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Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Maria and Josefa Tiu Tojin v. Guatemala
Doc. Type:	Judgement (Merits, Reparations, and Costs)
Decided by:	President: Cecilia Medina Quiroga; Vice President: Diego Garcia-Sayan; Judges: Sergio Garcia Ramirez; Manuel E. Ventura Robles; Leonardo A. Franco; Margarette May Macaulay; Rhadys Abreu Blondet; Alvaro Castellanos Howell
Dated:	26 November 2008
Citation:	Tiu Tojin v. Guatemala, Judgement (IACtHR, 26 Nov. 2008)
Represented by:	APPLICANTS: Mario Minera and Angelica Gonzalez

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In the case of Tiu Tojín,

the Inter-American Court of Human Rights (hereinafter “the Inter-American Court”, the “Court” or “the Tribunal”), pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) and with Articles 29, 31, 53(2), 55, 56, and 58 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure”), issues the present Judgment.

I. INTRODUCTION OF THE CASE AND OBJECT OF THE CONTROVERSY

1. On July 28, 2007, pursuant with that stated in Articles 51 and 61 of the American Convention, the Inter-American Commission of Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) submitted to the Court an application against the Republic of Guatemala (hereinafter “the State” or “Guatemala”), which originated in claim number 10,686 presented on October 17, 1990 by the non-governmental organization of the Human Rights Commission of Guatemala. [FN1] On October 18, 2004, the Commission approved the Report on Admissibility and Merits No. 71/04 (hereinafter “Report No. 71/04” or “the Report”), in the terms of Article 50 of the American Convention, which includes certain recommendations for the State. The Report was notified to the State on November 10, 2004. On August 8, 2005, the parties signed an agreement on reparations and compliance of the commitments acquired within the framework of an amicable solution, in which the State acknowledged its international responsibility derived from the facts of the present case. However, due to the partial non-compliance by the State of certain commitments acquired in the agreement signed (infra para. 12, 15, and 16), the Commission decided to submit the present case to the jurisdiction of the Court. The Inter-American Commission appointed Messrs. Víctor Abramovich, Commissioner and Santiago A. Canton, Executive Secretary, as delegates and Elizabeth Abi-Mershed, Isabel Madariaga, and Juan Pablo Albán as legal advisors.

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[FN1] On August 24, 1993 the Center for the Legal Action of Human Rights (CALDH) became a petitioner (dossier of annexes to the petition, annex 2, folio 166).
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2. The facts of the present case refer to the alleged forced disappearance of María Tiu Tojín and her daughter Josefa, occurred in the Municipality of Chajul, Department of the Quiché, as of August 29, 1990, in hands of officers of the Guatemalan army along with members of the Civil Self-Defense Patrols. The Commission held that, up to this date, the State has not complied with its duty to investigate these facts with the due diligence required, and therefore they remain in absolute impunity and under the knowledge of military courts. In the Commission's opinion, the present case reflects "the abuses committed during the internal [armed] conflict by the military forces against the Mayan indigenous people and the communities of populations in resistance." Based on these facts, the Commission requested that the Court determine that the State has failed to comply with its international obligations by incurring in the violation of Articles 4 (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), and 25 (Right to Judicial Protection) of the American Convention, in relation to the general obligation of respect and guarantee of human rights established in Article 1(1) of the same instrument and Article I of the Inter-American Convention on Forced Disappearances of People (hereinafter "Inter-American Convention on Forced Disappearances"), in detriment of María and Josefa Tiu Tojín; Article 19 (Rights of the Child) of the American Convention, in relation to the general obligation included in Article 1(1) of the same treaty, in detriment of the child Josefa Tiu Tojín; and Articles 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), and 25 (Right to Judicial Protection) of the American Convention, in relation to Article 1(1) of the same instrument, in detriment of the next of kin of the alleged victims.

3. The Commission indicated that it values the State's positive attitude in acknowledging the facts and its international responsibility derived from the same[,] as well as the efforts made in seeking to repair, at least in part, the violations to human rights suffered by the [alleged] victims of this case […]." However, the current state of impunity of the forced disappearance of María Tiu Tojín and her daughter "contributes to prolong sufferings caused by the violation of fundamental rights." It also stated that it is a "duty of the Guatemalan State to provide an adequate judicial response, establish the identity of those responsible, and locate the remains of the [alleged] victims in order to adequately repair their next of kin."

4. On December 31, 2007 Messrs. Mario Minera and Angélica González of the Center for Legal Action of Human Rights (CALDH), representatives of the alleged victims (hereinafter "the representatives"), presented their brief of pleadings, motions, and evidence (hereinafter "brief of pleadings and motions"), in the terms of Articles 23 and 36 of the Rules of Procedure. The representatives coincided with the legal arguments presented by the Inter-American Commission (supra para. 1) and requested the Court to order the State to comply with the rest of the commitments acquired and effectively repair the alleged victims.

5. On February 29, 2008 the State presented its response to the petition and its observations to the brief of pleadings and motions (hereinafter "defendant's response"). In said brief the State

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indicated that on August 8, 2005, during the process before the Inter-American Commission, Guatemala and the representatives signed an agreement of reparations and compliance of the recommendations made by the Commission. It also informed the Tribunal that through said agreement the State acknowledged its international responsibility for the facts and violations stated in Report No. 71/04. Likewise, The State indicated that it had adopted some of the recommendations of the Commission to repair the violations to human rights, specifically: an act of apology presided by the Vice-President of the Republic, payment of an economic compensation to the next of kin of María and Josefa Tiu Tojín, and the construction of a monument in their memory. Therefore, it asked the Court that upon deciding on the present case "it take into consideration the reparation measures implemented by the State and its compliance according to the [representatives'] requirements." Similarly, the State acknowledged "the unjustified delay in the investigation, prosecution, and punishment of those responsible for the facts of this case, within the domestic realm, claim regarding which it stated its acquiescence." The State appointed Mrs. Yovana Ester López Salguero as Agent and Mrs. Viviana González as Deputy Agent.

II. PROCEEDINGS BEFORE THE COURT

6. The Commission's application was notified to the State and the representatives on October 31, 2007. During the proceedings before this Tribunal, besides the presentation of the main briefs forwarded by the parties (supra paras. 1, 4, and 5), the President of the Court [FN2] (hereinafter "the President") ordered she receive, through statements offered before a notary public (affidavit), the testimonies of a witness and an expert offered in a timely manner by the Commission and the representatives. Subsequently, the Commission desisted of the testimonial statement, reason for which only the expert's statement was received and regarding which the State had the opportunity to present observations. Additionally, in consideration of the specific circumstances of the case, the President summoned the Commission, the representatives, and the State to a public hearing in order to receive the statements of a witness and an expert proposed by the Commission and the representatives, as well as the oral arguments on the merits and possible reparations and costs.

[FN2] Cfr. order issued by the President of the Inter-American Court of March 14, 2008 in the present case.

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7. The public hearing was held on April 30, 2008 during the XXXIII Extraordinary Sessions of the Court, held in the city of Tegucigalpa, Honduras. [FN3]

[FN3] The following appeared at this hearing: a) for the Inter-American Commission: Víctor Abramovich, Delegate, Isabel Madariaga, advisor, and Juan Pablo Albán, advisor F. 343; b) in representation of the alleged victims: Mario Minera, Executive Director of CALDH, and Angélica González, legal advisor (CALDH) F. 341, and c) for the State: Ruth del Valle Escobar, President of the Presidential Human Rights Commission, Yovana López Salguero, agent, and Viviana González, deputy agent.

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8. On May 6, 2008 the Tribunal asked the State to present, along with its final written arguments, evidence to facilitate adjudication of the case. [FN4]

[FN4] The evidence requested consisted in information and documents related to: 1) the State's comments and information regarding the bill that would modify the scope of application of the military criminal jurisdiction, expanding it to common or related crimes committed by military officials, as well as the situation of said bill in the Congress of the Republic and the possibilities of the National Executive to request a moratorium. The State shall forward a copy of said bill; 2) information regarding the inclusion of this case in the national reconciliation plan and its situation in the Congress of the Republic. The State shall forward a copy of the bill; 3) information regarding the decision of the Supreme Court of Justice of Guatemala that ordered the transfer of the military criminal jurisdiction to the regular jurisdiction of the dossiers of cases regarding common or related crimes committed by military officials, pursuant with Article 2 of Decree No. 4196, and 4) information on the specific steps the State would adopt to activate the transfer of the dossier of the present case from the Judge Advocate to courts of the regular jurisdiction.

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9. On June 5, 2008 the representatives forwarded their final written arguments with which they enclosed documentary evidence. On that same date, the State forwarded its final written arguments, along with part of the evidence requested by the Court to facilitate adjudication of the case. [FN5] On June 6, 2008 the Commission forwarded its final written arguments.

[FN5] The State forwarded the following documents: a) Decree 41-96 of June 12, 1996; b) Agreement No. 26-96 of July 22, 1996; c) Decree No. 32-2006 Organic Law of the National Institute of Forensic Sciences of Guatemala; d) Initiative No. 3590 and Opinion, which recommends the approval of the National Commission for the Search of People victim of forced disappearances and other forms of disappearance; and e) Initiative No. 2794 and Opinion, which recommends approval of the Military Code.

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10. On July 15, 2008 the State presented a brief "expanding its final written arguments." (supra para. 9) In that brief, it forwarded evidence to facilitate adjudication of the case (supra para. 8) and it objected the requests made by the representatives in their final written arguments with regard to payment of compensations and the reimbursement of costs and expenses. On November 26, 2008 the State forwarded information regarding the new diligences developed in the investigation of the present case by national authorities (infra para. 47).

III. JURISDICTION

11. The Inter-American Court is competent, in the terms of Article 62(3) of the Convention, to hear the present case, since Guatemala is a State Party to the American Convention since May

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25, 1978 and it acknowledged the Court's contentious jurisdiction on March 9, 1987. Similarly, the State ratified the Inter-American Convention on Forced Disappearances on February 25, 2000.

IV. ACKNOWLEDGMENT OF INTERNATIONAL RESPONSIBILITY

12. Within the framework of a negotiation process started before the Inter-American Commission after the adoption of Report No. 71/04 (supra para. 1), the State and the representatives signed an "agreement of specific compliance of the recommendations issued by the Inter-American Commission." In that agreement the State acknowledged its international responsibility for the forced disappearance of María and Josefa Tiu Tojín and the subsequent denial of justice. The State has reiterated this acknowledgment before the Tribunal, reason for which we shall precise the terms and scope of the same.

13. In what refers to the anticipated termination of the process, Articles 53, 54, and 55 of the Rules of Procedure regulate the figures of discontinuance, friendly settlement, and continuation of a case. [FN6]

[FN6] Article 53. Discontinuance of a Case

1. When the party that has brought the case notifies the Court of its intention not to proceed with it, the Court shall, after hearing the opinions of the other parties thereto, decide whether to discontinue the hearing and, consequently, to strike the case from its list.

2. If the respondent informs the Court of its acquiescence to the claims of the party that has brought the case as well as to the claims of the representatives of the alleged victims, their next of kin or representatives, the Court, after hearing the opinions of the other parties to the case, shall decide whether such acquiescence and its juridical effects are acceptable. In that event, the Court shall determine the appropriate reparations and indemnities.

Article 54. Friendly Settlement

When the parties to a case before the Court inform it of the existence of a friendly settlement, compromise, or any other occurrence likely to lead to a settlement of the dispute, the Court may strike the case from its list.

Article 55. Continuation of a Case

The Court may, notwithstanding the existence of the conditions indicated in the preceding paragraphs, and bearing in mind its responsibility to protect human rights, decide to continue the consideration of a case.

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14. The Agreement signed by the State and the representatives during the process before the Commission gives expression to the acknowledgment of international responsibility made by the State in the following terms:

[…] Guatemala acknowledges [the] International Responsibility for the violation of the human rights of Maria Tiu Tojín and Josefa Tiu Tojín established in the American Convention on Human Rights, specifically in what refers to Articles 1(1) Obligation to respect rights, Art. 4(1) Right to life, Art. 5 Right to Humane Treatment, Art. 7 Right to Personal Liberty, Art. 19 Rights

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of the Child, Art. 8 Right to a Fair Trial, Art. 25 Right to Judicial Protection, as well as Article 1 of the Inter-American Convention on the Forced Disappearance of Persons. This acknowledgment does not prejudge individual responsibilities pursuant with domestic legislation.
The main grounds for compliance of said recommendations is to cooperate in reaching national reconciliation through the search for truth and the administration of justice in those cases whose nature allows it; the dignification of the victim and their next of kin; the assistance or reparation resulting from the alleged violation; and the strengthening of the Inter-American System for the Promotion and Protection of Human Rights.

15. By virtue of said agreement the Guatemalan State promised to carry out the following actions of compliance and/ or reparation measures:

• Hold a public act of apology and deliver an apology letter from the State to the next of kin of the victims;
• develop an immediate, impartial, and effective investigation that will establish the identity of the authors of the violations to the human rights of the [alleged] victims and in its case start a criminal proceeding against them;
• inform the petitioners and the Commission, every two months, of the progress of the investigation to be carried out by the Prosecutor's Office to find the planners and perpetrators of the forced disappearance of Maria Tiu Tojín and Josefa Tiu Tojín;
• pay the next of kin of the [alleged] victims, a compensation of Q2'000,000.00 (two million quetzales), which should be delivered in two equal payments of Q.1'000,000.00 (one million quetzales), made in the first and second trimester of the year 2006;
• coordinate with the Foundation of Forensic Anthropology of Guatemala in order to locate and identify the remains of Maria Tiu Tojín and Josefa Tiu Tojín and subsequently deliver them to the next of kin. This commitment would be considered complied with when the State has proven to the petitioners that it exhausted all the resources possible for the location of the remains;
• include the present case in the National Plan for the Search of Missing People when it is implemented;
• build a monument representing a mother with a child in her arms, and place a commemorative plate on the same; the content of the latter shall be agreed on by both parties. Likewise, both parties shall agree on the location where this monument will be built and the placement of the corresponding plate;
• negotiate with the National Compensation Program, a proposal to decree August 25th as the "National Day of the boys and girls victims of the internal armed conflict;" and
• pay the expenses and costs incurred in by the next of kin of Maria Tiu Tojín and Josefa Tiu Tojín, including those incurred in by their representatives.

16. The Court observes that, in compliance of the commitments acquired (supra para. 5) and prior to the presentation of the application before this Tribunal, the State carried out the following actions in order to adopt the recommendations of the Inter-American Commission and repair the damages caused to the alleged victims:

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a) act of apology presided by the then Vice-President of the Republic on September 8, 2006. Said event had a private nature, upon the request of the representatives. The Vice-President of the Republic acknowledged the State's responsibility for the facts occurred during the armed conflict in Guatemala, delivered a letter of apology to the next of kin of the victims, [FN7] and indicated the State's will to comply with the recommendations of the Commission.
b) construction of a monument in memory of María and Josefa Tiu Tojín. Upon request of the representatives, the monument was built in the cemetery of Parraxtut, municipality of Sacapulas, department of El Quiché. The monument represents a bust of a mother with a child in her arms, and it has a commemorative plate whose content was agreed on with the next of kin. The next of kin of María and Josefa Tiu Tojín, their representatives, and state authorities were present when it was unveiled. Along with the defendant's plea, the State forwarded a photograph [FN8] of the plate and the monument, in which the following text can be read:
"María Tiu Tojín. A brave and determined woman who shed her blood for her people, a good daughter, sister, and mother, María and her daughter Josefa disappeared in the hands of members of the Guatemalan army on August 29, 1990. The State of Guatemala acknowledges its international responsibility for the violations to human rights established in the report on merits issued by the Inter-American Commission of Human Rights. Long live the memory of María and Josefa!"
c) payment of compensations for pecuniary and non-pecuniary damages. In December of the year 2005 the State paid Q.2'000,000.00 (two million quetzales), equal to US $260,000.00 (two hundred and sixty thousand dollars of the United States of America). Said amount was distributed between six of the next of kin of María and Josefa Tiu Tojín, specifically: Josefa Tojín Imul, mother of María and grandmother of Josefa; Victoriana Tiu Tojín; Rosa Tiu Tojín, Pedro Tiu Tojín, Manuel Tiu Tojín, and Juana Tiu Tojín, all siblings of María. [FN9]
d) reimbursement of US $1,219.82 (one thousand two hundred and nineteen dollars of the United States of America with 82/100) to the representatives for the expenses and costs incurred in by them during the processing of this case before the Inter-American Commission. [FN10]

[FN7] Cfr. Letter of the Vice-President of the Republic of the month of September 2006 (Annexes to the brief of pleadings, motions, and evidence, annex B, folio 1366).
[FN8] Cfr. photographs of the act of unveiling of the plate and presentation of the monument in memory of the victims, held on November 9, 2006. (dossier of annexes to the defendant's plea, annex IV).
[FN9] Cfr. copies of the administrative settlement records (dossier of annexes to the defendant's plea, annex I, folios 2 through 19).
[FN10] Cfr. copies of the administrative settlement records (dossier of annexes to the defendant's plea, annex II, folios 21 through 23)

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17. The Commission indicated in its application that the acknowledgment of the facts of the case and the international responsibility derived from the same, as well as the efforts made by the State to repair the victims during the processing of this case before said instance "has full effects with regard to the judicial proceedings currently being presented." The representatives, on their part, indicated that said acknowledgment "has evidentiary consequences," reason for which they requested that "it be included […] in the corresponding judgment."

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18. In its response to the application Guatemala stated that "from the content of the previously indicated agreement [we] can conclude that the State has not denied the existence of violations to the human rights of the [alleged] victims, on the contrary it acknowledged its responsibility for said violations and it undertook actions to grant the next of kin of the [alleged] victims a fair and adequate reparation, reasons for which it considers that the subject of the acknowledgment of responsibility was already complied with." Likewise, the State acknowledged "the unjustified delay in the application of justice" and its deficiency in this matter, claim regarding which it stated its acquiescence. The State indicated it acknowledged its international responsibility "for having infringed Articles 4, 5, 7, 8, and 25 of the Convention in detriment of Mrs. María Tiu Tojín; Articles 4, 5, 7, 8, 19, and 25 in detriment of Josefa Tiu Tojín; and Articles 5, 8, and 25 in detriment of their next of kin, in relation to Article 1(1) of the American Convention on Human Rights and Article 1 of the Inter-American Convention on Forced Disappearance of Persons." The State informed it continues making efforts to comply with the pending commitments in matters of reparations and asked the Tribunal that "the economic reparation agreed on and delivered in the present case be considered adequate and effective."

19. In the course of the public hearing (supra para. 7) the State reiterated its acknowledgment of international responsibility and promised, inter alia, to offer information on the steps it would adopt to activate the transfer of the dossier of the present case from the Judge Advocate to the courts of the ordinary jurisdiction. Both the Commission and the representatives valued positively the State's declarations and asked the Tribunal to, based on said "unconditional acquiescence", consider as established the facts denounced and that it declare the violation of the alleged rights.

20. After the hearing, the State informed that it took the corresponding actions to transfer the investigation started regarding the facts of the present case to the courts of the regular jurisdiction. Similarly, it indicated that the Public Prosecutor's Office requested a decline of its jurisdiction to the Judge Advocate, which was decided on in a favorable manner, ordering the transfer of the dossier to an ordinary court. [FN11]

[FN11] Cfr. order of the Military Court of the Fourth Infantry Brigade, Coyotenango, Department of Suchitepéquez, of June 10, 2008. (dossier on merits, Volume III, folio 704). In what is relevant it stated: "I. The decline of this military court to continue hearing the proceedings regarding the investigation on the plagiarism and kidnapping of María Tiu Tojín or María Tojín García and the minor Josefa Tiu or María Josefa Tojín, filed under number 44-90 (Military Court of Santa Cruz of El Quiché, currently inactive). II. The corresponding proceedings shall be forwarded to the Court of the First Instance for Criminal, Narcotics, and Environmental Offenses of the department of El Quiché".

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21. As it has done in other cases, [FN12] the Court considers that the acknowledgment of international responsibility made by the State in the proceedings before the Commission – which has been reiterated by the State before this instance- has full legal effects according to Articles

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54 and 55 of the Rules of Procedure of the Court. In the case sub judice, the facts covered by said acknowledgment were clearly established in Report No. 71/04 and correspond to those presented in the complaint, which constitute the factual framework of these proceedings. Likewise, both the Agreement signed as well as the actions carried out by the State based on the same (supra paras. 12 and 15) prove that the acknowledgment made is consistent with the preservation of the rights to life, humane treatment, personal liberty, to a fair trial and judicial protection, as well as the general obligations of respect and guarantees established in the American Convention and in the Inter-American Convention on Forced Disappearances. Therefore, the State's declarations must be considered by the Court as an acknowledgment of the facts presented and a total acquiescence of the claims of the Commission and the representatives in what refers to merits.

[FN12] Cfr. Case of the Rochela Massacre v. Colombia. Merits, Reparations, and Costs. Judgment of May 11, 2007. Series C No. 163, para. 8 and Case of Acevedo Jaramillo et al. v. Peru. Preliminary Objections, Merits, Reparations, and Costs. Judgment of February 7, 2006. Series C No. 144, paras. 176 through 180; and Case of Kimel v. Argentina. Merits, Reparations, and Costs. Judgment of May 2, 2008 Series C No. 177, paras. 23 through 25.

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22. The Tribunal considers that the State's attitude constitutes a positive contribution to the development of this process, to the good serving of the Inter-American jurisdiction on human rights, to the supervision of the principles that inspire the American Convention and the behavior to which the States are compelled in this sense, [FN13] by virtue of the commitments they assume as parties to the international human rights instruments. The Tribunal positively values the actions carried out by the State after the public hearing held and based on the requirements of this Court (supra para. 20). The Inter-American Court acknowledges that the acts carried out by the State in the present case form part of a policy of the National Executive maintained in recent years during the processing of individual petitions before the bodies of the Inter-American system for the protection of Human Rights, characterized by the Government's intention to tend to the needs of reparation of the victims of violations of human rights and their next of kin. This has been evidenced in different cases this Tribunal has heard against Guatemala, [FN14] in which the State has acknowledged its international responsibility with regard to the violations to human rights occurred in its jurisdiction and it has promoted actions to comply with the reparations pursuant with that ordered by the Tribunal.

[FN13] Cfr. Case of the Rochela Massacre, supra note 12, para. 29; Case of Zambrano Vélez et al. v. Ecuador. Merits, Reparations, and Costs. Judgment of July 4, 2007. Series C No. 166, para. 30, and Case of Kimel v. Argentina, supra note 12, para. 25.

[FN14] Cfr. Among other cases: Case of Bámaca Velásquez v. Guatemala, Case of Myrna Mack Chang v. Guatemala, Case of Maritza Urrutia v. Guatemala, Plan de Sánchez Massacre v. Guatemala, Case of Molina Theissen v. Guatemala, and Case of Carpio Nicolle et al. v. Guatemala.

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23. Taking the aforementioned into account, the Court considers that the controversy regarding the forced disappearance of Maria and Josefa Tiu Tojín and the violations of the rights enshrined in the following Articles: 4 (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), and 25 (Right to Judicial Protection) of the American Convention, in relation to Article 1(1) of the same and Article I of the Inter-American Convention on Forced Disappearance, in detriment of María Tiu Tojín; Articles 4 (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), 19 (Rights of the Child), and 25 (Right to Judicial Protection) of the American Convention, in detriment of the child Josefa Tiu Tojín, in relation to Article 1(1) of the same and Article I of the Inter-American Convention on Forced Disappearance; Articles 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), and 25 (Right to Judicial Protection) of the American Convention, in relation to Article 1(1) of that instrument, in detriment of Victoriana Tiu Tojín, and Articles 8 (Right to a Fair Trial) and 25 (Rights to Judicial Protection) of the American Convention, in relation to Article 1(1) of the American Convention, in detriment of the following next of kin of María and Josefa Tiu Tojín: Josefa Tojín Imul, mother of María Tiu Tojín, Rosa Tiu Tojín, Pedro Tiu Tojín, Manuel Tiu Tojín, and Juana Tiu Tojín, all siblings of María Tiu Tojín.

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24. In the terms of Articles 53(2) and 55 of the Rules of Procedure, in exercise of the powers of international protection of human rights inherent to the Tribunal's jurisdictional powers, the Court may determine if an acknowledgment of international responsibility, made by a respondent State, offer sufficient grounds, pursuant with the American Convention to continue or not with the hearing of the merits and the determination of the possible reparations and costs. For these effects the Tribunal analyzes the situation presented in each specific case. [FN15]

[FN15] Cfr. Case of Myrna Mack Chang v. Guatemala. Judgment of November 25, 2003. Series C No. 101, para.105; Case of Zambrano Vélez et al. v. Ecuador, supra note 13, para. 12; and Case of Albán Cornejo et al. v. Ecuador. Merits, Reparations, and Costs. Judgment of November 22, 2007. Series C No. 171, para. 14.

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25. In the case sub judice, the Commission asked the Tribunal that it issue a judgment on merits in this case stating as established the facts "due to the importance the determination of an official truth of what occurred has for the victims of violations of human rights and in this case for Guatemalan society as a whole." The representatives reiterated said request and indicated that the judgments of this Tribunal are per se a form of reparation and they offer "a great contribution in the processes of truth and justice."

26. In this regard, taking into account the seriousness of the facts and the violations acknowledged by the State, the Court will proceed to the ample and specific determination of the facts occurred, since it contributes to the reparation of the victims, to avoiding the repetition of similar events, and to satisfying, in short, the purposes of the Inter-American human rights jurisdiction. However, the Tribunal does not consider it necessary, on this opportunity, to open to discussion the matters not subject to controversy, taking into account that the legal claims argued

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in his case have already been broadly established by the Inter-American Court in other cases on the forced disappearance of people, some of them against Guatemala. [FN16]

[FN16] Cfr. Case of Blake v. Guatemala. Merits. Judgment of January 24, 1998. Series C No. 36; Case of Bámaca Velásquez v. Guatemala. Merits. Judgment of November 25, 2000. Series C No. 70; Case of Molina Theissen v. Guatemala. Merits. Judgment of May 4, 2004. Series C No. 106, and Case of the Plan de Sánchez Massacre v. Guatemala. Merits. Judgment of April 29, 2004. Series C No. 105.

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27. Even though the State has already partially repaired the victims, by virtue of the demands of justice that revolve around this case, the Court will examine the reparations that have been argued. The Commission and the representatives insisted that several reparation measures, especially those related with the investigation of the facts and the location of the remains of the victims, "had not been effectively complied with." The Commission stated that in Guatemala "the subsistence of high levels of impunity does not only mean that numerous serious crimes are not punished but instead it becomes a situation that affects the life itself of the nation and its culture."

28. The State acknowledged that there are commitments that are still pending compliance that "due to their complexity, and not because of a lack of will or actions, could not be achieved in the time periods established." The State informed the Court that "it continues making efforts to implement processes that allow the location of the remains of María and Josefa Tiu Tojín and the remains of the victims of the internal armed conflict." Similarly, it stated "that even though they have not been able to identify those responsible for the facts, it is promoting actions" so that this can be achieved.

29. Taking into account the aforementioned, the Tribunal will proceed to precise the grounds of the obligation to investigate the facts of the forced disappearance of María and Josefa Tiu Tojín in Section VII.C of this Judgment, and it will take on the legal and factual obstacles that have prevented its compliance within the framework of the transition toward democracy in Guatemala. These precisions will contribute to the development of jurisprudence regarding this matter and the corresponding protection of the human rights of the victims of this case. Finally, the Tribunal will decide on the subsisting controversy with regard to the rest of the reparations requested by the Commission and the representatives.

V. EVIDENCE

30. Based on that established in Articles 44 and 45 of the Rules of Procedure, as well as on the jurisprudence of the Tribunal with regard to evidence and its appraisal, the Court will examine and assess the documental evidentiary elements forwarded by the Commission, the representatives, and the State on different procedural opportunities or as the evidence to facilitate adjudication of the case requested by the President, as well as the expert opinion offered in writing and the statements offered at the public hearing, pursuant with the principles of competent analysis and within the corresponding regulatory framework. [FN17]

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[FN17] Cfr. Case of the “White Van” v. Guatemala. Merits. Judgment of March 8, 1998. Series C No. 37, para. 76; Case of Heliodoro Portugal v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008. Series C No. 186, para. 64; and Case of Bayarri v. Argentina. Preliminary Objection, Merits, Reparations, and Costs. Judgment of October 30, 2008. Series C No. 187, para. 31.

A) DOCUMENTARY, TESTIMONIAL, AND EXPERT EVIDENCE

31. According to that ordered by the President [FN18] the statement offered before a notary public (affidavit) by Javier Gurriaran Prieto, social worker and expert proposed jointly by the representatives and the Commission was received. In his condition of expert he informed the Tribunal of the situation of the communities of populations in resistance and of the organizations dedicated to the defense of the same and of the rights of indigenous communities, all during the time of the internal conflict in Guatemala.

[FN18] Cfr. Order issued of the President of the Inter-American Court on March 14, 2008 in this case.
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32. Additionally, the Court heard in public hearing the statement of Victoriana Tiu Tojín, sister of Maria Tiu Tojín, who offered testimony regarding i) the relationship and work of María Tiu Tojín with the Council of Ethnic Communities Runujel Junam (CERJ) and her follow-up to the work of the National Committee of Widows of Guatemala (CONAVIGUA); ii) the alleged facts recounted by María Tiu Tojín upon escaping from her alleged first illegal detention and the alleged violations to her rights suffered during said detention; iii) the circumstances under which the alleged detention and disappearance of the victims occurred; iv) the relationship between the alleged execution of her sister María Mejía Tojín [FN19] with the alleged disappearance of her sister María Tiu Tojín; v) the alleged obstacles and harassments faced by the next of kin of the victims in the search for justice in this case, and vi) the consequences for the next of kin derived from the alleged violations of human rights in detriment of her sister and niece.

[FN19] In its final written arguments, the Commission informed the Tribunal that María Tiu Cojín was not María Mejía’s sister, as had been initially established in the complaint presented before that body.
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33. On the other hand, the Court heard in the public hearing, the expert statement of Helen Mack Chang, who informed the Tribunal of the access to justice and impunity for human rights violations in Guatemala and how said phenomena affects the Guatemalan indigenous people.

B) ASSESSMENT OF THE EVIDENCE

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34. In this case, as in others, [FN20] the Tribunal admits the evidentiary value of the documents presented by the parties on their procedural opportunity that were not opposed or objected, nor was their authenticity questioned. With regard to the documents forwarded as evidence to facilitate adjudication of the case (supra para. 10), the Court includes them in the body of evidence, in application of that stated in Article 45(2) of the Rules of Procedure.

[FN20] Cfr. Case of Velásquez Rodríguez. Merits. Judgment of July 29, 1988. Series C No. 4, para. 140; Case of Heliodoro Portugal v. Panama, supra note 17, para. 67; and Case of Bayarri v. Argentina, supra note 17, para. 35.

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35. Similarly, the Tribunal accepts the documents presented by the State and the representatives during the public hearing, since it considers them useful for the present case and their authenticity or veracity were not objected or questioned.

36. In what refers to the additional documents sent by the representatives along with their brief of final arguments (supra para. 9), regarding the procedural costs and expenses, the Court reiterates that pursuant to Article 44(1) of the Rules of Procedure, "[i]tems of evidence tendered by the parties shall be admissible only if previous notification thereof is contained in the application and in the reply thereto." Additionally, this Tribunal has stated that "the claims of the victims or their representatives in relation to costs and expenses, and the evidence supporting them, must be presented to the Court at the first procedural opportunity granted to them, namely, in the brief containing pleadings and motions, without prejudice to those claims being updated subsequently, to include new costs and expenses incurred as a result of the proceedings before this Court." [FN21] On this opportunity the Court considers that these documents are useful in deciding the present case and will assess them along with the rest of the body of evidence and taking into account the observations made in this regard by the State (supra para. 10).

[FN21] Cfr. Case of Molina Theissen v. Guatemala. Reparations and Costs. Judgment of July 3, 2004. Series C No. 108, para. 22; Case of Apitz Barbera et al ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 5, 2008. Series C No. 182, para. 258; and Case of Castañeda Gutman v. Mexico. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008. Series C No. 184, para. 75.

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37. Regarding the expert opinions and the testimony offered in the public hearing (supra paras. 32 and 33), the Court considers them relevant since they adjust to the object defined by the President in the Ruling in which she ordered they be received (supra para. 6). The Court points out that Mrs. Victoriana Tiu Tojín offered her statement in the Mayan language k'iche', reason for which a translator guaranteed that she could understand and be understood during that hearing. This Tribunal considers that the testimonial statement offered by Mrs. Victoriana Tiu Tojín cannot be assessed in an isolated manner since the person making the statement has a

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direct interest in the case, and therefore it will be appraised within the totality of the evidence of the process. [FN22]

[FN22] Cfr. Case of Loayza Tamayo v. Peru. Merits. Judgment of September 17, 1997. Series C No. 33, para. 43; Case of Castañeda Gutman v. Mexico, supra note 21, para. 72, and Case of Bayarri v. Argentina, supra note 17, para. 49.

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38. The Tribunal observes that some documents mentioned by the parties in their corresponding briefs were not presented as evidence. In this case they are documents corresponding to international or local organisms or organizations that have an electronic link to a webpage. [FN23] In principle, it corresponds to the parties to enclose with their respective main briefs all documentation they expect be considered evidence, so that it is known by the Tribunal and the other parties immediately. However, as has been stated previously by the Court, [FN24] with regard to the receipt and assessment of the evidence, the proceeding followed before it is not subject to the same formalities as domestic judicial actions, and the incorporation of certain elements into the body of evidence must be done paying special attention to the circumstances of the specific case and taking into account the limits imposed by the respect to legal security and the procedural balance of the parties. Taking into account the aforementioned, the Court considers that legal security and the procedural balance is not affected in those cases in which a party provides at least the direct electronic link to the document mentioned as evidence, since this would make it possible for the Tribunal and the other parties to locate it immediately. Since the parties have had the possibility to object this type of documents in the present case and the Court has had access to the same and has considered them appropriate, they are accepted and included in the case file.

[FN23] Quoted by the Commission: Report of the Commission of Historical Explanation (hereinafter "CEH"), Guatemala, Memorias del Silencio, available at http://shr.aaas.org/guatemala/ceh/gmds_pdf/; Report of the Inter-Diocese Project "Recovery of Historic Memory" of the Human Rights Office of the Archbishopric of Guatemala: Guatemala, Nunca Más, available at http://www.odhag.org.gt/INFREMHI/INDICE.HTM. Inter-American Commission of Human Rights, Report on the situation of human rights in Guatemala in the years 1983, available at http://www.cidh.org/countryrep/Guatemala83sp/indice.htm; 1993, available at http://www.cidh.org/countryrep/Guatemala93sp/indice.htm; Special report on the situation of the human rights of the so-called "Communities of Populations in Resistance" of Guatemala 1994, available at http://www.cidh.org/countryrep/CPR.94sp/Indice.htm; ODHAG, Report "Hasta Encontrarte: Niñez Desaparecida por el conflicto armado interno en Guatemala", 2000, page 29, available at http://www.odhag.org.gt/Informe%20Ninez%20Desaparecida/hasta%20encontrarte%20contenido.pdf; and Report on the disappearance of María Tiu Tojín and her one-month old daughter, María Josefa Tiu Tojín. Amnesty International, January 29, 1991, AMR Index 34/05/91/s, available at http://web.amnesty.org/library/print/ESLAMR340051991.
[FN24] Cfr. Case of Baena Ricardo et al. v. Panama. Merits, Reparations, and Costs. Judgment of February 2, 2001. Series C No. 72, para. 71; Case of the Miguel Castro Castro Prison v. Peru.

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Merits, Reparations, and Costs. Judgment of November 25, 2006. Series C No. 160, para. 184; and Case of Escué Zapata v. Colombia. Merits, Reparations, and Costs. Judgment of July 4, 2007. Series C No. 165, para. 26.

VI. ARTICLES 4 (RIGHT TO LIFE), [FN25] 5 (RIGHT TO HUMANE TREATMENT), [FN26] 7 (RIGHT TO PERSONAL LIBERTY), [FN27] 8(1) (RIGHT TO A FAIR TRIAL), [FN28] 19 (RIGHTS OF THE CHILD), [FN29] AND 25(1) (RIGHT TO JUDICIAL PROTECTION) [FN30] IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) [FN31] OF THE INTER-AMERICAN CONVENTION AND OF ARTICLE I OF THE INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCE [FN32]

[FN25] Article 4. Right to Life
[…]
1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. […]
[FN26] Article 5. Right to Humane Treatment
1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with regard for the inherent dignity of the human person. […]
[FN27] Article 7. Right to Personal Liberty
1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies. […]
[FN28] Article 8. Right to a Fair Trial
1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the

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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. […]
[FN29] Article 19. Rights of the Child
Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.
[FN30] Article 25. Right to Judicial Protection
1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. […]
[FN31] Article 1. Obligation to Respect Rights
1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. […]
[FN32] Article I
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.
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39. As a form of reparation to the victims, in this section the Court will establish the facts of the present case and the international responsibility derived from the same (supra para. 1 y 5), based on the application presented by the Inter-American Commission, the acknowledgment of responsibility made by the State and the body of evidence.

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40. On August 29, 1990 members of the Guatemalan Army accompanied by members of the Civil Self-Defense Patrols [FN33] arrived at the Community of Population in Resistance of Santa Clara known as “La Sierra”, Municipality of Chapul, Department of El Quiché, and captured 86 of its residents. [FN34] This community was made up of groups of families that had been moved [FN35] who had sought refuge in the mountains, as resistance to the strategies of the Guatemalan Army used against the population displaced during the armed conflict. [FN36]

[FN33] The Civil Self-Defense Patrols were created at the end of 1981 by the military regime de facto led by the General Efraín Ríos Montt, as part of the anti-insurgent policy, whose goal was

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to exterminate the guerrilla movement through the relocation of the indigenous population and the eradication of "any person or community of suspicious people, through procedures that violate human rights." The PACs started in the department of Quiché, and expanded to other departments. Cfr. application of the Inter-American Commission, para. 74, and Fourth Report on the Human Rights Situation in Guatemala. Inter-American Commission of Human Rights, 1993. Chapter VI. (Available at: http://www.cidh.org/countryrep/Guatemala93sp/cap.6.htm)
[FN34] Cfr. CEH, Guatemala, Memoria del Silencio, Volume X, Annex II: Cases Presented, pages 1210 and 1211, (Available at http://shr.aaas.org/guatemala/ceh/gmds_pdf/).
[FN35] Regarding the phenomenon of the displacement of the indigenous population, Cfr. Case of the Plan de Sánchez Massacre v. Guatemala, supra note 16, paras. 42(5), 42(6). In this Judgment the Court considered as proven that:
[…]the most violent period of this conflict was between 1978 and 1983, when the military operations focused on the regions of Quiché, Huehuetenango, Chimaltenango, Alta and Baja Verapaz, the southern coast and Guatemala City. During these years, counterinsurgency policy in Guatemala was characterized by "military actions geared toward destruction of groups and communities as well as forced geographic displacement of indigenous communities when they were considered potential supporters of the guerrilla forces;"
[…] these military actions, known to or ordered by the highest authorities of the State, consisted primarily of killing defenseless population, known as massacres and "scorched earth operations." According to the Report by the Historical Elucidation Committee, approximately 626 massacres were carried out by means of cruel actions directed at eliminating persons or groups of persons previously identified as targets of the military operations and with the aim of causing terror as a mechanism of social control; […]
[FN36] Cfr. expert opinion of Javier Gurrieran Prieto, given before a notary public (affidavit) on April 4, 2008 (Dossier of merits, Volume II, folios 359 through 381); Inter-American Commission of Human Rights, Report of Merits No. 71/04, para. 58 (dossier of annexes to the application, Appendix 1, folio 15). Similarly, on the Communities of Population in Resistance, cfr. Case of Myrna Mack Chang v. Guatemala, supra note 15, para. 134(7).
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41. Among the people detained were Mrs. María Tiu Tojín and her daughter, [FN37] who belonged to the Maya ethnic group. The 86 detainees were transferred to the military base in Santa María Nebaj. In this place María Tiu Tojín and her daughter Josefa were seen for the last time. [FN38] The other 84 people detained were transferred to a camp of the Special Commission for the Attention of Repatriates, Refugees, and Displaced People [FN39] (hereinafter "CEAR") at Xemamatze. The CEAR officials received from the Army a list of people delivered to its custody and assistance, which included María Tiu Tojín and her daughter. [FN40] However, they never arrived at the CEAR camp [FN41] and there whereabouts are unknown up to this date. According to the practices that existed during the armed conflict (infra para. 49), it is suspected that Mrs. Tiu Tojín remained at the military barracks as a "war prisoner" accused of being a member of the guerrilla. [FN42] Her whereabouts are unknown up to this date. In the case of Josefa Tiu Tojín, there is a possibility that she was handed over to a third party [FN43] or that she was also executed "based on her age and innocence."

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[FN37] Cfr. CEH, Guatemala, Memoria del Silencio, Volume X, Annex II: Cases Presented, pages 1210 and 1211, (Available at http://shr.aaas.org/guatemala/ceh/gmds_pdf/). In the mentioned report of the CEH it was established that "In November 1990, in the community of Santa Clara, CPR La Sierra, municipality of Chajul, Department of [the] Quiché, members of the Guatemalan Army captured eighty six people and took them to Amachel, municipality of Chajul, where they were detained and tortured for four days, accusing them of being members of the guerrilla. They were later taken by helicopter to Nebaj. Among the victims there was a young mother with her fifteen-day old daughter. The mother was the leader of CONAVIGUA, and that is why soldiers took her to the detachment along with her daughter and nobody has heard of them since. It is suspected that this woman was raped during the time they remained in Amachel."
[FN38] Cfr. CEH, Guatemala, Memoria del Silencio, Volume X, Annex II: Cases Presented, pages 1210 and 1211, (Available at http://shr.aaas.org/guatemala/ceh/gmds_pdf/).
[FN39] The Special Commission for the Attention of Repatriates, Refugees, and the Displaced "CEAR" was created at the beginning of 1991 as a dependency of the Presidency of the Republic, with the objective of offering a solution to the problem of refugees, those who returned and those who were displaced during the internal armed conflict. Cfr. Fourth Report on the Situation of Human Rights in Guatemala of the Inter-American Commission of Human Rights of 1993, Chapter VII (Available at: http://www.cidh.org/countryrep/Guatemala93sp/cap.7.htm).
[FN40] Cfr. list of the those displaced received by the CEAR (dossier of annexes to the application, Annex 1, folio 600).
[FN41] Cfr. copy of the hand-written memorandum of October 20, 1990, registering telephone notices and addressed to the Licentiate Carmen Rosa de León, director of the CEAR and to Lic. Lucrecia de Feliz from the same institution by Jorge Enrique Cancinos (dossier of annexes to the application, Annex 2, folio 602). The note indicated word by word "Matter María Tiu Tojín and her 25-day old daughter are not in Xemamatze. We just received a list and we are still awaiting their arrival." Cfr. Communication of March 5, 1991 from Carmen Rosa León, Executive Director of the CEAR (dossier of annexes to the application, annex 5, folio 755).
[FN42] Cfr. CEH, Guatemala, Memoria del Silencio, Volume X, Annex II: Cases Presented, pages 1210 and 1211, (Available at http://shr.aaas.org/guatemala/ceh/gmds_pdf/); and expert opinion of Javier Gurrieran Prieto, offered before a notary public (affidavit) on April 4, 2008 (dossier of merits, volume II, Merits, folios 359 through 381).
[FN43] Cfr. expert opinion of Javier Gurrieran Prieto, offered before a notary public (affidavit) on April 4, 2008 (dossier of merits, volume II, Merits, folios 359 through 381).
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42. According to her baptism certificate, at the time of her disappearance Mrs. Tiu Tojín was 27 years old. [FN44] Josefa, on her part, was approximately one month old. [FN45] At the time of her detainment María Tiu Tojín was part of the Community of Population in Resistance of Santa Clara, known as "la Sierra". [FN46] She was also linked to the Council of Ethnic Communities Runujel Junam (hereinafter "CERJ") and to the National Committee of Widows of Guatemala CONAVIGUA, [FN47] organizations that had promoted the non-participation of the Civil Self-Defense Patrols during the internal armed conflict in Guatemala.

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[FN44] Cfr. proof of baptism issued on January 13, 2005 by the Parish of Santo Domingo de Guzmán, Sacapulas, El Quiché (dossier of annexes to the brief of pleadings and motions, Annex D, folio 1374). According to the document María Tiu Tojín was born on November 15, 1962.
[FN45] Cfr. list of those displaced received by the CEAR (dossier of annexes to the application, annex 1, folio 600).
[FN46] Cfr. CEH, Guatemala, Memoria del Silencio, Volume X, Annex II: Cases Presented, pages 1210 and 1211, (Available at http://shr.aaas.org/guatemala/ceh/gmds_pdf/).
[FN47] Cfr. statement of Victoriana Tiu Tojín offered before the Inter-American Court of Human Rights during the public hearing held on April 30, 2008, and CEH, Guatemala, Memoria del Silencio, Volume X, Annex II: Cases Presented, pages 1210 and 1211, (Available at http://shr.aaas.org/guatemala/ceh/gmds_pdf/).
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43. On October 14, 1990 Juan Tum Mejía presented before the judge of Paz, Santa Cruz of El Quiché a habeas corpus in favor of Mrs. Tiu Tojín and her daughter Josefa. [FN48] The next day, the CERJ presented a habeas corpus before the Human Rights Ombudsman and the president of the Supreme Court of Justice in favor of the victims. [FN49] On November 4, 1990 Victoria Tiu Tojín presented a habeas corpus in favor of her sister María and her niece Josefa Tiu Tojín before the court of Paz, Santa Cruz of El Quiché. [FN50] On November 20, 1990 Victoria Tiu presented a brief to the Auxiliary Human Rights Ombudsman in which she denounced the disappearance of María Tiu Tojín and Josefa and the threats made by the military commissioners against them. [FN51]

[FN48] Cfr. habeas corpus filed by Juan Tum Mejía before the Judge of Paz of Santa Cruz of the Quiché on October 14, 1990 (dossier of annexes to the application, annex 5, folio 792).
[FN49] Cfr. habeas corpus filed by the Council of Ethnic Communities Runujel Junam CERJ on October 15, 1990 before the Human Rights Ombudsman (dossier of annexes to the application, annex 5, folio 790).
[FN50] Cfr. habeas corpus filed by Victoriana Tiu Tojín before the Court of Paz of Santa Cruz of the Quiché on November 4, 1990 (dossier of annexes to the application, annex 5, folio 793).
[FN51] Cfr. complaint filed by Victoriana Tiu Tojín before the Auxiliary Human Rights Ombudsman of the Department of the Quiché on November 20, 1990 (dossier of annexes to the application, annex 5, folio 794).
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44. The habeas corpus filed by Juan Tum Mejía and Victoriana Tui Tojín (supra para. 43) were declared inadmissible on December 20, 1990 by the Second First Instance Criminal Court of the Quiché, which ordered the “investigation of the whereabouts of the […] victims and the corresponding prosecution of those responsible.” [FN52]

[FN52] Cfr. order of the Second First Instance Criminal Court of the Department of the Quiché of December 20, 1990 (dossier of Annexes to the application, annex 5, folios 612 through 616).
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45. On January 30, 1991 the Second Lower Court of El Quiché disqualified itself from continuing to hear the habeas corpus presented by the CERJ and it forwarded the actions to the military justice system. [FN53] Then, on February 6, 1991 the Judge Advocate of Military Zone No. 20 of the Department of El Quiché started the preliminary investigation of the facts denounced, titled “On investigating the plagiarism or kidnapping of María Tiu Tojín and Josefa Tiu Tojín.” [FN54] In it, a lieutenant of the reserve in the infantry area was syndicated, but he was released on May 15, 1991 due to lack of sufficient motives to issue a commitment order. [FN55] On May 24, 1991 the Public Prosecutor’s Office asked that the CEAR be notified, so that it would forward to the Advocate Judge a copy of the list of the people displaced it received in said institution’s camp on September 9, 1990 and that a testimonial hearing be received from all of them. [FN56] Said people were not summoned, the Public Prosecutor’s Office did not correct the omission, and the process did not continue. [FN57]

[FN53] Cfr. order of the Second First Instance Criminal Court of the Department of the Quiché of January 30, 1991 (dossier of annexes to the application, annex 5, folio 692).
[FN54] Cfr. order of the Military Prosecutors’ Office of Military Area No. 20 of Santa Cruz of El Quiché of February 6, 1991 (dossier of Annexes to the application, annex 5, folios 695 through 697).
[FN55] Cfr. order of the Advocate Judge of Military Area No. 20 of May 15, 1991 (dossier of annexes to the application, annex 5, folio 779).
[FN56] Cfr. petition of the Attorney General of the Nation, Public Prosecutors’ Office, processed before the Advocate Judge of Military Area N°20 of May 24, 1991 (dossier of annexes to the application, annex 5, folios 782 and 783).
[FN57] Cfr. dossier of the military criminal proceedings N° 2047-90 processed before the Advocate Judge of Military area N°20 (dossier of annexes to the application, annex 5).

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46. The criminal proceedings started with the Advocate Judge remained in its preliminary phase for more than 16 years. During that period the investigation did not see any important progress and the facts were not duly investigated by the Guatemalan justice system.

47. On June 10, 2008, once the public hearing on the present case had been celebrated, the Military Court of the Fourth Infantry Brigade of Cuyotenengo, Department of Suchitepéquez issued a ruling regarding the investigation processes on the whereabouts of María and Josefa Tiu Tojín (supra para. 20), answering a request of the Human Rights Section of the Public Prosecutors’ Office of the City of Guatemala in which it requests the decline of jurisdiction of the Military Court with regard to the investigation process in the present case. [FN58] In said ruling the Military Court declined its jurisdiction to continue with the investigation processes into the “plagiarism or kidnapping” of Maria Tiu Tojín and Josefa Tiu Tojín filed under No. 44-90 in the Military Court of Santa Cruz of El Quiché, which is currently inactive. Therefore, it ordered that the corresponding processes be forwarded to the Court of the First Instance for Criminal, Narcotics, and Environmental Offenses of the department of El Quiché. [FN59] On June 17, 2008 the First Instance Court for Criminal, Narcotics, and Environmental Offenses of the Department of the Quiché, Santa Cruz del Quiché, [FN60] decided that by virtue of the fact that the facts denounced were committed within the municipality of Santa María Nebaj, the

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competent judge to exercise jurisidiction is the First Instance Court for Criminal, Narcotis, and Environmental Offenses of Santa María Nebaj. Subsequently, this court received the dossier through the order of July 7, 2008 and it forwarded it to the Public Prosecutors' Office for its investigation. [FN61]

[FN58] Cfr. brief of June 4, 2008, through which the Prosecutor's Office of the Human Rights Section referred to "jurisdiction issues due to its decline of the same" (dossier of merits, Volume III, folio 688).
[FN59] Cfr. ruling of June 20, 2008 issued by the Military Court of the Fourth Infantry Brigade (dossier of merits, volume III, folio 703).
[FN60] Cfr. order of June 17, 2008 of the Court of the First Instance for Criminal, Narcotics, and Environmental Offenses of Santa Cruz, Department of the Quiché (dossier of merits, volume III, folio 720).
[FN61] Cfr. certificate of July 7, 2008 of the Court of the First Instance for Criminal, Narcotic, and Environmental Offenses of Santa María Nebaj, Department of the Quiché (dossier of merits, volume III, folio 722)

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48. The arrest and subsequent forced disappearance of María Tiu Tojín and her daughter were not isolated facts. In Guatemala, between the years 1962 and 1996 there was a domestic armed conflict that resulted in elevated human, material, institutional, and moral costs. It has been estimated that during this time "more than two hundred thousand people" were victims of arbitrary executions and forced disappearances, as a consequence of the political violence. [FN62] In ethnical terms "83.3% of the victims of violations to human rights and acts of violence registered by the [Commission for Historic Explanations (hereinafter the "CEH")] belonged to any Mayan ethnic group, 16.5% belonged to the mestizo group and 0.2% to other groups. [FN63]

[FN62] Cfr. CEH, Memoria del Silencio, Volume V, Conclusions and Recommendations, page 21 (Available at http://shr.aaas.org/guatemala/ceh/gmds_pdf/).
[FN63] Cfr. CEH, Memoria del Silencio, Volume II, Conclusions and Recommendations, page 321 and 322 (Available at http://shr.aaas.org/guatemala/ceh/gmds_pdf/).

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49. As has been established in other cases regarding Guatemala brought before this Tribunal, [FN64] the forced disappearance of persons in that country constituted a practice of the State during the time of the internal armed conflict carried out mainly by agents of its security forces, through which members of insurgent movements or people identified as inclined to insurgency were captured and held secretly without informing a competent, independent, and impartial legal authority, and they were physically and psychologically tortured in order to obtain information and, possibly, even murdered.

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[FN64] Cfr. Case of Bámaca Velásquez v. Guatemala, supra note 16, para. 132 and Case of Molina Theissen v. Guatemala, supra note 16, para. 40(1)
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50. The internal armed conflict "created a scenario that favored the exposure of children to be exposed to a multiplicity of violations. It has been documented that in the execution of military operations […] boys and girls were the victims of forced disappearances." [FN65]

[FN65] Cfr. ODHAG, Report "Hasta Encontrarte: Niñez Desaparecida por el conflicto armado interno en Guatemala", 2000, page 29.
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51. Additionally to the aforementioned, the Guatemalan system for the administration of justice resulted ineffective in guaranteeing compliance of the law and protection of the rights of the victims and their next of kin in almost the totality of the violations committed against human rights during that period of time. [FN66] Thus, the lack of investigation into this type of facts constituted a determining factor in the systematic practice of violations against human rights.

[FN66] Cfr. expert opinion offered by Helen Mack Chang during the public hearing before the Inter-American Court of Human Rights on April 30, 2008.

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52. Since its first judgment in the case of Velásquez Rodríguez, [FN67] the Court has reiterated that the forced disappearance of persons is a crime of a continuous or permanent nature, [FN68] and of a multiple offense nature, since it not only produces an arbitrary deprivation of freedom, but it puts the personal integrity, safety and the life itself of the detainee in danger. The permanent and multi-offense nature of the forced disappearance of persons is reflected in Articles II and III of the Inter-American Convention on the Forced Disappearance of Persons, which state, in what is relevant, 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 continuous or permanent as long as the fate or whereabouts of the victim has not been determined.

[FN67] Cfr. Case of Velásquez Rodríguez v. Honduras, supra note 20, para. 155; Case of Goiburú et al. v. Paraguay. Merits, Reparations, and Costs. Judgment of September 22, 2006.

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Series C. No. 153, paras. 81 through 85; and Case of Heliodoro Portugal v. Panama, supra noe 17, para. 106.
[FN68] The European Court of Human Rights has also considered forced disappearance a continuous or permanent crime. Loizidou v. Turkey, App. No. 15318/89, 513 Eur. Ct. H.R. (1996).
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53. The Court has established that in view of the nature of the rights violated, [FN69] a forced disappearance constitutes a grave violation of human rights that are non-derogable in character, producing a gross abandonment of the basic principles on which the Inter-American system is based. [FN70] In the present case, besides the forced disappearance of María and Josefa Tiu Tojín was part of a pattern of massive and systematic violations to human rights committed during the internal armed conflict in detriment of some groups or sectors of the population in Guatemala (supra paras. 48 and 49). As such, the forced disappearance of María and Josefa Tiu Tojín have particular consequences with regard to the obligation to guarantee the human rights protected under the American Convention (infra para. 91).

[FN69] Cfr. Preamble of the Inter-American Convention on Forced Disappearance of Persons, which in what is relevant states: CONSIDERING that the forced disappearance of persons 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.
[FN70] Cfr. Case of Gómez Palomino v. Peru. Merits, Reparations, and Costs. Judgment of November 22, 2005. Series C No. 136, para. 92; Case of the Serrano Cruz Sisters. Preliminary objections. Judgment of November 23, 2004. Series C No. 118, para. 105; and Case of Heliodoro Portugal v. Panama, supra note 17, para. 118.
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54. In view of the previous considerations, based on the facts established (supra paras. 40 to 51) and in the terms of the acknowledgment of international responsibility made by the State, it is correct to state that the latter is responsible for the violation of the rights enshrined in Articles 4(1), 5(1) and 5(2), 7(1), 7(2), 7(4), 7(5) and 7(6), 8(1), and 25(1) of the American Convention, in relation to Article 1(1) of the same treaty and Article I of the Inter-American Convention on Forced Disappearances, in detriment of María Tiu Tojín; for the violation of the rights enshrined in Articles 4(1), 5(1) and 5(2), 7(1) and 7(2), 8(1), and 25(1) of the American Convention, in relation to Articles 1(1) and 19 of the same treaty and Article I of the Inter-American Convention on Forced Disappearances, in detriment of the child Josefa Tiu Tojín; for the violation of the right foreseen in Article 5(1) of the Convention in relation to Article 1(1) of the same, in detriment of Victoria Tiu Tojín, sister and aunt of the victims, and for the violation of the rights enshrined in Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) of the same, in detriment of the next of kin of María and Josefa Tiu Tojín, specifically: Josefa Tiu Imul, mother of María Tiu Tojín, Rosa Tiu Tojín, Pedro Tiu Tojín, Manuel Tiu Tojín, and Juana Tiu Tojín, siblings of María Tiu Tojín. The State's international responsibility is considered aggravated, pursuant with that established in this chapter (supra para. 53).

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

55. It is a principle of international law that any violation of an international obligation that has caused damage entails the obligation to repair it adequately. [FN71] The Court has adopted decisions in this regard based on Article 63(1) of the American Convention. [FN72]

[FN71] Cfr. Case of Velásquez Rodríguez. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, para. 25; Case of Heliodoro Portugal v. Panamá, supra note 17, para. 217; and Case of Bayarri v. Argentina, supra note 17, para. 119.

[FN72] Article 63(1) of the Convention states 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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56. Within the framework of the acknowledgment made by the State (supra paras. 12, 14, and 16), the considerations on the acknowledgment of international responsibility, and the violations to the American Convention declared in the previous chapter, as well as in the light of the criteria determined in the Court's jurisprudence with regard to the nature and scope of the obligation to repair, [FN73] the Court will proceed to analyze the claims presented by the Commission and the representatives and the State's position, with the purpose of ordering the measures tending to repair the damages caused to the victims.

[FN73] Cfr. Case of Velásquez Rodríguez v. Honduras, supra note 71 paras. 25 through 27; Case of Yvon Neptuno v. Haiti. Fond, Réparations et Frais. Arret du 6 Mai 2008. Series C No. 180, para. 153; and Case of Heliodoro Portugal v. Panama, supra note 17, para. 99.

A) Injured Party

57. The Court will now proceed to decide who should be considered an "injured party" in the terms of Article 63(1) of the American Convention and, consequently, entitled for the reparations established by the Tribunal.

58. In this regard, the Tribunal reiterates that they will consider as injured party those people that have been declared victims of violations of any right enshrined in the Convention. The jurisprudence of this Court has indicated that the alleged victims must be listed in the application and in the Commission's report pursuant with Article 50 of the Convention. Additionally, pursuant with Article 33(1) of the Rules of Procedure of the Court, it corresponds to the Commission and not this Tribunal, to identify with precision and on the due procedural opportunity the alleged victims in a case before this Tribunal. [FN74]

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[FN74] Cfr. Case of the Ituango Massacres v. Colombia. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 1, 2006. Series C No. 148, para. 98; Case of Kimel v. Argentina, supra note 12, para. 102; and Case of Bayarri v. Argentina, supra note 17, para. 229.
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59. The Court considers that María Tiu Tojín and Josefa Tiu Tojín are "injured parties" in their nature of victims of the violations that were declared in their detriment, and therefore they will be entitled to the reparations set by the Tribunal in their case. Likewise, Victoriana Tiu Tojín (sister), Josefa Tiu Tojín (mother), Rosa Tiu Tojín (sister), Pedro Tiu Tojín (brother), Manuel Tiu Tojín (brother), and Juana Tiu Tojín (sister) in their quality of next of kin will be considered beneficiaries of the reparations ordered, in their case, in relation to the violations that were declared in their detriment (supra para. 54).

60. In their brief of pleadings and motions, the representatives stated that "[they had] received information during the last few weeks of the possible existence of the [c]ompanion of María, [f]ather of Josefa, who should be considered a beneficiary within the process."

61. The Court observes that the victims of the present case and, therefore, beneficiaries of the reparations, were individualized upon allocating the compensations in the Agreement on the specific compliance of recommendations [FN75] (supra paras. 5 and 16(c)) and in the application. On that opportunity, the alleged partner of María Tiu Tojín and father of Josefa was not identified as a victim in the present case, thus he cannot be considered an injured party.

[FN75] Cfr. "Counterproposal of economic compensation" signed by the representatives of the victims and the State on August 8, 2005 within the framework of the agreement of specific compliance of reparations issued by the Inter-American Commission (dossier of annexes to the application, appendix 2, folios 381 and 382).

B) Compensations

Pecuniary and non-pecuniary damages

62. The Court has developed in its jurisprudence the concept of pecuniary damage [FN76] and non-pecuniary damage, [FN77] as well as the circumstances in which it must compensate it.

[FN76] This Tribunal has established that pecuniary damage entails "the loss or impairment of the victim's income, the expenses incurred in connection with the facts of the case and such pecuniary consequences as may have a causal link to the facts of the instant case." Cfr. Case of Bámaca Velásquez v. Guatemala. Reparations and Costs. Judgment of February 22, 2002. Series C No. 91, para. 43; Case of Heliodoro Portugal v. Panama, supra note 17, para. 221; and Case of Bayarri v. Argentina, supra note 17, para. 127.

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[FN77] "[N]on-pecuniary damages may include the suffering and affliction caused to the direct victim and their next of kin, as well as the detriment to very significant personal values, as well as non-pecuniary alterations in the conditions of existence of the victim or their next of kin. Since it is not possible to assign a precise monetary equivalent to non-pecuniary damages, it can only be the object of compensation […] through payment of an amount of money or the delivery of goods or services that may be valued in monetary terms, which the Tribunal will establish […] in terms of equity, as well as through the realization of acts or works that are public in their scope or effects, which result in the acknowledgment of the victim's dignity and avoid the repetition of violations to human rights." Cfr. Case of Neira Alegría v. Peru. Reparations and Costs. Judgment of September 19, 1996. Series C No. 29, para. 56; Case of Castañeda Gutman v. Mexico, supra note 21, para. 239; and Case of Bayarri v. Argentina, supra note 17, para. 164.
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63. The Commission stated in its application that due to the implementation of the recommendations of report No. 71/04 and the agreement signed between the parties on August 8, 2008, "several of the next of kin of the victims have received payments" as compensation for the damages caused. It added that "it considers that the amounts for pecuniary compensation that have been agreed on through said process should be acknowledged as part of the reparation." However, it indicated that the decisions adopted domestically do not bind the Tribunal, and therefore "the fair solution is that the Court […] declare the compensation amounts to which the victims in the present case are entitled and, upon issuing its judgment, it establish that the State can deduct the amounts mentioned […] corresponding to [any] payment made […] within the domestic realm for the same facts." The representatives, in their final written arguments, added a proposal for a pecuniary compensation and the reimbursement of expenses and costs. Additionally, they indicated that they agreed with that stated by the Commission and they added that, based on "the background of the case, the economic compensation already delivered, and under the terms of this proposal it establish what is most convenient under the principle of equity."

64. The State mentioned that "derived [from the acknowledgment of international responsibility] in the present case [it had] grant[ed] an economic compensation to [the next of kin] of the victims in compliance with the recommendations of the Commission […]." Said amount was stipulated in the (supra para. 16). It added that "it does not share the position that said amounts be deducted from those appropriately set by the […] Court, nor that they be considered decisions adopted domestically, since, even though it is true that they result from an agreement between the parties, it is also true that they result from the compliance with the recommendations issued by the [Commission], which is not a domestic mechanism but a [b]ody of the Inter-American Human Rights Protection System. Additionally, said compensation was not imposed by the State, nor did it derive from a process of national compensation, on the contrary, it resulted from the substantiation of a case on violations to Human Rights against the State at an international level. Likewise, it can be determined that the amounts granted are not typical of the domestic compensation mechanisms, since it exceeds them significantly […]."

65. This Tribunal reiterates that according to its jurisprudence a judgment in a case of a violation of rights is per se a form of reparation. [FN78] However, given the characteristics of the cases submitted before it, the Tribunal has considered that one of the modalities of reparation

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of the violations to human rights committed is the compensation for pecuniary and non-pecuniary damages. In the case sub judice, the State indicated that "it agreed on the amount of [two million quetzales] (2,000,000.00) as economic reparation" and that "payment of the economic compensation was made […] on December 29 and 30, 2005." [FN79] (supra para. 16(c))

[FN78] Cfr. Case of Neira Alegría et al. v. Peru, supra note 77, para. 56; Case of Heliodoro Portugal v. Panama, supra note 17, para. 239, and Case of Bayarri v. Argentina, supra note 17, para. 164.
[FN79] Cfr. Copy of the administrative settlement records (dossier of annexes to the respondent's plea, annex I, folios 2 through 19).

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66. The Court values the payment of compensations made by the State based on the Agreement signed by the parties (supra para. 15(c)) and considers that the amount granted not only reflects the will of the parties but it is adequate and fair according to jurisprudential criteria. As indicated by the State, the compensation granted was not imposed by it, nor did it result from a domestic compensation process, it was the result of the substantiation of a case before the Inter-American Human Rights System. (supra para. 64) Therefore, this Tribunal does not consider it necessary to set additional compensations.

C) Other Forms of Reparation: Obligation to investigate, Measures of Satisfaction, Rehabilitation, and Guarantees of non-repetition.

67. The Tribunal will determine the measures of satisfaction that seek to repair the non-pecuniary damage and that do not have a pecuniary nature and it will define measures with a public scope or effect. [FN80]

[FN80] Cfr. 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 Heliodoro Portugal v. Panama, supra note 17, para. 240, and Case of Bayarri v. Argentina, supra note 17, para. 164.

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i) Obligation to investigate the facts that resulted in the violations of the present case and identify, prosecute, and, in its case, punish those responsible

68. Both the Commission and the representatives asked the Court to order the State to carry out, before the ordinary justice system, a special, rigorous, impartial, and effective investigation in order to prosecute and punish the planners and perpetrators of the forced disappearance of María Tiu Tojín and her daughter Josefa.

69. On repeated opportunities, the Tribunal has stated that, pursuant with the obligation to guarantee enshrined in Article 1(1) of the American Convention, the State has the duty to avoid and fight impunity, which has been defined by the Inter-American Court as "the lack in its

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totality of the investigation, persecution, capture, prosecution, and conviction of those responsible for the violations of the rights protected by the American Convention." [FN81] As has been indicated by the Court, "the investigation of the facts and the punishment of the people responsible, [...] is an obligation that corresponds to the State every time there is a violation of human rights and that obligation must be complied with seriously and not as a mere formality." [FN82] This obligation implies the duty of the States Parties to organize the entire governmental system and, in general, all the structures through which the exercise of public power is manifested, in such a way that it legally guarantees the free and full exercise of human rights. [FN83]

[FN81] Cfr. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala, supra note 17, para. 173; Case of the Miguel Castro Castro Prison v. Peru, supra note 24, para. 405; and Case of vargas Areco v. Paraguay. Merits, Reparations, and Costs. Judgment of September 26, 2006. Series C No. 155, para. 153. See in the same sense: Case of Myrna Mack Chang v. Guatemala, supra note 15, paras. 156 and 210; Case of Maritza Urrutia v. Guatemala. Merits, Reparations, and Costs. Judgment of November 27, 2003. Series C No. 103, para. 126; Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala, supra note 80, para. 100.
[FN82] Cfr. Case of Velásquez Rodríguez v. Honduras, supra note 20, para. 177; Case of El Amparo v. Venezuela. Reparations and Costs. Judgment of September 14, 1996. Series C No. 28, para. 61; Case of García Prieto et al v. El Salvador. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 20, 1007. Series C No. 16, para. 100; and Case of Heliodoro Portugal v. Panama, supra note 17, para. 144.
[FN83] Cfr. Case of Velásquez Rodríguez v. Honduras, supra note 20, para. 166, and Case of Godínez Cruz v. Honduras. Judgment of January 20, 1989. Series C No. 5, para. 175; and Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 26, 2006. Series C No. 154, para. 110.

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70. It has been established in the present Judgment that the facts that surrounded the forced disappearance of María and Josefa Tiu Tojín have not been duly investigated by the Guatemalan justice system (supra paras. 46 and 51), and therefore up to this date they continue to be in absolute impunity. For approximately 17 years the investigation of these facts remained practically inactive and under the jurisdiction of courts of a military nature (supra paras. 46 and47). The Court observes that this situation of impunity is characteristic of similar facts occurred during the internal armed conflict in Guatemala, becoming a determining factor that forms part of the systematic patterns that allowed the commission of grave violations to human rights during that time (supra para. 51).

71. Guatemala has acknowledged its failure to comply with its obligations in this matter and has stated its commitment regarding the violations to human rights committed in the past "under the precepts of justice, truth, reparation of the people, and dignification of the victims in order to create a new identity toward the future, which implies clarifying the whereabouts of those disappeared and making progress towards a State respectful of human rights and that seeks national reconciliation." According to said policy, Guatemala has promoted actions within the framework of the proceeding taken before the Inter-American Commission and before this

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Tribunal in relation to this case (supra paras. 16 and 20), which must be acknowledged. The Inter-American Court values positively that the military court of the Fourth Brigade of General Infantry "Justo Rufino Barrios", through its ruling of June 10, 2008 declined its jurisdiction to hear the case and established that the processes be forwarded to the Courts of Ordinary Jurisdiction responding to a request of the Prosecutors' Office of the Human Rights Section of the City of Guatemala (supra para. 20). This is consistent with the jurisprudence of this Court on this subject (infra paras. 118 and 119).

72. However, after more than 17 years since the detention and forced disappearance of María and Josefa Tiu Tojín, the State's obligations continue to be unmet. Therefore, it is imperative that the State exhaust all the procedures necessary in order to guarantee, within a reasonable period of time, the effective compliance of its duty to investigate, prosecute, and, if it is the case, punish those responsible for the facts of this case, as well as ensure the victims' right to a fair trial. The result of the proceedings must be made public, so that the Guatemalan society can know the truth.

73. Taking into account the aforementioned, this Tribunal will refer separately to each of the requests of the Commission and the representatives, in what refers to the mentioned obligation to investigate.

Due diligence in the investigation and pursuit of the facts of this case

74. The representatives asked the Tribunal that it order the State to appoint, before the ordinary justice system, a Special Prosecutor for the compliance with the investigation of the facts of the present case.

75. On November 26, 2008 the State informed that the investigation of the facts of the present case has been transferred to the Public Prosecutors' Unit for Special Cases and Human Rights Violations (Historical Explanation), of which this Tribunal takes note.

76. On other opportunities the Court has established that the obligation to investigate with due diligence acquires special intensity and importance due to the gravity of the crimes committed and the nature of the rights infringed. [FN84] In cases of the forced disappearance of persons, such as the present, the Tribunal has considered that the due diligence in the investigation implies that it be carried out ex officio, without delay, and in a serious, impartial, and effective manner. [FN85]

[FN84] Cfr. Case of Goiburú et al. v. Paraguay, supra note 67, para. 84; Case of La Cantuta v. Peru. Merits, Reparations, and Costs. Judgment of November 29, 2006. Series C No. 162, para. 157; and Case of La Rochela Massacre v. Colombia, supra note 12, para. 156.
[FN85] Cfr. Case of the Serrano Cruz Sisters v. El Salvador. Merits, Reparations, and Costs. Judgment of March 1, 2005. Series C No. 120, para. 88; Case of García Prieto et al. v. El Salvador, supra note 82, para. 101; and Case of Heliodoro Portugal v. Panama, supra note 17, para. 144.

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77. Based on the aforementioned, the State shall guarantee, as a way of guaranteeing that the investigation started before the courts of the ordinary jurisdiction (supra para. 20) be carried out with due diligence [FN86] (supra para. 69), that the authorities in charge of the investigation have within their reach and uses all the means necessary to promptly carry out all those actions and inquiries essential to clarifying the fate of the victims and identifying those responsible for the forced disappearance. [FN87] For this, the State will guarantee that the authorities in charge of the investigation have the logistic and scientific resources necessary to recollect and process evidence, and more specifically, that he is allowed access to the documents and information relevant to the investigation of the facts denounced and that they be able to obtain evidence of the locations of the victims. In this sense, it is important to reiterate that in the case of violations to human rights, state authorities cannot hide behind mechanisms such as official secrets or confidentiality of the information or behind reasons of public interest or national security, to justify not providing the information required by the judicial or administrative authorities in charge of the investigation or pending proceedings. [FN88]

[FN86] Cfr. Inter-American Convention on Forced Disappearance of People, Article X and International Convention for the Protection of all people against forced disappearances.
[FN87] Cfr. Case of Velásquez Rodríguez v. Honduras, supra note 20, para. 174; Case of the Serrano Cruz Sisters v. El Salvador, supra note 85, para. 83; Case of García Prieto et al. v. El Salvador, supra note 82, para. 101; and Case of Heliodoro Portugal v. Panama, supra note 17, para. 144.
[FN88] Cfr. Case of Myrna Mack Chang v. Guatemala, supra note 15, para. 180 and 181, and Case of La Cantuta v. Peru, supra note 84, para. 111.

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78. Likewise, the State must guarantee that the authorities in charge of the investigation take into account the systematic patterns that allowed the commission of grave violations to human rights in the present case, [FN89] so that the object of the investigation be carried out taking into account the complexity of those facts, the context in which they occurred [FN90] and the patterns that explain their commission, avoiding omissions in the gathering of evidence and in the follow-up of logical lines of investigation. [FN91]

[FN89] Cfr. Case of La Rochela Massacre v. Colombia, supra note 12, para. 156.
[FN90] Cfr. Case of the Serrano Cruz Sisters v. El Salvador, supra note 85, para. 88 and 105, and Case of La Rochela Massacre v. Colombia, supra note 12, para. 157.
[FN91] Cfr. . Case of La Rochela Massacre v. Colombia, supra note 12, para. 157.

Legal classification applicable in the investigation, trial, and possible punishment of the offenses committed in this case

78. The Court observes that the facts of the present case started occurring before the definition of the crime of forced disappearance of persons in the Guatemalan Criminal Code

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(infra para. 82). Thus, the criminal proceedings were started for the crime of plagiarism or kidnapping, in force at that time (infra para. 80). However, up to this date, the investigation has not offered results nor has the corresponding order for trial to commence been issued. [FN92] In this regard, both the Commission and the representatives asked the Court that it order the State that "during the investigation proceedings, trial, and punishment of those responsible in this case, the definition of the crime be that of forced disappearance."

[FN92] Cfr. brief of June 4, 2008, through which the Public Prosecutors' Office of the Human Rights Section requested an "incident due to lack of competence" (dossier of merits, volume III, folio 689 through 691).

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80. In this regard, the Commission argued that:

The scope that some decisions give the freedom from ex post facto laws in the case of more severe criminal laws in relation to the application of the crime of forced disappearance constitutes an obstacle to the obtaining of justice in cases such as the one currently before us.
In the practice, the domestic courts give way before the arguments of the defense of people charged with the crime of forced disappearance regarding the prevalence of the principle of the most favorable law when imposing the sentence and the subsequent need to apply the crime of plagiarism.
[…]
In the present case the proceedings followed are for the crime of plagiarism or kidnapping; this domestic legal classification only covers some aspects of the international crime of forced disappearance of persons. In the Commission's opinion, the conceptualization of the facts as a crime of forced disappearance is not only a legal matter, since the legal classification given to a case is what determines the delimited object of the criminal investigation carried out within its framework, all of which goes beyond the classification granted to them under the existing legislation.

81. During the public hearing held, the State indicated that "even though they have not yet identified those responsible for the facts, it is promoting actions [in this sense]. To start the corresponding investigation and take the alleged responsible parties to an oral and public debate it is important to mention […] that in Guatemala two trials for forced disappearance defined in Article 201 of the […] Criminal Code."

82. In effect, Guatemala defined the crime of forced disappearance in the Criminal Code – through the reform included in Decree No. 33-96 of the Congress of the Republic, approved on May 22, 1996-, [FN93] in the following terms:

Article 201 TER. Forced Disappearance. The crime of forced disappearance is committed by whoever, by order, with the authorization or support of State authorities, deprives one or more people in any way of their freedom, for political motives, hiding their whereabouts, denying to reveal their fate or acknowledging their detention, as well as the public official or employee,

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whether they belong or nor to the State's security bodies, that orders, authorizes, supports, or offers acquiescence for said actions.
The crime of forced disappearance is defined as the deprivation of the liberty of one or more persons, even when there is no political motive, when it is committed by elements of the State's security bodies, in the exercise of their position, when they act arbitrarily or with abuse or excessive force. Likewise, the members of groups or organized gangs with terrorist purposes, insurgents, subversive or with any other criminal purpose commit the crime of forced disappearance when they commit plagiarism or a kidnapping, participating as members or collaborators of said groups or gangs.
The crime is considered continuous until the victim is released.
The person accused of the forced disappearance will be punished with a prison sentence of twenty-five to forty years. The death penalty will be imposed instead of the maximum prison term when due to or as a result of the forced disappearance the victim were to suffer serious or very serious injuries, permanent psychic or psychological trauma, or they die.

[FN93] Decree No. 33-96 "Reforms to Decree 17-73 of the Congress of the Republic. Criminal Code" published in the Diario de Centro América No. 24 of June 25, 1996. Official Body of the Republic of Guatemala

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83. Regarding this matter, the expert Helen Mack established that:

As of 1996, with the introduction of the figure of forced disappearance, the cases that had been previously classified as plagiarism or kidnapping were transferred to a specific prosecutor's office of the Public Prosecutors' Office dedicated to investigating the violations to human rights occurred during the internal armed conflict. However, since this criminal definition came into force, the Public Prosecutors' Office has only made one accusation for forced disappearance.
In Guatemala, the legal debate on forced disappearance has not yet been settled, in the sense that there has not been a legal sentence establishing the criterion suitability of declaring forced disappearances in cases prior to the validity of the reform of the Criminal Code. However, there are still political positions that question the non-retroactive nature of this criminal definition and the classification of continuous crime, promoted by groups in tune with the military power structures, upon which the majority of the responsibility for the violations to human rights occurred during the internal armed conflict falls.
According to the Inter-American Convention on the Forced Disappearance of Persons, of which Guatemala is a party, the criminal action and punishment derived from this crime are not subject to a statute of limitation, and their systematic practice constitutes a crime against humanity. However, the retroactivity of forced disappearances is commonly argued by the defense of any of those involved in the commission of these violations with the clear purpose of closing the possibility of starting judicial proceedings on the load of forced disappearances occurred in the past. [FN94]

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[FN94] Cfr. brief presented by the expert Helen Mack Chang during the public hearing held before the Inter-American Court of Human Rights on April 30, 2008 (dossier of merits, volume III, folio 521).
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84. As previously stated, the Court has established in its constant jurisprudence that forced disappearance constitutes a multiple violation to several rights protected by the Convention, of a permanent or continued nature. [FN95] (supra para. 52) Due to its permanent nature, while the fate or whereabouts of the victim or their remains is not established, the forced disappearance continues in execution.

[FN95] Cfr. Case of Velásquez Rodríguez v. Honduras, supra note 20, para. 155; Case of Goiburú et al. v. Paraguay, supra note 67, paras. 81; and Case of Heliodoro Portugal v. Panama, supra note 17, paras. 106 through 111.
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85. In the same sense, Article III of the Inter-American Convention on Forced Disappearances establishes that the crime of forced disappearance will be considered continued or permanent as long as the fate or whereabouts of the victim have not been determined (supra para. 52). The need to consider the crime of forced disappearance integrally in an autonomous manner and with a continuous or permanent nature, with its multiple elements interconnected in a complex manner and all related criminal facts, is concluded not only from Article III in the Inter-American Convention of Forced Disappearances, the travaux prépáratoires of the same, [FN96] its preamble and regulations, but also from Article 17(1) of the Declaration of the United Nations on the Protection of all Persons against Enforced Disappearances of 1992, that even adds another element, related to the duty of investigation when it mentions that the crime of reference shall be considered "permanent while its authors continue to hide the fate and whereabouts of the disappeared person and while the facts have not been clarified." International jurisprudence also reflects this understanding [FN97] and it refers in similar terms to Articles 4 and 8(1)(b) of the mentioned International Convention of the United Nations on the subject. [FN98]

[FN96] Cfr. Annual Report of the Inter-American Commission of Human Rights 1987-1988, Chapter V.II. This crime "is permanent since it is not committed instantly but in a permanent and prolonged manner during the totality of the period during which the person remains disappeared." (OEA/CP-CAJP, Report of the President of the Workgroup In Charge of Analyzing the Project of the Inter-American Convention on the Forced Disappearances of Persons, doc. OEA/Ser.G/CP/CAJP-925/93 rev.1, de 25.01.1994, p. 10). See in the same sense Case of Goiburú et al. v. Paraguay, supra note 67, para. 83; and Case of Heliodoro Portugal v. Panama, supra note 17, para. 107.
[FN97] Cfr. 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); Cyprus v. Turkey, Application No. 25781/94, Eur. Ct. H.R. (2001), paras. 136, 150, and 158; Human Rights Committee of the United Nations, case of Ivan Somers v. Hungary, Communication No. 566/1993, 57th session, CCPR/C/57/D/566/1993

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(1996), July 23, 1996, par. 6.3; case of E. y A.K. v. Hungary, Communication No. 520/1992, 50º session, CCPR/C/50/D/520/1992 (1994), May 5, 1994, para. 6.4, and case of Solorzano v. Venezuela, Communication No. 156/1983, 27th session, CCPR/C/27/D/156/1983, 26 March 1986, para. 5.6.
[FN98] Cfr. In what is relevant, Article 8(1)(b) of the International Convention for the Protection of all Persons from Enforced Disappearance establishes that:
"[…] A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings; […]
[…] Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature. […]"
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86. On its part, Guatemalan criminal legislation acknowledges that the crime of forced disappearance of people "is considered permanent as long as the victim has not been released." (supra para. 82)

87. Since this is a crime of permanent execution, that it, its consummation is prolonged in time, if at the time the definition of the crime of forced disappearance of persons when into force in the domestic criminal law, the author maintains his criminal behavior, the new law is applicable. The courts of a higher hierarchy within the American continent, such as the National Criminal Court of Peru, the Constitutional Court of Peru, the Supreme Court of Justice of Mexico, the Constitutional Court of Bolivia, the Supreme Court of Justice of Panama, The Supreme Court of Justice of Venezuela, and the Constitutional Court of Colombia, [FN99] have issued rulings in this same sense; all of them States that, as Guatemala, have ratified the International Convention on Forced Disappearance.

[FN99] The National Criminal Chamber of Peru with regard to the investigation of the disappearance of Mr. Castillo Paéz, upon deciding if the facts attributed in the crime of forced disappearance of persons, established that "some of the defense attorneys of those accused have objected that it would be contrary to the rule of freedom from ex post facto law, to take into consideration a criminal figure not defined in the domestic legislation, such as the forced disappearance of persons, that was not in force at the time of the fact. In this sense we must state that up to this moment, we ignore the whereabouts of the youngster Castillo Páez, situation that directly results from the criminally defined actions of the author and for which he must respond in all its magnitude. If we base our decision of the seemingly undeniable circumstance that we have not yet established the whereabouts of the student Ernesto Castillo Páez, we must presume that his illegal deprivation of freedom continues, and that therefore this crime, and its characterization as permanent, continues to be executed. In these cases it can be said that the crime 'had a continuous execution.' […] [t]hus, pursuant with that established in Article 285 A of Legislative Decree 959, the facts proven in the records, fit into Article three hundred and twenty of the Criminal Code in force, this is crimes against Humanity- Forced Disappearance." Cfr. National Criminal Chamber of Peru, judgment of March 20, 2006, Exp:111-04, D.D Cayo Rivera Schreiber.

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In this same sense, the Constitutional Court of Peru, upon analyzing the legality of a habeas corpus presented in favor of Mr. Genaro Villegas Namuche –who disappeared in the year 1992-, determined that "[…] in permanent crimes, new criminal regulations may arise and they will be applicable to those who commit the crime at that time, without that meaning a retroactive application of criminal law. Such is the case of the crime of forced disappearance, which, according to Article III of the Inter-American Convention on Forced Disappearance of Persons, shall be considered a permanent crime as long as the fate or whereabouts of the victim are not determined." Cfr. Constitutional Court of Peru, judgment of March 18, 2004, dossier No. 2488-2002-HC/TC, para. 26 (At: http://www.tc.gob.pe/jurisprudencia/2004/02488-2002-HC.html). This precedent was later ratified by the same Constitutional Court in the judgment of December 9, 2004 in which it denied a habeas corpus presented by one of the alleged perpetrators in the cases of "Barrios Altos" and "La Cantuta". Thus, the Tribunal established that "the guarantee of the prior law derived from the rule of freedom from ex post facto laws is not violated if a criminal rule that was not in force prior to the start of the execution of the fact is applied to a permanent crime if it results applicable because the same is still being carried out. In this sense, the fact that the criminal definition of forced disappearance of persons was not always in force, is not an impairment to carry out the corresponding criminal proceedings for said crime and to punish those responsible. Cfr. Constitutional Court of Peru, judgment of December 9, 2004, dossier No. 2798-04, para. 22 (At: http://www.tc.gob.pe/jurisprudencia/2005/02798-2004-HC.html).
Similarly, the Supreme Court of Justice of Mexico examined this problem when it analyzed the entry into force of the Inter-American Convention on Forced Disappearance of People adopted at Belém do Pará and established that "[t]he stipulations established in the Convention may not be applied to those behaviors that constitute a disappearance that has terminated before the new regulation has become obligatory, but it shall not be interpreted in the sense that it will not be applied to the criminal behavior of said offense that having started before its validity continues to be carried out, because since the crime of forced disappearance of persons has the nature of permanent or continuous it may occur that the criminal behavior continue occurring during the validity of the Convention." Cfr. Supreme Court of Mexico. Thesis: P./J. 49/2004, Judicial Seminar of the Federation and its Gaceta, Ninth Period, In Full.
Likewise, the Constitutional Court of Bolivia in its judgment of November 12, 2001, in which it analyzed an ruling in which it ordered the investigation into the forced disappearance of Juan Carlos Trujillo Oroza, it decided that "in permanent crimes, the statute of limitation should be compute as of the moment in which it is no longer being carried out. In this order, we must precise that crimes based on the duration of the offense to the juridical right attacked are classified into instant offenses and permanent offenses. In the instant crimes, the offense to the juridical right ceases immediately after the criminal behavior has been carried out (Ex. The crime of murder); instead, in the permanent crimes, the consummative activity does not cease upon the execution of the criminal action but instead it lasts in time, in a manner such that all moments of its duration are considered as consummation of the criminal action." Cfr Constitutional Court of Bolivia judgment of November 12, 2001, No. 1190/01-R. (At: http://www.tribunalconstitucional.gov.bo/resolucion3350.html)
In the same sense, the Supreme Court of Justice of Panama stated that "it cannot in this aspect [of forced disappearance], under any circumstance, bring about criminal principles such as the rule of freedom from ex post facto laws." Cfr. Supreme Court of Justice of Panama, Criminal Chamber, judgment of March 2, 2004.

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On its part, the Supreme Court of Justice of Venezuela ruled that "if during the illegal deprivation of freedom of the passive subject the active subject continues to refuse to reveal the fate or whereabouts of the person deprived of their freedom or to acknowledge they are in that condition, and at the same time, the legal definition of the crime of forced disappearance of persons goes into effect, it must be concluded that the subjects implied in that behavior may be prosecuted and declared guilty and responsible for the crime of forced disappearance of persons, without this implying retroactivity of criminal law, since it refers to the application of the law that defines an unconcluded crime." Cfr. Constitutional Chamber of the Supreme Court of Justice of the Bolivarian Republic of Venezuela, judgment of August 10, 2007.
With regard to the continuous and permanent nature of forced disappearance, the Colombian Constitutional Court stated that "this offense shall be considered of continuous or permanent execution while the whereabouts of the victim are unknown. This obligation is reasonable if the fact that the lack of the missing person prevents the victim and their next of kin from exercising the judicial guarantees necessary for the protection of their rights and the clarification of the truth is taken into consideration: the person is still missing. This situation implies that the violation to the protected goods is prolonged in time and, therefore, the behavior is still criminally defined and illegal until there is knowledge of the whereabouts of the person, thus allowing the exercise of those judicial guarantees." Cfr. Judgment C – 580/02 of July 31, 2002 of the Constitutional Court of Colombia.
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88. Taking the above into account, this Court considers that according to nullum crimen nulla poena sine lege praevia, the figure of forced disappearance constitutes the crime currently applicable to the facts of the present case, since the whereabouts of María and Josefa Tiu Tojín are still unknown.

Application of the figure of amnesty or other forms of extinction of criminal responsibility in relation to the facts of the present case

89. During the public hearing, the Commission stated that in Guatemala there is a lack of certainty of the scope of the law on national reconciliation –Legislative Decree 145/96- that amnesties political crimes that have been committed within the context of the armed conflict. According to the Commission "this amnesty excludes the crimes of genocide, torture, and forced disappearance, as well as those crimes not subject to statutes of limitation or that do not admit extinction, pursuant with domestic law or the international treaties ratified by Guatemala." On the other hand, the Commission indicated that some decisions issued by the Guatemalan Constitutionality Court, among them, Judgment 3380-2007 "make it clear that there is discretionality in the interpretation of common and related crimes, by classifying the facts of violence and the violations to human rights committed by state agents as acts related to political crimes committed by groups that sought to modify and alter the organization and operation of the State's institutions in accordance with a political motivation." Based on the aforementioned, it also indicated that "the determination [that the facts of this case] constitute crimes against humanity and may eventually be classified within the crime of genocide, would offer greater clarity and strength to the international juridical framework that classifies the actions of the criminal justice system in Guatemala [and] would contribute to limiting criminal judges' margins

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of interpretation, while sending a clear message on the diligent investigation of these facts and on the legal consequences […] of a lack of investigation.”

90. The Court observes that the State did not apply amnesty or any other forms of exclusion of criminal responsibility in relation with the facts of the present case. The possibility of this happening is not a matter that the Court may decide upon in this stage of the proceedings.

91. However, we should reiterate to the State that the prohibition of the forced disappearance of persons and the related duty to investigate them and, if it were the case, punish those responsible has the nature of jus cogens. [FN100] As such, the forced disappearance of persons cannot be considered a political crime or related to political crimes under any circumstance, to the effect of preventing the criminal persecution of this type of crimes or suppressing the effects of a conviction. [FN101] Additionally, pursuant with the preamble of the Inter-American Convention on Forced Disappearance, the systematic practice of the forced disappearance of persons constitutes a crime against humanity and, as such, entails the consequences established in the applicable international law.

[FN100] Cfr. Case of Goiburú et al. v. Paraguay, supra note 67, paras. 84 and 131, and Case of La Cantuta v. Peru, supra note 84, para. 157.

[FN101] In this sense, pursuant with Article V of the Inter-American Convention on the Forced Disappearance of Persons, “the forced disappearance of persons shall not be considered a political offense for purposes of extradition.” Likewise, pursuant with Article 13 of the International Convention for the Protection of all Persons from Enforced Disappearance “For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives.” In the same sense, Article 5 of the International Convention for the Protection of All Persons from Enforced Disappearance states that “the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.”

Need to avoid differentiated obstacles in detriment of the victims of the present case as members of the Maya Ixil Indigenous People

92. The Commission argued that, “it is very important that the Court examine the differentiated impact of the impunity processes on the indigenous people of Guatemala as well as the differentiated social and cultural obstacles faced by them when accessing the instances of criminal justice that shall investigate those crimes.” Similarly, it indicated that “the impunity for grave violations against human rights committed during the internal armed conflict against the Maya people and its members reaches levels of such a magnitude that they necessarily lead us to conclude that the remains of a racist and discriminatory culture continue to permeate ample sectors and spheres of the Guatemalan society, reflecting itself in a special manner on the justice administration system.” The Commission indicated that this is due, mainly, to five factors: a) lack of intercultural training of justice operators; b) limiting factors to the physical access to

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judicial institutions; c) high costs of the processing of judicial processes and the hiring or attorneys; d) a single language in the development of judicial processes; and e) behaviors and practices of a discriminatory type by the justice operators.

93. On its part, the representatives argued that:

One of the main obstacles in this case is economic resources; the next of kin of María and Josefa, [are] farmers with little resources, which in no way would allow them to assume the representation costs of an attorney in order to formally become Plaintiffs and promote the investigation in this case […].
The language of the next of kin of María and Josefa is K´iche´, and as could be observed during the hearing they require a translator in order to be able to transmit information and request the same. The main bodies of the justice administration –the Judicial Body and the Public Prosecutors' Office- do not have a permanent translator system, thus the possibility that […] they promote the process for themselves becomes even more difficult.
Similarly, discrimination and racism on behalf of the operators of justice towards the indigenous and poor population does not allow or make the presentation of complaints or their promotion easy and even less so the possibility to go to trial for any of the cases related to the internal armed conflict, when many of the people who were victims of grave violations, in their majority of the indigenous population, are accused of being communists and members of the guerrilla when any of these facts is reported.

94. The State did not refer to this matter in its arguments.

95. In what refers to the exercise of the right to a fair trial enshrined in Article 8 of the American Convention, the Court has established, inter alia, that "it is precise that all requirements designed to protect, guarantee or assert the entitlement to a right be complied with; in other words, the conditions necessary to ensure the adequate representation or management of the interests or claims of those whose rights or obligations are under judicial consideration must be fulfilled." [FN102] Similarly, "this stipulation of the Convention enshrines the right to a fair trial. From it we can conclude that the States shall not interject obstacles to those people who turn to judges or courts in order to have their rights determined or protected. Any regulation or practice of the domestic order that makes individual access to the courts difficult and is not justified by the reasonable needs of the administration of justice itself, shall be understood as contrary to the previously mentioned Article 8(1) of the Convention." [FN103] This is especially important in the cases of the forced disappearance of persons since the right to a fair trial also encompasses the right of the victim's next of kin to access them.

[FN102] Cfr. Judicial Guarantees in States of Emergency (Arts. 27(2), 25, and 8 American Convention of Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9; para. 28; Case of Lori Berenson Mejía v. Peru. Merits, Reparations, and Costs. Judgment of November 25, 2004. Series C No. 119, para. 132; Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations, and Costs. Judgment of June 17, 2005. Series C No. 125, para. 108.

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[FN103] Cfr. Case of Cantos v. Argentina. Merits, Reparations, and Costs. Judgment of November 28, 2002. Series C No. 97, para. 50; and Case of Yvon Neptune v. Haiti. Supra note 73, para. 82.
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96. As has been established by this Tribunal in other occasions and pursuant with the principle of non-discrimination enshrined in Article 1(1) of the American Convention, in order to guarantee the members of indigenous communities access to justice, "it is necessary that the States grant an effective protection taking into account their specific features, economic and social characteristics, as well as their special situation of vulnerability, their common law, values, uses and customs." [FN104]

[FN104] Cfr. Case of the Yakye Axa Indigenous Community v. Paraguay, supra note 102, para. 63; Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations, and Costs. Judgment of March 29, 2006. Series C No. 146, para. 83; and Case of the Saramaka People v. Surinam. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007. Series C No. 172, para. 178.
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97. From the facts established, as well as from the statement offered by Victorina Tiu Tojín, a victim in the present case and the sister of María Tiu Tojín, it can be concluded that the next of kin of the missing victims faced obstacles when accessing justice due to the fact that they belonged to the Mayan Indian People. In this sense, Victorina Tiu Tojín indicated in her statement before the Court that:

She turn[ed] to the organizations that supported [her] since they [have] the experience that when they arrive at the court they look at [them] with [their] suits and all, [their] complaints have to wait, and therefore she [had] to turn to these people so the authorities would pay attention to their petitions. […]
That she felt fear when turning to the authorities; that they feel great fear of going to an authority or explaining their specific cases to them. […]
That none of the State authorities but instead only the organizations supporting her during these processes made the translations, but she did not receive any attention from the State in her language. […] [FN105]

[FN105] The Court points out that this statement corresponds to the interpretation made from the K'ich'e language to Spanish during the public hearing held on April 30, 2008.
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98. In the same sense, the expert Helen Mack, stated that:

Even though it is true that Centers for the Administration of Justice were opened in three different regions, since there aren't roads available many times this becomes ineffective, for example, moving from one town to another by foot takes more than six hours […], that on one

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hand, and on the other hand we can mention the economic cost this implies because if you go by foot, you have to miss several days of work in order to go to the justice system and if you are going to travel by vehicle it is more difficult because there are not enough roads to be able to do so. Of course there are currently a few more, but the cost of moving is very expensive. There was also a program for translators in justice matters, there was a program in which 300 translators were trained, and of these 300 translators the Supreme Court of Justice only hired 60, there was a follow-up of these 60 translators and it was established that many of them did not speak all the languages of the indigenous groups and some of them do not even speak one indigenous language, nor are they in the regions where they should be, thus these translators are not accessible to the indigenous people.

99. The Court warns that access to justice and the special protection that must be granted to indigenous communities is regulated in the Constitution of the State of Guatemala. [FN106] However, this Tribunal has established that "the legislation itself is not enough to guarantee full effectiveness of the rights protected by the American Convention, instead it entails the need of a governmental behavior that ensures the existence, in reality, of an effective guarantee of the free and full exercise of human rights." [FN107]

[FN106] The Constitution of Guatemala establishes that:
Article 29.- Free access to the courts and dependencies of the State. All persons shall have free access to the State's courts, dependencies, and offices, in order to exercise their actions and assert their rights pursuant with the law. […]
Article 58.- Cultural Identity. The right of persons and communities to their cultural identity according to the values, language, and customs is acknowledged.
Article 66.- Protection to ethnical groups. Guatemala is formed by different ethnical groups among which there are indigenous groups of Mayan descent. The State acknowledges, respects, and promotes their life style, customs, traditions, forms of social organization, the use of the indigenous clothing in men and women, languages, and dialects.
[FN107] Cfr. Case of the Pueblo Bello Massacre v. Colombia, supra note 1, para. 142; and Case of the Sawhoyamaxa Indigenous Community v. Paraguay, supra note 104, para. 167.

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100. This Tribunal considers that in order to guarantee the victims' right to a fair trial –as members of the Maya indigenous community- and that the investigation of the facts of the case under study be performed with due diligence, without obstacles or discrimination, the State must ensure that they understand and are understood in the legal proceedings started, thus offering them interpreters or other effective means for said purpose. Similarly, the State shall guarantee, as far as possible, that the victims of the present case do not have to make excessive or exaggerated efforts to access the centers for the administration of justice in charge of the investigation of the present case. Without detriment to the aforementioned, the Court considers it necessary to order the State to pay an amount for future expenses, as a way of guaranteeing that the victims can act as plaintiffs in the criminal proceedings started before the ordinary justice system (infra para. 128).

ii) Search for María and Josefa Tiu Tojín

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101. The Commission asked the Inter-American Court to order the State "to adopt the measures necessary to locate and deliver the remains of María Tiu Tojín and Josefa Tiu Tojín to their next of kin." On their part, the representatives stated that "it is important to determine the whereabouts of both victims, for which the State must arrange for all the economic, administrative, legislative, and regulatory resources that favor and make the search [and] location of María and Josefa Tíu Tojín easier." The representatives also stated that it is necessary to determine "the existence of clandestine cemeteries located in the areas where the victims could have been taken, using as a point of reference the detachment of Nebaj, [t]he last place where they were seen, and perform the corresponding exhumations in order to exhaust all possibilities of locating the victims;" similarly, "the State must assume the commitment to speed up the processes referring to the regulatory framework, constitution, and budget allocated to the [National Search Plan] for its operation […]."

102. The State mentioned that, "it had already started actions with the Foundation of Forensic Anthropology of Guatemala with the purpose of locating the remains of the victims. As part of these actions they […] met with the next of kin of the victims in order to obtain information related to the facts and [the] possible location of the same."

103. The Court has established that María and Josefa Tiu Tojín are still missing and their whereabouts are still unknown (supra para. 41). The effective investigation of their whereabouts or the circumstances of their disappearance constitute a reparation measure and therefore an expectation the State must satisfy. [FN108] Thus, the State must proceed immediately with the search and location of the remains of María and Josefa Tiu Tojín, through the corresponding diligences for that effect, specifically, in the place where they were last seen alive or any other place where there is evidence of their location. If the victims were found dead, the State shall, in a short period of time, hand over the remains to their next of kin, prior genetic verification of their relationship. The expenses generated by this process shall be covered by the State. Additionally, the State shall cover, if it were the case, the funeral expenses, respecting the traditions and customs of the next of kin of the victims.

[FN108] Cfr. Case of Velásquez Rodríguez v. Honduras, supra note 20, para. 181; Case of Zambrano Vélez et al. v. Ecuador, supra note 13, para. 149, and Case of Heliodoro Portugal v. Panama, supra note 17, para. 244.

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104. The Court observes that the inclusion of the present case in the National Plan for the Search of Missing People is a commitment included in the agreement (supra para. 15). In this regard, the State indicated, during the public hearing (supra para. 7) that the mentioned Plan is currently in the Commission of Matters Pending Resolution of the Congress of the Republic [FN109] awaiting its approval in the following months.

[FN109] Cfr. initiative number 3590 of the Congress of the Republic of Guatemala (dossier of Annexes to the final written arguments of the State, Annex IV, folios 23 through 51).

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105. The Tribunal values the efforts made by the State in this sense. However, it considers that the State may not cite the lack of implementation of the mentioned National Search Plan as a defense for a possible failure to comply with this obligation.

iii) Publication of the Judgment

106. The State shall publish in the Official Newspaper and in another of wide national circulation, for a single time, chapters I, IV and VI and the paragraphs 67 to 120 from chapter VII of the present Judgment, without the corresponding footnotes as well as its operative paragraphs, as a measure of satisfaction. For the aforementioned, the State will have a six-month period as of the notification of the present Judgment.

107. In this regard, the Commission stated in its application that it considers "the diffusion of the judgment possibly issued by the Tribunal on community radio stations of the Department of El Quiché, in the [m]ayan and […] Spanish language, a measure of satisfaction."

108. The Court takes into account that requested by the Commission, as well as the fact that the next of kin of the victims belong to the Maya people (supra para. 42) and that their native language is Maya K'iché, reason for which it considers it necessary that the State make public, through a radio station of ample coverage in the department of El Quiché, chapters I, IV, and VI and paragraphs 67 through 120 of chapter VII of the present Judgment –without the corresponding footnotes- and its operative paragraphs. The aforementioned must be done in Spanish and in the Maya K'iché language, for which the translation of the previously mentioned sections of the present judgment to Maya K'iché must be ordered. The radio broadcast shall be done on a Sunday and at least on four occasions with a four-week interval between each one. For this, the State has a one-year period as of the notification of the present Judgment.

iv) Rehabilitation

109. The Commission indicated that the State "shall offer rehabilitation measures to the next of kin of the victims [and that these] shall necessarily include psychological and medical rehabilitation in decent conditions and considering their own condition as victims." The representatives asked that "the Court determine the provision of psychological and physical attention to the next of kin of María and Josefa for a period of at least three years. Said attention shall be offered at Parraxtut."

110. The State, on its part, indicated that "the [compensation] delivered to the next of kin of the victims included pecuniary damages, consequential damages, and loss of earnings, and an amount was assigned for moral damages, which includes future medical and psychological expenses divided as follows: pecuniary damages Q 525,000 (five hundred and twenty-five thousand quetzales), moral damages including future medical and psychological expenses Q 1,475,000.00 (one million for hundred seventy five thousand quetzals, total two million quetzales)."

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111. The Court warns, first of all, that these claims were presented by the Commission and the representatives in their final written arguments. Due to this and in view of that informed by the State, which was not contested by the parties, the Court considers that the rehabilitation of the victims of the present case has already been endured with the payment of the pecuniary compensation.

iv) Guarantees of non-repetition

112. The Commission requested that the State be ordered to adopt the fight against impunity as a public policy. Similarly, it requested that the Court order Guatemala to adopt all the measures necessary to avoid military justice from assuming the investigation and prosecution of the violations to human rights committed by members of the police force. In this sense, during the public hearing, the Commission stated that "Article 2 of Legislative Decree No. 41-96 limited the jurisdiction of military courts and established […] that the common or related offenses committed by soldiers correspond to regular courts, but it did not establish a mechanism for the transfer of the case files from the military criminal justice system to the regular one, even though there is a decision of the Supreme Court" in this regard. Based on the aforementioned, it requested that "the stipulations of said legislative decree be carried out in all cases and the investigation case files withheld in the military jurisdiction be transferred immediately to the civil jurisdiction."

113. The representatives asked the Court that it order the State to "adopt all the measures necessary to avoid the military justice system from getting involved in past cases, specifically cases in which the alleged responsible parties are or have been members of the armed police force, as a measure to avoid the prevalence of impunity in this type of offense."

114. Upon this Tribunal's request (supra para. 8), the State forwarded a copy of Legislative Decree 41-96 of June 12, 1996, which in its second article establishes that "the jurisdiction in the essentially military crimes or offenses corresponds exclusively to the courts assigned in this Law. In the cases of common or related crimes or offenses committed by military officers, the Code of Criminal Procedures will be applied and they will be prosecuted by the regular courts referred to in the Law of the Judicial Body."

115. Similarly, the State forwarded a copy of Agreement No. 26-96 of July 22, 1996 of the Supreme Court of Justice, through which it agreed, based on the mentioned legislative decree (supra para. 114), that "the Lower Military Court of the Department of Guatemala shall transfer all documents, processes, books, and case files in its power to the Secretariat of the Supreme Court of Justice, which will distribute them among the Courts of the First Instance for Criminal, Narcotics, and Environmental Offenses of this department, pursuant with the agreements of territorial jurisdiction in force." The State also forwarded a copy of the initiative of Law No. 2794, heard by the Full Congress of the Republic of Guatemala on January 21, 2003, and the pronouncement of the National Defense Commission of said Congress of November 30, 2004, which states the approval of the New Military Criminal Code and submits it to the Consideration of the Congress in Full.

116. In this regard, the expert Helen Mack stated that:

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the personal military [jurisdiction was] established [in Guatemala in] 1870 and [was] in force until the year 1990. […] Any case that reached the military courts […] remained in impunity, […] from traffic accidents to murder […] [thus] the resistance that a case […] of human rights violations were to be discussed in the civil courts. The scope of this reform is that it has allowed at least some access, but obviously with many obstacles, to the obtainment of information. […] There was an order from the Supreme Court of Justice […] after the derogation of the military jurisdiction so that all the case files of the military jurisdiction be transferred to the Supreme Court and, according to jurisdiction, the Supreme Court of Justice distributed the cases, but there were very few cases. [There is] a new reform […] to the military justice system seeking to go back to the personal jurisdiction again.

117. In what refers to the legislative reform started in the Congress of the Republic of Guatemala, the Court takes note of that indicated by the State in the sense that it has not been "known" of since the year 2005, which seems to be "a factual moratorium." [FN110]

[FN110] In this sense, the State indicated that "the Executive Power has not issued any official determination in this sense, because "there is no instrument that regulates the figure of moratorium in Guatemala" (final written arguments of the State, dossier of Merits, Volume III, folio 586).

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118. The Court has been constant in stating that in a Democratic Constitutional State the military criminal jurisdiction must have a restrictive and exceptional scope: it must only try soldiers for the commission of crimes or offenses that due to their own nature endanger juridical rights of the military order itself. [FN111] In this sense, the Court has stated that "[w]hen the military justice system assumes jurisdiction over a matter that must be heard by the regular justice system, the right to a competent, independent and impartial tribunal previously established by law and, a fortiori, the due process, which is, at the same time, intimately related to the right to a fair trial itself, is affected. [FN112]

[FN111] Cfr. Case of Durand and Ugarte v. Peru. Merits. Judgment of August 16, 2000. Series C No. 68, para. 117; Case of Palamara Iribarne v. Chile. Judgment of November 22, 2005. Series C No. 135, para. 124; Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations, and Costs. Judgment of January 31, 2006. Series C No. 140, and Case of Almonacid Arellano et al. v. Chile, supra note 83, para. 131.

[FN112] Cfr. Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations, and Costs. Judgment of May 30, 1999. Series C No. 52, para. 128; Case of Palamara Iribarne v. Chile, supra note 111, para. 143; and Case of Almonacid Arellano et al. v. Chile, supra note 83, para. 131.

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119. Specifically, this Tribunal has established that the prosecution of grave violations of human rights corresponds to the court of the ordinary jurisdiction. [FN113] In the cases of forced disappearances of persons, Article IX of the Inter-American Convention on Forced

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Disappearance, to which Guatemala is a party, expressly prohibits the intervention of military courts. The aforementioned article states that "[P]ersons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions. The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties."

[FN113] Cfr. Case of Durand and Ugarte v. Peru, supra note 111 para. 117; Case of La Cantuta v. Peru, supra note 84, para. 142; and Case of Almonacid Arellano et al. v. Chile, supra note 83, para. 131.

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120. In synthesis, the military criminal jurisdiction has a restrictive and exceptions nature linked to military functions. The acknowledgment of responsibility made by the State and the actions carried out by it reflect this understanding. (supra paras. 14, 15 and 18) Based on its obligations derived from Article 8(1) of the American Convention, which establishes that every person has the right to be heard by a competent judge or court and of the aforementioned Article IX of the Inter-American Convention on Foced Disappearance, the State is compelled to guarantee, as it did in the present case (supra para. 20), the transfer from the military criminal jurisdiction to the regular jurisdiction of those judicial case files that refer to any issue not directly related to the duties of the armed forces, specifically those that imply the prosecution of human rights violations. The domestic legislation in force and the decisions of the Guatemalan Supreme Court of Justice is clear in this sense (supra paras. 114 and 115).

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121. On the other hand, the Court observes that the Commission requested other guarantees of non-repetition, [FN114] which were presented in a time-barred manner, that is outside the suitable procedural opportunity to make said requests, reason for which neither the State or the representatives could object or present their position with regard to said requests. Therefore, the Court will not refer to them.

[FN114] The Commission requested in its final written arguments that the Court order the State to:

[..]

take all measures necessary to fight the structural impunity that affects the Guatemalan justice system. In this sense, the State shall specifically implement measures destined to avoiding the concealment of public officials involved in investigations regarding violations to human rights;

adopt all measures necessary to guarantee that in the processing of judicial proceedings in Guatemala the factors of actual inequality of those who turn to the justice system be taken into account, especially in the case of people of an indigenous origin, and

adopt all measures necessary to avoid the military justice system from being in charge of investigating and prosecuting violations of human rights committed by members of the police force; that what has been established in legislative decree 41-96 be executed in all cases, and that

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the investigation case files withheld by the military jurisdiction, including the one referred to in the present case, be transferred immediately to the civil jurisdiction. […]

D) Costs and expenses

122. The costs and expenses are included within the concept of reparation enshrined in Article 63(1) of the American Convention. [FN115]

[FN115] Cfr. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Reparations and Costs. Judgment of May 25, 2001. Series C No. 76, para. 212, Case of Heliodoro Portugal v. Panama, supra note 17, para. 264; and Case of Bayarri v. Argentina, supra note 17, para. 188.
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123. The Commission stated that "it takes note of the payment made by the Guatemalan State to the next of kin of the victims for costs and expenses of the domestic process and it ask[ed] the Court to, once it has heard the representatives of the victims and their next of kin, order the State […] to pay the costs and expenses duly proven originating in the processing of the present case before the Tribunal."

124. The representatives, under the principle of equity, requested US $11,979.86 (eleven thousand nine hundred and seventy nine dollars with eight six cents) for fees and for the concept of expenses the amount of US $5,421.31 (five thousand four hundred and twenty one dollars with thirty one cents), broken down as follows: US $180.21 for expenses in notary services; US $213.67 for paperwork and office expenses; US $869.74 mobilization expenses for meetings with the victims, and US $4,157.69 for expenses regarding the public hearing held in the present case (supra para. 7).

125. The State argued that it "considers the request of the […] representatives regarding attorney fees unacceptable since there is no evidence that they have worked on the case or advised the victims […] before the Court." It added that the expenses and costs requested correspond to a period of the case before the Commission, which had already been paid by the State, and it stated that the number of professionals indicated was disproportionate. Regarding the administrative expenses requested by the representatives, the State indicated that it opposed those invoices dated prior to the notification of the application. Finally, with regard to the hearing expenses it opposed payment of an airplane ticket and the expenses per diem regarding one of the persons the representatives had indicated, stating that "it was not aware that said person works with the Center for Legal Action in Human Rights –CALDH–."

126. The Court has stated that the costs and expenses are included within the concept of reparation (supra para. 122), since the activities carried out by the victims in order to obtain justice, both nationally and internationally, implies expenses that must be compensated when the State's international responsibility is declared in a conviction. Regarding their reimbursement, it corresponds to the Tribunal to prudently assess their scope, which includes the expenses generated throughout the proceedings before the Inter-American system, taking into account the

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circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment can be made based on equity and taking into account the expenses mentioned by the parties, as long as their quantum is reasonable. [FN116]

[FN116] Cfr. Case of Garrido and Baigorria v. Argentina. Reparations and Costs. Judgment of August 27, 1998. Series C No. 39, para. 82; Case of Apitz Barbera et al ("First Court of Administrative Disputes") v. Venezuela, supra note 21, para. 257; and Case of Bayarri v. Argentina, supra note 17, para. 192.

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127. In the present case, upon forwarding their brief of pleadings and motions (supra para. 4), the representatives did not present the corresponding receipts for payment of costs and expenses in which the next of kin of María and Josefa Tiu Tojín had allegedly incurred. The representatives limited themselves to indicating that "they could not determine or prove the amounts that may be necessary with regard to the processing of the case […], reason for which these amounts, as well as the receipts for the same may be delivered to the Court in the due procedural time." In this regard, the Tribunal considers that the claims of the victims or their representatives in the matter of costs and expenses and the evidence to support them must be presented to the Court in the first procedural moment granted to them, [FN117] that is, in the brief of pleadings and motions, without detriment to the possibility of updating said claims at a later time, pursuant with the new costs and expenses in which they may have incurred during the proceedings before this Court.

[FN117] Cfr. Case of Molina Theissen v. Guatemala, supra note 21, para. 22; Case of Apitz Barbera et al ("First Court of Administrative Disputes") v. Venezuela, supra note 21, para. 258; and Case of Castañeda Gutman v. Mexico. Preliminary Objections, supra note 21, para. 75.

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128. La Court warns that the claims regarding costs and expenses presented by the representatives refer only to the processing of the present case before this Tribunal, since the State had made a payment in the amount of US $ 1,219.82 (one thousand two hundred and nineteen dollars with eighty two cents) (supra para. 15.d) for said concept to the representatives in relation to the substantiation of the case before the Commission.

129. Taking into account the foregoing considerations, as well as the body of evidence presented in that respect and the objections of the State, the Court determines in equity that the State must pay the amount of US $3,500.00 (three thousand five hundred United States dollars) to Victoriana Tiu Tojín for costs and expenses so that she may distribute that amount to the appropriate parties. Additionally, the State must pay the amount of US $6,000.00 (six thousand United States dollars) to Victoriana Tiu Tojín for any future expenses that the victims may incur at the domestic level or during the supervision of compliance with this Judgment (supra para. 100). The amounts fixed must be delivered directly to the beneficiary within one year of the notification of the present Judgment.

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E) MODALITY OF COMPLIANCE WITH THE PAYMENTS ORDERED

130. The reimbursement of costs and expenses, past and future, will be made directly to Mrs. Victoriana Tiu Tojín. If she were to die before the corresponding reimbursement is covered, it will be delivered to her successors, pursuant to the applicable domestic law.

131. The State shall comply with its obligations through payment in dollars of the United States of America or in an equal amount in the Guatemalan currency, using for its corresponding calculation the exchange rate between both currencies valid in the plaza of New York, United States of America, the day before the payment.

132. If, for reasons attributable to the beneficiary of the compensation, it is not possible for them to receive it within the indicated period, the State shall deposit the amount in favor of the beneficiary in an account or a deposit certificate in a Guatemalan banking institute in United States dollars or in an equal amount in its national currency, and in the most favorable financial conditions permitted by law and banking practice. If, after 10 years, the compensation has not been claimed, it shall revert to the State with the accrued interest.

133. The amounts allocated in this judgment for compensation and for reimbursement of costs must be delivered to the beneficiaries integrally as established in this judgment without any deductions for possible taxes.

134. If the State falls into arrears, it shall pay interest on the amount owed, corresponding to banking interest on arrears in Guatemala.

135. In keeping with its consistent practice, the Court reserves the right inherent in its attributes and derived from Article 65 of the American Convention to monitor compliance with all the terms of this judgment. The case will be closed when the State has fully complied with that stated in the present judgment. Within one year as of notification of this judgment, the State shall provide the Court with a report on the measures adopted to comply with it.

VIII. OPERATIVE PARAGRAPHS

136. Therefore,

THE COURT

DECLARES,

Unanimously, that:

1. It accepts the acknowledgment of international responsibility made by the State, in the terms of paragraphs 12 through 23 of this Judgment and indicates that the State is responsible for the violation of the rights enshrined in Articles 4(1); 5(1) and 5(2); 7(1), 7(2), 7(4), 7(5), and 7(6); 8(1) and 25(1) of the American Convention on Human Rights, in relation to Article 1(1) of

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the same treaty and Article I of the Inter-American Convention on Forced Disappearance, in detriment of María Tiu Tojín; in the terms of paragraphs 53 and 54 of the present Judgment.

2. It accepts the acknowledgment of international responsibility made by the State, in the terms of paragraphs 12 through 23 of this Judgment and indicates that the State is responsible for the violation of the rights enshrined in Articles 4(1); 5(1) and 5(2); 7(1) and 7(2); 8(1) and 25(1) of the American Convention on Human Rights, in relation to Article 1(1) and 19 of the same treaty and Article I of the Inter-American Convention on Forced Disappearance, in detriment of the child Josefa Tiu Tojín; in the terms of paragraphs 53 and 54 of the present Judgment.

3. It accepts the acknowledgment of international responsibility made by the State, in the terms of paragraphs 12 through 23 of this Judgment and indicates that the State is responsible for the violation of the rights enshrined in Articles 5(1), 8(1), and 25(1) of the American Convention on Human Rights, in relation to Article 1(1) of the same, in detriment of Victoriana Tiu Tojín, in the terms of paragraph 54 of the present Judgment.

4. It accepts the acknowledgment of international responsibility made by the State, in the terms of paragraphs 12 through 23 of this Judgment and indicates that the State is responsible for the violation of the rights enshrined in Articles 8(1) and 25(1) of the American Convention on Human Rights, in relation to Article 1(1) of the same, in detriment of Josefa Tiu Imul, Rosa Tiu Tojín, Pedro Tiu Tojín, Manuel Tiu Tojín, and Juana Tiu Tojín, in the terms of paragraph 54 of the present Judgment.

AND ORDERS,

Unanimously, that:

5. This Judgment constitutes, per se, a form of reparation.

6. The State shall investigate the facts that led to the violations of the present case and identify, prosecute, and, in its case, punish those responsible, in the terms of paragraphs 68 through 100 of the present Judgment.

7. The State shall immediately proceed to the search and location of María and Josefa Tiu Tojín, in the terms of paragraphs 101 through 105 of the present Judgment.

8. The State shall publish in the Official Newspaper and in another newspaper of ample national circulation, for a single time, chapters I, IV, and VI and paragraphs 67 through 120 of chapter VII of the present Judgment, without the corresponding footnotes, and its operative paragraphs, within a six-month term as of the notification of the present Judgment, in the terms of paragraph 106 of the same.

9. The State shall broadcast on the radio, in the K'iche' and Spanish language, and for a single time, chapters I, IV, and VI and paragraphs 67 through 120 of chapter VII of the present Judgment, without the corresponding footnotes, and its operative paragraphs, within a one-year term as of the notification of the present Judgment, in the terms of paragraph 108 of the same.

10. The State shall make the corresponding payment for the reimbursement of costs and expenses within a one-year term computed as of the notification of the present Judgment, in the terms of paragraph 129 of the same.

11. To monitor full compliance of this Judgment and will consider the present case concluded once the State has fully complied with the stipulations of the same. Within a one year-term, computed as of the notification of this Judgment, the State shall submit to the Court a report on the measures adopted to comply with it.

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The Judge ad hoc Álvaro Castellanos Howell informed the Court of its Concurring Separate Opinion, which is enclosed with this Judgment.

Drawn up in Spanish and English, the Spanish text being authentic, in San Jose, Costa Rica, on November 26, 2008.

Cecilia Medina Quiroga
President

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

Pablo Saavedra Alessandri
Secretary

So ordered,

Cecilia Medina Quiroga
President

Pablo Saavedra Alessandri
Secretary

CONCURRING SEPARATE OPINION OF THE JUDGE AD-HOC ÁLVARO CASTELLANOS HOWELL

I fully concur with the judgment issued by the Inter-American Court of Human Rights in the case of Tiu Tojin v. Guatemala. As a result of the fact that this Court, pursuant with its attributions and jurisdictional competence, has as its supreme goal to internationally and effectively shelter and protect human rights, after the corresponding deliberation, I have voted in favor of the adoption of said judgment without any reservation in this sense in my conscience.

The facts proven as well as the violations acknowledged by the State of Guatemala, define the grave transgression of the human rights identified in paragraph 54 of that judgment committed against the victims also identified therein. Even more so, as also expressed in the judgment (paragraph 91), the prohibition of the forced disappearance of people and the corollary duty to investigate it and, in its case, punish those responsible, have the nature of jus cogens. Therefore, as Judge ad-hoc I find myself in the obligation to specify, below, some personal reflections derived from my participation in the hearing, deliberation, and unanimous resolution of the case sub-judice.

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A.- Continuance of the hearing of the case, despite the acknowledgment of international responsibility by the State of Guatemala. In section IV of the Judgment a detailed examination of the consequences or scope said acknowledgment shall have in relation to the possibility of an anticipated termination of the proceedings pursuant with Articles 53, 54, or 55 of the Rules of Procedure of the Inter-American Court of Human Rights was carried out. As can be determined in that section, the State of Guatemala's attitude is highly appreciated not only with regard to its acknowledgment of international responsibility, but also with regard to the unconditional acquiescence made during the processing of the present case and of the positive acts performed even after the hearing. [FN118] Despite the aforementioned, since there is still a clearly acknowledged and proven denial of justice in this case, and up to now the legal responsibilities against the planners and perpetrators of the crime of forced disappearance […] of María Tiu Tojín and her daughter Josefa has not been attributed, the Court has correctly decided to "precise the grounds of the obligation to investigate the facts of the forced disappearance of María Tiu Tojín and Josefa Tiu Tojín and refer to the legal and factual obstacles that have prevented its compliance within the framework of the transition towards democracy in Guatemala." [FN119] Thus, the case was not dismissed or finalized, but instead its continuance was decided. As Judge ad-hoc I would like to especially point out one of the reasons why I agreed with this decision. The Inter-American Commission of Human Rights ("the Commission") requested that despite the acknowledgment and acquiescence by Guatemala, instead of dismissing the case, it will issue a judgment on merits considering the facts as established "based on the importance the establishment of an official truth of the facts has for the victims of violations of human rights and in this case for Guatemalan society as a whole." [FN120] The undersigned wishes to especially point out, the right to know the material truth as part of the right to a fair trial: "The Court has previously established that the right to truth is included within the right of the victim or their next of kin to obtain from the State's competent bodies the explanation of the violating facts and the corresponding responsibilities, through the investigation and prosecution that result from Articles 8 and 25 of the Convention." [FN121] It is also definitely necessary to understand, as stated by the Commission, that said right to know the truth, as part of the acknowledgment of the Right to a Fair Trial (Article 8) and Judicial Protection (Article 25) acknowledged by the American Convention on Human Rights, corresponds individually to each victim, but also to the Guatemalan society in general. I consider there are enough precedents of this Court to substantiate said criterion [FN122] and therefore, I found it necessary to clarify why, despite the acknowledgment of responsibility by the State of Guatemala and its acquiescence during the processing of the case sub judice, it was, in my opinion, necessary to continue with the examination of the case, pursuant with the aforementioned Article 55 of the Rules of Procedure and issue the judgment with which I fully concurred.

[FN118] See paragraph 20 of the Judgment.
[FN119] See paragraph 29 of the Judgment.
[FN120] See paragraph 25 of the Judgment.
[FN121] Cfr. Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Repartions, and Costs. Judgment of September 26, 2006. Series C No. 154, para. 148.

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[FN122] Case of Carpio Nicolle et al. v. Guatemala; Case of Montero Arangueren et al. (Detention Center of Catia) v. Venezuela; Case of the Miguel Castro Castro Prison v. Peru, are just some of these precedents.

B.- Evidentiary value of the reports of the CEH and the REMHI. More than once the evidentiary value or appropriateness of the documents and reports of the Historic Explanation Commission –CEH- (Guatemala, Memories of Silence), as well as of the Report of the Inter-Diocese Project "Recovery of Historic Memory" –REMHI- of the Human Rights Office of the Archbishopric of Guatemala ("Guatemala, Nunca Más") have been questioned both internally within Guatemala and before international instances. [FN123] However, both competent national courts in Guatemala and this Court [FN124] have received, assessed, and taken into account as evidence, the reports of the CEH as well as the REMHI. The present judgment reiterates the evidentiary value of these documents (paragraph 38 and footnotes number 34; 37; 38; 62; and 63). There must be no doubt regarding the pertinent criterion of this judgment stating that the reports and documents used for the preparation of the same and presented by the CEH and the REMHI may have the value of documentary evidence, direct or indirect, main or subsidiary, if they are relevant for the specific case in question, either at a national or international level. The Agreement on the Establishment of the Commission for the Historic Explanation of the Violations to Human Rights and the Acts of Violence that have caused suffering to the Guatemalan People" [FN125] (hereinafter the "Agreement on the Establishment of the CEH") states, as part of the purposes of said Commission ("CEH"), that one of them is to "Explain with all objectivity, equity, and impartiality the violations of human rights and the acts of violence that have caused suffering to Guatemalan people, linked to the armed conflict" and as a consequence of it, "Prepare a report that includes the results of the investigations carried out and that offers objective elements of judgment regarding the events occurred during that period covering all factors, internal and external."

[FN123] For example, see the separate and partially dissenting opinion of the Judge ad hoc Martínez Gálvez in the case of Myrna Mack Chang v. Guatemala, as well as section VI of the Judgment issued by the Constitutionality Court of Guatemala in case file No. 3380-2007.
[FN124] Case of the Plan de Sánchez Massacre v. Guatemala and Case of Myrna Mack Chang v. Guatemala.
[FN125] "Agreement on the establishment of the Commission for the Historic Explanation of the violations to human rights and the facts of violence that have caused suffering to the Guatemalan people," signed in Oslo, Norway, June 23, 1994. Within its initial Considerations, there are the following: "Considering that the contemporary history of our country registers grave facts of violence, of disrespect to people's fundamental rights and suffering of the population linked to the armed conflict;" "Considering the right of the people of Guatemala to fully know the truth about these events whose explanation will contribute to avoid the repetition of these sad and painful pages and to strengthen the country's democratization process."

Regarding the operation itself of the CEH, numeral III that regulates that aspect in the corresponding Agreement of Establishment, literally states the following: "III) The works,

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recommendations, and report of the Commission will not individualize responsibilities or have legal purposes or effects." It is in reference to this numeral III that speculations have been made regarding if those works, recommendations, and reports have an evidentiary value within trials or not. This judgment makes it clear they do. In any case, it is obvious that this rule on the operation of the CEH referred to the fact that said Commission could not become a court and assign responsibility to any person individually considered.

C.- Lack of Jurisdiction of the Military Court. The fact that on June 10, 2008, the Military Court of the Fourth Brigade of the General Infantry "Justo Rufino Barrios", of the municipality of Cuyotenango, department of Suchitepéquez, issued a decision stating its lack of jurisdiction to continue with the investigation diligences regarding the whereabouts of María and Josefa Tiu Tojín, responding to a request of the Public Prosecutors' Office of the Human Rights Section of the city of Guatemala and that said military court forwarded the case file to the First Instance Court of Criminal, Narcotic, and Environmental Offenses of the Department of the Quiché, can be interpreted in two forms: the first as positive since the State of Guatemala itself, as a result of this case and after the holding of the public hearing to receive evidence, made this request and it was successful in the sense that the military jurisdiction gave way, as should be, to the ordinary criminal jurisdiction. [FN126]

[FN126] See paragraph 47 of the Judgment.

However, the second interpretation of this same fact is concerning. As clarified in paragraphs 46 and 70 of the Judgment, for more than 16 years the case of María and Josefa Tiu Tojín remained in the investigation phase, period during which there was no progress and the facts were not duly investigated by Guatemalan justice, thus materializing a clear denial of justice and maintaining, even up to this date, a complete impunity in this case. Even more so, the Court observes that this situation of impunity is characteristic of similar facts occurred during the internal armed conflict in Guatemala, becoming a determining factor that forms part of the systematic patterns that allowed the commission of grave violations to human rights during that time."

I find the content of paragraph 118 of the Judgment extremely important and relevant in what refers to the scope and limits, according to this Court, of the military criminal jurisdiction ("restrictive and exceptional scope"). Therefore, there is already jurisprudence that states that "when military justice assumes jurisdiction over a matter that should be heard by the ordinary justice, the right to a competent court and, a fortiori, the due process, which is at the same time intimately linked to the right to a fair trial itself, is affected." (see footnote number 112 of the Judgment).

These limits to the military criminal jurisdiction and its correct application must be observed by the State of Guatemala, derived from the full acknowledgment of the jurisdiction of the Inter-American Court of Human Rights and therefore the binding nature its judgments has on the Guatemalan State when it is part of a proceeding before that Court. Thus, these parameters should be seriously taken into consideration when the discussion on a new military criminal law is taken up again in Guatemala. In the meantime, the case of Tiu Tojín v. Guatemala shall also

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act as a parameter or reference for the Supreme Court of Justice when it carries out all the steps it must complete in order to fully comply with Decree 41-96 of the Congress of the Republic through which Article 2 of Decree 214-1878 (Military Code) was reformed and therefore finally achieve that "the military jurisdiction be applied only to the members of the armed institution that commit crimes of a military order that affect the army" (third considering clause of the previously mentioned Decree 41-96), since, as observed in this case, at least on this opportunity almost twelve years went by since the Military Code was reformed and the mentioned reform was not effectively put into action.

D.- Jus Cogens To conclude this concurring separate opinion, the consideration made by the court in paragraph 91 of this Judgment is especially relevant. This taking into account that some domestic judgments of the Guatemalan jurisdiction (for example the judgment issued in case file number 3380-2007 of the Constitutionality Court) have avoided considering or remembering the grave nature of the offense of forced disappearance and they have wanted to define or classify it as a political crime or as related to a political crime. As correctly stated by the Court, pursuant with the preamble of the Inter-American Convention on Forced Disappearance, of which Guatemala is a State Party, the systematic practice of the forced disappearance of people constitutes a crime against humanity and is also an offense of a continuous and non-extinguishable nature, which entails the consequences established by the applicable international law.

"…the jus cogens, in my understanding, is an open category, which expands itself to the extent that the universal juridical conscience (material source of all Law) awakens for the necessity to protect the rights inherent to each human being in every and any situation" (para. 68). [FN127]

[FN127] Concurring opinion of Judge Cancado Trinidade, in Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18.

I believe that the Judgment in the case of Tiu Tojín v. Guatemala refers to this definition of "jus cogens".

For all the aforementioned reasons as well as other important considerations included in the judgment of the case sub judice and that I personally praise due to the positive impact they should have on the Guatemalan system for the administration of justice, such as the correct criminal definition of the crime of forced disappearance by the national courts; of the right to a fair trial with "cultural pertinence" when dealing with people who belong to indigenous groups who require said access; as well as the impossibility to argue "State secrecy" and "reasons of national safety" when dealing with violations to human rights; therefore, I fully agree, from beginning to end, with the judgment issued on this day.

Álvaro Castellanos Howell
Judge ad hoc

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Pablo Saavedra Alessandri
Secretary