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| Institution: | Inter-American Court of Human Rights |
| Title/Style of Cause: | Heliodoro Portugal v. Panama |
| Doc. Type: | Judgement (Preliminary objections, Merits, Reparations and Costs) |
| Decided by: | President: Diego Garcia Sayan;<br>Judges: Sergio Garcia Ramirez; Manuel E. Ventura Robles; Leonardo A. Franco; Margarette May Macaulay; Rhadys Abreu Blondet<br><br>For reasons beyond their control, Judge Cecilia Medina Quiroga and Deputy Secretary Emilia Segares Rodriguez did not take part in the deliberation and signature of this judgment. |
| Dated: | 12 August 2008 |
| Citation: | Portugal v. Panama, Judgement (IACtHR, 12 Aug. 2008) |
| Represented by: | APPLICANTS: Viviana Krsticevic, Soraya Long, Gisela De Leon and Marcela Martino |



In the case of Heliodoro Portugal,

the Inter-American Court of Human Rights (hereinafter, "the Court" or "the Inter-American Court"), pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter, "the Convention" or "the American Convention") and Articles 29, 31, 37, 56 and 58 of the Rules of Procedure of the Court (hereinafter, "the Rules of Procedure"), delivers this judgment.

## I. INTRODUCTION OF THE CASE AND SUBJECT MATTER OF THE DISPUTE

1. On January 23, 2007, in accordance with the provisions of Articles 50 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter, "the Commission" or "the Inter-American Commission") lodged before the Court an application against the Republic of Panama (hereinafter "the State" or "Panama"). This application originated from petition No. 12,408 submitted to the Secretariat of the Commission on June 2, 2001, by the Center for Justice and International Law (hereinafter "CEJIL") and Patria Portugal. On October 24, 2002, the Commission adopted Report on admissibility No. 72/02 and, on October 27, 2005, it adopted Report on merits No. 103/05, in accordance with Article 50 of the Convention; [FN1] the latter contained various recommendations for the State. On January 22, 2007, the Commission, "[h]aving considered the State's report on implementation of the recommendations contained in the report on merits and the lack of substantive progress in complying with them," decided to submit the case to the Court. The Commission appointed Paolo Carozza, Commissioner, and Santiago A. Canton, Executive Secretary, as delegates, and

Ariel E. Dulitzky, Elizabeth Abi-Mershed, Juan Pablo Albán A., and Christina M. Cerna, as legal advisers.

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[FN1] In its report on merits, the Commission concluded that the State was responsible for the violation of the rights established in Articles I, XXV, XXVI of the American Declaration of the Rights and Duties of Man; Articles 4, 5, 7, 8 and 25, in conjunction with Article 1(1) of the American Convention, Articles II and III of the Inter-American Convention on Forced Disappearance of Persons and Articles 1, 2, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

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2. The application submitted to the competence of the Court the alleged violations committed by the State owing to the alleged forced disappearance and extrajudicial execution of Heliodoro Portugal, the alleged failure to investigate and punish those responsible for this act and the alleged failure to make adequate reparation to his next of kin. According to the Commission's application, on May 14, 1970, Heliodoro Portugal was in a café known as the "Coca-Cola" Café in Panama City, when he was approached by a group of individuals in civilian clothing, who obliged him to get into a vehicle, which drove off to an unknown destination. The Commission alleged that State agents took part in these acts, which occurred at a time when Panama was governed by a military regime. The Commission indicated that, "[d]uring the military dictatorship, it was not possible to have recourse to the domestic authorities to file complaints for human rights violations or to know the whereabouts of a person." Therefore, the alleged victim's daughter did not report the disappearance until May 1990, when democracy was restored in the country. In September 1999, the Attorney General's Office (Ministerio Público) found some remains in the military barracks known as "Los Pumas" in Tocumen, which were presumed to be those of a Catholic priest; however, after they had undergone DNA testing, financed by private sources, they were identified as belonging to the alleged victim. The results of the DNA tests were communicated to the next of kin and made public in August 2000. The corresponding criminal proceeding is still open and those responsible have not been convicted.

3. The Commission asked the Court to declare the international responsibility of the State for the violation of Articles 4 (Right to Life), 5 (Right to Humane Treatment) and 7 (Right to Personal Liberty) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Heliodoro Portugal, and also for the violation of Articles 5 (Right to Humane Treatment), 8(1) (Right to a Fair Trial) and 25 (Judicial Protection) of the American Convention, to the detriment of Graciela De León (the alleged victim's permanent companion) and of Patria and Franklin Portugal (the alleged victim's children). The Commission also asked the Court to declare the international responsibility of the State for failing to comply with the obligation to define the offense of forced disappearance, established in Article III of the Inter-American Convention on Forced Disappearance of Persons; for failing to comply with the obligation to investigate and punish torture, established in Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, and for failing to make adequate reparation for the violation of the rights that were alleged. In addition, the Commission asked the Court to order the State to adopt various pecuniary and non-pecuniary measures.

4. On April 27, 2007, the representatives of the alleged victim and his next of kin (hereinafter, "the representatives"), that is, Viviana Krsticevic, Soraya Long, Gisela De León and Marcela Martino of "CEJIL," presented their brief with pleas, motions and evidence (hereinafter "pleas and motions brief"), pursuant to Article 23 of the Rules of Procedure. The representatives asked the Court to declare that the State had committed the same human rights violations alleged by the Commission; in addition, they alleged that the State had violated Article 13 (Freedom of Thought and Expression) of the Convention to the detriment of the alleged victim and his next of kin, because "it had not provided them with the necessary information to determine what had occurred"; Article 5 (Right to Humane Treatment) of the Convention, to the detriment of the grandchildren of the alleged victim, Román and Patria Kriss, as well as the obligation to define the offense of torture, derived from Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture and of Articles 2 (Domestic Legal Effects), 4 (Right to Life), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial) and 25 (Judicial Protection) of the American Convention, all in relation to Article 1(1) thereof. They also requested the adoption of various measures of reparation and the reimbursement of the costs and expenses incurred when processing the case at both the domestic and the international levels.

5. On June 26, 2007, the State submitted its brief with preliminary objections, the answer to the application and observations on the pleas and motions brief (hereinafter, "answer to the application"). The State presented three preliminary objections, questioning the admissibility of the application owing to the alleged failure to exhaust domestic remedies, and alleged that the Court did not have competence either ratione temporis or ratione materiae in relation to this case. In particular, the State argued that the next of kin had not filed any specific complaint (querella) or private action in order to intervene directly in the criminal proceeding, so that the domestic remedies had not been exhausted; that there had not been an unjustified delay in the domestic judicial proceedings on the reported facts; that the Court did not have competence over the alleged violation of Articles 4, 5, 7, and 13 of the Convention because the death, alleged mistreatment, detention and alleged violation of the freedom of expression of Heliodoro Portugal occurred before or during June 1971, 19 years before the State accepted the compulsory competence of the Court, and seven years before Panama ratified the Convention; that the lack of competence over the principal fact extended to the secondary facts, such as the presumed adverse effects on the personal integrity and freedom of expression of Mr. Portugal's next of kin; that the obligation to define the offenses of forced disappearance of persons and torture arose after the date on which the facts of the instant case allegedly occurred, and this obligation cannot be interpreted retroactively, and that the State's obligation to define the offense of forced disappearance of persons cannot be ordered in the context of a contentious case. Lastly, the State alleged the inadmissibility of the claim for compensation for the alleged loss of rights of ownership over a piece of land belonging to Heliodoro Portugal's next of kin, because the corresponding domestic remedies had not been exhausted.

## II. PROCEEDINGS BEFORE THE COURT

6. The Commission's application was notified to the State [FN2] and to the representatives in a communication of February 27, 2007. During the proceedings before this Court, the Commission and the representatives presented their principal briefs on merits (supra paras. 3 and

4), and on August 5 and 8, 2007, respectively, they presented their arguments on the preliminary objections presented by the State.

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[FN2] When notifying the application to the State, the Court advised the State of the possibility of appointing a Judge ad hoc for the instant case. On March 22, 2007, the State appointed Juan Antonio Tejada Espino as Judge ad hoc. On April 11, 2007, the representatives asked the Court "to declare that Mr. Tejada Espino is not qualified to take part in the processing of the case in [that] capacity." In its observations, the Commission indicated that it "noted that it appeared that the person proposed had taken part in the investigative measures related to the case […]." The State alleged that "Mr. […] Tejada Espino has clarified that, while he was the First Superior Prosecutor of the First Judicial District, he was not responsible for investigating the Heliodoro Portugal case[…]." The representatives, in their observations on the State's communication, reiterated the Commission's allegations in its brief with observations. On May 10, 2007, the Court issued an Order in which it decided "[t]o reject the recusal submitted by the representatives […] against Juan Antonio Tejada Espino." Subsequently, on May 9, 2008, Juan Antonio Tejada Espino asked the President of the Court to excuse him from hearing the instant case. The same day, the President of the Court accepted his recusal.

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7. On November 29, 2007, the Court ordered that 13 witnesses and three expert witnesses proposed by the Commission, the representatives, and the State submit statements made before notary public (affidavits), and the parties were given the opportunity to present their respective observations. The Court also convened the Inter-American Commission, the representatives and the State to a public hearing to receive the statements of five witnesses, and also the final oral arguments on the preliminary objections and on possible merits, reparations and costs. [FN3] Subsequently, the representatives requested "a change in the way that the testimony of Daniel Zúñiga and Janeth Rovetto would be received" because the former was a public employee and had stated that he was "afraid for his personal safety and his job security, and therefore did not want to testify in public," but rather by means of an affidavit. Based on "this supervening fact," the representatives asked that the testimony of Janeth Rovetto, whose testimony the Court had required by affidavit, be received during the public hearing. The parties were given the possibility of presenting their observations in this regard. On December 19, 2007, after having considered these observations, the President partially modified the Order of November 29, 2007, and decided that Daniel Zúñiga would testify by means of a statement before notary public and that the failure of Mr. Zúñiga to appear at the public hearing did not justify changing the way in which the Court had required Ms. Rovetto to testify. [FN4] The public hearing was held on January 29 and 30, 2008, during the Court's seventy-eighth regular session. [FN5]

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[FN3] Order issued by the Inter-American Court of Human Rights on November 29, 2007.

[FN4] Order issued by the President of the Inter-American Court of Human Rights on December 19, 2007.

[FN5] The following persons were present during the public hearing: (a) for the Inter-American Commission: Paolo Carozza and Elizabeth Abi-Mershed, Delegates, and Juan Pablo Albán A. and Christina Cerna, advisers; (b) for the representatives: Soraya Long, Gisela De León and

Marcela Martino, CEJIL lawyers, and (c) for the State: Jorge Federico Lee, Agent; Iana Quadri de Ballard, Deputy Agent; Nisla Lorena Aparicio, Alternate Representative of the Republic of Panama before the Organization of American States; Luis Ernesto Vergara, Ambassador of Panama to Costa Rica; Luis Gómez, Lawyer of the Legal Affairs Secretariat of the Attorney General's Office; Rogelio Naranjo, Legal Adviser, and Sophia Astrid Lee Bonilla, Legal Adviser.

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8. On March 3, 2008, the parties presented their final written arguments.

9. On June 23, 2008, the representatives submitted a copy of a journalistic investigation published on June 21, 22 and 23, 2008, in the La Prensa newspaper in Panama, regarding the alleged "context of grave human rights violations during the military dictatorship […]," in relation to the present case.

## III. PRELIMINARY OBJECTIONS

10. When presenting its answer to the application, the State filed three preliminary objections: (a) "inadmissibility of the application owing to the failure to exhaust domestic remedies"; (b) lack of competence of the Court ratione temporis, and (c) lack of competence of the Court ratione materiae. The Court will examine these three preliminary objections in the order they were presented.

### A) Failure to exhaust domestic remedies

11. In the answer to the application, the State argued that the requirement to exhaust domestic remedies had not been complied with for two reasons. First, the State indicated that the alleged victim's next of kin had not exhausted domestic remedies because "they never took advantage – and to date still have not – of the right granted them by the Panamanian Judicial Code to file a complaint or a private action in order to intervene directly or participate in the criminal investigation and in the proceedings that could result from it." Second, the State indicated that "the Commission declared the petition admissible, even though a criminal investigation by the Panamanian Attorney General's Office was underway at the time, based on the offenses committed to the detriment of Heliodoro Portugal," and this was "being conducted in an impartial, serious and exhaustive manner." On this point, it added lastly that "the Commission admitted the petition and decided to submit the case to the Inter-American Court based on an alleged unjustified delay in the investigations; that is, using the cause for exclusion provided for in Article 46(2)(c) of the American Convention," even though the State considered that "there [had been] no unjustified delay in the actions of the Attorney General's Office and the Panamanian Judiciary."

12. The Commission asked the Court "to reject, as groundless, this preliminary objection," because "[t]he State had not argued that the decision on admissibility was based on erroneous information or that it was the result of a procedure in which the equality of arms or the right to defense of the parties was curtailed in any way, but merely expressed its disagreement with [the Commission's] decision." The Commission also indicated that "any discussion on the unjustified

delay and the inconsistency of the domestic proceedings with the State's Convention obligations should be addressed as part of the merits of the case."

13. The representatives agreed with the Commission and also indicated that, in Panama, the complaint or private action is not a remedy, but a form of participation by the victims, which they are not obliged to use.

14. The Court has developed clear standards for examining an objection based on an alleged failure to comply with the exhaustion of domestic remedies. [FN6] First, it has interpreted the objection as a defense available to the State and, as such, the State may waive it, either expressly or tacitly. Second, the objection of failure to exhaust domestic resources must be submitted opportunely so that the State can exercise its right to defense; otherwise, it is presumed that the State has tacitly waived the presentation of this argument. Third, the Court has affirmed that the State that presents this objection must specify the domestic remedies that have not been exhausted and prove that those remedies are applicable and effective.

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[FN6] Cf. Velásquez Rodríguez v. Honduras. Preliminary objections. Judgment of June 26, 1987. Series C No. 1, para. 88; Salvador Chiriboga v. Ecuador. Preliminary objection and merits. Judgment of May 6, 2008. Series C No. 179, para. 40, and Saramaka People v. Suriname. Preliminary objection, merits, reparations, and costs. Judgment of November 28, 2007. Series C No. 172, para. 43.

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15. Based on the above, the Court will, first, examine the alleged failure to file a complaint or a private action and, second, it will examine the alleged unjustified delay of the criminal proceeding that is still ongoing. To this end, the Court will examine the information that the State provided during the proceedings before the Commission.

a) The alleged failure to file a complaint or a private action

16. The case file before the Commission indicates that the State mentioned opportunely [FN7] that the exhaustion of "the possibility that the Panamanian Judicial Code grants for a private party to file a complaint or a private action in order to intervene directly and take part in the criminal investigations and in the proceedings that could result from them" remained pending (supra para. 11). In Report on admissibility No. 72/02 of October 24, 2002, the Commission did not refer to this allegation by the State. Nevertheless, the Court considers that the next of kin do not have to file a complaint or a private action in the criminal proceeding in order to exhaust domestic remedies; especially when the criminal proceeding relates to an alleged forced disappearance, which the State must investigate ex officio (infra paras. 143 to 145).

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[FN7] In its fourth communication during the admissibility proceedings before the Commission, the State alleged for the first time that "[t]he petitioner can still appear before the proceeding and even participate as a complainant in the preliminary investigation being undertaken by the Attorney General's Office."

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17. Consequently, the Court rejects the preliminary objection concerning to the alleged failure to exhaust the remedy of the complaint or private action.

b) The alleged unjustified delay in the criminal proceedings

18. The preliminary objection filed opportunely [FN8] by the State before the Commission argued that the alleged victims' petition should have been declared inadmissible because the respective judicial proceedings were still open. The Court observes that the Commission examined the State's arguments in its Report on admissibility No. 72/02, and indicated that the fact that "Mr. Portugal disappeared 30 years ago and that there is a continuing situation that subsists today, without there being a final judicial decision on those responsible for these facts" was sufficient reason to consider that there had been "an unjustified delay in processing the criminal case investigating the facts and, consequently, the petitioners were exempt from the requirement to exhaust domestic remedies, as stipulated in Article 46(2)(c) of the Convention." In its answer to the application, the State argued that there had not been an "unjustified delay" in the domestic competence and, therefore, the assumptions established in Article 46(2)(c) of the Convention did not apply (supra para. 11).

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[FN8] In its first communication during the proceedings before the Commission, the State alleged for the first time the supposed failure to exhaust domestic remedies in relation to the criminal proceeding that was underway.

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19. Based on the above, the arguments of the parties and the evidence provided in these proceedings, the Court observes that the State's arguments on the alleged inexistence of an unjustified delay in the investigations and proceedings opened in the domestic competence relate to issues concerning the merits of the case, as they dispute the arguments regarding the alleged violation of Articles 8 and 25 of the American Convention. Moreover, the Court finds that it has no cause to re-examine the Inter-American Commission's reasoning when it decided on the admissibility of this case. [FN9]

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[FN9] Cf. Serrano Cruz Sisters v. El Salvador. Preliminary objections. Judgment of November 23, 2004. Series C No. 118, para. 141, and Case of Salvador Chiriboga, supra note 6, para. 44.

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20. Consequently, the Court rejects the preliminary objection in this regard and will address the arguments adduced by the State when considering the merits of this case.

B) Lack of Competence of the Court Ratione Temporis

21. The State also filed as a preliminary objection that the Court lacked competence ratione temporis to examine the following four groups of alleged violations of: (1) the rights to life,

humane treatment, personal liberty and freedom of thought and expression established in Articles 4, 5, 7 and 13 of the American Convention, respectively, to the detriment of Heliodoro Portugal; (2) the right to humane treatment, under Article 5 of the American Convention, to the detriment of Heliodoro Portugal's next of kin; (3) the obligation to define the offenses of forced disappearance and torture in accordance with Article III of the Inter-American Convention on Forced Disappearance of Persons (hereinafter "Convention on Forced Disappearance" or "ICFDP") and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture (hereinafter "Convention against Torture" or "ICPPT"), and (4) the obligation to investigate and punish torture, pursuant to Articles 1, 6 and 8 of the Convention against Torture, all in relation to Article 1(1) of the American Convention.

22. The Court will proceed to examine these four arguments in the above order, together with the arguments presented by the Commission and the representatives. However, before ruling on these four specific arguments, the Court finds it pertinent to reiterate some general considerations applicable to the exercise of its competence.

23. The Court, as any organ with competenceal functions, has the authority inherent in its attributes to determine the scope of its own competence. The instruments recognizing the optional clause on compulsory competence (Article 62(1) of the Convention) presuppose the acceptance of the Court's right to decide any dispute relating to its competence by the States that submit it. [FN10] To determine the scope of its own competence (compétence de la compétence), the Court only has to take into account the principle of non-retroactivity of treaties established in general international law and contained in Article 28 of the 1969 Vienna Convention on the Law of Treaties, [FN11] which establishes that:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with regard to that party.

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[FN10] Cf. Ivcher Bronstein v. Perú. Competence. Judgment of September 24, 1999. Series C No. 54, para. 34; García Prieto et al. v. El Salvador. Preliminary objection, merits, reparations, and costs. Judgment of November 20 2007. Series C No. 168, para. 38, and Almonacid Arellano et al. v. Chile. Preliminary objections, Merits, reparations, and costs. Judgment of September 26, 2006. Series C No. 154, para. 45.

[FN11] Cf. Cantos v. Argentina. Preliminary objections. Judgment of September 7, 2001. Series C No. 85, paras. 35 to 37; Case of García Prieto et al., supra note 10, para. 38, and Nogueira de Carvalho et al. v. Brazil. Preliminary objections and merits. Judgment of November 28, 2006. Series C No. 161, para. 43.

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24. Consequently, the Court cannot exercise its contentious competence to apply the Convention and declare a violation of its provisions when the alleged facts or the conduct of the defendant State that could involve international responsibility took place prior to that State's acceptance of this competence. [FN12] Contrario sensu, the Court is competent to rule on those

violations that occurred after the date on which the State accepted the Court's competence or that had not ceased at that date.

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[FN12] Cf. Case of Cantos, supra note 11, para. 36; Case of Nogueira de Carvalho et al., supra note 11, para. 44, and the Girls Yean and Bosicov. the Dominican Republic. Preliminary objections, Merits, reparations, and costs. Judgment of September 8, 2005. Series C No. 130, para. 105.

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25. On this last point, on numerous occasions, the Court has considered that, without infringing the principle of non-retroactivity, it can exercise its competence ratione temporis to examine those facts that constitute violations of a continuing or permanent nature; in other words, those that occurred before the date on which the Court's competence was recognized, and that persist after that date. [FN13]

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[FN13] Cf. Case of the Serrano Cruz Sisters, supra note 9, para. 65; Case of Nogueira de Carvalho et al., supra note 11, para. 45, and Vargas Areco v. Paraguay. Merits, reparations, and costs. Judgment of September 26, 2006. Series C No. 155, para. 63.

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26. For the Court to exercise its competence ratione temporis in relation to cases in which the State of Panama is the defendant, the Court observes that on May 9, 1990, Panama accepted "as binding ipso facto, the competence of the Inter-American Court of Human Rights on all matters relating to the interpretation or application of the American Convention on Human Rights," without including any reservation that could place temporal limits on this competence for matters that took place after this acceptance.

27. Consequently, the Court concludes that it has competence to rule on the alleged facts that are the grounds for the supposed violations that took place after May 9, 1990, the date on which Panama accepted the compulsory competence of the Court, as well to rule on those violations that, having commenced prior to that date, continued or persisted subsequently.

1. Competence ratione temporis regarding the alleged violations of Articles 4, 5, 7 and 13 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Heliodoro Portugal

28. Regarding the first group of alleged violations, the State based its objection on the fact that the death, alleged mistreatment and detention of Heliodoro Portugal occurred and were completed by June 1971, at the latest; "19 years before the State accepted the Court's competence as compulsory" on May 9, 1990, and "seven years before Panama ratified the American Convention" in 1978. Therefore, according to the State, these facts, as well as the alleged violations of the rights to life, humane treatment and personal liberty, would fall outside the Court's temporal competence. The State also considered that a person can only express himself when he is alive, and since Heliodoro Portugal died in June 1971, the Court does not

have temporal competence to rule on the alleged violation of his right to freedom of expression, because the retroactive application of the Convention is not permitted.

29. The Commission and the representatives affirmed that the date of Heliodoro Portugal's death is unknown, and that there is no certainty as to whether this fact falls outside the Court's temporal competence. They also indicated that, although Heliodoro Portugal was detained on May 14, 1970, his whereabouts remained unknown until August 2000, the date on which "his remains that had been found on September 22, 1999, were genetically identified; that is, more than 10 years after Panama had accepted the compulsory competence of the Court." According to the Commission and the representatives, the foregoing should be understood and analyzed in the context of the juridical figure of forced disappearance of persons, which is a continuing and multiple offense. In addition, they indicated that the Court is competent to examine the alleged failure to investigate the facts, because the Court's competence in this regard commenced after the State accepted its competence. Lastly, the representatives indicated that Heliodoro Portugal carried out political activities; that, having been disappeared, his right to freedom of expression was violated, and that the Court has competence in this regard because this alleged violation "continued at all times while he was disappeared."

30. Based on the above, the Court must decide on the exercise of its competence ratione temporis in relation to the alleged forced disappearance and extrajudicial execution of Heliodoro Portugal, who was presumably detained on May 14, 1970; that is, 20 years before the State recognized the Court's competence in 1990, and whose whereabouts were unknown until his remains were identified in August 2000.

a) Competence ratione temporis regarding the alleged extrajudicial execution

31. In its application, the Commission requested that the Court declare the State's responsibility for the extrajudicial execution of Heliodoro Portugal, who "was in the custody of State agents" from the date of his detention. The Court observes that, in the instant case, the date of the alleged victim's death is not know with any certainty and, consequently, it is not know whether his death occurred following the date on which the State accepted the Court's competence. Nevertheless, and even taking into account the possible errors in the handling of the remains and during the exhumation procedure indicated by the representatives, the Court refers to the reports of the Institute of Forensic Medicine, according to which the analysis of the remains, subsequently identified as belonging to Heliodoro Portugal, allowed it to be concluded that he died at least 20 years before they were found; [FN14] that is, at least 10 years before the State accepted the Court's competence. Consequently, the Court finds it reasonable to suppose, [FN15] based on the 20 years that have elapsed since his alleged detention in 1970, that, in any event, Heliodoro Portugal died prior to May 9, 1990.

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[FN14] Cf. forensic examination of osseous remains N/99-23-724 carried out by the Institute of Forensic Medicine on September 24, 1999 (file of appendixes to the answer to the application, fs. 5535 to 5538) and report of the forensic pathologist of the Institute of Forensic Medicine of September 4, 2001 (file of appendixes to the application, appendixes 1 and 2, appendix 31, f. 210).

[FN15] Cf. Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, paras. 157 and 188; Bámaca Velásquez v. Guatemala. Merits. Judgment of November 25, 2000. Series C No. 70, para. 173; (declaring that "the fact that 8 years and 8 months have elapsed since he was captured, without any news of him, leads the Court to presume that Bámaca Velásquez was executed") and Enzile Özdemir v. Turkey (no. 54169/00 Eur) Ct. H.R. (2008), paras. 42, 48 and 49 (declaring that "taking into account the fact that no information has come to light concerning his whereabouts for more than ten years - a fact not disputed by the Government - the Court is satisfied that Mehmet Özdemir must be presumed dead following unacknowledged detention," and Tahsin Acar v. Turkey [GC], no. 26307/95, § 226, ECHR 2004 III (similarly).
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32. Since the Court has elements to presume that the death of Heliodoro Portugal occurred before the date on which Panama accepted its competence, it finds that it is not empowered to rule on his alleged extrajudicial execution, as a violation that is independent of his right to life, particularly since this is a violation of an instantaneous nature. Therefore, the Court declares admissible the preliminary objected filed by the State on this point. Despite the foregoing, the Court finds it pertinent to emphasize that this conclusion does not imply that Mr. Portugal was not extrajudicially executed by State agents, but merely that the Court does not have competence to rule on this allegation.

b) Competence ratione temporis regarding the alleged forced disappearance

33. In this case, the Commission and the representatives also alleged that Mr. Portugal was the victim of forced disappearance and that, despite the finding and identification of his remains in 2000, the Court has Competence to examine this alleged violation owing to his continuing or permanent nature. Accordingly, the Court must analyze whether it has competence to rule on the alleged forced disappearance of Mr. Portugal.

34. In this regard, the Court finds that, contrary to extrajudicial executions, forced disappearance of persons is characterized by being a violation of a continuing or permanent nature. This means that the Court may rule on an alleged forced disappearance, even if this commenced prior to the date on which the State accepted the Court's competence provided that this violation is maintained or continues following that date (supra para. 25). Based on this assumption, the Court would have competence to rule on forced disappearance while this violation continued. In this regard, the Court observes that Article III of the Convention on Forced Disappearance establishes that a forced disappearance "shall be deemed continuing or permanent as long as the fate or whereabouts of the victim has not been determined." Similarly, the Court has indicated previously that "while the whereabouts of […] [disappeared] persons have not been determined, or their remains duly found and identified, the appropriate juridical treatment for [this] situation […] is that of forced disappearance of persons." [FN16]

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[FN16] La Cantuta v. Perú. Merits, reparations, and costs. Judgment of November 29, 2006. Series C No. 162, para. 114.
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35. In the instant case, the whereabouts and fate of Mr. Portugal became known when his remains were identified in August 2000. Hence, his alleged disappearance would have commenced with his detention on May 14, 1970, and would have been maintained or continued until 2000; that is, subsequent to May 9, 1990, the date on which Panama accepted the Court's competence. Accordingly, the Court has competence to rule on the alleged forced disappearance of Heliodoro Portugal, because it continued after May 9, 1990, and up until August 2000.

36. Consequently, it is relevant and necessary to identify the facts on which the Court may rule based on the legal arguments submitted by the representatives and the Commission. First, the Court has indicated in this case that it does not have competence to rule on Mr. Portugal's death (supra para. 32). In addition, the Court does not have competence to rule on the alleged acts of torture and ill-treatment that Mr. Portugal presumably suffered, because these acts constitute instantaneous violations that, in any event, would have occurred prior to 1990. Likewise, if Mr. Portugal's right to freedom of expression had been restricted, this would have occurred before his death; that is, prior to the date on which Panama accepted the Court's competence. Therefore, the Court does not have competence to rule on the violations that these facts allegedly supposed to the detriment of Mr. Portugal; in other words, violations of the rights embodied in Articles 4, 5 and 13, respectively, of the American Convention.

37. It is alleged that Mr. Portugal was detained in 1970 and that this fact, examined from the perspective of a forced disappearance, would have continued until August 2000, when the fate and whereabouts of the alleged victim were presumably discovered. In this regard, the Court finds that it has competence to rule on the alleged deprivation of liberty of Mr. Portugal, since this is related to his alleged forced disappearance, which continued after 1990, and until his remains were identified in 2000.

38. Based on the above, the Court also finds that it has competence to examine the State's alleged failure to comply with the obligation to investigate the alleged forced disappearance of Heliodoro Portugal as of May 9, 1990, and also to examine the way in which the State conducted the respective investigations after that date. Specifically, regarding the alleged violation of the obligations contained in the Convention on Forced Disappearance, the Court has competence to rule on the respective State actions as of March 28, 1996, the date on which this Convention entered into force for the State.

39. On these grounds, the Court partially rejects the preliminary objection filed by the State on this point.

2. Competence ratione temporis regarding the alleged violation of Article 5 of the American Convention, in relation to Article 1(1) thereof, to the detriment of the next of kin of Heliodoro Portugal

40. The State also affirmed that the reported harm to the personal integrity of the next of kin of Heliodoro Portugal is accessory to the alleged violation of the latter's personal integrity. Therefore, the State argued that the lack of temporal competence on the principal fact extended to the accessory fact.

41. On this point, the Commission and the representatives indicated that "the State was trying to reduce the [alleged] harm to the integrity of the members of the Portugal family merely to the initial moment of the disappearance, disregarding that the disappearance [presumably] had numerous effects on the Portugal family that have continued over time." They added that the alleged violation of the mental and moral integrity of the next of kin is a "direct consequence of not knowing the whereabouts of Heliodoro Portugal until August 22, 2000, and of the [alleged] lack of due diligence of the State authorities […] to conduct an effective investigation." Consequently, they argued that the Court is competent to rule in this regard.

42. The Court observes that, in its answer to the application, the State acknowledged that "[t]he Court has competence only to examine the effects of Heliodoro Portugal's forced disappearance that subsisted after May 9, 1990, the date on which […] Panama accepted the Court's competence, until August 22, 2000, the date on which the human remains buried in June 1971 in the Tocumen Barracks were identified as belonging to Mr. Portugal."

43. Based on the State's arguments, and observing the principle of the non-retroactivity of treaties, the Court considers that it is competent to rule on the facts related to the alleged violation of the right to personal integrity of the next of kin of Heliodoro Portugal that occurred after May 9, 1990. In particular, the Court is competent to examine the alleged facts relating to matters such as the presumed existence of close family ties with the alleged victim, the way in which the next of kin were involved in the search for justice, the State's response to the measures taken by the next of kin, and the uncertainty that the alleged victim's next of kin allegedly endured as a result of not knowing the whereabouts of Heliodoro Portugal.

44. Consequently, the Court rejects the lack of competence filed by Panama in relation to this point and will proceed to examine the arguments of the parties in this regard when considering the merits of the case.

3. Competence ratione temporis regarding the obligation to define the offenses of forced disappearance and torture

45. The third argument presented by the State is related to the alleged failure to comply with the obligation to define the offenses of forced disappearance of persons and torture. It indicated that this State obligation only arose as of February 28, 1996, and August 28, 1991, when Panama ratified the respective Inter-American Conventions on Forced Disappearance and Torture, 25 and 19 years respectively after the death of Mr. Portugal. It also indicated that the offense of torture has been defined under Panamanian law for more than 25 years, in Article 160 of the 1982 Penal Code, and that Article 432 of the Penal Code adopted in 2007 also defines the offense of torture.

46. On this point, the Commission and the representatives indicated that the State's obligation "to define as offenses both forced disappearance of persons and torture does not arise only from the ICFDP and the ICPPT [respectively], but from the American Convention itself," which Panama ratified on June 22, 1978. They also argued that the specific obligations that the State assumed on ratifying the ICFDP on February 28, 1996, and the ICPPT on August 28, 1991, are additional to the general obligation established in Article 2 of the American Convention. Lastly, they indicated that the offense of disappearance of persons was not defined until May 22,

2007. Based on the above, they argued that the Court has temporal competence to rule on the violations that occurred during all the years during which the State failed to comply with its obligation to adapt its domestic law.

47. The Court observes that Panama ratified the American Convention on June 22, 1978, and that, pursuant to Article 74(2) of the Convention, this instrument entered into force on July 18, 1978. Hence, as of that date, in accordance with the provisions of Article 2 thereof, the State has had the constant, permanent and continuing obligation to adapt its domestic law to the Convention. [FN17] Consequently, the Court has competence to examine whether the State adapted its domestic law to the provisions of the American Convention within a reasonable time, as of May 9, 1990, the date on which the State accepted its competence. Nevertheless, it is not for the Court to decide whether the State failed to comply with this obligation while examining this preliminary objection. This issue will be examined, if appropriate, in the corresponding chapter, since it relates to merits.

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[FN17] Cf. Castillo Petruzzi et al. v. Perú. Merits, reparations, and costs. Judgment of May 30, 1999. Series C No. 52, para. 207; Case of Salvador Chiriboga, supra note 6, para. 122, and Zambrano Vélez et al. v. Ecuador. Merits, reparations, and costs. Judgment of July 4, 2007. Series C No. 166, para. 57.

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48. In addition, the State ratified the Convention on Forced Disappearance on February 28, 1996, and the Convention against Torture on August 28, 1991. As of their entry into force for the State, the Court is also competent to examine the alleged failure to comply with the obligation to define the offenses of forced disappearance and torture, respectively, in light of the standards established by those inter-American instruments.

49. Consequently, the Court rejects the objection on competence filed by Panama in relation to this point, and will proceed to examine the arguments of the parties when considering the merits of the case.

4) Competence ratione temporis regarding the obligation to investigate and punish torture under the ICPPT

50. Lastly, the State argued that it is not possible to claim retroactively the failure to comply with the obligations established in Articles 1, 6 and 8 of the Convention against Torture, because torture is an instantaneous offense and the alleged torture must have occurred necessarily before June 1971, the date on which the State alleges that Mr. Portugal was killed and buried. The State ratified the Convention against Torture on August 28, 1991, and it entered into force for the State, pursuant to Article 22 thereof, on September 28, 1991.

51. On this point, the Commission and the representatives argued that the obligation to investigate the alleged torture arose for the State as of its ratification of the American Convention, on June 22, 1978, and that the Court has temporal competence to rule on the failure to comply with the obligations established in Articles 1, 6 and 8 of the Convention against

Torture, owing to "the failure to investigate and punish torture after August 28, 1991, the date on which Panama ratified [the said Convention]."

52. The Court has indicated on other occasions [FN18] that it is competent to examine alleged facts that violate Articles 1, 6, and 8 of the Convention against Torture, which occurred after the date of entry into force of that Convention. Nevertheless, in the instant case, compliance with the obligation to investigate and punish alleged torture must be evaluated in the context of the obligation corresponding to the offense of forced disappearance, defined as a continuing and multiple offense (supra para. 29) The Court has also considered that this competence extends to those State acts or omissions relating to the investigation of possible torture, even if this was perpetrated before the Convention against Torture entered into force for the said State, provided that this obligation to investigate remains pending. [FN19] Although there is a dispute between the parties regarding the moment as of which this obligation was pending, for the purpose of examining this preliminary objection, it is sufficient for the Court to find that it is competent to examine possible facts violating Articles 1, 6 and 8 of the Convention against Torture that occurred after September 28, 1991, the date on which the Convention entered into force for the State.

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[FN18] Cf. The "White Van" (Paniagua Morales et al.) v. Guatemala. Merits. Judgment of March 8, 1998. Series C No. 37, paras. 133 to 136; Cantoral Huamaní and García Santa Cruz v. Perú. Preliminary objection, merits, reparations, and costs. Judgment of July 10, 2007. Series C No. 167, para. 18; and Tibi v. Ecuador. Preliminary objections, Merits, reparations, and costs. Judgment of September 7, 2004. Series C No. 114, para. 62.
[FN19] Cf. Case of the "White Van" (Paniagua Morales et al.), supra note 18, paras. 133 to 136; Case of Cantoral Huamaní and García Santa Cruz, supra note 18, para. 18, and Case of Tibi, supra note 18, para. 62.

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53. Consequently, the Court rejects the objection on competence filed by Panama with regard to this point and will proceed to examine the arguments of the parties in relation to the supposed violation of Articles 1, 6 and 8 of the Convention against Torture when considering the merits of the case.

C) Lack of competence of the Court ratione materiae

54. The State affirmed that the Court does not have competence ratione materiae "to examine the alleged failure to comply with the obligation to definethe offense of forced disappearance," because on May 22, 2007, a new Penal Code was adopted, and Article 432 thereof defines this offense and punishes it with 20 to 30 years of imprisonment, the most severe punishment included in the new Code. It also argued that the State's obligation to define the offense of forced disappearance of persons cannot be required in the context of a contentious case, because the purpose of such a case cannot be to revise domestic laws in abstract, but must examine only human rights violations perpetrated against specific persons. Similarly, it added that the said obligation can be established by the Court only in exercise of its advisory function.

55. The Commission argued that the State failed to comply with the obligation to define the offense of forced disappearance for more than ten years, and that the adoption of the definition of this offense in Panama occurred after the case had been submitted to the Court. According to the Court's case law, the State's international responsibility arises at the time of the international unlawful act that is attributed to it. In addition, the definition of the conduct by Panama "was not adapted to the standards established in the Convention on the Forced Disappearance of Persons for the definition of this offense and the appropriate punishment of those responsible, particularly because the unlawful nature of the conduct is restricted to generalized and systematic situations." In this regard, the Commission indicated that, "the Court has […] competence ratione materiae to determine the compatibility of the definition of the offense in question with Article III of the Convention on Forced Disappearance of Persons.

56. The representatives indicated that the absence of this type of offense in Panamanian law has meant that the criminal proceedings underway for the forced disappearance of Heliodoro Portugal have been conducted under the offense of homicide. "The definition of the offense of homicide disregards the complex nature of forced disappearance, which involves numerous offenses, and leaves some of the conducts that comprise it unpunished." They also underscored that the failure to comply with the obligation "persists today, because, even though the offense has been included in the recently approved Penal Code, this is not yet in force."

57. On several occasions the Court has declared itself competent to examine, under its contentious competence and in light of Article 2 of the American Convention, the alleged failure to comply with both the positive obligation of the States to adopt the necessary legislative measures to guarantee the exercise of the rights embodied in it, and also the obligations of the State not to enact laws that are contrary to the Convention. [FN20] In the instant case, the arguments in this regard refer to both State obligations.

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[FN20] Cf. Case of Castillo Petruzzi et al., supra note 17, para. 207; Case of Salvador Chiriboga, supra note 6, para. 122, and Boyce et al. v. Barbados. Preliminary objection, merits, reparations, and costs. Judgment of November 20, 2007. Series C No. 169, para. 69.

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58. Even though the State defined the offense of forced disappearance in its new Penal Code adopted on May 22, 2007, the Court has competence to examine whether the failure to define it prior to that date may have resulted in an investigation under an inappropriate type of offense and whether the definition is adapted to the provisions of Article III of the Convention on Forced Disappearance. In addition, the Court observes that "the possibility of subsequent reparation under domestic law does not prevent the Commission or the Court from hearing a case […]." [FN21]

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[FN21] Cf. The Gómez Paquiyauri Brothers v. Perú. Merits, reparations, and costs. Judgment of July 8, 2004. Series C No. 110, para. 75.

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59. Since the arguments on this point refer to a possible failure by the State to comply with its obligations under the American Convention and the Convention on Forced Disappearance and, since the State has ratified the two conventions, both of which, in their Articles 33 and XIII, respectively, recognize the competence of the Inter-American Court to examine whether they have been complied with, the Court considers that it has competence ratione materiae to rule on these arguments.

60. In addition, on repeated occasions the Court has declared that it can examine, under its contentious competence and not only under its advisory competence, the compatibility of domestic law with the American Convention. [FN22]

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[FN22] Cf. Suárez Rosero v. Ecuador. Merits. Judgment of November 12, 1997. Series C No. 35, paras. 97 to 99; Albán Cornejo et al. v. Ecuador. Merits, reparations, and costs. Judgment of November 22, 2007. Series C No. 171, and Case of Boyce et al., supra note 20, para. 72 and 73. See also International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, paras. 40 to 49.

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61. Based on the foregoing (supra para. 48), the Court considers that, as of May 9, 1990, it has competence to rule on the alleged failure to comply with the obligation to adapt Panamanian domestic law to the American Convention, and also to examine the alleged incompatibility between the definition of the offense in the new 2007 Penal Code and the provisions of the Convention on Forced Disappearance, as of March 28, 1996, the date on which this instrument entered into force for the State. [FN23]

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[FN23] Cf. Gómez Palomino v. Perú. Merits, reparations, and costs. Judgment of November 22, 2005. Series C No. 136, paras. 90 to 110, and Goiburú et al. v. Paraguay. Merits, reparations, and costs. Judgment of September 22, 2006. Series C No. 153, paras. 91 and 92.

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62. Consequently, the Court rejects this aspect of the preliminary objection filed by the State and considers that it has competence to examine the arguments related to the merits of this case, as indicated in this chapter.

## IV. COMPETENCE

63. The Court has competence to hear this case in the terms of Article 62(3) of the Convention. The State of Panama ratified the American Convention on June 22, 1978, and it entered into force for the State on July 18, 1978. On May 9, 1990, the State recognized "as binding, ipso facto, the competence of the Inter-American Court of Human Rights on all matters relating to the interpretation or application of the American Convention […]." The State also ratified the Inter-American Convention to Prevent and Punish Torture on August 28, 1991, and

the Inter-American Convention on Forced Disappearance of Persons on February 28, 1996. They entered into force for the State on September 28, 1991, and March 28, 1996, respectively.

## V. EVIDENCE

64. Based on the provisions of Articles 44 and 45 of the Rules of Procedure, and on the Court's case law regarding evidence and its assessment, [FN24] the Court will proceed to examine and assess the documentary probative elements forwarded by the Commission, the representatives and the State on different procedural occasions or as helpful evidence that was requested by the President and the Court, as well as the sworn testimonial statements and expert opinions rendered before notary public (affidavits) or at the public hearing before the Court. In this regard, the Court will observe the principles of sound judicial discretion within the corresponding legal framework. [FN25]

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[FN24] Cf. Case of the "White Van" (Paniagua Morales et al.), supra note 18, para. 50; Yvon Neptune v. Haiti. Merits, reparations, and costs. Judgment of May 6, 2008. Series C No. 180, para. 22, and Case of Salvador Chiriboga, supra note 6, para. 18.
[FN25] Cf. Case of the "White Van" (Paniagua Morales et al.), supra note 18, para. 76; Case of the Saramaka People, supra note 6, para. 63, and Case of Albán Cornejo et al., supra note 22, para. 26.

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### A) DOCUMENTARY, TESTIMONIAL AND EXPERT EVIDENCE

65. At the request of the Court and of the President, [FN26] the Court received the statements and expert opinions rendered before notary public (affidavits) of the following witnesses and expert witnesses: [FN27]

(a) Graciela De León Rodríguez, witness proposed by the Commission and the representatives, was the alleged victim's companion. She testified on the different measures that she and her family took to discover the truth of what happened to Heliodoro Portugal; the State's response in this regard; the alleged obstacles faced by the family in their search for justice in the case and in the finding and identification of Heliodoro Portugal's remains, as well as the consequences on her personal life and on that of her family of the alleged disappearance of Heliodoro Portugal and the presumed lack of justice in that regard;
(b) Franklin Portugal, witness proposed by the Commission and the representatives, is the alleged victim's son and his testimony referred to the consequences on his personal life and on that of his family of the alleged disappearance of Heliodoro Portugal and the presumed lack of justice in that regard, as well as on the expenses they had to incur while seeking justice in this case;
(c) Rafael Pérez Jaramillo, witness proposed by the Commission and the representatives, is the Director of Institutional Responsibility and Human Rights of the Panamanian Prosecutor General's Office (Procuraduría General). He testified on his participation as Coordinator of the Final Report of the Panama Truth Commission, the investigations conducted by this commission

in relation to the case of Heliodoro Portugal, and also the general context of alleged human rights violations during the military regime in Panama that was verified by the Truth Commission;

(d) Román Mollah Portugal, witness proposed by the representatives, and the alleged victim's grandson, testified on the alleged impact of the search for justice on the members of the Portugal family;

(e) Patria Kriss Mollah Portugal, witness proposed by the representatives, and the alleged victim's granddaughter, testified on the alleged impact of the search for justice on the members of the Portugal family;

(f) Jacqueline Riquelme, witness proposed by the representatives, is a psychologist and testified on the presumed psychological effects on the members of Heliodoro Portugal's family following his alleged disappearance, and on the impact of the alleged lack of an investigation in this case;

(g) Roberto Arosemena, witness proposed by the representatives, is a lawyer and testified on the general context of the alleged human rights violations that occurred during the military regime in Panama and how the disappearance of Heliodoro Portugal fitted into this context;

(h) Janeth Rovetto, witness proposed by the representatives, is a lawyer and testified about her work as Special Investigating Officer for cases of forced disappearance; the status of the investigations into the murders and forced disappearances documented by the Truth Commission, particularly the case of Mr. Portugal, and the alleged obstacles that she met while investigating the facts, together with the results of her investigations;

(i) Daniel Zúñiga Vargas, witness proposed by the representatives, a consumer adviser in the Bureau for Consumer Protection and Defense of Competition, testified on the circumstances of the alleged detention that he shared with Heliodoro Portugal and the treatment that both he and Heliodoro Portugal received while they were detained, as well as on the alleged duration of this detention;

(j) Edgardo Sandoval Ramsey, witness proposed by the State, is the Head of the Human Rights Department of the Legal Affairs and Treaties Directorate of the Ministry of Foreign Affairs. His testimony referred to the measures adopted by the State to comply with the recommendations made by the Inter-American Commission in its report under Article 50 of the Convention in the instant case and to respond to the needs of Heliodoro Portugal's next of kin;

(k) Gerardo Victoria Mirones, witness proposed by the State, is the Medical Director of the Santo Tomás Hospital and he testified on the measures taken by the Panamanian health care system to provide specialized medical care to the next of kin of Heliodoro Portugal;

(l) Rolando Alberto Rodríguez Chong, witness proposed by the State, is a lawyer and worked for the Attorney General's Office from 1984 to 2005. He testified on the actions of the Attorney General's Office and his own efforts in the criminal proceeding relating to the alleged disappearance and death of Heliodoro Portugal;

(m) María Victoria González de Espinioza, witness proposed by the State, is the Director of the Judiciary's Publications and Editorial Department and testified on the actions of the courts in relation to the proceeding opened in the Heliodoro Portugal case;

(n) Carlos Manuel Lee Vásquez, expert witness proposed by the representatives, is a defense lawyer and was a consultant to the Panama Truth Commission. He gave an opinion on the alleged general context of human rights violations during the military regime in Panama, the actions taken by the administration of justice during that period and to date in dealing with these cases, and the actions taken by the administration of justice in the specific case of Heliodoro Portugal;

(o) Freddy Armando Peccerelli, expert witness proposed by the representatives, is the Executive Director of the Forensic Anthropology Foundation of Guatemala. He gave an opinion on the scientific technology and tests used to examine and identify the osseous remains, as well as his opinion on the procedure used in the recovery of the remains found in the Las Pumas Barracks in Tocumen, and

(p) Carlos Enrique Muñoz Pope, expert witness proposed by the State, is a lawyer and full professor of criminal law of the Faculty of Law and Political Science of the Universidad de Panama. He gave an opinion on the remedies available in the Panamanian competence under criminal procedure; the development of the preliminary proceedings and trial in criminal cases; the impact of the fundamental guarantees of presumption of innocence and due process in the investigation and prosecution of offenses; the development of the case opened in Panama on the alleged disappearance and death of Heliodoro Portugal; the mechanism for appealing before the Third Chamber of the Supreme Court of Justice of Panama for compensation for damage resulting from de facto acts carried out by State officials, and the right to property in Panama.

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[FN26] Order issued by the Inter-American Court, supra note 3 and Order issued by the President of the Inter-American Court, supra note 4.

[FN27] In their communications of January 9, 2008, the Inter-American Commission and the representatives informed the Court that they desisted from offering the testimony of Terry Melton.

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66. During the public hearing in this case, the Court received the testimony of the following witnesses and expert witnesses: [FN28]

(a) Patria Portugal, witness proposed by the Inter-American Commission and the representatives, is Heliodoro Portugal's daughter, and she testified on the measures taken by her family to discover the truth about what happened to her father; the actions of the judicial authorities and the alleged obstacles that the family faced in their search for justice; the discovery and identification of the remains of Heliodoro Portugal; the consequences of Heliodoro Portugal's alleged disappearance and the alleged lack of justice on her personal life and that of her family; the State's attitude towards the recommendations of the Inter-American Commission and the presumed consequences and impact that the alleged disappearance had on the Portugal family;

(b) José Antonio Sossa, witness proposed by the State of Panama, is a former Prosecutor General (Procurador General) and testified on the actions of the Attorney General's Office in the criminal case relating to the alleged disappearance and death of Heliodoro Portugal over the period 1994-2004, and

(c) Ana Matilde Gómez Ruiloba, witness proposed by the representatives and by the State, is the current Prosecutor General and testified on the investigations carried out by the Legal Department of the Panama Truth Commission in relation to the cases of forced disappearance and execution; the creation of the Special Preliminary Investigation Unit to investigate cases of forced disappearance and the current status of the investigations into the different cases of forced disappearance, including the case of Heliodoro Portugal; the judicial and legal obstacles for the investigation and punishment of forced disappearances in Panama and the legal reforms and

initiatives concerning the definition of this act as an offense; the actions of the Attorney General's Office in the criminal case relating to the disappearance and death of Heliodoro Portugal, and the response that the State has provided to the needs of Graciela De León Rodríguez, Patria Portugal and Franklin Portugal.

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[FN28] In its communication of January 24, 2008, the State informed the Court that it desisted from the offer of the testimony of Heraclio Sanjur.

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B) ASSESSMENT OF THE EVIDENCE

67. In this case as in others, [FN29] the Court accepts the probative value of those documents and statements forwarded by the parties at the appropriate procedural moment, in the terms of Article 44 of the Rules of Procedure, that were not contested or opposed and the authenticity of which was not questioned.

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[FN29] Cf. Loayza Tamayo v. Perú. Reparations and costs. Judgment of November 27, 1998. Series C No. 42, para. 53; Case of Yvon Neptune, supra note 24, para. 29, and Case of Salvador Chiriboga, supra note 6, para. 21.

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68. Regarding the testimonies and opinions given by the witnesses and the expert witnesses at the public hearing and by sworn statements (affidavits), the Court considers them pertinent provided they correspond to the purpose defined by the Court or the President in the Order requiring them (supra para. 65), taking into account the observations submitted by the parties. The Court considers that the testimony given by the alleged victims must be assessed together with all the evidence in the proceedings and not in isolation, because they have a direct interest in the case. [FN30]

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[FN30] Cf. Loayza Tamayo v. Perú. Merits. Judgment of September 17, 1997. Series C No. 33, para. 43; Case of Yvon Neptune, supra note 24, para. 33, and Case of Salvador Chiriboga, supra note 6, para. 23.

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69. The Commission and the representatives contested the sworn written statement of María Victoria González, alleging that her testimony did not refer to the purpose indicated by the Court's Order (supra para. 65). In this regard, the Court takes note of the observations presented by the Commission and the representatives, and finds that the said testimony may help the Court determine the facts of this case, so that it will be assessed according to the rules of sound judicial discretion and the body of evidence in the proceedings.

70. The Commission and the representatives challenged the written expert opinion of Carlos Enrique Muñoz Pope. The Commission indicated that "the information presented only

corresponds to part of the purpose"; and also added that "the statement is in the form of an allegation, which is unacceptable given the objectivity and impartiality that should characterize an expert witness." The representatives indicated that the said opinion "is intended to justify the actions of the investigative and judicial authorities who have acted in the domestic proceedings" and that "the expert opinion is full of inexactitudes that are not supported by the judicial case file." The Court, however, accepts this evidence to the extent that it is related to the purpose established in the Order of the Court (supra para. 65), taking into account the observations of the Commission and the representatives, and it will be assessed according to the rules of sound judicial discretion and the body of evidence in the proceedings.

71. The representatives challenged the sworn written statement of Rolando Alberto Rodríguez, stating that "he could have an interest in the result of these proceedings," because he is Manuel Antonio Noriega's lawyer, and his name appears in the judicial proceedings relating to Heliodoro Portugal's disappearance as the person who issued the order for his detention. Nevertheless, the Court admits this evidence, to the extent that it relates to the purpose established in the Order of the Court (supra para. 65), bearing in mind the observations of the representatives, and it will be assessed in accordance with the rules of sound judicial discretion and the body of evidence in the proceedings.

72. Regarding the sworn written statements of Gerardo Victoria and Edgardo Sandoval, the representatives indicated that, in the case of the former, his testimony "is only partially true," because the medical care provided to the Portugal family "was not adapted to their requirements." In relation to Mr. Sandoval's testimony, they indicated that the measures taken by the State to comply with the Inter-American Commission's recommendations in its Report 103/05 "were not only belated, but also ineffectual." In this regard, the Court takes into account the observations submitted by the representatives, and considers that these statements could help the Court determine the facts of the instant case, to the extent that they are in keeping with the purpose established in the Order of the Court (supra para. 65), and it will assess them in accordance with the rules of sound judicial discretion and all the evidence in the proceedings.

73. The State challenged the sworn written statement of Roberto Arosemena because "it did not meet the minimal requirements for admission as testimonial evidence"; it argued that, instead of testimony, Mr. Arosemena had presented an "argument full of accusations that correspond to the personal ideology of the deponent." However, the Court admits this evidence, to the extent that it relates to the purpose established in the Order of the President (supra para. 65), bearing in mind the observations of the State, and it will be assessed in accordance with the rules of sound judicial discretion and in light of all the evidence in the proceedings.

74. The State challenged the sworn written statement of Jacqueline Riquelme, considering it inadmissible, because it was time-barred. In this regard, the Court observes that, on January 9, 2008, the date on which the respective time limit expired, the representatives presented an electronic version of Ms. Riquelme's testimony and forwarded the original version on January 11, 2008, in keeping with the time limit established in Article 26(1) of the Rules of Procedure. In addition, the State alleged that this testimony "[d]oes not constitute an assessment of the individual psychological conditions of Graciela De León, Patria Portugal, Franklin Portugal and Román Mollah" and that "[its] conclusions have not been validated." In this regard, the Court

takes note of the observations of the State, and considers that the said testimony can help the Court determine the facts of this case, to the extent that it is in keeping with the purpose determined in the Order of the Court (supra para. 65), and it will assess it in accordance with the rules of sound judicial discretion and the body of evidence in the proceedings.

75. The State contested the written expert opinion of Freddy Armando Peccerelli, arguing that it "has fundamental flaws that negate all of its probative value." According to the State, "[i]t is an eminently theoretical and abstract document […] based on incomplete information." In addition, it indicated that the expert witness "attempts […] to emit an opinion about what should be done in Panama from a Guatemalan perspective." Nevertheless, the Court admits this evidence, to the extent that it relates to the purpose established in the Order of the Court (supra para. 65), bearing in mind the observations of the State, and it will be assessed in accordance with the rules of sound judicial discretion and the body of evidence in the proceedings.

76. The State challenged the written expert opinion of Carlos Manuel Lee Vásquez, because "it was not suitable to be considered expert evidence." The Court, however, admits this evidence to the extent that it complies with the purpose established in the Order of the Court (supra para. 65), bearing in mind the observations of the State, and it will be assessed in accordance with the rules of sound judicial discretion and the body of evidence in the proceedings.

77. Furthermore, on January 8, 2008, the State presented a "petition and authenticated copy of Official Record No. 233 of November 30, 2007, issued by the Second Superior Court of Justice, as supervening evidence. The Court considers that this document, which has not been contested or its authenticity questioned, is useful and relevant; the Court will therefore incorporate it into the body of evidence, pursuant to Article 44(3) of the Rules of Procedure.

78. The representatives presented additional documentary evidence, together with their final written arguments. The Court finds that these documents, which have not been contested or their authenticity questioned, are useful and relevant, because they relate to the expenses corresponding to the processing and authentication of the sworn statements that were submitted. Consequently, the Court incorporates them into the body of evidence in the proceedings, pursuant to Article 45(1) of the Rules of Procedure.

79. With regard to the newspaper Articles submitted by the parties, the Court has considered that they can be assessed when they refer to well-known public facts, or statements by State officials that have not been modified, or when they corroborate aspects related to the case. [FN31]

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[FN31] Cf. Case of the "White Van" (Paniagua Morales et al.), supra note 18, para. 75; Case of Yvon Neptune, supra note 24, para. 30, and Case of Salvador Chiriboga, supra note 6, para. 29.

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80. The Court also adds to the body of evidence, in accordance with Article 45(2) of the Rules of Procedure, and because it considers that it is useful for deciding the case, the documentation requested by the Court as useful evidence (supra para. 78).

81. Having examined the probative elements that appear in the case file, the Court will proceed to analyze the alleged violations of the American Convention according to the facts that the Court considers have been proved, together with the arguments of the parties.

VI. VIOLATION OF ARTICLE 7 [FN32] (RIGHT TO PERSONAL LIBERTY) OF THE AMERICAN CONVENTION, IN RELATION TO ARTICLE 1(1) THEREOF [FN33], TOGETHER WITH ARTICLE I [FN34] OF THE INTER- AMERICAN CONVENTION ON FORCED DISAPPEARANCE OF PERSONS, IN RELATION TO ARTICLE II THEREOF [FN35]

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[FN32] In this regard, Article 7 establishes that:

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

[FN33] In this regard, Article 1(1) of the Convention stipulates:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. […]

[FN34] Article I of the Convention on Forced Disappearance establishes:

The States Parties to this Convention undertake:

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

[FN35] Article II of the Convention against Torture establishes that:

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

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82. Before presenting the arguments of the parties relating to the alleged forced disappearance of Heliodoro Portugal which, according to the Commission and the representatives, constitutes a violation of Articles 4, 5 and 7 of the American Convention, the

Court considers it pertinent to summarize the facts in order to establish whether they resulted in the State's international responsibility. To make the analysis of this case more comprehensible, the facts will be divided into the following time periods: (i) from 1970 to 1989; (ii) from 1990 to 1999, and (iii) from 1999 to the present.

83. As indicated in the chapter on preliminary objections (supra para. 27), the Court reiterates that it has competence over those facts that took place after May 9, 1990, or that constitute continuing violations that began before this date and persisted thereafter. Notwithstanding the above, the Court will refer to other facts that occurred in the period from 1970 to 1989 with the sole purpose of providing a context for the examination of the alleged violations. To this end, the Court will refer to the contents of the Final Report of the Panama Truth Commission of Panama of April 18, 2002, [FN36] and also to decisions of the national courts that have ruled on the facts denounced in this case, and to the evidence that appears in the case file.

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[FN36] This Commission was created by Executive Decree No. 2 of January 18, 2001, with the purpose of "contributing to clarify the truth about the violations of fundamental human rights committed […] during the military regime that governed the Republic of Panama after 1968." The Commission was composed of commissioners Alberto Almanza (President), Juan Antonio Tejada Mora, Osvaldo Velásquez, Bishop Julio Murray, and Fernando Berguido. Executive Decree No. 2 of January 18, 2001 (file of appendixes to the brief with pleas and evidence, Volume I, fs. 4264 to 4268), and Final Report of the Panama Truth Commission of April 18, 2002 (file of appendixes to the brief with pleas and motions, Volume I, fs. 4271 to 4460).

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a) Period from 1970 to 1989

84. According to the Panama Truth Commission, [FN37] and the abovementioned national courts, [FN38] on October 11, 1968, a group of officers of the Panamanian National Guard carried out a coup d'état against the democratically elected President, who had taken office a few days previously. Following the 1968 coup d'état, the National Guard high command suspended individual guarantees, dissolved the National Assembly and appointed a Provisional Governing Junta presided by the military. As a result of the coup d'état, the suspension of several Articles of the Constitution was decreed, the media were censured, public order on the street was controlled, meetings were prohibited, freedom of movement was limited, and political parties were suppressed, a curfew was imposed, property was raided, and various arrests and detentions were carried out. [FN39] From that time and until December 20, 1989, when the United States of America invaded Panama, the country was governed by various military leaders and by civilian presidents.

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[FN37] The Court considers that the creation of a Truth Commission, according to the objective, procedure, structure and purpose of its mandate, can contribute to constructing and preserving the historical memory, clarifying the facts, and determining institutional, social and political responsibilities during specific historical periods of a society. The historical truths obtained by means of this mechanism should not be understood as a substitute for the State's obligation to

ensure the judicial determination of individual or State responsibilities by the corresponding jurisdictional means, or the determination of international responsibility that corresponds to this Court. These are determinations of the truth that are complementary, because they all have their own meaning and scope, as well as specific possibilities and constraints, which depend on the context in which they arise and on the specific cases and circumstances they examine. Indeed, the Court has accorded special value to the reports of the truth or historical clarification commissions, as relevant evidence in the determination of the facts and of a State's international responsibility in various cases submitted to its jurisdiction. Myrna Mack Chang v. Guatemala. Merits, reparations, and costs. Judgment of November 25, 2003. Series C No. 101, paras. 131 and 134; Case of Zambrano Vélez et al., supra note 17, para. 128, and Case of La Cantuta, supra note 16, para. 224.
[FN38] Cf. Judgment of the Second Criminal Chamber of the Supreme Court of Justice of March 2, 2004 (file of appendixes to the application, appendixes 1 and 2, appendix 35, fs. 287 to 297); and Decision No. 167 issued by the Second Superior Court of Justice of June 13, 2003 (file of appendixes to the application, appendixes 1 and 2, appendix 33, fs. 237 to 255).
[FN39] Cf. Final Report of the Panama Truth Commission, supra note 36, f. 4281.
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85. The report of the Panama Truth Commission indicates that it was able to document at least 40 cases of disappeared persons, who had been "arrested by [State] agents operating under the protection of orders issued by their superiors, deprived of their liberty, and most of them beaten and tortured before being executed." [FN40] During this period, the Truth Commission also documented the murder of 70 individuals by State agents. As the Truth Commission stated, "in both cases, the acts occurred without the intervention of any judicial authority, revealing criminal behavior by those who were called on to protect the safety and integrity [of the people]." [FN41]

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[FN40] Final Report of the Panama Truth Commission, supra note 36, p. 9, f. 4279.
[FN41] Final Report of the Panama Truth Commission, supra note 36, p. 9, f. 4279.
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86. The Truth Commission also indicated that the reports received demonstrate that most of the deaths and disappearances took place during the first three years (1968-1971) of the military dictatorship, [FN42] at the time Heliodoro Portugal was detained.
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[FN42] Cf. Final Report of the Panama Truth Commission, supra note 36, p. 2, f. 4366.
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87. It is an undisputed fact that Mr. Portugal was born in the District of Calobre, Veraguas Province, Republic of Panama, and that, at the time of his detention, he was 36 years of age; he was a typographer, and lived on a permanent basis with Graciela De León Rodríguez, with whom he had two children, Patria and Franklin Portugal. Furthermore, Mr. Portugal had been a student leader and, subsequently, a supporter and promoter of the "Movimiento de Acción Revolucionaria" [Revolutionary Action Movement] led by Floyd Britton, who opposed the military regime.

88. The Truth Commission determined that the arrest of Heliodoro Portugal occurred on May 14, 1970, while he was "in the Coca-Cola Café situated in the Santa Ana Park, when a taxi, a red van, drew up in front of the Café. Two men dressed as civilians got out; they arrested him, forced him to get into the car […] and took him away]." [FN43]

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[FN43] Final Report of the Panama Truth Commission, supra note 36, p. 101, f. 4279.

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89. According to the case file, when Graciela De León, Mr. Portugal's companion, realized that he had been detained, she tried unsuccessfully to find him. [FN44] According to the alleged victim's next of kin, approximately one month after the detention, "a police agent came to the house and told them that he had been sent by the victim to tell them not to worry, that he was in Tocumen and would soon be released." [FN45] The Truth Commission's report states that, in December 1999, a witness confided to a journalist that he had been imprisoned with Heliodoro Portugal in a house whose address he was unaware of, but he thought that it was near the "Casa de Miraflores," which the Truth Commission considered to be one of the clandestine interrogation and torture centers during the initial years of the dictatorship. [FN46] The witness related that they held a man prisoner in the room next to the one in which he was detained and, during the interrogations, he heard that the man's name was Heliodoro Portugal; they asked the latter whether he knew Floyd Britton. [FN47] The witness also stated that, from Miraflores, they "were taken blindfolded to the Tocumen Barracks, to a meeting room, around October 9 or 10, 1970. The following day, he saw Heliodoro Portugal, who asked that his family be contacted. The witness was transferred to the Chorrera Prison and heard nothing more about the alleged victim." [FN48]

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[FN44] Testimony of Graciela De León of June 21, 1990, before the Third Superior Prosecutor's Office of the First Judicial District of Panama (file of appendixes to the application, appendix 3 f. 54). Testimony given at the public hearing held on January 29, 2008, at the seat of the Inter-American Court of Human Rights by the witness Patria Portugal.
[FN45] Final Report of the Panama Truth Commission, supra note 36, p. 101, f. 4279.
[FN46] Cf. Final Report of the Panama Truth Commission, supra note 36, pp. 48-53, fs. 4315 to 4319.
[FN47] Cf. Final Report of the Panama Truth Commission, supra note 36, p. 101, f. 4366.
[FN48] Cf. Final Report of the Panama Truth Commission, supra note 36, p. 101, f. 4366.

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90. Subsequently, in 1977, the Inter-American Commission carried out a visit in loco to Panama and asked the State whether it had any information on the whereabouts of several disappeared persons, including Mr. Portugal. According to the Commission's report on this visit, on that occasion, the State identified Mr. Portugal as a "well-know member of the Panamanian Communist Party," and indicated that "he was not under investigation, that he did not have a criminal record, and that [it] was unaware of his whereabouts." [FN49]

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[FN49] Cf. IACHR, Report on the situation of human rights in Panama, of June 22, 1978. OEA/Ser.L/V/II.44 doc. 38, rev 1, Chapter II: Right to life, liberty and personal safety.

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91. According to her testimony before the Court, [FN50] in 1987 and 1988, Patria Portugal, Heliodoro Portugal's daughter, went to the offices of the Panamanian National Human Rights Committee to submit a claim reporting the disappearance of her father.

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[FN50] Cf. testimony given by Patria Portugal before the Inter-American Court, supra note 44.

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92. Regarding this first period from 1968 to 1972, it is worth noting that, as the Supreme Court of Justice of Panama has acknowledged, "at the date of the forced disappearance of Heliodoro Portugal the country was governed by a regime that prevented free access to justice." [FN51] Furthermore, in a statement made during the public hearing before the Court, the Prosecutor General, Ana Matilde Gómez, stated that during this period "it was evident that there was no access to justice, because the population was afraid to have recourse to the courts and the prosecutors' offices to testify." [FN52]

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[FN51] Judgment of the Second Criminal Chamber of the Supreme Court of Justice of March 2, 2004, supra note 38, f. 295.

[FN52] Testimony given during the public hearing held on January 29, 2008, at the seat of the Inter-American Court of Human Rights by the current Prosecutor General, Ana Matilde Gómez.

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b) Period from 1990 to 1999

93. When Panama returned to a democratic regime, the State accepted the Inter-American Court's competence as binding on May 9, 1990.

94. On May 10, 1990, Patria Portugal filed a complaint before the Office of the First Superior Prosecutor of the First Judicial District of Panama indicating that on May 14, 1970, her father had been detained and disappeared, and that it had not been possible to file a complaint before the Attorney General's Office at the time, owing to the reigning political situation. [FN53]

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[FN53] Cf. Complaint filed by Patria Portugal before the Office of the First Superior Prosecutor of the First Judicial District of Panama on May 10, 1990 (file of appendixes to the application, appendixes 1 and 2, appendix 1, fs. 48 and 49), and testimony given by Patria Portugal before the Inter-American Court, supra note 44.

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c) Period from 1999 to the present

95. On September 21, 1999, the Attorney General's Office issued a resolution ordering excavations to be conducted in the former "Los Pumas" Barracks in Tocumen, as a result of information received from the Metropolitan Archbishop of Panama City to the effect that he had been informed that the mortal remains presumably belonging to the priest, Héctor Gallegos, who had allegedly disappeared 20 years previously, were to be found there. [FN54] As a result of these excavations, human remains were found, [FN55] and submitted to DNA testing, which, on October 27, 1999, revealed that the remains did not belong to the priest, Héctor Gallegos. [FN56] Owing to this negative result and, as a result of a private initiative, the remains found were submitted to additional DNA testing, using samples from the next of kin of Heliodoro Portugal and the next of kin of other disappeared persons. In the August 22, 2000, report on the genetic testing conducted by Reliagene Technologies and Armed Forces DNA Identification Laboratories (AFDIL), it was determined that the remains found in the former "Los Pumas" Barracks belonged to Heliodoro Portugal, and the Prosecutor General was informed of this on August 22, 2000. [FN57]

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[FN54] Cf. transcript of the record of the exhumation of the corpse in the "Los Pumas" Barracks, Tocumen of September 22, 1999 (file of appendixes to the application, appendixes 1 and 2, appendix 22, fs. 151 and 152).
[FN55] Transcript of the record of the inspection at the "Los Pumas" Barracks, Tocumen, of September 22, 1999 (file of appendixes to the application, appendixes 1 and 2, appendix 21, fs. 148 and 149); and transcript of the record of the exhumation procedure, supra note 54.
[FN56] Cf. Forensic pathology report of the Institute of Forensic Medicine, supra note 14.
[FN57] Results of the DNA analysis carried out by Reliagene Technologies on August 22, 2000 (file of appendixes to the brief with pleas and evidence, Volume II, fs. 4842 to 4855).

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96. Furthermore, according to the forensic examination carried out on the osseous remains of Heliodoro Portugal on September 24, 1999, there were signs that he had possibly been tortured and that the physical injuries he suffered were such that they caused his death. [FN58]

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[FN58] Cf. Forensic medicine examination of the osseous remains by the Institute of Forensic Medicine, supra note 14.

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97. On September 4, 2001, the Third Prosecutor's Office announced, in a press release, that, as a result of the tests carried out by private initiative in the Reliagene Technologies Laboratory, which indicated that the remains found in the "Los Pumas" Barracks in Tocumen belonged to Heliodoro Portugal, an official DNA test had been ordered and would be carried out by Fairfax Identity Laboratories (FIL); the results of these tests indicated that the remains delivered to the Portugal family did not belong to Heliodoro Portugal. [FN59] Owing to the contradiction between the first test carried out by private initiative and the second by official initiative, the opinion was sought of a third expert in DNA testing, Dr. Terry Melton, of the Mitotyping Technologies Laboratory. This forensic anthropologist assessed both tests and concluded, in a

report of October 30, 2001, that the first test carried out by AFDIl was "of a high quality and did not show any evidence of contamination" while, in the case of the second test, carried out by FIL, there was evidence of contamination. [FN60] Accordingly, it was determined that the body found corresponded to Heliodoro Portugal.

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[FN59] Cf. communication of the Third Superior Prosecutor's Office of the First Judicial District of September 4, 2001 (file of appendixes to the brief with pleas and evidence, Volume II, f. 5037); report of the Fairfax Identity Laboratory of August 30, 2001 (file of appendixes to the application, appendixes 1 and 2, appendix 30, fs. 207 and 208), and testimony given by Patria Portugal before the Inter-American Court, supra note 44.

[FN60] Cf. Report of Dr. Terry Melton dated October 30, 2001 (file of appendixes to the application, appendixes 1 and 2, appendix 39, fs. 336 to 339).

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98. Now that the facts relating to the alleged forced disappearance of Heliodoro Portugal have been established, the Court will summarize the arguments of the parties in this regard.

99. The Commission indicated that the State had violated Article 7(2) of the Convention, "because Heliodoro Portugal was deprived of his liberty unlawfully, without regard for the reasons and conditions established by Panamanian law." It argued that "the authorities did not act based on an individualized suspicion that an offense had been committed," and that "there is no evidence whatsoever that, at the time of his deprivation of liberty, the alleged victim had been caught in flagrante delicto." The Commission alleged that Panama violated Article 7(3) of the Convention because "both the reasons that could have motivated the capture and the methods used by the Army to deprive him of liberty were incompatible with the respect due to fundamental human rights." In the Commission's opinion, these actions reveal "an unreasonable, unpredictable and disproportionate abuse of power." The Commission also indicated that the State had violated Article 7(4) of the Convention because "neither Heliodoro Portugal nor his next of kin were informed of the reasons for the detention" and Heliodoro Portugal "was not informed of his rights." It indicated that the State had violated Article 7(5) of the Convention because Heliodoro Portugal "was improperly removed from the protection of the authority before which he should have been brought to decide promptly about his liberty." To the contrary, according to the Commission, the reason for his detention was "to interrogate him, mistreat him, threaten him and, finally, eliminate him." The Commission argued that Article 7(6) of the Convention was violated because Heliodoro Portugal was not granted "the possibility of filing, on his own initiative, a prompt and effective remedy to determine the lawfulness of his detention, and was kept deprived of liberty in a place other than the official or authorized places of detention, without any institutional control."

100. The Commission also indicated that the State of Panama violated Article 5(1) and 5(2) of the Convention, "because it did not respect the physical, mental and moral integrity of Heliodoro Portugal, since it did not treat him with the respect due to the inherent dignity of the human being." According to the Commission, this alleged treatment consisted in: (i) the forced transfer

and hiding of the alleged victim, so that his next of kin did not know his whereabouts; (ii) his subjection to a situation of incommunicado in places that were not detention centers, and (iii) the fear and anguish produced by his situation of vulnerability and "the uncertainty regarding the outcome of his deprivation of liberty, owing to the systematic practice of extrajudicial executions at the time." All of the foregoing in relation to the existence of a pattern of grave human rights violations at the time of the facts. The Commission also indicated that there is material evidence, such as the analysis of the osseous remains and testimonial evidence, to suggest that the victim was subjected to torture.

101. Lastly, the Commission indicated that Heliodoro Portugal was last seen alive in the military barracks in the Tocumen area. The discovery and identification of his remains in September 1999 "helped confirm that he had been executed in the barracks while he was in the custody of State agents, and the date of this event is unknown at present." In addition, the Commission indicated that "the existence of a pattern of violations of the right to life in Panama at the time of the facts has been proved"; a fact acknowledged by the State itself. The disappearance of the victim extended until August 21, 2000, as a continuing violation and, "although the genetic identification of the remains of Mr. Portugal confirms that that he was executed while he was in the custody of the State," there is still "uncertainty about the date, method and place of this execution, as well as those responsible for the execution and hiding the corpse."

102. The representatives endorsed the allegations presented by the Commission. In brief, the representatives indicated that there had been a violation of Article 7(1), 7(2), 7(3), 7(4), 7(5) and 7(6) of the Convention, because Mr. Portugal was a victim of unlawful and arbitrary detention, that deprived him of his physical liberty without any legal basis and without being brought before a judge or court with competence to examine his detention, so that, in addition, he and his family were prevented from filing any judicial remedy that would protect him from the arbitrariness of his detention. The representatives also stated that, from the conditions in which the remains of Mr. Portugal were found, it could be concluded that he was subjected to torture and that "the physical injuries he suffered could have caused his death." Lastly, the representatives indicated that "the political context in Panama at the time resulted in an increase of violence against the opponents of the military regime," including torture. The representatives also indicated that the disappearance of Heliodoro Portugal "occurred at the hands of State agents and in a context of political violence, where grave human rights violations predominated." Consequently, they asked the Court to declare that Panama was responsible for the violation of Article 4 of the Convention, because "the death of Mr. Portugal took place in a context of a forced disappearance perpetrated by military agents, and was prolonged until 2000, when his death was confirmed."

103. The State argued that the situation of deprivation of liberty undergone by Heliodoro Portugal as of May 14, 1970, ceased to exist at the time of his death; that is, in June 1971, so that the Court does not have competence to examine this violation. The State also indicated that "the [alleged] torture would have occurred before the date of [Mr. Portugal's] death"; in other words, prior to June 1971. In addition, it indicated that torture and the deprivation of life are "instantaneous offenses rather than […] continuing offense[s]." Accordingly, it indicated that the

Commission was asking the Court to rule on the death of Heliodoro Portugal, which occurred between May 1970 and June 1971, 19 years before Panama accepted the Court's competence.

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104. Before proceeding to consider the merits of this matter, it is pertinent to reiterate that, as stated in the chapter on preliminary objections, the Court has competence to rule on the alleged forced disappearance of Heliodoro Portugal owing to the continuing nature of this violation (supra, para. 29). However, since the Court has already declared that it does not have competence to rule on the death or possible torture or ill-treatment that Mr. Portugal is presumed to have suffered, it will not examine the arguments of the Commission and the representatives in relation to the alleged violation of Articles 4 and 5 of the American Convention. Nevertheless, the Court has declared that it does have competence to rule on the alleged deprivation of liberty of Mr. Portugal that, although it commences on May 14, 1970, continued over all the time that he was allegedly disappeared. In other words, the Court has competence to rule on the alleged violation of Article 7 of the Convention, inasmuch as it is alleged that this initiated the forced disappearance and continued until the alleged victim's fate and whereabouts became known in 2000, 10 years after Panama had accepted the competence of the Court to examine "all matters relating to the interpretation or application of the American Convention."

105. Furthermore, although, in the instant case, neither the Commission nor the representatives have alleged the failure to comply with the provisions of the Inter-American Convention on Forced Disappearance of Persons, under which the States Parties are obliged to prevent this occurrence of this type of act, the Court observes that Panama ratified this Convention on February 28, 1996. Consequently, based on the facts in the case file and on the iura novit curia principle, which is solidly supported by international case law, [FN61] the Court finds it pertinent to rule not only with regard to Article 7 of the American Convention, but also with regard to the provisions of the Inter-American Convention on Forced Disappearance of Persons. In addition, the Court considers it pertinent to make some general observations on the forced disappearance of persons.

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[FN61] Cf. Godínez Cruz v. Honduras. Merits. Judgment of January 20, 1989. Series C No. 5, para. 172; Kimel v. Argentina. Merits, reparations, and costs. Judgment of May 2, 2008 Series C No. 177, para. 61, and Sawhoyamaxa Indigenous Community v. Paraguay. Merits, reparations, and costs. Judgment of March 29, 2006. Series C No. 146, para. 186.

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106. From the time of its first judgment in the Velásquez Rodríguez case, [FN62] which preceded the international norms on forced disappearance of persons, the Court has understood that, when examining an alleged forced disappearance, it must take into account its continuing nature, [FN63] together with the fact that it is a multiple offense. The continuing and multiple offense nature of forced disappearance of persons is reflected in Articles II and III of the Inter-American Convention on Forced Disappearance of Persons, which, in this regard, establish the following:

For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.
[…] This offense shall be deemed continuing or permanent as long as the fate or whereabouts of the victim has not been determined.

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[FN62] Cf. Case of Velásquez Rodríguez, supra note 15, para. 155; Case of Goiburú et al., supra note 23, paras. 81 to 85, and Case of Gómez Palomino, supra note 23, para. 92.
[FN63] The European Court of Human Rights has also considered forced disappearance of persons as a continuing or permanent offense. Loizidou v. Turkey, App. No. 15318/89, 513 Eur. Ct. H.R. (1996).

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107. The need to consider the offense of forced disappearance in toto, as an autonomous offense of a continuing or permanent nature with multiple intricately interrelated elements arises not only from Articles II and III of the Inter-American Convention on Forced Disappearance of Persons, but also from the travaux préparatoires for this Convention, [FN64] and from its preamble. [FN65]

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[FN64] Cf. Annual Report of the Inter-American Commission on Human Rights 1987-1988, Chapter V.II. This offense "will be considered continuing or permanent as long as the whereabouts or the fate of the victim has not been established." (OEA/CP-CAJP, Report of the President of the Working Group responsible for examining the draft Inter-American Convention on Forced Disappearance of Persons, doc. OEA/Ser.G/CP/CAJP-925/93 rev.1, of January 25, 1994, p. 10).
[FN65] Cf. Preamble to the Inter-American Convention on Forced Disappearance of Persons, in which it is considered "that the forced disappearance of persons violates numerous non-derogable and essential human rights enshrined in the American Convention on Human Rights, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights."

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108. Likewise, the Court observes that Article 1(2) of the 1992 United Nations Declaration on the Protection of all Persons from Forced Disappearance indicates that forced disappearance constitutes:

[A] violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.

109. Moreover, Article 17(1) of this Declaration indicates that the forced disappearance of persons must be considered "a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclear." Article 8(1)(b) of the International Convention for the Protection of all Persons from Forced disappearance, adopted by the United Nations General Assembly on December 20, 2006, contains a similar text. [FN66]

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[FN66] In this regard, Article 8(1)(b) of the International Convention for the Protection of all Persons from Forced Disappearance establishes that:
[…]
A State Party which applies a statute of limitations in respect of forced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:
[…]
Commences from the moment when the offences of forced disappearance ceases, taking into account its continuous nature. […]"

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110. Similarly, other international instruments refer to the following coexisting and constituent elements of this violation: (a) deprivation of liberty (b) intervention of State agents, at least indirectly by their concurrence, and (c) refusal to acknowledge the detention and reveal the fate or the whereabouts of the person involved. [FN67] These elements can also be found in the definition of forced disappearance of persons established in Article 2 of the abovementioned United Nations International Convention on this matter, [FN68] and also in the definition found in Article 7 of the Statute of the International Criminal Court, [FN69] an instrument that Panama ratified on March 21, 2002.

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[FN67] Cf. United Nations Economic and Social Council. Report of the Working Group on Forced or Involuntary Disappearances. General Comments on Article 4 of the Declaration on the Protection of all Persons from Forced disappearance of January 15, 1996 (E/CN. 4/1996/38), para. 55.
[FN68] Cf. Article 2 "[f]or the purposes of this Convention, 'forced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."
[FN69] Cf. Article 7(i) of the Statute of the International Criminal Court establishes that: "'Forced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of liberty or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."

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111. International case law also reflects this understanding, [FN70] together with several Constitutional Courts of the States of the Americas. [FN71] For example, the National Criminal Chamber of Peru has declared that "the expression 'forced disappearance of persons' is merely the nomen iuris for the systematic violation of a multiplicity of human rights. […]Various stages in the practice of the disappearance of persons can be distinguished; they include: the selection of the victim, the detention, the holding in a place of detention, the eventual transfer to another place of detention, and the interrogation, torture, and processing of the information received. In many cases, the victim dies and his remains are hidden." [FN72]

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[FN70] Cf. Kurt v. Turkey, App. No. 24276/94, Eur. Ct. H.R. (1998); Cakici v. Turkey, Eur. Ct. H.R. (1999); Ertak v. Turkey, Eur. Ct. H.R. (2000); Timurtas v. Turkey, Eur. Ct. H.R. (2000); Tas v. Turkey, Eur. Ct. H.R. (2000); European Court of Human Rights, Cyprus v. Turkey, judgment of 10 May 2001, Application No. 25781/94, paras. 136, 150 and 158; United Nations Human Rights Committee, Ivan Somers v. Hungary, Communication No. 566/1993, fifty-seventh session, CCPR/C/57/D/566/1993 (1996), 23 July 1996, para. 6.3; E. and A.K. v. Hungary, Communication No. 520/1992, fiftieth session, CCPR/C/50/D/520/1992 (1994), 5 May 1994, para. 6(4), and Solorzano v. Venezuela, Communication No. 156/1983, twenty-seventh session, CCPR/C/27/D/156/1983, 26 March 1986, para. 5(6).

[FN71] Cf. Case of Marco Antonio Monasterios Pérez, Supreme Court of Justice of the Venezuelan Bolivarian Republic, judgment of August 10, 2007 (declaring the offense of forced disappearance to be a multiple offense of a permanent nature); Case of Jesús Piedra de Ibarra, Supreme Court of Justice of Mexico, judgment of November 5, 2003 (stating that forced disappearances are continuing offenses and that the statute of limitations should be calculated from the time the remains are found); Case of Caravana, Criminal Chamber of the Supreme Court of Chile, judgment of July 20, 1999; Case of the withdrawal of immunity from Pinochet, Plenary of the Supreme Court of Chile, judgment of August 8, 2000; Case of Sandoval, Court of Appeal of Santiago, Chile, judgment of January 4, 2004 (all of them stating that the offense of forced disappearance is continuing, a crime against humanity, not subject to a statute of limitations or amnesty); Case of Vitela et al., Federal Criminal and Correctional Appeals Chamber of Argentina, judgment of September 9, 1999 (stating that forced disappearances are continuing offenses and crimes against humanity); Case of José Carlos Trujillo, Constitutional Court of Bolivia, judgment of November 12, 2001 (similarly); Case of Castillo Páez, Constitutional Court of Perú, judgment of March 18, 2004, (stating that, as a result of the requirement of the Inter-American Court in this case, forced disappearance is a permanent offense until the victim's whereabouts have been established); Case of Juan Carlos Blanco and Case of Gavasso et al., Supreme Court of Uruguay, judgments of October 18, 2002, and April 17, 2002, respectively (similarly).

[FN72] Cf. National Criminal Chamber of Perú, judgment of March 20, 2006, regarding the offense against the liberty-abduction of Ernesto Rafael Castillo Páez. In this case, when almost 16 years had elapsed since the facts occurred and almost four since the start of the criminal proceedings against the perpetrators, the National Criminal Chamber of Perú handed down a conviction for the offense of forced disappearance, based on the judgment of the Inter-American Court of Human Rights of November 1997. Similarly, the judgment of August 10, 2007, of the Supreme Court of Justice of the Bolivarian Republic of Venezuela, in the case of Marco Antonio Monasterios Pérez.

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112. In this regard, forced disappearance affects different juridical rights and it continues owing to the deliberate intention of the alleged perpetrators, who, by refusing to provide information on the victim's whereabouts maintain the offense throughout time. Consequently, when examining an alleged forced disappearance it should be taken into account that the deprivation of liberty of the individual must be understood merely as the beginning of the constitution of a complex violation that is prolonged over time until the fate and whereabouts of the alleged victim are established. In keeping with the above, it is therefore necessary to consider the offense of forced disappearance in toto, as an autonomous offense of a continuing or permanent nature with its multiple elements intricately interrelated. Consequently, the examination of a possible forced disappearance should not be approached in an isolated, divided and fragmented manner, considering merely the detention, or the possible torture, or the risk of loss of life, but rather the focus should be on all the facts presented in the case being considered by the Court, bearing in mind the Court's case law when interpreting the American Convention, and also the Inter-American Convention on Forced Disappearance of Persons in the case of States that have ratified the latter.

113. When examining all the facts of this case together, and to put them in context, the Court observes that, as stated in the report of the Panama Truth Commission, members of the Panamanian National Guard surrounded Mr. Portugal in a cafe; they forced him to get into the vehicle they were using, and took him away to an unknown destination, without explaining the reasons for the detention (supra para. 88). The Court considers that this deprivation of liberty by State agents, without information being provided on his whereabouts, initiated his forced disappearance. This violation continued over time after 1990 until his remains were identified in 2000. Therefore, considering the Court's lack of competence to rule on the death or possible torture or ill-treatment that it is alleged that Mr. Portugal suffered (supra para. 104), the Court considers that Mr. Portugal's right to personal liberty, established in Article 7 of the Convention, was violated continuously until that date, owing to his forced disappearance.

114. Furthermore, although the Court does not have competence to declare a violation of Articles 4 and 5 of the American Convention to the detriment of Mr. Portugal, from the facts contained in the case file, it is clear that Mr. Portugal was detained and transferred to an unknown place, where he was mistreated and subsequently executed.

115. Added to the foregoing, the Court has understood that the general obligation to ensure the human rights embodied in the Convention, contained in Article 1(1) thereof, gives rise to the obligation to investigate violations of the substantive rights that should be protected, ensured or guaranteed. [FN73] Thus, in cases of extrajudicial executions, forced disappearance and other grave human rights violations, the Court has found that conducting a prompt, genuine, impartial and effective investigation ex officio is a fundamental and conditioning factor for the protection of certain rights that are affected or annulled by these situations, such as the rights to personal liberty, humane treatment and life. In this regard, in the chapter corresponding to the examination of Articles 8 and 25 of the American Convention, the Court will examine the actions taken by the State in relation to investigating the facts of this case.

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[FN73] Cf. Pueblo Bello Massacre v. Colombia. Merits, reparations, and costs. Judgment of January 31, 2006. Series C No. 140, para. 142; Case of Zambrano Vélez et al., supra note 17, para. 88, and Case of La Cantuta, supra note 16, para. 110.

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116. Lastly, the Court recalls that forced disappearance presumes disregard of the obligation to organize the State apparatus to guarantee the rights established in the Convention; this contributes to the conditions of impunity in which this type of act may be repeated; [FN74] hence the importance of the State adopting all necessary measures to avoid such facts, and to investigate and punish those responsible. [FN75]

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[FN74] Cf. Case of Myrna Mack Chang, supra note 37, para. 156; Case of La Cantuta, supra note 16, para. 115, and Case of Goiburú et al., supra note 23, para. 89.
[FN75] Cf. Case of Goiburú et al., supra note 23, para. 89; Case of La Cantuta, supra note 16, para. 115.

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117. Based on the above, the Court concludes that, as of May 9, 1990, the State was responsible for the forced disappearance of Heliodoro Portugal and, therefore, according to the particularities of the instant case, it is responsible for the violation of the right to personal liberty established in Article 7 of the American Convention, in relation to Article 1(1) thereof, as well as for the violation of Article I of the Convention on Forced Disappearance, in relation to Article II thereof, as of February 28, 1996, the date on which the State ratified this instrument, to the detriment of Heliodoro Portugal.

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118. On other occasions, according to the characteristics of the case, the Court has declared that a State's international responsibility is aggravated when the forced disappearance forms part of a systematic pattern or practice applied or tolerated by the State. Such cases entail a crime against humanity that involves a crass disregard of the essential principles that underlie the inter-American system. [FN76] In the instant case, the Court does not have competence to declare a violation as a result of the supposed systematic pattern of forced disappearances that is alleged to have existed in 1970, and on which the alleged "aggravated responsibility" of the State in relation Mr. Portugal's forced disappearance would have been based (supra paras. 23 to 38). Consequently, the Court will not rule in this regard, beyond its considerations on the contextual facts in paragraphs 84 to 97 of this judgment.

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[FN76] Cf. Case of the Serrano Cruz Sisters, supra note 9, paras. 100 to 106; Case of La Cantuta, supra note 16, para. 115, and Case of Goiburú et al., supra note 23, para. 82.

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## VII. ARTICLE 13 (FREEDOM OF THOUGHT AND EXPRESSION) [FN77] OF THE AMERICAN CONVENTION IN RELATION TO ARTICLE 1(1) THEREOF

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[FN77] In this regard, Article 13 of the Convention establishes that:
Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

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119. The representatives alleged the violation of Article 13 of the Convention because they maintained that Heliodoro Portugal's forced disappearance was motivated by his ideology and political affiliation, and by the fact that he had expressed opinions contrary to the military regime. The representatives considered that the violation of freedom of expression, like the forced disappearance, was continuing over time, because it subsisted at all times while he remained disappeared. In addition, they argued that the State had not taken the necessary measures to investigate the facts. Lastly, they indicated that the right of Mr. Portugal's next of kin to have access to information on what happened, which formed part of their right to freedom of expression, had also been violated. The Commission did not express an opinion in this regard.

120. The State affirmed that the representatives had not indicated specific facts to support the violation of the right to freedom of expression, so it considered that the accusation was without grounds. It added that, "nothing in the text or spirit of Article 13 of the Convention […] allows it to be understood that, when the State fails to provide information to someone, the latter is prevented from expressing himself freely." Lastly, it emphasized that Mr. Portugal's next of kin had received all the information gathered and available in relation to his disappearance and death.

121. Regarding the first allegation relating to the alleged violation of Heliodoro Portugal's right to freedom of expression, the Court observes that, in the chapter on preliminary objections, it had declared that it did not have competence to rule in that respect (supra para. 36).

122. With regard to the second allegation of the representatives relating to the violation of the right to freedom of expression of Mr. Portugal's next of kin, [FN78] the Court considers that the refusal to provide information on the whereabouts of the victims constitutes one of the elements that comprise a forced disappearance. The Court examined this violation in the preceding chapter and, in addition, it will examine the allegations related to the presumed lack of access to justice of the next of kin in the next chapter. Accordingly, the Court finds that the facts indicated by the representatives in this regard are dealt with in the said chapters.

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[FN78] Despite the above, the Court considers it pertinent to emphasize, as it has on other occasions, that the scope of Article 13 of the Convention encompasses both the right to freedom of expression and the right to have access to information. Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No.

5, para. 30; "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, reparations, and costs. Judgment of February 5, 2001. Series C No. 73, para. 64; Case of Kimel, supra note 61, para. 53, and Claude Reyes et al. v. Chile. Merits, reparations, and costs. Judgment of September 19, 2006. Series C No. 151, para. 76.

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VIII. ARTICLES 8(1) (RIGHT TO A FAIR TRIAL) [FN79] AND 25(1) (JUDICIAL PROTECTION) [FN80] OF THE AMERICAN CONVENTION IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) THEREOF

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[FN79] Article 8(1) (Right to a Fair Trial) of the Convention establishes: "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

[FN80] Article 25(1) (Judicial Protection) of the Convention indicates that: "[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

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123. The Commission alleged that, taken as a whole, the actions of the State authorities had contributed to the failure to investigate, pursue, capture, prosecute and convict those responsible for the forced disappearance of Heliodoro Portugal, which constitutes a violation of Articles 8 and 25 of the American Convention, in relation to Article 1(1) thereof. Specifically, it indicated that the State failed to conduct sufficiently rigorous investigations and domestic proceedings, because it disregarded lines of investigation and possible participants referred to by numerous witnesses who testified before the Third Prosecutor's Office and the Panama Truth Commission. The Commission also argued that the start of the proceedings was delayed excessively and that the procedural actions were subsequently suspended or closed on several occasions. Consequently, it indicated that the ineffectiveness of the proceedings can be clearly inferred from the fact that they exceeded the reasonable time for conducting them, because to date no one has been punished, and the investigation has not concluded, and this has also given rise to impunity. Lastly, the Commission indicated that the competent authorities did not initiate, ex officio, an investigation concerning torture after it had been found that Mr. Portugal's remains bore injuries that were compatible with acts of torture. Hence, the Commission considered that the State failed to investigate, prosecute and punish those responsible for the alleged torture to which Mr. Portugal was subjected, which constitutes a violation of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

124. The representatives endorsed most of the Commission's allegations. Regarding the criminal investigation proceedings, they added that Panama failed to comply with its obligation to investigate, because it requested the application of a statute of limitations to the criminal action and then recommended a stay of proceedings in the case, despite the fact that it involved

grave human rights violations. Regarding the reasonable time period, the representatives indicated that the proceedings were relatively simple, because there was irrefutable evidence of the existence of a context of political violence, the practice of forced disappearance, and the direct participation of State agents. In addition, the delays were not due to an obstructive attitude by the alleged victim's next of kin but, to the contrary, it was the family that filed the complaint when it was politically possible, provided testimony and indicated possible witnesses who could throw some light on the situation for the investigator.

125. The State indicated that it was not possible to infer a violation of the right to a fair trial and to judicial protection from the alleged facts. To the contrary, the next of kin did not avail themselves of the complaint mechanism (querella), which is a remedy available under the Panamanian juridical order to safeguard judicial protection and rights, which allows the next of kin to intervene directly in the preliminary proceedings and the procedural actions relating to the criminal act.

126. Based on the above, the Court must determine whether the State violated the rights established in Articles 8(1) and 25(1) of the Convention, in relation to Article 1(1) thereof. To this end, the Court has established that "[c]larification of whether the State has violated its international obligations owing to the actions of its judicial organs may lead the Court to examine the respective domestic proceedings." [FN81] The Court will therefore examine the measures taken before the criminal competence in light of the standards established in the American Convention in order to determine whether there was a violation of judicial guarantees and the right to judicial protection in the context of the investigations to clarify the facts of this case. Before proceeding to examine whether the State has complied with its convention obligations, it is pertinent to describe the facts on which the allegations are based.

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[FN81] Cf. "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits. Judgment of November 19, 1999. Series C No. 63, para. 222; Case of García Prieto et al., supra note 10, para. 109, and Case of Ximenes Lopes v. Brazil. Merits, reparations, and costs. Judgment of July 4, 2006. Series C No. 149, para. 174.

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a) Period from 1990 to 2000

127. As already indicated (supra para. 94), on May 10, 1990, Patria Portugal filed a complaint before the Office of the First Superior Prosecutor of the First Judicial District of Panama indicating that, on May 14, 1970, her father had been detained and disappeared, and that it was not possible to file a complaint before the Attorney General's Office then, owing to the political situation at the time. [FN82]

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[FN82] Complaint filed by Patria Portugal before the First Prosecutor's Office, supra note 53, and testimony given by Patria Portugal before the Inter-American Court, supra note 44.

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128. The Attorney General's Office took statements from the following: Graciela De León de Rodríguez, Patria Portugal, Antonia Portugal García, Norberto Antonio Navarro, Gustavo Antonio Pino Llerena, Pedro Antonio Velásquez Llerena and Marcos Tulio Pérez Herrera. On January 15, 1991, the Third Superior Prosecutor's Office of the First Judicial District (hereinafter "the Third Prosecutor's Office"), represented by the Prosecutor, Nelson Rovetto Madrid, asked the Second Superior Court of Justice of the First Judicial District (hereinafter "Second Superior Court") to declare that the criminal proceeding was subject to a statute of limitations, and advised that the investigations conducted by his office had not produced evidence to incriminate anyone. [FN83] On March 13, 1991, the Second Superior Court decreed the expansion of the preliminary proceedings [FN84] and, on May 27, 1991, the Third Prosecutor's Office asked the Second Superior Court to issue a provisional impersonal stay of proceedings, because the judicial measures ordered by the expansion of the preliminary proceedings had been completed without shedding any light on the investigation. [FN85] Finally, on November 8, 1991, the Second Superior Court ordered a provisional impersonal dismissal of the preliminary proceedings, because "no dispute [had been established] between the opinions of Heliodoro Portugal and those of the Government in office." [FN86]

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[FN83] Cf. request for a declaration of the application of the statute of limitations to the criminal proceedings filed by the Third Superior Prosecutor's Office of the First Judicial District of Panama on January 15, 1991 (file of appendixes to the application, appendixes 1 and 2, appendix 9, fs. 86 to 91).
[FN84] Cf. decision expanding the preliminary proceedings issued by the Second Superior Court of Justice of the First Judicial District of Panama on March 13, 1991 (file of appendixes to the application, appendixes 1 and 2, appendix 10 to the application, fs. 93 to 96).
[FN85] Cf. request for stay of proceedings presented by the Third Superior Prosecutor's Office of the First Judicial District (file of appendixes to the application, appendixes 1 and 2, appendix 12, f. 106).
[FN86] Cf. judicial decision ordering a provisional stay of proceedings issued by the Second Superior Court of Justice of the First Judicial District of Panama on November 8, 1991 (file of appendixes to the application, appendixes 1 and 2, appendix 13, fs. 108 to 114)

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129. As of that date, and for nine years, until the identification of the remains of Heliodoro Portugal in August 2000, there was no procedural activity whatsoever in the case.

b) Period from 2000 to date

130. On August 24, 2000, Patria Portugal De León appeared before the Third Prosecutor's Office to submit evidence about the identification of the remains of her father and request the re-opening of the case and the investigation into "those who were guilty of this crime." [FN87] On August 30, 2000, as new evidence had arisen of a violent act in which someone had died, which had not been investigated, the Attorney General's Office, through the Third Prosecutor's Office, asked the Second Superior Court to re-open the proceedings. [FN88] On September 11, 2000, the Second Superior Court decreed the re-opening of the preliminary proceedings of the

investigation into the death of Heliodoro Portugal and ordered that the case file, together with the new evidence, be forwarded to the Third Prosecutor's Office. [FN89]

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[FN87] Cf. sworn statement made by Patria Portugal on August 24, 2000 (file of appendixes to the application, appendixes 1 and 2, appendix 16, fs. 127 to 129).
[FN88] Cf. request to re-open the investigation of the Third Superior Prosecutor's Office of the First Judicial District of Panama of August 30, 2000 (file of appendixes to the application, appendixes 1 and 2, appendix 15, fs. 123 to 125).
[FN89] Cf. decision to re-open the preliminary proceedings issued by the Second Court of Justice of the First Judicial District of Panama of September 11, 2000 (file of appendixes to the application, appendixes 1 and 2, appendix 20, fs. 143 to 146).

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131. As already indicated (supra para. 97), on September 4, 2001, the Third Prosecutor's Office announced, in a press release, that, based on the results of the test conducted privately by the Reliagene Technologies Laboratory, which indicated that the remains found in the "Los Pumas" Barracks, in Tocumen, belonged to Heliodoro Portugal, an official DNA test had been ordered, to be carried out by Fairfax Identity Laboratories (FIL); the latter indicated that the remains handed over to the Portugal family did not belong to Heliodoro Portugal. [FN90] Given the contradiction between the first test conducted privately, and the second conducted officially, the opinion of a third expert in DNA testing from the Mitotyping Technologies Laboratory, Dr. Terry Melton, was sought. This forensic anthropologist assessed both tests and concluded, in a report of October 30, 2001, that the first test conducted by AFDIL was "of a high quality and did not show any evidence of contamination," while there was evidence of contamination in the test conducted by FIL. [FN91]

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[FN90] Cf. communication of the Third Superior Prosecutor's Office, supra note 59; report of the Fairfax Identity Laboratory, supra note 59, and testimony given by Patria Portugal before the Inter-American Court, supra note 44.
[FN91] Cf. report by Dr. Terry Melton, supra note 60.

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132. On October 31, 2002, once the time for terminating the investigation decided by the Second Superior Court when it ordered the re-opening of the proceedings had expired (supra para. 130), the Third Prosecutor's Office made the following requests: (1) the dismissal of the criminal proceedings against two State agents, because they were deceased; (2) the dismissal of the case against one State agent, because he was not in the country on the date of the facts on which the proceedings were based; (3) the stay of proceedings against six members of the Army because, even though the punishable act had been proved, the accused had not been duly accused of perpetrating it, and (4) the summons to trial of the director of the "Los Pumas" Barracks in Tocumen at the time that Heliodoro Portugal was detained and presumably buried. [FN92] The Attorney General's Office also recommended declaring the inapplicability of a statute of limitations to the case, pursuant to the provisions of the Inter-American Convention on Forced Disappearance of Persons ratified by the State in 1996.

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[FN92] Cf. request for the dismissal, stay of proceedings and the summons to trial submitted by the Third Superior Prosecutor's Office of the First Judicial District of Panama on October 31, 2002 (file of appendixes to the application, appendixes 1 and 2, appendix 32, fs. 213 to 235).

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133. On June 13, 2003, the Second Superior Court of Justice decided to dismiss the case against nine State agents, including the director of the "Los Pumas" Barracks in Tocumen at the time that Heliodoro Portugal was detained, and declared that the criminal proceeding filed against another State agent had extinguished owing to his decease. [FN93] To this end, the Second Superior Court classified the reported facts into two unlawful criminal acts: unlawful detention and aggravated homicide and, consequently, tried to determine the times from which a statute of limitations should be calculated for the criminal proceedings. [FN94] To establish these times, the Second Superior Court referred to the autopsy report signed by Dr. José Vicente Pachar on September 24, 1999, which stated: "[…] time elapsed since death: more than 20 years." [FN95] Consequently, the Second Superior Court considered that the criminal proceedings arising from the crimes of "homicide and against personal liberty […] coincided, as regards their inception, at the time of death," more than 20 years previously. According to the Second Superior Court, this was the date on which the statute of limitations for the criminal proceedings began to run. [FN96] In addition, that court found that the Inter-American Convention on Forced Disappearance of Persons was not pertinent as regards the non-applicability of the statute of limitations to this type of offense, because the relevant facts occurred prior to its signature by the State. [FN97]

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[FN93] Cf. judicial order No. 167 issued by the Second Superior Court, supra note 38, fs. 237 to 255.
[FN94] Cf. judicial order No. 167 issued by the Second Superior Court, supra note 38, fs. 243.
[FN95] Judicial order No. 167 issued by the Second Superior Court, supra note 38, fs. 243.
[FN96] Cf. judicial order No. 167 issued by the Second Superior Court, supra note 38, fs. 246.
[FN97] Cf. judicial order No. 167 issued by the Second Superior Court, supra note 38, fs. 247.

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134. The Third Prosecutor's Office filed an appeal against the preceding decision before the Supreme Court of Justice, arguing that an unlawful act could only be subject to a statute of limitations as of the moment it was examined by a competenceal body and not before, and affirming that the criminal case in question referred to "an offense that had been committed with permanent effects. Although it was true that it materialized at a specific, yet unknown, moment, its effects subsisted until the existence of the unlawful act was known or, in other words, until it was examined by a competenceal body." [FN98] On March 2, 2004, the Criminal Chamber of the Supreme Court of Justice decided the appeal filed before it and revoked the decision of June 13, 2003 (supra para. 133), ordered an expansion of the preliminary proceedings consisting in taking the sworn statement of Manuel Antonio Noriega, and declared that the criminal proceedings were not subject to a statute of limitations. [FN99] In this decision, the Supreme Court declared that, in the case of the criminal proceedings, the statute of limitations could not

begin until the competenceal bodies had examined the unlawful act. [FN100] As grounds for the foregoing, the Supreme Court based itself on the Inter-American Convention on Forced Disappearance, Article VII of which indicates that the "criminal action for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations." In addition, the Supreme Court stated that the non-applicability of the statute of limitations to the criminal action in a case of forced disappearance was based on:

The importance for society and its right to know what happened to persons who disappeared as a result of their political ideas. Hence, in this regard, under no circumstance can the criminal principles of legality and non-retroactivity of criminal laws operate, because as the Nuremberg Court stated at the time, "the Court does not create law; it merely applies the law that already exists. […] [FN101]

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[FN98] Appeal filed before the Second Criminal Chamber of the Supreme Court of Justice on July 30, 2003, by the Third Superior Prosecutor's Office of the First Judicial District of Panama (file of appendixes to the application, appendixes 1 and 2, appendix 34, fs. 257 to 285).
[FN99] Cf. judgment of the Second Criminal Chamber of the Supreme Court of Justice of March 2, 2004, supra note 38, fs. 287 to 297.
[FN100] Cf. judgment of the Second Criminal Chamber of the Supreme Court of Justice of March 2, 2004, supra note 38, f. 293.
[FN101] Cf. judgment of the Second Criminal Chamber of the Supreme Court of Justice of March 2, 2004, supra note 38, fs. 294 and 295.

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135. Also, as indicated above, the Supreme Court considered that it would not be pertinent to grant a dismissal in this case based on the application of the statute of limitations to the criminal action when, "at the time of Heliodoro Portugal's forced disappearance, a regime was in power that prevented free access to justice." [FN102]

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[FN102] Cf. judgment of the Second Criminal Chamber of the Supreme Court of Justice of March 2, 2004, supra note 38, f. 295.

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136. Based on the expansion of the preliminary proceedings ordered by the Supreme Court, the Third Prosecutor's Office tried to obtain the sworn statement of General Manuel Antonio Noriega, but he refused to testify. [FN103] On May 20, 2004, this Prosecutor's Office concluded the preliminary investigation and recommended the dismissal of the case against three State agents; a stay of proceedings in the case against six State agents, and a summons to trial of the director of the "Los Pumas" Barracks in Tocumen at the time Heliodoro Portugal was detained. [FN104] In this regard, on December 17, 2004, the Second Superior Court took the following decisions: (1) to open a criminal proceeding for the offense of homicide against the director of the "Los Pumas" Barracks in Tocumen at the time Heliodoro Portugal was detained; to revoke the precautionary measures imposed on him and to order his immediate detention; (2) to dismiss the case against two State agents because they were deceased; (3) to decree a stay of proceedings

in the case against seven State agents, and (4) to establish an oral hearing for June 7, 2006. [FN105]

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[FN103] Cf. documents of the United States Department of Justice of January 22 and June 19, 2004 (file of appendixes to the brief with pleas and evidence, Volume II, fs. 4969 to 4978).
[FN104] Cf. judicial order No. 192 issued by the Second Superior Court of Justice of the First Judicial District of Panama on December 17, 2004 (file of appendixes to the application, appendixes 1 and 2, appendix 37, fs. 303 and 304).
[FN105] Cf. judicial order No. 192 issued by the Second Superior Court of Justice, supra note 104, fs. 323 to 325.

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137. On July 6, 2006, the director of the "Los Pumas" Barracks in Tocumen who had been summoned to trial died, so that the proceedings did not end with a judgment, but with the declaration of the extinction of the criminal action owing to his decease, and the consequent filing of the case. [FN106]

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[FN106] Cf. note published in the "LA PRENSA" newspaper on July 8, 2006, entitled "Muere teniente Coronel (r) Ricardo Garibaldo," available at http://mensual.prensa.com/mensual/contenido/2006/07/08/hoy/panorama/ 663140.html (file of appendixes to the application, appendixes 1 and 2, appendix 48, fs. 425 to 427); and testimony give at the public hearing held on January 29, 2008, at the seat of the Inter-American Court of Human Rights by the witnesses Patria Portugal, José Antonio Sossa and Ana Matilde Gómez.

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138. Subsequently, on December 6, 2006, the Third Prosecutor's Office requested the re-opening of the preliminary proceedings to investigate the "disappearance and death" of Heliodoro Portugal, owing to "new evidence" that had been obtained by means of the testimony of former members of the former National Guard intelligence group, known as G-2, indicating the presumed participation of a member of this unit in the reported facts. [FN107] On November 30, 2007, the Second Superior Court ordered the re-opening of the preliminary proceedings, because it knew the identity of the person indicated by the Third Prosecutor's Office as the possible perpetrator of the detention of Heliodoro Portugal, who had been named during the first stage of the investigation in a statement taken on April 4, 2001. [FN108]

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[FN107] Cf. re-opening brief submitted by the Third Superior Prosecutor's Office of the First Judicial District of Panama on December 6, 2006 (file of appendixes to the application, appendixes 1 and 2, appendix 38, fs. 329 to 334), and testimony given by Ana Matilde Gómez, before the Inter-American Court, supra note 52.
[FN108] Cf. judicial decision No. 233 issued on November 30, 2007, by the Second Superior Court of Justice of the First Judicial District of Panama, and testimony given by Ana Matilde Gómez, before the Inter-American Court, supra note 52.

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139. Based on the facts described above, the Court must proceed to examine the possible violation of the rights established in Articles 8(1) and 25(1) of the Convention, in relation to Article 1(1) thereof.

140. In previous cases, the Court has recognized that a basic principle of international human rights law is that every State is internationally responsible for the acts or omissions of any of its powers or organs that violate internationally protected rights, pursuant to Article 1(1) of the American Convention. [FN109] In addition, Articles 8 and 25 of the Convention specify, in relation to the acts and omissions of the domestic judicial bodies, the scope of the above-mentioned principle on the generation of responsibility for the acts of any of the State's organs. [FN110]

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[FN109] Cf. Case of Velásquez Rodríguez, supra note 15, paras. 164, 169 and 170; Case of Yvon Neptune, supra note 24, para. 37, and Case of Albán Cornejo et al., supra note 22, para. 60.
[FN110] Cf. Case of the "Street Children" (Villagrán Morales et al.), supra note 81, para. 97; Case of Albán Cornejo et al., supra note 22, para. 60, and Case of García Prieto et al., supra note 10, para. 97.

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141. As a result of the general obligation to guarantee rights established in Article 1(1) of the Convention, the State assumes obligations to ensure the free and full exercise of the rights recognized in the Convention to all persons subject to its competence. [FN111] Since this obligation is related to specific rights, it can be complied with in different ways, depending on the rights that the State has the obligation to guarantee and the specific conditions of the case. [FN112]

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[FN111] Cf. Case of Velásquez Rodríguez, supra note 6, para. 91; Case of Yvon Neptune, supra note 24, para. 77, and Case of Albán Cornejo et al., supra note 22, para. 60.
[FN112] Cf. Case of Vargas Areco, supra note 13, para. 73, and Case of García Prieto et al., supra note 10, para. 99.

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142. The obligation to investigate human rights violations is one of the positive measures that the State must adopt to guarantee the rights recognized in the Convention. The Court has stated that, in order to comply with this obligation to guarantee rights, the States must not only prevent, but also investigate any violations of the human rights recognized in the Convention, such as those alleged in the instant case and also, if possible, endeavor to re-establish the violated right and, if appropriate, repair the damage produced by the human rights violations. [FN113]

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[FN113] Cf. Case of Velásquez Rodríguez, supra note 15, paras. 166 and 176; Case of García Prieto et al., supra note 10, para. 99, and Case of Zambrano Vélez et al., supra note 17, para. 88.

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143. It is worth noting that the obligation to investigate arises not only from provisions of the international legal conventions that are binding for the States Parties, but also from the domestic laws [FN114] that refer to the obligation to investigate ex officio certain unlawful conducts and the provisions that allow the victims or their next of kin to denounce or file complaints, in order to participate procedurally in the criminal investigations undertaken to establish the truth about the facts. In this regard, it is relevant to indicate that Articles 1975 and 1977 of the Panamanian Code of Criminal Procedure in force at the time of the facts established, respectively that " [t]he procedure for criminal actions shall always be ex officio and the agents of the Attorney General's Office shall be the investigating officials, except in those cases in which the law provides for another mechanism" and "[t]he exercise of the criminal action may be ex officio or by charges filed in accordance with the law."

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[FN114] Cf. Case of García Prieto et al., supra note 10, para. 104.

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144. In light of this obligation, once the State authorities have been informed of the facts, they should commence a genuine, impartial, and effective investigation ex officio and promptly. [FN115] The investigation must be conducted using all available legal means and designed to determine the truth and to pursue, capture, prosecute and eventually punish all the masterminds and perpetrators of the facts, particularly when State agents are or may be involved. [FN116] It is pertinent to emphasize that the obligation to investigate is an obligation of means, and not of results. However, it must be undertaken by the State as a legal obligation and not as a mere formality preordained to be ineffective. [FN117]

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[FN115] Cf. Juan Humberto Sánchez v. Honduras. Preliminary objections, Merits, reparations, and costs. Judgment of June 7, 2003. Series C No. 99, para. 112; Case of García Prieto et al., supra note 10, para. 101, and Case of Cantoral Huamaní and García Santa Cruz, supra note 18, para. 130.

[FN116] Cf. Case of the Serrano Cruz Sisters v. El Salvador. Interpretation of the judgment on Merits, reparations, and costs. Judgment of September 9, 2005. Series C No. 131, para. 170; Case of García Prieto et al., supra note 10, para. 101, and Case of Zambrano Vélez et al., supra note 17, para. 123.

[FN117] Cf. Case of Velásquez Rodríguez, supra note 15, para. 177; Case of García Prieto et al., supra note 10, para. 100, and Case of Cantoral Huamaní and García Santa Cruz, supra note 18, para. 131.

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145. In the instant case, the State has argued that the next of kin of Heliodoro Portugal did not file a complaint or private action in order to intervene directly in the development of the criminal proceedings. However, the Court finds it pertinent to repeat that the investigation into human

rights violations, such as those alleged in the instant case, must be conducted ex officio, as the Panamanian Code of Criminal Procedure indicates (supra para. 143), so that it cannot be considered a mere step taken by private interests, that depends on the procedural initiative of the victim or his next of kin or on the private offer of probative elements. [FN118]

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[FN118] Cf. Case of Velásquez Rodríguez, supra note 15, para. 177; Case of Albán Cornejo et al., supra note 22, para. 62, and Case of Zambrano Vélez et al., supra note 17, para. 120.

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146. Moreover, the Court has referred to the right of the next of kin of alleged victims to know what happened and to know who was responsible for the respective facts. [FN119] The next of kin of the victims also have the right, and the State has the obligation to ensure, that the facts are investigated effectively by the State authorities, that criminal proceedings are filed against those responsible for the unlawful facts, and that, if applicable, pertinent sanctions are imposed on the latter, and the damage suffered by the said next of kin is repaired. [FN120]

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[FN119] Cf. Case of Velásquez Rodríguez, supra note 15, para. 181; Case of García Prieto et al., supra note 10, para. 102, and Case of Zambrano Vélez et al., supra note 17, para. 1155.
[FN120] Cf. Bulacio v. Argentina. Preliminary objections, Merits, reparations, and costs. Judgment of September 18, 2003. Series C No. 100, para. 114; Case of García Prieto et al., supra note 10, para. 103, and Case of Zambrano Vélez et al., supra note 17, para. 115.

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147. In light of the above, the Court observes that 38 years have elapsed since the alleged disappearance of Heliodoro Portugal and 18 years since the State accepted the competence of the Court, without the next of kin being able to know the truth about what happened or who was responsible.

148. The reasonableness of this delay must be examined in accordance with the "reasonable time" mentioned in Article 8(1) of the Convention, which should be assessed in relation to the total duration of the proceedings until the final judgment is delivered. [FN121] The Court has also indicated that the right of access to justice implies that the settlement of the dispute should be produced within a reasonable time, [FN122] because a prolonged delay can constitute, in itself, a violation of the right to a fair trial. [FN123]

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[FN121] Cf. Case of Suárez Rosero, supra note 22, para. 71; Case of Salvador Chiriboga, supra note 6, para. 56, and López Álvarez v. Honduras. Merits, reparations, and costs. Judgment of February 1, 2006. Series C No. 141, para. 129.
[FN122] Cf. Case of Suárez Rosero, supra note 22, para. 73; Case of Salvador Chiriboga, supra note 6, para. 59, and Case of López Álvarez, supra note 121, para. 128.
[FN123] Cf. Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations, and costs. Judgment of June 21, 2002. Series C No. 94, para. 145; Case of Salvador Chiriboga, supra note 6, para. 59, and Case of López Álvarez, supra note 121, para. 128.

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149. The Court has established that it is necessary to take into consideration three elements to determine the reasonableness of the delay: (a) the complexity of the matter; (b) the procedural activity of the interested party, and (c) the conduct of the judicial authorities. [FN124]

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[FN124] Cf. Case of Genie Lacayo v. Nicaragua. Merits, reparations, and costs. Judgment of January 29, 1997. Series C No. 30, para. 77; Case of Salvador Chiriboga, supra note 6, para. 78; Case of Zambrano Vélez et al., supra note 17, para. 102.

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150. In this regard, the Court observes that, even though in the instant case there was only one victim, the investigation was made more complex by the time that had elapsed since the last time that Heliodoro Portugal was seen alive and, consequently, by the difficulty in obtaining information that contributed to or facilitated an investigation into the case. On this point, the Third Prosecutor's Office indicated in its appeal (supra para. 134) that the "masterminds and perpetrators of this criminal act have always had an evident interest that the crime and, particularly their punishable conduct, should not be discovered; in other words, that their actions should go unpunished, which is revealed by the fact that they buried the corpse and sprinkled lime on it in order to ensure its rapid decomposition and total disintegration." [FN125] Thus, the passage of time has a directly proportionate relationship to the constraints – and, in some cases, the impossibility – of obtaining evidence or testimonies that help clarify the facts under investigation. The constraints inherent in the period prior to 1990, which the Panamanian Supreme Court of Justice itself described as a period during which it was not possible to exercise the right of access to justice (supra para. 92), must also be added to these elements.

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[FN125] Cf. appeal filed before the Supreme Court by the Third Prosecutor's Office, supra note 98.

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151. Regarding the procedural activity of the next of kin, it is clear that they never attempted to obstruct the judicial proceedings or delay any decision in that regard. To the contrary, with the exception of the said period prior to 1990, the next of kin have submitted testimony and evidence in order to advance the investigation into the facts (supra paras. 127, 128 and 130). They even obtained private funding to cover the expenses related to the identification of Heliodoro Portugal's remains by DNA testing (supra para. 95). Consequently, any delay in the investigation has not been the responsibility of Mr. Portugal's next of kin.

152. Furthermore, the conduct of the judicial authorities has not conformed to criteria of reasonableness. Since the complaint was presented in 1990, Heliodoro Portugal's next of kin and friends have provided probative elements relating to the possible participation of State agents in his detention. In this regard, the next of kin of Mr. Portugal testified that, approximately one month after his disappearance, "a police agent came to the house telling them that the victim had sent word that they should not worry, that he was in the Tocumen [barracks] and that he would

soon be released" (supra para. 89). Despite the foregoing, 18 months after the complaint had been filed, a stay of proceedings was declared, without a complete and effective investigation having been conducted into the participation of State agents in the facts of the case. In addition, the total absence of judicial activity during nine years, from the stay of proceedings in 1991 until the re-opening of the case in 2000, is exclusively due to the failure of the judicial authorities to conduct an effective investigation into the reported facts.

153. It is worth noting that the political context in which the facts occurred pointed at the participation of the members of a group known as G-2. For example, in its report, the Panama Truth Commission stated that, during December 1999, a witness confided to a journalist that he had been imprisoned with Heliodoro Portugal in a house at an unknown address, which he suspected could be near the "Casa de Miraflores," an alleged clandestine interrogation and torture center during the first years of the military dictatorship. The witness related that a man was held prisoner in the room next to the one in which he was detained, and, during interrogations, he heard it said that his name was Heliodoro Portugal; they interrogated and tortured the latter, asking him whether he knew Floyd Britton, an opposition leader (supra para. 87). This indicates that other people were also presumably disappeared by acts or omissions of State agents at the time Mr. Portugal was detained. In this regard, according to the Report of the Truth Commission, during the military dictatorship there were at least 40 forced disappearances in Panama (supra para. 85). This context was not adequately taken into account by the judicial authorities in order to determine patterns and common practices among the different disappearances or those possibly responsible within the armed forces. It was not until 2000 that the Prosecutor's Office summoned members of the security forces to testify, despite the indications provided in the statements made by Mr. Portugal's next of kin and friends in 1990 and 1991 (supra paras. 127 and 128).

154. Moreover, the State was unable to acquire the documents from the Panamanian Armed Forces that the United States Government obtained following the 1989 invasion and which could have provided information on what happened to Heliodoro Portugal. On this point, the Court finds it necessary to emphasize that, in the context of presumed human rights violations, States should collaborate with each other in judicial matters, so that the pertinent investigations and judicial proceedings can be conducted adequately and promptly.

155. In addition, it is pertinent to emphasize that, even though on November 30, 2007, the Second Superior Court ordered the re-opening of the preliminary proceedings, based on the fact that the identity of the possible author of the detention of Heliodoro Portugal was known, the name of this person was already known and formed part of the evidence gathered in the criminal action as the result of a statement taken on April 4, 2001 (supra para. 138). The Prosecutor General who testified before the Court described the failure to verify this information as a possible "omission in the proceedings." Having focused all its efforts on convicting the head of the barracks where the remains of Heliodoro Portugal were found, presuming that he knew everything that took place there, the State failed to follow up on other lines of investigation to seek all those allegedly responsible, both the masterminds and the perpetrators. As a result, 18 years after Patria Portugal filed a report before the Judiciary, the criminal action is still open." [FN126]

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[FN126] Testimony given by Ana Matilde Gómez, before the Inter-American Court, supra note 52.

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156. Based on the above, it can be concluded that the time that has elapsed greatly exceeded the time that could be considered reasonable for the State to complete a criminal action. This delay has given rise to an evident denial of justice and a violation of the right of access to justice of the next of kin of Mr. Portugal, [FN127] especially taking into account that the case was only recently re-opened in 2007 and, therefore, that the time required for conducting the criminal action, with its different stages up until the final judgment, must be added to the time that has already elapsed.

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[FN127] Cf. Case of Genie Lacayo, supra note 124, para. 80; Case of Salvador Chiriboga, supra note 6, para. 87, and Case of Zambrano Vélez et al., supra note 17, para. 126.

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157. The Court finds that the State's failure to respond is a determinant factor when assessing whether there has been a failure to comply with the contents of Articles 8(1) and 25(1) of the American Convention, because it bears a direct relationship to the principle of effectiveness that such investigations should respect. [FN128] In the instant case, the State, after receiving the complaint filed in 1990, should have conducted a genuine and impartial investigation in order to rule on the merits within a reasonable time.

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[FN128] Cf. Case of García Prieto et al., supra note 10, para. 115.

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158. Based on the foregoing, the Court finds that the domestic procedures and proceedings have not constituted effective remedies to guarantee access to justice, the investigation and eventual punishment of those responsible, and the integral reparation of the consequences of the violations. As a result of these findings, the Court concludes that the State violated the rights established in Articles 8(1) and 25(1) of the American Convention, in relation to Articles 1(1) thereof, to the detriment of Graciela De León and Patria and Franklin Portugal.

159. Furthermore, the Court finds that the lack of investigation into the alleged torture to which Mr. Portugal was subjected is subsumed under the violation declared in the preceding paragraph in relation to the failure to investigate the forced disappearance of Heliodoro Portugal, so that it does not find it necessary to undertake further analysis in this regard in light of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture.

IX. ARTICLE 5 (RIGHT TO HUMANE TREATMENT) [FN129] OF THE AMERICAN CONVENTION IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) THEREOF

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[FN129] In this regard, this Article establishes that:
1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment. All persons deprived of their liberty shall be treated with regard for the inherent dignity of the human person.

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160. The Commission alleged in its application that the mental and moral integrity of the permanent companion of Heliodoro Portugal, Graciela De León, and of his children, Patria and Franklin, "was affected as a direct consequence of the disappearance of Heliodoro Portugal, the lack of knowledge regarding his ultimate fate, and the failure to investigate the facts."

161. The representatives alleged, additionally, that the children of Patria Portugal, namely, Román and Patria Kriss Mollah Portugal should also be considered victims of a violation of their mental and moral integrity.

162. The State argued that "the alleged effect on the personal integrity of Heliodoro Portugal's next of kin was incidental to the alleged effect on the personal integrity of Heliodoro Portugal himself" and that, since the Court does not have competence regarding the effect on his personal integrity, it does not have competence regarding any incidental consequences.

163. The Court has reiterated on many occasions that the relatives of victims of certain human rights violations can also be considered victims. [FN130] In this regard, in other cases the Court has found that the right to mental and moral integrity of the next of kin of a victim may be violated due to the additional suffering caused as a result of the particular circumstances of the violations committed against their loved ones and of the subsequent acts and omissions of the State authorities in response to those violations. [FN131] The issues that must be considered include the following: (1) the existence of a close family tie; (2) the particular circumstances of the relationship with the victim; (3) the extent to which the family member was involved in the search for justice; (4) the State's response to their efforts; [FN132] (5) the context of a "system that prevents free access to justice," and (6) the constant uncertainty in which the next of kin live as a result of not knowing the victim's whereabouts.

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[FN130] Cf. Blake v. Guatemala. Merits. Judgment of January 24, 1998. Series C No. 36, paras. 114 to 116; Case of Cantoral Huamaní and García Santa Cruz, supra note 18, para. 112, and Bueno Alves v. Argentina. Merits, reparations, and costs. Judgment of May 11, 2007. Series C No. 164, para. 102.
[FN131] Cf. Case of Blake, supra note 130, paras. 114 to 116, and Case of Albán Cornejo et al., supra note 22, para. 46.
[FN132] Cf. Case of Bámaca Velásquez, supra note 15, para. 163; Case of Albán Cornejo et al., supra note 22, para. 46, and Case of Cantoral Huamaní and García Santa Cruz, supra note 18, para. 112.

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164. In this regard, the Court observes, first, that the representatives named the grandchildren of Heliodoro Portugal, Román and Patria Kriss Mallah Portugal, as alleged victims of the violation of the right to personal integrity. While the Commission did not include them either in its application or in its report under Article 50 of the Convention, it did refer to them in its final written arguments.

165. According to the Court's case law, the alleged victims must be indicated in the application and the Commission's report on admissibility under Article 50 of the Convention. Article 33(1) of the Court's Rules of Procedure establishes that it is the Commission, and not the Court, that must identify the alleged victims in a case before the Court precisely and at the appropriate procedural opportunity. [FN133] Therefore, in keeping with this case law and the State's right of defense, the Court will not consider Heliodoro Portugal's grandchildren as alleged victims in this case because they were not named as such by the Commission at the appropriate procedural opportunity.

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[FN133] Cf. Case of Plan de Sánchez Massacre v. Guatemala. Merits. Judgment of April 29, 2004. Series C No. 105, para. 48; Case of Kimel, supra note 61, para. 102, and Chaparro Álvarez and Lapo Íñiguez. v. Ecuador. Preliminary objection, merits, reparations, and costs. Judgment of November 21, 2007. Series C No. 170, para. 224.

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166. Regarding Graciela De León, Patria Portugal and Franklin Portugal, the companion and children of Heliodoro Portugal, respectively, the Commission and the representatives presented evidence of their close family ties to Heliodoro Portugal, their involvement in seeking justice, and the effect of the State's response on their efforts.

167. Before proceeding, the Court considers it necessary to reiterate that it will take into consideration the facts described in the application that occurred before June 9, 1990, the date on which the State accepted the Court's competence, to the extent that doing so is necessary to contextualize the alleged violations that took place after that date. [FN134]

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[FN134] Cf. Case of the Serrano Cruz Sisters v. El Salvador. Merits, reparations, and costs. Judgment of March 1, 2005. Series C No. 120, para. 27.

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168. Graciela De León testified before the Court that she looked for her companion, Heliodoro Portugal "in all the hospitals and barracks and asked all his friends about him." [FN135] The psychologist, Jacqueline Riquelme, indicated that, owing to the disappearance of her companion, Graciela De León "relives that traumatic experience every day; this manifests itself in her silence, fear and shunning of social participation." [FN136] Furthermore, Patria Portugal, Mr. Portugal's daughter, testified at the Court's public hearing: "my mother, carrying my brother, and I went to the prisons to look for him, and to the hospitals […]. We went to all the prisons, and they said he was not there." [FN137] Patria Portugal also stated:

I have suffered so much from the loss of my father, not from his death itself […], more than from his death, from his disappearance, the fact that he was beaten, tortured, disappeared, leaving his family unprotected and not knowing where he was. This is the greatest crime of all because we did not where he was. [FN138]

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[FN135] Statement made before notary public by the witness Graciela De León on December 28, 2007 (file of affidavits and the corresponding observations, f. 8916).
[FN136] Cf. Statement made before notary public by the psychologist, Jacqueline Riquelme Caniuñir, on January 8, 2008 (file of affidavits and the corresponding observations, f. 9091).
[FN137] Testimony given by Patria Portugal before the Inter-American Court, supra note 44.
[FN138] Testimony given by Patria Portugal before the Inter-American Court, supra note 44.

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169. Franklin Portugal also testified with regard to his sister and his mother:

My mother [Graciela De León] suffered a great deal, and the effects of her husband's disappearance remain with her still. She suffers from nerves and high blood pressure. My sister has also suffered a lot; I always found her crying, thinking that my father would return some day. [FN139]

Regarding the effect that the disappearance of Heliodoro Portugal had on his next of kin, the psychologist, Jacqueline Riquelme, indicated that, until the body was found, the disappearance allowed the next of kin to hope that they would find their loved one alive; but the "alive/dead" status of the disappeared did not allow them to experience the natural mourning process and to end a long process of pain and separation. [FN140]

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[FN139] Statement made before notary public by the witness Franklin Portugal De León on December 28, 2007 (file of affidavits and the corresponding observations, f. 8919).
[FN140] Cf. Testimony given by the psychologist, Jacqueline Riquelme Caniuñir, supra note 136.

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170. The State's actions in response to the efforts of Mr. Portugal's next of kin added to the suffering caused by his disappearance.

171. In this regard, Franklin Portugal De León stated that his mental and moral integrity had been affected by the fact that "there has not been a definite response [from the State about what happened to his father] and the guilty parties remain free and unpunished." Franklin Portugal receives psychiatric and medical care to treat these effects. [FN141]

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[FN141] Cf. Testimony given by Franklin Portugal De León, supra note 139, f. 8920.

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172. Moreover, regarding Patria Portugal, the psychologist, Jacqueline Riquelme, testified:

In the psychological reactions of the daughter Patria, who was the most active in the search for truth, one can observe defense mechanisms, predominantly of disassociation while filing the report and during the judicial proceedings, alternating with periods of depression, rage, hyperactivity and despair, especially because of the impossibility of obtaining justice and recognition. [FN142]

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[FN142] Testimony given by the psychologist, Jacqueline Riquelme Caniuñir, supra note 136, f. 9096.

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173. As stated in the previous chapter (supra paras. 152-159), in addition to failing to diligently investigate the disappearance in order to clarify what happened, determine those responsible and punish them, the State cast doubt publicly on the results of the first DNA test that identified the remains found in the Tocumen barracks in 1999 as those of Heliodoro Portugal (supra paras. 97 and 131). This caused Heliodoro Portugal's next of kin anxiety, anguish, frustration, and feelings of powerlessness, since the only action taken by the State in more than nine years was directed at refuting the results of the DNA tests that the next of kin had arranged with private funds to identify Mr. Portugal and determine his fate. In the words of Patria Portugal, this meant that, "a year after finding my father […] the State wanted to disappear him all over again." [FN143] Ultimately, a third DNA test, carried out in October 2001, concluded that the remains did belong to Heliodoro Portugal.

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[FN143] Testimony given by Patria Portugal before the Inter-American Court, supra note 44.

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174. The Court finds that the uncertainty and absence of information from the State regarding what happened to Mr. Portugal, which to a great extent continue to this day, have been a source of frustration and anguish for his next of kin, in addition to causing feelings of insecurity, frustration and powerlessness in the face of the failure of the authorities to investigate the facts. [FN144]

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[FN144] Cf. Case of Blake, supra note 130, para. 114; Case of Albán Cornejo et al., supra note 22, para. 50, and Case of Cantoral Huamaní and García Santa Cruz, supra note 18, para. 117.

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175. Based on the above, the Court considers that the existence of close family ties, added to the efforts made by the next of kin in the search for justice and to know the truth of the whereabouts and circumstances of the disappearance of Heliodoro Portugal, as well as the failure of the State authorities to act or the ineffectiveness of the measures adopted to clarify the facts and punish those responsible for them, affected the mental and moral integrity of Graciela De León and her children, Patria and Franklin Portugal De León, which means that the State is

responsible for the violation of the right to humane treatment established in Article 5(1) of the Convention, in relation to Article 1(1) thereof, to the detriment of these individuals.

X. FAILURE TO COMPLY WITH ARTICLES 2 (DOMESTIC LEGAL EFFECTS) [FN145] OF THE AMERICAN CONVENTION, III OF THE INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCE OF PERSONS, AND 1, 6 AND 8 OF THE INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE

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[FN145] In this regard, Article 2 of the Convention establishes that:
Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

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176. The Commission asked the Court to declare that the State had failed to comply with "its obligation to adopt the necessary measures to define the offense of forced disappearance of persons, to impose an appropriate penalty commensurate with its extreme gravity, and to consider forced disappearance as a continuing and permanent offense until the fate or whereabouts of the victim is known." According to the Commission, the State's obligation arises as of its ratification of the Convention on Forced Disappearance on February 28, 1996. The Commission also alleged that the failure to define that offense until its inclusion in the new Penal Code of 2007 "hampered the judicial proceedings" in the present case and "allowed impunity to be perpetuated." Moreover, it stated that the definition in the 2007 Penal Code does not meet international standards […] particularly because it restricts the anti-juridical nature of the conduct to systematic or general statements."

177. The representatives also argued that the failure to define the offense of forced disappearance has meant that "investigations into forced disappearances have been carried out under the offense of homicide" in Panama and this is what happened in the case of Heliodoro Portugal. The representatives indicated that, according to Article 93 of the 1983 Penal Code, "in cases of homicide, the statute of limitations for criminal proceedings comes into force 20 years after the unlawful act." Additionally, the representatives stated that although a new Penal Code was adopted in 2007 that defines the offense of forced disappearance, that definition "does not comply with the requirements established in the Inter-American Convention on Forced Disappearance of Persons. They indicated that, by placing it under the title of offenses against liberty, the State failed to acknowledge the multiple and continuing nature of the offense of forced disappearance. Moreover, they argued that the definition does not meet international standards because "it establishes, as an alternative, the deprivation of liberty or the denial of information on the whereabouts of the victim," which could give rise to "confusion with other types of offense and prevent the application of the appropriate probative criteria." They also alleged that the definition of the offense is too restrictive, because it limits its application "to situations in which public servants abuse their authority or infringe legal procedures," while the international standards prohibit any form of deprivation of liberty followed by an absence of information on the whereabouts of the detained person. Furthermore, they indicated that the

penalties established "are inadequate because they do not acknowledge the extreme gravity of the offense" when compared to the penalties imposed for other offenses. Finally, they indicated that the definition of the offense does not reflect the continuing and permanent nature of the offense of forced disappearance. Although the Penal Code recognizes that there is no statute of limitations for the offense, it does not recognize this for the criminal action. According to the representatives, the obligation to define this offense arose not only as of the ratification of the Inter-American Convention on Forced Disappearance of Persons in 1996, but also following the State's ratification of the American Convention in 1978.

178. The State argued that it has been taking steps to define the offense of forced disappearance since 1993, when it created legislative commissions to draft a new Penal Code and a new Code of Criminal Procedure. It pointed out that, in September 2005, the Prosecutor General presented a draft law to the Assembly to define the offense of forced disappearance. However, the legislators did not discuss this project, because it was considered preferable to define the offense while drafting the new Penal Code. This Penal Code was approved on May 22, 2007, and defined the autonomous offense of forced disappearance in its Article 150. Moreover, the State indicated that Article 432 of the new Code establishes the penalty of 20 to 30 years' imprisonment for the offense: the most severe penalty included in its domestic laws. In addition, it pointed out that, according to Article 115 of the new Penal Code, neither pardon nor amnesty can be applied in cases of forced disappearance and that, according to Article 107 of the new Code, the benefit of commutation of a prison sentence for individuals in special circumstances is not applicable to those convicted of the offense of forced disappearance. Likewise, the State noted that the penalty imposed for the offense is not subject to the statute of limitations, according to Article 120 of the Penal Code, and obeying orders does not constitute a defense, according to Article 40 thereof. Consequently, the State argued that the definition of the offense complies fully with international standards.

179. Regarding the general obligation to ensure that domestic laws comply with the Convention, the Court has affirmed on several occasions that "[u]nder public international law, a customary norm stipulates that a State that has concluded an international agreement, must introduce the necessary modifications in its domestic law to ensure compliance with its undertakings." [FN146] This principle is embodied in Article 2 of the American Convention, which establishes the general obligation for every State Party to adapt its domestic laws to its provisions in order to give effect to the rights recognized therein, [FN147] which implies that the domestic measures must be effective (principle of effet utile). [FN148]

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[FN146] Cf. Case of Garrido and Baigorria v. Argentina. Reparations and costs. Judgment of August 27, 1998. Series C No. 39, para. 68; Case of Zambrano Vélez et al., supra note 17, para. 55, and Case of La Cantuta, supra note 16, para. 170.

[FN147] Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.), supra note 78, para. 87; Case of La Cantuta, supra note 16, para. 171, and Case of Zambrano Vélez et al., supra note 17, para. 56.

[FN148] Cf. Case of Ivcher Bronstein, supra note 10, para. 37; Case of La Cantuta, supra note 16, para. 171, and Case of Zambrano Vélez et al., supra note 17, para. 56.

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180. The Court has found that this principle requires the adoption of two types of measure: (i) the repeal of laws and practices of any kind that entail a violation of the guarantees established in the Convention, or that disregard the rights recognized therein or impede their exercise, and (ii) the enactment of laws and the development of practices conducive to respect for those guarantees. [FN149] More precisely, regarding the adoption of those measures, it is important to note that the defense of or respect for human rights, arising from international commitments concerning the work of the Judiciary, must be achieved through the so-called "convention control." According to this principle, every judge must ensure the effet utile of international instruments so that they are not reduced or annulled by the application of domestic laws and practices contrary to the object and purpose of the international instrument or standard for the protection of human rights. [FN150]

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[FN149] Cf. Case of Castillo Petruzzi et al., supra note 17, para. 207; Case of Almonacid Arellano et al., supra note 10, para. 118, and Case of Salvador Chiriboga, supra note 6, para. 122.
[FN150] Cf. Case of Almonacid Arellano et al., supra note 10, para. 124, and Case of Boyce et al., supra note 20, para. 113.

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181. Regarding the forced disappearance of persons, the definition of this autonomous offense and the specific description of the punishable conducts that constitute the offense are essential for its effective eradication. Considering the particularly grave nature of forced disappearance of persons, [FN151] the protection offered by criminal laws on offenses such as abduction or kidnapping, torture and homicide is insufficient. [FN152] Forced disappearance of persons is a different offense, distinguished by the multiple and continuing violation of various rights protected by the Convention [FN153] (supra paras. 106-112).

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[FN151] According to the Preamble of the Inter-American Convention on the Forced Disappearance of Persons, forced disappearance is "a grave affront to the conscience of the hemisphere and a grave and abominable offense against the inherent dignity of the human being," and its systematic practice "constitutes a crime against humanity".
[FN152] Cf. United Nations Economic and Social Council. Report of the Working Group on Forced or Involuntary Disappearance, supra note 67 para. 54.
[FN153] Cf. Case of the Serrano Cruz Sisters, supra note 9, paras. 100 to 106; Case of Gómez Palomino, supra note 23, para. 92, and Case of Goiburú et al., supra note 23, para. 82.

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182. Faced with the imperative of avoiding impunity in cases of forced disappearance, when this has not been defined as an autonomous offense, the State must use the penal resources available to it that relate to protecting the fundamental rights that may be affected in such cases, such as the rights to liberty, humane treatment and life, if applicable, that are recognized in the American Convention.

183. Furthermore, the Court observes that the failure to define forced disappearance of persons as an autonomous offense has prevented the development of effective criminal proceedings that encompass the constituent elements of forced disappearance of persons, and this allows impunity to be perpetuated. [FN154] In the instant case, for example, owing to the failure to define the offense of forced disappearance in Panama, at least until the new 2007 Penal Code entered into force, the investigation was conducted under the offense of homicide, as defined in Article 131 of the 1983 Penal Code. This offense focuses only on the effect on the right to life and the criminal proceedings are subject to a statute of limitations. Consequently, in the criminal proceedings for the "homicide" of Heliodoro Portugal, a stay of proceedings was declared for those allegedly involved, owing to the statute of limitations coming into force with regard to the criminal action (supra paras. 128 and 133). The Court observes that, nonetheless, the Criminal Chamber of the Supreme Court of Justice of Panama indicated, when issuing its decision on the application of the statute of limitations to the criminal proceedings in the case of Heliodoro Portugal that, since Panama had ratified the Inter-American Convention on Forced Disappearance of Persons, and by virtue of Article VIII of that treaty, criminal proceedings concerning cases of forced disappearance are not subject to a statute of limitations. [FN155]

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[FN154] Cf. Trujillo Oroza v. Bolivia. Reparations and costs. Judgment of February 27, 2002. Series C No. 92, para. 97; Case of Gómez Palomino, supra note 23, paras. 76 and 88, and Blanco Romero et al. v. Venezuela. Merits, reparations, and costs. Judgment of November 28, 2005. Series C No. 138, para. 105.

[FN155] Cf. Judgment of the Second Criminal Chamber of the Supreme Court of Justice of March 2, 2004, supra note 38, fs. 294 to 295.

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184. Certainly, in 1990, when the proceedings were initiated, a criminal offense of forced disappearance of persons did not exist in Panamanian law. However, the Court observes that, at that date, the obligation to define the offense of forced disappearance in keeping with the undertakings made by the State owing to its ratification of the American Convention did not exist. In light of Article 2 of the American Convention, the Court considers that, from the time the proceedings were initiated, the laws of Panama contained criminal laws conducive to respect for the human rights to life, humane treatment and personal liberty embodied in the Convention, as established in the 1983 Penal Code that was in force at the time. [FN156]

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[FN156] Cf. 1982 Panamanian Penal Code, Title I "Offenses against life and personal integrity," Articles 131 to 146, and Title II "Offenses against liberty", Articles 147 to 171; and 2007 Penal Code, Title I "Offenses against life and personal integrity," Articles 130 to 146, and Title II "Offenses against liberty," Articles 147 to 166.

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185. However, the specific obligation to define the offense of forced disappearance of persons arose for the State on March 28, 1996, when the Inter-American Convention on Forced Disappearances of Persons entered into force in Panama. Accordingly, it is as of this date that the Court can declare the failure to comply with that specific obligation within a reasonable time.

Consequently, the Court must determine whether, in addition to the general provisions indicated in the preceding paragraph, the State defined the autonomous offense of forced disappearance specifically and adequately, as of March 28, 1996, the date on which it was internationally obliged to do so.

186. The relevant part of Article III of the said Inter-American Convention states:

The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined […].

187. The Court observes that, even though it assumed this obligation in 1996, the State only defined the offense of forced disappearance of persons recently in the current 2007 Penal Code, which entered into force in May 2008. It is thus relevant to note that the Inter-American Commission submitted the application in this case on January 23, 2007, before the promulgation of the new Panamanian Penal Code that defined the offense of forced disappearance. The Court finds that, since more than 10 years elapsed from the date on which Panama ratified the Inter-American Convention on Forced Disappearance of Persons, without the State defining the conduct in question as an offense, this exceeds the reasonable time in which to do so. Therefore, the Court finds that the State failed to comply with its specific Convention obligation to define the offense of forced disappearance in keeping with the provisions of Article III of the Inter-American Convention on Forced Disappearance of Persons.

188. In addition, bearing in mind that the State has now defined the offense of forced disappearance of persons, the Court must determine whether that definition meets the minimum requirements of the Inter-American Convention on Forced Disappearance of Persons. [FN157]

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[FN157] Cf. Case of Blanco Romero et al., supra note 154, para. 104.

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189. In this regard, international law establishes a minimum standard for the correct definition of this type of conduct and the essential elements that must be included, in the understanding that criminal prosecution is a fundamental means of preventing future human rights violations. [FN158] To define this offense, the Panamanian State must take into consideration Article II (supra para. 106) of the said Convention, which sets out the elements that the definition of this criminal offense in domestic law must contain.

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[FN158] Cf. Case of Goiburú et al., supra note 23, para. 92.

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190. The State defined the offense of forced disappearance in Article 150 of the 2007 Penal Code, which establishes the following:

The public servant who, in abuse of his functions or in violation of legal procedures, shall deprive one or more persons of their physical liberty in whatever form or, knowing their whereabouts, refuses to provide this information when it is requested, shall be punished with from three to five years' imprisonment.
The same punishment applies to private individuals who act with the authorization or support of the public servants.
If the forced disappearance is for more than one year, the punishment shall be from ten to fifteen years' imprisonment.

191. Although this definition allows certain elements of the offense of forced disappearance of persons to be punished, the Court will examine it to determine whether it fully complies with the State's international obligations in light of Article II of the Inter-American Convention on Forced Disappearance. To this end, it will analyze: (a) the unlawfulness of the deprivation of liberty; (b) the disjunction between the elements of deprivation of liberty and refusal to provide information on the whereabouts of the disappeared; (c) the refusal to acknowledge the deprivation of liberty; (d) the proportionality of the punishment with the gravity of the offense, and (e) the continuing or permanent nature of the offense.

(a) Unlawfulness of the deprivation of liberty

192. A substantive element of the definition of the offense of forced disappearance found in Article 150 of the current Panamanian Penal Code is that the offense of deprivation of personal liberty is perpetrated by a public servant "in abuse of his functions or in violation of legal procedures" or by a private individual acting "with the authorization or support of the public servants" (supra para. 190). By limiting the deprivation of liberty in this context to those situations in which this is unlawful, thus excluding legitimate forms of deprivation of liberty, the definition of the offense deviates from the minimum requirements of the Convention. It should be emphasized that the Inter-American Convention refers, as a basic element, to deprivation of liberty "in whatever way." In other words, it is irrelevant how the deprivation came about: whether it was lawful or unlawful, violent or peaceful, for example.

193. In this regard, the definition of this offense in the Panamanian Penal Code is similar to the definition that the Court found insufficient in Blanco Romero et al. [FN159] In that case, as in this one, the description of the conduct constituting a forced disappearance referred only to the unlawful deprivation of liberty, which excludes other forms of deprivation of liberty. For example, deprivation of liberty can be lawful at the start, but can become unlawful after a certain period of time or under certain circumstances.

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[FN159] Cf. Case of Blanco Romero et al., supra note 154, para. 105.
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194. Likewise, if it is considered that the text of Article 150 of the Penal Code contemplates the possibility that "private individuals who act with the authorization or support of public servants" can commit the offense of forced disappearance, it is not clear under what

circumstances a private individual can deprive someone of his liberty "in abuse of his functions or in violation of legal procedures".

195. This ambiguity in part of the definition of the offense of forced disappearance contained in the said Article 150 of the Panamanian Penal Code results in a definition that is less comprehensive than the one required by Articles II and III of the Inter-American Convention on Forced Disappearance of Persons; this implies that the State has not complied with this obligation under that Convention.

b) Disjunction between the elements of deprivation of liberty and refusal to provide information on the whereabouts of the disappeared

196. The Panamanian definition of the offense of forced disappearance establishes that this offense occurs in one of the following two cases, but not in both: (1) when someone is deprived of their personal liberty unlawfully, or (2) when there is a refusal to provide information on the whereabouts of persons detained unlawfully (supra para. 190). This disjunction creates confusion, since the first hypothesis can correspond to the general prohibition on unlawful deprivation of liberty. Moreover, the international norms require the presence of both elements: both the deprivation of liberty, in whatever way, and also the refusal to provide information in that regard.

197. Therefore, the aforementioned disjunction results in a failure on the part of the State to fulfill its international obligations pursuant to Articles II and III of the Inter-American Convention on the Forced Disappearance of Persons.

(c) Refusal to acknowledge the deprivation of liberty

198. An essential element of forced disappearance is the refusal to acknowledge the deprivation of liberty. This element must be present in the definition of the offense because this allows it to be distinguished from the other offenses to which it is usually related, such as abduction, in order to apply the appropriate probative criteria and impose on those implicated in its perpetration the penalties that take into account the extreme gravity of this offense. [FN160]

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[FN160] Cf. Case of Gómez Palomino, supra note 23, para. 103.

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199. In the instant case, the Court has observed that Article 150 of the Panamanian Penal Code appears to be applicable only when there is "a refusal to provide" information about the whereabouts of someone whose deprivation of liberty is already a fact, and when it is known for certain that someone has been deprived of his liberty. This definition of the offense does not allow for a situation in which it is not known for certain whether a disappeared person is or was detained; that is to say, it does not contemplate situations in which it is not acknowledged that someone has been deprived of his liberty, even when the whereabouts of that person is unknown. It is precisely this failure to acknowledge the deprivation of liberty that, on many occasions, endangers other fundamental rights of the disappeared person.

200. Given that Article 150 of the Panamanian Penal Code does not include this element as required by the Convention, the State has failed to comply with its obligation to define the offense of forced disappearance pursuant to its international obligations in this regard.

(d) Proportionality of the punishment with the gravity of the offense

201. Article III of the Inter-American Convention on Forced Disappearance of Persons places an obligation on the State to impose "an appropriate penalty commensurate with the extreme gravity" of the offense of forced disappearance.

202. Article 150 of the Panamanian Penal Code establishes a penalty of from three to five years' imprisonment for anyone who commits the offense of forced disappearance if the disappearance lasts less than a year, and from ten to fifteen years' imprisonment if the forced disappearance lasts more than a year. Moreover, Article 432 establishes penalties of from twenty to thirty years' imprisonment when the offense is committed "in a generalized or systematic manner […] against the civilian population or [when, aware of a forced disappearance, it is not] prevented, having the means to do so."

203. On other occasions, this Court has considered that it may not substitute domestic authorities in the identification of penalties corresponding to offenses established in domestic law; however, it has also indicated that the State's response to the unlawful conduct of an agent must be commensurate with the juridical rights affected. [FN161] On this occasion, the Court deems it appropriate to reiterate this position and recall that the States have a general obligation, in light of Articles 1(1) and 2 of the Convention, to ensure respect for the human rights protected by the Convention, and that the duty to prosecute unlawful conduct that violates these rights is derived from that obligation. The prosecution must be consequent with the State's obligation to ensure rights; it is therefore necessary to avoid illusory methods that only appear to satisfy the formal legal requirements. In this regard, the rule of proportionality requires that the States, in exercising their duty to prosecute, impose penalties that truly contribute to prevent impunity, taking into account various factors such as the characteristics of the offense, and the participation and guilt of the accused. [FN162]

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[FN161] Cf. Case of Raxcacó Reyes v. Guatemala. Merits, reparations, and costs. Judgment of September 15, 2005. Series C No. 133, paras. 70 and 133; Case of Vargas Areco, supra note 13, para. 108, and Case of the Rochela Massacre v. Colombia. Merits, reparations, and costs. Judgment of May 11, 2007. Series C No. 163, para. 196.

[FN162] Cf. Case of Hilaire, Constantine and Benjamin et al., supra note 123, paras. 103, 106 and 108; Case of Boyce et al., supra note 20, para. 50, and Case of Raxcacó Reyes, supra note 161, para. 81. Cf., likewise, Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 55.

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e) Continuing or permanent nature of the offense

204. Article III of the Inter-American Convention on Forced Disappearance of Persons establishes that the offense of forced disappearances should be "deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined."

205. According to Article 120 of the Panamanian 2007 Penal Code, the penalty imposed for the offense of forced disappearance cannot be subject to the statute of limitations. Likewise, in accordance with Article 115 of the Penal Code, "pardons or amnesties [cannot be granted] in a case of forced disappearance."

206. Even though the Penal Code recognizes that the punishment is not subject to a statute of limitations, the Convention requires that the criminal proceedings cannot be subject to a statute of limitations while the fate or whereabouts of the victim has not been established. It is worth noting that the continuing nature of the offense of forced disappearance was recognized, confirmed and reaffirmed by the State's highest national court [FN163] when, in 2004, it refused to apply the statute of limitations to the domestic proceeding on the disappearance of Heliodoro Portugal (supra para. 133). The highest courts of other State Parties to the American Convention have also recognized this (supra para. 111).

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[FN163] Cf. Case of Almonacid Arellano et al., supra note 10, para. 121.

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207. Since the State has not adapted its domestic laws to expressly indicate that the criminal proceedings for the offense of forced disappearance are not subject to a statute of limitations, the State has failed to comply with its obligation established in Article III of the Convention on Forced Disappearances.

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208. The Court observes that the removal of elements that are considered irreducible from the prosecutorial formula established at the international level, as well as the introduction of mechanisms that weaken its meaning or effectiveness, can lead to the impunity of acts that the States are obligated to prevent, eradicate, and punish in accordance with international law. [FN164]

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[FN164] Cf. Case of Goiburú et al., supra note 23, para. 92.

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209. Based on the above, the Inter-American Court considers that the State has failed to comply with its obligation to define forced disappearance as an offense pursuant to the provisions of Articles II and III of the Inter-American Convention on Forced Disappearance of Persons.

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210. In addition, the representatives alleged that the State had failed to comply with its obligation to define torture as an offense, derived from Articles 1, 6, and 8 of the Convention against Torture, an obligation they alleged is also derived from Articles 2, 4, 7, 8 and 25 of the American Convention. They supported their argument, by stating that "the State has been a party to the Convention against Torture since August 28, 1991, and that, as of that moment, the State had the obligation to define torture and attempts to commit acts of torture as offenses, establishing severe penalties to punish them, that take into account their seriousness." According to the representatives, the State has not yet complied with this obligation.

211. The State indicated that Article 432 of the new Penal Code establishes torture, among other acts, as an autonomous offense and penalizes it with 20 to 30 years' imprisonment, the most severe punishment contained in the new legislative text.

212. The Commission did not present arguments in this regard. However, the Court reiterates that the representatives may invoke different rights to those included in the Commission's application, based on the facts presented by the Commission (infra paras. 226 and 227); [FN165] this also applies to allegations regarding other instruments that grant the Court competence to declare violations arising from the facts that are the purpose of the application. [FN166]

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[FN165] Cf. Case of the "Five Pensioners" v. Perú. Merits, reparations, and costs. Judgment of February 28, 2003. Series C No. 98, para. 155; and Case of the Saramaka People, supra note 6, para. 27, and Case of Salvador Chiriboga, supra note 6, para. 128.[FN166] Cf. Case of the Miguel Castro Castro Prison v. Perú. Merits, reparations, and costs. Judgment of November 25, 2006. Series C No. 160, para. 265.

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213. Article 6 of the Convention against Torture establishes the obligation for all States Parties to ensure that "all acts of torture and attempts to commit torture are defined as offenses under their criminal law, and shall make such acts punishable by severe penalties that take into account their serious nature". Likewise Article 8 of that Convention indicates that "if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their competence, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process." The above relates to the general obligation to "prevent and punish torture," contained in Article 1 of that Convention, which entered into force for the State on September 28, 1991.

214. The Penal Code in force in Panama since 1983 does not define the offense of torture specifically, but rather, its Article 160 establishes, under the heading of "Crimes against Personal Liberty" that the "public servant who subjects a detainee to undue coercion or hardships shall be penalized with from 6 to 20 months' imprisonment. If the act consists of torture, dishonorable punishment, humiliation or arbitrary measures, the punishment shall be from 2 to 5 years' imprisonment." Article 154 of the new Penal Code shares the same language, the only difference being that the term of imprisonment was increased from 5 to 8 years.

215. Although the said Articles of the Panamanian Penal Codes indicate a punishment of imprisonment when an act consists of torture, the text of these Articles does not elaborate on the elements that constitute this offense. Additionally, Article 160 of the 1983 Code and Article 154 of the new Penal Code merely refer to the conduct of public officials and only when the victim has been detained. Hence, these Articles do not contemplate the criminal responsibility of any other "person, who at the instigation of a public servant or employee […] orders, instigates, or induces the use of torture, directly commits it, or is an accomplice thereto," according to Article 3(b) of the Convention against Torture. Furthermore, such an imprecise description of this act violates the requirements of the principle of legal and juridical certainty.

216. Based on the above, it is clear that the State has failed to comply with its obligation to modify its domestic laws to define the offense of torture, as stipulated in Articles 1, 6, and 8 of the Convention against Torture.

XI. REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION) [FN167]

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[FN167] Article 63(1) of the Convention stipulates that:
If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

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217. It is a principle of international law that any violation of an international obligation that results in harm creates an obligation to make adequate reparation. [FN168] All aspects of this obligation to repair are regulated by international law. [FN169] The Court has based its decisions in this regard in Article 63(1) of the Convention.

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[FN168] Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs. Judgment of July 21, 1989. Series C No. 7, para. 25; Case of Yvon Neptune, supra note 24, para. 152, and Case of Kimel, supra note 61, para. 98.
[FN169] Cf. Case of Aloeboetoe et al. v. Suriname. Reparations and costs. Judgment of September 10, 1993. Series C No. 15, para. 44; Case of Yvon Neptune, supra note 24, para. 152, and Case of the Saramaka People, supra note 6, para. 186.

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218. In accordance with the findings on merits and the violations to the Convention that have been declared in the preceding chapters, as well as in light of the criteria established by the Court's case law on the nature and scope of the obligation to repair, [FN170] the Court will rule on the claims presented by the Commission and the representatives, and the arguments of the State in this regard, in order to order measures tending to repair the damage.

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[FN170] Cf. Case of Velásquez Rodríguez, supra note 168, paras. 25 to 27; Case of Yvon Neptune, supra note 24, para. 153, and Case of Kimel, supra note 61, para. 99.

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A) INJURED PARTY

219. The Court considers as "injured party", pursuant to Article 63(1) of the American Convention, Heliodoro Portugal, Graciela De León, Patria Portugal, and Franklin Portugal, in their capacity as victims of the declared violations (supra paras. 117, 158 and 175); so that they will be the beneficiaries of the reparations the Court orders below.

B) COMPENSATION

220. The representatives and the Commission asked the Court to establish compensation for both pecuniary and non-pecuniary damage suffered by the victims as a result of the facts considered in the instant case. The Court now proceeds to examine their arguments and the relevant evidence.

a) Pecuniary damage

221. The Court has developed the concept of pecuniary damage and the situations in which such compensation is required. [FN171]

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[FN171] Cf. Bámaca Velásquez v. Guatemala. Reparations and costs. Judgment of February 22, 2002. Series C No. 91, para. 43; Case of Yvon Neptune, supra note 24, para. 159, and Case of Kimel, supra note 61, para. 105.

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222. The Commission asked the Court "to establish, in equity, the amount of compensation for consequential damages and loss of earnings," and indicated that the representatives "are in a better position to quantify their claims" for compensation.

223. The representatives indicated that the State should compensate the victims for the consequential and patrimonial damage, and the loss of earnings suffered. Regarding consequential damages, they stated that Mr. Portugal's family incurred expenses when trying to determine his whereabouts, including accommodation, food, telephone calls and transportation, together with the cost of Mr. Portugal's burial and the expenses of the medical and psychological care they required as a result of the physical and psychological effects of the facts of this case. However, since the Portugal family has not kept the corresponding receipts, the representatives asked the Court to establish this sum in equity. Regarding patrimonial damage, the representatives requested the sum of US$57,800.00 (fifty-seven thousand eight hundred United States dollars) for the loss of earnings of Patria Portugal who, in August 2000, left her employment as manager of a construction firm "to devote herself to promoting the investigation of her father's case." Also, they asked the Court to order the State to pay the sum of

US$171,000.00 (one hundred and seventy-one thousand United States dollars) for the sums that the family failed to receive as a result of the destruction by fire of their farm in the Province of Veraguas. Lastly, they asked for US$139,926.48 (one hundred and thirty-nine thousand nine hundred and twenty-six United States dollars and forty-eight cents) for Heliodoro Portugal's loss of earnings.

224. The State argued that the damages alleged by the representatives lack any "factual basis and do not comply with the legal requirement that they be specific and authenticated."

225. First, the Court considers it relevant to reiterate that the violations declared in this judgment refer to the forced disappearance of Heliodoro Portugal, and to the denial of justice and the effects on personal integrity suffered by his next of kin, as well as to the failure of the State to comply with its general obligations embodied in Articles 1(1) and 2 of the American Convention.

226. Even though the Court has declared that Heliodoro Portugal was forcibly disappeared, it should be stressed that the Court found that it did not have competence to address those facts and, consequently, the damage concerning Mr. Portugal that occurred before the date on which the State accepted the Court's compulsory competence; that is, in 1990 (supra paras. 27, 28, 32 and 36).

227. In this section, the Court also considers it appropriate to analyze the State's argument that some requests for reparation are not admissible "because they lack the petitioners' legitimatio ad causam," because they "do not constitute reparations based on the facts that occurred in relation to Heliodoro Portugal." The Commission did not address this issue. The representatives indicated that the State's answer "reflected a restrictive understanding of measures of reparation, reducing them merely to compensatory measures."

228. On several occasions, the Court has established that the alleged victim, his next of kin or his representatives may invoke rights and claims that differ from those contained in the Commission's application, based on the facts presented by the Commission. [FN172] On this point, the Court has indicated that it is not possible to allege new facts that differ from those described in the application, although facts may be submitted that explain, clarify or reject those mentioned in the application or answer the plaintiff's claims. [FN173] The foregoing does not imply a modification of the purpose of the application or infringe or violate the State's right of defense, since the State is granted procedural opportunities to respond to the allegations of the Commission and the representatives at all stages of the proceedings. Ultimately, it is for the Court to decide in each case on the appropriateness of allegations of this nature in order to preserve the procedural balance of the parties. [FN174] Supervening facts are a different matter and can be presented by any of the parties at any stage of the proceedings before the judgment is handed down. [FN175]

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[FN172] Cf. Case of the "Five Pensioners", supra note 165, para. 155; Case of Salvador Chiriboga, supra note 6, para. 128, and Case of the Saramaka People, supra note 6, para. 27.

[FN173] Cf. Case of the "Five Pensioners", supra note 165, para. 153; Case of Salvador Chiriboga, supra note 6, para. 128, and Case of Yvon Neptune, supra note 24, para. 157.
[FN174] Cf. Case of the “Mapiripán Massacre" v. Colombia. Merits, reparations, and costs. Judgment of September 15, 2005. Series C No. 134, para. 58; Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations, and costs. Judgment of July 1, 2006 Series C No. 148, para. 89, and Case of the Pueblo Bello Massacre, supra note 73, para. 54.
[FN175] Cf. Case of "Five Pensioners", supra note 165, para. 154; Case of Salvador Chiriboga, supra note 6, para. 128, and Case of the Saramaka People, supra note 6, para. 27.
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229. The Court also recalls that, owing to progress in the development of its case law, and following the entry into force of the 1996 reform of the Court’s Rules of Procedure, the representatives may request the measures they consider appropriate to put an end to and repair the consequences of the alleged violations, as well as those measures of a positive nature that the State must adopt to ensure that harmful acts are not repeated. Ultimately, it is for Court to decide on the appropriateness of the measures of reparation that it must order.

230. In the instant case, the Court considers that the claims for reparations made by the representatives are in keeping with the facts indicated by the Commission in its application, with the exception of the alleged loss of property rights to a farm belonging to the victim, as well as the burning of the farm’s coffee harvest, which the representatives alleged to justify part of the patrimonial damage. These facts were not included in the Commission’s application. Similarly, the alleged date on which these facts occurred preceded the presentation of the application, and therefore cannot be considered supervening facts. Consequently, the Court will not examine these alleged facts and claims. [FN176]

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[FN176] Cf. Case of the Saramaka People, supra note 6, paras. 13 to 17.
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231. The Court observes that the representatives requested that the State pay the sum of US$57,800.00 (fifty-seven thousand eight hundred United States dollars) in patrimonial damages because Patria Portugal left her employment in August of 2000 “to devote herself to promoting the investigation of the Portugal case.” However, on other occasions, the Court has observed that expenses related to access to justice should be repaired under the concept of “reimbursement of costs and expenses” and not “compensation.” [FN177] Therefore, in the instant case, in addition to not having sufficient evidence to determine the professional income that Patria Portugal failed to receive, the Court considers that the corresponding expenses arise from the access to justice, so that they will be considered in subsection (D) of this chapter.

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[FN177] Cf. Case of the Serrano Cruz Sisters, supra note 134, para. 152; Case of Kimel, supra note 61, para. 109, and Case of García Prieto et al., supra note 10, para. 173.
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232. Regarding Mr. Portugal's alleged loss of earnings owing to his forced disappearance, particularly for the period from 1990 to 2000, the Court has indicated in this judgment that there is an assumption that Mr. Portugal died prior to May 9, 1990 (supra para. 31). Therefore, since the Court only has competence to repair the damage that occurred after that date, the Court will not order reparation in this regard.

233. Regarding consequential damages, having analyzed the information provided by the parties, the facts of the case, and its case law, the Court observes that, even though the corresponding receipts were not provided, it can be assumed that the victims incurred various extrajudicial expenses as a result of the disappearance and death of Heliodoro Portugal, particularly in relation to his burial and the medical and psychological treatment they indicated that they required as a result of the facts of this case. Consequently, the Court considers it appropriate to establish, in equity, the sum of US$20,000.00 (twenty thousand United States dollars), for consequential damages, in favor of Graciela De León, Patria Portugal and Franklin Portugal, jointly. This amount must be delivered to Patria Portugal within one year of notification of this judgment.

b) Non-Pecuniary Damages

234. The Court will determine the non-pecuniary damage in keeping with the guidelines established in its case law. [FN178]

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[FN178] Cf. Case of Aloeboetoe et al., supra note 169, para. 52; Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary objections, Merits, reparations, and costs. Judgment September 2, 2004. Series C No. 112, para. 295; Case of Yvon Neptune, supra note 24, para. 165, and Case of Kimel, supra note 61, para. 111.

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235. The Commission alleged that Heliodoro Portugal's next of kin had been "victims of intense psychological suffering, anguish, uncertainty, sorrow and alteration of [their] way of life, owing to the lack of justice in relation to the disappearance and death of their loved one." Consequently, the Commission asked the Court to establish, in equity, the amount of the non-pecuniary damage.

236. The representatives asked for payment of US$100,000.00 (one hundred thousand United States dollars) to be ordered in favor of Heliodoro Portugal for non-pecuniary damage, "to be distributed among his heirs." Likewise, based on the suffering caused them by the disappearance of Heliodoro Portugal, they asked that the State pay US$80,000.00 (eighty thousand United States dollars) each to Graciela De León, Patria Portugal and Franklin Portugal, and US$30,000.00 (thirty thousand United States dollars) each to Román Kriss Mollah and Patria Kriss Mollah, for non pecuniary damage.

237. The State argued that the damage alleged by the representatives "lack any factual basis and do not comply with the legal requirement that they be specific and authenticated."

238. As the Court has indicated in other cases, [FN179] the non-pecuniary damage inflicted on Heliodoro Portugal is self-evident, because it is inherent in human nature that anyone subjected to forced disappearance experiences profound suffering, anguish, terror, feelings of powerlessness and insecurity, so that this type of damage does not require evidence.

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[FN179] Cf. Case of Castillo Páez v. Perú. Reparations and costs. Judgment of November 27, 1998. Series C No. 43, para. 86; Case of La Cantuta, supra note 16, para. 217, and Case of Goiburú et al., supra note 23, para. 157.

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239. International case law has repeatedly established that a judgment constitutes per se a form of reparation. [FN180] On this point, it is important to note that, despite the continuing nature of the violations that constitute a forced disappearance, the Court is only competent to order compensation for the victims based on the damage they suffered as of the year in which the State accepted the Court's competence (supra para. 226). Accordingly, owing to the gravity of Mr. Portugal's forced disappearance, the Court considers it necessary to order in equity, as payment of compensation for non-pecuniary damage, [FN181] the sum of US$66,000.00 (sixty-six thousand United States dollars) in favor of Heliodoro Portugal. This amount must be delivered in equal parts to Graciela De León, Patria Portugal and Franklin Portugal. The Court also considers it pertinent to order compensation, in equity, for the non-pecuniary damage suffered by the other victims, because it has been proved that the lack of justice and the concealment of the truth in this case has caused them profound distress, intense psychological suffering, anguish, and uncertainty (supra paras. 168 to 175). Therefore, the State must pay the sum of US$40,000.00 (forty thousand United States dollars) to each of the following: Graciela De León, Heliodoro Portugal's companion, and Franklin Portugal, Heliodoro Portugal's son. In the case of Patria Portugal, Heliodoro Portugal's daughter, the State must pay the sum of US$60,000.00 (sixty thousand United States dollars), because it was she who promoted and monitored the investigation process. The State must pay these amounts directly to the beneficiaries within a year of notification of this judgment.

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[FN180] Cf. Case of Suárez Rosero v. Ecuador. Reparations and costs. Judgment of January 20, 1999. Series C No. 44, para. 72; Case of Yvon Neptune, supra note 24, para. 166, and Case of Kimel, supra note 61, para. 117.

[FN181] Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs. Judgment of May 26, 2001. Series C No. 77, para. 84; Case of Yvon Neptune, supra note 24, para. 168, and Case of Kimel, supra note 61, para. 117.

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C) MEASURES OF SATISFACTION AND GUARANTEES OF NON-REPITITION

240. The Court will determine the measures of satisfaction that seek to repair the non-pecuniary damage, and will order measures of public scope or repercussion. [FN182]

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[FN182] Cf. Case of the "Street Children" (Villagrán Morales et al.), supra note 181, para. 84; Case of Yvon Neptune, supra note 24, para. 170, and Case of Kimel, supra note 61, para. 120.

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i) Obligation to investigate the facts that gave rise to the violations in the instant case, and to identify, prosecute and, if appropriate, punish those responsible

241. Both the Commission and the representatives asked that the State conduct "a full, impartial and effective investigation in order to identify and punish the masterminds, perpetrators and other participants" in what happened to Heliodoro Portugal, or those who "through their active participation or failure to act contributed to the concealment and impunity of the facts by hindering and delaying the investigations."

242. Regarding the investigation of the facts, the State indicated that the criminal proceedings were reopened on November 30, 2007.

243. The Court has established in this judgment that 18 years have elapsed since the State accepted the Court's competence and the domestic proceedings in this case have not provided Heliodoro Portugal's next of kin with an effective means of ensuring real access to justice, within a reasonable time, encompassing the clarification of the truth of the facts, the investigation and, if applicable, punishment of those responsible, and the reparation of the violations (supra para. 147 to 158).

244. The Court reiterates that the State is obliged to combat this situation of impunity by all available means, since impunity promotes the chronic repetition of human rights violations and leaves victims and their families, who have a right to know the truth about the facts, totally defenseless. [FN183] The exercise and recognition of the right to the truth in a specific situation constitutes a measure of reparation. Therefore, in the instant case, the right to the truth gives rise to the victims justified expectations, which the State must satisfy. [FN184]

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[FN183] Cf. Case of Velásquez Rodríguez, supra note 15, para. 174; Case of Escué Zapata v. Colombia. Merits, reparations, and costs. Judgment of July 4, 2007. Series C No. 165, para. 165, and Case of the Rochela Massacre, supra note 161, para. 289.

[FN184] Cf. Case of Velásquez Rodríguez, supra note 15, para. 181; Case of Zambrano Vélez et al., supra note 17, para. 149, and Case of Escué Zapata, supra note 183, para. 165.

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245. Taking into account the above, as well as the Court's case law, [FN185] the Court orders that the State must conduct effectively the criminal proceeding that is underway, and those proceedings yet to be initiated, in order to determine those responsible for the facts of this case and to apply the consequence provided for by law. Also, the State, through its competent institutions, must exhaust all investigative leads regarding what happened to Heliodoro Portugal to ascertain the truth about the facts.

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[FN185] Cf. Case of Baldeón García v. Perú. Merits, reparations, and costs. Judgment of April 6, 2006. Series C No. 147, para. 199; Case of Escué Zapata, supra note 183, para. 166, and Case of the Rochela Massacre, supra note 161, para. 295.

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246. The Court recalls that, in compliance with its obligation to investigate and, if applicable, punish those responsible, the State must remove all de facto and de jure obstacles that impede the required investigation of the facts, and it must use all available means to expedite that investigation and the related proceedings, in order to avoid the repetition of such grave facts as those of the instant case. The State cannot use any law or domestic legal provision to waive its obligation to investigate and, if applicable, criminally convict those responsible for the offenses perpetrated against Heliodoro Portugal.

247. Additionally, taking into account the Court's case law, [FN186] the State must ensure that Heliodoro Portugal's next of kin have full access and capacity to act at all stages and in all instances of the said investigations and proceedings, in accordance with domestic law and the provisions of the American Convention. The result of the proceedings must be publicly divulged so that Panamanian society is able to know the judicial determination of the facts and those responsible in this case. [FN187]

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[FN186] Cf. Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations, and costs. Judgment of June 7, 2003. Series C No. 99, para. 186; Case of Zambrano Vélez et al., supra note 17, para. 149, and Case of Escué Zapata, supra note 183, para. 166.
[FN187] Cf. Case of Baldeón García, supra note 185, para. 199; Case of Escué Zapata, supra note 183, para. 166, and Case of the Rochela Massacre, supra note 161, para. 295.

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ii) Publication of the judgment

248. As the Court has ordered in other cases, [FN188] as a measure of satisfaction, the State must publish once in the official gazette and in another newspaper with widespread national circulation, chapters I, III, VI, VII, VIII, IX and X of this judgment, without the corresponding footnotes, and its operative paragraphs. The State shall have six months as of the notification of this judgment to comply with this aspect.

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[FN188] Cf. Case of Cantoral Benavides v. Perú. Reparations and costs. Judgment of December 3, 2001. Series C No. 88, para. 79; Case of Yvon Neptune, supra note 24, para. 180, and Case of Kimel, supra note 61, para. 125.

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iii) Public acknowledgment of international responsibility

249. As it has in other cases, [FN189] the Court considers it necessary, in order to repair the damage caused to the victim and his next of kin and to avoid the repetition of facts similar to

those of this case, that the State conduct a public act acknowledging its international responsibility for the violations declared in this judgment. This act must refer to the human rights violations declared in the judgment. It must be conducted in a public ceremony in the presence of authorities representing the State, and of those individuals who have been declared victims in this judgment, and the State must invite the latter with sufficient notice. The act must be carried out within six months of notification of this judgment.

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[FN189] Cf. Case of the "Street Children" (Villagrán Morales et al.), supra note 181, para. 103; Case of Kimel, supra note 61, para. 126, and Case of Cantoral Huamaní and García Santa Cruz, supra note 18, para. 193.

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iv) Naming of a street "in memoriam"

250. Both the Commission and the representatives requested that a street "located in a significant zone" be given the name of Heliodoro Portugal; the representatives asked specifically that it be the street where the café in which Mr. Portugal was detained is located.

251. In this regard, the State indicated that, on December 27, 2006, the Municipal Council of the District of Panama agreed to give the name of Heliodoro Portugal to a street in the Santa Ana district, where "Mr. Portugal carried out his political activities"; this met with "the approval of Graciela De León, Patria Portugal and Franklin Portugal."

252. As reported by the parties, although the naming of a street "Heliodoro Portugal" in the Santa Ana district was approved, the Municipal Council's decision in this regard has not yet been implemented.

253. Regarding the above, the Court takes note of the State's decision to designate a street in memory of Heliodoro Portugal, which will contribute to the due reparation of the next of kin in this sphere.

v) Medical and psychological care

254. The Commission and the representatives requested that the State provide medical and psychological care and the necessary medication for Graciela De León, Patria Portugal and Franklin Portugal.

255. The State maintained that it had already provided these rehabilitation measures to Graciela De León de Rodríguez, Patria Portugal and Franklin Portugal; that the treatment included "specialized care in the disciplines of internal medicine, psychiatry and urology," and that its continuation depended solely on the wishes of the beneficiaries.

256. The Court considers, as it has in other cases, [FN190] that it is necessary to order a measure of reparation that seeks to reduce the physical and mental suffering that the facts of this case have caused the victims. To this end, the Court considers it necessary to declare the State's

obligation to provide medical and psychological care free of charge and immediately, through its specialized medical institutions, to Graciela De León de Rodríguez, Patria Portugal, and Franklin Portugal. The medical treatment for their physical health must be provided by personnel and institutions specializing in the ailments suffered by these persons to ensure that the most adequate and effective care is provided. The psychological and psychiatric treatment must be provided by personnel and institutions specialized in treating victims of acts such as those that occurred in this case. This medical and psychological treatment must be provided as of notification of this judgment and for as long as necessary; it must include provision of the required medication, and take into account the ailments of each of the victims following individual evaluation.

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[FN190] Cf. Cf. Case of Loayza Tamayo, supra note 29, para. 129; Case of García Prieto et al., supra note 10, para. 201, and Case of Cantoral Huamaní and García Santa Cruz, supra note 18, para. 200.

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vi) Legislative reform

257. The Commission and the representatives requested, as a guarantee of non-repetition, that the State undertake the legislative and other reforms necessary to define the offense of forced disappearance of persons. The representatives also asked that the State define the offense of torture adequately.

258. The State indicated that both offenses have now been defined in domestic law.

259. In keeping with the contents of Chapter X of this judgment, the Court considers it appropriate to order the State to adapt, within a reasonable time, its domestic laws to define the offenses of forced disappearance and torture in the terms and in compliance with the obligations assumed under the Convention on Forced Disappearance and the Convention against Torture, as of March 28, 1996, and August 28, 1991, respectively.

vii) Other claims for reparation

260. The representatives asked that, in addition to publication of the judgment, the Court order the State "to produce a video on the context of the military dictatorship and the case of Heliodoro Portugal; to include the Report of the Truth Commission in the required school curriculum in Panama; to designate June 9 as the day of the disappeared; to name a public square in memory of those who disappeared during the military dictatorship; to create a Special Prosecutor for Human Rights; to adopt a national program of compensation for families of the victims of forced disappearance and extrajudicial execution, and for the victims of torture; to create a genetic information database to determine the identity of the remains of those who disappeared during the military dictatorship; and to use all methods at its disposal to provide information on the whereabouts of disappeared persons.

261. Regarding these other forms of reparation, the State argued that "they do not constitute reparation for the damage that Heliodoro Portugal's next of kin may have suffered as a result of the facts relating to his death and disappearance." Consequently, the next of kin of Heliodoro Portugal lack legitimatio ad causam to make these claims for reparations, in the understanding that this legitimation is the procedural condition or characteristic attributed to a specific category of persons, which allows them to formulate claims with a specific purpose."

262. The Court observes that most of the measures of reparation requested by the representatives are designed to raise awareness about forced disappearance in order to avoid the repetition of facts like those of the present case. However, the Court considers that the reparations already ordered (supra paras. 240 to 259) go a long way towards achieving this goal, and therefore it is not necessary to order additional measures in the instant case. [FN191]

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[FN191] Cf. Case of Escué Zapata, supra note 183, para. 185.

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263. Nevertheless, the Court considers it important that the necessary material and human resources are allocated to ensure that the Prosecutor's Office can comply adequately with the State's obligation to investigate and, if applicable, punish those responsible for the forced disappearance of Heliodoro Portugal.

D) COSTS AND EXPENSES

264. Costs and expenses are included in the concept of reparation embodied in Article 63(1) of the American Convention. [FN192]

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[FN192] Cf. Case of Garrido and Baigorria v. Argentina. Merits. Judgment of February 2, 1996. Series C No. 26, para. 79; Case of Yvon Neptune, supra note 24, para. 184, and Case of Kimel, supra note 61, para. 129.

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265. The Commission asked the Court to order the State "to pay the costs and expenses duly authenticated by the representatives that were incurred in processing the case at both the domestic level and before the inter-American system." The representatives asked the Court to order the State "to pay the costs and expenses that the Portugal family and CEJIL incurred in the domestic and the international proceedings, as well as future expenses during the remainder of the processing of the case before the Court." They asked the Court to establish, based on equity, an amount in favor of Patria Portugal, because she has not kept receipts for the expenses she had to incur in the said proceedings, and that it order the State to pay US$17,553.93 for the costs and expenses that CEJIL incurred. The State did not submit arguments in this regard.

266. The Court observes that the Portugal family and its representatives incurred expenses during the domestic and the international proceedings in this case. In order to determine a reasonable amount, in equity, for the reimbursement of the expenses incurred by Patria Portugal

in her search for justice, the Court bears in mind that it was she who advanced the case, because Mr. Portugal's family was not represented by a lawyer during the domestic proceedings because of financial constraints. In addition, the Court notes that the domestic proceedings commenced more than 18 years ago, with the filing of a complaint by Patria Portugal and that she has participated actively in the international proceedings since the initial petition was submitted to the Inter-American Commission in May 2001. In this regard, she has met on several occasions with the different prosecutors responsible for the domestic investigations and has incurred expenditure for telephone calls, copies, and sending faxes and correspondence to Costa Rica and Washington, D.C. She also traveled to Washington, D.C. on three occasions to take part in the hearings before the Inter-American Commission. In addition, the Court observes that, as of 2000, Mrs. Portugal abandoned her employment to devote herself to seeking justice for what happened to her father. Moreover, the Court observes that CEJIL has acted as the representative in this case since the initial petition was filed before the Inter-American Commission in May 2001 and submitted vouchers corroborating that it had incurred expenses totaling US$17,553.93 (seventeen thousand five hundred and fifty-three United States dollars and ninety-three cents), which included traveling expenses, hotels, communications, photocopies, stationery and mailings, as well as obtaining the statements submitted to the Court.

267. Taking into account the preceding considerations and the evidence provided, the Court determines, based on the principle of equity, that the State must deliver the sum of US$30,000.00 (thirty thousand United States dollars) to Patria Portugal for costs and expenses. The amount includes the future expenses that the victims may incur at the domestic level or during the stage of monitoring compliance with this judgment. This amount must be delivered to the victim within one year of notification of this judgment. Patria Portugal shall, in turn, deliver the amount she considers appropriate to those who represented her in the proceedings before the inter-American system, in keeping with the assistance they provided to her.

E) MEANS OF COMPLYING WITH THE MEASURES ORDERED

268. The payment of compensation and the reimbursement of costs and expenses shall be made directly to the victims. If any of these persons should die before the respective compensation has been delivered, the compensation shall be delivered to their successors, in accordance with the applicable domestic law. [FN193]

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[FN193] Cf. Case of Myrna Mack Chang, supra note 37, para. 294; Case of Albán Cornejo et al., supra note 22, para. 169, and Case of Kimel, supra note 61, para. 134.

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269. The State shall comply with its obligation by payment in United States dollars.

270. If, for causes that can be attributed to the beneficiaries of the compensation, they are unable to receive it within the specified time, the State shall deposit the said amounts in an account or a deposit certificate in favor of the beneficiaries in a Panamanian financial institution, in United States dollars, and in the most favorable financial conditions allowed by banking

practice and law. If, after 10 years, the compensation has not been claimed, the amounts shall be returned to the State with the accrued interest.

271. The amounts assigned in this judgment as compensation and as reimbursement of costs and expenses must be delivered to the beneficiaries integrally, as established in this judgment, without any reductions arising from possible taxes or charges.

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

273. In keeping with its consistent practice, the Court reserves the authority, inherent in its attributes and derived also from Article 65 of the American Convention, to monitor compliance with all aspects of this judgment. The case will be closed when the State has fulfilled all aspects of this judgment.

274. Within one year of notification of this judgment, the State must provide the Court with a report on the measures adopted to comply with it.

## XII. OPERATIVE PARAGRAPHS

275. Therefore,

THE COURT

unanimously,

DECIDES:

1. To reject the preliminary objection concerning failure to exhaust domestic remedies filed by the State, in accordance with paragraphs 15 to 19 of this judgment.
2. To declare partially admissible and to reject partially the preliminary objection concerning competence ratione temporis filed by the State, in accordance with paragraphs 31 and 53 of this judgment.
3. To reject the preliminary objection concerning competence ratione materiae filed by the State, in accordance with paragraphs 57 a 62 of this judgment.

DECLARES THAT:

4. The State violated the right to personal liberty established in Article 7 of the American Convention on Human Rights, in relation to Article 1(1) thereof, and also failed to comply with its obligations under Article I of the Inter-American Convention on Forced Disappearance of Persons, in relation to Article II thereof, to the detriment of Heliodoro Portugal, in accordance with paragraph 117 of this judgment.
5. The State violated the rights embodied in Articles 8(1) and 25(1) of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Graciela De León, Patria Portugal and Franklin Portugal, in accordance with paragraph 158 of this judgment.

6. The State violated the right to humane treatment embodied in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Graciela De León, Patria Portugal and Franklin Portugal, in accordance with paragraph 175 of this judgment.
7. The State failed to comply with its obligation to define the offense of forced disappearance, as stipulated in Articles II and III of the Inter-American Convention on Forced Disappearance of Persons, in accordance with paragraphs 187, 195, 197, 200, 207 and 209 of this judgment.
8. The State failed to comply with its obligation to define the offense of torture, as stipulated in Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, in accordance with paragraph 216 of this judgment.

AND ORDERS THAT:

9. This judgment constitutes, per se, a form of reparation

10. The State shall pay Graciela De León, Patria Portugal and Franklin Portugal, the amount established in paragraph 233 of this judgment, as compensation for pecuniary damage, within one year of notification of the judgment, in the terms of paragraphs 233 and 268 to 272 herein.
11. The State shall pay Graciela De León, Patria Portugal and Franklin Portugal, the amounts established in paragraph 239 of this judgment, as compensation for non-pecuniary damage, within one year of notification of the judgment, in the terms of paragraphs 239 and 268 to 272 herein.
12. The State shall investigate the facts that gave rise to the violations in the instant case, and identify, prosecute and, if applicable, punish those responsible, in the terms of paragraphs 243 to 247 of this judgment.
13. The State shall publish, once, in the official gazette and in another newspaper with widespread circulation, Chapters I, III, VI, VII, VIII, IX and X of this judgment, without the corresponding footnotes, and its operative paragraphs, within six months of notification of the judgment, in the terms of paragraph 248 herein.
14. The State shall carry out a public act acknowledging its international responsibility in relation to the violations declared in this judgment, within six months of notification of the judgment, in the terms of paragraph 249 herein.
15. The State shall provide the medical and psychological care required by Graciela De León de Rodríguez, Patria Portugal and Franklin Portugal, free of charge and immediately, through its specialized health care institutions, in the terms of paragraph 256 of the judgment.
16. The State shall define the offenses of forced disappearance of persons and torture within a reasonable time, in the terms of paragraphs 181, 189, 192 to 207, 213 to 215 and 259 of this judgment.
17. The State shall make the payment for reimbursement of costs and expenses, within one year of notification of the judgment, in the terms of paragraphs 267 to 272 hereof.

Done, at San José, Costa Rica, on August 12, 2008, in the Spanish and the English languages, the Spanish version being authentic.

Judge Sergio García Ramírez informed the Court of his Separate Opinion, which accompanies this judgment.

Diego García-Sayán
President

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

Pablo Saavedra Alesandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

SEPARATE OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN RELATION TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS OF AUGUST 12, 2008, IN THE CASE OF HELIODORO-PORTUGAL (PANAMA)

1. I concurred with the adoption of the judgment delivered in this case, which declared that the facts that were subject to the temporal and material jurisdiction of the Inter-American Court violated human rights. Nevertheless, I consider it pertinent to make some additional observations on the principal fact sub judice, the forced disappearance of Mr. Portugal. This is the fact to which the Court paid most attention, because another extremely serious fact – the deprivation of life by extrajudicial execution – was outside its jurisdiction ratione temporis, taking into account the date on which it probably occurred and the date on which the State accepted the Court's compulsory jurisdiction.

2. The frequency and relevance of the cases of forced disappearance submitted to the Court's consideration should be emphasized once again. The Court commenced the exercise of its contentious jurisdiction several decades ago by hearing such cases. At that time, the 1994 Inter-American Convention on Forced Disappearance of Persons did not exist (nor did the Inter-American Convention to Prevent and Punish Torture). Consequently, the Court had to elaborate its own concepts in this regard, which would pave the way to the subsequent thinking within the inter-American human rights system. The development of these concepts by the Court in unique decisions – particularly, the well-respected judgment in the Velásquez Rodríguez (Honduras) case – established the continuing (or continuous) nature of this violation, involving multiple offenses, and this has had significant consequences for the jurisdictional exercise.

3. In these pioneering decisions, widely-known and often cited in America and in Europe, the Court expressed its most energetic condemnation of the forced disappearances that State agents – organized by "high spheres of power" or acting on their own initiative – have used to repress groups or individuals they classify as enemies of the established order and, therefore, targets of extraordinarily serious acts and omissions. This is just one more example of a deplorable manifestation of certain concepts of public reaction against "enemies" selected by the political powers for intimidation and punishment.

4. In view of the fact that, nowadays, we have an inter-American instrument on forced disappearance (in contrast to before 1994), we can and must use the definition that this document provides. It includes the generally-recognized elements of this unlawful conduct. Let us recall the words of Article II: "For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees."

5. I am not forgetting that this precept starts out by stating: "For the purposes of this Convention" (which was also directly applied by the Court in the case which occupies my attention at this time), and I will not take into account the possibility – which has not been referred to and examined – that there could be another concept of forced disappearance for different purposes than those of the 1994 Convention and, in brief, of the inter-American corpus juris in accordance with which the Court exercises its material jurisdiction. Evidently, I am not saying that it is impossible or undesirable to reformulate this definition. I am merely noting that, currently, the Inter-American Court's examination of cases is based on it, and this is how the Court interprets the American Convention on Human Rights itself, when pertinent.

6. Based on the above, we must examine the elements of forced disappearance that appear in the 1994 Convention: (a) deprivation of liberty; in other words, violation of personal liberty as the nucleus or principal element of the unlawful conduct, conditio sine qua non for the other components to take effect; (b) irrelevance of the way in which this is perpetrated: whether unlawfully or arbitrarily (and even though the onset may be legal owing to the existence of a judicial arrest warrant or flagrante delicto); (c) by State agents or third parties whose conduct involves the State's international responsibility (by act or omission), an issue that the Court has examined extensively; (d) subsequent absence of information on the deprivation of liberty; (e) in the same circumstances, refusal to acknowledge this deprivation; (f) in the same circumstances, refusal to provide information on the whereabouts of the person, and (g) result of these conducts (whether or not deliberate): impediment to the exercise of the legal remedies and pertinent procedural guarantees (to combat and end the violation, which is unacknowledged and about which no information is provided: violation of personal liberty). The offense of forced disappearance is summarized in this series of elements (with the alternatives they include), which provide the obligatory frame of reference for examining the matter, both in general and in specific cases.

7. The juridical nature of the violation that constitutes the central element of the offense examined in the context of these factual assumptions must be defined from a dual perspective: the conduct of the agents and its adverse effect on the human and juridical rights of the victim, and the implications of those acts in relation to those rights; that is, the identification of the juridical and human rights that have been violated. In other words: what are the violations inherent in forced disappearance? That is, the violations that are consubstantial with it, and inseparable or characteristic of it, because they are "intertwined" in this offense; the elements required by the definition itself, in the absence of which there would be no forced disappearance, even though there could be other acts that violate human rights. Since I have used the phrase "inherent in forced disappearance," I should recall the academic acceptance of inherence "the union of things that are inseparable due to their nature, or that can only be separated mentally and by abstraction."

8. Regarding the first question posed, the Court has always understood that forced disappearance is an act – or conduct or situation or circumstance – that is prolonged, uninterrupted, over time. While the conduct persists, the violation subsists, without ending its continuity. It is unique and constant. We have often resorted to concepts of criminal law, which provides the best description of the offense being examined. From this discipline, we obtain the definition of the offense, as regards the conduct of the agent and his impact on the consummation of the crime: the persistence of the acts that involve a specific type of result.

9. In the hypothesis of the instantaneous offense, the consummation occurs once, "with a single blow," if you will allow me to use this expression. In the continuous crime (using a specific terminology), the unlawful conduct is fragmented over time: it begins and ceases, with unity of active and passive subjects and breaking the same norm. (It is not necessary to recall now why the different offenses that are committed under this heading have been grouped into one under the fiction that there is "one" continuous offense.) And, in the continuing or permanent offense, the unlawful conduct, the typical result, the violation of the norm persist, without interruption, for a greater or lesser time. This is precisely what happens in the hypothesis of unlawful deprivation of liberty, until the deprivation ceases. The same thing occurs in the case of abduction or kidnapping, which are aggravated forms of deprivation of liberty. And also in forced disappearance, a conduct of unmatched gravity and a crime against humanity, which also entails deprivation of liberty.

10. The second question posed corresponds to the human and juridical rights affected by forced disappearance. Clearly, I am not including here the "other" juridical and human rights that could be involved in the "circumstance" of a disappearance; as a result of this, and as a frequent – but not necessary – culmination of the disappearance perpetrated. These other human and juridical rights may be numerous – and usually are – and they also merit autonomous consideration and punishment, in their own terms. Those rights that are plainly affected by the disappearance, according to the description in the 1994 Inter-American instrument – by which I am abiding in this note – are liberty and access to justice (an expression that I use with a general scope to include different manifestations of judicial guarantees, due process and adequate defense).

11. These rights – liberty and access to justice – correspond to the essence of the disappearance. The respective violations are inherent in the act that we are examining. It is not possible to conceive forced disappearance without liberty and access to justice being necessarily and immediately harmed. This is what is referred to when it is said that disappearance entails a violation of various juridical and human rights; in other words, it entails multiple offenses. Obviously, the latter status of an unlawful conduct is established based on the characteristics of that conduct and on its real and concrete effect on juridical rights; not the inverse, sustaining first that the conduct entails multiple offenses and then examining it to know what juridical and human rights it harms.

12. The Court must obligatorily ask itself this question: when does a forced disappearance cease? Certain relevant issues depend on the reply, including the jurisdiction to examine the facts. I will not mention the commencement of a statute of limitations also, because it is generally accepted that this does not come into effect in hypotheses of extremely grave violations, such as disappearance. The answer may be found – and thus the Court considered it in the case sub judice – in Article III of the 1994 Convention. When deciding the domestic definition of the crime of disappearance, this precept stipulates that the crime thus defined "shall be deemed continuous (continuing in the terminology that I am using) or permanent as long as the fate or whereabouts of the victim has not been determined." However, what do we refer to when we speak of determining the fate or whereabouts of the victim?

13. It could be understood that the disappearance ceases when this fate or whereabouts have been established by finding the disappeared person alive, or his corpse or his remains when he has been executed or died from other causes. In its judgment of November 29, 2006 in the La Cantuta (Peru) case, the Inter-American Court added an element to this convention-based indication, or rather, defined its scope – an alternative which should be pondered juridically – when it said that "while the whereabouts of [...] [disappeared] persons have not been determined, or their remains duly found and identified, the appropriate juridical treatment of [this situation] is that of forced disappearance of persons." Hence, the Court refers to the identification of the remains as the point at which the forced disappearance ceases.

14. When adopting this criterion in the judgment in the Heliodoro-Portugal case, the Inter-American Court presumed – as have other jurisdictional instances – that the disappearance ceased at the time the remains were identified (despite the fact that this is an action accrediting a specific act in the past, not the execution or consummation of an unlawful conduct), rather than at the time of the real or probable death of the victim (even though, at that moment, deprivation of liberty gave way to death, because it does not seem reasonable to speak of the "deprivation of liberty of a person who is deceased" and thus to suppose that this deprivation is prolonged after death). By basing the cessation of the criminal act on the identification of the remains, and not on the loss of life, the Court established its competence ratione temporis. This matter will probably be taken up by those who study these issues.

15. Regarding the description of forced disappearance in the Convention and some jurisdictional rulings in this regard, it has been debated whether the deprivation of life (by arbitrary or extrajudicial execution) is inseparably linked to disappearance, to the point that it is inherent in this offense, and forms part of it, so that the jurisdictional examination of

disappearance involves the examination of the deprivation of life, which would involve simultaneous violations of Article 4 and 7 of the American Convention and would possibly extend the competence ratione temporis corresponding to arbitrary deprivation of life.

16. Evidently, many cases of disappearance culminate in the extrajudicial execution of the victim. Nevertheless, it is perfectly possibly – logically and ontologically – to detach the death from the disappearance and recognize the particularity of each, which calls for a separate and objective treatment. This separation in no way signifies reducing the punishment or encouraging impunity, in the same way that this does not happen when the penal system recognizes the existence of different types of results that pave the way for the concurrence of crimes, not their merging.

17. This is what the Court has understood in this judgment, which denies its jurisdiction ratione temporis to examine the death of the victim and asserts this jurisdiction to examine the forced disappearance based on the abovementioned reasons. The Court noted and strongly condemned the fact that Mr. Portugal was arbitrarily deprived of his life, even though it was unable to declare this in the judgment, by applying Article 4 and emitting the corresponding formal condemnation, because, in the instant case, the Court did not have the authority to rule on this point. It would be erroneous to consider that the Court's conclusion, which is in keeping with the provisions that governs its actions, produces impunity. Although this impunity has been suggested, it does not arise from the Court's judgment, but from the date of acceptance of the Court's jurisdiction; that is, from an act that is external to the decisions of the international jurisdiction.

18. Having established the foregoing, I leave to the future interpreter to reflect on the treatment that could be given to the facts relating to the mental integrity of the victim (Article 5(1) of the American Convention). Obviously, the deprivation of liberty can be differentiated from the violation of integrity, but it is also reasonable to suppose that the suffering of the victim of forced disappearance is maintained continuously (or of a continuing nature) while this extremely serious situation persists, with all the dangers, terror and stress that this implies. In this case, it would be possible to contemplate the existence of violations of Articles 5 and 7 of the American Convention, while maintaining the conceptual separation between deprivation of liberty and the effect on integrity.

19. In the judgment to which this opinion is attached, the Inter-American Court noted the State's obligation to adapt its domestic laws to the provisions of the American Convention, in order to prevent and punish conducts that violate those juridical rights, a duty that results from the respect and guarantee obligation contained in the said instrument. The Court also observed that the State's obligation to define forced disappearance as a crime arises from the explicit mandate of the 1994 Inter-American Convention on Forced Disappearance of Persons. It is pertinent – insofar as a convention-based obligation is claimed – that the State legislator adopt the definition of forced disappearance provided by international human rights law (and also that of torture, if applicable) to avoid disparities between the international provision, which is binding for the State, and the domestic definition of the crime. It is evidently possible for the latter to be expressed in more comprehensive terms than the former in order to favor the protection of

human rights, but not that this protection is reduced by domestic definitions of crimes that contradict or do not correspond to the international definitions.

Sergio García Ramírez,
Judge