Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Miguel Castro Castro Prison v. Peru
Doc. Type:	Judgement (Interpretation of the Judgment on Merits, Reparations, and Costs)
Decided by:	President: Sergio Garcia Ramirez; Judges: Antonio A. Cancado Trindade; Cecilia Medina Quiroga; Manuel E. Ventura Robles; Leonardo A. Franco The Judge Diego Garcia-Sayan excused himself from hearing the present case, pursuant to articles 19(2) of the Statute and 19 of the Court's Rules of Procedure. The Judge Sergio Garcia Ramirez was the President of the Tribunal when the Judgment on merits, reparations and costs was issued in the present case, reason for which for the effects of this judgment he maintains said position. Similarly, through the Ruling of May 3, 2008 the Court accepted the request of the Judge Alirio Abreu Burelli, based on reasons of force majeure, to turn down his participation in the hearing of the present case. Thus, Judge Leonardo A. Franco was included in the hearing of the present process of interpretation of a judgment, pursuant to Article 16(1) of the Rules of Procedure.
Dated:	2 August 2008
Citation:	Miguel Castro Castro Prison v. Peru, Judgement (IACtHR, 2 Aug. 2008)
Represented by:	APPLICANT: Monica Feria Tinta

In the Case of the Miguel Castro Castro Prison,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court", "the Court", or "the Tribunal"), pursuant to Article 67 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Article 59 of the Court's Rules of Procedure (hereinafter "the Rules of Procedure"), decides on the requests of interpretation of the Judgment on merits, reparations, and costs issued by the Court on November 25, 2006 in the Case of the Miguel Castro Castro Prison (hereinafter "the Judgment"), presented on the 16th and 20th days of March 2007, respectively, by the State of Peru (hereinafter "the State" or "Peru") and by Messrs. Douglass Cassel and Sean O'Brien, representatives of a group of victims who are not the common intervener of the representatives in this case. [FN2]

[FN2] Article 23 subparagraphs 2 and 3 of the Rules of Procedure of the Court establishes that "when there are several alleged victims, next of kin or duly accredited representatives, they shall designate a common intervener who shall be the only person authorized to present pleadings,

motions and evidence during the proceedings, including the public hearings" and in case "of disagreement, the Court shall make the appropriate ruling." In the processing of the present case the victims were reunited in two groups, one called Canto Grande, whose representatives were who presented one of the requests for interpretation (who the Tribunal refers to as "the representatives") and the other group with the majority of the victims, represented by Mrs. Mónica Feria Tinta, who is the common intervener of the representatives of the victims (who the Tribunal refers to as "the common intervener" in this Judgment).

I. PRESENTATION OF THE REQUEST FOR INTERPRETATION AND PROCEEDINGS BEFORE THE COURT

1. On November 25, 2006 the Court issued the Judgment on merits, reparations, and costs in this case. Said Judgment was notified to the parties on December 20, 2006.

2. On March 16, 2007 the State presented a request for interpretation of the Judgment, pursuant to Articles 67 of the Convention and 59 of the Rules of Procedure. The State made reference to six aspects of the Judgment "to be clarified or interpreted": one of them refers to the content of two paragraphs from the section on proven facts (infra para. 28); three matters refer to the compliance of three measures of non-repetition (infra para. 29); and the final two refer to payment of the compensations (infra para. 30). Additionally, the request included a section named "Some final considerations", different to the chapter on "Matters to be clarified or interpreted", in which the State does not request the interpretation or clarification of a specific aspect of the Judgment, but instead it asks the Court about "the [international] responsibility of non-state groups for the violation of human rights and crimes against humanity." (infra para. 32) Finally, in its request the State asked for the holding of a "public hearing to support [its] request for interpretation," and it reiterated said request on June 6th and July 31, 2007 (infra para. 10).

3. On March 20, 2007 the representatives presented a request for interpretation of the Judgment, pursuant to Articles 67 of the Convention and 59 of the Rules of Procedure, in which they referred to three aspects of the Judgment regarding the determination of the victims and reparations ordered in the Judgment (infra para. 58).

4. On May 9, 2007 the Institute for Legal Defense (ILD) and the National Human Rights Coordinator of Peru presented a brief in their capacity of amici curiae with regard to "the request for interpretation […] presented by the Peruvian State" in the present case.

5. On May 11, 2007, pursuant to that stated in Article 59(2) of the Rules of Procedure and following instructions given by the President of the Court (hereinafter "the President"), the Secretariat of the Court (hereinafter "the Secretariat") sent a copy of both requests for interpretation to the Inter-American Commission of Human Rights (hereinafter "the Inter-American Commission" or "the Commission") and to Mrs. Mónica Feria Tinta, common intervener for the victims' representatives in this case (hereinafter "the common intervener"). Likewise, the Secretariat sent a copy of the State's request for interpretation to the representatives and of the representatives' request to the State, and informed the parties that they could present the written observations they considered appropriate no later than August 1, 2007.

On that opportunity, it reminded the State that, pursuant to Article 59(4) of the Rules of Procedure, "[a] request for interpretation shall not suspend the effect of the judgment."

6. On July 31, 2007 the State presented its written arguments on the request for interpretation of the Judgment presented by the representatives and stated, inter alia, that the "Court must clarify the exclusion of Francisco Alcázar Miranda as an injured party," which rejects the intent of the representatives to "give the next of kin not included in one of the suppositions established […] in the Judgment in question a period of time so they may be included in them […]," and that "the next of kin referred to in [the Judgment as beneficiaries of medical and psychological treatment] are those identified in appendix 2 [of the same] and eventually the inmates' children verified in the time period granted."

7. On August 1, 2007 the representatives presented their written arguments to the request for interpretation presented by the State, and they stated their "opposition […] to the Request for Interpretation presented by the State" with regard to the Judgment in the Case of the Miguel Castro Castro Prison, asking the Tribunal to "[…] declare it inadmissible."

8. On the same August 1, 2007 the Commission and the common intervener presented their written arguments regarding the requests for interpretation presented. The Inter-American Commission stated that the request presented by the State sought to modify certain aspects of the Judgment and include additional matters in the case. With regard to the request presented by the representatives, the Commission considered that, beyond the clarification on the classification of a specific person as a victim, the matters presented "[are] not a subject of interpretation of the judgment. On her part, the common intervener stated that the request presented by the State seeks to "propose the change of [certain] terms [of the Judgment] because it is not satisfied with them." Regarding the request for interpretation presented by the representatives, the common intervener stated that "she does not consider that there is any doubt in the scope of the passages mentioned" by them in the Judgment.

9. On August 21, 2007 the common intervener forwarded a brief and several appendixes that presented arguments regarding the written pleadings presented by the Inter-American Commission and the State with regard to "the acceptability of the inclusion of victims or beneficiaries of the reparations in Appendix 2 [of the Judgment] not determined by the Court […]."

10. On November 5, 2007, pursuant to that decided by the majority of the Judges of the Court, the Secretariat responded to Peru's request for a public hearing (supra para. 2). In said communication the State was informed that, pursuant to Article 59(5) of the Rules of Procedure, the Court determined that in order to decide on the present requests of interpretation it would follow "the written procedure, taking into account for the same the arguments presented by the parties that refer to matters of law and their characteristics, whose nature and scope can be clearly concluded from the requests made by those who ask for the interpretation," without the need for clarifications or complementary precisions. In this regard, "the Court goes by the nature and scope of the request for interpretation pursuant to the Inter-American ordinance, which does not imply a new presentation of facts or juridical consideration regarding these, additional to

those presented by the parties in the case on merits and analyzed by the Tribunal for the purposes of the corresponding Judgment."

11. On November 22, 2007 the State sent a note in which it made reference to the Secretariat's letter of November 5, 2007 and it stated that "understanding […] that the Court would be in the condition to know of and decide on the requests for interpretation presented," it reiterated that expressed in its previous briefs.

12. On February 29, 2008 the State sent "additional information" regarding its request for interpretation of the Judgment. In said brief the State informed and sent a copy of a newspaper of February 25, 2008, which refers to the arrest and processing of a person that appears in Appendix 2 of the Judgment of November 25, 2006 and reproduces "what were the statements offered" by said person before a public prosecutor with regard to its alleged relationship with Sendero Luminoso. Similarly, the State enclosed a letter of the author of the monument "The Eye that Cries", who stated that she hoped that the act of engraving the names of the victims of the case of La Cantuta in said monument "is not considered a precedent so that the same could happen with the victims of the Castro Castro [P]rison. To be more precise, not with those persons who have a proven criminal record of crimes against humanity […]."

13. On April 3, 2008 the common intervener presented observations to the State's brief of February 29, 2008. She stated that "it is clear" that Peru "has the right [to] criminally investigate any person the State considers has committed a crime, pursuant to the law;" however, the case of the person referred to by the State does not allow it to "generalize an alleged criminal behavior and extend a criminal behavior to other people benefited in the judgment […]." She mentioned that the State is making a generalization that violates elemental considerations of the due process of law and ignores that the people she represents "have made clear, throughout the litigation of the case […] their rejection of Sendero Luminoso" and that the same "have confronted any position that has tried to distort the sense of the case […]." She stated that the incident of the arrest informed by Peru "is an excuse to try to justify non-compliance of the judgment by the Peruvian State with regard to victims that have no relationship whatsoever with [S]endero [L]uminoso." Likewise, she informed over several procedures carried out before the State for compliance of the Judgment, all of which had been unsuccessful. Regarding that informed on "The Eye that Cries", among other considerations, the common intervener indicated that it was "precisely the Peruvian State who proposed to the […] Court that it include in ['The Eye that Cries'] the names of the inmates murdered in the Castro Castro [Prison] […]," and she recalled that both she and those she represents had requested "that a green area with trees be built as a symbolic measure of satisfaction." Among the considerations made when choosing a park with trees "was precisely not giving way to political uses foreign to [their] position to the measure of a symbolic nature;" a green park did not try to legitimize anything different to "a message of life."

14. On April 28, 2008 Judge Alirio Abreu Burelli, acting Vice-President at that time for the present case, urgently informed the Tribunal that due to a grave and unexpected reason of force majeure he had to cancel his trip to the Headquarters of the Inter-American Court, and that he could not participate in the XXXIV Extraordinary Session to be held on May 1, 2008, date on which the Court would deliberate and study the possibility to issue a judgment in the present

proceedings. Later, on May 2, 2008, Judge Alirio Abreu Burelli sent a note in which he stated that considering that "[i]t is the second time that due to completely inevitable causes it is impossible for him to be present in the ruling of said case," he asked the Tribunal to "remove him from [his] duties as Judge in these proceedings."

15. On the same May 2, 2008, Judge García Ramírez, acting President in the present case, asked the Presidency of the Tribunal, Judge Medina Quiroga, to formally inform him of the order of precedence of the judges that were elected in the XXXVI Regular Session of the General Assembly of the Organization of American States, held on June 4th to 6, 2006. On that same day Judge Medina Quiroga officially informed Judge García Ramírez that Judge Leonardo A. Franco had precedence among the judges elected on that opportunity. Having asked Judge Leonardo A. Franco he expressed his willingness to form part of the Tribunal to hear the proceedings of interpretation of the judgment in the present case, and through Order of May 3, 2008 the Court decided "to accept the resignation to hear the present case presented by Judge Alirio Abreu Burelli" and "include Judge Leonardo A. Franco so that he can hear the present proceedings of interpretation of a judgment in substitution of Judge Alirio Abreu Burelli." [FN3] All this pursuant to Articles 13, 16(1) and 59(3) of the Rules of Procedure.

[FN3] Case of the Miguel Castro Castro Prison. Order of the Inter-American Court of Human Rights of May 3, 2008.

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16. On July 23, 2008 Peru sent a brief of "additional grounds to the request," and copies of the Judgment of October 13, 2006 in dossier No. 560-03 of the National Criminal Chamber and of the Supreme Executory Court of December 14, 2007 of the Second Transitory Criminal Chamber of the Supreme Court of the Republic (Appeal for Annulment No. 5385-06).

17. On the same July 23, 2008, the Secretariat forwarded said brief and its appendixes to the parties and informed Peru that they were presented to the Inter-American Court in a timely manner so that it could decide on its admissibility. Additionally, the parties were given time until July 30th to present their observations.

18. On July 30, 2008 the representatives presented their observations requesting that the inadmissibility of said brief be declared, or, in its defect, that it be dismissed due to lack of reason and grounds.

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19. The Tribunal observes that the communications mentioned in paragraphs 9, 11 through 13 and 16 of the present Judgment constitute written procedural acts that are not foreseen in the American Convention or in the Rules or Procedure, nor do they respond to a request of the Tribunal or its President. Despite the aforementioned, regarding those statements made by the State and the common intervener in said briefs, as well as those of the representatives in their brief of July 30, 2008, that refer to matters related to the supervision of compliance of the Judgment on merits, reparations, and costs, in what is relevant, will be considered by the

Tribunal throughout the course of said proceedings, even when the Court may take note of the new information recently presented by the State regarding the reparation measure related to the monument "The Eye that Cries", as well as of the observation of the common intervener, and it will make the considerations and rule as considered pertinent in the present Judgment (infra para. 57).

II. JURISDICTION AND COMPOSITION OF THE COURT

20. Article 67 of the Convention states that:

[t]he judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment

21. Pursuant to the above-cited provision, the Court has jurisdiction to interpret its judgments. To carry out the exam of the request for interpretation and to decide what corresponds in this matter the Tribunal must, whenever possible, be composed of the same judges who delivered the corresponding judgment (Article 59(3) of the Rules of Procedure). On this occasion, the Court is composed of the judges who delivered the Judgment on merits, reparations, and costs, whose interpretation has been requested by the State and the representatives, with the previously mentioned modification (supra paras. 14 and 15). [FN4]

[FN4] Judge Oliver Jackman, who due to reasons of force majeure had not participated in the deliberation and signing of the Judgment on merits, reparations, and costs of November 25, 2006, passed away on January 25, 2007.

III. ADMISSIBILITY

22. It corresponds to the Court to verify if the requests for interpretation comply with the norms applicable to this specific procedural supposition. Besides above-mentioned Article 67 of the Convention, Article 59 of the Rules of Procedure states, in what is relevant, that:

1. The request for interpretation, referred to in Article 67 of the Convention, may be made in connection with judgments on the merits or on reparations and shall be filed with the Secretariat. It shall state with precision the issues relating to the meaning or scope of the judgment of which the interpretation is requested.
[…]
4. A request for interpretation shall not suspend the effect of the judgment.
5. The Court shall determine the procedure to be followed and shall render its decision in the form of a judgment.

23. Finally, Article 29(3) of the Rules of Procedure establishes that "[j]udgments and orders of the Court may not be contested in any way."

24. The Court has verified that both the State and the representatives presented their request for interpretation of the judgment within the term established in Article 67 of the Convention, since they were presented on the 16th and 20th days of March 2007, respectively, and the Judgment on merits, reparations, and costs was notified to the parties on December 20, 2006.

25. As had been previously stated by this Tribunal in its constant and invariable jurisprudence clearly based on the applicable jurisdiction, the request for interpretation of a judgment may not be used as a means of appeal of the ruling whose interpretation is being requested. Its exclusive objective is to clarify the sense of a judgment when any of the parties holds that the text of its operative paragraphs or its considerations lacks clarity or precision, as long as these considerations affect said operative paragraphs. Therefore, the modification or annulment of the corresponding judgment may not be asked for through a request for interpretation. [FN5]

[FN5] Cfr. Case of Loayza Tamayo v. Peru. Interpretation of the Judgment on Merits. Judgment of the Court of March 8, 1998. Series C No. 47, para. 16; Case of Cantoral Huamaní and García Santa Cruz v. Peru. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2008. Series C No. 176, para. 10, and Case of Escué Zapata v. Colombia. Interpretation of the Judgment on Merits, Reparations, and Costs. Judgment of May 5, 2008 Series C No. 178, para. 10.

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26. Consequently, the Court has established that the request for interpretation of the judgment cannot refer to and decide on matters of fact and law that were already presented at the correct procedural moment and with regard to which the Tribunal adopted a final decision. [FN6]

[FN6] Cfr. Case of Loayza Tamayo v. Perú. Interpretation of the Judgment on Reparations. Judgment of June 3, 1999. Series C No. 53, para. 15; Case of Cantoral Huamaní and García Santa Cruz. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations, and Costs, supra note 5, para. 11; and Case of La Cantuta v. Perú. Interpretation of the Judgment on Merits, Reparations, and Costs. Judgment of November 30, 2007. Series C No. 173, para. 32.

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27. To analyze the validity of the requests for interpretation presented by the State and the representatives and, in its case, clarify the sense or scope of the Judgment on merits, reparations, and costs of November 25, 2006, the Court will analyze, first the matters presented by the State and later those submitted to the consideration of the Tribunal by the representatives.

IV. PROVEN FACTS AND COMPLIANCE OF CERTAIN MEASURES OF REPARATION ORDERED IN THE JUDGMENT (THE STATE'S REQUEST FOR INTERPRETATION)

The State's Request for Interpretation

28. In its request for interpretation the State indicated that two of the facts proven in the Judgment of this Tribunal, included in paragraphs 197(1) and 197(5), should be clarified since they "reflect a situation that does not coincide with the reality of the violent actions lived by Peru in the hands of [Sendero Luminoso]," and that said facts "have their logical corollary in Operative Paragraphs" and "they derive, through a certain intrinsic logic, in a determined modality of compliance of the Judgment." Regarding the fact proven in paragraph 197(1), which establishes that there was in Peru a conflict between "armed groups and agents of the police and military forces," the State requests that the reference to "armed groups" be clarified, since the Commission of Truth and Reconciliation of Peru (CVR) considered Sendero Luminoso a "subversive terrorist movement responsible for serious violations of human rights and crimes against humanity." Regarding the fact proven in paragraph 197(5), which refers to complaints received and information of the CVR on violations to human rights in Peru, the State requests that the "predominant nature of acts of violence and violation of human rights perpetrated by [Sendero Luminoso]" be clarified.

29. In what refers to compliance of the three non-repetition measures ordered in the Judgment, the State mentioned:

a) regarding paragraph 440 of the Judgment, which establishes the obligation to "fight [the] situation of impunity and the importance of informing the victims and their next of kin of the truth of the facts in the present case," the State asks about "the possibility to refer to past acts of serious violations to human rights perpetrated by members of [Sendero Luminoso,] related to or as a background to the facts of May 1992;"
b) regarding the public act of acknowledgment of responsibility, it requested that it be clarified if it implies "distinguishing throughout the course of the act itself, a respectful and reflexive mention of the juridical condition of the victims at the time of the facts," whether they are being prosecuted or have been sentenced for crimes related to terrorism. This, according to the State, based on the fact that this case differs from others "in the sense that the victims were not deprived of their freedom in a prison or had never committed acts classified as a crime against public tranquility – specifically, terrorism." That request for clarification is made "in respect and memory of the victims of [Sendero Luminoso];" and
c) regarding the diffusion of the Judgment, the State indicated that this was the first time in which the Court asked Peru to broadcast by radio and television certain parts of the Judgment. The State asked the Court to consider "the contrary effect that this could generate among the population upon reference [to some aspects of the Judgment ordered by the Tribunal as a measure of reparation]."

30. Regarding the payment of the compensations ordered in the Judgment, the State mentioned that:

a) "since some of the victims determined by the Court are at the same time people that have committed crimes and are currently serving time for them," said people could "receive the compensation to, eventually, continue maintaining the subversive behavior that led them to prison, finance the so-called Communist Party of Peru -– Sendero Luminoso, and for new acts of violence." Therefore, the State requested that "the same amount of money ordered to be paid as

compensation be destined to the offering of health services, education, food, [etc.] Said payment would be made individually through an intangible fund or trust whose amounts would be the same ones established by the Court, and they could be managed by the United Nations Development Program (UNDP) or any entity of the Organization of American States (OAS) that can guarantee their objective and independent administration;" and

b) regarding the victims that "were convicted in a due process for crimes of terrorism and who owe the State or the victims of their crimes the civil reparation, it asks if the State or the individuals entitled to civil reparation may deduct [from the compensation granted by the Court] the person's previous debt or judicially request the withholding of the reparation that must be paid by the State."

31. The State declared that "in the case of the victims acquitted in a procedure in a national venue will be exactly as stated literally by the […] Court and regarding the same no clarification or interpretation is presented."

32. Finally, the request included a section called "Some final considerations", different from the chapter on "Matters to be clarified or interpreted." In that section, Peru, based on "Article 64 of the [American Convention,] asks the Court for its interpretation of several international treaties considering the systematic, dynamic, and evolving nature of international human rights law," regarding the "[international" responsibility of non-state groups for the violation of human rights and crimes against humanity." This with the objective of having the mentioned dynamic interpretation "included within the legal framework in which [the Court] appraises the claims developed in the request for interpretation" in support "of its request for a change in the modality of compliance."

Arguments of the Inter-American Commission

33. The Commission presented observations of a general nature and other specific ones to the request for interpretation presented by the State. Regarding the first it stated that "the brief presented by the State […] does not seek that [the Court] interpret the sense or scope of the judgment […] but instead it seeks a revision and inclusion of additional matters in the final and unappealable judgment issued by [the Tribunal] that were not object of the action, as acknowledged by the claimant itself." In what refers to the specific observations it stated that "the manner in which the public act of acknowledgement of responsibility and compensation must be carried out is clearly determined in paragraph 445 of the Judgment," therefore the appropriateness of making reference during said act to "the juridical situation of 31 people […] who had been convicted by the national authorities due to their militancy in the subversive group Sendero Luminoso […] or that, as expressed by the State, are fully acknowledged by society as members of the leadership of Sendero Luminoso," is "inappropriate and inadmissible." Similarly, the Commission mentioned that the State proposed "a reconsideration of the broadcasting of the relevant parts of the judgment through radio and television" based on the alleged "contrary effect that could be generated among the population by referring only to the facts of the present case without mentioning the violence attributable to Sendero Luminoso […]," and stated that said "question made by the State results inadmissible" and that "it is […] within the framework of the follow-up and evaluation process of the implementation of said reparations where this type of consultation may be presented." Finally, with regard to payment of

the compensations, the Commission stated that the "Tribunal has already determined with complete clarity the form and terms in which said payments must be made" and that "the Judgment clearly establishes […] that the compensations must be delivered to their beneficiaries. Any process following the effective payment of said compensations, carried out within the domestic realm with the objective of fulfilling the pending civil obligations of some of said beneficiaries, is not the object of the present case."

Arguments of the common intervener

34. The common intervener declared that the State's request does not consist in a request for clarification of aspects of the Judgment that "are in its understanding obscure or unclear." Specifically, she stated that Peru "[…] is clear regarding the operative paragraphs and the terms established by the Tribunal in the Proven Facts of the Judgment and the object of its brief is instead to propose a change of said terms since it is not satisfied with them." Likewise, the common intervener stated that she represents the "next of kin of people that were never detained, Peruvian citizens that have never been submitted to any criminal proceeding […] as well as direct victims of the attack to pavilions 1A and 4B who were acquitted or pardoned in the proceedings that motivated their arrest and others that having been sentenced but are not members of Sendero Luminoso." She added that "among the beneficiaries and next of kin of the prisoners that were murdered or that suffered the attack […] there are all types of people, including members of the Peruvian police […]," and that "what happened to the group of people affected by the massacre occurred in the Castro Castro prison touched the entire Peruvian society." Finally, the common intervener concluded that the State's request does not adjust to the terms of Article 67 of the Convention, since its purpose is to change operative paragraphs of the Judgment.

Arguments of the representatives

35. The representatives stated that the requests made by Peru are inadmissible, among other reasons, because the "interpretations and clarifications requested by the State go beyond the interpretation [of the Judgment] and even modify the sense and scope [of the same]." Likewise, the representatives argued that "to be or not in favor of the PCP does not have any effect on [the] fundamental rights" of the "defenseless inmates that were attacked and massacred by a repressive government." With regard to the act of acknowledgment of responsibility they stated that the State's request "denatures that ordered by the Court" and will be translated into a "stigmatization" of all the victims "[as] terrorists, even without the existence of a single piece of evidence against them." According to the representatives the request presented by the State in relation with the broadcast on radio and television, "would have the consequence of minimizing the effectiveness of the measure." Finally, regarding the pecuniary reparation the representatives stated that all the victims and their next of kin "have the same right as any other citizen to receive compensations when their human rights are violated."

Considerations of the Court

36. The Court observes that the State on several opportunities expressed that its request for an interpretation of the Judgment does not seek in any way to change the content and substance

of the same and that at all times "[…] it acknowledges the facts that led to the punishment of the Peruvian State due to grave violations of human rights with the facts occurred in May 1992 and during the following months […]."

37. However, the Tribunal observes that in certain questions made by the State there are underlying doubts regarding the scope of that stated in the Judgment on merits, reparations, and costs, and based on this it will proceed to make the necessary considerations regarding certain aspects of the request for interpretation.

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Two paragraphs of the proven facts of the Judgment

38. The Court considers it appropriate to refer to that mentioned by the State in its request for interpretation with regard to two paragraphs of Chapter VIII, Proven Facts of the Judgment (supra para. 28). The first aspect mentioned by the State appears in paragraph 197(1) of the section on "Background and juridical context," while paragraph 197(5) is located in the section of the Judgment that refers to "The Commission for Truth and Reconciliation". First of all in this sense it is necessary to clarify that neither of these two paragraphs questioned by the State include erroneous information. The first of them refers to the characterization the Tribunal made of Sendero Luminoso and other armed groups the State does not agree with; while the second paragraph refers to information the Tribunal has obtained from the evidence presented by the parties in the present case, regarding which the State has shown concern for the possible conclusions that could be derived from said information.

39. Similarly, it is necessary to point out that in the case submitted to the Court the conflict lived in Peru since the beginning of the decade of the eighties and until the end of the year 2000 was not under analysis, nor was the decision regarding who should be attributed the "majority of the blame" for the violence carried out, or the "historic truth" of that occurred in said conflict. On the contrary, the facts for which the International Commission presented an application and the State acknowledged its international responsibility are limited to that occurred in the Miguel Castro Castro Prison in May 1992 and that are stated, among others, in paragraph 221 of the Judgment on merits, reparations, and costs.

40. As has been stated in other opportunities, the Court lacks the power to rule on the nature and aggravating circumstances of the criminal acts attributed to the victims. This is the characteristic of an international human rights court, which is not a criminal court. When ruling on other cases, the Court pointed out that it is not a criminal court in the sense that it may not discuss the criminal responsibility of individuals. [FN7] Therefore, the Court determines the juridical consequences of the facts it has considered as proven within the framework of its competence and concludes if there is any responsibility of the State for the violation of the Convention and it cannot examine the parties' statements regarding the alleged criminal responsibility of the victims, since this matter corresponds to the domestic jurisdiction or eventually, under certain circumstances, to the international criminal jurisdiction. In this sense, the Court observes that the State in its request for interpretation acknowledged that "[…] it is not within the Court's jurisdiction to issue a ruling on the behaviors that are foreign to and different

from the State's international responsibility, such as those of the SL [Sendero Luminoso]." (emphasis added).

[FN7] Cfr. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 134; Case of Zambrano Vélez et al. v. Ecuador. Merits, Reparations, and Costs. Judgment of July 4, 2007. Series C No. 166, para. 93; Case of Boyce et al. v. Barbados. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 20, 2007. Series C No. 169, footnote 37; and Case of Yvon Neptune v. Haiti. Merits, Reparations, and Costs. Judgment of May 6, 2008. Series C No. 180, para. 37.

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41. Without detriment to that previously mentioned, the suffering caused to Peruvian society by Sendero Luminoso is widely and publicly known. In effect, as can be read in its Judgment in the present case, the Tribunal is not unaware of the fact that said armed group acted on the fringes of the law, nor is it unaware of the effects of the actions of said group.

42. This Court has previously stated its most energetic rejection to terrorist violence, especially in the cases regarding Peru where it has indicated that:

"a State has the right and the duty to guarantee its own security, although it must always exercise that right and duty within limits and according to procedures that preserve both public safety and the fundamental rights of the human person. Obviously, nothing justifies terrorist violence –no matter who the perpetrators- that is harmful to individuals and to society as a whole. Such violence warrants the most vigorous condemnation." [FN8]

[FN8] Cfr. Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations, and Costs. Judgment of May 30, 1999. Series C No. 52, para. 89; and Case of Lori Berenson Mejía v. Peru. Merits, Reparations, and Costs. Judgment of November 25, 2004. Series C No. 119, para. 91.

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43. Finally, the Tribunal is not unaware of the fact that the Commission of Truth and Reconciliation, with regard to the attribution of responsibility in the conflict lived in Peru, concluded that Sendero Luminoso "was the main perpetrator of crimes and violations of human rights using as the measurement for this the number of people dead and missing. It was responsible for 54 per cent of the fatal victims [reported to said Commission]." [FN9]

[FN9] Cfr. Final Report of the Commission of Truth and Reconciliation, CVR, issued on August 27, 2003 in the city of Lima, Peru; Volume VIII, General Conclusion 13, page 355 (Appendix E to the brief of the State's request for interpretation of the judgment, dossier of interpretation of the judgment, folio 138).

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Three measures of non-repetition

44. Regarding the State's considerations in its request for interpretation, related to the three measures of non-repetition ordered by the Court in the Judgment (supra para. 29, subparagraphs a, b, and c), referred to the obligation to investigate, the public act of acknowledgment of responsibility, and the diffusion of the Judgment, this Tribunal considers it appropriate to make the following considerations.

45. In relation to paragraph 440 of the Judgment the State asked about "the viability of referring to past acts of grave violation to human rights perpetrated by the members of [Sendero Luminoso,] linked or as a background to the events of May 1992."

46. The Court warns that the paragraph referred to by the State is located in Chapter XVI on Reparations of the Judgment where the obligation to criminally investigate the facts that led to the violations of the present case and identify, prosecute, and, in its case, punish those responsible is established, among others.

47. The Court has reiterated in several cases that the lack in its totality of investigation, prosecution, prosecution, and conviction of those responsible for the violations of the rights protected by the American Convention is considered impunity. [FN10] It is precisely through the actions of investigation, arrest, prosecution, and, in its case, conviction carried out by the State of those responsible for said violations that the victims and their next of kin will be in the condition to know the truth of the facts, which in itself constitutes a means of reparation. [FN11]

[FN10] Cfr. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits. Judgment of March 8, 1998. Series C No. 37, para. 173; Case of Vargas Areco v. Paraguay. Merits, Reparations, and Costs. Judgment of September 26, 2006. Series C No. 155, para. 153; and Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations, and Costs. Judgment of November 25, 2006. Series C No. 160, para. 405.

[FN11] Cfr. Case of Velásquez Rodríguez. Merits, supra note 7, paras. 174-177; Case of Bueno Alves v. Argentina. Merits, Reparations, and Costs. Judgment of May 11, 2007. Series C No. 164, para. 90; and Case of Escué Zapata v. Colombia. Merits, Reparations, and Costs. Judgment of July 4, 2007. Series C No. 165, paras. 75 and 165.

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48. The Court observes that paragraph 440 of the Judgment refers to the criminal investigation that must be carried out by the State in relation to the facts known and decided on by the Inter-American Court in the present case. The Court considers that the compliance of said international obligation is different and compatible with the possible criminal investigations that could be carried out in Peru regarding the alleged crimes attributable to people that the State links to criminal acts.

49. With regard to the public act of acknowledgment of responsibility, the State requested that the Court clarify if it was possible "to distinguish throughout the course of the act itself, a

respectful and reflexive mention of the juridical condition of the victims at the time of the facts (whether they are being prosecuted or have been sentenced for crimes acknowledged in the criminal legislation in force at the time of the facts) or after the facts of May 6 through 9, 1992." (supra para. 29(b)) This "in respect and memory of the victims of [Sendero Luminoso]."

50. A public act of acknowledgment of international responsibility is a reparation measure that the Inter-American Court usually orders in certain cases in which it has found there is a violation to the human rights enshrined in the American Convention. The facts regarding which the parties went on record and the Court issued its Judgment were those occurred in the Miguel Castro Castro Prison and some subsequent ones directly related to the same, as that occurred with certain family members and the corresponding judicial actions, thus the reparation measure must be limited to the facts known of and decided on by the Tribunal. On the other hand, upon ordering this reparation measure the Tribunal took into account that the State acknowledged its international responsibility for the facts occurred in the Miguel Castro Castro Prison during the processing of the present case. Therefore, in the terms of the acknowledgment of international responsibility made before this Court, the State must now make said acknowledgment within its domestic jurisdiction.

51. Finally, with regard to the diffusion of the Judgment, the State indicated that this was the first time in which the Court asked Peru to broadcast on radio and television certain parts of the Judgment. The State asked the Court to consider the "cumulative" effect of the different forms of diffusion of the Judgment and the "contrary effect this could generate among the population […]." Likewise, Peru stated "it supports its consultation in the objective that the victims or their next of kin understand that it would be reasonable to limit the coverage hours of the broadcasting of the satisfaction measure in order to protect the higher interest of the child, who has already been exposed to high doses of violence through mass media." Finally, the State argues that it makes this consultation in order "not to send ambiguous, or wrong, messages to the totality of the population in the sense of tolerating, backing, or vindicate people committed with Sendero Luminoso or even do so in favor of said group, characterized by its terrorist methods and practices […]."

52. The Court considers it pertinent to state that the meaning of this measure of reparation is to inform of the truth of the facts that were examined by the Tribunal in the present case in order to avoid their repetition in the future; facts for which the State acknowledged its international responsibility in its response to the application, in the public hearing, and in the brief of final arguments. The considerations related with the compliance of this reparation measure, its modality and how to reach the objective sought by the same, may be submitted to the Court's consideration by the State in the process of supervision of compliance of the Judgment and be assessed by the Tribunal in said proceeding.

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Compensations

53. With regard to that argued by the State on the possibility that the creditors, third parties, and the State itself present a legal action against any of the beneficiaries of the economic

reparations for previous debts they may have (supra para. 30(b)), first of all the Tribunal recalls that in its Judgment it ordered, as it has done invariably, that the amounts assigned as compensation and reimbursement of costs and expenses not be affected or conditioned by tax reasons. This constitutes a supposition of fact different to the question presented by the State. In this sense, the Court observes that the possible debts the people that accessed to the Inter-American system may have within their domestic legislation and the legal actions their private creditors, whether private or public, may present against them are matters foreign to the international process before this Tribunal that the State must solve pursuant to its domestic law.

54. In reference to that requested by the State with regard to the modality of compliance of the economic reparations (supra para 30(a)), the Tribunal warns that in said aspect of the request for interpretation it is not asked to clarify the sense or precise the scope of said part of the Judgment, but instead it is asked to revise and modify what was established and ordered in that decision. The State itself expressed its claim of modification upon indicating that "[…] the cornerstone of [its] argument […], respectfully seeks a change in the modality of compliance of some of the operative paragraphs […]." (emphasis added). The Court lacks the power to solve said aspect of the request for interpretation, since Articles 67 of the Convention, 29(3) and 59 of the Rules of Procedure do not permit it. The Tribunal will consider the matters related with this reparation measure that may be the object of the procedure of supervision of compliance with the Judgment in a timely manner.

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Regarding the consultation in the terms of Article 64 of the Convention

55. The Court observes that the State, based on "Article 64 of the [American Convention], consults the Court on the interpretation of certain international treaties considering the systematic, dynamic, and evolving nature of international human rights law," regarding "the [international] responsibility of non-state groups for violations of human rights and crimes against humanity." This in seeking that the alleged dynamic interpretation "be included in the juridical framework within which [the Court] appraises the claims developed in the request for interpretation" in support "to its request for a change in the modality of compliance."

56. This Tribunal considers that this aspect of the request for interpretation based on Article 64 of the American Convention, which regulates the filing of advisory opinions, and that does not refer to a specific aspect of the Judgment to be clarified, but to "the interpretation of certain treaties," results as foreign to the present proceeding of interpretation as can be concluded from the American Convention itself, reason for which it will not issue an opinion regarding this matter in the present Judgment.

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57. With regard to the reparation measure related to the monument "The eye that cries" (supra paras. 12, 13, and 19), even though said information was presented outside of the term granted for it and was not part of the request for interpretation, the Court considered it appropriate to recall, as can be seen in paragraph 453 of the Judgment on merits, reparations, and

costs that, regarding the request of the Inter-American Commission and the common intervener on the construction of monuments and the creation of a park in the area of Canto Grande, it was the State who argued that "a monument (called the Eye that Cries) has already been built in favor of all the victims of the conflict in a public place within the capital of the Republic and it is the object of continuous acts of commemoration." In attention to said argument of the State, the Court ordered the reparation measure established in the Judgment. In order to overcome the difficulty informed of by Peru in its brief of February 29, 2008, the Court accepts that the State create a park or build a monument that can satisfy the sense and purpose of the reparation measure ordered by the Tribunal in its Judgment. The State has a one-year term as of the notification of the present Judgment to comply with this measure.

V. DETERMINATION OF VICTIMS AND RIGHT TO THE REPARATION MEASURES ORDERED IN THE JUDGMENT (REQUEST FOR INTERPRETATION OF THE REPRESENTATIVES OF VICTIMS DIFFERENT TO THE COMMON INTERVENER)

Request for interpretation of the representatives

58. In their request for interpretation, the representatives stated their position with regard to the determination of the people considered victims in the Judgment indicating the following:

a) in paragraph 433(d) the Judgment granted an 8-month term to the inmate's children that at the time of the facts were under the age of eighteen so they could prove their condition of victims before the domestic authorities. The representatives requested that "[…] it be clarified if the 8-month term referred to in paragraph 433(d) of the judgment" extends also to the next of kin "that were not determined in appendix 2 of the Judgment," so "they may prove before the competent authorities of the Peruvian state within an 8-month term that they comply with the suppositions established [in the Judgment in paragraphs] 336 [next of kin of the inmates that visited hospitals and morgues looking for them] and 340 [next of kin of the inmates victims of solitary confinement and visitation restrictions that were not children under the age of 18 of inmates] and therefore receive the corresponding reparations;"

b) "there is doubt […] regarding which of the victims' next of kin are specifically considered by the Court as beneficiaries of the medical and psychological treatment," since 1) the Tribunal mentions that the beneficiaries of these measures are "victims and their next of kin", without making reference to a specific group of victims, or limiting the category of the next of kin, or making reference to any appendix, and 2) the next of kin mentioned in appendix 2 of the Judgment were declared victims, reason for which "it does not seem that the treatment should be limited only to them since in that case it would have been enough for the Tribunal to grant it to the 'victims', ,instead of 'victims and their next of kin'." Therefore, the representatives requested it clarify that who should receive the medical and psychological treatment ordered are "all the next of kin of the deceased victims and survivors." Finally, they ask the Court to clarify that the 8-month term to prove the condition of next of kin is applicable to all relatives, pursuant to that previously stated; and

c) despite the fact that the injuries suffered and the condition of surviving inmate of Mr. Francisco Alcázar Miranda were proven, his name does not appear in appendix 2 of the Judgment; therefore, they requested that if be "clarified if the mentioned exclusion […] was due

to a typographical error or an involuntary omission and that therefore he must be included […] in the list."

Arguments of the Commission

59. The Commission stated that the Judgment "clearly determined which of the next of kin were considered victims and were therefore named in Appendix 2 of the [J]udgment" and that "the only next of kin of the victims not specified in Appendix 2 of the Judgment, to who the Tribunal grants the possibility to prove their condition within the 8 months following the notification of the Judgment[,…] are the inmates' children that at that time were under the age of 18." Likewise, it stated that "the purpose of paragraph 461,[which orders medical and psychological treatment,] is to establish this reparation in favor of the next of kin declared as victims by the Tribunal in paragraphs 336, 337, and 340 and specified in 'Appendix 2'; and of those identified by virtue of that stated in paragraph 433(d), within the term established for that effect." The Commission added that "this subject is not a matter of interpretation of the judgment, because it does not respond to the need of precision of a text […] in what refers to that decided in its operative paragraphs [or] in what refers to the determination of the scope, sense, and purpose of its considerations." Finally, it stated that "as long as there is evidence in the dossier that [Mr. Francisco Alcázar Miranda] in effect resulted with injuries as a consequence of the facts, it could be necessary to expressly state that he is a victim and beneficiary of […] reparations."

Arguments of the common intervener

60. The common intervener stated her disagreement with some observations of the representatives and expressed, among other considerations, that "the Judgment is clear with regard to the number of injured and uninjured parties, however, it left the possibility open for people not included in the list of the injured parties […] to prove [said] condition pursuant to the terms of the Judgment."

Arguments of the State

61. The State expressed that when issuing its Judgment, the Tribunal "considered it had enough evidentiary elements to specify the next of kin of the inmates entitled to a compensation for the violation of their right to humane treatment, in three situations[, established in paragraphs 336, 337, and 340 and 341 of the Judgment]." According to paragraph 433(d) of the Judgment only the last of the three situations, which refers to the next of kin of the inmates victims of solitary confinement and restriction of visits, may be extended to the inmates' children that at the time of the facts were under the age of 18. It stated that "it considers that the next of kin referred to by the State are those included in Appendix 2 of the Judgment […] and eventually the children of the inmates verified in the term granted." Besides, the State understands that the mentioned 8-month term "was granted to the victims so they may prove their residency outside of Peru and that they need medical and psychological treatment." Finally, it mentioned that "the Court must clarify the exclusion of Francisco Alcázar Miranda as an injured party and beneficiary […] of the reparations."

Considerations of the Court

62. The Court considers that there are doubts that underlie the questions made by the representatives regarding the scope of that stated in the Judgment on merits, reparations, and costs and based on this it will proceed to interpret the judgment in the aspects requested.

a) Regarding the victims to which the 8-month term established in paragraph 433(d) applies

63. In paragraphs 334 and following of the Judgment, the Court established the reasons why it concluded that the facts of the case constituted a violation to the right to humane treatment of certain next of kin of the inmates of the Miguel Castro Castro Prison. The next of kin declared victims therein, with the only exception of some of the underage children of the inmates, were identified in Appendix 2 of the Judgment. Since the Court was not aware of the identity of all the inmates' children, they were granted an 8-month term to appear before the competent state authorities, prove their relationship and age, and receive the corresponding compensation. The representatives requested a clarification regarding the situation of the next of kin of the inmates that were not declared victims in the Judgment and they asked if they can be compared to the situation of the inmates' children that at the time of the facts were under the age of 18 in order to grant them the same 8-month term so they may appear before the national authorities and prove the alleged condition of victim.

64. As can be concluded from the reading of the corresponding paragraphs of the Judgment on merits, reparations, and costs and from the aforementioned, these are different suppositions and therefore clearly differentiated by the Tribunal. On one hand, in the case of the next of kin regarding which it was proven before the Court that they were outside the prison between May 6 and 9, 1992 and who witnessed the attack, or had to visit hospitals and morgues searching for their next of kin, or who suffered due to the strict solitary confinement and restriction of visits applied to the inmates, the Tribunal concluded that they suffered a violation to their right to humane treatment. The individual situation of these persons was analyzed and proven in the correct procedural moment before the Court. From the evidence provided by the parties to the process the result was a closed number of those next of kin declared victims and identified in Appendix 2 of the Judgment. The possible existence of next of kin that were not declared victims by the Court and regarding which it could be argued that they lived or were submitted to one of the factual suppositions mentioned that determined the breach of the right to humane treatment, this should have been proven in the appropriate procedural moment, specifically during the processing of the merits of the case.

65. On the other hand, the situation of the children under the age of 18 of the inmates of the Castro Castro Prison is different. The Court declared a violation of Article 5 of the Convention in detriment of every person who at the time of the facts was the underage child of an inmate because it understood that "the deprivation of contact and relationships with their inmate mothers," as a consequence of the measures of solitary confinement applied by the State, violated the right to humane treatment of said children. The Court granted them an 8-month term to the mere effect of proving their relationship and age, since their condition of victims was established in the Judgment. What was suggested by the representatives (supra para. 58 subparagraph a) would open the possibility that other family members who the Court did not

declare victims and that therefore are not considered in paragraph 433(d) or identified in Appendix II be considered as such, which is not established in the Judgment issued in the present case.

b) Next of kin of the victims who are beneficiaries of the medical and psychological treatment

66. With regard to that stated by the representatives in the sense that "there is doubt […] about which of the next of kin of the victims […] are beneficiaries of the medical and psychological treatment," the Court reiterates that it established in paragraph 449 of the Judgment the State's obligation "to offer, without cost and through its specialized health institutions, the medical and psychological treatment required by the victims and their next of kin, including any medication required by them, taking into consideration the sufferings of each of them after an individual evaluation." On its part, in paragraph 461 of the Judgment, the Court ordered, inter alia, that said medical and psychological treatment required by the victims and their next of kin be "offered immediately to those who have already been identified and as of the moment in which the State identifies them in the case of those who have not yet been identified […]."

67. Based on the above, in order to determine the next of kin that are beneficiaries of the reparation granted, it is enough to observe who has been declared a victim in the Judgment. This was specified by the Court in the whereas paragraphs 342, 408, and 418, as well as in the fifth and sixth operative paragraphs of the Judgment in which the next of kin of the inmates determined in paragraphs 336, 337, 340, and 341 and identified in Appendix 2 and the direct relatives of the 41 deceased inmates identified, which were specified in Appendix 3, were declared victims. Said next of kin included in Appendix 2 and Appendix 3 of the Judgment were declared victims and therefore are beneficiaries of the reparation measure regarding medical and psychological attention.

68. Likewise, regarding the next of kin of the 41 deceased inmates identified, according to the evidence presented in the merits stage of the present case, the Court specified some of the mentioned next of kin, whose names, as has been indicated, are found in Appendix 3. However, as can be concluded from paragraph 420 of the Judgment on merits, reparations, and costs, said Appendix included only those people with regard to whom there was evidence that allowed the Court to determine that they were alive at the time of the facts. In relation to the rest of the next of kin of the 41 deceased victims identified that were not specified at that time, the Court stated that the compensation that corresponds to them be delivered directly in the same manner stated for those who have been individualized, once they have presented themselves before the State's competent authorities, within the 8 months following the notification of the Judgment and they prove, through sufficient means of identification, their relationship or kinship with the victim and that they were alive at the time of the facts. That is, said next of kin of the 41 deceased victims identified were also appropriately considered victims by the Tribunal and beneficiaries of the corresponding reparations, including medical and psychological treatment.

C) Condition of Mr. Francisco Alcázar Miranda

69. Regarding the condition of Mr. Francisco Alcázar Miranda, the Court observes that pursuant to paragraph 173 of the Judgment, said person was considered an alleged surviving victim, since he had been included in a brief of one of the groups of representatives provided by the common intervener as appendix to her brief of pleadings, motions, and evidence. The representatives provided the Court with the original complaint presented before the Inter-American Commission in which the name of Mr. Francisca Alcázar Miranda appears as one of the inmates in the Prison at the time of the facts and who presented "beatings to the face and chest" as evidence to facilitate adjudication of the case.

70. The Court observes that due to a material error Mr. Francisco Alcázar Miranda was not included in Appendix 2 of the victims of the Judgment. Mr. Alcázar Miranda should have appeared in the mentioned Appendix 2, in his condition of surviving inmate, in detriment of who the Tribunal declared the violation of Articles 5(1) and 5(2) of the American Convention on Human Rights, in relation to Article 1(1) of said treaty, and in connection with Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture. Based on the aforementioned, and to the effect of establishing the reparations the determination established in paragraphs 425 and 433(c) are applied to Mr. Francisco Alcázar Miranda in what is appropriate. The terms established therein will be computed, only in his case, as of the notification of the present Judgment of interpretation.

VI. OPERATIVE PARAGRAPHS

71. Therefore,

THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Pursuant with Article 67 of the American Convention on Human Rights and Articles 29(3) and 59 of the Rules of Procedure,

DECIDES:

Unanimously,

1. To declare admissible the request for interpretation of the Judgment on merits, reparations, and costs in the Case of the Miguel Castro Castro Prison presented by the State.
2. To determine the sense and scope of that stated in the Judgment on merits, reparations, and costs in the terms of paragraphs 36 to 57 of the present Judgment of interpretation.
3. To declare admissible the request for interpretation of the Judgment on merits, reparations, and costs in the Case of the Miguel Castro Castro Prison presented by the representatives.
4. To determine the sense and scope of that stated in the Judgment on merits, reparations, and costs in the terms of paragraphs 62 to 70 of the present Judgment of interpretation.
5. To request the Secretariat of the Tribunal to notify the present Judgment to the State, the Inter-American Commission, the representatives, and the common intervener of the representatives of the victims and their next of kin.

Judges Sergio García Ramírez, Antônio A. Cançado Trindade, and Manuel E. Ventura Robles informed the Court of the Concurring Opinions, which they enclose with the present Judgment.

Drawn up in Spanish and English, the Spanish text being authentic, in San Jose, Costa Rica, on August 2, 2008.

Sergio García Ramírez
President

Antônio Augusto Cançado Trindade
Cecilia Medina Quiroga
Manuel Ventura Robles
Leonardo A. Franco

Pablo Saavedra Alessandri
Secretary

So ordered,

Sergio García Ramírez
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS, OF AUGUST 2, 2008, ON THE INTERPRETATION OF THE JUDGMENT ON MERITS AND REPARATIONS IN THE CASE OF THE MIGUEL CASTRO CASTRO PRISON (PERU)

1. I present some personal considerations regarding the judgment of interpretation issued by the Inter-American Court with regard to the case of the Castro Castro Prison. The members of this tribunal adopted said judgment unanimously. In it –object of an extended and free deliberation—there is no different opinion. The unanimity covers all the operative paragraphs.

2. The present considerations obey to my purpose to respond to concerns and arguments presented to the Court within the context of a case that has generated debates and provoked different opinions. These arguments, from different sources, deserve attention. I avoid, as has been my habit, statements that could result inconsiderate or conflicting, as well as rhetorical expressions, inadequate in the ruling of a judge, who must be careful of both the content of his opinions as well as the manner in which they are expressed within the jurisdictional venue. The purpose of explaining my opinion regarding the judgment of interpretation has led me to extend myself in the examination of some matters and I have probably incurred in reiterations or in emphasis that could seem unnecessary. However, they are not. They derive from the wish to carefully analyze the opinions that have been stated to us, acknowledging their importance.

3. I presided over the Court for the effects of this interpretation because I was in charge of this duty when the judgment on merits was issued. I suggested that another judge be chosen to preside over the sessions related to the interpretation. My request is on the record in writing in this case's dossier. The members of the Court considered it appropriate that I preside over these sessions. I obeyed their request. It should not go without saying that the person that presides over the Court –in any of the stages of a matter subject to trial—does not expect nor could they expect to "lead" the opinion of his colleagues, whose freedom he must be the first to respect and appreciate scrupulously. Therefore, I do not respond for the coincident points of view nor do I condemn the different ones. I limit myself to presenting my own.

4. I am aware of the responsibility the exercise of the jurisdictional duty implies, which has a special importance when it has an international scope. Thus the need to act carefully and with caution in all the aspects of the trial: both the processing and the instrumental decisions of the process, as well as the judgment and the statements of the judges in the exercise of their duties. It is not only about making justice, but also about avoiding, as much as possible, undesired consequences foreign to the merits of the judgment and its juridical scope. I consider that the Inter-American Court has sought to submit itself to these requirements of justice and pulchritude.

5. The members of a tribunal cannot ignore the circumstances in which the facts regarding which it issues a ruling occur, even when they are, in themselves, foreign to the case submitted to the jurisdictional body. The judges do not act within a bubble, foreign to the concerns of society. They must be respectful of the feelings and reasoning of those who intervene in a process, and even of those who do not participate formally in it but are attentive to their origin, process, and results. The Court states in its judgment of interpretation that "the suffering caused to Peruvian society is widely and publicly known." Now, this natural receipt of the data that informs of or surrounds the judicial cases could not modify the court's jurisdiction, take away or add powers that have not been expressly granted, or alter the course of its institutional duty. If it did, it would compromise its independence, impartiality, and jurisdiction. In synthesis, it would fail to comply with its obligation.

6. I am aware of the matters present in the origin of the facts analyzed in the judgment on merits, as well as those that arise from the interpretation. These are grave problems that have touched the society. Regarding the same there are different and even opposed opinions. They deserve a deep consideration and specific decision, which must be adopted within the channels of the powers and responsibilities of the instances called upon to resolve them. The international human rights jurisdiction intervenes precisely in the terms of its powers and responsibilities, as well as the domestic one within the realm of its own jurisdiction. None of them could act differently.

7. The Court's attention has been brought to the circumstances that prevailed when the facts subject to trial in the international instance occurred. The corresponding arguments point out the characteristics of the behavior assumed by people that would later appear as victims in the international trial, and they put emphasis on the suffering of many citizens that faced the grave consequences of the violence. They request for the latter the treatment of victims, especially when dealing with innocent people that suffered the effects of the conflict and who deserve both solidarity and esteem.

8. Whoever suffers the effects of an unfair behavior, whichever its origin, is a victim of an abuse that must be punished. There are legal proceedings for this, both in the national and international scene, through processes followed according to the corresponding regulations. As much can be said about the employment of adequate measures to face threats or acts of violence, with legal instruments and proceedings and within the juridical system characteristic of a democratic society.

9. On several opportunities, the Inter-American Court of Human Rights has issued rulings regarding the State's obligation to protect the society from crime. The precedents in advisory opinions and judgments in cases are many. It is obvious that the State must provide that protection and for this it must have ideal police and criminal justice resources. Providing security to people is a "foundational reason" of the State. It comes to explain and justify the creation itself of a political society.

10. The Inter-American Court is not unaware of this obligation of the public power nor has it doubted the appropriateness –even more so: the absolute need—that it effectively and energetically assume it, pursuant to the regulations and procedures characteristic of the rule of law. The same determination is on the record in the Inter-American corpus juris. Proof of this can be found, for example, in the Inter-American Convention Against Terrorism.

11. Having established the aforementioned, which constitutes a premise for the examination and understanding of the rulings of the Court, we must remember the scope of the rights included in the American Convention on Human Rights, as well as the specific jurisdiction the States have granted this tribunal, with the exclusion of any other; a jurisdiction that binds the actions and decisions of the Court and its members.

12. The States Parties to the American Convention have proclaimed and assumed the duty to acknowledge and guarantee these rights in favor of all people, without distinction, regardless of the fact that they are or not responsible for criminal acts. This is a fundamental principle of International Human Rights Law. The States themselves –that make up the collective guarantee in this matter—gave the Inter-American Court the sole and exclusive power to hear and decide on applications regarding facts, attributed to the States, that violate the rights and freedoms protected by that international treaty. That is its contentious jurisdiction. Not any other. When exercising the judicial protection of human rights, the Court must abide by the stipulations of the Convention, just as domestic courts must observe the regulations of the criminal system.

13. Within this indispensable and rigorous framework, whose excess would imply a violation, the Inter-American Court issues decisions regarding the facts that violate the Convention and that imply the State's international responsibility, not on transgressions of different regulations that result in the responsibility of other subjects. This explains why the Court that issues convictions for violations to human rights does not also do so with regard to acts of terrorism, which are not within its jurisdiction, nor does it go into detail in the analysis of the same, which would imply a criminal proceeding foreign to its powers. It is important to mention that the State itself acknowledged that "it does not correspond to the Court's jurisdiction

to issue a ruling with regard to behaviors foreign and different to the State's international responsibility, such as those of SL." (Sendero Luminoso)

14. For that same reason, when the Inter-American Court refers to "victims" of illegal acts, it can only refer to those who have been the object of behaviors that violate the American Convention on Human Rights. It makes the assessments it can and must make, without incurring in others that it cannot or must not make and that are the responsibility of other instances, which must be addressed so they may make the decisions that correspond to them. It is true that victims, in an ample and general sense, are any person who suffers the loss or damage of a juridical good –life, integrity, liberty, property—as a consequence of an illegal behavior. If the latter corresponds to a violation of the American Convention, the classification of victim and the corresponding punishment correspond to the Inter-American Court. If it refers to the violation of criminal law, the classification and punishment correspond to other courts.

15. The State points out that the Court refers to certain people as members of "armed groups", basin on the fact that the Commission on Truth and Reconciliation considers them members of a "terrorist subversive movement responsible for grave violations of human rights and crimes against humanity." The Court has not varied at all the findings of the Commission on Truth and Reconciliation. It leaves the assessment made by the latter unchanged. The terms that the Court uses –within the realm of its own jurisdiction and for the purposes of the procedures followed before it—do not seek to "reassess" what that Commission has observed pursuant to its institutional duties.

16. A judgment of the Inter-American Court must be based on the evidence of the violating acts of the Convention, from which the State's responsibility derives. Even when the respondent State's acknowledgment of the facts and its international responsibility does not determine, for itself, the Court's judgment, it is obvious that it constitutes relevant evidence. In the matter that currently occupies us, there was an explicit and reiterated acknowledgment of the State with regard to the facts that constitute violations to the American Convention.

17. In the request for interpretation of the judgment on merits, the State reiterated "it acknowledges the facts that led to the punishment of the Peruvian State for grave violations to human rights because of the facts occurred in May 1992 and during the following months (…)." In the response to the application of the Inter-American Commission, the State had already mentioned: "It is impossible to hide the facts occurred and their magnitude." It then stated that "the conditions not only of lack of control but also the levels of resistance that very probably were present (in the Prison, caused) the unmeasured response of the state agents."

18. In the public hearing on this case, the State's representative observed that "in the brief of the response to the application, the Peruvian State is already acknowledging those facts based on the evidence of the same and because as of the moment they occurred (…) they were subject to a wide diffusion in the media." In the final written arguments, the State reiterated the acknowledgment of its partial responsibility "for the facts occurred between May 6 and 9, 1992." It added that "the facts subject of the present process were part of the strategy of the government in office to face, violating human rights, the internal conflict." Those expressions, quoted, are of the State, not the Court.

19. In all the cases –which are more numerous everyday—in which a State admits facts, it accepts claims, and acknowledges international responsibility, the Court has pointed out that this attitude, ethically and legally plausible, contributes to the strengthening of the human rights protection system and offers an important service to the administration of international justice. In this sense, the tribunal received and assessed the acknowledgment made by the State, in the terms exposed and confirmed by it.

21. In its request for interpretation, the State requested a ruling from the Court regarding the responsibility of non-state groups for the violation of human rights and crimes against humanity. Therefore, it invokes the "systematic, dynamic, and evolving nature of international human rights law." Of course, this is not a matter of interpretation of the judgment on merits, in the strict sense, and that latter has not referred to this matter because it is not within the contentious jurisdiction exercised by the Court in hearing and solving the case of the Castro Castro Prison. Evidently, whoever incurs in crimes that imply a violation of human rights, must respond for its behavior and receive the corresponding punishments. In what refers to the case that occupies us, the matter in question is not that of the criminal responsibility of people who violated criminal law, but the definition of the body called upon to hear of these violations and apply the corresponding punishment.

22. On the other hand, the State itself suggested the analysis of this matter through an advisory opinion, since it expressly invokes Article 64 of the American Convention. This is the regulatory framework of advisory opinions, not of contentious cases. We are now before a matter presented, dealt with, and solved though a contentious procedure. The Court cannot modify the matters subject to its knowledge, the procedure through which it acts, and the nature of its decisions. The assertion –that was not made and that could be presented by the State or the Inter-American Commission, among other subjects with legal standing for it-- would be different with regard to the interpretation, in its case, of a treaty on human rights applicable to American countries.

23. It is also necessary to take into account that the Court must limit itself to the facts invoked in the application presented by the Inter-American Commission. It is not authorized to include, motu proprio, other facts and carry out the examination of responsibilities different to those that may correspond to the respondent State. If it were to do so, it would vary the subjective and material scope of its jurisdiction, without a regulatory foundation to do so. With regard to all other aspects, the court's jurisprudence has constantly reiterated that the only facts to which a case and the judgment may refer are those included in the application: the contentious jurisdiction has this object and this limitation.

24. I move on to another aspect of the request for interpretation, which also generates different opinions and that must be tended to by the Inter-American Court, as has occurred. I am referring to the petition to reconsider decisions included in the judgment whose interpretation is requested. The State expressed that it wants the modification of some aspects of the judgment and that with said purpose it presents the petition we are currently analyzing. In effect, it stated that "the cornerstone of our argument (…) seeks a change in the form of compliance of some of the operative paragraphs." Now, the forms of compliance do not constitute agreements foreign to

the judgment, but instead they are part of it. With regard to this matter, it is convenient to go back to the powers of the Inter-American Court, to the nature of the judgment issued by the latter, to the nature and scope of an argument of interpretation, and to the standard jurisprudence of the tribunal regarding each and every one of these matters.

25. The Inter-American Court does not have the power to modify its judgments, in response to objections presented by the parties. The Convention does not grant it this power, nor has it created the possibility that it reform its judgments through a proceeding that could be compared to a reconsideration, appeal, or annulment. If it did so, it would exceed its powers.

26. What the Court can do with regard to the judgments issued and notified is interpret them upon request of the parties to the proceedings. This is a matter different to the objection of a judgment and its possible modification. However, interpreting does not imply alteration of the terms of the judgment. It does not imply the issuing of a new judgment, but simply the clarification or precision of the sense and scope of the decisions adopted, which remain final. The exercise of the power of interpretation assumes darkness or lack of precision in the text of a ruling, but not a step back in the examination of a matter that has already been analyzed and decided on, or withdrawal of the definitiveness that corresponds to a judgment on merits.

27. In the present case it is not necessary that the Court develop greater explanations about the sense of the words used or the meaning of the decisions adopted, which are not obscure or imprecise, but instead clear and explicit. That is probably why the request for interpretation has mentioned the desire that the Court "change" –not only interpret—certain aspects of the judgment. In the end, the Court limited itself –as expressed—"to the nature and scope of the request for interpretation pursuant to the Inter-American system, which does not suppose a new presentation of facts or juridical considerations regarding the same, additional to those presented by the parties in the dispute on merits and analyzed by the Tribunal for the purposes of the corresponding Judgment."

28. The Court has been asked to consider certain implications of some of the aspects of the judgment in what refers to the public acknowledgment of responsibility, the diffusion of the judgment, payment of compensations to several people, and the engraving of names on the monument known as "The eye that cries".

29. During the international trial the State admitted facts it was charged with and accepted the international responsibility attributed to it. Now the matter is that said acknowledgment must transcend to the domestic realm, as is characteristic of the international human rights protection system. The Court has not specified who must make the acknowledgment, nor has it gone into details in what specific media, programs, and hours the parts of the judgment must be broadcasted. The general and special statements regarding these matters must be associated with the obtainment of the objective sought with these measures, linked to the current and future protection of human rights. There is, therefore, a connection of those with the purpose they seek to serve and with the reasonable manner in which it may be reached.

30. As much can be said about the engraving of the names on a plaza or monument created for that purpose. When the Commission and the common intervener requested a measure of this

nature, the State mentioned that “a monument (called the Eye that Cries) has already been erected in a public place of the capital in favor of all the victims of the conflict;” it is “a public place in the capital of the Republic that is the object of continuous acts of commemoration.” The Court took note of the express suggestion. Then clarifications were presented regarding the availability of that place. Considering these circumstances, the judgment of interpretation mentions the possibility that the names be included in a monument or in the name of a plaza within the territorial circumscription where “The Eye that Cries” is located. This reference refers to the site of the engraving of the names, not the measure itself.

31. In what refers to the manner in which payment of compensations must be made, the Court has followed the criterion adopted in its constant jurisprudence when amounts of money must be delivered to adults. It cannot express what it anticipates will happen, which would be speculations or conjectures, regarding the destination the individual beneficiaries of the compensation may give the amounts received. Of course these resources, as any others, must have a legal destination. The Inter-American Court lacks the authority and the instruments to supervise this destination and prevent the application of goods to illegal objectives. The supervising duties regarding the legitimacy of economic movements, in general, are within the realm of the State’s powers and possibilities, pursuant to its constitutional authorities and observing the corresponding guarantees.

32. With regard to the existence of debts of the beneficiaries of the compensations with regard to third parties, whether they are people of public or private law, the decision of the Court does not exclude nor could it exclude the possibility, subject to domestic law, that creditors exercise the actions acknowledged to them by law, in the terms of the due process of law. The judgment does not deprive them of this right. What the Court seeks to avoid, as can be concluded from its jurisprudence –and of the specific ruling in the present case--, is the evasion of compliance of a compensatory decision through tax burdens that deprive the beneficiary of the compensation to which he is entitled.

33. I conclude my opinion with a comment on the request for a public hearing in these proceedings, which the majority of the members of the Court –among them myself—did not endorse. In this sense, it is necessary to take into account the grounds that justify the celebration of a public hearing for the effects of the interpretation of a judgment, not only in what refers to the present case, but in general terms, as a reference for the matter that is now analyzed.

34. The Court receives in public hearing, whenever necessary, the evidence provided by the parties to clarify a controversy and listens to the same directly. This is not the only way to know of the aspects of the case and gather elements for its adjudication. An important part of the jurisdictional proceedings is carried out in writing. Only the second part is developed with immediacy, publicity, and orally, always without detriment of the tribunal’s possibility to receive written petitions, evidentiary elements, and arguments.

35. Throughout the previous years, the tribunal has considerably increased the number of matters tended to and solved, and of hearings during its regular sessions. To these they have added those held in extraordinary sessions, outside the Court’s headquarters, system that became

rooted in those same years. Besides, the tribunal has established a new practice consisting in special hearings to know of the progress in the compliance of judgments.

36. In synthesis, the holding of hearings characterizes the Court's performance, even though it is not the only means used for compliance of its tasks. The option among the different procedural forms –in what refers to the written or oral substantiation—derives from the stipulations of the rules of procedures, of the general need to deal with and the conditions of each matter subject to examination. A double and ineludible rule is observed: need and appropriateness. On the contrary, it would be incurring in one of the two undesirable extremes: suppression or decrease of the hearings, on one hand, or an unnecessary multiplication of the same, on the other. It is important to mention that the majority –almost the totality—of the stages in which the Court hears of the merits of the controversy and of the possible reparations include the holding of hearings. The same does not occur with the stage for the interpretation of the judgment. Less than five hearings have been held in the last eighteen years, period during which the tribunal considered more than twenty-five requests. It was not necessary to hold them because the court had the necessary elements –as in the present case- to rule on the interpretation of the corresponding judgments.

38. The public hearing gives the parties the possibility to offer the tribunal elements that will help them form an opinion for the effects of the decision it will adopt, when necessary. The idea is to make access to justice easier, allowing a public exposure of the damages caused and of the evidentiary and argumentative response of the counterparty. Of course, there is a great difference between an academic deliberation, which is a debate among all the participants, and a legal hearing, in which the debate occurs only between the parties, who hold a dialogue in order to convince the tribunal. In this hypothesis, the tribunal deliberately places itself outside of the debate and it conserves, with regard to the merits and the form –both important--, the attitude of impartiality that characterizes its performance and concurs to establish its consideration and respectability, without becoming a main character in the controversy. It would be completely inadequate for the tribunal or its members to debate with the parties at a hearing.

39. In this case there was a public hearing at an extraordinary session held in the city of Guatemala. There the Court heard what the parties wished to contribute and argue before the full Court. The contentious matter was presented with freedom and sufficiency in the conditions of maximum publicity and visibility that normally characterize extraordinary sessions. It is possible for differences to arise between the parties regarding how to express their corresponding positions, and even regarding the procedures that must be carried out by the Court, but none of the arguments avoided, differed, or altered the celebration of the hearing, carried out with absolute normality.

40. Having issued and notified the judgment, the parties had the possibility to request the interpretation of the same, pursuant to the rules applicable to this matter, this is, ask the tribunal –as I have stated supra—to clarify dark or ambiguous terms, throw light on phrases or words, or precise concepts, but not to modify the judgment itself.

41. Having made the request for interpretation, the Court went on to examine the arguments and respond to the questions received. For this it considered the need and convenience of

summoning a hearing, taking into account the characteristics of this procedural diligence, whose object is not to open a forum to reiterate positions widely expressed in previous diligences of the same nature; present new elements to solve matters of merits or reparation already decided on; listen to questions and offer responses, eventually very polemic, already given or unnecessary for the purposes of the trial; or establish the position of the tribunal or its members, in general or on specific matters, established in writing in the collegiate ruling or in the individual opinions.

42. What the Court should establish with the formality and objectivity characteristic of a tribunal, is the need to summon a hearing based on the lack of, insufficiency, or extreme complexity of the elements of judgment available for the sole and exclusive purpose of this stage: interpret the judgment. If this could not be carried out with the available elements, it would be necessary to hold the hearing, which in no case would seek to revise the aspects of merits and modify the judgment. If the interpretation could be made with said elements –both the judgment itself on merits as well as the arguments of the parties with regard to the interpretation—it would not be necessary to hold one. In this case the Court could decide considering their written contributions. Of course, I am referring to contributions regarding the sense of the text subject to interpretation, not about the merits of the case, already analyzed extensively, debated in detail, and clearly decided.

43. The majority of the Court adopted the decision to do without the hearing and decide on the requests for interpretation as it did so with the ruling to which I am enclosing this opinion. For this it took into account –and so it stated—"the arguments of the parties that refer to aspects of law and their characteristics, whose nature and scopes can be clearly concluded from the claims presented by those requesting the interpretation." It is obvious that a hearing was not required to reiterate the arguments expressed in writing, encourage disputes regarding contentious matters tended to, or analyze the sense of words well defined pursuant to their ordinary meaning.44. As stated at the beginning of this text, my opinion is limited to expressing my own points of view and in no way do they question other opinions, and much less the general direction of the decisions of the Court. One and the other deserve the respect with which I have always expressed, publicly and privately, my coincidences and my discrepancies. Anything different would be inappropriate of a judge and would not correspond to the way in which I have invariably expressed my point of view.

Sergio García Ramírez
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I have concurred with my opinion in the adoption of the present Judgment of Interpretation adopted by the Inter-American Court of Human Rights in the case of the Castro Castro Prison versus Peru, in which it declares admissible the requests for interpretation presented to its consideration both by the appellant State as well as by the legal representatives (different to the common intervener) of a group of victims, and in which it seeks to clarify the

matters presented in said requests. However, I consider the reasoning of the Court insufficient and unsatisfactory in relation to some of the aspects covered by it, thus I am in the obligation to go on the record, in the present Concurring Opinion, with regard to my own reasoning, as grounds for my position on the matters dealt with. Before going on to the substantive matters in question, I allow myself to outline some prior considerations, starting with the content itself, specifically, of the State's request for Interpretation of the Judgment submitted to the Court's consideration.

I. The Content of the Central Matter Object of the Judgment of Interpretation of the Court.

1. The State's Request for Interpretation.

2. In its request for Interpretation of the Judgment, of March 15, 2007, in the present case of the Castro Castro Prison, the Peruvian State refers to different aspects of the Judgment on merits and reparations in the cas d'espèce of this Court (of 11.25.2006), summarized in the present Judgment of Interpretation adopted by the Court (paras. 2, 6, 12, and 28-32). The concern that can be concluded from said request for interpretation, of 33 pages, is, however, to obtain from the Court clarification, in the form of obiter dicta, regarding the entire set of thousands of victims in the internal Peruvian armed conflict, that is, the victims of the terrorist acts of both Sendero Luminoso and State agents. In its request, the State argues that it is aware of the protection due to the totality of these victims, "without asymmetries that have the risk of being perceived as injustices by the concerned reaction." (para. 6(20))

3. The Court must, naturally, subject itself to the facts established in the initial application that led to the Judgment on merits and reparations. The appellant State itself says, at the beginning of its request for interpretation, that it is not seeking in any way a revision of the previous Judgment of the Court, or a re-discussion of matters of fact or law already determined by the Court (para. 3(4)). It also states that "honoring the principle pacta sunt servanda", it respects and will obey the orders emanated from the Court's Judgment (para. 3(2)). What the appellant State is looking for is basically clarifications on the matters presented in its request for Interpretation of the Judgment, including doctrinal progress on "the responsibility of non-state groups for violations of human rights and crimes against humanity." (para. 6(2))

2. Briefs Submitted to the Court regarding the State's Request for Interpretation.

4. Several briefs were presented to the Court with regard to the request for Interpretation of the Judgment presented by the State. In one of its three briefs (all of 07.31.2007) presented to the Court, the Legal Representative and common intervener of the victims (Mrs. Mónica Feria Tinta) observed that

"A considerable number of victims represented by this legal representation is made up by families of people who were never detained, Peruvian citizens who have never been submitted to any criminal proceedings, and taxpayers as well as any other citizen, and well as direct victims of the attack to pavilions 1A and 4B who were acquitted or pardoned in the proceedings that led to their arrest and others who having been convicted are not members of Sendero Luminoso. Therefore, this group of victims does not consider relevant the considerations presented by the

Distinguished Peruvian State with regard to a minority of people who would be members of Sendero Luminoso, on behalf of who their legal representatives must speak,. (...) The Court's Judgment in the case of the Miguel Castro Castro Prison is the affirmation of the recta ratio over a logic that seeks to scorn the fact that there are rules of law also in times of war and that there are rules of jus cogens that are non-revocable even in the most extreme case of an armed conflict and that they do not fall upon principles of reciprocity.
(...) Among the relatives and next of kin of the prisoners murdered or who suffered the attack, represented by the undersigned, there is all type of people, including members of the Peruvian police force. Does this in any way help the Peruvian State understand that the effects of that occurred to the group of people affected by the massacre that took place in the Castro Castro Prison reached all sectors of the Peruvian society and therefore the insistence on stigmatizing said group of people as 'terrorists', which we have seen reflected in some sectors, is unbecoming to reality." (paras. 7-8)

5. At the same time, the attorneys of the "Canto Grande 92 Group" of victims (Messrs. Douglass Cassel and Sean O'Brien) stated in their brief of 08.01.2007, that the State's request for interpretation referred to entities and people who were not participating in the present proceedings (p. 3), and that the condemnation by the State of terrorism must be done through "judicial proceedings, pursuant to the principles of the rule of law." (p. 8) They recalled, in this sense, that the Inter-American Court, in the case of Lori Berenson versus Peru (Judgment of 11.25.2004, para. 91), was very clear in its "categorical rejection" to "terrorist violence – whoever its main protagonists – that may harm individuals and society as a whole (p. 11);" likewise, they recalled that the Inter-American Court, in its Judgment (of 11.25.2003, para. 134(8)-(13)) in the case of Myrna Mack Chang versus Guatemala, in its "expansion of the historical context" of the case, "did not seek to condemn any entity or person absent from the process." (p. 4)

6. On its part, the Inter-American Commission of Human Rights, in its brief of 08.01.2007, observed that the State's request for interpretation refers to aspects that "were not the object of the case, as acknowledged by the appellant itself," (para. 5) and it added that the Court's Judgment in the present case of the Castro Castro Prison (paras. 424-428) established clearly that "the compensations must be handed over to their beneficiaries." (para. 21) Finally, the Court received a brief (on 05.11.2007) from the Institute of Legal Defense (IDL) and the National Human Rights Coordinator (CNDH), in their quality of amici curiae, presenting new arguments to its consideration. They observed that "the classification as a victim of the violation of human rights does not depend on the previous behavior of the affected party," and they stated that what occurred in the Castro Castro Prison "was a crime committed by state agents," in which "41 people detained in the mentioned prison were deliberately deprived of their life, also violating other fundamental rights of the surviving inmates." (paras. 5-6)

7. Immediately, the IDL and CNDH asked the Court to consider, in its Judgment of Interpretation,

"the suffering and grave social, economic, and political problems Sendero Luminoso caused Peru. We believe this could contribute to a better understanding, without taking passionate

positions, by the Peruvian society of the transcendental role the Inter-American Court fulfills in the defense of human rights throughout the region (...).
(...) Every State has the duty to guarantee that all the measures adopted to fight terrorism adjust to their obligations contracted by virtue of International Law, specially the regulations on human rights, Refugee Law, and Humanitarian International Law.
(...) [According to the Commission of Truth and Reconciliation] Sendero Luminoso caused 54% of the victims of the armed conflict, being the poor and defenseless the most affected populations. (…) This was one of the excuses – even though not the only one, in fact – based on which the Peruvian State reacted in an abusive and extreme manner and therefore increased the number of victims of grave violations of human rights.
(...) The distinguished Court could 'exercise a narrative duty' (…), enriching its analysis on the historical context of the internal armed conflict lived in Peru (...). This would not be the first time that the honorable Court has expanded its analysis of historical context (…). In the case of Myrna Mack Chang versus Guatemala (2003), a brief analysis of the social context lived by Guatemala at the time in which the regretful murder of the investigator and sociologist Myran Mack Chang occurred was carried out." (paras. 7, 14(21-22), and 26-27)

3. New Briefs Presented by the Parties.

8. More recently, the State presented new briefs, on 02.26.2008, regarding the beneficiaries of reparations based on the Judgment on merits and reparations in the cas d'espèce and regarding the monument "The Eye that Cries", and on 07.23.2008, with additional data to its request for interpretation. [FN12] The Legal representative and common intervener of the victims presented, in her brief of 03.26.2008 (received in the Court on 04.03.2008), arguments contrary to those of the State on these matters, [FN13] and referred to the Judgment on merits and reparations of the Court as "a victory of reason and the rule of law." [FN14] As stated in the present Judgment, the victims' representatives, in their observations of 07.30.2008, asked the Court to dismiss the State's brief of 07.23.2008 (para. 18).

[FN12] Summarized in paragraphs 12 and 16 of the present Judgment.
[FN13] Summarized in paragraph 13 of the present Judgment.
[FN14] Page 7 of the brief.

II. Preliminary Considerations on the Mentioned Request for Interpretation of the Judgment.

9. These were, in synthesis, the main arguments presented to the Court by those intervening in the present proceedigns of Interpretation of the Judgment. It is true that the Commission on Truth and Reconciliation (CVR) of Peru, in its extensive Final Report (2003), when referring to the factors that led to the generalized violence and the "triggering of the internal armed conflict," held Sendero Luminoso accountable for "54% of the fatal victims" reported to it. [FN15] On its part, the Inter-American Court proceeded naturally to its own determination of the facts in the present case of the Castro Castro Prison, based on the application presented to it.

[FN15] Commission of Truth and Reconciliation of Peru, Final Report, volume VIII, parts II-III, Lima, 2003, p. 355.
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10. With regard to the proven facts in the cas d'espèce, the Court mentioned, in its Judgment of 11.25.2006 that “as of the coup d’état of April 05, 1992 and in order to fight some subversive and terrorist groups, the State implemented in its prisons practices that were not compatible with the effective protection of the right to life and other rights, such as extrajudicial killings and cruel and inhuman treatments, as well as the disproportionate use of force in critical circumstances." (para. 197(9)). The Court turned to relevant parts (volumes VI-VII) of the Final Report (2003) of the CVR itself, for its ruling of the specific case, and also observed, with regard to the proven facts, that

“The CVR received thousands of accusations regarding acts of torture and cruel, inhuman, or degrading treatments or punishments produced during the period between 1980 and 2000. In its final report it states that of 6,443 acts of torture and cruel, inhuman, or degrading treatments or punishments registered by said body, 74.90% corresponded to actions attributed to State officials or people that acted under its authorization or acquiescence, and the final report expressed that ‘the forceful disappearance of people was […] one of the main mechanisms of counter-subversive fighting employed by State agents, acquiring the characteristics of a systematic or generalized practice.’ ‘Of the total of victims reported to the CVR as executed or whose whereabouts continue to be unknown due to responsibility of State agents, 61% were victims of forced disappearances’." (para. 197(5)).

11. Even though the briefs submitted to the Court in the present proceedings of Interpretation of the Judgment (supra) have different positions with regard to the fact that it offers or not a response to the basic issue presented by the appellant State, all the briefs offered a response to this matter when they presented their points of view in this sense. It is a matter that, in my opinion, refers to the sense or scope of the Judgment on merits and reparations of the Court in the present case of the Castro Castro Prison. Said matter has been the object of careful attention, in different international juridical forums, by the contemporary international legal doctrine, and it should be clarified with the greatest detail and the most solid foundations by the Inter-American Court.

12. The present case of the Castro Castro Prison occurs within a situation of chronic and generalized violence, in which atrocities were reacted to with atrocities, the terrorism of Sendero Luminoso was reacted to with the State’s terrorism, multiplying the thousands and thousands of victims, and affecting the social fabric. The tragedy referred to in the present legal proceedings of the Interpretation of a Judgment, - whose examination should have been analyzed in greater depth by the Court, without in any way modifying its Judgment on merits and reparations of 11.25.2006, - generates in me a series of personal reflections that – as already stated – I establish below, in the present Concurring Opinion, as grounds for my position regarding the matters dealt with.

13. My reflections fall upon the following matters: a) the primacy of Law over brute force in the historical passing from private revenge to public justice; b) the perennial nature of the search

for justice; c) the importance of the oral procedure and the need to hold public hearings; d) reason and persuasion; e) the Kantian imperative and the due process of law; f) clarification and substantiation; g) the primacy of Law in any circumstance, even in the fight against terrorism; h) the protection of human rights in the middle of the fight against terrorism; i) the victims and the precisions regarding applicable law; j) the blindness of private revenge and the "Eye That Cries" even more; and k) the right to a fair trial (national and international) as the right to realization itself, and as an imperative of the jus cogens. I proceed now to examine each of the matters stated herein.

III. From Private Revenge to Public Justice: The Primacy of Law over Brute Force.

14. Everyone is submitted to the Law in a democratic society in the sense of the American Convention on Human Rights, - both those governed as well as those who govern. Nobody is removed from the protection of the Law; both the victims of violations to human rights and the victims of terrorist acts are protected and have the right to receive reparation. There are, however, precisions to be made with regard to the law applicable to the situations of one and the other, as I will indicate below (cf. infra). The contemporary needs of protection have been covered with difficulties that arise from the current phenomenon of the diversification of sources, state and non-state, of the violations to human rights (cf. infra).

15. This is a relevant aspect that will reveal the complexity of the issue, presented as a whole in the present Interpretation of the Judgment in the case of the Castro Castro Prison versus Peru. In a historical perspective, it was necessary to wait a long time, actually centuries, to reach the degree of evolution culminating in the primacy of Law over brute force, - which will certainly continue – within the conceptual universe of Law. Its historic roots are found in ancient times. Lets concentrate, first, on the protection and reparation, guaranteed by Law to all people and all the victims of violations of their rights, perpetrated both by state agents as well as by non-state and clandestine agents.

16. In the trilogy of tragedies of The Oresteia by Aeschylus, the chain of private revenges that afflicted and victimized its characters was only suspended or interrupted with the emergency (in the third part of the triad) of Dike, the emblematic figure of the constitution of a criminal court, - with the identification of the parties (victim and defendant), the preliminary stages of the proceedings, a fair trial (due process, procès équitable), and the judgment. Corrective or restorative justice was superimposed over private justice (revenge), the rational response to the brutal reaction, thus rebuilding the social fabric.

17. In his Oresteia, a literary classic of old Greece essentially regarding justice, Aeschylus did not give in when facing the spirit of tragedy, since, in the middle of the intense human suffering, he revealed his belief in ethical accession; in The Eumenides, the final piece (458 a.C.), Aeschylus considered that, in the end, reason and persuasion of what is fair should prevail for common good, the good of all. [FN16] In The Eumenides, the creation of the court of Areopagus, - the first of the classical world, - was able to end the destructive cycle of private revenges, in midst of the absence, up to that time, of public institutions of criminal justice.

[FN16] W. Kaufmann, Tragedy and Philosophy, Princeton, University Press, 1992 [reprint], pp. 178, 183, and 190.

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18. At the end of the Oresteia, the Furies are infuriated with Athena, but she is able to persuade them in the sense of the acceptance of the verdict and their new role as "beneficial metoikoi of the city," as "protective goddesses of the tribunal", as Eumenides (Kind); thus the final scene of the trial of Las Euménides, the clarification of the sense of justice, the establishment of dike as legal justice. [FN17] The perennial lesson of Aeschylus' Oresteia is still current and valid in our time, in the turbulent end of the XX century and the beginning of the XXI century. The tragic trilogy evolved from chaos to the law of the polis, from darkness to light, from isolation to understanding, from blood revenges to legal justice based on reason. [FN18]

[FN17] C. Rocco, Tragedia e Ilustración, Santiago/Barcelona, Edit. Andrés Bello, 1996, pp. 144, 203, and 207.
[FN18] Ibid., pp. 47, 64-65, 184-185, 201, 204-205, and 214.

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19. The cycle of private blood revenges, which will consume the entire family, - the heroic Agamemnon, Clytemnestra, Orestes (at the end acquitted by the court of Athena, but also swallowed by violence, - only ended with the founding of the court of justice and the assertion of the primacy of Law over brute force. As has been stated with regard to Aeschylus' Oresteia, "the trilogy transforms darkness into light, the bloody tunic of Agamemnon in the festive attire of the final procession (...) of Las Eumenides." [FN19] The comprehension of the Greek tragedy can help us "mitigate the pressure that the modern forms of life have over us" (without this implying an undesirable return to the past), keeping present "the wisdom obtained with difficulty that comes with suffering," which must be cultivated by us all. [FN20]

[FN19] Ibid., p. 201.
[FN20] Ibid., p. 261.

IV. The Perennial Nature of the Search for Justice.

20. The perennial relevance of the Greek tragedy is illustrated by Peru's tragedy of terrorism by clandestine agents confronted with the State's terrorism, leading to a cycle of revenges that caused more than 30 thousand deaths, and that up to this date flagellates the Peruvian society. From within this same society emerged the awareness of the need for the search for justice, for public justice, in order to end the self-destructive cylce of revenges. As in Aeschylus' Oresteia it was understood that they could no longer survive in the midst of the growing decomposition of the social fabric, in the middle of the intense pain of the surviving next of kin of so many fatal victims. It was understood that they should step out of the darkness in search of the light, that violence should be abandoned in search of the solution to these social problems based on reason.

21. Victims cannot be forgotten. There is a duty to remember, as stated by Primo Levi in the XX century, in his tenacious fight to preserve the memory in honor of the victims, especially in a fast mutating world, a little "livré au hasard". [FN21] Even to defend the memory – as a form of reparation – we must turn to justice. The justice of Athena in the Oresteia, is imposed to guarantee the due reparation of the damages suffered by all of them, - in our times the victims of both the terrorism of the acts of clandestine agents as well as the State's terrorism. Within this Court, I have pointed out the duty to remember in my Concurring Opinion in the case of Gutiérrez Soler versus Colombia (Judgment of 09.12.2005).

[FN21] Primo Levi, Le devoir de mémoire (1982), Paris, Fayard, 2006, p. 38; and cf. Primo Levi, "Si c'est un homme" (1947), in Oeuvres, Paris, Éd. R. Laffont, 2005, pp. 5-157; M. Belpoliti y R. Gordon (eds.), The Voice of Memory - Interviews (1961-1987) with Primo Levi, N.Y., New Press, 2001, pp. 223 and 255.

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22. Even though the applicable law may be different in different situations, of perpetration of crimes attributable to state agents or non-state groups (cf. infra), all the victims are under the protective cloak of the Law (precisely to avoid the tragic scene of Agamemnon's bloody tunic). And all those responsible, both the non-State groups as well as the State itself, are covered by the Law (the rule of Law, the préeminence du Droit, in a democratic society), nobody is excluded from the protection or prescriptions (even punitive for the crimes committed) of the Law. The juridical relationships themselves may not be considered in abstracto, making abstraction of the parties; the "administration" of justice cannot lose sight of the parties.

23. For years, within this Court, I have stated the imperative need to look for a greater approximation between International Human Rights Law and contemporary Criminal Law (v.g., in my Concurring Opinions in the cases of Myrna Mack Chang versus Guatemala, Judgment of 09.18.2003; of Goiburú et al. versus Paraguay, Judgment of 09.22.2006; of Almonacid Arellano versus Chile, Judgment of 09.26.2006). I have done so precisely to guarantee the realization of Justice in any and all circumstances, and face a new disturbing phenomenon for the (international) protection of human rights: that of the diversification of the sources of violations of human rights.

24. In synthesis, all victims have the right to reparations for the suffering they underwent, and all perpetrating agents of illegal acts (national and international) must assume the juridical consequences of the illegal acts committed.

In what refers to human rights treaties, the contemporary juridical doctrine itself is currently making an effort to determine its effects with regard to third parties, [FN22] seeking precisely to guarantee a comprehensive protection of the human rights enshrined.

[FN22] Cf., e.g., D. Spielmann, L'effet potentiel de la Convention Européenne des Droits de l'Homme entre personnes privées, Bruxelles, Bruylant, 1995, pp. 17-89; A. Clapham, Human

Rights Obligations of Non-State Actors, Oxford/Florence, Academy of European Law (European University Institute)/Oxford University Press, 2006, pp. 25-566.

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25. In this Concurring Opinion in the present Interpretation of the Judgment in the case of the Castro Castro Prison versus Peru (2007), I had to evoke my reflections enshrined in another two of my Concurring Opinions in two cases of massacres regarding to different States Parties to the American Convention on Human Rights, specifically, the case of the Mapiripán Massacre, regarding Colombia (Judgment of 09.15.2005), and the Plan de Sánchez Massacre, regarding Guatemala (Reparations, Judgment of 11.19.2004). [FN23] In effect, in my Concurring Opinion in the case of the Mapiripán Massacre, I allowed myself to consider that

"One does not combat terror with terror, but rather within the framework of the Law. Those who resort to the use of brute force brutalize themselves, creating a spiral of widespread violence that ends up turning the innocent, including children, into victims. (...)
Brute force generates brute force, and at the end, what do we have? Nothing, general devastation, the breakdown of the social fabric, vengeance, torture, and summary executions and other grave violations of International Humanitarian Law and International Human Rights Law, the transformation of human beings into mere instruments of confrontation and destruction –opening wounds that will require generations to heal." (paras. 46-47).

[FN23] The texts of both Concurring Opinions are reproduced in: A.A. Cançado Trindade, Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006), México, Edit. Porrúa/Universidad Iberoamericana, 2007, pp. 595-613 and 457-465.

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26. And, in the same Concurring Opinion in the case of the Mapiripán Massacre, I added:

As I noted in my Separate Opinion in the case of the Plan de Sánchez Massacre (reparations, Judgment of 19.11.2004), "the ancient Greek were already aware of the devastating effects of the use of brute force and of war, both on the victors and on the vanquished, revealing the great evil of substituting ends with means" (para. 29); since the times of Homers Iliad to the present day, all those in favor of brute force have become cogs in the killing machine. As in Homers Iliad, "there are neither victors nor vanquished, they are all taken over by force, possessed by war, degraded by the devastation of brutality and massacres" (para. 30), perpetuating themselves, multiplying their innocent victims.
Long after Homer, in the 3d century of our age, Plotinus (204-270), in his Enneads, argued that the fate of human beings cannot be left to chance, to fortune, because human beings are gifted with reason, which must prevail [FN24] under all circumstances, at it is not just any type of reason, but a noble one, above the natural state, and which guides everyone. [FN25] In our somber times, we must remember Plotinus' enduring lesson, that of one who sought the "liberation" or "emancipation" of the soul [FN26] so much." (paras. 48-49).

[FN24] Plotinus, The Enneads, London, Penguin, 1991 [reed.], p. 522.
[FN25] Ibid., p. 33.
[FN26] Cf. ibid., pages 51 and 115.

V. The Importance of the Oral Procedure and the Need to Hold Public Hearings.

27. I allow myself, in the present Concurring Opinion, to spread upon the record the importance I attribute to the oral proceedings before the Court and the need – which I have always defended within this Tribunal, - of the holding of public hearings before the Court. These are essential for the better investigation of the proceedings; in the exercise of the judicial function, the search for truth and the realization of justice should, in my opinion, always prevail over the current eagerness for "productivity" of the majority of the Court.

28. Therefore, I reiterate my firm disagreement with regard to the criterion of the majority of the Court (para. 10 of the present Judgment), for not having considered it necessary to hold a public hearing to issue the present Judgment of Interpretation, due to lack of, in their opinion, "juridical doubt" to be resolved. What currently seems to motivate the majority of the Court is "productivity", a bad habit inherited from domestic courts, who, at the end of each judicial year, proudly present productivity graphs showing growing numbers of cases "solved" by them (or better said, simply "dealt with").

29. In my understanding, public hearings are held not only to solve "juridical doubts", a flagrantly utilitarianistic point of view of the judicial function. Public hearings are held to give the parties the opportunity to reveal to the Court their points of view, their version, or perception of the facts, their arguments with regard to the law (even when there are no "juridical doubts" in the mind of the judges). Within this Court, in certain cases I have given the greatest importance (even with some resistance from the majority) to the psychological, anthropological, and sociological expert assessments, which have contributed to enrich so many Judgments of this Court in cases of specific complexity, of a dense cultural content (such as the cases of Bámaca Velásquez versus Guatemala (2000-2002), of the Moiwana Community versus Suriname (2002), among so many others). It is for me incomprehensible that this Court, deciding against the clock, did not consider indispensable the holding of at least one public hearing in a case of such historical importance as was that of Goiburú et al. versus Paraguay (regarding the sinister "Condor Operation), which could have enriched its Judgment in many aspects.

30. An international tribunal such as the Inter-American Court of Human Rights not only "solves" doubts and cases, but also states which is the Law, it makes Justice, and restores the dignity of victims. In order to state which is the Law, we must benefit from other branches of human knowledge, since, to the contrary of what was arrogantly thought by the positivists, Law is not self-sufficient and lawyers have a lot to learn from other areas of human knowledge. In order to make Justice, the parties must be given a chance to present all their arguments. And to restore the dignity of the victims, we must let them express themselves freely, we must hear them attentively, even as a form of reparation.

31. The victims of bad treatments and torture (v.g., cases of Loayza Tamayo versus Peru, 1997-1998; Suárez Rosero versus Ecuador, 1997-1999; Cantoral Benavides versus Peru, 2000-2001; Tibi versus Ecuador, 2004; among others), who have been strongly humiliated, for the first time feel legally equal to the respondent States, upon personally presenting their case before the Court and personally vindicating before it the reparation. The victims act as real subject of law and not as mere objects of protection. This also contributes to avoiding the repetition of the violations. The jurisprudence itself must reflect the interdisciplinary nature (Law, psychology, anthropology, sociology) in attention to and in the reparations ordered in favor of victims.

32. During the years of my Presidency of the Inter-American Court, I invariably made emphasis in receiving, in public hearings, not only witnesses, but also experts from different areas of human knowledge. I have always given said public hearings a greater relevance, based on a series of reasons: a) they contribute to the materialization of the equality of arms (égalité des armes), so the parties have equal opportunities to present all their arguments and evidence before the Court; b) they guarantee compliance with the principle of having the presence of both parties to an action, [FN27] and therefore the parties feel, themselves, satisfied that all their evidence has been produced before the Court for the determination of the facts, and all their arguments have been presented before the Court for its evaluation of what occurred; and c) they constitute, for the victims, as previously stated, a form of reparation, and for them one of the most important.

[FN27] For a recent general study, cf., [Various Authors,] Le principe du contradictoire devant les juridictions internationales (eds. H. Ruiz Fabri and J.-M. Sorel), Paris, Pédone, 2004, pp. 1-195.

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33. To the contrary of what is underlying the decision of the majority of the Court regarding the specific matters in the present case, the doubts that have to be clarified, both juridical and factual, are not only the Judges' doubts, but also – and mainly – the parties' doubts. And, for this purpose, public hearings are not only more appropriate but also necessary. Therefore, in the course of the present proceedings of Interpretation of the Judgment, I allowed myself to address a letter to the Secretariat of the Court, on August 10, 2007, recommending that a public hearing be held [FN28] in relation to the requests – presented by all the procedural parties participating in the present case of the Castro Castro Prison –of Interpretation of the Judgment, but the majority of the Tribunal preferred to do without said hearing.

[FN28] IACHR, document CDH-11.015/288, pp. 1-2 (internal circulation).

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34. The present case of the Castro Castro Prison is paradigmatic in what refers to the bad conditions of detention and the violent attack against defenseless people, who were under the State's custody. The petitioners presented arguments better substantiated than those of the Inter-American Commission itself (v.g., regarding the matter of the principle of proportionality), in a demonstration that the victims, as subjects of International Law, are in better conditions of

presenting their case before a tribunal such as the Inter-American Court than any intermediary presumably acting on their behalf. In reference to the international subjectivity of groups of individuals, the case of the Moiwana Community versus Suriname (Judgment on merits of 06.15.2005) presents an appropriate illustration of a case of rights of the people. [FN29]

[FN29] And, specifically, on the legal subjectivity of people within international law. For example, the Court recalled, in its Judgment, that six Maroons communities in Suriname, more than two centuries before it became an independent State, celebrated peace treaties with the Dutch colonial authorities (the N'djukas in 1760), later renovated, thus obtaining their freedom from slavery (paras. 83(1) and (2)). In my Concurring Opinion in said case of the Moiwana Community, I considered that "the Maroons, - the N'djuka in particular, - regard these treaties as still valid and authoritatives in the relations with the successor State, Suriname. This means that those peoples exercised their attributes of legal persons in international law, well before the territory where they lived acquired statehood. This reinforces the thesis which I have always supported, namely, that the State are not, and have never been, the sole and exclusive subjects of international law" (para. 6). And I added: "Human beings, individually and collectively, have emerged as subjects of international law. The rights protected disclose an individual and a collective or social dimensions, but it is the human beings, members of such minorities or collectivities, who are, ultimately, the titulaires of those rights" (para. 10). As holders of rights, they can present their own arguments before a tribunal such as the Inter-American Court with full freedom of expression (para. 12). – Actually, in a more distant past, treaties were celebrated between people and human societies with a minimum level of organization, much before the emergency of the Westphalian inter-state order in the XVII century, which proves that, both international juridical capacity, and the capacity to celebrate treaties (treaty-making power), were never an exclusive monopoly of the States. For examples (of treaties celebrated by human communities, from ancient times up to the Westphalia Peace of 1648), cf., v.g., A. Truyol and Serra, Histoire du Droit international public, Paris, Economica, 1995, pp. 5-7 and 13-14; P. Guggenheim, Traité de Droit international public, 2a. ed. rev., volume I, Genève, Georg & Cie., 1967, pp. 114-115; R. Ago, "Les premières collectivités interétatiques méditerranéennes", in Mélanges offerts à P. Reuter - Le Droit international: unité et diversité, Paris, Pedone, 1981, pp. 22-23 and 29-30. – This is additional historical information in defense of my position, held throughout the years in this Court (cf., inter alia, my Concurring Opinion in OC-16), of the humanization of International Law; cf., more recently, A.A. Cançado Trindade, A Humanização do Direito Internacional, Belo Horizonte/Brasil, Edit. Del Rey, 2006, pp. 3-409.

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35. In the present Judgment of Interpretation in the case of the Castro Castro Prison, the Court clarified the consultation made to it with regard to the determination of victims and the right to measures of reparation (paras. 62-70), but it did not do the same, satisfactorily, as obiter dicta, with regard to the central matter of the State’s request for interpretation. A public hearing was not held, and with this it has lost an opportunity to deal in detail with the referred matter presented to it, which today occupies a central position in the contemporary international agenda of human rights.

36. In my opinion, Article 67 of the American Convention perfectly empowers the Court to clarify the matters presented to it by all the procedural or intervening parties (the appellant State, the legal representative and common intervener of the victims, the attorneys of the “Canto Grande 92 Group” of victims, the Inter-American Commission of Human Rights, as well as the IDL and the CNDH). Articles 29(3) and 59 of the Rules of Procedure may also be considered the grounds for said clarification. Besides, Article 58 of the Rules of Procedure determines that the Court will decide upon the requests for interpretation through a judgment, which will include the legal substantiation (Article 55(1)(f) of the Rules of Procedure). The Convention also states that the Judgments of the Court must be substantiated. Likewise, Article 44 of the Rules of Procedures empowers the Court "in any state of the case,” to require “any measure of investigation" (evidence, report, expert opinion, information, opinion, or any other).

37. Given the importance of the matters set forth in the present proceedings of the Interpretation of a Judgment, including the appellant State’s main concern, I requested in vain to the Court, through letters addressed to its Secretariat on 06.13.2007 and 12.04.2007, the holding of a hearing, because I had issues I wanted to present to the parties. The Court could have summoned it – it can do so “in any state of the case” and even in the stage of supervision of compliance of the Judgment, - to better conduct the proceedings. It did not do so, and its majority was pleased with a reasoning that, in my opinion, could be more elaborate and satisfactory.

VI. Reason and Persuasion.

38. I allow myself to take up again the consideration of Aeschylus, in The Eumenides, in 458 a.C., regarding the need of prevalence of reason and persuasion of what if fair (cf. supra). In the works, Athena, upon announcing the creation “for all times” of the court of Areopagus, - the first permanent court of the old world, responsible for judging murders, - considered it necessary to explain the basic reasons for her decision. Athena did not exempt herself from the task of conviction, persuasion, and she considered:

"As of this day and forever the people
(...) will have the concern to maintain intact
the regulations adopted in this Tribunal (...).
(...) Reverence and fear (...)
will avoid that citizens commit crimes,
except if they prefer
to annihilate the laws for their well-being (...).
No oppression, no anarchy: this is the motto
that citizens must follow and respect. [FN30]

(...) I hope it is not your intention to exacerbate
rage in the heart of the citizens
and in them create the thirst of homicides
which insanely throws brothers against brothers
until leading them to reciprocal extermination (...)." [FN31]

[FN30] Versos 904-907, 918-922, and 925-926.
[FN31] Versos 1138-1143.
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39. Currently, the same task of conviction and persuasion are reserved to the courts, to all courts, national and international. Besides the grounds for their judgments, they must make the parties see that the decision reached is pursuant to the applicable law. They may not, in my understanding, leave the doubts presented to them by the parties without clarification, at any time during the processing of the case, even in the form of requests, as in the present case of the Castro Castro Prison, of Interpretation of a Judgment.

40. Reason and persuasion of what is fair, the perennial leason of The Eumenides, is what they must expose, in benefit of the parties. These are not mere elements of the “operation of justice” (to use a “modern” or “post-modern” expression), but instead subjects of the law. Both parties – the plaintiffs and the defendant – have the right to wait for reason and persuasion of what is fair. This right has given way to a human aspiration that has been transmitted from generation to generation, throughout centuries.

41. Currently said right has been invoked in relation to the tasks of contemporary international courts. Actually, the judgment of a tribunal, - as has been stated by J.G. Merrills, - must give “cumulative reasons” that substantiate its conclusion, so that it has persuasion; this applies with even more strength in an international human rights court, whose applicable law is oriented not so much by rules, but by general principles of law. [FN32] This is the only way in which law can be applied and at the same time developed, to obtain results in the search for the full realization of justice, which corresponds in my own point of view to the exercise of the international judicial function.

[FN32] J.G. Merrills, The Development of International Law by the European Court of Human Rights, 2a. ed., Manchester, University Press, 1993, pp. 31, 34-35, 177, 205, and 208-210, and cf. pp. 231-234 and 249-252.
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42. Studies from the past contrasted the "judicial restraint" with the "judicial legislation", [FN33] when referring to the distance between the orthodox vision and the creative one, respectively, of the exercise of the international judicial function. I consider it more appropriate to characterize them in another way, as the judicial self-limitation, which I consider completely inadequate for an international human rights court, and the judicial impartiality, which I have defended for years within this Court, in the search for the realization of justice. These different conceptualizations have been reflected, throughout the years, in the Court’s work in matters of the Interpretation of Judgments.

[FN33] Cf., v.g., Hersch Lauterpacht, The Development of International Law by the International Court, London, Stevens, 1958, pp. 75-223.
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43. I already referred to the extraordinary contribution, acknowledged internationally, given by the Inter-American Court to the evolution of International Human rights Law itself, through its Interpretation of the Judgment in the case of Barrios Altos (supra). There is a sensible distance between the Court's position of judicial impartiality in the Interpretation of the Judgment in the case of Barrios Altos, which has won it the international acknowledgment of the most lucid doctrine on international law, and the restrictive predisposition that can be clearly concluded, v.g., from paragraphs 25-26 of the present Judgment of Interpretation in the case of the Castro Castro Prison. [FN34]

[FN34] Once the Court declared the admissibility of all the requests for interpretation (both of the appellant State and the legal representatives – different to the common intervener – of a group of victims), it had to clarify all the matters presented to it, instead of formulating the warning – without cost -, in the cas d'espèce – of the mentioned paragraphs 25-26 of the present Judgment.

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44. I allow myself to recall here another example of the Court's jurisprudence. In its Interpretation of a Judgment (of 10.01.1999) in the case of Blake versus Guatemala, the Inter-American Court recalled the prevailing criterion in the international jurisprudence in this regard, according to which the interpretation of a judgment implies not only the precision of that decided by the Tribunal, but also the determination of the scope, the sense, and the purpose of the decision, pursuant to the considerations that motivated it (para. 18).

45. The Court considered that, even though they were "clear in the scope and content" of that stated in their previous Judgment on reparations in the case of Blake, it was "useful to explain the matters presented by the State in order to dispel any doubt" in this sense. [FN35] In effect, even though the judgment of a tribunal is final and not susceptible to modifications, nothing prevents its purpose from provoking any matter in the form of a request presented to the tribunal for the interpretation of said judgment. [FN36]

[FN35] Reimbursement of expenses in the processing of the case.
[FN36] S. Rosenne, Interpretation, Revision and Other Recourse from International Judgments and Awards, Leiden, Nijhoff (Series "International Litigation in Practice", vol. I), 2007, pp. 1 and 4-5.

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46. "Sense" and "scope" are not, in my opinion, suitable for a dogmatic or restrictive predetermination, which leads to a single, standard conclusion. On the contrary, the "sense" is the understanding or reason formed when distinguishing something, regarding which an opinion or interpretation is issued. [FN37] The "scope" refers instead to the meaning or effect or transcendence of something. [FN38] Therefore, the sense and the scope are, in my understanding, more directly related to the cognoscente subject than to the cognoscible object.

As such, for their determination emphasis falls on human reason, that is, on the exercise of reason and persuasion.

[FN37] Cf. Real Academia Española, Diccionario de la Lengua Española, 21a. ed., volume I, Madrid, R.A.E., 1992, p. 1864; Diccionario Océano de la Lengua Española, Barcelona, Ed. Océano, [2003], pp. 1023-1024; G. Gómez de Silva, Breve Diccionario Etimológico de la Lengua Española, México, El Colegio de México/Fondo de Cultura Económica, 1996 [5a. reimpr.], p. 634.

[FN38] Cf. Real Academia Española, Diccionario de la Lengua Española, op. cit. supra n. (26), p. 87.

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47. In an international human rights court, such as this Court, reason and persuasion, in my understanding, necessarily prevail over the production (of judgments). Reason and persuasion are imposed per se, and cannot be captured by statistical data. What the latter does not reveal is the time and effort of an international tribunal, such as the Inter-American Court, dedicated to their task of reasoning and persuading, in order to substantiate their decisions and make justice.

48. For example, the famous case of Bámaca Velásquez versus Guatemala (Judgments on merits, 11.25.2000, and of reparations, 02.22.2002), had four public hearings before this Court (on merits and reparations), which implied eight days of hearing. [FN39] Between 1987 and 2002, eleven cases had three public hearings each, on preliminary objections, merits, and reparations (Velásquez Rodríguez versus Honduras, Godínez Cruz versus Honduras, Neira Alegría et al. versus Perú, Caballero Delgado and Santana versus Colombia, Loayza Tamayo versus Peru, Castillo Páez versus Peru, Paniagua Morales et al. versus Guatemala, Cesti Hurtado versus Peru, Cantoral Benavides versus Peru, Durand and Ugarte versus Peru, and Las Palmeras versus Colombia).

[FN39] June 16, 17, and 18, 1998; October 15, 1998; November 22 and 23, 1998; and November 28 and 29, 2001.

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49. The two last cases that in which two hearings were held in each one were those of Cantos versus Argentina (Judgment of 11.28.2002) and 19 Tradesmen versus Colombia (Judgment of 07.05.2004). The proceedings of Interpretation of the Judgment do not necessarily exclude the holding of public hearings: for example, v.g., the Judgment of Interpretation in the case of Cesti Hurtado versus Peru, which was duly preceded by a public hearing (on 01.25.2001).

50. There seems to be statistics for everything, except for reason and persuasion. From 1990 and until the end of 2006, the Inter-American Court had issued 19 Judgments of Interpretation; of this total, nine Judgments of Interpretation were issued only in the two-year period of 2005-2006. The total of requests for interpretation of Judgments seems to have accompanied the decrease of the total of public hearings before the Court. In short, I allow myself to insist that

there seems to be statistical graphs for everything except for reason and persuasion. Statistical graphs do not impress me at all; I have a real aversion for them.

51. And in this I enjoy good company. The historian Arnold J. Toynbee, known for his profound erudition, has criticized, for more than three years, the “statistical approach” and the “quantification” that were going on to dominate in the contemporary world and that, in his opinion, have a very limited value in “human affairs". For him, "the permanent and regular element in human affairs is human nature, - the whole psychosomatic unity of a human being." [FN40] He confessed that, in the final part of his monumental A Study of History, he experienced

"a sense of awe and wonder at human destiny, and human affairs in general, in which the historian is on common ground with the poet or the visual artist. So perhaps he is half-way between the scientist and the poet. (...)
I am very conscious of the tragedy of human events (...). When I study history I try to penetrate beyond the human phenomena to what lies behind them. (...) My curiosity leads me on to be curious about the nature and meaning of destiny (if there is such a thing), about existence as a whole. (...) For me history is a way of entering into and trying to comprehend the universe. Every human being has a feeling that life is mysterious, and every human being is to some extent trying to comprehend the incomprehensible." [FN41]

[FN40] Toynbee on Toynbee, Oxford, University Press, 1974, pp. 26-27.
[FN41] Ibid., pp. 28, 38, and 40.
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52. Each human rights case submitted to the consideration of this Court is a universe in itself, which, in my opinion, reveals – some with greater density – the uncertainties and mysteries that surround human existence, the inquiries on the alleged destination, and the tragedy of the human condition. An international court is called upon to hear and issue a ruling on facts that frequently reveal violence and injustice that victimize so many human beings on a daily basis. In effect, human nature does not seem to have changed throughout the centuries.

53. It is hard for me to escape from the impression that, submitting the noble work of an international human rights tribunal such as this Court, to quantifications and statistical graphs, is an improper trivialization of the mission reserved to it. An additional brief precision would be appropriate here, also in relation to quantifications that seem to me lack all sense of being. The cases under supervision of the compliance of the Judgment of the Court are not cases “en process”, as they have been incorrectly characterized in order to try to feed “productivity” statistical graphs of this Tribunal (and impress the unwary). They are, instead, cases that have already been processed with regard to their merits and reparations and they are awaiting the comprehensive compliance of the corresponding Judgments, that is, cases totally or partially not complied with by the corresponding respondent States up to that date.

VII. The Kantian Imperative and the Due Process of Law.

54. This leads me to another, correlated, line of reflection. The conceptualization of the human person was enhanced in the line of thinking of Emmanuel Kant, when he acknowledged that the first had an intrinsic dignity, which demands respect for oneself and in all relationships with other human beings. Each person, as a moral being (homo noumenon), subject of practical reason, is an end in themselves, thus they may never be treated as a means for the purposes of others. In his Groundworks for the Metaphysics of Moral (1785) [FN42] E. Kant formulated his well-known imperative, according to which each person must act only according to a maxim they aspire while it becomes a universal law. [FN43]

[FN42] Works originally published in 1785, it had another three editions authorized by him (en 1786, 1792, and 1797), and it was finally offered to the public revised by him, with the summarized title The Metaphysics of Morals (1797), two years after the publication of his project for Everlasting Peace (1795).
[FN43] E. Kant, Fondements de la métaphysique des moeurs (1785), Paris, Libr. Delagrave, 1999, pp. 46, 103, 125-129, 136-137, 159, 164, and 166-167; I. Kant, The Metaphysics of Morals (1797), Cambridge, Cambridge University Press, 2006 [reprint], pp. 17, 183, and 209.

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55. Thus, the imperatives of duty of each rational being, of one with all others. Each rational being exists as an end in themselves, and never as means for others. Underlying the Kantian reasoning is the principle of the dignity inherent to each human being, which is currently present throughout the corpus juris of International Human Rights Law. [FN44] His main concern is with regard to the protection of human dignity, in any and all situations.

[FN44] For a study of said principle with regard to the European Convention of Human Rights, cf. B. Maurer, Le principe de respect de la dignité humaine et la Convention Européenne des Droits de l'Homme, Paris, Éd. CERIC/Univ. d'Aix-Marseille, 1999, pp. 7-491.

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56. From this we can extract some illations. First of all, the Kantian imperative is always present, when dealing with the defense and preservation of the dignity of human beings, the dignity of their own humanity. Second, it affects all spheres of human relations, both in relations of the person with agents of the public or state power, as with other human beings, with individuals. [FN45] Third, it can be invoked in the protection of each human being individually, as well as of groups of people threatened or injured. And, fourth, it can be invoked in the safeguarding of different human rights to be protected.

[FN45] Cf., in this sense, A. Clapham, Human Rights Obligations of Non-State Actors, Oxford/Florence, Academy of European Law (European University Institute)/Oxford University Press, 2006, pp. 545-546.

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57. In the Kantian conception, the behavior (moral) of human beings is guided by reason, and not by self-interest or the search for personal advantages. Its hypothetical imperative leads us to reach a specific goal without referring to an intrinsic value, while its categorical imperative orients us to choose a course of action, pursuant to the intrinsic value of the goal to be reached. [FN46] It is precisely here that their actions must aspire to configure at the same time a universal law (supra). Based on their humanity, every person is an end in themselves, never a means, and this is how it must be seen by others. The Kantian imperative has a deep humanistic sense.

[FN46] E. Kant, Fondements de la métaphysique des moeurs (1785), Paris, Libr. Delagrave, 1999, pp. 15, 43, and 47.

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58. E. Kant is very clear when he warns that human beings

"existe comme fin en soi, et non pas simplement comme moyen dont telle ou telle volonté puisse user à son gré; dans toutes ses actions, aussi bien dans celles qui le concernent lui-même que dans celles qui concernent d'autres êtres raisonnables, il doit toujours être considéré en même temps comme fin." [FN47]

His imperative, - as stated by himself, - extends to all beings endowed with reason, to all humanity, which must be considered as an end in itself. [FN48] For Kant, "faire preuve d'humanité consiste à prendre part au sort des autres hommes; l'inhumanité est l'attitude de celui qui est indifférent au sort des hommes." [FN49]

[FN47] Ibid., p. 148, and cf. p. 150.
[FN48] Ibid., p. 153. According to Kant, "quand quelqu'un déshonore l'humanité d'un autre homme, c'est comme s'il enlevait toute valeur à la sienne propre, et c'est comme s'il la dégradait"; E. Kant, Leçons d'éthique (1775-1780), Paris, Livr. de Poche/Classiques de Philosophie, 1997, p. 335.
[FN49] E. Kant, Leçons d'éthique, op. cit. supra n. (24), p. 336. – In the XX century, in a similar line of concern and reasoning, Gustav Radbruch stated that the essence of the notion of person lies in equality before the law and the equal juridical capacity of human beings (inherent to them, regardless of the powers granted to them by the legal system); the relationship between “being” and “end” established herein, - G. Radbruch warned, - "is precisely inverse to that established in organicism theories.” In synthesis, “to be a person is the same as being an end-in-themselves (Selbstzweck);" G. Radbruch, Filosofia do Direito, 4a. ed. rev., volume II, Coimbra, A. Amado Ed., 1961, pp. 18-20.

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59. The Kantian imperative has effectively been invoked in the vindication of different human rights. An appropriate example is that of the guarantees of the due process of law. It is imperative that a human being, who turns to a court because he considers that his rights were violated, know the reasons that motivated the judgment that refers to him and feels free to request its interpretation if he does not consider it is sufficiently clear. A party cannot be treated

as if he were a simple means in the so called “administration or operation of justice” (to mention a post-modern expression, which I find especially irritating).

60. We must invoke here the Kantian imperative, according to which nobody must be treated as a simple means (not even for the “operation of justice”), but instead as an end in themselves. This requires listening to them attentively in a public hearing, offering them the reasons that substantiate the judicial decision that refers to them, clarifying the doubts they may still have after said decision. Only then will the party not feel like a means (for the work of others), and they will go on to feel as an end in themselves. [FN50]

[FN50] E.L. Pincoffs, "Due Process, Fraternity, and a Kantian Injunction", in Due Process (eds. J.R. Pennock y J.W. Chapman), N.Y., N.Y. University Press, 1977, pp. 172-181.

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61. There are duties of justice with regard to others, characterized by a universal nature, among which we find, within the Kantian line of thought, respect (Hochachtung) for the rights of others; the obligation to respect the rights of others is imposed on each human being. [FN51] And, as has been stated, each person has the right to know the reasons on which a judgment that refers to him or her is founded, and to participate with all freedom [of expression] in the corresponding trial. If, in the end, there is something left to clarify, there is no reason why the Tribunal would exempt itself from doing so, - without this implying even the slightest modification or deference of an apparent intent to appeal, the corresponding judgment.

[FN51] E. Kant, Leçons d'éthique, op. cit. supra n. (24), p. 331.

VIII. Clarification and Substantiation.

62. Article 67 of the American Convention states that “the judgment of the Court shall be final and not subject to appeal," and that "in case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.” The indication that can be concluded from Article 67 of the American Convention is that the sense or scope of the judgment must be clarified in the Interpretation of the Judgment. This is precisely what the Court did, in an exemplary manner, in its historic Interpretation of the Judgment of 09.03.2001 in the case of Barrios Altos versus Peru (para. 13), in which it clarified that, given the violation constituted by the laws of self-amnesty in the cas d'espèce, that decided by the Court in the Judgment on merits in the case of Barrios Altos had general effects (para. 18 and operative paragraph number 2).

63. Thus, the Court responded to the request for interpretation presented to the Court in the case of Barrios Altos by the Inter-American Commission of Human Rights, making it clear that the effects of operative paragraph 4 of the Judgment on merits (of 03.14.2001) of the Court were not only in that specific case, but also, in a generic manner, on all the cases of human rights

violations in which the mentioned laws of self-amnesty had been applied. Precisely for having clarified the sense or scope of the judgment in its Interpretation of the Judgment, it had a deep impact – currently well-known and acknowledged in the Latin American juridical circles – on the domestic legal system not only of the respondent State, but also the different States of South America. It also contributed in a valuable way to the fight against impunity.

64. If, in that historical case of Barrios Altos, the Inter-American Court would have followed a restrictive line of reasoning, it is very possible that it would not have provided the important clarification regarding something that was not specified in the Judgment on merits (of 03.14.2001) in the same case of Barrios Altos. The matter presented to the Court in the request for Interpretation of the Judgment had not been dealt with in the contentious proceedings that culminated with the mentioned Judgment on merits of the Court, but not even because of that did the Court deny the clarification requested a posteriori, precisely to clarify the sense or scope of the mentioned judgment.

65. In its Interpretation of the Judgment in the case of Barrios Altos, the Court acted in full awareness of its fundamental role of stating which is the Law. Thus, the impact of its decision on our region, on our part of the world, was way beyond what we anticipated in 2001. Article 29(3) of the Rules of Procedure, invoked by the Court in the dispositif of the present Interpretation of a Judgment, cannot be considered as grounds for the decision made by it: Article 29(3) refers to the impossibility to contest judgments and orders of the Court, - which is not the case. Here, once again, its restrictive predisposition is present, which, along with the eagerness of "productivity" of decisions do not always produce satisfactory or well-grounded results.

66. Actually, this tendency has been occurring for some time (as of the end of 2004), as stated in my extensive Dissenting Opinions (paras. 1-49 and 1-75, respectively) in the Judgments on preliminary objections (of 11.23.2004) and of merits and reparations (of 03.01.2005), in the case of the Serrano Cruz Sisters versus El Salvador. [FN52] To evoke another example, half a decade after the transcendental Interpretation of the Judgment in the case of Barrios Altos, the Court no longer seemed to have the same willingness to clarify that presented before it, v.g., in the request for Interpretation of Judgment in the case of the Moiwana Community versus Suriname.

[FN52] Text of these Dissenting Opinions reproduced in: A.A. Cançado Trindade, Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006), México, Edit. Porrúa/Universidad Iberoamericana, 2007, pp. 466-482 and 483-507, respectively.

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67. In its Interpretation of the Judgment of 02.08.2006 in this case of the Moiwana Community, the Court stopped and limited itself to the point where I saw myself in the obligation to contribute, in a Concurring Opinion (paras. 1-32), with what the Court preferred to abstain from doing. I focused my reflections on three aspects, to which I attributed special importance, specifically: a) the delimitation, demarcation, titling, and handing over of land as a form of reparation (non-pecuniary); b) the guarantee of the voluntary and sustainable return (of

the members displaced from the Community); and c) the need to rebuild and preserve the cultural identity. [FN53] In that case of the Moiwana Community, as in the present case of the Castro Castro Prison, I have stayed loyal, - as during the totality of my term as Full Judge of the Inter-American Court, - to my conception of the fundamental role of an international human rights court, which is not exhausted with "solving" a controversy submitted to its knowledge, but instead also requires that it indicate which is the Law.

[FN53] Text of my referred Concurring Opinion, reproduced in ibid., pp. 683-693.

IX. The Primacy of Law in Any Circumstance, including the Fight against Terrorism.

68. In recent years, the cases of violations to human rights in the middle of a chronic state of generalized violence have generated difficulties that exceed the purely conceptual level, and extend to the scope itself of the applicable law and the determination of those entitled to the right to reparation. Therefore, I consider it completely appropriate to dedicate the following considerations of the present Concurring Opinion to the different aspects of the primacy of law even in circumstances of chronic violence, even in the so-called fight against terrorism. The matter occupies a fundamental position in the present Interpretation of the Judgment in the case of the Castro Castro Prison.

1. The Victims of Massacres.

69. The cases of massacres that currently reach the international human rights courts (Inter-American and European Courts) have generated great difficulties – maybe perplexities – for those who study not only Law (v.g., the determination of the victims for the effect of reparations) but also for social sciences in general. In principle, the phenomenon of massacres defies all intent of comprehension: it does not seem to have any sense or purpose, it is deeply disturbing, it seems to be the product of human insanity and cruelty.

70. Additionally, it does not obey any intent of "general theory": each massacre – extermination of non-combatants, - between men and women, children and the elderly, - in general completely defenseless has been perpetrated within a different specific historic, political, and cultural context. [FN54] It would be difficult to submit said phenomenon to any intent of generalization.

[FN54] J. Sémelin, "Analysing Massacres and Genocide: Contribution of the Social Sciences", in: [Various Authors,] Violence and Its Causes: A Stocktaking, Paris, UNESCO, 2005, pp. 63-65, and cf. p. 62 y 67.

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71. On the other hand, the instigators and perpetrators of the massacres systematically try to characterize the victims as "enemies" that must be eliminated or exterminated, even when they are innocent and defenseless, - they try, in synthesis, to dehumanize them before killing them.

[FN55] With this, they seek to “protect themselves” from the feeling of guilt they may have for their acts of extreme cruelty. The element of intentionality seems to always be present, in my opinion as an aggravating circumstance, even for the effects of reparations.

[FN55] For a personal dramatic account, cf. Primo Levi, The Drowned and the Saved, N.Y., Vintage, 1989 [reprint], pp. 11-203.

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72. The notion of “massacre” starts to be considered as a "unité lexicale de référence": in said cases of massacres, the survivors and the next of kin of the fatal victims carry with them the load of their personal suffering along with the suffering of those who were massacred. [FN56] This is an aggravating circumstance, along with the premeditation, an intentionality that led to the perpetration of the massacres. In synthesis, in the efforts to achieve a restorative justice, the profound traumatic effects of the massacres, not only and obviously on the victims and their next of kin, but also on the social fabric itself, on the population affected by the massacres as a whole, must necessarily be taken into consideration.

[FN56] Y. Ternon, Guerres et génocides au XXe. siècle, Paris, O. Jacob, 2007, pp. 80-82, and cf. p. 83.

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73. It if of great importance that the victims of massacres and people in situations of the utmost adversity (such as, inter alia, those detained in infra-human conditions), are currently able to reach international jurisdiction in order to assert their rights. This fact, - hard to anticipate some decades ago, - reveals the progress of International Human Rights Law in the midst of so many difficulties. This constitutes, in my opinion, one of the manifestations of the humanization of contemporary International Law, which also reveals the impact of International Human Rights Law within International Public Law and, finally, what I would define as the current evolution of International Law towards the People’s Law. [FN57]

[FN57] Cf., in this regard, my recent study: A.A. Cançado Trindade, Évolution du Droit international au droit des gens - L'accès des individus à la justice internationale: Le regard d'un juge, Paris, Pédone, 2008, pp. 1-188.

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74. This evolution comes to rescue the roots of humanist thinking, and its flourishing throughout time, in the middle of successive atrocities perpetrated by individuals against their fellow men. Remember, for example, that at the end of the XVIII century (in 1793), in a brilliant essay written a little before being executed, Condorcet warned that there was

"une science du droit des gens: mais malhereusement on chercha des lois des nations, non dans la raison et la nature (...). On s'occupa moins des droits de l'humanité, de la justice envers les individus, que de l'ambition, de l'orgueil ou de l'avidité des gouvernements." [FN58]

However, he added with admirable hope that

"les principes de la philosophie, les maximes de la liberté, la connaissance des véritables droits de l'homme et de ses intérêts réels, sont répandus dans un trop grand nombre des nations, et dirigent dans chacune d'elles les opinions d'un trop grand nombre d'hommes éclairés, pour qu'on puisse redouter de les voir jamais tomber dans l'oubli." [FN59]

[FN58] Condorcet, Esquisse d'un tableau historique des progrès de l'esprit humain [1793], Paris, Flammarion, 1988 [reed.], p. 201.
[FN59] Ibid., p. 259.

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2. The Protection of Human Rights in the Midst of the Fight Against Terrorism.

75. The present case of the Castro Castro Prison is not the first in which the matter of the protection of human rights in the midst of a prolonged situation of a fight against terrorism is presented before the Inter-American Court. Remember that, a decade ago, in the case of Loayza Tamayo versus Peru (Judgment of 09.17.1997), in its assessment of the evidence, the Court had already taken note of that pointed out by the respondent State “with regard to terrorism”, which led, - in its evaluation, - to “an escalation of violence in detriment of human rights. The Court warned, however, that “exceptional circumstances” could not be invoked “in detriment of human rights.” And it added that

"None of the provisions of the American Convention may be interpreted in such a way as to allow States Parties or any group or person to suppress the enjoyment or exercise of recognized rights or to restrict them to a greater extent than is provided therein (Article 29(2). The origin of this precept is to be found as far back as the 1948 Universal Declaration of Human Rights (Article 30)." (para. 44)

76. In the same case of Loayza Tamayo, with regard to the merits, the Court once again warned that

"Any use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person (…), in violation of Article 5 of the American Convention. The exigencies of the investigation and the undeniable difficulties encountered in the anti-terrorist struggle must not be allowed to restrict the protection of a person's right to physical integrity." (para. 57)

77. Actually, when interpreting and applying the American Convention, as corresponds to it, in relation to the specific cases submitted to its knowledge, the Inter-American Court has on reiterated occasions stated the primacy of Law, integrity, and safeguarding of the protected rights, even in the most difficult circumstances, such as, v.g., that of the fight against terrorism. Thus, in the case of Cantoral Benavides versus Peru (Judgment of 08.18.2000), for example, the Court reiterated that “the needs of the investigation and the undeniable difficulties of the fight

against terrorism must not lead to restrictions to the protection of a person's right to humane treatment." (para. 96)

78. In the same manner, in the case of Maritza Urrutia versus Guatemala (Judgment of 11.27.2003), the Court once again warned that

"The prohibition of torture is absolute and non-derogable, even in the most difficult circumstances, such a war, the threat of war, the fight against terrorism, and any other crime, martial law or state of emergency, civil war or commotion, suspension of constitutional guarantees, internal political instability, or any other public disaster or emergency." (para. 89)

79. The Court reiterated this warning ipsis literis in the cases of the Gómez Paquiyauri Brothers (Judgment of 07.08.2004, para. 111), and of Lori Berenson (Judgment of 11.25.2004, para. 100), both regarding Peru, as well as in the case of Tibi versus Ecuador (Judgment of 09.08.2004), in which it also stated that "there is an international juridical regime of absolute prohibition of all the forms of torture, both physical and psychological, regime that currently belongs to the sphere of the jus cogens (para. 143). Still regarding the subject in examination, in my Concurring Opinion in the case of the Mapiripán Massacre versus Colombia (Judgment of 09.15.2005), I allowed myself to consider that

"One does not combat terror with terror, but rather within the framework of the Law. Those who resort to the use of brute force brutalize themselves, creating a spiral of widespread violence that ends up turning the innocent (…) into victims. (...)
Brute force generates brute force, and at the end, what do we have? Nothing, general devastation, the breakdown of the social fabric, vengeance, torture, and summary executions and other grave violations of International Humanitarian Law and International Human Rights Law, the transformation of human beings into mere instruments of confrontation and destruction –opening wounds that will require generations to heal." (paras. 46-47)

80. In confirmation of the understanding held by the Court regarding the matter in examination, the Inter-American Convention against Terrorism (2002) states, in its Article 15, that the measures adopted by the States Parties pursuant to its regulations "will be carried out with full respect for the rule of Law, human rights, and fundamental freedoms." (para. 1) It immediately safeguards the conventional obligations of the States Parties pursuant to "International Humanitarian Law, International Human Rights Law, and International Refugee Law." (para. 2) And it adds that "any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including the enjoyment of all rights and guarantees in conformity with the law of the state in the territory of which that person is present and applicable provisions of international law." [FN60]

[FN60] I was present, as President at that time of the Inter-American Court, in the General Assembly of the Organization of American States (OAS) of 2002, held in Bridgetown, Barbados, upon the adoption of the Inter-American Convention Against Terrorism and in the three days that preceded it. I remember that the insertion of the important Article 15 in the Inter-American

Convention Against Terrorism resulted from a successful Latin American diplomatic initiative, presented at the last minute during the final stage of its travaux préparatoires, a little before the adoption of the mentioned Convention in the full session of 06.03.2002 of the General Assembly of the OAS (resolution AG/RES.1840 (XXXII-0/02)). The mentioned Article 15 must receive credit for enshrining, in an unmistakable manner, the protection of human rights in midst of the fight against terrorism.

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3. Victims and Precisions with regard to the Applicable Law.

81. In my General Course of International Public Law, [FN61] offered in the Academy of International Law of The Hague in 2005, when referring to the Final Reports of contemporary Commissions of Truth, [FN62] I allowed myself to state precisely that

"They warn against responding to crimes committed by non-State entities (including terrorist groups) with crimes perpetrated by the State itself: the results are invariably the disruption of the rule of law (État de droit), social decomposition, killings of innocent people, impunity and corruption." [FN63]

In the same line of thought, I added in my Concurring Opinion in the case of Acosta Calderón versus Ecuador (Judgment of 06.24.2005), that "The serious evils or our times, - drug trafficking, terrorism, organized crime, among so many others, - must be combated from within the Law, since they can not simply be confronted with their own weapons: said evils may only be overcome from within the Law." (para. 8)

[FN61] Chapter XV, on the responsibility for international crimes and universal jurisdiction.
[FN62] Cf., e.g., inter alia, Commission on Truth and Reconciliation [CVR], Final Report – General Conclusions, Lima/Peru, CVR, 2003, pp. 11-20, 30 and 34-43, and cf. pp. 24 and 26-29; and for a recent evaluation, cf. Defensoría del Pueblo [DP], A Dos Años de la Comisión de la Verdad y Reconciliación, Lima/Perú, DP/Informe Defensorial n. 97, 2005, pp. 17-333.
[FN63] A.A. Cançado Trindade, "International Law for Humankind: Towards a New Jus Gentium - General Course on Public International Law - Part I", 316 Recueil des Cours de l'Académie de Droit International de la Haye (2005) p. 431.

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82. At the same time, the victims of violations to human rights that result from terrorist acts can find themselves in different juridical situations if said acts have been perpetrated, on one hand, by mere individuals or clandestine or non-identified agents or, on the other hand, by agents of the State itself. Both types of victims are, all of them, under the protection of the Law, even when the applicable law is different in one case and the other. The concerning contemporary diversification of the sources of the violations to human rights does not because of that deprive or remove the victims from the protection of the Law, which is due to them in any and all circumstances.

83. The victims of violations to human rights attributable to the State are protected by the regulations of International Human Rights Law (along with the rights enshrined in the constitution), which precisely determines the State's international responsibility, - while the victims of terrorist acts attributable to non-state agents or groups are protected by the regulations of criminal law, which precisely determines the criminal responsibility of individuals, and whose application must be pursuant to the international human rights regulations binding to the State in question. Thus, nobody is removed from the protection of the Law, even when the applicable law may be different according to the circumstances of each specific case.

84. Both the State through its powers or agents, as well as simple individuals (even clandestine or non-identified agents), are compelled to not violate the rights inherent to human beings. Said obligation is enshrined, in the human rights treaties and treaties of International Humanitarian Law (that are binding to the State in question), as well as the regulations of domestic criminal law (that must be applied pursuant to those treaties). The victims of terrorist acts or their next of kin can seek justice through criminal law. As has been stated in a recent study on the subject,

"The issue of the obligations of the non-State actor as regards the right to life hardly arises in practice. Taking a life is clearly illegal under national law and there would normally be no reason to raise this before a national court in terms of human rights law." [FN64]

[FN64] A. Clapham, Human Rights Obligations of Non-State Actors, op. cit. supra n. (7), p. 368.

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85. They can, however, turn to human rights regulations to reinforce the legal arguments within the framework of domestic criminal law, and even to seek the application of the relevant rules of the human rights treaties binding to the State in question within the realm of its domestic law. But if the terrorist acts included the participation or connivance, or knowledge and negligence of the State in question, - endowed with the legislative power in criminal matters, among other subjects, - promptly compromising its own international responsibility, the corresponding regulations of International Human Rights Law must be applied immediately for the determination of the State's responsibility.

86. Besides this, since facts are richer than regulations and they require from the latter a constant aggiornamento, even to offer greater protection to the victims of violations of human rights, there are situations of a high complexity that require clairvoyance, by the court or judge called upon to settle a dispute, in what refers to the identification itself of the applicable law. An example can be found in the determination of the possible effect of a human rights treaty with regard to third parties (the Drittwirkung), - who could be the perpetrators of terrorist acts.

87. The effect of international human rights regulations would occur, in said circumstances, based on the theory of the positive obligations of protection by the State. In the European protection system, this aspect has been developed, v.g., in the pioneer monograph by the jurist from Luxembourg Dean Spielmann. [FN65] In the Inter-American protection system, the same matter has been developed in several of my Opinions within this Court regarding the

Drittwirkung. [FN66] If the State does not assume its positive obligations of protection, it becomes responsible for negligence or omission within the international realm, ass well as criminally responsible as perpetrators of terrorist acts within the realm of the domestic law.

[FN65] D. Spielmann, L'effet potentiel de la Convention européenne..., op. cit. supra n. (7), pp. 75-77, 79, 82-84 and 88, for the possibility to study the possible effect of the European Convention on third parties in the light of the theory of the positive obligations of protection.

[FN66] V.g., in my Concurring Opinions in the Judgments of the Court in the cases of the Mapiripán Masscare versus Colombia (of 09.15.2005) and of the Massacre of Pueblo Bello versus Colombia (of 01.31.2006), as well as in my Concurring Opinions in the Orders of the Court on Provisional Protection Measures in the cases of the Communities of Jiguamiandó and Curbaradó versus Colombia (of 03.06.2003 and 03.15.2005), of Pueblo Indígena Kankuamo versus Colombia (of 07.05.2004), of the Pueblo Indígena of Sarayaku versus Ecuador (of 07.06.2004), of the Urso Branco Prison versus Brazil of 07.07.2004), of the `Globovisión' Television Station versus Venezuela (of the 09.04.2004), of the Peace Community of San José de Apartadó versus Colombia (of 03.15.2005); and, finally, also in my Concurring Opinions in the Court's Orders on Provisional Measures of Protection in the cases of the Mendoza Prisons versus Argentina (of 0.3.30.2006), and of the Araraquara Penitentiary versus Brazil (of 09.30.2006). Cf. the texts of my mentioned Opinions reproduced in: A.A. Cançado Trindade, Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006), México, Edit. Porrúa/Universidad Iberoamericana, 2007, pp. 595-613, 629-654, 891-929, 984-991, and 1002-1019.

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88. The State is responsible for the protection of every person under its jurisdiction, for the safety of human beings, even against terrorist acts. It cannot, however, with this purpose (guarantee human safety), practice itself terrorist acts; it must act within the Law. And here I move on to a second example of a highly complex situation. I am referring to a generalized situation of violence, of a domestic or non-international armed conflict: in said situation, along with the application of criminal law to the perpetrators of terrorist acts and of International Human Rights law with regard to violations perpetrated by State bodies or agents, International Humanitarian Law – with its current institutional shortages – is also applied.

89. For years I have been defending the concomitant application of International Human Rights Law and International Humanitarian Law (cf. infra). In the end what is important is to guarantee that nobody is left without the protection of the Law. The matter of the exact realm of the addressees of the regulations of International Humanitarian law in domestic or non-international armed conflicts has resulted in debates and controversies. The doctrine is inclined to consider all those involved in said conflicts, even those that support the parties involved in them, as addressees of said regulations and bound by it. [FN67] The applicability of International Law to all those involved in domestic armed conflicts has the effect of gradually strengthening the protection of the defenseless, [FN68] of possible victims.

[FN67] Cf. M. Sassòli y A.A. Bouvier et alii, How Does Law Protect in War?, Geneva, ICRC, 1999, p. 215.
[FN68] Cf., v.g., C. Ewumbue-Monono, "Respect for International Humanitarian Law by Armed Non-State Actors in Africa", 88 International Review of the Red Cross (2006) n. 864, pp. 905-923.
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90. This means that, moved by the needs themselves of protection, International Humanitarian Law has transcended its previous inter-state point of view, and it currently extended its realm of application to non-state groups and entities, to armed groups that oppose domestic conflicts, who may have compromised their criminal responsibility. [FN69] (cf. infra) This development is not limited to a purely doctrinal level, and it has currently also found its expression in international jurisprudence: recently the Appellate Chamber of the Special Court for Sierra Leon stated, in the case of Prosecutor versus Sam Hinga Norman (jurisdiction, decision of 05.31.2004), that

"it is well settled that all parties to an armed conflict, whether States or non-State actors, are bound by International Humanitarian Law, even though only State may become parties to international treaties." [FN70]

[FN69] Cf. L. Zegveld, The Accountability of Armed Opposition Groups in International Law, Cambridge, University Press, 2002, pp. 3-260.
[FN70] Cit. in A. Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations", 88 International Review of the Red Cross (2006) n. 863, pp. 497-498.
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91. Thus, the obligations of International Humanitarian Law are imposed both to States and to individuals and groups, to non-state entities, to armed insurgents in general, and the States have not questioned this notable development of International Humanitarian Law in the practice. [FN71] It also deals with the growing needs of protection of human beings in situations of domestic (and also international) armed conflict. Therefore, the individual’s responsibility, acting individually or in groups, can be considered a violation of International Humanitarian Law.

[FN71] Ibid., pp. 498, 500-501 y 521-523. – On the operation, in general, of the Special Court for Sierra Leona, cf. [Several Authors,] Internationalized Criminal Courts - Sierra Leone, East Timor, Kosovo and Cambodia (eds. C. Romano, A. Nollkaemper y J.K. Kleffner), Oxford, University Press, 2004, caps. VII-IX, pp. 125-180.
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92. The latter prohibits any act of terrorism. We must recall, in this sense, that the IV Convention of Geneva of 1949 on the Protection of Civilians expressly prohibits inter alia any act of intimidation or terrorism (Article 33). This stipulation was the grounds for the subsequent absolute prohibition, enshrined in the II Additional Protocol of 1977 to the four Conventions of

Geneva of 1949, of “acts of terrorism" (Article 4(2)(d)). With regard to the protection of the civil population, the II Additional Protocol prohibits any acts or threats of violence with the purpose of spreading terror among the civil population (Article 13(2)). This same prohibition is also enshrined in the I Additional Protocol (Article 51(2)). The reference to “acts or threats of violence” makes the prohibition especially ample, so that it covers “all possible circumstances." [FN72]

[FN72] Y. Sandoz, Chr. Swinarski y B. Zimmermann (eds.), Commentary on the Additional Protocols of 08 June 1977 to the Geneva Conventions of 12 August 1949, Geneva, ICRC/Nijhoff, 1987, pp. 1375 and 1453.

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93. The acknowledgment that the violations to International Humanitarian Law applicable to armed conflicts (international or domestic) constitute individual criminal responsibility has been considered a “historical event." [FN73] This occurs with even more severity when dealing with grave violations of International Humanitarian Law [FN74] (Articles 50/51/130/147 of the I-IV Conventions of Geneva of 1949, besides Article 85 of the I Additional Protocol of 1977), in relation to which the States Parties to the four Conventions of Geneva of 1949 are compelled to make sure that their legislation includes the “adequate criminal punishments” to be applied, to those responsible, by domestic courts themselves (Articles 49/50/129/146 of the I-IV Conventions of Geneva of 1949). [FN75]

[FN73] F. Kalshoven y L. Zegveld, Restricciones en la Conducción de la Guerra, 2a. ed., Ginebra, CICR, 2005, p. 220.

[FN74] Cf. Th. Graditzky, "Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts", 38 International Review of the Red Cross (1998) n. 322, pp. 29-56; and cf. also, regarding those violations, G. Doucet, "La qualification des infractions graves au Droit international humanitaire", in Implementation of International Humanitarian Law / Mise-en-oeuvre du Droit international humanitaire (eds. F. Kalshoven and Y. Sandoz et alii), Dordrecht, Nijhoff, 1989, pp. 79-107, and cf., in general, E. Méndez, "La Responsabilidad Internacional del Estado y del Individuo por Incumplimiento del Derecho Internacional Humanitario", in [Several Authors,] Derecho Internacional Humanitario (coord. Fabián Novak), Lima, IDEI/Pontificia Universidad Católica del Perú, 2003, pp. 463-487.

[FN75] F. Kalshoven y L. Zegveld, Restricciones en la Conducción de la Guerra, op. cit. supra n. (48), p. 94.

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94. In practice, several States have already adapted their national legislations to the requirements of the four Conventions of Geneva of 1949; said practice has expanded as of the nineties with the creation of the ad hoc Criminal Courts for the former Yugoslavia and for Rwanda. [FN76] Therefore, there is nothing surprising in the fact that in recent years the attention has been focused – in theory and practice – on the national implementation (within the realm of the domestic law of the States) of the regulations of International Humanitarian Law. [FN77]

[FN76] Ibid., pp. 95 and 231.

[FN77] Cf., v.g., M. Bothe, P. Macalister-Smith y Th. Kurzidem (eds.), National Implementation of International Humanitarian Law, Dordrecht, Nijhoff, 1990, pp. 1-273; [Several Authors,] La Aplicación Nacional del Derecho Internacional Humanitario y de las Convenciones Interamericanas Relacionadas (Actas de la Conferencia de San José de Costa Rica de 2001), San José de Costa Rica, CICR/OEA, 2002, pp. 19-170; K. Drzewicki, "National Legislation as a Measure for Implementation of International Humanitarian Law", in Implementation of International Humanitarian Law / Mise-en-oeuvre du Droit international humanitaire (eds. F. Kalshoven y Y. Sandoz et alii), Dordrecht, Nijhoff, 1989, pp. 109-131; M. Bothe, "The Role of National Law in the Implementation of International Humanitarian Law", in Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet (ed. Christophe Swinarski), Genève/La Haye, CICR/Nijhoff, 1984, pp. 301-312.

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95. The grave violations of International Humanitarian Law (which are also grave violations of human rights), enshrined in the four Conventions of Geneva and the I Additional Protocol (supra) have also been felt in the Statute of Rome of 1998 of the International Criminal Court; [FN78] its Article 8, upon identifying the elements of war crimes, for example, includes a broader list (than that of the four Conventions of Geneva) of the mentioned grave violations. [FN79] The concept of said grave violations of International Humanitarian Law (and of human rights) perpetrated in domestic or non-international armed conflicts.

[FN78] Cf., v.g., its Article 7, on crimes against humanity.

[FN79] Cf., in this regard, v.g., Y. Ternon, op. cit. supra n. (45), pp. 52 and 56-57; R. Provost, International Human Rights and Humanitarian Law, Cambridge, University Press, 2005 [reprint], p. 106; L. Hannikainen, "Developments of Jus Cogens in International Law in the Post `Cold War' Years, in Particular in Human Rights Law", in Theory and Practice of Contemporary International Law - Essays in Honour of Prof. L. Alexidze on the 80th Birthday Anniversary, Tbilisi, Inovatia, 2007, pp. 44 and 49. And, for a substantial comment, cf. K. Dörmann, L. Doswald-Beck y R. Kolb, Elements of War Crimes under the Rome Statute of the International Criminal Court - Sources and Commentary, Cambridge, University Press, 2003, pp. 1-498.

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96. This reveals another situation amid the complexity of contemporary armed conflicts (domestic or non-international, as well as international): in case of grave violations of Humanitarian International Law (or the rights of the human being), [FN80] contemporary International Criminal Law must be applied. The complexities of the situations of armed conflicts (domestic or international) are clear, and they reveal the pressing need for protection of all the victims, and to provide reparation to all of them, that is, - the victims of terrorist acts perpetrated both by mere individuals (including clandestine or non-identified agents) as well as by the State itself. In said circumstances, they are all bound by the obligations of International Humanitarian Law and International Criminal Law.

[FN80] That constitute acts of genocide, crimes of war, or crimes against humanity.

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97. In the past, retributive justice and restorative justice have been dealt with in a parallel and compartmentalized manner. However, in recent years, there seems to be a new tendency, reflected in recent progress in International Criminal Law (as of the adoption of the Statute of Rome of 1998), to stop opposing [FN81] retributive justice (focused on the punishment of the criminal behavior) and restorative justice (threatens the situation of victims and their rehabilitation). In my understanding, retributive justice and restorative justice are not self-excluding, but instead they complement themselves. There is a convergence between the search for justice through the punishment of those responsible for violations to human rights (retributive justice) and the search for the rehabilitation of the victims of said violations (restorative justice). [FN82]

[FN81] Cf., v.g., T.G. Phelps, Shattered Voices, Philadelphia, Univ. of Pennsylvania Press, 2004, p. 30; Ch.L. Griswold, Forgiveness - A Philosophical Exploration, Cambridge, University Press, 2007, pp. 158-159.

[FN82] As illustrated by the mechanisms of the TPI itself as a whole.

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4. The Integrating Hermeneutics and the Protection of the Law.

98. This is how terrorism is fought: within the Law. Here, International Humanitarian Law meets domestic criminal law to punish those responsible for those grave violations, thus dealing with the claims for justice of the victims of terrorist acts. What is not admissible, besides being criminal, is to fight terrorism with their own weapons, turning to the State's terrorism and thus multiplying the number of innocent and defenseless victims. The recent and notable developments in International Criminal Law also come to give a boost to these new approximations or convergences, - now between International Humanitarian Law and International Criminal Law. It was necessary to wait all those years for this to happen, what today is a result of the awakening of the universal juridical conscience –in my opinion the ultimate material source of all Law – to deal with an urgent need of protection of human beings in situations of armed conflicts.

99. These new approximations or convergences are now added to the other that, for years, have been the object of my reflections and studies, specifically, the approximations or convergences – at a normative, hermeneutic, and operative level – between the International Human Rights Law, International Humanitarian Law, International Refugee Law; [FN83] to these three aspects of protection we must currently add contemporary International Criminal Law in full evolution (with its impact on the States' domestic law). In my opinion, the Law is just one, and all these aspects must be treated from the perspective of a necessarily integrating hermeneutics.

[FN83] Cf. A.A. Cançado Trindade, Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario: Aproximaciones y Convergencias, in 10 Años de la Declaración de Cartagena sobre Refugiados - Memoria del Coloquio Internacional (San José de Costa Rica, diciembre de 1994), San José, IIDH/ACNUR/Gob. Costa Rica, 1995, pp. 77-168; A.A. Cançado Trindade, Aproximaciones o Convergencias entre el Derecho Internacional Humanitario y la Protección Internacional de los Derechos Humanos, in Seminario Interamericano sobre la Protección de la Persona en Situaciones de Emergencia - Memoria (Santa Cruz de la Sierra, Bolivia, junio de 1995), San José de Costa Rica, CICR/ACNUR/Gob. Suiza, 1996, pp. 25-28 y 195-197; A.A. Cançado Trindade, Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario - Aproximaciones y Convergencias, Ginebra, CICV, [2000], pp. 1-66; A.A. Cançado Trindade, "Aproximaciones y Convergencias Revisitadas: Diez Años de Interacción entre el Derecho Internacional de los Derechos Humanos, el Derecho Internacional de los Refugiados, y el Derecho Internacional Humanitario (De Cartagena/1984 a San José/1994 y México/2004)", in Memoria del Vigésimo Aniversario de la Declaración de Cartagena sobre los Refugiados (1984-2004), 1a. ed., San José de Costa Rica/México, ACNUR, 2005, pp. 139-191; A.A. Cançado Trindade, "International Law for Humankind: Towards a New Jus Gentium - General Course on Public International Law - Part II", 317 Recueil des Cours de l'Académie de Droit International de la Haye (2005) cap. XXIII, pp. 150-171; A.A. Cançado Trindade, A Humanização do Direito Internacional, Belo Horizonte/Brasil, Edit. Del Rey, 2006, pp. 279-352.----------

100. In the present sphere of protection of human beings, there is still a long way to go, despite the important progress of the doctrine and practice of international law in the previous years. The first steps have been taken, both nationally and internationally, in the fight against impunity and in favor of the prevalence of the right to trust and justice. In its request for interpretation, of March 15, 2007, of the Judgment of merits and reparations in the present case of the Castro Castro Prison, the Peruvian State invoked the right to truth (para. 52), while acknowledging the work in favor of this right carried out in Peru by he Commission for Truth and Reconciliation (para. 5(20)), duly taken into consideration by the Inter-American Court (para. 5(23)).

101. The appellant State referred to the proven “multiplicity of criminal acts” perpetrated by members of Sendero Luminoso [FN84] that victimized the population and “remain in the nation’s collective conscience," (para. 5(20)), while acknowledging that they “are not a direct party to this case” of the Castro Castro Prison (para. 5(2)). It is understandable that the appellant State would evoke, in the same brief, the protection of all victims (para. 6(20)), of the tragic armed conflict that flagellated the country, and specifically its population, as well as search for a clarification of the applicable law and the recent doctrinal progress in this regard (para. 6(2)).

[FN84] On the history of Sendero Luminoso, cf., v.g., S. Roncagliolo, La Cuarta Espada, Lima, Ed. Debate, 2007, pp. 15-245; and on the violence and origins of the terrorism of Sendero Luminoso, cf., v.g., [Several Authors,] Shining Path of Peru (ed. D. Scott Palmer), N.Y., St. Martin's Press, 1992, pp. 1-247.

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102. What is not true (precise) is to presume that the international juridical system is not built for situations such as those of the mentioned Peruvian armed conflict (para. 6(27)). The considerations previously developed by me reveal a series of complexities that instead lead to precisions with regard to the applicable law (cf. supra). But – I allow myself to insist on this matter – nothing is beyond the protection of the Law. In what refers to the Inter-American Court, its jurisdiction, in the terms of the American Convention, it is directed towards the determination of the State's responsibility, for which it must confine itself to the facts stated in the application. But the regulations on protection of the American Convention do not exclude the concomitant application of International Humanitarian Law and that of criminal law (domestic and international); and the latter is directed toward the determination of individual criminal responsibility.

103. In successive Concurring and Separate Opinions I have presented in different Judgments of this Court, I have defended the complementary nature (and even the concomitant application of certain circumstances) of the corresponding regulations of International Human Rights Law (IHRL), of International Humanitarian Law (IHL), and International Refugee Law (IRL). Regarding this matter, I allow myself to make reference to my Concurring Opinion in the case of Las Palmeras versus Colombia (preliminary objections, Judgment of 02.04.2000), my Concurring Opinion in the case of Bámaca Velásquez versus Guatemala (merits, Judgment of 11.25.2000), my Concurring Opinion in the case of the Pueblo Indígena Kankuamo versus Colombia (Order of 07.05.2004), my Concurring Opinion in the case of the Peace Community of San José de Apartadó versus Colombia (Order of 03.15.2005), among others.

104. In the same line of reasoning, I have held, besides the need to promote the complementary nature of the State's international responsibility and the individual's international criminal responsibility, in order to reveal a necessary coming together of International Human Rights Law and contemporary International Criminal Law. [FN85] In this sense I have issued my Concurring Opinion in the case of Myrna Mack Chang versus Guatemala (Judgment of 09.18.2003), my Concurring Opinion in the case of the Plan de Sánchez Massacre versus Guatemala (merits, Judgment of 04.20.2004), my Concurring Opinion in the case of Goiburú et al. versus Paraguay (Judgment of 09.22.2006), my Concurring Opinion in the case of Almonacid Arellano versus Chile (Judgment of 09.26.2006), among others.

[FN85] V.g., through the presence and participation of the victims in international proceedings.

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105. That way, nobody is removed from the application of the Law, neither the victims of the violations of their rights by State bodies or agents nor the victims of violations of their rights due to terrorist acts. I do not see any impossibility or difficulty for the Inter-American Court to clarify this matter in the preset Judgment of Interpretation in the case of the Castro Castro Prison; it did not do it because it did not want to, but in my opinion it should have. If it had done it, it would not be acting ultra vires, but instead complying fully with its duty in the circumstances of the cas d'espère, duly clarifying the sense and scope of its previous Judgment, on merits and reparations, of 11.25.2006, in the case of the Castro Castro Prison.

106. In the present case, the appellant State was not the only one who requested the interpretation of the Judgment; the attorneys of the victims (different to the representative of the victims and the common intervener) also requested clarifications on different matters. The Court clarified a request for interpretation, the latter, but in my opinion, it did not, sufficiently or satisfactorily, clarify the issues presented in the State's request for interpretation.

107. In my opinion, if it had clarified all the matters presented to it in the present process of Interpretation of Judgment, the Court would have contributed to strengthening even the position of the victims in the present case of the Castro Castro Prison, within the framework of the rule of law under the American Convention. It would have also clearly solved the central issue presented in the State's request, imbued of the acknowledgment of the importance of reason and persuasion in its substantiation of the Judgment of Interpretation. Since the Court abstained from doing so, I spread upon the record my own personal reasoning, in the present Concurring Opinion, as grounds to my position in this sense.

X. The Blindness of Private Vengeance and the "Eye that Cries" Even More.

108. In my Concurring Opinion in the previous Judgment on merits and reparations (of 11.25.2006) in the present case of the Castro Castro Prison, I allowed myself to consider that

"(...) From the debris of the bombing on the Prison of Castro Castro, from the devastation of the armed attack perpetrated against its defenseless inmates between the days of May 06 and 09, 1992, from the blood of its victims piled up one on top of the other, from the brutalities prolonged in time, from the damages caused to the inmates' eyes by the splinters (fragmentation weapons) and the gases, - of this entire massacre without pity, arises the human conscience declared and symbolized today in the monument "The Eye that Cries," [FN86] in acknowledgment of the suffering of the victims and as an expression of solidarity to them.
Solidarity and, through the present Judgment of this Court, justice, finally triumphed over criminal victimization. Today "The Eye that Cries" defies the passing of time, or intends to do so, as a sign of regret for the eyes that burned or were perforated in the Prison of Castro Castro, and as a lesson that everyone must persevere in the search of their own redemption. Given the finite nature of existential time, there are those that seek their improvement through the expressions of the spirit. In the present case, "The Eye that Cries" proves it. (...)" (paras. 19-20)

[FN86] To which the Court itself made reference in the mentioned Judgment (paras. 496-497 and 506, and operative paragraph n. 15).
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109. In the present Judgment of Interpretation, the Court referred to the monument "The Eye that Cries", in the framework of a precision it makes with regard to a non-pecuniary measure of reparation in benefit of the victims and their next of kin in the cas d'espèce (para. 57). In the period of time that has gone by between the previous Judgment on merits and reparations, and the present Judgment of Interpretation in the case of the Castro Castro Prison, an incident that constitutes, in my opinion, a reason for great concern occurred.

110. It is this incident, more than the Court's consideration, what I allow myself to refer to in the following considerations; since I consider that it should not go unnoticed. In my present Concurring Opinion, I already referred to the historical passing from the destructive cycle of private vengeance to the advent of public justice, with the corresponding primacy of Law over brute force, - made endless in the trilogy of tragedies of The Oresteia by Aeschylus, in ancient Greece (cf. supra). It seems that not even this passing has always happened in a lineal manner, but instead through steps forward and back, characteristic of the sad human condition.

111. The mentioned incident – that promptly became of public and notorious knowledge – occurred on Sunday 07.23.2007, when a group of demonstrators of an unknown identity attacked the memorial "The Eye that Cries" in Lima, dedicated to the victims of the political repression and violence that flagellated the country between 1980 and 2000. The demonstrators, in an unpleasant act of vandalism, beat the monument, destroyed an important part of its central stone, took out several stones with the names of the victims, and broke part of them. It was an act of violence; this time directed toward the respect for the memory of those who lost their lives during the two-decade cycle of extreme violence that flagellated the country. Since the matter of the collective memory of all the victims of the Peruvian tragedy underlies the State's present request for interpretation of the Judgment, I feel compelled to include in this Concurring Opinion my reflections regarding this incident.

112. The attackers of the memorial, not moved by the numerous fatal victims of violence from different origins, turned their hate against a memorial in respect to the memory of the victims. At the same time, it was an attack against the future (the search of peace through justice in Peru) and the past (the respect for the dead, the victims of violence and repression). Their act of vandalism promptly generated public demonstrations – that also became of public and notorious knowledge – of repudiation to the attack against the monument, which culminated in a public demonstration in the Campo de Marte, in Lima, on Thursday 09.27.2007, which offered an act of amends to the memorial "The Eye that Cries". All the victims, - those of the terrorism of Sendero Luminos, as well as those of the State's terrorism, - must be venerated by the memory of their surviving loved ones and the entire social means.

113. The forms to express the duty to remember – in the exercise of the right to remember [FN87] - vary, - the monument "The Eye that Cries" is one of them, - but they are all emanations of the human spirit, of the ties of solidarity between the living and the dead, which acts of vandalism are not capable of affecting. Acts of vandalism such as those perpetrated against the monument "The Eye that Cries" are moved by a blind hate, and perpetrated in vain, since they do not reach the harmful objective they seek, to erase the memory of the victims. The memory and respect for the dead have outlived, throughout history, the hate and the vain attempts to erase them.

[FN87] Cf., recently, F. Gómez Isa (ed.), El Derecho a la Memoria, Gipuzkoa/España, Giza Eskubideak Derechos Humanos, 2006, pp. 23-615.

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114. In the history of humanity there are successive examples of this primacy of spirit over matter, - primacy that seems to generate despair among the vandals, self-consumed by their own hate. Throughout history monuments, memorials, temples, and architectural works, works of art and literature, archives, and libraries have been destroyed. [FN88] Those who have started the war are not satisfied with killing human beings (labeled “enemies”), including the elderly, women, and defenseless children; they have destroyed entire families and have also sought to destroy the history of the victims, their history, their way of thinking, their cultural identity, the specific expressions of their feelings, their memory.

[FN88] Cf. R. Bevan, The Destruction of Memory - Architecture at War, London, Reaktion Books, 2006, pp. 7-212. In 1824-1825, when he was still very young, Víctor Hugo denounced, outraged and in two pamphlets (published years later, in 1831 and 1834), the vandalism in the destruction of monuments and works of architecture in France; cf. V. Hugo, Pamphlets pour la sauvegarde du patrimoine (éd. 1834), [Paris/Barcelona], Éd. A. Minotaure, 2006 [reed.], pp. 13-53.

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115. Here they have made a mistake: it is impossible to impose obscurity. The producers of bodies have not been able to annihilate the spirit of the victims, which survives in their loved ones, who remember them with nostalgia, and, in short, in all their social environment. The search for justice also covers the preservation of their memory, the honor of the victims, of all the victims of terrorism (perpetrated by clandestine groups as well as by the State itself). The demonstrations of cultural identity are equally under the shelter and protection of the Law, as illustrated by the corresponding regulations of numerous contemporary human rights treaties and treaties for the protection of cultural goods and expressions. [FN89]

[FN89] Regarding the latter, cf. my Concurring Opinion (paras. 21-24) in the Interpretation of Judgment (of 02.08.2006) in the case of the Moiwana Community versus Suriname. And cf., in this regard, A.A. Cançado Trindade, "International Law for Humankind: Towards a New Jus Gentium - General Course on Public International Law - Part I", 316 Recueil des Cours de l'Académie de Droit International de la Haye (2005) pp. 379-396.

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116. Similarly, good books, the most loyal friends of human beings, have not escaped the voracity of warriors, murderers, and vandals throughout history. So much so, that versions of the universal history of the destruction of books have already been produced. [FN90] Even when they have destroyed entire libraries, and books of those persecuted who became universal authors (such as, among so many others, Dante Alighieri), at different moments throughout history, invoking for this “State reasons”, they have not been able to destroy them as bonds to memories. In effect, the memory of the victims has survived the most horrible atrocities, despite the attempts to cover them and impose obscurity.

[FN90] Cf., recently, F. Báez, História Universal da Destruição dos Livros (Das Tábuas da Suméria à Guerra do Iraque), Rio de Janeiro, Ediouro, 2006, pp. 17-376.

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117. For example, in his memories of the Spanish civil war, George Orwell denounces the lies that led hundreds and hundreds of people to the armed struggle and death, and that immediately sought to dishonor the dead. [FN91] Before the possibility of having so many lies go down in history, he confessed "the sensation that the concept itself of objective truth is disappearing from the world." [FN92] He also confessed his fear before the purpose of the "leaders" in power of controlling not only the future, but also the past; "this perspective", - added G. Orwell, - "scares me much more than the bombs." [FN93]

[FN91] Remember that, in his famous allegory 1984, G. Orwell outlines the structure of a totalitarian State, in which an official department dogmatically tried to erase the entire past.
[FN92] G. Orwell, Lutando na Espanha, São Paulo, Ed. Globo, 2006 [reed.], pp. 273-275.
[FN93] Ibid., p. 276. And, for an appreciation of the literary legacy of G. Orwell, cf., v.g., J. Meyers, Orwell - La Conciencia de una Generación, Barcelona, Vergara Ed., 2002, pp. 173-225.

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118. When remembering an Italian militiaman he had known and who had disappeared in that civil war, G. Orwell expressed, in verse, all his repugnance for the war and the uselessness of the human sacrifices, while also stating his faith in human conscience and in the primacy of spirit over matter:

"(...) Your name and your deeds were forgotten
Before your bones were dry,
And the lie that slew you is buried
Under a deeper lie;

But the thing that I saw in your face
No power can disinherit:
No bomb that ever burst
Shatters the crystal spirit." [FN94]

[FN94] Reproduced in: G. Orwell, Lutando na Espanha, op. cit. supra n. (51), p. 384.

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119. However, human memory has survived a succession of brutalities and currently the human conscience has awoken for the duty to remember and the right to remember, in both its individual and social dimensions. The evolution of International Human Rights Law in general (moved, like that of all Law, by the universal juridical conscience), and the jurisprudence of the Inter-American Court, en particular, especially in its Judgments in cases of great cultural density, such as, v.g. the cases of Bámaca Velásquez versus Guatemala (2000-2002) and the Moiwana Community versus Suriname (2005-2006), whose public hearings I remember as if they had

occurred yesterday, have contributed decisively to this awakening. In view of the sadness of the human condition, we must continue fighting for the primacy of the memory of victims over human cruelty.

120. In effect, in recent decades human conscience seems to have awakened for the duty to remember the victims of brutalities and atrocities. This has been materializing itself through the construction, in different parts of the world, of memorials, “awareness sites”, “pedagogical museums”, and monuments. [FN95] Several times we have felt the need to engrave the traces of our memory in stone, [FN96], so they can survive the passing of time. These efforts or initiatives of memorialization – in which the monument “The Eye that Cries” is included – seek to remember and honor the victims, meditate on the atrocities of the past (and the need for responsibility to be assumed for them), extract from them lessons for the present and the future, looking to guarantee that they do not happen again.

[FN95] Such as, v.g., the memorials in South Africa for the victims of the apartheid, the museum in memory of the victims at the headquarters of the old ESMA (School of Mechanics of the Army) in Argentina, Memory Park in Buenos Aires/Argentina, Terezín Memorial in the Czech Republic, the Villa Grimaldi Memorial and park for peace in Chile, the memorial for the missing detainees at the Vaz Ferreira Park in the Hill of Montevideo/Uruguay, besides the monument “The Eye that Cries”, in Peru, among others.
[FN96] S. Lindeperg y A. Wieviorka, Univers concentrationnaire et génocide - Voir, savoir, comprendre, Paris, Éd. Mille et Une Nuits, 2008, p. 41.

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121. In effect, a more critical spirit and a greater awareness of past facts are favorable, trying to avoid that the grave abuses and violations of human rights occur again in the present and the future. Even though, - and as has been revealed by the recent attack on the monument “The Eye That Cries” in Lima, - the wounds of the past are still open, they have not healed. Many wounds take a long time, maybe decades or generations, to heal. It is true that compliance of the duty to remember is a symbolic form of reparation for the victims (and their next of kin), but it is also true that the preservation of collective memory has faced difficulties up to this date.

122. Among said difficulties, we have identified some, such as, for example: a) memorials do not guarantee that the abuses and atrocities of the past do not happen again; b) nor has there always been consensus on the inclusion of names of victims in memorials (v.g., the search to identify “innocent victims"); c) nor is the historic memory always the most acute little after the occurrence of the facts that violated human rights (it may occur that it become more acute with the passing of time); d) the perception of past facts is altered with the passing of time; and e) there is still not a lot of clarity with regard to the correlationship between the memorialization of past atrocities and the creation of a stable rule of law in democratic societies [FN97] (in the terms of human rights treaties).

[FN97] Cf. S. Brett, L. Bickford, L. Sevenko y M. Rios, Memorialization and Democracy: State Policy and Civic Action, Santiago de Chile, FLACSO/ICTJ, 2007, pp. 1-32.

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123. The recent attack on the monument “The Eye that Cries” in Lima has not been the only one in its kind in recent times. It has been preceded by others, and followed by three more in the course of the present year 2008, all of equal public and notorious knowledge. On 06.05.2008, the Belower Wald memorial, built in memory of the victims of a concentration camp (of Sachsenhausen, at the end of the II World War), and located in the Oriental State of Brandenburg in Germany, was attacked, as it had been previously attacked in 2002. [FN98] On 09.11.2008, a stone memorial in they city of Frankfurt an der Oder, built in honor of the memory of the victims of the persecution against the Jewish (in the destruction of a temple in the Kristallnacht en 1938) was also attacked. [FN99]

[FN98] DW-World.de Deutsche Welle, 06.06.2008, p. 1.
[FN99] In: Der Spiegel, 10.11.2006, pp. 1-2.

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124. On 04.10.2008, the Genocide Memorial in Rwanda was also attacked. Said memorial, - in the Gisozi Genocide Memorial Centre, in the city of Kigali in Rwanda, - had been inaugurated in April 2004, on the tenth anniversary of the tragedy of the genocide in Rwanda. The memorial went on to shelter the mortal remains of 250 thousand, of the total of more than 800 thousand victims, of the genocide of 1994 in Rwanda; even so, it has been attacked, for the first time, on 04.10.2008, during a vigil organized in memory of the victims of the mentioned tragedy. [FN100] Said attacks to memorials in honor of the memory of victims of atrocities, in different parks of the world, raise questions that are without a doubt disturbing.

[FN100] In: Afrol News, 11.04.2008, pp. 1-2; Afriquenligne, 11.04.2008, p. 1.

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125. Memories are uncomfortable, and even so we have to nurture them. Memories chase us, and even so we have to live with them. More than that, we have to fight for them. Feelings of hate and vengeance are hard to eradicate, [FN101] as can be concluded from Aeschylus’ The Oresteia. Collective memory seeks, instead of vengeance, the realization of justice, in honor of the victims. [FN102] The preservation of memories requires awareness and determination. The entire debate originated by the monument “The Eye That Cries” has revealed that there is still a long way to go, before the deep wounds of the tragedy lived by the Peruvian people can heal. [FN103]

[FN101] The fact that the problem of evil has always marked presence in the trajectory of philosophical thinking is not at all surprising (cf., inter alia, R.J. Bernstein, El Mal Radical - Una Indagación Filosófica, Ed. Lilmod, Buenos Aires, 2005, pp. 15-327) así como teológico (cf., inter alia, M. Neusch, L'énigme du mal, Paris, Bayard, 2007, pp. 7-193).

[FN102] C. Fournet, The Crime of Destruction and the Law of Genocide - Their Impact on Collective Memory, Aldershot, Ashgate Publ., 2007, p. 148, and cf. pp. 75-81 for the substantiation of the author on the existence of State crimes.
[FN103] What is the solution to the "impasse" of the identification of the victims to be honored in the monument “The Eye That Cries”? Is there any what to solve it? To this question, Mario Vargas Llosa responded: -"Yes. Turn around the rounded stones with the names that appear on them, hiding them temporarily from the public light, until time has healed the wounds, calmed the spirits, and has at some time established that consensus that allows one and another to accept the horror lived by Peru due to the criminal attempt of Sendero Luminoso (...) and the terrible abuses and injustices that the State’s forces committed in the fight against terror, they did not leave any innocents, they stained us all, by action and by omission, and it will only be as of that acknowledgment that we will be able to start building a democracy worthy of that name, where ignominies like those that stained our eighties and nineties are no longer conceivable." M. Vargas Llosa, "El Ojo que Llora", El País - Madrid, 14.01.2007, p. 2. – And this is not an isolated case; in another continent, debate with regard to the victims whose memory must be honored in the memorial at the cemetery that holds the remains of those murdered in the massacre of Srebrenica in July of 1995 has continued up to this date; cf., v.g., E. Suljagic, Postcards from the Grave, London, Saqi/Bosnian Institute, 2005, p. 196 (afterword de E. Vulliamy).

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126. I already referred to the necessary fight for the primacy of the memory of the victims over human cruelty. [FN104] Underlying all this defiance, is the unfathomable mystery that surrounds human existence: the passing of time. Memories cannot be prevented (destroying memorials, temples, libraries, works of art), it is a real human need, in the unpleasant, but ineludible, fights against the effects of the passing of time. This concern is present in all different cultures. In the Swahili culture, for example, the dead remain in the memory of their survivors as “living-dead, who only die completely when the last one in conditions to remember them disappear." [FN105] This is a concern expressed both in individuals and collectively.

[FN104] Para. 98, supra.
[FN105] P. Rossi, El Pasado, la Memoria, el Olvido, Buenos Aires, Ed. Nueva Visión, 2003, p. 222, and cf. p. 27.

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127. In an anthology of the Universal Academy of Cultures named “Why Remember”, it was stated that, in many societies, the victims of violence (in general, the poor and the most vulnerable) disappear in the “institute of obscurity”, and this regretful attitude of disdain toward human suffering “leaves” us all “on the fringes of any law." [FN106] Jacqueline de Romilly considered that one of the purposes of the duty to cultivate memories is to seek to guarantee that the same horror does not happen again. [FN107]

[FN106] J. Tonglet, "Tienen Historia los Pobres?", in Academia Universal de las Culturas, Por Qué Recordar? (Foro Internacional de Paris [UNESCO/La Sorbonne] de 1998), Barcelona, Granica, 2002, pp. 53-55.
[FN107] She added that she would like “to see history closely linked to literature so that collective memories can be conserved and gather new life and energy, because without it our desires become inconsistent and our life becomes completely insipid;" J. de Romilly, "La Historia entre la Memoria Individual y la Memoria Colectiva", in ibid., pp. 45-46.
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128. At a collective level, the traumas produced in the social means most affected by human brutalities have led the consciences to confront cruelty; said collective tragedies leave deep traces, since, even after the cycle of violence has been overcome “the past keeps on resounding in the consciences;” we have been warned that “the dehumanization we inherit threatens our survival." [FN108] Remembering the dead, the victims of human violence, all victims of terrorism (perpetrated both by extermination groups and by the State itself) is a vital need.

[FN108] Th. Delpech, El Retorno a la Barbarie en el Siglo XXI, Buenos Aires, Ed. El Ateneo, 2006, pp. 21-22 and 280.
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129. Similarly, we must not minimize the strength of memories. After decades of silence and apparent “obscurity”, never before have the victims of the massacres of the Armenians (of 1915) been as remembered as in our times, more than nine decades after they happened. [FN109] Another example of the strength of memories can be found in the impressive modern history of Poland, a country that has learned to live intimately with tragedy and that disappeared from the mappa mundi in 1795 and appeared again in the same as of 1918. During those 123 years, Poland, amid successive wars, partitions, persecutions, and repressions, and acts of violence, survived in the culture, the literature, the religion, in synthesis, in the spirit of their suffered people. [FN110]

[FN109] Cf., v.g., B. Bruneteau, Le siècle des génocides - Violences, massacres et processus génocidaires de l'Arménie au Rwanda, Paris, A. Colin Éd., 2004, pp. 48-72; G. Chaliand and Y. Ternon, 1915, le génocide des Arméniens, Bruxelles, Éd. Complexe, 2006 [réed.], pp. 15-198; J.-B. Racine, Le génocide des Arméniens - Origine et permanence du crime contre l'humanité, Paris, Dalloz, 2006, pp. 3-160; E. Staub, The Roots of Evil - The Origins of Genocide and Other Group Violence, Cambridge, University Press, 2005 [reprint], pp. 173-187; Y. Ternon, Guerres et génocides au XXe. siècle, Paris, O. Jacob, 2007, pp. 126-170; J.-B. Racine, Le génocide des arméniens - Origine et permanence du crime contre l'humanité, Paris, Dalloz, 2006, pp. 1-160; A. Toynbee and J. Bryce, Atrocidades Turcas na Armênia [1916], São Paulo/Rio de Janeiro, Ed. Paz e Terra, 2003 [reed.], pp. 11-118.
[FN110] As described, almost literally by a scholar of its history: - "(...) The essential sources of its history have to be sought less in social, political, and economic affairs than in the realm of culture, literature, and religion - in short, in the world of the Polish spirit, which enabled men and women to live their lives in their own way in spite of the established order, and often in defiance

of the law." Thus the importance offered, v.g., to the folklore and historical traditions. In Poland, "throughout these five generations, Polish history loses much of its material substance, and retreats into the realm of ideas, plans, dreams, and prospects. Right from the start, the subject seems tailored for the romantics, with their contempt for material things and their preoccupation with the world of the spirit. Polish literature is a surer guide to the essential features of the age than is sociology or economics. Owing to the specific features of the partitions, the link between politics and literature in Poland was exceptionally intimate. (...) In Poland, (...) national politics and national literature were smelted in the same fierce fire, and were fused into an amalgam of such unusual intensity that often one could no longer be recognized from the other. In a land where all forms of open political activity of a national character were gradually suppressed, poetry and fiction were mobilized as the most convenient vehicle of political expression. (...) In Poland, literature did not merely reflect politics as it did elsewhere; it threatened to replace it. (...) Under such pressures, and hardened by the horrors of XXth-century occupations, they [the Poles] developed a sense of social solidarity which the comfortable inhabitants of modern democracies (...) find hard to comprehend". N. Davies, Heart of Europe - The Past in Poland's Present, Oxford, University Press, 2001 [reed.], pp. 139, 154, 156 y 161, and cf. p. 148.
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130. In short, neither in the individual or social realm can we neglect our memory, [FN111] which, in our days, emerges stronger than before because of the awakening of human conscience for the vital need to remember and venerate the victims of human cruelty. The memorial “The Eye That Cries”, is one of the symbols of the tragedy lived by the Peruvian people during the last two decades of the XX century, which generated deep wounds that have not yet healed. We cannot avoid that “The Eye That Cries” continue crying, since each human being and each social means must learn to live with their own area of guilt.

[FN111] We have already correctly stated that "là où la mémoire est dynamique, là où elle sert d'instrument à une transmission psychologique et commune, l'héritage se transforme en présent"; G. Steiner, Le silence des libres, Paris, Éd. Arléa, 2007, p. 14.

XI. The Right to a Fair Trial (National and International) as a Right to the Realization of Justice, and as an Imperative of the Jus Cogens.

131. With this, I go on to my final considerations regarding a matter that has been my flag throughout all my years as a Full Judge of the Inter-American Court: the right of human beings to a fair trial – both national and international – as a right to the realization of justice, thus becoming an imperative of the jus cogens. The present case of the Castro Castro Prison highlights this matter, in order to achieve the overcoming of private vengeance by public justice, - as can be concluded from Aeschylus’ The Oresteia.

132. It is not my objective to reiterate here everything I have written in this sense, but instead point out some aspects regarding the matter, which become especially relevant within the context of the present Judgment of Interpretation in the case of the Castro Castro Prison. The right to a fair trial lato sensu (the right to jurisdictional assistance) is a basic pillar of the protection of

human rights. It is enshrined in the American Convention, with regard to both the national (Articles 25 and 8) and international (Article 44) realm, being a real right to Law.

1. The Right to a Fair Trial Lato Sensu.

133. In its constant jurisprudence, the Inter-American Court, in relation to the realm of the domestic law of the States Parties to the American Convention, has correctly assumed the definition lato sensu of the right to a fair trial, when it has mentioned the intimate correlationship between the right to an effective recourse (Article 25) and the guarantees of the due process of law (Article 8). With regard to the international realm, the right to make an individual petition, conceived with the most ample liberality (Article 44) has proven to be an effective means of solving not only individual cases, but also cases of massive and systematic violations to human rights. [FN112]

[FN112] A.A. Cançado Trindade, "The Right of Access to Justice in the Inter-American System of Human Rights Protection", in Italian Yearbook of International Law (2007) (in press).

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134. More than twelve years ago, in the Judgments of the Court on preliminary objections in the cases of Castillo Páez and Loayza Tamayo (of 01.30.1996 and 01.31.1996, respectively) regarding Peru, I stated, in my Concurring Opinions, the arguments in support to the granting of the locus standi in judicio to the petitioners in all the stages of the proceedings before the Court (paras. 14-17). Said arguments were taken into account for the introduction of the historic changes made by Article 23 of the third, and fourth, and current, Rules of Procedure of the Court (of 1996 and 2000). In my extensive Concurring Opinion in the Court's Judgment (on preliminary objections in the case of Castillo Petruzzi et al. versus Peru (of 09.04.1998), I pointed out the fundamental nature of the right to an individual international petition (Article 44) (paras. 3 and 36-38), as a "historical rescue" of the individual's position as a subject of International Human Rights Law, endowed with full international procedural capacity (paras. 5 and 12).

135. Likewise, I revised the historia juris of said right to petition (paras. 9-15), and I mentioned the expansion of the notion of "victim" in the jurisprudence under human rights treaties (paras. 16-19), as well as referring to the autonomy of the right of individual international petition vis-à-vis the domestic law of the States (paras. 21, 27, and 29). And I warned that, if it were not for the exercise of this right, justice would not have been done in many cases of grave violations (paras. 33 and 35).

136. Actually, the right to a fair trial is an imperative both in the international and national realm. There is currently a convergence between international law and domestic public law, which turns the approaches of the past based on the static vision of "subsidiarity" of the international legal system into anachronistic ones. A quarter of a century ago, I allowed myself to state that, from the perspective of the people protected, the effective domestic recourses (v.g., Article 25 of the American Convention) are part of the international protection of human rights. [FN113]

[FN113] A.A. Cançado Trindade, The Application of the Rule of Exhaustion of Local Remedies in International Law, Cambridge, Cambridge University Press, 1983, pp. 1-445.

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137. The granting of the locus standi in judicio to individuals before the Inter-American Court was announced by Article 23 of the third Rules of Procedures of the Court (adopted on 09.16.1996 and in force as of 01.01.1997), granted only in the reparations stage. The decisive step and great qualitative leap occurred with the adoption of the fourth and current Rules of Procedure of the Court (of 11.24.2000, in force as of 06.01.2001, up to this date). The new Rules of Procedure granted an active legal standing or a direct participation (locus standi in judicio) to individual petitioners (the alleged victims, their next of kin, or legal representatives duly accredited) in all the stages of the proceedings before the Court. [FN114] (Article 23)

[FN114] Regarding the legislative background of the third and fourth Rules of Procedure of the Court, cf. A.A. Cançado Trindade, "El Nuevo Reglamento de la Corte Interamericana de Derechos Humanos (2000) y Su Proyección Hacia el Futuro: La Emancipación del Ser Humano como Sujeto del Derecho Internacional", in XXVIII Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano - OEA (2001) pp. 33-92.

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138. In a historical perspective, this was the most transcendental modification introduced by the Rules of Procedure of the Court, a real turning point in the evolution of the Inter-American human rights protection system as a whole. In effect, the consolidation of the locus standi in judicio of individuals before the Court is an appropriate and logical development, since it does not seem reasonable to acknowledge rights in the international realm without the corresponding procedural capacity to vindicate them. Based on the right of individual petition the juridical mechanism of emancipation of the human being vis-à-vis the State itself is created [FN115] for the protection of their rights within the sphere of International Human Rights Law, - an emancipation that comes in the end to attribute an ethical content to the regulations both of domestic public law and international law.

[FN115] Cf. A.A. Cançado Trindade, "The Emancipation of the Individual from His Own State - The Historical Recovery of the Human Person as Subject of the Law of Nations", in Human Rights, Democracy and the Rule of Law - Liber Amicorum L. Wildhaber (eds. S. Breitenmoser et alii), Zürich/Baden-Baden, Dike/Nomos, 2007, pp. 151-171.

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2. The Right to the Realization of Material Justice .

139. The understanding of the progress made by the Inter-American Court in its jurisprudential construction in recent years – which does not admit steps backwards – has been in the sense that the right to a fair trial (lato sensu) at national and international levels corresponds

to a right of realization of material justice. As such, it not only covers formal access to a court or judge, but also to the guarantees of the due process of law, the right to a fair trial, reparations (as long as they are due), and the faithful and full execution of judgments.

140. According to the jurisprudence constante of the Court up to this date, the American Convention not only requires a formal right to a fair trial within domestic law (the right to an effective recourse under Article 25), but also in the realization itself of material justice. With this purpose in mind, the Convention determines the faithful observance of the right to a fair trial (Article 8), the latter taken lato sensu, covering the totality of the procedural requirements that must be observed so that all individuals can defend themselves adequately from any act arising from the State's power that may affect their rights.

141. As I recalled in my extensive Concurring Opinion (paras. 35-43) in the case of the Pueblo Bello Massacre, regarding Colombia (Judgment of 01.31.2006), the Court has, up to this date, consistently related judicial protection (Article 25) with the right to a fair trial (Article 8). [FN116] This continues to be its position up to this date, August 02, 2008, of adoption of the present Judgment of Interpretation in the case of the Castro Castro Prison. This is an area that does not allow backward steps; in the event that these occur in the future, those responsible for possible backward steps will have to respond for their unfounded alterations to the history of the Inter-American human rights protection system.

[FN116] Cf., in this sense, its Judgments in the cases of Barrios Altos versus Peru (of 03.14.2001, paras. 47-49), Las Palmeras versus Colombia (0f 12.06.2001, paras. 48-66), Baena Ricardo et al. versus Panama (of 02.02.2001, paras. 119-143), Myrna Mack Chang versus Guatemala (of 11.25.2003, paras. 162-218), Maritza Urrutia versus Guatemala (of 11.27.2003, paras. 107-130), 19 Tradesmen versus Colombia (of 07.05.2004, paras. 159-206), Gómez Paquiyauri Brothers versus Peru (of 07.08.2004, paras. 137-156), Serrano Cruz Sisters versus El Salvador (of 03.01.2005, paras. 52-107), Caesar versus Trinidad and Tobago (of 03.11.2005, paras. 103-117), Moiwana Community versus Suriname (of 06.15.2005, paras. 139-167), Yakye Axa Indigenous Community versus Paraguay (of 06.17.2005, paras. 55-119), Fermín Ramírez versus Guatemala (of 06.20.2005, paras. 58-83), Yatama versus Paraguay (of 06.23.2005, paras. 145-177), The Girls Yean and Bosico versus Dominican Republic (of 09.08.2005, para. 201), the Mapiripán Massacre versus Colombia (of 09.15.2005, para. 193-241), Gómez Palomino versus Peru (of 11.22.2005, paras. 72-86), Palamara Iribarne versus Chile (of 11.22.2005, paras. 120-189). The same position has been assumed by the Court in its Judgments in the case itself of the Pueblo Bello Massacre versus Colombia (of 01.31.2006), as well as in the cases of López Álvarez versus Honduras (of 02.01.2006), of the Ituango Massacres versus Colombia (of 07.01.2006), and of Ximenes Lopes versus Brazil (of 07.04.2006).

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142. Moved by this concern – maybe a little ambitious – to avoid backward steps, I allow myself to once more warn here that the current Rules of Procedure of the Court, by granting direct access of the individual petitioners to the Inter-American Court – in the form of locus standi, to be followed by the jus standi [FN117] - is part of an improvement and strengthening process of the protection mechanism under the American Convention. The next step in this line

of evolution must consist, as I have been stating for many years, in a Protocol of Reforms to the American Convention on Human Rights, [FN118] in order to include in it, and therefore consolidate, the regulatory advances already made, and more.

[FN117] Cf., in this regard, A.A. Cançado Trindade, El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos, Bilbao, Universidad de Deusto, 2001, pp. 9-104.

[FN118] In the light of Article 77(1) of the American Convention.

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143. With this purpose in mind I prepared, by designation of my peers, as rapporteur and President of the Court, and I presented to the Organization of American States (OAS), in May 2001, my Report named Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección. [FN119] Since then said Report has invariably marked presence in the agenda of the General Assembly of the OAS from 2001 up to 2008 (in the corresponding documents of the Assemblies of San Jose, Costa Rica in 2001, of Bridgetown/Barbados in 2002, of Santiago, Chile in 2003, of Quito in 2004, as well as those of the following Assemblies of 2005-2006 [FN120] and 2007-2008). The aforementioned Report gives hope that the jus standi of individuals directly before the Inter-American Court may be reached in the future.

[FN119] A.A. Cançado Trindade, Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección, tomo II, 2a. ed., San José de Costa Rica, CtIADH, 2003, pp. 3-64, and cf. pp. 65-1015. There I recommended amendments to Articles 50(2), 51(1), 59, 65, 68, 75, and 77 of the American Convention, and also to Article 62, in order to make the jurisdiction of the Court (in contentious cases) automatically compelling for all the States Parties to the Convention, not admitting any type of restrictions, without the need of an additional demonstration of consent, following the ratification of the Convention.

[FN120] OAS, doc. AG/RES.2129 (XXXV-0/050), of 06.07.2005, pp. 1-3; OAS, doc. CP/CAJP-2311/05/Rev.2, of 02.27.2006, pp. 1-3. Cf., in this regard, A.A. Cançado Trindade, El Derecho Internacional de los Derechos Humanos en el Siglo XXI, 2a. ed., Santiago, Editorial Jurídica de Chile, 2006, pp. 9-10 and 515-524.

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3. The Right to a Fair Trial as an Imperative of the Jus Cogens.

144. I finally move on to the last aspect of my final reflections in the present Concurring Opinion, regarding the right to a fair trial as an imperative of the jus cogens. Three years ago, in my Curso General de Derecho Internacional Público, offered in the Academy of International Law of The Hague in 2005, I characterized the doctrinal and jurisprudential construction of the international jus cogens as characteristic of a new jus gentium, International Law for Humanity. I also held that, in this understanding, and according to its definition, the international jus cogens goes beyond treaties law, extending to the law on the State's international responsibility, and to

the entire corpus juris of Contemporary International law, and including, finally, all juridical acts. By covering all International Law, it also projects itself on domestic law, invalidating any measure or act not compatible with it. The jus cogens has a direct effect on the foundations themselves of a Universal International Law and it is a basic pillar of the new jus gentium. [FN121]

[FN121] A.A. Cançado Trindade, "International Law for Humankind: Towards a New Jus Gentium - General Course on Public International Law - Part I", 316 Recueil des Cours de l'Académie de Droit International de la Haye (2005), cap. XII, pp. 336-346.

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145. It is not my objective here to reiterate the extensive considerations I developed in my mentioned Curso General at the Academy of La Haya, but instead complement them with an additional aspect, of great importance, which must not go by unnoticed: that of the expansion of the material content of the jus cogens, to which I have dedicated myself with complete conviction, in the recent jurisprudence of the Inter-American Court. In effect, during my more than twelve years as a Full Judge of the Inter-American Court, the latter (followed by the International Criminal Court ad hoc for the former Yugoslavia), has been the contemporary tribunal that has contributed the most in the conceptual evolution of the jus cogens, in the faithful exercise of its duties of protection of human beings, even when it is in situations of complete adversity or vulnerability.

146. More than twelve years ago, I warned about the need of a jurisprudential development of the prohibitions of the jus cogens, in my Concurring Opinions in the case of Blake versus Guatemala (preliminary objections, Judgment of 07.02.1996; [FN122] merits, Judgment of 01.24.1998; [FN123] and reparations, Judgment of 01.22.1999 [FN124]). In an initial stage of notable jurisprudencial evolution (in contentious cases), the Court stated the absolute prohibition, of the jus cogens, of torture, in any and all circumstances, followed by the same prohibition of cruel, inhuman, or degrading treatments (Judgments of 08.18.2000, in the case of Cantoral Benavides versus Peru, para. 99; of 07.08.2004, in the case of the Gómez Paquiyauri Brothers versus Peru, paras. 111-112; of 09.07.2004 in the case of Tibi versus Ecuador, para. 143; among others [FN125]).

[FN122] Paras. 11 and 14 of the Opinion.
[FN123] Paras. 15, 17, 23, 25, and 28 of the Opinion.
[FN124] Paras. 31, 40, and 45 of the Opinion.
[FN125] The IACDH reiterated its position in its Judgment of 04.06.2006 in the case of Baldeón García versus Peru (para. 121). A year before that, the Judgment (of 03.11.2005) in the case of Caesar versus Trinidad and Tobago, in the same line of reasoning of its jurisprudential construction of the jus cogens, correctly took another step forward, when it stated the absolute prohibition, characteristic of the sphere of the jus cogens, of torture as well as of other cruel, inhuman, and degrading treatments. The absolute prohibition of both torture and said treatments, in any and all circumstances, as a prohibition of the jus cogens, is today jurisprudence constante of the Court.

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147. In the same line of thought, I reiterated my position in this regard in my Concurring Opinion to the Judgment (of 03.14.2001) in the case of Barrios Altos versus Peru, [FN126] as well as in my Separate Opinion to the Judgment (09.01.2001) in the case of Hilaire versus Trinidad and Tobago; [FN127] in my Concurring Opinion to the Judgment (of 11.27.2003) in the case of Maritza Urrutia versus Guatemala; [FN128] in my Separate Opinion to the Judgment (of 07.08.2004) in the case of the Gómez Paquiyauri Brothers versus Peru (of 07.08.2004); [FN129] and in my Dissenting Opinion in the case of the Serrano Cruz Sisters versus El Salvador (Judgment on preliminary objections of 11.23.2004). [FN130]

[FN126] Paras. 10-11 and 25 of the Opinion.
[FN127] Para. 38 of the Opinion.
[FN128] Paras. 6, 8-9, and 12 of the Opinion.
[FN129] Paras. 1, 37, 39, 42, and 44 of the Opinion.
[FN130] Paras. 2, 32, and 39-41 of the Opinion.

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148. In a new stage of its jurisprudential construction in this regard, the Court went even further, by expanding the material content of the jus cogens in its historical Advisory Opinion n. 18 (of 09.17.2003), on the Juridical Condition and Rights of the Undocumented Migrants, thus including the basic principle of equality and non-discrimination (paras. 97-101 and 110-111). [FN131] Regarding this other great parallel jurisprudential step forward I issued an extensive Concurring Opinion (paras. 1-89), in which I supported the Court's position, acknowledging that this basic principle permeates the entire legal system, and requesting attention to its importance and that of all the general principles of law, from which the rules and regulations arise, and without which, in the end, there is no "legal system " (paras. 44-46 and 65). [FN132]

[FN131] The IACHR held that the States have the duty to respect and guarantee respect for human rights in the light of the general and basic principle of equality and non-discrimination, and that any discriminatory treatment with regard to the protection and exercise of said rights (even labor ones) generates the States' international responsibility. In the Court's understanding, the mentioned fundamental principle entered the sphere of the jus cogens, thus not allowing the States to discriminate or tolerate discriminatory situations, in detriment of migrants, and having to guarantee the due process of law to any person, regardless of their migratory status. The States cannot subordinate or condition the observance of the principle of equality before the law and non-discrimination to the objectives of immigration policies, among others.
[FN132] In syntheses, said principles make up, in my understanding, the substratum of the legal system itself (paras. 52-58). The matters covered by me – including the evolution of the jus cogens and of the obligations erga omnes of protection, - was done within the realm of the definition of the civitas maxima gentium and of the universality of human gender. In a stretch of my mentioned Concurring Opinion, I allowed myself to consider that
i. "Every legal system has fundamental principles, which inspire, inform and conform their norms. It is the principles (derived ethmologically from the Latin principium) that, evoking the

first causes, sources or origins of the norms and rules, confer cohesion, coherence and legitimacy upon the legal norms and the legal system as a whole. It is the general principles of law (prima principia) which confer to the legal order (both national and international) its ineluctable axiological dimension; it is they that reveal the values which inspire the whole legal order and which, ultimately, provide its foundations themselves. This is how I conceive the presence and the position of the principles in any legal order, and their role in the conceptual universe of Law.

ii. From the prima principia the norms and rules emanate, which in them find their meaning. The principles are thus present in the origins of Law itself. The principles show us the legitimate ends to seek: the common good (of all human beings, and not of an abstract collectivity), the realization of justice (at both national and international levels), the necessary primacy of law over force, the preservation of peace. Contrary to those who attempt - in my view in vain - minimize them, I understand that, if there are no principles, nor is there truly a legal system. Without the principles, the "legal order" simply is not accomplished, and ceases to exist as such. (...)." (paras. 44 and 46)

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149. Since then, I went on to insist, within the Court, in successive contentious cases, on the need to expand even more the material content of the jus cogens, so that it could also include the right to access justice, [FN133] and tend to the urgent needs of protection of human beings. I did it, inter alia, in my Concurring Opinion (dedicated to the right to access justice lato sensu) to the Judgment of the Court (of 01.31.2006) in the case of the Pueblo Bello Massacre versus Colombia, in which I considered inter alia that

The indivisibility between Articles 25 and 8 of the American Convention that I maintain (…) leads me to characterize access to justice, understood as the full realization of justice, as forming part of the sphere of jus cogens; in other words, that the inviolability of all the judicial rights established in Articles 25 and 8 considered together belongs to the sphere of jus cogens. There can be no doubt that the fundamental guarantees, common to international human rights law and international humanitarian law, [FN134] have a universal vocation because they are applicable in any circumstance, constitute a peremptory right (belonging to jus cogens), and entail obligations erga omnes of protection." (para. 64)

[FN133] Cf., in this sense, my Separate Opinions in the Judgments of the Court in the cases of the Plan de Sánchez Massacre versus Guatemala (merits, of 04.29.2004), paras. 22, 29-33, and 35 of the Opinion; and (reparations of 11.19.2004), paras. 4-7 and 20-27 of the Opinion; of the Gómez Paquiyauri Brothers versus Peru (of 07.08.2004), paras. 37-44 of the Opinion; of Tibi versus Ecuador (of 09.07.2004), paras. 30-32 of the Opinion; of Caesar versus Trinidad and Tobago (of 03.11.2005), paras. 85-92 of the Opinion; of Yatama versus Nicaragua (of 06.23.2005), paras. 6-9 of the Opinion; of Acosta Calderón versus Ecuador (of 06.14.2005), paras. 4 and 7 of the Opinion; of the Ituango Massacres versus Colombia (of 07.01.2006), para. 47 of the Opinion; of Baldeón García versus Peru (of 04.06.2006), paras. 9-10 of the Opinion; of López Álvarez versus Honduras (of 02.01.2006), paras. 53-55 of the Opinion; of Ximenes Lopes versus Brazil (of 07.04.2006), paras. 38-47 of the Opinion.

[FN134] E.g. Article 75 of Protocol I (1977) to the 1949 Geneva Conventions on international humanitarian law.

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150. Little afterwards, in my Concurring Opinion in the case of López Álvarez versus Honduras (2006) I allowed myself to insist on my understanding in the sense that the right to Law (the access to justice lato sensu) is an imperative of the jus cogens (paras. 52-55). Likewise, in my Concurring Opinion to the Judgment of the IACHR in the case of Baldeón García versus Peru (merits and reparations, of 04.06.2006), upon recalling its precedents regarding the jurisprudential construction of the prohibition of the jus cogens (cf. supra), I differed from the reasoning of the majority of the IACHR, which considered that the state's obligations of prevention, investigation, and punishment of those responsible would be mere obligations "of means, not of results". Unlike the majority of the Court, in that Concurring Opinion I considered that

"In my opinion, the right to fair trial is also part of the realm of the international jus cogens. (...)
(...)We are referring to compulsory laws; therefore, the State's obligations to prevent, investigate and punish perpetrators are not mere obligations 'to act in a given manner, but not to achieve a given result,' as stated by the Court in paragraph 93 of this Judgment. I dissent in this reasoning from the majority of the Court.
As I indicated in my Separate Opinion (para. 23) in the recent Judgment of the Court of 03.29.2006, in the city of Brasilia, in the case of Sawhoyamaxa Indigenous Community v. Paraguay:
`(...) The State's obligations require it to act diligently and to achieve a given result, not merely to act in a given manner (such as adopting insufficient and ineffective legislative measures). Indeed, the examination of the difference between obligations to act in a given manner and to achieve a given result [FN135] has, in general, been carried out under a theoretical approach, assuming variations in the conduct of the State and even a succession of acts by the latter, [FN136] -without sufficiently and duly considering a situation that suddenly causes irreparable damage to a human being (v.g., deprivation of life due to the State's lack of diligence).'
In other words, the obligations involved are to achieve a given result and not merely to act in a given manner, because, otherwise, they would not refer to compulsory laws and, in addition, they could result in impunity." (paras. 5-7 and 9-12).

More recently, I insisted on this same aspect in my extensive Dissenting Opinion (paras. 1-60) in the case of the Dismissed Congressional Employees versus Peru (Judgment of Interpretation of 11.30.2007).

[FN135] Especially based on the work of the United Nations Human Rights Commission on the International Responsibility of States.
[FN136] Cf. A. Marchesi, Obblighi di Condotta e Obblighi di Risultato - Contributo allo Studio degli Obblighi Internazionali, Milano, Giuffrè, 2003, pp. 50-55 and 128-135.

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151. But it was in the case of Goiburú et al. versus Paraguay (Judgment of 09.22.2006), regarding the sinister "Condor Operation" of the so-called "intelligence services" of the countries of the Southern Cone of South America (during the time of the dictatorships of three decades

ago), that the Court finally endorsed the thesis I had been defending within ito for more than two years, [FN137] by effectively expanding even more the material content of the jus cogens, thus including the right to a fair trial at national and international levels. [FN138]

[FN137] Cf. the text of my Concurring Opinion in this case, reproduced in: A.A. Cançado Trindade, Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006), México, Edit. Porrúa/Universidad Iberoamericana, 2007, pp. 779-804.

[FN138] In my Separate Opinions in the case of Goiburú et al. (paras. 62-68, text in ibid., pp. 801-804), as well as in the following cases of Almonacid Arellano versus Chile (Judgment of 09.26.2006, paras. 58-60 of the Opinion), and of La Cantuta versus Peru (Judgment of 11.29.2006, paras. 49-62 and 58-60 of the Opinion), I made emphasis on the considerable importance of said expression of the material content of the jus cogens. Cf. also in this regard, A.A. Cançado Trindade, "La Ampliación del Contenido Material del Jus Cogens", in XXXIII Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano - 2007, Washington D.C., General Secretariat of the OAS, 2008 (in press). – In my Concurring Opinion in the case of Almonacid et al. versus Chile I sought to prove the lack of juridical validity of the so-called self-amnesties, not compatible with the ACHR, since they generate obstruction and denial of justice, and the resulting impunity of those responsible for the atrocities. I insisted on the need to expand the material content of the prohibitions of the jus cogens (in order to guarantee the right to a fair trial at both national and international levels), and I placed, in the end, the definition of the crimes against humanity in the crossing between International Human Rights Law and International Criminal Law.

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152. In effect, in its mentioned Judgment of 09.22.2006 in the case of Goiburú et al., the Court, upon verifying violations to the jus cogens in the cas d'espèce, stated that

"(...) Access to justice is a peremptory norm of international law and, as such, gives rise to obligations erga omnes for the States to adopt all necessary measures to ensure that such violations do not remain unpunished (...)." (para. 131) [FN139]

Little after that, in its Judgment of 11.29.2006 in the case of La Cantuta versus Peru, the Court made this statement once again (para. 160). The gradual expansion of the material content of the jus cogens, recently including the right to a fair trial, has occurred pari passu with the recent judicial condemnation of grave violations of human rights and massacres, which are, in my opinion, true State crimes. [FN140]

[FN139] The importance of this new expansion of the material content of the jus cogens, by the Court in its Judgment of 09.22.2006, in the case of Goiburú et al., so that it includes the right to a fair trial, and the importance and implications of this notable jurisprudential progress, are emphasized in my Concurring Opinion (paras. 62-68) in that case, in which I also referred to the criminalization of the grave violations of human rights; the State's crime within the context of the State's terrorism (the already mentioned "Condor Operation", and the concealment by the

State of the atrocities perpetrated); the State's international responsibility aggravated by the State's crime; and new elements of the necessary complementary nature between International Human rights Law and contemporary International Criminal Law.
[FN140] Cf., in this regard, A.A. Cançado Trindade, "Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited", in International Responsibility Today - Essays in Memory of O. Schachter (ed. M. Ragazzi), Leiden, M. Nijhoff, 2005, pp. 253-269.
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153. If the Court were to regretfully abandon this jurisprudential construction, it would be failing to comply with its duty of maximum judicial body for the safeguarding of human rights within the Inter-American protection system, and within the framework of the universality of human rights. As stated in the doctrine on international law, the international jus cogens expands in the realm of operation of a true international ordre public, to tend to the highest interests of the international community as a whole and it highlights the need of judicial control in the compliance of the peremptory regulations of International Law. [FN141]

[FN141] Cf., inter alia, K. Zemanek, "How to Identify Peremptory Norms of International Law", in Völkerrecht als Wertordnung - Festschrift für C. Tomuschat (eds. P.-M. Dupuy et alii), Kehl, N.P. Engel Verlag, 2006, pp. 1108, 1114, and 1117; and cf., for a discussion, R. Kolb, Théorie du Ius Cogens International, Paris, PUF, 2001, pp. 68-83 and 172-181; cf. also, v.g., E.P. Nicoloudis, La nullité de jus cogens et le développement contemporain du Droit international public, Athènes, Éd. Papazissi, 1974, pp. 41-45 and 227-228.
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154. It is not at all surprising that it has been precisely in the sphere of the protection of the fundamental rights of human beings that the material content of the jus cogens is defined. [FN142] Today nobody would question, v.g., that the prohibitions of grave violations to Humanitarian International Law are in effect prohibitions of the international jus cogens, [FN143] which are also projected in the domestic legal systems of the States. [FN144] The international and national legal systems are shown here in interaction, in the fight against violations to the jus cogens.

[FN142] G. Cohen-Jonathan, "Du caractère objectif des obligations internationales relatives aux droits de l'homme - Quelques observations", in Les droits de l'homme et la Constitution - Études en l'honneur du Prof. G. Malinverni (eds. A. Auer et alii), Genève/Zurich/Bâle, Schulthess, 2007, pp. 130-133.
[FN143] Cf. L. Hannikainen, Peremptory Norms (Jus Cogens) in International Law - Historical Development, Criteria, Present Status, Helsinki, Lakimiesliiton Kustannus/Finnish Lawyers' Publ. Co., 1988, pp. 605-606 and 621, and cf. pp. 602-604 and 607-608.
[FN144] Cf. E. de Wet, "The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law", 15 European Journal of International Law (2004) pp. 98, 100, 105, 112, and 120-121.
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155. We are standing before a humanized ordre public (or what is the same, a truly humanistic one) where the public interest or the general interest coincides completely with the prevalence of human rights, [FN145] - which implies the acknowledgment that human rights constitute the basic foundation, in themselves, of the legal system, [FN146] at international and national levels. Underlying the concept of jus cogens is the natural law theory, which leads to peremptory regulations based on the affirmation and enshrinement of ethical values that seek to benefit humanity as a whole. [FN147]

[FN145] In that sense, the emergence of a real jus commune of human rights in the international realm has been suggested; cf. M. de Salvia, "L'élaboration d'un `jus commune' des droits de l'homme et des libertés fondamentales dans la perspective de l'unité européenne: l'oeuvre accomplie par la Commission et la Cour Européennes des Droits de l'Homme", in Protection des droits de l'homme: la dimension européenne - Mélanges en l'honneur de G.J. Wiarda (eds. F. Matscher y H. Petzold), 2a. ed., Köln/Berlin, C. Heymanns Verlag, 1990, pp. 555-563; G. Cohen-Jonathan, "Le rôle des principes généraux dans l'interprétation et l'application de la Convention Européenne des Droits de l'Homme", in Mélanges en hommage à L.E. Pettiti, Bruxelles, Bruylant, 1998, pp. 168-169.
[FN146] A.A. Cançado Trindade, O Esgotamento de Recursos Internos no Direito Internacional, 2ª ed., Brasília, Edit. Universidad de Brasília, 1997, pp. 265-266.
[FN147] Cf. M. Ragazzi, "Alexidze on Jus Cogens (Selected Considerations)", in Theory and Practice of Contemporary International Law - Essays in Honour of Prof. L. Alexidze on the 80th Birthday Anniversary, Tbilisi, Inovatia, 2007, pp. 35 and 38.
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156. In what refers to the right to a fair trial, the fact that Articles 25 and 8 of the American Convention are not included in the list of non-revocable rights of Article 27(2) of the same is a problem that is more apparent than real. The abolitions would only be possible if they were not compatible with the obligations imposed on the States by International Law, as warned by Article 27(1) of the Convention; here the peremptory nature of the right to a fair trial makes said lack of compatibility evident. The States Parties to the Convention have here, in my opinion, obligations based on results.

157. It would be unconceivable to deny the right to a fair trial to any person. Here, we can visualize a real right to Law, that is, the right to a legal system that effectively safeguards the rights inherent to human beings. [FN148] This is an imperative of the jus cogens. In effect, without the right to a fair trial there is not a real legal system. Without the right to Law, there is no Law. And without Law, without public justice, we are not able to reach the encouraging culmination that puts an end to the trilogy of tragedies of The Oresteia by Aeschylus.

[FN148] This evolution, with the acknowledgment of the direct access of individuals to international justice, currently reveals the advent of the new primacy of the reason of humanity over the reason of the State, to inspire the historical process of humanization of International

Law; A.A. Cançado Trindade, A Humanização do Direito Internacional, Belo Horizonte/Brasil, Edit. Del Rey, 2006, pp. 3-409.
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158. I hope that my reflections, which I spread upon the record in the present Concurring Opinion, are good for something: that they help clarify all the consultations presented to the Court in the present process of Interpretation of Judgment in the case of the Castro Castro Prison; that they help guarantee compliance by the appellant State – faithful to its best legal tradition – of the Judgment on merits and reparations in the cas d'espèce, duly clarified herein (the interpreted res regarding the res judicata); and that they help the Court keep moving forward in its more guarantor jurisprudential construction, which has benefited so many victims in situations of the most acute adversity. I dare to trust that this will not be expecting too much.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION JUDGE MANUEL E. VENTURA ROBLES

I. INTRODUCTION

1. I have concurred with my opinion to the adoption of this judgment of interpretation of the Judgment on merits, reparations, and costs in the case of the Castro Castro Prison v. Peru (hereinafter "the State"), for two basic reasons: first, because the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court") admitted the request for interpretation made by the State; and second, because I considered it convenient to go into detail regarding the reasons why I voted in favor of the judgment that Peru asked be interpreted.

2. It is also important to mention that the request for the interpretation of the judgment presented by the State has awaken in me a series of reflections, which correspond both to matters of a juridical and a meta-juridical nature, which I wish to share with the main actors of the Inter-American system that are, besides the Court and the Inter-American Commission of Human Rights (hereinafter "the Commission" or "the Inter-American Commission"), conventional bodies of protection, the States Parties to the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), and the non-governmental organizations that litigate before the Court, as well as the victims that access the system.

II. THE PROBLEMATIC PRESENTED BY THE STATE

3. The State has communicated to the Court, through its request for interpretation of the judgment, not a matter of a juridical nature but of a meta-juridical nature: the perception among the Peruvian population, which for many years suffered from the violence of terrorism, that the judgment of the Court favors offenders or alleged offenders of the domestic antiterrorist legislation, who the judgment calls victims and makes them the beneficiaries of a reparation.

And this would make it morally unacceptable for many Peruvians. Both the State, and many of its nationals, would have wanted the Court to condemn terrorism in a much more explicit and strong manner, and that it would have gone into greater detail of considerations regarding this criminal, social, and political phenomenon, as well as determined other types of reparations.

III. THE REQUEST FOR A PUBLIC HEARING TO SUPPORT THE REQUEST FOR INTERPRETATION OF THE JUDGMENT PRESENTED BY THE STATE

4. In its request for interpretation of the judgment, the State has requested that a public hearing be held to orally support its main arguments. Against my criterion, the majority of the Judges considered that the hearing was not necessary to respond to the request for interpretation. In my opinion, if the State wished to make certain statements on the judgment publicly, whichever the reasons to do so, accepting the request for a public hearing was, at least, an act of diplomatic courtesy that, in the especially complex context in which the facts of the case occurred, should have been expressed to the State Party, who in good faith presented a serious argument to the Court within a judicial proceeding in which it appears as the respondent. Besides, the experience has always been that in the public hearings the Court gathers information of great importance, from a direct source, which at least helps to better understand the position of the petitioner, even when from reading the written texts the judge considers that it does not have juridical doubts. The Court has already held public hearings on other opportunities for the interpretation of judgments. [FN1]

[FN1] Cases of Velásquez Rodríguez and Godínez Cruz against Honduras, public hearing of August 14, 1990 and case of Cesti Hurtado against Peru, public hearing of January 25, 2000.

IV. THE JURIDICAL ASPECT OF THE REQUEST FOR INTERPRETATION OF THE JUDGMENT

5. The problematic presented by the Peruvian State, which must not be ignored because it is not exactly technical-juridical, originates in the principles themselves of the reason for the existence of the international systems for the protection of human rights, in this case the Inter-American system, which were approved by the States themselves, specifically the protection of the human being's fundamental rights with regard to the violations committed by the States, reason why the essence itself of the system is subsidiarity. The system's bodies do not replace the State in its main and fundamental obligation to protect and guarantee the human rights of their population, but instead they offer that protection once the State has not done so, as is its main obligation. In this case, fourteen years had gone by since the facts occurred in the year 1992 and up to the date of the judgment in 2006.

6. Besides, the litigation before the Inter-American system is totally different to the criminal litigation carried out in the domestic system of the States: in the latter, the State intervenes as the accusing party against an individual allegedly responsible of violating the domestic legislation, reason for which the main purpose of the process is to determine and, in its case, declare the criminal responsibility of the person who committed the violation. On the other hand, in the

international jurisdiction the individual becomes an alleged victim of the violation by the State of any of the rights protected by the American Convention or any other international treaty applicable. And if the violation is proven, pursuant to Article 63 of the American Convention, the right infringed must be restored and, in its case, if it proceeds, payment of a fair compensation must be ordered. In this sense, the Tribunal has stated:

The Court considers it fundamental to reiterate, as it has done when deciding on other cases, that it is not a criminal court that can analyze the criminal responsibility of individuals. [FN2]

[FN2] Cfr. Case of Velásquez Rodríguez, Merits, Judgment of July 29, 1988, Series C No. 4, para. 134; Case of Suárez Rosero, Merits, Judgment of November 12, 1997, Series C No. 35, para. 37; Case of the Massacre of Pueblo Bello, Merits, Reparations, and Costs, Judgment of February 1, 2006, Series C No. 141, para. 122; Case of Fermín Ramírez, Merits, Reparations, and Costs, Judgment of June 20, 2005, Series C No. 126, para. 63; Case of Raxcacó Reyes, Merits, Reparations, and Costs, Judgment of September 15, 2005. Series C No. 133, para. 55; Case of Boyce et al., Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 20, 2007, Series C No. 169, footnote 37; Case of Zambrano Vélez et al., Merits, Reparations, and Costs, Judgment of July 4, 2007, Series C No. 166, para. 93; and Case of Yvon Neptune, Merits, Reparations, and Costs, Judgment of May 6, 2008, Series C No. 180, para. 37.

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7. That is, I think that the wrong perception of a part of the Peruvian population of what a proceeding before the Inter-American Court is, lies in the fact that they believe that this is an international criminal court that determines individual criminal responsibilities, that it is a superior instance that knows of the same process carried out in the domestic law and, within it, not only acquits alleged terrorists, but also orders payment of a compensation in their favor.

8. I must point out, once again, that the Inter-American Court is a tribunal for the control of conventional legality, with regard to the acts or omissions of the States Parties to the American Convention, which are the only ones who can be declared internationally responsible for infractions to the Convention. It is a process different to the domestic one, in which the parties, the object, and the applicable legislation are different. In one domestic criminal law is applied and in the other international human rights law is applied, since one is carried out in the venue of a domestic or national criminal court and in the other a proceeding is carried out in the venue of an international court.

9. This results in the confusion between some people who are not experts in Law, those who assume that the Inter-American Court has erroneously determined criminal responsibility, which is obvious to them and that, as if this were not enough, orders the payment of a compensation to the alleged guilty parties. The public opinion must be clear, and it is the responsibility of the States Parties to the Convention to inform them, of the different nature of both processes. That is, they must make it clear that if the case reached the Inter-American Court it is because the State did not correct the violations through its own courts.

10. However, it is my understanding, that one thing is to request the interpretation of a judgment, whichever it is, and another is to expect that the forms of compliance of the judgment be defined through the interpretation, since this is a matter of the supervision of compliance of the judgment. Some of the State's concerns could be the object of consideration of the Tribunal in this stage of the proceedings. In this sense, the Tribunal has stated:

[…] the Court considers that said argument does not constitute a matter regarding the sense and scope of the Judgment, but instead refers to the means the State must employ to comply with the Judgment. Since it does not correspond to a supposition of interpretation of the Judgment according to the applicable regulations, the mentioned argument must be declared inadmissible and, as soon as it is appropriate and convenient, it may be analyzed in the stage of supervision of compliance with the Judgment. [FN3]

[FN3] Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Request for Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 30, 2007. Series C No. 174.

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11. The other possibility, that the Court had extended on its considerations on terrorism, which it has done in other judgments, will be considered in the next section.

V. THE META-JURIDICAL ASPECT OF THE REQUEST FOR INTERPRETATION OF THE JUDGMENT

12. I have left the treatment of the State's request regarding the fact that the Court did not offer greater details in its consideration on the phenomenon of terrorism, which it has done in other cases submitted to its decision by the Inter-American Commission with regard to several States, [FN4] to the possibility that an "obiter dictum" has been issued in this sense within the text of the judgment, based on the Court's working conditions, which to solve cases of the magnitude of the present case and many others has four sessions of two weeks each.

[FN4] Cfr. Case of Zambrano Vélez et al. v. Ecuador. Merits, Reparations, and Costs. Judgment of July 4, 2007. Series C No. 166; Case of Goiburu et al. v. Paraguay. Merits, Reparations, and Costs. Judgment of September 22, 2006. Series C No. 153; Case of Loayza Tamayo v. Peru. Merits. Judgment of September 17, 1997. Series C No. 33; Case of Castillo Páez v. Peru. Merits. Judgment of November 3, 1997. Series C No. 34; Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations, and Costs. Judgment of May 30, 1999. Series C No. 52; and Case of Cantoral Benavides v. Peru. Merits. Judgment of August 18, 2000. Series C No. 69.

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13. In a two-week session the Court usually issues four or five judgments, holds public hearings, issues orders on provisional measures and the processing of cases and other important matters, which forces it to work against the clock in work sessions that end up exhausting the Judges and the Secretariat's personnel. And during those eight weeks a year, the Court

deliberates, mainly because the reading of the dossiers and the preparation of the judgments by the rapporteur judges and legal teams and interns of the Secretariat is done outside those sessions, when the activities to which each Judge is dedicated allow it. If the work conditions of the Judges were different, it would be possible to issue judgments to which more time could be dedicated and they could offer greater detail with regard to determinations considered important by the State Parties. It is an obligation of the State Parties to guarantee that the Court can meet a period of time sufficient enough to appropriately consider the cases. [FN5]

[FN5] Cfr. "La Corte Interamericana de Derechos Humanos: Camino Hacia un Tribunal Permanente" and "La Corte Interamericana de Derechos: La Necesidad Inmediata de Convertirse en un Tribunal Permanente (Efectos de la Aplicación del Cuarto Reglamento de la Corte Interamericana de Derechos Humanos, de Junio de 2001 a Junio de 2004, en Relación con el Artículo 44.1 del Reglamento de la Comisión Interamericana de Derechos Humanos" In: Trindade, Antônio Augusto Cançado; Ventura Robles, Manuel E. "El Futuro de la Corte Interamericana de Derechos Humanos". Corte IDH-ACNUR, 3a Edición, San José, Costa Rica, 2005.

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14. With the reformed rules of procedure, of the Court and the Commission, which came into force in the year 2001, the number of cases submitted to the consideration of the Court by the Commission has more than duplicated, and the Organization of American States (OAS) funds the same eight weeks of sessions per year, which has led the Court to receive in public hearings only the most important testimonies and expert statements, ordering the receipt of the rest through sworn statements (affidavits), and it has decreased the time of deliberation for every case.

This entire situation affects the problematic presented by Peru in its request for interpretation of the judgment based on Article 67 of the Convention, reason for which I will refer to possible solutions to the same in the next section.

VI. REFLECTION ON THE INTER-AMERICAN HUMAN RIGHTS PROTECTION SYSTEM FOR ITS IMPROVEMENT AND STRENGTHENING

15. The only solution that exists to improve the Inter-American Human Rights Protection System is to continue with the reflection process for its improvement that the General Assembly has ordered be carried out, every year, by its Commission of Juridical and Political Matters. What has happened is that since 1996 when the Assembly carried out this activity for the first time, based on the corresponding meetings held regarding this matter at the headquarters of the Ministry of Foreign Affairs and Worship of Costa Rica in the year 2001, agreements were made through the consensus of all the parties involved, State Parties, Court, and Commission, whose consequences were of the utmost importance: the reforms to the Rules of Procedure of the Court and the Commission, the most important step taken since the Specialized Inter-American Conference held in Costa Rica in 1969.

16. This dialogue process between the main actors of the system: the bodies of protection, Court and Commission, the State Parties to the American Convention, and civil society,

especially those non-governmental organizations that litigate with frequency in the system, must be vigorously taken up again in order to reach agreements in work groups that can later be forwarded to the Permanent Council and the General Assembly.

17. The following resolutions of the General Assembly refer to any of the matters that must be the object of dialogue: [FN6] AG/RES. 1633 (XXIX-O/99), AG/RES. 1652 (XXIX-O/99), AG/RES. 1701 (XXX-O/00), AG/RES. 1716 (XXX-O/00), AG/RES.1827 (XXXI-0-01), AG/RES.1828 (XXXI-0-01), AG/RES.1833 (XXXI-0-01), AG/RES.1850 (XXXII-0-02), AG/RES.1890 (XXXII-0-02), AG/RES.1918 (XXXIII-0-03), AG/RES.1925 (XXXIII-0-03), AG/RES.2030 (XXXIV-0-04), AG/RES.2043 (XXXIV-0-04), AG/RES.2129 (XXXV-0-05), AG/RES.2075 (XXXV-0-05), AG/RES.2223 (XXXVI-0-06), AG/RES.2220 (XXXVI-0-06), AG/RES. 2291 (XXXVII-O/07), AG/RES. 2292 (XXXVII-O/07), y AG/RES. 2407 (XXXVIII-O/08).

[FN6] Organization of American State: Minutes and Documents, Volume I. Years: 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008.

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18. To the following subjects previously mentioned we could add others that are not less relevant. It is necessary to make a non-exhaustive list of subjects that can be complemented by the interested participants.

1. Direct access of the victim to the Inter-American Court, after exhausting the process before the Commission.
2. A Permanent Court and Commission.
3. Application of Article 65 of the Convention due to non-compliance of judgments.
4. Supervision of compliance of judgments by the Inter-American Court.
5. Nature, type, and amounts of the reparations.

VII. CONCLUSIONS

1. The Inter-American Court of Human Rights which, since the Rules of Procedure of the Court and Commission came into force in the year 2001, decided to issue, in general, in a singe judgment the preliminary objections, the merits, and the reparations, and receive in public hearings only some of the testimonies and expert statements and the rest through sworn statements (affidavits), maintains its agenda up to date, a very important achievement due to the decrease of the duration of the process before the Tribunal, as a consequence of the above.
2. The negative consequence, among so many positive ones, has been the tendency to reduce the holding of public hearings in cases of requests of interpretation of judgments and of provisional measures that, when held, have been of great usefulness in the formation of the Judge’s criteria, precisely because of the immediacy of the arguments.
3. In my opinion, the arguments of overloaded agendas or the non-existence of juridical doubts are not enough to not accept the request for a public hearing presented by a State Party, especially with regard to a matter to which the latter has given the mayor importance.

4. The solution in order for the Court to be able to go into greater detail in some of the aspects of its judgment is to have more time for its sessions and for the Judges to deliberate, in use of both their contentious and advisory function.

Manuel E. Ventura Robles
Judge

Pablo Saavedra Alessandri
Secretary