 2005. The related text lists, but ultimately without limitation, certain specific ways in which deprivation of freedom may occur, in its largest meaning: “arrest, detention, abduction or any other form of deprivation of liberty.”

16. The foregoing considerations do not completely cover the description of the conduct contained in the Inter-American Convention. This incorporates other necessary references to classify the conduct of the person responsible for instances of forced disappearance: a) absence of information on that deprivation of freedom; b) refusal to acknowledge that deprivation or (in the alternative); c) refusal to give information on the whereabouts of that person. In the first case, there is a failure to inform; in the second and third cases, information is refused. The description of the illegal act would be altered if either of these characteristics of the conduct was eliminated, my comments contained in paragraph 28 of this Opinion notwithstanding.

17. Other international systems include expressions that are partially coincidental with the one set forth in the Inter-American Convention. The Statute of the ICC refers to a “refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of [the] person[s]” arrested, detained or abducted. The United Nations project mentions: “refusal to acknowledge that deprivation of freedom” or “to give information on the whereabouts of that person.”

18. B) References to the persons involved: i) there are no specific references to the person affected by the conduct: one or more persons; i.e. any number of individuals, irrespective of any specific characteristic, and ii) there are references as to the individual responsible for the conduct: he or she may be an agent of the State; i.e. a person holding or performing a public position, rank, commission or activity, or (in the alternative), “persons or groups of persons acting with the authorization, support, or acquiescence of the State.” In terms of the legal definition, the punishable conduct may bring together individuals from both categories or individuals from only one of these categories. In both cases, forced disappearance will be deemed to have occurred. Thus, the provisions that set forth that this offense can only be committed by public servants, without taking into account all other categories of persons possibly responsible for that conduct, amounts to failure to comply with the international commitment to establish a specific crime definition.

19. The Statute of the International Criminal Court refers to the arrest, detention or abduction of persons “by, or with the authorization, support or acquiescence of, a State or a political organization.” Indeed, the wording is not entirely adequate. The United Nations project advances

along the path followed by the Inter-American Convention: “agents of the state or [...] persons or groups of persons acting with the authorization, support, or acquiescence of the state.”

20. C) The definition contained in Article II of the 1994 Convention includes another expression worth examining: that those circumstances; i.e. the conduct described attributable to certain individuals, “thereby imped[e] his or her recourse to the applicable legal remedies and procedural guarantees.” It is necessary to examine the scope of this phrase which, if analyzed loosely, may result in the absolute impunity of forced disappearance.

21. On the one hand, we could consider that the phrase mentioned in the preceding paragraph does not comprise an element of the crime definition, but rather an explanation or thought of the legislator to recall the aim that the perpetrators of the crime of forced disappearance had in mind and its normal effects: avoidance of the ordinary controlling force of justice aimed at providing personal security. The wording of the paragraph itself leads to the following conclusion: indeed, the final part of the rule reads: “thereby impeding” and not “in a manner that impedes,” as it should have read had one more element of the crime definition been in mind.

22. On the other hand, if the wording of the Inter-American Convention I am now analyzing is deemed to refer to an element of the crime definition, that circumstance would not hinder the criminalization of the conduct of forced disappearance merely on the grounds that, in theory, the legal remedies and procedural safeguards to protect personal freedom (the appropriate remedies and safeguards, in a general and impersonal sense) remain available. Moreover, the crime of forced disappearance would be committed all the same, even if, hypothetically, it were possible for a third party to resort to a given remedy. The important thing is to continue allowing unrestricted and prompt access to remedies and safeguards that effectively ensure that the violated right is redressed and that the holder of that right is properly protected. In other words, —as suggested by the United Nations project— the victim should not be deprived of legal protection. Obviously, the idea is that the person should not be deprived of the safeguards that the appropriate legal system should make available to him or her.

23. The treatment of this matter is different in all other instruments, which were also mentioned in the judgment of the Inter-American Court and to which I have made reference in this Opinion. The final sentence of Article 2 of the aforementioned UN project is probably more adequate, since the relation established between the elements of the crime definition is even clearer. It establishes a relation between the conduct of the agent and its consequences regarding the personal security afforded the victim under the law: “depriving (the victim) of the protection of the law.” Moreover, the Statute of the ICC incorporates that aspect as a subjective element of the crime definition. Indeed, it mentions “the intention” of the perpetrator of “removing them (the individuals deprived of their freedom) from the protection of the law for a prolonged period of time.”

24. This type of considerations, as applied to the instant case, motivated the Inter-American Court to examine Article 320 of the Criminal Code of Peru. We should bear in mind that the aforementioned Article punishes “[a] public official or servant who deprives an individual of his liberty, by ordering or carrying out any act that results in the individual’s duly proven disappearance, shall be punished by imprisonment for not less than fifteen years and

disqualification from office, pursuant to Article 36(1) and (2) of the Criminal Code.” This concise wording leaves ample space for criticism and deserves —from my point of view, hence this separate concurring Opinion of mine— a decision such as that rendered by the Court. Let us see.

25. Firstly, the reference to the conduct is not consistent with the 1994 Convention and, in any case, it is obscure. Article 320 refers to the ordering or carrying out of an act, thus involving another issue that should not have been included in the wording of the crime definition: criminal involvement, either as intellectual perpetrator (ordering) or as physical perpetrator, i.e. the actual wrongdoing (carrying out). These acts (quid of the omissions?) are oriented to a result expressly required by the crime definition: the “duly verified” disappearance of the victim.

26. Evidently, mere deprivation of freedom is not enough —as required by the Convention, according to a wide protection scheme— but “disappearance” is also required, an ambiguous expression that is subject to various constructions. Furthermore, said “disappearance” must be “duly verified.” This requirement raises new difficult questions. Is the goal to have the applicant prove that disappearance, which is inadmissible, as alleged by some detractors of that principle? Is there a reference to the fact that occurrence of the crime can only be established and the perpetrator punished when disappearance has been “duly proven” – through judicial proceedings, where evidence is examined? Upon examining the wording used in Article 320 and its possible interpretations and consequences one should analyze if attempt, as a conduct, is not subject to criminal prosecution. Indeed, the definition of the crime requires the occurrence of an instance of disappearance and that said disappearance be duly proven. All in all, there is ample difference between that concept in domestic legislation and the description contained in the Inter-American Convention, as ratified by the State.

27. As regards the perpetrator, Article 320 refers to a specific characteristic: the person depriving the victim of his freedom is “a public official or servant.” In principle, the phrase “agents of the State” —as used in the Convention— is wider than “public official or servant,” except as otherwise set forth in domestic rules aimed at explaining these concepts. Of course, incrimination will not apply —at least under this legal category, whose enforcement is required by the international system— to individuals who are not public officials or servants, thus considerably restricting the description contained in Article II of the Convention. The judgment of the Court indicates that the domestic criminal standard restricts the category of wrongdoing and disregards other forms of criminal involvement. Considered as a whole, the problem is even greater: the crime definition excludes every from wrongdoing or criminal involvement in forced disappearance any individual not falling under the category of public official or servant.

28. Obviously, the domestic crime definition does not cover other elements of the legal definition of the crime set forth in the Convention, as mentioned above: i.e. absence of information or refusal to acknowledge that deprivation or to give information on the whereabouts of the victim. The consequence of that omission may be disadvantageous for the official and, therefore, result in the imposing of a more severe criminal punishment than the one established for the act of forced disappearance. Indeed, the crime would be perfected once the acts that result in said disappearance have been effectively performed, irrespective of the subsequent conduct of the official as regards information, explanations or acknowledgment.

29. During the regular session in which judgment was rendered in the Case of Gómez-Palomino v. Peru, the Court heard and decided –after the State acknowledged its liability- the Case of Blanco-Romero et al. v. Venezuela. In these proceedings, domestic legislation on forced disappearance of persons was also taken into account. In that regard, upon ordering reparations, the Court found that domestic legislation was not consistent with the Inter-American Convention on the matter and decided that the State should review legislation to guarantee compliance therewith.

30. In the Case of Blanco-Romero, the description of the illegal conduct of forced disappearance only refers to an “illegal” deprivation of freedom, thus excluding other forms of deprivation: deprivation may be lawful at the beginning and become illegal after some time or as a result of certain circumstances. In that case, it would be appropriate —and consistent with the special Convention— to expressly take into account any other form of deprivation of freedom, as set forth in the 1994 Convention and with different degrees of amplitude, in the other international instruments I have already mentioned herein.

31. Moreover, upon referring to the persons responsible for the illegal conduct, the legislation of Venezuela only mentions “public authorities” or “people rendering services to the State.” The wording excludes other “persons or groups of persons acting with the authorization, support or acquiescence of the State,” as set forth in the provisions on forced disappearance within the Inter-American system. Possibly, such persons are punishable for their involvement in an illegal conduct, but they would be so under a category other than forced disappearance, and that is not the aim of the Convention.

32. The discussion on the crime of forced disappearance set forth in the international instrument evidences, once again, the need for the States that are parties to international treaties containing definitions of illegal conducts to review their domestic legislation in order to adapt it to such international provisions, since adoption thereof is one of the obligations undertaken by the States, in exercise of their sovereignty, upon signing such instruments. This consistency between domestic and international rules does away with certain gaps or doubts regarding the analysis of disputed facts, the definition of international responsibilities and the fixing of their potential consequences in specific cases.

33. In that respect, it is necessary to underscore very specially the principle of legality, which must be strictly applied in criminal matters. It will not always be possible for the authorities in charge of enforcing criminal laws to assess their consistency with international rules through construction procedures that may be difficult or challengeable, precisely from the perspective of fair warning. Therefore, it is useful to consider that the descriptions of illegal acts or conducts contained in binding international instruments should be reflected with as much accuracy as possible in the domestic criminal system. That will dispel doubts as to the alleged or actual international responsibility for breaches of the general duty to give “domestic legal effects,” to international law, pursuant to the provisions in Article 2 of the American Convention on Human Rights.

Sergio García-Ramírez

Judge

Pablo Saavedra-Alessandri  
Secretary

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I have concurred in my opinion with the Judgment rendered by the Inter-American Court of Human Rights in the Case of Gómez-Palomino v. Peru. Furthermore, I feel I have to record, in this Separate Opinion, my personal thoughts the instant Judgment rendered by the Court has prompted, particularly regarding the issue of reparations, as in my previous Separate Opinions in the Case of Myrna Mack-Chang v. Guatemala (Judgment of November 25, 2003), and the Case of the Plan de Sánchez Massacre (Judgment on reparations of November 19, 2004).

2. Indeed, the provisions in Article 63(1) of the American Convention on Human Rights [FN1] effectively provide the Inter-American Court with quite an amount of leeway regarding reparations. In my opinion, as stated in the Opinions referred to above and as re-stated herein, some reparations with dissuasive or exemplary purposes (related to aggravated liability) may contribute to the struggle against impunity and to guarantee non-repetition of harmful events.

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[FN1] Article 63(1) of the American Convention sets forth that: “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 party harmed 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 party harmed.”

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3. The entire chapter on reparations for human rights violations requires a greater development in concept and in case law, starting with the acknowledgment of the close relation between the right to reparations and the right to justice. Such development is particularly necessary in the event of serious and systematic violations of human rights —as in the instant Case of Gómez-Palomino(cf. *infra*)— that call for dissuasive reparations, precisely to ensure non-repetition of such serious human rights violations.

4. As previously stated in my Separate Opinion in the Case of Myrna Mack-Chang (2003), on the actual reparatio,

"to what the Inter-American Court maintained in the past, [FN2] it is my view that reparations can perfectly well be both compensatory and punitive, with the aim of putting an end to impunity and ensuring realization of justice —which is perfectly in accordance with the current stage of development of international law" (para. 46).

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[FN2] In the judgments on “compensatory indemnification” (of 1989) in the Velásquez-Rodríguez and Godínez- Cruz cases, *cit. supra* n. (47).

5. Indeed, reparations of dissuasive or exemplary nature can already be found in the precedents of this Court. Thus, for instance, in the Case of *Aloeboetoe v. Suriname* (Judgment of September, 10, 1993), the Court ordered to reopen a school and establish a foundation to assist the beneficiaries. In the Case of *Villagrán-Morales et al. v. Guatemala* (case of the "Street Children," Judgment of May 26, 2001), the Court ordered once again that an education center be named after the victims of the case; similarly, in the Case of *Trujillo-Oroza v. Bolivia* (Judgment of February 27, 2002), the Court again ordered that an education establishment be given the name of the victim.

6. I find particularly significant and exemplary the reparation measures aimed at recognizing the suffering of the victims and preserving their collective memory. We can mention some other related examples in precedents of the Court. In the Case of *Cantoral Benavides v. Peru* (Judgment of December 3, 2001), for instance, the Court ordered the State to provide a university student grant to the victim. In the Case of *Barrios Altos v. Peru* (Judgment of November 30, 2001), the Court ordered reparations to be made effective through education-related benefits and payment of expenses for health services.

7. Moreover, in the Case of *Durand and Ugarte v. Peru* (Judgment of December 3, 2001), the Court once again ordered payment of health services or expenses and psychological support. In the Case of *Myrna Mack-Chang v. Guatemala* (Judgment of November 25, 2003), the Court ordered reparations [FN3] of both compensatory and punitive nature, for dissuasive or exemplary purposes, in order to preserve the memory of the violations occurred, to satisfy (in the sense of achieving justice) the relatives of the victim, and to contribute to guarantee non-repetition of such violations.

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[FN3] Such as those specified in operating paragraphs 6-11 of the Judgment rendered in that case.

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8. These exemplary reparations are similar to "punitive damages" which, contrary to what some hasty authors aver, do exist. "Punitive damages" —a notion which is not strange to comparative domestic case law and to arbitration international law— [FN4] may, in my opinion, be easily conceived in this sense, akin to "obligations to do" that are both compensatory and punitive. [FN5]

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[FN4] Cf., e.g., *inter alia*, R.W. Hodgkin and E. Veitch, "Punitive Damages Reassessed", 21 *International and Comparative Law Quarterly* (1972) pp 119-132. Some authors even find a tendency to clearly recognize "punitive damages" in international law; cf., e.g., N.H.B. Jorgensen, "A Reappraisal of Punitive Damages in International Law", 68 *British Year Book of International Law* (1997) pp 247-266. And, for the development of legal scholars opinions, cf. G. Arangio-Ruiz, "Second Report on State Responsibility", in United Nations, *Yearbook of the International Law Commission* (1989)-II, part I, pp 31-35, 40-43 and 47-54.

[FN5] Thus, the dichotomy between civil and criminal matters inherent to the liability scheme in domestic law is overcome.

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9. “Punitive damages,” *lato sensu* (beyond the merely pecuniary meaning inappropriately given to them) can be an appropriate response or reaction of the legal order against particularly serious human rights violations. Thus understood, “punitive damages” —as stated in my Separate Opinion on the Case of Myrna Mack-Chang (para. 52) actually have already been applied, for a long time, in the domain of international human rights protection— which makes us recall the phrase uttered by Molière’s famous character, Monsieur Jourdain, *qui parlait la prose sans le savoir...* [FN6]

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[FN6] M. Jourdain: *Il y a plus de quarante ans que je dis de la prose, sans que j'en susse rien, et je vous suis le plus obligé du monde de m'avoir appris cela*". Molière, *Oeuvres Complètes (Le bourgeois gentilhomme, 1670, act II, scene V)*, Paris, Éd. Seuil, 1962, p. 515.

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10. Similarly, as I explained in my Separate Opinion on the Case of the Plan de Sánchez Massacre (Reparations, 2004):

“Even if the reparations ordered in the instant Judgment by the Court are referred to as ‘punitive damages’, (...) or as “exemplary reparations” or “reparations exemplars,” or any other similar word, their basic purpose is still the same: to recognize the extreme gravity of the events, to punish the State responsible for the serious violations incurred, to recognize the supreme sacrifice displayed by the dead victims and relieve the efforts of the surviving ones, and they provide a guarantee of non-repetition of those harmful events. Irrespective of the words used to refer to them, their basic purpose is still the same and they are imposed so as to revert to the benefit of the victims (direct and indirect) and of the inhabitants of the State as a whole, since their aim is precisely to re-build the affected social fabric” (para 25).

11. In its Judgment on the Case of Mr. Gómez-Palomino, the Inter-American Court ordered, by way of reparation and as a measure of satisfaction, the granting of “education reparation measures” to the siblings of the victim or, if so desired, to their sons and daughters, including study grants for primary, secondary and higher education. [FN7] The Court established a relation between those education reparation measures and the suffering of the indirect victims, the relatives of S.F. Gómez-Palomino, in view of his forced disappearance, and the right to a fair trial (paras. 145 to 148).

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[FN7] Paragraphs 145-148, and operating paragraph 11 of the Judgment.

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12. As to the proven facts, the Court referred to the “generalized systematic pattern” of forced disappearances of persons in Peru during the 1989-1993 period, as a “mechanism of anti-subversive struggle” (para. 54.1-4). In its Final Report, adopted on August 27, 2003, the



Comisión de la Verdad y Reconciliación del Perú (Truth and Reconciliation Commission of Peru) referred to "reconciliation through education in values" (para. 4.2.7 of the Report), and requested a series of human rights education measures, including establishing "humanistic training courses" to achieve "a more integral training for individuals." [FN8]

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[FN8] Final Report of the Comisión de la Verdad y Reconciliación del Perú (Truth and Reconciliation Commission of Peru), August, 27, 2003, pp 133-134.

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13. Thus, human rights education measures have a broader scope than that of reparations since they are also preventive measures against violence and abuses against human beings. Today, these measures have gained special relevance in all Latin America: one cannot disregard the fact that education is in the public interest (aimed at reaching the common good) and not simply a commodity left abandoned to the "logic" (or, in fact, lack of logic) of the market (as sadly observed throughout Latin America) and, in the medium and long term, education will be the only way to efficiently face many of the challenges involving the protection of human rights.

Antônio Augusto Cançado Trindade  
Judge

Pablo Saavedra-Alessandri  
Secretary

#### CONCURRING OPINION OF JUDGE C. MEDINA-QUIROGA

In general, I concur with the decision of this Court regarding the human rights violations mentioned in the foregoing judgment. However, I have problems with the grounds on which the Court finds that Articles 8 and 25 of the American Convention have been violated, as I already have had in previous cases. [FN1]

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[FN1] Partially Dissenting Opinion of Judge Cecilia Medina-Quiroga, Case of 19 Tradesmen. Judgment of July 05, 2004. Series C No. 109, and Partially Dissenting Opinion of Judge Cecilia Medina-Quiroga, Case of the Gómez-Paquiyaury Brothers. Judgment of July 08, 2004. Series C No. 110.

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A. As to Article 8:

1. Upon analyzing the violation of Articles 8 and 25, in whereas clause 78 of this judgment, the Court held that:

"the victims of grave human rights violations and their next of kin, if applicable, have the right to know the truth. In consequence, the family members of victims and society as a whole must be informed regarding the circumstances of such violations. This right to the truth, once recognized,

constitutes an important means of reparation. Therefore, in the instant case, the right to the truth creates an expectation that the State must fulfill to the benefit of the victims. This measure benefits not only the next of kin of the victims, but also society as a whole, because, by knowing the truth about such crimes, it can prevent them in the future.” [FN2]

In whereas clause 80, the Court added that “[t]herefore, the relatives of the victims are entitled to, and the State has the duty to procure, an effective investigation by state authorities of the events involving the victim, proceedings against the alleged perpetrators and, if applicable, the appropriate penalties imposed to redress the damage sustained by said relatives.” [FN3]

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[FN2] Cf. Case of 19 Tradesmen. Judgment of July 5, 2004. Series C No. 109, para. 259.

[FN3] Cf. Case of the Serrano-Cruz Sisters. Judgment of March 01, 2005. Series C No. 120, para. 64; and Case of 19 Tradesmen, *supra* note 2, para. 184.

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2. The Court quotes these two considerations in order to support its determination that Articles 8 and 25 of the Convention have been violated.

3. In my opinion and, I believe, as it repeatedly appears in the precedents of the Court, [FN4] the obligation to investigate does not derive from Articles 8 and 25, but from the general duty State Parties have to ensure the exercise of those substantive human rights that the Court considered to have been violated by the State. We can maintain that, in compliance with the general duty to guarantee such enjoyment, the State must protect the human rights of persons against third parties, either State authorities or private individuals, through legal provisions establishing the illegal nature of certain acts (undoubtedly, those that result in forced disappearance) and, after that conduct has been perpetrated, the law must be fully enforced to deter commission of acts of similar nature. Therefore, if the rule that has been infringed is a criminal provision, all those who participated in the criminal act must be investigated, prosecuted and punished in accordance with criminal legislation.

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[FN4] See on this matter, my concurring opinion in the Case of the Moiwana Village, also signed by Judge García-Ramírez and the case law precedents mentioned in the footnotes on pages 3 to 12.

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4. The events in the instant case refer to an instance of forced disappearance for which the State has acknowledged its responsibility regarding the violation of Articles 4(1), 5(1) and 5(2) of the American Convention to the detriment of Mr. Gómez-Palomino and Article 5 to the detriment of his mother, his daughter and his partner. Moreover, the Court has declared that the State violated Article 5 to the detriment of the sisters and the brother of the missing party. The violation of these two rights; i.e. the right to life and to personal integrity, in the light of the obligation to ensure set forth in Article 1(1) of the Convention, gives rise to the duty of the State to investigate, prosecute and punish perpetrators, and the right of the relatives to demand that said duty be fulfilled.

5. Once this right of the relatives of the victim arises, it is time to examine whether the State complied with its duty, as resulting therefrom. To that effect, international enforcement authorities have resorted to two mechanisms. One is the method adopted by the European system, which consists in examining, in circumstances comparable to those of the instant case, what the European Court refers to as “the procedural obligation contained in Article 2 of the European Convention,” which sets forth the right to life. In the case of *Hugh Jordan v. United Kingdom*, the Court did not examine as an independent violation the requirements of Article 6 of the Convention, which includes the requirements of due process, but included an analysis on how the investigation was carried in its considerations regarding the right to life. [FN5]

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[FN5] Case of *Hugh Jordan v. United Kingdom*, Application No. 24746/94, judgment of May 4, 2001, letter b., particularly paragraphs 142 to 145. See also Case of *Anchova and others v. Bulgaria*, Applications Nos. 43577/98 and 43579/98, judgment of February 26, 2004, particularly paragraph 141.

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6. The other method, the one chosen by the Court in many cases (though in this judgment the Court omitted establishing the relation between the determination of the substantive right violation and the emergence of the right to have that violation investigated pursuant to Article 8), consists in verifying if the rules of due process contained in Article 8 have been violated upon complying with the obligation. I do not disagree with this method, as long as it be accepted that the right to know the truth about the circumstances undergone by the victim whose right to life or personal integrity has been violated, originates in the violation of a substantive right that must be “determined” by an independent and impartial court, within reasonable time. In my opinion, this makes it possible to apply Article 8, subparagraph one, wherein the general requirements with which all proceedings, whether criminal, civil or of any other nature, must comply are established.

7. In the instant case, I have not dissented with the opinion of the Court in the sense that Article 8 has been violated, since in fact the State has not complied with the terms of Article 8 as regards the investigation of the events that led to the disappearance of Mr. Gómez-Palomino, which is still pending.

B) As to Article 25:

1. The judgment in the instant case resorts to the considerations mentioned in paragraph 1 of this opinion in the sense that Article 25 also applies to support the validity of the right of the relatives of Mr. Gómez-Palomino to require the State to investigate the events that led to the disappearance of their relative. The reasons given above are also valid to support my disagreement with such line of thought.

2. Notwithstanding the foregoing, as regards Article 25, I also raise an objection to the Court discussing the aforementioned article together with Article 8 of the Convention.

3. Article 25 sets forth that 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, which is known in our continent as the right to the remedy called amparo [protection of constitutional guarantees and rights]. [FN6] This is so to the point that the first drafting of this provision only conferred the right regarding the rights set forth in the Constitution and in the laws of the country concerned. [FN7] After it was later amended to include the wording in the International Covenant on Civil and Political Rights, Article 2, paragraph 3 , it incorporated the idea to extend the protection under such remedy of amparo to also include the human rights set forth in the American Convention. [FN8]

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[FN6] The Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 32.

[FN7] Inter-American Specialized Conference on Human Rights, Minutes and Documents, p. 22.

[FN8] Ibid., page 41.

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4. The joint discussion of Articles 8 and 25, in my opinion, suggests that the only provision contained in the Convention that establishes the right to the aforementioned protection measures is the one embodied in Article 25. I believe that not to be so. That idea is indirectly supported by the provisions in Article 46(1) (a) of the Convention which requires that “all domestic remedies” be exhausted for a person to be able to resort to the individual communications examination procedure in the Inter-American system. Evidently, these remedies cannot always be simple, prompt and effective; on the contrary, they may consist in the right to bring an action to initiate judicial proceedings of the most diverse nature, even allowing for the filing of appeals, among other remedies, in each of such proceedings. The obligation of the State Parties to the Convention to provide every type of remedy originates, in my opinion, in their duty to ensure the exercise of fundamental rights since that obligation “implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.” [FN9] In order to legally ensure the free and full exercise of human rights, the writ of amparo set forth in Article 25 is definitely insufficient.

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[FN9] Case of Velásquez-Rodríguez. Judgment of July 29, 1988. Series C No. 4, para. 166.

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5. If that is the case, the inclusion in Article 25 of the right to any type of remedy distorts the original purpose of the rule, to the detriment of the victims. The Court thus bars itself from developing the concept and the requirements of the writ of amparo and, in doing so, it also hinders identification of which specific protection measures in the manner of the writ of amparo as such should be in force in the domestic legal system of each State Party to the American Convention to safeguard human rights in a simple, prompt and effective manner.

6. I do not dissent with the opinion of the Court regarding the violation of Article 25 in the instant case because the State acknowledged its liability for having violated Article 7(6) of the Convention, which is similar in nature to the writ of amparo. [FN10] Personally, I believe that it would have been enough to acquiesce the violation of Article 7(6), but I concur that it is possible to contend that if the specific remedy was violated, the generic remedy must have been violated as well.

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[FN10] See in this regard, *The Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights), *supra* note 6, paras. 33-34.  
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Cecilia Medina-Quiroga  
Judge

Pablo Saavedra-Alessandri  
Secretary