In the case of Palamara-Iribarne,

The Inter-American Court of Human Rights (hereinafter "the Inter-American Court", "the Court" or "the Tribunal") delivers the following judgment pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Articles 29, 31, 56 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure").

I. INTRODUCTION TO THE CASE

1. On April 13, 2004, pursuant to the provisions of Articles 50 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") filed before the Court an application against the Republic of Chile (hereinafter "the State" or "Chile") originating in petition No. 11,571, filed before the Secretariat of the Commission on January 16, 1996.

2. The Commission filed an application requesting the Court to decide whether the State had violated Articles 13 (Right to Freedom of Expression) and 21 (Right to Property) of the American Convention, with relation to the obligations set forth in Articles 1(1) (Obligation to Respect Rights) and 2 (Obligation to Adopt Domestic Law Measures) thereof, to the detriment of Humberto Palamara-Iribarne. The facts stated in the application refer to the alleged prohibition in March 1993, against publication of the book authored by Humberto Antonio Palamara-Iribarne, "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services"), "in which he addressed issues related to military intelligence and the need to bring it into line with certain ethical standards;" the alleged seizure of copies of the book, as well as the originals, a diskette containing the full text, and the galleys of the publication, all of it carried out at the premises of the publishing company where the book was to be published; and the alleged erasure of the

complete text of the book in question from the hard disk of the personal computer of Palamara-Iribarne, and the seizure of the books found there. As argued by the Commission, "Palamara-Iribarne, a retired Chilean Navy officer, was at the time of the events a civil servant hired as contractor by the Chilean Navy in the city of Punta Arenas." The Commission held that Palamara-Iribarne "was prosecuted for two counts of disobedience and correspondingly convicted," and "called a press conference at his residence and because of said conference, criminal charges were instituted against him for contempt of authority (desacato) and a guilty verdict was returned."

3. Likewise, the Commission asked the Inter-American Court to order the State, under Article 63(1) of the Convention, to adopt the specific reparation measures detailed in the application. Lastly, the Commission requested the Court to order the State to pay costs and expenses arising from legal proceedings in the domestic jurisdiction and under the Inter-American System.

II. JURISDICTION

4. The Court has jurisdiction to hear the instant case pursuant to Articles 62 and 63(1) of the Convention as Chile has been a State Party to the American Convention since August 21, 1990, and it accepted the contentious jurisdiction of the Court on that date.

III. PROCEEDING BEFORE THE COMMISSION

5. On January 16, 1996, the Center for Justice and International Law (CEJIL, for its acronym in Spanish) filed a complaint before the Commission.

6. On October 10, 2001, the Commission approved Report No. 77/01, whereby it declared the admissibility of the instant case. On October 19, 2001, the Commission made itself available to the parties to try and reach a friendly settlement.

7. On March 4, 2003 the Commission, pursuant to Article 50 of the Convention, adopted Report No. 20/03, and recommended the State:

1. To restore to Humberto Palamara the exercise of the violated rights and to give back the books seized.
2. To adequately compensate Humberto Palamara-Iribarne for the human right violations […] set forth [in the report].
3. To adopt adequate measures to adapt domestic legislation to the provisions of the American Convention regarding freedom of expression, particularly the de-classification of contempt of authority as a crime.

8. On March 13, 2003, the Commission gave notice of the above-mentioned report to the State, granting it two months, as from the date of notice, to inform the Commission of the measures adopted in compliance with the recommendations.

9. On March 13, 2003, the Commission notified CEJIL that the report had been approved pursuant to Article 50 of the Convention and requested that a statement of its position on the submission of the case to the jurisdiction of the Court be filed within one month.

10. On April 14, 2003, CEJIL filed a brief requesting the Commission to submit the case to the Court, should the State fail to comply with the recommendations contained in the report.

11. On May 16, 2003, the State requested a 30-day extension to submit its comments on the Report on the Merits No. 20/03 issued by the Commission (supra para. 7), and the Commission granted the extension until June 5, 2003.

12. On June 12, 2003, the State requested a new extension to comply with the recommendations made by the Commission in its Report No. 20/03 (supra para. 7) and stated that "it expressly waives its right to file preliminary objections regarding the term set forth in […] Article 51(1) of the American Convention," in the understanding that said extension would have the effect of suspending such term.

13. On August 7, 2003, the State requested a new 2-month extension to comply with the recommendations made by the Commission in its Report No. 20/03 (supra para. 7), which was granted until October 12, 2003.

14. On October 7, 2003, the State submitted information to the Commission in response to the recommendations included in Report on the Merits No. 20/03 (supra para. 7) and requested a 3–month extension "to bring the case to an end […], given the stage of conversations and […] the willingness of Palamara" and the State. Said extension was granted until January 12, 2004. On January 5, 2004, the State requested another extension to report on the recommendations made by the Commission, which was granted until April 12, 2004.

15. On April 13, 2004, after expiration of the term allowed for the State to submit information on the recommendations made by the Commission on Report on the Merits No. 20/03 (supra para. 7), the Commission decided to submit the instant case to the Court.

IV. PROCEEDING BEFORE THE COURT

16. On April 13, 2004, the Inter-American Commission filed an application before the Court (supra para. 1), together with documentary evidence and offered to submit testimonies of witnesses and expert witnesses as further evidence. The Commission appointed Evelio Fernández-Arévalo, Santiago A. Canton and Eduardo Bertoni as delegates and Andrea Galindo and Lilly Ching as legal counsel.

17. On May 20, 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"), pursuant to the provisions of Article 35(1)(b) of the Rules of Procedure, served said application and its appendixes on the State and also notified the State of the term allowed to answer the application and to appoint its agents in the proceedings.

18. On May 20, 2004, pursuant to Article 35(1)(d) and (e) of the Rules of Procedure, the Secretariat served the application on Humberto Palamara-Iribarne, his representatives and the attorneys from CEJIL (hereinafter "the representatives") and informed them the term within which the brief of requests, arguments and evidence should be filed (hereinafter "brief of requests and arguments").

19. On June 16, 2004, the State appointed Amira Esquivel-Utreras as agent and Miguel Ángel González-Morales as deputy Agent.

20. On July 19, 2004, the representatives filed a brief of requests and arguments, attached documentary evidence and offered testimonies of witnesses and expert witnesses as evidence.

21. On September 16, 2004, the State filed the answer to the application and comments on the brief of requests and arguments, but no evidence was submitted.

22. On January 12, 2005, the Secretariat sent a note to Chile, based on the instructions of the President, to inform that, since Judge Cecilia Medina-Quiroga, Chilean citizen, excused herself from hearing this case, pursuant to Articles 19 of the Statute and 19 of the Rules of Procedure of the Court, the State had the right to appoint, within 30 days, an ad hoc judge to participate in the hearing of the instant case, pursuant to the provisions of Article 55(3) of the American Convention, Article 10(3) of the Statute of the Court and Article 18 of the Rules of Procedure of the Court. The State failed to make such appointment.

23. On March 18, 2005, the President issued an Order requiring Anne Stewart-Orlandini, Fernando Palamara-Stewart, Humberto Palamara-Stewart and Raimundo Palamara-Stewart, witnesses proposed by the representatives, to render their testimony through affidavits. The President further ordered Carlos Peña-Gonzalez, expert witness proposed by the Commission and the representatives, and Cristian Riego-Ramírez and María Inés Horvitz, expert witnesses proposed by the representatives, to render their expert opinions through affidavits. Likewise, in such Order, the President summoned the parties to attend a public hearing to be held in Asunción, seat of the Supreme Court of Paraguay, on May 9, 2005, to hear the final oral arguments regarding the merits and potential reparations and costs, and the testimony of Humberto Antonio Palamara-Iribarne, witness proposed by the Commission and the representatives, the testimony of Manuel González-Araya and Carlos Vega-Delgado, witnesses proposed by the representatives, and the report of Alex Avsolomovich-Callejas, expert witness proposed by the Commission and the representatives. In such Order, likewise, the President informed the parties that the term to submit their final written arguments on the merits, reparations, and costs would expire on June 9, 2005.

24. On April 6, 2005, the representatives filed a brief requesting, among other things, "[t]hat the applicants be authorized to allow the expert witness Cristian Riego to render an expert opinion at a public hearing."

25. On April 7, 2005, the representatives of the alleged victim filed a brief requesting "an authorization for [the] testimony of the [witnesses Manuel González-Araya and Carlos Vega-

Delgado, called by the President to appear at a public hearing,] to be rendered through an affidavit."

26. On April 11, 2005, the State sent two briefs stating that "it would not object to the rendering of testimony by the expert […] Riego-Ramírez at the public hearing of […] May 9, [2005]." Moreover, the State communicated "its objection to the request" made so that the witnesses González-Araya and Vega-Delgado could render testimony through an affidavit.

27. On April 13, 2005, the Inter-American Commission filed a brief stating that "it had no objections" regarding the request of the representatives that the opinion of the expert witness Riego-Ramírez be rendered at a public hearing, and that the witnesses Manuel González-Araya and Carlos Vega-Delgado, called by the President of the Court to appear at a public hearing, render their testimony through affidavits (supra paras. 24 and 25).

28. On April 20, 2005, the representatives filed a copy of the expert opinion rendered before a "court officer of the Republic of Chile" by María Inés Horvitz (supra para. 23). On April 29, 2005, the representatives filed exhibits to said expert opinion.

29. On April 22, 2005, after the extension granted by the President, the representatives filed a copy of the expert opinion rendered through an affidavit by Carlos Peña-González and the testimony rendered through an affidavit by Raimundo Jesús Palamara-Stewart (supra para. 23). The following day, the representatives filed a brief stating their decision "to desist […] from obtaining the testimony of the witnesses" Manuel González-Araya and Carlos Vega-Delgado (supra paras. 23 and 25).

30. On April 28, 2005, the President issued a Resolution ordering, among other things, 1) to accept the waiver made by the representatives of the testimony of Manuel González-Araya and Carlos Vega-Delgado, and to omit submission of that evidence (supra para. 29); and 2) to call Cristian Riego-Ramírez, expert witness proposed by the representatives, to render its opinion at a public hearing to be held on May 9, 2005, as instructed by the President through a Resolution issued on March 18, 2005 (supra paras. 23 and 24).

31. On April 29, 2005, the representatives filed a brief and an appendix, whereby they informed that "on April 27, [2005], the expert witness […] Alex Avsolomovic[h …] informed that he would not be able to travel to Asunción, Paraguay to render his expert opinion in court[,] since he would undergo a surgery […]" and requested "to be authorized to render an expert opinion through an affidavit."

32. On April 29, 2005, Anne Ellen Stewart-Orlandini filed a brief and its appendixes whereby it sent a copy of the affidavits signed by her and her children, Humberto Antonio and Fernando Alejandro, both members of the Palamara-Stewart family, in response to the provisions of the Resolution issued by the President on March 18, 2005 (supra para. 23). On May 6, 2005, Anne Ellen Stewart-Orlandini sent a copy of the certified affidavits.

33. On April 29, 2005, the Inter-American Commission filed a brief stating that "it had no comments to raise against the expert report[s]" of expert witness María Inés Horvitz and witness Raimundo Jesús Palamara-Stewart (supra paras. 28 and 29).

34. On May 2, 2005, the State sent its comments on the expert opinion rendered through an affidavit by Carlos Peña-González (supra para. 29).

35. On May 4 and 5, 2005, the State submitted its comments "on the expert opinion rendered by María Inés Horvitz" (supra para. 28), and the witness testimony of Anne Ellen Stewart-Orlandini, Raimundo Jesús Palamara-Stewart, Humberto Antonio Palamara-Stewart and Fernando Alejandro Palamara-Stewart (supra paras. 29 and 32).

36. A public hearing was held on May 9, 2005, to discuss the merits, reparations, and costs of the case, and the following persons were present: a) for the Inter-American Commission: Evelio Fernández-Arévalo, delegate; Eduardo Bertoni, delegate; Víctor H. Madrigal-Borloz and Lilly Ching, legal counsel; b) for the representatives of the alleged victim: Liliana Tojo, Julieta Di Corleto and Francisco Cox-Vial, attorneys for CEJIL; c) for the State of Chile: Amira Esquivel-Utreras, agent; Miguel Ángel González-Morales, deputy agent; and Patricio Aguirre-Vacchieri. Moreover, the alleged victim, Humberto Antonio Palamara-Iribarne, witness proposed by the Commission and the representatives and Cristian Riego-Ramírez, expert witness proposed by the representatives and summoned by the President (supra paras. 23 and 30) appeared in the Court. Furthermore, the Court heard the final arguments of the Commission, the representatives and the State.

37. On June 3, 2005, the representatives filed a brief and an appendix through which they submitted a copy of the affidavit signed by the expert witness Alex Avsolomovich-Callejas and stated that they "regret[ed] the delay, but the affidavit had been sent after the surgery undergone by the expert witness" (supra paras. 23 and 31).

38. On Jun 10, 2005, the Commission filed a brief stating that "it had no comments to make" regarding the affidavit signed by the expert witness Alex Avsolomovich-Callejas (supra para. 37).

39. On June 15, 2005, Chile submitted its comments on the affidavit whereby the expert opinion of Alex Avsolomovich-Callejas had been rendered (supra para. 37).

40. On June 23, 2005, the representatives filed their final written arguments on the merits, reparations, and costs.

41. On June 28, 2005, the Inter-American Commission and the State submitted their final written arguments on the merits, reparations, and costs.

42. On August 18, 2005, the State filed a brief informing that "the Chilean legislative branch approved a regulatory amendment that abrogates contempt of authority as a crime" and indicated that "the final text of the bill" would be delivered as soon as it was published in the Official Gazette.

43. On September 9, 2005, the State submitted a brief and appendixes containing a copy of the Armed Forces Constitutional Organic Law of Chile, and stated that, "it constitutes a relevant precedent for the resolution of the case and that said law has been repeatedly mentioned in the instant case." Moreover, together with that brief, Chile submitted a copy of the Armed Forces Personnel Regulations, the Disciplinary Rules of the Navy and a copy of Sections 299 to 339 of the Annotated Code of Military Justice.

44. On September 16, 2005, the State filed a brief and an appendix including a copy of Law No. 20,048 and stated that said Law "abrogated contempt of authority as a crime under Chilean legislation." On September 19, 2005, as instructed by the President, the Secretariat set October 3 and 10, 2005, as the expiration dates of the terms allowed to the representatives and the Commission, respectively, to submit their comments on the above-mentioned brief and appendix.

45. On October 3, 2005, the representatives filed a brief through which they submitted their comments on the brief filed by the State and its appendix (supra para. 44). On October 11, 2005, the Commission submitted its comments on the brief filed by the State and its appendix.

46. On October 18, 2005, as instructed by the President, the Secretariat submitted to the State a note requesting the following information, as set forth in Section 45(2) of the Rules of Procedure of the Court: request for protective measure filed by the wife of Palamara-Iribarne with the Court of Appeals of Punta Arenas and the complete case file; the complaint initiating proceedings for the crime of disobedience and breach of military duties filed with the Naval Court of Magallanes; the order passed by the Commander in Chief of the Chilean Navy on May 28, 1993, ordering early termination of the employment contract of Palamara-Iribarne; and expert opinion No. 34,913 of December 20, 1993, regarding the effective date of early termination of the employment contract signed by Palamara-Iribarne.

47. On October 31, 2005, the State filed a brief and appendixes through which it submitted the information requested by the President of the Court on October 18, 2005.

V. EVIDENCE

48. Before examining the evidence offered, in the light of the provisions set forth in Articles 44 and 45 of the Rules of Procedure, the Court will state a number of considerations arising from the precedents of the Court, which apply to the instant case.

49. As regards the weighing of evidence, the contradictory principle is applied in order to respect the right of defense of the parties. This principle 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. [FN1]

[FN1] Cf. Case of the "Mapiripán Massacre". Judgment of September 15, 2005. Series C No. 134, 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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50. In accordance with Court practice, at the beginning of each procedural stage, the parties must specify in writing, at the first opportunity granted to do so, the evidence they will provide. Furthermore, the Court or the President of the Court, exercising the discretionary authority under Article 45 of the Rules of Procedure, may ask the parties to supply additional items as evidence to facilitate adjudication of the case without thereby affording them a fresh opportunity to expand or complement their arguments, unless by express leave of the Court. [FN2]

[FN2] Cf. Case of the "Mapiripán Massacre", supra note 1, para. 72; Case of Gutiérrez-Soler, supra note 1, para. 38; and Case of the Girls Yean and Bosico. Judgment of September 8, 2005. Series C No. 130, para. 82.

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51. The Court has also pointed out 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 effected paying special attention to the circumstances of the specific case, and bearing in mind the limits imposed by the principles of legal certainty and procedural equality regarding the parties. The Court has taken into account that international precedents, according to which international courts are deemed to have authority to appraise and assess evidence based on the rules of a reasonable credit and weight analysis, and has always avoided rigidly setting the quantum of evidence required to reach a decision. This criterion is valid with regard to international human rights courts, which enjoy ample authority to assess the evidence submitted to them bearing on the pertinent facts, in accordance with the rules of logic and based on experience. [FN3]

[FN3] Cf. Case of the "Mapiripán Massacre", supra note 1, para. 73; Case of Raxcacó-Reyes, supra note 1, para. 35, and Case of Gutiérrez-Soler, supra note 1, para. 39.

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52. Based on the foregoing considerations, the Court will now examine and assess the documentary evidence provided in the instant case by the Commission, by the representatives and by the State, at different procedural stages or as evidence requested the President of the Court to facilitate adjudication of the case, as well as the testimonial and expert evidence rendered before the Court at the public hearing. To such end, the Court shall abide by the principle of assessment on the basis of sound judgment, within the appropriate legal context.

A) DOCUMENTARY EVIDENCE

53. The documentary evidence submitted by the parties, both the Commission and the representatives filed witness statements and written expert opinions sworn before a notary public (affidavits) in accordance with the Order of the President of March 18, 2005 (supra para. 23). In addition, the representatives submitted a written expert opinion from an expert witness who was

summoned to render an opinion at a public hearing (supra paras. 23, 31 and 37). The above-mentioned witness statements and expert opinions are summarized below.

WITNESS STATEMENTS

a) Proposed by the representatives

1. Anne Ellen Stewart-Orlandini, wife of the alleged victim

Mrs. Stewart-Orlandini got married to Humberto Antonio Palamara-Iribarne and had three children with him. In February 1993, she lived with her husband in the city of Punta Arenas, Chile. Her husband was a retired Navy officer, a "civil servant hired as contractor" and worked "at the Office of the Commander in Chief of the Third Naval Zone, in Punta Arenas."
In 1993, her husband tried to publish the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services"); she financed said publication. All related "invoices were made to the name of [her] company." Final profits should be received by her family members. The corresponding taxes had to be paid; however, "[the books] were never published."
On the night of March 1, 1993, various Navy officers appeared at her residence, "arrested her husband" and took the books claiming that they "constituted an attack to national security." "[T]hey accessed her husband's computer and deleted all files without [producing] any written authorization to that effect." From that moment on, "they lived a nightmare" since her husband was "often" arrested and kept incommunicated. These events occurred in the presence of their children. One night, they even got into his private office at the company and "deleted the entire hard disk of his computer."
Since she was "the owner of the books," she filed a complaint against the Chilean Navy with the Court of Appeals of Punta Arenas, requesting that "no limitations be imposed upon her right to sell [her] the books," considering that she is a private individual. The Court declared it had no jurisdiction to hear the case as the "issue fell within the scope of military jurisdiction;" therefore, she was "left defenseless, […] since, as she was a civilian, she had no access to the military jurisdiction and civil jurisdiction authorities gave up on her."
Three proceedings were initiated against her husband before the Naval Court of Punta Arenas; two on counts of disobedience for refusing to deliver the books and one on a charge of contempt of authority. The witness rendered testimony "several times" during those proceedings before the Clerk, but never before a judge.
The proceedings initiated against her husband impaired the life of every member of her family. Everything changed due to the conduct of Navy officers against her husband and her family. Her friends no longer talked to them. A member of the Navy threatened "to arrest her if she made new comments against Almiral Bruna."
Said proceedings and the convictions resulting therefrom affected the personal lifestyle of her husband since his colleagues and friends from the days at Navy School criticized him for having written the book. Her husband could not trust anyone. In a given occasion, they received an "invitation" for her husband to be hospitalized at the Naval Hospital of Punta Arenas "to avoid being hounded by journalists." They rejected the "invitation" since her husband had been released from his arrest the previous day and it was "an evident attempt to get rid of him."
Temporary detention pending trial was imposed upon her husband in one of these proceedings; therefore, "she was on her own with their 3 children aged 9, 8 and 6." She had to continue

working to be able to cover their home expenses, since her husband's "salary was withheld." Their children were also deeply affected by having their father arrested without warning. "[T]hey arrived at their home in vans carrying machine guns." That happened even after leaving the naval post.
During the proceedings against her husband, she had to rent a family residence outside the naval post since, while her husband was under arrest, she was told "on Tuesday that she had to move out from their naval residence on Friday that same week."
Once judicial proceedings were initiated against her husband, they were denied access to naval premises. Once "she was kicked out" together with her children when she was trying to receive assistance at the Naval Hospital in Punta Arenas. Several years afterwards, she lost an employment opportunity as she was denied access to naval museums.

2. Fernando Alejandro Palamara-Stewart, son of the alleged victim

He was born to Humberto Palamara-Iribarne and Anne Stewart-Orlandini. In 1993, he was 9 years old when one of his father's colleagues "arrived" at night and took away the books they had at home in the "living room." They "got into" their home computer and then arrested his father. He ignores whether they had an arrest warrant.
In 1993, they lived in a naval community in Punta Arenas, where he played with the "sons of naval officers." After judicial proceedings were initiated against his father, their neighbors "no longer hanged around" with them and said his father was "a traitor." He was deeply affected by criticism against his father. He "cannot forget" when […] his father "was arrested" and they arrived at their place "carrying machine guns, as if his father were a terrorist." He ignored why his father was arrested and the reason why "they all went mad" after he wrote a book.
The relationship with his father was hampered since the latter "was stressed" due to the situation he had to endure.

3. Humberto Antonio Palamara-Stewart, son of the alleged victim

He was born to Humberto Palamara-Iribarne and Anne Stewart-Orlandini. In 1993, he was 8 years old and he lived with his parents. His father had written a book. One night, "some [of his father's] colleagues appeared at their house and took away all the books from the living room," they "arrested" his father and "deleted" the computer files. He ignores if the people who came into his house had a search and seizure warrant.
After these events, his parents grew apart and he had to move with his grandparents to Viña del Mar with his mother Anne and his brothers, while his father lived with his grandmother. He did not fully understand what was happening with his family, but he realized that his father was nervous and did not spend much time with the family.

4. Raimundo Jesús Palamara-Stewart, son of the alleged victim

He was born to Humberto Palamara-Iribarne and Anne Stewart-Orlandini. In 1993, he was 6 years old and he lived with his parents. His father had written a book. One night, before selling the book, various naval officers appeared at their residence in Punta Arenas, took away all copies of the book and arrested his father. He ignores whether they had a search warrant. His lifestyle was altered because "now they were weird" and their friends "were no longer hanging out" with

them. Moreover, they had to move. "[N]aval officers often arrived at their place […] and […] arrested his father." His father left for Valparaiso because he could not find a job in Punta Arenas. The rest of the family would stay in Punta Arenas "until the end of the school year," but due to "economic problems" they had to move to Viña del Mar in October. These circumstances caused him a detriment because he would not be accepted at any school as the year was about to end. The same happened the following year because he could not read. His parents never went back together. Nowadays, he lives with his father and is "about to finish school," though he is "two years behind." His mother lives in Spain with his two elder brothers.
His father has been almost banned from professional practice as a naval engineer since no shipping company will hire him given his close relation to the Navy. Thus, he is always in financial hardship.

EXPERT REPORTS

a) Proposed by the Inter-American Commission and the representatives

1. Carlos Peña-Gonzáles, lawyer

Under Chilean legislation, the crime of contempt of authority is set forth in Sections 263 and 264 of the Third Criminal Code. This crime is defined in ordinary criminal law as that committed "upon performing acts or making comments that are indecorous or insulting against governmental bodies or certain public authorities" and is subject to aggravated penalties.
In Chile, the crime of contempt of authority has been abrogated in special criminal laws, though it remains valid in the context of ordinary criminal law and there have been bills that are "extremely restrictive of freedom of expression." To adapt Chilean legislation to international standards, in addition to the abrogation of the crime of contempt of authority, it is necessary to reduce the standard of protection of public officers "when so required in the public interest." The consequences of the recognition of contempt of authority as a crime are the criminal penalty, on the one hand, and "the disqualification of open and fierce criticism" towards authorities in active public duty, on the other hand.
The crime of contempt of authority punishes the delivery and release of speeches that are part of the democratic dialogue and the scrutiny that citizens should perform; thus "sacralizing institutions" and rendering them immune to criticism by the community.
Moreover, Section 89 of the Ordinance of the Chilean Navy restricts the exercise of freedom of expression by the members of the Armed Forces. Publication of a book by a civil servant does not "fall, strictly speaking," under the cases listed in that section, which should be interpreted restrictively since "a book […] should be considered a distinctive artistic or intellectual work, different from those expressly listed in that rule."

2. Alex Avsolomovich-Callejas, lawyer

The Constitution, the laws and regulations of Chile do not allow for a civil servant hired as contractor to be considered a military officer, "therefore, they cannot be held responsible for crimes that can only be committed by military officers." Only "those individuals whose status is contemplated in the rank or personnel structure of the Armed Forces," as specified in applicable rank provisions, "can be considered military officers." Said laws "take into account the number

of individuals composing each […] rank within the various branches of the Armed Forces," who compose its "permanent personnel." The status of "civil servants hired as contractors" is not contemplated in rank regulations, are not part of the hierarchical structure, and are renewed on an annual basis, and those holding said status are not considered personnel of the Armed Forces.
Section 91 of the Political Constitution of Chile sets forth that, as a general rule, "admission to the rank or personnel system of the Armed Forces" must be channeled through "the official troop schools." An exception to said Constitutional provision relates to "the professionals and 'civil servants' ranks specified by law," to avoid increasing the personnel structure through regulations.
It would be absurd to extend the scope of Section 6 of the Code of Military Justice and thus hold "any person joining a division of the Armed Forces" as a military officer.
Section 10 of Constitutional Organic Law No. 18,948 of the Armed Forces, among others, sets forth that "the staff of the Armed Forces is composed of officers, permanent personnel and seafarers, and civil servants (excluding civil servants hired as contractors)." Moreover, Section 3 sets forth that those hired as contractors render services "on a temporary status." Furthermore, Section 6 of the Code of Military Justice sets forth that those who are subject to the rank or personnel regulations of the Army, Navy, Air Force or Police, and students attending the last two years at any Armed Forces school will be considered military officers.
Moreover, the civil servants listed in rank regulations who enroll as personnel of the Armed Forces will only be subject to military jurisdiction if they commit a common crime "during a state of war or campaign," while on duty, inside "military premises" or upon committing military crimes that do not depend on military status to be considered as such; for instance "theft of military species."

b) Proposed by the representatives of the alleged victim:

3. María Inés Horvitz, lawyer

The scope of military jurisdiction in Chile is the broadest within Latin America as regards trials on civilians, given that Section 5 of the Code of Military Justice of Chile defines military crimes and lists those who shall be considered military officers pursuant to Sections 6 and 7 of said Code. The military proceedings initiated from 1990 to 1996 include a much larger number of civilians than military officers as defendants.
Mrs. Horvitz believes that the prohibition against book publication contained in Section 89 of the Ordinance of the Navy is unconstitutional and "shall not apply […] to civil servants hired as contractors."Since said section has not been declared unconstitutional, it should be construed restrictively and should only be enforced regarding military officers.
The judges, prosecutors and judge advocates that compose the military justice system of Chile are individuals on active duty; they belong to a special hierarchical structure within military justice that is subordinated and dependent within the military system.Military judges do not undergo technical training to hold that position. In practice, judge advocates, who are lawyers, "render" judgment but are subject to military rule; thus they lack independence and impartiality. Prosecutors are lawyers but "they rank lower than judges and advocates." The procedure for removal is subject to the criterion of the superior officer. Very frequently "prosecutors are removed from an investigation 'due to military reasons,' no further explanations being

provided."As a result of this, the guarantees on the availability of a competent judge previously established by law and on the irremovability of judges from the bench are not satisfied.

The headquarters of the Navy Court-Martial are in Valparaíso and the Court is composed of two Justices from the Court of Appeals of Valparaíso, appointed upon an annual drawn; a general Navy judge advocate general and a navy active-duty officer in that institution. In 1991, an attempt was made to offer greater independence and impartiality to the active military members of Courts-Martial through a legal amendment that "guaranteed the irremovability of the members of these tribunals who are not justices of the Courts of Appeal, [...] for a term of three years after they took up their position."

The criminal procedure set forth in the Code of Military Justice, in times of peace, comprises two stages: the investigation and the trial. At both stages, jurisdiction falls on the prosecutor. Once the investigation stage is closed, the prosecutor must "submit [...]" its report to the appropriate institutional court. If the court where proceedings are instituted considers that there are sufficient grounds to set the case for trial, it will do so and will send the case file back to the prosecutor, who will continue in charge of proceedings until judgment is rendered by the court where proceedings were instituted. Investigation proceedings are secret and in writing, and the case file containing the certificates of procedures carried out by the prosecutor have evidentiary value.

The prosecutor, in addition to investigating the alleged crime, is empowered to order personal provisional measures. "An order from the prosecutor denying release on bail" can only be "appealed when the individual was deprived of freedom for more than twenty days."Criminal proceedings within the military jurisdiction "automatically lead to temporary detention pending trial in the case of serious and less serious crimes, limitation of political rights, an order prohibiting the individual from leaving the country and registration of the individual with the Civil Registry regarding the crime for which proceedings were initiated." Temporary detention pending trial is not a measure of exceptional nature.

In accordance with the law, evidence must be produced before the prosecutor. However, in practice, evidence is produced before the clerk, i.e. an administrative officer of the court who "has no or scant technical training." At no instance may evidence be produced at a hearing before the judge.

The Constitution of Chile was amended to incorporate "the need that any investigation proceeding or measure that may affect fundamental rights must be previously authorized by the Court." However, "an entirely irrational constitutional decision" excluded completely the military jurisdiction from the procedural amendment.

The defendant has the right to know the reasons and facts of the case only 120 days after the commencement of proceedings; furthermore, the defendant may be subject to temporary detention pending trial during the four-month period prior to the time a defense against the charges may be raised. The defense counsel cannot be present while the defendant renders a statement at the investigation stage and often evidentiary procedures need be requested to the prosecutor without inspecting the case file and, thus, without knowing the specifics of the charges brought against the defendant.

Sections 299 (3); 337 (3) and 336 of the Code of Military Justice, regarding the crimes of disobedience and breach of military duties, "do not comply with the legality principle […] as regards the definition of the crime or specificity." There is no classification of duties to allow individuals to be aware of the prohibited acts; therefore, "the definition of punishable conducts and the corresponding punishment by the authorities of the military jurisdiction is significantly arbitrary."

B) TESTIMONIAL AND EXPERT EVIDENCE

54. On May 9, 2005, the Court held a public hearing at the Auditorium of the Supreme Court of Justice of Paraguay to receive the testimony of the witness proposed by the Inter-American Commission and the representatives of the alleged victim and to hear the report of the expert witness proposed by the representatives (supra para. 36). Below is a summary of the relevant parts of such testimonies and expert reports.

WITNESS TESTIMONY

a) Proposed by the Inter-American Commission and the representatives

1. Humberto Antonio Palamara-Iribarne, alleged victim

He joined the Navy in 1972, and until December 1992, he served as Training Official at the Navy Operations Department of the Office of the Commander in Chief of the Third Naval Zone and performed military functions. By the end of 1992, he authored the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services") while "on holidays." In 1993, he worked as a "civil servant hired as contractor," "under an annual contract" as analyst at the Navy Intelligence Department of the Office of the Commander in Chief and performed administrative functions.
One of the reasons that led him to write the book was "human right violations, mostly committed by intelligence personnel." As States "were looking for mechanisms to control these services," in his book he suggested "that the best way to exercise control is self-control," which should "be governed by ethical conduct." Furthermore, he intended to publish and sell the book. That notwithstanding, he "did not get to publish it" due to the seizure of the copies of the book from the publishing house and his residence, and due to its "erasure from the computer" he lost his right to the book, "computer contents" and was punished for that. Consequently, the book was not "distributed" and "the prevailing conditions did not allow a new publication." He could not "sell a single book," he only delivered one or two, but he was never paid.
In February 14 and 15, 1993, he informed the Commander in Chief of the Third Naval Zone that he had authored a book, delivered a copy printed using "his personal computer," informed of his intention to publish the book and asked for "authorization" to do so "in good faith" and not in accordance with Section 89 of the Ordinance of the Navy. He requested an authorization in writing; therefore, he "was voluntarily submitting himself to censorship […]," possibly because as "he served in the Navy" he "is used to abiding by the rules." After that, the Commander in Chief reviewed the book and told him he "liked the contents, […] that there was no problem and that […] intelligence activities could be demystified." Then, he "requested the printing" of one thousand copies of the book and some "advertisements" at the offices of Ateli publishing company. His wife would be in charge of "selling" the book. On February 20 or 22, 1993, he was informed that personnel from the Office of the Commander in Chief of the Navy of Valparaíso wished to inspect the contents of the book; therefore, he gave two copies to the Commander in Chief of the Third Naval Zone, who sent the copies to the Chief of the General Navy Staff and the Directorate of Intelligence of the Navy. He did not attempt to publish the book through the Navy publishing company because the cost "was higher than at Ateli publishing company" and

because the nature of the book was personal and it would "acquire a quasi-official nature if published through the Navy."

On March 1, 1993, the Commander in Chief of the Third Naval Zone informed him that the book had been banned by the Navy as it posed a threat to national defense and security; he was further warned to surrender all copies of the book and any material used in printing said publication. He refused because his book did not constitute an attack to national defense or security and those copies were his private property, since he had contributed funds to sell the book. He was told that his opinion "was not important," that the "sources used to write the book" were irrelevant, that he should consider himself arrested and that at 3 p.m. he should go the publishing company "to withdraw the copies."The witness did not go to the publishing company. However, a "navy squad" went to the printing house and the owner refused to deliver the books, as no seizure warrant was produced. A few hours later, members of the Office of the Naval Prosecutor appeared at the publishing company and took all material related to the book: some copies, "computer files" and the galleys. Around 9 p.m. that same day, they appeared at his home and took "most copies of his book," but "about thirty-five to forty copies were lost from the time of seizure until judgment was rendered." The Naval Prosecutor ordered that "the text of the book be deleted from his personal computer;" therefore, he complied with that order. That same night, he was arrested and taken to the Office of the Naval Prosecutor, where he rendered a statement until about 12:30 a.m. the following day and "remained there under an order prohibiting him from leaving."

Two criminal proceedings were initiated against him: one for disobedience of military duties and another for the crime of contempt of authority. The proceedings for breach of orders were initiated as a result of his refusal to deliver the copies of the book to the Commander in Chief of the Third Naval Zone and for having "failed to comply with [...] Section 89 of the Ordinance of the Navy," which sets forth that authorization must be requested from the Commander of the Navy to publish "press articles." However, he attempted to publish "a book" and not a "press article;" therefore, the case did not fall under that legal description. During those proceedings, he was imprisoned "for about ten days." The criminal proceedings for the crime of contempt of authority were initiated after he called a press conference at his residence, despite "an order not to make any statements [...] issued by the Office of the Prosecutor." At that conference, he complained about having received "humiliating treatment" and being persecuted for "defending himself against the actions [of the] Naval Corporation" which also caused a detriment to his family. He was charged with the crime of contempt of authority which was previously contemplated in the Criminal Code. During these proceedings, he was imprisoned "for about […] five days." His wife filed with the Court of Appeals a request for protective measures against the violation of his constitutional rights. The Naval Court informed the Court of Appeals that "no proceedings had been initiated [and…] that the prosecutor had acted on his own initiative based on a complaint filed." Neither he nor his attorney could have access to the case file to prepare his defense during the investigation; they could only do so after the Navy Prosecutor issued his report. They could not be present when witness testimony was rendered and he rendered a statement "behind closed doors."

These proceedings had significant impact on his life and that of his family. He lost his job, the money he spent in printing the books, he was arrested for writing the book and had to move to Punta Arenas. Both proceedings reached the Supreme Court of Chile; despite "the high costs" resulting therefrom. Moreover, once he stopped serving at the Navy after he was sentenced within the naval jurisdiction for "constituting an attack on national security," he found no

chances of working as a naval mechanic engineer at any company. Furthermore, in Viña del Mar, most families have at least one member in the Navy; therefore, that community deems that posing a threat to national security is "bad in itself."
During the proceedings before the Commission, the State showed "some kind" of intention to reach an agreement, but never made "a final proposal."

EXPERT WITNESSES

a) Proposed by the representatives of the alleged victim

1. Cristian Riego-Ramírez, lawyer

In Chile, there exists a procedure "to implement a large criminal justice reform aimed […] at incorporating the due process of law guarantee in the criminal system." Nevertheless, said reform excluded the military jurisdiction, where a "significantly orthodox inquisitive system" is in force, disregarding the due process guarantee and imposing certain aggravating circumstances.
This written procedure "basically consists of a unilateral and secret investigation through which […] a military prosecutor […] carries out[…] a pre-trial investigation procedure incorporating […] information to the written case file," without requesting the involvement of defendant or the attorney for defendant, though in theory a request "for inspection of investigation records" can be filed, and can be appealed upon denial. In practice, investigation proceedings are secret and the defendant only intervenes to render a statement, without the presence of his/her attorney. "All the information incorporated to the case file throughout the written pre-trial investigation stage will have conclusive evidentiary value at the time of rendering judgment; therefore, it is considered investigation and evidence at the same time."
The defense counsel may only intervene once the investigation is closed, when the trial stage starts and evidence may be requested; however any evidence produced during the investigation will not be rendered invalid. At the end of this procedure, the military judge, i.e. the office in charge of the military area in question, will render judgment. There is no right to an oral and public hearing; there is no right to defense or presumption of innocence.
Military justice is composed of individuals who are subordinated to a hierarchical structure and are subject to an appointment and removal system.
The Court-Martial is composed of civilians and military officers. The Court-Martial hears on appeal the decisions of military prosecutors at the initial stage and of military judges at the trial stage. The members of the Court-Martial cannot be removed from their judicial duties even if they are removed from their positions. Judge advocates are attorneys and, in fact, they draft judgments given that military judges are not lawyers. The Supreme Court has never exercised an effective control on the operation of military powers in times of peace.
In Chile, individuals subject to proceedings before the military jurisdiction will always spend ten to twenty days on remand custody since the law sets forth that if the crime is punished with a certain minimum penalty, release on bail can only be granted prior enquiry by the judge to the Court of Appeals and that procedure takes a few days.During the first days of the investigation, judges usually order that the individual be held on remand custody awaiting trial, not due to actual precautionary needs but basically "to facilitate proceedings." In practice, the burden of proof is shifted and the presumption of innocence is infringed. The defendant's freedom is subject to the discretion of the prosecutor since he may "order detention of defendant for up to

five days, without even providing reasons," or he may order that the individual be held on remand custody awaiting trial without providing any evidence to justify said measure. "Release on bail" can also be granted.
"An order initiating a proceeding" does not contain much useful information for the defense attorney and, sometimes, "[does not even contain] a thorough description of the facts." It contains references to the pages where the grounds for the accusation are stated, but the attorney for defendant has no access to the case file.
The Supreme Court has tolerated the inclusion of officers who have no relation to the structure of the Court, to hear military cases even though the Political Constitution does not provide that said Court may be composed by military officers.
In Chile, there is a high percentage of civilians subject to proceedings before military courts; though this situation has decreased during the last few years. A person who feels damaged by a decision passed by a military prosecutor may appeal that decision before the Court-Martial, which has a mixed composition. Therefore, in fact, no appeal can be filed with the ordinary courts.
As that the military justice was excluded from the procedural reform, it is difficult for the Supreme Court to overcome reluctance to review and reevaluate the decisions of military courts.

C) EVIDENCE ASSESSMENT

Documentary Evidence Assessment

55. In the instant case, as in others, [FN4] the Court recognizes the evidentiary value of the documents submitted by the parties at the appropriate procedural stage or as evidence to facilitate the adjudication of the case pursuant to Article 45(2) of the Rules of Procedure, which have not been disputed nor challenged, and whose authenticity has not been questioned.

[FN4] Cf. Case of the "Mapiripán Massacre", supra note 1, para. 77; Case of Raxcacó-Reyes, supra note 1, para. 38, and Case of Gutiérrez-Soler, supra note 1, para. 43.
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56. Moreover, the State produced evidence regarding an event subsequent to the filing of the complaint, in accordance with Section 44(3) of the Rules; therefore, the Court admits as evidence those documents that were not objected, whose authenticity was not challenged and that are related to the instant case (supra paras. 44 and 45). [FN5]

[FN5] Cf. Case of YATAMA. Judgment of June 23, 2005. Series C No. 127, para. 113; Case of the Indigenous Community Yakye Axa. Judgment of June 17, 2005. Series C No. 125, para. 41; and Case of the Serrano-Cruz Sisters. Judgment of March 01, 2005. Series C No. 120, para. 37.
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57. As regards the testimonial evidence and the written expert witness opinion issued through affidavits, pursuant to the Order issued by the President on March 28, 2005 (supra paras. 23 and 29), the Court admits them inasmuch as they are in accordance with the purpose of said Order

and assesses them as a whole with the rest of the body of evidence, applying thereto the standards of reasonable credit and weight analysis, and taking into account the points made by the parties (supra para. 33). As to the sworn statements which have not been given before a public official whose acts command full faith and credit by three witnesses and an expert witness proposed by the representatives, the Court admits them inasmuch as they serve the purpose set forth by the Order of the President issued on March 18, 2005, and assesses them as a whole with the rest of the body of evidence, applying thereto the standards of reasonable credit and weight analysis and taking into consideration the comments filed by the State. In other instances, the Court has admitted sworn statements which were not executed before a public officer with authority to confer full faith and credit to the acts passed before him, provided legal certainty and procedural equality between the parties was not impaired. [FN6] As stated by the Court, the statements made by the relatives of the alleged victims may provide useful information on the violations alleged and their consequences. [FN7] Moreover, the Court ratifies the decision of the President in the Order issued on April 28, 2005, to accept the waiver by the representatives of the testimony of Manuel González-Araya and Carlos Vega-Delgado, and to omit submission of that evidence (supra para. 30).

[FN6] Cf. Case of the "Mapiripán Massacre", supra note 1, para. 82; Case of Gutiérrez-Soler, supra note 1, para. 45; and Case of the Girls Yean and Bosico, supra note 2, para. 93.
[FN7] Cf. Case of the "Mapiripán Massacre", supra note 1, para. 81; Case of Raxcacó-Reyes, supra note 1, para. 39, and Case of Gutiérrez-Soler, supra note 1, para. 45

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58. The State has challenged the sworn statement of the expert witness Alex Avsolomovich-Callejas (supra para. 39) filed by the representatives on June 3, 2005, since the submission of expert opinions "after the public hearing," among other things, "has prevented the State [...] from cross-examining the expert witness." To that respect, the Court finds that the submission of testimonies or expert opinions through an affidavit executed before a public officer does not allow the parties to "cross-examine" the appearing witnesses or expert witnesses. However, as done by the State in the writing of June 15, 2005, regarding the statement of the expert witness Avsolomovich-Callejas (supra para. 39), a procedural opportunity is given for them to file any comments they may deem relevant pursuant to the principle of adversary proceedings. Therefore, the Court finds that, as established by the President in the Order of March 18, 2005, and in accordance with the written sworn statements specified above, the expert opinion of Avsolomovich-Callejas "may contribute to allow the Court to establish the facts in the instant case" inasmuch as it satisfies the purpose set forth in said Order. Therefore, it is assessed as a whole with the rest of the body of evidence, applying the standards of reasonable credit and weight analysis and taking into consideration the comments submitted by the State (supra para. 39).

59. The Court considers that the appendixes to the expert opinion rendered by María Inés Horvitz (supra para. 28), and the documents sent by the State (supra para. 43), which have not been contradicted or contested and whose authenticity has not been questioned, are useful; therefore, the Court incorporates them to the body of evidence, pursuant to Article 45(1) of the Rules of Procedure.

60. As to the press documents submitted by the parties, this Court has considered that they may be assessed insofar as they contain public and notorious facts or statements given by State officials or confirm aspects related to the case. [FN8]

[FN8] Cf. Case of the "Mapiripán Massacre", supra note 1, para. 79; Case of the Girls Yean and Bosico, supra note 2, para. 96; and Case of YATAMA, supra note 5, para. 119.

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61. Furthermore, in accordance to Article 45(1) of the Rules, the Court admits into the body of evidence the State Security Law, the Criminal Code, the Code of Criminal Procedure in force in 1993, and the Chilean Code of Military Justice, since they are helpful for the adjudication of the instant case.

Testimonial and Expert Evidence Assessment

62. As regards the statement rendered by the witness proposed by the Commission and the representatives, and the expert report issued by the expert witness proposed by the representatives in the instant case (supra para. 36), the Court admits them inasmuch as they be in accordance with the purpose of the interrogatory defined by the President in the Orders of March 18 and April 28, 2005, (supra paras. 23 and 30), and recognizes their evidentiary value, taking into consideration the comments filed by the parties. This Court finds that the testimony rendered by Humberto Antonio Palamara-Iribarne (supra paras. 36 and 54), which is useful in the instant case, cannot be assessed separately for he is an alleged victim with an interest in the outcome of the instant case, but rather that it must be assessed as a whole with the rest of the body of evidence in the case. [FN9]

[FN9] Cf. Case of the "Mapiripán Massacre", supra note 1, para. 81; Case of Raxcacó-Reyes, supra note 1, para. 39, and Case of Gutiérrez-Soler, supra note 1, para. 45.

VI. PROVEN FACTS

63. The Court has examined the items of evidence and the respective arguments of the parties and, as a result of that examination, finds the following facts to be proven:

With regard to Humberto Antonio Palamara-Iribarne

63(1) Humberto Antonio Palamara-Iribarne, a naval mechanic engineer, enrolled in the Chilean Navy in 1972, and retired in January 1, 1993, with the rank of Training Officer of the Navy Operations Department of the Office of the Commander in Chief of the Third Naval Zone. [FN10] In January 1993, he was retained by the Armed Forces as technical consultant, grade 7, under a "monthly global remuneration" to serve in the Department of Naval Intelligence of the above-mentioned Office of the Commander in Chief. From January 1, 1993, until December 31,

1993, he was a "civil servant hired as contractor," "under a yearly contract." [FN11] His contract was executed pursuant to "institutional needs." [FN12]

[FN10] Cf. Testimony of Humberto Antonio Palamara-Iribarne rendered before the Inter-American Court during the public hearing held on May 9, 2005; and Order No. 471 issued on December 9, 1992, by the Ministry of National Defense, Office of the Commander in Chief of the Navy on "contracts of servants hired as contractors" (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, Appendixes to the complaint, volume III, Appendix 9(a), page 898).

[FN11] Cf. Order No. 471 of December 9, 1992, issued by the Ministry of National Defense, Office of the Commander in Chief of the Navy; 1992/1993 curriculum vitae and civil employee annual evaluation of Humberto Antonio Palamara-Iribarne issued by the Chilean Navy and report on the labor situation of Palamara-Iribarne issued by the Legal Department of the Comptroller General's Office on December 29, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume IV, appendix 9.c, page 1526).

[FN12] Cf. Testimony of Humberto Antonio Palamara-Iribarne rendered before the Inter-American Court during the public hearing held on May 9, 2005; Report of the Department of the Office of the Commander in Chief of the Third Naval Zone of March 1, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 737 to 738); and Order No. 1000/0101 CJ. IIIra. ZN. issued by the General Staff Director of the Chilean Navy (Case File on Summary Administrative Investigation, appendixes to the complaint, appendix 8, volume II, folio 523).

63(2) In 1993, Palamara-Iribarne lived in the city of Punta Arenas, Chile, in a state-owned house with his wife Anne Ellen Stewart-Orlandini and his three children, Humberto Antonio, Fernando Alejandro and Raimundo Jesús Palamara-Stewart. [FN13]

[FN13] Cf. Testimony of Humberto Antonio Palamara-Iribarne rendered before the Inter-American Court during the public hearing held on May 9, 2005; affidavit of Anne Ellen Stewart-Orlandini of April 21, 2005; sworn statement of Raimundo Jesús Palamara-Stewart (affidavit) of April 21, 2005; affidavit of Humberto Antonio Palamara-Stewart of April 21, 2005; and affidavit of Fernando Alejandro Palamara-Stewart of April 21, 2005 (case file on the merits, reparations, and costs, volume II, pages 456 to 458, 569, 573 and 575).

63(3) Anne Ellen Stewart-Orlandini owned a company engaged in the distribution of books, advertising and modeling that also operated as a leather crafts workshop. [FN14]

[FN14] Cf. Invoice of February 28, 1993, issued by the company owned by Anne Ellen Stewart-Olardini, engaged in the distribution of books, advertising and modeling, also operating as

leather crafts workshop (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9 a, page 893).

With regard to the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services")

63(4) By the end of 1992, Humberto Antonio Palamara-Iribarne authored the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services), [FN15] which is divided into five chapters, as follows: Chapter I "La Inteligencia es Conocimiento y Organización" ("Intelligence is Knowledge and Organization"); Chapter II "La Inteligencia es Actividad" ("Intelligence is Action"); Chapter III "Las Operaciones Especiales de Inteligencia" ("Special Intelligence Operations"); Chapter IV "La Contrainteligencia" (Counter-intelligence"); and Chapter V "La Guerra Sucia" ("The Dirty War"). [FN16]

[FN15] Cf. Testimony of Humberto Antonio Palamara-Iribarne rendered before the Inter-American Court during the public hearing held on May 9, 2005; and report of the Office of the Commander in Chief of the Third Naval Zone of March 1, 1993 (appendixes to the complaint, volume III, appendix 9(a)).

[FN16] Cf. Review of the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services") filed by the attorney for Palamara-Iribarne with the Court-Martial (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 854, 865 and 868).

63(5) Near the end of January and early in February 1993, Palamara-Iribarne commissioned the publication of 1,000 copies of his book from Ateli, a publishing company [FN17], in consideration of payment of $700,000 Chilean pesos; $472,000 Chilean pesos were paid off by his wife. [FN18] On February 9, 1993, Anne Stewart-Orlandini registered the book in the intellectual property registry on behalf of her husband. The book is registered under I.S.B.N. 956-7314-01-2 of the Library of Congress of the United States of America, which "protects […] the rights of the author at an international level." [FN19] Moreover, Mrs. Stewart-Orlandini registered the work in the National Library of Chile, under number 85,611. [FN20]

[FN17] Cf. Request for protective measure filed by Anne Ellen Steward-Orlandini before the Court of Appeals of Punta Arenas (evidence to facilitated the adjudication of the case, submitted by the State on October 31, 2005, file of the case on the merits, reparations, and costs, volume IV, page 1099); testimony of Humberto Antonio Palamara-Iribarne given before the Inter-American Court during the public hearing held on May 9, 2005; report issued by the Chief of the Department of the Commander in Chief of Naval Zone III, dated March 1, 1993; and statement of the legal representative of the publishing company Ateli, made before the Deputy Naval Prosecutor of Magallanes (Case No. 464, pending before the Naval Court of Magallanes, on the charges of disobedience and breach of military duties, file including the appendixes to the complaint, volume III, Appendix 9,.a, pp.739 and 752).

[FN18] Cf. Testimony of the legal representative of Ateli rendered before the Naval Prosecutor of Magallanes on March 2, 1993; and invoice of the book distribution company owned by Anne Stewart-Orlandini (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 752 and 784).
[FN19] Cf. Report No. 266/93 of the Cámara Chilena del Libro [Publisher's Association of Chile] of April 29, 1993; declaration of Mr. Humberto Antonio Palamara Iribarne of March 2, 1993 rendered before the Naval Prosecutor of Magallanes; and testimony of the legal representative of Ateli rendered before the naval Prosecutor of Magallanes on March 2, 1993 (Case No. 464 before the naval Court of Magallanes on the crimes of disobedience and breach of military duties, file included in the appendixes to the complaint, volume III, Appendix 9.a, pp. 1023 and 760).
[FN20] Cf. Testimony of the legal representative of Ateli publishing company, rendered before the Deputy Naval Prosecutor of Magallanes on March 4, 1993; testimony of Humberto Antonio Palamara-Iribarne of March 2, 1993, rendered before the Deputy Naval Prosecutor of the Naval Court of Magallanes; and Report No. 266/93 of the Cámara Chilena del Libro [Publisher's Association of Chile] of April 29, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 760, 782 and 1023).

63(6) Mr. Palamara-Iribarne wrote - and intended to publish and sell - the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services") during a democratic administration. In order to publish the book, military authorities considered that the author needed the authorization by his superiors. The Chief of the General Staff asserted that "he [had] not authorize[d], neither orally nor in writing, the publication of the [above-mentioned] book." [FN21]

[FN21] Cf. Report of the Chief of the General Staff of the Navy of March 29, 1993 addressed to the Naval Prosecutor of Magallanes; report of the Department Chief of the Third Naval Zone; and statement of the Chief of Department A-2 of the Office of the Commander in Chief of the Third Naval Zone rendered before the Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 955, 737 and 767).

With regard to the prohibition to publish the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services")

63(7) Article 89 of Ordinance of the Navy No. 487 of April 21, 1988, prohibits "all members or servants of the Navy [from] publishing or facilitating publication through the media of any article involving criticism to Navy services, public or government bodies," as well as "any article that directly or indirectly refers to issues of secret, classified or confidential nature concerning political, religious or other matters that may give rise to dispute or controversy as to the reputation of the institution." Furthermore, the above-referred rule establishes that "Navy staff

may publish articles in the media in their own name, prior authorization by the competent Commander or Naval Authority. During war times or under special circumstances, the Office of the Commander in Chief of the Navy may withhold or restrict said authorization." [FN22]

[FN22] Cf. Ordinance of the Navy No. 487 of April 21, 1988 (opinion of the Naval Prosecutor of Magallanes of September 24, 1993, Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume IV, appendix 9.c, folio 1375).

63(8) On February 15, 1993, Palamara-Iribarne had an interview with the Commander in Chief of the Third Naval Zone, Hugo Bruna-Greene, and told him that during his vacations he had written a book entitled "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services"). The Commander in Chief said to Palamara-Iribarne that "he should follow institutional procedures to publish" the book. [FN23]

[FN23] Cf. Report of the Department of the Office of the Commander in Chief of the Third Naval Zone of March 1, 1993 (file included in the appendixes to the complaint, volume III, Appendix 9.a, page 737); testimony of Humberto Antonio Palamara-Iribarne rendered before the Inter-American Court during the public hearing held on May 9, 2005; and testimony rendered by the Commander in Chief of the Third Naval Zone of March 10, 2993 before the Deputy Naval Prosecutor of Magallanes (Case No. 464 before the naval Court of Magallanes on the crimes of disobedience and breach of military duties, file included in the appendixes to the complaint, volume III, Appendix 9.a, page 811).

63(9) On February 17, 1993, the Commander in Chief of the Third Naval Zone received via fax from Valparaíso a promotional brochure of the book authored by Palamara-Iribarne, without having previously processed any "request for authorization of publication". [FN24] In the presence of the Chief of the General Staff of the Office of the Commander in Chief of the Third Naval Zone, Vicente Casselli, the Commander in Chief of the Third Naval Zone ordered Palamara-Iribarne "not to publish anything without prior authorization by the competent authorities" and requested him to hand in "the original text written by him." [FN25]

[FN24] Cf. Report of the Department of the Office of the Commander in Chief of the Third Naval Zone of March 1, 1993; statements rendered by the Chief of Department A-2 of the Office of the Commander in Chief of the Third Naval Zone of March 3, 1993, before the Deputy Naval Prosecutor of Magallanes and statement rendered by the Deputy Chief of the General Staff of the Office of the Commander in Chief of the Third Naval Zone (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 737, 768, 786 and 790).

[FN25] Cf. Testimony of Humberto Antonio Palamara-Iribarne rendered before the Inter-American Court during the public hearing held on May 9, 2005; statement of the Commander in

Chief of the Third Naval Zone of March 10, 1993, rendered before the Deputy Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 812).

63(10) On February 17, 1993, Palamara-Iribarne handed in four copies of the book to the Commander in Chief of the Third Naval Zone which were, in turn, delivered to the Chief of the General Staff of the Navy "for his information and to render a decision," to the Directorate of Intelligence of the Navy "for their information and to issue a technical report," to the Chief of the General Staff of the Third Naval Zone and the Chief of Department A-2 of the above-mentioned Office of the Commander in Chief. [FN26] The Commander in Chief of the Third Naval Zone ordered Palamara-Iribarne "not to publish anything, not even brochures, without prior authorization and to refrain from continuing compiling the books." [FN27]

[FN26] Cf. Report of the Chief of Department A-2 of the Office of the Commander in Chief of the Third Naval Zone of March 1, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 737); and testimony of Humberto Antonio Palamara-Iribarne rendered before the Inter-American Court during the public hearing held on May 9, 2005.

[FN27] Cf. Testimony of Humberto Antonio Palamara-Iribarne rendered before the Inter-American Court during the public hearing held on May 9, 2005; and statement rendered by the Commander in Chief of the Third Naval Zone on March 10, 1993, before the Deputy Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 813).

63(11) On February 18, 1993, Palamara-Iribarne requested in writing to the Commander in Chief of the Third Naval Zone an "[a]uthorization to [p]ublish [his] book," on the grounds that "he wishe[d] to make it public in his own name," that its contents referred to "the general role of intelligence from an ethical standpoint" and that "it [did not] contain classified information." [FN28] That same day, the Commander in Chief forwarded a memorandum to the Chief of the General Staff whereby he informed that Palamara-Iribarne had requested authorization to publish his book and attached a simple copy of the text for its consideration and "further authorization of publication." [FN29]

[FN28] Cf. Testimony of Humberto Antonio Palamara-Iribarne rendered before the Inter-American Court during the public hearing held on May 9, 2005; and report of the Office of the Commander in Chief of the Third Naval Zone of March 1, 1993 (appendixes to the complaint, volume III, appendix 9(a)).

[FN29] Cf. Memorandum of February 18, 1993 from the Commander in Chief of the Third Naval Zone to the Chief of the General Staff (Case No. 464 before the Naval Court of

Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 1256).

63(12) On February 26, 1993, the "Naval Authority" of Valparaíso phoned the Commander in Chief of the Third Naval Zone to notify him that "publication of the book had not been authorized and that said decision would be officially communicated," because it considered that its contents posed a threat to "[national] security and defense." Said Commander in Chief instructed the Chief of the General Staff and the Chief of Department A-2 of the Third Naval Zone to notify Palamara-Iribarne the decision made by the Naval Authority. On February 28, 1993, the Chief of the Department notified Palamara-Iribarne by oral means that his book "had not been authorized by the Institution," and that said decision would be officially notified to him. [FN30]

[FN30] Cf. Testimony of Humberto Antonio Palamara-Iribarne rendered before the Inter-American Court during the public hearing held on May 9, 2005; statement rendered by the Commander in Chief of the Third Naval Zone before the Deputy Naval Prosecutor of Magallanes on March 10, 1993; statement rendered by Chief of the Department of Naval Zone III, before the Deputy Naval Prosecutor of Magallanes on March 3, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9 a, pages 767 and 813).

63(13) On March 1, 1993, Palamara-Iribarne appeared before the Commander in Chief of the Third Naval Zone, who notified him that his book had not been authorized. Palamara-Iribarne stated that he was willing to publish the book without authorization. [FN31] The Commander in Chief, who also served as Naval Judge of Magallanes, orally ordered Palamara-Iribarne to halt the publication process [FN32] and to accompany the Chief of Department in his mission to withdraw "all records of the book from the publishing house." To accomplish such mission, they should go to the publishing house at 3 p.m. Palamara-Iribarne failed to go to the publishing house. [FN33]

[FN31] Cf. Testimony of Humberto Antonio Palamara-Iribarne rendered before the Inter-American Court during the public hearing held on May 9, 2005; statement rendered by the Commander in Chief of the Third Naval Zone on March 10, 1993, before the Deputy Naval Prosecutor of the Naval Court of Magallanes; statement rendered by the Chief of Department of the Third Naval Zone before the Deputy Naval Prosecutor of Magallanes on March 3, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 812, 767 and 768).

[FN32] Cf. Seizure record dated March 1, 2005 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 739).

[FN33] Cf. Report of the Chief of Department A-2 of the Office of the Commander in Chief of the Third Naval Zone of March 1, 1993; seizure record dated March 1, 2005; testimony of Humberto Antonio Palamara-Iribarne rendered before the Inter-American Court during the public hearing held on May 9, 2005; and statement rendered by the Commander in Chief of the Third Naval Zone on March 10, 1993 before the Deputy Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 738, 739 and 815).

63(14) On March 2, 1993, the Chilean Navy issued a press release whereby it stated that Palamara-Iribarne "would have violated the solemn oath binding on him under naval rules to hold in strict confidence any information of which he may have become aware during the performance of his official duties, regardless of the fact that the contents and, in particular, the opinion of the author of said work, may mislead the readers and adversely affect the interests of the institution." [FN34]

[FN34] Cf. Chilean Navy press release No. 24/93 of March 2, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 980).

63(15) On March 3, 1993, the Commander in Chief of the Third Naval Zone withdrew "the authorization [granted unto Palamara-Iribarne] to publish a column in 'La Prensa Austral' newspaper." [FN35]

[FN35] Cf. Order of the Commander in Chief of the Third Naval Zone of March 3, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9.c, page 1534).

63(16) In response to the refusal of Palamara-Iribarne to halt publication of the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services") and his failure to request authorization to publish said book, criminal proceedings were instituted against him in the Naval Court of Magallanes for the crimes of disobedience and breach of military duties. Moreover, based on the same events, a summary administrative investigation was conducted by the Office of the Naval Administrative Prosecutor of the Third Naval Zone for administrative violations. [FN36]

[FN36] Cf. Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties (appendixes to the complaint, volume III, appendix 9.c); and administrative summary investigation conducted by the Office of the Naval Prosecutor of the Third Naval Zone of Punta Arenas (appendixes to the complaint, volume IV, appendix 8, page 1022).

With regard to Case No. 464 against Palamara-Iribarne for the crimes of disobedience and breach of military duties pending before the Naval Court of Magallanes

63(17) Case No. 464 pending before the Naval Court of Magallanes against Humberto Antonio Palamara-Iribarne is based on the events detailed above (supra paras. 63(1) to 63(16)). At first, the Naval Prosecutor, referred to two crimes: disobedience and breach of military duties. The defendant and his attorney were not allowed to access the case file during the preliminary investigation. At different stages of the proceedings taken during the preliminary investigation, the Naval Prosecutor acting in said Court charged Palamara-Iribarne with two other counts of disobedience for subsequent acts (infra paras. 63(38) to 63(56)). The new case and the first proceedings instituted for the above-mentioned acts were joined in Criminal Case No. 464. [FN37]

[FN37] 37 Cf. Orders delivered by the Naval Judge of Magallanes on April 30 and May 14, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(b), pages 1092 and 1181).

First proceedings for the crimes of disobedience and breach of military duties

63(18) The first proceedings were instituted under a complaint lodged by phone by Vicente Casselli-Ramos, Deputy Chief of the General Staff of the Office of the Commander in Chief of the Third Naval Zone and under the order to seize the copies of the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services") kept at Ateli publishing company; said seizure warrant was issued by the Commander in Chief of the Third Naval Zone on the grounds that defendant had written and published the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services"), in violation of the institutional procedure in force and direct orders to refrain from publishing the book on the grounds that its contents posed a threat to national security and defense. On March 1, 1993, the Deputy Naval Prosecutor issued an order instructing seizure of "each and every existing writing, document or publication" kept by said publishing company. [FN38] That same day, a report on the "violation [of Article 89] of the Ordinance of the Navy and insubordination," signed by the Chief of Department A-2 of the Third Naval Zone, direct chief of Palamara-Iribarne, was filed with the Office of the Commander in Chief of the Third Naval Zone. [FN39]

[FN38] Cf. Statement rendered by Gustavo Adolfo Leiva-Balich, Advocate of the Naval Judge of Magallanes; statement rendered by Rafael Leopoldo Mera-Muñoz (Case File No. 471, appendixes to the complaint, appendix 10, pages 2111 to 2114); and order delivered by the Deputy Naval Prosecutor of Magallanes on March 1, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, evidence to facilitate

adjudication of the case presented by the State on October 31, 2005, file on the merits and possible reparations and costs, volume IV, page 1138).
[FN39] Cf. Report J.DP.A-2 RES. No. 1590/11/2 CJ.IIIa. ZN. of the Chief of Department A-2 of the Office of the Commander in Chief of the Third Naval Zone of March 1, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 737 and 738).

63(19) On March 1, 1993, at 6:45 p.m., the Deputy Naval Prosecutor and the Clerk of the Naval Court of Magallanes visited the facilities of Ateli publishing company and seized 16 copies of the book, 1 diskette containing the entire text of the book, three packages containing five books each with an undetermined number of spare pages and two envelopes containing the electrostatic masters with the text originals. Furthermore, "all files with information related to the publication" were deleted from the computers. [FN40]

[FN40] Cf. Report J.DP.A-2 RES. No. 1590/11/2 CJ.IIIa. ZN. of the Chief of Department A-2 of the Office of the Commander in Chief of the Third Naval Zone of March 1, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 737 and 738).

63(20) On March 1, 1993, the Deputy Naval Prosecutor issued two orders. One of said orders declared that, "based on the evidence of the case file," which consisted in 6 folios, "there were sufficient grounds to issue an arrest warrant against Civil Servant […] Humberto Palamara-Iribarne," and prohibited the accused from leaving the country for 60 days. [FN41] The other order instructed the Court to appear at Palamara-Iribarne's home in order to "seize the copies [of the books] that he may have with him [… together with] any other instrument or document related to said publication." [FN42] On March 1, 1993, at 10:15 p.m., the Deputy Naval Prosecutor and the Clerk visited Palamara-Iribarne's home and seized 874 copies of the book. During said proceedings, the Deputy Naval Prosecutor, the Clerk and Palamara-Iribarne signed a "seizure record" stating that "Palamara delete[d] the entire text of the above-mentioned book from the hard drive of his personal computer." [FN43]

[FN41] Cf. Order of the Deputy Naval Prosecutor of Magallanes of March 1, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 742).
[FN42] Cf. Order of the Deputy Naval Prosecutor of Magallanes of March 1, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 743).
[FN43] Cf. Seizure record dated March 1, 2005 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 745).

63(21) On March 1, 1993, during seizure proceedings, Palamara-Iribarne was arrested but was not notified of the grounds for the arrest and the charges brought against him. [FN44] After the seizure, which concluded at 11 p.m., the Deputy Naval Prosecutor ordered that "a hearing be held without delay" to "examine" Palamara-Iribarne, since it "[was] necessary to do so" and because the accused was at the Clerk's Office of the Office of the Naval Prosecutor of Magallanes. [FN45] Palamara-Iribarne made a statement before the above-referred Prosecutor and Clerk. [FN46] Thereafter, at 12:40 a.m. on March 2, 1993, at the Clerk's Office, he was notified that the Prosecutor had delivered an order stating that "there were no sufficient grounds for arresting the accused," and ordered his release from custody "under the legal rules in force, notifying the order prohibiting him from leaving the country. [FN47]

[FN44] Cf. Order of the Deputy Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 743); testimony of Humberto Antonio Palamara-Iribarne rendered before the Inter-American Court during the public hearing held on May 9, 2005; affidavit of Anne Ellen Stewart-Orlandini of April 2, 2005; sworn statement of Raimundo Jesús Palamara-Stewart (affidavit) of April 21, 2005; affidavit of Antonio Palamara-Stewart of April 21, 2005; and affidavit of Fernando Alejandro Palamara-Stewart of April 21, 2005 (file on the merits, reparations, and costs, volume II, pages 456 to 458, 570, 573 and 575).

[FN45] Cf. Order of the Deputy Naval Prosecutor of Magallanes of March 1, 1993 (Case No. 464 before the Naval Court Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 746).

[FN46] Cf. Statement of Humberto Antonio Palamara-Iribarne of March 2, 1993, rendered before the Deputy Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 746).

[FN47] Cf. Order of the Deputy Naval Prosecutor of Magallanes of March 2, 1993; statement of Humberto Antonio Palamara-Iribarne of March 2, 1993, rendered before the Deputy Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 749 and 750); and testimony of Humberto Antonio Palamara-Iribarne rendered before the Inter-American Court during the public hearing held on May 9, 2005

63(22) On March 2, 1993, the Deputy Naval Prosecutor of Magallanes summoned Palamara-Iribarne through the Punta Arenas Investigation Police Department, "under warning of arrest," to appear that same day before the "Naval Court for the first hearing of the Preliminary Investigation" conducted by the Office of the Prosecutor. [FN48] Palamara-Iribarne failed to appear at the hearing and the Naval Prosecutor ordered his "arrest to secure appearance of the accused," [FN49] who was arrested that same afternoon at his home. The summons, the arrest warrant and the police chief's report failed to state the crime under investigation. [FN50] On that same day, Palamara-Iribarne, under the custody of the Office of the Prosecutor, rendered a new statement before the above-mentioned Deputy Naval Prosecutor and was released thereafter. [FN51]

[FN48] Cf. Order of the Deputy Naval Prosecutor of Magallanes of March 2, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 755).
[FN49] Cf. Arrest warrant against Humberto Antonio Palamara-Iribarne issued by the Deputy Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 754 and 755).
[FN50] Cf. Report No. 1089 of the Detective of the Punta Arenas Judicial Police Station of March 2, 1993; arrest warrant against Humberto Palamara-Iribarne issued by the Deputy Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 758 and 757).
[FN51] Cf. Statement of Humberto Antonio Palamara-Iribarne rendered before the Deputy Naval Prosecutor of Magallanes on March 2, 1993; and order of the Deputy Naval Prosecutor of March 2, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 760, 762 and 763).

63(23) On March 10, 1993, the Deputy Naval Prosecutor of Magallanes ordered issuance of rogatory letters requesting the Naval Prosecutor of the First Naval Zone to "appoint two expert witnesses with expertise in Intelligence" to make a report on "how adversely the confidentiality and security of naval services has been affected by defendant Humberto Antonio Palamara-Iribarne as a result of the publication of the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services")." [FN52] On April 26, 1993, the expert witnesses delivered a report under which they "definitely conclude[d] that the book [… did] not adversely affect the confidentiality and security of the Chilean Navy." [FN53] On May 20, 1993, the Naval Prosecutor of Magallanes sent rogatory letters to the Naval Prosecutor of the First Naval Zone requesting that "the expert witnesses […] be required to provide further details on the issues addressed in [the] report [of April 26, 1993]," and stating that they had to verify whether "it contain[ed] relevant information on the Navy from an institutional perspective and/or classified information, and whether it affect[ed] institutional interests." [FN54] On July 20, 1993, the expert witnesses filed an amended report concluding that "the book contains relevant information on the Navy from an institutional perspective, but that does not mean that […] it contains literal and verbatim transcriptions of intelligence-related rules or publication[s] of the Navy." In said amended report, the expert witnesses stated that the information contained in the book "is in the public domain." Finally, the expert witnesses concluded that the book "undoubtedly affect[ed] institutional interests [of the Chilean Navy,] since the author claims to act in compliance with the moral obligation to disclose his knowledge and expertise to the public, implicitly stating that his training as an intelligence expert […] allowed him to write about intelligence issues." [FN55]

[FN52] Cf. Order of the Deputy Naval Prosecutor of Magallanes of March 10, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 805).

[FN53] Cf. Expert report requested by the Naval Prosecutor of Magallanes of April 26, 1993 (appendixes to the complaint, appendix 4, page 36).
[FN54] Cf. Order of the Naval Prosecutor of Magallanes of May 20, 1993 (appendixes to the complaint, appendix 5, page 38).
[FN55] Cf. Amended expert report of July 20, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendix 4 to the complaint, pages 43 and 44).

63(24) On March 10, 1993, the Deputy Naval Prosecutor sent letters rogatory to the Naval Prosecutor of Valparaíso requesting him to examine Palamara-Iribarne's direct chief and ordering that an official letter be sent to the Chief of the General Staff of the Navy requiring him to inform whether "he processed any type of authorization prior to the publication of the book" authored by Palamara-Iribarne. [FN56] On April 30, 1993, the officer that served as chief of Palamara-Iribarne from February to December 1992, rendered a statement before the Naval Prosecutor of Magallanes. [FN57]

[FN56] Cf. Order of the Deputy Naval Prosecutor of Magallanes of March 10, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 808).
[FN57] Cf. Order of the Naval Judge of Magallanes and the Commander in Chief of the Third Naval Zone of March 12, 1993; and statement of the Chief of Department of the Office of the Commander in Chief of the Third Naval Zone between February and December 1992, rendered before the Naval Prosecutor of Valparaíso on April 30, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 818 and 1116).

63(25) On March 10, 1993, the Commander in Chief of the Third Naval Zone made a statement before the Deputy Naval Prosecutor. On March 12, 1993, the above-mentioned Commander in Chief found himself "disqualified to conduct the proceedings related to the reported events as Naval Judge of Magallanes," since he "ha[d] a relationship with and actively took part in the events that gave rise to the report originating the preliminary investigation which was forwarded to him for his knowledge and further decision." Therefore, he ordered that "the case file be submitted to the […] Chief of the General Staff of the Third Naval Zone." [FN58]

[FN58] Cf. Statement of the Commander in Chief of the Third Naval Zone of March 10, 1993, rendered before the Deputy Naval Prosecutor of Magallanes; and order of the Commander in Chief of the Third Naval Zone of March 12, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 812 and 818).

Preliminary investigation of the crimes of disobedience and breach of military duties

63(26) On March 13, 1993, the Interim Naval Judge decided to conduct a preliminary investigation under File No. 464. [FN59]

[FN59] Cf. Order of the Interim Naval Judge of Magallanes of March 13, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 819).

63(27) On March 15, 1993, the Deputy Naval Prosecutor of Magallanes issued a writ of indictment, whereby it stated that: [FN60]

a) The crime of disobedience of military duties provided for and punished under Article 299 No. 3 of the Military Justice Code, was duly evidenced in the case file as having been committed in February 1993, by an officer of the Chilean Navy who, without prior authorization, published a book containing information directly related to "classified matters" about a subject that may "give rise to dispute or controversy on the reputation of the Navy." Following instructions of the above-mentioned officer, "at least one of said books" was distributed to a third party unconnected with the institution, all of which violates the duties provided for in Article 89 of Ordinance of the Navy No. 487 of April 21, 1988;
b) The crime of disobedience provided for and punished under Article 337 No. 3 of the Military Justice Code, was duly evidenced in the case file as having been committed by an officer of the Navy who refused to comply with the order delivered by his superior in rank on March 1, 1993, when he was "expressly denied" authorization to publish a book and ordered to surrender the materials connected therewith;
c) Based on the evidence presented in the case file and the statements rendered by Palamara-Iribarne, there were grounds to believe that he was liable as perpetrator of the above-mentioned crimes; and, therefore, he should be prosecuted;
d) As Palamara-Iribarne was required to remain in custody pending trial at the Military Garrison IM "Orden y Seguridad" ("Order and Security"), an arrest warrant was issued against him, to be enforced by the Punta Arenas Investigation Police Department; and
e) Palamara-Iribarne could not be released due to "proceedings pending execution" that "require[d] that defendant be held in custody," to wit: statement of his direct chief, official letter to the Chief of the General Staff of the Navy (supra para. 63(24)) and filing of a certificate of birth and criminal record of the accused.

[FN60] Cf. Writ of indictment dated March 15, 1993, issued by the Deputy Naval Prosecutor of Magallanes against Humberto Antonio Palamara-Iribarne (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 823 and 824).

63(28) On March 15, 1993, the Deputy Naval Prosecutor of the Naval Court of Magallanes ordered the arrest of Palamara-Iribarne and the search of his residence, if necessary, but neither

said order nor the arrest warrant of March 16, 1993, made reference to the type of crime under investigation. [FN61] Palamara-Iribarne was detained at his house and held under the custody of the Office of the Naval Prosecutor of Magallanes. [FN62] Palamara-Iribarne served time at the Military Garrison IM "Orden y Seguridad" ("Order and Security"). [FN63]

[FN61] Cf. Order of the Deputy Naval Prosecutor of Magallanes of March 15, 1993; arrest warrant of March 16, 1993, issued by the Deputy Naval Prosecutor of Magallanes; and report No. 1279 of March 16, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 838 and 840).

[FN62] Cf. Report No. 1279 of March 16, 1993, issued by the precinct police chief of Punta Arenas Judicial Police Station (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 840).

[FN63] Cf. Summons issued by the Naval Prosecutor of Magallanes on March 23, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 933).

63(29) On March 16, 1993, Humberto Antonio Palamara-Iribarne requested the Deputy Naval Prosecutor of Magallanes to be released on bail "on the grounds that the crime of which he [was] accused by the Court was not punishable by long-term imprisonment and, in particular, because he consider[ed] that he [had] not committed any crime; that [his] arrest [was] unnecessary for the investigation; that he need[ed] to take care of his family; that he [was] not dangerous for society; and that [...] he [would] not flee or hide to evade the orders of the prosecution." In said request, Palamara-Iribarne appointed an attorney to represent him. [FN64] On that same day, the Deputy Naval Prosecutor "dismissed" the request filed by Palamara-Iribarne, "under the provisions of Art[icles] 361(1) and 363(1) of the Code of Criminal Procedure," on the grounds that "the certificate of birth and criminal record was not attached to the case file." [FN65]

[FN64] Cf. Request for release on bail dated March 16, 1993, filed by Humberto Antonio Palamara-Iribarne with the Deputy Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 828).

[FN65] Cf. Order of the Deputy Naval Prosecutor of Magallanes of March 16, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 842).

63(30) On March 16, 1993, Palamara-Iribarne rendered a statement before the Deputy Naval Prosecutor and the Clerk. [FN66]

[FN66] Cf. Statement of Humberto Antonio Palamara-Iribarne of March 16, 1993, rendered before the Deputy Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 731 and 732).

63(31) On March 16, 1993, Palamara-Iribarne raised a motion of appeal against the writ of indictment and the dismissal of the request for release. [FN67] On March 23, 1993, the Court-Martial reversed, "as to the appealed parts," the Order of the Deputy Naval Prosecutor of March 16, 1993 (supra para. 63(28)) and allowed Palamara-Iribarne to be "released on bail" for an amount to be fixed by the Deputy Naval Prosecutor. [FN68]

[FN67] Cf. Motion raised by Palamara-Iribarne on March 16, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 843 and 844).

[FN68] Cf. Order of the Court-Martial of March 26, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 902).

63(32) On March 23, 1993, the attorney for Palamara-Iribarne requested the Deputy Naval prosecutor of Magallanes to issue an order for final dismissal of the case that gave rise to the investigation of the alleged disclosure of "secrets under Article 255 of the Military Justice Code," to order restitution of the seized texts and materials, since said seizure "[would] not be justified," and to release defendant on parole. Moreover, he alternatively requested to allow defendant to serve time under home arrest or to order his transfer to a different location. The above-mentioned attorney enclosed a copy of a book review by an "analyst of political-military matters" published on the March 4, 1993 edition of "La Nación" newspaper, where the columnist states that the book "neither poses a threat to national security" nor "discloses any information" that may make someone think that "the book is particularly delicate." [FN69]

[FN69] Cf. Request filed by the attorney for Palamara-Iribarne on March 23, 1993, before the Deputy Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 928 to 932).

63(33) On March 23, 1993, the Deputy Naval Prosecutor found it necessary to examine Palamara-Iribarne, who finally rendered a statement that same day before the Prosecutor. [FN70] The following day, the Naval Prosecutor dismissed the requests filed by the attorney for Palamara-Iribarne and decided to record "on the Book of Abusive Passages" certain parts of the writing filed by the attorney which are crossed out in the copy of the document incorporated to the case file. [FN71]

[FN70] Cf. Order of the Naval Prosecutor of Magallanes of March 23, 1993; and statement of Humberto Antonio Palamara-Iribarne of March 24, 1993, rendered before the Deputy Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 934).

[FN71] Cf. Order of the Deputy Naval Prosecutor of the Naval Court of Magallanes of March 24, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 937).

63(34) On March 25, 1993, the attorney for Palamara-Iribarne presented documentary evidence before the Navy Court-Martial. That same day, the Court-Martial requested "that a copy of the book be incorporated to the case file" to facilitate adjudication of the case, which order was executed by the deputy chief of the General Staff of the Navy that same day. [FN72]

[FN72] Cf. Analysis of the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services") presented by the attorney for Palamara-Iribarne before the Court-Martial of the Navy and newspaper clippings (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 854 to 867).

63(35) On March 26, 1993, the order of the Court-Martial of March 23, 1993, instructing the release on bail of Palamara-Iribarne was executed [FN73] (supra para. 63(31)).

[FN73] Cf. Notice of the Chief of Garrison I.M. "Orden y Seguridad" ("Order and Security") of March 26, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 1057).

With regard to the motion for protection raised by Palamara-Iribarne's wife before the Court of Appeals

63(36) On March 3, 1993, Anne Ellen Stewart-Orlandini filed a motion for protection of her family and herself against the Chilean Navy based on the arbitrariness and illegality of the acts performed by the Naval Prosecutor, on the grounds that they infringed the constitutional guarantee of psychological integrity, the right to engage in business, the right to property and copyrights. On March 24, 1993, the Court of Appeals of Punta Arenas dismissed the motion, inter alia, because "it is not incumbent [on that Court] […] to declare that a crime has been committed, to resolve or rectify proceedings lawfully submitted before judicial authorities sitting in another jurisdiction […]." [FN74]

[FN74] Cf. Motion for protection filed by Anne Ellen Steward-Orlandini with the Court of Appeals of Punta Arenas (evidence presented to facilitate adjudication of the case filed by the State on October 31, 2005, file on the merits, reparations, and costs, volume IV, pages 1098 to 1112); and order of the Court of Appeals of Punta Arenas of March 24, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 872).

63(37) Whoever considers that the decision of a military prosecutor adversely affects a right is entitled to move the Court-Martial for acknowledgment thereof, but is not entitled to resort to a court of law. [FN75]

[FN75] Cf. Statement of expert witness Cristian Riego-Ramírez rendered before the Inter-American Court of Human Rights during the public hearing held on May 9, 2005; and order of the Court of Appeals of Punta Arenas of March 24, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 872).

With regard to Case No. 465 for another count of disobedience based on new facts and its joinder into Case No. 464

63(38) On March 26, 1993, the Chief of Garrison IM "Orden y Seguridad" ("Order and Security") signed an acknowledgment of the internal order to transfer Palamara-Iribarne to said Garrison, issued by the Office of the Commander in Chief of the Third Naval Zone after Iribarne's release on bail, in which it was stated that "he [should] keep the judicial proceedings and the ISA [Administrative Summary Investigation] in confidence and that it [was] absolutely forbidden to make critical comments, public or private, written or spoken, that might be to the detriment of or that might harm the image of the Institution, any naval authority, or those carrying out the judicial case and administrative investigations against him." [FN76]

[FN76] Cf. Notice of the Chief of Garrison "Orden y Seguridad" ("Order and Security") of March 26, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 1057).

63(39) On March 26, 1993, Humberto Antonio Palamara-Iribarne gave an interview to "La Prensa Austral" newspaper, where he revealed, inter alia, that he considered the ruling of the Court of Appeals of Punta Arena (supra para. 63(36)) "inconceivable." That same day, a representative of the Military Attorney General's Office filed a brief with the Court-Martial of the Navy, whereby he stated that the "serious allegations about civil justice administration made

by the defendant" against the Court-Martial let us assume that Palamara-Iribarne persists in his "disloyal conduct" toward another government authority such as the Judiciary. [FN77]

[FN77] Cf. Notice of the Military Attorney General's Office representative of March 26, 1993 and newspaper clipping entitled "Palamara calificó de 'increíble' el fallo dictado por la Corte" ("Palamara says order of the Court is 'inconceivable") (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 895 and 896).

63(40) On March 31, 1993, Palamara-Iribarne was interviewed by journalists of "La Prensa Austral" newspaper and asserted, inter alia, that the Navy gave him seven days to vacate the state-owned house where he resided and that his wife had reported that "his family was denied access to the hospital of the Armed Forces," because his name appeared on "a list of people with no access to said institution." Palamara-Iribarne stated that "such a discriminatory practice [was] unnecessary, particularly concerning the wife of an officer of the Armed Forces." [FN78]

[FN78] Cf. Newspaper clipping entitled "De trato discriminatorio se queja el ex oficial Palamara" ("Former Navy officer Palamara claims discrimination") published on March 31, 1993, in "La Prensa Austral" (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 1056).

63(41) On March 31, 1993, the Chief of Garrison IM "Orden y Seguridad" ("Order and Security") (M) went to the Hospital of the Armed Forces where Palamara-Iribarne "was being medically treated for his nervous condition" and told him that "the comments he made to the media amounted to a manifest disobedience of the above-mentioned order" (supra para. 63(38)). [FN79] That same day, the Garrison Chief forwarded a report to the Commander in Chief of the Third Naval Zone, whereby he pointed out that "on page 10 of La Prensa Austral newspaper, of Punta Arenas, there is an article [… where Palamara-Iribarne] asserts to have been discriminated by the [Naval] Institution, in violation of the order" delivered on March 26, 1993 (supra para. 63(38)), and that he had skipped "the claim procedure outlined under the Ordinance of the Navy." [FN80]

[FN79] Cf. Statement of the Chief of Garrison IM "Orden y Seguridad" ("Order and Security") rendered before the Naval Prosecutor of Magallanes on March 31, 1993, and statement of Humberto Antonio Palamara-Iribarne of April 2, 1993, rendered before the Naval Prosecutor (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 1063 and 1076).
[FN80] Cf. Report on "disobedience committed by civil servant hired as contractor" Humberto Antonio Palamara-Iribarne by the Chief of Garrison IM "Orden y Seguridad" ("Order and Security") of March 31, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes

of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 1055).

63(42) On April 2, 1993, Palamara-Iribarne appeared before the Naval Prosecutor of Magallanes and stated, inter alia, that he was not acquainted with the reasons for such request and that the comments he made to the journalists of "La Prensa Austral" newspaper did not constitute criticism against the Navy "because he was only refer[ing] to an event that actually occurred, which does not amount to classified information." [FN81] That same day, the Naval Prosecutor of Magallanes ordered the journalist who authored the above-mentioned article (supra para. 63(40)) to appear before his office, and the latter also stated that he ignored the reasons for such request. [FN82]

[FN81] Cf. Statement rendered by Humberto Antonio Palamara-Iribarne on April 2, 1993, before the Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 1075).

[FN82] Cf. Order of the Naval Prosecutor of April 2, 1993; and statement rendered by journalist Poly Rain on April 5, 1993, before the Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), folios 1079 y 1080).

63(43) On April 13, 1993, the attorney for Palamara-Iribarne filed a brief whereby he requested "restitution of all copies" of the book on behalf of his client because, during the preliminary investigation, the prosecution "failed to prove the occurrence of an event that may adversely affect the interests of the Navy or jeopardize national security," the above-mentioned individual did not disclose secrets about the Navy, and the crimes of disobedience and breach of military duties charged upon him did not justify "upholding [said] seizure." Moreover, he asserted that said measure violates the right to express an opinion and to inform the public without prior censorship, in any way and by any means," as established in Article 19(2) of the Political Constitution of Chile. [FN83]

[FN83] Cf. Request filed by the attorney for Palamara-Iribarne on April 13, 1993, before the Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 982 to 984).

63(44) On April 14, 1993, the Naval Judge of Magallanes, Hugo Bruna-Greene, who had found himself "disqualified" to hear Case No. 464 (supra para. 63(25)), ordered that "a preliminary investigation be conducted" and "the […] case file be forwarded to the Naval Prosecutor of Magallanes for further proceedings," under File No. 465. [FN84]

[FN84] Cf. Order of the Naval Judge of Magallanes of April 14, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(b), page 1087).

63(45) As a result of the above-mentioned statements (supra paras. 63(39) and 63(40), Palamara-Iribarne was charged with another count of disobedience of orders issued by a superior in rank. [FN85]

[FN85] Cf. Order of the Naval Judge of Magallanes of April 14, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(b), page 1087).

63(46) On April 15, 1993, the attorney for Palamara-Iribarne requested "access to the preliminary investigation;" the following day, the Naval Prosecutor of Magallanes dismissed said request and the Prosecutor's dismissal was appealed against by said attorney on April 21, 1993. [FN86] That same day, the Naval Prosecutor "dismissed" the motion of appeal on the grounds that it "refers […] to a nonappealable order." [FN87]

[FN86] Cf. Request filed by the attorney for Palamara-Iribarne on April 15, 1993, before the Naval Prosecutor of Magallanes; order of the Naval Prosecutor of Magallanes of April 16, 1993; and motion of appeal raised by the attorney for Palamara-Iribarne before the Naval Prosecutor of Magallanes on April 21, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 1000 and 1016).

[FN87] Cf. Order of the Naval Prosecutor of Magallanes of April 21, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 1016).

63(47) On April 27, 1993, once again, the attorney for Palamara-Iribarne requested the Naval Prosecutor of Magallanes access to the preliminary investigation to "contribute the information necessary to forthwith close proceedings" and requested confrontation between the statements made by his representatives and the interpretation of said statements made by the Military Attorney General's Office upon requesting release on bail in the closing arguments, because there were material contradictions that should be clarified. [FN88] The following day, the Naval Prosecutor of Magallanes denied the request to have access to the preliminary investigation on the grounds that it "may jeopardize the investigation," and decided that the request for statement confrontation "will be addressed in due time." [FN89] On June 23, 1993, the prosecutor dismissed the confrontation request. [FN90]

[FN88] Cf. Request of April 27, 1993, filed by the attorney for Palamara-Iribarne before the Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 1032).
[FN89] Cf. Order of the Naval Prosecutor of Magallanes of April 28, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 1033).
[FN90] Cf. Order of the Naval Prosecutor of Magallanes of June 23, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), page 1237).

63(48) On April 30, 1993, the Naval Judge of Magallanes, Hugo Bruna-Greene, ordered, at the Naval Prosecutor's request, the joinder of "Case No. 465 to Case No. 464." [FN91]

[FN91] Cf. Order of the Naval Judge of Magallanes of April 30, 1993; and request of the Naval Prosecutor of Magallanes of April 29, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(b), pages 1091 and 1092).

63(49) On May 5, 1993, the Naval Prosecutor of Magallanes ordered the Commander in Chief of the Third Naval Zone, Hugo Bruna-Greene, to appear before his office to render a statement. That same day, the Commander in Chief appeared before the Naval Prosecutor and stated that when Palamara-Iribarne told him that he was determined to publish the book, he asserted that "demystification of intelligence services will be positive," but that said comment did not entail "an authorization" to publish the book. [FN92]

[FN92] Cf. Order of the Naval Prosecutor of Magallanes of May 5, 1993; and statement of Hugo Bruna-Greene rendered before the Naval Prosecutor of Magallanes on May 5, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(b), pages 1106 and 1107).

63(50) On May 22, 1993, the Naval Prosecutor of Magallanes requested Naval Judge Hugo Bruna-Greene an extension of time to complete the preliminary investigation "on the grounds that certain proceedings were pending execution." The following day, the Judge granted the petition for extension. [FN93]

[FN93] Cf. Orders of the Naval Judge of Magallanes of May 22 and 23, 1993 (Case No. 464 before the Naval Court of Magallanes on the crimes of disobedience and breach of military duties, appendixes to the complaint, volume III, appendix 9(a), pages 1129 to 1131).

First proceedings for the third charge of disobedience and consolidation of said proceedings with Case No. 464

63(51) On May 5, 1993, Mr. Palamara-Iribarne went to a program broadcast on the National Radio called "Propuesta 93," where he was interviewed and answered several questions posed by the audience. [FN94] The next day, the Chief of Garrison IM "Orden y Seguridad" ("Order and Security") forwarded a report to the Commander in Chief of the Third Naval Zone, wherein he affirmed that Mr. Palamara-Iribarne had violated the order issued by said Chief of Garrison on March 26, 1993 (supra para. 63(38)), for he had made critical comments that damage the image of the institution and the Office of the Commander in Chief of the Third Naval Zone. [FN95]

[FN94] Cf. Transcription record of Mr. Humberto Antonio Palamara-Iribarne's statements made at the radio program "Propuesta 93" broadcast on May 10, 1993 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume III, appendix 9(b), folios 1153 to 1165).
[FN95] Cf. Report of May 6, 1993 of the Chief of Garrison IM "Orden y Seguridad" ("Order and Security") addressed to the Commander in Chief of the Third Naval Zone (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume III, appendix 9(b), folio 1153).

63(52) Mr. Palamara-Iribarne's defense counsel filed an appeal of complaint against the Naval Prosecutor of Magallanes for "abuses committed in […] the processing of File No. 464 […,] by denying access to the preliminary investigation and delaying the confrontations". On June 1, 1993, the Valparaíso Court-Martial decided said appeal of complaint and pointed out that it was pursuant to law that Mr. Palamara-Iribarne had been denied access to the preliminary investigation and that, in accordance with section 78 of the Code of Criminal Procedure and section 129 of the Code of Military Justice, the preliminary investigation was secret and this was not attributable to the contested Prosecutor. Furthermore, as regards the request for confrontations, "since it had been ruled that the issue would be timely decided, no determination had been made about it, wherefore the […] Prosecutor had to issue a decision thereon" (supra para. 63(47)). [FN96]

[FN96] Cf. Complaint appeal filed by Mr. Palamara-Iribarne's defense counsel with the Valparaíso Court-Martial on June 1, 1993; and resolution issued by the Valparaíso Court-Martial on June 1, 1993 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume III, appendix 9(b), folios 1207 to 1212).

63(53) On June 3, 1993, the Naval Judge of Magallanes, Hugo Bruna-Greene, ordered that the first proceedings initiated in the wake of Mr. Palamara-Iribarne's radio statements, conducted by the Naval Prosecutor of Magallanes, be consolidated with Case No. 464. [FN97]

[FN97] Cf. Resolution issued on June 3, 1993 by the Naval Judge of Magallanes (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume III, appendix 9(b), folio 1181).

63(54) On June 15, 1993, Mr. Palamara-Iribarne, upon being summoned by the Naval Prosecutor, stated, inter alia, that when he deleted the content of his book from his computer "he removed it from the hard drive." That same day, the Naval Prosecutor of Magallanes ordered that a mechanical engineer specializing in systems analysis give an expert opinion on Mr. Palamara-Iribarne's computer and verify whether or not "the information [to which Mr. Palamara-Iribarne referred in the statement rendered before the Naval Prosecutor] had been actually deleted from the computer." The next day, the expert witness reported that the information pertaining to the book could not be found in the files of the computer he had checked. [FN98]

[FN98] Cf. Statement rendered by Mr. Palamara-Iribarne before the Naval Prosecutor of Magallanes on June 15, 1993; resolution issued by the Naval Prosecutor of Magallanes on June 15, 1993; and expert opinion issued on June 16, 1993 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume III, appendix 9 b, folios 1192, 1196 to 1199).

63(55) On July 6, 1993, Mr. Palamara-Iribarne rendered a statement before the Naval Prosecutor of Magallanes. [FN99]

[FN99] Cf. Statement rendered by Mr. Humberto Antonio Palamara-Iribarne before the Naval Prosecutor of Magallanes on July 6, 1993 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume III, appendix 9(b), folios 1264 and 1265).

63(56) On July 12, 1993, the Naval Prosecutor of Magallanes issued a writ of indictment for two crimes of disobedience arising from new facts (supra paras. 63(38) to 63(53)), wherein he ruled that: [FN100]

a) the record evidenced the existence of the crime of disobedience established in section 336(3) of the Code of Military Justice, which arose when Mr. Palamara-Iribarne went to the newspaper "La Prensa Austral" (supra para. 63(39)) and "made public […] complaints and criticisms against the Navy and its leaders, which were published in said newspaper on March 31, 1993," all of it in contravention of the military order of March 26, 1993 (supra para. 63(40));
b) the record evidenced the existence of the crime of disobedience established in section 336(3) of the Code of Military Justice, which arose when Mr. Palamara-Iribarne "was interviewed at a radio program broadcast by Radio Nacional de Chile de Punta Arenas (National

Radio of Chile at Punta Arenas) […,] 'Propuesta 93' […,] and complained about and criticized the Navy and its leaders;" and

c) he issued a warrant for imprisonment of Mr. Palamara-Iribarne, through the Investigation Police of Punta Arenas, for committing the above mentioned crimes. In this regard, he was to be held in remand custody at Garrison IM "Orden y Seguridad" ("Order and Security").

[FN100] Cf. Writ of indictment issued by the Naval Prosecutor of Magallanes on July 12, 1993 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume III, appendix 9(b), folios 1281 to 1283).

63(57) On July 12, 1993, Mr. Palamara-Iribarne, upon being notified of the writ of indictment, filed a motion of appeal against the order for preventive detention and requested that he be released on bail. That same day, the Naval Prosecutor of Magallanes "granted the appeal[, … d]ecide[d] the request for release on bail [and r]eferre[d" the appeal, the original record and the consultation on the granted release on bail] to the Navy Court-Martial." [FN101] On July 15, 1993, the Valparaíso Court-Martial decided to strike the phrases "existence of the crime of disobedience established and punished in section 336(3) of the Code of Military Justice" and "which arose when" from the Naval Prosecutor's writ of indictment of July 12, 1993 (supra para. 63(56)), and also ordered that "the words 'the crimes' be replaced with 'the crime'." Furthermore, the Court-Martial "confirm[ed] the contested resolution […] with a statement that proceedings be instituted against Mr. Humberto Antonio Palamara-Iribarne," [FN102]

[FN101] Cf. Motion of appeal filed by Mr. Palamara-Iribarne on July 12, 1993 against the writ of indictment issued by the Naval Prosecutor of Magallanes (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume III, appendix 9(b), folio 1283).

[FN102] Cf. Resolution issued by the Valparaíso Court-Martial on July 15, 1993 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume III, appendix 9(b), folio 1292).

63(58) The Office of the Naval Prosecutor of Magallanes conducted investigations into the exact number of edited copies of the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services"), as well as the location of "missing copies" and the surrender thereof to the court. To do so, it called upon and took statements from those who, according to the information of Case File No. 464, might have a copy of the book or those who had made comments on the book in the media; and the Naval Judge prevented the case from being sent to full trial until all copies of the book were collected. [FN103]

[FN103] Cf. Report of Judicial Police Station of Punta Arenas of April 5, 1993 addressed to the Naval Prosecutor of Magallanes; formal summons of April 8, 1993 issued by the Naval

Prosecutor of Magallanes; statement rendered by Ms. Anne Stewart-Orlandini on April 15, 1993; statement rendered by the legal representative of the publishing company Ateli S. A. on April 20, 1993; statement made by Ms. Mackenney Schauk on April 16, 1993; and statement rendered by Mr. Humberto Antonio Palamara's mother on April 29, 1993 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume III, appendix 9(a), folios 957, 958, 966, 968, 969, 1002 and 1229).

63(59) On August 25 and September 9, 1993, Mr. Humberto Antonio Palamara-Iribarne's defense counsel filed requests "for authorization to establish domicile outside the jurisdiction of the Court" with the Naval Prosecutor of Magallanes, in order to allow his client to look for a job, since "it [had] proved impossible for him to find a job" in Punta Arenas. Around those days, the Naval Prosecutor authorized Mr. Palamara-Iribarne to leave the jurisdiction of the Court, pointing out that "he [was] subject to weekly control of his signature at the Office of the Naval Prosecutor of Valparaíso." Mr. Palamara-Iribarne complied with said signature controls in Valparaíso. [FN104]

[FN104] Cf. Requests filed by Mr. Palamara-Iribarne's defense counsel before the Naval Prosecutor of Magallanes on August 25 and September 9, 1993; and resolutions issued by the Naval Prosecutor of Magallanes on August 25 and September 9, 1993 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume IV, appendix 9.c, folios 1359-1364 and 1379).

63(60) On September 24, 1993, the Naval Prosecutor of Magallanes issued his opinion regarding "the investigation into alleged crimes of disobedience and breach of military duties" corresponding to Case No. 464 and Case No. 465, which were consolidated through a resolution dated April 30, 1993 (supra para. 63(48)), together with the "first proceedings," through a resolution dated June 3, 1993 (supra para. 63(53)), and declared the preliminary investigation stage concluded. In said opinion, the Naval Prosecutor considered that Mr. Palamara-Iribarne should be convicted, in successive order, to: a) 541 days of minor military imprisonment, in medium degree, for committing the crime of breach of military duties (section 299(3) of the Code of Military Justice), by "publishing a book that dealt with institutional matters [...,] without waiting for the authorization that had been requested pursuant to section 89 of the Ordinance of the Navy;" b) 3 years of minor military imprisonment, in medium degree, for committing the crime of disobedience (section 336(3) of the Code of Military Justice), by "openly refusing [to comply with the order to] surrender the material pertaining to his book;" c) 541 days of minor military imprisonment, in medium degree, for committing the crime of disobedience (section 337(3) of the Code of Military Justice), by "infringing the prohibition against criticizing the Institution and its leaders[,] imposed on him through a military order [(supra para. 63(38)], when he made statements on the radio and in the written press complaining about and criticizing the Navy and its leaders;" d) loss of military status; e) forfeiture of seized material; and f) he expressed that the 13 days during which Mr. Palamara-Iribarne had been deprived of his freedom should be deducted from the above mentioned sentences. [FN105]

[FN105] Cf. Opinion issued by the Naval Prosecutor of Magallanes on September 24, 1993 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume IV, appendix 9.c, folios 1371-1378).

63(61) On November 5, 1993, the Interim Naval Judge of Magallanes ordered that the investigation proceedings related to the case be reopened, in order to conduct pending proceedings, which included, inter alia, the interrogation of the Commander in Chief of the Third Naval Zone regarding the written request for authorization to publish submitted by Mr. Palamara-Iribarne on February 18, 1993 (supra para. 63(11)). On February 13, 1994, the Naval Prosecutor, once the above mentioned proceedings had been conducted, declared "the preliminary investigation stage concluded" and confirmed the opinion issued on September 24, 1993 (supra para. 63(60)). [FN106] On March 16, 1994, the Interim Naval Judge of Magallanes ordered that the investigation proceedings of the case be reopened, in order to conduct such proceedings as might be necessary to complete the seizure of all the books held by a person who had made public statements about their content and one of Mr. Palamara-Iribarne's next of kin. On August 8, 1994, the Third Interim Naval Prosecutor declared the preliminary investigation stage concluded, and, on August 31, 1993, confirmed the first opinion of the Prosecutor. [FN107] On October 5, 1994, the Delegate of the Military Attorney's General Office endorsed the Prosecutor's opinion. [FN108]

[FN106] Cf. Resolution issued by the Interim Naval Judge on November 5, 1993; resolution issued by the Naval Prosecutor of Magallanes on November 16, 1993; resolution issued by the Naval Prosecutor of Magallanes on February 13, 1994 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume IV, appendix 9.c, folios 1382, 1383, 1437 and 1440).

[FN107] Cf. Resolution issued by the Deputy Naval Prosecutor of Magallanes on August 8, 1994; and extension of the Prosecutor's opinion issued by the Deputy Naval Prosecutor of Magallanes on August 31, 1994 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume IV, appendix 9.d, folios 1480 and 1485).

[FN108] Cf. Decision issued by the Delegate of the Military Attorney´s General Office on October 5, 1994 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume IV, appendix 9.c, folio 1490).

63(62) On October 24, 1994, the Naval Prosecutor of Magallanes sent the case to full trial so that defendant Humberto Palamara-Iribarne might answer the charges filed against him" in the prosecutor's opinions (supra paras. 63(60) and 63(61)). That same day, said Naval Prosecutor authorized the Office of the Naval Prosecutor to "give the case file to the defense counsel of the defendant," who would thus have access to said file for the first time. [FN109]

[FN109] Cf. Resolutions issued by the Naval Judge of Magallanes on October 24, 1994 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume IV, appendix 9.c, folios 1492 and 1493).

63(63) Proceedings remained at the preliminary investigation stage from March 13, 1993 to October 24, 1994 (supra para. 63(26) and 63(62)). [FN110]

[FN110] Cf. Resolution issued by the Naval Prosecutor of Magallanes on October 24, 1994 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume IV, appendix 9.c, folio 1493).

63(64) On October 28, 1994, the Deputy Naval Prosecutor of Valparaíso notified Mr. Palamara-Iribarne's defense counsel that he had to "answer the charges filed by the prosecutor within the legal term." [FN111] That same day, Mr. Palamara-Iribarne asked said Prosecutor "for photocopies of all that was included in the record, to be used in [his] defense," which he obtained, at his expense. [FN112] On February 14, 1995, the Deputy Naval Prosecutor of Valparaíso appointed "the Corporación de Asistencia Judicial de Valparaíso (Valparaíso Legal Services Corporation) to answer, within the legal term, the charges [...] filed against the defendant;" since Mr. Palamara-Iribarne and his defense counsel had failed to do so. [FN113]

[FN111] Cf. Decision issued by the Naval Prosecutor of Valparaíso on October 28, 1994 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume IV, appendix 9.c, folio 1495).
[FN112] Cf. Request filed by Mr. Humberto Antonio Palamara-Iribarne with the Naval Prosecutor; and resolution issued by the Deputy Naval Prosecutor of Valparaíso on October 31, 1994 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume IV, appendix 9.c, folios 1497 and 1498).
[FN113] Cf. Decision issued by the Naval Prosecutor of Valparaíso on February 14, 1995 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume IV, appendix 9.c, folio 1508).

63(65) On February 20, 1995 Mr. Palamara-Iribarne's defense counsel raised "a defense to decline assumption of jurisdiction or for lack of jurisdiction of the [...] Naval Court in and for Magallanes," since his client "was, from the legal point of view, a civil servant hired as a contractor by the Chilean Navy," which means that "submitting a civil servant to the jurisdiction of a Military Court for crimes that due to their very nature can only be committed by active-duty

military professionals goes beyond the necessary and natural jurisdiction provided for by the law maker." Furthermore, on said occasion, the above mentioned counsel subsidiarily answered "the charges brought in the accusatory opinion" (supra paras. 63(60) and 63(61)), holding, inter alia, that the alleged acts "did not constitute a crime" and that an acquittal should be entered, and also produced documentary, testimonial and expert witness evidence, as well as evidence obtained through personal inspection. [FN114]

[FN114] Cf. Brief submitted by Mr. Palamara-Iribarne's defense counsel before the Naval Prosecutor of Valparaíso on February 20, 1995 filing a defense, answering the charges filed by the Prosecutor and producing evidence (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume IV, appendix 9.c, folio 1539-1566).

63(66) On June 10, 1996, the Naval Judge of Magallanes, "in agreement with the judge advocate," handed down a judgment in case Nº 464, whereby defendant Humberto Antonio Palamara-Iribarne was convicted to: [FN115]

a) "61 days of [m]inor [m]ilitary [i]mprisonment, in minimum degree, for having committed the crime of [b]reach of [m]ilitary [d]uties" established in section 299(3) of the Code of Military Justice, by having failed to comply with the regulatory procedure set forth in section 89 of the Ordinance of the Navy with "direct malice," by printing, editing, publishing, promoting, registering and selling the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services"), despite having been refused an authorization to do so;
b) 540 days of minor military imprisonment, in minimum degree, for committing the crime of disobedience established in section 337(3) of the Code of Military Justice in relation to section 334 thereof, which makes it possible to "understand the legal definition properly," by failing to observe an order of the Commander in Chief of the Third Naval Zone of the Navy "to surrender all the copies of the book and other materials used in printing as soon as possible;"
c) 61 days of minor military imprisonment, in minimum degree, for committing the crime of disobedience established in section 336(3) of the Code of Military Justice, by breaching an order of the Chief of Garrison IM "Orden y Seguridad" ("Order and Security") of Magallanes that forbade Mr. Palamara-Iribarne from making critical comments (supra para. 63(38)). The Judge considered that Mr. Palamara-Iribarne had breached said order inasmuch as he had issued critical opinions about institutional procedures, which were published in the newspaper "La Prensa Austral" of Punta Arenas on March 31, 1993 and broadcast on radio;
d) the additional punishment of loss of military status for committing the crime established in section 299(3) of the Code of Military Justice;
e) the additional punishment of being suspended from public office or employment during the term of the sentences;
f) forfeiture of 900 copies of the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services"), a floppy disk containing the complete text of the publication, 6,213 loose sheets of paper making up the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services"), 90 thin cardboard covers of said book, 4 of which were half printed, 31 brochures advertising the book and 15 thin cardboard sheets with the cover design of the book;

g) defray the costs of the case; and
h) in keeping with the requirements established by Law Nº 18,216, actual compliance with imprisonment sentences was replaced with the benefit of night imprisonment for a term of 649 days.

[FN115] Cf. Judgment entered by the Naval Judge and the Navy Judge Advocate of Magallanes on June 10, 1996 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volumes IV and V, appendix 9.d, folios 1681 to 1824).

63(67) On July 17, 1996, Mr. Palamara-Iribarne filed a motion of appeal with the Navy Court-Martial against the judgment rendered by the Naval Court in and for Magallanes on June 10, 1996 (supra para. 63(66)), and raised "a defense to decline assumption of jurisdiction." [FN116]
63(68) On January 2, 1997, the Navy Court-Martial rendered a judgment [FN117] whereby it decided:

a) to reject the defense to decline assumption of jurisdiction of military courts raised by Mr. Palamara-Iribarner's defense counsel (supra para. 63(65)), inasmuch as "jurisdiction [...] over the crimes perpetrated by the defendant arises from the military nature of both the punishable acts described in the relevant code and the person that performed them," as provided in section 6 of the Code of Military Justice;
b) to acquit Mr. Palamara-Iribarne of the crime of disobedience committed by "giving interviews which were broadcast on the radio and in the written press," in contravention of an order issued by a superior, since the breach of said order "has already been punished in case No. 471 before the Naval Court in and for Magallanes […] for the crime of contempt." Hence, the Court-Martial quashed the part of the contested judgment that sentenced defendant Humberto Antonio Palamara-Iribarne to 61 days of minor military imprisonment, in minimum degree, for committing the crime of disobedience established in section 336(3) of the Code of Military Justice (supra para. 63(66)(c));
c) to exonerate Mr. Palamara-Iribarne from the punishment of loss of military status for committing the crime of breach of military duties, inasmuch as it is "at the same time, a major military punishment" and it is out of order to punish him in this way and also "make him serve a prison term" (supra para. 63(66)(d)); and
d) to affirm the contested judgment and reduce the sentence for the crime of disobedience to 61 days of minor military imprisonment, in minimum degree (supra para. 63(66)). Additionally, the benefit of night imprisonment is replaced with that of conditional pardon; the defendant is thus placed under administrative control by the Chilean Border Police for a one-year term. Defendant shall comply with the duties established in section 5 of Law No. 18,216.

[FN116] Cf. Registered letter of the notification of the judgment of second instance entered by the Navy Court-Martial of Valparaíso on January 2, 1997 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume V, appendix 9.d, folios 1825 to 1828).

[FN117] Cf. Registered letter of the notification of the judgment of second instance entered by the Navy Court-Martial of Valparaíso on January 2, 1997 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume V, appendix 9.d, folios 1825 to 1828).

63(69) On January 9, 1997, Mr. Humberto Antonio Palamara-Iribarne's defense counsel filed a motion for cassation on the merits with the Navy Court-Martial against "the judgment of second instance" rendered by the Court-Martial on January 2, 1997, based on the "erroneous application of criminal law." Said motion was grounded on section 546(3) of the 1993 Code of Criminal Procedure, which provides that erroneous application of criminal law warrants a motion for cassation when "the judgment describes as a crime an act that is not considered a crime under criminal law." The defense counsel based the motion, inter alia, on the fact that "[a] breach of law was committed when it was reckoned that the defendant was a member of the military, which led to the erroneous application of section 6 of the Code of Military Justice [, …and] allowed behavior that was not criminal to be described as being actually criminal," an error arising under sections 299(3) and 337(3) of the Code of Military Justice. [FN118]

[FN118] Cf. Motion for cassation filed on January 9, 1997 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume V, appendix 9.d, folio 1829).

63(70) On January 31, 1997, the Prosecutor of the Chilean Supreme Court of Justice issued an opinion wherein he held that the motion for cassation on the merits should be granted, since "a breach of law affecting the operative part of the judgment had been committed." The above mentioned Prosecutor pointed out that the purpose of the law maker when drafting sections 6 and 7 of the Code of Military Justice had been "to bring civil servants under the jurisdiction of military criminal courts only for common crimes committed within military premises or during a state of war" and that "writing [a] book was an activity that fell outside Mr. Palamara"-Iribarne's duties as an employee. [FN119]

[FN119] Cf. Opinion issued by the Prosecutor of the Chilean Supreme Court on January 31, 1997 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume V, appendix 9 d, folios 1847 and 1848).

63(71) On August 5, 1997, the Chilean Supreme Court of Justice, one member of which was the judge advocate general, denied the motion for cassation filed by Mr. Palamara-Iribarne on January 9, 1997, since it considered that "section 6 of the Code of Military Justice had not been breached and had been properly applied[,] which means that no error was made in the contested judgment by applying sections 299(3) and 337(3) of [said Code], inasmuch as both sections

establish the requirement of being a "member of the military" to become involved in facts that constitute a breach of military duties and disobedience." [FN120]

[FN120] Cf. Decision issued by the Chilean Supreme Court of Justice on August 5, 1997 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume V, appendix 9.d, folios 1850 to 1862).

Proceedings for the crime of contempt: Case No. 103/93 against Mr. Palamara-Iribarne brought before the Court of Appeals of Punta Arenas

63(72) On May 6, 1993, Mr. Palamara-Iribarne called a press conference at his house, in which he criticized the actions taken by the Office of the Naval Prosecutor in the proceedings against him. [FN121]

[FN121] Cf. Newspaper article entitled "Palamara expresó deseos que pronto su libro pueda ser conocido por comunidad" ("Palamara wished that his book be soon known by the community") published in the newspaper "La Prensa Austral" on May 7, 1993; and report of the Chief of Garrison IM "Orden y Seguridad" ("Order and Security") of May 7, 1993 addressed to the Commander in Chief of the Third Naval Zone (case file on the summary administrative investigation, record of appendixes to the complaint, volume II, appendix 8, folios 671 and 672).

63(73) On May 7, 1993, the statements made by Mr. Palamara-Iribarne during said press conference were published in the newspaper "La Prensa Austral" of Punta Arenas. According to the newspaper article, Mr. Palamara-Iribarne affirmed, inter alia, that "freedom of expression [had] been curtailed and repression had been apparently covered up by 'accusing [him] of breaching military orders and duties'." He also expressed that "there exist[ed] reasons to believe that the Office of the Naval Prosecutor had faked legal documents and lied to the Court of Appeals when asked about who had filed the complaint that gave rise to the preliminary criminal proceedings and about the roll number of the criminal proceeding with which the investigation was initiated, all of it to avoid an unfavorable judgment." [FN122]

[FN122] Cf. Newspaper article entitled "Palamara expresó deseos que pronto su libro pueda ser conocido por comunidad" ("Palamara wished that his book be soon known by the community") published in the newspaper "La Prensa Austral" on May 7, 1993; and report of the Chief of Garrison IM "Orden y Seguridad" ("Order and Security") of May 7, 1993 addressed to the Commander in Chief of the Third Naval Zone (case file on the summary administrative investigation, record of appendixes to the complaint, volume II, appendix 8, folios 671 and 672).

63(74) On May 25, 1993, the Commander in Chief of the Third Naval Zone, Mr. Hugo Bruna-Greene, filed a complaint against Mr. Palamara-Iribarne with the Court of Appeals of Punta Arenas, accusing him of committing the crime of contempt, established and punished in section 264(3) of the Criminal Code. According to the claimant, Mr. Palamara-Iribarne had made "highly offensive" statements "against [the] Naval Prosecutor of Magallanes." [FN123]

[FN123] Cf. Complaint filed by the Commander in Chief of the Third Naval Zone with the Court of Appeals (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folios 1925 to 1928).

63(75) On May 31, 1993 the Prosecutor ("Ministro Sumariante") of the Court of Appeals conducted the preliminary criminal investigation and requested the claimant to identify "accurately and definitively the officer allegedly affected by the facts [...], who held the position of Naval Prosecutor when the facts took place." [FN124] On June 2, 1993 the Interim Prosecutor of the Court of Appeals of Punta Arenas, pursuant to "subparagraph a) of section 27 of Law No. 12,927[…,] request[ed], as a first action, that a comprehensive order to investigate be issued, in order to establish the corpus delicti and the responsibility of the defendant, including that which may be derived from the latter during the preliminary investigation." Said section provides that "immediately after receiving a complaint stating that civilians have committed one of the crimes mentioned in the previous section," including the crime of contempt, "the President of the Court shall forward it to the incumbent Judge, so that the case may be removed to a higher court [...and] processed under the rules established in Title II of Book II of the Code of Military Justice, which deals with criminal procedure in times of peace, with the amendments and additions mentioned therein." [FN125]

[FN124] Cf. Resolution issued by the Appellate Court Judge in charge of Investigations on May 31, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 1930).

[FN125] Cf. Resolution issued by the Office of the Appellate Court Prosecutor on June 2, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 1934).

63(76) On June 3, 1993, the Court of Appeals summoned Mr. Palamara-Iribarne to testify, "under penalty of arrest," which he did before said Court on June 8, 1993. [FN126]

[FN126] Cf. Statement rendered by Mr. Humberto Antonio Palamara-Iribarne before the Court of Appeals of Punta Arenas on June 8, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folios 1940 to 1943).

63(77) On June 14, 1993, the Prosecutor of the Court of Appeals found that he had no jurisdiction to hear case No. 103-93, which corresponded to the complaint filed by the Commander-in-Chief of the Third Naval Zone, Mr. Hugo Bruna-Greene, based on section 26 of Law 12,927, and referred the record of said case to the Naval Judge of Magallanes "so that it be heard and judgment be rendered." [FN127]

[FN127] Cf. Official letter No. 737 issued by the Punta Arenas Appellate Court Minister in charge of Investigations on June 14, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 1944).

Criminal Case No. 471/93 against Mr. Palamara-Iribarne brought before the Naval Court in and for Magallanes for the crime of contempt

63(78) On June 16, 1993 the Commander in Chief of the Third Naval Zone, Mr. Hugo Bruna-Greene, who was also the Naval Judge of Magallanes, found that "he was not qualified to hear and determine the facts giving rise to the complaint" filed against Mr. Palamara-Iribarne for committing the crime of contempt. [FN128]

[FN128] Cf. Resolution issued by the Naval Judge of Magallanes on June 16, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 1945).

63(79) On June 17, 1993, the Interim Naval Judge, having jurisdiction under section 26 of Law No. 12,927, issued a resolution wherein he stated that, although Mr. Palamara-Iribarne was involved in Criminal Cases No. 464, 465 and in the first proceedings, all which had been consolidated into a single proceeding (supra para. 63(17)), section 160(2) of the Organic Court Code "empower[ed] him to [...] order, through a well-founded ruling, that the case be heard separately." Additionally, he pointed out that the court had jurisdiction to try the crime of contempt pursuant to section 26 of Law No. 12,927. [FN129]

[FN129] Cf. Resolution issued by the Interim Naval Judge of Magallanes on June 17, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 1946).

63(80) On July 12, 1993, the Naval Prosecutor of Magallanes issued a writ of indictment against Mr. Palamara-Iribarne, whereby he became a party in Case No. 471 for committing the crime of contempt provided for in section 264(3) of the Chilean Criminal Code, in relation to sections 265 and 266 thereof, when he made public statements before the press that seriously slandered the Office of the Naval Prosecutor and because he considered that those facts "gave rise to the crime

of contempt." The above mentioned Naval Prosecutor based his writ of indictment, inter alia, on evidence contained in the records of the other proceedings pending before the Naval Court of Magallanes, as well as on some of the assertions included in Motion for Protection No. 10-93 filed with the Court of Appeals by Mr. Palamara-Iribarne's wife (supra para. 63(36) and 63(37)). In said writ, the Naval Prosecutor of Magallanes considered that, pursuant to section 274 of the Code of Criminal Procedure, Mr. Palamara-Iribarne had to be held in remand custody at Garrison IM "Orden y Seguridad" ("Order and Security"). [FN130]

[FN130] Cf. Resolution issued by the Naval Prosecutor of Magallanes on July 12, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 1961 and 1964).

63(81) On July 12, 1993, upon being notified of the writ of indictment, Mr. Palamara-Iribarne filed a motion of appeal against said writ (supra para. 63(80)). That same day, his defense counsel "request[ed] that the constitutional benefit of release on bail be granted [...,] all the more so because there were no proceedings pending in relation to the case." [FN131]

[FN131] Cf. Requests filed by Mr. Humberto Antonio Palamara-Iribarne's defense counsel with the Naval Prosecutor of Magallanes on July 30 and August 25, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 1967).

63(82) On July 12, 1993, the Naval Prosecutor of Magallanes "grant[ed] the appeal lodged by the defendant," "[d]ecid[ed] the request for release on bail, setting the amount of said bail," and "[r]eferr[ed the] record to the [...] Navy Court-Martial, in appeal of the writ of indictment and consultation about the granted release." [FN132]

[FN132] Cf. Resolution issued by the Naval Prosecutor of Magallanes on July 12, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 1969).

63(83) Mr. Palamara-Iribarne was imprisoned from July 12 to July 15, 1993, [FN133] and was released pursuant to the resolution issued by the Court-Martial, which intervened by virtue of a consultation process, confirming the decision to release Mr. Palamara-Iribarne on bail (supra para. 63(82)). [FN134]

[FN133] Cf. Certification issued by the Clerk of the Naval Court of Punta Arenas on August 13, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 1984).

[FN134] Cf. Resolution issued by the Valparaíso Court-Martial on July 15, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 1975).

63(84) On July 16, 1993, the Court-Martial "confirm[ed] the contested resolution." [FN135] In July and August 1993, Mr. Palamara-Iribarne was authorized to leave the jurisdiction of the court. [FN136]

[FN135] Cf. Resolution issued by the Valparaíso Court-Martial on July 16, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 1980).

[FN136] Cf. Requests filed by Mr. Humberto Antonio Palamara-Iribarne's defense counsel with the Naval Prosecutor of Magallanes on July 30 and August 25, 1993; and resolutions issued by the Naval Prosecutor of Magallanes on July 30 and August 25, 1993 (Case No. 471 before the Naval Court of Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folios 2061, 2070 and 2079).

63(85) On August 16, 1993 the Naval Prosecutor of Magallanes declared "the preliminary investigation stage concluded" and issued his opinion the next day, stating that he believed the defendant should be sentenced to 540 days of minor imprisonment, in minimum degree, and to payment of a fine in the amount of fifteen basic salaries, for committing the crime of contempt, established and punished in sections 264(3), 266(2) and 265 of the Criminal Code, as well as to the additional punishment of suspension from public office or employment. [FN137] On September 29, 1993, the Military Attorney General "endorse[d] the Prosecutor's opinion." [FN138] On October 4, 1993, the Interim Naval Judge "sen[t] the case to full trial." [FN139]

[FN137] Cf. Resolution issued by the Naval Prosecutor of Magallanes on August 16, 1993; and opinion issued by the Naval Prosecutor of Magallanes on August 17, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folios 2064 and 2068).

[FN138] Cf. Decision issued by the delegate of the Military Attorney General on September 29, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 2085).

[FN139] Cf. Resolution issued by the Interim Naval Judge of Magallanes on October 4, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 2086).

63(86) On October 6, 1993, the Naval Prosecutor of Magallanes "let the defendant have access to the record so that he may answer the charges against him within the legal term of six days." [FN140]

[FN140] Cf. Decision issued by the Naval Prosecutor of Magallanes on October 6, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 2088).

63(87) On November 18, 1993 Mr. Palamara-Iribarne's defense counsel filed the "reply to the Prosecutor's opinion" and forwarded a copy of a newspaper article "containing statements by the […] Navy Commander in Chief that, to date, two investigations were being conducted in relation to the case, as well as a photocopy of the report prepared by the […] Deputy Prosecutor, which refers to one complaint only, a circumstance that motivated Mr. Palamara-Iribarne's statements, which […] , in turn, g[ave] rise to the proceedings." [FN141]

[FN141] Cf. Brief filed by Mr. Humberto Antonio Palamara-Iribarne's defense counsel on November 18, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 2096).

63(88) On September 7, 1994, the Naval Judge of Magallanes pronounced a judgment acquitting Mr. Palamara-Iribarne of the crime of contempt, and concluded that "the merits [had] been neither suitable nor sufficient to establish the existence of the illegal act giving rise to the charges [and, furthermore, the defendant] [did] not have the intent or the willingness to offend any person, let alone an authority; his statements result[ed] from a way of thinking of the time, inspired by a defensive stance taken against circumstances that affected him, but exempt from any intent or willingness to offend or insult." [FN142]

[FN142] Cf. Judgment entered by the Naval Court in and for Magallanes on September 7, 1993 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 2152).

63(89) On September 27, 1994, the term for filing appeals against said judgment expired without any appeals having been filed. Nonetheless, on October 4, 1994, the Naval Judge of Magallanes issued a resolution "empowering the [Naval Court of Valparaíso] to refer the record to the […] Navy Court-Martial, for its opinion." [FN143]

[FN143] Cf. Resolution issued by the Naval Judge of Magallanes on October 4, 1994 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 2158).

63(90) On November 11, 1994, the Naval Judge of Valparaíso issued a resolution whereby, pursuant to "the authority conferred by [...] the resolution of the [Naval Judge of Magallanes of

October 4, 1994 (supra para. 63(89)),] he referr[ed] the record to the […] Navy Court-Martial for its opinion." [FN144]

[FN144] Cf. Resolution issued by the Naval Judge of Valparaíso on November 11, 1994 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, appendix 10, folio 2162).

63(91) On January 3, 1995, the Navy Court-Martial overturned the acquittal of the court of first instance and found Mr. Palamara-Iribarne guilty of the crime of contempt. He was sentenced to 61 days of minor imprisonment, in minimum degree, to payment of a fine in the amount of 11 basic salaries, to suspension from public office or employment for the duration of the sentence and to defray the costs of the case. The Navy Court-Martial pointed out that "the intent to slander was clear in the statements published by the [Newspaper "La Prensa Austral"] and they prov[ed] that the defendant was fully convinced of the insults he had uttered and aware of the seriousness of the charges." [FN145]

[FN145] Cf. Judgment entered by the Valparaíso Court-Martial on January 3, 1995 (Case No. 471 before the Naval Court in and for Magallanes, for the crime of contempt, record of appendixes to the complaint, volume V, folios 2168 to 2175).

63(92) On January 9, 1995, Mr. Palamara-Iribarne's defense counsel filed an appeal of complaint against the Judges of the Navy Court-Martial. In said complaint it was alleged, inter alia, that the judges had committed "breaches or abuses" when they held that the crime of contempt had existed and when they convicted Mr. Palamara-Iribarne under circumstances in which the conditions that make up the essence of the crime of contempt were not met. [FN146]

[FN146] Cf. Complaint appeal filed by Mr. Humberto Antonio Palamara-Iribarne's defense counsel with the Chilean Supreme Court of Justice on January 9, 1995 (Entry No. 6448 before the Supreme Court, record of appendixes to the complaint, appendix 10, folio 2210).

63(93) On July 20, 1995, the Chilean Supreme Court dismissed the appeal of complaint , for it found that no breach or abuse had been committed by the contested judges. [FN147]

[FN147] Cf. Decision issued by the Chilean Supreme Court of Justice on July 20, 1995 (Case No. 6,448, record of appendixes to the complaint, appendix 10, folio 2221).

Summary Administrative Investigation No. 1590 before the Office of the Administrative Prosecutor of the Third Naval Zone, Punta Arenas

63(94) On March 1, 1993, through Resolution Nº 1590/11/2, the Head of the A-2 Department of the Office of the Commander in Chief of the Third Naval Zone, Mr. Fernando Migram, informed the Commander in Chief of said Naval Zone, Hugo Bruna-Greene, about Mr. Palamara-Iribarne's "lack of compliance [with section 89 of the] Ordinance of the Navy and insubordination" as well as about his failure to conform to the disciplinary rules of the Navy. [FN148] Said report can be found in the first proceedings of Case No. 464 before the Naval Court of Magallanes (supra para. 63(18)). [FN149]

[FN148] Cf. Resolution Nº 1590/11/4 issued by the Head of the A-2 Department of the Office of the Commander in Chief of the Third Naval Zone on March 2, 1993 (Case File on the Summary Administrative Investigation, record of appendixes to the complaint, volume II, appendix 8, folio 502).

[FN149] Cf. Statement rendered by the Head of the A-2 Department of the Office of the Commander in Chief of the Third Naval Zone before the Administrative Naval Prosecutor (Case File on the Summary Administrative Investigation, record of appendixes to the complaint, volume II, appendix 8, folio 508).

63(95) On March 2, 1993, the Commander in Chief of the Third Naval Zone, Hugo Bruna-Greene, issued resolution No. 1590/11/4, wherein he decided: "to [a]ppoint [an] administrative prosecutor […] to conduct a Summary Administrative Investigation into the offense committed by the civil servant hired as a contractor [...] Humberto Palamara-Iribarne." [FN150] On April 2, 1993, the above mentioned Commander in Chief issued Resolution No. 1590/7/11, wherein he further instructed "the [Administrative Prosecutor in charge] to inquire into the breaches of discipline mentioned in the report" of March 30, 1993. [FN151]

[FN150] Cf. Resolution No. 1590/11/4 issued by the Commander in Chief of the Third Naval Zone on March 2, 1993 (Case File on the Summary Administrative Investigation, record of appendixes to the complaint, volume II, appendix 8, folio 506).

[FN151] Cf. Report of the Chief of Garrison IM "Orden y Seguridad" ("Order and Security") of March 30, 1993; resolution No. 1590/7/11 issued by the Commander in Chief of the Third Naval Zone on April 2, 1993; and resolution No. 1590/11/4 issued by the Commander in Chief of the Third Naval Zone on March 2, 1993 (Case File on the Summary Administrative Investigation, record of appendixes to the complaint, volume II, appendix 8, folios 506 and 546 to 549).

63(96) On April 8, 1993, the Administrative Naval Prosecutor issued an opinion wherein he expressed that it had been proved that Mr. Palamara-Iribarne, inter alia: had not requested an authorization to publish through the regular channel; that, upon informing the Commander in Chief of the Third Naval Zone, his book had already been published, "and he willingly omitted to give [him] this information;" that he was ordered "to halt the publication process of the book, which he did not do;" that on March 1, 1993, he was officially notified that his book "had not been authorized;" that he openly told the above mentioned Commander in Chief that he would

not comply with the order to surrender the books; and that he "gave false reasons" for not going to work." [FN152]

[FN152] Cf. Opinion issued by the Administrative Naval Prosecutor of Punta Arenas on April 8, 1993 (Case File on the Summary Administrative Investigation, record of appendixes to the complaint, volume II, appendix 8, folio 590).

63(97) On April 30, 1993, the Administrative Naval Prosecutor ordered that two expert witnesses be appointed "in order that they report to the Court on the content of the [...] book, taking into account the disciplinary values and postulates that govern the institution." One of the appointed expert witnesses was the Chief of Staff of the Third Naval Zone, Vicente Caselli-Ramos, who had filed the telephone complaint that gave rise to Case No. 464 (supra para. 63(18)). [FN153] On May 24, 1993, both expert witnesses produced a report on the content of the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services"), wherein they concluded that: a) the document could be considered an authentic testimony of intelligence services and could provide essential investigation tools for foreign countries or political groups; and b) the statements and judgments contained in the book could not have resulted from information obtained through open sources. [FN154]

[FN153] Cf. Resolution issued by the Administrative Naval Prosecutor on April 30, 1993 (Case File on the Summary Administrative Investigation, record of appendixes to the complaint, volume II, appendix 8, folio 599).

[FN154] Cf. Expert opinion on the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services") of May 24, 1993 prepared by two expert witnesses (Case File on Summary Administrative Summary No. 1590/11/4 of March 2, 1993, volume II, appendix 8, folio 675).

63(98) On May 3, 1993, the Administrative Prosecutor and the Secretary appeared at the A-2 Department of the Office of the Commander in Chief of the Third Naval Zone and "[were] shown several files with documents of a Secret, Reserved and Confidential nature [...,which] had been found in filing cabinets at [Mr.] Palamara's office." [FN155] In the statement rendered on May 7, 1993 before said Prosecutor, Mr. Palamara-Iribarne expressed that "breaking into [his] office and searching documents without his being present and without a written judicial order [was] illegitimate and illegal." [FN156]

[FN155] Cf. Inspection performed on May 3, 1993 at the A-2 Department of the Office of the Commander in Chief of the Third Naval Zone (Case File on the Summary Administrative Investigation, record of appendixes to the complaint, volume II, appendix 8, folio 603).

[FN156] Cf. Statement rendered by Mr. Palamara-Iribarne before the Administrative Naval Prosecutor on May 7, 1993 (Case File on the Summary Administrative Investigation, record of appendixes to the complaint, volume II, appendix 8, folio 636).

63(99) On May 7, 1993, the Chief of Garrison IM "Orden y Seguridad" ("Order and Security") forwarded a report to the Commander in Chief of the Third Naval Zone, wherein he expressed that Mr. Palamara-Iribarne had committed a breach of discipline when he "made statements against the judicial proceedings being conducted by the Office of the Naval Prosecutor of Magallanes and against the Commander in Chief of the Third Naval Zone" in the newspaper "LA PRENSA AUSTRAL" (supra para. 63(73)), in contravention of the order issued by said Chief of Garrison on March 26, 1993 (supra para. 63(38)). [FN157]

[FN157] Cf. Report of the Chief of Garrison IM "Orden y Seguridad" ("Order and Security") addressed to the Commander in Chief of the Third Naval Zone on May 7, 1993 (Case File on the Summary Administrative Investigation, record of appendixes to the complaint, volume II, appendix 8, folio 672).

63(100) On May 27, 1993, the Administrative Naval Prosecutor issued an opinion stating that Mr. Palamara-Iribarne ought to be punished with removal from his position, with the aggravating circumstances of misbehavior and prior deficient professional performance, inasmuch as he "[had] engaged in conduct constituting deliberate disloyalty that show[ed] [...] absolute disregard for essential values and principles," "with very serious consequences for the discipline and prestige of the [Chilean Navy]." [FN158]

[FN158] Cf. Opinion issued by the Administrative Naval Prosecutor on May 27, 1993 (Case File on the Summary Administrative Investigation, record of appendixes to the complaint, volume II, appendix 8, folios 697 to 732).

63(101) On August 23, 1993, the Dirección General de Personal de la Armada (Navy General Staff Board) issued a memorandum to which was "attach[ed...,] for information and filing purposes [by the Auditoría de Personal de la Armada (Navy Staff Audit Office), the] summary administrative investigation" concerning Mr. Palamara-Iribarne, "given that, pursuant to a resolution[...] of May 28, 1993, it was decided that he be retired from active duty on the ground of EARLY TERMINATION OF CONTRACT." Furthermore, said memorandum was forwarded to the Third Department, "in order that it be set down in [Mr. Palamara-Iribarne's] personal file that at the time of his retirement he was involved in a [summary administrative investigation]." [FN159]

[FN159] Cf. Memorandum sent by the Dirección General de Personal de la Armada (Navy General Staff Board) to Auditoría de Personal (Staff Audit Office) on August 23, 1993 (Case File on the Summary Administrative Investigation, record of appendixes to the complaint, volume II, appendix 8, folio 735).

Law No. 20,048 in relation to the crime of contempt

63(102) On August 31, 2005, Law No. 20,048 was published, "to amend the provisions pertaining to contempt of the Criminal Code and the Code of Military Justice." Under this law: the heading of paragraph 1, Title VI of Book II of the Criminal Code, "Attacks on and contempt of authorities" was replaced with "Attacks on authorities;" section 263, which described the crime of slander against authorities, was repealed; the text of section 264, which established the crime of contempt of authorities, was amended; section 265, which established the crime of contempt or serious slander against an authority, was repealed; the words "or contempt" were struck from the two parts of section 266 where they appeared; section 268, which defined the crime of mobbing or incitement to disorder at the office of an authority or public company to the point of interrupting or halting their activities, was repealed. Also, said law amended section 416(4) of the Code of Military Justice and replaced the phrase "eleven to twenty basic salaries" with "six to eleven monthly tax units." The bill submitted by the Executive Power to the Chilean House of Deputies put forward the amendment, though not the complete deletion, of the sections of the Code of Military Justice that dealt with contempt. [FN160]

[FN160] Cf. Law No. 20,048 published in the Official Gazette on August 31, 1993 (evidence of a supervening fact produced by the State on September 16, 2005, case file on the merits, reparations, and costs, volume IV, folios 996 and 997); and bill to amend the Criminal Code and the Code of Military Justice in relation to contempt submitted to the House of Deputies on August 26, 2002 (record of appendixes to the complaint, volume I, appendix 6, folio 53).

Labor and personal condition of Mr. Palamara-Iribarne after the different proceedings

63(103) On March 1, 1993, when the Deputy Naval Prosecutor of Magallanes and the Secretary seized the copies of the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services") (supra para. 63(19) and 63(20)), Mr. Palamara-Iribarne was living with his family in Punta Arenas, in a subsidized dwelling, that is to say, an apartment which the Navy allowed him to use as a benefit. [FN161]

[FN161] Cf. Report on the labor condition of Mr. Palamara-Iribarne issued by the Legal Division of General Comptroller's Office of the Chilean Republic on December 29, 1993 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume IV, appendix 9.c, folios 1526-1534).

63(104) On March 3, 1993, the Commander in Chief of the Third Naval Zone, Mr. Hugo Bruna-Greene, issued a resolution suspending the authorization granted to Mr. Palamara-Iribarne to make publications in the newspaper "La Prensa Austral." [FN162]

[FN162] Cf. Resolution issued by the Commander in Chief of the Third Naval Zone of Magallanes on March 3, 1993 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume III, appendix 9.c, folio 1534).

63(105) On March 26, 1993, while Mr. Palamara-Iribarne was detained (supra para. 63(35)), he was informed that he had "a week to restore the subsidized dwelling where he lived [with his family], because he was now a retired navy officer [...and] because he had led a life that was inconsistent with the navy." [FN163] At that moment, Mr. Palamara-Iribarne's and Ms. Anne Stewart-Orlandini's three children, Raimundo Jesús, Humberto Antonio and Fernando Alejandro were, respectively, 6, 8 and 9 years old. Following that order, the family had to leave the "naval apartment." [FN164]

[FN163] Cf. Communication sent by Mr. Palamara-Iribarne to the Head of the Navy Staff Board on June 2, 1993; and report on the labor condition of Mr. Palamara-Iribarne issued by the Legal Division of the General Comptroller's Office of the Chilean Republic on December 29, 1993 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume IV, appendix 9.c, folio 1526).

[FN164] Cf. Testimony of Mr. Humberto Palamara-Iribarne, taken before the Inter-American Court during the public hearing held on May 9, 2005; affidavit signed by Ms. Anne Ellen Stewart-Orlandini on April 2, 2005; affidavit signed by Mr. Antonio Palamara-Stewart on April 21, 2005; affidavit signed by Mr. Fernando Alejandro Palamara-Stewart on April 21, 2005; and affidavit rendered by Mr. Raimundo Jesús Palamara-Stewart before an officer authorized to administer oaths on April 21, 2005 (case file on the merits, reparations, and costs, volume II, folios 456-458, 569 and 573).

63(106) On May 28, 1993, the Commander in Chief of the National Navy issued a resolution ordering the early termination of Mr. Palamara-Iribarne's employment contract. [FN165] During 1993, the Chilean Navy paid Mr. Palamara-Iribarne three salaries in the gross total amount of 1,168,897 Chilean pesos. [FN166]

[FN165] Cf. Resolution issued by the Navy Commander in Chief on May 28, 1993 (evidence to facilitate adjudication of the case filed by the State on October 31, 2005, case file on the merits, reparations, and costs, volume IV, folio 1227); telegram sent in July 1993 by the Chilean Navy; and report on the labor condition of Mr. Palamara-Iribarne issued by the Legal Division of the General Comptroller's Office of the Chilean Republic on December 29, 1993 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume IV, appendix 9.c, folios 1352 and 1516).

[FN166] Cf. Certificate issued by the Chilean Navy regarding the salaries collected by Mr. Palamara-Iribarne during 1993 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume III, appendix 9.c, folio 1532).

63(107) On August 26, 1993, Mr. Humberto Antonio Palamara-Iribarne, with a view to finding a job, asked the Naval Prosecutor to allow him to leave the jurisdiction of the Naval Court, had to move to the city of Valparaíso and went to live with his mother. [FN167]

[FN167] Cf. Request for authorization to leave the jurisdiction of the Court (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume III, appendix 9.c, folio 1359); testimony of Mr. Humberto Palamara-Iribarne, taken before the Inter-American Court during the public hearing held on May 9, 2005; affidavit signed by Ms. Anne Ellen Stewart-Orlandini on April 2, 2005; affidavit signed by Mr. Antonio Palamara-Stewart on April 21, 2005; affidavit signed by Mr. Fernando Alejandro Palamara-Stewart on April 21, 2005; and affidavit rendered by Mr. Raimundo Jesús Palamara-Stewart before an officer authorized to administer oaths on April 21, 2005 (case file on the merits, reparations, and costs, volume II, folios 456-458, 569 and 573).

63(108) Around October 1993, due to economic problems, Ms. Stewart-Orlandini and her three children had to move to another apartment in Punta Arenas, outside the naval base, and later to her parents' house in Viña del Mar, while Mr. Palamara-Iribarne stayed with his mother. Mr. Palamara-Iribarne and Ms. Anne Stewart-Olardini have lived in separate houses since then. At present, Ms. Stewart-Orlandini lives in Spain with two of her children, Humberto Antonio Palamara-Stewart and Fernando Alejandro Palamara-Stewart, and Mr. Palamara-Iribarne lives in Viña del Mar with his son Raimundo Jesús Palamara-Stewart. [FN168]

[FN168] Cf. Testimony of Mr. Humberto Palamara-Iribarne, taken before the Inter-American Court during the public hearing held on May 9, 2005; affidavit signed by Ms. Anne Ellen Stewart-Orlandini on April 2, 2005; affidavit signed by Mr. Antonio Palamara-Stewart on April 21, 2005; affidavit signed by Mr. Fernando Alejandro Palamara-Stewart on April 21, 2005; and affidavit executed by Mr. Raimundo Jesús Palamara-Stewart before an officer authorized to administer oaths on April 21, 2005 (case file on the merits, reparations, and costs, volume II, folios 456-458, 569, 573 and 574).

63(109) On November 16, 1993, the Sociedad de Escritores de Chile (Association of Chilean Writers), "as a new token of [their] solidarity towards Mr. Palamara-Iribarne for the censorship suffer[ed] by his book, [told him] that he was eligible to become a Cooperating Partner." [FN169]

[FN169] Cf. Communication of the Sociedad de Escritores de Chile (Association of Chilean Writers) (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume III, appendix 9.c, folio 1535).

63(110) On June 28, 1994, the División Jurídica de la Contraloría General de la República de Chile (Legal Division of the General Comptroller's Office of the Chilean Republic) issued a resolution answering the questions posed to said institution by Mr. Palamara-Iribarne regarding his labor condition. [FN170] Said questions were related to:

a) the partial reconsideration of the opinion of December 20, 1993 regarding the date on which his employment contract with the military institution was early terminated, since "he had not been legally notified of the early termination of his contract." In this respect, the Legal Division expressed, inter alia, that "an authority who has hired a contractor may terminate the contract early if the official's presence proves harmful or if it affects the discipline, order or simply the convenience of the corresponding service." Also, the Legal Division claimed that the Comptroller's Office had noted, "in several of its decisions," that military authorities are fully empowered to terminate contracts early;
b) the legality of the "allowance for forced change of residence within the same city [...], since he was forced to leave the dwelling he occupied in the city of Punta Arenas." In this respect, the Legal Division of the Comptroller's Office decided that said benefit "is only in order when the official has changed his habitual residence, a requirement which is not met if the hired person moves to another place within the same city;" hence, "he [was] not entitl[ed] to request [said] benefit;"
c) the legality of the seven-day term to leave the "subsidized dwelling". In this respect, the Legal Division of the Comptroller's Office considered that, under the Rules on Subsidized Housing of the Navy, "civil servants are not entitled to use subsidized dwellings. Nonetheless, as an exception, [...] a relevant authority may, in consultation with the Dirección de Bienestar de la Armada (Navy Welfare Board), allocate subsidized dwellings to these officials." Therefore, Mr. Palamara-Iribarne "was only entitled to the benefit of [inhabiting a subsidized dwelling] while he worked as a Navy officer [,...] and the term granted by his employer to restore said dwelling was reasonable;" and
d) the legality of the reductions applied to Mr. Palamara-Iribarne's wages in April 1993. In this respect, the Legal Division held that said reductions were "reimbursements of sums which had been unduly paid in January and February 1993," since he had been paid as a Lieutenant Commander and not as a civil servant hired as a contractor.

[FN170] Cf. Report on the labor condition of Mr. Palamara-Iribarne issued by the Legal Division of the General Comptroller's Office of the Chilean Republic on June 28, 1994 (Case No. 464 before the Naval Court in and for Magallanes, for the crimes of disobedience and breach of military duties, record of appendixes to the complaint, volume IV, appendix 9.c, folios 1515-1520).

63(111) Following the facts of the instant case, Mr. Palamara-Iribarne had difficulty in finding a job, for after he stopped serving in the Navy for having been convicted by a military court, shipping companies closed their doors on him, preventing him from working as a naval mechanical engineer. Besides, his social and family relationships changed, since many of his friends were from the Navy. Additionally, there is a Navy member in most families living in Viña del Mar, so, for the community, breaching the national security is "wrong in itself." [FN171]

[FN171] Cf. testimony of Mr. Humberto Palamara-Iribarne, taken before the Inter-American Court during the public hearing held on May 9, 2005; affidavit signed by Ms. Anne Ellen Stewart-Orlandini on April 2, 2005; affidavit signed by Mr. Antonio Palamara-Stewart on April 21, 2005; affidavit signed by Mr. Fernando Alejandro Palamara-Stewart on April 21, 2005; and affidavit rendered by Mr. Raimundo Jesús Palamara-Stewart before an officer authorized to administer oaths on April 21, 2005 (case file on the merits, reparations, and costs, volume II, folios 456-458, 569, 573 and 574).

Costs and Expenses

63(112) Mr. Palamara-Iribarne incurred expenses in the processing of the cases in which he was involved at the domestic level, and the representatives and the alleged victim incurred a number of expenses during international proceedings.

VII. VIOLATION OF ARTICLE 13 OF THE CONVENTION IN RELATION TO ARTICLES 1(1) AND 2 THEREOF (FREEDOM OF THOUGHT AND EXPRESSION)

64. Arguments by the Commission

a) the State engaged in acts of prior censorship that are incompatible with Article 13(2) of the American Convention insofar as, in March 1993, officers of a Naval Court searched the premises of "Ateli Limitada" publishing company and Mr. Palamara's home to seize the copies of the book, the originals, a diskette containing the full text, the electrostatic masters of the publication and to erase the complete text of the book from the hard disk of his personal computer, and Chilean courts ordered the banning of the publication and distribution of the book entitled "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services"). The aforesaid article only provides for prior censorship on the basis of moral protection of children and adolescents in relation to public entertainments or upon a declaration of a state of emergency, which is not the case here. In addition "the expert reports required by the State concluded that the information contained in the book could be readily accessible via other means;"

b) the prohibition of prior censorship encompasses "the prohibition of any act that prevents the distribution of an existing book;"

c) the offense of contempt of authority is incompatible with Article 13 of the Convention. The conviction of Mr. Palamara-Iribarne for this offense, "grounded on his criticism of public officials' conduct," "constitutes an imposition of subsequent liability on the exercise of the freedom of expression that is unnecessary" in a democratic society;

d) contempt laws provide more protection to public officials than to private citizens, in direct violation of the fundamental principle of any democratic system, which provides for public scrutiny as a means to prevent and control any abuse of their coercive power. Said laws are a means to silence unpopular ideas and opinions and discourage criticism for fear of legal action or monetary penalties;
e) the mere threat of criminal prosecution for making negative remarks about matters of public interest may lead to self-censorship. Defending against criminal charges involves significant costs for the defendant and may entail the imposition of restrictions on rights. The potential imposition of a criminal sanction for criticizing a public official has or may have an intimidating effect. In Chile, said offense carries the threat of imprisonment or fines for those convicted;
f) in 2001, Chile abolished the offense of contempt defined in section 6 of the Ley de Seguridad del Estado (State Security Law). In August 2005, Chile enacted Law No. 20,048 which eliminated the offense of contempt "only for the purposes of the Criminal Code and not of the Code of Military Justice." Mr. Palamara-Iribarne must be fully compensated for the damage sustained. In this regard, the Commission stated that "it ha[d] no specific comments to raise" and that "it shared the comments made by the representatives of the [alleged] victim;"
g) in convicting Mr. Palamara of contempt, the State applied provisions of the Chilean Criminal Code, in violation of the standards and parameters set by the Convention as well as by the case law of the Inter-American system.
h) Article 2 of the Convention also sets forth that States undertake to "adopt such other measures," in addition to legislative measures, as may be necessary to give effect to the rights and freedoms enshrined therein. If courts refuse to give effect to the treaty, given the need to harmonize domestic law, their decisions give rise to international liability on the part of the State for violating the treaty; and
i) the State must set aside the domestic court's judgment convicting Mr. Palamara-Iribarne.

65. Arguments by the representatives

a) they agree with the argument raised by the Commission that the seizure of the book entitled "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services"), the diskettes and the masters as well as the act of erasing the files of said book from the personal computer of Humberto Palamara-Iribarne constitute acts of prior censorship, which are incompatible with Article 13 of the Convention. These acts did not fall within any of the exceptions to the prohibition of censorship provided for therein;b) in this case, it is not necessary to prove what the content of the book was. "The issue [to be] resolved is whether there is a legal possibility of establishing preventive measures to control freedom of expression and the categorical answer to this question is found in Art[icle] 13(2)" of the Convention. Even "if the argument by the State were to be accepted" regarding the determination of subsequent liability to protect national security, the book written by Mr. Palamara-Iribarne did not reveal any military secrets, nor did it affect national security;
c) the commencement of the Case No. 464 for disobedience and breach of military duties and the subsequent conviction constituted a direct attempt to prevent the publication of the book. The criminal complaint was intended to have the publication of the book banned. As part of these proceedings, the book and its masters were seized. This measure, once affirmed in the judgment of conviction, irreversibly prevented the distribution of the book;

d) sections 264(3) and 266 of the Criminal Code were incompatible with the American Convention inasmuch as they violated the principle of necessity, "insofar as it provides for the punishment of those who criticize public officials acting in the course of their official duties." Criminal proceedings are particularly burdensome due to the limitations they entail, their stigmatizing nature and their restrictive effect on freedom of expression. They may result in the deprivation of liberty of the accused, as was the case with Mr. Palamara-Iribarne. "Furthermore, the quantum of punishment imposed, due to the type of sanctions, violates the principle of necessity of the restriction." Criminal proceedings should be resorted to only where all other mechanisms prove insufficient to solve certain conflicts;

e) in criminalizing contempt of authority and "prosecuting and convicting the [alleged] victim in the instant case as a result of his statements" against a government official, the State violated the freedom of expression of Mr. Palamara-Iribarne. Moreover, all of it was an indirect attempt to restrict his freedom of expression, which is prohibited under the American Convention insofar as it is unnecessary and disproportionate. The protection of the affected interests could have been achieved through measures less restrictive of Mr. Palamara-Iribarne's freedom;

f) when restricting the right to freedom of thought and expression, it should be taken into account that public officials are subject to closer scrutiny by citizens. Contempt of authority, as defined by Chilean law, does not comply with the standards set in the Convention and in the Declaration of Principles on Freedom of Expression because it is an offense and, as a result, it warrants resort the criminal justice system to punish the accused for his statements. This way, the principle of ultima ratio is violated;

g) "they have no objections to the legislative reform notified by the State" by means of Law No. 20,048, published on August 20, 2005. Said "statutory amendment […] only provides for the partial reparation of one of the violations of the Convention;" and

h) the State failed to comply with its obligation to respect and ensure respect for the right to freedom of expression and with the duty to adopt domestic laws, thus violating Articles 1(1) and 2 of the Convention.

66. Arguments by the State

a) the State did not prevent the publication of the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services"), which was published by "Ateli" publishing company before being banned. The promotion of the book began in early February 1993 through the distribution of posters. Around February 18 of that same year, the edition and printing of 1,007 copies of the book was completed. Approximately on February 19, 1993, the owner of the printing company gave Mr. Palamara-Iribarne 985 copies, and some of them were made available for sale. Therefore, the book "was effectively published, promoted and sold without prior censorship by the State;"

b) before being banned, 102 copies of the book were distributed and at least 13 copies were sold. Once published, distribution of the book was banned by the Navy, as punishment for failing to comply with the military duty imposed on the author of the work to request authorization to publish the book. "[T]he alleged victim was not subject to prior censorship, but to subsequent liability, which is explicitly provided by law" and "grounded on the urgent need to ensure protection of national security;"

c) the examination of the content of the work carried out after the publication was fully justified by the fact that the author served as an intelligence officer for the most part of his

career, between 1983 and 1991, and the work in question was the result of 8 years of experience and analysis of navy information;

d) Mr. Palamara-Iribarne, in his civilian capacity, was sworn to "maintain absolute secrecy and discretion regarding the information or matters pertaining to the Units where he [has] served, coming to his knowledge either accidentally or in the course of his duties during [his] service in the Chilean Navy." Mr. Palamara-Iribarne requested authorization in writing to publish the book when the work had already been published. The alleged victim's behavior regarding the required authorization to publish his book was not justifiable pursuant to the explicit duties under the aforesaid oath;

e) Mr. Palamara-Iribarne, as a Navy officer, was not allowed to disclose secret or confidential information without prior written authorization from the relevant authorities. The banning of the publication was the result of the author's negligence to request authorization for publication in a timely manner, as required under applicable law;

f) During the pendency of the petition before the Commission, the State exerted its best efforts to reach an amicable settlement of the case based on the recommendations contained in report No. 20/30. However, "given the institutional and legal complexity of the settlement, it was impossible to reach an agreement before the complaint was filed with the Honorable Court;"

g) it referred to the "main advances achieved over the last years in the harmonization of domestic law with Article 13" of the Convention. "Contempt provisions, contrary to Article 13 of the Convention," were eliminated. On August 8, 2005, Law No. 20,048 was enacted, which "eliminates contempt of authority" from the chapter dealing with offensive and inflammatory remarks against authorities but maintains the sanction applicable to threats and disruption of the order, insofar as they constitute dangerous conduct that may compromise public order and security." Said law "introduces important changes to the Code of Military Justice," amends sections 276, 284 and 417 and "provides that non-military subjects may not be held responsible for the crime of sedition, thus removing civilians from the jurisdiction of military courts." This law conforms to Law No. 19,733 on Libertades de Opinión e Información y Ejercicio del Periodismo (Freedom of Opinion and Information and the Practice of Journalism), which provides that civilian courts shall have jurisdiction over crimes committed by civilians in the exercise of freedom of opinion and information;

h) there is a bill that is currently going through the legislative process whose purpose is to limit the powers that the Códigos de Procedimiento Penal (Code of Criminal Procedures) and the Código Procesal Penal (Code of Criminal Procedure) conferred upon the judges to order the withdrawal of a publication from circulation and the seizure of all copies. The bill to regulate seizure of publications and withdrawal from circulation is pending before the Lower Chamber of Congress and "the Executive has undertaken to sponsor the bill and order the bill to proceed under the emergency procedure." The proposed amendment to the Código de Procedimiento Penal (Code of Criminal Procedure) seeks to "establish the right of withdrawal of publications from circulation and subsequent seizure but only after consultation to the superior court, and allows a stay of these proceedings by means of a deposit in court of the necessary funds to secure any potential award of damages resulting from the determination of tort liability for the alleged crime or offense;" and

i) compliance with "the recommendation contained in Report No. 20/03 of the Commission" would be achieved through the enactment of Law No. 20,048 and the aforesaid bill to regulate the withdrawal from circulation and the seizure of publications "[and] within this new legal framework, Mr. Humberto Palamara-Iribarne would be able to request, under the principle

of in dubio pro reo, that the judgments of conviction rendered against him be reversed and all criminal charges be expunged from his record." Furthermore, in said context, the Chilean Government is ready, willing and able to participate together with the petitioner in the adoption of any such forms of symbolic reparation that may be agreed with him for the purpose of restoring the affected rights, thus consolidating, through a specific and well-known case, the improvement of the Chilean legal system to ensure the effective enforcement of the fundamental rights and freedoms."

Considerations of the Court

67. Article 13 of the American Convention sets forth, inter alia, that:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
    a. respect for the rights or reputations of others; or
    b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
[…]

68. As asserted by this Court on earlier occasions, a violation of Article 13 of the Convention may take different forms, depending on whether the violation results in the denial of the freedom of expression or whether it entails a restriction beyond permissible limits. [FN172] Not every breach of Article 13 of the Convention entails an outright denial of the right to freedom of expression, which occurs when government power is used to establish means to prevent the free flow of information, ideas, opinions or news. Examples of this type of violation are prior censorship, seizure or banning of publications and, in general, any measures that subject expression or dissemination of information to State control. In such case, there is a gross violation not only of the right of each individual to express their views, but also of the right of each person to be well informed, thus affecting one of the fundamental basis of a democratic society. [FN173]

[FN172] Cf. Case of Ricardo Canese. Judgment of August 31, 2004. Series C No. 111, para. 77; and Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 of the American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, paras. 53 and 54.

[FN173] Cf. Case of Ivcher-Bronstein. Judgment of February 6, 2001. Series C No. 74, para. 152; and Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, supra note 172, para. 54.

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69. The book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services") as well as the statements made by Mr. Palamara-Iribarne, which were published in the media, involved the exercise of the right to freedom of thought and expression through the dissemination of his thoughts and ideas regarding issues related to the need for "intelligence personnel," in the interest of preventing human rights violations, to adhere to "ethical standards of conduct" and the possibility to express his views on the proceedings and the treatment he and his family were subject to by the authorities. In addition, they also further the social dimension of said right by offering readers access to the information contained in the book and the opinions and ideas advanced by Mr. Palamara-Iribarne. The concept of the individual and social dimension of freedom of thought and expression, as well as their interdependence, has been developed by the Court on several occasions. [FN174]

[FN174] Cf. Case of Ricardo Canese, supra note 172, paras. 77-80; Case of Herrera-Ulloa. Judgment of July 2, 2004. Series C No. 107, paras. 108-111; Case of Ivcher-Bronstein, supra note 173, paras. 146–149; Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.). Judgment of February 5, 2001. Series C No. 73, paras. 64-67; and Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism. Advisory Opinion OC-5/85, supra note 172, paras. 30-33 and 43.

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70. The Court must determine, in view of the facts proven in the instant case, firstly, whether the State committed acts of prior censorship incompatible with the American Convention when it prohibited Mr. Humberto Antonio Palamara-Iribarne from publishing his book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services") and seized the copies thereof, instituting proceedings against Mr. Palamara-Iribarne for disobedience and breach of military duties. Secondly, this Court must establish whether the contempt charge in the military criminal proceedings brought against Mr. Palamara-Iribarne based on the statements he made, as well as the military and criminal sanctions imposed as a result of said proceedings and the opening of an administrative investigation, which was subsequently closed, constitute and undue restriction on his right to freedom of thought and expression.

1) Freedom of Thought and Expression

71. In accordance with the provisions laid out in Article 13 of the Convention the States may not prevent or restrict, beyond permissible limits, the right of individuals to "seek, receive, and impart information and ideas of all kinds," […] either orally, in writing, in print, in the form of art, or through any other medium of one's choice." In addition, the aforesaid Article sets forth the circumstances under which restrictions may be imposed on these rights and also regulates prior censorship. On several occasions, the Court has expressed its opinion on the means by

which legitimate restrictions may be placed on freedom of expression, and on the provisions of Article 13 regarding prior censorship. [FN175]

[FN175] Cf. Case of Ricardo Canese, supra note 172, para. 95; Case of Herrera-Ulloa, supra note 174, paras. 108-111; Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.), supra note 147, para. 70; and Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism. Advisory Opinion OC-5/85, supra note 172, paras. 36-38.

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72. As asserted by this Court, "the expression and the dissemination of ideas are indivisible;" [FN176] therefore, in order to ensure the effective exercise of freedom of thought and expression, the State may not unduly restrict the right to disseminate ideas and opinions.

[FN176] Cf. Case of Ricardo Canese, supra note 172, para. 78; Case of Herrera-Ulloa, supra note 174, para. 109; and Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism. Advisory Opinion OC-5/85, supra note 172, para. 36.

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73. In the instant case, in order to ensure the effective exercise of Mr. Palamara-Iribarne's right to freedom of thought and expression, it was not enough for the State to allow him to write his ideas and opinions. The protection of such right implied the duty of the State not to restrict their dissemination, enabling him to distribute his book by any appropriate means to make his ideas and opinions reach the maximum number of people and, in turn, allowing these people to receive this information. [FN177]

[FN177] Cf. Case of Ricardo Canese, supra note 172, para. 78; Case of Herrera-Ulloa, supra note 174, para. 108; and Case of Ivcher-Bronstein, supra note 173, para. 146.

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74. The Court has found, in the instant case, that the State committed the following acts, which circumscribed Mr. Palamara-Iribarne's right to disseminate information and ideas, at the time the book entitled "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services") was edited and in the process of being published and commercialized, to wit: the prohibition to publish the book pursuant to Article 89 of Ordinance of the Navy No. 487 (supra paras. 63(7), 63(10) to 63(13)), the oral order to remove "all background information on the book from the offices of "Ateli" publishing company because it affected "national security and national defense" (supra para. 63(13)); the seizures ordered and conducted in the offices of said publishing company and in Mr. Palamara-Iribarne's home (supra paras. 63(19) and 63(21)); the elimination of the electronic information from the computers of Mr. Palamara-Iribarne and the publishing company (supra paras. 63(19) and 63(20)); the proceedings conducted for the purpose of securing the copies of the book that were in the possession of several people (supra paras. 63(58) and 63(61)); and the order prohibiting Mr. Palamara-Iribarne to "make negative comments" on the proceedings instituted against him or regarding "the image" of the Navy

(supra para. 63(38)). Although the book had been edited and Mr. Palamara-Iribarne had almost 1000 copies and promotional leaflets, it was not possible to actually distribute the book through Chilean bookstores and shops and, consequently, the public did not have the opportunity to buy a copy and have access to its content, as intended by Mr. Palamara-Iribarne.

75. The Court finds it somewhat surprising that, although in the expert reports requested by the Naval Prosecutor (supra para. 63(23)) the experts concluded that the book written by Mr. Palamara-Iribarne "[did] not breach the secrecy and security of the Chilean Navy," the return of the copies and the material related to the book was never ordered. On the contrary, the prosecutor requested further expert examination of the book in order to verify whether it "contain[ed] relevant information from the point of view of the naval institution and/or information obtainable only from privileged sources and whether it affected institutional interests." After said examination, the experts stated, inter alia, that the information contained in the book "may be obtained from open sources and that it was implied that [the] training [of Mr. Palamara-Iribarne] as an intelligence specialist […] enable[d] him to write about this topic."

76. The Court considers that it is logical that Mr. Palamara-Iribarne's training and professional and military experience helped him write the book and that it does not entail per se an abuse of his right to freedom of thought and expression. Any interpretation to the contrary would prevent individuals from using their education or professional training to enrich the expression of their ideas and opinions.

77. The Court understands that the employees or officers of an institution have the duty to maintain the confidentiality of certain information to which they have access in the course of their duties, when the content of said information is involved in such duty. The duty of confidentiality is not applicable to information related to the institution or the duties performed by it that is already in the public domain. However, under certain circumstances, a breach of the duty of confidentiality may result in administrative, tort or disciplinary liability. In the instant case, the content of the duty of confidentiality will not be examined insofar as it has been established that Mr. Palamara-Iribarne used information from "open sources" (supra para. 63(23)) to write the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services").

78. The Court considers that, under the circumstances of the instant case, the control measures adopted by the State to prevent the distribution of the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services") by Mr. Palamara-Iribarne constituted acts of prior censorship that are incompatible with the parameters set by the Convention inasmuch as there was no element that, pursuant to said treaty, would call for the restriction of the right to freely publish his work, which is protected by Article 13 of the Convention.

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2) Restrictions on Freedom of Thought and Expression

79. The Court considers it important to restate that the right to freedom of expression is not an absolute right and that Article 13(2) of the Convention provides for the possibility of placing restrictions on freedom of thought and expression by imposing subsequent liability for abuse of

this right. The grounds for imposing subsequent liability must be expressly, previously and strictly limited by law; they should be necessary to ensure "respect for the rights or reputations of others" or "the protection of national security, public order, or public health or morals," and should in no way restrict, beyond what is strictly necessary, the full exercise of freedom of expression or become either direct or indirect means of prior censorship. [FN178] Furthermore, the Court has previously pointed out that Criminal Law is the most restrictive and severe means of imposing liability for illegal conduct. [FN179]

[FN178] Cf. Case of Ricardo Canese, supra note 172, para. 95; Case of Herrera-Ulloa, supra note 174, para. 120; and Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism. Advisory Opinion OC-5/85, supra note 172, para. 39.
[FN179] Cf. Case of Ricardo Canese, supra note 172, para. 104.

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80. The Court will examine whether the subsequent liability for contempt imposed upon Mr. Palamara-Iribarne by the military criminal court is compatible with Article 13 of the Convention (supra paras. 63(72) to 63(93)). The offense of contempt, with which Mr. Palamara-Iribarne was charged, was defined in Chapter VI of the Criminal Code, which is concerned with felonies and misdemeanors against "public order and security" committed by private individuals. These provisions were in force at the time of the events surrounding the case and were applied to it.

81. The Court notes that Mr. Palamara-Iribarne was acquitted of the charge of contempt by the trial court and said decision was not appealed (supra paras. 63(88) to 63(89)). However, by means of the consultation mechanism, the Navy Court-Martial reversed the trial court's judgment of acquittal and convicted Mr. Palamara-Iribarne of contempt, as defined in sections 264(3), 265 and 266 of the Chilean Criminal Code (supra paras. 63(89) to 63(91)).

82. In relation to restrictions on freedom of expression through the imposition of subsequent liability, the Court has held, in previous cases, that it is logical and appropriate that statements concerning public officials and other individuals who perform public services are afforded, as set forth in Article 13(2) of the Convention, greater protection, thus allowing some latitude for broad debate, which is essential for the functioning of a truly democratic system. [FN180] These criteria are applied to the instant case with regard to the criticism or statements on matters of public interest advanced by Mr. Palamara-Iribarne regarding the conduct of the Magallanes Naval Prosecutor within the criminal military proceedings instituted against him for disobedience and breach of military duties. In addition, the facts of this case and the statements made by Mr. Palamara-Iribarne arouse interest in the press and, as a result, among the public.

[FN180] Cf. Case of Ricardo Canese, supra note 172, para. 98; Case of Herrera-Ulloa, supra note 174, para. 128; Case of Ivcher-Bronstein, supra note 173, para. 155.

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83. Democratic checks and balances, exercised by society through public opinion, encourage transparency in State activities and promote accountability of public officials for their

administration. This is why there should be more tolerance and openness to criticism, in the face of statements and opinions advanced by individuals in the exercise of said democratic mechanism. [FN181] This is applicable to officers and members of the Navy, including those who preside over courts. Moreover, said democratic mechanism of checks and balances promotes greater participation among people in matters of social interest.

[FN181] Cf. Case of Ricardo Canese, supra note 172, para. 97; Case of Herrera-Ulloa, supra note 174, para. 127; Case of Ivcher- Bronstein, supra note 173, para. 155. In this regard, Feldek v. Slovakia, no. 29032/95, § 83, ECHR 2001-VIII; and Sürek and Özdemir v. Turkey, nos. 23927/94 and 24277/94, § 60, ECHR Judgment of 8 July, 1999.

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84. Therefore, as stated by the Court, in the case of public officials, individuals who perform public services, politicians, and government institutions a different threshold of protection should be applied, which is not based on the specific individual, but on the fact that the activities or conduct of a certain individual is of public interest; [FN182] in this particular case, the conduct of the Office of the Prosecutor in the military proceedings against the alleged victim.

[FN182] Cf. Case of Ricardo Canese, supra note 172, para. 103; Case of Herrera-Ulloa, supra note 174, para. 129; and Case of Ivcher-Bronstein, supra note 173, para. 155.

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85. The Court has pointed out that the "necessity" and, therefore, the legality of the restrictions on freedom of expression based on Article 13(2) of the American Convention will depend on whether they are designed to fulfill an overriding public interest. Among the options available to achieve such purpose, that which is less restrictive of the protected right should be chosen. Given this standard, it is not sufficient to prove, for example, that the law serves a useful or suitable purpose. To be compatible with the Convention, the restrictions must be justified on the basis of collective purposes that, given their importance, clearly override the social need for the full enjoyment of the right protected by Article 13 of the Convention, and must not restrict, beyond what is strictly necessary, the right enshrined therein. In other words, the restriction must be proportionate to the underlying interest and in direct furtherance of such legitimate purpose, interfering as little as possible with the effective exercise of the right to freedom of thought and expression. [FN183]

[FN183] Cf. Case of Ricardo Canese, supra note 172, para. 96; Case of Herrera-Ulloa, supra note 174, paras. 121 and 123; and Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism. Advisory Opinion OC-5/85, supra note 172, para. 46.

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86. In this regard, in message No. 212-347 regarding the introduction of the bill subsequently enacted into Law No. 20,048, the President of Chile stated that "the offense of contempt […] does not seem to be a legitimate restriction on the freedoms of thought, opinion and

information," and that "that the existence of these provisions […] has degraded into an unjustified privilege […] for the benefit of certain [public officials…, which], through the intimidating power of the punishment that may be imposed[,…] prevents free debate from developing fully […and inhibits] citizens watch [on] decision-makers and political leaders."

87. In the instant case, Mr. Palamara-Iribarne suffered serious consequences for having voiced his opinion on the manner in which officers of the military justice were conducting the proceedings against him and the manner in which military authorities were treating him and his family. During Criminal Case for contempt No. 471/93, pending before the Naval Court in and for Magallanes, Mr. Palamara-Iribarne was deprived of his liberty for four days (supra para. 63(83)); he was released on bail after filing a petition against this measure (supra para. 63(82)) and, finally, on January 3, 1995, the Court-Martial sentenced him to, inter alia, a minimum term of imprisonment of 61 days and suspension from public office or employment for the duration of the sentence (supra para. 63(91)).

88. The Court considers that in the instant case, by pressing a charge of contempt, criminal prosecution was used in a manner that is disproportionate and unnecessary in a democratic society, which led to the deprivation of Mr. Palamara-Iribarne's right to freedom of thought and expression with regard to the negative opinion he had of matters that had a direct bearing on him and were closely related to the manner in which military justice authorities carried out their public duties during the proceedings instituted against him. The Court believes that the contempt laws applied to Palamara-Iribarne established sanctions that were disproportionate to the criticism leveled at government institutions and their members, thus suppressing debate, which is essential for the functioning of a truly democratic system, and unnecessarily restricting the right to freedom of thought and expression.

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89. Article 2 of the American Convention binds States Parties to adopt, in accordance with their constitutional processes and the provisions of the Convention, such legislative or other measures as may be necessary to give effect to the rights and freedoms protected thereby. It is necessary to reassert that the obligation to harmonize domestic legislation is not satisfied until the reform is effectively implemented [FN184] and until such reform includes all provisions hindering the exercise of the aforesaid rights and freedoms.

[FN184] Cf. Case of Raxcacó-Reyes, supra note 1, para. 87; Case of the Indigenous Community Yakye Axa, supra note 5, para. 100; and Case of Caesar. Judgment of March 11, 2005. Series C No. 123, paras. 91 and 93.

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90. As regards the offense of contempt, of which Mr. Palamara-Iribarne was convicted, the Court notices that on August 31, 2005, the State published Law No. 20,048 which amends the Criminal Code and the Code of Military Justice, abolishing or amending the provisions of the Criminal Code that were applied to his case (supra paras. 44 and 63(102)). In this regard, the representatives of the alleged victim, in their comments on the aforesaid Law, stated that "they

ha[d] no objections to the legislative reform notified by the State" and indicated that the "statutory amendment […] only provide[d] for the partial reparation of one of the violations of the Convention." In turn, the Commission stated that "it ha[d] no specific comments to raise and […] that the abrogation of contempt was effected only for the purposes of the Criminal Code and not of the Code of Military Justice." In addition, the Commission pointed out that "it share[d] the comments made by the representatives of the [alleged] victim" in the sense that Mr. Palamara-Iribarne should be fully compensated for the damage sustained.

91. The Court appreciates the enactment of Law No. 20,048 by the State in order to harmonize domestic legislation with the American Convention, and considers that it is of significant importance in this case given that it abrogated or amended, inter alia, sections 264(3), 265 and 266 of the Chilean Criminal Code, which served as the basis for the Navy Court-Martial's judgment against Mr. Palamara-Iribarne.

92. The Court notes with concern that, despite the valuable contribution of the legislative reform, section 264 of the Criminal Code, as amended, still includes the offense of "threat" to the same authorities that constituted, before the amendment to said Code, the passive subject of the offense of contempt. This way, the Criminal Code includes an ambiguous description and does not clearly specify the scope of the criminal conduct, thus leaving room for broad interpretation and, as a result, the conduct previously regarded as contempt may be unduly punished through the use of the criminal offense of threats. Therefore, if the State decides to maintain said provision, it should specify the kind of threats concerned in order to prevent suppression of freedom of thought and expression of valid and legitimate opinions or whatever disagreement and protests against government bodies and their members.

93. In addition, the Court notes that the legislative reform implemented by means of Law No. 20,048 did not encompass all provisions dealing with contempt insofar as it is still an offense under the Code of Military Justice. Therefore, disproportionate sanctions are still being imposed for criticism leveled at government institutions and their members, and military institutions and their members are afforded greater protection than that afforded to civilian institutions in a democratic society, which is incompatible with Article 13 of the American Convention.

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94. Furthermore, the Court considers that, in the instant case, the summary administrative investigation (supra paras. 63(94) to 63(101)), the decision to suspend the authorization that Mr. Palamara-Iribarne had to write for a newspaper (supra para. 63(104)) and the decision to "terminate" Mr. Palamara-Iribarne's "contract early" (supra para. 63(106)) constituted indirect means to restrict Mr. Palamara-Iribarne's freedom of thought and expression.

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95. Based on the foregoing, the Court finds that the State has violated the right to freedom of thought and expression enshrined in Article 13 of the American Convention to the detriment of Mr. Palamara-Iribarne in light of the acts of prior censorship and the restrictions imposed on the exercise of this right, and has failed to comply with the general obligation to respect and ensure

respect for the rights and freedoms set forth in Article 1(1) of said Convention. In addition, Chile has failed to comply with the general obligation to adopt domestic laws laid out in Article 2 of the Convention insofar as it included contempt provisions in its domestic legislation, some of which are still in force, which are contrary to Article 13 of the Convention.

VIII. VIOLATION OF ARTICLE 21 OF THE CONVENTION IN RELATION TO ARTICLE 1(1) THEREOF (RIGHT TO PRIVATE PROPERTY)

96. Arguments of the Commission

a) The State deprived Mr. Palamara-Iribarne of his property upon seizing the copies of the book "Ética y Servicios de Inteligencia" (Ethics and Intelligence Services) and the data stored in the hard disk of his personal computer, and interfered with his legitimate right to "the use and enjoyment" thereof in violation of Article 21(1) and 21(2) of the Convention;
b) Not only were the books seized from Mr. Palamara-Iribarne his property, but also the data stored in the hard disk of his personal computer and the intellectual property rights thereon he was not allowed to enjoy, as the publication of the above-mentioned book was prohibited. "[Th]e document simply disappeared and […] so did all the material stored in his personal computer;"
c) The measure adopted by the Naval Court ordering the above seizure was neither based on reasons of public utility or social interest nor on reasons of national security. "[O]n the contrary [, …] pursuant to Article 13 of the Convention it is an illegal act of censorship." Furthermore, no allegations or evidence have been submitted which show that Mr. Palamara-Iribarne has received compensation for the deprivation of the use and enjoyment of his property;
d) As to the duty set forth in Article 2 of the Convention to "adopt other measures" to enforce the rights and freedoms recognized by the Convention, should the courts of law refuse to enforce the provisions of the above treaty or be unable to do so given the need to adapt the domestic legislation, their decisions give rise to international responsibility; and
e) The State must overturn the domestic judgment whereby Mr. Palamara-Iribarne was convicted.

97. Arguments of the representatives

They concur with the arguments submitted by the Commission, adding that the condemnatory judgment rendered in Case No. 464 for the criminal offenses of disobedience and breach of military duties "constituted an irreparable violation of the right to property." Such proceedings were arbitrary and aimed at "imposing censorship on [Mr. Palamara-Iribarne's] works and to that purpose the State deprived him of his intellectual property."

98. Arguments of the State

a) Seizure is contemplated in the Code of Criminal Procedure as a "general measure," while the Criminal Code provides for the additional punishment of forfeiture. "[Th]e precautionary measure adopted, which was later turned into the additional punishment of forfeiture of the property allegedly constituting the corpus delicti, does not violate […] Article 21 of the Convention in any manner whatsoever." According to Chilean procedural law, after the

commission of a criminal offense has been established, the judge has no other choice but to seize the related property and instruments; and
b) No State agents were involved in the erasure of the full text of the book from the hard disk of Mr. Palamara-Iribarne's personal computer; rather it was he who erased such text. Furthermore, after examining the alleged victim's personal computer, the technical experts pointed out that there was no file containing the text of the book.

Considerations of the Court

99. Article 21 of the American Convention sets forth that:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
[…]

100. In the chapter regarding Article 13 of the Convention the Court considered, inter alia, that the seizure of the copies of the book "Ética y Servicios de Inteligencia" (Ethics and Intelligence Services), written by Mr. Palamara-Iribarne and published by Ateli Limitada publishing company, as well as the erasure of the electronic information from his computer and from the computers of the above publishing company, constituted acts of censorship which prevented Mr. Palamara-Iribarne from disseminating and marketing the above-mentioned book (supra paras. 73 to 78). According to the information forwarded to the Court, since the above seizure and erasure took place, all the material seized in relation to the book has been kept by the State.

101. In order to establish whether the foregoing facts constitute a deprivation of Mr. Palamara-Iribarne's property rights on the copies of the book seized and the material concerning such book, the Court takes into consideration that the parties to the instant case agree that Mr. Palamara-Iribarne is the author of the book "Ética y Servicios de Inteligencia" (Ethics and Intelligence Services). Furthermore, as it results from the facts proven in the instant case, Mr. Palamara funded the publication of his book with the proceeds from the business belonging to his wife, Anne Ellen Stewart-Orlandini, who registered it before the U.S. Copyright Office of the United States Congress, as well as before the Biblioteca Nacional de Chile (National Library of Chile), in order to protect his property rights both in the country and abroad (supra para. 63(5)).

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102. Pursuant to the case law developed by the Court, the concept of property is a broad one and comprises, among other aspects, the use and enjoyment of "property," defined as those material objects which are susceptible of being possessed, as well as any rights which may be part of a person's assets. Such concept includes all movables and immovables, and all tangible and intangible assets, as well as any other property susceptible of having value. [FN185] Thus, within the broad concept of "assets" whose use and enjoyment are protected by the Convention

are also the works resulting from the intellectual creation of a person, who, as the author of such works, acquires thereupon the property rights related to the use and enjoyment thereof.

[FN185] Cf. Case of the Indigenous Community Yakye Axa , supra note 5, para. 137; Case of the Moiwana Community. Judgment of June 15, 2005. Series C No. 124, para. 129; and Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of August 31, 2001. Series C No. 79, para. 144.

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103. The protection of the use and enjoyment of a person's works, grants the author rights which have both tangible and intangible aspects. The tangible dimension of such property rights includes, among other aspects, the publication, exploitation, assignment, or transfer of the works, while the intangible dimension of such rights is related to the safeguard of the authorship of the works and the protection of the integrity thereof. The intangible dimension is the link between the creator and the works, which extends over time. The exercise of both the tangible dimension and the intangible dimension of property rights is susceptible of having value and becomes part of a person's assets. Therefore, the use and enjoyment of intellectual works is also protected by Article 21 of the American Convention.

104. Besides the Convention, various international instruments and agreements recognize property rights, [FN186] which in Chile are regulated by Law. No. 17.336 on Intellectual Property Rights, as well as by Law No. 19.912, wherein it is stated that the Chilean legislation has been adapted to the agreements signed by the State of Chile and the World Trade Organization. Article 1 of the former sets forth, inter alia, that intellectual property rights comprise both pecuniary and non-pecuniary rights, which protect the use and enjoyment, authorship, and integrity of the works. Furthermore, Chapter II provides that the original holder of said rights is the author of the works, who will be deemed to be the person mentioned in the copy which has been registered.

[FN186] Cf. Article 27(2) of the Universal Declaration of Human Rights of 1948; Universal Copyright Convention; Article 2 of the Berne Convention for the Protection of Literary and Artistic Works; Article 15 of the International Covenant on Economic, Social, and Cultural Rights; Article 6, subparagraph 1 of the Treaty of the World Intellectual Property Organization on Intellectual Property Rights; and WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

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105. As it has been proven, besides the erasure of the electronic information related to the book whose text was stored in two computers, sixteen copies of the book, one diskette containing its full text, three packs with five books each, three packs containing an indefinite number of sheets in excess of those used for the publication of the book, and envelopes containing the electrostatic masters used for the publication and the original text of the book, were seized from Ateli Limitada publishing company, while 874 copies of the book were seized from Mr. Palamara-Iribarne's house (supra paras. 63(19) and 63(20)). On June 7, 1996 the Clerk of the

Naval Court of Magallanes verified the existence of the material seized and issued a record accordingly.

106. The acts mentioned in the foregoing paragraph implied the actual deprivation of the property of Mr. Palamara-Iribarne's tangible assets related to his book. Such deprivation of Mr. Palamara-Iribarne's property rights over his works prevented him from publishing, disseminating, and marketing his creation, whereby he could neither obtain any economic proceeds from its publication nor benefit from the protection he was entitled to have over his works. It is evident that the book was registered by Mr. Palamara-Iribarne's wife before two offices with the purpose of using and enjoying the related intellectual property rights. Such rights are susceptible of having value and were part of the author's assets.

107. Furthermore, the erasure of the electronic information regarding the book prevented Mr. Palamara-Iribarne from modifying, reusing, or updating its contents, in case he wished to do so. In this regard, the Court deems that the contents of the intellectual property rights which protect the use, authorship, and integrity of the works, and whose exercise includes the right to disseminate the creation, are closely related to the two dimensions of the right to freedom of thought and freedom of expression (supra para. 69).

108. The Court notes that the right to property is not an absolute one and that Article 21(2) of the Convention states that for the deprivation of a person's property to be in keeping with the right to property as enshrined in the Convention, it must be based on reasons of public utility or social interest, subject to payment of just compensation, and restricted to the cases and the forms established by law. [FN187] In view of the circumstances of the instant case, the Court considers that it is evident that Mr. Palamara-Iribarne has not been awarded compensation by the State for the deprivation of the use and enjoyment of his property.

[FN187] Cf. Case of the Indigenous Community Yakye Axa , supra note 5, paras. 145 and 148; and Case of Ivcher-Bronstein, supra note 173, para. 128.

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109. The Court notes that in the expert opinion requested by the Naval Prosecutor in Case No. 464 (supra para. 63(24)), two expert witnesses concluded that the book written by Mr. Palamara-Iribarne "did not brea[ch] the reserve and security of the Chilean Navy." Furthermore, in the supplementary report to such expert opinion, the same expert witnesses stated that the book that was the object of their examination "undoubtedly affect[ed] the institutional interest of the [Chilean Navy]" (supra para. 63(23)). The judgments rendered by the Naval Court of Magallanes and the Navy Court-Martial regarding the criminal offenses of disobedience and breach of military duties make no reference to the interests on which the prohibition to publish such book was based (supra paras. 63(66) and 63(68)). The Court considers that deprivation of property on the grounds of an "institutional interest" is not in line with the Convention.

110. Regarding the statement made by Chile on the non-participation of State agents in the erasure of the full text of the book from the hard disk of Mr. Palamara-Iribarne's personal computer, the Court notes that regardless of the persons involved in such act, it was committed

as a result of the order issued by the Naval Prosecutor of Magallanes to "seize the copies [of the book] that may be in his possession [… and of] any other material or document related to the publication thereof" (supra para. 63(20)). Thus, it is possible to infer that if Mr. Palamara-Iribarne "erased the full text of said book from the hard disk of his personal computer," as it was entered on the "seizure record," he did so as a result of such order during the above-mentioned seizure on March 1, 1993 rather than as a mere voluntary act (supra para. 63(20)).

111. In view of the foregoing, the Court concludes that the State has violated the right to property as set forth in Article 21(1) and 21(2) of the American Convention to the detriment of Humberto Antonio Palamara-Iribarne, and has failed to fulfill the general duty to respect and guarantee rights as set forth in Article 1(1) of such treaty.

IX. VIOLATION OF ARTICLE 9 OF THE AMERICAN CONVENTION IN RELATION TO ARTICLES 1(1) AND 2 THEREOF (RULE OF FREEDOM FROM EX-POST FACTO LAWS)

112. The Commission did not file any arguments alleging the violation of Article 9 of the Convention.

113. Arguments of the alleged victim's representatives:

a) Article 229 of the Code of Military Justice, which defines the criminal offense of disobedience for which Mr. Palamara-Iribarne was convicted, "does not provide an accurate description thereof." Furthermore, the domestic courts did not even consider that an essential element of the criminal offense alleged in the instant case is the fact that the perpetrator must have military status, a requirement which was not met in the case of Mr. Palamara-Iribarne;"
b) Subparagraph (3) of Article 299 of the Code of Military Justice "contains a special broad legal definition -the purpose of which is to punish criminally any breach of military duties for which no specific punishment has been established-, whereby it should be annulled by means of a future amendment. As a matter of fact, the above-mentioned provision does not describe the criminal offense." Furthermore, the drafting of Article 336 of the Code of Military Justice, which describes the criminal offense of breach of duties, is inaccurate. The above-mentioned criminal definitions of disobedience and breach of military duties constitute a violation of the rule of freedom of ex post facto laws as set forth in Article 9 of the American Convention;
c) The condemnatory judgment for the criminal offenses of disobedience and breach of duties has violated the rule of freedom of ex post facto laws, as the court of first instance and the appeals court did not abide by the scope of the legal provisions applied (Articles 299(3) and 337(3) of the Code of Military Justice), and sanctioned Mr. Palamara-Iribarne's claim to legally exercise his right to freedom of expression; and
d) It is the duty of lawmakers to prevent acts which are not illegal from being incriminating, and it is the duty of judges to prevent criminal definitions from being interpreted in such a way as to punish legal acts.

114. The State did not submit any independent arguments to refer specifically to the alleged violation of Article 9 of the Convention.

Considerations of the Court

115. Article 9 of the Convention sets forth that:

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

116. In passing judgment on the alleged violations of Article 8 of the Convention, the Court shall take into consideration the foregoing representatives' arguments on the violation of Article 9 of said treaty.

X. VIOLATION OF ARTICLES 8 AND 25 OF THE AMERICAN CONVENTION IN RELATION TO ARTICLES 1(1) AND 2 THEREOF (JUDICIAL GUARANTEES AND JUDICIAL PROTECTION)

117. The Commission did not file any arguments alleging the violation of Articles 8 and 25 of the Convention.

118. Arguments of the alleged victim's representatives

a) Regarding the right to a hearing (article 8(1) of the Convention), they argued that:

i) this right necessarily implies that an oral hearing be held, at which arguments may be offered before a judge, evidence may be directly tendered to the court, and evidence may be contested;

ii) all procedural steps taken against Mr. Palamara-Iribarne were written and, therefore, all submissions were filed in writing, including the statements of witnesses. Mr. Palamara-Iribarne's counsel was neither allowed to submit his defense arguments orally and directly to the court nor to tender evidence;

iii) as some judicial functions have been delegated, the principle of procedural immediacy was not observed. All statements given by Mr. Palamara-Iribarne in the proceedings were taken by a court clerk. The Naval Prosecutor has the power to decide which documents the court will read and which ones it will not. The orders issued by the Military Prosecutor as a general rule are not appealable;" and

iv) the State has reformed ordinary criminal procedures (inquisitorial) so that oral ones (accusatory) have been adopted in criminal proceedings.

b) Regarding the right to a hearing before an impartial judge or court (Article 8(1) of the Convention), they argued that:

i) the State has violated Mr. Palamara's right not to be tried by a military court, despite his civilian status. Furthermore, "an ambiguous and extremely broad definition regarding who has military status for the purpose of determining who is to be tried by the military courts" is in violation of Article 8 of the Convention;

ii) at the time Mr. Palamara wrote his book he was a civilian "contract" employee of the Chilean Navy. Pursuant to the domestic legislation he had civilian status, since as of January

1, 1993 he retired as a Navy active-duty officer. "Therefore, he could not possibly commit any crime in which is the military status of the perpetrator is an essential element (military criminal offenses);"

iii) "civilian contract personnel" are not included in the military's rank system and perform temporary tasks in order to meet contingent institutional requirements. Furthermore, "pursuant to Article 6 of the Code of Military Justice they are not subject to the jurisdiction of military courts;"

iv) "as civilian contract personnel are not hired through the Schools of the Armed Forces, nor are they included in their rank system, they cannot possibly be members of the permanent personnel of the Armed Forces;"

v) in its judgment, the Court-Martial considered that "civilian contract employees" have military status as they belong to the Armed Forces permanent personnel. This interpretation opposes the provisions of Article 91 of the Political Constitution of Chile, those of Article 10 of the Ley Orgánica Constitutional de las Fuerzas Armadas (Armed Forces Constitutional Organic Law), and those of Article 3 of the Estatuto del Personal de las Fuerzas Armadas (Armed Forces Personnel Regulations);

vi) had the writers of the Code of Military Justice wished to extend the military jurisdiction to "civilian contract personnel," they would have expressly stated so as they did in Article 7 of said Code, which sets forth that "cadets, cabin boys, apprentices, and regular students of the military Schools, as well as civilian employees of the Armed and Police Forces who are included in the cases considered in subparagraph (3) of Article 5 shall be subjected to the jurisdiction of military courts;" and

vii) the mere fact that a person has a labor relationship with the Armed Forces cannot be deemed as grounds for considering that he or she has military status.

c) Regarding the violation of Article 8(1) of the Convention, in relation to Article 25 thereof on the lack of independence of the military courts, the representatives argued that:

i) Mr. Palamara was not tried by an independent and impartial court in the two criminal proceedings wherein he was convicted. The structure of the Chilean naval military justice violates the requirement to be tried by an impartial and independent court;"

ii) Mr. Palamara-Iribarne was tried by a judge who was a Navy active-duty member, who, as such, was not qualified to render an independent and impartial judgment. If the victim of the crime is the Navy and the judge is a member of the Navy, the latter is subject to military hierarchical subordination, which is in violation of objective impartiality;

iii) the various functions taken up by the Naval Prosecutor who conducted the investigation in the proceedings brought against Mr. Palamara are not compatible. From the moment the Naval Prosecutor conducts an investigation into the commission of a crime, he is no longer independent to adopt decisions that may affect the rights of the accused;

iv) the Code of Military Justice provides that it is the duty of prosecutors to issue arrest and imprisonment warrants. The orders issued by the military prosecutor as a general rule are not appealable. The prosecutor may issue an imprisonment warrant, "on the mere grounds that there is sufficient reason to suspect that a person has committed an offense, either as perpetrator or accessory before, during, or after the fact. He may even issue a warrant of arrest to ensure the appearance of the accused," as it happened in the case of Mr. Palamara. The order of preventive detention was issued by the Interim Prosecutor, who is a member of the Chilean Navy, and whose military superior is the Commander-in-Chief of the Third Naval Zone. Likewise, it was the Interim Prosecutor who ordered the seizure from the publishing company

and from Mr. Palamara's house of all the material regarding the above-mentioned book and ordered him to erase the full text of the book from the hard disk of his personal computer;

v) "as it is recognized by almost all national text writers, military criminal procedures in peacetime are similar to ordinary inquisitorial criminal procedures. Such procedures in Chile have been reformed as a result of their incompatibility with the guarantees of due process as enshrined by the American Convention;"

vi) in the proceedings brought against Mr. Palamara for the criminal offense of contempt of authority, several prosecutors took part who did not have the required independence as they were "lay Prosecutors" (fiscales no letrados)." Prosecutors who conduct the preliminary investigations in the cases under the naval jurisdiction are known as naval prosecutors and are appointed by the President of the Republic, while "lay Prosecutors" (fiscales no letrados) are appointed by the pertinent Commander-in-Chief, among subordinate naval officers when a Prosecutor must be replaced; and

vii) the structure and organization of the Chilean military justice affects the independence and impartiality of officials, thus breaching not only Article 8(1) of the Convention, but also the right of every person to judicial protection pursuant to the provisions of Article 25 thereof, "as the State does not grant an effective domestic remedy for the defense of the rights of those who have been subjected to judicial proceedings."

d) Regarding the right to defense (Article 8(2)(d) of the Convention), the representatives argued that:

i) the provisions of the Code of Military Justice -which sets forth a number of limitations which unduly restrict the right to defense- were applied in the proceedings brought against Mr. Palamara. The participation of the defense counsel at the investigation stage is minimal and it is the naval prosecutor who has the control of the proceedings and takes all evidentiary procedures at this stage. As these are written, trial becomes a mere repetition of what was done during the investigation proceedings, which are not public, though they are the most relevant stage regarding the evidence.

ii) the violation of the right to defense is a problem inherent to the structure of military criminal procedures, which are based on the military criminal legislation in force in Chile;

iii) the weakness of the defense is evident in the indictment. The drafting of the writ of indictment, added to the confidentiality of the investigation proceedings, prevent having access to the information about the merits of the investigation and the charges;

iv) "given the importance of the investigation stage of the proceedings and the infringement of rights that takes place during this stage, a person must have all the judicial guarantees recognized by the Convention." Therefore, Mr. Palamara "should have been in a position to challenge the evidence gathered against him by the Naval Prosecutor at that time, which he was not allowed to do;"

v) nor was he allowed to exercise his right to defense at the trial, as the Naval Court dismissed the evidentiary measures requested by Mr. Palamara's defense counsel in the proceedings started for the criminal offenses of disobedience and breach of military duties; and

vi) the State violated the principle of procedural immediacy, since at the trial the Naval Judge merely read the record of the case.

e) Regarding the right to forward and contest evidence (Article 8(2)(f) of the Convention), the representatives argued that:

i) it is a fundamental tenet of the right to defense and due process; and

ii) in the judicial proceedings brought against Mr. Palamara, he was neither allowed to exercise his right to forward evidence and contest it, nor to cross-examine the witnesses who gave testimony in the proceedings. Pursuant to the Code of Military Justice, at the investigation proceedings the accused is not allowed to be present while witnesses give testimony. When Mr. Palamara requested that some witnesses be summoned to give testimony at the trial, his request was dismissed by the Naval Prosecutor. At the trial no further statements of witnesses were submitted, whereby Mr. Palamara was not able to cross-examine the witnesses who had given testimony at both stages of the proceedings.

f) Regarding the right not to be compelled to be a witness against himself (Article 8(2)(g) of the Convention), the representatives argued that:

i) Mr. Palamara was not informed that he was entitled to remain silent. Nor was he informed that he was entitled not to plead guilty, as that is a right which is not contemplated in the Code of Military Justice. The procedure through which such guarantee is sought to be met is by resorting to the formula of "urging the accused to tell the truth," that is, assuming that the accused is not forced to incriminate himself for the mere fact that he is not required to give his statement under oath. The "only advantage [… is that] the accused cannot commit the crime of perjury;"

ii) the Code of Military Justice considers the statement as a means to obtain a confession rather than as a means of defense; and

iii) article 8(2)(g) of the Convention has been violated to the detriment of Mr. Palamara "as he was compelled to make a statement in the proceedings started against him."

g) Regarding the provision that sets forth that criminal proceedings shall be public (Article 8(5) of the Convention), the representatives argued that:

i) criminal proceedings must be public, that is, not only must the accused have access to the proceedings, but also society as a whole must have the possibility to see how the punitive power of the State is exercised; and

ii) criminal judicial proceedings heard by military courts are not public; instead, they consist of written procedures to which citizens have no access. Furthermore, the investigation proceedings are not public. Even if the record of the case were available to anyone, this would not make the entire criminal proceedings public. Publicity of the proceedings should comprise each procedural stage thereof. None of these requirements were met in the proceedings brought against Mr. Palamara.

h) Regarding the violation of Article 8 of the American Convention in relation to Articles 1 and 2 thereof, the representatives argued that:

i) the State has violated Articles 1 and 2 of the Convention as a result of its failure to fulfill the duties to "respect" and "ensure" the free and full exercise of all the rights and freedoms protected by the Convention, and to adopt such domestic measures as may be necessary to enforce such rights and freedoms; and

ii) the State is responsible for these violations "as it has failed to adopt effective judicial, legislative, and executive measures in order to legally ensure the free and full exercise of human rights."

119. Arguments of the State: [FN188]

a) Regarding the alleged violations of the right to be tried by an impartial judge or court (Article 8(1) of the Convention), the State argued that Mr. Palamara-Iribarne held office as

Deputy Chief of the Intelligence Department of the Third Naval Zone before being hired by the Navy as a contract civilian employee. Mr. Palamara-Iribarne was hired to perform the same duties as the Deputy Chief of the Intelligence Department of the Third Naval Zone, "thus being a member of the permanent personnel thereof." The process of retirement from the Navy as an active-duty officer concluded "after the facts which gave rise to the above-mentioned judicial proceedings;"

b) Article 6 of the Code of Military Justice provides that "any person who is under the regulations for the permanent personnel of the Army, Navy […] shall be deemed to have military status." To the purpose of establishing whether the perpetrator of a criminal offense has military status or not, this general interpretative provision of the concept of "military" shall apply;

c) Articles 5(3) and 7 of the Code of Military Justice address the military jurisdiction over ordinary crimes rather than the categorization of a military member. Said articles address the concept of "military" to the purpose of classifying the military criminal offenses included in the Code, and do not affect the general provision contained in Article 6 thereof;

d) According to the Prosecutor of the Court of Appeals of Punta Arenas, "civil servants who serve in the Armed Forces in general, and in the Chilean Navy in particular, including those who have filed a retirement application as well as those who are "Civilian Contract Personnel," have "military status." The above Prosecutor concluded that Mr. Palamara-Iribarne as Lieutenant Commander pending retirement from active duty and hired as a Civilian Contract Employee under the employment system of the Chilean Navy had military status and, therefore, was subject to the discipline thereof. Furthermore, as a military member he was under the "jurisdiction of military courts;" and

e) The Commission did not endorse any of the allegations regarding the military status of the alleged victim. "Its silence and lack of recommendations in this regard are a clear message about the irrelevancy of said allegations."

[FN188] The State did not submit any independent arguments to refer specifically to the alleged violation of Article 8 of the Convention.

Considerations of the Court:

120. The Court has established that the alleged victims or the representatives thereof may invoke any rights other than those asserted in the application filed by the Commission, as long as they are based on the facts alleged therein. [FN189]

[FN189] Cf. Case of Acosta-Calderón. Judgment of June 24, 2005. Series C No. 129, para. 142; Case of YATAMA, supra note 5, para. 183; and Case of Fermín- Ramírez. Judgment of June 20, 2005. Series C No. 126, para. 88.

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121. In similar cases, the Court has found that "in order to clarify whether the State has violated its international obligations owing to the acts of its judicial organs, the Court may face the need to examine the related domestic proceedings." [FN190] Adhering to precedent, the

Court will consider all domestic proceedings which are relevant to the instant case, in order to make an informed determination as to whether the above-mentioned provisions of the Convention regarding due process and judicial protection have been violated. To that end, the Court will particularly take into consideration that the facts described in the instant case occurred mainly in the context of the Chilean military jurisdiction in "peacetime," and were the grounds for the two criminal proceedings brought against Mr. Palamara-Iribarne, one for the criminal offenses of disobedience and breach of military duties and the other for the criminal offense of contempt of authority.

[FN190] Cf. 78; Case of the "Mapiripán Massacre" supra note 1, para. 198; Case of the Moiwana Community, supra note 185, para. 143; and Case of the Serrano-Cruz Sisters, supra note 5, para. 57.

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122. The Court bears in mind that in the last years Chile has implemented a deep reform of the criminal justice, aimed at introducing the guarantees of due process in criminal proceedings in order to shift from a written inquisitorial procedural system to an accusatory procedural system which rests on the guarantee of being based on oral procedures. Notwithstanding, the military jurisdiction has been excluded from such procedural reform, which implied a constitutional amendment.

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

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

a) Right to a hearing by a competent judge or court

124. The Court has established that every person has the right to be tried by a competent, independent, and impartial judge or court. In a democratic constitutional State the military criminal jurisdiction should have a restricted and exceptional scope and should be aimed at the protection of special legal interests related to the duties the law assigns to the military. Therefore, only military members should be tried for the commission of criminal offenses or breaches which, due to their own nature, constitute an attack on military legal interests. [FN191]

[FN191] Cf. 78; Case of the "Mapiripán Massacre" , supra note 1, para. 202; Case of Lori Berenson-Mejía. Judgment of November 25, 2004. Series C No. 119, para. 142; and Case of 19 Tradesmen. Judgment of July 5, 2004. Series C No. 109, para. 165.

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125. The right to be tried by ordinary courts in accordance with the procedures set forth by law is an essential tenet of due process. [FN192] Therefore, the right to be tried by a competent judge

is not enforced for the mere fact that it is established by law which court is to hear a particular case and jurisdiction thereof is recognized.

[FN192] Cf. Case of Lori Berenson, supra note 191, para. 143, and Case of Castillo-Petruzzi et al. Judgment of May 30, 1999. Series C No. 52, para. 129.

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126. In this regard, military criminal regulations must clearly set forth without any ambiguities whatsoever, which persons are deemed to be military members -the only perpetrators of military criminal offenses-, which criminal offenses fall within the specific military scope, and the illegal nature of criminal offenses by means of a description of the injury to or endangerment of military legal interests which have been seriously attacked, which may justify the exercise of punitive military power, as well as establish the appropriate sanction. In applying military criminal regulations and charging a military member with the commission of a criminal offense, the authorities who exercise the military criminal jurisdiction must also abide by the nullum crimen nulla poena sine lege praevia principle and, among other requirements, prove the existence of all the elements which must be present according to the description of such military criminal offense, as well as the existence or non-existence of criminal excuses for such criminal acts.

127. In the instant case, the military status of Mr. Palamara-Iribarne is a fact at issue between the parties. The State has alleged before the Court that the application filed by Mr. Palamara for retirement from the Navy as an active-duty officer was admitted after the facts which gave rise to the criminal proceedings and, it has further alleged that civilian contract employees have military status. The authorities who exercised the criminal jurisdiction in the trial of Mr. Palamara-Iribarne, based on the interpretation of various provisions, understood that as a civilian contract employee he should be deemed to have military status and thus be subjected to the jurisdiction of military criminal courts (supra para. 63(70)).

128. As it has been proven, Mr. Palamara-Iribarne joined the Chilean Navy in 1972 and retired from the Navy as an active-duty officer on January 1, 1993 (supra para. 63(1)). In a previous case, the Court considered that a person having military status and having filed an application for retirement from active duty could not be tried by the military courts. [FN193] In the instant case, it is also taken into consideration that, as it results from the body of evidence, civilian contract employees are not included in the military's rank system, work in contingent areas which are under an annual renewal system, do not hold positions which are described in the personnel regulations, are not members of the permanent personnel, can be foreign, and have their contracts for services extended annually. Furthermore, civilian contract employees perform "temporary tasks" according to the institutional requirements, whereby they should be subject to the sanctions provided for in labor legislation rather than in criminal military laws.

[FN193] Cf. Case of Cesti-Hurtado. Judgment of September 29, 1999. Series C No. 56, para. 151.

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129. In Chile Article 5 of the Code of Military Justice sets forth, inter alia, that it is incumbent upon the military courts to hear the cases started for criminal offenses included in said Code, except for those crimes which can be classified as military criminal offenses committed by civilians as provided for in Articles 284 and 417 of said Code which, inter alia, contemplate the criminal offense of contempt of authority, and set forth that the proceedings brought for the commission of such offenses must be heard by ordinary courts.

130. The above-mentioned Article 5 of said Code provides that civilians may be tried by military courts in different cases, that military members may be tried by military courts for the commission of ordinary crimes "committed […] in the course of their military duties or as a result thereof […] or in military areas […] or facilities or offices of the Armed Forces," and that both may be tried for criminal offenses which are not even described in the Code of Military Justice itself, as it recognizes the jurisdiction of military courts over "those cases which, pursuant to special laws, are referred there[to]."

131. Regarding the jurisdiction and proceedings brought for the criminal offense of contempt of authority as described in the Criminal Code which was applied in the case of Mr. Palamara-Iribarne, Article 26 of the Ley sobre Seguridad del Estado (State Security Law) sets forth that the proceedings brought for such criminal offense are to be heard in first instance by the appropriate Military Court, and on appeals by the Court-Martial, where such offenses have been committed by persons subject to the military jurisdiction or jointly by military members and civilians.

132. The Court considers that the provisions which define military criminal jurisdiction in Chile do not restrict trials by military courts to criminal offenses which due to the nature of the military criminal legal interests protected are strictly military and constitute serious offenses committed by military members who endanger such legal interests. The Court highlights that such criminal offenses can only be committed by military members during the performance of specific duties related to the defense and external security of a State. In democratic States the jurisdiction of military criminal courts in peacetime has tended to be restricted, if not to disappear, whereby, where it has not, it should be reduced to the minimum and be inspired in the principles and guarantees prevailing in modern criminal law.

133. In the instant case, the broad scope of military criminal jurisdiction applied to Mr. Palamara-Iribarne resulted in the trial of a civilian contract employee by military courts for the commission, inter alia, of criminal offenses which constituted an attack on the "military duties and honor" or which implied "insubordination," such as the criminal offenses of disobedience and breach of military duties as provided for in the Code of Military Justice, as well as for the commission of criminal offenses which put "public order and security" at risk, such as contempt of authority.

134. It is clear that the criminal offenses for which Mr. Palamara-Iribarne was convicted did not endanger any military legal interests susceptible of criminal protection. The Court further understands that due to the ultima ratio nature of military criminal law, bringing the foregoing criminal proceedings against Mr. Palamara was not the least injurious means the State may resort to in order to protect the interests of the Navy.

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135. Furthermore, besides the wide scope of military criminal jurisdiction as derived from the definition of military criminal offenses and the reference to laws which recognize the jurisdiction of military courts, it is to be emphasized that in Chile said courts may hear numerous cases due to the fact that the status of the perpetrator of military criminal offenses is not relevant.

136. Articles 6 and 7 of the Code of Military Justice set forth who is to be deemed to have military status for the purpose of applying the jurisdiction of military courts and refer to other laws to broaden this concept, whereby state authorities take into consideration other legal and statutory provisions in order to interpret the above-mentioned articles of the Code of Military Justice.

137. Furthermore, the Court notes that, as it results from the expert and documentary evidence tendered by the parties, during the period from 1990 to 1996 most accused persons subject to the jurisdiction of military courts were civilians.

138. The Court further notes that both the above-mentioned Article 299(3) of the Code of Military Justice and the criminal offense of disobedience as set forth in Articles 334, 336, and 337, Title VII, Book III of such Code on "Insubordination Criminal Offenses" applied to Mr. Palamara-Iribarne, sets forth that perpetrator of such offenses must have "military status."

139. The Court has pointed out that the application of military justice must be strictly reserved to active-duty military members, based on a previous case wherein it noted that "when [the] proceedings [against the victim] were started and heard, [he was] a retired military member, and therefore, could not be trie[d] by the military courts." [FN194] Chile, as a democratic State, must respect the restrictive and exceptional scope of military courts, and exclude the trial of civilians from the jurisdiction thereof.

[FN194] Cf. Case of Cesti-Hurtado, supra note 193, para. 151.

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140. The description of the criminal offenses of disobedience and breach of military duty as contained in the Code of Military Justice provides that the perpetrator must have "military status." In this regard, the Court considers that Mr. Palamara-Iribarne, as a retired officer, did not have the "military status required to be the perpetrator of the criminal offenses charged, and therefore, the above military criminal provisions were not applicable to the accused. Furthermore, the Court considers that Mr. Palamara-Iribarne, at the time he wrote the book and set in motion its publication, did so in the legitimate exercise of his right to express his opinions and ideas freely.

141. The Court considers that Chile has not adopted the necessary measures for Mr. Palamara-Iribarne to be tried by ordinary courts, since as a civilian he did not have the military status required to be deemed the perpetrator of a military criminal offense. The Court notes that, in Chile, establishing that a person has military status is a complex task which requires the

interpretation of various provisions and regulations, which allowed the judicial authorities who applied them to make a broad interpretation of the concept of "military" in order to subject Mr. Palamara-Iribarne to the military courts.

142. Such broad jurisdiction of military courts in Chile, which allows them to hear cases which should be heard by civilian courts, is not in line with Article 8(1) of the American Convention.

143. The Court has pointed out that "[w]here the military courts find themselves competent to hear cases which should be heard by ordinary courts, the right to be tried by a competent judge or court is violated, and so is, a fortiori, due process, which, in turn, is closely related to the right to a fair trial." [FN195] The trial of civilians is incumbent on the ordinary justice.

[FN195] Cf. Case of Lori Berenson-Mejía, supra note 191, para. 141; Case of 19 Tradesmen. Judgment of July 5, 2004. Series C No. 109, para. 167; and Case of Las Palmeras. Judgment of December 6, 2001. Series C No. 90, para. 52.

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144. In view of the foregoing considerations, the Court concludes that the State has violated Article 8(1) of the Convention to the detriment of Mr. Palamara-Iribarne, as he was tried by courts which were not competent to do so, and that it has violated the general duty to respect and guarantee the rights and freedoms enshrined by Article 1(1) of the Convention. Furthermore, as the Chilean domestic legislation comprises provisions which oppose the right to a hearing by a competent judge or court as provided in Article 8(1) of the Convention and which are still in full force and effect, Chile has failed to comply with the general duty to adopt domestic measures as set forth in Article 2 of the Convention.

b) Right to be heard by a competent judge or court

145. The Court considers that the right to be tried by an impartial judge or court is a fundamental guarantee of due process. In other words, it must be ensured that the judge or court hearing a case does so based on the utmost objectivity. Furthermore, the independence of the Judiciary from the other State powers is essential for the exercise of judicial functions. [FN196]

[FN196] Cf. Case of Herrera-Ulloa, supra note 174, para. 171.

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146. The impartiality of a court implies that its members have no direct interest in, a pre-established viewpoint on, or a preference for one of the parties, and that they are not involved in the controversy.

147. The judge or court must withdraw from a case being heard thereby where there is some reason or doubt which is in detriment to the integrity of the court as an impartial body. For the sake of safeguarding the administration of justice, it must be ensured that the judge is free from

any prejudices and that no doubts whatsoever may be cast on the exercise of jurisdictional functions.

148. Now, in analyzing Mr. Palamara-Iribarne's right to be tried by an impartial and independent judge or tribunal, the Court must give special consideration to the structure and composition of military courts in Chile in peacetime.

149. As it results from the body of evidence in the instant case and from Article 1 of the Chilean Code of Military Justice, the power of military courts to hear civil and criminal cases, to "render judgment and enforce the provisions thereof" is exclusively incumbent upon the military courts established by said Code. These military courts have jurisdiction both over Chilean and foreign nationals to hear any cases under the military jurisdiction brought for facts which have occurred in the national territory.

150. As it results from the body of evidence and the expert examination carried out by María Inés Horvitz, the organic structure of the military justice in Chile in peacetime is made up of three instances including judges, prosecutors, judges advocate, and clerks, who are active-duty military members included in a "special rank system of military justice" and who are in a position of subordination and dependence within the military chain of command. Military jurisdiction is exercised by Institutional Courts, Prosecutors, Courts-Martial, and the Supreme Court.

151. Institutional Courts are classified into Military, Naval, and Aviation Courts. The first instance is exercised by the five Naval Courts located in the cities where the four military naval areas are based (Valparaíso, Talcahuano, Punta Arenas, and Iquique) and on the Squadron flagship. Each Naval Court is made up of the naval prosecutor; the naval judge, who is the Commander-in-Chief of the pertinent naval zone and need not be a lawyer; the judge advocate, who must be a lawyer and is appointed by the President of the Republic to advise the military judge; and the judge's and prosecutor's clerks. The Commander-in-Chief of a Military Unit has jurisdiction over the territory under his command.

152. The second instance in peacetime is exercised "by an Army, Air Force, and Police Force Court-Martial" based in Santiago, and by "a Navy Court-Martial, based in Valparaíso." The Navy Court-Martial is made up of two Members of the Court of Appeals of Valparaíso, appointed annually by drawing lots, the Navy Judge Advocate General, and a Navy active-duty General Officer. Since 1991 the tenure of the last two above-mentioned officers has been for three years, during which they cannot be removed from their positions. The Court-Martial is competent to hear appeals regarding the judgments rendered by naval courts and the writs of amparo [protection of constitutional guarantees and rights] filed in favor of persons detained or arrested as a result of an order issued by a military authority. As opposed to naval courts of first instance, judges sitting on Courts-Martial have received legal education. Notwithstanding, the military members who sit on Courts-Martial are hierarchically subordinate to higher-ranked military commanders.

153. The highest military instance in peacetime is the Supreme Court of Justice of Chile based in Santiago, which, when hearing an appeal regarding a decision taken by a lower military court, such as Institutional Courts or Courts-Martial, adds an Army Judge Advocate to its composition.

154. Prosecutors, who exercise the military jurisdiction, are lawyers and "their [military] rank is lower than that of judges and judges advocate." "Prosecutors are the authorities who start and conduct criminal proceedings under the jurisdiction of the military courts in first instance." The prosecutor conducts the preliminary investigation into the criminal offense and "is empowered to issue, within the context of the proceedings, personal precautionary measures such as preventive detention" or "intrusive measures," which may affect the fundamental rights of the accused. Prosecutors must gather and deposit all pertinent items of evidence, arrest the accused persons, and forward all the evidence relevant to the case.

155. The Court deems that the organic structure and composition of military courts as described in the foregoing paragraphs implies that, in general, they are made up of active-duty military members who are hierarchically subordinate to higher-ranked officers through the chain of command, that their designation does not depend on their professional skills and qualifications to exercise judicial functions, that they do not have sufficient guarantees that they will not be removed, and that they have not received the legal education required to sit as judges or serve as prosecutors. All this implies that said courts lack independence and impartiality.

156. Regarding the necessity that a military judge or court meets the requirements of independence and impartiality, it has to be recalled what has been decided by the Court in that in a democratic State such conditions must be guaranteed "as to any judge [or court]. The independence of any judge presumes that his appointment is the result of the appropriate process, that his position has a fixed term during which he will not be removed, and that there are guarantees against external pressures." [FN197] This has also been endorsed by the UN Basic Principles on the Independence of Judges.

[FN197] Cf. Case of the Constitutional Court. Judgment of January 31, 2001. Series C No. 71, para. 75.

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157. The lack of independence of Naval Prosecutors is evident as, for instance, pursuant to Article 37 of the Code of Military Justice they are subordinated to Navy Judges Advocate, who must "[s]upervise the performance of Prosecutors in their pertinent jurisdiction" and may "give [them] instructions […] on how to perform their duties." Furthermore, the Prosecutor concentrates the duties to investigate and prosecute. The Prosecutor must issue the writ of indictment and charge the accused with the alleged criminal offense, so that the decisions on the necessity and lawfulness of the procedures adopted regarding the evidence and on its weight to prove the commission of a criminal offense are to be taken by the same person, which affects his impartiality.

158. The Court notes that, after disqualifying himself for "having be[en] involved and actively taken part in the facts which gave rise to the indictment" (supra para. 63(25)), Mr. Bruna-Greene

sat as Naval Judge in the proceedings brought for the criminal offenses of disobedience and breach of military duty. For instance, he ordered that an investigation be conducted in the proceedings identified as Case Rol No. 465 for another criminal offense of disobedience (supra para. 63(44)), ordered that such Case be joined to Case No. 464 (supra para. 63(48)), granted the extension requested by the Naval Prosecutor so that the investigation proceedings may be continued (supra para. 63(50)), and ordered that the first measures taken in the proceedings brought for another criminal offense of disobedience be joined to Case No. 464 (supra para. 63(53)).

159. As to the other military criminal proceedings brought against Mr. Palamara-Iribarne for the criminal offense of contempt of authority, it is a striking fact for the Court that even when the Commander-in-Chief of the Third Naval Zone, Mr. Hugo Bruna-Greene, initially brought the indictment for said offense against Mr. Palamara-Iribarne before the ordinary courts, on June 14, 1993, the Court of Appeals, based on the Ley de Seguridad del Estado (State Security Law), found that it had no jurisdiction to hear the proceedings identified as Case Rol 103-93 regarding the above-mentioned complaint (supra para. 63(77) and referred the record of the case to the Naval Judge of Magallanes, "so that it be heard and judgment be rendered."

160. Upon taking up Case No. 471 for the criminal offense of contempt of authority, the members of the Naval Court of Magallanes prosecuted Mr. Palamara-Iribarne for insulting or offending the Naval Prosecutors, whereby the authorities hearing this case, all of them members of the Armed Forces, were to render judgment over a matter wherein their own interests had been affected, thus casting doubts on the impartiality and independence of the court.

161. In view of the foregoing, the Court concludes that the State did not guarantee Mr. Palamara's right to be tried by an appropriate, impartial, and independent judge in the criminal proceedings brought against him, and therefore, it has violated Article 8(1) of the Convention to his detriment, and has failed to fulfill the general duty to respect and guarantee the rights and freedoms enshrined in Article 1(1) of the Convention.Furthermore, as the Chilean domestic legislation includes provisions which oppose the right to a hearing by a competent court as provided in Article 8(1) of the Convention and which are still in full force and effect, Chile has failed to comply with the general duty to adopt domestic measures as set forth in Article 2 of the Convention.

c) Judicial guarantees in the military criminal proceedings brought against Mr. Palamara-Iribarne

162. Article 8 of the Convention provides that:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[…]

c) adequate time and means for the preparation of his defense;

d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

[…]

f) the right of the defense to examine witnesses present in the court, and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

g) the right not to be compelled to be a witness against himself, or to plead guilty, and

[…]

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

163. The Court has argued that the States Parties to the American Convention have the duty to provide effective judicial remedies to the victims of human rights violations (Article 25), and that said remedies must be enforced in accordance with the rules of due process (Article 8(1)), in compliance with the States' general duty to ensure to all persons subject to their jurisdiction the free and full exercise of the rights recognized by the Convention (Article1(1)). [FN198]

[FN198] Cf. Case of the "Mapiripán Massacre" supra note 1, para. 195; Case of the Moiwana Community, supra note 185, para. 142; and Case of the Serrano-Cruz Sisters, supra note 5, para. 76.

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164. All bodies which exercise functions which are materially jurisdictional have the duty to adopt fair decisions based on the full respect for the guarantees of due process as enshrined in Article 8 of the American Convention. [FN199]

[FN199] Cf. Case of YATAMA, supra note 5, para. 149; Case of Ivcher-Bronstein, supra note 173, para. 104; and Case of the Constitutional Court, supra note 197, para. 71.

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165. Besides the problems arising from the broad jurisdiction of military criminal justice in Chile to try civilians and from the lack of impartiality and independence of its courts, which is typical of their structure and composition, the Court shall analyze whether the guarantees of publicity of the proceedings and those related to the right to defense of the accused as enshrined in Article 8 of the Convention were respected in the military criminal proceedings brought against Mr. Palamara-Iribarne.

166. To that end, the Court will bear in mind that one of the main requirements to be met during their substantiation of criminal proceedings is their publicity. The right to have a public trial is protected by various international instruments as an essential element of judicial

guarantees. [FN200] Article 8(5) of the American Convention sets forth that "criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice."

[FN200] Cf. Articles 10 and 11(1) of the Universal Declaration of Human Rights; Article 14(1) of the International Covenant on Civil and Political Rights; Article 6(1) of the European Convention on Human Rights; Article 21(2) of the Statute of the International Criminal Tribunal for the Former Yugoslavia; Article 20(2) of the Statute of the Criminal Tribunal for Rwanda; and Articles 67(1) and 64(7) of the Rome Statute of the International Criminal Court.

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167. The right to a public trial as enshrined in Article 8(5) of the Convention is an essential element of accusatory criminal procedural systems in democratic States and is guaranteed by the oral stage of the proceedings, which is governed by the immediacy principle whereby the accused may have immediacy with both the judge and the evidence, and which facilitates access to the proceedings by the public. [FN201]

[FN201] Cf. Case of Lori Berenson, supra note 191, paras. 198-200; Case of Cantoral-Benavides. Judgment of August 18, 2000. Series C No. 69, paras. 146 and 147; and Case of Castillo-Petruzzi et al, supra note 192, para. 172.

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168. The publicity of criminal proceedings aims at preventing the administration of secret justice, submitting it to the careful examination of the parties and the public, and is related to the requirements of transparency and impartiality of the decisions which are to be taken. Furthermore, it is a means for promoting confidence in courts of law. [FN202] Publicity specifically refers to the access to the information the parties to the case, and even third parties, may have on the proceedings.

[FN202] Cf. Osinger v. Austria, No. 54645/00, § 44, March 24, 2005; Riepan v. Austria, No. 35115/97, § 40, ECHR 2000-XII; and Tierce and Others v. San Marino, No. 24954/94, 24971/94, and 24972/94, § 88, ECHR 2000-IX.

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169. The Code of Military Justice provides that military criminal proceedings in peacetime comprise two stages: the pre-trial investigation stage and trial. To the purpose of regulating criminal proceedings, said Code also refers to certain provisions of the Code of Criminal Procedure of 1993.

170. The Court considers that the above provisions, which set forth that in the Chilean military criminal jurisdiction the investigation stage of the proceedings must be confidential, except as otherwise provided by law, oppose the right to defense of the accused, as they prevent access to the record of the case and to the evidence gathered against him, which, in turn, prevents him

from defending himself adequately, in violation of the provisions set forth in Article 8(2)(c). Furthermore, the Court notes that in the instant case all procedural steps taken by the military courts in the criminal proceedings brought against Mr. Palamara-Iribarne were written.

171. The investigation stage of Case No. 464 brought before the Naval Court of Magallanes lasted over a year and seven months, from March 13, 1993 to October 24, 1994, when the Naval Prosecutor referred the case to the military court for trial and Mr. Palamara-Iribarne's counsel, for the first time, had access to the record of the case (supra paras. 63(63) and 63(64)).

172. As it has been proven, during the above proceedings the request so that Mr. Palamara-Iribarne may have access to the steps and procedures adopted against him was neither admitted. On several occasions Mr. Palamara-Iribarne's counsel requested access to the procedures adopted during the investigation stage in order to prepare the defense of the accused, which was dismissed by the military courts, even when he filed an appeal against such decisions (supra paras. 63(46), 63(47), and 63(52)). Among other aspects, the Court highlights that the Court-Martial of Valparaíso, in response to an appeal of complaint filed by Mr. Palamara-Iribarne's counsel against the above dismissal, pointed out that denial to access to the investigation steps was in keeping with law and was not attributable to the Prosecutor being challenged (supra para. 63(52)).

173. Pursuant to the Code of Military Justice, should the term of forty days as from the date of the decree ordering that the investigation stage be started be extended "and exceed the term of sixty days, such stage may be made public as long as this is not to the detriment of the success of the investigation, and any person who has a direct interest in its conclusion may take part to proceed to that end."

174. With a few exceptions, the Court considers that the provision regarding the confidentiality of the investigation stage under the Chilean military jurisdiction opposes the guarantee of publicity of criminal proceedings pursuant to Article 8(5) of the Convention, is not consistent with the restrictive nature of the confidentiality of the investigation stage, is deemed to be an obstacle to access by the parties to all the steps taken during such procedural stage, and is not a strategy to temporarily protect sensitive information which may affect the course of the investigation. From the beginning of the first steps taken in any proceedings, all procedural guarantees must be ensured in order to safeguard the right to defense during the entire proceedings brought against a person charged with the commission of a criminal offense, pursuant to Article 8(2)(d) of the Convention.

175. Since during the investigation stage the defense counsel is not allowed to be present while the accused makes a statement and, as it happened in the instant case, the defense counsel had to submit a request to the Prosecutor for evidentiary measures to be taken without having had access neither to the investigation procedures nor to the charges brought against the accused, his right to be assisted by a legal counsel as enshrined in Article 8(2)(d) of the Convention was also violated. The defense counsel was allowed to take part in the proceedings only after the investigation stage had concluded and the case was referred to the military court for trial. It was then that the Prosecutor ordered to forward the record of the case to Mr. Palamara-Iribarne's

counsel so that a response to the charges brought against the accused be filed (supra paras. 63(62) and 63(64)).

176. Furthermore, the Court highlights that upon requesting release from prison Mr. Palamara-Iribarne's counsel, without having had access to the record of the case, requested that confrontations be made between the statements given by the accused and the versions thereon described in the arguments of the Military Prosecutors, "as the existence of relevant contradictions which had to be clarified was noticed" (supra para. 63(47)). The Naval Prosecutor of Magallanes dismissed such request, which shows the difficulties faced by the defense in forwarding the evidence.

177. The Court considers that the impossibility to access to the procedures adopted during the investigation stage and forward evidence prevented Mr. Palamara-Iribarne from defending himself adequately. When Mr. Palamara-Iribarne's counsel had access to the record of the case after it was referred to the military court on October 24, 1994 for trial, pursuant to Article 150 of the Code of Military Justice, only six days were available to file a response to the "charges broug[ht] against the accused." It was only on February 20, 1995 that Mr. Palamara-Iribarne's counsel, upon filing a response to the Prosecution's case, was able to forward his evidence in the proceedings (supra para. 63(65)).

178. Furthermore, and closely related to the foregoing, the Inter-American Court has pointed out that the accused has the right to examine the witnesses who give testimony both for the defense and the prosecution, under the same conditions, in order to exercise his defense. This decision has been endorsed by the European Court. [FN203] The Court has established that in any proceedings all the required elements must concur so that "there is the greatest possible balance between the parties, for the sake of the defense of the interests and rights thereof. This implies, among other aspects, that the principle of adversary proceeding must prevail." [FN204]

[FN203] Cf. Case of Lori Berenson-Mejía, supra note 190, para. 184; and Case of Castillo-Petruzzi et al., supra note 192, para. 154. In the same regard, cf. Case of Salov v. Ukraine, No. 65518/01, § 87, September 6, 2005; Case of Storck v. Germany, No. 61603/00, § 161, May 12, 2005; and Case of Öcalan v. Turkey, No. 46221/99, § 140, March 12, 2003.

[FN204] Juridical Status and Human Rights of the Child. Advisory Opinion OC-17/02, August 28, 2002. Series A No. 17, para. 132. In the same regard, cf. Case of Laukkanen and Manninen v. Finland, No. 50230/99, § 34, February 3, 2004; Case of Edwards and Lewis v. the United Kingdom, No. 39647/98 and 40461/98, § 52, July 22, 2003; Case of Öcalan v. Turkey, No. 46221/99, § 146, March 12, 2003.

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179. The above-mentioned restrictions imposed on Mr. Palamara-Iribarne and his defense counsel in Case No. 464 regarding the criminal offenses of disobedience and breach of military duties and in Case No. 471 regarding the criminal offense of contempt of authority, both brought before the Naval Court of Magallanes, violated the guarantees inherent to the right to defense, as well as the right to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts, as enshrined in Article 8(2)(f) of the Convention. [FN205]

[FN205] Cf. Case of Lori Berenson-Mejía, supra note 191, para. 185; Case of Ricardo Canese, supra note 172, para. 166; and Case of Castillo Petruzzi et al., supra note 192, para. 155 .

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180. Furthermore, the Court must highlight that during both military criminal proceedings Mr. Palamara-Iribarne made a statement before the Prosecutor on several occasions. Regarding such statements the Court will make two observations. On the one hand, on neither occasion did Mr. Palamara-Iribarne give testimony before a competent, impartial, and independent judge or court, which is in violation of Article 8(1) of the Convention. On the other hand, the various summonses served on the accused did neither state the reason why he was requested to appear nor the subject on which he was requested to give testimony. Nor was he informed that he was entitled not to be a witness against himself. Due to the structure inherent to military criminal proceedings and the resulting lack of impartiality, the Naval Prosecutor cannot be put on an equal footing with the judge who guarantees the right to a hearing. Therefore, the State has violated Article 8(1) and 8(2)(g) of the Convention, to the detriment of Mr. Palamara-Iribarne.

181. In view of the foregoing considerations, the Court concludes that the State has violated Article 8 of the Convention in relation to subparagraphs (1), (5), (2)(c), (2)(d), (2)(f) and (2)(g), to the detriment of Mr. Humberto Antonio Palamara-Iribarne, and has failed to fulfill the general duty to respect and guarantee the rights and freedoms enshrined in Article 1(1) of the Convention. Furthermore, as its domestic legal system contains provisions which oppose the guarantees of due process protected by the above-mentioned subparagraphs of Article 8 of the Convention and which are still in full force and effect, the State of Chile has failed to comply with the general duty to adopt domestic measures as set forth in Article 2 of the Convention. Furthermore, as the Chilean domestic legislation contains provisions which oppose the right to a hearing by a competent court as provided in Article 8(1) of the Convention and which are still in full force and effect, the State of Chile has failed to comply with the general duty to adopt domestic measures as set forth in Article 2 of the Convention.

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d) The right to judicial protection

182. 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.

183. This Court has previously held that the safeguard of the individual in the face of the arbitrary exercise of the power of the State is the primary purpose of the international protection of human rights. [FN206] In this regard, the lack of effective domestic remedies leaves the person helpless. Article 25(1) of the Convention establishes, in broad terms, the obligation of States to offer to all persons subject to their jurisdiction an effective judicial remedy against acts that violate their fundamental rights. [FN207]

[FN206] Cf. Case of Tibi. Judgment of September 7, 2004. Series C No. 114, para. 130; Case of the "Juvenile Reeducation Institute." Judgment of September 2, 2004. Series C No. 112, para. 239; and Case of Baena-Ricardo et al. Competence. Judgment of November 28, 2003. Series C No. 104, para. 78.

[FN207] Cf. Case of the "Mapiripàn Massacre", supra note 189, para. 195; Case of Acosta-Calderón, supra note 189, para. 92; and Case of Tibi, supra note 206, para. 130.

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184. From this perspective, it has been stated that, in order for a State to be in compliance with Article 25(1) of the Convention, such remedies must not only exist as a formality, but they must also be effective, [FN208] which means that a person is to be afforded a real opportunity to pursue a simple and prompt recourse which, if applicable, will secure the judicial protection sought from the competent authority. The Court has repeatedly stated that the existence of these guarantees "represents one of the basic mainstays, not only of the American Convention, but also of the Rule of Law itself in a democratic society in the sense set forth in the Convention." [FN209]

[FN208] Cf. Case of Acosta-Calderón, supra note 189, para. 93; Case of Tibi, supra note 206, para. 131; and Case of Maritza Urrutia. Judgment of November 27, 2003. Series C No. 103, para. 117.

[FN209] Cf. Case of Acosta-Calderón, supra note 189, para. 93; Case of the Serrano-Cruz Sisters, supra note 5, para. 75; and Case of Tibi, supra note 206, para. 131.

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185. In previous paragraphs of this Judgment, the Court stated that the State has failed to guarantee to Mr. Palamara-Iribarne his right to be tried by competent, independent and impartial tribunals, and violated certain aspects of the right to a fair trial in the proceedings to which he was a party. Mr. Palamara-Iribarne was removed from the regular courts and thus deprived of his right to be tried by a competent, independent, impartial tribunal previously established by law (supra para. 161). As a result of this, all remedies he filed against the adverse military decisions that impaired his rights were ruled on by military courts that did not meet the impartiality and independent safeguards and were not the competent tribunal previously established by law and, therefore, the State violated his rights to simple and prompt recourse or to any other effective remedy before a competent court or tribunal.

186. This situation was further aggravated by the fact that the Code of Military Justice only allows appeals to be taken from very few of the rulings that are handed down by the military criminal court authorities and affect the fundamental rights of the defendants. Accordingly, Mr. Palamara-Iribarne was not able to lodge remedies against certain adverse decisions issued by the military criminal court authorities, such as the denial of access to the court records, as such decision was not open to appeal (supra paras. 63(46) and 63(47)).

187. The Court takes due note of the fact that Article 20 of the Constitution of Chile establishes the remedy of protection to safeguard the fundamental rights of persons before the regular courts. In this case, however, it has been established that the remedy pursued by Mr. Palamara-Iribarne's wife for his and his family's benefit (supra para. 63(36)) to protect the constitutional guarantees to mental integrity, the right to engage in any business activity, the right to property and copyrights was neither adequate nor effective to protect the rights of Mr. Palamara-Iribarne, as the Court of Appeals of Punta Arenas did, without even analyzing whether the alleged violations of said fundamental rights had actually taken place, hold that the military courts had jurisdiction in the matter and, accordingly, it could not rule on the subject. Therefore, the State failed to ensure "that any person claiming such remedy [would] have his rights determined by the competent authority provided for by the legal system of the State."

188. The right to fair trial is not exhausted by the processing of domestic proceedings; it must also ensure, within a reasonable term, the right of the alleged victim to secure judicial supervision to determine whether the decisions of the military authorities were in fact made in conformity with the basic rights and guarantees provided for in the American Convention, as well as those established under Chile's own domestic laws, [FN210] which is not incompatible with a respect for the inherent duties of the military authorities. Such supervision is essential when the bodies exercising military jurisdiction, such as the Naval Court, exercise powers that affect fundamental rights and which, without adequate supervision, may lead to arbitrary rulings.

[FN210] Cf. Case of the "Mapiripán Massacre" supra note 1, para. 216; Case of the Serrano-Cruz Sisters, supra note 5, para. 66; and Case of 19 Tradesmen, supra note 195, para. 188.

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189. Accordingly, it is the Court's view that the State has violated Article 25 of the American Convention to the detriment of Mr. Palamara-Iribarne, as it failed to guarantee his right to have access to effective judicial remedies that would protect him from violations of his rights, and that it has failed to fulfill its general obligation to respect and ensure the exercise of rights and freedoms provided for in Article 1(1) of the Convention. Furthermore, considering that Chile's domestic legal system contains provisions which are in conflict with the right to be tried by a competent, independent and impartial court or tribunal and are still in force, Chile has failed to comply with its general obligation to adopt the required domestic law provisions under Article 2 of the Convention.

XI. VIOLATION OF ARTICLES 7 AND 8(2) OF THE AMERICAN CONVENTION, IN RELATION TO ARTICLES 1(1) AND 2 THEREOF (RIGHT TO PERSONAL LIBERTY AND RIGHT TO A FAIR TRIAL)

190. The Inter-American Commission did not raise a violation of Article 7 of the American Convention or Article 8(2) thereof.

191. Arguments of the alleged victim's representatives

a) Mr. Palamara was arbitrarily deprived of his liberty both for the crime of disobedience and breach of military duties and for the crime of contempt. The detention was ordered in both cases by Naval Prosecutors "who lacked jurisdiction," in violation of Article 7(2) of the American Convention. The measures of preventive detention against Mr. Palamara were reviewed by a body lacking the required independence and impartiality, thus in violation of Article 7(5), since Mr. Palamara was detained by naval prosecutors who had conducted the relevant investigations prior to the detention and could also act in the post-detention stage by issuing an indictment;
b) Mr. Palamara "was placed in preventive detention without any kind of assessment of the need for this State-coercion measure." The resolution by which Mr. Palamara was charged does not state the reasons why it was necessary for him to be held in remand custody or the reasons why this serious impairment of his rights was actually necessary;
c) under the American Convention, any deprivation of a person's liberty must involve a reasoned, necessary decision made in a democratic society, and mere reference to procedural rules is not sufficient therefor. Under Chile's procedural rules, preventive detention applies as a result of the writ of indictment. The set of rules by which personal liberty is governed throughout a military criminal proceeding in Chile does not clearly define that detention shall only apply in exceptional cases. Furthermore, the procedural provisions that govern release from prison and which were applied in the proceedings against Mr. Palamara establish detention as the rule during the course of a criminal proceeding, and the only requirement to be satisfied in ordering detention is that there be well-founded reasons to believe that the defendant was actually involved in the commission of the crime. Preventive detention is only excluded for minor offenses;
d) in the case of Mr. Palamara, it is obvious that the orders for his preventive detention were not justified, as the sentences he received did not entail confinement. Both judgments granted him the benefit of suspended pardon.The State violated Mr. Palamara's right to personal liberty due to the arbitrary nature of the orders for his preventive detention. Section 4 of Law No. 18,216 made it possible to anticipate, in Mr. Palamara's case, the imposition of a non-custodial sentence, which is why preventive detention was inadmissible insofar as the principle of proportionality is concerned;
e) preventive detention and the principle of innocence conflict with each other; that conflict influences the determination of the reasons that justify restricting personal liberty and require that, ultimately, the regulatory principle of Article 8(2) of the Convention prevail;
f) "there were no elements to anticipate that […] Mr. Palamara was going to obstruct the pending procedures," particularly considering the fact that the existence of procedural risk cannot be presumed;
g) where detention is carried out by a person other than a judge, three requirements must be met: the person must have statutory authority to exercise judicial functions, meet the independence and impartiality standard and be empowered to review the reasons that warrant a person's detention and, if applicable, order that person released. The naval prosecutor who

ordered the detention of Mr. Palamara was statutorily authorized to exercise judicial functions and was empowered to order him released. However, such prosecutor did not meet the independence and impartiality requirement;
h) the requirements that apply by virtue of Article 8(2) of the Convention are not observed in Chile's military criminal procedural system. "As a matter of fact, preventive detention is usually ordered as a consequence of the writ of indictment;" and
i) the right to the presumption of Mr. Palamara's innocence was breached in both proceedings in which he was prosecuted, as preventive detention was ordered for purposes other than those authorized under the American Convention.

192. The State did not submit arguments on the alleged violation of Article 7 of the American Convention or Article 8(2) thereof.

Considerations of the Court

193. Article 7 of the American Convention provides as follows:

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
[…]

194. Articles 8(2) and 8(2)(b) of the Convention provide as follows:

[e]very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
[…]
b) prior notification in detail to the accused of the charges against him;

195. Given the peculiarities of the instant case, the Court will now analyze the alleged violations of Article 7 of the Convention, which are supposedly the result of the orders of preventive detention issued during the course of the two military criminal proceedings instituted against Mr. Palamara-Iribarne for the crime of disobedience and breach of military duties and the crime of contempt, together with the alleged violation of the right to the presumption of innocence (Article 8(2) of the Convention). In turn, because of the circumstances surrounding the facts of the instant case, in this very same chapter the Court will analyze the alleged violations of Articles 7(4) and 8(2)(b) of the Convention, as both bear relation to the detention

that took place after the seizure of the books that Mr. Palamara-Iribarne kept in his home (supra para. 63(20)).

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196. Under Article 7(1) of the Convention, every person has the right to personal liberty and security. Furthermore, under Article 7(2) of the Convention, a person's right to personal liberty may be restricted for the reasons and under the conditions established beforehand by the constitution or by a law established pursuant thereto (material aspect), but also in strict compliance with the procedures objectively defined therein (formal aspect). [FN211]

[FN211] Cf. Case of Acosta-Calderón, supra note 189, para. 57; Case of Tibi, supra note 206, para. 98; Case of the Gómez-Paquiyauri Brothers. Judgment of July 8, 2004. Series C No. 110, para. 83.

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197. According to the Court's case law, precautionary measures which impair, among other things, the personal liberty of the defendant are exceptional in nature and restricted by the right to the presumption of innocence and the principles of nullum crimen nulla poena sine lege praevia, need and proportionality, which are essential to any democratic society. [FN212]

[FN212] Cf. Case of Acosta-Calderón, supra note 189, para. 74; Case of Tibi, supra note 206, para. 180; and Case of Ricardo-Canese, supra note 172, para. 153.

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198. In exceptional cases, the State may order preventive detention provided that the necessary requirements to restrict the right to personal liberty are met, that there are sufficient indicia to reasonably believe that the defendant is guilty and that such detention is strictly necessary to ensure that the accused will not impede the effective development of the investigations or evade justice. [FN213] Therefore, in order for the presumption of innocence not to be disregarded when issuing measures that restrict personal liberty, it is necessary for the State to provide grounds therefor and evidence that the applicable requirements under the Convention are met in each specific case.

[FN213] Cf. Case of Acosta-Calderón, supra note 189, para. 111; Case of Tibi, supra note 206, para. 180; and Case of Ricardo-Canese, supra note 172, para. 153.

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199. Because of the requirement that the conditions and reasons for restricting personal liberty be provided for in the Constitutions of the State Parties or in their laws, the Court considers it necessary to address certain domestic legal provisions of Chile that applied to Mr. Palamara-Iribarne.

200. Under Article 136 of the Code of Military Justice, "[i]f there is sufficient reason to believe that a person is the perpetrator of or an accomplice in the commission of a crime, or an accessory after the fact, the Prosecutor may order that person detained or merely require his appearance for a preliminary examination statement." Pursuant to Article 142 of said Code, the rules on the release of defendants on bail laid down in the Code of Criminal Procedure apply to military proceedings.

201. Article 277 of the Code of Criminal Procedure, which was in force at the time of the facts of this case and was applied to Mr. Palamara-Iribarne in both military criminal proceedings against him, provided that "[u]pon a writ of indictment, arrest becomes preventive detention."

202. Article 274 of said Code of Criminal Procedure, which applied in the case at hand, provided that:

After being questioned by the judge, the defendant shall be indicted if the background information shows that: 1) [t]he existence of the crime under investigation has been proven; and 2) [t]here is sufficient cause to believe that the defendant has been involved in the crime, either as perpetrator, accomplice or accessory after the fact.

203. Furthermore, under Article 363 of said Code:

[r]elease on bail may only be denied, by means of a reasoned decision, based on records admitted to the proceeding, where detention or imprisonment is deemed strictly necessary by the Court for the successful completion of specific, defined steps of the investigation or where the release of the detainee or prisoner represents a danger to society or to the victim.

204. It is a proven fact in the instant case that the military prosecutors ordered the precautionary measure of preventive detention against Mr. Palamara-Iribarne and that he was repeatedly deprived of his liberty, both during the processing of Case No. 471, instituted against him for the crime of contempt, and the processing of Case No. 464, in which he was prosecuted for the crime of disobedience and breach of military duties (supra para. 63(21), 63(22), 63(27)(d) and (e), 63(28), 63(29), 63(56)(c), 63(80) and 63(83).

205. As to Case No. 471, concerning the crime of contempt, it is a proven fact that, on July 12, 1993, the Naval Prosecutor of Magallanes issued a writ of indictment against Mr. Palamara-Iribarne, ordering his preventive detention at Garrison IM "Orden y Seguridad" ("Order and Security") without providing any further legal grounds other than Article 274 of the Code of Criminal Procedure, which article makes no reference to the conditions that need to be met in order for preventive detention to apply, but instead defines the conditions to be met for a writ of indictment (supra para. 63(80)).

206. Taking due account of the presumption of innocence, it is the Court's view that the requirements to be met in issuing a writ of indictment are different from those that apply in ordering preventive detention as, in the latter case, in addition to the reasonable attributability of the criminal conduct to the defendant, detention must also be necessary to prevent the accused from hindering the development of the proceeding (supra para. 198).

207. In the order of preventive detention of July 12, 1993, the Prosecutor made no reference whatsoever to the requirements defined by Chile's domestic laws for the deprivation of Mr. Palamara-Iribarne's liberty to apply, and provided no evidence pointing to the hindering of the investigation by the accused. The Prosecutor based the order of preventive detention only on the elements required to be met for the issue of a writ of indictment and, therefore, Mr. Palamara-Iribarne remained in detention for four days, from July 12 through July 15, 1993 (supra para. 63(83)). He was released as a result of the ruling handed down by the Court-Martial (supra para. 63(82)).

208. As to Case No. 464, it has been proven that, on March 15, 1993, the Deputy Naval Prosecutor of Magallanes issued a writ of indictment against Mr. Palamara-Iribarne ordering his preventive detention and denying his release on bail, on the grounds that there were "proceedings pending execution" that "require[d] that defendant be held in custody" (supra para. 63(27)(d) and (e)). Even though Mr. Palamara-Iribarne requested that the Deputy Naval Prosecutor of Magallanes granted his release on bail, setting the amount of such bail, and claimed, inter alia, that "[his] arrest [was] unnecessary for the ongoing investigation and […] [he] [would] not flee or hide [from prosecution]," the Deputy Naval Prosecutor "denied" the request "under the provisions of Art[icles] 361(1) and 363(1) of the Code of Criminal Procedure," as "the certificate of existence and criminal record was not attached to the case file" (supra paras. 63(28) and 63(29)).

209. As a result of the order of preventive detention, Mr. Palamara-Iribarne was deprived of his liberty on March 16, 1993, and remained in custody until March 26, 1993, when he was released on bail as ordered by the Court-Martial three days earlier, on March 23, 1993 (supra paras. 63(31) and 63(35)).

210. The military authorities who ordered his preventive detention and denied his request to be released on bail in Case No. 464 (supra paras. 63(27) and 63(29)) relied on Article 361(1) of the Code of Criminal Procedure as legal grounds for the measure, which provision required that detention be essential to ensure the successful completion of specific steps of the investigation. Said authorities merely cited the article, without providing grounds therefor or evidence of the facts of the case that would show that the statutory requirements had been met.

211. Furthermore, it is the Court's view that the preventive detention of Mr. Palamara-Iribarne in Case No. 464, referred to in the preceding paragraph, was not essential in order for the Naval Prosecutor to be able to carry out the pending steps of the proceeding, considering that these consisted in taking the statement of Mr. Palamara-Iribarne's direct superior, sending an official communication to the General Staff to confirm whether "any sort of prior authorization had been processed in connection with the publication of the book 'Ética y Servicios de Inteligencia' ('Ethics and Intelligence Services')" and the filing of a certificate of existence and criminal record of the accused (supra paras. 63(24), 63(27) and 63(29)). It should be noted that, given the secret nature of the preliminary investigation stage of the proceeding, Mr. Palamara-Iribarne could not possibly hinder completion of such steps.

212. In cases subject to Chilean military jurisdiction, preventive detention is apparently the rule, not an exception. The provisions of the Code of Military Justice and the Code of Criminal Procedure that applied to Mr. Palamara-Iribarne and which govern preventive detention show that, in issuing the writ of indictment, the court may release the defendant from prison without imposing any bail, provided that the "crime with which defendant has been charged only carries a fine sentence or a sentence that entails the deprivation of rights, or a custodial or semi-custodial sentence for a term not in excess of a minimum term of imprisonment." Put differently, release on bail is a "privilege" that the court may grant the defendant when certain statutory requirements are met, starting from the premise of detention as the rule.

213. The interpretation of the domestic legal provisions drawn by the military authorities in the instant case caused a precautionary measure restrictive of personal liberty not to be exceptional in nature as required by the Convention. On the contrary, by ordering preventive detention without taking due consideration of the legal and conventional elements required therefor, the State violated Mr. Palamara-Iribarne's right to the presumption of innocence since, as evidenced by the facts of the instant case, it did not overturn the presumption through sufficient evidence of the requirements allowing his liberty to be restricted (supra para. 198 in fine). In this regard, expert witness Horvitz stated that a person's indictment under the rules of military criminal procedure "automatically" leads to "temporary detention pending trial in the case of serious and less serious crimes."

214. In the light of the above, the analysis of the preventive prevention orders issued against Mr. Palamara-Iribarne in the two military criminal proceedings instituted against him shows that the State violated Articles 7(1), 7(2) and 8(2) of the American Convention to his detriment.

215. Moreover, Article 7(3) of the Convention requires as a condition that no one be subject to arbitrary arrest or imprisonment, i.e. arrest or imprisonment ordered for reasons and through methods which —even if legal— may be deemed incompatible with a respect for the fundamental rights of a person because, among other things, they are unreasonable, impossible to anticipate or out of proportion. [FN214]

[FN214] Cf. Case of Acosta-Calderón, supra note 189, para. 57; Case of Tibi, supra note 206, para. 98; and Case of the Gómez-Paquiyauri brothers, supra note 211, para. 83.

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216. In previous decisions the Court found that those rulings of domestic bodies that may impair human rights, such as the right to personal liberty, and which are not duly substantiated, are arbitrary. [FN215] In the instant case, the orders for preventive detention issued in both military criminal proceedings, which were analyzed in the preceding paragraphs, are without reasoned and objective legal substantiation regarding the applicability of said precautionary measure and proving the need therefor, pursuant to the legal and conventional requirements that allowed such measure to be taken and in accordance with the facts of the case. Accordingly, the State violated Articles 7(3) and 8(2) of the Convention, to the detriment of Mr. Palamara-Iribarne, by depriving him of his liberty based on arbitrary orders, in disregard of the principles of nullum crimen nulla poena sine lege praevia, need and proportionality.

[FN215] Cf. Case of YATAMA, supra note 5, para. 152. Similarly, cf. García Ruiz v. Spain [GC], No. 30544/96, § 26, ECHR 1999-I; and Eur. Court H.R., Case of H. v. Belgium, Judgment of November 30, 1987, Series A No. 127-B, para. 53.

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217. The Court finds it important to note that the State's failure to meet the necessary requirements to restrict the personal liberty of Mr. Palamara-Iribarne that were listed above is the result of both the legal provisions applied in the instant case and the manner in which such provisions were interpreted by the military authorities involved in the case.

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218. Under Article 7(5) of the Convention, any person detained is entitled to have such detention promptly reviewed by a judicial authority as a means of adequate control to prevent cases of arbitrary and illegal detention. Prompt judicial review is a measure aimed at avoiding arbitrariness or illegality in detentions, taking due consideration of the fact that, in a State in which the Rule of Law prevails, the judge must guarantee the rights of the person held in custody, authorize precautionary or coercive measures if strictly necessary and, in general, make sure that the accused is treated in a manner that is consistent with the presumption of innocence. [FN216]

[FN216] Cf. Case of Acosta-Calderón, supra note 189, para. 75; Case of Tibi, supra note 206, para. 114; and Case of the Gómez-Paquiyauri brothers, supra note 211, para. 96.

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219. Both the Inter-American Court and the European Court of Human Rights have stressed the material role played by the prompt judicial supervision of detentions. A person deprived of his liberty without judicial supervision must be released or immediately brought before a judge. [FN217]

[FN217] Cf. Case of Acosta-Calderón, supra note 189, para. 76; Case of Tibi, supra note 206, para. 115; and Case of the Gómez-Paquiyauri brothers, supra note 211, para. 95.

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220. The second Principle of the United Nations' Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "[a]rrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose." [FN218]

[FN218] U.N., Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Adopted by General Assembly resolution 43/173 of December 9, 1988, Principle 2.

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221. The Court believes that certain clarifications on this topic are in order. The language of the guarantee laid down in Article 7(5) of the Convention is clear as to the fact that any person arrested is to be brought promptly before a judge or other competent judicial authority pursuant to the principles of judicial supervision and procedural immediacy. This is essential for the protection of the right to personal liberty, and also to protect other rights such as the rights to life and humane treatment. The mere fact that a court is aware of a person's detention does not satisfy this guarantee, as the detainee must personally appear before and provide a statement to the judge or competent authority. [FN219]

[FN219] Cf. Case of Acosta-Calderón, supra note 189, para. 77; and Case of Tibi, supra note 206, para. 118.

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222. In previous cases, the Court established that a "judge or other officer authorized by law to exercise judicial power" must satisfy the requirements laid down in the first paragraph of Article 8 of the Convention, [FN220] also holding that civilians must be tried by the regular courts. It should be noted that, in this Judgment, the Court has stated that the judges or tribunals that heard the two proceedings against Mr. Palamara-Iribarne did not satisfy the competence, impartiality and independence requirements that are necessary in order for the right to a fair trial to be safeguarded in the context of a military proceeding (supra para. 161). Furthermore, the Court stated that, in spite of being a civilian, Mr. Palamara-Iribarne was brought before military authorities.

[FN220] Cf. Case of Tibi, supra note 206, para. 119; and Case of Cantoral-Benavides, supra nota 201, paras. 74 and 75.

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223. In this regard, it is the Court's view that the fact that, upon his detention, Mr. Palamara-Iribarne was set to appear before the Naval Prosecutor, who was vested with the exercise of judicial functions under the domestic laws, did not guarantee the right to have the legality of his detention reviewed by a judicial authority. Considering that it was the Naval Prosecutor who ordered that Mr. Palamara-Iribarne be held in preventive detention in both cases, said officer cannot review the legality of his own orders. Consequently, the requirements laid down in Article 7(5) of the Convention were not met by Mr. Palamara-Iribarne's being brought before the Office of the Magallanes Naval Prosecutor.

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224. Moreover, under Article 7(4) of the Convention, anyone who is detained shall be informed of the reasons for his detention and promptly notified of the charge or charges against him. In turn, Article 8(2)(b) requires that notification to the accused of the charges against him be "prior and in detail."

225. Article 8(2)(b) of the American Convention requires that the competent judicial authorities notify the person held in detention of the charges against him, the reasons therefor and the crimes for which he is being prosecuted, prior to the proceeding. [FN221] For this right to be fully enforced and satisfy the purposes for which it is intended, it is necessary that such notice be given before the person held in detention provides his first statement. [FN222] Moreover, the Court finds that the enforcement of this guarantee is to be specially taken into consideration when taking measures that restrict the right to personal liberty, as in the instant case.

[FN221] Cf. Case of Acosta-Calderón, supra note 189, para. 118; Case of Tibi, supra note 206, para. 187. Also, see U.N. Human Rights Committee. General Comment No. 13, on "Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14)," paragraph 8.

[FN222] Cf. Case of Acosta-Calderón, supra note 189, para. 118; and Case of Tibi, supra note 206, para. 187.

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226. It is a proven fact that on the night of March 1, 1993, Mr. Palamara-Iribarne was arrested by the military authorities who seized those copies of his book he kept at home, even though the case file contains no record of an arrest warrant being notified to him. Once taken to the Clerk's Office of the Office of the Magallanes Naval Prosecutor, the Prosecutor "immediately scheduled an interview" to take Mr. Palamara-Iribarne's statement on the grounds that doing so "was necessary," without stating the purpose of such statement (supra para. 63(21)). The taking of such statement went on until 12:40 a.m. on March 2, 1993.

227. During the seizing of books on the night of March 1, 1993, Mr. Palamara-Iribarne was arrested without being notified of the reasons therefor or the charges against him. Furthermore, Mr. Palamara-Iribarne's first statement to the military authorities was taken by the Naval Prosecutor while he was being held at military premises even though the Prosecutor did not give him prior detailed notice of the charges against him before taking such statement (supra para. 63(21)). This means that Mr. Palamara-Iribarne provided his first statement without being first given prior notice of the crimes he was being charged with, and the State thus violated Articles 7(4) and 8(2)(b) of the Convention.

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228. Based on the above considerations, it is the Court's conclusion that the State violated Articles 7(1), 7(2), 7(3), 7(4), 7(5), 8(2) and 8(2)(b) of the American Convention, to the detriment of Mr. Humberto Antonio Palamara-Iribarne, and has failed to comply with its general obligation to respect and ensure the exercise of rights and freedoms under Article 1(1) of the

Convention. Moreover, by having domestic legal provisions that are in conflict with the rights to personal liberty and the presumption of innocence, Chile has failed to comply with its general obligation to adopt domestic legislative measures under Article 2 of the Convention.

XII. REPARATIONS (APPLICATION OF ARTICLE 63(1))

229. Arguments of the Commission

a) The person entitled to reparations is Mr. Humberto Palamara-Iribarne, the victim in the instant case;
b) regarding compensation for pecuniary damage, the Commission requested that, in fairly and equitably assessing both the consequential damages and future losses, the Court take due account, "in making its decision, not only of the monetary consequences of the prohibition of the book, but also the effects of such prohibition upon the victim's family, as the Palamaras were forced to leave their previous residence;"
c) regarding non pecuniary damages, the Commission requested that the Court set such compensation at a fair amount payable to Palamara-Iribarne. "It is the Commission's view that non pecuniary damage flows not only from the loss of a loved one or from bodily injuries. The conditions to which a person is subjected while undergoing criminal prosecution[,] which included measures restricting his personal liberty and a constant feeling of vulnerability upon being criminally convicted for exercising a right, are conditions that cause extreme pain and suffering;"
d) as to the measures of satisfaction and non-repetition guarantees, the Commission requested that the Court order the State: 1) to take such measures as may be required to return all seized copies of the book as well as its master copy; 2) to allow immediate publication of the book "Ética en los Servicios de Inteligencia" ("Ethics and Intelligence Services"); 3) to take such measures as may be required to remove the crime of contempt from the laws of Chile, "bringing such legislation in line with the American Convention;" and 4) to take such measures as may be required to prevent similar events from happening in the future; and
e) regarding costs and expenses, the Commission requested that, after hearing the representatives of the alleged victim, the Court order the State to make payment of such costs "as may be duly proven by the petitioners," incurred both domestically in the processing of the judicia l proceedings against the victim and internationally in the prosecution of the case before the Commission, and such costs as may arise from the prosecution of the case before the Court.

230. Arguments of the victim's representatives

a) Mr. Palamara-Iribarne, the person directly affected by the facts that constituted a violation of his rights, is to be provided reparation;
b) regarding compensation for pecuniary damage, the Court was requested to set an amount based on equitable standards, "on a prudential basis." In the instant case, consequential damages consist in "the expenses arising directly from the loss of the forfeited property." Furthermore, "compensation must be awarded for costs related to his loss of tax benefits upon losing his status as a civil servant hired as contractor;"
c) regarding non pecuniary damage, the victim's representatives requested that the Court set compensation "on a prudential basis" for the damage suffered by the victim as a result of "being

censured, arrested, held in remand custody, prosecuted in the context of two judicial proceedings that did not guarantee due process of law, and having a criminal record that still reflects two criminal convictions." "Linking non pecuniary damage to pure pain or suffering sustained by a person as a result of the harm caused excessively restricts this concept, thus depriving the Inter-American Court of a tool that allows the reparation of all damage." The State is under a duty to compensate for non pecuniary damage caused by the "radical disruption" of the victim's family life, as evidenced by his being forced to move far away from his wife and children, and his incapacity to reenter the job market to practice his profession, all of which started upon the commencement of the criminal proceeding;

d) as to the measures of satisfaction and non-repetition guarantees, the representatives requested that the Court order the State: 1) to adapt its domestic laws to international standards, in a manner such that military justice will operate as an exceptional system applicable to the military regarding crimes committed in the exercise of their duties; 2) to publicly acknowledge its responsibility for the violation of the victim's rights, by publication of such acknowledgement in the "El Mercurio de Valparaíso" newspaper, as well as in armed-forces publications; 3) to return the books to Mr. Palamara and allow publication thereof; 4) to remove the effects of the judgments of conviction rendered against Mr. Palamara-Iribarne, invalidating any and all consequences thereof;

e) regarding costs and expenses, the representatives stated that the total duration of the domestic proceedings was four years, during which Mr. Palamara-Iribarne incurred expenses arising from the various briefs filed with the lower courts and the cassation and complaint appeals. Furthermore, they requested reimbursement of US$ 5,425.27 as costs and expenses incurred by the representatives; [FN223] and

f) regarding litigation of this case before the Court, they reserved their right to subsequently submit the amount of expenses incurred in the future.

[FN223] They claim that such amount breaks down into the following expenses: 1) preparation of notarial copies of witness and expert statements filed with the Inter-American Court: US$ 372.24; 2) telephone, fax and mail costs: US$ 785.36; 3) air fare, traveling allowance and accommodation for one attorney (Santiago de Chile-Asunción-Santiago de Chile) to attend a hearing before the Court: US$ 1,233; 4) air fare, traveling expenses and accommodation for two attorneys (Buenos Aires-Asunción-Buenos Aires and Río de Janeiro-Asunción-Buenos Aires): US$ 2,316.67; 5) air fare, traveling expenses and accommodation in Asunción for expert Christian Riego, for the hearing of May 9,2005: US$ 718.

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231. Arguments of the State

a) Based on the arguments submitted and the merits of the case, measures of reparation are to be ruled out;

b) should the Court consider that the State should provide measures of reparation, due regard should be had to the fact that the final use of the books was not commercial, but that Mr. Iribarne intended to donate a copy of the book to "each member of the intelligence department of the Office of the Commander in Chief of the Third Naval Zone. [This] unmistakably shows the

intellectual, not commercial, motive of the book's author, which would hardly provide justification for material monetary loss;"

c) the forfeiture of the copies of the book and other materials does not amount to the consequential damages claimed by the representatives of the alleged victim. The forfeiture of ownership rights to the items and instruments of the crime (books and other materials) was the result of the application of a legal provision that is enforced in most legal systems and which the judge hearing the case cannot possibly disregard;

d) the representatives' claim that the value of the books and other seized materials cannot possibly be assessed is not convincing. On the contrary, there is sufficient background information to accurately assess the commercial value of the books. The documentary evidence submitted by the Commission shows that Mr. Palamara-Iribarne invested seven hundred thousand Chilean pesos to have the books printed and published (consequential damages), that the commercial price of one book was $ 3,800 (three thousand eight hundred Chilean pesos) and that the commercial value of all the seized copies of the book totaled 3,439,000 (three million four hundred and thirty-nine thousand Chilean pesos). The actual cost of the books should be deducted off such commercial value;

e) an award of non pecuniary damages on account of court proceedings that were legally instituted and carried out is not in order. There are no precedents in the Court's case-law to assess such damage; and

f) the alleged victim imprudently placed himself in a situation of economic risk by publishing a book without first obtaining the prior authorization required under legal provisions that apply to every civilian contract employee of the Chilean Navy.

Considerations of the Court

232. Based on the statements in the chapters above, the Court has found that the State is responsible for the violation of Articles 7, 8(1), 8(2), 8.(2)(b), 8(2)(c), 8(2)(d), 8(2)(f), 8(2)(g), 8(5), 13 and 25 of the Convention, all of them in conjunction with Articles 2 and 1(1) thereof, and Article 21 of the Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Humberto Antonio Palamara-Iribarne. In its case law, the Court has established that it is a principle of international law that any violation of an international obligation that has produced damage entails the obligation to repair it adequately. [FN224] The Court has based such statement on Article 63(1) of the American Convention, under which:

[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the party harmed.

Therefore, the Court will now analyze the measures required to be taken in order to repair the damage caused to Mr. Humberto Antonio Palamara-Iribarne as a result of the aforementioned violations of the Convention.

[FN224] Cf. Case of the "Mapiripán Massacre" supra note 1, para. 242; Case of Raxcacó-Reyes, supra note 1, para. 114, and Case of Gutiérrez-Soler, supra note 1, para. 61.

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233. Article 63(1) of the American Convention reflects a rule of customary law that is one of the fundamental principles of contemporary International Law on the responsibility of States. Upon the occurrence of an internationally wrongful act attributable to a State, the international liability of such State arises immediately, with the consequent duty to make reparations and to have the consequences of the violation remedied. [FN225]

[FN225] Cf. Case of the "Mapiripán Massacre" supra note 1, para. 243; Case of Raxcacó-Reyes, supra note 1, para. 114, and Case of Gutiérrez-Soler, supra note 1, para. 62.

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234. The reparation of the damage caused by the breach of an international obligation requires, whenever possible, full restitution (restitutio in integrum), which consists in restoring the previous status quo. Should this, as in the instant case, not be feasible, the international court is to determine the measures to be ordered to guarantee the exercise of the impaired rights, as well as to make reparations for the consequences of the violations, ordering compensation for the damage caused. [FN226] The responsible State may not rely on domestic law provisions to modify or fail to comply with its obligation to provide reparation, all aspects of which (scope, nature, methods and determination of the beneficiaries) are regulated by international law. [FN227]

[FN226] Cf. Case of the "Mapiripán Massacre" supra note 1, para. 244; Case of Raxcacó-Reyes, supra note 1, para. 115, and Case of Gutiérrez-Soler, supra note 1, para. 63.
[FN227] Cf. Case of the "Mapiripán Massacre" supra note 1, para. 244; Case of Raxcacó-Reyes, supra note 1, para. 115, and Case of Gutiérrez-Soler, supra note 1, para. 63.

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235. Reparations, as the word indicates, consist of measures tending to eliminate the effects of the violations committed. Their nature and amount depend on the characteristics of the violation and on both the pecuniary and non pecuniary damage caused. Reparations shall not result in the victims or their successors becoming richer or poorer. In this regard, the reparations ordered should be proportionate to the violations declared in the preceding chapters of this Judgment. [FN228]

[FN228] Cf. Case of the "Mapiripán Massacre" supra note 1, para. 245; Case of Raxcacó-Reyes, supra note 1, para. 116, and Case of Gutiérrez-Soler, supra note 1, para. 64.

A) BENEFICIARIES

236. The Court has found that the facts of the instant case amount to the violation of Articles 7, 8(1), 8(2), 8.(2)(b), 8(2)(c), 8(2)(d), 8(2)(f), 8(2)(g), 8(5), 13 and 25 of the Convention, all of them in conjunction with Articles 2 and 1(1) thereof, and Article 21 of the Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Humberto Antonio Palamara-Iribarne who, as the victim of said violations, is entitled to such reparations as the Court may order.

237. Furthermore, in deciding the reparations to be awarded to the victim, the Court will take due account of the fact that Mrs. Anne Ellen Stewart-Orlandini, the victim's wife, made monetary contributions in order to get the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services") published, secured its national and international copyright registration, and incurred other expenses as a result of her husband being prosecuted in military criminal proceedings (supra paras. 63(3), 63(5), 63(105) and 63(108). Said monetary contributions and the efforts made in connection with the book were carried out through Mrs. Stewart-Orlandini's business, which operated as a book distribution firm (supra para. 63(3)). Accordingly, it is the Court's view that, given the close connection of Mrs. Stewart-Orlandini, in her capacity as the spouse of Mr. Palamara-Iribarne, and the fact that she made expenditures to facilitate the publication of the book and to move out of their residence, Mrs. Stewart-Ortolani must be considered a beneficiary for the purposes of distribution (infra paras. 242 and 243).

B) PECUNIARY DAMAGE

238. Under this heading, the Court will assess the amount due as pecuniary damage, for which purpose it shall set a compensatory sum aimed at providing compensation for the monies and personal effects lost as a result of the violations declared to have been committed in this Judgment, [FN229] taking due account of the circumstances of the instant case, the evidence offered, the Court's case-law, and the relevant arguments submitted by the Commission, the representatives and the State.

[FN229] Cf. Case of the "Mapiripán Massacre" supra note 1, para. 265; Case of Acosta-Calderón, supra note 207, para. 157; and Case of YATAMA, supra note 5, para. 242.

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239. In the Court's view, it has been adequately proven that Mr. Palamara-Iribarne was a naval mechanic engineer and that, at the time of the facts of this case, he worked as a civilian contract employee for the Navy. His contract commenced on January 1, 1993 and was to remain in full force and effect until December 31, 1993 (supra para. 63(1)). Due to the facts of the instant case, on May 28, 1993, the Commander in Chief of the Navy passed a resolution ordering the early termination of said contract, effective on that very same date, based, inter alia, on the allegation that Mr. Palamara-Iribarne's stay was "harmful or affect[ed] discipline" in the Navy. In this regard, the Court takes due account of the fact that, while said contract was in full force and effect, Mr. Palamara-Iribarne was paid a total of three salaries, as per the certificate issued by the Navy of Chile. Considering the above and on grounds of equity, the Court believes that Mr. Palamara-Iribarne missed payment of about US$ 8,400.00 (eight thousand four hundred United States Dollars) or its equivalent in Chilean currency. Said compensation is to be paid, within a term of one year, to Mr. Palamara-Iribarne.

240. Regarding the income lost as a consequence of the deprivation of the use and enjoyment of his copyright on the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services"), which was censored, the Court agrees with the State on the fact that the body of evidence provides certain elements that the Court could use as guidance to assess an approximate commercial value for the book written by Mr. Palamara-Iribarne at the time of publication. In this regard, it has been duly demonstrated that the business of Mrs. Stewart-Orlandini did issue, on one occasion, an invoice for the sale of a copy of the book for about US$ 13 (United States dollars) and that Mr. Palamara-Iribarne was paid about US$ 7 (seven United States dollars) for another copy.

241. Furthermore, the Court takes due account of the fact that, in order to calculate potential profit, the costs of the book need to be deducted off such commercial value. It has been proven that the total cost of publication of about 1,000 copies by Imprenta Ateli (publishing company) amounted to about US$ 1,650.00 (one thousand six hundred and fifty United States dollars). The body of evidence in the instant case shows that a portion of the total price of publication of such edition by Ateli was settled by the wife of Mr. Palamara-Iribarne, through her business, by payment of about US$ 1,150 (one thousand one hundred and fifty United States dollars).

242. Given that the body of evidence does not provide a uniform value for the book that is conclusive evidence of a single price, and considering the special characteristics of copyright, the fact that the book had not yet been priced at bookstores and stores in Chile, that it is not possible to calculate the profits that Mr. Palamara-Iribarne would have potentially obtained had the book been distributed, and that the settled costs of publication were as indicated in the preceding paragraph, based on grounds of equity the Court sets a total sum of US$ 11,000.00 (eleven thousand United States dollars) or its equivalent in Chilean currency, covering both lost profits and expenses actually incurred. Such compensation is to be paid within one year to Mr. Palamara-Iribarne, who will in turn deliver to Mrs. Anne Ellen Stewart-Orlandini such portion thereof as is appropriate to cover the expenses she actually incurred.

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243. Mr. Palamara-Iribarne and Mrs. Anne Ellen Stewart-Orlandini incurred a number of expenses as a consequence of the prosecution of Mr. Palamara-Iribarne in the military criminal proceedings, as well as due to the order to abandon, within a period of about one week, the state-owned dwelling where both resided with their three children (supra para. 63(105)). Both Palamara-Iribarne and his wife and their three children were forced to move to a different city, for which purpose they had to incur moving expenses. Consequently, the Court finds it appropriate to set, on grounds of equity, the sum of US$ 4,000.00 (four thousand United States dollars) or its equivalent in Chilean currency. Such compensation is to be paid within one year to Mr. Palamara-Iribarne, who will in turn deliver to Mrs. Anne Ellen Stewart-Orlandini such portion thereof as is appropriate to compensate her for the expenses she actually incurred.

B) NON PECUNIARY DAMAGE

244. Non pecuniary damage may include distress and suffering caused directly to the victim or the victim's relatives, the impairment of an individual's core values, and changes of a non pecuniary nature in the everyday life of the victim or the victim's family. Given that it is impossible to assess the value of the non pecuniary damage sustained in a precise equivalent in money, for the purposes of full reparation to the victim, compensation may be made effective by paying an amount of money or by delivering property or services whose value may be established in money, as the Court may reasonably determine at its judicial discretion and based on equitable standards, and by public actions or works, such as the broadcasting of a message officially condemning the relevant violations of human rights and committing to making efforts intended to prevent their recurrence, aimed at acknowledging the victim's dignity. [FN230] The first aspect of the reparation of non pecuniary damage will be analyzed herein, and its second aspect will be analyzed in section (C) of this chapter.

[FN230] Cf. Case of the "Mapiripán Massacre" supra note 1, para. 245; Case of YATAMA, supra note 5, para. 243; and Case of the Indigenous Community Yakye Axa, supra note 5, para. 199.

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245. Judgments, pursuant to repeated international precedents, constitute in and of themselves a form of reparation. [FN231] However, due to the circumstances of the instant case and the non pecuniary consequences of the violations of the right to fair trial and judicial protection committed by way of the proceedings held and judgments of conviction rendered against Mr. Palamara-Iribarne by the military criminal courts on the professional, personal and family life of the victim and the exercise of his rights to freedom of thought and expression and to property, it is the Court's view that non pecuniary damage must also be redressed through compensatory damages, on grounds of equity. [FN232]

[FN231] Cf. Case of the "Mapiripán Massacre" supra note 1, para. 285; Case of Gutiérrez-Soler, supra note 1, para. 83; and Case of the Girls Yean and Bosico, supra note 2, para. 223.
[FN232] Cf. Case of the "Mapiripán Massacre" supra note 1, para. 285; Case of Gutiérrez-Soler, supra note 1, para. 83; and Case of the Girls Yean and Bosico, supra note 2, para. 223.

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246. In order to set the amount of compensation for non pecuniary damage, the Court takes due account of the fact that the violations to the freedom of thought and expression committed by the State, the deprivation of the use and enjoyment of copyrights on the book "Ética y Servicios de Inteligencia" ("Ethics and Intelligence Services"), the lack of procedural safeguards to which the victim was subjected upon being tried by military courts in the military criminal proceedings instituted against him, the various arbitrary deprivations of liberty and the lack of effective judicial protection, all hindered family relations since the facts of this case forced the victim's family to separate. As shown by the proven facts and the statements of the victim, his wife and their three children, Mr. Palamara-Iribarne was forced to move to Valparaíso in March of 1993, while his wife and children moved to a different apartment outside of the naval base in Punta Arenas, and later on to Viña del Mar. The splitting up of his family, along with the lack of

economic resources to be able to meet with them, has caused Mr. Palamara-Iribarne suffering and stress. Moreover, as he was a professional naval engineer whom the military authorities had accused of endangering national security and the interests of the Navy, and convicted of the crimes of disobedience, breach of military duties and contempt of authority, he encountered difficulties in finding a job within his professional field.

247. In this regard, it is particularly worth mentioning that, for exercising his right to freely express his ideas and opinions, Mr. Palamara-Iribarne was prosecuted by the military criminal courts and, throughout the entire proceedings instituted against him, he was not heard or dealt with by any regular judicial authority satisfying the independence and impartiality requirements. Being a civilian subjected to a jurisdiction that was not the appropriate one for being tried for the commission of crimes that affected the interests of the very institution that was in charge of trying him created in Mr. Palamara-Iribarne a sense of defenselessness and powerlessness in view of the actions of the military authorities. Mr. Palamara-Iribarne was aware of the fact that the members of the military courts were a part of the very same institution that had made the accusation for the alleged offenses, investigated, gathered and assessed evidence against him and, at the same time, prosecuted him, and that such members were subordinated, under the chain of command, to the same military authorities who had censored his book and, later on, filed charges against him for the commission of other crimes.

248. Considering the different aspects of the non pecuniary damage caused in the instant case, the Court does, on grounds of equity, set the amount of US$ 30,000.00 (thirty thousand United States dollars) or its equivalent in Chilean currency, to be paid by the State to Mr. Palamara-Iribarne as compensation for non pecuniary damage, within a period of one year.

C) OTHER FORMS OF REPARATION (MEASURES OF SATISFACTION AND NON-REPETITION GUARANTEES)

249. Under this heading, the Court will determine those measures of satisfaction aimed at redressing non pecuniary damage which are not pecuniary in nature but are public or publicly noticeable instead. [FN233]

[FN233] Cf. Case of the “Mapiripán Massacre” supra note 1, para. 294; Case of Gutiérrez-Soler, supra note 1, para. 93; and Case of Acosta-Calderón, supra note 189, para. 163.

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a) Publication of the book and delivery of copies and other materials back to Mr. Palamara-Iribarne

250. The State must allow Mr. Palamara-Iribarne to get his book published. Furthermore, the State shall, within a period of six months, deliver back to him all materials seized from him (supra para. 63(19) and 63(20)). The copies of the book and related materials were seized by the State on March 1, 1993 from the Ateli publishing company and the residence of Mr. Palamara-Iribarne; a seizure warrant was subsequently issued in the judgment of conviction for the crime of disobedience and breach of military duties (supra para. 63(66)(f)).

251. Due to the material role played by the electronic version of a given work in its update and modification by its author, the Court hereby holds that the State is required to adopt such measures as may be required so that, should there be no electronic version of the book, it will recover all information from the hard copy and digitize it into an electronic version, which is to be done within a period of six months.

b) Publication of the Judgment

252. As ordered in other cases and as a measure of satisfaction, [FN234] the State shall publish once in the Official Gazette and in another national large-circulation newspaper the proven facts chapter of this Judgment, without the relevant footnotes, and the operative paragraphs hereof. The full text of the judgment shall be published on the State's official website. Said publications shall be made within six months of notice of this Judgment.

[FN234] Cf. Case of Acosta-Calderón, supra note 189, para. 164; Case of YATAMA, supra note 5, para. 252, and Case of the Indigenous Community Yakye Axa, supra note 5, para. 226.

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c) Regarding the Judgments of conviction rendered against Palamara-Iribarne

253. The Court has found that the criminal proceedings instituted and carried out against Mr. Palamara-Iribarne before the military criminal courts did not satisfy the guarantees of competence, impartiality and independence required for the rights to be heard by a competent tribunal and due process of law to be respected in a democratic State. Given the characteristics of the instant case, the Court finds that the State is to annul in their entirety, within a period of six months, the judgments of conviction rendered against Mr. Palamara-Iribarne, namely: the judgment rendered on January 3, 1995 by the Navy Court-Martial in Case known as Rol No. 471 for the crime of contempt (supra para. 63(91)) and the judgments rendered by said Court-Martial in Case No. 464 on January 3, 1997 and by the Naval Court of Magallanes on June 10, 1996, for the crimes of disobedience and breach of military duties (supra paras. 63(66) and 63(68)). The Court finds that the State is required to adopt, within a period of six months, all such judicial, administrative and any other measures as may be required to fully annul the military criminal proceedings instituted against Mr. Palamara-Iribarne and to secure the removal of his criminal history from the relevant records.

d) Adaptation of domestic law to the international standards on contempt

254. The Court values the reform of the Criminal Code enacted through the publication of Law No. 20,048 on August 31, 2005, whereby certain provisions addressing the crime of contempt were repealed and modified. Regarding the domestic legal provisions that still regulate such crime (supra paras. 92 and 93), within a reasonable time period the State is required to adopt such measures as may be required to repeal and modify whatever legal provisions may be incompatible with the international standards on freedom of thought and expression, in a manner such that all persons are allowed to exercise democratic control over all state institutions and

officials, through the free expression of their ideas and opinions on their performance in office without fearing future retaliation.

255. For such purpose, the State is to take special consideration of the provisions of the American Convention, in line with the criteria laid down in paragraphs 79 to 93 of this Judgment.

e) Adaptation of domestic law to the international standards on military criminal jurisdiction

256. As to the need to bring its domestic law in line with the international standards on military criminal jurisdiction, it is the Court's view that, should the State consider that having military criminal courts is in fact necessary, their jurisdiction should be restricted to cases concerning crimes of a strictly military nature committed by military personnel in active service only. Therefore, through its own domestic laws, the State is required to set limits to the subject-matter and personal jurisdiction of military courts, so that under no circumstance may a civilian be subjected to the jurisdiction of military courts (supra paras. 120 to 144). The State is to implement the necessary legislative changes within a reasonable term.

257. Furthermore, within the military criminal jurisdiction, court members shall meet the competence, impartiality and independence requirements stated in paragraphs 120 to 161 of this Judgment. Moreover, the State is to guarantee due process of law before the military criminal courts and judicial protection in the context of proceedings before military authorities, as stated in paragraphs 162 to 189 of this Judgment.

258. With regard to the other claims on reparations, the Court considers that this Judgment constitutes, in and of itself, a form of reparation.

D) COSTS AND EXPENSES

259. As the Court has stated on previous occasions, costs and expenses are contemplated within the concept of reparations as enshrined in Article 63(1) of the American Convention, since the victim' efforts to obtain justice at both the domestic and international levels generate expenses that must be compensated when the State's international responsibility has been established in a condemnatory judgment. With regard to their reimbursement, the Court must prudently assess their extent, which involves the expenses incurred when acting before the authorities with 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. This assessment may be based on the principle of equity and take into account the expenses indicated by the Inter-American Commission and the representatives, provided the sum is reasonable. [FN235]

[FN235] Cf. Case of the "Mapiripán Massacre" supra note 1, para. 322; Case of Raxcacó-Reyes, supra note 1, para. 137, and Case of Gutiérrez-Soler, supra note 1, para. 116.

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260. The Court takes due account of the fact that Mr. Palamara-Iribarne incurred expenses during the prosecution of the domestic proceedings that were carried out against him, and that he acted before the Commission and this Court through CEJIL. As there is no documentary evidence proving the expenses incurred by CEJIL on account of the steps taken in representing the victim in the international proceeding, or the expenses incurred by Mr. Palamara-Iribarne before the domestic courts, this Court sets, on grounds of equity, the amount of US$ 4,000.00 (four thousand United States dollars) or its equivalent in Chilean currency to be paid to Mr. Palamara-Iribarne as costs and expenses, within a term of one year. Mr. Palamara-Iribarne shall deliver to his representatives such amount as may be appropriate based on the assistance received from them.

E) METHOD OF COMPLIANCE

261. In order to comply with this Judgment, within a term of one year of notice hereof, the State shall make payment of the compensatory amounts hereby ordered (supra paras. 239, 242, 243 and 248) and reimburse costs and expenses (supra para. 260), and, within a term of six months, it shall adopt the measures ordered in paragraphs 250 to 253 of this Judgment. As to those measures of reparation that require the State to bring its domestic law in line with the international standards set in the American Convention, the State shall have a reasonable term to comply therewith (supra paras. 254 to 257).

262. All payments to be made on account of pecuniary damage, lost profits and expenses arising on account of the violations of the victim's rights, as well as the reimbursement of the costs and expenses incurred as a result of the steps taken by the victim in the context of the domestic proceedings and by the victim's representatives in the international proceeding before the Inter-American system for the protection of human rights, shall be made to Mr. Humberto Antonio Palamara-Iribarne in the manner indicated in paragraphs 241 to 243, 248 and 260 of this Judgment.

263. Should the victim pass on, payment of said amounts shall be made to his heirs.

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

265. Should the victim not be able to receive the compensation payments within the specified one-year term due to causes attributable to the victim, the State shall deposit said amounts into an account to the beneficiary's name or draw a certificate of deposit from a reputable Chilean banking institution, in United States dollars, under the most favorable financial terms available under the law and customary banking practice in force. In the event that, after a term of ten years, compensation were still to remain unclaimed, the amount thereof plus accrued interest shall be returned to the State.

266. The amounts hereby set as compensation for pecuniary and non pecuniary damage and reimbursement of costs and expenses shall not be reduced or conditioned by currently existing or

future tax-related reasons. Consequently, they shall be delivered to the victims in full, as established in this Judgment.

267. Should the State fall into arrears, it shall pay interest on the amount owed, at the banking arrearage interest rate applicable in Chile.

268. In accordance with its constant practice, the Court reserves its jurisdictional authority to monitor full compliance with this Judgment. The instant case shall be closed once the State has fully complied with the provisions hereof. Within one year of notice of this Judgment, Chile shall provide the Court with a report on the measures taken to fully comply herewith.

XIII. OPERATIVE PARAGRAPHS

269. Now Therefore,

THE COURT

DECLARES

Unanimously that:

1. The State violated the right to freedom of thought and expression consecrated in Article 13 of the American Convention on Human Rights, to the detriment of Mr. Humberto Antonio Palamara-Iribarne, regarding the general obligations to respect and guarantee rights and freedoms, and to adopt the domestic law regulations set forth in Articles 1(1) and 2 of the above mentioned treaty, in the terms of paragraphs 67 to 95 herein.
2. The State violated the right to private property consecrated in Article 21(1) and 21(2) of the American Convention on Human Rights, to the detriment of Mr. Humberto Antonio Palamara-Iribarne, regarding the general obligation to respect and guarantee the rights set forth in Article 1(1) of the above mentioned treaty, in the terms of paragraphs 99 to 111 herein.
3. The State violated the right to fair trial consecrated in Article 8 of the American Convention on Human Rights, subparagraphs 1, 5, 2(c), 2(d), 2(f), and 2(g), to the detriment of Mr. Humberto Antonio Palamara-Iribarne, regarding the general obligations to respect and guarantee rights and freedoms and to adopt the domestic law provisions set forth in Articles 1(1) and 2 of the above mentioned treaty, in the terms of paragraphs 120 to 181 herein.
4. The State violated the right to judicial protection consecrated in Article 25 of the American Convention on Human Rights, to the detriment of Mr. Humberto Antonio Palamara-Iribarne, regarding the general obligations to respect and guarantee the rights and freedoms and to adopt the domestic law provisions set forth in Articles 1(1) and 2 of the above mentioned treaty, in the terms of paragraphs 182 to 189 herein.
5. The State violated the rights to personal freedom and fair trial consecrated in Articles 7(1), 7(2), 7(3), 7(4), 7(5), 8(2) and 8(2)(b) of the American Convention of Human Rights, to the detriment of Mr. Humberto Antonio Palamara-Iribarne, regarding the general obligations to respect and guarantee the rights and freedoms and to adopt the domestic law regulations set forth in Articles 1(1) and 2 of the above mentioned treaty, in the terms of paragraphs 193 to 228 herein.

6. The State has failed to comply with the general obligation to respect and guarantee the rights and freedoms set forth in Article 1(1) of the Convention, in the terms of paragraphs 95, 111, 144, 161, 181, 189 and 228 herein.
7. The State has failed to comply with the general obligation to adopt domestic law regulations set forth in Article 2 of the Convention, in the terms of paragraphs 95, 144, 161, 181, 189 and 228 herein.
8. This Judgment constitutes per se a form of reparation, in the terms of paragraph 258.
And Unanimously orders that:
9. The State must allow the publication of Mr. Humberto Antonio Palamara- Iribarne´s book, as well as the restitution of the material he was deprived of, in the terms of paragraphs 250 and 251 herein.
10. The State must publish, in the term of six months, in the Official Gazette and in another national release newspaper, only one time, the chapter regarding the facts proved in this Judgment, without the pertinent footnotes, as well as the operative part thereof, in the terms of paragraph 252.
11. The State must publish this Judgment entirely in the official website of the State, in the term of six months, under the terms of paragraph 252.
12. The State must leave without effect, in the term of six months and to every extent, the conviction against Mr. Humberto Antonio Palamara-Iribarne: judgment of January 3, 1995 passed by the Navy Court-Martial in Case Rol No. 471 for the crime of contempt and judgments issued by the said Court Martial in Case No. 464 of January 3, 1997, and by the Naval Court of Magallanes on June 10, 1996 for the crime of disobedience and breach of military duties, in the terms of paragraph 253 herein.
13. The State must take all the necessary measures to annul and amend, within a reasonable period of time, any domestic provisions which are incompatible with the international standards regarding freedom of thought and expression, in the terms of paragraphs 254 and 255 herein.
14. The State must align the domestic legal system to the international standards regarding criminal military jurisdiction within a reasonable period of time, so that in case it considers the existence of a military criminal jurisdiction to be necessary, this must be restricted only to crimes committed by military personnel in active service. Therefore, the State shall set limits to the material and personal jurisdiction of the military courts through its legislation, so that under no circumstances may a civilian be subjected to the jurisdiction of military criminal courts, in the terms of paragraphs 256 and 257 herein.
15. The State must guarantee due process in the military criminal jurisdiction, and judicial protection regarding the actions of military authorities, in the terms of paragraph 257 herein.
16. The State must award Mr. Humberto Antonio Palamara-Iribarne, in the term of one year and as compensation for pecuniary damage, the amounts set forth in paragraphs 239, 242 and 243 of this Judgment, in the terms of paragraphs 261 to 267 herein.
17. The State must award Mr. Humberto Antonio Palamara-Iribarne, in the term of one year and as compensation for non pecuniary damage, the amount set forth in paragraph 248 of this Judgment, in the terms of paragraphs 261 to 267 herein.
18. The State must award Mr. Humberto Antonio Palamara-Iribarne, in the term of one year, the amount set forth in paragraph 260 of this Judgment, in the terms stated therein as consideration of expenses and costs.
19. The Inter-American Court of Human Rights shall supervise the complete fulfillment of this Judgment, and shall deem this case concluded once the State has completely fulfilled what

has been ordered. Within one year from the notice of this Judgment, the State shall submit the Court a report on the measures taken to achieve its fulfillment, in the terms of paragraph 268 herein.

Judge García Ramírez and Judge Cançado Trindade have submitted their Concurring Opinions to the Court, which are attached hereto.

Sergio García-Ramírez
President

Alirio Abreu-Burelli
Oliver Jackman
Antônio A. Cançado Trindade
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 TO THE JUDGMENT ON THE CASE OF PALAMARA-IRIBARNE V. CHILE OF NOVEMBER 22, 2005

1. Freedom of expression and due process of law are the central issues of this case. The due process of law shall be the main issue of this Concurring Opinion, and it constitutes the most frequently addressed issue by the Inter-American Court jurisprudence regarding adversarial cases, and it has also been approached, directly or indirectly, in some advisory opinions. It is also present in several decisions of provisional measures. The remarkable presence of this subject matter in the actions brought before the Inter-American Court coincides with the experience of the European Court of Human Rights and the European national courts before which violations against the Rome Convention are claimed.

2. Consequently, the due process of law is a crucial issue of the international protection system of human rights. It is so due to its material characteristics and its constant presence. The frequency with which it occurs corresponds to the transcendence it has for the operation of human rights and, therefore, for the effectiveness and firmness of the state in which the rule of law prevails. It is through the due process of law that the best defense of fundamental rights is provided, when these are affected or at risk. So, all the aspects of this subject matter gain extraordinary relevance, particularly some which have been considered by the Court in the Case

of Palamara-Iribarne, which judgment follows the line set by previous decisions which have influenced the domestic legislation and jurisprudence.

3. To give credit to these statements, it should be enough to take into account – quantitatively and qualitatively – the preventions of Article 8 of the American Convention on Human Rights, grouped under the "Right to a Fair Trial" title. The matter gains even more importance –that is to say, it shows its true face and actual transcendence- if under a broader concept of due process of law, the other expressions of effective, timely and fair trial are added, which appear in several cases and which constitute many other means to preserve, protect or recover basic rights of the person.

4. This extension of the traditional concept in order to encompass all the aspects of the subject matter into one concept which corresponds to the whole phenomenon leads to invoke different means of protection incorporated in provisions of the Pact of San José, several included in Article 8, which have autonomy regarding the pact, but are linked to it through the notion of due process: Article 4 (right to request pardon, amnesty or commutation); Article 5 (exclusion of mistreatment in every case, most of which are related – of fact or of law – with the development of a criminal judicial investigation or pretrial investigation, separation of indictees, regime of minors pending trial); Article 7 (legality and legitimacy of deprivation of liberty, rights of the detainee, judicial control of confinement); 25 (judicial protection of fundamental rights), and probably also Articles 9 (conviction grounds) and 10 (damages compensation for conviction based on a procedural error). The provisions regarding deprivation or restriction of rights explicitly related to specific cases (for instance, impact on the right to property, according to Article 21, and on the rights of circulation and residence, in the terms of Article 22) should be added, as well as –of course- Article 27, regarding the prohibition to suspend certain rights and the right to fair trial, indispensable for their protection.

5. Paragraph 1 of Article 8, invoked in the Case of Palamara-Iribarne, to which Judgment I attach this Opinion, sets forth a rule of general scope in this area, to wit: every person has the right "to a hearing with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law (…)". For functional reasons I consider evident, this is a guiding guarantee or, even better, conditioning of the aggregate of guarantees set forth in Article 8, with a very broad scope in the most different aspects of the trial. The provision of the Article above gains meaning and effectiveness under the protection of the rule which establishes the right to a hearing under qualified conditions.

6. As we already know, there is not a comprehensive and unanimously accepted description of due process, with regard to which other concepts are brought to discussion –synonymic or bordering concepts, a relation that I shall not analyze now –, such as effective legal protection or fair trial. Thus, it is usual to mention a series of rights, concepts or institutions on this matter, among which the demand for a trial before a legally established jurisdictional body which additionally has the characteristics of impartiality and jurisdiction stated in the above mentioned paragraph 1 of Article 1 of the American Convention on Human Rights is invariably present.

7. It is possible – and even necessary, in my opinion- to establish a certain division between this guarantee on the court, which I have called "guiding" or "conditioning", and the remaining

guarantees of that same Article 8, paragraphs 1 and 2, as well as those of other provisions of the American Convention. In order for these to operate, the complete and strict observance of the above mentioned guarantee is required; that is why it is considered to be guiding and conditioning. So, it seems reasonable to award to the existence of the judge or court the characteristic of the requirement of due process, and not only that of a component or element of the latter. In fact, it is precedent to the other rights which may be characterized in this last manner.

8. If we talk about proper defense, right to remain silent, remedy for the complete revision of the judgment, etc., it is supposed that all that is relevant precisely when a set of procedural acts is developed before the judicial authority of paragraph 1, which in this way constitutes the institutional or organic context, or the hypothesis or grounds for the presentation of the other rights. Of course, this does not prevent the demand for the observance of the due process guarantees when other authorities –not strictly judicial or jurisdictional- fulfill functions out of which the acknowledgement or disregard of rights or obligations shall be derived. In this case there is an extension of the concept and scope of due process of law, so as to address with realism and efficiency the protection purposes it pursuits.

9. Article 8(1) sets forth the characteristics of the settler (in the material sense, not only in the formal sense) summoned to decide an adversarial case and before whom the proceedings subjected to the guarantees system specified in the same provision must be developed:

a) legally established, that is, his powers shall derive from the law which creates him or, in any case, from a law preventing them, considering the genuine scope of the expression “law”, a topic which has also been addressed by the Inter-American Court jurisprudence;
b) preexistent to the facts on which it is to pass judgment, an ex ante characteristic which often constitutes a precious guarantee of legal certainty: it is set in the axis of criminal repression itself, regarding the principle of nullum crimen nulla poena sine lege praevia: substantive, organic and procedural, and it excludes ad hoc courts and the trials by commission;
c) independent, that is, autonomous in every aspect of its jurisdictional performance, with the powers to decide without the influence of other bodies of the State –or any external instance-, the actions brought before it, autonomy which must exist not only in the provision governing formal judicial performance (Constitution and secondary law), but also the reality in which the settler acts;
d) impartial, that is, alien to the interest and the right of those who appear before him, free from “prejudice,” fit to constitute –formally and materially- that “third subject, set above the parties,” and therefore summoned to decide with total objectivity; and
e) competent, that is, vested (by the preexistent law which institutes him) with the capacity to solve (in an independent and unbiased manner) the actions brought before him according to the system which distributes among the jurisdictional bodies the power of jurisdiction and decision corresponding to the State and that the latter exercises through the jurisdictional function.

10. Knowing that the court must internally have said capacity characteristics, it is necessary to move forward on external information – already implied in the capacity features– of its performance. It is in that aspect that we find the connections between jurisdiction and equality

between the parties. Finally, it is attempted to project another radical principle of the democratic system over the exercise of the judicial function: that equality between the parties which claims for the same trial pattern, without detriment to the singularities derived from the action's subject matter and from the inclusion of equaling elements when the controversy is between individuals with a natural "inequality of arms," as I have expressed in precedent Opinions, in those cases where the actual inequality fights against formal equality.

11. After a long phase of material and procedural privileges, the equality which disregards special jurisdictions and trials made its way: the State jurisdiction is exercised with utmost objectivity, identical for any individuals, without any considerations but the weight of the reason with which the claims are sustained. In this long jurisdictional unity process –without this preventing, as I have already said, the existence of special material jurisdictions by virtue of the nature of the substantive relations- some special jurisdictional systems have remained, to a greater or smaller extent. The so called military, war or martial jurisdiction appears among them.

12. At present, there is a stronger tendency to the reduction and even the disappearance of the military trials. Several reasons related to the characteristics of the natural settler and to the principle of equality between the parties explain so, reasons to which I have already made reference. Those who support the pertinence of this jurisdiction, and at the same time the need to observe the principle of equality between the parties to its greatest extent –and before its typical instruments: mainly, the jurisdictional instruments – state that the military jurisdiction may and must be applied –preferably during war times- in the scope of two determining and unavoidable aspects:

a) the subjective aspect, that is, in fact, a professional piece of information: regarding military personnel in active service, which excludes those of the "reserve", the "retired" and other categories of individuals who belonged to the armed forces as active members but who are no longer in that situation; and
b) the material aspect, related to the nature of the action's subject matter: it has to deal with matters directly and immediately connected with the military performance, with the arms function, the military discipline.

In some legislations where the restrictive tendency of the military jurisdiction has progressed much more, one requirement is added to the circumstances required for that jurisdiction to act: war time or situation. The fact that only under this circumstance is the military justice to operate, reinforces the functional character of the Military Law and the respective jurisdiction, and it evidently constitutes an eloquent fact regarding its essentially exceptional character.

13. As it can be observed, the first requirement leaves civilians –the non-military, in the sense I have just described- out of the military jurisdiction, completely and without exceptions. The second requirement excludes any of the causes which have no direct and immediate relation, by their own nature, with the military function. That is why "function" crimes are mentioned in this case, which are not updated because of the fact that the "officer" is a military member, although, as I have already said, that condition is also required. Evidently, this reference to the "function" is related to the nature of the activities, duties, performance qualified as military, of which the legislation has to be informed, and not only with certain formal qualification in

provisions or authorities decisions. In other words, it is necessary to bear in mind –in this aspect as in many others- the nature of the legal relations, materially considered.

14. As in this case we are before a special justice, subtracted to the ordinary jurisdiction which governs all people, and therefore, we are before an exception or suspension of the equality system, when it comes to determine who are justifiable and which is the subject matter of the military justice it is necessary to act with a restrictive criterion, as it is the case of every hypothesis of exception. This implies the prevalence and preference of the equality, and not of the exception. Such is the only possible interpretation rule from the human rights standpoint and, by the way, also the only one consistent with the historical development of the subject.

15. In the case sub judice, the accused in the internal criminal action and victim in the Inter-American proceeding was no longer a member of the armed forces: he had no military functions under his responsibility. He was a civilian to the service of the armed forces, bound by a private legal instrument, the contract, and responsible for tasks which had no relation whatsoever with the military function, although they had a certain connection to it in the broad sense, but that does not determine the application of the military criminal law and the intervention of the military justice. Should there be any doubts –which I do not have— as to the civil or military nature of the defendant, they should be clarified through the interpretation criterion I mentioned above: the most compatible with the complete application of the principle of equality between the parties and, therefore, the most favorable to the individual.

16. Thus, the Court has been able to bring its jurisprudence constante with regard to the military jurisdiction: only for military officers in active service and regarding issues strictly related to the military function, firm jurisprudence which constitutes a valuable contribution by the Inter-American Court to the solution of issues which have often appeared in our region. Should this be the case, the application of the military jurisdiction on a civilian and regarding issues which go beyond the military function turns out to be incompatible with the Convention, particularly with regard to Article 8: the judge or court is not naturally competent, without discussing here if he or it gathers the other characteristics required by the same provision, which has been a matter of discussion in the case of trials followed by other types of crimes which affect or are supposed to affect the public or national security, with regard to which the court and the defendant are –or seem to be-, each in a different trench, members of the fighting forces.

17. I return to the remarks with which I began this Opinion, so as to come to a conclusion therefrom and from the development of the precedent paragraphs. If the existence of a competent judge or court is a requirement of the proceeding and not a mere element thereof, along with those of fair trial, and if in certain hypothesis there was no such a competent judge or court, the acts performed before someone who does not bear this condition can not be considered as procedural acts in the strict sense, nor can the aggregate be qualified as true proceeding, nor its conclusion as authentic judgment.

18. Should it be the case, the Court judging violations against human rights may restrict itself to determine the capacity of the acting tribunal for the reasons described above, without being necessary for it to qualify –more precisely, to disqualify- each act performed in the alleged proceeding, taking into account the specific deficiencies those acts present: defense, legal

representation, evidence, remedies, etc. Even if these proceedings had taken place with stricter attachment to the American Convention, they would not be considered as true procedural acts, nor the final decision would gain the force of authentic judgment, because both would lack the requirement –the grounds- on which the proceeding is built: a competent court, that is to say, a body vested with the indispensable jurisdictional powers to take up a certain case regarding both subject matter and in personam jurisdiction – or the profession of the person-, and the rule of equality between the parties, which only admits limited and rigorous exceptions.

19. As I have pointed out, freedom of expression constitutes another of the relevant issues of this case, according to the claim that gave rise to the proceeding before the Inter-American Court. This court did not perform a detailed and thorough revision of the characteristics of the freedom of expression with regard to the publication of the questioned book. It did not seem necessary to do so, as the information handled by the defendant came from open sources and had been of public domain. This circumstance made it unnecessary to analyze the issue any further. Had the situation been different, a situation which had led to deepest reflections, it would have been necessary to analyze how the Convention operates with regard to the State obligations and the freedoms and duties of the individual – including the duty of confidentiality and the consequences of failing to comply with it-, the rights and restrictions of Article 13 and the provisions included in Articles 29 and 32(2) of the Convention. This analysis shall be addressed some other time in the future.

20. The Court presented some considerations regarding the crime of contempt in the context of freedom of expression. I agree with the Court observations with regard to the risks that the typical formulation of contempt may entail to the freedom of expression. In my opinion added to other judgments of the Court – for instance, case of Herrera Ulloa—I expressed my points of view, which have not changed, on the exercise of criticism with regard to civil servants and the less strict requirement regarding the freedom of expression, if compared with the one which may appear when individuals are involved. What I want to enhance now is that this topic must be analyzed under the light –or the shadow- of the specific criminal formulas, that is to say, in front of “concretions” and not “abstractions.”

21. In other words, what interests and concerns is not the existence of a certain legal classification called “contempt” – a nomen juris which may loose several contents, from acceptable to inadmissible-, but the way in which that criminal concept influences the freedom of analysis and expression, and also the possibility – which was not unnoticed by the Court – that undue repression is exercised through a different criminal definition, as may be the case of the threats. It is also necessary to notice that criticism legalization does not mean to set aside the old guarantee –included in several Constitutions- which protects the members of Parliament and the judges against malicious counterclaims which attack their own capacity of expression or decision, also important for the democratic system.

Sergio García-Ramírez
Judge

Pablo Saavedra-Alessandri
Secretary

CONCURRING OPINION OF JUDGE A. A. CANÇADO TRINDADE

1. I vote in favor of this Judgment, which has just been adopted by the Inter-American Court of Human Rights in the case of Palamara-Iribarne v. Chile, with which I mostly agree. I would like to add some brief remarks and opinions in this Concurring Opinion, as grounds for my personal position on the matter addressed by the Court in this Judgment, particularly regarding a central aspect in which I have centered my attention for years while in the Court seat.

2. The Court has correctly determined the alignment of the domestic law of the respondent Government with the rules and regulations of the American Convention on Human Rights as a means of reparation (specifically, as satisfaction and guarantee of non-repetition). In a sharp paragraph of this Judgment, the Court stated that

"As to the need to bring its domestic laws in line with the international standards on military criminal jurisdiction, it is the Court's view that, should the State consider that having military criminal courts is in fact necessary, [their jurisdiction should be restricted] to cases concerning crimes of a strictly military nature committed by military personnel in active service only. Therefore, through its own domestic laws, the State is required to set limits to the subject-matter and personal jurisdiction of military courts, so that under no circumstance may a civilian be subjected to the jurisdiction of military criminal courts (...)" (para. 256).

3. I have been stating for years within this Court, my understanding in the sense of the broad scope of the general duties of protection set forth in Articles 1(1) and 2 of the American Convention. [FN1] In my opinion, the American Convention is not infringed just because one of the rights it protects has been violated; it is also violated whenever one of the general duties therein set forth is not complied with (Articles 1(1) and 2)). Thus, the general duty of Article 1(1) of the Convention – to respect and make others respect, without any discrimination, the rights the Convention protects – is much more than a mere "accessory" to the provisions regarding conventionally consecrated rights, taken one by one, individually; it is a general duty imposed to the States Parties and which encompasses the aggregate of rights protected by the Convention.

[FN1] In my interpretation of Article 1(1) – as well as of Article 2 – of the Convention, which maximizes human rights protection under the Convention, I have been insisting, within the seat of this Court, from my Dissenting Opinion in the case of Caballero-Delgado and Santana v. Colombia (reparations, Judgment of January 29, 1997).

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4. Its continued violation may entail additional violations, added to the original ones. Article 1(1) consequently has a broad scope. It refers to a permanent duty of the States, the non-fulfillment of which may cause new victims, generating per se additional violations, without it being necessary to relate them to the rights originally injured.

5. Fortunately, the Court has taken my interpretation of the broad scope of Articles 1(1) and 2 of the Convention from the case of Suárez-Rosero v. Ecuador (Judgment of November 12, 1997), with immediate positive results, and in other subsequent Judgments (those of the cases of Castillo-Petruzzi et al v. Perú, of May 30, 1999; Baena-Ricardo et al v. Panamá, of February 2, 2001; of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, of June 21, 2002; case of the "Five Pensioners" v. Peru, of February 28, 2003; as I have just remembered in my recent Concurring Opinions, in the cases of the Girls Yean and Bosico v. Dominican Republic (paras. 15-21, Judgment of September 8, 2005), and the case of Mapiripán Massacre v. Colombia (paras. 3-5, Judgment of September 15, 2005).

6. In this sense, the general duties of Articles 1(1) and 2 of the American Convention, - according to the jurisprudence constante, which admits no regressions, - have a broad and autonomous sense, and the determination of their non-fulfillment is not conditioned by instances of specific separate violations of one right or another consecrated in the American Convention. Thus, the violation of the general duties of Articles 1(1) and 2 of the American Convention, rather than being subsumed in separate violations of specific rights under the Convention, is added to those violations.

7. For years I have fought within this Court in the conceptual construction of the erga omnes obligations of protection under the American Convention. [FN2] In my Concurring Opinions of Judgments on the merits of January 24, 1998, para. 28, and on the reparations of January 22, 1999, para. 40, in the case of Blake v. Guatemala, I had already made a warning with regard to the urging need to promote the doctrinal and jurisprudential development of the legal system of the erga omnes protection obligations of the human being rights; also, in my Concurring Opinion in the case of Las Palmeras (Judgment on the preliminary objections of February 4, 2000) regarding Colombia, I stated that the correct understanding of the general obligation of guarantee of the rights consecrated in the American Convention set forth in its Article 1(1) can contribute to the execution of the purpose of the development of the erga omnes protection obligations (paras. 2 and 6-7).

[FN2] It is not my purpose here to repeat thoroughly the concepts I have already developed regarding the matter in the past, particularly in my Concurrent Opinions in the Decisions of Protection Provisional Measures adopted by the Court in the Matter of the Peace Community of San José de Apartadó regarding Colombia (of June 18, 2002 and March 15, 2005), Matter of the Communities of Jiguamiandó and Curbaradó (of March 06, 2003 and March 15, 2005), Matter of Pueblo Indígena de Kankuamo (of July 5, 2004), of Pueblo Indígena de Sarayaku (of July 06, 2004 and June 17, 2005), and Urso Branco Prison (of July 07, 2004), and Matter of the Mendoza Prisons (of June 18, 2005), - as well as in my Concurring Opinion of the Case of the "Mapiripán Massacre" (Judgment of September 15, 2005).

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8. With regard to that aspect, the Inter-American Court has also enhanced, in its recent Judgment in the case of the Mapiripán Massacre (of September 15, 2005), the broad scope of the general duty of guarantee under Article 1(1) of the American Convention. True to its most lucid jurisprudence, and to an integrating (and not separating) jurisprudence of the American

Convention rules and regulations, the Inter-American Court, in its judgment on this case of Palamara-Iribarne v. Chile, has related inter se the violations set forth by the American Convention, the right to freedom of thought and expression (Article 13), the right to private property (Article 21(1) and (2)), the rights to fair trial (Article 8) and to judicial protection (Article 25), the right to personal freedom (Article 7), also in their relation – each one of them [FN3] - with Articles 1(1) and 2 of the Convention (operative paragraphs 1-5).

[FN3] With the only exception of violation of the right to private property, related only to Article 1(1) (and not to Article 2) of the Convention.

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9. However, apart from this, the Court has added to those violations, in operative paragraphs 6 and 7 of this Judgment, the violation per se of the general duties respectively consecrated in Article 1(1) (duty to respect and guarantee the respect of all the rights protected) and in Article 2 (duty to align the domestic legal system with the rules and regulations of the Convention). This is quite significant, as it recognizes the autonomous violation of Articles 1(1) and (2) of the Convention, regardless of the violations of substantive rights in relation with said general duties, under the circumstances of the cas d'espèce.

10. In effect, we do not have to disregard, in this case of Palamara-Iribarne, that Chile, due to the existence itself – at the time the facts took place- of Law No. 12,297 on the “State Security” of the Code of Military Justice, of the provisions regarding the crime of contempt of the Criminal Code and the Code of Military Justice- was already infringing the general duty of alignment of its domestic legal system with the American Convention (Article 2), taking into account that these rules were patently incompatible with said treaty, and it did not take positive protection measures (Article 1).

11. As I expressed in my Dissenting Opinion in the case of El Amparo (Judgment Interpretation, 1997) [FN4], with regard to Venezuela,

"A State may (...) have its international responsibility compromised, in my opinion, by the mere approval and enactment of a law not in agreement with its international conventional obligations of protection, or for the lack of alignment of the necessary legislation to allow the fulfillment of said obligations. The time to give precision to the scope of legislative obligations of the States Parties in human rights treaties has come. The tempus commisi delicti is, in my opinion, that of the approval and enactment of a law which, per se, by its mere existence and applicability, affects the protected human rights (...), without it being necessary to wait for the subsequent application of this law, generating additional damage.
The State under issue must immediately remedy such a situation; failure to do so may configure a “continued situation” of human rights violation (...). It is perfectly possible to conceive a “legislative situation” contrary to the international obligations of a certain State (for instance, keeping a legislation contrary to the conventional obligations of protection of human rights, or not adopting the required legislation to give effect to such obligations within the domestic legal system). In this case, the tempus commisi delicti would be extended so as to cover the whole period during which the national laws remained in conflict with the conventional obligations of

protection, thus entailing the additional obligation to repair the subsequent damage caused by that "continued situation" during the whole period under analysis" (paras. 22-23).

[FN4] IACHR, Decision of April 16, 1997, C Series, No. 46.

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12. Also, in my Dissenting Opinion (para. 21) in the case of Caballero Delgado and Santana v. Colombia (Reparations, 1997), [FN5] in which I stressed the impossible dissociation between the two general obligations consecrated in the American Convention, to wit, the obligation to respect and guarantee the protected rights (Article 1(1)) and the obligation to align the domestic legal system with international protection rules and regulations (Article 2) (paras. 6 and 9). Then, in Case of "The Last Temptation of Christ" (Olmedo-Bustos et al. v. Chile, Judgment of February 5, 2001), [FN6] following the same line of reasoning, I stated that

"the international responsibility of a State Party in a human rights treaty arises the moment an illegal international fact –act or omission- attributable to that State and in violation of the treaty under issue takes place (tempus commisi delicti); (...) the effectiveness of a domestic law provision, which per se entails a legal situation which affects the rights protected by a human rights treaty, constitutes, within the context of a specific case, a continued violation of said treaty; (...) the amendments in the domestic legal system of a State Party necessary to its harmonization with the rules and regulations of a human rights treaty may constitute, in the context of a specific case, a way of non-pecuniary reparation under said treaty" (...) (para. 40).

[FN5] IACHR, Judgment of January 29, 1997, C Series, No. 31.
[FN6] IACHR, Judgment of February 05, 2001, C Series, No. 73.

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13. In the cas d'espèce, the legislation applied to Mr. Palamara-Iribarne, although amended to a certain extent, as recognized in this Judgment (paras. 91-93, 130 and 263), retains rules or provisions which are contrary to the general obligations set forth in Articles 1(1) and 2 of the American Convention, reason for which additional violations are generated per se, regardless of those related to the rights declared violated herein.

14. The combination of the above mentioned rules, still in force, entails as main and most serious consequence, that in Chile civilians may be subjected, in certain circumstances, to the military criminal jurisdiction, placing them, when that occurs, in a particular condition of vulnerability and non-protection, thus violating the general duty to respect and make others respect, without any discrimination, the rights protected in the American Convention (Article 1(1)).

15. It is evident that the amendment of the Criminal Code by the Chilean State regarding contempt and the criminal procedural amendment it carried out are particularly important in order to fulfill the above mentioned general duties under the Convention. However, as pointed out in this Judgment, those provisions are not enough to achieve the protection of the rights

consecrated in the American Convention because, on the one hand, the State still enforces domestic legislation provisions which contemplate the crime of contempt or criminal concepts which could lead to broad interpretations that would allow that the above considered conducts - such as contempt - to be penalized (paras. 91-93 and 254), and, on the other hand, it has excluded the military jurisdiction from the above mentioned criminal procedural amendment (paras. 122 and 256-257).

16. Consequently, as long as the State does not completely align the domestic law provisions with the international standards of the American Convention and stops fulfilling the general duty to respect and guarantee the respect for the conventionally protected rights, it shall be committing additional violations of Articles 1(1) and 2 of the Convention. Thus, in this case of Palamara-Iribarne, the Chilean State has violated and continues to violate the general obligations set forth in Articles 1(1) and 2 of the American Convention, - as they were in force at the time the facts of this case took place and at present domestic law provisions which are not in agreement with the international standards of protection of human rights set forth in those Articles of the American Convention are still in force.

17. However, considering its valuable and respectable legal tradition, I cherish hope that Chile, the land of Alejandro Álvarez, shall manage to correct this situation soon, thus faithfully fulfilling this Judgment of the Inter-American Court -as it exemplarily has with the previous Judgment of this Court in the case of "The Last Temptation of Christ" (2001).

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary