In the case of Tristán Donoso,

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 Articles 29, 31, 37(6), 56 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers the following Judgment.

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

1. On August 28, 2007, pursuant to the provisions in Articles 51 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted an application to the Court against the Republic of Panamá (hereinafter "the State" or "Panamá"), originating in the petition filed on July 4, 2000 by the Centro por la Justicia y el Derecho Internacional [Center for Justice and International Law] (hereinafter "the representatives" or "CEJIL"), the representatives of Mr. Tristán Donoso, the alleged victim in the instant case (hereinafter "Mr. Tristán Donoso" or "the alleged victim"). On October 24, 2002 the Commission declared the case admissible by means of Report No. 71/02 and on October 26, 2006 it adopted Report No. 114/06, under Article 50 of the Convention, wherein certain recommendations for the State were contained. Such report was served upon the State on November 28, 2006 and it was given a two-month time limit to communicate about the action taken for the purpose of implementing the recommendations by the Commission. Once the "[e]xtensions granted had fallen due […], and given the lack of response by the State […] regarding compliance [with] the recommendations in the Report on the Merits," the Commission decided to submit the case for the consideration of the Court. The Commission appointed as delegates Messrs. Paulo Sérgio Pinheiro, Commission member, Santiago A. Canton, Executive Secretary, and Ignacio Álvarez, Special Rapporteur for Freedom

of Expression at the time, and as legal counsel lawyers Elizabeth Abi-Mershed, Lilly Ching, Christina Cerna and Carlos Zelada.

2. As the Commission indicated, the application makes reference to "the [alleged wiretapping, recording and] disclosure of a telephone conversation held by the lawyer Mr. Tristán Donoso […]; later, the commencement of criminal proceedings for defamation as an [alleged] retaliation for the accusations Mr. Tristán Donoso had made about [the aforementioned recording and disclosure]; the failure to investigate and punish those responsible of such events, and the lack of adequate reparation."

3. In the application the Commission requested the Court to declare the State responsible for violation of Articles 8 (Right to a Fair Trial), 11 (Right to Privacy), 13 (Freedom of Thought and Expression) and 25 (Right to Judicial Protection) of the American Convention, in connection with the general obligation to respect and guarantee human rights and the duty to adopt domestic law measures, provided, respectively, in Articles 1(1) and 2 of the aforementioned treaty, to the detriment of Mr. Tristán Donoso. The Commission requested the Court to order the State to adopt certain measures of reparation.

4. On December 8, 2007, CEJIL filed its brief of motions, pleadings and evidence (hereinafter "motions and pleadings brief") in the terms of Article 23 of the Rules of Procedure. In such brief they requested the Court that, on the grounds of the facts in the account made by the Commission in its application, it declare the rights to privacy, to freedom of expression, to a fair trial, and to judicial protection provided in Articles 11, 13 and 8 and 25 of the American Convention, the first two of them in connection with Articles 1(1) and 2 of such treaty, to have been violated, as well as the principle of freedom from ex post facto laws provided in Article 9 of the Convention in connection with its Article 1(1). Finally, it requested the Tribunal to order measures of reparation for the violation of the rights of Mr. Tristán Donoso. By means of the power of attorney granted on December 18, 2006, the alleged victim appointed CEJIL as its attorney at law.

5. On February 5, 2008, the State filed a brief wherein it made a preliminary objection, it replied to the application and it put forward its observations to the motions and pleadings brief (hereinafter "reply to the application"). The State requested the Court to determine that there were sufficient grounds for the preliminary objection and to declare itself devoid of competent jurisdiction on the subject matter of ordering Panamá to adapt its domestic criminal legal system to Article 13 of the American Convention; that on the grounds of the points of fact and law put forth, not to admit neither the application nor the reparation measures requested by the Commission and that "all petitions made by CEJIL be denied, as inadmissible and groundless". Among other grounds, it pointed out that there had been no abusive or arbitrary intrusion into the privacy of Mr. Tristán Donoso in violation of Article 11(2) of the Convention; that in the proceedings against the former National Attorney General José Antonio Sossa (hereinafter also called "the Attorney General at the time of the events", "the former Attorney General" or "Attorney General Sossa") and against the alleged victim fair trial guarantees had been observed and therefore there had been no violations of Articles 8 and 25 of the above mentioned treaty; that the alleged victim could, at all times, exercise his right to freedom of expression, therefore

Article 13 of such instrument had not been violated. The State appointed Mr. Jorge Federico Lee as agent and, later, Mr. Edgardo Sandoval Rampsey, as deputy agent.

II. PROCEEDING BEFORE THE COURT

6. The application by the Commission was served upon the State and upon the representatives on October 5 and 8, 2007, respectively. [FN1] During the proceedings before the Court, in addition to the presentation of the principal briefs forwarded by the parties (supra paras. 1, 4 and 5), the representatives and the Commission filed, on March 18 and 26, 2008, respectively, their pleadings on the preliminary objection made by the State, among other briefs.

[FN1] On September 28, 2007, before serving notice of the application, the State forwarded a brief to the Tribunal wherein it indicated that it was "approaching" the alleged victim "for the purpose of arriving at a settlement of the case by mutual agreement" and that it hoped for the "early termination of the proceedings under Article 54 of the Rules of Procedure." On the other hand, on October 3, 2007, the State was informed that it could appoint an ad hoc judge to take part in the consideration of the instant case. On August 29, 2007, the Inter-American Commission forwarded its brief "Position of the Inter-American Commission for Human Rights on the institution of the ad hoc judge." On October 30, 2007, the State appointed Mr. Juan Antonio Tejada Espino as ad hoc judge. However, on November 23, 2007, the State informed that such person "had declined the decision by the State to appoint him as ad-hoc Judge for the instant case" and requested "an additional time period to allow it to appoint a new ad-hoc Judge." On December 5, 2007, the Tribunal informed the State that "when it was holding its LXXVII Session it learned about the request by the State and had decided that it could not be granted, inasmuch as the State had had the time and the opportunity that were procedurally due in order to effect such appointment and that the aforementioned request for an additional term was made when such delay had already fallen due. Such has been the standard applied by the Court in other cases where a request of this nature has been made."

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7. By means of an Order dated June 9, 2008, the President of the Court ordered that depositions by the witnesses offered by the representatives and by the State be received through statements made before a public official whose acts command full faith and credit (affidavit), as well as those of the expert witnesses, one of them offered by the Inter-American Commission and by the representatives, and the other offered by the State, regarding whom the parties have had the opportunity to put forth observations. Likewise, considering the specific circumstances attending the case, the President summoned the Commission, the representatives and the State to a public hearing in order to hear the statement by Mr. Tristán Donoso, offered by the Commission and by his representatives, and that of two expert witnesses, one of them offered by the Inter-American Commission and the other one offered by the State, as well as the final pleadings by the parties on the preliminary objection and possibly on the merits, reparations and costs. [FN2]

[FN2] Cf. Case of Tristán Donoso v. Panamá. Summons to a Public Hearing. Order of the President of the Court of June 9, 2008 (File on Merits, Book II, folios 452 to 466).

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8. The public hearing was held on August 13, 2008, during the XXXV Special Session of the Court, held at the city of Montevideo, Uruguay. [FN3]

[FN3] By means of an Order dated August 8, 2008, the Court decided to commission Judges García Sayán, as Incumbent President, García Ramírez, Ventura Robles, Franco, Macaulay and Abreu Blondet to sit at the public hearing summoned in the instant case. The following individuals attended the public hearing: a) for the Inter-American Commission: Luz Patricia Mejía, Delegate, Lilly Ching and Manuela Cuvi Rodríguez, counsel; b) by the representatives of the alleged victim: Viviana Krsticevic, Marcela Martino and Gisela De Leon, from CEJIL, and c) for the State: Jorge Federico Lee, Agent, Edgardo Sandoval Rampsey, Deputy Agent, Lorena Nisla Aparicio, Deputy Representative of the Republic of Panamá to the Organization of American States, Vladimir Franco, Director for Legal Matters with the Foreign Affairs Ministry and Sophia Astrid Lee, Legal Counsel.

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9. On September 15, 2008, the State, the Commission and the representatives forwarded their final written pleadings. The latter, responding to a request by the President of the Tribunal, forwarded, along with the aforementioned brief, as evidence to facilitate adjudication of the case, the rules and regulations governing the disciplinary procedure for ethics code infringements in force at the time of the events before the Colegio Nacional de Abogados de Panamá [Panamá National Bar Association]. Additionally, the representatives also forwarded documents evidencing expenses incurred in connection with the public hearing.

10. On the other hand, on August 7, 2008 the Tribunal received a brief from a person identifying himself under the name of Javier P. Weksler, who filed a document intending he would be considered as an amicus curiae. The Secretariat, following instructions by the President of the Tribunal, given under its regulatory authority to establish order in the proceedings and pursuant to the provision in Article 26(1) of the Rules of Procedure, requested the above mentioned person to submit the original brief within a seven day time limit, along with a copy of his identity document. In its turn, on September 16, 2008 the Inter-American Commission forwarded its comments on the above mentioned brief. Mr. Weksler did not comply by forwarding the requested information within the time limit given him, for which reason the Inter-American Court does not admit such appearance. Finally, on December 19, 2008 and on January 5, 2009, the Court received two amicus curiae briefs: the first one of them from Messrs. Pedro Nikken and Carlos Ayala Corao, and from Mrs. Mariella Villegas Zalazar, and the second one of them had been forwarded by Mr. Damián Loreti and by Mrs. Paola García Rey and by Mrs. Andrea Pochak from the Centro de Estudios Legales y Sociales [Legal and Social Studies Center]. The original briefs were received on January 8 and 13, 2009.

III. PRELIMINARY OBJECTION

11. In its brief answering the application, the State made a preliminary objection on the grounds of "the partial lack of competent jurisdiction on the subject matter," in connection with a reparation measure requested by the Commission in its application and three "preliminary observations" on the standing of the representatives to move for two reparation measures and to put forward, in their pleadings and motions brief, claims differing from those in the application by the Commission.

12. Panamá objected to the reparation measure requested by the Commission about the State adapting its criminal legal system pursuant to Article 13 of the American Convention. It asserted that the "demand for a State to review its domestic legislation cannot be enforced in adjudication proceedings, which must deal only with human rights violations perpetrated against certain persons" and that "the aforementioned demand may be taken into consideration by the Court only when exercising its advisory function, but never when it is exercising its adjudicatory jurisdiction." For which reasons it requested that, "once this preliminary objection is found to be well grounded, the Court declare it lacks competent jurisdiction to consider the above mentioned request." In its final written argument Panamá "ratifi[ed] and reiter[ated] the preliminary objection."

13. The Commission considered that "the objection made had to be rejected because it was inadmissible and groundless," inasmuch as the Court has "an unquestionable competent jurisdiction to set reparations for the victims of human rights violations, among which four general kinds of reparation have been distinguished, such as […] restitution, compensation, rehabilitation and adopting measures aimed at satisfaction and at setting up non-repetition guarantees." Within such guidelines, once a case has been determined on the merits and the existence of a violation to the American Convention has been established, according to the Commission, the Court has competent jurisdiction to order measures "encompassing the different ways a State has to acquit itself of the international responsibility in which it has incurred." Based on the foregoing reasons, the Commission considered the preliminary objection made by the State must be rejected on account of its being evidently groundless.

14. The representatives indicated that such argument does not refer neither to matters affecting the competent jurisdiction of the Court to consider the case, nor to its admissibility, for which reasons it does not amount to a preliminary objection. Inasmuch as the argument aims at rebutting a motion for reparations, it must be assessed when the stage for considering reparations is reached.

15. The Tribunal deems it necessary to point out that although neither the American Convention nor the Rules of Procedure do explain the notion of "preliminary objection," the Court has stated that through such act the admissibility of an application, or the competent jurisdiction of the Tribunal to consider a certain case or one of its aspects, is objected by reason of the persons, of the subject matter, of the time or of the place. [FN4] In other instances, the Court has pointed out that a preliminary objection has the purpose of obtaining a decision preventing or barring consideration of the merits, either of the challenged matter or of the whole case. For which reason, it must be spelled out therefore that it responds to its essential legal characteristics, its content and purpose being of a "preliminary" nature. The contentions not having such nature, for example those regarding the merits of a case, may be put forth through

other procedural acts provided in the American Convention, but not as a preliminary objection. [FN5]

[FN4] Case of Luisiana Ríos et al. v. Venezuela. Order by the Inter-American Court of Human Rights of October 18, 2007, Considering Clause Number 2 and Case of Castañeda Gutman v. Mexico. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 184, para. 39.
[FN5] Cf. Case of Castañeda Gutman, supra note 4, para. 39.

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16. The Court considers that the contention by the State in connection with the power of the Tribunal to order a reparation measure is a claim that does not qualify as proper subject matter for a preliminary objection. That is therefore inasmuch as such challenge does not have the purpose nor the ability to prevent the Court from considering the merits of the dispute brought before it, in whole or in part. In effect, even if the Court were to determine the matter as the State contends, that would in no way affect the competent jurisdiction of the Tribunal to consider the merits of the instant case. On the basis of the foregoing the pleading is rejected, for it does not qualify as a proper preliminary objection.

17. So, the pleadings by the State on this matter will be examined when the Tribunal considers, if necessary, the reparation measures requested. Likewise, the Court will decide on the observations by the State to the motions and pleadings brief in the pertaining section of the instant Judgment, be it when considering the merits or, possibly, reparations.

IV. COMPETENCE

18. The Inter-American Court has competent jurisdiction to hear the instant case pursuant to Article 62(3) of the Convention as Panamá has been a State Party to the American Convention since June 22, 1978 and accepted the contentious jurisdiction of the Court on May 9, 1990.

V. EVIDENCE

19. On the basis of the provisions in Articles 44 and 45 of the Rules of Procedure, as well as in the case law of the Tribunal regarding evidence and its assessment [FN6], the Court will examine and assess the documentary evidence forwarded by the parties at the various procedural stages when they have had the opportunity to do so, or as evidence to facilitate adjudication of the case requested by the President, as well as the depositions by witnesses and the reports rendered by means of a sworn statement before a public official whose acts command full faith and credit (affidavit) and at the public hearing before the Court. To such effect, the Court shall abide by the principles of sound criticism, within the corresponding legal framework. [FN7]

[FN6] Cf. Case of the “White Van” (Paniagua Morales et al.) v. Guatemala. Reparations and Costs. Judgment of May 25, 2001. Series C No. 76, para. 50; Case of Ticona Estrada et al. v. Bolivia. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 191, para.

31; and Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192, para. 49.
[FN7] Cf. Case of the "White Van" (Paniagua Morales et al.) supra note 6, para. 76; Case of Ticona Estrada et al., supra note 6, para. 31; and Case of Valle Jaramillo et al., supra note 6, para. 49.

A. Documentary evidence, testimonies and expert reports

20. The Tribunal received the statements rendered before a public official whose acts command full faith and credit by the following witnesses and expert witnesses mentioned hereinbelow, on the matters mentioned in this section. [FN8] The contents of such statements is included in the pertaining chapter:

1) Aimée Urrutia Delgado. Wife of the alleged victim, a witness offered by the representatives. She testified, among other matters, about a) the way in which Mr. Tristán Donoso and his family were supposed to have been affected by the alleged wiretapping, recording and disclosure of a telephone conversation her husband held with Mr. Adel Zayed; b) the public accusation Mr. Tristán Donoso made against the former Attorney General, and c) the consequences the criminal prosecution and conviction of Mr. Tristán Donoso in the proceedings instituted by the aforementioned official would have borne on the private life and the professional activities of her husband;
2) Carlos María Ariz. At the time of the events, he was the Bishop of Colón, a witness offered by the representatives. He testified, among other matters, about a) the request he made to Mr. Tristán Donoso, legal counsel of the Diocese, to render professional services to the Zayed family, for their children were in custody pending a criminal enquiry; b) the disclosure effected by the former Attorney General regarding a telephone conversation between Mr. Tristán Donoso and Mr. Adel Zayed, father to Walid Zayed; c) the meeting held with the former Attorney General in order to "demand explanations […] on such telephone wiretapping", and d) the contents of the tape recorded conversation;
3) Walid Zayed. A client of Mr. Tristán Donoso in a criminal inquiry, and a witness offered by the representatives. He testified, among other matters, about a) the circumstances having led him to record some of his conversations when he was in custody; and b) on the recording of the telephone conversation between his father, Adel Zayed, and Mr. Tristán Donoso;
4) Sydney Alexis Sittón Ureta. Counsel for the defense of Mr. Tristán Donoso in the criminal proceedings instituted by the former Attorney General, a witness offered by the representatives. He testified, among other matters, about the criminal inquiry for defamation instituted by Attorney General Sossa against Mr. Tristán Donoso;
5) Rolando Rául Rodríguez Bernal. A journalist, and a witness offered by the representatives. He testified, among other matters, about: (a) the accusation made by Mr. Tristán Donoso against the former Attorney General of having allegedly tape recorded and disclosed a private telephone conversation; b) the criminal proceedings for defamation instituted on the motion of Attorney General Sossa against Mr. Tristán Donoso; and c) how freedom of expression stands in Panamá;
6) José Eduardo Ayú Prado Canals. In July, 1996 he was acting as Fiscal Tercero del Circuito de la Provincia de Colón [Colón Province Circuit Prosecutor Number Three], a witness

offered by the State. He testified, among other matters, about: a) receiving and forwarding to the Procuraduría General de la Nación [Office of the National Attorney General] an audio tape on which a telephone conversation was recorded; and b) the inexistence of adequate equipment to tap or record telephone conversations at the Ministerio Público [Office of the Public Attorney] or at police facilities at the time of the events;

7) Octavio Amat Chong. A lawyer and a journalist, he was the Director of the El Panamá América newspaper between 1994 and 1996, and is an expert witness offered by the Commission and by the representatives. He reported, among other matters, on how freedom of expression stands in Panamá and on the inhibiting effect criminal prosecutions and convictions for defamation have on those reporting or accusing public officials on account of their behavior; and

8) Olmedo Sanjur. A lawyer, a former Procurador de la Administración [Solicitor for the Administration], and an expert witness offered by the State. He reported, among other matters, on: a) the respective ranks given by the Constitution to the Procurador General de la Nación [National Attorney General] and to the Procurador de la Administración [Solicitor for the Administration]; b) the competent jurisdiction the Procurador de la Administración [Solicitor for the Administration] has to determine the criminal cases brought against the Procurador General de la Nación [National Attorney General]; c) the independence of the Procurador de la Administración [Solicitor for the Administration], and d) the independence and the impartiality of criminal Courts in Panamá.

[FN8] In a communication dated June 30, 2008, received on that same day by the Secretariat of the Court, the representatives informed the Tribunal that they desisted from presenting the testimony of Mr. Italo Isaac Antinori (File on the Merits, Book II, folio 517).

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21. Concerning the evidence rendered at the public hearing, the Court heard statements by the following persons:

1) Santander Tristán Donoso. Alleged victim and a witness offered by the Commission and the representatives. He testified, among other matters, about: (a) the alleged wiretapping, recording and disclosure of a telephone conversation he held with a third party and the lack of an adequate investigation into such events; b) the Court prosecution against him; and c) the alleged consequences his criminal prosecution and his criminal conviction by the Panamanian justice would have had on his private life and on his professional activities.

2) Guido Alejandro Rodríguez Lugari. A former Adjunto del Defensor del Pueblo de la República de Panamá [Panamá Republic Deputy Ombudsman], in charge of freedom of expression in such body; an expert witness offered by the Commission and the representatives. He reported, among other matters, on: a) how freedom of expression stands in Panamá; b) the legal rules governing such right; and c) the practice allegedly existing in Panamá of public officials accusing of defamation those criticizing the way they conduct State business; and

3) Javier Chérigo. A lawyer, a former Subdirector General de la Policía Técnica Judicial [Assistant Director General of the Judicial Technical Police] and an expert witness offered by the State. He reported, among other matters, on: a) the rules governing wiretapping and recording telephone conversations and the practice thereof in Panamá at the time of the events, its formal and operational aspects; b) the statutory code applicable to criminal investigations in cases of

illegal wiretapping and recording of telephone conversations; and c) the legal standing of freedom of expression en Panamá; specifically, the alleged need to continue defining its violation as a crime instead of the alternative of considering it a mere tort.

B. Assessment of evidence

22. In the instant case, as in others, the Tribunal admits the evidentiary value of the documents forwarded by the parties at the appropriate stage in the proceedings [FN9] that were not contested nor challenged, and the authenticity of which was not questioned. In connection with the documents forwarded as evidence to facilitate adjudication of the case (supra para. 9), the Court joins them to the body of evidence under Article 45(2) of the Rules of Procedure.

[FN9] Cf. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 140. Case of Ticona Estrada et al., supra note 6, para. 34; and Case of Valle Jaramillo et al., supra note 6, para. 53.

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23. Concerning the testimonies and reports rendered by the witnesses and the expert witnesses at the public hearing and by means of sworn statements, the Court deems them pertinent inasmuch as they dwell on the subject matter which was defined by the President of the Tribunal in the Order whereby they were admitted, bearing in mind the comments by the parties. [FN10]

[FN10] Cf. Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations, and Costs. Judgment of June 23, 2005. Series C No. 127, para. 122; Case of Ticona Estrada et al., supra note 6, para. 37; and Case of Valle Jaramillo et al., supra note 6, para. 54.

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24. The Tribunal deems that the statement by Mr. Tristán Donoso, alleged victim in the instant case, and the affidavit by his wife, may not be assessed separately, for such persons have an interest in the outcome of this case, for which reason they are to be considered along with the whole body of evidence gathered in these proceedings. [FN11]

[FN11] Cf. Case of Loayza Tamayo v. Peru. Merits. Judgment of September 17, 1997. Series C No. 33, para. 43; Case of Ticona Estrada et al., supra note 6, para. 37; and Case of Valle Jaramillo et al., supra note 6, para. 54.

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25. On the other hand, in connection with the testimony by Sydney Sittón, when such evidence was being rendered the representatives observed that such deposition, besides containing elements related to the aspects required in the Order by the President “also includes personal statements and evaluations beyond the subject matter of the testimony and that of the proceedings as a whole.” For which reason, “for the purpose of preventing situations which

might hinder the proceedings or affect the spirit of respect and good faith among the parties," they moved for the Tribunal "to grant a maximum delay of three days for the witness to exclude the personal statements to which we refer and to limit himself only to those aspects giving the Court elements to determine the subject matter of the dispute." At such time, the President of the Tribunal did not grant such request inasmuch as it would imply modifying the evidence rendered.

26. Later, when submitting its comments on the statements rendered before a public official whose acts command full faith and credit, the Inter-American Commission indicated that "the depositions by Messrs. Rolando Rodríguez Bernal, Walid Zayed and Sydney Sittón contain information that could go beyond their nature as testimonies and/or the purpose of requesting the evidence; for which reason the [Commission] request[ed] the Court to consider them only inasmuch as they are pertinent and as they provide the information requested by [the Tribunal] in the instant case." In its turn, regarding the testimony by Sydney Sittón, the State pointed out, among other considerations, that "it is an evident ad hominem attack" against the former Attorney General.

27. The Court realizes that, in fact, in the testimony by Sydney Sittón there are statements bearing no relation with the purpose for which such evidence was requested. In view of the foregoing, the Tribunal decides not to admit such testimony. Concerning the points made by the Inter-American Commission on the testimonies by Messrs. Walid Zayed and Rolando Rodríguez Bernal (supra para. 26), the Court will assess them only inasmuch as they adjust to the subject matter set out in the Order by the President and along with the rest of the elements in the body of evidence.

28. With regard to the press documents submitted by the parties, this Tribunal has found that these may be assessed when they describe public and generally known events, or when they record statements by State agents, or when they confirm other aspects related to the case. [FN12]

[FN12] Case of the "White Van" (Paniagua-Morales et al.) supra note 6, para. 75; Case of Ticona Estrada et al., supra note 6, para. 42; and Case of Valle Jaramillo et al., supra note 6, para. 62.

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29. Having examined the evidentiary elements that have been incorporated into the present case, the Court will proceed with its analysis of the alleged violations of the American Convention in the light of the facts that the Court deems proven, as well as the legal arguments by the parties.

VI. ARTICLE 11 (RIGHT TO PRIVACY) [FN13] IN CONNECTION WITH ARTICLES 1(1) (OBLIGATION TO RESPECT RIGHTS) [FN14] AND 2 (DOMESTIC LEGAL EFFECTS) [FN15] OF THE AMERICAN CONVENTION

[FN13] Article 11 of the Convention provides that:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

[FN14] Article 1(1) of the Convention establishes that:
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.

[FN15] Article 2 of the Convention establishes that:
"Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms".

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30. The Commission alleged the right to privacy of the alleged victim to have been violated, by holding the State responsible for wiretapping and recording a telephone conversation, for disclosing its contents, and for not identifying and punishing those responsible for such acts.

31. The representatives coincided with the pleadings by the Commission and added that the State had violated the right of Mr. Tristán Donoso to have his honor respected, for the accusations by the former Attorney General against him were false and the conspiracy alleged by such public official never existed.

32. The State pointed out that the alleged violation had not taken place because it is established that the former Attorney General did not order the telephone conversation held on July 8, 1996 to be tapped and tape recorded and because the Panamá Supreme Court of Justice (hereinafter "the Supreme Court") in full had concluded that the disclosure effected was not against the law On the failure to investigate, it expressed that, in view of the acquittal of the former Attorney General in the proceedings against him, Mr. Tristán Donoso was required to effect a fresh report of the fact therefore that the pertaining preliminary enquiry be commenced at the Personería Municipal [Office of the Township Attorney].

33. For the purpose of examining the alleged violations of Article 11 of the American Convention, the Court: 1) will determine the legally relevant facts which are proven; and 2) will dwell on the right to privacy and examine the alleged violations in connection with: i) the wiretapping and recording of a private telephone conversation; ii) the disclosure of the contents of the telephone conversation; and iii) the duty to guarantee privacy, specifically through criminal procedure.

1) Proven Facts

34. Mr. Tristán Donoso is a lawyer by profession, and a citizen of Panamá, who at the time of the events was legal counsel for the Catholic Church, and that, at the request of the Bishop of

Colón, Monsignor Carlos Ariz, rendered professional services to Mr. Walid Zayed and his family. Walid Zayed was currently remanded in custody in the course of criminal proceedings for a money laundering offense. [FN16]

[FN16] Cf. Depositions rendered before a public official whose acts command full faith and credit (affidavit) by Mrs. Aimée Urrutia Delgado, on June 24, 2008 (Case File on the Merits, Book II, folio 521); by Bishop Emeritus Carlos María Ariz, on June 24, 2008 (Case File on the Merits, Book II, folio 529); and by Mr. Walid Zayed on June 27, 2008 (Case File on the Merits, Book II, folio 533).

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35. Early in July 1996, Mr. Walid Zayed reported to police authorities that he had received, at the place where he was held in custody, a visit by some persons who had offered to obtain him his liberty in exchange for a sum of money. [FN17] At the request of Walid Zayed, a joint operation was set up between Mrs. Darelvia Hurtado Terrado, Jefa de la Policía Técnica Judicial [Judicial Technical Police Chief] (hereinafter "Inspector Hurtado") and Mr. José Eduardo Ayú Prado Canals, the incumbent at the Fiscalía Tercera del Circuito de Colón [Colón Circuit Third Prosecuting Office] (hereinafter "Prosecutor Prado"), [FN18] wherein Mr. Walid Zayed cooperated with the investigation personally recording the conversations he held with the alleged extorters at the Colón National Police Station. [FN19]

[FN17] Cf. Sworn Statement by Walid Zayed rendered on July 11, 1996 in the proceedings for the alleged offense against property rights to his detriment (Case File of Appendixes to the Reply to the Application, Book VI, Appendix B-2, Volume 1, folios 3847 and 3848); and statement rendered before a public official whose acts command full faith and credit (affidavit) by Walid Zayed, supra note 16, folio 532.
[FN18] Cf. Official Letter No. 2268 dated July 4, 1996, signed by Prosecutor Prado (Case File of Appendixes to the Reply to the Application, Book II, Appendix B-2, Volume 1, folios 3795 and 3797).
[FN19] Cf. Statement rendered before a public official whose acts command full faith and credit by Walid Zayed supra note 16, folio 532.

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36. On July 7, 1996, a newspaper published a piece of news about an alleged check that would have been donated for the reelection campaign of the former Attorney General as a legislator in 1994 by two companies that allegedly would have been used by criminal organizations to launder money from narcotics trafficking. [FN20]

[FN20] Cf. "La Prensa" newspaper issue dated July 7, 1996 (Case File of Appendixes to the Reply to the Application, Book I, Appendix 3, folio 1449.)

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37. On July 8, 1996 the alleged victim and Mr. Adel Zayed, father to Walid Zayed, had a telephone conversation on the possible publication of a press report stating that, unlike the company belonging to Walid Zayed, the two companies that allegedly had financed the 1994 reelection campaign of the former Attorney General as a legislator, with drug trafficking money, had not been investigated for the alleged perpetration of the money laundering offense. [FN21]

[FN21] Cf. Unnumbered Official Letter dated July 16, 1996, signed by Dalma de Duque, Jefa del Departamento de Prensa y Divulgación del Ministerio Público [Prosecuting Office Press and Social Communications Department Chief] (Case File of Appendixes to the Reply to the Application, Book I, Appendix 5, folios 1457 and 1459). Official Letter PGN – SG – 047 – 99 dated May 24, 1999, signed by the former Attorney General in response to the set of questions sent him by the Procuraduría de la Administración [Office of the Solicitor for the Administration] (Case File of Appendixes to the Reply to the Application, Book IV, Appendix B-1), and Statement by Mr. Tristán Donoso at the public hearing held on August 12, 2008 before the Inter-American Court of Human Rights.

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38. On July 9, 1996 the same newspaper published the news where it held the check allegedly drawn to finance the campaign of the former Attorney General to be false. [FN22]

[FN22] Cf. “La Prensa” newspaper issue dated July 9, 1996 (Case File of Appendixes to the Reply to the Application, Book I, Appendix 13, folios 1532 and 1533.)

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39. In the course of the extortion investigation commenced in connection with the facts detrimental to Walid Zayed (supra para. 35), on July 10, 1996, by means of Official Letters No. 2412 and No. 2413, Prosecutor Prado requested leave from the former Attorney to have the telephones at the Zayed family residence recorded, and to authorize the Policía Nacional de Colón [Colón National Police] to record and to film the conversations and meetings Walid Zayed might hold with his extorters, exempting those with his next of kin and defense counsel. [FN23]

[FN23] Cf. Official Letter No. 2412, dated July 10, 1996 (Case File of Appendixes to the Reply to the Application, Appendix B-2, Book II, Volume 1, folios 3828 and 3829) and Official Letter No. 2413 dated July 10, 1996, (Case File of Appendixes to the Reply to the Application, Appendix B-2, Book II, Volume 1, folios 3830 and 3831), both of them signed by Prosecutor José E. Ayu Prado Canals, Fiscal Tercero del Circuito Judicial de Colón [Colon Court Circuit Prosecutor Number Three].

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40. Also on July 10, 1996, Prosecutor Prado, by means of Official Letter No. 2414, forwarded to the former Attorney two cassettes and a videocassette. One of the cassettes and the videocassette contained recordings of the conversations held with the alleged extorters, done on the motion of Mr. Walid Zayed and made inside the Colón National Police Station. The other

cassette, according to such Official Letter, had been provided by the Policía Técnica Judicial [Technical Judicial Police] and contained "telephone calls allegedly made from the [Z]AYED family residence, also without leave from the Ministerio Público [Office of the Public Attorneys], for it had been made by private initiative." [FN24]

[FN24] Cf. Official Letter No. 2414 dated July 10, 1996, signed by Prosecutor José E. Ayu Prado Canals, Fiscal Tercero del Circuito Judicial de Colón [Colon Court Circuit Prosecutor Number Three] (Case File of Appendixes to the Application, Appendix 8, folios 1519 and 1520).

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41. On July 12, 1996, the former Attorney General issued two orders wherein he gave Prosecutor Prado a permit to proceed as requested, [FN25] and another order addressed to the Instituto Nacional de Telecomunicaciones [National Telecommunications Institute] (hereinafter "INTEL"), to tap the telephones at the Zayed family residence for a fifteen-day period. [FN26]

[FN25] Cf. Unnumbered Official Letters dated June 12, 1996, signed by José Antonio Sossa, Procurador General de la Nación [Procurador General de la Nación [National Attorney General]] (Case File of Appendixes to the Reply to the Application, Appendix B-2, Book II, Volume 1, folios 3877 and 3880).

[FN26] Cf. Official Letter DPG-9007-96, dated June 12, 1996, signed by José Antonio Sossa, Procurador General de la Nación [Procurador General de la Nación [National Attorney General]] (Case File of Appendixes to the Reply to the Application, Appendix B-2, Book II, Volume 1, folio 3876).

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42. On July 16, 1996, complying with an order from the former Attorney General, [FN27] the Departamento de Prensa y Divulgación del Ministerio Público [Prosecuting Office Press and Social Communications Department] sent a copy of the cassette recording the conversation held on July 8, 1996 between the alleged victim and Mr. Adel Zayed, along with its transcription, to the Archbishop of Panamá, Monsignor José Dimas Cedeño, [FN28] who in turn transmitted it to the Bishop of Colón, Monsignor Carlos María Ariz Bolea. [FN29] This last person was the one who informed Mr. Tristán Donoso about the existence of the telephone conversation recording. [FN30]

[FN27] Official Letter PGN – SG – 047-99 dated May 24, 1999, signed by the former Attorney General in response to the set of questions sent him by the Procuraduría de la Administración [Office of the Solicitor for the Administration] supra note 21, folio 3336.

[FN28] Cf. Unnumbered Official Letter dated July 16, 1996, signed by Dalma de Duque, supra note 21, folio 1455.

[FN29] Cf. Testimony rendered before a public official whose acts command full faith and credit by Bishop Carlos María Ariz, supra note 16, folios 529 and 530, and Answer to the set of questions sent by the Procuraduría de la Administración [Office of the Solicitor for the

Administration] to Bishop Carlos María Ariz Bolea (Case File of Appendixes to the brief on Motions, Pleadings and Evidence, Book 1, Appendix 20, folios 2530 to 2531).
[FN30] Cf. Record of Hearing No. 32, dated July 11, 2002, held in the course of the proceedings instituted against Mr. Tristán Donoso for defamation (Case File of Appendixes to the brief on Motions, Pleadings and Evidence, Book II, Appendix 43, folio 2707).
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43. By mid July, 1996, already acquainted with the situation, Mr. Tristán Donoso, in the company of Bishop Ariz, went to the Office of the former Attorney General in order to clarify the situation and to receive explanations. [FN31] However, the former Attorney General received Bishop Ariz alone, "and proceed[ed] to acquaint [him with] the contents of the cassette, pointing out […] that the matter was but a scheme made up by the alleged victim against the Ministerio Público [Office of the Public Attorneys], " [FN32]

[FN31] Testimony rendered before a public official whose acts command full faith and credit by Bishop Carlos María Ariz, supra note 16, folio 529, and Answer to the set of questions sent by the Procuraduría de la Administración [Office of the Solicitor for the Administration] to Bishop Carlos María Ariz supra note 29, folio 2531.
[FN32] Testimony rendered before a public official whose acts command full faith and credit by Bishop Carlos María Ariz, supra note 16, folio 529, and Answer to the set of questions sent by the Procuraduría de la Administración [Office of the Solicitor for the Administration] to Bishop Carlos María Ariz supra note 29, folio 2531.
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44. Likewise, during the month of July 1996, the former Attorney General held a meeting at the offices of the Procuraduría General de la Nación [Office of the National Attorney General], with members of the Junta Directiva del Colegio Nacional de Abogados (Governing Board of the National Bar Association], [FN33] by reason of "a number of grievances [such organization] had regarding the way the Ministerio Público [Office of the Public Attorneys] Agents were handling matters in the [Colón] Province." [FN34] On such occasion, the former Attorney General had them listen to a recording pointing out to them that "such recording was […] some sort of a conspiracy" [FN35] in order to "damage either his own person or the image of the Ministerio Público [Office of the Public Attorneys]" [FN36], on which recording "the voice of whom […] he said were Mr. [Z]ayed and Lawyer Santander Tristán Donoso could be heard." [FN37]

[FN33] Cf. Official Letter PGN – 047 – 99 dated May 24, 1999 and signed by the Procurador General de la Nación [National Attorney General], supra note 21, folio 3338.
[FN34] Sworn Statement by Armando Abrego, dated April 15, 1999 rendered before the Procuraduría de la Administración [Office of the Solicitor for the Administration] (Case File of Appendixes to the Application, Book I, Appendix 20, folio 1554). Along such lines: Sworn Statement by Luis Alberto Barqué Morelos, dated April 13, 1999 rendered before the Procuraduría de la Administración [Office of the Solicitor for the Administration] (Case File of Appendixes to the Application, Book IV, Appendix B-1, folio 3241); Sworn Statement by Edna Ramos, dated April 14, 1999 rendered before the Procuraduría de la Administración [Office of

the Solicitor for the Administration] (Case File of Appendixes to the Application, Book I, Appendix 21, folio 1557); Sworn Statement by Jorge de Jesús Vélez Valdés, dated April 14, 1999 rendered before the Procuraduría de la Administración [Office of the Solicitor for the Administration] (Case File of Appendixes to the Application, Book I, Appendix 19, folio 1550), and Official Letter 1041 – FE – 99 dated April 13, 1999, signed by Gerardo Solís Díaz, and addressed to the Procuraduría de la Administración [Office of the Solicitor for the Administration] (Case File of Appendixes to the Application, Book I, Appendix 18, folio 1547).
[FN35] Sworn Statement by Luis Alberto Barqué Morelos, dated April 13, supra note 34, folio 3241.
[FN36] Sworn Statement by Jorge de Jesús Vélez Valdés, dated April 14, 1999, supra note 34, folio 1550.
[FN37] Official Letter 1041 – FE – 99 dated April 13, 1999, signed by Gerardo Solís Díaz, supra note 34, folio 1554. Along the same lines: Sworn Statement by Edna Ramos dated April 14, 1999, supra note 34, folio 1557, and Sworn Statement by Armando Abrego dated April 15, supra note 34, folio 1550.

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45. On July 21, 1996, the alleged victim sent a written communication addressed to the former Attorney, wherein he let him know that he was "deeply hurt by the telephone spying to which he [had] been subjected." Likewise, he offered to clarify the aforementioned telephone conversation. [FN38] It is a fact not contended by the State that such letter was not answered by the former Attorney General.

[FN38] Cf. Letter dated July 21, 1996, signed by Santander Tristán Donoso and addressed to the Procurador General de la Nación [National Attorney General] José Antonio Sossa (Case File of Appendixes to the Application, Book I, Appendix 23, folio 1563).

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46. On March 25, 1999, within the framework of a succession of public challenges to the former Attorney in connection with his legal powers to order telephone calls to be tapped and tape recorded, Mr. Tristán Donoso held a press conference in the course of which he declared that the former Attorney General had ordered a conversation of the alleged victim with a client to be tapped and tape recorded, and then had disclosed it to third parties (infra para 95).

47. On March 26, 1999, Mr. Tristán Donoso filed a criminal report against the former Attorney General with the Procuraduría de la Administración [Office of the Solicitor for the Administration], for the alleged crime of abusing his authority and of infringing his duties as a public official, which is to say for considering he had broken the provisions contained in Articles 169, 336 and 337 of the Penal Code. [FN39] Such criminal complaint was extended by Mr. Tristán Donoso on three occasions, on April 5, 1999, [FN40] when he extended his complaint to include the crime described in Article 170 of the Penal Code; on April 7, 1999 [FN41] and finally on April 22, 1999. [FN42] In all such presentations, it was requested that pieces of evidence were proposed or specific documents were produced, in order to be added to the inquiry being conducted before the Procuraduría de la Administración [Office of the Solicitor for the Administration].

[FN39] Cf. Criminal report filed on March 26, 1999 by Mr. Tristán Donoso against the Procurador General de la Nación [National Attorney General], José Antonio Sossa (Case File of Appendixes to the Application, Book I, Appendix 28, folios 1620 to 1624).
[FN40] Cf. Extension of the criminal report filed on April 5, 1999 by Mr. Tristán Donoso against the Procurador General de la Nación [National Attorney General], José Antonio Sossa (Case File of Appendixes to the Application, Book I, Appendix 28, folios 1625 to 1627).
[FN41] Cf. Extension of the criminal report filed on April 7, 1999 by Mr. Tristán Donoso against the Procurador General de la Nación [National Attorney General], José Antonio Sossa (Case File of Appendixes to the Reply to the Application, Book I, Appendix B-1, folios 3209 and 3210)
[FN42] Cf. Extension of the criminal report filed on April 22, 1999 by Mr. Tristán Donoso against the Procurador General de la Nación [National Attorney General], José Antonio Sossa (Case File of Appendixes to the Reply to the Application, Book I, Appendix B-1, folios 3288 and 3289).

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48. On September 22, 1999 the Procuraduría de la Administración [Office of the Solicitor for the Administration] issued Prosecutor's Opinion No. 472, requesting "objective and impersonal acquittal, in [the above mentioned] inquiry, in favor of Licentiate José Antonio Sossa Rodríguez, Procurador General de la Nación [National Attorney General]." [FN43] On October 8, 1999, [FN44] Mr. Tristán Donoso proceeded to enter his opposition to such Prosecutor's Opinion, an opposition the scope of which was extended on October 22, 1999. [FN45]

[FN43] Prosecutor's Opinion No. 472 dated September 22, 1999, of the Procuraduría de la Administración [Office of the Solicitor for the Administration] (Case File of Appendixes to the Application, Book I, Appendix 35, folio 1714).
[FN44] Opposition to Prosecutor's Opinion No. 472, dated September 22, 1999, entered by Santander Tristán Donoso on October 8, 1999 (Case File of Appendixes to the Application, Book II, Appendix 36, folios 1720 to 1729).
[FN45] Extension of the Opposition to Prosecutor's Opinion No. 472, dated September 22, 1999, entered by Santander Tristán Donoso on October 22, 1999 (Case File of Appendixes to the Application, Book II, Appendix 36, folios 1730 to 1732).

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49. On December 3, 1999 the Panamá Republic Supreme Court of Justice in full decided to "reject the complaint submitted, for it was found lacking the entity necessary to prove the existence of the punishable act reported, both in itself, as well as for the pieces of evidence accompanying it," and, so, "it acquit[ted] in a final manner the Procurador General de la Nación [National Attorney General] of the crimes of abusing his authority and of infringing the duties of a public official, as contained in the criminal report submitted by Licentiate [Santander Tristán Donoso]." [FN46]

[FN46] Cf. Judgment by the Corte Suprema de Justicia de Panamá [Panamá Supreme Court of Justice] dated December 3, 1999 (Case File of Appendixes to the Application, Book II, Appendix 37, folios 1750 and 1751).
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50. At the time of the events in the instant case, the Constitución Política de la República de Panamá [Political Constitution of the Republic of Panamá] [FN47] provided that:

Article 29. […] private telephone calls are privileged and cannot be tapped.

[FN47] Cf. Constitución Política de la República de Panamá [Political Constitution of the Republic of Panamá] (Case File of Appendixes to the brief in Reply to the Application, Book II, Appendix A-2, folio 3017).
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51. Law No. 31 of February 8, 1996, [FN48] on "rules governing telecommunications in the Republic of Panamá" provided that:

Article 6. Telecommunications are privileged, they shall not be tapped or intercepted, nor shall their contents be disclosed, except in the cases, in the manner and by the persons statutorily empowered to do so.

[FN48] Law Nº 31 of February 8, 1996 whereby "statutory rules governing telecommunications in the Republic of Panamá" are established, in force as from May 1, 1996 (Case File of Appendixes to the Application, Book II, Appendix 49, folios 2016 and 2036).
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52. In its turn, the Penal Code [FN49] of September 22, 1982 provided that:

Article 168. Whoever is in legitimate possession of correspondence, recordings or papers not meant to be made public and discloses them without due permission, even though they were addressed to the holder, shall be punished with 15 to 60 days' fine, when the event might be damaging. It will not be considered an offense to disclose documents without which history and political events would be impossible to understand.
Article 169. Whoever records the words of another that are not meant for the public, without permission by the speaker or, by means of technical devices, listens on private conversations not meant for the listener, shall be punished with 15 to 50 days' fine.
Article 170. Anyone who, in the course of trade, employment or profession, comes to learn about secrets that might be damaging if made public and discloses them without permission by the interested party or without such revelation being necessary to further a superior interest, shall be punished with imprisonment for 10 months to 2 years or with 30 to 150 days' fine, and exclusion from the practice of such trade, employment or profession for up to two years.
Article 171. In the cases of Articles 168, 169 and 170, prosecution shall not proceed but on the basis of a report by the offended party.

Article 336. The public official who, abusing his office, orders or commits, to the detriment of someone, any arbitrary Law Not specifically described in criminal law, shall be punished with imprisonment for 6 to 18 months or with 25 to 75 days' fine."
Article 337. The public official who discloses or makes public documents or news acquired in the course of duty, and supposed to be kept secret, shall be punished with imprisonment from 6 to 18 months or with 25 to 75 days' fine."

[FN49] Penal Code, Law No. 18 of September 22, 1982 (Case File of Appendixes to the Reply to the Application, Book I, Appendix A-1, folios 2943 and 2944).

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53. Likewise, Law No. 23 of December 30, 1986 [FN50] "on prevention and rehabilitation in connection with drug related crimes," established:

Article 26: When there be indications a serious crime has been committed, the Procurador General de la Nación [National Attorney General] may give leave to film or to record conversations and telephone calls of those linked to the offense, subject to what is established in Article 29 of the Political Constitution.
Transcriptions of the recordings shall be registered in minutes wherein only the information bearing a relation with the case under investigation shall appear, and which will be subscribed by the public official in charge of the operation and by the supervisor thereof.

[FN50] Cf. Law No. 23, of December 30, 1986, "on prevention and rehabilitation in connection with drug related crimes" (Case File of Appendixes to the brief on motions, pleadings and evidence, Book I, folio 2488).

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54. Finally, the law "Whereby practice of the legal profession is governed" [FN51] established the procedures for the cases where professional ethics were infringed.

[FN51] Cf. Law No 9 of April 18, 1984, whereby the practice of the legal profession is governed. (Case File on the Merits, Book II, folio 757).

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2) Right to Privacy

55. Article 11 of the Convention sets forth that no one may be the object of arbitrary or abusive interference with his private life, including his family life, home, and correspondence. The Court has held that the sphere of privacy is characterized by being exempt from and immune to abusive and arbitrary invasion or attack by third parties or by the public authorities. [FN52] Though telephone conversations are not expressly mentioned in Article 11 of the Convention, they are a type of communication, which, like correspondence, is included within the personal sphere protected by the right to privacy. [FN53]

[FN52] Cf. Case of the Ituango Massacres v. Colombia. Preliminary Objection, Merits, Reparations and Costs. Judgment dated July 1, 2006, Series C No. 148, paras. 193 and 194.
[FN53] Along such lines, cf. Eur. Court H.R., Case of Klass and others v. Germany, Judgment of 6 September 1978, para. 29; Case of Halford v. the United Kingdom, Judgment of 27 May 1997, para. 44; Case of Amann v. Switzerland, Judgment of 16 February 2000, para. 44, and Copland v. the United Kingdom, Judgment of 13 March 2007, para. 41.

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56. The right to privacy is not an absolute one, and, so, it may be restricted by the States provided that their interference is not abusive or arbitrary; accordingly, such restriction must be statutorily enacted, serve a legitimate purpose, and meet the requirements of suitability, necessity, and proportionality which render it necessary in a democratic society.

57. Lastly, Article 11 of the Convention sets forth that everyone has the right to have his honor respected and his dignity recognized and that no one may be the object of illegal attacks on his honor or reputation and imposes on the States the duty to afford protection against such attacks. In broad terms, the right to have honor respected relates to self-esteem and self-worth, whereas reputation refers to the opinion other persons have about someone.

2.) The right to a private life.

58. The Commission alleged that "there is [n]o evidence on the record of any orders issued by the Procurador General de la Nación [National Attorney General] authorizing the wiretapping and recording of the telephone conversations of Mr. Tristán Donoso." "[T]he interference with and recording of the telephone conversation of July 8, 1996 were made in violation of the domestic legislation of Panamá in force on the matter." Likewise, "neither Mr. Tristán Donoso nor Mr. Adel [Z]ayed had authorized either the interference with [or] the recording of […] such telephone conversation." Finally, it argued that "the States must adopt the necessary measures to create a legal system which is adequate to deter the occurrence of 'arbitrary or abusive' interference with the right to privacy or to a private life."

59. The representatives added that the legislation which regulates tapping and recording telephone conversations: a) "did [n]ot establish any standards whereby to describe an offense as serious, [nor] did it expressly establish the procedures to be followed to examine and use the information obtained by wiretapping a telephone conversation;" b) Law No. 23 dated December 30, 1986 does not establish time limits for the interference, nor the obligation that such interference be authorized by a Court organ, that is, both prior judicial checks and political checks are lacking; c) "the vagueness of existing regulations regarding this matter allowed the Procurador General de la Nación [National Attorney General] much leeway to take actions which were not subject to any checks. This […] put Panamanians in a situation of legal uncertainty derived from the ample powers vested in the Attorney General, which resulted in specific violations to the detriment of some individuals, […] including, of course, […] the case of Santander Tristán;" and d) "at the time the facts described in the instant case occurred, there were no other regulations in Panamá regarding the privilege of communications, and standards

regulating interference with telephone communications had not as yet been established by case law." They concluded that the Panamanian State, due to the lack of adequate, accurate, and clear legislation to regulate interference with telephone communications, failed to fulfill its obligation to adapt its domestic legislation therefore as to secure the right of Mr. Tristán Donoso not to be subjected to arbitrary interference with his private life.

60. The State alleged that, "it has been conclusively established that the Procurador General de la Nación [National Attorney General] […] did not order the wiretapping and recording of the telephone conversation of July 8, 1996. Accordingly, there was no "arbitrary or abusive interference" with the private life of Mr. Tristán Donoso committed by the aforementioned Procurador General de la Nación [National Attorney General]," and pointed out that "Mr. Santander Tristán […] knew that the recording had been made by his client, [Adel Zayed, who], inadvertently gave an additional cassette […] to Inspector Hurtado without being acquainted with its contents, [delivering the cassette with the recording of the telephone conversation in question] unknowingly."

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61. The Court recalls that at the public hearing the parties agreed that it had not been proven that the former Attorney General had ordered the wiretapping and recording of the telephone conversation of July 8, 1996 between the alleged victim and Mr. Adel Zayed. In view of this, it is not necessary to make any additional considerations on this matter.

62. Notwithstanding, this circumstance in itself does not exempt the State from its international responsibility if from the evidence submitted by the parties it result that another State agent is responsible for the wiretapping and recording of such telephone conversation. So, the Court will examine the body of evidence in the instant case.

63. Among the elements that point to the responsibility of the State, the Court notes that at the public hearing the alleged victim declared that he had neither tape recorded nor consented to anyone recording his telephone conversation and that, due to various reasons, he had held the former Attorney General to be responsible for such recording, wherefore he had lodged a criminal complaint against him. [FN54] The Court has already rejected such imputation (supra para. 61). Furthermore, in the statement he rendered before a public official whose acts command full faith and credit, Walid Zayed also rejected the argument that the recording had been made by his father or the alleged victim and at the same time stated that "he did not have the slightest doubt that the telephone recording had been made by some agency to which the Attorney General […] had access." [FN55] However, such imputation was made on circumstantial grounds, and there are no other elements to back them before the Court. Finally, Mr. Adel Zayed, in his statement regarding the complaint lodged against the former Attorney General, declared that he only delivered to a police agent a single cassette and not the tape containing the recording of his conversation with the alleged victim. He stated that he had never "delivered nor tape recorded or consented to any recording of [his] private telephone conversations." [FN56] In such circumstances, the Court finds that such statements do not amount to sufficient evidence to prove before the Court the responsibility of the State for recording the telephone conversation and convince it thereof.

[FN54] Criminal complaint lodged on March 26, 1999 by Mr. Tristán Donoso against the Procurador General de la Nación [National Attorney General] (supra note 39, folio 1620).
[FN55] Cf. Statement rendered before a public official whose acts command full faith and credit by Mr. Walid Zayed, supra note 16, folio 533.
[FN56] Cf. Sworn Statement rendered by Mr. Adel Zayed before the Procuraduría de la Administración [Office of the Solicitor for the Administration] on May 5, 1999 (Case File of Appendixes to the Application, Book I, Appendix 2, folio 1447).

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64. Besides, there is evidence on the record of the case filed with the Court, which indicates that such recording might have been made privately. This results, among other elements, from the following public documents and statements: a) Official Letter No. 2414 of July 10, 1996, through which Prosecutor Prado forwarded, among other items, a cassette "containing tape recorded telephone conversations allegedly made from the residence of the [Z]ayed family, without authorization of the Ministerio Público [Office of the Public Attorneys], as it was made privately;" [FN57] b) Report dated July 19, 1996, issued by the Clerk Álvaro Miranda of the Fiscalía Tercera del Circuito de Colón [Office of the Colón Circuit Prosecutor Number Three] (hereinafter "Clerk Miranda") and addressed to Prosecutor Prado, in which, among other considerations, it was stated that the recording had been made privately; [FN58] c) Sworn Statement dated March 30, 1999, rendered by Clerk Miranda in the criminal proceedings started by the former Attorney General against Mr. Tristán Donoso, confirming that the recording had been made privately; [FN59] and d) Official Letter No. 1289-99 dated April 7, 1999 in which Prosecutor Prado declared that Mr. Zayed had allegedly delivered such recording to a police officer. [FN60] The Court notes that in such documents and in the sworn statements rendered in different proceedings it was confirmed that the recording had been made privately. Such documents were not challenged, nor their authenticity questioned before this Court.

[FN57] Official Letter No. 2414 from Prosecutor Prado, dated July 10, 1996, supra note 24, folio 1519.
[FN58] Cf. Report of July 19, 1996 of Clerk Miranda (Case File of Appendixes to the Application, Book I, Appendix 11, folio 1527).
[FN59] Cf. Sworn Statement rendered by Clerk Miranda on March 30, 1999 before the Office of the Deputy Prosecutor of the Republic (Case File of Appendixes to the Reply to the Application, Book V, folio 3769).
[FN60] Cf. Official Letter No. 1289-99 dated April 7, 1999, from Prosecutor Prado (Case File of Appendixes to the Reply to the Application, Book VIII, Appendix B-2, folio 4399).

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65. Additionally, the Commission and the representatives pointed out that in her statement in the criminal proceedings against Mr. Tristán Donoso, Inspector Hurtado declared that she had not delivered the tape containing the recording at issue to Prosecutor Prado, thus contradicting the contents of the report dated July 19, 1996 drawn by Clerk Miranda and of official letter No. 2414 of July 10, 1996 issued by Prosecutor Prado. [FN61] Notwithstanding, in the same

proceedings and following such statement, the above-mentioned police officer rendered three further statements, one of them before a notary public, [FN62] another one before the Fiscalía Auxiliar de la República de Panamá [Office of the Auxiliary Prosecutor of the Republic of Panamá] [FN63] and one more at the hearing of the case, [FN64] in which she stated that Mr. Adel Zayed had given her the tape; that she gave it to Prosecutor Prado as at that time an investigation was being conducted into a possible extortion of the Zayed family, and that in her statement of April 29, 1999 she had stated otherwise "because [she] was forced to do therefore [by her superiors] and she did not want to lose [her] job. [FN65] In fact, the Court notes the contradiction among the aforementioned statements regarding the delivery of the recording by Inspector Hurtado to Prosecutor Prado. Notwithstanding, in her three subsequent testimonies the officer was consistent in pointing out the private origin of the tape.

[FN61] Cf. Sworn Statement rendered by Inspector Hurtado on April 29, 1999 before the Fiscalía Cuarta del Primer Circuito Judicial de Panamá [Panamá First Court Circuit Public Attorney Number Four] (Case File of Appendixes to the Application, Book I, Appendix 33, folios 1659 and 1660).

[FN62] Cf. Sworn Statement rendered by Inspector Hurtado on May 30, 2000 before a Notary Public (Case File of Appendixes to the Reply to the Application, Book IX, Appendix B-2, Volume 1, folios 4800 and 4801).

[FN63] Cf. Sworn Statement rendered by Inspector Hurtado on June 6, 2000 before the Fiscalía Auxiliar de la República [Office of the Auxiliary Prosecutor of the Republic of Panamá] (Case File of Appendixes to the Application, Book II, Appendix 38, folio 1754).

[FN64] Cf. Minutes of Hearing No. 32, held on July 11, 2002; statement by Inspector Hurtado, supra note 30, folio 2618.

[FN65] Sworn Statement rendered by Inspector Hurtado on June 6, 2000, supra note 63, folio 1758.

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66. As it has been indicated before, the assessment of the evidence brought before the Court is governed by the principle of sound criticism. [FN66] The Court's certainty about a specific fact and its verification is not restricted to one or more evidentiary items established in the Convention or its Rules, nor to evidentiary assessment criteria which define when a fact is deemed to be certain or not. On the basis of the foregoing considerations and of the evidence on the record, the Court finds that it has not been proven that the tape containing the telephone conversation of Mr. Tristán Donoso was recorded by State agents. Accordingly, it is not possible to determine the responsibility of the State for the violation of the right to privacy of the alleged victim as enshrined in Article 11(2) of the Convention, in connection with Article 1(1) of such treaty, regarding the alleged wiretapping and recording of the aforementioned telephone conversation.

[FN66] Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits. Judgment of March 8, 1998. Series C No. 37, para. 52; Case of Heliodoro Portugal v. Panamá. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 186, para. 64; and Case of Valle Jaramillo et al., supra note 6, para. 49.

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67. Finally, the Court will not examine the argument that such recording was the result of the alleged deficiencies of the legal system which regulated the wiretapping of telephone conversations by the State of Panamá, and that therefore the State would have failed to comply with the general duty established in Article 2 of the Convention, for such argument necessarily assumes the State to be responsible for such wiretapping and recording, something which has not been proven in the instant case.

2.ii) Privacy and disclosure of the contents of the telephone conversation

68. The Commission alleged that: a) "the telephone conversation […] was a private conversation held […] in the framework of the practice of the alleged victim's profession as a lawyer […] and, so, its contents were not intended to be disclosed. Neither Mr. Tristán Donoso nor Mr. Adel [Z]ayed had [consented] to making the contents of […] such telephone communication public;" b) "even if the Procurador General de la Nación [National Attorney General] had not been involved in the wiretapping and recording of the telephone conversation in his capacity as a public official it was his duty to refrain from disclosing its contents; and c) "the moment a public official […] disclosed the contents of a telephone conversation which had been illegally wiretapped and tape recorded, the State violated the right to privacy provided in Article 11(2) of the American Convention to the detriment of Mr. Tristán Donoso and failed to fulfill its duty to respect the rights and liberties enshrined in Article 1(1) of the American Convention."

69. The representatives argued that: a) upon recording a telephone conversation and disclosing its contents the State interfered with the private life of Tristán Donoso; b) no regulations existed which empowered the former Attorney General to disclose private information. Moreover, Article 337 of the Penal Code enacted punishments for the disclosure of information by public officials who, in their capacity as such, were supposed to keep it secret and Article 24 of Law No. 23 set forth the duty of confidentiality regarding the information legally obtained in the course of formal investigation proceedings. Much less could "[…] a conversation which had been illegally obtained, which was not part of any ongoing investigation proceedings and which, furthermore, was a dialogue between a lawyer and his client" be disclosed; c) the former Attorney General did not start an investigation into the alleged "preparatory acts leading to a wrongdoing or to an illegal action," nor did he report, being aware of the identity of the persons who held the conversation, the alleged unethical conduct to the Colegio Nacional de Abogados [National Bar Association]; instead he disclosed the contents of the conversation to the authorities of the Catholic Church and of the aforementioned Bar Association; and d) the Panamanian legislation was not clear, among other aspects, as to how the private information to which public authorities may have access was to be handled; the period of time during which the information might have been kept or stored and the authorized uses of the information obtained. They indicated that "[t]his has allowed the State to keep the contents of the conversation […] even today, ten years after it took place."

70. Furthermore, the representatives added that the statements of the former Attorney General upon disclosing the contents of the telephone conversation constituted a violation of the honor of Mr. Tristán Donoso. They indicated that, at the meeting held by former Attorney

General Sossa and some members of the Junta Directiva del Colegio Nacional de Abogados [National Bar Association Governing Board], the former Attorney General stated that such conversation showed that there a plot and a conspiracy against him was afoot for the purpose of creating instability in the Procuraduría General de la Nación [Attorney General's Office]. From the foregoing "[i]t is evident that the former Attorney General intended to tarnish the good name of Santander Tristán and his professional reputation in the legal community of the country." Finally, they concluded that "the charges made by former Attorney General Sossa against Santander Tristán were absolutely false and that the plot alleged by the former Attorney General never existed" and that "the statements made by the Procurador General de la Nación [National Attorney General] affected Santander Tristán's honor, for which no […] reparation was ever made."

71. The State pointed out that: a) "the violation of the right protected by Article 11(2) [of the Convention] can only result from "arbitrary interference" or "abusive interference" in the private life of an individual, his family, his home or his correspondence. Therefore, "[t]he actions of Attorney General […] perfectly lawful, as they do not entail arbitrariness or abuse resulting in the violation of the right to privacy;" b) the former Attorney General obtained the contents of the tape in a lawful manner after Adel Zayed himself delivered it to Inspector Hurtado, who, in turn, delivered it to Prosecutor Prado; c) "Attorney General Sossa decided to inform the Junta Directiva del Colegio Nacional de Abogados [National Bar Association Governing Board] on the defamation plan devised by Mr. Tristán Donoso with Adel Zayed, taking into consideration that the conduct of the lawyer […] could be deemed to be a breach of the ethics standards set for the legal profession;" and d) likewise, as the discussion of the defamation plan devised by Mr. Tristán Donoso involved a "Monsignor," the former Attorney General considered that it had to be informed to the highest authority of the Catholic Church in Panamá. According to the State "[i]n this case, it is unquestionable that the conversation held between Mr. Tristán Donoso and Adel [Z]ayed on July 8, 1996 was nothing but the preparatory act of a wrongdoing or illegal action" […] which was to falsely accuse the Procurador General de la Nación [National Attorney General] – the highest authority in the Ministerio Público [Office of the Public Attorney]- of having favored two companies allegedly related to drug trafficking."

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72. As to the alleged violation of the right to honor of the alleged victim, based on the statements of the former Attorney General upon disclosing the contents of the telephone conversation to the Colegio Nacional de Abogados [National Bar Association], such argument was not upheld by the Commission, but only by the representatives (supra para. 70).

73. In this regard, the Court has determined that the alleged victim, his next of kin or his representatives may invoke rights other than those asserted in the application by the Commission, on the basis of the facts described therein. [FN67]

[FN67] Cf. Case of the "Five Pensioners" v. Peru. Merits, Reparations and Costs. Judgment of February 28, 2003. Series C No. 98, para. 155; Case of Bueno-Alves v. Argentina. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 164, para. 121; and Case of

Escué-Zapata v. Colombia. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 165, para. 92.

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74. Along such lines, the Court notes that from the application filed by the Commission it appears that "the first disclosure [of the telephone conversation] was made at a meeting held at the Office of the Attorney General with the members of the Junta Directiva del Colegio Nacional de Abogados [National Bar Association Governing Board]", during which, according to the representatives, the former Attorney General used expressions which affected the honor and reputation of Mr. Tristán Donoso (supra para. 70). Consequently, such argument submitted by the representatives is based on a fact described in the application and, so, may be considered by the Court.

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75. The Court considers the telephone conversation between Mr. Zayed and Mr. Tristán Donoso to have been private and that none of the two of them consented to its disclosure to third parties. Moreover, as such conversation was held between the alleged victim and one of his clients, [FN68] it should even be afforded a greater degree of protection on account of professional secrecy.

[FN68] Cf. Statements rendered before a public official whose acts command full faith and credit (affidavits) by Ms. Aimée Urrutia-Delgado on June 24, 2008 (Case file on the merits, Book II, folio 521); by Bishop Emeritus Carlos María Ariz on June 24, 2008 (Case file on the merits, Book II, folio 529) and by Walid Zayed on June 26, 2008 (Case file on the merits, Book II, folio 533).

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76. The disclosure of the telephone conversation by a public official implied an interference with the privacy of Mr. Tristán Donoso. The Court must examine whether such interference was arbitrary or abusive under the terms of Article 11(2) of the Convention or whether it was in line with such treaty. As it has been already indicated (supra, para. 56), in order to be in line with the American Convention, an instance of interference must meet the following standards: to be contemplated in legislation, to serve a legitimate purpose, and to be suitable, necessary, and proportionate. Consequently, the failure to meet any one of such standards implies the measure runs contrary to the Convention.

Legality of the interference

77. The first step in order to analyze whether an interference with a right enshrined by the American Convention is in line with such treaty is to examine whether the restrictive measure meets the legality standard. This means that the general conditions and circumstances, which allow restricting the exercise of a declared human right must be clearly established by statute. [FN69] The rule, which allows for such restriction must be both an enacted statute and a written rule of a general scope. [FN70]

[FN69] Article 30 of the American Convention sets forth that:
The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.
[FN70] Cf. The word "Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 dated May 9, 1986. Series A. No. 6., paras. 27 and 32.

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78. Panamá alleged that the disclosure of the tape was lawful and served two purposes: on the one hand, to prevent a possible criminal conspiracy to defame the Attorney General or destabilize the Attorney General's Office, and, on the other, to inform the authorities of the Colegio de Abogados [Bar Association] about a possible breach of the professional ethics code.

79. The Panamanian legislation empowered and constitutionally ordered the Procurador General de la Nación [National Attorney General] and the Office of the Public Prosecutor to 'defend the interests of the State' and to 'prosecute crimes and violations of constitutional or legal provisions.' [FN71] Likewise, the law "which regulates the exercise of the legal profession" empowered the Office of the Public Prosecutor to report a breach of the professional ethics code if one occurred in the course of a case with which it was seized. [FN72] Such laws would have allowed the telephone conversation in question to be disclosed only to certain persons, who in the instant case should have been a judge having competent jurisdiction, by means of a criminal report, and the Tribunal de Honor del Colegio Nacional de Abogados [Ethics Review Board of the National Bar Association], in connection with the alleged breach of the professional ethics code.

[FN71] Cf. Constitución Política de la República de Panamá [Political Constitution of the Republic of Panamá] of 1972, supra note 47, folio 3050, that establishes:
Article 217.- The Public Prosecutor is empowered to:
1. Defend the interests of the State or of the Township.
[…]
4. Prosecute crimes and violations of constitutional or legal provisions.
[FN72] Cf. Law Nº 9, enacted on April 18, 1984, supra note 51, folio 757, wherein it is provided that:
Article 21: The Colegio Nacional de Abogados [National Bar Association] shall create a Tribunal de Honor [Ethics Review Board] to inquire into ethics breaches following a report by the interested party, or by the official with the Judicial Body, Public Prosecution or Public Administration seized with the case in connection with which the breach was committed.

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80. More so, Article 168 of the Penal Code (supra para. 52) of the Penal Code prohibits those who legitimately have a tape which is not intended for publicity, to make it public without due authorization, even when it has been addressed to them, if such an act could cause damage. In the

specific case of public officials, Article 337 of the Penal Code (supra para. 52) established punishments for public officials who disclosed or published documents or news to which they had access by reason of their office and which they were supposed to keep secret. Consequently, disclosing the contents of a recorded telephone conversation to third parties without due authorization was not only not provided by the law, but rather statutorily punished.

81. In the instant case, if the former Attorney General had considered that from the contents of the recording it would transpire that the alleged victim and Mr. Adel Zayed were performing preparatory acts leading to a crime, in his capacity as a member of the Ministerio Público [Office of the Public Attorney] he had the obligation, ─ which was even a constitutional duty of his ─ to report it, therefore that a criminal investigation might be started, in accordance with the legal procedures in force. The Court deems that disclosing a private conversation before the Catholic Church authorities just because a "Monsignor" is mentioned therein is not the procedure provided to prevent the alleged criminal conducts. Likewise, neither is the disclosure of the recording to certain authorities of the Colegio Nacional de Abogados [National Bar Association] the procedure established by Panamanian legislation in case of a possible breach of the lawyer's ethics code. In the instant case, the former Attorney General should have effected a report to the Tribunal de Honor del Colegio Nacional de Abogados [National Bar Association Ethics Review Board], which should have examined whether the facts reported amounted to a case of unethical conduct among those set forth in the Código de Ética y Responsabilidad Profesional del Abogado [Lawyers' Code of Ethics and Professional Responsibility]. In view of the foregoing, the Court concludes that the way in which the telephone conversation was disseminated in the instant case lacked statutory grounds.

82. Finally, this Tribunal finds that the comments by the former Attorney General when effecting the aforementioned disclosure (supra paras. 43 and 44) may be deemed to have affected honor and reputation in a manner incompatible with the Convention to the detriment of Mr. Tristán Donoso, inasmuch as qualifying the statements contained in the cassette as "a defamation plan," or as a "conspiracy against the head of the Ministerio Público [Office of the Public Attorney]" uttered by the highest authority of the body responsible for prosecuting crimes before two audiences which are relevant for the life of the alleged victim, implied participation by the latter in an illegal activity, with the resulting impairment of his honor and reputation. The opinion that the authorities of the Catholic Church and of the Colegio de Abogados [Bar Association] had about the worthiness of, and the action taken by, the alleged victim necessarily affected his honor and reputation (supra para. 34).

83. So, the Court considers that disseminating the private conversation before Catholic Church authorities and some of the persons responsible for running the Colegio Nacional de Abogados [National Bar Association] and the comments made by the former Attorney General on such occasions, violated the rights to a private life and to honor and reputation of Mr. Tristán Donoso, recognized in Articles 11(1) and 11(2) of the American Convention, in connection with the obligation to respect rights enshrined in Article 1(1) thereof.

2.iii) The duty to guarantee a private life through the criminal proceedings

84. The Commission alleged that, "the fact [that] Prosecutor's Opinion No. 472 was drawn up by agents under the hierarchical authority of the Procurador General de la Nación [National Attorney General] [in the criminal investigation instituted against him] is a situation which in itself affected the impartiality of the officials in charge of conducting such investigation." In the opinion of the Commission, such fact, together with the alleged omissions in the above-mentioned investigation, resulted in the failure to identify and punish those responsible for the above mentioned wiretapping and recording. So, by not ensuring the right to a private life and to honor, as set forth in Article 11(2) of the Convention, the State failed to meet the general duty provided in Article 1(1) thereof.

85. In turn, the State alleged that the Procurador General de la Nación [National Attorney General] and the Procurador de la Administración [Procurador de la Administración [Solicitor for the Administration]] are public officials having the same hierarchy and that "[b]oth have clearly distinct powers of their own and neither is in a subordinate position with regard to the other."

86. From the provisions in the Constitución Política de la República de Panamá de 1972 [1972 Political Constitution of the Republic of Panamá] and from the Judicial Code in effect at the time the events described in the instant case occurred, it results that lower-ranking prosecutors must abide by and comply with the rules issued by their superiors in the exercise of their legal powers, insofar as such rules be legitimate and in conformity with Constitution and statute. [FN73] Lower-ranking prosecutors are subordinated both to the Procurador General de la Nación [National Attorney General] and to the Procurador de la Administración [Solicitor for the Administration].

[FN73] Cf. Constitución Política de la República de Panamá de 1972 [1972 Political Constitution of the Republic of Panamá] supra note 47, folio 3050, which provides:
Article 216.- The Office of the Public Attorney is comprised of the Procurador General de la Nación [National Attorney General], the Procurador de la Administración [Solicitor for the Administration], the Prosecutors and Representatives and other public officials as established by law […].
Article 218.- In order to serve as Procurador General de la Nación [National Attorney General] and Procurador de la Administración [Solicitor for the Administration] the same eligibility requirements established to be a Supreme Court Justice must be fulfilled. Both officials will be appointed for a period of ten years.
Article 219.- The Procurador General de la Nación [National Attorney General] shall have the following specific duties: […] 2. Ensure that the other public officials with the Office of the Public Attorney faithfully carry out their duties and that they be held accountable for the breaches of duty or crimes that they may commit.
Article 221.- The Procurador General de la Nación [National Attorney General] and the Procurador de la Administración [Solicitor for the Administration] and their alternates shall be appointed in the same fashion as the Supreme Court Justices. Prosecutors and Representatives shall be appointed by their senior officials. Subordinate staff shall be appointed by the respective Prosecutor or Representative. All such appointments shall be made in accordance with the Judicial Career, as provided in Title XI.

In turn, the Código Judicial de la República de Panamá [Panamá Republic Judicial Code] (Case File of Appendixes to the Application, Book II, Appendix 46, folio 1908) provides:
Article 331. The Procurador General de la Nación [National Attorney General] presides over the Office of the Public Attorney and all other officials in the area are hierarchically subordinated to him in accordance with the Constitution and the law. Except for the Procurador General de la Nación [National Attorney General], all public officials with the Office of the Public Attorney are subordinated to the Procurador de la Administración [Solicitor for the Administration]. […] The public officials with the Office of the Public Attorney shall exercise their duties independently and shall obey to nothing but the Constitution and the law, although they shall abide by such legitimate provisions as may be of their superiors in the exercise of their legal powers.
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87. The investigation against the former Attorney General was conducted by the Procuradora de la Administración [Solicitor for the Administration], who prepared and subscribed the Vista Fiscal [Prosecutor's Opinion] No. 472, supra paras. 47 and 48). [FN74]

[FN74] Cf. Prosecutor's Opinion No. 472 dated September 22, 1999 of the Procuraduría de la Administración [Office of the Solicitor for the Administration], supra note 43, folio 1681. Likewise, cf. Report by the expert witness Olmedo Sanjur (Case File on the Merits, Book II, Appendix 46, folio 512).
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88. In this regard, the expert report drawn by Mr. Olmedo-Sanjur, which was neither challenged nor questioned by the parties, states that "pursuant to Article 219 and Article 221 of the Constitution […], the Procurador General de la Nación [National Attorney General] and the Procurador de la Administración [Solicitor for the Administration] have the same hierarchy within the structure of the Ministerio Público [Office of the Public Attorney]" as "in order to hold both public offices […] the same eligibility requirements must be fulfilled [and both public officials] are 'appointed by agreement of the Consejo de Gabinete [Council of Ministers] and subject to approval by the Asamblea Nacional [Legislative Assembly]' (Article 200, paragraph 2, of the 1972 Political Constitution)." [FN75] Though Article 331 of the Judicial Code provides that "'[t]he Procurador General de la Nación [National Attorney General] is the highest-ranking official in the Ministerio Público [Office of the Public Attorneys] and all other officials are hierarchically subordinated thereto,' such provision has always been construed as not applicable to the Procurador de la Administración [Solicitor for the Administration], as the latter was not hierarchically subordinated to the Attorney General under the Panamanian constitutional system established in 1972." [FN76]

[FN75] Cf. Report by the expert witness Olmedo Sanjur, supra note 74, folios 510 and 511.
[FN76] Cf. Report by the expert witness Olmedo Sanjur, supra note 74, folio 511.
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89. The Court concludes that there are no evidentiary items on the record which show that the authority responsible for the investigation was hierarchically subordinated to the former Attorney General, the defendant in the case. On the grounds of the foregoing, the Court dismisses such argument.

VII. ARTICLE 13 (FREEDOM OF THOUGHT AND EXPRESSION) [FN77], IN RELATION TO ARTICLES 1(1) (OBLIGATION TO RESPECT RIGHTS) AND 2 (DOMESTIC LEGAL EFFECTS)

[FN77] In its relevant passage, Article 13 of the Convention states that:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
a. respect for the rights or reputations of others; or
b. the protection of national security, public order, or public health or morals. […]

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90. The Commission alleged that: a) the dispute which broke out around the then Procurador General de la Nación [National Attorney General], "allegedly linked to acts of wiretapping and recording of telephone communications, inevitably draws immediate attention by local public opinion"; b) the criminal provisions on the crime of defamation are expressly contemplated in the legislation of Panamá, and are lawfully aimed at protecting the right to privacy and the reputation of individuals. However, when such provisions are used to prevent criticism towards a public official or to censor expressions related to alleged illegal activities carried out by a public official in the course of office, the effect of the mere commencement of criminal prosecution constitutes a violation of the Convention; c) the protection of the honor of individuals involved in matters of public interest "[…] should be consistent with the principles of democratic pluralism" and should allow for a much wider scope of acceptance and tolerance of criticism than that of private individuals. Likewise, "given that there were other measures to protect privacy and reputation that were less restrictive, such as the right of rectification or civil penalties, and considering the importance of open debate regarding matters of public interest, in this case it was not necessary to resort to the crime of defamation to protect honor"; and d) both the institution of criminal proceedings and the punishment imposed on the victim "for the crime of false accusation, in order to protect the reputation of a public official allegedly accused of illegal acts are therefore out of proportion with the 'interest justifying' such laws, as required under Article 13(2) of the Convention." It also results out of proportion "[…] when the criminal punishment imposed does not imply an imprisonment risk but rather the payment of a fine calculated on a daily basis." Finally, it requested that the violation of the obligation to bring the Panamanian legislation into conformity with the international standards be declared insofar as "the Panamanian legislation entails the threat of imprisonment or fine for those who insult or offend public officials or express critical opinions given by third parties about public officials or about private individuals who voluntarily take part in matters of public interest."

91. The representatives, among other arguments, advanced that: a) the exercise of freedom of expression is not exclusively reserved to journalists and all individuals must be fully guaranteed the possibility of communicating and receiving information, ideas and opinions. Likewise, they considered that "[t]he protection granted under Article 13 of the American Convention covers not only assessments, but also statements regarding matters of public interest related to the exercise of democratic control [,including] any statements that may be considered offensive"; b) "the legislation of Panamá applied in the case [of Mr. Tristán Donoso] does not allow for open and transparent debate regarding public matters and spawns fear to disseminate information, thus causing a serious detriment to the operation of the democratic system, particularly when involving matters of public interest"; such legislation releases public officials from the duty to submit summary evidence when pressing criminal charges against third parties for crimes against honor and provides for the verification of the truth -exceptio veritatis- as a means to exempt from punishment those who commit a crime against honor, for which reason such legislation does not comply with freedom of expression international standards; c) "the protection of honor of those under the jurisdiction of the State of Panamá is a legitimate purpose", however, since there are other means that are less restrictive, such as those indicated by the Commission, "the statutory definition of the crimes of slander, libel and defamation become a necessary means to achieve the legitimate purpose pursued"; and d) the rules on civil compensations do not clearly establish "a distinction regarding the type of criticism involved [regarding public or private individuals], do not […] establish neither an actual malice standard nor a the purpose of compensation and do not include measures to guarantee that the penalty be commensurate." They concluded that the criminal conviction of Mr. Tristán Donoso, as well as the civil compensation payment imposed upon him – the amount of which is to be determined ─ violated his right to freedom of expression.

92. Finally the State held that: a) the instant one "is a clear case of subsequent liability ─ as expressly set forth in Article 13(2)(a) of the American Convention ─ , resulting from an illegitimate attack by Tristán Donoso against the rights and reputation of others"; b) the victim could, at all times, exercise his right to freedom of expression and "the accusation publicly made by Mr. [Tristán] Donoso […] could not be understood as 'criticism' or 'public debate' regarding the acts of a public official." Considering an act of false accusation as "news of high public interest" is equivalent to legitimating any illegal act performed upon exercising freedom of expression, provided such act may draw the attention of the public; c) the sections of the Penal Code "constitute a protection granted by the State to the right to honor and reputation against illegal acts, enshrined in Article 11 of the Convention and Article 17 of the Constitución Política de la República de Panamá [Political Constitution of the Republic of Panamá], which protection is consistent with the standards set forth in Article 13(2) of the American Convention; d) "[i]n the judgment rendered on appeal No." 40 of April 1, 2005, the Second Court of Justice […] imposed [upon Mr. Tristán Donoso] the minimum punishment established in Section 173(a) of the Penal Code ─ imprisonment for 18 months ─ and in that same judgment, such penalty was replaced by a pecuniary penalty[,] something which constitutes a very minor punishment, considering the seriousness of the crime committed." The State insisted that objectively accusing an individual of a criminal act is not included in the concept of criticism Article 13 of the Convention protects; and e) as regards the need for other means of protection of honor alleged by the Commission and the representatives, it pointed out that "in Panamá, it is completely useless

and ineffective to provide for a means of reparation that is merely civil in nature as a way of compensation for an illegal damage, given the prevailing cultural trend […] to avoid compliance therewith through mechanisms such as self-seizure and concealment of property."

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93. The arguments submitted by the parties have evidenced once again before the Court the conflict between the right to freedom of expression on matters of public interest and the protection of the right of public officials to honor and reputation. The Court recognizes that the right to freedom of expression and the right to have personal honor respected are both enshrined in the American Convention, and are of the utmost importance, wherefore both rights must be protected and should coexist in harmony. La Corte deems that, as ensuring the exercise of both rights is imperative, the solution to such collision requires examining each case in accordance with its specific characteristics and circumstances. [FN78]

[FN78] Cf. Case of Kimel v. Argentina. Merits, Reparations, and Costs. Judgment of May 2, 2008, Series C No. 177, para. 51.

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94. As in prior cases, the Court will not examine whether the statements made by the alleged victim at the press conference amounted to a specific crime pursuant to Panamanian statute, [FN79] but whether in the instant case, upon imposing a criminal punishment on Mr. Tristán Donoso and the consequences thereof, among which the additional pecuniary compensation, the amount of which is pending determination, the State has violated or restricted the right enshrined in Article 13 of the Convention. Based upon the above, the Court will: 1) start the examination of the instant case by analyzing the determination of the events which have been proven; 2) secondly, it will briefly consider the contents of the right to freedom of thought and expression and, 3) it will examine whether criminal punishment amounts to a restriction to freedom of thought and expression which is allowed or not.

[FN79] Cf. Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C. No. 107, para. 106

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1) Proven facts

95. On March 25, 1999, Mr. Tristán Donoso called a press conference at the venue of the Colegio Nacional de Abogados de Panamá [Panamá National Bar Association], [FN80] where he such:

in July 1996, in that sad July [19]96, I was having a telephone conversation with the father of one of such persons in that criminal prosecution [of Walid Zayed for the alleged charge of

money laundering], which the Attorney General tape recorded and of which I have a cassette and not only that was done, he used the cassette to summon the authorities of the Junta Directiva del Colegio Nacional de Abogados [Governing Board of the National Bar Association] […] to explain to them that I was part of a conspiracy against his person. [T]wo brave lawyers who were at that historical meeting, […] told the Attorney General that what he was doing at that moment was a crime. [FN81]

[FN80] The Defensoría del Pueblo de Panamá [Office of the Ombudsman of Panamá] by means of Official Letter D.P.P.-R.P. No. 151/99 of March 25, 1999, addressed to the Procurador de la Administración [Solicitor for the Administration], pointed out that "[t]oday, at about five p.m. at the Bar Association and in the presence of journalists, Licentiate. Santander Tristán Donoso delivered some documents to me which, in his opinion, are evidence of the wiretapping to which he was subjected by the Procurador General de la Nación [National Attorney General], José Antonio Sossa." (Case File of Appendixes to the Application, Book I, Appendix 26, folio 1606); Cf. El Siglo newspaper, March 26, 1999 issue, article entitled "¿Renunciará el Procurador? La Corte no ha dado una "autorización en blanco" para que Sossa "pinche" teléfonos" ["Will the Attorney General resign? The Court has not given Sossa a 'blank endorsement' for 'bugging' telephones."] this article reads "[l]a denuncia del abogado [Tristán Donoso] agrega nuevos elementos contra Sossa que enfrenta una verdadera tormenta de críticas y denuncias, […]" ["the criminal complaint filed by lawyer [Tristán Donoso] adds further elements against Sossa, who faces a host of criticism and accusations […]."] (Case File of Appendixes to the Reply to the Application, Book I, Appendix B-2, folio 3463). Cf. as well La Prensa newspaper, April 16, 1999 issue, article entitled "Nuevas revelaciones sobre espionaje telefónico" ["New revelations on telephone spying"] referring to the case of Mr. Tristán Donoso (Case File of Appendixes to the Reply to the Application, Book I, Appendix B-2, folio 4857).
[FN81] Judgment No. SA-2 of the Juzgado Noveno de Circuito Penal del Primer Circuito Judicial de Panamá [Panamá First Court Circuit Criminal Circuit Court Number Nine], dated January 16, 2004 (Case File of Appendixes to the Application, Book I, Appendix 25, folio 1576).
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96. At the moment the facts described in the instant case occurred, there was intense debate in Panamá, in which even a civil judge and the Chief Justice of the Supreme Court had participated, over the powers of the Procurador General de la Nación [National Attorney General] to wiretap and tape-record telephone conversations.

97. In fact, on March 20, 1999, the Juez Tercero del Circuito Civil de Panamá [Panamá Civil Circuit Judge Number Three] lodged a complaint against the former Attorney General for illegally interfering with the telephone communications of the Court in his charge, a fact which had widespread repercussion and was published in several Panamanian newspapers, [FN82] prompting the intervention of several bodies such as the Defensoría del Pueblo de Panamá [Office of the Ombudsman of Panamá]. [FN83]

[FN82] Cf. La Prensa newspaper, Wednesday March 24, 1999, article headlined "Juez acusa al procurador Sossa por intervenir ilegalmente su teléfono" ["Judge accuses Attorney General

Sossa of illegally wiretapping his telephone"] (Case File of Appendixes to the Motions, Pleadings and Evidence brief, Book II, Appendix 51, folio 2852) and El Siglo newspaper, March 26, 1999 issue, supra note 80 (Case File of Appendixes to the Reply to the Application, Book I, Appendix B-2, folio 3463).
[FN83] Cf. Official Letter D.P.P.-R.P. No. 177/99, dated April 15, 1999, of the Defensoría del Pueblo de la República de Panamá [Office of the Ombudsman of the Republic of Panamá] and addressed to the Procuradora de la Administración [Solicitor for the Administration] (Case File of Appendixes to the Application, Book I, Appendix 32, folio 1636).
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98. On his part, on March 23, 1999, the Defensor del Pueblo [Ombudsman] issued a press release [FN84] where he considered that:

[…] the wiretapping of the telephone conversation ordered by the Procurador General de la Nación [National Attorney General], José Antonio Sossa, against the Juez Tercero Civil [Civil Judge Number Three] is unacceptable, disgraceful and very serious […] as it amounted to the violation of Article 29 of the Political Constitution, as well as of various international conventions on Human Rights which protect everyone's right to privacy and the right not to be subjected to undue interference by the State.
[…]
So, the Ombudsman repudiates, condemns and disapproves of the unreasonable and unfounded interference with the telephone communications of the Civil Judge ordered by the Procurador General de la Nación [National Attorney General], […], without having valid reasons which justify such a worrisome, terrible and arbitrary measure.

[FN84] Cf. Press release of the Ombudsman on March 23, 1999 (Case File of Appendixes to the Reply to the Application, Book IV, Volume I, Appendix B-2, folio 4842). Later on, the Ombudsman, delivered documents related to the instant case to the Procuradora de la Administración [Solicitor for the Administration]. Cf. Official Letter D.P.P.-R.P. No. 177/99 of April 15, 1999 by the Ombudsman of Panamá, supra note 83, folio 1636.
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99. The former Attorney General issued a public clarification, [FN85] which contained no date, in which he pointed out that Article 26 of the Single Text of Law of August 29, 1994, empowered him to authorize the recording of telephone conversations and communications of those persons who might be involved in a wrongdoing, such as bribery of public officials, when there is evidence that a serious crime has been perpetrated. He likewise added that

"[a]ssessing whether there is evidence or not of a serious crime, and whether it is serious or not, is the obvious duty of the only public official authorized to do so, the Procurador General de la Nación [National Attorney General]."

[FN85] Public clarification bearing no date, of the Procurador General de la Nación [National Attorney General] (Case File of Appendixes to the Application, Book I, Appendix 24, folio 1569).

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100. In view of the foregoing, on March 25, 1999, Chief Justice of the Supreme Court of Panamá Arturo Hoyos addressed a note [FN86] to the former Attorney General which was widely taken up by the press, [FN87] and where he pointed out that:

[I] have gained knowledge through the press that you ordered interference with the telephone communications of a member of the Judiciary and that such Court official has started a criminal prosecution against you. I have also read the communication in which you explained the reasons for such action.
[…]
The Supreme Court of Justice has not given you, Attorney General, a blank or full endorsement to order the wiretapping of telephone communications.

[FN86] Cf. Note No. P-CSJ-015-99 of March 25, 1999 signed by the Chief Justice of the Supreme Court of Panamá and addressed to the Procurador General de la Nación [National Attorney General] (Case File of Appendixes to the Motions, Pleadings and Evidence Brief, Book I, Appendix 16, folio 2516).
[FN87] Cf. La Prensa newspaper, Friday March 26, 1999 issue, article entitled "Escándalo de intervenciones telefónicas, Hoyos desmiente al procurador" [Scandal over telephone wiretapping. Hoyos contradicts the Attorney General] (Case File of Appendixes to the Reply to the Application, Book IV, Volume I, Appendix B-2, folio 4850), and the "El Siglo" newspaper, Friday March 26, 1999 issue, supra note 80, folio 3463).

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101. On March 26, 1999, the day after the press conference called by Mr. Tristán Donoso, the former Attorney General filed a criminal complaint against him before the Fiscalía Auxiliar de la República [Auxiliary Office of the Public Attorney] for the charge of defamation, in which he pointed out that "on Thursday March 25, 1999, at the press conference called by Licentiate SANTANDER TRISTÁN, he charg[ed] [him] with wiretapping and recording his telephone communications." [FN88]

[FN88] Cf. Criminal proceedings against Mr. Santander Tristán Donoso started on March 26, 1999 by José Antonio Sossa, on the charge of defamation (Case File of Appendixes to the Application, Book II, Appendix 39, folios 1768 and 1769).

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102. On June 27, 2000, the Juzgado Noveno de Circuito Penal del Primer Circuito Judicial de Panamá [Panamá First Court Circuit Criminal Circuit Court Number Nine] handed down a dismissal without prejudice in behalf of Mr. Tristán Donoso on the grounds that "it had not been conclusively proven at the preliminary investigation that SANTANDER TRISTÁN had not

deemed the alleged false event he allegedly attributed on March 25, 1999, at a press conference, to be true, therefore that it would have amounted to the crime of defamation, that is, for such crime to be effectively perpetrated the person making the imputation must be aware that such fact is false, something which did not occur." [FN89]

[FN89] Cf. Preliminary Hearing Record No. 101 of the Juzgado Noveno del Circuito Penal del Primer Circuito Judicial de Panamá [Panamá First Court Circuit Criminal Circuit Court Number Nine] of June 27, 2000. (Case File of Appendixes to the Brief on Motions, Pleadings and Evidence, Book II, Appendix 34, folios 2568 to 2578).

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103. On July 12, 2000, the Fiscal Cuarto del Primer Circuito Judicial de Panamá [Panamá First Court Circuit Public Prosecutor Number Four] filed a motion for appeal against the dismissal without prejudice handed down in behalf of Mr. Tristán Donoso [FN90] and on August 31, 2001, the Segundo Tribunal Superior [Superior Court Number Two] revoked the appealed decision. [FN91]

[FN90] Cf. Motion for appeal of the Fiscal Cuarto del Primer Circuito Judicial de Panamá [Panamá First Court Circuit Public Attorney Number Four] of July 12, 2000. (Case File of Appendixes to the motions, pleadings and evidence brief, Book II, Appendix 35, folio 2579).
[FN91] Cf. Ruling No. 160 of the Segundo Tribunal Superior de Justicia [Superior Court of Justice Number Two] of August 31, 2001, (Case file of appendixes to the motions, pleadings and evidence brief, Book II, Appendix 36, folios 2587 and 2601).

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104. On October 26, 2001, the former Attorney General, through his representative, filed before the Juzgado Noveno de Circuito de lo Penal del Primer Circuito Judicial de Panamá [Panamá First Court Circuit Criminal Circuit Court Number Nine] an ancillary action for damages against Mr. Tristán Donoso for the amount of 1,100,000 balboas. [FN92]

[FN92] Cf. Ancillary action for damages filed on October 26, 2008 (Case File of Appendixes to the motions, pleadings and evidence brief, Book II, Appendix 37, folio 2602).

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105. On January 15 and March 7, 2002, the Panamá First Court Circuit Public Prosecutor Number Four requested the Juzgado Noveno de Circuito Penal del Primer Circuito Judicial de Panamá [Panamá First Court Circuit Criminal Circuit Court Number Nine] First Judicial Circuit Court to send a communication to the offices of INTERPOL in the United States and Canada in order to locate Mr. Tristán Donoso and his wife and serve notice of the indictment issued in the proceedings against him. [FN93] Both petitions were granted by means of Order No. 139 of May 23, 2002. [FN94]

[FN93] Cf. Motions filed by the Fiscal Cuarto del Primer Circuito Judicial de Panamá [Panamá First Court Circuit Public Attorney Number Four] (Case File of Appendixes to the motions, pleadings and evidence brief, Book II, Appendix 38, folio 2606, and Appendix 39, folio 2607).
[FN94] Cf. Ruling No. 139, of the Juzgado Noveno de Circuito Penal del Primer Circuito Judicial de Panamá [Panamá First Court Circuit Criminal Circuit Court Number Nine] on May 23, 2002 (Case File of Appendixes to the motions, pleadings and evidence brief, Book II, Appendix 38, folio 2606, and Appendix 40, folios 2608 and 2609).
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106. On January 16, 2004, the [Panamá Province Criminal Circuit Court Number Nine] acquitted Mr. Tristán Donoso of a general crime against honor to the detriment of José Antonio Sossa and rejected the ancillary request for damages to the benefit of the latter, [FN95] as it found that:

the main pieces of evidence that compose this dossier do not prove beyond reasonable legal doubt that Mr. TRISTÁN DONOSO acted maliciously since there is no sufficient testimonial evidence to support the allegation that, upon attributing liability for the illegal recording of calls, the individual accuser was aware of the actual source of such recording. [FN96]

[FN95] Cf. Judgment No. SA-2 rendered by the Juzgado Noveno de Circuito Penal del Primer Circuito Judicial de Panamá [Panamá First Court Circuit Criminal Circuit Court Number Nine] on January 16, 2004, supra note 81, folios 1571 to 1604.
[FN96] Cf. Judgment No. SA-2 rendered by the Juzgado Noveno de Circuito Penal del Primer Circuito Judicial de Panamá [Panamá First Court Circuit Criminal Circuit Court Number Nine] on January 16, 2004 supra note 81, folio 2742.
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107. On February 11, 2004, Panamá First Court Circuit Public Prosecutor Number Four [Office of the First Panamá Court Circuit Prosecutor Number Four] filed an appeal against such judgment [FN97] and on April 1, 2005, the Segundo Tribunal Superior de Justicia de Panamá [Panamá Superior Court of Justice Number Two] reversed the acquittal, sentencing Mr. Tristán Donoso to imprisonment for 18 months and disqualification to hold public office for an equal term for having found him to be the perpetrator of the crime of defamation to the detriment of José Antonio Sossa and substituting the imprisonment imposed by 75 days' fine calculated on a 10 balboas daily basis (total B/.750.00). Furthermore, the aforementioned authority granted compensation for pecuniary and non-pecuniary damages caused to the victim "as is to be assessed", after liquidation before the lower Court. [FN98] Among other considerations, the Segundo Tribunal Superior de Justicia [Superior Court of Justice Number Two] found that:

[t]he arguments set forth by the Court having heard the case in the first instance are inadmissible as it acquitted the accused stating that there is no animus injuriandi, because the accused was not certain about the falsehood of the allegations brought against Mr. SOSSA. The reasons provided should not be deemed valid in the sense that a kind of defense of a right that is inherent to the individual was attempted by affecting another right inherent to the individual in the person of the

victim; this line of thought can only be admitted in the event of the so-called grounds for justification; none of which applies in the instant case. [FN99]

[FN97] Cf. Argument on appeal against Judgment No. SA-2 rendered by the Juzgado Noveno de Circuito Penal del Primer Circuito Judicial de Panamá [Panamá First Court Circuit Criminal Circuit Court Number Nine] on January 16, 2004 (Case File of Appendixes to the motions, pleadings and evidence brief, Book II, Appendix 45, folios 2750 to 2767).
[FN98] Cf. 2nd Judgment No. 40 passed by the Segundo Tribunal Superior de Justicia [Superior Court of Justice Number Two] on April 1, 2005 (Case File of Appendixes to the Application, Book II, Appendix 47, folio 1952).
[FN99] Cf. 2nd Judgment No. 40 passed by the Segundo Tribunal Superior de Justicia [Superior Court of Justice Number Two] on April 1, 2005 supra note 98, folio 1950).

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108. At the time of the events, the Penal Code (supra para. 52), established, among other provisions regarding crimes against honor, as follows:

Section 172. Any person who falsely accuses another of committing a punishable act will be subject to a 90 to 180 days' fine.

2) Freedom of thought and expression

109. As regards the scope of freedom of expression, in its decisions the Court has repeatedly held that those who enjoy the protection of the Convention have the right to seek, receive, and impart information and ideas of all kinds, and to receive and have access to the information and ideas disclosed by others. [FN100]

[FN100] Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 of the American Convention of Human Rights). Advisory Opinion OC-5/85, dated November 13, 1985. Series A No. 5, para. 30; Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para 77; and Case of Kimel v. Argentina, supra note 78, 53.

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110. The foregoing notwithstanding, freedom of expression is not an absolute right. Article 13(2) of the Convention, which prohibits prior censorship, also provides for the possibility to impose liability, as appropriate, in the event of an abusive exercise of this right. These restrictions are exceptional in nature and should not limit, unless strictly necessary, the free exercise of freedom of expression and become a direct or indirect method of prior censorship. [FN101]

[FN101] Cf. Case of Herrera-Ulloa v. Costa Rica. supra note 79, para. 120; Case of Palamara-Iribarne v. Chile. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 79; and Case of Kimel supra note 16, para. 54.

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111. Furthermore, Article 11 of the Convention provides that all persons have the right to have their honor respected and their dignity recognized. This gives rise to restrictions to the powers of individuals and the State. So, all persons who consider their honor to have been affected may lawfully resort to the judicial authorities provided by the State for protection of their individual rights. [FN102]

[FN102] Cf. Case of Ricardo Canese v. Paraguay. supra note 16, para. 101; and Case of Kimel supra note 78, para. 55.

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112. This fundamental right must be exercised in a context of respect and safeguard of all other fundamental rights. In this process for harmonization, the State plays a crucial role as it seeks to define the responsibilities and penalties that might be necessary to such effect. [FN103] The need to protect the rights to honor and reputation, and other rights that may be affected by abuses in the exercise of freedom of expression calls for proper compliance with the limits imposed in that regard by the Convention itself.

[FN103] Cf. Case of Kimel, supra note 78, para. 75.

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113. Given the importance of freedom of expression in a democratic society, the State should not only minimize restrictions to circulation of information but also balance, as much as possible, participation by various sources information in public debate, thus promoting information pluralism. Consequently, fairness must rule the flow of information. [FN104]

[FN104] The Court has indicated that "[…] plurality of media, the prohibition of any type of monopolistic practice in relation thereto, is a necessary requirement." Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 of the American Convention of Human Rights), supra note 44, para. 34; See also, mutatis mutandi: Case of Kimel v. Argentina, supra note 78, para 57.

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114. The American Convention guarantees this right to every individual, irrespective of any other consideration; so, such guarantee should not be limited to a given profession or group of individuals. Freedom of expression is an essential element of the freedom of the press, although they are not synonymous and exercise of the first does not condition exercise of the second. The instant case involves a lawyer who claims protection under Article 13 of the Convention.

115. Lastly, as regards the right to honor, the Court recalls that any expression regarding the suitability of an individual for holding public office or regarding the acts performed by public officials in the course of their duties enjoy greater protection, thus fostering democratic debate. [FN105] The Court has indicated that in a democratic society, public officials are more exposed to scrutiny and criticism by the general public. This different protection threshold is justified by the fact that public officials have voluntarily exposed themselves to a stricter scrutiny. Their activities go beyond their private life and expand to enter the arena of public debate. Such threshold is not based on the quality of the individual, but rather on the public interest attending the activities the officer performs. [FN106]

[FN105] Cf. Case of Herrera-Ulloa, supra note 79, para. 128; Case of Ricardo Canese, supra note 100, para 98; and Case of Kimel, supra note 78, para. 86.
[FN106] Cf. Case of Herrera Ulloa, supra note 79, para. 129; and Case of Ricardo Canese, supra note 100, para. 103, and Case of Kimel, supra note 78, para. 86.

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3) Restrictions to freedom of expression and assessment of subsequent liability in the instant case

116. Based on the foregoing considerations and the allegations made by the parties, the Court will examine if the subsequent liability measure applied in the instant case met the aforementioned requirements of being enacted by statute, of serving a legitimate purpose and of being adequate, necessary and commensurate.

Statutory standing of the measure

117. The Court observes that the crime of false accusation for which the victim was sentenced was enacted in Section 172 of the Penal Code; which is statute, both in the formal sense as a legislative act and in a substantive sense as a general written legal rule (supra para. 108).

Legitimate purpose and adequacy of the measure

118. The Court has pointed out that public officials, in as much the same manner as any other individual, enjoy the protection of the provisions of Article 11 of the Convention, which enshrines the right to honor. Moreover, Article 13(2)(a) of the Convention sets forth that the "reputations of others" may be grounds to impose subsequent liability for such an exercise of freedom of expression as attains them. Likewise, the incrimination instrument is adequate since it is aimed at safeguarding – through the penalties established – the interest that it is meant to protect; i.e. it could be suitable to contribute to attaining such end. [FN107]

[FN107] Cf. Case of Kimel, supra note 78, para. 71.

Need for the measure

119. In a democratic society punitive power is exercised only to the extent that is strictly necessary in order to safeguard essential legally protected interests from the more serious attacks serious attacks which may impair or endanger them. The opposite would result in the abusive exercise of the punitive power of the State. [FN108]

[FN108] Cf. Case of Kimel, supra note 78, para. 76.

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120. The Court does not deem any criminal sanction regarding the right to inform or give one's opinion to be contrary to the provisions of the Convention; however, this possibility should be carefully analyzed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception. At all stages the burden of proof must fall on the party who brings the criminal proceedings. [FN109]

[FN109] Cf. Case of Kimel, supra note 78, para. 78.

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121. In its constant case law, the Court has repeatedly upheld the protection of freedom of expression regarding opinions and statements on matters of which society has a legitimate interest to be informed, in order to be aware of anything that bears on the performance of the State or impacts on general interests or rights, or of anything having significant consequences (supra para. 115). For the Court, the manner in which a high ranking public official – such as the Procurador General de la Nación [National Attorney General] – exercises his or her statutory powers, in this case, the wiretapping of telephone conversations and the manner in which domestic rules and regulations are abided by in therefore doing, is a matter of public interest. It is against the background of the series of challenges publicly made against the former Attorney General by various State authorities, such as the Ombudsman and the President of the Supreme Court, regarding his actions in connection with telephone wiretapping, that the alleged victim stated in a press conference that such public official had tape recorded a telephone conversation and had disclosed such recording to the Junta Directiva del Colegio Nacional de Abogados [National Bar Association Governing Board] (supra paras. 95 to 100). The Court considers that Mr. Tristán Donoso made statements regarding events that had the greatest public interest in a context of intense public debate regarding the powers of the Procurador General de la Nación [National Attorney General] to wiretap and record telephone conversations, a debate in which Court authorities, among others, were involved.

122. As indicated above, it is established in international law that the threshold for protection the honor of public officials to be protected should allow for the broadest control by citizens regarding the way they discharge their duties (supra para. 115). This different honor protection standard is justified by the fact that public officials voluntarily expose themselves to control by society, which results in a greater risk of having their honor affected and also the possibility –

given their status – of having greater social influence and easy access to the media to provide explanations or to account for any events in which they take part. The instant case involves a person that held one of the highest public offices in his country, the Procurador General de la Nación [National Attorney General].

123. Likewise, as it already has been held by the Court the Judiciary must take into account the context in which the statements involving matters of public interest are made; the judge shall "assess the respect of the rights and reputations of others in relation to the value in a democratic society of open debate regarding matters of public interest or concern." [FN110]

[FN110] Case of Ricardo Canese, supra note 100, para. 105.

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124. The Court observes that the expression by Mr. Tristán Donoso did not amount to an opinion but to a statement of facts. While opinions cannot be declared true or false, statements of facts can. In principle, a true statement regarding a fact in a case involving a public official in relation to a matter of public interest is an expression protected under the American Convention. However, the situation is different when factual inaccuracy is present in the statement that allegedly causes damage to honor. In the instant case, during the press conference, Mr. Tristán Donoso referred to two legally relevant facts; a) the former Attorney General had disclosed to third parties a private telephone conversation a true fact that was even admitted by such public official and which, as mentioned above, amounts to a violation of privacy (supra para. 83); and b) the unauthorized recording of a telephone conversation that led Mr. Tristán Donoso to initiate criminal proceedings which were later unsuccessful in proving that the former Attorney General had taken part in the crime alleged (supra paras. 49 and 61).

125. In the instant case, the Court realizes that, at the time Mr. Tristán Donoso called the press conference, there were various and important information and assessment elements allowing to consider that his statement was not groundless regarding the responsibility of the former Attorney General for the recording of the conversation, to wit: a) at the time of the events, such officer was the only person legally empowered to order telephone wiretappings, which were carried out without any control, neither by a Court nor otherwise, a situation which had prompted a warning by the President of the Supreme Court (supra para. 100); b) the former Attorney General had in his possession the tape on which the private telephone conversation was recorded; c) a copy of the tape and a transcription of its content was forwarded to the authorities of the Catholic Church from his offices; d) the recording of the private conversation was played at his office to the authorities of the Colegio Nacional de Abogados [National Bar Association of Attorneys]; e) Mr. Tristán Donoso sent a letter and tried to meet with the former Attorney General to give and receive explanations regarding the recording of the conversation; however, the latter did not answer the letter and refused to meet with the alleged victim; f) the person with whom Mr. Tristán Donoso was holding the conversation denied having made the recording as alleged -even upon rendering a deposition under oath in the course of the proceedings against the former Attorney General; and g) Mr. Tristán Donoso had no part in the inquiry into the extortion of the Zayed family, wherein signs revealing the private origin of the recording appeared. Prosecutor Prado, in charge of the inquiry into the act of extortion, in the sworn statement

rendered during the proceedings against Mr. Tristán Donoso, held that such person "was not a claimant, complainant, individual accuser, judicial representative of the victim, victim, witness, expert, interpreter, translator, accused, suspect, incidental third party, contributing third party, defense attorney, in the initial inquiry carried out into the alleged crime of 'Extortion', perpetrated to the detriment of Mr. ADEL ZAYED and of young WALID ZAYED." [FN111] A similar opinion was expressed by Inspector Hurtado, who was in charge of the inquiry into the extortion, and, at the hearing held in the case against Mr. Tristán Donoso, claimed that "[neither Prosecutor Prado nor herself] had nothing to do with [the victim, they were], handling a case of extortion […] but he has nothing to do with this." [FN112]

[FN111] Cf. Official Letter No. 1289-99, by Prosecutor Prado dated April 7, 1999, supra note 60, folio 4397.

[FN112] Cf. Minutes of Hearing No. 32 of July 11, 2002, in the framework of the procedings instituted against Mr. Tristán Donoso for a crime against honor, supra note 30, folio 2618.

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126. Furthermore, the Court realizes that Mr. Tristán Donoso not only had reasons to believe in the accuracy of the statement attributing the recording to the Attorney General then in office. In the written statement given before a public official whose acts command full faith and credit, submitted to this Court, Bishop Carlos María Ariz mentioned that when he became aware of the content of the tape and of its transcript, "h[e] went over to the office of the Procurador General de la Nación [National Attorney General], together with [the victim], to demand appropriate explanations on the telephone wiretappings." [FN113] It is a deposition by a witness which has not been neither challenged nor objected by the State. At the same time, the Court also observes that the statements made by Mr. Tristán Donoso were supported by two important institutions: the Colegio de Abogados de Panamá [Panamá Bar Association] and the Defensoría del Pueblo de Panamá [Panamá Office of the Ombudsman], the heads of which accompanied Mr. Tristán Donoso at the press conference where the challenged statements were made. Lastly, the criminal report he filed on account of such events is an additional element purporting that he considered he had sufficient grounds for his statements (supra para. 47). All these elements led the Court to conclude that it was not possible to sustain that his expression was groundless and, consequently, that the criminal remedy was a necessary action.

[FN113] Statement rendered before a public official whose acts command full faith and credit by Bishop Carlos María Ariz, supra note 16, folio 529.

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127. The Court also realizes that some of such elements were assessed in the acquittal ordered by the Juzgado Noveno de Circuito Penal del Primer Circuito Judicial de Panamá [Panamá First Court Circuit Criminal Circuit Court Number Nine], which provided:

[…] in our opinion, there is no legal certainty that Mr. SANTANDER TRISTÁN DONOSO actually knew the source of that recording or, at least, suspected that such recording was obtained through means other than those he alleged; particularly considering that by 1999, all

evidence pointed to the individual accuser, given the events that were occurring which, in our opinion, could have influenced or determined the decision by Mr. TRISTÁN DONOSO to publicly express his discomfort, as he was firmly convinced that in fact the Procurador General de la Nación [National Attorney General] had also participated in wiretapping his telephone, as other authorities were accusing him of doing, especially considering that no answer was given to the questions he posed in the year 1996. [FN114]

[FN114] Judgment No. SA-2 of the Juzgado Noveno de Circuito Penal del Primer Circuito Judicial de Panamá [Panamá First Court Circuit Criminal Circuit Court Number Nine], dated January 16, 2004 supra note 81, folio 1581.

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128. Likewise, the First Instance Court specified that:

[…] we must recall that it was not until an inquiry was started in March 1999 and a Court decision was rendered that it became possible to verify that Licentiate José Antonio Sossa, Procurador General de la Nación [National Attorney General], had no participation in the instant events. [FN115]

[FN115] Judgment No. SA-2 of the Juzgado Noveno de Circuito Penal del Primer Circuito Judicial de Panamá [Panamá First Court Circuit Criminal Circuit Court Number Nine], dated January 16, 2004 supra note 81, folio 1582.

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129. Lastly, even though the days' fine does not seem excessive as a punishment, the criminal conviction imposed as a form of the subsequent liability established in the instant case is not necessary. Additionally, the facts the Tribunal is examining show that the fear of a civil penalty, considering the claim by the former Attorney General for a very steep civil reparation, may be, in any case, equally or more intimidating and inhibiting for the exercise of freedom of expression than a criminal punishment, since it has the potential to attain the personal and family life of an individual who accuses a public official, with the evident and very negative result of self-censorship both in the affected party and in other potential critics of the actions taken by a public official.

130. Based on the above, the Court finds that the criminal punishment imposed upon Mr. Tristán Donoso was evidently unnecessary, considering the alleged violation of the right to honor in the instant case, for which reason it results in a violation of the right to freedom of thought and of expression enshrined in Article 13 of the American Convention, as related to Article 1(1) of such treaty, to the detriment of Mr. Tristán Donoso.

131. On the other hand, it has not been shown in the instant case that the abovementioned criminal punishment was the outcome of alleged deficiencies in the rules framing crimes against honor in Panamá. So, the State has not failed to comply with the general obligation to give domestic legal effects to the American Convention established in Article 2 thereof.

132. Likewise, the Court finds and appreciates that, after the events that led to the instant case, significant reforms were made to the regulatory framework of Panamá, as far as freedom of expression is concerned.

133. Indeed, in July 2005, the Law "prohibiting the application of penalties for contempt, enacting measures related to the right of reply, correction or answer, and adopting other provisions," [FN116] was published in the Official Gazette. Section 2 of such law provides for the right of correction and reply, and establishes the procedure to be followed, [FN117] strengthening the protection of the right to freedom of expression.

[FN116] National Assembly, Law No 22, of June 29, 2005, (Case File of Appendixes to the Motions, Pleadings and Evidence Brief, Book II, Appendix 10, folios 2461 to 2467).

[FN117] National Assembly, Law No 22, of June 29, 2005, supra note 116, folios 2461 and 2462. In Section 2, it provides:

Anyone attained by inaccurate or offensive information disclosed through any of the media addressing the general public has the right to effect, through the same means of communication, his reply, correction or answer, under the conditions herein established. The reply, correction or answer must occupy the same space as the aggravating piece of news or reference, and may be reasonably greater according to the special circumstances of each case, depending on the availabilities in that one of the media concerned. The media must reserve a permanent space or section to publish or disseminate the replies, corrections, answers, clarifications and comments by readers or by any other person affected by the piece of news.

The publication or broadcasting of the reply, correction or answer must be made within the forty-eight hours following receipt thereof, through that of the media used to disseminate the information or reference in question. An additional term of twenty-four hours will be allowed when the media concerned prove that it has been impossible for them to comply with the initial term due to reasons beyond their control […].

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134. The Court views favorably the fact that, among other modifications, the promulgation of the new Penal Code eliminated certain procedural privileges hitherto enjoyed by public officials [FN118] and established that no criminal punishment may be imposed in those cases where a public official considers his or her honor has been attained; such officer shall resort to the civil jurisdiction to determine the possible subsequent liability in the event of abuse in the exercise of freedom of expression. [FN119]

[FN118] Cf. Penal Code, Law No. 18, dated September 22, 1982, supra note 49, folio 2949. In its Section 180 of the 1982 Penal Code provided:

To prosecute crimes against honor, it is necessary for the offended party to press charges individually, filing them together with the summary evidence supporting the report of the facts. In the cases of individual accusations filed by the President of the Republic, the Vice Presidents, the Cabinet Ministers, the Directors of Decentralized Agencies, Legislators, Justices of the Supreme Court and Members of the Electoral Tribunal, the National Attorney General, the

Solicitor for the Administration, the Comptroller General of the Republic, the Deputy Comptroller General of the Republic, the Commander in Chief of the Defense Forces, the Staff Officers with the Defense Forces and the Ambassadors accredited in Panamá, a written communication that the offended party will appear before the investigating authority will be sufficient.
[FN119] Cf. Penal Code, Law No 14, of May 18, 2007, (Case File of Appendixes to the Motions, Pleadings and Evidence Brief, Book I, Appendix 12, folio 2479). In its Section 180 of the 2007 Penal Code provides:
Where crimes against honor are concerned, a public recantation, to which the offended party consents, excludes criminal liability. When the parties allegedly offended by a behavior such as the ones described en the foregoing Section be one of the public officials listed in Section 204 of the Political Constitution, an official elected by the people, or a governor, no criminal punishment shall be imposed, something which does not exclude the civil liability which may derive from the act.

VIII. ARTICLE 9 (FREEDOM FROM EX POST FACTO LAWS) [FN120] IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) OF THE AMERICAN CONVENTION

[FN120] Article 9 of the Convention states that:
No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.
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135. The Commission did not file allegations that Article 9 of the Convention had been violated.

136. The representatives held that Mr. Tristán Donoso was sentenced to "a criminal punishment for the statements determined to be in violation of individual honor and dignity, without drawing a distinction based on the public interest nature of the criminal report filed [by him against Attorney General Sossa]." They indicated that "the State punished the legitimate exercise of freedom of expression", i.e., an "essentially lawful act" and thus violated Article 9 of the American Convention in relation to the general obligation set forth in Article 1(1) of such treaty.

137. The State held that such argument by the representatives was legally untenable. The State indicated that "the conduct [of Mr. Tristán Donoso] in making a direct accusation at a press conference against the then Attorney General […], alleging the latter had committed a criminal act, fell under the crime definition contained in Sections 172 and 173(a) of the Penal Code," did not run contrary to the legality principle.

138. As previously pointed out by the Court (supra para. 73), the alleged victim, his next of kin or his representatives may claim under rights different from those mentioned in the application by the Commission, on the basis of the facts described therein.

139. However, when examining the violation of Article 13 of the Convention, the Court declared that the conduct for which Mr. Tristán Donoso was accused and the pertaining punishment for it were both described by a criminal statute in force at the time of the facts (supra para. 117). Declaring a violation of the American Convention to have taken place in the course of enforcing such statute in a specific case does not imply in and of itself that the legality principle has been infringed, for which reason the Court considers that the State did not violate the right enshrined in Article 9 of the American Convention.

IX. ARTICLES 8 (RIGHT TO A FAIR TRIAL) [FN121] AND 25(1) (RIGHT TO JUDICIAL PROTECTION) [FN122], IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS), OF THE AMERICAN CONVENTION

[FN121] Article 8(1) of the American Convention establishes that:
"[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."
[FN122] Article 25(1) of the Convention sets forth that:
"[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent Court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

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140. The Court will examine the arguments put forth by the parties regarding the alleged violation of Articles 8 and 25 of the Convention, as follows: 1) regarding the proceedings for the crime of abusing authority and infringing the duties of public officials against the former Attorney General; and 2) regarding the Court proceedings for crimes against honor instituted against Mr. Tristán Donoso.

1) Regarding the proceedings for the crime of abusing authority and infringing the duties of public officials against the former Attorney General

141. The Commission argued that "the inquiry carried out by the Procuraduría de la Administración [Office of the Solicitor for the Administration] did not include all the steps necessary to investigate the source of the wiretapped and recorded conversation, and subsequently punish those responsible for the violation of the right to privacy of Mr. Tristán Donoso." The Commission stated that on October 22, 1999, Mr. Tristán Donoso appealed Prosecutor's Opinion No. 472, rendered by the Procuraduría de la Administración [Office of the Solicitor for the Administration] alleging that the latter body had ignored a series of pieces of evidence that showed a violation to his detriment, such as: a) the testimonies by Mr. Adel Zayed

and by Inspector Hurtado, and b) the contradictions regarding the source of the disclosed conversation recording on the basis of the statements delivered by the different witnesses before the Procuraduría de la Administración [Office of the Solicitor for the Administration]; and c) the lack of a statement by Monsignor José Dimas Cedeño. Finally, the Commission stated that "the State has neither been able to identify or punish the perpetrators or the instigators, nor shown that any other lines of investigation have been started in order to discover who [the persons who wiretapped and recorded the telephone conversation] are." So, the State "failed to comply with its duty to provide an effective remedy […]."

142. The representatives alleged that the obligation of the State to investigate "was not acquitted by determining the alleged lack of individual liability by the [former] Attorney General, since other lines of investigation [should have been] explored." Likewise, the representatives stated that the malicious contradictions contained in the statements made by Inspector Hurtado amounted to an obstruction of justice that was not investigated by the State. Despite contradictions in the account of the facts, the Procuraduría de la Administración [Office of the Solicitor for the Administration] did not seek to clarify those contradictions, failing to request statements and confrontation among the key witnesses having rendered contradictory testimonies, such as Inspector Hurtado, Prosecutor Prado and Clerk Miranda, and neither did it take subsequent action aimed at obtaining the testimony of Monsignor Dimas Cedeño.

143. Furthermore, in the opinion of the representatives, the deficiencies and omissions in the investigation were not pointed out or redressed by the Corte Suprema de Justicia [Supreme Court of Justice], which did not order any action to complete the body of evidence. Specifically, the representatives indicated that the Supreme Court, based on Prosecutor's Opinion No. 472, by the Procuraduría de la Administración [Office of the Solicitor for the Administration], found that the recording was allegedly made from the residence and with the permission of the Zayed family, without considering: a) the statements by Mr. Adel Zayed and Inspector Hurtado, and b) the remarks by the Procuraduría de la Administración [Office of the Solicitor for the Administration] in the aforementioned Prosecutor's Opinion, regarding insecurity and divergence in the testimonies about the means whereby the former Attorney General obtained the magnetophonic tape. They indicated, lastly, that the aforementioned Court decision did not determine the point on the disclosure of the contents of the private telephone conversation, even though such act constitutes a flagrant violation of the right to a private life of the victim. According to the representatives, the Supreme Court considered that "the criminal complaint and the evidence submitted lack sufficient entity to prove the existence of the punishable act reported, arriving at the conclusion – on the grounds that the wiretapping of the conversation had not been proven – that the [former Attorney General] was not responsible for the disclosure thereof either."

144. The State alleged that the aforementioned proceedings were carried out with the guarantees due the accused and the accuser; that a decision was rendered within reasonable time by competent, independent and impartial tribunals, and that "the fact that the result of the criminal prosecution does not comply with the expectations of the accuser […] does not entail that no protection was provided [, since such protection] is concerned with the right to a fair trial and not with [the] favorable Order of the claim brought forth. It further considered that the Commission overemphasizes the fact that the Procuraduría de la Administración [Office of the Solicitor for the Administration] failed to insist in obtaining the testimony of Monsignor José

Dimas Cedeño, since the points in the set of questions filed in order to be posed to him lacked weight to form the opinion of the Court […] and the key point [in his testimony] had been fully established through other pieces of evidence [and] was never doubted throughout the inquiry", for which reasons none of his answers would have had any impact on the judgment. It pointed out that, given the dismissal of the charges against the former Attorney General, "criminal legislation in Panamá required a formal report by the injured party […] in order to initiate criminal enquiry proceedings." Thus, the State held that "Tristán Donoso never appeared at a Personería Municipal [Municipal Judicial Office] – the investigation authority with competent jurisdiction – to formally submit an impersonal criminal complaint therefore that such body could initiate summary investigation proceedings to impose criminal liability for the recording of the conversation of July 8, 1996, even though, being a lawyer, he was fully aware of which was the body having competent jurisdiction." Lastly, the State alleged that "the [former] Attorney General received [the] tape from the Prosecutor [Prado] in the course of a criminal investigation for the alleged crime of extortion, and that, as he was informed, it had been provided by Mr. Adel [Z]ayed, from which it derives that the [former Attorney General] had no reasons to believe that the recording had been made illegally."

145. The Court has held that "[i]n order to clarify whether the State has violated its international obligations owing to the acts of its judicial organs, the Court may have to examine the respective domestic proceeding. [FN123] In this sense, the Court will examine, firstly: i) the allegations regarding the investigations carried out by the State in the course of the criminal prosecution brought against the former Attorney General, and then ii) consider the allegations made regarding the grounds for the judicial decision made by the Corte Suprema de Justicia [Supreme Court of Justice] in the course of such proceedings.

[FN123] Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits. Judgment of November 19, 1999. Series C No. 63, para. 222; Case of Heliodoro Portugal, supra note 66, para. 126, and Case of García Prieto et al. v. El Salvador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 168, para. 109.

1.i) The investigation carried out by the Procuraduría de la Administración [Office of the Solicitor for the Administration] against the former Attorney General.

146. The duty to investigate involves an obligation to act diligently and not to guarantee a given result since such duty does not necessarily entail that the accused or the investigated individuals should be convicted. The foregoing notwithstanding, as stated by the Court at various instances, this duty must be undertaken by the State as its own legal obligation and not as a mere formality condemned in advance to be fruitless, [FN124] or as a superficial administration of private interests, which depends upon the procedural initiative of the victims or their next of kin, or upon the production of evidence by private parties. [FN125]

[FN124] Cf. Case of Velásquez Rodríguez, supra note 9, para. 177; Case of Heliodoro Portugal, supra note 66, para. 144, and Case of Bayarri v. Argentina. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 30, 2008. Series C No. 187, para. 100.
[FN125] Cf. Case of Velázquez-Rodríguez, supra note 9, para. 177; Case of Heliodoro Portugal, supra note 66, para. 145; and Case of Ticona Estrada et al., supra note 6, para. 84.
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147. The Court finds that in the investigation carried out by the Procuraduría de la Administración [Office of the Solicitor for the Administration], the evidence and attached items submitted with the criminal complaint filed by Mr. Tristán Donoso and with the one submitted by the Defensor del Pueblo de Panamá [Panamá Ombudsman], [FN126]included, among other elements: a) the magnetophonic tape and the transcription of the aforementioned telephone recording; b) the copy of the letter sent by Mr. Tristán Donoso to the former Attorney General on July 21, 1996; c) the request by the reporting party that the testimonies, among others, of Ms. Edna Ramos and Ms. Dalma de Duque, of Archbishop José Dimas Cedeño, of Mr. Adel Zayed, of Licentiate Gerardo Solís be heard; d) the sworn statements by Licentiate Luis Banqué, of Luis Banqué, of Licentiate Jorge Vélez, of Licentiate Armando Abrego and of Monsignor Carlos Ariz; e) the copy of the note dated July 16, 1996, whereby the Jefa de Prensa y Divulgación del Ministerio Público [Prosecuting Office Press and Social Communications Department Chief], Dalma del Duque, forwarded to Archbishop José Dimas Cedeño a transcript of the recording of the telephone conversation; f) note D.D.P. – R.P.-No. 177/99, wherein it is pointed out that the Ombudsman passed Order No. 545-99 of March 30, 1999, whereby an ex officio investigation was commenced to establish whether the National Police wiretapped telephone conversations; and g) the copy bearing the seal of the Corregiduría [Local Police Authority] of Communication DPG-907-96 of July 12, 1996, whereby the former Attorney General requested the Director of the Instituto Nacional de Telecomunicaciones [National Telecommunications Institute] then in office to deploy his good offices to wiretap six telephones lines.

[FN126] Cf. Criminal Report filed on March 26, 1999 by Mr. Tristán Donoso against the former Procurador General de la Nación [National Attorney General, supra note 39, folios 1620 to 1624; Extension of the criminal report, dated April 5, 1999, supra note 40, folios 1625 to 1627; Official Letter D.P.P.-R.P. No. 151/99 dated March 26, 1999 of the Defensoría del Pueblo de la República de Panamá [Panamá Ombudsman], supra note 80, 1606 and 1607; Extension of the criminal report, dated April 7, 1999, supra note 41, folios 3209 and 3210, and Official Letter D.D.P-R.P. No. 177/99 dated April 15, 1999 of the Defensoría del Pueblo de la República de Panamá [Panamá Ombudsman], supra note 83, folios 1636 to 1638.
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148. In its turn, the Procuraduría de la Administración [Office of the Solicitor for the Administration] gathered the following items of evidence: a) note DG-01-053-99 of the Director General of the Policía Técnica Judicial [Judicial Technical Police] Alejandro Moncada, whereby he reported he received no request from the Procurador General de la Nación [National Attorney General] to neither to record the telephone conversations of Mr. Tristán Donoso, nor to implement surveillance measures regarding the private activities of the reporting party, and that it had no documentation or information related to the recordings that were the subject matter of

the investigation; [FN127] b) note from the telephone company, Cable & Wireless Panamá (formerly INTEL, Instituto Nacional de Telecomunicaciones [National Telecommunications Institute]), wherein it stated that after thoroughly reviewing the company files, no official letter related to the aforementioned telephone wiretapping was found; [FN128] c) statements by the Bishop of the Colón Diocese Carlos María Ariz, by the Fiscal Electoral de la República [Prosecutor General for Elections of the Republic] Gerardo Solís, by Dalma de Duque, by Luis Banqué, by Jorge Luis Vélez, by Armando Abrego, by Adel Zayed and by the former Attorney General; [FN129] d) also, upon request by the reporting party, the Sworn Statement rendered by Inspector Hurtado before the Fiscalía Cuarta del Primer Circuito Judicial de Panamá [Office of the First Panamá Court Circuit Prosecutor Number Four] in the framework of the Individual Accusation Proceedings for false accusation filed by the former Attorney General against Mr. Tristán Donoso; [FN130] e) official letter No. 2414 of July 10, 1996, sent by Prosecutor Prado to the former Attorney General, wherein, according to the Procuraduría de la Administración [Office of the Solicitor for the Administration], the source of the recordings received at the offices of the Procurador General de la Nación [National Attorney General] is established; [FN131] and f) the report dated July 19, 1996, by Clerk Miranda, [FN132] among other items. [FN133]

[FN127] Cf. Note DG-01-053-99 dated April 12, 1999, from the Director General of the Policía Técnica Judicial [Judicial Technical Police] Alejandro Moncada (Case File of Appendixes to the Reply to the Application, Book IV, Appendix B-2, folios 3236 and 3237).

[FN128] Cf. Note dated April 14, 1999, from the telephone company Cable & Wireless Panamá (Case File of Appendixes to the Reply to the Application, Book IV, Appendix B-1, folio 3261).

[FN129] Answer by Bishop Carlos María Ariz to the set of questions forwarded him by the Procuraduría de la Administración [Office of the Solicitor for the Administration], supra note 29, folio 2531; Official Letter 1041-FE-99 dated April 13, 1999, signed by Gerardo Solís Díaz, supra note 34, folio 1547; Sworn Statement by Dalma de Duque dated May 14, 1999 before the Procuraduría de la Administración [Office of the Solicitor for the Administration] (Case File of Appendixes to the Reply to the Application, Book IV, Appendix B-1, folio 3315); Sworn Statement by Edna Ramos dated April 14, 1999, supra note 34, folio 1557; Sworn Statement by Luis Alberto Banqué Morelos dated April 13, 1999, supra note 34, folio 3241; Sworn Statement by Jorge de Jesús Vélez Valdés dated April 14, 1999, supra note 34, folio 1550; Sworn Statement by Armando Abrego dated April 15, 1999, supra note 34, folio 1554; Sworn Statement by Adel Zayed dated May 5, 1999, supra note 56, folios 1446 and 1447; Official Letter PGN-SG-047-99 dated May 24, 1999 signed by the former Attorney General in answer to the set of questions forwarded him by the Procuraduría de la Administración [Office of the Solicitor for the Administration], supra note 21, folio 3336, and Prosecutor's Opinion No. 472 dated September 22, 1999 of the Procuraduría de la Administración [Office of the Solicitor for the Administration], supra note 43, folios 1688 and 1689.

[FN130] Cf. Official Letter No. 2375 dated May 20, 1999 from the Fiscal Cuarto del Primer Circuito Judicial de Panamá [First Panamá Court Circuit Prosecutor Number Four] and its Appendix, whereby the extension of the sworn statement rendered by Inspector Darelvia Hurtado on April 29, 1999 is forwarded (Case File of Appendixes to the Reply to the Application, Book IV, Appendix B-1, folios 3318 to 3332).

[FN131] Official Letter No. 2414 from Prosecutor Prado, dated July 10, 1996, supra note 24, folio 1519.
[FN132] Report by Clerk Miranda, dated July 19, 1996, supra note 58, folio 1527.
[FN133] The Procuraduría de la Administración [Office of the Solicitor for the Administration] also took the following action: (i) at the petition of Mr. Tristán Donoso, the Corregidora del Barrio Sur de Ciudad Colón [Colón City Southern District Local Police Authority] was requested to send the record of the investigation for the crime against property initiated against Edmundo Morales Montenegro, Robert Boyce and others to the detriment of Walid Sayed; and (ii) received the testimony by the Director General de la Policía Nacional [Director General of the National Police], José Luis Sossa. Cf. Prosecutor's Opinion No. 472 dated September 22, 1999 of the Procuraduría de la Administración [Office of the Solicitor for the Administration], supra note 43, folios 1649.
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149. The Court finds that, once the evidence produced during the investigation stage has been considered, there are no elements to assume that such investigation was not carried out diligently. Moreover, even though the representatives mentioned to the Court a series of additional measures that could have been adopted during the investigation, such measures were not requested to the investigating authority neither in the initial report nor in subsequent extensions thereof. In his challenge to Prosecutor's Opinion No. 472 of September 22, 1999, Mr. Tristán Donoso only dwelt in general on the fact that certain measures had not been implemented; e.g. the confrontation between Inspector Hurtado and Clerk Miranda, regarding the two contradictory versions about the recorded cassette. Other items of evidence were requested to the Procuraduría de la Administración [Office of the Solicitor for the Administration] and duly gathered by the latter (supra paras. 147 and 148).

150. This Court finds, moreover, that despite the fact that there were contradictions between the statements by Inspector Hurtado and by Mr. Adel Zayed and other evidence gathered by the Procuraduría de la Administración [Office of the Solicitor for the Administration], regarding the source of the recording, such contradictions did not directly impact on the objective of establishing whether the former Attorney General was responsible or not. There were other pieces of evidence on the record that showed, as held by the Supreme Court, that the former Attorney General did not perform the wiretapping in question.

151. Based on all of the foregoing, the Court finds that, as regards the obligation to diligently investigate the events reported by Mr. Tristán Donoso, the State did not violate Articles 8(1) and 25(1) of the American Convention, in connection with Article 1(1) thereof.

1.ii) Grounds for the decision by the Corte Suprema de Justicia de Panamá [Panamá Supreme Court of Justice]

152. As to the allegations of the representatives in the sense that the judgment about the disclosure of the telephone conversations lacked sufficient grounds, the Court has stated that such grounds are "the exteriorization of the reasoned justification that allows a conclusion to be reached." [FN134] The duty to provide the grounds for a Court decision is a guarantee related to the adequate administration of justice, which protects the right of citizens to be judged for the

reasons expressly set forth by law and grants credibility to legal decisions in the framework of a democratic society. [FN135]

[FN134] Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 107. Case of Apitz-Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 77.
[FN135] Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes") supra note 134, para. 77.

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153. The Court has underscored that the decisions by domestic organs which might affect human rights and are not duly grounded are arbitrary. [FN136] In this sense, the reasoning of a Court decision should show that the allegations made by the parties have been taken into account and that the body of evidence has been considered. Likewise, such reasoning shows the parties they have been heard and, in those cases were decisions are subject to appeal, it affords them the possibility of challenging the Order and obtaining a new examination of the issues by higher Courts. Based on all of the foregoing, the duty to give the grounds for Court decisions constitutes one of the "due guarantees" enshrined in Article 8(1) of the Convention in order to safeguard the right to the due process of the law. [FN137]

[FN136] Cf. Case of Yatama, supra note 10, para. 152; Case of Chaparro Álvarez and Lapo Íñiguez, supra note 134, para. 107; and Case of Apitz Barbera et al. ("First Court of Administrative Disputes") supra note 134, para. 78.
[FN137] Case of Apitz Barbera et al. ("First Court of Administrative Disputes") supra note 134, para. 78.

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154. The Court has found that the duty to provide the grounds for Court decisions does not entail a duty to offer a thorough answer to every allegation made by the parties, but it constitutes a duty that may vary depending on the nature of the decision and that should be analyzed on a case-by-case basis to assess compliance with such guarantee. [FN138]

[FN138] Case of Apitz Barbera et al. ("First Court of Administrative Disputes") supra note 134, para. 90.

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155. The representatives alleged that the decision of the Corte Suprema de Justicia [Supreme Court of Justice] of December 3, 1999, did not include any assessment of the matter regarding disclosure of the contents of the private telephone conversation. In this sense, the Court realizes that the criminal complaint refers to two different aspects: a) the recording of the telephone conversation held by Messrs. Tristán Donoso and Adel Zayed; and b) the disclosure of the

content of such recording before members of the Junta Directiva del Colegio Nacional de Abogados de Panamá [Panamá National Bar Association Governing Board] and the Archbishop of Panamá. In the criminal complaint of March 26, 1999, Mr. Tristán Donoso stated that in July 1996, "the Procurador General de la Nación [National Attorney General], Licentiate JOSÉ ANTONIO SOSSA, recor[d]ed one of [his] telephone conversations with Mr. ADEL ZAYED. Such recording […] was presented to members of the Junta Directiva del Colegio Nacional de Abogados de Panamá [Panamá National Bar Association Governing Board] […] The same cassette and its transcript was sent on July 16, 1996, to Monsignor José Dimas Cedeño, Bishop of Panamá." Similarly, the decision of the Corte Suprema de Justicia [Supreme Court of Justice] establishes that Mr. Tristán Donoso based his accusation on "the alleged perpetration of the offenses of Abusing Authority and of Infringing the Duties of a Public Official [under] Chapter IV, Title IX in Book II of the Penal Code" and on the fact that "he was a victim of telephone spying by the Procurador General de la Nación [National Attorney General], JOSÉ ANTONIO SOSSA, who tape recorded a telephone conversation he was holding with Mr. ADEL ZAYED […] and that such conversation had been presented to members of the Colegio Nacional de Abogados de Panamá [Panamá National Bar Association]. [FN139]

[FN139] Judgment by the Corte Suprema de Justicia de Panamá [Supreme Court of Justice of Panamá] of December 3, 1999, supra note 46, folio 1736.

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156. As to the recording, the Supreme Court held that "despite the exhaustive investigation carried out, the allegations made by attorney MR. TRISTÁN DONOSO could not be proven, in the sense that the recording of the telephone conversation with Adel [Z]ayed was obtained through illegal means by Attorney General JOSÉ ANTONIO SOSSA, in violation of the right to privacy of the two citizens involved." [FN140] However, as to the disclosure of the conversation in question, the Corte Suprema de Justicia de Panamá [Supreme Court of Justice of Panamá] pointed out that "[t]he cassette reached the hands of the Procurador General de la Nación [National Attorney General], JOSÉ ANTONIO SOSSA, who made it available to some members of the Colegio de Abogados de Panamá [Panamá Bar Association] governing board […] and to the Archbishop of Panamá JOSÉ DIMAS CEDEÑO", and merely transcribed the reasons the former Attorney General gave for having effected the disclosure in question. [FN141]

[FN140] Judgment by the Corte Suprema de Justicia de Panamá [Supreme Court of Justice of Panamá] of December 3, 1999, supra note 46, folio 1749.

[FN141] Judgment by the Corte Suprema de Justicia de Panamá [Supreme Court of Justice of Panamá] of December 3, 1999, supra note 46, folio 1748.

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157. The Court considers that the Corte Suprema de Justicia [Supreme Court of Justice] should have provided the grounds for its decision regarding the point on disclosure of the telephone conversation and, should the Court have found that such disclosure existed – as it appears from the decision – it should have given the reasons why such act was described or not in a criminal statute and, if applicable, should have considered the pertinent responsibilities.

Consequently, the Court considers that the State failed to fulfill its duty to provide the grounds for its decision on the disclosure of the telephone conversation, in violation of the "due guarantees" set forth in Article 8(1) of the American Convention, in connection with Article 1(1) thereof, to the detriment of Mr. Tristán Donoso.

2) Regarding the Court proceedings for the crimes against honor against Mr. Tristán Donoso

158. The Inter-American Commission did not allege a violation of the right to a fair trial set forth in Article 8 of the American Convention, in accordance with the private criminal charges for crimes against honor brought against Mr. Tristán Donoso.

159. However, the representatives alleged that during the investigation in the criminal prosecution brought against Mr. Tristán Donoso, he was prevented from exercising his right of defense: a) in violation of the legislation of Panamá, he was denied procedural standing as a party to such proceedings and, consequently, he was denied access to the case record file [FN142], and b) he was summoned to render his first interrogatory statement "through a note that only stated that he should appear before the Office of the Prosecutor 'to comply with a Court proceeding', without explaining neither the charges brought against him nor the facts on which those charges were grounded". Furthermore, the representatives held that the authorities in charge of conducting the investigation held a rank below that of the former Attorney General – the individual accuser-, who "had a personal and private interest in the matter" and "a position of power with regard to [the prosecutors that were in charge of the investigation]". In the opinion of the representatives, such situation attained per se the impartiality and independence of the aforementioned State agents. Lastly, they alleged that the judgment rendered by the Segundo Tribunal Superior de Justicia [Superior Court of Justice Number Two] "violated the principle whereby everyone must be presumed innocent, convicting Mr. Tristán [Donoso] without having the prosecution prove that he acted with the intention to bring false charges against the individual accuser, that is to say it presumed him guilty." To conclude, the representatives alleged that the criminal prosecution against Mr. Tristán Donoso was characterized by the existence of serious irregularities that amounted to a violation of his right to a fair trial, particularly his right to defense, to an investigation carried out by an independent and impartial authority, and to be presumed innocent, thus resulting in an infringement of the provisions of Articles 8(1) and 8(2) of the American Convention, in relation to Article 1(1) of such treaty.

[FN142] In such regard, the representatives held that Article 2006 of the Judicial Code in force at the time of the events provided in its Article 2006 that "[t]he criminal action is brought against the accused who is any person against whom […] criminal proceedings are brought". Likewise, they pointed out that Article 2038 of such Code established that "[t]he accused may avail himself of his or her rights under the Constitution and statute, as from the initial act of the prosecution against him […]". (Case File on the Merits, Book I, folio 243.)

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160. The State contended that the proceedings initiated against Mr. Tristán Donoso "were carried out in compliance with due guarantees in favor of [the accused and the reporting party], that a decision was rendered within reasonable time and that the case was tried by competent,

independent and impartial tribunals." The accused and the claimant in the proceedings "had the opportunity to avail themselves of the remedies statutorily enacted to protect the rights they considered violated."

161. The Court finds that in the application filed by the Commission reference is made to the criminal complaint filed by the former Attorney General against Mr. Tristán Donoso was handled by the Fiscalía Auxiliar de la República [Office of the Assistant Prosecutor], which, in the opinion of the representatives, was not an impartial and independent body qualified to investigate the aforementioned criminal complaint. Similarly, the application points out that "the Segundo Tribunal Superior de Justicia de Panamá [Panamá Superior Court of Justice Number Two] reversed the first instance judgment and convicted Mr. Tristán Donoso as the perpetrator of the crime of false accusation to the detriment of the Procurador General de la Nación [National Attorney General]," stating the grounds supporting the decision [FN143]. Consequently, the allegations of the representatives regarding the alleged organic subordination of the prosecutors in charge of the investigation and the presumption of innocence are based on facts contained in the application and, so, may be considered by this Court (supra para. 73.)

[FN143] Cf. Brief containing the application (File on the Merits, Book I, folios 18, 32, and 33), and 2nd. Judgment No. 40 passed by the Segundo Tribunal Superior de Justicia [Superior Court of Justice Number Two], on April 1, 2005, supra note 98, folio 1950.

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162. However, the Court finds that the allegations related to the alleged impossibility of the victim to act during the investigation and the alleged restriction of his access to the case record file are facts that are not contained in the application and that were not examined in Report on the Merits No. 114/06 of the Inter-American Commission. Thus, such allegations will not be considered by the Tribunal.

2.i) Investigation conducted by the Public Attorneys

163. As regards the allegations of the representatives related to the hierarchical subordination of the prosecutors in charge of the investigation against Mr. Tristán Donoso to the former Attorney General – the individual accuser – the matter to be decided by the Tribunal is whether said organic subordination entails a violation of the right to due process established by the American Convention.

164. States parties may organize their criminal procedural system, as well as determine the function, the structure or the institutional place Public Attorneys in charge of criminal prosecution are to have, taking into account their specific needs and conditions, provided they comply with the purposes and obligations established in the American Convention. In cases where the legislation of a certain State sets forth that the Public Attorneys must perform their duties with organic dependency, such circumstance does not necessarily entail in itself a violation of the Convention.

165. In its turn, the Court underscores that the principle of legality ruling the acts performed by public officials, which governs the activities of Public Attorneys, imposes on them the obligation to carry out their duties acting on the basis of the regulations defined in Constitution and statute. That way, prosecutors must watch for the law to be correctly applied and seek the truth of the facts as they are, acting professionally, loyally and in good faith, considering both the elements that prove the existence of the crime and the participation of the person charged with such crime, as well as the elements that may extinguish or extenuate the criminal responsibility of the accused.

166. In the instant case, it was not been proven that the prosecutors acting in the proceedings conducted against Mr. Tristán Donoso acted in response to their individual interests, upon motives alien to the law, or that they based their decisions on instructions imparted by senior officials that ran contrary to the applicable legal provisions. On the other hand, it has not been shown that either Mr. Tristán Donoso or his representatives, through domestic law procedures such as that allowing for a challenge, [FN144] claimed that there were possible irregularities regarding the activities of the Public Attorneys during the inquest stage of the proceedings, nor did such representatives affirm that the criminal action brought against the victim was vitiated because of their acts or omissions as a body having occurred during the preliminary proceedings.

[FN144] Section 395 of the Judicial Code provides that "[t]he provisions on impediments and challenges concerning justices and judges shall be applicable to Public Attorneys," supra note 73, folio 1920.

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167. In view of the foregoing, the Court hereby finds that the State did not violate the right to the due process of the law enshrined in Article 8 of the American Convention to the detriment of Mr. Tristán Donoso, in the context of the investigation carried out against him for crimes against honor.

2.ii) Right to be presumed innocent

168. The representatives alleged that, in the proceedings conducted against Mr. Tristán Donoso, the Segundo Tribunal Superior de Justicia [High Court of Justice Number Two] a) did not assess "[a] series of factors that caused [the victim] to become convinced that the [former Attorney General] had recorded his conversation"; b) presumed that the accused party willfully attributed a false criminal act to the individual accuser, and concluded that Mr. Tristán Donoso had acted with reckless malice; and c) sentenced the victim, among other things, to serve eighteen months in prison, which sentence was replaced by the obligation to pay 75 days' fine (supra para. 107). In view of the foregoing, the representatives considered that the State violated Article 8(2) of the Convention in relation to Article 1(1) thereof.

169. As it has done in previous cases, [FN145] the Court points out that it has already considered the criminal proceedings and the sentence imposed on Mr. Tristán Donoso in relation to Article 13 of the American Convention (supra paras. 116 to 130), and that, so, it is not

necessary for this Court to determine on the alleged violation of the right to be presumed innocent enshrined in Article 8(2) of the American Convention in relation to Article 1(1) thereof.

[FN145] Cf. Case of Herrera-Ulloa, supra note 79, paras. 176 to 178.

X. REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION) [FN146]

[FN146] Article 63(1) of the Convention provides 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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170. It is a principle of International Law that any violation of an international duty, which has caused damage, entails the duty to make proper reparations for such damage. [FN147] All aspects of this duty to make reparations are governed by International Law. [FN148] The Court has based its decisions on Article 63(1) of the American Convention.

[FN147] Cf. Case of Velásquez-Rodríguez v. Honduras. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, para. 25; Case of Ticona-Estrada et al., supra note 6, para. 106; and Case of Valle-Jaramillo et al., supra note 6, para. 198.
[FN148] Cf. Case of Aloeboetoe et al. v. Suriname. Merits. Judgment of December 4, 1991. Series C No. 11, para. 44; Case of Ticona-Estrada et al., supra note 6, para. 106; and Case of Valle-Jaramillo et al., supra note 6, para. 198.

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171. On the grounds of the considerations on the merits and the violations of the Convention stated above, and in the light of the criteria set forth in the Tribunal's case law as regards the nature and scope of the duty to make reparations, [FN149] the Court shall now proceed to analyze both the claims made by the Commission and by the representatives, and the relevant arguments of the State, in order to establish the necessary measures to redress such violations.

[FN149] Cf. Case of Velásquez-Rodríguez, supra note 147, paras. 25 to 27; Case of Ticona-Estrada et al., supra note 6, para. 107; and Case of Valle-Jaramillo et al., supra note 6, para. 199.

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172. Before examining the requested reparations, the Court observes that the State did not submit any specific arguments on the reparation measures requested by the Commission or the

representatives, but instead it only pointed out that the claims for a condemnatory judgment made by the Commission were pointless, and requested that all the petitions submitted by the representatives of the victim be rejected because they were inadmissible and groundless.

173. Nevertheless, the State submitted arguments regarding reparations under the headings "preliminary objection" and "preliminary comments" of its answer to the application. Under the first item, it alleged that the Court may not order the State to adapt its criminal legal system to conform to Article 13 of the Convention, since it has competent jurisdiction to do therefore only when acting in an advisory capacity but not in the context of a contentious case. Likewise, in its comments on the motions by the representatives, the State alleged that: a) the Court has no authority to order the State to adapt its criminal and civil legal system to conform to international standards in the field of freedom of expression, or to order the State to take such administrative and legislative measures as may be necessary to regulate wiretapping, and b) that Mr. Tristán Donoso lacks a legal interest to back the above mentioned requests, inasmuch as they "do not constitute reparations for the alleged damage he falsely claims was caused to him."

174. On such matters, the Commission held, among other arguments, that the Court has authority to order measures "concerning the different ways in which a State may acquit itself of the international responsibility it has incurred" (supra para. 13).

175. On their part, the representatives argued that the "Court has ordered measures similar to those requested by [the] Commission and by themselves, in the framework of the so-called satisfaction and non-repetition measures[,] after analyzing state behavior in light of the duty to adopt measures to enforce the rights protected by the Convention." On the other hand, the argument pertaining to the lack of a legal interest of the representatives in the matter is in fact an objection to Mr. Tristán Donoso having the status of a victim. This matter shall be determined by the Court, when it considers the alleged violations.

176. Pursuant to Article 63(1) of the Convention, this Court has ample powers to order such reparation measures as it deems necessary. When exercising its contentious jurisdiction, the Court may order States, among other satisfaction and non-repetition measures, to adapt their domestic law to conform to the American Convention, therefore as to amend or remove any provisions that unjustifiably curtail such rights, as required by the international obligation of States to respect rights and adopt domestic law provisions established in Articles 1(1) and 2 of the Convention.

177. On the other hand, as it has been recently stated, [FN150] this Court also recalls that, owing to progress in the development of its case law, and following the entry into force of the 1996 reform of the Court's Rules of Procedure, the representatives may request the measures they consider appropriate to put an end to and repair the consequences of the alleged violations, as well as those measures of a positive nature that the State must adopt to ensure that harmful acts are not repeated. Ultimately, it is for Court to decide on the appropriateness of the measures of reparation that it must order.

[FN150] Cf. Case of Heliodoro Portugal, supra note 66, para. 229.

A) Injured party

178. The Commission listed Mr. Tristán Donoso and his wife, Aimée Urrutia, as injured parties. The latter was included because of the close emotional bond she had with the victim and because "she was deeply affected by the facts."

179. In their briefs of motions and pleadings and of final arguments, the representatives mentioned Mr. Tristán Donoso as beneficiary of the right to reparation, in his capacity as direct victim of the alleged violations.

180. Although the Commission identified the victim's wife as beneficiary of the reparations, it did not include any arguments or file any evidence to prove that such person was a victim of some violation of a right enshrined in the American Convention. In view of the foregoing, and pursuant to Article 63(1) of the American Convention, the Court finds that the "injured party" is Mr. Tristán Donoso, inasmuch as he was a victim of the violations of the American Convention described herein. Accordingly, he shall be the beneficiary of the reparations ordered by the Tribunal hereinbelow.

B) Compensation

i) Pecuniary damages

181. The Court has developed the notion of pecuniary damages and the cases in which compensation for them must be set. [FN151]

[FN151] This Court has established that pecuniary damages involve "the loss of or detriment to the victims' income, the expenses incurred as a result of the facts, and the monetary consequences that have a causal nexus with the facts of the sub judice case." Cf. Case of Bámaca-Velásquez v. Guatemala. Reparations and Costs. Judgment of February 22, 2002. Series C No. 91, para. 43; Case of Ticona-Estrada et al., supra note 6, para. 111, and Case of Valle-Jaramillo et al., supra note 6, para. 212.

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182. The Inter-American Commission pointed out that, in the instant case, since restitutio in integrum is not possible, compensation must be paid for the damages caused. The Commission also developed the general standards on reparations and requested that the Court order full reparation measures, "which also represent a message against impunity."

183. The representatives considered that compensatory damages must include consequential damages and lost earnings and that they must be determined on equitable grounds, since, owing to the time elapsed, the victim did not keep the receipts of the alleged expenses. They pointed out that consequential damages include fees for legal counsel and other expenses incurred by Mr. Tristán Donoso in the two proceedings conducted in Panamá, the expenses he incurred when he

emigrated to Canada in search of new opportunities, and the medical fees and money spent on medication for his father, whose health was adversely affected after the dismissal was reversed and the victim was called to trial. Additionally, the professional activity of the victim as a lawyer was affected by the criminal conviction entered against him. Hence, lost earnings include the income the victim did not receive as a consequence of the facts of the instant case, mainly after being stigmatized as a criminal; by the direct confrontation with such a prominent figure as the Procurador General de la Nación [National Attorney General], and by the fact that the was barred from being nominated as Supreme Court Justice due to the criminal punishment.

184. The Court observes that the representatives of the victim did not file any evidence to prove the alleged pecuniary damages. As it has been decided in previous cases, expenses incurred for legal counsel during domestic proceedings will be considered under the costs and expenses item. [FN152] This Tribunal shall not set any compensation for the alleged lost earnings in relation to the professional activity of the victim, due to the lack of elements to evidence whether such losses actually existed, whether they resulted from the facts of the instant case or, possibly, which would have been the amount of such sums. Likewise, the Court finds it unproven that the victim had to flee Panamá because of the violations stated herein, as well as the date and duration of his stay abroad. The Tribunal notes that the trip to Canada might have been made for family reasons, among others. [FN153]

[FN152] Cf. Case of Kimel, supra note 78, para. 109; Case of Heliodoro Portugal, supra note 66, para. 231; and Case of Ticona-Estrada et al., supra note 6, para. 124.
[FN153] Cf. Testimony rendered by Ms. Aimée Urrutia-Delgado before a public official whose acts command full faith and credit, supra note 16, folio 522.

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185. As regards the health problems suffered by the victim's father, which would have been caused by the facts of the instant case, the Court has no elements, apart from what has been alleged, evidencing the existence of such situation or its causal link with the facts of the instant case. Finally, regarding the disqualification from being nominated as Supreme Court Justice due to the criminal conviction, it cannot be concluded that such a situation is encompassed by the concept of lost earnings, for it was an expectation Mr. Tristán Donoso could legitimately have but the loss of which did not result in actual damage to his property as a consequence of the violation declared herein. On the contrary, the Court notes that the facts of the instant case did not prevent him from finding a position within the State administration, as the victim informed during the public hearing. [FN154] In view of the foregoing, this Tribunal shall not set any compensation for pecuniary damages.

[FN154] Cf. Statement by Mr. Tristán-Donoso during the public hearing held August 12, 2008 before the Inter-American Commission on Human Rights, supra note 21, and testimony rendered by Ms. Aimée Urrutia-Delgado before a public official whose acts command full faith and credit, supra note 16, folio 523.

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ii) Non-pecuniary damages

186. The Court has developed in its case law the notion of non-pecuniary damages and the cases in which compensation must be set on such account. [FN155]

[FN155] This Tribunal has established that non-pecuniary damage "can include the suffering and hardship caused to the direct victim and his next of kin, and the impairment of values that are highly significant to them, and also alterations, of a non pecuniary nature, in the living conditions of the victim or his family." Cf. Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Reparations and Costs. Judgment of May 26, 2001. Series C No. 77, para. 84; Case of Ticona-Estrada et al., supra note 6, para. 126, and Case of Valle-Jaramillo et al., supra note 6, para. 219.

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187. The Inter-American Commission developed the general standards on reparations and pointed out that Mr. Tristán Donoso "has been a victim of psychological pain, distress, uncertainty and change of lifestyle as a result of his being been subjected to an unjust criminal proceeding; the subsequent criminal conviction for having exercised his right to freedom of expression; and the personal and professional consequences of such conviction."

188. The representatives pointed out that, in the instant case, the non-pecuniary damages is evident, since apart from the suffering and distress undergone by Mr. Tristán Donoso for having been involved in a criminal proceeding, his case was given wide coverage, which deteriorated his reputation and significantly undermined his emotional health. Furthermore, his forced emigration to Canada affected his way of life and state of mind, and the claim by the former Attorney General to collect a large sum of money in the action for defamation was a permanent source of concern for him. Finally, the victim was very much disappointed by the failure to adequately investigate the wiretapping, recording and disclosure of his conversation, since "even though there was sufficient evidence [to prove] the involvement of the former Attorney General […], at least in the disclosure of the conversation, he had to put up with the indulgent attitude of the Courts of law and the resulting impunity in relation to his case." So, the representatives request that the victim be compensated for non-pecuniary damages and that the Court set such reparation in the amount of 30,000 balboas, equivalent to US$ 30,000 (thirty thousand dollars of the United States of America.)

189. This Court has repeatedly held that a judgment declaring the existence of a violation constitutes, in and of itself, a form of reparation. [FN156] Nevertheless, in view of the circumstances of the instant case, of the pain and suffering that the violations caused the victim and of the non-pecuniary damages inflicted on him, the Court deems it pertinent to order that fair compensation, to be set on equitable grounds, be paid for non-pecuniary damages.

[FN156] Cf. Case of Neira-Alegría et al. v. Peru. Reparations and Costs. Judgment of September 19, 1996. Series C No. 29, para. 57; Case of Ticona-Estrada et al., supra note 6, para. 130, and Case of Valle-Jaramillo et al., supra note 6, para. 224.

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190. For the purposes of setting the compensation for non-pecuniary damages, the Court considers that the private life of Mr. Tristán Donoso was invaded and that he was discredited as a professional, firstly before two important audiences: the authorities of the Colegio Nacional de Abogados [National Bar Association] and the Catholic Church, to which he provided legal counsel; and then before society, due to the criminal conviction entered against him. [FN157]

[FN157] Cf. Testimony of Ms. Aimée Urrutia-Delgado rendered before a public official whose acts command full faith and credit, supra note 16, folio 522.

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191. In view of the foregoing, the Court deems it pertinent to order that compensation be paid to the victim for non-pecuniary damages in the amount of US$ 15,000.00 (fifteen thousand dollars of the United States of America). The State shall pay this amount directly to the beneficiary within one year as from the date notice of the instant Judgment be served.

C) Satisfaction measures and guarantees of non-repetition

192. Under this heading, the Court will order non-monetary satisfaction measures aimed at redressing non-pecuniary damages, and will also order measures of public scope or impact. [FN158]

[FN158] Cf. Case of Villagrán-Morales et al. ("Street Children"). Reparations and Costs, supra note 155, para. 84; Case of Ticona-Estrada et al., supra note 6, para. 142, and Case of Valle-Jaramillo et al., supra note 6, para. 227.

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a) Setting aside the conviction and its consequences

193. The Inter-American Commission requested that the judgment entered on April 1, 2005 by the Segundo Tribunal Superior de Justicia de Panamá [Panamá High Court of Justice Number Two], which convicted the victim of the crime of defamation to the detriment of the former Procurador General de la Nación [National Attorney General], be set aside in full.

194. Like the Commission, the representatives requested that the judgment entered on April 1, 2005 by the Segundo Tribunal Superior de Justicia de Panamá [Panamá High Court of Justice Number Two] be set aside, that any ancillary civil compensation Mr. Tristán Donoso may have been ordered to pay be declared ineffective and that his name be struck from all criminal background records.

195. This Court has held that the criminal punishment imposed on Mr. Tristán Donoso affected his right to freedom of expression (supra para. 130). So, the Tribunal finds that, in accordance with its case law, [FN159] the State must set aside such judgment in all of its points,

including its effects on third parties, to wit: a) The qualification of Mr. Tristán Donoso as guilty of the crime of defamation; b) the imposition of an 18 month imprisonment sentence (replaced by a 75 days' fine); c) the disqualification for holding public office for the same term; d) the civil compensation pending determination; and e) the inclusion of his name in any criminal records. The State shall comply with the foregoing within one year as from the date notice of the instant Judgment be served upon it.

[FN159] Cf. Case of Herrera-Ulloa, supra note 79, para. 195; Case of Palamara-Iribarne, supra note 101, para. 253; and Case of Kimel, supra note 78, para. 123.

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b) Obligation to publish the Judgment

196. The representatives requested the Tribunal that, for the Panamanian society to "learn the truth about what happened", it order the State to publish the relevant parts of the instant Judgment in the Official Gazette and in two newspapers of greater nationwide circulation. Likewise, they indicated that the media in which the Judgment is to be published should "be established by mutual agreement [with the victim]."

197. As the Court has ruled in other cases, [FN160] as a satisfaction measure, the State shall publish, only once, in the Official Gazette and in another newspaper of nationwide circulation, paragraphs 1 to 5; 30 to 57; 68 to 83; 90 to 130; 152 to 157 and the operative part of the instant Judgment, without footnotes. Such publications shall be effected within six months as from the date notice of the instant Judgment be served.

[FN160] Cf. Case of Barrios Altos v. Peru. Reparations and Costs. Judgment of November 30, 2001. Series C No. 87, Operative Paragraph 5 d); Case of Ticona-Estrada et al., supra note 6, para. 160; and Case of Valle-Jaramillo et al., supra note 6, para. 234.

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c) Public acknowledgment of international responsibility

198. The Commission requested that the State publicly acknowledge its international responsibility for having violated the human rights of the victim in the instant case.

199. The representatives requested that the State be ordered to hold a public ceremony of apology and acknowledgment of its international responsibility for the violations. Such ceremony "shall be headed by the highest representative of the State, and other representatives of government organs shall also be present, in particular, of the Judicial Branch and of the Procuradoría General de la Nación [Office of the National Attorney General]," and the media shall be there. The foregoing shall be done owing to the fact that the reputation of the victim was seriously affected and that the case was given wide coverage by the Panamanian media.

200. The Court notes that, although in a recent case involving the right to freedom of expression it was considered pertinent to hold a ceremony of public recognition due to the particular circumstances thereof, such measure is often, although not exclusively, ordered as reparation for violations of the rights to life, to humane treatment and to personal liberty. [FN161] The Tribunal does not believe such measure to be necessary in order to redress the violations verified in the instant case. Along such lines, the measure ordering that the criminal conviction and its consequences be set aside, the instant Judgment, and its publication constitute important reparation measures.

[FN161] Cf. Case of Castañeda-Gutman, supra note 4, para. 239.

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d) Duty to investigate, prosecute and punish those responsible for the violations of the human rights of Mr. Tristán Donoso.

201. The Commission requested that the Court order the State to conduct a complete, impartial and effective investigation in order to establish the circumstances in which the telephone conversation at issue in the instant case was wiretapped, recorded and disclosed, to identify the persons involved in such acts, to prosecute them and to punish them as is due.

202. The representatives alleged that such measure had to be adopted in relation to all those involved in wiretapping, recording and disclosing the telephone conversation between the victim and Adel Zayed, and in relation to those who obstructed the inquiry carried out against the former Attorney General.

203. The Court finds it unproven that there was lack of diligence in the investigation of the wiretapping and recording of the telephone conversation (supra para. 151), and therefore deems it unnecessary to order, as a reparation measure, the inquiry into such facts. On the other hand, regarding the matter of disclosure of the telephone conversation, the Court deems the instant Judgment and its publication constitute sufficient reparation measures.

e) Enactment of legislation on wiretapping and on the use of information held by the authorities and concerning the private life of a person

204. The representatives argued that Panamanian legislation on wiretapping is scarce, for Section 26 of Law No. 23 is still in force, although in 2004 the Constitution was amended to allow private communications to be wiretapped or recorded only under an order issued by a judicial authority. Likewise, they argued that legislation on the use of private information by public officials is not clear and effective enough, especially in the event of transmission and storage of such information.

205. Regarding the alleged recording of the telephone conversation or the rules governing wiretapping, the Tribunal did not declare Article 11 of the Convention to have been violated; so, it shall not order that reparation measures be adopted with regard thereto (supra paras. 66 and 67).

206. Nevertheless, the Court notes and views favorably the constitutional amendment effected by the State in 2004 pursuant to which private communications may only be wiretapped or recorded under a judicial order. The Court underscores the importance of adopting, forthwith, the legislative and administrative measures that may be necessary to implement such constitutional amendment in such a way as to establish that the legal procedures to be followed by judicial authorities in order to authorize wiretapping comply with the purposes and other obligations set forth in the American Convention. Finally, the Court underscores the pertinence of reviewing the need to enact legislation on the use of information held by government authorities about the private life of a person.

f) Adaptation of criminal and civil legislation on defamation

207. The Inter-American Commission requested that the Court order the State to adapt its criminal legal system to conform to Article 13 of the American Convention.

208. The representatives expressed that "the crimes against honor involved [in the instant case] are unnecessary in a democratic society and constitute mechanisms to indirectly curtail freedom of expression." They pointed out that the Panamanian criminal legislation that describes crimes against honor, even after the amendment that became effective in May 2008, does not conform to international standards on freedom of expression. Among other considerations, they remarked that: a) the great scope of the legal descriptions of crimes may allow prosecutions limiting free expression to be instituted; b) regulations preclude only criminal punishment if the defamation is addressed against certain public officials; but this does not prevent persons from being subject to criminal prosecution; c) retraction, inasmuch as it requires consent by the offended person, is not effective; and; d) the exceptio veritatis is an institution that, by reversing the burden of proof, indirectly restricts freedom of expression. Regarding civil legislation, they affirmed that it has numerous gaps, which have made it possible to enforce such legislation to the detriment of freedom of expression. It does not preclude, as punishable cases, those in which the information is furnished or the criticism is made regarding matters of public interest, and it does not establish either the actual malice standard or a clear scale to determine pecuniary compensations, something which has led to abuse.

209. The Court has found that the criminal punishment imposed on Mr. Tristán Donoso violated Article 13 of the Convention (supra para. 130). On the other hand, the Tribunal notes and views favorably the amendments the State has introduced in its domestic statutory system regarding this issue. Such amendments came into force after the instant case which, among other progressive rules, preclude the possibility of criminally punishing the crime of defamation when those offended are certain public officials (supra paras. 132 to 134). In view of the foregoing, the Court does not deem it necessary to order the State to adopt the requested reparation measure.

g) Training of members of the Court system on the protection standards of the right to honor and freedom of expression in matters of public interest

210. The representatives requested this Tribunal to order the Panamanian State to design and implement a training program for operators active in the Court system, intended to prevent

violations such as the ones involved in the instant case from occurring again. The training program must emphasize that criminal punishment is a measure of last resort, applicable only to matters falling beyond the scope of public interest and in which the malicious conduct of the person responsible has been proved.

211. In order to make reparations for the violations determined in the instant case, the Court deems it sufficient that the State ensure that this Judgment be widely disseminated through its publication.

D) COSTS AND EXPENSES

212. As the Court has stated on previous occasions, costs and expenses are contemplated within the concept of reparations as enshrined in Article 63(1) of the American Convention. [FN162]

[FN162] Cf. Case of Garrido and Baigorria v. Argentina. Reparations and Costs. Judgment of August 27, 1998. Series C No. 39, para. 79; Case of Ticona-Estrada et al., supra note 6, para. 177; and Case of Valle-Jaramillo et al., supra note 6, para. 243.

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213. The Inter-American Commission requested that this Tribunal order the Panamanian State to reimburse the costs and expenses incurred at the domestic level and before the Inter-American system which be duly evidenced by the representatives, taking into consideration the special characteristics of the instant case.

214. In its brief of motions and pleadings, the representatives requested that the Court order the State to reimburse the costs and expenses incurred by the victim to defray the fees of legal counsel for his defense in the two proceedings conducted at the domestic level. They requested that, in the event the receipts were not available, such amount be determined on equitable grounds. On the other hand, they requested the reimbursement of the expenses incurred by CEJIL in representing the victim at the international level, as from the filing of the initial petition before the Inter-American Commission on July 4, 2000, that is to say, for more than eight years of work. Such expenses include five trips of the representatives to Panamá, the salaries and benefits of the professionals who handled the case and communication expenses, which, in the representatives' opinion, amount to US$ 11,610.71 (eleven thousand six hundred and ten dollars of the United States of America with seventy-one cents). This sum does not include expenses in an approximate amount of US$ 5,000.00 (five thousand dollars of the United States of America) corresponding to lawyers' fees during the case, among other expenses. Additionally, in their brief of final arguments, they updated the amounts indicated originally and included the receipts of the expenses incurred in relation to the public hearing held in Montevideo, Uruguay, such as trips, accommodation and food expenses of the representatives and the expert witness, which amounted to US$ 5,072.44 (five thousand and seventy-two dollars of the United States of America with forty-four cents). In all, the representatives included expenses for an approximate total amount of US$ 11,600 (eleven thousand six hundred dollars of the United States of America.)

215. This Court has held that "the Tribunal considers that the claims of the victims or their representatives as to costs and expenses and the supporting evidence must be offered to the Court at the first occasion granted to them, that is, in the brief of requests and motions, without prejudice to the fact that such claim may be later on updated, according to new costs and expenses incurred during the processing of the case before this Court". [FN163]

[FN163] Cf. Case of the "Panel Blanca" (Paniagua-Morales et al.). Reparations and Costs, supra note 6, para. 50; Case of Castañeda-Gutman, supra note 4, paras. 75 and 244; and Case of Ticona-Estrada et al., supra note 6, para. 180.

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216. Taking into account the preceding considerations and the evidence produced, the Court hereby orders, on equitable grounds, that the State reimburse the amount of US$ 15,000.00 (fifteen thousand dollars of the United States of America) to Mr. Tristán Donoso for costs and expenses resulting both from the proceedings conducted at the domestic level and from the proceedings before the Inter-American system. Mr. Tristán Donoso will then give the corresponding amount to his representatives (supra para. 214.) This amount includes the expenses that may be incurred by the representatives while monitoring compliance with this Judgment. The State shall effect the payment for costs and expenses within one year as from the date notice of the instant Judgment be served.

E) METHOD OF COMPLIANCE WITH THE ORDERED PAYMENTS

217. The payment of compensation for non-pecuniary damages and the reimbursement of costs and expenses established herein shall be made directly to the victim, within one year as from the date notice of the instant Judgment be served, as indicated in paragraphs 191 and 216.

218. The State shall discharge its pecuniary obligations by tendering dollars of the United States of America.

219. If, due to causes attributable to Mr. Tristán Donoso, it should prove impossible for him to collect those amounts within the established term, the State shall deposit such amounts in an account in the beneficiary's name or draw a certificate of deposit from a reputable Panamanian financial institution, under the most favorable financial terms allowed by the laws in force and customary banking practice. If after ten years the compensation awarded remains unclaimed, the amounts plus any accrued interest shall be returned to the State.

220. The amounts allocated in this Judgment for non-pecuniary damages and for the reimbursement of costs and expenses shall be delivered to the beneficiary in full, as provided herein, and shall not be affected or conditioned by taxes now existing or created hereafter.

221. Should the State fall into arrears with its payments, interest shall be paid on any amount due at the current bank default interest rate in Panamá.

222. In accordance with its constant practice, the Court retains the authority emanating from its jurisdiction and the provisions of Article 65 of the American Convention, to monitor full compliance with this Judgment. The instant case shall be closed once the State implements the provisions herein in full. The State, within one year as from the date notice of the instant Judgment be served, shall submit a report to the Court on the measures adopted in compliance with this Judgment.

XI. OPERATIVE PARAGRAPHS

223. Therefore,

THE COURT

DECIDES,

unanimously:

1. To dismiss the preliminary objection raised by the State in paragraphs 15 to 17 of the instant Judgment.

DECLARES,

unanimously, that:

2. The State did not violate, to the detriment of Mr. Santander Tristán Donoso, the right to a private life enshrined in Article 11(2) of the American Convention, in relation to Articles 1(1) and 2 thereof, for the wiretapping and recording of the telephone conversation, as explained in paragraphs 61 to 67 of this Judgment.
3. The State violated, to the detriment of Mr. Santander Tristán Donoso, the right to a private life and the right to honor and reputation enshrined in Articles 11(1) and 11(2) of the American Convention, in relation to Article 1(1) thereof, for the disclosure of the telephone conversation, as explained in paragraphs 72 to 83 of this Judgment.
4. The State did not fail to comply, to the detriment of Mr. Santander Tristán Donoso, with the duty of guaranteeing the right to a private life enshrined in Article 11(2) of the American Convention, in relation to Article 1(1) thereof, for the investigation conducted against the former Procurador General de la Nación [National Attorney General], as explained in paragraphs 86 to 89 of this Judgment.
5. The State violated, to the detriment of Mr. Santander Tristán Donoso, the right to freedom of expression enshrined in Article 13 of the American Convention, in relation to Article 1(1) thereof, regarding the criminal conviction entered against Mr. Tristán Donoso, as explained in paragraphs 109 to 130 of this Judgment.
6. The State did not fail to comply with the general obligation to adopt domestic measures, enshrined in Article 2 of the American Convention, to the detriment of Mr. Santander Tristán Donoso, regarding the alleged deficiencies in the legal framework which regulates crimes against honor in Panamá, as set forth in paragraph 131 of this Judgment.

7. The State did not violate, to the detriment of Mr. Santander Tristán Donoso, the principle of legality enshrined in Article 9 of the American Convention, in relation to Article 1(1) thereof, regarding the criminal conviction entered against Mr. Tristán Donoso, as set forth in paragraphs 138 and 139 of this Judgment.
8. The State did not violate, to the detriment of Mr. Santander Tristán Donoso, the right to a fair trial and the right to judicial protection enshrined in Articles 8 and 25 of the American Convention, in relation to Article 1(1) thereof, regarding the investigation of the criminal complaints filed by Mr. Tristán Donoso, as explained in paragraphs 146 to 151 of this Judgment.
9. The State violated, to the detriment of Mr. Santander Tristán Donoso, the right to a fair trial enshrined in Article 8(1) of the American Convention, in relation to Article 1(1) thereof, for the lack of sufficient grounds in the Court decision on the disclosure of the telephone conversation, as set forth in paragraphs 152 to 157 of this Judgment.
10. The State did not violate, to the detriment of Mr. Santander Tristán Donoso, the right to a fair trial enshrined in Article 8(1) of the American Convention, in relation to Article 1(1) thereof, in the framework of the investigation conducted against Mr. Tristán Donoso for crimes against honor, as set forth in paragraphs 163 to 167 of this Judgment.
11. It is deemed unnecessary to effect any considerations besides those made on Article 13 of the American Convention regarding the allegations by the representatives of the victim on the alleged violation of the right to be presumed innocent, enshrined in Article 8(2) of the American Convention, in relation to Article 1(1) thereof, as set forth in paragraph 169 of this Judgment.

AND RULES,

unanimously, that:

12. This Judgment is per se, a form of reparation.
13. The State shall pay to Mr. Tristán Donoso the amount set in paragraph 191 of this Judgment for non-pecuniary damages within one year as from the date notice of the instant Judgment be served and pursuant to the provisions in paragraphs 217 to 222 of this Judgment.
14. The State shall set aside the criminal conviction entered against Mr. Tristán Donoso and all the consequences arising therefrom, within one year as from the date notice of the instant Judgment be served and pursuant to the provisions of paragraph 195 hereof.
15. The State shall publish paragraphs 1 to 5; 30 to 57; 68 to 83; 90 to 130; 152 to 157 and the operative part of this Judgment, only once and without footnotes, in the Official Gazette and in another newspaper of great nationwide circulation. Such publications shall be made within six months as from the date notice of the instant Judgment be served, as required in paragraph 197 hereof.
16. The State shall pay the amount established in paragraph 216 of the instant Judgment, in reimbursement of costs and expenses, within one year as from the date notice of the instant Judgment be served and in the manner provided by paragraphs 217 to 222 of this Judgment.
17. The Court, by virtue of its authority and in accordance with its duties under the American Convention, shall monitor full compliance with this Judgment. The instant case shall be closed once the State has fully complied with the provisions set forth herein. Within one year as from the date notice of the instant Judgment be served, the State shall submit a report to the Court describing the measures adopted in compliance with this Judgment.

Judge Sergio García Ramírez made available to the Court his Concurring Opinion, which is attached to this Judgment.

Done in Spanish and English, the Spanish version being authentic, in San José, Costa Rica, on January 27, 2009.

Cecilia Medina Quiroga
President

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

Pablo Saavedra Alessandri
Secretary

So ordered,

Cecilia Medina Quiroga
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ REGARDING THE CASE OF TRISTÁN DONOSO v. PANAMA, OF JANUARY 27, 2009

1. I have concurred with my fellow justices sitting in the Inter-American Court of Human Rights when delivering the judgment disposing of the Case of Tristán Donoso v. Panama, the examination of which gives rise to several issues the Tribunal has analyzed and determined. I deliver the instant concurring opinion in order to set forth complementary considerations or to revisit Court case law.

The principle of legality

2. In this dispute –as in others, which as a whole have permitted the development of a worthy jurisprudence- the violation of the principle of freedom from ex post facto laws provided in Article 9 of the Convention has been the matter. Such principle is, without any doubt, one of the most important references in criminal matters ─which does not mean it is not applied to other matters─, and derives from the reforming trend that tried to, and succeeded in, "reconstructing" punitive Law form the XVIII Century onwards.

3. Legality, a guarantee of the greatest value concurring to define the Rule of Law and to exclude authoritarian discretion, entails several questions the Inter-American Court has examined. For the time being, the different sign the rule of legality shows in the system having its roots in Continental European ─ statute ruled ─ and the Common Law System is not included among such questions. Neither has the relation such rule bears to the principle enshrined in Human Rights and Criminal International Law whereby behaviors in breach of general principles of law, and widely recognized as illegal, have been punished. I set aside, for the time being, such aspects of the issue.

4. Court case law has referred to the nuclear or literal concept of legality: provision for a crime and its legal consequences in the penal rule, under the maxim nullum crimen nulla poena sine lege. Of course, the Tribunal has also studied procedural and executive legality. If the punished conduct has not been established by statute, the principle of legality has been manifestly violated.

5. Such breach also appears when the legal description of the behavior is equivocal, confusing, ambiguous to the point of prompting diverging constructions (“fostered” by the lawgiver and ushering discretion) and of leading to different penal consequences, as reflected in punishment and prosecution, for example. Hence the requirement for strict specification of punishable behaviors, under the principle of legality.

6. The case law of the Court likewise indicates that the State cannot include just any conduct in a criminal description, nor group thereunder different behaviors to be uniformly punished, regardless of the diverse elements concurring in the illegal action. In doing so, it would break the penal framework admissible in a democratic society: a framework that in the course of recent centuries has become more and more specific and demanding, although it has had to suffer from some authoritarian relapses as well.

7. Inn other words, there are limits for the powers of crime description and punishment lying in the hands of lawmaking bodies (it is, for example, inadmissible to incriminate conducts which are naturally lawful: such as medical care; or to consider in a uniform manner and indiscriminately widely differing hypothesis of life deprivation, all of them punished with "mandatory penalty of death"). Overstepping such limits implies violating the principle of legality. It has been thus understood by Inter-American case law, which in this sense has incorporated into the notion of legality a “material” element.

8. It is obvious that it is necessary to take into account at this point the rules in the American Convention about legitimate restrictions or limitations to the enjoyment of rights and freedoms. This leads us on to analyze the concept of “laws” employed in Article 30 of the Convention, and the relationship between duties and rights, to which Article 32 thereof refers, besides the allusion to other restrictions associated with certain rights and freedoms, provided in the precepts dealing therewith. The case law of the Court has explored this matter and adopted definitions that make up Inter-American Human Rights Law. The aforementioned examination goes further, of course, than the mere verification that a certain behavior ─ whichever it may be ─ is described in a document clothed with the formalities of a criminal statute.

9. As it has already been observed, human rights confer legitimacy upon the punitive statute and, at the same time, limit its scope and operation. Criminal Law occupies a “frontier” area, so to speak, between legitimate public reproach ─ entailing penal consequences ─ and excessive incrimination ─ that implies overacting the punitive function. None of the foregoing is alien to thinking about penal legality, which is not just literally including any conduct, at the lawmaker's discretion.

10. In short, when considering whether Article 9 of the Pact of San Jose has been violated, the Tribunal does not exclusively analyze if there is or there is not a provision incriminating the conduct examined, but also the way it is done and the nature and the characteristics of the reproached behavior. If it were not so, it would be enough Were it not so, it would be enough to enact into statute criminal descriptions “made to measure” in order to avoid the responsibility that could be incurred, under Article 9 of the Convention, by an arbitrary or an excessive description. It is worth imagining the outcome of such a narrow “legality” standard.

Public Attorneys

11. I also wish to dwell on the Public Attorneys (hereinafter also “the PAs”), that has played, and still plays, a leading role in criminal prosecution, lato sensu. Obviously, this is hardly the place to mention the historic development of the Public Attorneys. However, it is advisable to note two substantial points which allow us to perceive the nature, to appreciate the performance and to establish the characteristics of the PAs: a) this figure appeared and acquired importance as a “magistrate for legality”, and still maintains such character (described with different expressions); and b) it appears with different characteristics and assumes diverse powers (generally powers in the nature of duties) in the several national systems, which nonetheless show a certain trend towards uniformity and harmony. In Latin American Law, the Public Attorneys has many roots, coming from: Spain, France and the United States of America; in some countries and at certain points in time, other sources concurred. All of them have contributed to cast particular institutions, even though radically coincident among themselves.

12. I do not consider it reasonable to “adjust” Public Attorneys to a single pattern, without accepting variants nor recognizing specific national developments and needs. Such dominant models may generate disturbances or malfunctioning in the legal system and in its bearing on the diverse circumstances wherein its rules must be applied. As far as the duties of Public Attorneys are concerned, and as regards criminal prosecution (although PAs also act in other areas), several States have chosen to confer upon them investigation powers, independent from those of the adjudicator, (the Court of Inquests); in others, they have accusing powers, on the basis of a previous inquiry; in several ones, they act in concurrence with private accusers; in some, they hold a monopoly on criminal action, et caetera. And as far as organization is concerned, there are States where the PAs or Public Prosecutors are a constitutionally autonomous body, and States where they are part of the Executive Branch, or of the Judiciary.

13. Naturally, there are interesting arguments for and against each one of the aforementioned options, as well as regarding their different combinations and developments. Such arguments must be weighed in the light of their real conditions. Their assessment, in the final analysis, falls within the purview of domestic instances. Certain forms of organization (such as the

constitutionally instituted autonomy) “are and seem to be” more adequate than others to foster discipline under statute and respect for human rights, points which I will take up in the following paragraphs.

14. For the purposes now sought ─ national and international human rights protection ─ , what matters is to acknowledge that any organizational and operating system for Public Attorneys, a State institution, must respect individual rights, that is it must consequently conform to the respect and guarantee general duties. Therefore, a “human rights perspective” is required in order to assess the performance of Public Attorneys; the administrative approach or the procedural perspective are not enough. It is the former aspect, and not the two latter ones, that can be questioned before a human rights tribunal.

15. If Public Attorneys are “magistrates of legality”, their inquest function ─ and more so their quasi adjudicating duties, where they have them ─ must abide by statute. To put it differently: they must pay attention solely and exclusively to it when establishing the existence of a criminal act or when ascribing criminal responsibility, be it to institute (or not to institute, when the system allows them to decide the point at their own discretion) an action, be it to indict, with all the different attending procedural actions. In such sense, actions by the PAs are “neutral” at the first stage (inquest), even though they may become “parties” at the second one (indictment), once they have reached a position about the facts and those responsible for them.

16. PAs would not be true to their mission if they avoided the rule of law, which does not condemn or acquit any person beforehand, but that orders that the facts leading to a conclusion serving truth, and therefore instrumental to justice, be searched for diligently. In such sense, the duty ─ and the work ─ of PAs are akin to those of the tribunal. Neither they nor the latter pursue their own interests, but they rather exercise public functions regulated by statute. It is for statute to set the framework, the course and the limits.

17. Public Attorneys are an institution, rather than individuals. Consequently, they act “institutionally”, conforming to unity and indivisibility principles, among others. What I have said hereinbefore is applicable to the operation of the “Public Attorneys institution”, but in fact such institution is left in charge of individuals acting on the basis of their institutional investiture; they are therefore bound to strictly perform the statutory duties of the institution they represent.

18. The sole dependence of the law characterizing PAs as the officials whose duty is to investigate and charge, does not exclude the possibility that the “Public Attorneys institution” adopt general standards to construe the statutory rules they must apply (by means of agreements receiving different denominations; internal administrative acts, which should be made public as a legal certainty imperative) so that they can take action in the proceedings as one, in an institutional manner, avoiding inconsistency and divergence. None of the foregoing implies that the authorities empowered to establish such general construction standards secundum legem (which, in the long run, are subject to assessment by the court, whose construction of statute is final), may determine beforehand that the institution act, in the course of the prosecution, contra legem.

19. For the reasons hereinbefore stated, I fully subscribe the observation by the Inter-American Court in el paragraph 165 of the judgment to which I append the instant opinion, when it upholds that “prosecutors, [that is the Public Attorneys acting in criminal proceedings] must watch for the law to be correctly applied and seek the truth of the facts as they are, acting professionally, loyally and in good faith, considering both the elements that prove the existence of the crime and the participation of the person charged with such crime, as well as the elements that may extinguish or extenuate the criminal responsibility of the accused”.

Sergio García Ramírez
Judge

Pablo Saavedra - Alessandri
Secretary