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Title/Style of Cause: Yvon Neptune v. Haiti
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Decided by: President: Cecilia Medina Quiroga;
Vice President: Diego Garcia-Sayan;
Judges: Sergio Garcia Ramirez; Manuel E. Ventura Robles; Leonardo A. Franco; Margarette May Macaulay; Rhadys Abreu Blondet
Dated: 6 May 2008
Citation: Neptune v. Haiti, Judgement (IACtHR, 6 May 2008)
Represented by: APPLICANT: Brian Concannon Jr.
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In the case of Yvon Neptune,

the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”), pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) and Articles 29, 31, 53(2), 55, 56 and 58 of the Court’s Rules of Procedure (hereinafter “the Rules of Procedure”), delivers this judgment.

I. INTRODUCTION OF THE CASE AND SUBJECT OF THE DISPUTE

1. On December 14, 2006, in accordance with the provisions of Articles 50 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) submitted an application to the Court against the Republic of Haiti (hereinafter “the State” or “Haiti”) in relation to case no. 12,514. The application originated from petition No. 445/05, submitted to the Secretariat of the Commission on April 20, 2005, by Brian Concannon Jr., Mario Joseph and the Hastings Human Rights Project for Haiti. On October 12, 2005, the Commission adopted Admissibility Report No. 64/05, and on July 20, 2006 it adopted Report on Merits No. 62/06 pursuant to the terms of Article 50 of the Convention; the latter included specific recommendations to the State. [FN1] On December 14, 2006, the Commission decided, in accordance with Articles 51(1) of the Convention and 44 of its Rules of Procedure, to submit this case to the jurisdiction of the Court, [FN2] since “the State had not responded [to its report] nor adopted its recommendations.”

[FN1] In the Merits Report, the Commission concluded that Haiti “is responsible for failing to guarantee Mr. Neptune’s right to respect for his physical, mental and moral integrity under Article 5(1) of the Convention and his right under Article 5(4) to be segregated from convicted

prisoners, in conjunction with Article 1(1) of the Convention, based upon his detention conditions and treatment when he was held in the National Penitentiary[;...] for violating Mr. Neptune's rights under Article 7(4) of the Convention to be promptly notified of the charge or charges against him, Article 7(5) of the Convention to be brought promptly before a judge or other officer authorized by law to exercise judicial power, and Article 7(6) of the Convention to recourse to a competent court to decide without delay on the lawfulness of his arrest or detention, together with his right to judicial protection under Article 25 of the Convention, in conjunction with Article 1(1) of the Convention, based upon the delay in bringing Mr. Neptune before a competent court or tribunal following his arrest[;...] for violating Mr. Neptune's rights under Article 8(2)(b) of the Convention to prior notification in detail of the charges against him and Article 8(2)(c) of the Convention to adequate time and means for the preparation of his defense, as well as his right to freedom from ex post facto laws under Article 9 of the Convention, in conjunction with Article 1(1) of the Convention, based upon deficiencies in the criminal charges ordered against him." The Commission also concluded that Haiti "is not responsible for violating Mr. Neptune's right under Article 8 of the Convention to be tried within a reasonable time." Lastly, the Commission made certain recommendations to the State. Cf. Report No. 62/06, Case 12,514, Merits, Yvon Neptune, Haiti, July 20, 2006, para. 95 (evidence file, volume I, appendix 1, folio 312).

[FN2] The Commission appointed Clare Kamau Roberts, member of the Commission, and Santiago A. Canton, Executive Secretary, as delegates, and Ariel E. Dulitzky, then Deputy Executive Secretary, Elizabeth Abi-Mershed, current Deputy Executive Secretary, and the lawyers Ismene Zarifis and Juan Pablo Albán Alencastro, as legal advisers.

2. The Commission considered that "a Court judgment in this case [the first contentious case filed before the Court against Haiti,] would not only seek to redress the violations against Mr. Neptune, [...] but also has the potential to improve the situation of all detainees in Haiti suffering from similar circumstances of arbitrary arrest, prolonged pretrial detention, due process irregularities and poor prison conditions, through the implementation of the necessary and appropriate reforms to the Haitian judicial system." The Commission requested the Court to declare the State responsible for the violation of Articles 5(1), 5(2) and 5(4) (Right to Humane Treatment), 7(4), 7(5) and 7(6) (Right to Personal Liberty), 8(1), 8(2)(b) and 8(2)(c) (Right to a Fair Trial), 9 (Freedom from Ex Post Facto Laws) and 25(1) (Right to Judicial Protection) of the American Convention, all "in conjunction with" Article 1(1) (Obligation to Respect Rights) thereof, to the detriment of Mr. Yvon Neptune, alleged victim in this case. As a result of the above, the Commission requested the Court to order the State to adopt certain measures of reparation.

3. The representative of the alleged victim, Brian Concannon Jr., from the Institute for Justice and Democracy in Haiti (hereinafter "the representative"), did not submit a brief with pleadings, motions and evidence to the Court in accordance with Article 23 of the Rules of Procedure (infra para. 12). Subsequently, he stated that he endorsed the facts and points of law established by the Commission in this case and, in his final written arguments, he asked the Court to declare the State responsible for violating Articles 5(1), 5(2), 5(4), 7(4), 7(6), 8(2)(b), 8(2)(c) and 25 of the Convention, in relation to Article 1 thereof, and to order certain measures of reparation

4. The State did not submit a brief answering the application or final arguments. Then, in a brief of October 3, 2007 (*infra* para. 13), it presented its version of some of the facts related to the instant case and indicated that “the constitutional Government of Haiti [...] undertakes that, within a reasonable time, Mr. Neptune will appear before the High Court of Justice [(Haute Cour de Justice)) (hereinafter “High Court of Justice”)], in accordance with the terms of the 1987 Constitution.” The State also referred to a fact that occurred after the application had been submitted: an April 13, 2007, decision of the Gonaïves Court of Appeal in the criminal proceedings against Mr. Neptune and others. The said domestic court heard an appeal filed against the decision of the Court of First Instance of St. Marc accusing Mr. Neptune of a series of criminal acts. In its ruling, the Gonaïves Court of Appeal considered that, since Mr. Neptune was Prime Minister of the Government when the acts for which he was charged had been committed, he should have been prosecuted according to the provisions of Articles 185 to 190 of the Constitution of the Republic of Haiti, which establish a trial of political nature in the Senate sitting as the High Court of Justice. Hence, the Court of Appeal declared itself “incompetent *ratione personae*” in this matter.

5. The facts of this case occurred in a context of political polarization, public insecurity and institutional deficiencies in Haiti, aggravated, among other factors, by the crisis caused by the local and legislative elections of May 21, 2000. Mr. Neptune was elected to the Haitian Senate in these elections. [FN3] This crisis was intensified by the lack of consensus concerning possible solutions to correct the electoral irregularities denounced by both the opposition and the international community. [FN4] Subsequently, Mr. Jean-Bertrand Aristide was elected President in the presidential and senatorial elections of November 26, 2000, in which the opposition did not participate. [FN5] Following one mandate as President of the Senate, Mr. Neptune resigned from this position in March 2002 because he had been appointed Prime Minister of Haiti in the Government of then President Jean-Bertrand Aristide. [FN6]

[FN3] Cf. Application submitted by the Commission, December 14, 2006, para. 22 (merits file, Volume I, folio 106).

[FN4] Cf. United Nations, Economic and Social Council. Report on the situation of human rights in Haiti prepared by Mr. Adama Dieng, the independent expert, E/CN.4/2001/106, 30 January 2001, para. 5.

[FN5] Cf. United Nations, Economic and Social Council. Report on the situation of human rights in Haiti prepared by Mr. Adama Dieng, the independent expert, *supra* note 4, para. 9-13.

[FN6] Cf. Statement made before notary public (affidavit) by Yvon Neptune on September 20, 2007, para. 1 (evidence file, volume III, folio 448).

6. In the following months numerous acts of political violence, protest and repression took place. Violent confrontations occurred throughout the country between protestors opposed to the Government, demanding the resignation of then President Aristide, and sectors of the National Police of Haiti. [FN7]

[FN7] Cf. United Nations, Economic and Social Council. Situation of human rights in Haiti: report prepared by the independent expert, Louis Joinet, E/CN.4/2004/108, 21 January 2004, paras. 47-53; and United Nations, Security Council. Report of the Secretary General on Haiti, S/2004/300, 16 April 2004, para. 8.

7. The political crisis intensified towards the end of 2003 and the beginning of 2004. In February 2004, civil disorder broke out in the town of Gonaïves, in the north of Haiti and, in the following days, the conflict spread to other cities. [FN8]

[FN8] Cf. United Nations, Security Council. Report of the Secretary General on Haiti, supra note 7, para. 9.

8. In its application, the Inter-American Commission described the events that took place in Saint Marc – a city located to the south of Gonaïves – as follows: [FN9]

On 7 February 2004, after days of fighting, the armed, anti-government group RAMICOS took control of the police station in the city of St. Marc located approximately 100 kilometers north of Port-au-Prince on the road from Gonaïves to the capital [...]. On 9 February 2004, the St. Marc police, aided by a pro-government force named Bale Wouze, regained control of the St. Marc police station [...].

On 9 February 2004, Mr. Neptune made a widely-publicized visit to St. Marc by helicopter to encourage the police to re-establish order in the city and called upon the police to defend the city from gangs that were marching through St. Marc south to the capital, Port-au-Prince [...].

Two days after Mr. Neptune's visit, Haitian police, together with civilians reported to be Bale Wouze members, entered the La Scierie neighborhood of St. Marc, which was considered a RAMICOS stronghold. According to reports, several people were killed and many were wounded in the ensuing confrontation between government forces and RAMICOS. In addition, members of both the police and RAMICOS are alleged to have burned and ransacked houses and cars in St. Marc in retaliation. According to witnesses, some people were deliberately burned in their homes. [...]. [FN10]

[FN9] Cf. Application submitted by the Commission, supra note 3, paras. 25 to 28 (folios 107 and 108).

[FN10] Application submitted by the Commission, supra note 3, paras. 25 to 27 (folio 107).

9. With the armed opposition threatening to enter the capital, Jean-Bertrand Aristide abandoned the country on February 29, 2004, in a United States Government plane that transported him to the Central African Republic. Following this, the President of the Supreme Court at that time, Boniface Alexandre, was sworn in as acting President under the 1987 Haitian Constitution in force at the time. A "transition Government" was established with Gérard Latortue as Prime Minister. [FN11] On February 29, 2004, at the request of the acting President,

the United Nations Security Council adopted Resolution 1529, [FN12] establishing a Multinational Interim Force, which was deployed in Haiti immediately. [FN13] Subsequently, in its Resolution 1542 of April 30, 2004, the Security Council decided to establish the United Nations Stabilization Mission in Haiti (hereinafter “MINUSTAH”) and ordered that the authority of the Multinational Interim Force be transferred to MINUSTAH on June 1, 2004. The latter’s mandate included ensuring a secure and stable environment within which the political and constitutional process in Haiti could take place, and monitoring the human rights situation in the country. [FN14] This mission was subsequently extended several times. [FN15] The mandate of the acting President, Boniface Alexandre, ended in May 2006. [FN16] The return to constitutional rule was enshrined, inter alia, by the election of René Prével as President of the Republic. [FN17]

[FN11] Cf. United Nations, Security Council. Report of the Secretary General on Haiti supra note 7, paras. 9-10.

[FN12] Cf. United Nations Security Council, Resolution 1529 (2004), adopted on 29 February 2004.

[FN13] Cf. United Nations, Security Council. Report of the Secretary General on Haiti, supra note 7, para. 9.

[FN14] Cf. United Nations, Security Council, Resolution 1542 (2004), adopted on 30 April 2004.

[FN15] Cf. Inter-American Commission on Human Rights, Haiti: Failed Justice or the Rule of Law? Challenges ahead for Haiti and the International Community, OAS/Ser/L/V/II.123, October 26, 2005, para. 21.

[FN16] Cf. Report of the Secretary General on the United Nations Stabilization Mission in Haiti (MINUSTAH), S/2007/503, 22 August 2007, para. 2.

[FN17] Cf. United Nations, Economic and Social Council. Situation of human rights in Haiti: report prepared by the independent expert, Louis Joinet, A/HRC/4/3, 24 February 2007, para. 5.

10. With specific reference to Mr. Neptune, his mandate ended on March 12, 2004. [FN18] In this regard, the Commission indicated in its application that “the petitioners also claimed [...] that, shortly thereafter, threats made against Mr. Neptune’s life forced him into hiding.” [FN19] In March 2004, an investigating magistrate of the Court of First Instance of St. Marc issued an arrest warrant against Mr. Neptune, “accused of having ordered and participated in the massacre of the population of La Scierie (Saint-Marc) and in the arson of several houses in February 2004.” [FN20] Two days later, the Government of Haiti issued an order banning Mr. Neptune from leaving the country. Mr. Neptune was detained on June 27, 2004, when he turned himself into the police. [FN21] According to the Commission, at the time of his arrest, he was not informed of the reasons for his detention, nor was he informed of his rights. [FN22] The application also refers, inter alia, to the fact that the State did not bring Mr. Neptune promptly before a judge or other judicial official authorized by law to exercise judicial power; he was not granted recourse to a competent court to decide on the lawfulness of his arrest; his physical, mental and moral integrity was not guaranteed, nor his right to be separated from convicted criminals, given the conditions of his detention and the treatment he received. Mr. Neptune remained detained until July 27, 2006, first in the National Penitentiary of Port-au-Prince and

later in the Annex to the National Penitentiary, from which he was released on humanitarian grounds. [FN23] The criminal proceedings against him remained open.

[FN18] Cf. Statement made before notary public (affidavit) by Yvon Neptune, supra note 6, para. 1 (folio 405).

[FN19] Cf. Application submitted by the Commission, supra note 3, para. 29 (folio 108).

[FN20] Cf. Arrest warrant issued by the investigating magistrate of the Court of First Instance of St. Marc on March 25, 2004 (evidence file, Volume II, folio 254).

[FN21] Cf. Application submitted by the Commission, supra note 3, para. 30 (folio 108) and statement made before notary public (affidavit) by Yvon Neptune, supra note 6, para. 30 (folio 456).

[FN22] Cf. Application submitted by the Commission, supra note 3, para. 87 (folio 123), and final written arguments presented by the Commission, October 2, 2007, para. 36 (merits file, volume II, folio 307).

[FN23] Cf. Application submitted by the Commission, supra note 3, paras. 31, 42, 48 and 49 (folios 109, 111 and 112).

II. JURISDICTION

11. The Court has jurisdiction to hear this case in the terms of Article 62(3) of the American Convention, because Haiti has been a State Party to the American Convention since September 27, 1977, and accepted the compulsory jurisdiction of the Court on March 20, 1998.

III. PROCEEDINGS BEFORE THE COURT

On February 5, 2007, the Secretariat of the Court (hereinafter “the Secretariat”), following a preliminary examination of the application by the then President of the Court, and in accordance with Articles 34 and 35(1) of the Rules of Procedure, notified the said application together with its attachments to the State [FN24] and to the representative [FN25] and indicated that, as established in Article 20(2) and 20(3) of the Rules of Procedure, the working language in this case would be French. On June 29, 2007, the Secretariat reminded the State and the representative that it had not received the brief with pleadings, motions and evidence or the brief answering the application, within the respective time frame. On July 26, 2007, the Secretariat informed the parties that, after examining the application submitted by the Commission, the Court in plenary session had considered that, in the circumstances of the case, it was not necessary to convene a public hearing. On August 9, 2007, the representative offered his apologies for failing to present a brief with pleadings, motions and evidence; he stated that he endorsed the facts and points of law established by the Commission in this case; he requested authorization “to submit additional information”; he asked that he be allowed to present “additional written requests” if the State did not present its answer to the application, and that a hearing be convened. On August 22, 2007, the Secretariat advised the representative that the time for submitting the said brief had expired; that, if he had additional information, he should submit this with his final arguments, and that the Court had already decided not to convene a hearing. Subsequently, the President ordered that the testimony of Yvon Neptune and Ronald

Saint-Jean, together with the expert opinion of Serge Henri Vieux, and the informative statement of Mario Joseph, all of them offered by the Commission, be received via affidavits. [FN26] The parties were given the opportunity to submit their observations on these documents. In a brief received by the Secretariat of the Court on September 4, 2007, the State indicated, inter alia, that “if the case file were reopened, the Government of the Republic would present its observations pursuant to Article 38 of the Rules of Procedure.” The Secretariat informed the State that, as had been mentioned previously, the proceedings in the instant case had continued even though, up until that time, the representative and the State had not submitted their respective briefs; that, in his Order, the President had indicated that, once the statements had been presented, the case file would be ready to consider the possibility of delivering judgment and recalled the time frame for submitting final arguments. The requested statements were presented. On September 30 and October 12, 2007, the representative and the Commission, respectively, submitted their final written arguments.

[FN24] When the said application was notified to the State, the latter was advised that it had the right to answer the application in writing and, if applicable, to submit its observations on the brief with pleadings, motions and evidence presented by the alleged victim or his representative, within a non-extendible period of four months from its notification, pursuant to Article 38 of the Rules of Procedure. In addition, the State was asked, pursuant to Article 35(3) of the Court’s Rules of Procedure, to appoint an Agent to represent it before the Court within 30 days and, should it consider it necessary, a Deputy Agent also. Lastly, the State was informed of the possibility of appointing an ad hoc judge, within 30 days of notification of the application, to take part in the consideration of the case. The State did not appoint agents or an ad hoc judge (merits file, volume I, folio 145).

[FN25] When the said application was notified to the representative, he was advised of his right to submit his brief with pleadings, motions and evidence within a non-extendible period of two months from notification of the application (merits file, volume I, folio 150).

[FN26] Cf. Order of the President of the Inter-American Court of Human Rights of August 30, 2007.

13. On October 3, 2007, the State presented a brief in which it made several assertions (supra para. 10 and infra para. 20). On October 29, 2007, pursuant to Article 45(2) of the Rules of Procedure, the parties were asked to submit useful information. [FN27] On November 5, 2007, the representative submitted some of the requested information and, one week later, on the instructions of the President, the Secretariat asked the parties to forward the remaining information.

[FN27] The parties were asked to submit, by November 5, 2007, at the latest and pursuant to Article 45(2) of the Court’s Rules of Procedure, the following information to be considered as helpful evidence:

- the current status of any judicial or administrative investigation or any other proceedings of any nature filed in relation to the facts of the instant case;

- the nature, procedure and scope of a possible hearing by the High Court of Justice, as well as the latter's nature and composition, the applicable laws and the possible sanctions; whether such a hearing has already been initiated or is about to begin in relation to Mr. Neptune, and its possible effects in relation to the criminal proceedings against him;
 - the text of the April 13, 2007, decision of the Gonaïves Court of Appeal.
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14. As previously indicated (*supra* para. 4), since the Court had been informed of a supervening fact – the decision of the Gonaïves Court of Appeal – and the State's intention to submit Mr. Neptune to trial before the High Court of Justice, the Court issued an Order on November 29, 2007, in which it decided to conduct an *ex officio* procedure for taking evidence, by holding a hearing, in order to receive Mr. Neptune's testimony, as well as any information the parties could provide on several aspects in dispute, [FN28] and asked for documentation and information to be forwarded. [FN29] At the request of the representative, on January 23, 2008, the then President decided to summon Mario Joseph to declare at this hearing to provide information. On January 30, 2008, the Court held the said public hearing. [FN30] As ordered by the President of the Court (hereinafter "the President") during the public hearing, on February 15, 2008, the Secretariat asked the parties to answer some questions in accordance with Article 45(1) of the Rules of Procedure. [FN31] The replies of the State, the representative, and the Commission were received on February 22, 2008. [FN32] On March 14, 2008, on the instructions of the President, the Secretariat informed the parties that, in application of Article 45(1) of the Rules of Procedure, it would incorporate certain probative elements into the case file [FN33] with regard to which the parties were allowed to submit their observations.

[FN28] The purpose of the hearing was to receive precise, detailed information about the following:

- (a) The content, effects and supposedly final nature of a April 13, 2007, decision of the Gonaïves Court of Appeal, issued in the context of the criminal proceedings against Mr. Neptune; his current juridical situation, as well as any fact that has occurred in these proceedings following the submission of the application by the Inter-American Commission;
- (b) The juridical nature, procedure and possible consequences of an eventual proceeding before the High Court of Justice, the applicable laws and the possible sanctions; whether such a hearing had already been initiated or was about to begin in relation to Mr. Neptune, and its possible effects *vis-à-vis* the criminal proceedings against him; and
- (c) The current status of any judicial or administrative investigation or any other proceedings of any nature filed in relation to the facts of the instant case.

[FN29] The parties were asked to forward, by January 10, 2008, at the latest, copies of the documents relating to the domestic investigation and judicial proceedings; in particular the complete official text of the judgment of April 13, 2007, of the Gonaïves Court of Appeal; copies of the laws and regulations applied and applicable to this case; in particular the Code of Criminal Investigation (Code d'instruction criminelle), the Penal Code and the Constitution of the Republic of Haiti. Within the allotted time, the representatives forward the unofficial text of the Court of Appeal's ruling and the Commission forwarded the requested copies of the Codes and the Constitution. On January 29, 2008, the State submitted a copy of the official manuscript text of the decision of the Gonaïves Court of Appeal of April 13, 2007, together with the text of the

closing order (Ordonnance de clôture) of September 14, 2005, issued by the Court of First Instance of Saint-Marc.

[FN30] The following persons were present at the hearing: Yvon Neptune, alleged victim and deponent; Mario Joseph, informative deponent; for the Inter-American Commission: Elizabeth Abi-Mershed, Deputy Executive Secretary, and Juan Pablo Alban, adviser; for the representatives of the alleged victim: Brian Concannon Jr. and Pooja Bhatia, assistant; and for the State, Fortuné Dorléan, Director of Legal Affairs of the Ministry of Foreign Affairs of Haiti, and Jean-Frédérique Benèche, member of the Cabinet of the Minister of Justice of Haiti.

[FN31] The questions were as follows:

- If a court decision has not been notified, can it be considered notified under Haitian law if one of the parties uses it or relies on it during legal proceedings?
- Based on the testimony provided by the State during the hearing, what guarantees can the State give to ensure that there will be no criminal or other proceedings against Mr. Neptune?

[FN32] Since the representative submitted an affidavit by Mario Joseph, answering the said questions, on the instructions of the President, the State and the Commission were advised that they could submit observations by March 7, 2008, at the latest. The State presented observations and, after an extension had been granted, the Commission indicated that it had no observations to make in this regard.

[FN33] The parties were advised that, by March 26, 2007, at the latest, they should forward any observations they deemed pertinent concerning the incorporation into the file of the following documents: Inter-American Commission on Human Rights, Annual Report 2006, OAS/Ser.L/V/II.127, March 3, 2007, Chapter IV – Haiti; Inter-American Commission on Human Rights, Annual Report 2005, OAS/Ser.L/V/II.124, February 27, 2006, Chapter IV – Haiti; United Nations, Economic and Social Council. Report on the situation of human rights in Haiti presented by the independent expert, Adama Dieng, E/CN.4/2001/106, 30 January 2001; United Nations, Economic and Social Council. Report on the situation of human rights in Haiti presented by the independent expert, Louis Joinet, E/CN.4/2004/108, 21 January 2004; United Nations, Economic and Social Council. Report on the situation of human rights in Haiti presented by the independent expert, Louis Joinet. E/CN.4/2006/115, 26 January 2006; United Nations, General Assembly, Economic and Social Council. Report on the situation of human rights in Haiti presented by the independent expert, Louis Joinet. A/HRC/4/3, 2 February 2007; United Nations, Security Council. Report of the Secretary General on the Haiti, S/2004/300, 16 April 2004; United Nations, Security Council, Resolution 1529 (2004), adopted on 29 February 2004; United Nations, Security Council, Resolution 1542 (2004), adopted on 30 April 2004. Within the allotted time, the representative and the Commission stated that they had no observations to make.

15. The Court has assessed the arguments and evidence submitted by the Inter-American Commission during the proceedings, as well as the arguments and statements provided by the representative and the State; it has convened a hearing and has requested the parties to submit useful information and documentation. On this basis, the Court will now deliver judgment.

IV. PRIOR CONSIDERATIONS

16. The Court deems it pertinent to refer to the applicability of Article 38(2) of the Rules of Procedure in the circumstances of this case, which was invoked by the Commission in its final written arguments. This provision establishes:

In its answer, the respondent must state whether it accepts the facts and claims or whether it contradicts them, and the Court may consider accepted those facts that have not been expressly denied and the claims that have not been expressly contested.

17. In previous cases, the Court has considered that when the State does not answer the application specifically, the facts about which it is silent are presumed to be true, provided that conclusions may be drawn from the existing evidence that are consistent with them. [FN34] Furthermore, in other cases the Court has observed:

[...] that procedural inactivity does not give rise to a specific sanction against the parties, nor does it affect the development of the proceeding; but, it may eventually prejudice them, if they take the decision not to exercise fully their right to defense or to execute the appropriate procedural actions that are in their interests, in accordance with the *audi alteram partem* principle. [...] International case law has recognized that the absence of one of the parties at any stage of the case does not affect the validity of the judgment. [FN35]

[FN34] Cf. *Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, para. 138; *Caesar v. Trinidad and Tobago*. Merits, reparations and costs. Judgment of March 11, 2005. Series C No. 123, para. 37, and *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*. Merits, reparations and costs. Judgment of June 21, 2002. Series C No. 94, para. 67. [FN35] Cf. *The Constitutional Court v. Perú*. Merits, reparations and costs. Judgment of January 31, 2001. Series C No. 71, paras. 60 and 62; *Case of Caesar supra note 34*, para. 37; and *Ivcher Bronstein v. Perú*. Merits, reparations and costs. Judgment of February 6, 2001. Series C No. 74, paras. 80 and 82. See also, *inter alia*, *International Court of Justice Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, para. 27; *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, I.C.J. Reports 1974, para. 17; *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, I.C.J. Reports 1974, para. 15; *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment of 19 December 1978, I.C.J. Reports 1978, para. 15; and *United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran)*, Judgment of 24 May 1980, I.C.J. Reports 1980, para. 33.

18. It should be noted that, according to the American Convention and the Court's Rules of Procedure, the application provides the factual framework of the proceedings [FN36] and serves as a frame for the legal claims and the claims for reparations. During the proceedings of a contentious case before the Court, the timely procedural moment for the defendant State to accept or contest the central subject of the litigation is in its answer to the Commission's application. Likewise, the procedural moment that allows the alleged victims, their family members or representatives to fully exercise their right of *locus standi in judicio*, as well as the corresponding faculty to complement the factual framework of the application, is the brief with

pleadings, motions and evidence referred to in Article 23 of the Rules of Procedure. To the contrary, lack of procedural activity or the late incorporation of the alleged victims and their representatives or of the State into the proceedings results in the impossibility for them to complement or question, as applicable, the facts and claims contained in the application.

[FN36] Cf. The “Mapiripán Massacre” v. Colombia. Merits, reparations and costs. Judgment of September 15, 2005. Series C No. 134, para. 59; the Saramaka People. v. Suriname. Preliminary objections, merits, reparations and costs. Judgment of November 28, 2007. Series C No. 172, and Chaparro Álvarez and Lapo Iñiguez v. Ecuador. Preliminary objection, merits, reparations and costs. Judgment of November 21, 2007. Series C No. 170, para. 28. See also, the “Five Pensioners” v. Perú. Merits, reparations and costs. Judgment of February 28, 2003. Series C No. 98, para. 153.

19. According to Article 38(2) of the Rules of Procedure, the Court is empowered to consider accepted the facts that have not been expressly denied and the claims that have not been expressly contested. Evidently, the Court is not obliged to do this in all cases in which a similar situation occurs. Thus, in exercise of its inherent powers to determine the scope of its own competence (*compétence de la compétence*) [FN37] in such circumstances, the Court determines the need to verify the facts as they were presented by the parties in each case or by taking into account other elements from the body of evidence.

[FN37] Cf. Ivcher Bronstein v. Perú. Competence. Judgment of September 24, 1999. Series C No. 54, para. 32, See also, Nogueira de Carvalho et al. v. Brazil. Preliminary objections and merits. Judgment of November 28, 2006. Series C No. 161, para. 43, and Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs. Judgment of September 26, 2006. Series C No. 154, para. 45.

20. In the instant case, in which the State did not answer the application, the Court considers that the State has accepted the facts set out in this document. Subsequently, in its brief of October 3, 2007 (*supra* paras. 4 and 14), the State submitted a version of the facts that, in general, coincided with most of the facts set out in the Commission’s application. As previously indicated, the State also referred to a supervening fact that would be relevant for Mr. Neptune and for the consideration of the case before this Court (*supra* paras. 4 and 14 and *infra* paras. 56 to 66). However, in this brief, Haiti did not refer directly to the legal claims and the claims for reparations submitted by the Inter-American Commission and by Mr. Neptune’s representative.

21. Hence, in exercise of its attributes as an international organ for the protection of human rights, the Court finds it necessary to deliver a judgment in which it determines the facts and all the elements concerning the merits of the matter, together with the corresponding consequences, as the delivery of the judgment helps to avoid the repetition of similar facts and to satisfy the purposes of the Inter-American human rights jurisdiction. [FN38]

[FN38] Cf. *Myrna Mack Chang v. Guatemala*. Merits, reparations and costs. Judgment of November 25, 2003. Series C No. 101, para. 116; *Albán Cornejo et al. v. Ecuador*. Merits, reparations and costs. Judgment of November 22, 2007. Series C No. 171, para. 25, and *Chaparro Álvarez and Lapo Iñiguez*, supra note 36, para. 34.

V. EVIDENCE

22. Based on the provisions of Articles 44 and 45 of the Rules of Procedure, as well as the Court's case law concerning evidence and its assessment, [FN39] the Court will proceed to examine and assess the probative elements forwarded by the parties at different procedural opportunities or as evidence requested on the instructions of the President, together with the testimonies, the informative statements, and the expert opinions rendered before the Court or by means of an affidavit. To this end, the Court shall abide by the principles of sound criticism, within the corresponding legal framework. [FN40]

[FN39] Cf. *Baena Ricardo et al. v. Panama*. Merits, reparations and costs. Judgment of February 2, 2001. Series C No. 72, para. 68; the "White Van" (*Paniagua Morales et al.*) v. Guatemala. Reparations and costs. Judgment of May 25, 2001. Series C No. 76, para. 50, and *Bámaca Velásquez v. Guatemala*. Reparations and costs. Judgment of February 22, 2002. Series C No. 91, para. 15. See also the *Miguel Castro Castro Prison v. Perú*. Merits, reparations and costs. Judgment of November 25, 2006. Series C No. 160, paras. 183 and 184; *Almonacid Arellano et al. v. Chile*, supra note 37, paras. 67, 68 and 69, and *Servellón García et al. v. Honduras*. Reparations and costs. Judgment of September 21, 2006. Series C No. 152, paras. 34 and 35.

[FN40] Cf. The "White Van" (*Paniagua Morales et al.*) v. Guatemala. Merits. Judgment of March 8, 1998. Series C No. 37, para. 76; *The Saramaka People*, supra note 36, para. 63, and *Albán Cornejo et al.*, supra note 38, para. 26.

A) DOCUMENTARY, TESTIMONIAL AND EXPERT EVIDENCE

23. The Court underscores that, when notifying the application, on the instructions of the President and taking into account the Commission's request in paragraph 157 of the application, the State was asked that, when submitting its answer to the application and observations on the representative's brief with pleadings, motions and evidence, it forward complete and legible copies of the documentation relating to the investigations and to the domestic proceedings filed in connection with this case, as well as a copy of the applicable laws and regulations. The State did not present most of this information. The Court recalls that the parties must submit to the Court all the evidence they are requested to provide, so that it is has as much relevant information as possible to deliberate on the facts and motivate its decisions.

24. The witnesses proposed by the Commission, Yvon Neptune and Ronald Saint-Jean, testified about the detention conditions that Mr. Neptune allegedly endured. Mr. Neptune also

testified about the criminal proceedings filed against him and their effects, as well as about his hunger strikes while he was detained.

25. In addition, the statement made by Serge Henry Vieux, the expert witness proposed by the Commission, was provided. He made a general statement about the Haitian judicial system and criminal proceedings, particularly during the period when the facts of the instant case occurred, as well as about the judicial proceedings filed against Mr. Neptune.

26. The informative statement of Mr. Mario Joseph, proposed by the Commission, was also provided concerning the criminal proceedings filed against Mr. Neptune and the prison conditions that he supposedly experienced.

27. During the public hearing, convened and held as a procedure for taking evidence, the Court heard the testimony of Mr. Neptune, and the informative statement of Mario Joseph; they both testified on the facts regarding which the hearing had been convened (*supra* para. 14).

28. Also, in application of Article 45(1) of the Rules of Procedure, specific documents were incorporated into the proceedings as probative elements and, pursuant to Article 45(2), the parties were asked to present helpful information (*supra* paras. 13 and 14).

B) ASSESSMENT OF THE EVIDENCE

29. In this case, as in others, [FN41] in application of Articles 44, 45(1) and 45(2) of the Rules of Procedure, the Court accepts the probative value of those documents and clarifications submitted by the parties at the opportune time, or as helpful evidence, that have not been contested or disputed, and the authenticity of which has not been questioned.

[FN41] Cf. *Loayza Tamayo v. Perú. Reparations and costs. Judgment of November 27, 1998. Series C No. 42, para. 53; The Saramaka People, supra note 36, para. 66, and Albán Cornejo et al., supra note 38, para. 29.*

30. It is worth emphasizing that the evidence for many of the facts contained in the Commission's application is based on press Articles and information on Internet sites. In its case law, the Court has assessed the probative value of press Articles only when they refer to well-know public facts or statements made by State officials, or when they corroborate aspects of the case [FN42] that have been established by other means. [FN43] This was the situation as regards the probative value of the information offered by the Commission to substantiate certain facts. Consequently, in the instant case, the Court will consider such facts proved insofar as they have not been contested by the State (*supra* paras. 16 to 21).

[FN42] Cf. *Velásquez Rodríguez. Merits, supra note 34, para. 146; The "White Van" (Paniagua Morales et al.). Merits, supra note 40, para. 75; La Cantuta v. Perú. Merits, reparations and costs.*

Judgment of November 29, 2006. Series C No. 162, para. 65; Nogueira de Carvalho et al., supra note 37, para. 65

[FN43] Cf. La Rochela Massacre v. Colombia. Merits, reparations and costs. Judgment of May 11, 2007. Series C No. 163, para. 59; The Saramaka People, supra note 36, para. 67, and Albán Cornejo et al., supra note 38, para. 35.

31. Regarding the testimonies, declarations, the informative statement, and the expert opinion provided, the Court considers them pertinent to the extent that they relate to the purpose defined by the President in the Order requiring them (supra para. 12).

32. Mario Joseph, who has been Mr. Neptune's lawyer in the domestic proceedings and before the inter-American system, declared by means of an affidavit and during the hearing. The Court assesses his statements only to the extent they provide information and relate to the purpose defined by the President, and together with the body of evidence, since, in his capacity as Mr. Neptune's lawyer, he was unable to testify as a witness or an expert witness. This decided by the President and the Court in their orders of August 30 and November 29, 2007, respectively.

33. The Court considers that the testimony of alleged victims or their family members cannot be assessed alone since they have a direct interest in the case; [FN44] hence the testimony provided by Yvon Neptune will be assessed together with the body of evidence in the proceedings.

[FN44] Cf. Loayza Tamayo v. Perú. Merits. Judgment of September 17, 1997. Series C No. 33, para. 43; The Saramaka People, supra note 36, para. 68, and Albán Cornejo et al., supra note 38, para. 33.

34. Regarding the documents incorporated into the proceedings as probative elements in application of Article 45(1) of the Rules of Procedure (supra paras. 14 and 28), the Court has understood that, in the case of documents issued by international organizations such as the Inter-American Commission or the United Nations and its agencies, or documents of local or international organizations and public institutions that can be found by the Court and the other parties on the Internet or by other means, the Court reserves the authority to incorporate them into the case file, if it considers them useful to decide a specific case, unless one of the parties contests them. This is a power of the Court, but not an obligation, because it is the parties who should provide the Court with all the documents they wish to contribute as evidence. Since the parties have been granted the possibility of contesting this type of document in the instant case, and the Court has had access to them and has considered them pertinent, they are accepted and incorporated into the file. [FN45]

[FN45] Cf. Escué Zapata v. Colombia. Merits, reparations and costs. Judgment of July 4, 2007. Series C No. 165, para. 26.

35. Having examined the probative elements in the file of the instant case, together with the statements made by the parties, as well as the elements indicated in the chapter on Prior Considerations (supra paras. 16-21), the Court will now examine the alleged violations in this case, based on the facts that have already been acknowledged and those that will be proved, [FN46] included in the corresponding chapters.

[FN46] Hereafter, this judgment contains facts that the Court considers proved based on the State's silence, with the pertinent clarifications regarding the facts presented in the application. Some of these facts have been completed with other probative elements, in which case the respective footnotes are included.

VI. INTERNATIONAL RESPONSIBILITY OF THE STATE

36. Bearing in mind the context in which the facts of this case occurred (supra paras. 5 to 10), as well as some of the declarations made by the State, before examining the alleged violations of specific provisions of the American Convention, the Court finds it pertinent to include this chapter to offer some clarifications regarding the structure and scope of the State's international responsibility under the Convention, which is what the Court will establish in this case in the exercise of its contentious jurisdiction.

37. First, the Court considers it fundamental to reiterate, as it has when deciding other cases, that it is not a criminal court in which the criminal responsibility of an individual can be examined. [FN47] This is applicable in the instant case, which does not relate to Mr. Neptune's innocence or guilt concerning the facts of which he is accused in the criminal proceedings in Haiti, but rather to whether the actions taken in the proceedings against him are consistent with the American Convention. The organs of the inter-American human rights system do not function as a court of appeal or review of the decisions or judgments issued in domestic proceedings, because its function is to determine the compatibility of such proceedings with the American Convention. [FN48] The Court limits itself to the foregoing in this judgment. Under the Convention, the State's international responsibility arises when it violates the general obligations of an erga omnes nature to respect and ensure respect for – guarantee – the norms of protection, and to ensure the effectiveness of the rights embodied therein, in all circumstances and with regard to all persons, as established in Articles 1(1) and 2 of this instrument. Special duties arise from these general obligations, which can be determined in function of the particular needs for protection of the subject of law, either based on his personal situation or owing to the specific situation in which he finds himself. [FN49] Thus, any violation of the human rights established in the Convention that can be attributed, according to the rules of international law, to an act or omission of any public authority of a State Party, constitutes a fact that can be attributed to the State, which involves its international responsibility in the terms of the Convention and according to general international law. [FN50]

[FN47] Cf. Case of Velásquez Rodríguez. Merits, *supra* note 34, para. 134, and Suárez Rosero v. Ecuador. Merits. Judgment of November 12, 1997. Series C No. 35, para. 37. See also, Boyce et al. v. Barbados. Preliminary objection, merits, reparations and costs. Judgment of November 20, 2007. Series C No. 169, footnote 37, and Zambrano Vélez et al. v. Ecuador. Merits, reparations and costs. Judgment of July 4, 2007. Series C No. 166, para. 93.

[FN48] Cf. Castillo Petruzzi et al. v. Perú. Preliminary objections. Judgment of September 4, 1998. Series C No. 41, para. 83; Case of Zambrano Vélez et al., *supra* note 47, para. 93, and Fermín Ramírez v. Guatemala. Merits, reparations and costs. Judgment of June 20, 2005. Series C No. 126, para. 62.

[FN49] Cf. The “Mapiripán Massacre” Merits, reparations and costs, *supra* note 36, para. 111; case of the La Rochela Massacre, *supra* note 43, para. 67, and Ximenes Lopes v. Brazil. Merits, reparations and costs. Judgment of July 4, 2006. Series C No. 149, para. 85. See also, Velásquez Rodríguez v. Honduras. Merits, *supra* note 34, paras. 164-168, and Juridical Status and Rights of Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 140.

[FN50] Cf. Velásquez Rodríguez. Merits, *supra* note 34, paras. 164, 169 and 170; Case of Albán Cornejo et al., *supra* note 38, para. 60, and Cantoral Huamaní and García Santa Cruz v. Perú. Preliminary objection, merits, reparations and costs. Judgment of July 10, 2007. Series C No. 167, para. 79.

38. In these terms, the Court underscores the obligation of the States to protect all persons by preventing, avoiding, prosecuting and punishing offenses; by investigating and, if applicable, punishing those responsible for them, and by keeping the public order, particularly in the case of the serious facts that may have occurred in February 2004 in La Scierie, St. Marc, Haiti, which gave rise to the criminal proceedings in which Mr. Neptune was charged. However, it is opportune to recall that, irrespective of the nature or gravity of the crime prosecuted, the investigation of the facts and the eventual trial of specific persons should be carried out within the limits and according to the procedures that permit public safety to be preserved, with full respect for the human rights. [FN51]

[FN51] Cf. similarly, Velásquez Rodríguez. Merits, *supra* note 34, para. 154; Castillo Petruzzi et al. v. Perú. Merits, reparations and costs. Judgment of May 30, 1999. Series C No. 52, para. 89; Zambrano Vélez et al., *supra* note 47, para. 96; and The Miguel Castro Castro Prison, *supra* note 39, para. 240.

39. On the other hand, during the public hearing held by the Court in the instant case, the State’s representative declared, referring to the deficiencies in the system of administration of justice in that country, that: “given that since 1987 [Haiti is undergoing] a phase of transition, that judicial body was never established [sic]. To date, there has never been a law to implement the Articles of the Constitution [that refer to the High Court of Justice].” In particular, the State and the representative have indicated that the facts of this case occurred under the interim Government mentioned above and, when referring to the actual juridical situation of Mr.

Neptune, the State indicated that the current Government has no intention whatsoever of prosecuting him (*infra* para. 73).

40. It is the Court's case law that the conditions that a country is undergoing, no matter how difficult they may be, do not constitute grounds for the States Parties to the American Convention to be released from complying with the obligations established therein. [FN52] In this regard, what the Court has established in other cases is applicable:

According to the principle of the continuity of the State in international law, responsibility exists irrespective of changes of Government over time and, specifically, from the time of the act that generates responsibility to the time when the act is declared unlawful. The foregoing is also valid in the area of human rights, although, from an ethical or political point of view, the attitude of the new Government is much more respectful of those rights than that of the Government in power when the violations occurred. [FN53]

[FN52] Cf. *Bámaca Velásquez v. Guatemala*. Merits. Judgment of November 25, 2000. Series C No. 70, para. 207; *Zambrano Vélez et al. v. Ecuador*, *supra* note 47, para. 96, and *Goiburú et al. v. Paraguay*. Merits, reparations and costs. Judgment of September 22, 2006. Series C No. 153, para. 89.

[FN53] Cf. *Velásquez Rodríguez v. Honduras*. Merits, *supra* note 34, para. 184, and *Godínez Cruz v. Honduras*. Merits. Judgment January 20, 1989. Series C No. 5, para. 194.

41. Consequently, in relation to the State's affirmations, the principles of identity or continuity of the State are fundamental when determining its responsibility, irrespective of the political moment in the country when the alleged violations of the provisions of the American Convention occurred.

42. Moreover, the State's representatives also mentioned during the hearing that, in its current Constitution, Haiti has adopted an institutional structure that includes a separation between the powers of the State (judicial, executive and legislative branches). Based on this and on the autonomy and independence of each power, the State's representatives argued that "it is not the fault of the Government" if the decision of the Gonaïves Court of Appeal has not yet been notified, because the notification of a judicial decision "is not a State responsibility; it is not a responsibility of the Executive, it is a responsibility of a member of the Judiciary." [FN54]

[FN54] Cf. *Intervention of the State of Haiti during the public hearing held at the Court on January 30, 2008*. ("When a legal decision is issued, it is not the Government, it is not the Minister of Justice, who is responsible for notifying it or ensuring that it is notified; this is the responsibility of the Government Commissioner (Commissaire du Gouvernement); it is not a responsibility of the State, it is not a responsibility of the Executive, it is a responsibility of a member of the Judiciary.")

43. In addition to what the Court has established regarding the origin of the State's international responsibility, when referring to the principle of the unity of the State in this regard, the Court has established that this responsibility arises from "acts or omissions of any power or organ of the State, irrespective of its rank, that violate the American Convention," [FN55] and it is generated immediately with the international unlawful act attributed to the State, because it is a principle of international law that the State responds for the acts or omissions of its agents in their official capacity, even if they act above and beyond the limits of their competence. [FN56]

[FN55] Cf. *The Constitutional Court v. Perú*. Merits, reparations and costs, supra note 35, para. 109; *Case of Cantoral Huamaní and García Santa Cruz*, supra note 50, para. 79, and *La Rochela Massacre v. Colombia*, supra note 43, para. 68.

[FN56] Cf. *Velásquez Rodríguez v. Honduras*. Merits, supra note 34, para. 173; *The "White Van" (Paniagua Morales et al.)*. Merits, supra note 40, para. 91; *Cantoral Huamaní and García Santa Cruz v. Perú*, supra note 50, para. 79, and *Zambrano Vélez et al. v. Ecuador*, supra note 47, para. 104.

44. Having established the above, in the following chapters the Court will examine the arguments of the Commission and the representative concerning violations of the Convention, as well as eventual reparations.

VII. ARTICLES 8(1) AND 25 (RIGHT TO A FAIR TRIAL AND JUDICIAL PROTECTION) [FN57] IN RELATION TO ARTICLE 1(1) OF THE AMERICAN CONVENTION [FN58]

[FN57] Article 8(1) (Right to a Fair Trial)

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.

Article 25 (Judicial Protection)

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 States Parties undertake:

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;

to develop the possibilities of judicial remedy; and

to ensure that the competent authorities shall enforce such remedies when granted.

[FN58] Article 1 (Obligation to Respect Rights)

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex,

language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. [...]

45. The Court will determine whether the guarantees of due process and real access to justice were observed in the criminal proceedings filed against Mr. Neptune, as required by Articles 8 and 25 of the Convention in relation to Article 1(1) of this instrument.

46. The Commission alleges that the State violated Mr. Neptune's rights to the protection of an impartial trial established in Articles 8(1) and 8(2) of the Convention, "including [Mr.] Neptune's rights under Article 8(2)(b) to prior notification in detail of the charges against him, and Article 8(2)(c) to adequate time and means for the preparation of his defense." [FN59] Based on the Court's case law in *Fermín Ramírez v. Guatemala* and that of the European Court of Human Rights in *Pélissier and Sassi v. France*, the Commission maintained "that the factual and legal basis of the charges against Mr. Neptune should have been clear from the [arrest] warrant in accordance with the need for clear, detailed and precise notification mandated by the right to a fair trial generally, as well as the specific requirements of Article 8(b) and (c) of the Convention." [FN60] In particular, according to the Commission, the *Ordonnance de cloture* or the order closing the investigation (hereinafter "the closing order") of September 14, 2005, "issued against Mr. Neptune raised serious concerns regarding his ability to defend himself effectively against the charges." [FN61] The Commission affirmed that "the terms [of the accusations] are not sufficiently detailed when defining the circumstances of the crimes with which Mr. Neptune is charged [...]. The closing order indicates that Mr. Neptune participated as an accomplice in specific and serious crimes; [... however,] dates, times and other particulars for each of these crimes are not specified, nor are the identities of the individuals who are alleged to have directly perpetrated these crimes; [... and it] does not indicate with sufficient clarity the facts or circumstances that allegedly link Mr. Neptune to these specific incidents so as to lead to his individual criminal responsibility." [FN62] The Commission also contended that "[t]he mental and physical elements necessary to establish Mr. Neptune's criminal responsibility based upon a complicity theory remain entirely unclear." [FN63]

[FN59] Cf. Application submitted by the Commission, *supra* note 3, para. 117 (folio 130).

[FN60] Cf. Application submitted by the Commission, *supra* note 3, para. 110 (folio 128).

[FN61] Cf. Application submitted by the Commission, *supra* note 3, para. 111 (folio 128).

[FN62] Cf. Application submitted by the Commission, *supra* note 3, para. 112 (folios 128 and 129).

[FN63] Application submitted by the Commission, *supra* note 3, para. 113 (folio 129).

47. The Commission also alleged that the closing order should have decided that Mr. Neptune be submitted to a trial by jury, because, according to Article 50 of the 1987 Haitian Constitution, "crimes of blood" (*délits de sang*) must be heard by a judge and a jury and the alleged crimes of murder of which he was accused are included in this category. In the Commission's opinion, a court without a jury did not represent a "competent tribunal, previously established by Haitian law, as stipulated in Article 8(1) of the Convention." [FN64]

[FN64] Cf. Final written arguments presented by the Commission, *supra* note 22, para. 54 (folio 312).

48. The representative alleged belatedly that the State's refusal to refer Mr. Neptune's case to a natural judge for eleven months, the failure to respect the legal time frames and procedures during the investigation of the case, and the eleven months taken to issue a decision concerning the appeal, violated Mr. Neptune's right to a fair trial. [FN65]

[FN65] Cf. Final written arguments presented by the representative, September 30, 2007, para. 79 (merits file, volume II, folio 286).

49. The Court notes that the Commission lodged the application in this case when the criminal proceedings filed against Mr. Neptune were still open. In particular, even though the Commission was aware of the fact that supervened the filing of the application (*supra* paras. 4, 14 and 20), it maintained its position regarding the alleged violations of Articles 8 and 25 of the Convention. Taking into consideration what was said in the chapters on the Introduction of the Case and the Proceedings before the Court concerning this supervening fact, the Court will now examine the facts of this case in light of the State's obligations under the Convention, as contained in the said provisions.

50. Before examining the specific facts of the case, it is worth recalling that they occurred in a context of political change and institutional crisis. In this regard, the United Nations Independent Expert on Haiti indicated in his report for this period that:

In addition to the institutional crisis (a virtual parliament, an "interim Transitional" government handicapped by the destruction or ransacking of many public institutions), there is a worsening crisis in the administration of justice (16 courts have been damaged, many police stations and prisons are devastated, the vast majority of inmates have been "released", i.e. have escaped, and threats are constantly made against judges, victims and witnesses), all this in a climate of insecurity, despite MINUSTAH's efforts to support, in operations to maintain law and order, a police force that all too often is "in competition" with groups of former soldiers who are trying to create a *de facto* justification for their return. [FN66]

[FN66] United Nations, Economic and Social Council. Report on the situation of human rights in Haiti presented by the independent expert, Louis Joinet, E/CN.4/2005/123, 24 January 2005, summary.

51. Furthermore, there was a context of institutional deficiencies, in particular in the sphere of the administration of justice, [FN67] where there were systematic failures to protect the

human rights of the people of Haiti [FN68] that had been pointed out many times previously. [FN69] Thus, the irregularities in due process, the arbitrary arrests and the prolonged pre-trial detentions, together with the deficient prison conditions – to which Mr. Neptune was subjected – constituted general and recurrent problems [FN70] that transcended the political position of the different Haitian Governments over recent years. The general problem of prolonged detentions was closely related to the irregularities in the legal proceedings and the inefficiency of the judicial institutions:

These and other inadequacies in Haiti’s court system, including the outdated nature of many of Haiti’s laws, lack of effective access to legal assistance, and the failure of police to execute judicial orders, have created chronic and unacceptable delays in the processing of cases in the court system, have resulted in a pervasive problem of prolonged pre-trial delay, where an estimated 85 to 90% of detainees have not been tried. These deficiencies have also undermined the ability of the justice system in Haiti to effectively ensure and protect the fundamental rights and freedoms to which Haitians are entitled, resulting in a pattern of impunity in Haiti for violations committed by both state and non-state actors. [FN71]

[FN67] Cf. Inter-American Commission on Human Rights, Annual Report 2006, OAS/Ser.L/V/II.127, March 3, 2007, Chapter IV – Haiti, paras. 88, 89 and 109.

[FN68] Cf. Inter-American Commission on Human Rights, Annual Report 2006, supra note 67, para. 102.

[FN69] Cf. United Nations, General Assembly. 19th Annual Report del Human Rights Committee. Examination of the reports presented by the States parties under Article 40 of the Convention: Haiti. Fiftieth session, supplement No 40 (A/50/40), 3 October 1995, paras. 226 and 238.

[FN70] Cf. Application submitted by the Commission, supra note 3, para. 4 (folio 101), and Inter-American Commission on Human Rights, Annual Report 2005, OAS/Ser.L/V/II.124, February 27 2006, Chapter IV – Haiti, paras. 235 and 237.

[FN71] Cf. Inter-American Commission on Human Rights, Haiti: Failed Justice or the Rule of Law? Challenges ahead for Haiti and the International Community, supra note 15, para. 4 of the summary.

a) Criminal proceedings filed against Mr. Neptune

a.i Arrest warrant, detention, and closing order

52. With specific reference to the instant case, the facts that have been proved or that have not been contested are that, on March 25, 2004, the investigating magistrate of the Court of First Instance of St. Marc, who was responsible for investigating the La Scierie case, issued an arrest warrant against Mr. Neptune, “accused of having ordered and participated in the massacre of the population of La Scierie (Saint-Marc) and in the arson of several houses during February 2004.” The arrest warrant stated that these are “acts that are established and punished by Articles 240 and ff., 356 and ff.,” without indicating of which law. [FN72] Also, on March 26, 2004, the Haitian Government issued an order that prohibited Mr. Neptune from leaving the country.

[FN73] Mr. Neptune only heard about the existence of this warrant at the end of June 2004 through an announcement on the radio and on June 27, 2004, he turned himself into the police and was detained. [FN74] In his testimony, Mr. Neptune stated that he had been shown the arrest warrant at that time. [FN75] Mr. Neptune remained in detention, first in the National Penitentiary of Port-au-Prince and subsequently in the Annex to the National Penitentiary, until he was released two years and one month later. [FN76]

[FN72] Cf. Arrest warrant, supra note 20.

[FN73] Cf. Application submitted by the Commission, supra note 3, para. 30 (folio 108).

[FN74] Cf. Statement made before notary public (affidavit) by Yvon Neptune, supra note 6, para. 4 (folio 448).

[FN75] Cf. Statement made before notary public (affidavit) by Yvon Neptune, supra note 6, para. 4 (folio 448).

[FN76] Cf. Application submitted by the Commission, supra note 3, para. 30, 42, 48, 49 (folios 108, 111 and 112).

53. It should be underscored that on May 1, 2005, the interim Government of Haiti offered to release Mr. Neptune and transfer him to another country in the region. On that occasion, Mr. Neptune rejected this offer because he wanted to be “released without conditions [...], to be free to enter and leave Haiti” and to clear his name. [FN77]

[FN77] Cf. Statement made before notary public (affidavit) by Yvon Neptune, supra note 6, para. 24 (folio 454).

54. On May 25, 2005, Mr. Neptune appeared before the investigating magistrate of the Court of First Instance of St. Marc, responsible for La Scierie case, in relation to the lawfulness of his detention. It is true that, prior to this, Mr. Neptune had twice been summoned to appear, but not in relation to his detention. [FN78]

[FN78] On July 17, 2004, Mr. Neptune appeared before a judge of Port-au-Prince, who questioned him as a witness regarding an incident that had occurred at the National University of Haiti in December 2003. The judge did not question him about the case of La Scierie and did not rule on the lawfulness of his detention, because he did not have the authority to do so. Then, on April 22, 2005, on the orders of the Executive Branch of the former Interim Government of Haiti, Mr. Neptune was taken before the Court of First Instance of Saint-Marc to be questioned, but the hearing did not take place because the investigating magistrate had not been advised and, consequently, was not present. Cf. Application submitted by the Commission, supra note 3, paras. 33, 34, 35 and 94 (folios 109, 110 and 124); Statement made before notary public (affidavit) by Yvon Neptune, supra note 6, para. 5 (folio 449), and Civil Court of Port au Prince, Investigation Chamber, Interrogation of Yvon Neptune, July 16, 2004 (evidence file, volume II, appendix 6, folio 263).

55. The charges against Mr. Neptune were not officially formulated until September 14, 2005, when the investigating magistrate of the Court of First Instance of St. Marc issued the closing order in La Scierie case. [FN79] Citing Articles 119 and 120 of the Criminal Investigation Code, this order referred those accused to a “criminal court without a jury” so that they could be tried under Articles 44, 45, 240, 241, 247, 248, 256 “and ff.,” 254 “and ff.,” 279 and 281 of the Penal Code, and indicated that “there were sufficient charges and evidence” against Mr. Neptune, among others, to try him as an “accomplice” in connection with the following facts supposedly committed to the detriment of various persons:

- 1) The Scierie Massacre of February 11, 2004 that caused the deaths of numerous persons [...];
- 2) The killing of [... 10 persons];
- 3) The arson of houses [...];
- 4) The arson of vehicles [...];
- 5) The rape of [... two women];
- 6) The assault and battery of [... two persons]. [FN80]

[FN79] Cf. Application submitted by the Commission, *supra* note 3, para. 36 and 94 (folios 110 and 124).

[FN80] Cf. Closing order issued by an investigating magistrate of the Court of First Instance of Saint-Marc on September 14, 2005 (evidence file, volume III, appendix 7, folios 272 and ff.).

a.ii. Decision of the Gonaïves Court of Appeal

56. Following the issue of the closing order (*supra* para. 55), in October 2005 several of Mr. Neptune’s co-accused filed an appeal against this order before the Gonaïves Court of Appeal. [FN81] The co-accused who did not appeal, as well as those who appealed inappropriately, including Mr. Neptune, benefited from the appeal under the principle of the indivisibility of the appeal. During the hearings before this court, which began on May 8, 2006, the prosecutor recommended withdrawing the charges against Mr. Neptune based on the lack of evidence and on procedural irregularities. [FN82] Moreover, according to the State, a request for Mr. Neptune’s release on bail was filed, but the Gonaïves Court of Appeal rejected this request because he had not filed an appeal. [FN83]

[FN81] Cf. Statement made before notary public (affidavit) by Mario Joseph on September 20, 2007, para. 14 (evidence file, volume III, folio 472); and fact acknowledged by the State in its brief of October 3, 2007 (merits file, volume II, folios 293-295).[FN82] Cf. Statement made before notary public (affidavit) by Serge Henri Vieux on September 21, 2007, para. 14 (evidence file, volume III, folio 445); and statement made before notary public (affidavit) by Yvon Neptune, *supra* note 6, para. 8 (folio 449).[FN83] Fact acknowledged by the State in its brief of October 3, 2007 (merits file, volume II, folios 293 to 295).

57. On July 27, 2006, after the constitutional Government of President Préval had taken office in May of that year (supra para. 6), Mr. Neptune was released provisionally “on humanitarian grounds” by order of the Gonaïves Court of Appeal, under an ‘en main levée’ action (provisional release under Article 80 of the Code of Criminal Investigation), [FN84] on condition that he remain available to the courts for any matter relating to the charges against him. [FN85]

[FN84] Cf. Informative statement made by Mario Joseph during the public hearing held at the seat of the Court on January 30, 2008, which was not contested by the State.
[FN85] Cf. Application submitted by the Commission, supra note 3, para. 49 (folio 112).

58. In its decision of April 13, 2007, the Gonaïves Court of Appeal considered that, since Mr. Neptune was Prime Minister of the Government when the facts for which he was charged occurred, any proceedings against him were regulated by Articles 185 to 190 of the Constitution of the Republic of Haiti, which relate to a political trial in the Senate sitting as a High Court of Justice. Hence, the Court of Appeal considered that it could only decide “purely and simply” on its competence to investigate Mr. Neptune and other former State officials, who were criminally prosecuted in this capacity and, consequently, declared itself “incompetent *ratione personae*” in this matter. In addition, regarding the other accused in these proceedings, it declared that the investigation was incomplete and ordered, based on the principle of the “two-tier court system” (double degré de juridiction), that the investigation should be returned to the Investigation Chamber of the Court of First Instance of Saint-Marc, since most of them had not even been summoned to appear. [FN86]

[FN86] For these reasons [...] the appeal of the accused, Jocelerme Privert, Amanus Mayette, Yvon Neptune, etc... is formally admitted under the principle of the indivisibility of the criminal appeal, accepted by the Court of Cassation of the Republic [...]; [and this court] declares itself incompetent *ratione personae* to institute a preliminary hearing against the accused, Yvon Neptune [and four others], prosecuted in their respective capacities as Prime Minister [...]; declares that the investigation into the case is incomplete; orders, under the principle of the “two-tier court system,” that this investigation be resumed by the Instruction Chamber of the Court of First Instance of Saint-Marc, so that it may question the accused [...] most of whom have never been heard by the Investigation Chamber or summoned to appear for this purpose, but were sent before the criminal court sitting without a jury, the non-justiciables being excluded from this list; and decides to postpone the hearing, until a ruling has been made on the merits (evidence file, volume VI, folios 892-893)

59. As indicated (supra paras. 4 and 14), the decision of the Gonaïves Court of Appeal of April 13, 2007, is a supervening fact in the case before the Court. This decision has been the subject of intense discussion between the parties, principally as regards its effects in relation to

Mr. Neptune: whether it was duly notified to him, and if it is a final ruling in the criminal proceedings filed against him.

60. The first references to this decision that appear in the case file are in the affidavits of Mario Joseph and the expert witness, Serge Henry Vieux, presented by the Commission on September 20 and 25, 2007, respectively (supra para. 12). In his statement, Mr. Joseph affirmed that, following Mr. Neptune's release in July 2006, "the charges [against him] remained in force almost a year later, which meant that he was still susceptible of being imprisoned [and that] the Gonaïves Court of Appeal finally issued its decision on April 13, 2007," after the legal time limit to issue it, and without acknowledging that there was no evidence for the charges against him. [FN87] The expert witness, Mr. Vieux endorsed this assessment and added that Mr. Neptune did not appeal because he did not recognize the legitimacy of that court's jurisdiction, and that the delay in reaching a decision was another inappropriate use of the judicial system to detain him and other political prisoners, in violation of their procedural rights. [FN88]

[FN87] Cf. Statement made before notary public (affidavit) by Mario Joseph, supra note 81, paras. 15-16 (folio 423).

[FN88] Cf. Statement made before notary public (affidavit) by Serge Henri Vieux, supra note 82, para. 14 (folio 445).

61. In his brief with final arguments, the representative referred to this decision as one of the facts of the case, when indicating that, in violation of the procedural norms of domestic law, "finally, the Gonaïves Court of Appeal had issued the decision[, in which] it affirmed [...] that it did not have competence in Mr. Neptune's case." In addition, he argued that the decision did not establish anything concerning the charges and that it did not clear the name of the alleged victim, because it did not refer to the lack of evidence for the accusations. [FN89] The representative also alleged, in relation to Article 7 of the Convention, that "the prosecution of Mr. Neptune occurred in violation of Article 186 of the 1987 Haitian Constitution [...] because the ordinary courts and tribunals did not have jurisdiction over a Prime Minister who had committed a crime or misdemeanor in the exercise of his function, as the Court of Appeal acknowledged three years later." [FN90]

[FN89] Cf. Final written arguments presented by the representatives, supra note 65, paras. 54 and 55 (folios 280 and 281).

[FN90] Cf. Final written arguments presented by the representatives, supra note 65, para. 71 (folio 285).

62. In its abovementioned brief of October 3, 1007, the State indicated that the decision was "final" and that it implied that, in his capacity as former Prime Minister, Mr. Neptune could not be tried by ordinary justice. It then affirmed that "the constitutional Government of Haiti [...] undertakes that, within a reasonable time, Mr. Neptune would appear before the High Court of Justice, as established in the 1987 Constitution." [FN91]

[FN91] Cf. The State's brief of October 3, 2007, supra note 81 (folio 295).

63. When responding to the request for useful evidence (supra para. 12), the representative stated that the Gonaïves Court of Appeal's decision had not been notified to the parties; consequently, under Haitian law, it was not official or final and the time period for filing cassation recourse had not initiated. However, he also stated that Mario Joseph had obtained a photocopy of the decision, which he had submitted to the Court of First Instance of St. Marc in April 2007, in the context of an application for habeas corpus that he had filed before that court in favor of Mr. Neptune's co-accused, who had been released following this action. He also alleged that the Court of First Instance subsequently rejected a similar action, on the basis that it was not legally aware of the decision. In addition, he alleged that, subsequently, that Court of First Instance rejected a similar action, on the basis that it was not legally aware of the decision. He also alleged that this decision must necessarily be notified to Mr. Neptune and the time for eventually filing a cassation recourse allowed to start before filing an action before the High Court of Justice. [FN92]

[FN92] Subsequently, the typed text of the decision was provided by the representative and the official manuscript text by the State.

64. Regarding the supposed final nature of the decision, Mr. Joseph stated that it was not final, but it would be if it was notified and not appealed in cassation. During the hearing, the State indicated that "once the Gonaïves Court of Appeal declared its incompetence *rationae personae* in this case, Mr. Neptune has no longer to answer to ordinary justice [and] even if a cassation recourse were filed [...], this would not affect the status of the Prime Minister, who is now at liberty, because the civil party cannot question the punishment." The Commission stated that, once notified, the decision could still be appealed in cassation, so that it was not yet final. [FN93]

[FN93] However, when answering certain questions raised by the Court (supra para. 14), the representative indicated that a judicial decision that has not been notified does not exist legally, so that it cannot be considered notified if one of the parties uses it or cites it during a hearing. The Commission endorsed this. The State agreed that, if a decision has not been notified, it cannot be appealed by the parties. Nevertheless, the State added that, if the decision is adopted in the presence of the parties or their lawyer, it can be appealed; that, in the instant case, although it has not been notified, the decision of the Court of Appeal is irrevocable, while the Court of Cassation has not "set it aside" and that the alleged victim cannot allege that he has no knowledge of it, since he cited it in the hearing before the Inter-American Court.

65. As can be appreciated, on this point the position of the representative and the statement made by Mario Joseph during these proceedings are not consistent. Together with expert witness, Serge Henry Vieux, they originally agreed that the decision was “final” and some of their arguments were based on the contents of that decision. Indeed, the alleged victim’s lawyer at the domestic level, Mario Joseph, informed the Court of First Instance of St. Marc of the decision as grounds for an application for habeas corpus filed in favor of Mr. Neptune’s co-accused; an application that was declared admissible. Subsequently, Mr. Neptune’s representative alleged that it was not final and that he had not been notified of it. However, the representative, the Commission and the State agree that the decision has not been notified.

66. In short, regarding the said decision of the Gonaïves Court of Appeal, the Court finds that the following is proven: that Mr. Neptune benefited from the appeal filed by other co-accused; that this domestic court declared itself incompetent to hear the facts that Mr. Neptune was accused of, but did not issue a judicial decision that assessed the causes and purposes that justified depriving him of his liberty or that determined his criminal responsibility for the charges against him; that, although several months have elapsed since it was issued, the decision has not been duly notified to Mr. Neptune; that, while it is not notified, it can still be appealed in cassation, at least for some effects and, consequently, it is still not final; that, although it is not final, the decision has already had effects in relation to other co-accused of Mr. Neptune and has been cited by the representative and by the State to support their positions and arguments. In addition, it has not been proved that this decision means that Mr. Neptune cannot be subjected to criminal proceedings again or that it equates absolving him of the charges of which he was accused.

a.iii. Possible proceedings before the High Court of Justice

67. On this point, the Court notes the scope that the State has attempted to derive from this decision of the Gonaïves Court of Appeal, following which it indicated that Mr. Neptune should appear before the High Court of Justice, under the terms of the 1987 Haitian Constitution (supra paras. 4, 14 and 62).

68. In this regard, Mr. Neptune stated that he had heard that, on September 9, 2007, the President of the Republic of Haiti had said that his file would be elevated to the Senate so that the latter could proceed pursuant to the law. He considered that a proceeding before that organ would be a political trial where he would face his opponents and that, owing to the current constitutional ambiguity, it would take months or years to institute this procedure. [FN94]

[FN94] Cf. Statement made by Yvon Neptune during the public hearing held at the seat of the Court on January 30, 2008.

69. Regarding the nature, scope and procedure of a trial before the High Court of Justice, from the information provided by the parties, in particular by the State, [FN95] the Court finds that the following has been proven: Articles 185 to 190 of the 1987 Constitution of the Republic of Haiti provide for the establishment of this organ as a political procedure, designed to try high

State officials accused of crimes committed in the exercise of their functions, excluding them initially from the action of ordinary justice. Hence, if the High Court of Justice has not previously tried one of the senior State officials referred to in these provisions, that person cannot be prosecuted by ordinary justice. However, according to the said constitutional norms, the appearance of such a person before the High Court of Justice does not necessarily imply that he can subsequently be prosecuted by ordinary justice. Also, this High Court has never been installed, because there is no law to implement the said constitutional norms, and Parliament and the Court of Cassation must be functioning normally in order to install it, since the Constitution establishes that the president of the Senate [FN96] and the president of the Court of Cassation act as its president and vice president, respectively. [FN97] Consequently, in the actual circumstances, the High Court of Justice cannot be constituted immediately and it is not clear when it can be in the future, given that the way it will function before the Chamber of Deputies remains to be determined, and the latter is responsible for formulating the accusation and transmitting it to the president of the Senate; also, at present, the Court of Cassation functions with an acting president and no timetable has been established for the senatorial elections. Accordingly, it is clear that the procedure to be followed before the High Court of Justice and the guarantees for those persons who can stand trial before it have not been determined.

[FN95] The State indicated that the 1987 Constitution established that senior State officials cannot be prosecuted under ordinary justice, unless they have previously been heard by the High Court of Justice; this measure was decided by the members of the constituent assembly to avoid such officials being charged and sent to prison at any moment, in a country experiencing political unrest. The State also indicated that the High Court of Justice established in the Constitution had never been installed, because that required a law implementing the constitutional norms, and that the means of setting it up had not been determined; however, the Constitution stated that it did not correspond to the Government of the Republic to do this. In addition, in order to install the High Court of Justice, Parliament and the Court of Cassation must be functioning normally, because the presidents of the National Assembly and of the Supreme Court must act de officio as its president and vice president; but, currently, there is an acting president of the Court of Cassation, who has not been confirmed in his functions, and the means of setting up the Chamber of Deputies, which would be responsible for filing the accusation before the High Court, has not been determined. Lastly, it indicated that, even if Mr. Neptune is heard under this procedure, it will not necessarily be possible to prosecute a senior State official under ordinary justice. The Inter-American Commission does not consider the High Court of Justice to be a judicial organ; but rather a power of the Legislature, and it has no rules of procedure, other than Articles 185 to 190 of the Constitution, so that the procedure is extremely vague, as are the guarantees of individuals subjected to it; moreover, in the actual circumstances, it is not possible to install it, since the Court of Cassation has not had a president since 2004. According to the representative, the possibility of bringing Mr. Neptune before the High Court of Justice implies a threat, because there is nothing to indicate that the Government cannot continue the proceedings.

[FN96] According to Article 99 of the Constitution, the National Assembly is presided by the president of the Senate. Cf. 1987 Constitution of the Republic of Haiti (evidence file, volume V, folio 730).

[FN97] Cf. 1987 Constitution of the Republic of Haiti, Articles 185-190 (evidence file, volume V, folios 745-746).

a.iv. Mr. Neptune's current juridical situation

70. In this context, the Court must examine Mr. Neptune's juridical situation at the time this judgment is delivered.

71. In this regard, Mr. Neptune testified that he had been released from prison on humanitarian grounds, although he had not been given any official document relating to his release and that his liberty could be revoked, because he is still accused of very serious crimes, so that he could return to prison at any time. [FN98] In addition, that the intention of taking him before the High Court of Justice signifies that the Government means to continue the proceedings against him. This situation makes him feel vulnerable, even to a physical attack, and prevents him from taking part in politics in Haiti. [FN99] His representative alleged that the decision of the Gonaïves Court of Appeal could indeed be revoked without the possibility of review, so that Mr. Neptune could return to prison at any time, which means that he is still in a vulnerable situation and that the prosecution started by the interim Government continues. [FN100]

[FN98] Cf. Statement made before notary public (affidavit) by Yvon Neptune, supra note 6, para. 26 (folio 455), and statement made by Yvon Neptune during the public hearing held at the seat of the Court on January 30, 2008.

[FN99] Cf. Statement made by Yvon Neptune during the public hearing held at the seat of the Court on January 30, 2008.

[FN100] Cf. Intervention by the representative during the public hearing held at the seat of the Court on January 30, 2008.

72. The Commission agreed with the above when it indicated that the prosecution is still in progress and that Mr. Neptune could be subjected to a political trial, so that there is a real possibility of him continuing to be subject to trial and being imprisoned again. [FN101]

[FN101] Cf. Intervention by the Inter-American Commission during the public hearing held at the seat of the Court on January 30, 2008.

73. The State indicated that, when the current Government came to power, Mr. Neptune was in prison, but based on his health and respect for human rights, it intervened to have him released. In addition, the representative of the State was emphatic in the hearing, when he stated that:

The Government of the Republic of Haiti has not got a case file against Prime Minister Yvon Neptune [...] and, since there is no file against him, the constitutional Government of Haiti is not trying to prosecute Prime Minister Yvon Neptune. The Government knows very well that the

legal provisions to bring former Prime Minister Yvon Neptune before the High Court of Justice do not exist. The constitutional Government of the Republic of Haiti does not intend to make a mistake [...]. At present, there is only one condition under which he could return to prison and that is if the Court of Cassation overrules the decision of the Gonaïves Court of Appeal and, thus, affirms the ruling of the Court of First Instance of Saint-Marc, [which is] improbable. [FN102]

[FN102] Cf. Intervention by the State of Haiti during the public hearing held at the seat of the Court on January 30, 2008 (based on a translation into Spanish by the Secretariat of the Court).

74. However, the declarations made by the State have been contradictory. Initially, it expressed the Government's wish to bring Mr. Neptune before the High Court of Justice within a reasonable time. [FN103] Then, during the hearing, it was explicit in indicating that the Government does not have a case file open against Mr. Neptune, nor has it the intention of prosecuting him. However, when answering the Court's questions at the end of the proceedings (supra para. 14), the State indicated that the charges against Mr. Neptune have been made by private individuals who have filed a complaint; that the Gonaïves Court of Appeal considered that it was not competent to hear the matter, because the charges referred to acts committed in the exercise of his functions; that if the High Court of Justice, as the constitutional court authorized to try senior officials for acts committed in the exercise of their functions, was constituted and verified the facts of which Mr. Neptune was accused, he could then be prosecuted before the ordinary criminal courts; that Neptune's file "corresponds to the Judiciary and not to the Executive, which does not intend to intervene in the administration of justice and cannot interfere so as to grant an individual total immunity"; and that Mr. Neptune will be prosecuted by the criminal courts if the Haitian judicial authorities so decide. [FN104] Lastly, in answer to some statements made by the representative, [FN105] the State indicated that if the Gonaïves Court of Appeal had declared itself incompetent, because the matter did not correspond to ordinary justice, the latter could not be asked to renounce an action for which it does not have jurisdiction. In addition, it recalled that there is still no law to regulate the procedure before the High Court of Justice, that the Haitian State has no file on Mr. Neptune, and that it cannot terminate a legal action by individuals, constituted in civil party, who filed a complaint. [FN106]

[FN103] Cf. The State's brief of October 3, 2007 (merits file, volume II, folio 295).

[FN104] Cf. The State's brief of February 22, 2008 (merits file, volume II, folio 526).

[FN105] The representative stated that, at this time, it would be difficult for the State to ensure that there will be no further investigation in relation to Mr. Neptune, because it cannot prevent the civil party exercising its right to appeal in cassation, although the State could waive the criminal prosecution. However, according to Mr. Joseph, the civil party would have the right to raise the matter before the High Court of Justice.

[FN106] Cf. The State's brief of March 6, 2008 (merits file, volume II, folio 539).

75. In summary, the Court finds that Mr. Neptune's actual juridical situation is uncertain: it has been proved that, since he was released on humanitarian grounds and not based on a judicial

decision defining his responsibility for the facts of which he is accused, he can still be criminally prosecuted for these facts. In addition, although the State indicated that it was improbable, there is still a possibility that Mr. Neptune may return to prison if, once the Court of Appeal's decision is notified, it is appealed before the Court of Cassation and the latter revokes the decision, in which case the closing order of the Court of First Instance of Saint-Marc would be confirmed.

76. Furthermore, according to domestic law and the information provided by the State, proceedings could possibly be initiated against Mr. Neptune before the High Court of Justice, following which, according to Article 189(2) of the Constitution, it is possible that criminal or civil proceedings could eventually be filed or continue against him. When delivering this judgment, there is no evidence that any procedure of that nature has been initiated against him. Moreover, at this time, the conditions do not appear to exist which would ensure that this procedure could be constituted, or that it could serve as an effective remedy (*supra* para. 69). Even if the constitutional provisions relating to the High Court of Justice could not serve interests contrary to justice as regards grave human rights violations, neither can invoking them lead to the continuation of situations of arbitrariness. Although the Court will not assess whether Mr. Neptune should appear before this procedure in future, these constitutional provisions must be taken into account as procedural guarantees to which Mr. Neptune has not had access. In conclusion, his actual juridical situation is one of absolute juridical uncertainty.

b) The right of access to justice and the right to be heard within a reasonable time by a competent judge

77. The Court has stated that, under the American Convention, the States Parties are obliged to provide effective judicial recourses to those who allege that they are victims of human rights violations (Article 25), recourses that must be substantiated in accordance with the rules of due process of law (Article 8(1)), all within the general obligation of these States to ensure the free and full exercise of the rights established by the Convention to all persons subject to their jurisdiction (Article 1(1)). [FN107] It is evident that the mere formal existence of the recourse is insufficient; it must also be effective, that is, it must provide results or a response to the violations of the rights established in the Convention. [FN108]

[FN107] Cf. *Velásquez Rodríguez v. Honduras*. Preliminary objections. Judgment of June 26, 1987. Series C No. 1, para. 91; *Case of Zambrano Vélez et al.*, *supra* note 47, para. 114, and *La Rochela Massacre v. Colombia*, *supra* note 43, para. 145.

[FN108] Cf. *Velásquez Rodríguez v. Honduras*. Merits, *supra* note 34, paras. 63-64 and 66-68; *Case of the Saramaka People*, *supra* note 36, para. 177, and *Chaparro Álvarez and Lapo Iñiguez v. Ecuador*, *supra* note 36, para. 133. See also, *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24..

78. Mr. Neptune's situation of juridical uncertainty has been established (*supra* paras. 75 and 76), confirmed, in particular, by the scope of the decision of the Gonaïves Court of Appeal: in principle, the organs of the administration of ordinary justice were not competent to investigate

him without a prior determination of responsibility in a political trial before the High Court of Justice. In other words, Mr. Neptune was prosecuted and kept in prison for more than two years by order of a court that was not legally competent.

79. Article 8 of the Convention, which refers to the right to a fair trial, establishes the guidelines of the so-called “due process,” which consist inter alia in the right of every person to be heard, with due guarantees and within a reasonable time, by a competent, independent and impartial judge or court, previously established by law, in the substantiation of any accusation of a criminal nature made against him. [FN109]

[FN109] Cf. *Genie Lacayo v. Nicaragua*. Merits, reparations and costs. Judgment of January 29, 1997, Series C No. 30, para. 74, and *Baena Ricardo et al. v. Panamá*, supra note 39, para. 137.

80. In this case, it should be emphasized that this norm implies that the judge or court responsible for hearing a case must, above all, be competent, in addition to independent and impartial. [FN110] More specifically, the Court has indicated that “any person subject to a trial of any nature before an organ of the State must be guaranteed that this organ [...] acts pursuant to the procedure established by law for hearing and deciding the case submitted to it.” [FN111]

[FN110] Cf. *Castillo Petruzzi et al. v. Perú*, Merits, reparations and costs, supra note 51, para. 130.

[FN111] Cf. *The Constitutional Court v. Perú*. Merits, reparations and costs, supra note 35, para. 77; *Case of La Cantuta*, supra note 42, para. 140, and *Almonacid Arellano et al. v. Chile*, supra note 37, para. 130.

81. In the instant case, the Court finds it unreasonable that the organs of administration of justice of a State Party to the American Convention subject a person to criminal proceedings and deprive him of liberty for more than two years without having determined, with certainty, their own competence as regards the relevant procedure established by domestic law. In addition, the failure to determine the competent court opportunely was aggravated by the fact that the decision of the Gonaïves Court of Appeal had still not been duly notified several months after it had been issued; and no satisfactory explanation has been provided in this respect. Until it has been notified, its content cannot be acted on, its useful effect is futile and abstract, a situation that causes or perpetuates an unjustified delay in justice. The Court understands that a person suspected of having committed a crime, if criminally prosecuted, has the right, in the terms of Article 8(1) of the Convention, to be brought promptly before a competent organ of justice or investigation in order both to substantiate the charges against him, if applicable, and to achieve the purposes of the administration of justice, particularly the determination of the truth. This is because the person accused is in a situation of uncertainty that makes it necessary to substantiate and decide his juridical situation as soon as possible, so as not to prolong indefinitely the effects of a criminal prosecution, bearing in mind also that, in the context of criminal proceedings, his personal liberty may be restricted. Added to this, the determination of the facts under

investigation needs to be made possible and effective as well as the corresponding criminal responsibilities, if applicable, in view of the need to protect and guarantee the rights of other injured persons.

82. Mr. Neptune's lack of access to a competent court has unduly prolonged this situation of uncertainty – normally resulting from criminal proceedings – and he has not been allowed to obtain a final ruling of a competent judge on the charges of which he is accused. In this regard, the Court has stated that any domestic law or measure that imposes costs or in any other way obstructs an individual's access to the courts, and that is not warranted by what is reasonably needed for the administration of justice, should be considered contrary to Article 8(1) of the Convention. [FN112]

[FN112] Cf. *Cantos v. Argentina*. Merits, reparations and costs. Judgment of November 28, 2002. Series C No. 97, para. 50.

83. Closely related to the above, the right of access to justice recognizes that, from the outset, any person who is committed to trial must have the effective possibility of obtaining a final ruling, without undue delays resulting from the lack of diligence and care that the courts of justice must guarantee, as observed in the instant case. [FN113] Otherwise, in light of the right to an effective recourse embodied in Article 25 of the Convention, it is evident that the person prosecuted cannot resort to the guarantees contained in Article 8 of the Convention, which would be useless if it was impossible to begin the proceedings in the first place. [FN114]

[FN113] Cf. *mutatis mutandis*, *Palamara Iribarne v. Chile*. Merits, reparations and costs. Judgment of November 22 2005. Series C No. 118, para. 50.

[FN114] Likewise, cf. *Eur Court H.R., Golder v. United Kingdom*, judgment of 21 February 1975, Series A, No. 18, paras. 28-36, and *Eur Court H.R., Baskiene v. Lithuania*, Judgment, 24 July 1975, paras. 78-79.

84. Irrespective of the fact that the decision of the Gonaïves Court of Appeal has not been notified to Mr. Neptune and is not final, the Court finds that the information provided by the State constitutes an acknowledgement that the criminal proceedings opened against him were simply inadequately instituted. That is, that the subsequent actions in the context of these criminal proceedings would be invalid in toto, because they were conducted by courts that did not have competence, at least initially, to hear the facts of which Mr. Neptune was accused. In the context described (*supra* paras. 50 and 51), the Court considers that this case arose in a situation of normative and practical impediments to real access to justice, as well as in a general situation of absence of guarantees, juridical uncertainty and the ineffectiveness of the judicial institutions to deal with facts such as those of the instant case. Hence, from the outset, the State failed in its obligation to guarantee Mr. Neptune his right to be heard by a competent court in the substantiation of the charges against him in the terms of Article 8(1) of the Convention, as well

as his right to an effective recourse, protected by Article 25 of the Convention, because he did not have access to a competent court within a reasonable time.

85. Regarding the other arguments raised by the Commission: that “the closing order was contrary to the principle of consistency, and that it should have ordered that Mr. Neptune be brought before a court with a jury” (supra paras. 46 and 47), the Court finds that the said order was clearly ambiguous, unclear and inconsistent in the way in which the facts were alleged. If the factual description of the alleged facts is imprecise, the essential reference point for adequately exercising the right to defense is non-existent. [FN115] Nevertheless, even assuming that the closing order constituted the accusation under the Haitian criminal procedural system, it is not possible to examine its consistency, as the Commission suggests, because there was no guilty verdict that would allow this, either at the time the proceedings before this Court initiated, or subsequently because this is not the nature of the decision of the Gonaïves Court of Appeal of April 13, 2007. Consequently, in this regard, the precedent cited by the Commission is not applicable.

[FN115] Cf. *Fermín Ramírez v. Guatemala*, supra note 48, para. 68.

86. In brief, as has been established, Mr. Neptune is currently in a situation of juridical uncertainty, because he was criminally prosecuted and kept in prison for more than two years by order of a court that was not legally competent. This is aggravated by the fact that the abovementioned decision of the Gonaïves Court of Appeal has still not been duly notified. This situation has resulted in an unjustified delay in access to justice, prolonged Mr. Neptune’s situation of uncertainty, and has not allowed him to obtain a final ruling from a competent judge concerning the charges made against him. In a context of normative and practical obstacles to real access to justice, together with a general situation of absence of guarantees, juridical uncertainty and the inability of the judicial institutions to deal with facts such as those of the instant case, the international responsibility of the State has arisen because it has failed in its obligation to guarantee Mr. Neptune’s right to accede to, and be heard within a reasonable time by, a competent court in the substantiation of the charges against him, in the terms of Articles 8(1) and 25 of the Convention, in relation to Article 1(1) thereof.

VIII. ARTICLE 7 (RIGHT TO PERSONAL LIBERTY) [FN116] IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) OF THE AMERICAN CONVENTION

[FN116] Article 7 (Right to Personal Liberty)

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.
 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
 6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies. [...]
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87. The Commission alleged that the State is responsible for violating the rights of Mr. Neptune embodied in Articles 7(4), 7(5), 7(6) and 25 of the Convention, together with Article 1(1) of the Convention. [FN117]

[FN117] Cf. Application submitted by the Commission, *supra* note 3, para. 103 (folio 126).

88. In his final written arguments, the representative alleged that the detention and judicial proceedings against Mr. Neptune violated “on a daily basis, his right to personal liberty and security, since Mr. Neptune was deprived of his liberty and detained under difficult and dangerous conditions for 25 months.” [FN118] The representative alleged that the State had violated Articles 7(1) to (6) of the Convention. [FN119]

[FN118] Cf. Final written arguments presented by the representatives, *supra* note 65, para. 69 (folio 284).

[FN119] Cf. Final written arguments presented by the representatives, *supra* note 60, para. 68 (folio 284).

89. This Court understands that Article 7 of the Convention contains two distinct types of regulations: one general and the other specific. The general one is found in the first subparagraph: “[e]very person has the right to personal liberty and security.” While the specific one comprises a series of guarantees that protect the right not to be deprived of liberty unlawfully (Art. 7(2)) or arbitrarily (Art. 7(3)), for the detainee to be informed of the reasons for his detention and the charges against him (Art. 7(4)), to judicial control of the deprivation of liberty and to the reasonableness of the length of pre-trial detention (Art. 7(5)), to contest the lawfulness of the detention (Art. 7(6)), and not to be detained for debt (Art. 7(7)). [FN120]

[FN120] Cf. Chaparro Álvarez and Lapo Iñiguez v. Ecuador, supra note 36, para. 51.

90. Regarding personal liberty, Article 7 of the Convention protects exclusively the right to physical liberty and encompasses physical conducts that presuppose the physical presence of the holder of the right and that are normally expressed by physical movement. [FN121] However, attempting to regulate the exercise of this right would be a never-ending task, owing to the many forms in which physical liberty can be expressed. What is regulated, therefore, are the limits or restrictions that the State may legitimately impose. This explains why Article 7(1) embodies in general terms the right to liberty and security and the other subparagraphs regulate the different guarantees that must be provided when depriving someone of their liberty. Accordingly, the way in which domestic laws affect the right to liberty is characteristically negative, when they allow liberty to be deprived or restricted. Thus, liberty is always the rule, and its limitation or restriction the exception. [FN122]

[FN121] Cf. Eur. Court H.R., Engel and Others v. The Netherlands, judgment of 8 June 1976, Series A, no. 22, para. 58. The text reads “[i]n proclaiming the "right to liberty", paragraph 1 of Article 5 (art. 5-1) is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person. [...]”.

[FN122] Cf. Chaparro Álvarez and Lapo Iñiguez v. Ecuador, supra note 36, para. 53.

91. In addition, the Court emphasizes that any violation of subparagraphs 2 to 7 of Article 7 of the Convention necessarily entails the violation of Article 7(1) thereof, because the failure to respect the guarantees of the person deprived of liberty involves, in brief, the failure to protect this person’s right to liberty. [FN123]

[FN123] Cf. Chaparro Álvarez and Lapo Iñiguez v. Ecuador, supra note 36, para. 54.

92. Having outlined the general considerations about Article 7 of the Convention, the Court will examine the alleged violations of this provision in the following order: (a) the alleged unlawfulness and arbitrariness of Mr. Neptune’s detention (Article 7(2) and 7(3)); (b) the right to be informed of the reasons for his detention and the charges against him (Article 7(4)) and the right to judicial control of the detention and to be tried within a reasonable time (Article 7(5)); and (c) the right to a recourse to contest Mr. Neptune’s deprivation of liberty (Article 7(6)).

93. Before examining these provisions, it is worth recalling that, regarding the period from April to November 2004, during which Mr. Neptune was detained, the report of the United Nations independent expert emphasized – within the general context of prolonged pre-trial detentions – the possible political nature of the detention of persons who held office under the Government of Jean-Bertrand Aristide, [FN124] because, as of December 20, 2004, “of the approximately 60 cases submitted to the independent expert by the pro-Aristide Office of

International Attorneys (BAI), the majority [...] had not been brought before a judge within the legal time period, and others had been the subject of a late detention order or had not been heard by the judge within a reasonable period of time [...]” [FN125] The document mentions the prolonged pre-trial detention of Yvon Neptune, Jocelerme Privert and Senator Yvon Feuillé. [FN126] Two of these detentions, those of Yvon Neptune and Jocelerme Privert, are also mentioned in the Secretary General’s report on MINUSTAH of February 2006, emphasizing that these persons had been detained for about 17 months and still no date had been set for a hearing. [FN127] In his 2006 report, the United Nations independent expert on Haiti mentioned that:

[P]retrial detention supposes that the procedural time limits will be respected. If, at the end of the maximum period, the charges are substantiated, pretrial detention can be justified. If, on the other hand, the allegations are not well-founded and the prisoner remains in detention, doubt is permissible. When such a situation persists, in addition to the fact that it constitutes a serious illegality in the case of any prisoner, whether under ordinary law or not, it tends to confer a political dimension on such extended pretrial detentions where they involve individuals who exercised responsibilities or discharged functions of any kind under a previous government. [...] [FN128]

[FN124] Cf. United Nations, Economic and Social Council. Situation of human rights in Haiti: report prepared by the independent expert, Louis Joinet, supra note 66, paras. 56-57.

[FN125] Cf. United Nations, Economic and Social Council. Situation of human rights in Haiti: report prepared by the independent expert, Louis Joinet, supra note 66, para. 57.

[FN126] Cf. United Nations, Economic and Social Council. Situation of human rights in Haiti: report prepared by the independent expert, Louis Joinet, supra note 66, paras. 59-67.

[FN127] Cf. Report of the Secretary General on the United Nations Stabilization Mission in Haiti (MINUSTAH), S/2006/60, of 2 February 2006. para. 45. This situation had already been reported in the report of May 6, 2005, S/2005/302, in para. 30, and in the report of 25 February 2005, S/2005/124, in paras. 37 and 58.

[FN128] Cf. United Nations, Economic and Social Council. Situation of human rights in Haiti: report prepared by the independent expert, Louis Joinet, 26 January 2006, E/CN.4/2006/115, para. 44.

a) The alleged unlawfulness and arbitrariness of Mr. Neptune’s detention (Article 7(2) and 7(3) of the Convention)

94. The Commission did not allege that Article 7(2) and 7(3) of the Convention had been violated.

95. The representative alleged belatedly that the deprivation of liberty to which Mr. Neptune was subjected did not correspond to the reasons and conditions established beforehand by the Haitian Constitution or by the laws enacted pursuant thereto. [FN129] He affirmed that the proceedings against Mr. Neptune violated Article 186 of the 1987 Haitian Constitution from the very moment that the investigating magistrate issued the arrest warrant, because the ordinary courts did not have competence to hear the case of a Prime Minister who had committed a crime

or a misdemeanor in the exercise of his functions, as the Gonaïves Court of Appeal acknowledged three years later. [FN130] In addition, he stated that “these violations of national and international law [indicated above], mean that Mr. Neptune’s detention was arbitrary.” [FN131]

[FN129] Cf. Final written arguments presented by the representatives, *supra* note 65, para. 70 (folio 285).

[FN130] Cf. Final written arguments presented by the representatives, *supra* note 65, para. 71 (folio 285).

[FN131] Final written arguments presented by the representatives, *supra* nota 65, para. 74 (folio 285).

96. Article 7(2) of the Convention establishes “[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the Constitution of the State Party concerned or by a law established pursuant thereto.” This subparagraph of Article 7 recognizes the main guarantee of the right to physical liberty: the legal reservation, according to which, only a law can affect the right to personal liberty. The legal reservation must necessarily be accompanied by the principle of legal definition of the offense (*tipicidad*). Thus, Article 7(2) of the Convention refers automatically to domestic law. Consequently, any requirement established by the national laws that is not complied with when depriving a person of his liberty, will render this deprivation unlawful and contrary to the American Convention. [FN132] Accordingly, the Court must verify whether Mr. Neptune’s detention was carried out in accordance with the laws of Haiti.

[FN132] Cf. *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra* note 36, para. 57.

97. Article 7(3) of the Convention establishes that “no one shall be subject to arbitrary arrest or imprisonment.” On other occasions, the Court has established that:

No one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed incompatible with respect for the fundamental rights of the individual because, among other matters, they are unreasonable, unforeseeable or disproportionate. [FN133]

[FN133] Cf. *Gangaram Panday v. Suriname*. Merits, reparations and costs. Judgment of January 21, 1994. Series C No. 16, para. 47; *Case of Chaparro Álvarez and Lapo Íñiguez*, *supra* note 36, para. 90, and *García Asto and Ramírez Rojas v. Perú*. Preliminary objection, merits, reparations and costs. Judgment of November 25, 2005. Series C No. 137, para. 105. See also, *Servellón García et al. v. Honduras*, *supra* note 39, para. 90.

98. In brief, it is not sufficient that any reason for the deprivation or restriction of the right to liberty is embodied in the law, but this law and its application must be compatible with the Convention. In other words, to ensure that this measure is not arbitrary, it must respect the following requirements: [FN134] (i) that the purpose of the measures that deprive or restrict liberty is legitimate (it is worth noting that the Court has recognized that ensuring that the accused does not impede the development of the proceedings or evade the action of justice are legitimate purposes); [FN135] (ii) that the measures adopted are appropriate to achieve the intended objective; (iii) that they are necessary, in the sense that they are absolutely essential to attain the desired objective, and that there is no measure that is less onerous in relation to the affected right, among all those that are similarly appropriate to achieve the proposed objective (for this reason, the Court has indicated that the right to personal liberty presupposes that any limitation must be exceptional), [FN136] and (iv) that the measures are strictly proportionate, [FN137] so that the sacrifice inherent in the restriction of the right to liberty is not exaggerated or disproportionate compared with the advantages obtained by the use of this restriction and the achievement of the intended objective. Any restriction of liberty that does not include sufficient grounds that allow an assessment to be made of whether it is adapted to these conditions will be arbitrary and, consequently, will violate Article 7(3) of the Convention. [FN138]

[FN134] Cf. Chaparro Álvarez and Lapo Íñiguez v. Ecuador, *supra* note 36, para. 93.

[FN135] Cf. Servellón García et al. v. Honduras, *supra* note 39, para. 90, and Acosta Calderón v. Ecuador. Merits, reparations and costs. Judgment of June 24, 2005. Series C No. 129, para. 111.

[FN136] Cf. Palamara Iribarne v. Chile, *supra* note 113, and García Asto and Ramírez Rojas v. Perú, *supra* note 133, para. 106.

[FN137] Cf. The "Juvenile Reeducation Institute" v. Paraguay. Preliminary objections, merits, reparations and costs. Judgment of September 2, 2004. Series C No. 112, para. 228.

[FN138] Cf. García Asto and Ramírez Rojas v. Perú, *supra* note 133, para. 128.

99. Over and above the allegations of the representative concerning the specific form of the possible unlawfulness of the detention, in the preceding chapter, the Court determined that the criminal proceedings opened against Mr. Neptune were inadequately instituted, because the organs of the administration of ordinary justice were not competent to investigate him, unless his responsibility had previously been determined by the High Court of Justice in a constitutional trial of a political nature. In other words, that the subsequent actions in the context of those criminal proceedings were also invalid in toto and that, as Mr. Neptune's juridical situation continues to be uncertain, there is still a risk that he can be deprived of his liberty again (*supra* paras. 70 to 76).

100. Irrespective of whether the political trial before the High Court of Justice takes place, considering the abovementioned context and that Mr. Neptune is still susceptible to being deprived of his liberty, it can be concluded that, during the two years and one month he remained in prison, Mr. Neptune was at all times unlawfully and arbitrarily detained, because the entire criminal proceedings were invalid *ab initio*, since his deprivation of liberty arose from the decisions of a court that lacked competence, as has been established (*supra* paras. 77 to 86).

Thus, the State is responsible for the violation of Articles 7(1), 7(2) and 7(3) of the American Convention

101. The foregoing analysis suffices to conclude the examination of the alleged violations of Article 7 of the Convention. Nevertheless, the Court finds it desirable to determine the scope of the violations to other norms included in this provision.

b) The right to be informed of the reasons for the detention and, to be notified promptly of the charges (Article 7(4) of the Convention) and the right to be brought promptly before a judge and to a trial within a reasonable time (Article 7(5) of the Convention)

102. The Commission contended that the State violated Mr. Neptune's rights embodied in Article 7(4) of the Convention, since "at the time of his arrest, [he] was not informed [...] of] the reasons for his detention [...] or was he advised of his rights." [FN139] In addition, the Commission considered that the State violated that provision and Article 7(5) of the Convention, because "it did not bring Mr. Neptune promptly before a judge or another officer authorized by law to exercise judicial power." [FN140] To the contrary, [the Commission alleges,] Mr. Neptune did not appear before a judge [in relation to the incident for which he was arrested and detained] until 11 months after his arrest [...]." [FN141]

[FN139] Cf. Application submitted by the Commission, supra note 3, para. 87 (folio 123).

[FN140] Cf. Application submitted by the Commission, supra note 3, para. 94 (folio 124).

[FN141] Cf. Application submitted by the Commission, supra note 3, para. 94 (folio 124).

103. The representative alleged belatedly that the State's refusal to bring Mr. Neptune before a natural judge for 11 months and the failure to respect the legal time limits and procedures during the investigation of the case violated Mr. Neptune's rights embodied in Article 7(4) and 7(5) of the Convention. [FN142]

[FN142] Cf. Final written arguments presented by the representatives, supra note 65, para. 75 (folio 285).

104. Article 7(4) of the American Convention stipulates that "[a]nyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him." When the violation of this provision is alleged, the Court must examine the facts of the case under two normative parameters: domestic law and treaty-based law. If it is proved that the State did not inform the person of the "reasons" for his detention and failed to notify him of the "charges" against him, the detention would be unlawful and, consequently, contrary to Article 7(2) of the Convention, but it would also constitute a violation of the right embodied in Article 7(4) thereof. [FN143]

[FN143] Cf. Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra note 36, para. 69.

105. This Court has established that the information on the “motives and reasons” for the detention must be provided “when the detention takes place,” which “constitutes a mechanism to avoid unlawful or arbitrary detentions from the very instant of deprivation of liberty and, also, guarantees the right to defense of the individual detained.” [FN144] In addition, the right to be informed of the reasons for the detention allows the person detained to contest its lawfulness, using the legal mechanisms that all States must offer, in the terms of Article 7(6) of the Convention.

[FN144] Cf. Juan Humberto Sánchez v. Honduras. Preliminary objections, merits, reparations and costs. Judgment of June 7, 2003. Series C No. 99, para. 82, and Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra note 36, para 70.

106. The information on the motives and reasons for the detention necessarily supposes, first, providing information on the detention itself. The person detained must understand that he is being detained. Second, the agent carrying out the detention must inform him in simple language, free of technicalities, of the essential facts and legal grounds on which the detention is based. Article 7(4) of the Convention is not satisfied if only the legal grounds are mentioned. [FN145]

[FN145] Cf. Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra note 36, para. 71.

107. The first part of Article 7(5) of the Convention stipulates that a detention must be subject to prompt judicial review. The Court has understood that immediate judicial control is a measure intended to avoid arbitrary or unlawful detention, bearing in mind that, under the rule of law, the judge must guarantee the rights of the person detained, authorize the adoption of preventive or coercive measures when this is strictly necessary and, in general, ensure that the accused is treated in a manner consequent with the presumption of innocence. [FN146] The European Court has ruled similarly and, in addition, has equated the term “promptly” with the term “immediately” and has established that flexibility in the interpretation of this term must be limited. [FN147] This is so, given that pre-trial detention “is the most severe measure that can be applied to a person accused of a crime, so that its application must be exceptional in nature, limited by the principles of legality, the presumption of innocence, need and proportionality, all of which are strictly necessary in a democratic society,” [FN148] because “it is a preventive rather than a punitive measure.” [FN149]

[FN146] Cf. *Bulacio v. Argentina*. Merits, reparations and costs. Judgment of September 18, 2003. Series C No. 100, para. 129; *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, supra note 36, para. 81, and *García Asto and Ramírez Rojas v. Perú*, supra note 133, para. 109.

[FN147] *Eur. Court H.R., Brogan and Others v. The United Kingdom*, judgment of 29 November 1988, Series A No 145-B, para. 59

[FN148] Cf. *Acosta Calderón v. Ecuador*, supra note 135, para. 74; *Servellón García et al. v. Honduras*, supra note 39, para. 88, and *García Asto and Ramírez Rojas v. Perú*, supra note 133, para. 106.

[FN149] Cf. *Suárez Rosero v. Ecuador*. Merits, supra note 47, para. 77; *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, supra note 36, para. 145, and *López Álvarez v. Honduras*. Merits, reparations and costs. Judgment of February 1, 2006. Series C No. 141, para. 69.

108. The Court underscores that it is the national authorities who are responsible for assessing the pertinence of maintaining the preventive measures they order under their own laws. However, it is for the Court to assess whether the actions of these authorities are in conformity with the precepts of the American Convention. To this end, it must examine whether the judicial proceedings guaranteed not only the formal possibility of submitting arguments, but also the form in which, substantively, the right to defense was manifested as a real safeguard of the rights of the accused, which involve a reasoned and prompt response by the authorities to the pleas. [FN150] In this regard, the decisions adopted by domestic bodies that could affect human rights must be duly justified; otherwise, they are arbitrary. [FN151] The Court underscores that, when a person is detained, judges must not wait until delivering an acquittal for him to recover his liberty, but must periodically assess whether the reasons and purposes that justified the deprivation of liberty remain, whether the preventive measure is still absolutely necessary to achieve these purposes, and whether it is proportionate. [FN152]

[FN150] Cf. *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, supra note 36, para. 107.

[FN151] Cf. *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, supra note 36, para. 107; *Claude Reyes et al. v. Chile*. Merits, reparations and costs. Judgment of September 19, 2006. Series C No. 151, para. 120, and *Yatama v. Nicaragua*. Preliminary objections, merits, reparations and costs. Judgment of June 23, 2005. Series C No. 127, para. 152. The European Court has indicated that judges must indicate the grounds on which they take their decisions with sufficient clarity. Cf. *Eur. Court H.R., Hadjianastassiou v. Greece*, Judgment of 16 December 1992, Series A No 252, paras. 22 and 23.

[FN152] Cf. *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, supra note 36, para. 117.

109. In the instant case, the Court finds it unnecessary to examine whether Mr. Neptune was informed of the reasons for his detention based on domestic laws, given that the criminal proceedings were invalid and the detention itself has been classified as unlawful and arbitrary. Even if the ordinary criminal courts had been competent, the Court considers that, since the charges against Mr. Neptune were drawn up in the closing order 14 months after his arrest, the State incurred in a clear violation of its obligation to notify the charges “promptly” contained in Article 7(4) of the Convention. The relevant point is that, if a person does not receive adequate

information on the reasons for his detention, he does not know what charges he must defend himself against, and consequently, judicial control becomes meaningless.

110. Moreover, it has been established that Mr. Neptune was released two years and one month after his arrest on “humanitarian grounds” and not based on a judicial decision that assessed whether the reasons and purposes that justified depriving him of his liberty subsisted, whether the preventive measure continued to be absolutely necessary to achieve these purposes, and whether it was proportionate. In other words, there is no evidence that the decision to release him was a motivated and prompt response of the authorities that sought to provide a real safeguard for the rights of the accused; in particular, a substantive guarantee of his right to defense. Hence, the charges against Mr. Neptune remained in force, so that he continued to be susceptible of being detained, which could result in arbitrariness.

111. Based on the above, the Court finds that the State violated Mr. Neptune’s right to be taken before a judge “promptly” and to be tried within a reasonable time or released, embodied in Article 7(4) and 7(5) of the American Convention.

c) Mr. Neptune’s right to recourse to contest the deprivation of liberty (Article 7(6) of the Convention)

112. The Commission alleged that the State was responsible for the violation of Article 7(6) in relation to Article 25(1) of the Convention, given that “Mr. Neptune was not guaranteed his right to recourse and there is no evidence on record indicating that Mr. Neptune was otherwise afforded access to a competent court or tribunal to exercise his right to judicial protection.” [FN153] The Commission mentioned that the guarantees established in Articles 7(6) and 25 of the Convention “together seek to avoid arbitrariness and unlawfulness in the application of pre-trial detention” [FN154] and that the State’s obligation to grant a judicial recourse implies that it must “adopt affirmative measures to guarantee that the recourses it provides through the justice system are truly effective in establishing whether there has been a violation of human rights and in providing redress.” [FN155]

[FN153] Cf. Application submitted by the Commission, supra note 3, para. 102 (folio 125).

[FN154] Cf. Application submitted by the Commission, supra note 3, para. 97 (folio 124).

[FN155] Cf. Application submitted by the Commission, supra note 3, para. 101 (folio 125).

113. The representative alleged the violation of Article 7(6) of the Convention, because he considered that the State had not complied with the time limits for bringing Mr. Neptune before his natural judge, to decide a motion for disqualification filed against the judges of the Court of Saint-Marc and to decide on the appeal against the closing order. [FN156]

[FN156] Cf. Final written arguments presented by the representatives, *supra* note 65, para. 77 (folio 285).

114. The Court has understood that, according to the text of Article 7(6) of the Convention, the holder of the “right to have recourse to a competent judge or court [so that the latter] may decide without delay on the lawfulness of his arrest or detention” corresponds to the person “deprived of his liberty,” although “the recourses may be filed for himself or by another person.” [FN157] Unlike the right embodied in Article 7(5) of the Convention, which imposes on the State the obligation to respect and guarantee it *ex officio*, Article 7(6) protects the right of the person deprived of liberty to recourse to a judge, irrespective of the observance of his other rights and of the judicial activity in his specific case, which implies that the person detained effectively exercises this right, in the assumption that he can do so, and that the State effectively provides this recourse and rules on it.

[FN157] Case of La Cantuta, *supra* note 40, para. 112.

115. In situations of deprivation of liberty, such as those of the instant case, among the essential judicial guarantees, habeas corpus represents the appropriate means for guaranteeing the liberty and controlling respect for the life and integrity of the person, and also for protecting the personal integrity of the individual. [FN158] Obviously the name, procedure, regulation and scope of the domestic recourses that allow the lawfulness of a deprivation of liberty to be reviewed may vary from one State to another. Therefore, in any case lodged before the Court, it is necessary to examine whether the remedies established by law and filed by the alleged victims comply with the provisions of Article 7(6) of the Convention.

[FN158] Cf. *Neira Alegría et al. v. Perú*. Merits. Judgment of January 19, 1995. Series C No. 20, para. 82; Case of La Cantuta, *supra* note 42, para. 111, and *Serrano Cruz Sisters v. El Salvador*. Merits, reparations and costs. Judgment of March 1, 2005. Series C No. 120, para. 79. See also, *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 35.

116. In the instant case, the parties have not provided information on the domestic remedies that would have allowed the lawfulness of the deprivation of Mr. Neptune’s liberty to be assessed, even though Mr. Joseph declared during the hearing that habeas corpus was the appropriate recourse. [FN159] Neither the Commission nor the representative have alleged or proved that Mr. Neptune exercised any type of recourse in this regard.

[FN159] Cf. Informative statement made by Mario Joseph during the public hearing held at the seat of the Court on January 30, 2008.

117. The only fact that appears in the file is that, on July 9, 2004, prior to Mr. Neptune's appearance before the investigating magistrate in charge of La Scierie case, Mr. Neptune's lawyers filed a motion of forum non conveniens, ("based on legitimate suspicion") objecting to all the judges, government commissioners and deputy government commissioners of the Court of First Instance of Saint-Marc. This action was filed before the Court of Cassation, with the request that the former court should cease hearing La Scierie case and that the case be referred to a second court, arguing that the influence of the local population might have an effect on the court's independence. [FN160] Although this type of motion is normally decided within a week or so, [FN161] the Court of Cassation only ruled on it six months later, on January 17, 2005, when it rejected the recusal motion on the basis of "a minor technicality, namely the failure to pay the processing fee." [FN162]

[FN160] Cf. Application submitted by the Commission, supra note 3, para. 32 (folio 109) para. 32; and Forum non conveniens motion, July 9, 2004 (evidence file, volume II, appendix 4, folio 258).

[FN161] Cf. Statement made before notary public (affidavit) by Serge Henri Vieux, supra note 82, para. 5 (folio 444).

[FN162] Cf. Application submitted by the Commission, supra note 3, para. 32 (folio 109); and Haitian Supreme Court decision on the forum non conveniens motion, January 17, 2005 (evidence file, volume II, appendix 5, folio 260 and 261).

118. The Court observes that the purpose of this recusal motion was to remove the case from the court that, up until that time, had been conducting the investigation stage of the proceedings against Mr. Neptune. As has been established, that court was incompetent. There is no evidence, however, that this recourse questioned the competence of the court in itself, or the lawfulness of the deprivation of liberty of Mr. Neptune; thus, it is not appropriate to examine these facts under Article 7(6) of the Convention.

119. Consequently, neither the Commission nor the representative has proved that the State failed in its obligation to guarantee Mr. Neptune the right embodied in this provision.

120. The Court observes that the Commission asked the Court to declare the violation of Article 25(1) of the Convention based on the same facts. [FN163]

[FN163] Cf. Application submitted by the Commission, supra note 3, para. 103 (folio 126).

121. In this regard, the Court recalls that in Advisory Opinion OC-8/87, Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), it stated that, if Articles 7(6) and 25 of the Convention are examined together:

It is possible to conclude that “amparo” comprises a whole series of remedies and that habeas corpus is but one of its components. An examination of the essential aspects of both guarantees, as embodied in the Convention and, in their different forms, in the legal systems of the States Parties, indicates that in some instances habeas corpus functions as an independent remedy. Here its primary purpose is to protect the personal freedom of those who are being detained or who have been threatened with detention. In other circumstances, however, habeas corpus is viewed either as the “amparo of freedom” or as an integral part of “amparo.” [FN164]

[FN164] Cf. Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), supra note 158, para. 34.

122. As indicated above, there is no evidence that Mr. Neptune attempted to use the domestic remedies specifically to assess the lawfulness of the deprivation of his liberty. Consequently, there is insufficient information to examine Article 7(6) in conjunction with Article 25 of the Convention.

123. Based on the above, the Court declares that the State violated the right to personal liberty embodied in Article 7(1), 7(2), 7(3), 7(4) and 7(5) of the Convention, in relation to the obligation to respect this right established in Article 1(1) of this instrument, to the detriment of Mr. Neptune.

IX. ARTICLE 9 (FREEDOM FROM EX POST FACTO LAWS) [FN165]

[FN165] Article 9 (Freedom from Ex Post Facto Laws)

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.”

124. The Commission alleged that the said closing order of September 14, 2005, “implicates Mr. Neptune in the perpetration of a [‘massacre’,] when it appears that this type of ‘crime’ is not included or defined under prevailing domestic criminal law.” In the absence of clarification as to the manner in which [Mr.] Neptune is responsible for a ‘massacre’ in relation to the seven people named under the first charge, it is not possible for [Mr.] Neptune to defend himself effectively from these accusations, nor is it apparent that he is being accused of an act or omission that constitutes a criminal offence under the applicable law at the time it was committed.” [FN166] Consequently, the Commission alleged that “this defect in the closing order renders the accusation incompatible with the principle of legality and, therefore, constitutes the violation of Article 9 of the American Convention, together with its Article 1(1).” [FN167]

[FN166] Cf. Application submitted by the Commission, *supra* note 3, para. 120 (folio 131).

[FN167] Cf. Final written arguments presented by the Commission, *supra* note 22, para. 61 (folio 313).

125. The Court has considered that the principle of legality (freedom from *ex post facto* laws) is one of the central elements of criminal prosecution in a democratic society. By establishing that “no one shall be convicted for any act or omission that did not constitute a criminal offense, under the applicable law,” Article 9 of the Convention obliges the States to define these criminal “acts or omissions” as clearly and precisely as possible. In this respect, the Court has established:

[...] Regarding the principle of legality (freedom from *ex post facto* laws) in the criminal sphere, [...] the classification of types of crimes supposes a clear definition of the criminal conduct, which establishes its elements and permits it to be differentiated from conducts that are not punishable or unlawful conducts that can be penalized with non-penal measures.

Under the rule of law, the principles of legality and non-retroactivity govern the actions of all the organs of the State, in their respective jurisdictions, particularly in the case of the exercise of their punitive powers.

In a democratic system it is necessary to exercise extreme caution to ensure that punishments for crimes are adopted with strict respect for fundamental human rights and following a careful verification of the effective existence of the unlawful conduct.

In this regard, it is the responsibility of the criminal judge, when applying the criminal law, to abide strictly by the latter’s provisions, and to observe the greatest rigor in ensuring that the conduct of the accused is adapted to the type of crime, so that he does not penalize acts that are not punishable by law. [FN168]

[FN168] Cf. *De La Cruz Flores v. Perú*. Merits, reparations and costs. Judgment of November 18, 2004. Series C No. 115, paras. 79-82, and *Case of Fermín Ramírez*, *supra* note 48, para. 90. See also, *Castillo Petruzzi et al. v. Perú*. Merits, reparations and costs, *supra* note 51, para. 121; *Lori Berenson Mejía v. Perú*. Merits, reparations and costs. Judgment of November 25, 2004. Series C No. 119, paras. 125-126, and *Ricardo Canese v. Paraguay*. Merits, reparations and costs. Judgment of August 31, 2004. Series C No. 111, paras. 174-177.

126. In the instant case, the Court observes that the said closing order did indicate that “there were sufficient charges and evidence” against Mr. Neptune, among others, to prosecute him as an “accomplice” in relation to “La Scierie massacre that occurred on February 11, 2004, which resulted in the death of numerous persons...” (*supra* para. 55). In other words, it is one of the facts attributed to him. It is true, as the Commission and the representative have alleged and the expert witness Mr. Vieux mentioned, that an examination of the Haitian Criminal Code [FN169] shows that it does not contain any crime of “massacre.” [FN170] It is also true that the norms of the Criminal Code cited in the closing order, and for which Mr. Neptune could eventually be tried, refer to other type of crimes that do not include the term “massacre” among their elements.

[FN171] Furthermore, it is unclear from the text of this order whether this reference to “massacre” corresponds to the juridical designation of one of the specific crimes of which he was accused, or whether it was only a general description of the events that took place in La Scierie in February 2004 that were attributed to him. In any case, Mr. Neptune has not been tried or convicted based on the contents of this procedural act that, in addition, was issued by a court that, in principle, did not have competence to do so. Accordingly, the Court finds that it has not been provided with elements to determine the State’s international responsibility in relation to this point alleged by the Commission. Notwithstanding, it should be noted that the prequalification of the charges of which Mr. Neptune was and still is accused of participating in as a “massacre” could have contributed to stigmatizing him and to aggravating the treatment he received.

[FN169] The text of the Haitian Penal Code was provided to the case file by the deponent providing information, Mario Joseph.

[FN170] There is just one reference to “massacre” in Article 68 of the Haitian Penal Code, as a purpose of the crime of “an attack on a person’s life” (atentado), but not as a type of crime in itself.

[FN171] However, the closing order does not cite Article 68 of the Penal Code either.

X. ARTICLE 5 (RIGHT TO HUMANE TREATMENT), [FN172] IN RELATION TO ARTICLE 1(1) OF THE CONVENTION

[FN172] Article 5 (Right to humane treatment)

1. Every person has the right to have his physical, mental, and moral integrity respected.
 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. [...]
 3. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
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127. The Commission contended that the State violated the rights of Mr. Neptune embodied in Articles 5(1) and 5(2) of the Convention, in relation to Article 1(1) thereof, considering that “the living conditions [he] had to endure reveal that those conditions did not meet the minimum requirements for treatment befitting his condition as a human being.” [FN173] According to the Commission, “[t]he conditions of the National Penitentiary constitute inhumane and degrading treatment that imperils the inmates’ lives and safety. The detainees are in the total custody of the State authorities, with very limited means of protecting themselves, a situation that makes inmates of a certain age and state of health, such as Mr. Neptune, all the more vulnerable.” [FN174] The Commission affirmed that “the unlawful conditions under which the inmates, including Mr. Neptune, were forced to live and the lack of preventive strategies to avoid

escalating tensions, are in themselves breaches of the State's obligation to ensure the life and personal safety of persons in its custody." [FN175]

[FN173] Application submitted by the Commission, supra note 3, para. 80 (folio 121).

[FN174] Application submitted by the Commission, supra note 3, para. 63 (folio 117).

[FN175] Application submitted by the Commission, supra note 3, para. 75 (folio 120).

128. The representative presented similar arguments to those expressed by the Commission. In particular, he indicated that the conditions under which Mr. Neptune was detained "violated his right to humane treatment on a daily basis," especially during his detention in the National Penitentiary from June 27, 2004 to April 21, 2005; in particular, in relation to the general lack of security in the prisons which kept him in a state of constant fear; the threats and attacks on his life; the lack of medical and psychological care and treatment; the conditions of his cell (size, lack of hygiene, presence of animals and the thin, dirty mattress); the inadequacy of the sanitary installations and the hygiene conditions; the lack and poor quality of the water and adequate nutrition; and the impossibility of physical exercise or recreational activities. [FN176] The representative also alleged that Mr. Neptune's detention constituted a form of cruel, inhuman and degrading treatment; particularly due to the acts of "torture and other abuse [to which the other] detainees [were subjected] in the secretariat of the detention center," which was next door to Mr. Neptune's cell; and the fact that, on April 22, 2005, Mr. Neptune was taken to Saint-Marc, "against his will and despite the fact that he was in poor health, [and] by an exhausting route, to wait for hours in the court for a hearing that had never been convened by his judge." [FN177]

[FN176] Cf. Final written arguments presented by the representative, supra note 65, para. 64 (folios 282 and 283).

[FN177] Cf. Final written arguments presented by the representative, supra note 65, para. 65 (folio 283).

129. Article 5(1) of the Convention embodies in general terms the right to personal integrity of a physical, mental and moral nature; while Article 5(2) specifically establishes certain guarantees that protect the right not to be subjected to torture or to cruel, inhuman or degrading punishment or treatment, as well as the right of all persons deprived of their liberty to be treated with respect for the inherent dignity of the human person. [FN178] The Court understands that any violation of Article 5(2) of the Convention necessarily leads to the violation of its Article 5(1).

[FN178] The principles incorporated in Articles 5(1) and 5(2) of the Convention are also contained in Articles 7 and 10(1) of the International Covenant on Civil and Political Rights (hereinafter "the Covenant"), which establish, respectively, that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment [...]," and that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." The sixth and first principle, respectively, of the Body of Principles for

the Protection of All Persons under Any Form of Detention or Imprisonment establish the same precepts. In addition, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Cf. International Covenant on Civil and Political Rights, Art. 7 and 10(1); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 1 and 6; and European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3.

130. The Court has indicated that, pursuant to Article 5(1) and 5(2) of the Convention, any person deprived of liberty has the right to live in detention conditions that are compatible with his personal dignity, which must be ensured by the State, because the State occupies the special position of guarantor with regard to such persons, since the penitentiary authorities exercise total control over them. [FN179] Likewise, the European Court of Human Rights has indicated that:

Under [Article 3 of the European Convention] the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance. [FN180]

[FN179] Cf. *Neira Alegría et al. v. Perú*. Merits, supra note 158, para. 60; *The Miguel Castro Castro Prison v. Perú*, supra note 39, para. 160, and *Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*. Merits, reparations and costs. Judgment of July 5, 2006. Series C No. 150, paras. 85 and 87

[FN180] Eur. Court H.R., *Kudla v. Poland*, judgement of 26 October 2000, Reports of Judgments and Decisions 2000-XI, para. 94.

131. The Court has considered that detention in conditions of overcrowding, with lack of ventilation and natural light, without a bed to rest on or adequate conditions of hygiene, in isolation or with undue restrictions to the visiting regime, constitutes a violation of personal integrity. [FN181] The Committee against Torture has stated, in relation to detention conditions, that:

Overcrowding, lack of amenities and poor hygiene in prisons, the lack of basic services and appropriate medical attention in particular, the inability of the authorities to guarantee the protection of detainees in situations involving violence within prisons[, i]n addition to contravening the United Nations Standard Minimum Rules for the Treatment of Prisoners, these and other serious inadequacies aggravate the deprivation of liberty of prisoners serving sentences and those awaiting trial, making of such deprivation cruel, inhuman and degrading punishment and, in the case of the latter, punishment served in advance of sentence. [FN182]

[FN181] Cf. *Loayza Tamayo v. Perú*. Merits, supra note 44, para. 58; *The Miguel Castro Castro Prison vs. Perú*, supra note 39, para. 315, and *García Asto and Ramírez Rojas v. Perú*, supra note 133, para. 221. See also Standard Minimum Rules for the Treatment of Prisoners adopted by the First United Nations Congress on Prevention of Crime and Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council in its Resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Rules 10 and 11.

[FN182] Cf. United Nations, Final observations of the Committee against Torture: Bolivia. A/56/44, 10 May 2001 para. 95(f).

132. The facts that have not been disputed are that, from June 27, 2004, to March 10, 2005, Mr. Neptune was detained in the National Penitentiary, in an individual cement cell measuring 4.5 meters by 2.5 meters, which did not have a window, and was dark, badly ventilated and particularly dirty; the walls were stained with human excrement, and insects and animals appeared at night. He was allowed access to the sanitary installations for most of the day, but at night had to use a bucket. According to his testimony, members of the police or the prison guards sometimes beat the prisoners violently outside his cell, in front of him. [FN183]

[FN183] Cf. Statement made before notary public (affidavit) by Yvon Neptune, supra note 6, paras. 10-13 (folio 450).

133. The Penitentiary food was very limited; it was not nutritious or hygienically prepared. In addition, the water was contaminated. Consequently, and because he feared that someone might poison his food, Mr. Neptune only consumed the food and water that his family brought him each day. Even though he was allowed to go out to get fresh air and exercise, Mr. Neptune almost never left his cell because he feared physical violence, due to harassment or attacks by other prisoners. [FN184]

[FN184] Cf. Statement made before notary public (affidavit) by Yvon Neptune, supra note 6, para. 15 (folio 451).

134. Mr. Neptune alleged that “as a prominent member of the former Government,” he received several death threats and there was even an attempt on his life. [FN185] He received several threats to his life and his physical integrity, especially during two major incidents that occurred while he was detained in the National Penitentiary. On December 1, 2004, “police and prison guards fired shots in the course of a protest [which started about 60 meters from Mr. Neptune’s cell...], in the course of which [...] they killed several prisoners’ and during which [Mr., Neptune’s] life was in danger.” [FN186] Subsequently, on February 19, 2005, “armed men stormed the National Penitentiary, [... leading to the escape of nearly] 400 prisoners. [...] During the incident, Mr. Neptune was forced to leave the prison and get into a car. His abductors released him in Port-au-Prince [... where] he managed to reach the house of another prisoner and

immediately called the offices of [MINUSTAH] to request an escort back to the prison, because he was afraid he would be shot and killed. MINUSTAH accommodated his request.” [FN187]

[FN185] Cf. Statement made before notary public (affidavit) by Ronald Saint-Jean on September 20, 2007, para. 9 (evidence file, volume III, folio 430).

[FN186] Cf. Application submitted by the Commission, supra note 3, paras. 44 and 78 (folios 111, 120 and 121).

[FN187] Cf. Application submitted by the Commission, supra note 3, para. 45 and 78 (folios 111, 120 and 121).

135. Following the February 19, 2005, incident, Mr. Neptune’s detention conditions worsened. He was allegedly “insulted and threatened by the guards”; he was moved to another cell in the Penitentiary “that was less protected and less isolated from the other prisoners[, ... in which he] was immediately locked for more than 24 hours [with two other prisoners].” The following day, Mr. Neptune returned to his usual cell and began a hunger strike to protest his detention. On March 10, 2005, he was transferred to a military hospital run by MINUSTAH because, according to the report prepared by the Penitentiary doctor, his state of health had deteriorated and he was in a critical condition. On April 21, 2005, he was transferred from the MINUSTAH military hospital to the Annex of the National Penitentiary, where he remained until July 27, 2006. According to his statement, the detention conditions in the Annex were a little more tolerable than in the National Penitentiary, although he still received open and constant threats from the prison guards. [FN188]

[FN188] Cf. Statement made before notary public (affidavit) by Yvon Neptune, supra note 6, para. 22 (folio 453); statement made before notary public (affidavit) by Ronald Saint-Jean, supra note 185, para. 15 (folio 431), and application submitted by the Commission, supra note 3, para. 47 (folio 112).

136. According to Mr. Neptune’s testimony, when the guards entered his cell on April 22, 2005, to take him to appear before the court in Saint-Marc, he tried to resist, because he did not know whether they had come to abduct, kill or torture him. [FN189] He indicated that he was driven in the back of a van along a road full of potholes in the heat of the day, despite his critical condition owing to the hunger strike he had started five days before without medical assistance. [FN190] His health remained critical, “because he had begun a new hunger strike on April 17, 2005, and from April 29, 2005, to July 27, 2006, he had refused to eat and only accepted water. On May 15, 2005, he began to receive vitamins, salt and sugar orally, under medical supervision.” [FN191] His physical condition gradually deteriorated; he did not want or receive routine medical attention. Mr. Neptune was hospitalized upon his release on humanitarian grounds. [FN192]

[FN189] Cf. Statement made before notary public (affidavit) by Yvon Neptune, supra note 6 para. 23 (folios 453-454).

[FN190] Cf. Statement made before notary public (affidavit) by Yvon Neptune, supra note 6 para. 6 (folio 449).

[FN191] Application submitted by the Commission, supra note 3, para. 48 (folio 112).

[FN192] Application submitted by the Commission, supra note 3, para. 49 (folio 112).

137. The Court also finds that it has been proved and not disputed that, during the time Yvon Neptune was detained in the National Penitentiary and subsequently in the Annex, there was a general context of serious shortcomings in prison conditions in Haiti, as well as a lack of security in almost all the country's detention centers; this was pointed out by several international organizations and agencies. [FN193] There was extreme overcrowding, lack of beds, badly ventilated and unhygienic cells, few sanitary installations, poor food, a scarcity of drinking water, lack of medical attention and serious problems of hygiene, illnesses and bacterial diseases. The State did not dispute the Commission's allegations, according to which: "[t]he extreme overcrowding, unhygienic and unsanitary conditions and poor inmate diet at the National Penitentiary did not even approximate the standards set in the United Nations Standard Minimum Rules for the Treatment of Prisoners"; [FN194] and "[d]espite repeated outbreaks of violence in the National Penitentiary, the State kept its inadequate structure intact." [FN195]

[FN193] Cf. Application submitted by the Commission, supra nota 3, paras. 58-59 (folios 115-116).

[FN194] Cf. Application submitted by the Commission, supra note 3, para. 62 (folio 117).

[FN195] Cf. Application submitted by the Commission, supra note 3, para. 77 (folio 120).

138. From the above, it is clear that Yvon Neptune's detention conditions, in particular in the National Penitentiary, constituted inhumane treatment because they did not comply with the minimum material requirements of decent treatment pursuant to Article 5(2) of the American Convention. The unhygienic and unsanitary conditions of Mr. Neptune's cell, the lack of access to adequate sanitary installations, and the restriction of movement for fear of physical attack that he had to endure, constituted inadequate detention conditions. These conditions were aggravated by the climate of insecurity, the threats Mr. Neptune received from the guards and the other prisoners, the lack of a penitentiary policy to prevent the escalation of violence – which resulted in a riot in December 2004, in which Mr. Neptune's life was in danger – and the lack of measures to effectively protect his physical integrity.

139. Consequently, the Court finds that, while Mr. Neptune was detained in the National Penitentiary and in its Annex, the State failed to comply with its obligations as a guarantor of his rights, which constitutes a violation of Article 5(1) and 5(2) of the American Convention (supra para. 129), in relation to Article 1(1) thereof, to his detriment.

140. The Commission contended that “the failure to separate the detainees, taking into account the degree of danger posed by each one and the status of the proceedings in each case, is a violation of Article 5(4) of the American Convention, in conjunction with Article 1(1) thereof.” [FN196] The Commission indicated that, “in violation of domestic and international law, most inmates at the National Penitentiary are standing trial but have not been convicted (which, by extension, means that they are presumed innocent). Those inmates are forced to live in these highly dangerous conditions, alongside convicted criminals. No consideration is given to the degree of danger they pose or the status of the proceedings in their cases.” [FN197]

[FN196] Cf. Application submitted by the Commission, supra note 3, para. 82 (folio 121).

[FN197] Cf. Application submitted by the Commission, supra note 3, para. 81 (folio 121).

141. The representative also alleged the violation of this provision. [FN198]

[FN198] Cf. Final written arguments presented by the Commission, supra note 65, para. 66 (folio 283).

142. Article 5(4) of the American Convention establishes that “save in exceptional circumstances,” accused persons shall, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as persons who have not been convicted.

143. This principle is also established, in exactly the same way, in Article 10, paragraph 2(a), of the International Covenant on Civil and Political Rights. Likewise, the eighth principle of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment indicates that:

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons. [FN199]

[FN199] Cf. United Nations, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly in its Resolution 43/173, of 9 December 1988, Principle 8.

144. Also, paragraph 8 of the Standard Minimum Rules for the Treatment of Prisoners stipulates that:

The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus: [...] (b) Untried prisoners shall be kept separate from convicted prisoners[.] [FN200]

[FN200] Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, Rule 8.

145. In its General Comment No. 21 concerning humane treatment of persons deprived of liberty, [FN201] the Human Rights Committee indicated that the segregation of accused from convicted prisoners established in Article 10, paragraph 2(a) of the Covenant was “required in order to emphasize their status as unconvicted persons who at the same time enjoy the right to be presumed innocent as stated in Article 14, paragraph 2 [of the Covenant].” In addition, the Committee indicated that “[t]he reports of States parties should indicate how the separation of accused persons from convicted persons is effected and explain how the treatment of accused persons differs from that of convicted persons.”

[FN201] Cf. United Nations, Human Rights Committee General Comment No. 21: Replaces general comment 9 concerning humane treatment of persons deprived of their liberty (Art. 10). 10 April 1992, para. 9.

146. This Court has considered that Article 5(4) of the American Convention imposes on the States the obligation to establish a classification system for prisoners in penitentiary centers, in order to guarantee that accused persons are separated from convicted persons, and receive treatment adapted to their status as unconvicted persons. [FN202] These guarantees can be understood as a corollary of the right of the accused person to be presumed innocent, while he has not been found guilty in accordance with the law, which is stipulated in Article 8(2) of the Convention. The State must demonstrate the existence and functioning of a classification system that respects the guarantees established in Article 5(4) of the Convention, as well as the existence of exceptional circumstances, if it does not separate accused persons from convicted persons.

[FN202] In the case of Tibi, the Court concluded that the State was responsible for the violation of Article 5(4) due to failure to separate prisoners, because “there was no system for classifying the detainees in the penitentiary center where Mr. Tibi was imprisoned and, consequently, he had to live alongside convicted prisoners and was exposed to greater violence.” Likewise, the Court concluded that Article 5(4) had been violated in the case of López Álvarez, because “it had been proved that in the penitentiary centers where Alfredo López Álvarez was imprisoned, there was no system to classify detainees,” so that “for the more than six years and four months that he was deprived of liberty, he remained in the company of convicted prisoners, without the State having cited or proved the existence of exceptional circumstances. Cf. Tibi v. Ecuador. Preliminary objections, merits, reparations and costs. Judgment of September 7, 2004. Series C No. 114, para. 158, and Case of López Álvarez, supra note 149, paras. 111-112. See also, Case of Montero Aranguren et al. (Catia Detention Center), supra note 179, para. 104.

147. The Court considers that the separation of accused persons from convicted persons requires not only keeping them in different cells, but also that these cells be located in different sections within a detention center, or in different institutions if this is possible.

148. In the instant case, it has not been proved that there was a system for classifying prisoners, separating the accused from the convicted, in the National Penitentiary where Mr. Neptune was imprisoned from June 27, 2004, to March 10, 2005. The State did not dispute the allegations of the Commission and the representative in this regard. Regarding the detention conditions, the witness Ronald Saint-Jean stated that “[t]he detention center did not separate the convicted persons (approximately 4% of the prison population) from those who had not been charged or put on trial.” [FN203]

[FN203] Cf. Application presented by the Commission, supra note 3, paras. 42 and 55 (folios 111 and 114); statement made before notary public (affidavit) by Yvon Neptune, supra note 6, para. 15 (folio 451); statement made before notary public (affidavit) by Ronald Saint-Jean, supra note 185, para. 7 (folio 429), and testimony given before notary public (affidavit) by Mario Joseph, supra note 81, para. 23 (folio 425).

149. Regarding the specific situation of the alleged victim in this case, the State did not dispute the allegation according to which, even though Mr. Neptune was kept alone in his cell during his stay in the National Penitentiary, this cell was located near the other prisoners, including those who had been convicted. Yvon Neptune, Ronald Saint-Jean and Mario Joseph also indicated this in their respective statements, [FN204] and it was not contested by the State. Accordingly, it can be considered proven that, for most of the nine months during which Mr. Neptune was detained in the National Penitentiary, even though he was alone in his cell, he was not separated from the convicted prisoners as required by Article 5(4) of the Convention. In this regard, the State did not cite the existence of exceptional circumstances to justify the failure to temporarily separate the accused from the convicted prisoners.

[FN204] Cf. Application submitted by the Commission, supra note 3, paras. 42 and 55 (folios 111 and 114); statement made before notary public (affidavit) by Yvon Neptune, supra note 6, para. 15 (folio 451); statement made before notary public (affidavit) by Ronald Saint-Jean, supra note 185, para. 7 (folio 429), and statement made before notary public (affidavit) by Mario Joseph, supra note 81, para. 23 (folio 425).

150. Based on the above, the Court finds that the lack of separation between accused persons and convicted persons to which Mr. Neptune was exposed while he was detained in the National Penitentiary constitutes a violation of Article 5(4) of the American Convention, in relation to Article 1(1) thereof.

151. For these reasons, the Court finds that the State is responsible for the violation of the right to humane treatment embodied in Article 5(1), 5(2) and 5(4) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Yvon Neptune.

X. REPARATIONS (Application of Article 63(1) of the American Convention) [FN205]

[FN205] Article 63(1) of the Convention stipulates that:

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

152. It is a principle of international law that any violation of an international obligation that results in damage establishes the obligation to repair it adequately. [FN206] All aspects of this obligation to make reparation are regulated by international law. [FN207] In its decision in this regard, the Court has based itself on Article 63(1) of the American Convention.

[FN206] Cf. *Velásquez Rodríguez v. Honduras*. Reparations and costs. Judgment of July 21, 1989. Series C No. 7, para. 25; *The Saramaka People v. Suriname*, supra note 36, para. 186, and *Albán Cornejo et al. v. Ecuador*, supra note 38, para. 138.

[FN207] Cf. *Aloeboetoe et al. v. Suriname*. Reparations and costs. Judgment of September 10, 1993. Series C No. 15, para. 44; *The Saramaka People v. Suriname*, supra note 36, para. 186, and *Boyce et al. v. Barbados*, supra note 47, para. 117.

153. In keeping with the above-mentioned findings on merits and the violations of the Convention declared in the preceding chapters, as well as in light of the criteria established in the Court's case law in relation to the nature and scope of the obligation to repair, [FN208] the Court will proceed to examine the claims submitted by the Commission and by the representative concerning reparations, in order to decide on measures tending to repair the damage.

[FN208] Cf. *Velásquez Rodríguez v. Honduras*. Reparations and costs, supra note 206, paras. 25-26; *Garrido and Baigorria v. Argentina*. Reparations and costs. Judgment of August 27, 1998. Series C No. 39, para. 43, and *The "White Van" (Paniagua Morales et al.) v. Guatemala*. Reparations and costs, supra note 39, paras. 76-79. See also, *La Cantuta v. Perú*, supra note 42, paras. 200-203, and *The Miguel Castro Castro Prison v. Perú*, supra note 39, paras. 414-416

A) INJURED PARTY

154. The Court will determine who should be considered an “injured party” in the terms of Article 63(1) of the American Convention and, consequently, eligible for the reparations the Court establishes.

155. First, the Court finds that Yvon Neptune is the “injured party,” as a victim of the violations of the Convention that have been declared, so that he is eligible for any reparations that the Court establishes for pecuniary and non-pecuniary damage, if applicable.

156. In addition, in its final written arguments, the Commission asked that, “considering the damage and suffering caused to the victim’s family members [...], they also should be considered beneficiaries of reparations”; [FN209] however, it did not identify these family members. The representative in his final written arguments, and Mr. Neptune in his statement, requested that, when determining the reparations, the Court bear in mind “the inability of Marie Jose Neptune [Mr. Neptune’s wife] to work during his detention, owing to her constant travel between Haiti, where she helped her husband, and the United States, where her daughter lives and where she feels safe; because she found it hard to concentrate on her work owing to the uncertainty about Mr. Neptune’s situation and the fear that someone would kill him or that he would die of an illness or as a result of his hunger strike.

[FN209] Cf. Final written arguments presented by the Commission, *supra* note 19, para. 65 (folio 314).

157. In this regard, the Court has verified that the facts described in the preceding paragraph do not appear among the facts set out in the application filed by the Commission in this case. Also, the representative did not present a brief with pleas and motions, in which he could have referred to this situation. In this regard, the Court reaffirms its case law that, in principle, “it is not admissible to allege new facts, distinct from those set out in the application, without prejudice to presenting those that explain, clarify or deny the facts mentioned in the application, or respond to the claims of the plaintiff,” as well as, exceptionally, supervening facts. [FN210]

[FN210] Cf. The “Five Pensioners” v. Perú, *supra* note 36, paras. 153 and 154; The Saramaka People v. Suriname. May 11, 2007. Series C No. 164, para. 121.

158. Based on the above, the Court will only consider Yvon Neptune as the injured party in the terms of Article 63(1) of the American Convention.

B) COMPENSATION

a) Pecuniary damage

159. The Court has developed the concept of pecuniary damage and the circumstances under which it must be compensated. [FN211]

[FN211] Cf. *Aloeboetoe et al. v. Suriname Reparations and costs*, supra note 207, paras. 50, 71 and 87; *Bámaca Velásquez v. Guatemala. Reparations and costs*, supra note 39, para. 43; *Zambrano Vélez et al. v. Ecuador*, supra note 47, para. 138; *Escué Zapata v. Colombia*, supra note 45, para. 132, and *Cantoral Huamaní and García Santa Cruz v. Perú*, supra note 50, para. 166.

160. In the instant case, the representative and Mr. Neptune affirmed that the latter's wife traveled from New York to Port-au-Prince on six occasions "to take care of her husband and help him in his struggle against political persecution"; she spent around US\$5,280.00 (five thousand two hundred and eighty United States dollars), considering that each trip cost approximately US\$880.00 (eight hundred and eighty United States dollars). [FN212] In addition, Mr. Neptune stated that they had to pay US\$20,000.00 (twenty thousand United States dollars) in taxes and penalties relating to their pension plans, because they had to take money from these plans to pay the living expenses of Marie Jose Neptune, the mortgage on the house, and Mr. Neptune's medical insurance payments, since neither of them could work. [FN213]

[FN212] Cf. Statement made before notary public (affidavit) by Yvon Neptune, supra note 6, para. 34 (folio 457).

[FN213] Cf. Statement made before notary public (affidavit) by Yvon Neptune, supra note 6, para. 35 (folio 457).

161. Taking into account the facts of the case and its case law, the Court observes that, even though no vouchers for these expenses were provided, it is reasonable to presume that Mr. Neptune and his wife incurred various expenses owing to his arbitrary detention. Consequently, the Court finds it pertinent to establish, based on the equity principle, the sum of US\$10,000.00 (ten thousand United States dollars) as compensation for expenses, which must be paid to Yvon Neptune.

162. In relation to Mr. Neptune's loss of earnings, the representative requested that, when determining reparations, the Court should take into consideration "Mr. Neptune's inability to work during the 25 months that he was detained, as well as his inability to work for 26 additional months, owing to physical and psychological problems that can be attributed to his detention and prosecution." [FN214] In this regard, Mr. Neptune calculated his loss of earning based on the income he allegedly received as an architect before standing for election to the Senate of Haiti, and indicated that this was approximately US\$96,000.00 (ninety-six thousand United States dollars) a year. The total amount he claims under this heading is US\$408,000.00 (four hundred and eight thousand United States dollars) for a total of 51 months during which he claimed to have incurred loss of earnings. [FN215]

[FN214] Cf. Final written arguments presented by the representatives, *supra* note 65, para. 84 (folio 287).

[FN215] Cf. Statement made before notary public (affidavit) by Yvon Neptune, *supra* note 6, para. 31 (folio 456).

163. It should be emphasized that the Court has not received any probative elements that prove the income Mr. Neptune earned before the facts of this case, other than his own statement. The State has not offered any observations in this regard. Also no evidence has been provided of his alleged inability to work following his release; but, in the circumstances of the instant case, in addition to the two years and one month that he was unlawfully and arbitrarily detained, it is reasonable to suppose that the experience that Mr. Neptune had undergone did make it difficult for him to work once he was released. He himself stated that he has not left his house since he was released. Consequently, the Court refers to the equity principle and considers that the State must pay the sum of US\$50,000.00 (fifty thousand United States dollars) to Yvon Neptune, as compensation for the income he did not receive owing to his imprisonment.

164. The State must pay the compensation for pecuniary damage in favor of Mr. Neptune within two years of notification of this judgment.

b) Non-pecuniary damage

165. The Court will determine non-pecuniary damage, in accordance with the guidelines established in its case law. [FN216]

[FN216] Cf. *Aloeboetoe et al. v. Suriname Reparations and costs*, *supra* note 207, paras. 52, 54, 75, 77, 86 and 87; *Cantoral Benavides v. Perú. Reparations and costs. Judgment December 3, 2001. Series C No. 88*, paras. 53 and 57, and *Zambrano Vélez et al. v. Ecuador*, *supra* note 47, para. 141; *Escué Zapata v. Colombia*, *supra* note 45, para. 147, and *Cantoral Huamaní and García Santa Cruz v. Perú*, *supra* note 50, para. 175.

166. International case law has established repeatedly that the judgment constitutes *per se* a form of reparation. [FN217] Moreover, in the instant case the Court finds it necessary to establish compensation for the non-pecuniary damage suffered owing to the declared violations.

[FN217] Cf. *Suárez Rosero v. Ecuador. Reparations and costs. Judgment of January 20, 1999. Series C No. 44*, para. 72; *Albán Cornejo et al. v. Ecuador*, *supra* note 38, para. 148, and *The Saramaka People v. Suriname*, *supra* note 36, para. 195. See also, *El Amparo v. Venezuela. Reparations and costs. Judgment of September 14, 1996. Series C No. 28*, para. 35.

167. Regarding non-pecuniary damage, the representative asked the Court to take into account the different medical problems that Mr. Neptune suffered during his detention and hunger strike, such as hypertension, hypotension, inflammation, arrhythmia and a weak heart; the medical problems from which Mr. Neptune continues to suffer today, such as fatigue, indigestion, dizziness, weakness and reduced muscle mass; and also the psychological trauma related to the uncertainty about his life and physical safety, together with the stigma that he suffered during the long period of 25 months that his detention lasted, [FN218] the unfounded charges against him, and the separation from his family. [FN219]

[FN218] Cf. Final written arguments presented by the representatives, supra note 60, para. 85 (folio 288).

[FN219] Cf. Statement made before notary public (affidavit) by Yvon Neptune, supra note 6, para. 28 (folio 455).

168. In this regard, the Court has established that Mr. Neptune was subjected to inhuman detention conditions, that he was detained unlawfully and arbitrarily, and that he was not provided with due judicial protection and guarantees, all of which caused him physical and mental suffering. Taking into account the different aspects of the non-pecuniary damage caused, the Court establishes, based on the equity principle, the sum of US\$30,000.00 (thirty thousand United States dollars), that the State must pay in favor of Yvon Neptune.

169. The State must pay the compensation for non-pecuniary damage directly to Mr. Neptune, within one year of notification of this judgment.

C) MEASURES OF SATISFACTION AND GUARANTEES OF NON-REPETITION

170. The Court will determine measures of satisfaction that seek to repair the non-pecuniary damage, and that are not of a pecuniary nature, and will order measures with a public scope and repercussion.

171. As a guarantee of non-repetition, the Commission asked the Court to order the State “to adopt as a matter of priority, the measures necessary to ensure that the right under national law and Article 7 of the American Convention of any person detained to be brought promptly before a judge or other officer authorized by law to exercise judicial power is given general effect in Haiti.” [FN220] In addition, “the State must be required to modernize the Haitian prison system so that it conforms to the requirements of the Convention concerning humane treatment,” considering that “Haiti has subjected Mr. Neptune and thousands of persons to a system that does not meet the minimum international standards for prison conditions.” The Commission also asked the Court to order the State to “adopt all legislative, policy-related, administrative and economic measures necessary to relieve the problems in Haitian prisons resulting from overcrowding, inferior physical and sanitary infrastructure, substandard security systems and lack of contingency plans.” [FN221] Lastly, the Commission asked the Court that, given “the nature of the violations committed, [...] the damage and the consequences of the violations

mentioned in Mr. Neptune's testimony, it determine the corresponding measures of satisfaction." [FN222]

[FN220] Cf. Application submitted by the Commission, supra note 3, para. 145 (folio 137), and final written arguments presented by the Commission, supra nota 22, para. 66 (folio 314).

[FN221] Cf. Application submitted by the Commission, supra note 3, para. 145 (folio 137), and final written arguments presented by the Commission, supra nota 22, para. 67 (folio 315).

[FN222] Cf. Application submitted by the Commission, supra note 22, para. 67 (folio 315).

172. The representative asked the Court to determine the measures of satisfaction to clear Mr. Neptune's name, considering that he suffered and continues suffering from the unfounded charges against him, given that the decision of the Gonaïves Court of Appeal of April 13, 2007, did not rule on the merits of the case; that the Government has still not publicly acknowledged that the judicial proceedings against him and his detention conditions violated his fundamental rights; and that no measure has been adopted to prosecute and punish those who abused of their functions to target Mr. Neptune. [FN223]

[FN223] Cf. Final written arguments presented by the representative, supra nota 65, para. 86 (folio 288).

a) Obligation to provide Yvon Neptune with an effective recourse

173. Having established the violation of the right to personal liberty, to a fair trial and judicial protection to the detriment of Mr. Neptune, the Court finds it necessary to refer to the State's obligation to provide him with an effective recourse that strictly respects and guarantees his right to a fair trial.

174. The Court has determined that Mr. Neptune faced and still faces a situation of juridical uncertainty. He has stated that he feels vulnerable owing to the possibility of a new imprisonment and that the State's declaration that it will subject him to fresh proceedings constitutes a threat. Moreover, owing to the charges against him, Mr. Neptune stated during the hearing that he felt inhibited from taking part in politics in his country, even though he wished to do so:

The failure to notify the decision [of the Gonaïves Court of Appeal] has also affected me. Above all, I feel vulnerable. Before appearing before this Court, I had not been out of my house for 17 months. I am afraid that anything I have said that could displease my political opponents, including the Government, could lead to my return to prison. I am also afraid that as an individual criminally accused of the most serious crime, I am vulnerable to a physical attack. The failure to notify the decision [...] prevents me from taking part in political activities. As a former Prime Minister and Senator, and as an active member of a political organization, I would like to

participate in public debates [...] I would like to play an active role in the [Fanmi Lavalas] organization, especially for the upcoming elections. [FN224]

[FN224] Cf. Statement made by Yvon Neptune during the public hearing held at the seat of the Court on January 30, 2008.

175. The Court also notes that, in his testimony, Mr. Neptune expressed his wish to be tried for the facts he is accused of, and also his desire “to clear his name”: “For years, I have waited for the Haitian courts to clear my name.” [FN225]

[FN225] Cf. Statement made before notary public (affidavit) by Yvon Neptune, *supra* note 6, para. 41 (folios 454-458).

176. As previously indicated (*supra* para. 37), the Inter-American Court recalls that it is not a court where the criminal responsibility of the individual can be examined, so that it is not its function to determine Mr. Neptune’s innocence or guilt in relation to the facts of which he is accused at the domestic level. Nevertheless, the situation faced by Mr. Neptune, owing to the lack of an effective recourse to be heard by a competent court and because he remained unlawfully and arbitrarily detained for more than two years has been declared contrary to the Convention. In particular, no explanation has been provided about why the decision of the Gonaïves Court of Appeal has not been notified. Also, although it is not for this Court to determine whether, in future, the appropriate way to define Mr. Neptune’s juridical situation corresponds to a procedure before the High Court of Justice, it should be recalled that this possibility is uncertain (*supra* paras. 69 and 76). It should be clarified that the norms on immunity cannot be an obstacle for the State to investigate, prosecute and eventually punish those responsible for grave human rights violations.

177. Consequently, the Court orders the State to adopt the necessary judicial and any other measures, to ensure that, as soon as possible, Mr. Neptune’s juridical situation is totally defined as regards the criminal proceedings opened against him. If the State decides to submit him to further proceedings, they must be conducted in accordance with the applicable legal and constitutional procedures, satisfy the requirements of due process of law, and respect fully the guarantees of defense for the accused, in the terms of the American Convention.

b) **Obligation to implement the constitutional norms relating to the High Court of Justice**

178. It has been established that the lack of judicial guarantees and judicial protection, in particular to ensure the right to personal liberty faced by Mr. Neptune, constitutes a generalized problem in Haiti. More specifically, although Articles 185 to 189 of the 1987 Haitian Constitution establishes the possible creation of a procedure to give a preliminary trial to certain senior public officials, it has been established that, at the present time, there is no law to regulate the procedure established in these norms and stipulate the guarantees that must be granted to any

person eventually subjected to this procedure. This lack of juridical certainty and security could lead to the impunity of certain crimes, including grave human rights violations, should they be committed by high-ranking State authorities, as well as situations of juridical insecurity and violation of the right to due process for persons who hold such positions and are investigated or prosecuted for specific facts.

179. The Court orders the State, as a guarantee of non-repetition and irrespective of the observations contained in the preceding section (*supra* paras. 176 and 177), to adopt, as soon as possible, the legislative or other measures needed to regulate the procedures relating to the High Court of Justice, in order to define the respective competences, the procedural norms, and the minimum guarantees of due process.

c) Publication of the judgment

180. As it has ordered in other cases, [FN226] as a measure of satisfaction the State must publish once in the official gazette and in another national newspaper with widespread coverage, paragraphs 1 to 10, 16 to 21, 36 to 155, 161, 163, 167, 168 and 170 to 183 of this judgment and its operative paragraphs. These publications must be made within one year of notification of this judgment.

[FN226] Cf. *Cantoral Benavides v. Perú*. Reparations and costs, *supra* note 216, para. 79; *The Saramaka People v. Suriname*, *supra* note 36, para. 198, and *Albán Cornejo et al. v. Ecuador*, *supra* note 38, para. 157.

d) Prison conditions

181. The appalling conditions of Haitian prisons and detention centers have been brought to light in this case. It is pertinent to recall that international human rights treaties, particularly the American Convention, oblige States to provide decent living conditions for persons deprived of liberty.

182. Regarding the lack of security in the National Penitentiary, the Court has recognized that the State's international obligation to ensure to all persons the full exercise of their human rights includes the obligation "to design and apply a penitentiary policy that prevents critical situations" that endanger the fundamental rights of the prisoners in their custody. [FN227] The Court considers that the formulation and effective implementation of a preventive strategy to avoid the escalation of violence in the penitentiary centers is essential to ensure the life and personal safety of prisoners and also to guarantee that persons deprived of liberty are provided with the conditions needed to live with dignity.

[FN227] *The "Juvenile Reeducation Institute" v. Paraguay*, *supra* note 137, para. 178. See also *Matter of the Urso Branco Prison*. Provisional measures with regard to Brazil. Order of the Inter-American Court of Human Rights of April 22, 2004, eleventh considering paragraph. Likewise,

the European Court has established that Article 3 of the European Convention establishes the State's obligation to adopt preventively concrete measures to protect the physical integrity and health of those deprived of liberty. Cf. Eur. Court H.R., *Pantea v. Romania*, judgement of 3 June 2003, Reports of Judgments and Decisions 2003-VI (extracts), para. 190.

183. In this context and as it has in other cases, [FN228] it is opportune for the Court to determine, as a guarantee of non-repetition, that the State must adopt, within a reasonable time, the necessary legislative, administrative, political and economic measures to ensure that prison conditions comply with international human rights norms; in particular, to alleviate the problems of overcrowding, shortcomings in the physical and sanitary infrastructure, deficient security systems and the lack of contingency plans. To this end, the State must, within two years, establish a plan and an action program, as well as a timetable of activities relating to compliance with this provision

[FN228] Cf. *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*. Merits, reparations and costs, supra note 34, para. 217; *Boyce et al. v. Barbados*, supra note 47, para. 117(d), and *Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*, supra note 179, para. 145.

D) COSTS AND EXPENSES

184. As the Court has already indicated on previous occasions, costs and expenses are included within the concept of reparations embodied in Article 63(1) of the American Convention. [FN229]

[FN229] Cf. *Garrido and Baigorria v. Argentina*. Merits. Judgment of February 2, 1996. Series C No. 26, para. 79, and *The "White Van" (Paniagua Morales et al.) v. Guatemala*. Reparations and costs, supra note 39, para. 212. See also *La Cantuta v. Perú*, supra note 42, para. 243, and *The Miguel Castro Castro Prison v. Colombia*, supra note 39, para. 455.

185. The Court takes into consideration that Mr. Neptune's representative incurred expenses during the domestic and the international proceedings in this case. In this regard, the Commission asked that the costs and expenses incurred at the domestic level in the judicial proceedings filed by the victim or his representative before national courts, and at the international level in the processing of the case before the Commission and the Court be taken into account, [FN230] including compliance with judgment. [FN231] The representative asked the Court to take into account that Mr. Neptune had paid US\$12,320.00 (twelve thousand three hundred and twenty United States dollars) to his lawyers in Haiti to defend him before the domestic courts, [FN232] and indicated that they were not requesting compensation for the costs and expenses incurred to process the case before the Commission and the Court. [FN233]

[FN230] Cf. Application presented by the Commission, supra note 3, para. 152 (folio 139).

[FN231] Cf. Final written arguments presented by the Commission, supra note 22, para. 69 (folio 315).

[FN232] Cf. Final written arguments presented by the representatives, supra note 65, paras. 90-91 (folio 289).

[FN233] Cf. Final written arguments presented by the representatives, supra note 65, para. 90 (folio 289).

186. In this case, the representative did not provide the Court with any evidence to support his claims for costs and expenses, in addition to appearing before the proceedings belatedly (supra para. 12). Despite this, and based on equity, the Court establishes that the State must pay the sum of US\$5,000.00 (five thousand United States dollars) to Yvon Neptune for costs and expenses, and he will deliver the pertinent amount to his representative. This amount includes the future expenses that Mr. Neptune may incur at the domestic level or during monitoring compliance with this judgment. The State must make the payment for costs and expenses within one year of notification of the judgment.

E) MEANS OF COMPLYING WITH THE PAYMENTS ORDERED

187. The payment of the compensation established in favor of Yvon Neptune shall be made directly to him.

188. If, for causes that can be attributed to the beneficiary of the compensation, he is unable to receive it within the specified time, the State shall deposit the said amounts in an account or a deposit certificate in favor of the beneficiary in a solvent Haitian institution and under the most favorable financial conditions allowed by banking practice and law. If, after 10 years, the compensation has not been claimed, the amounts shall be returned to the State with the accrued interest.

189. The amounts assigned in this judgment as compensation and reimbursement of costs and expenses may not be affected or conditioned by current or future taxes or charges. Consequently, they must be delivered to the beneficiary integrally, as established in this judgment.

190. If the State falls in arrears, it shall pay interest on the amount owed corresponding to bank interest on arrears in Haiti.

191. In keeping with its consistent practice, the Court reserves the authority, inherent in its attributes and derived also from Article 65 of the American Convention, to monitor the execution of all aspects of this judgment. The case will be closed when the State as complied fully with all aspects of the judgment. Within one year from notification of this judgment, Haiti must provide the Court with a report on the measures adopted to comply with it.

XII. OPERATIVE PARAGRAPHS

192. Therefore,

THE COURT

DECLARES,

unanimously that:

1. The State violated, to the detriment of Yvon Neptune, the right to have access to and be heard by a competent court in the substantiation of the accusations against him, and the right to an effective recourse established in Articles 8(1) and 25 of the American Convention on Human Rights, in relation to the obligation to respect and guarantee these rights, established in Article 1(1) thereof, in the terms of paragraphs 49 to 86 of this judgment.
2. The State violated, to the detriment of Yvon Neptune, the right to personal liberty established in Article 7(1), 7(2), 7(3), 7(4) and 7(5) of the American Convention on Human Rights, in relation to the obligation to respect and guarantee this right, established in Article 1(1) thereof, in the terms of paragraphs 89 to 123 of this judgment.
3. The State did not violate, to the detriment of Yvon Neptune, the right to freedom from ex post facto laws established in Article 9 of the American Convention on Human Rights, in the terms of paragraphs 125 and 126 of this judgment.
4. The State violated, to the detriment of Yvon Neptune, the right to humane treatment established in Article 5(1), 5(2) and 5(4) of the American Convention on Human Rights, in relation to Article 1(1) thereof, in the terms of paragraphs 129 a 151 of this judgment.

AND DECIDES:

unanimously that:

5. This judgment constitutes per se a form of reparation, in the terms of paragraph 66 hereof.
6. The State shall adopt the necessary judicial and any other measures to ensure that, as soon as possible the juridical situation of Yvon Neptune is totally defined in relation to the criminal proceedings filed against him. If the State decides to submit him to further proceedings, they shall be conducted in accordance with the applicable legal and constitutional procedures, satisfy the requirements of due process, and fully respect the guarantees of the right to defense of the accused, in the terms of the American Convention, as indicated in paragraphs 173 to 177 of this judgment.
7. The State shall adopt, as soon as possible, the legislative and any other measures to regulate the procedures relating to the High Court of Justice, so that the respective competences, procedural norms, and minimum guarantees of due process are defined, in the terms of paragraphs 178 and 179 of this judgment.
8. The State shall publish once in the official gazette and in another national newspaper with widespread coverage, paragraphs 1 to 10, 16 to 21, 36 to 155, 161, 163, 167, 168 and 170 to 183 of this judgment and its operative paragraphs, in the terms of paragraph 180 hereof.
9. The State shall adopt, within a reasonable time, the necessary legislative, administrative and any other measures to substantially improve the conditions of the Haitian prisons, adapting

them to international human rights norms, in the terms of paragraphs 181 to 183 of this judgment.

10. The State shall make the payment of the amounts established in this judgment for pecuniary and non-pecuniary damage and the reimbursement of costs and expense, in the terms of paragraphs 161, 163, 164, 168, 169, 186 and 187 to 191 hereof.

Cecilia Medina Quiroga
President

Diego García-Sayán
Sergio García Ramírez
Manuel E. Ventura Robles
Leonardo A. Franco
Margarette May Macaulay
Rhadys Abreu Blondet

Pablo Saavedra Alessandri
Secretary

So ordered,

Cecilia Medina Quiroga
President

Pablo Saavedra Alessandri
Secretary