Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Guilherme Gomes Lund, Adriano Fonseca Fernandes Filho, Andre Grabois, Antônio Alfredo de Lima, Antonio Carlos Monteiro Teixeira, Antonio de Padua Costa, Antônio Ferreira Pinto, Antonio Guilherme Ribeiro Ribas, Antonio Teodoro de Castro, Arildo Airton Valadao, Aurea Elisa Pereira Valadao, Bergson Gurjao Farias, Cilon Cunha Brum, Ciro Flavio Salazar de Oliveira, Custodio Saraiva Neto, Daniel Ribeiro Callado, Dermeval da Silva Pereira, Dinaelza Santana Coqueiro, Dinalva Oliveira Teixeira, Divino Ferreira de Souza, Elmo Correa, Francisco Manoel Chaves, Gilberto Olimpio Maria, Helenira Resende de Souza Nazareth, Helio Luiz Navarro de Magalhaes, Idalisio Soares Aranha Filho, Jaime Petit da Silva, Jana Moroni Barroso, João Carlos Haas Sobrinho, Joao Gualberto Calatrone, Jose Huberto Bronca, Jose Lima Piauhy Dourado, Jose Maurilio Patricio, Jose Toledo de Oliveira, Kleber Lemos da Silva, Libero Giancarlo Castiglia, Lourival de Moura Paulino, Lucia Maria de Souza, Lucio Petit da Silva, Luiz Rene Silveira e Silva, Luiz Vieira de Almeida, Luiza Augusta Garlippe, Manoel Jose Nurchis, Marcos Jose de Lima, Maria Celia Correa, Mauricio Grabois, Miguel Pereira dos Santos, Nelson Lima Piauhy Dourado, Orlando Momente, Osvaldo Orlando da Costa, Paulo Mendes Rodrigues, Paulo Roberto Pereira Marques, Pedro Alexandrino de Oliveira Filho, Pedro Matias de Oliveira, Rodolfo de Carvalho Troiano, Rosalindo Souza, Suely Yumiko Kanayama, Telma Regina Cordeiro Correa, Tobias Pereira Junior, Uirassu de Assis Batista, Vandick Reidner Pereira Coqueiro and Walkiria Afonso Costa v. Brazil
Alt. Title/Style of Cause:	Guerrilha do Araguaia v. Brazil
Doc. Type:	Judgement (Preliminary Objections, Merits, Reparations, and Costs)
Decided by:	President: Diego Garcia Sayan; Vice President: Leonardo A. Franco; Judges: Manuel E. Ventura Robles; Margarette May Macaulay; Rhadys Abreu Blondet; Alberto Perez Perez; Eduardo Vio Grossi; Roberto de Figueiredo Caldas
Dated:	24 November 2010
Citation:	Gomes Lund v. Brazil, Judgement (IACtHR, 24 Nov. 2010)
Represented by:	APPLICANTS: the Group on Torture Never Again of Rio de Janeiro, the Commission of the Next of Kin of Politically Deceased and Disappeared Persons of the Institute of Studies on State Violence and the Center for Justice and International Law
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In the case of Gomes Lund et al. ("Guerrilha do Araguaia"),

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Articles 30, 38(6), 59, and 61 of the Rules of Procedure of the Court [FN1] (hereinafter "the Rules of Procedure"), delivers this Judgment.

[FN1] As stipulated in Article 79(1) of the Court's Rules of Procedure that entered into force on June 1, 2010, "[c]ontentious cases submitted to the consideration of the Court before January 1, 2010, will continue to be processed in accordance with the preceding Rules of Procedure until the delivery of a judgment." Consequently, the Court's Rules of Procedure mentioned in this judgment correspond to the instrument approved by the Court at its forty-ninth regular session, held from November 16 to 25, 2000, partially amended at its eighty-second regular session held from January 19 to 31, 2009.

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I. INTRODUCTION TO THE CASE AND PURPOSE OF THE DISPUTE

1. On March 26, 2009, in accordance with the provisions of 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 against the Federal Republic of Brazil (hereinafter, "the State," "Brazil," or "the Union") to the Court, which originated from the petition presented on August 7, 1995 by the Center for Justice and

International Law (CEJIL), Human Rights Watch/Americas, in the name of disappeared persons in the context of the Guerrilha do Araguaia (hereinafter, also "the Guerrilla") and their next of kin. [FN2] On March 6, 2001, the Commission issued Admissibility Report No. 33/01, [FN3] and on October 31, 2008, approved the Report on the Merits No. 91/08, pursuant to Article 50 of the Convention, in which it made a series of recommendations for the State. [FN4] This report was notified to Brazil on November 21, 2008, and the State was granted a period of two months to provide information on any actions taken to implement the recommendations of the Commission. Despite the two extensions afforded to the State, the period of time for it to present information regarding compliance with the recommendations elapsed without there having been "satisfactory implementation of [them]." As such, the Commission decided to submit the case to the Court, considering that it represented "an important opportunity for the Court to consolidate the Inter-American jurisprudence on amnesty laws in relation to enforced disappearances and extrajudicial executions, and the State's consequential obligation to provide society with the truth, investigate, prosecute, and punish serious human rights violations." Likewise, the Commission emphasized the historical value of the case and the possibility that the Court could affirm the non-compatibility, of not only the amnesty laws, but also of the laws on confidentiality of documents with the American Convention. The Commission designated as delegates, Mr. Felipe González, Commissioner, and Santiago A. Canton, Executive Secretary, and as legal advisors, the Deputy Executive Secretary, Mrs. Elizabeth Abi-Mershed, and the lawyers, Lilly Ching Soto and Mario López Garelli, Executive Secretariat specialists.

[FN2] Subsequently, the Next of Kin of the Politically Deceased and Disappeared Persons of the Institute of Studies on State Violence, Angela Harkavy, and the Grupo Tortura Nunca Más de Río de Janeiro [Group Torture Never Again from Rio de Janeiro], joined as petitioners.

[FN3] In the Admissibility Report No. 33/01 the Commission declared admissible the case No. 11.552 in regard to the alleged violation of Articles 4, 8, 12, 13, and 25, in accordance with 1(1), all of the American Convention, as well as Articles I, XXV, and XXVI on the American Declaration on the Rights and Duties of Man (hereinafter, "American Declaration"), (case file of annexes to the petition, appendix 3, tome III, folio 2322).

[FN4] In the Report on the Merits No. 91/08 the Commission concluded that the State was responsible for the violations of the human rights established in Articles I, XXV, and XXVI of the American Declaration and 4, 5, and 7 in relation with Article 1(1) of the American Convention, to the detriment of the disappeared victims; in Articles XVII of the American Declaration, and 3 in relation with Article 1(1) of the American Convention, to the detriment of the disappeared persons; in Articles I of the American Declaration and 5 of the American Convention, in connection with Article 1(1) to the detriment of the next of kin of the disappeared persons; in Article 13 of the American Convention, in relation with Article 2 of the same, to the detriment of the next of kin of the disappeared; in Articles XVIII of the American Declaration, and 8(1) and 25 of the American Convention in relation with Articles 1(1) and 2 of the same, to the detriment of the disappeared persons and their next of kin of the disappeared persons in virtue of the application of the amnesty law to the disappeared persons; to Articles XVIII of the American Declaration and 8(1) and 25 of the American Convention, in relation with Article 1(1) of the same, to the detriment of the disappeared persons and their next of kin, in virtue of the ineffectiveness of the non-criminal judicial actions filed in the framework of the present case (case file of annexes to the petition, appendix 3, tome VII, folio 3655).

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2. According to the Commission, the application refers to the alleged "responsibility [of the State] for the arbitrary detention, torture, and enforced disappearance of 70 persons, members of the Communist Party of Brazil […] and peasants of the region, […] as a result of the operations of the Brazilian Army between 1972 and 1975, whose purpose it was to eradicate the Guerrilha do Araguaia, in the context of the military dictatorship in Brazil (1964–1985)." Moreover, the Commission submitted the case to the Court because, "under Law No. 6.683/79 […], the State did not carry out a criminal investigation so as to prosecute and punish the persons responsible for the enforced disappearance of 70 victims and the extrajudicial execution of Maria Lúcia Petit da Silva […]; because the judicial remedies of a civil nature aimed at obtaining information regarding the facts have not been effective in guaranteeing that the next of kin of the disappeared and executed persons have access to information on the Guerrilha do Araguaia; because the legislative and administrative measures adopted by the State have unduly restricted the next of kin's right to access information; and because the disappearance of the victims, the execution of Maria Lúcia Petit da Silva, the impunity of those responsible, and the lack of access to justice, the truth, and information, have negatively affected the personal integrity of the next of kin of the disappeared and executed person." The Commission requested the Court to declare that the State is responsible for the violation of the rights established in Articles 3 (right to juridical personality), 4 (right to life), 5 (right to human treatment [personal integrity]), 7 (right to personal liberty), 8 (right to a fair trial [judicial guarantees]), 13 (freedom of thought and expression) and 25 (right to judicial protection) of the American Convention on Human Rights (hereinafter, "the American Convention" or "the Convention"), in relation with the obligations enshrined in Articles 1(1) (obligation to respect rights) and 2 (domestic legal effects) of the same. The Commission requested that the Court order the State to adopt specific measures of reparation.

3. On July 18, 2009, the Grupo Tortura Nunca Más de Rio de Janeiro [Group on Torture Never Again of Rio de Janeiro], the Comisión de Familiares de Muertos y Desaparecidos Políticos del Instituto de Estudios de la Violencia del Estado [Commission of the Next of Kin of Politically Deceased and Disappeared Persons of the Institute of Studies on State Violence] and the Center for Justice and International Law (hereinafter, "the representatives") presented their brief of pleadings, motions, and evidence (hereinafter, "brief of pleadings and motions"), pursuant to Article 24 of the Court Rules of Procedure. In said brief, the representatives requested that the Court declare "[i]n relation with the enforced disappearance of the [alleged] victims […] and the total impunity regarding the facts," the international responsibility of the State of Brazil for the violation of Articles 3, 4, 5, 7, 8, and 25 of the Convention, all in relation to Article[s] 1(1) and 2 of the same instrument, as well as Articles 1, 2, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture (hereinafter, also "Inter-American Convention against Torture"]; of Articles 8 and 25, in relation to Articles 1(1) and 2 of the American Convention and Articles 1, 6, and 8 of the Inter-American Convention against Torture for the failure to investigate and lack of due diligence in the domestic proceedings; of Articles 1(1), 2, 13, 8 and 25 of the Convention for the undue restrictions on the right to access information; of Articles 1(1), 8, 13, and 25 of the Convention for the violation of the right to the truth, and Article 5 of the Convention for the violation of the personal integrity of the next of kin of the [alleged] disappeared victims. As a consequence, they requested the Court to order various

measures of reparation. The next of kin of forty-eight alleged victims, through power of attorney granted on various dates, assigned the abovementioned organizations as their legal representatives, those of which are represented, in turn, by Mrs. Cecília Maria Bouças Coimbra, Elizabeth Silveira e Silva, and Victória Lavinia Grabois Olimpio (Grupo Tortura Nunca Más) [Group Torture Never Again]; Criméia Alice Schmidt de Almeida (Commission of the Next of Kin of the Politically Deceased and Disappeared Persons of the Institute of Studies on State Violence); Viviana Krsticevic, Beatriz Affonso, Helena Rocha, and Mr. Michael Camilleri (CEJIL).

4. On October 31, 2009, the State presented a brief wherein it filed three preliminary objections, responded to the application, and made observations to the brief of pleadings and motions (hereinafter "response to the application"). The State requested the Court to consider the preliminary objections founded, and as a consequence, to: a) recognize the lack of jurisdiction ratione temporis to examine the alleged violations which occurred prior to Brazil's recognition of the contentious jurisdiction of the Court; b) declare it lacks jurisdiction because of the failure to exhaust domestic remedies, and c) immediately archive the present case given that the representatives do not have a legal interest in the proceedings. Alternatively, in regard to the merits, Brazil requested the Court to recognize "all the measures taken in the domestic forum" and "to declare as inadmissible the requests of the [Commission and representatives] given that within the country a solution is unfolding, compatible with its peculiarities, for the definitive consolidation of national reconciliation." The State assigned Mr. Hildebrando Tadeu Nascimento Valadares as Agent and Mrs. Márcia Maria Adorno Calvalcanti Ramos, Camila Serrano Giunchetti, Cristina Timponi Cambiaghi, and Bartira Meira Ramos Nagado and Mr. Sérgio Ramos de Matos Brito and Mr. Bruno Correia Cardoso, as Deputy Agents.

5. Pursuant to Article 38(4) of the Court Rules of Procedure, on January 11th and 15th, 2010, the Commission and representatives, respectively, presented their arguments on the preliminary objections filed by the State.

II. PROCEEDINGS BEFORE THE COURT

6. The Commission's application was notified to the State and the representatives on May 18, 2009. [FN5] During the proceedings before this Court, in addition to the presentation of the main briefs (supra paras. 1 to 5), and others sent by the parties, in an order of March 30, 2010, the President of the Court (hereinafter, "the President") required, by way of declarations rendered before a public notary (hereinafter, also "affidavit"), the statements and expert reports of: a) 26 alleged victims; one of them offered by the Commission, the other offered both by the Commission and representatives, and the others offered solely by the representatives; b) four witnesses; two proposed by the representatives and two by the State, and c) five expert witnesses; one offered by the Commission, two by the representatives, and two by the State, [FN6] of which the parties were able to present their observations. Moreover, the President summoned the Commission, the representatives, and the State to a public hearing to listen to the testimonies of: a) three alleged victims; one offered jointly by the Commission and the representatives, and the other two proposed by the representatives; b) four witnesses; one proposed jointly by the Commission and representatives, one proposed by the representatives, and the other two by the State; c) the expert reports of two experts; one proposed by the

Commission, one by the State, as well as; d) the final oral arguments of the parties on the preliminary objections and eventual merits, reparations, and costs. [FN7]

[FN5] Before, on March 13, 2009, the State was informed that it could designate an ad hoc judge for the present case. The Commission presented a brief entitled, "Position of the Inter-American Commission on Human Rights on the role of the Ad hoc judge." On June 12, 2009, Brazil designated Mr. Roberto de Figueiredo Caldas as judge Ad hoc, whom on June 24, 2009, accepted the charge.
[FN6] Cf. Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil. Summons to a Public Hearing. Order of the President of the Inter-American Court of Human Rights on March 30, 2010, Operative Paragraph 1.
[FN7] Cf. Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil. Summons to a Public Hearing, supra note 6, Operative Paragraph 4.

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7. The public hearing was held on May 20 and 21, 2010, during the LXXXVII Ordinary Period of Sessions of the Court, held at the seat of the Court. [FN8]

[FN8] At this hearing, the following were present: a) for the Inter-American Commission: Felipe González, Commissioner; Santiago Canton, Executive Secretary; Catalina Botero, Special Rapporteur for Freedom of Expression, and Lilly Ching Soto, Leonardo Hidaka, and Alejandra Negrete, legal assistants; b) by the representatives: Viviana Krsticevic, Beatriz Affonso, and Helena Rocha, of CEJIL, and Victoria Lavínia Grabois Olímpio, of the Group on Torture Never Again of Rio de Janeiro, and c) for the State: Hildebrando Tadeu Nascimento Valadares, Ambassador of Brazil in Costa Rica; Gláucia Silveira Gauch, Carlos Eduardo da Cunha Oliveira, Camilla Serrano Giunchetti, Mauricio Candeloro, Rodrigo Wanderley Lima, and Francisco Samuel Barzotto of the Ministry of Foreign Affairs; Cristina Timponi Cambiaghi and Bartira Meira Ramos Nagado, of the Human Rights Secretariat of the Presidency of the Republic; Sérgio Ramos de Matos Brito, and Ana Claudia de Sousa Freitas, of the Attorney General of the Union; Mauro Almeida Noleto, of the Ministry of Justice; Paulo Massi Dallari, of the Civil House; Celia Cristina Whitaker, of the Special Secretariat on Human Rights of the Municipality of São Paulo; Bruno Correia Cardoso, of the Ministry of Defense; Gerson Menandro, of the Brazilian Army; Miguel Alejandro Gutiérrez Pizarro, of the Brazilian Embassy in Costa Rica, and Manoel Lauro Volkmer de Castilho, assistant. Before the celebration of such public hearing, on May 6, 2010, Brazil requested, inter alia, to postpone the public hearing for the next period of sessions of the Court, and to divide the hearing into two parts, one for the preliminary objections, and the other for the merits. Alternatively, in the case that such request would not be admitted, the State requested that the public hearing called for May 20 and May 21, 2010, only be for preliminary objections. After considering the observations of the Commission and of the representatives, the Court did not admit the request of the State (case file on the merits, tome VI, folios 2709 and 2710).

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8. On the other hand, the Court received eight amicus curiae briefs from the following persons and institutions: [FN9] a) Open Society Justice Initiative, Commonwealth Human Rights Initiative, Open Democracy Advice Centre and South African History Initiative, in relation with the right to truth and access to information; [FN10] b) Grupo de Investigación de Derechos Humanos en la Amazonía [Human Rights Investigation Group in the Amazon], in regard to the Amnesty Law; [FN11] c) Order of Attorneys of Brazil, section of Rio de Janeiro, on inter alia, the effects of the eventual condemnator -

. 153 (Non-compliance Action of the Fundamental Principle No. 153) (hereinafter, Non-compliance Action of the Fundamental Principle No. 153" or "Non-compliance Action No. 153"); [FN12] d) the Grupo de Ensino, Pesquisa e Extensão "Democracia e Justiça de Transição" [Group of Teaching, Investigation, and Extension "Democracy and Transitional Justice] of the Universidade Federal de Uberlândia, on inter alia, the extension of the Amnesty Law and the importance of the present case for the guarantee of the right to memory and the truth; [FN13] e) José Carlos Moreira da Silva Filho, Rodrigo Lentz, Gabriela Mezzanotti, Fernanda Frizzo Bragato, Jânia Maria Lopes Saldanha, Luciana Araújo de Paula, Gustavo Oliveira Vieira, Ana Carolina Seffrin, Leonardo Subtil, Castor Bartolome Ruiz, André Luiz Olivier da Silva, Sheila Stolz da Silveira, Cecília Pires, Sólon Eduardo Annes Viola, Investigation Group "Right to Memory and the Truth and Transitional Justice (Pontifícia Universidade Católica do Rio Grande do Sul), the Investigation and Extension Nucleus of the Federal University of Rio Grande, the National Movement of Education in Human Rights and Access, Citizenship and Human Rights, and the Grupo de Pesquisa "Delmas-Marty: Internacionalização do Direito e Emergência de um Direito Mundial," [Investigation Group "Delmas-Marty: Internationalization of the Right to and Emergency of a World Right,"] the Grupo de Pesquisa "Fundamentação Ética dos Direitos Humanos," [the Research Group "Ethical Basis of Human Rights," the Chair UNESCO/UNISINOS "Direitos Humanos e Violência, Governo e Governança," [Human Rights and Violence, Government, and Governance,"] the Graduate Course in Law and the Human Rights Nucleus, all associated with the Universidade do Vale do Rio dos Sinos, on, inter alia, the eventual consequences of this proceeding in the transitional justice in Brazil; [FN14] f) Global Justice Global, regarding the incompatibility of the Brazilian Amnesty Law in relation with the American Convention; [FN15] g) Equipe do Núcleo de Direitos Humanos [Nucleus Team of Human Rights] of the Legal Department of the Pontifícia Universidade Católica do Rio de Janeiro, on the right to access information in State control, [FN16] and h) Association of Judges for Democracy, on the right to memory and truth in regard to the Amnesty Law. [FN17]

[FN9] The Court received other briefs that were time-barred or were not useful or related to the objective of the present case, and as such, they are not admitted nor mentioned in the present judgment.

[FN10] The brief was received by the Secretariat of the Court on June 7, 2010, and is signed by James A. Goldston and Darian K. Pavli of the Open Society Justice Initiative; Maja Daruwala of Common Wealth Human Rights Initiative; Alison Tilley of the Open Democracy Advice Centre, and Catherine Kennedy of the South African History Archive. The copies of said brief in its English and Spanish versions were received on June 3 and 4, 2010, respectively, while the Portuguese version was received on July 12, 2010.

[FN11] The brief and its annexes were received by the Secretariat of the Court on June 4, 2010. The brief is signed by Sílvia Maria da Silveira Loureiro and Jamilly Izabela de Brito Silva.
[FN12] The brief and its annexes were received by the Secretariat of the Court on June 10, 2010, and is signed by Guilherme Peres de Oliveira, Ronaldo Cramer, and Wadih Damous. A copy of said brief was received on June 4, 2010.
[FN13] The brief and annexes were received by the Secretariat of the Court on June 4, 2010. The brief is signed by Adriano Soares Loes, Ailime Silva Ferreira, Alexandre Garrido da Silva, Anna Paula Santos de Souza, Bruna Arantes Vieira, Bárbara de Almeida Andrade Braga, Caroline Milagre Pereira, Carolina Nogueira Teixeira de Menezes, Ana Clara Neves da Silveira, Érika Cristina Camilo Camin, Felipe Martins Vitorino, Flávia Ferreira Jacó de Menezes, Géssika Sampaio da Fonseca, Jéssica da Silva Rehder, José Carlos Cunha Muniz Filho, Júlia Palmeira Macedo, Lara Caroline Miranda, Marcela Marques Maciel, Marco Túlio de Castro Caliman, Marcos Augusto Freitas Ribeiro, Mariana Rezende Guimarães, Maristela Medina Faria, Marília Freitas Lima, Mayara Bastos Mundin, Michelle Gonçalves, Monique Saito, Pablo Cardoso de Andrade, Paula Almeida Faria, Públio Dezopa Parreira, Pedro do Prado Möller, Rafael Momenté Castro, Raphael Siqueira Neves, Régis Cardoso Andrade, Renata Cardoso Fernandes, Roberta Camineiro Baggio, Samara Mariana de Castro, Sara Mirando Magno Freixo, Túlio César Rossetti, and Vagner Bruno Caparelli Carqui.
[FN14] The brief was received by the Secretariat of the Court on June 7, 2010, and is signed by José Carlos Moreira da Silva Filho, Fernanda Frizzo Bragato, and Rodrigo Lentz. A copy of said brief was received on June 4, 2010.
[FN15] The brief and its annexes were received by the Secretariat of the Court on June 5, 2010. The brief is signed by Andressa Caldas, Sandra Carvalho, Luciana Garcia, Renata Lira, Tamara Melo, and Fernando Delgado. A copy of said brief was received on June 7, 2010.
[FN16] The brief and its annexes were received by the Secretariat of the Court on June 7, 2010, and is signed by Marcia Nina Bernardes, Natália Frickmann, Teresa Labrunie, Paula D'Angelo, Natália Damazio, and Maria Fernanda Marques. A copy of said brief was receied on June 4, 2010.
[FN17] The brief and its annexes were received by the Secretariat of the Court on June 7, 2010. The brief is signed by Luís Fernando Camargo de Barros Vidal and Kenarik Boujikian Felippe.
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9. On June 21, 2010, the Commission and the State submitted their final written arguments, whereas the representatives submitted their brief hours after the period had passed, without receiving any objections, and being admitted by the Tribunal. The briefs were transmitted to the parties in order for them to make the necessary observations regarding the specific documents sent. The parties made observations on said documents, and the representatives submitted additional documents.

III. PRELIMINARY OBJECTIONS

10. In its response to the application, the State filed three preliminary objections: a) lack of jurisdiction of the Court in ratione temporis to examine specific facts, b) failure to exhaust domestic remedies, and c) the lack of legal interesting in the proceeding of the Commission and representatives. Subsequently, in the public hearing, the State added another preliminary

objection, the "rule of fourth instance" in regard to the argued supervening fact (infra paras. 44 and 47).

11. While both the American Convention and the Court Rules of Procedure do not develop the concept of "preliminary objection," in its jurisprudence, the Court has repeatedly affirmed that it is within this means that admissibility of an application or the jurisdiction of the Court to acknowledge specific cases or other aspects, in regard to the person, matter, time, or place, is questioned. [FN18] The Court has noted that the purpose of a preliminary objection is to obtain a decision that prevents or impedes the analysis on the merits of the issue in question or of the case as a whole. Therefore, the approach must satisfy the essential legal characteristics in content and objective that qualify it as a "preliminary objection." The approaches that do not meet said qualifications, such as those that refer to the merits of the case, can be asserted in other procedural actions allowed by the American Convention or the Court Rules of Procedure, but not as a type of preliminary objection. [FN19]

[FN18] Cf. Case of Las Palmeras v. Colombia. Preliminary Objections. Judgment of February 4, 2000. Series C No. 67, para. 34; Case of Garibaldi v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 23, 2009. Series C No. 203, para. 17, and Case of Manuel Cepeda Vargas v. Colombia. Preliminary Objections, Merits, Reparations, and Costs. Judgment May 26, 2010. Series C No. 213, para. 35. In the same sense, Cf. Article 79 of the Rules of Procedure of the International Court of Justice. Available at: http://www.icj-cij.org/homepage/sp/icjrules.php; last visited on November 20, 2010.

[FN19] Cf. Case of Castañeda Gutman v. México. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 6, 2008. Series C No. 184, para. 39; Case of Garibaldi, supra note 18, para. 17, and Case of Manuel Cepeda Vargas, supra note 18, para. 35.

A. Lack of jurisdiction ratione temporis of the Court

1. Arguments of the parties

12. The State argued that the Court lacks jurisdiction to examine the alleged violations that took place prior to the State's acknowledgment of the Court's contentious jurisdiction. Brazil accepted the jurisdiction of the Court "under a reservation of reciprocity and for facts subsequent to December 10, 1998." Nevertheless, Brazil recognized the jurisprudence of the Court in the sense that it can rule on continued or permanent violations, even when they take place prior to the acceptance of the Court's contentious jurisdiction, be it that they are prolonged from said moment in time, but it emphasized that it is unmistakable that the Court does not have jurisdiction to hear of accusations that reference arbitrary detentions, acts of torture, and extrajudicial executions that occurred prior to December 10, 1998.

13. The Commission argued that, with the dates of ratification of the American Convention and the State's recognition of the contentious jurisdiction of the Court, the application refers only to the violations enshrined in the American Convention that have persisted since said recognition of competence, given the continued nature of the crime of enforced disappearance, or that are

subsequent to said recognition. In this sense, it affirmed that the Court has jurisdiction to know of the violations presented in the application.

14. The representatives argued that the violations claimed in the present case refer to the enforced disappearance of the alleged victims; to the impunity as a result of the lack of investigation, prosecution, and punishment of those responsible for said acts, and the inefficiency of the measures adopted to respect, protect, and guarantee the right to the truth and information. They noted that the possible start date of the disappearances does not restrict or limit the Court's jurisdiction ratione temporis, because it involves a violation of a permanent and continued nature. In addition, the alleged violations related with the rights to information, the truth, and justice persist subsequent to the ratification of the American Convention and the State's recognition of the jurisdiction of the Court. As such, the representatives requested the Court to dismiss this preliminary objection. Nevertheless, they indicated that one of the disappeared persons was identified in 1996, and that, as a consequence, the Court lacks jurisdiction to rule regarding this individual's enforced disappearance.

2. The Court's considerations

15. In order to determine if the Court has jurisdiction to hear the case or aspects of it, pursuant to Article 62(1) of the American Convention, [FN20] the Court must take into consideration the date of the State's recognition of the jurisdiction, in the terms that it occurred and the principle of non-retroactivity enshrined in Article 28 of the Vienna Convention on the Law of Treatises of 1969. [FN21]

[FN20] Article 62(1) of the Convention establishes:
A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
[FN21] Said provision states: "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

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16. Brazil recognized the contentious jurisdiction of the Inter-American Court on December 10, 1998, and in its declaration it noted that the Court would have jurisdiction regarding "facts subsequent" to said recognition. [FN22] Based on the aforementioned and the principle of non-retroactivity, the Court cannot exercise its jurisdiction to apply the Convention and rule a violation of its norms when the alleged facts or conduct of the State, that may implicate its international responsibility, are prior to the recognition of jurisdiction. [FN23] As such, the extrajudicial execution of Mrs. Maria Lúcia Petit da Silva, whose bodily remains were identified in 1996, namely, two years before Brazil recognized the contentious jurisdiction of the Court, as well as any other facts prior to said recognition remain outside of the jurisdiction of the Court.

[FN22] The acknowledgment of the jurisdiction made by Brazil on December 10, 1009, notes that "[t]he Government of the Federal Republic of Brazil declares that it recognizes, for an undefined period, as binding, ipso facto, the jurisdiction of the Inter-American Court of Human Rights, in all of the cases related to the interpretation and application of the American Convention [on] Human Rights, pursuant to Article 62 of the same, under the reservation of reciprocity, and for facts subsequent to this Declaration." Cf. General Information on the Treaty: American Convention on Human Rights. Brazil, recognition of jurisdiction. Available at http://www.oas.org/juridico/spanish/firmas/b-32.html; last accessed on November 18, 2010.

[FN23] Cf. Case of the Serrano-Cruz Sisters v. El Salvador. Preliminary Objections. Judgment of November 23, 2004. Series C No. 118, para. 66; Case of Heliodoro Portugal v. Panamá. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 12, 2008. Series C No. 186, para. 24, and Case of Garibaldi, supra note 18, para. 20.

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17. In its constant jurisprudence, this Court has established, however, that acts of a continuous or permanent nature extend throughout time wherein the event continues, maintaining a lack of conformity with international obligations. [FN24] In accordance with the foregoing, the Court highlights that the continuous or permanent nature of the enforced disappearance of persons has been recognized in a repeated manner in the International Law of Human Rights, [FN25] where the act of disappearance and execution commence with the deprivation of liberty of the person and the subsequent lack of information regarding the whereabouts, and continues until the whereabouts of the disappeared person are made known and the facts are ascertained. Therefore, the Court has jurisdiction to analyze the alleged enforced disappearances of the alleged victims as of Brazil's recognition of the Court's contentious jurisdiction.

[FN24] Cf. Case of Blake v. Guatemala. Preliminary Objections. Judgment of July 2, 1996. Series C No. 27, paras. 39 and 40; Case of Radilla Pacheco v. México. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209, para. 23, and Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations, and Costs. Judgment of September 1, 2010 Series C No. 217, para. 21; In the same sense, Article 14(2) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. Cf. Order of the General Assembly of the United Nations No. 56/83 of December 12, 2001, annex, U.N. DOC. A/56/49 (VOL. I)/CORR.4.

[FN25] Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 155; Case of Chitay Nech et al. v. Guatemala. Preliminary Objections, Merits, Reparations, and Costs. Judgment of May 25, 2010. Series C No. 212, para. 81 and 87, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 59 and 60.

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18. In addition, the Court can examine and rule on the other alleged violations, which are founded in facts that occurred or persisted as of December 10, 1998. Based on the foregoing, the Court has jurisdiction to analyze the alleged facts and omissions of the State that occurred after said date, which are related to the failure to investigate, prosecute, and punish those responsible, inter alia, for the alleged disappearance and extrajudicial execution; the alleged lack of

effectiveness of judicial remedies of a civil nature aimed at obtaining information regarding the facts; the alleged restrictions on the right to access information, and the alleged suffering of the next of kin.

19. Based on the preceding considerations, the Court finds the preliminary objection to be partially well-founded.

B. Lack of legal interest in the proceeding

1. Arguments by the parties

20. Brazil argued that the Commission recognized and valued the measures of reparation adopted by the State in regard to the present case, but that said organ affirmed, in a general manner, that other measures needed to be implemented. According to the criteria of the State, due to the "minimal time which elapsed from the presentation of the Report on Partial Compliance of Recommendations [of the State regarding Report on the Merits No. 91/08] and the presentation of the case before the Court (three days), the evaluation of the [Commission] on the compliance of the measures of reparation and non-repetition recommended by it […] was to its detriment." Given the information contained in the mentioned State report, Brazil considered that the presentation of the case before the Court was untimely and "highlight[ed] the lack of a legal interest to conclude the analysis of the merits of the present case."

21. In particular, the State highlighted the measures of reparation adopted in the present case, stating, inter alia, that it: a) promulgated Law No. 9.140/95, in which "it promoted the official acknowledgment of responsibility for the deaths and disappearances that took place during the military regime" and paid compensation to family members of 59 alleged victims; b) published in August 2007 the book "Direito à Memória e à Verdade – Comissão Especial sobre Mortos e Desaparecidos Políticos" [Right to Memory and Truth – Special Commission on Political Deaths and Disappearances of Persons] wherein it established the official version of the human rights violations committed by State agents, "reinforcing in this manner, its public acknowledgment of State responsibility"; c) carried out "various acts of a symbolic and educational nature, that promote the recovery of memory and truth of the facts which occurred during the […] military regime"; d) submitted to the National Congress the Project Law No. 5.228/09 on access to public information; e) pushed forward the project "Memórias Reveladas," ["Disclosed Memories"] related with various initiatives regarding the archives and publication of documents related to the military regime, and f) pushed forward a campaign to stimulate the delivery of documents that could assist in locating the disappeared persons. In the same manner, several search initiatives for the mortal remains and identification of the disappeared members of the Guerrilla were carried out, including expeditions to the Araguaia region. Given the abovementioned, the State concluded that the "petitioners" not having a legal interest in the proceedings is a consequence of the fact that "the measures adopted [by the State], in addition to those being implemented, attend to the complexity of [their] requests."

22. The Commission noted that the argument of the State does not present the characteristics of a preliminary objection and it requested the Court to dismiss it. Brazil initially had a period of two months to present a report on the compliance of the recommendations of Report on the

Merits No. 91/08. Said period was extended on two occasions and finally expired on March 22, 2009. Nevertheless, the State presented a partial report on March 24, 2009, and requested a new extension of six months in order to present additional information. In analyzing the information presented by Brazil, the Commission concluded that it did not reflect "the adoption of specific and sufficient measures, nor of an express commitment in regard to the compliance of the recommendations." As follows, it "considered that the procedures enshrined in Articles 48 and 50 of the Convention were exhausted, and it decided to submit the case to the jurisdiction of the Court." On the other hand, it expressed that there is no provision that regulates the examination of the State's response to the recommendations formulated in the Report on the Merits, and there is also not established a minimum period of time for the Commission to examine the information provided by the State in regard to the compliance with its recommendations.

23. In addition, the Commission expressed that despite the State's efforts to implement measures of reparation at a domestic level, the recommendations contained in the Report on the Merits No. 91/08 and the pleadings included in the application have not yet been fully complied with; among them are the measures to: a) assure that the Amnesty Law 6.683/79 "does not continue being an obstacle for the criminal prosecution of serious human rights violations that constitute crimes against humanity"; b) "determine, via common law jurisdiction, the criminal responsibility of the enforced disappearance of the [alleged] victims," and c) systematize and publish all the documents regarding the military operations against the Guerrilha do Araguaia. As such, the Commission requested that the Court dismiss this preliminary objection.

24. The representatives affirmed the autonomy of the Commission to evaluate the compliance with the recommendations of its reports and to decide on whether to submit the case to the Court. The reasons for the submission cannot be the objective of a preliminary objection, and Brazil did not argue any error on behalf of the Commission that could be a detriment to the right to defense. On the other hand, the State intends to apply one of the conditions of the actions of domestic law to the present case, which defines a procedural legal interest as "the need demonstrated by the party in the sense of obtaining the jurisdictional authority to guarantee the effectiveness of rights [and] avoid the continuance of harm suffered." The State intends to not analyze the merits of the case, under the argument that the eventual requirements issued by a judgment of the Court will already be underway via actions implemented in the domestic forum. They expressed that the State's arguments do not concern the jurisdiction of the Court or the admissibility of the case, but rather the measures of reparation requested by the Commission and the representatives. Therefore, the arguments posed by Brazil refer to "a question closely linked to an examination of the effectiveness of said measures," and as a consequence, do not constitute a preliminary objection.

25. Likewise, the representatives expressed that the measures adopted by Brazil are insufficient, and also, one of them is contrary to the interests of the next of kin. According to the representatives, "important controversies still exist regarding the facts complained of […] and those recognized by the State[, which] extend to those [debated] rights and the effectiveness of the measures adopted by the State in order to provide justice, [access to] the truth, prevent future violations, and compensate the next of kin of the [alleged] disappeared victims in the present case."

2. The Court's considerations

26. The Court notes that under the same concept of lack of procedural legal interest, the State referred in reality to two different assumptions: a) one related to the actions of the Inter-American Commission regarding the State's report in response to the Report on the Merits No. 91/08, and b) another related to the measures of reparation adopted by Brazil, which, it is alleged, attend to the wishes of the Commission and representatives.

27. Regarding the decision of the Inter-American Commission to submit the case to the Court's jurisdiction, the Court has affirmed that the assessment made by the Commission regarding whether to send the case to the Court is an attribution that is solely and autonomously of the Commission, and as a consequence the reasons it had for sending it cannot be subject to a preliminary objection. Nevertheless, what can be subject to a preliminary objection, is the omission or violation of all or some of the procedural steps enshrined in Article 50 and 51 of the Convention, in a way that provokes procedural imbalance [FN26] or a serious error that affects the right to defense of a party to the case before the Court. [FN27] The party that affirms the existence of a serious error must demonstrate it, [FN28] given that a complaint or discrepancy regarding criteria related to the Commission's actions is not sufficient. [FN29]

[FN26] Cf. Case of the 19 Tradesmen v. Colombia, Preliminary Objection. Judgment of June 12, 2002. Series C No. 93, para. 31.
[FN27] Cf. Case of the Dismissed Congressional Employees (Aguado - Alfaro et al.) v. Peru. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2006. Series C No. 158, para. 66; Case of Escher et al. v. Brasil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 6, 2009. Series C No. 200, para. 22, and Case of Manuel Cepeda Vargas, supra note 18, para. 31.
[FN28] Cf. Case of the Dismissed Congressional Employees, supra note 27, para. 66; Case of Escher et al., supra note 27, para. 23, and Case of Manuel Cepeda Vargas, supra note 18, para. 31.
[FN29] Cf. Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007. Series C No. 172, para. 32; Case of Escher et. al., supra note 27, para. 23, and Case of Cepeda Vargas, supra note 18, para. 31.

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28. The Court deems it important to mention that, given that Article 44 of the Commission Rules of Procedure regulates the submission of a case before the Court, there is no provision in the Convention, in the Court Rules of Procedure or in the Commission Rules that regulates in an express manner the analysis or evaluation that the Commission must carry out regarding the State's response to the recommendations. There is also not a minimum time period established from the time when the State presents its response to the recommendations formulated in the report of Article 50 of the Convention, for the Commission to decide whether to submit the case before the Court. [FN30]

[FN30] Cf. Case of the 19 Tradesmen. Preliminary Objection, supra note 26, para. 32.

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29. The Court notes that the Inter-American Commission submitted the present case to the Court two days after Brazil presented its partial report on the recommendations adopted by said organ in its Report on the Merits No. 91/08, after the concession of two extensions for the State, the last of which expired on March 22, 2009. Likewise, the Court observed that the State forwarded the partial report to the Commission with a delay of two days, on March 24, 2009. [FN31] Namely, despite the expiration of the time period granted by the Commission, it waited for the State to inform on whether it had adopted specific measures aimed at complying with the recommendations, before deciding whether it was appropriate to submit the case to the Court.

[FN31] Cf. Answer to the application (case file on the merits, tome II, folio 552).

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30. Legal certainty demands that States know how to comply with the procedures before the Inter-American System of Human Rights. [FN32] As a consequence, if the Commission grants a time period for the State to comply with the recommendations of the report, it must wait for the State to respond within the period of time established for it to do so and evaluate whether submitting the case to the Court is the most favorable alternative for the protection of the rights enshrined in the Convention, [FN33] or if, to the contrary, the measures adopted by the State to comply with the recommendations of the Commission constitute a positive contribution to the development of the process and to the compliance of the obligations established in the American Convention. [FN34] In the present case, there is no notice of an error or failure to observe conventional norms or regulations governing the referral of the case by the Commission to this Court, but rather a discrepancy regarding the criteria with said action. Based on the aforementioned, the Court considers that the State's argument does not constitute a preliminary objection.

[FN32] Cf. Case of Cayara. Preliminary Objections. Judgment of February 3, 1993. Series C No. 14, para. 38, and Case of the 19 Tradesmen, Preliminary Objection, supra note 26, para. 35.
[FN33] Cf. Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights). Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 54; Case of the Saramaka People. v. Suriname, supra note 29, para. 39, and Case of Bayarri v. Argentina. Preliminary Objection, Merits, Reparations, and Costs. Judgment of October 30, 2008. Series C No. 187, para. 20.
[FN34] Cf. Case of the 19 Tradesmen, Preliminary Objection, supra note 26, para. 35.

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31. On the other hand, in regard to the lack of the procedural interest of the Commission and the representatives due to the various initiatives adopted by Brazil in the domestic forum, following its jurisprudence, [FN35] this Court reiterates that the international responsibility of the State is generated immediately after the illicit act takes places, pursuant to international law, and that the desire to remedy said act at a domestic level does not prevent the Commission or the Court from knowing the case. Namely, in conformity with the Preamble of the American

Convention, the international protection of a conventional nature "reinforces or complements the protection provided by the domestic law of the American States." As a consequence, when it is argued that the State did not fully comply with the obligation to repair a violation of the rights recognized in the American Convention, it corresponds to the Court to exercise its jurisdiction regarding the illicit act, when and if the conventional procedural requirements are met, such as, to eventually declare the violations that may correspond and order the appropriate reparations pursuant to Article 63(1) of the Convention. Therefore, the Court considers that the actions that the State indicates it has adopted to repair the alleged violations committed in the present case or to avoid their repetition, may be relevant for the Court's analysis of the merits of the case and, eventually, the possible reparations to be ordered, but they do not have an effect on the Court's exercise of jurisdiction to hear the case. Based on the abovementioned, the Court dismisses the State's preliminary objection.

[FN35] Cf. Case of the Gómez Paquiyauri Brothers v. Perú. Merits, Reparations, and Costs. Judgment of July 8, 2004. Series C No. 110, para. 75; Case of Bayarri, supra note 33, para. 19, and Case of Dacosta Cadogan v. Barbados. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 24, 2009, Series C No. 204, para. 30.

C. Lack of exhaustion of domestic remedies

1. Arguments of the parties

32. The State maintained that the Commission "refrained from properly assessing [the] issues [regarding exhaustion of domestic remedies] while the case was [before] it, and subsequently, when it made the decision to send it to the Court." It reminded that the rule on exhaustion of domestic remedies impedes an international complaint from being filed before the alleged victim has exhausted all the domestic remedies made available by the domestic legal system of the allegedly responsible State. The protection provided by the international organs has a subsidiary nature, and the purpose of an international instance is not to revise or reform the domestic judgment, but rather to assess that said ruling is in conformity with international regulations. Given the State's obligations to offer protection and effective judicial remedies, established in Articles 8 and 25 of the Convention, it corresponds to the victims to use all the domestic remedies available before turning to the Inter-American System. Therefore, the Court cannot disregard said norm, given that doing the contrary "would remove the assurance that the [S]ystem functions properly, […] placing its credibility and existence at risk."

33. In addition, the State noted that the representatives had not exhausted the following domestic remedies: a) the Non-compliance Action of Fundamental Principle No. 153, wherein it was requested that the amnesty granted by the Law No. 6.683/79 would not extend to common crimes carried out by repression agents against political opponents; b) the Ordinary Action No. 82.00.024682-5, wherein the determination of the whereabouts, the localization of the bodily remains, the clarification of the circumstances of the deaths, and the delivery of the official archive of information regarding the military operations against the Guerrilha do Araguaia was requested; c) the Public Civil Suit No. 2001.39.01.000810-5, filed by the Federal Public

Prosecutor's Office in order to obtain from the State all the existent documents on the military actions of the Armed Forces against the Guerrilla; d) the secondary private action for the criminal prosecution of crimes of public action, and e) initiatives in regard to the request for compensation, such as the ordinary civil action for compensation and the request for pecuniary reparation in the context of Law No. 9.140/95, of the Special Commission on Political Deaths and Disappearances of Persons and the Amnesty Commission pursuant to Law 10.559/02, among other measures of reparation.

34. In particular, regarding the Ordinary Action No. 82.00.024682-5, Brazil noted that on February 8, 2008, a definitive decision on the matter was issued, and its compliance is underway. On July 10, 2009, the date in which the time period established for the State to comply with the decision, the Attorney General's Office sent "all the available documentation in the hands of the Federal Union regarding the military operations, particularly in what deals with armed conflicts, the capture and detention of civilians, recognition of bodies, identification of victims, expert witnesses investigations, location of the bodily remains found, and information regarding transfers of civilians, dead or alive, to any area, which took place in said period of time." Likewise, said court has summoned experts to render declarations and documents in their possession regarding the Guerrilha do Araguaia. On the other hand, the State expressed that the Public Civil Suit filed by the Federal Public Prosecutor's Office on August 25, 2001, [FN36] was ruled admissible on December 19, 2005. Nevertheless, due to the remedies filed by the Federal Union against said ruling, it is not yet of a final nature.

[FN36]
["Public Civil Suit"] is a form of institutional function for the defense of diffuse and collective interests

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35. The Commission argued that the issue of non-exhaustion of domestic remedies was duly analyzed in the Admissibility Report No. 33/01 on March 6, 2001. It affirmed that three of the four argumentative points of the State, those related with the Non-compliance Action of the Fundamental Principle No. 153, the Public Civil Suit, and the specific considerations on the adopted measures of reparation, are subsequent to the date in which the Report was issued. Moreover, regarding the Ordinary Action, the Commission explicitly expressed in its admissibility report that, despite the complexity of the case and the interposition of many remedies in the context of said process, years have passed without a final decision and said delay cannot be considered reasonable. For this reason, the Commission applied the objection enshrined in Article 46(2)(c) of the Convention and declared the petition admissible. Furthermore, it noted that the State did not argue in its response to the petition, that the decision of admissibility which was adopted was based on erroneous information or that it stemmed from a process wherein the parties' equality of arms or right to defense was restricted. It also argued that, in principle, the content of the decisions on admissibility adopted in accordance with the Convention and the Commission Rules of Procedure should not be subject to a new substantive analysis. As such, the Commission requested the Court not to admit this preliminary objection.

36. The representatives noted that the Commission has already carried out an analysis of admissibility in the case, and the Court must make reference to it. Based on the principles of legal and procedural certainty, once the admissibility of the case is analyzed and established, the principle of preclusion is applied, except in extraordinary situations where there is a serious error that affects the right to defense of the parties. In the present case, the State did not identify a serious error in the proceedings before the Commission, nor did it demonstrate any detriment to its right to defense. In the six years that elapsed wherein the case remained in the admissibility stage, the State had several opportunities to respond to the arguments of the representatives and to the concerns of the Commission, reason for which there is no basis to reexamine the decision of the Commission in its admissibility report. In addition, the representatives reminded that the State should present the objection on the non-exhaustion of domestic remedies before the Inter-American Commission rules on the admissibility of the case. Prior to the issuance of the Admissibility Report No. 33/01, the State only argued the non-exhaustion of two domestic remedies: a) the Ordinary Action, in which, according to Brazil, the objection of undue delay should not be applied, and b) the habeas data action, that had not been filed. Notwithstanding, in the processing before the Court, the State reiterated the relevant arguments regarding the abovementioned Ordinary Action, and in addition, other legal actions related to the facts complained of in the present case, such as the Non-compliance Action No. 153, the Public Civil Suit, and other measures which were or could be adopted in order to fulfill the requested measures of reparation. For the representatives, the State did not argue a lack of exhaustion of the mentioned remedies at the opportune procedural moment, and as such, this preliminary objection should be considered time-barred and not admitted by the Court.

37. In a secondary manner, the representatives noted the ineffectiveness of the domestic remedies addressed by the State. In regard to the Ordinary Action, they argued that twenty-seven years have passed since the action initiated and despite the final decision, "it did not result in the awaited effects, and did not constitute, therefore[,] an effective remedy for the clarification of the facts of the complaint." They noted that the appropriate measure of reparation to remedy the alleged violations was via a criminal remedy. Nevertheless, given that it pertained to a case of enforced disappearance, due to the Amnesty Law, the State did not initiate an investigation designed to ascertain the facts, identify those responsible, and guarantee justice, which was not denied by the State. The interpretation in force of the Amnesty Law had a direct effect on the omissions of the Public Prosecutor's Office regarding the facts of the present case and inhibited the next of kin from filing a complaint in order to initiate a proceeding to establish the corresponding criminal action. Lastly, the representatives noted that, contrary to that specified in the jurisprudence of the Court, Brazil identified other remedies, but did not demonstrate the availability or effectiveness of said remedies in repairing the alleged violations in the case, such as the Non-compliance Action No. 153 or the Public Civil Suit, which was presented after the issuance of the admissibility analysis emitted by the Commission.

2. The Court's considerations

38. The Court has established in a consistent manner that an objection to the exercise of jurisdiction of the Court based on the non-exhaustion of domestic remedies should be presented at the appropriate procedural moment, [FN37] namely, in the admissibility stage of the proceedings before the Commission. [FN38] In this regard, the Court reiterates that the

interpretation it has used for over 20 years of Article 46(1)(a) of the Convention is in conformity with International Law [FN39] and that, pursuant to its jurisprudence [FN40] and international jurisprudence, [FN41] it is not the responsibility of the Court nor of the Commission to identify, ex officio, which domestic remedies need to be exhausted, but rather it is the State which should indicate in a timely manner the domestic remedies that must be exhausted and of their effectiveness.

[FN37] Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 88; Case of Da Costa Cadogan, supra note 35, para. 18, and Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 20, 2009. Series C No. 207, para. 19.

[FN38] Cf. Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 2, 2004. Series C No. 107, para. 81; Case of Apitz-Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations, and Costs. Judgment of August 5, 2008. Series C No. 182, para. 24, and Case of Bayarri, supra note 33, para. 16.

[FN39] Cf. Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, para. 22, and Case of Usón Ramírez, supra note 37, para. 22.

[FN40] Cf. Case of Velásquez Rodríguez. Preliminary Objections, supra note 37, para. 88; Case of Reverón Trujillo, supra note 39, para. 23, and Case of Usón Ramírez, supra note 37, para. 22.

[FN41] Cf. E.C.H.R., Deweer v. Belgium, Application No. 6903/75, Judgment of 27 February 1980, para. 26; E.C.H.R., Foti and others v. Italy, Applications Nos. 7604/76, 7719/76, 7781/77, and 7913/77, Judgment of 10 December 1982, para. 48, and E.C.H.R., De Jong, Baljet and van den Brink v. the Netherlands, Applications Nos. 8805/79, 8806/79, and 9242/81, Judgment of 22 May 1984, para. 36.

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39. The Tribunal notes that, in the case file before the Inter-American Commission, the latter requested the State to indicate, pursuant to Article 34 of its Court Rules of Procedure then in force, the legal elements which would allow to verify whether the remedies within the domestic jurisdiction had been exhausted. In response to this request, Brazil indicated that: a) the Ordinary Action which was still in the stage of hearing the case had not been exhausted, b) the possibility remained for the next of kin to file a habeas data petition and to obtain documents and information. These are the only positions held by the State in relation with the preliminary objection that were presented at the appropriate time.

40. To the contrary, the arguments regarding the Non-compliance Action No. 153, the Public Civil Suit, the possibility of filing a subsidiary criminal action, and the various initiatives regarding reparations, were presented by Brazil for the first time as a preliminary objection for non-exhaustion of domestic remedies in the response to the application, approximately nine years and eight months after the Inter-American Commission's decision on admissibility was adopted, thereby, time-barred. As such, said arguments cannot be admitted.

41. Regarding the two arguments of non-exhaustion of remedies presented at the appropriate time (supra para. 39), the Court notes that the State did not argue in the procedure before the latter the failure of not filing a habeas data, and as such, the Court considers that there was not an intention to proceed in this regard and will not make additional considerations.

42. Based on the aforementioned, the Court will only analyze the arguments of the State that refer to the non-exhaustion of domestic remedies regarding the Ordinary Action. At the time the Commission issued its Report No. 33/01, on March 6, 2001, 19 years after the action commenced, there was not a final decision on the merits in the domestic forum. Therefore, the Commission concluded that the delay in the proceeding could not be considered as reasonable. As a consequence, the Commission found that it could not require the exhaustion of domestic remedies and applied Article 46(2)(c) of the Convention to the case. The Court notes that from the case file it is not evident that there was an inadequate analysis by the Commission regarding this objection. Similarly, during the processing of the case before the Court, the State had the opportunity to present its defense regarding all the aspects of the application, to which it has not proven a detriment to its right to defense in regard to the Commission's decision. In this sense, the Court does not find any elements established that would require a modification to that resolved by the Inter-American Commission. In addition, of the arguments of the parties and the evidence provided in the case file, the Court notes that the arguments of the State related to the effectiveness of the remedy and the inexistence of an unjustified delay in the Ordinary Action deal with questions related to the merits of the case, given that they refute the arguments related to the alleged violation of Articles 8, 13, and 25 of the American Convention. Based on the previous considerations, the Court dismisses this preliminary objection.

D. Formula of Fourth Instance and Non-exhaustion of Remedies regarding the Non-compliance Action of the Fundamental Principle [FN42]

[FN42] The "Arguição de Descumprimento de Preceito Fundamental" is a type of remedy created by the Federal Constitution of 1988, amended by a constitutional reform in 1993 and regulated by Law No. 9.882 of December 3, 1999. It establishes in Article 1 that said action "shall be proposed to the Federal Supreme Court and its purpose will be to avoid and repair a violation to the Fundamental Principle that results from an act of the Public Power" (brief of annexes to the answer to the application, annex 35, tome IV, folio 6309).

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1. Arguments by the parties

43. In its response to the application, in its arguments regarding the non-exhaustion of domestic remedies, the State maintained that "it should be allowed the opportunity to debate and democratically deliberate the issue related with the purpose of the […] application within its domestic legal procedures[.] In particular, it is necessary to give time to the […] Federal Supreme Court for it to rule once and for all on the pending legal issues of the military government." In particular, it stated that in October 2008, the Order of Attorneys of Brazil filed an action of Argüição de Descumprimento de Preceito Fundamental wherein it requested the Federal Supreme Court to provide an interpretation of the Amnesty Law that is in conformity

with the Constitution […], in a way that rules that the amnesty granted by it to the crimes of political motivation or those in relation, do not extend to common law crimes carried out by agents of the repression against the political opposition during the military regime.

44. Subsequent to the response to the application, Brazil reported that on April 29, 2010, the Federal Supreme Court "declared [the Non-compliance Action No. 153], in a seven to two vote, inadmissible," considering that "the Amnesty Law represented, at the time, a necessary step in the reconciliation and redemocratization process in the country," and that "it was not a self-amnesty." Based on this recent decision, the State questioned the jurisdiction of the Inter-American Court to review decisions adopted by the highest courts of the State, noting that this Court cannot analyze issues on the merits of the present application, which occurred until April 29, 2010, given the non-exhaustion of domestic remedies. Based on the decision of the Non-compliance Action No. 153, the normal exhaustion of the domestic remedy was evinced, and in addition, a new barrier arose in the analysis of the merits of the application: the prohibition of the formula of the fourth instance. As such, on the one hand, the processing of the Non-compliance Action No. 153 respected due process, was transparent, permitted the participation of all the interested parties, and guaranteed impartiality and judicial independence, and on the other hand, the subsidiary nature of the action of the organs of the System, that cannot act as the highest tribunals and examine alleged errors of fact or law committed by national courts that have acted within their jurisdiction.

45. In relation with the Non-compliance Action No. 153, the representatives noted that: a) said remedy was not established in law at the time the case was presented to the Commission; b) the role of the persons legally entitled to press charges is limited and does not include the next of kin or their representatives; c) the Communist Party of Brazil, whom the State noted could file said remedy, is not the legal representative of the next of kin, and thus, cannot file said action in their name, and d) said action does not constitute an appropriate remedy to repair the enforced disappearances. Therefore, they concluded that it is absurd to require the exhaustion of the mentioned remedy. On the other hand, the representatives argued that the decision of the Supreme Federal Court, in granting amnesty to the agents of the repression that committed crimes against humanity, objectively prevents the search for justice and access to the truth sought by the victims. As an issue that is the purpose of the litigation of the present case, the argument presented by the State of the formula of fourth instance is not supported. Given that the representatives affirm the subsidiary nature of the international jurisdiction, they consider that the analysis of all the elements that constitute continued violations to the rights of the victims and their next of kin is essential for the determination of the international responsibility of the State.

2. The Court's considerations

46. The Court notes that, based on the Non-compliance Action No. 153, the State presented two preliminary objections, one related to the non-exhaustion of domestic remedies and the other related to the formula of fourth instance. In regard to the first of these arguments, the Court noted that the State did not present said exception at the appropriate procedural opportunity and dismissed the argument (supra para. 40). Although the fact that the objection was time-barred is the reason for its inadmissibility, the Inter-American Court deems it appropriate to clarify the

following. First, it is evident that the Non-compliance Action is not a remedy that can be considered available, not only because it did not exist at the time the petition was filed before the Commission, but also because the parties, such as the next of kin of the alleged victims, are not able to use it, given that the only parties able to legally file a complaint are specific State officials and institutions and social groups. [FN43] In addition, the purpose of said action is to avoid or repair a possible injury from a Fundamental Principle, which in the case before the Federal Supreme Tribunal was expressed in a specific constitutional interpretation. From this, it is clear that it also was not an appropriate remedy to repair the alleged violations, namely to ascertain the facts, establish the individual responsibility which arose from the violations, and to determine the whereabouts of the alleged disappeared victims.

[FN43] Article 103 of the Federal Constitution establishes that this action can be presented by: I. the President of the Republic; II. the Directing Board of the Federal Senate; III. the Directing Board of the Chamber of Deputies; IV. the Directing Board of a State Legislative Assembly or of the Federal District Legislative Chamber; V. a State Governor or the Federal District Governor; VI. the Attorney General of the Republic; VII. the Federal Council of the Brazilian Bar Association; VIII. a political party represented in the National Congress; IX. a confederation of labour unions or a professional association of a nationwide nature

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47. On the other hand, the Court notes that the argument regarding the "fourth instance" was presented by the State in the public hearing of the present case, subsequent to the presentation of the brief in response to the application. Although Article 38(1) of the Court Rules of Procedure establishes that the procedural moment for the interposition of preliminary objections is in the brief in response to the application, the Court considers that the judgment of the Federal Supreme Tribunal of April 29, 2010, constitutes a supervening fact (infra para. 58) and, as such, it corresponds that the Court rule on said State argument. The Commission and the representatives of the victims had an opportunity to present their arguments regarding this preliminary objection both in the public hearing and in the final written arguments, and thus their right to defense has been guaranteed.

48. The lawsuit brought by the Inter-American Commission does not seek to review the judgment of the Federal Supreme Tribunal, a decision which had not even been issued when said organ presented the application to the Inter-American Court, but rather it seeks to establish whether the State violated specific international obligations enshrined in the various rules of the American Convention to the detriment of the alleged victims, including, inter alia, the right to not be subjected to a enforced disappearance, derived from Articles 3, 4, 5, and 7 of the American Convention, the right to judicial protection, and the judicial guarantees so as to ascertain the facts and determine the individual responsibilities of said facts derived from Articles 8 and 25 of the American Convention.

49. On numerous occasions, the Court has held that ascertaining whether the State violated its international obligations by means of its actions before its judicial organs, can lead to this Court examining the particular domestic procedures, eventually including the decisions of the higher courts, so as to establish the compatibility with the American Convention. [FN44] In the

present case, the Inter-American Court is not called to carry out an analysis of the Amnesty Law in relation with the National Constitution of a State, an analysis of domestic law which is not of its jurisdiction, and which is an issue of the Non-compliance Action No. 153 (infra para. 136), but rather it must assess a conventional control, namely to assess the alleged non-compatibility of said law with Brazil's international obligations pursuant to the American Convention. As a consequence, the arguments in regard to the objections are matters related directly with the merits of the controversy, which can be examined by the Court under American Convention, without contravening the rule of the "fourth instance." As such, the Court dismisses this preliminary objection.

[FN44] 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 Escher et al., supra note 27, para. 44, and Case of Dacosta Cadogan, supra note 35, para. 12.

IV. JURISDICTION

50. The Inter-American Court has jurisdiction to hear this case under Article 62(3) of the Convention, because Brazil has been a State Party to the American Convention since September 25, 1992, and accepted the contentious jurisdiction of the Court on December 10, 1998.

V. EVIDENCE

51. Based on that established in Articles 46, 47, and 50 of the Court Rules of Procedure, as well as in its jurisprudence on evidence and its assessment, [FN45] the Court will examine and evaluate the documental evidentiary elements submitted by the parties in the various procedural opportunities, as well as the declarations of the alleged victims, the testimonies, the expert reports rendered by sworn statement before a public notary and in the public hearing before the Court. Accordingly, the Court will adhere to the principles of sound judicial discretion, within the appropriate normative framework. [FN46]

[FN45] 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 Rosendo Cantú et al. v. México. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2010. Series C No. 216, para. 27, and Case Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 39.
[FN46] Cf. Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala. Merits. Judgment of March 8, 1998. Series C No. 37, para. 76; Case of Rosendo Cantú et al., supra note 45, para. 27, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 39.

A. Documentary, testimonial, and expert evidence

52. The Court received the statements rendered before a public notary from the following victims, witnesses, and expert witnesses indicated in this section, regarding the topics mentioned below. The content of said statements is included in the corresponding chapter:

1) Diva Soares Santana, alleged victim, proposed by the Inter-American Commission. Declared on: a) the alleged efforts of the next of kin of the disappeared to obtain justice, truth, and reparation, as well as to know the whereabouts of the disappeared among them her sister, Dinaelza Santana Coqueiro and her brother-in-law Vandick Reidner Pereira Coqueiro, and b) the impact allegedly suffered by her and her family given the facts of the case;
2) Victoria Lavínia Grabois Olímpio, alleged victim, proposed by the Commission and the representatives. Declared on: a) her family relationship with her father, Mauricio Grabois; her brother, André Grabois, and her husband and father of her son, Gilberto Olímpio; b) the way in which she became aware of the alleged enforced disappearance of these persons; c) the impact in her life and that of her next of kin caused by said disappearances; d) the alleged personal efforts and actions taken by the next of kin to know the truth of that which occurred, obtain justice, and locate the bodily remains of her loved ones, and the obstacles confronted, and e) the alleged pecuniary and non-pecuniary consequences of the disappearances and the lack of truth and justice for her and her family;
3) Aldo Creder Corrêa; 4) Clóvis Petit de Oliveira; 5) Dilma Santana Miranda; 6) Dinorá Santana Rodrigues; 7) Dirceneide Soares Santana; 8) Elena Gibertini Castiglia; 9) Elza da Conceição Oliveira; 10) Helenalda Resende de Souza Nazareth; 11) Igor Grabois Olímpio; 12) João Carlos Schmidt de Almeida; 13) José Dalmo Ribeiro Ribas; 14) Junilia Soares Santana; 15) Lorena Moroni Girão Barroso; 16) Luíza Gurjão Farias; 17) Luiza Monteiro Teixeira; 18) Maria Eliana de Castro Pinheiro; 19) Maria Leonor Pereira Marques; 20) Maristella Nurchis; 21) Rosa Olímpio; 22) Rosana de Moura Momente; 23) Sônia Maria Haas; 24) Terezinha Souza Amorim; 25) Valéria Costa Couto, and 26) Viriato Augusto Oliveira [FN47], alleged victims, proposed by the representatives. They declared on the issues related to: a) their family relationship with the alleged disappeared victims; b) the manner in which they came to know about the enforced disappearances; c) the personal efforts and actions that the next of kin took to ascertain the truth of the events and find the bodily remains of their loved ones; d) the political context lived after the disappearances; e) the actions of the public authorities, as well as other obstacles in their search for justice; f) the pecuniary and non-pecuniary consequences of the disappearances, and the lack of truth and justice in their personal and family life, and g) the compensation received;
27) Danilo Carneiro, witness proposed by the representatives. Declared on: a) the alleged activities of the activists of said region, and b) the pattern of repression that was in place by the State during the military regime, and in particular, the modus operandi of the alleged detentions and torture perpetrated by state agents and their collaborators against the political opposition and their collaborators in the region;
28) Edmundo Teobaldo Müller Neto, witness proposed by the State. Declared on the alleged activities of the Tocantins Working Group established by Decree No. 567/MD, with the purpose of locating, collecting, and identifying the bodies of the Guerrilla and soldiers who died in the episode known as the Guerrilha do Araguaia;
29) Jaime Antunes da Silva, [FN48] Director of the National Archive, witness proposed by the State. Declared on the alleged implementation of the "Centro de Referência das Lutas Políticas no Brasil (1964-1985) Memórias Reveladas," [Center of Reference of the Political

Struggles in Brazil (1964-1985) Memories Revealed] which dealt with the recuperation and availability of the archives of the security organs of the state of emergency regime;

30) Flavia Piovesan, [FN49] professor of Constitutional Law and Human Rights, expert witness proposed by the Commission. Rendered an expert opinion on: a) the Law No. 11.111, and the Decrees No. 2.134/97, No. 4.553/02, and No. 5.584/05, in regard to the fundamental rights established in the Federal Constitution of 1988, and b) the consequences of this regulation for the compliance of the judgment issued in the framework of the Ordinary Action No. 82.00.24682-5, with the purpose of examining the specific possibility of the execution of said ruling;

31) Damián Miguel Loreti Urba, expert attorney on freedom of expression and secrecy laws, expert witness proposed by the Commission. Rendered an expert opinion on Law No. 11.111, the Decrees No. 2.134/97, No. 4.553/02, and No. 5.584/05, and the fundamental constitutional guarantees regarding freedom of expression and access to information;

32) Paulo César Endo, psychologist and professor, expert witness proposed by the representatives. Rendered an expert report on: a) the alleged affects of the enforced disappearance and the lack of justice and truth regarding what happened to the next of kin; b) the characteristics that an appropriate program of psychological care for said harm should have, and c) other measures that the State should adopt to repair the alleged perpetrated violations;

33) Hélio Bicudo, former Prosecutor of the Public Prosecutor's Office of the State of San Pablo, expert on international law of human rights, expert witness proposed by the representatives. Rendered an expert opinion on how the interpretation given to the "derived crimes" enshrined in Law No. 6.683/79 has become an alleged obstacle to the criminal prosecution and punishment of the perpetrators of the serious human rights violations committed during the Brazilian military regime;

34) Estevão Chaves de Rezende Martins, [FN50] professor, former Legislative Secretary of the Ministry of Justice and former Legislative General Counsel of the Federal Senate, expert witness proposed by the State. Rendered an expert report on the historical Brazilian experience under the concept of "transitional justice," and

35) Alcides Martins, Assistant Attorney General of the Republic, expert witness proposed by the State. Rendered a legal and technical analysis of the Amnesty Law.

[FN47] Cf. Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil. Reconsideration. Order of the Inter-American Court of Human Rights of May 19, 2010, Considering clauses 23 to 29 and Operative Paragraph 1.

[FN48] Cf. Case of Gomes Lund et al. ("Guerrilha do Araguaia"), supra note 47, Considering clauses 12 to 16 and Operative Paragraph 1

[FN49] Cf. Case of Gomes Lund et al. ("Guerrilha do Araguaia"). Reconsideration, supra note 47, Having Seen 4 and 7.

[FN50] Cf. Case of Gomes Lund et al. ("Guerrilha do Araguaia"). Reconsideration, supra note 47, Considering clauses 4 to 11 and Operative Paragraph 1.

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53. In regard to the evidence rendered at the public hearing, the Court heard the declarations of the following persons:

1) Laura Petit da Silva, alleged victim, proposed by the Commission and the representatives. Declared on: a) the identification of her sister, Maria Lúcia Petit da Silva; b) the impact the alleged execution of her sister and the alleged enforced disappearance of her brothers, Lúcio and Jaime Petit da Silva, had on her life and on her family, and c) the efforts and obstacles that she had faced to obtain the truth and justice;
2) Criméia Alice Schmidt de Almeida, and 3) Elizabeth Silveira e Silva, alleged victims, proposed by the representatives. Declared on matters dealing with: a) their family relationship with the alleged disappeared victim; b) the manner in which they found out about the enforced disappearance; c) the personal efforts and actions taken by the next of kin to know the truth regarding the events and the location of the bodily remains of their loved ones; d) the political context experienced during the military regime in Brazil; e) the actions of the public authorities, as well as other obstacles faced in the search for justice; f) the pecuniary and non-pecuniary consequences of the enforced disappearances, and the lack of truth and justice in their personal and family life, and g) the compensation received;
4) Marlon Alberto Weichert, witness proposed by the Commission and the representatives. Declared on: a) the reach and interpretation of the Brazilian Amnesty Law; b) the other obstacles that allegedly were used in Brazilian law to prevent the investigation, prosecution, and punishment of serious human rights violations, and c) the obstacles and restrictions which allegedly affected the right to access to information in Brazil;
5) Belisário dos Santos, [FN51] witness proposed by the representatives. Declared on: a) the alleged legal and juridical obstacles in the litigation of the cases of political prisoners, dealing with facts that took place during the Brazilian military regime; b) the barriers allegedly faced by the Special Commission in attempts to access official documents in State custody and in the search and delivery of the bodily remains of the alleged disappeared victims; c) the judgment of proceedings and the payment of compensation by the Special Commission, and d) the activities of the Monitoring Committee of the Tocantins Working Group;
6) José Gregori, witness proposed by the State. Declared on the importance of the activities of the Special Commission on Political Deaths and Disappearances of Persons and the historical context of Law No. 9.140/95;
7) José Paulo Sepúvelda Pertence, witness proposed by the State. Declared on: a) the historical context of the elaboration and promulgation of the Amnesty Law, and b) of its alleged contribution to the national reconciliation process during the time of its promulgation.
8) Rodrigo Uprimny, professor, expert on transitional justice, expert witness proposed by the Commission. Rendered an expert report on: a) the eventual impact on the current Brazilian society caused by the unawareness of the historical truth of its past and the serious human rights violations which occurred during the military regime, and b) the possible consequences of this, and
9) Gilson Langaro Dipp, Minister of the Superior Court of Justice, former National Ombudsman of Justice, expert proposed by the State. Rendered an expert report on the "Arguição de Descumprimento de Preceito Fundamental" under the Brazilian legal system.

[FN51] Cf. Case of Gomes Lund et al. ("Guerrilha do Araguaia"). Reconsideration, supra note 47, Considering clauses 18 to 22 and Operative Paragraph 2.

B. Assessment of documental evidence

54. In the present case, as in others, [FN52] the Court admits the evidentiary value of said documents submitted by the parties at the opportune procedural moment that were neither contradicted, objected to, nor their authenticity questioned.

[FN52] Cf. Case of Velásquez Rodríguez. Merits, supra note 25, para. 140; Case of Rosendo Cantú et al., supra note 45, para. 31, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 42.

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55. In relation to articles or academic texts, the Court has noted previously that are written works that contain declarations or affirmations by their authors for public dissemination. In this sense, the assessment of their content is not subject to the required formalities of testimonial evidence. Nevertheless, their evidentiary value depends on whether they corroborate or refer to issues related to the specific case. [FN53]

[FN53] Cf. Case of Radilla Pacheco, supra note 24, para. 72; Case of Fernández Ortega et al. v. México. Preliminary Objection, Merits, Reparations, and Costs. Judgment of 30 de agosto de 2010. Series C No. 215, para. 33, and Case of Rosendo Cantú et al., supra note 45, para. 34.

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56. In regard to the press releases, this Court has considered that they may be valued when they discuss facts of a public and notorious nature or declarations of State officials, or when they corroborate issues related to the case. [FN54] The Court decides to admit the documents that are complete or that at least allow the Court to identify their source and the date of publication, and assess them in consideration with all of the body of evidence, the observations of the State, and the rules of sound judgment.

[FN54] Cf. Case of Velásquez Rodríguez. Merits, supra note 25, para. 146; Case of Rosendo Cantú et al., supra note 45, para. 35, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 18, para. 43.

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57. Moreover, the Court adds those decisions and documents to the body of evidence, in application of Article 47(1) of the Rules of Procedure given that it considers them useful in resolving the case.

58. Subsequent to the response to the application, on May 6, 2010, the State reported to the Court that on April 29, 2010, the Federal Supreme Court ruled the inadmissibility of the Non-compliance Action of the Fundamental Principle No. 153 and confirmed, by seven to two votes, the domestic validity of the Amnesty Law. Brazil indicated that said decision constituted a new supervening fact in the terms of Article 46(3) of the applicable Rules of Procedure which

substantially alters the procedural instructions carried out to date, and requested that the votes of four Ministers of the Federal Supreme Court that accompanied the decision be submitted as evidence.

59. The Court considers that the decision of the Federal Supreme Tribunal of the State that affirms the constitutionality of the Amnesty Law is related to the facts of the present case. As a consequence, the Court admits, as supervening evidence of the facts, the documents provided by the State in the terms of Article 46(3) of the Rules of Procedure, and considers, where applicable, the information therein.

60. On its behalf, the Court admits, as an exception, the documents rendered by the parties at various procedural moments because it finds said documents to be relevant and useful for the determination of the facts and the eventual legal consequences, without precluding the considerations made below.

61. The Inter-American Commission presented with its final arguments, documents submitted by the expert Uprimny in relation to his expert report before the Tribunal. The State noted that there is no rule of procedure regarding the possibility of complementing an expert testimony rendered in the public hearing. Moreover, it argued that said documents do not refer to facts related to the proceedings nor to alleged force majeure, serious impediment, or supervening facts, and as such the documents offered are inadmissible and time-barred.

62. The Court recalls that the documents related to the expert report of the expert witness Uprimny were offered in response to a request by the Court during the public hearing, and as such, the Court will incorporate said documents into the body of evidence of the present case pursuant to Article 47 of the Rules of Procedure. The Court will take into consideration the observations of the State within the body of evidence, in application of the rules of sound judgment.

63. Brazil, in its final written arguments, offered the opinion of a person on the expert report of expert witness Uprimny in addition to press materials, which according to the State, contradicts the opinion of the expert witness. The representatives argued that the person that issued said response, aside from not being an expert witness summoned by the Court, rendered an opinion that was not offered in a timely manner as evidence, in the State's response, nor did it argue force majeure, serious impediment, or supervening facts for the presentation of said evidence. As a consequence, this entails evidence presented inopportunely and that is time-barred. In relation with the accompanying press material, they indicated that it is not directly related with the case and has not been cited in this opinion.

64. The Court observes that the presentation of said documents is not enshrined in the rules of procedure, and it was neither justified by one of the circumstances that, as exceptions, allow for the presentation of evidence that is time-barred, nor requested by the Court. Based on the aforementioned, the Court will not admit the documents that allegedly respond to the expert opinion of Mr. Uprimny.

65. The representatives submitted with their final written arguments proof of expenses related to the present case and "a compliment to the expert opinion" of Mr. Bicudo. In relation to this last document, the State considered its presentation to be time-barred and inadmissible.

66. The Court notes that the presentation of the "complimentary expert opinion" is not enshrined in the rules of procedure, was not justified by any of the circumstances that, as exceptions, allow for the presentation of time-barred evidence, nor was it requested by the Court. Based on the aforementioned, the Court will not admit the documents related to the mentioned complementary expert opinion. On the other hand, in regard to the proof of expenses submitted by the representatives, the Court will only consider those documents submitted with the final written arguments that are related to the costs and expenses incurred throughout the procedure before this Court, subsequent to the brief of pleadings and motions.

C. Admission of declarations of the alleged victims, of the testimonial and expert evidence

67. In regard to the statements of the alleged victims and the witnesses and expert opinions rendered at the public hearing and during the sworn statements, the Court deems them relevant only in what regards the purpose defined by the President of the Court in the Order requesting them, [FN55] and together with the other elements that form the body of evidence, taking into account the observations formulated by the parties. [FN56]

[FN55] Cf. Case of Gomes Lund et al. ("Guerrilha do Araguaia"). Summons to a Public Hearing, supra note 6. See also Case of Gomes Lund et al. ("Guerrilha do Araguaia"). Reconsideration, supra note 47, Considering clauses 4 to 11.

[FN56] Cf. Case of Loayza Tamayo v. Perú. Merits. Judgment of September 17, 1997. Series C No. 33, para. 43; Case of Rosendo Cantú et al., supra 45, para. 50, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 47.

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68. In regard to the declarations of the alleged victims, the State formulated clarifications or opinions on some matters raised in the depositions of Mrs. Victória Lavinia Grabois Olímpio and Diva Soares Santana.

69. Pursuant to the jurisprudence of the Court, the declarations rendered by the alleged victims cannot be assessed in isolation but rather together with the body of evidence in the process, given that they are useful in the sense that they can offer more information on the alleged violations and their consequences. [FN57] The Court notes that the observations of the State refer to certain aspects regarding the content of both statements, but that it does not contest the admissibility of them. Based on the aforementioned, the Court admits said statements, without failing to consider that the evidence be assessed under the mentioned criteria (supra para. 67) and under the rules of sound judgment.

[FN57] Cf. Case of the "White Van" (Paniagua-Morales et al.). Reparations and Costs, supra note 45, para. 70; Case of Rosendo Cantú et al. supra note 45, para. 52, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 48.

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70. Moreover, the Inter-American Commission, the representatives, and the State presented observations on some testimonial statements. The Commission and the representatives raised other aspects regarding the testimony of Mr. Antunes da Silva. In addition, the representatives added that "the witness exceeded the limits of the objective of his declaration per the Order of [the President,]" which was limited to the activities related to the project Memory Revealed, when he discussed the domestic regulations and the comparative experience. In its final arguments, the State responded to said observations, maintaining, inter alia, that the record, in the affidavit, of a small comparative analysis of the evidence of other countries is the product of the results obtained by the limited contact that the witness has maintained with the representatives and the practitioners of the various archive institutions in Latin America. Moreover, Brazil noted that "the reason for the commentary made regarding the 'reference to domestic legislation' was not entirely clear." It stated that if said observation refers to the access to information, it should be noted that one of the main reasons for the Project Memory Revealed is access to information, and as such the mention of domestic law is appropriate. On the other hand, the representatives made observations on the content of the testimony of Mr. Müller Neto, which the State responded to in its final arguments.

71. The Court noted that neither the Inter-American Commission nor the representatives contested the admissibility of the two mentioned witnesses, but rather they made the clarifications or opinions that they deemed appropriate in content. The Court will assess the content of said declarations as well as the observations indicated, where necessary, in the corresponding sections of this Judgment, in accordance with the appropriate criteria (supra. para. 67). On the other hand, the Court noted that the testimony of Mr. Antunes da Silva refers to the purpose indicated and that the concise comparative references on experiences in the region and the norms that regulate the access to information and activity of the Archive are not outside of the scope.

72. Lastly, the State and the representatives addressed specific expert opinions. Brazil made observations on the expert reports of experts Piovesan, Loreti, Bicudo, Endo, and Uprimny. In regard to the first two, the State offered information and its opinion on the content without contesting the admissibility. On the other hand, in regard to the expert report by expert Bicudo, Brazil indicated that only one part of the expert report "in paragraphs 13 to 38, is in line with its purpose" and that there are statements that are of the personal opinion of the expert. The State held that the expert exceeded the purpose of the expert report, and thus, requested that said statements not be considered. In regard to the expert report of Mr. Endo, Brazil recalled the purpose and noted that the expert should stay within the scope of it as well as avoid personal comments on historic facts when they are not related to the perceptions of the next of kin. Moreover, it stated that in some sections of the expert opinion it was not clear if the expert reflected the perceptions of the next of kin or his own personal opinion on the facts and historic events, highlighting the importance of said distinction. In addition, the State mentioned that it also was not clear if the expert carried out personal interviews with all the next of kin of the

disappeared of the Guerrilha do Araguaia, a measure considered necessary to establish the nature of the non-pecuniary damages, or if it was done with only some of the people affected. In addition, Brazil presented observations on specific measures recommended by the expert. Lastly, in regard to the expert statement of Mr. Uprimny, in its final arguments, the State questioned the content and methodology used as a basis for the expert report, providing the opinion of a person regarding the expert statement and a press release that disputed the affirmations of said expert (supra para. 63).

73. On its behalf, the representatives presented observations on the expert reports of the experts Martins and Chaves de Rezende Martins. Regarding the first, they stated that the expert went outside of the scope established from the purpose set by the President given that it refers expressly to other initiatives of the State such as the Amnesty Commission and the Special Commission on Political Deaths and Disappearances of Persons. Moreover, the expert made a substantive consideration of the work of the State, which was unnecessary for the purpose of the expert statement. Finally, the representatives made observations on the content of the expert report related to the Amnesty Law. In its final arguments, Brazil responded to said observations and, among other considerations, noted that the analysis of the Amnesty Law cannot be viewed distinctly now from the time when it was created, nor from the foundations in which it was based. On the other hand, regarding the expert opinion of expert Chaves de Rezende Martins, aside from making some general observations, the representatives noted that the report did not provide an analysis of the historic Brazilian experience, diverging it from the objective defined by the President (supra para. 52, numeral 34).

74. The Inter-American Court notes that the observations of the State and the representatives are based, in general terms, on: a) their disagreement with the content of the expert reports, contradicting or offering their opinion on them; b) the reach of that stated by the experts, indicating that some of these manifestations are not within the scope of the purpose of the expert statement; c) the expert presented personal opinions, and d) the methodology used to carry out the report.

75. This Court considers it appropriate to note that, unlike the witnesses who must avoid giving personal opinions, the expert witnesses offer technical or personal opinions, in as much as they relate to their special knowledge or experience. Moreover, the experts can refer both to specific points of the litis as well as to any relevant point of the litigation, when and if they limit the opinion to the purpose for which they were summoned and their conclusions are sufficiently well-founded. [FN58] In addition, regarding the observations on the content of the expert opinions, the Court understands that the admissibility is not contested, but rather that they question the probative value of the expert reports, which are to be considered in the applicable corresponding chapters of the present Judgment. On the other hand, in regard to the statements made that were outside of the scope of their expert opinion, the Court will consider the observations made by the parties and reiterates that it will only admit the statements that are within the established limits (supra paras. 52 and 53).

[FN58] Cf. Case of Reverón Trujillo, supra note 39, para. 42; Case of Fernández Ortega et al., supra note 53, para. 61, and Case of Rosendo Cantú et al. supra note 45, para. 68.

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76. In particular, regarding the observations on the methodology of Mr. Endo's expert report, without failing to consider that expressed by the State, the Court notes that said expert report provides an explanation on the procedure used. The expert noted that the structure of the expert opinion consists of three distinct parts, while the first two refer to the analysis of the harm on specific family members, whom are identified in the report, the third part emphasized the psychological harm of a repetitive nature affecting more than one family member, seeking to identify the repetitive nature of the harm. In order to elaborate a part of the expert report, he in-person interviewed specific family members, and in other circumstances there were no encounters between the expert and the next of kin, but rather, all of the analysis was carried out via their affidavits. The Court does not consider that the objections to the method used by the expert, which is sufficiently explained in the report, affect its admissibility. In effect, the fact that the expert combined the in-person interviews of four family members with the analysis of the declarations rendered before a public notary of twenty family members, does not discredit the validity of his report, given that the purpose of the expert opinion defined in the Order of the President (supra para. 52, numeral 32) did not establish a specific method or the obligation to individualize the analysis. Lastly, the Court takes into account the considerations raised by the State regarding the methodology used by the expert Uprimny in some of the statements of his report. Notwithstanding the aforementioned, the Court does not admit the documents that the State incorporated in its final written arguments (supra para. 64). Based on the foregoing, the Court admits the indicated expert opinions, in as much as they are within the scope of that which was ordered and will assess them together with the rest of the body of evidence, taking into account the observations of the parties, in conformity with the rules of sound judgment.

VI. PRELIMINARY CONSIDERATIONS ON THE NEXT OF KIN INDICATED AS ALLEGED VICTIMS

77. The Commission and the representatives indicated as alleged victims, the specific next of kin of those allegedly disappeared persons and of Mrs. Maria Lúcia Petit da Silva. Nevertheless, there are differing situations related to the identification of the next of kin as alleged victims in the present case, namely: a) 133 (one hundred and thirty three) persons were indicated as alleged victims in the report on the merits and in the application of the Commission; b) 107 (one hundred and seven) persons were included as alleged victims for the first time in the application, and c) 40 (forty) persons were mentioned for the first time in such condition in a list attached to the brief of pleadings and motions.

78. Brazil affirmed to be in agreement with the Court's criteria regarding the determination of the alleged victims in a case before the Court. It recalled that the alleged victims should be noted in the application and in the report of the Commission, pursuant to Article 50 of the Convention. It affirmed that it corresponds to the Commission and not the Court, to identify the alleged victims in a case before the Court in the opportune procedural moment.

79. In regard to the next of kin, the Court recalls that in its constant jurisprudence of recent years, it has established that the alleged victims should be indicated in the Report of the Commission issued pursuant to Article 50 of the Convention and in the application before the

Court. Moreover, pursuant to Article 34(1) of the Rules of Procedure, it corresponds to the Commission and not to this Court, to identify with specificity and in the due procedural opportunity, the alleged victims in the case before the Court. [FN59]

[FN59] Cf. Case of the Ituango Massacre v. Colombia. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006. Series C No. 148, para. 98; Case of Chitay Nech et al., supra note 25, para. 44, and Case of Rosendo Cantú et al., supra note 45, para. 140.

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80. As a consequence, the Court deems it convenient to clarify that the next of kin that will be considered as alleged victims in the present case are those that were indicated as such by the Inter-American Commission in the report on the merits mentioned by Article 50 of the American Convention and by the application brief. [FN60]

[FN60] Case file of annexes to the application, appendix 3, tome VII, folios 3553 to 3558 and case file on the merits, tome I, folios 37 to 42.

VII. RIGHT TO RECOGNITION OF JURIDICAL PERSONALITY, TO LIFE, TO PERSONAL INTEGRITY AND TO LIBERTY IN RELATION TO THE OBLIGATION TO RESPECT AND TO ENSURE RIGHTS

81. So as to examine the alleged international responsibility of Brazil for the violation of the rights to juridical personality, [FN61] to life, [FN62] to personal integrity, [FN63] and to personal liberty, [FN64] in relation to the obligation to respect rights, [FN65] the Court will summarize the arguments made by the parties, establish the facts it considers proven, and make the appropriate considerations. In the present case, the facts have been established, fundamentally, on official documents such as Law No. 9.140/95, the reports of the Special Commission on Political Deaths and Disappearances of Persons, the Ministry of Defense on the Guerrilha do Araguaia, and the Interministerial Commission created to investigate the circumstances of the disappearances which occurred in the context of the Guerrilla.

[FN61] Article 3 of the American Convention establishes that "[e]very person has the right to recognition as a person before the law."
[FN62] Article 4(1) of the American Convention establishes that "[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."
[FN63] Article 5(1) of the American Convention establishes that "[e]very person has the right to have his physical, mental, and moral integrity respected."
[FN64] Article 7(1) of the American Convention establishes that "[e]very person has the right to personal liberty and security."
[FN65] Article 1(1) of the American Convention establishes that "[t]he 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."

A. Arguments of the parties

82. The Inter-American Commission indicated that the practice of enforced disappearance is a crime against humanity, and that the present case "covers the particular historical significance of the facts that occurred in a context of systematic practices of arbitrary detentions, torture, executions, and enforced disappearances perpetrated by the security forces of the military government, where the state agents […] used the official investiture and resources offered by the State to [carry out] the disappearances of the members of the Guerrilha do Araguaia." Except in a few initial cases of arrest and torture, all the detained members of the Guerrilla were disappeared. The perpetrators hid all the evidence of their crimes and escaped all punishment; "attempting to create 'a legal limbo' implemented via the State's refusal to recognize that the victims were under its custody, or providing contradictory information regarding the whereabouts, intentionally impairing the victims from exercising their rights, and keeping the next of kin in an information gap regarding their whereabouts or situation." Although the Inter-American Commission valued the acknowledgement of responsibility for the enforced disappearances carried out at a domestic level and the payment of certain compensations, it highlighted that the next of kin of the disappeared persons remain without minimum information regarding the events and the whereabouts of their loved ones, with almost forty years having passed since the events took place. Based on the foregoing, it requested the Court to establish that the State violated the right to juridical personality, life, and personal integrity and liberty of the disappeared persons, enshrined in Articles 3, 4, 5, and 7 of the American Convention, respectively, in relation to the general obligation to respect rights, enshrined in Article 1(1) of the same instrument.

83. The representatives noted that the extermination of the Guerrilla was part of a pattern of repression, persecution, and systematic and generalized elimination of the political opposition to the Brazilian dictatorship, and marked one of its bloodiest periods. Pursuant to the information available, a large number of alleged victims were under State custody at some point prior to their disappearance. The prolonged isolation and solitary confinement the alleged victims underwent constituted cruel and inhumane treatment. The modus operandi of the State agents in the detentions throughout the region, as well as in other enforced disappearances or arrests of the political opposition in Brazil, allows for the inference that the alleged victims were tortured during the period in which they were under State custody. The circumstances of the disappearance have not be ascertained, the bodily remains have not been located, identified, and delivered to their next of kin, and those responsible have not been investigated, prosecuted, or punished. As a consequence, they asked the Court to declare the aggravated responsibility of the State and apply the legal consequences which ensue, for the violation to the right to juridical personality, to life, to personal integrity, and to personal liberty, enshrined respectively in Articles 3, 4, 5, and 7 of the American Convention, in relation with Article 1(1) of the same treaty.

84. In the public hearing, the State noted that "this is a historic moment, in which the Brazilian State reaffirms its responsibility for the violations of human rights which took place during the tragic episode known as the Guerrilha do Araguaia. This is also another opportunity to honor the deceased and the victims." On the other hand, the State referred to various measures adopted, among many others, the Law No. 9.140/95 and the publication of the Report Derecho a la Memoria y a la Verdad [Right to Memory and the Truth]. Moreover, it did not present specific allegations regarding the facts of the enforced disappearances, which allegedly occurred in the present case. Nevertheless, it objected to the application of the "doctrine of crimes against humanity" in the case given the principles of legality and applicability of a prior criminal law. It indicated, inter alia, that for international custom to establish the criminal elements, "it would be necessary for it to be duly consolidated at the time of the facts," (1972-1974)," and the "universalization of the codification of crimes against humanity in the international forum occurred only in the […] Rome Statute [of the international Criminal Court], in 1998."

B. Facts regarding the enforced disappearances

1. Historical Context

85. In April 1964, a military coup overthrew the government of President João Goulart. The consolidation of the military regime was based on the Doctrine of National Security and the issuance of successive "national security laws," [FN66] and regulations during a state emergency, such as the institutional acts, "that served as the legal framework giving legal support to the increasing repression." [FN67] This period was characterized by "the installation of a repressive apparatus that took on characteristics of a truly powerful nature parallel to that of the State," [FN68] reaching its "peak" with the decree of Institutional Act No. 5, in December 1968. [FN69] Among other repressive manifestations in that period, the National Congress was closed, the press was "completely censured," individual and political rights, freedom of expression, freedom of association, and the guarantee of habeaus corpus were suspended. [FN70] Likewise, the scope of the military justice system was extended, and a National Security Law introduced, among other measures, life imprisonment and the death penalty. [FN71]

[FN66] Among others, the Decree-Law No. 314 of 1967, No. 510 and 898 of 1969.
[FN67] Special Commission on Politically Motivated Deaths and Disappearances of Persons, Derecho a la Memoria y a la Verdad [Right to Memory and Truth] Special Secretariat of Human Rights of the Presidency of the Republic, Brasilia, 2007. (file of annexes to the answer to the application, tome I, annex 7, folio 5584).
[FN68] Right to Memory and Truth, supra note 67, folio 5587.
[FN69] Cf. Right to Memory and Truth, supra note 67, folios 5586 and 5591, and Institutional Act No. 5 of December 13, 1968.
[FN70] Cf. Right to Memory and Truth, supra note 67, folios 5587 and 5591.
[FN71] Right to Memory and Truth, supra note 67, folios 5587 and 5591, and Decree Law No. 898 of September 29, 1969.

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86. Between 1969 and 1974, there was a "sudden and devastating attack on the armed opposition groups." [FN72] The mandate of President Médici (1969-1974) represented "the most extreme phase of the repression in the 21 years of the military regime" in Brazil. [FN73] Subsequently, "during the first three years of the [government of President] Geisel [1974-1979], the disappearance of political prisoners, which had initially been only a fraction of the deaths that occurred, became the predominant norm so as not to leave as evident the contradiction between the speech of aperture and the systematic repetition of the regular official news reports wherein assaults, escape attempts, and false suicides were simulated." [FN74] Therefore, as of 1974 "there were no more deaths in the prisons[,] all of the political detainees whom died 'disappeared' [and] the regime went on not to assume the murders of their opponents." [FN75]

[FN72] Right to Memory and Truth, supra note 67, folio 5592.
[FN73] Right to Memory and Truth, supra note 67, folio 5591.
[FN74] Right to Memory and Truth, supra note 67, folio 5592.
[FN75] Right to Memory and Truth, supra note 67, folio 5614.

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87. According to the Special Commission, close to 50 thousand persons were detained in the first few months of the dictatorship; around 20 thousand prisoners were subject to torture; there are 354 dead and disappeared persons of the political opposition; 130 expelled from the country; 4,862 persons whose mandates and political rights were ceased, and hundreds of peasants were murdered. [FN76] The Special Commission noted that "Brazil is the only country [in the region] that did not use [criminal] procedures to examine the [h]uman [r]ights violations which took place during the dictatorship period [despite having] made official, by means of Law No. 9.140/95, the recognition of responsibility by the State for the complaints of deaths and disappearances by the victims." [FN77] The abovementioned is due to the fact that in 1979 the State issued an Amnesty Law (infra paras. 134 and 135).

[FN76] Cf. Special Commission on Politically Motivated Deaths and Disappearances of Persons. Accomplished rol and pending work [Papel cumplido y trabajo por hacer], 2006. Summary of the book Report [Extracto del Libro Informe](case file of annexes to the application, appendix 3, tome V, annex 2, folio 2762); Right to Memory and Truth, supra note 67, folio 5595.
[FN77] Right to Memory and Truth, supra note 67, folio 5586.

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2. Guerrilha do Araguaia

88. The resistance movement of the new Communist Party of Brazil against the military regime was denominated, Guerrilha do Araguaia. Said movement's objective was "to fight against the regime via the creation of a popular liberation army." [FN78] In the beginning of 1972, just prior to the first expedition of the Army to the Araguaia region, [FN79] the Guerrilla was comprised of approximately 70 persons, most of them were in their youth. [FN80]

[FN78] Right to Memory and Truth, supra note 67, folio 5759.
[FN79] The region where the events took place was located at the borders of the states of Maranhão, Pará and the actual Tocantins, where the river Aragauia passes through.
[FN80] Cf. Right to Memory and Truth, supra note 67, folios 5758 and 5759.
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89. Between April 1972 and January 1975, a contingent of approximately three thousand and ten thousand men of the Army, Marines, Air force, Federal Police, and Military Police carried out repeated information gathering and repression campaigns against the members of the Guerrilha do Araguaia. [FN81] In the first campaigns, the detained members of the Guerrilla were not deprived of their life nor disappeared. [FN82] The members of the Army received the order to detain prisoners and "bury the dead enemies in the jungle, after their identification;" as such, they were "photographed and identified by information officers and then buried in various places in the jungle." [FN83] Nevertheless, following a "broad and thorough intelligence operation, planned in preparation for the third and final counter-attack," there was a change in strategy among the armed forces. In 1973, the "Executive branch of the Republic, headed by General Medici, directly assumed control of the repressive operations [and] the official order became the extermination of the prisoners." [FN84]

[FN81] Cf. Right to Memory and Truth, supra note 67, folios 5758 and 5760 to 5761. See also, Ministry of Defense, Information on the Guerrilha do Araguaia, Brief of the Union in the proceeding of the Ordinary Action (case file on the merits, tome VII, 3314 and 3315, 3342 to 3379).
[FN82] Cf. Right to Memory and Truth, supra note 67, folio 5759; Information on the Guerrilha do Araguaia, supra note 81, folios 3332, 3333 and 3336 to 3339. Likewise, cf. statement of Mr. Danilo Carneiro rendered before a public notary (case file on the merits, tome V, folio 2173), and testimonies of Messers. José Genoíno Neto, Danilo Carneiro, Glenio Fernandes de Sá and Dower Moraes Cavalcante in the framework of the Ordinary Action (case file of annexes to the application, tome I, annex 9, folios 50, 56, 58 and 60).
[FN83] Right to Memory and Truth, supra note 67, folio 5762
[FN84] Right to Memory and Truth, supra note 67, folios 5759 and 5761.
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90. Towards the end of 1974, there were no longer any members of the Guerrilla in Araguaia, and there is information that the bodies of the activists were exhumed and incinerated or thrown in the rivers of the region. [FN85] On the other hand, "[t]he military government imposed absolute silence regarding the events which occurred in Araguaia" and it "[p]rohibited the press from releasing news on the matter, and in the meantime [the] Army denied the existence of the movement." [FN86]

[FN85] Cf. Right to Memory and Truth, supra note 67, folio 5762. See also, Tocantins Working Group, Report on the 4th Field Work Expedition (3rd phase), annex R (brief of annexes to the answer to the application, tome I, folio 8104), and Information on the Guerrilha do Araguaia, supra note 81, folios 3445 to 3452.

[FN86] Right to Memory and Truth, supra note 67, folio 5762.

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3. Law No. 9.140/95 and Special Commission on the Political Deaths and Disappearances of Persons

91. On December 4, 1995, Law No. 9.140/95 was promulgated, wherein the State of Brazil recognized its responsibility for the "murders of the political opposition" in the period between September 2, 1961 and August 15, 1979. [FN87] This Law "automatically recognized 136 cases of disappeared persons contained in a '[d]ossier' organized by next of kin and human rights defenders after […] years of searches." [FN88] Of them, 60 are alleged disappeared victims in the present case, that together with Maria Lucia Petit da Silva, person deprived of life in the military operations against the Guerrilla, are identified in Annex 1 of the Law. [FN89]

[FN87] Cf. Law No. 9.140/95 of December 4, 1995 (brief of annexes to the answer to the application, tome I, annex 1, folio 5567), and Right to Memory and Truth, supra note 67, folio 5582.
[FN88] Right to Memory and Truth, supra note 67, folios 5582 and 6058 to 6061. The 136 disappeared persons included in Law No. 9.140/95 are identified in its Annex I.
[FN89] Cf. Law No. 9.140/95, Annex I, supra note 87, folios 5 to 15.

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92. Moreover, the Law created the Special Commission on Politically Motivated Deaths and Disappearances of Persons, which is responsible, among its other functions, "in carrying out the recognition of the disappeared persons not included in Annex 1 of [said] law." [FN90] In this way, the requests for recognition of disappeared persons not included in Annex 1 of the law should be filed by the next of kin with the Special Commission and should be presented with information and documents that can prove said allegation of the disappearance of their family member. [FN91]

[FN90] Law No. 9.140/95, Article 4(I)(a), supra note 87, folio 5567.
[FN91] Cf. Law No. 9.140/95, Article 7, supra note 87, folio 5567.

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93. Law No. 9.140/95 also determined the possibility to grant a pecuniary remedy to the next of kin of the deceased and politically disappeared, conceded in jurisdiction of the Special Commission. [FN92] As of issuance of this Judgment, the State informed that it has compensated the next of kin of 58 disappeared persons of the Guerrilha do Araguaia indicated as alleged victims in the present case, for a total of R$ 6,531,345.00 (equivalent to six million, five hundred and thirty one thousand, three hundred and forty five reales, equivalent to US$ 3,772,000.00 (three million, seven hundred and seventy-two thousand dollars of the United States of America). [FN93]

[FN92] Cf. Law No. 9.140/95, Articles 10 to 12, supra note 87, folio 5568.
[FN93] Messers. Helio Luiz Navarro de Magalhães and Pedro Alexandrino de Oliveira Filho were recognized as victims of enforced disappearance by the Law No. 9.140/95, but their next of kin, in their request to the Special Commisison, did not request compensation. On the other hand, the next of kin of Messers. Francisco Manoel Chaves and Pedro Matías de Oliveira (Pedro Carretel) did not submit requests to the Special Commission. Cf. Compensation paid to next of kin of deceased and politically disappeared persons of the Guerrilha do Araguaia [Indemnizaciones pagadas a familiares de muertos o desaparecidos políticos de la Guerrilha do Araguaia] (annexes of the final written arguments of the State, tome I, annex 19, folios 9110 to 9115).

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4. Search and identification of the bodily remains

94. Between 1980 and 2006 thirteen expeditions were made to the region of Araguaia by the next of kin of the victims, the Special Commission, the Interministerial Commission, and the Public Prosecutor's Office, among others.

i. Searches carried out by the next of kin

95. In October 1980, April 1991, and January 1993, the next of kin of the alleged victims carried out campaigns in search of information and the bodily remains of their next kin, wherein they gathered the testimony of the inhabitants of the region and found evidence of the bodies buried in clandestine cemeteries. [FN94] In April 1991, with the support of the Justice and Peace Commission of the Archdiocese of São Paulo, the next of kin carried out excavations of the Xambioá cemetery, where they found three bodily remains of which two were exhumed, "a woman, wrapped in a parachute, and a man of elderly age." [FN95] Of these bodies found in 1991, the bodily remains of Maria Lucia Petit da Silva and Bérgson Gurjão Farias were identified in 1996 [FN96] and 2009 [FN97], respectively. On the other hand, a family member of Mr. Lourival Moura Paulino reported that his body was identified in the cemetery of Marabá in 2008.

[FN94] Cf. Right to Memory and Truth, supra note 67, folio 5763; statement rendered by Mrs. Schmidt de Almeida during the public hearing held on May 20, 2010, and Report on the trips to the site where the Guerrilha do Araguaia occured and history of the bodily remains found [Informe de viajes al sitio donde ocurrió la Guerrilha do Araguaia y histórico de los restos mortales encontrados] (brief of annexes to the answer to the application, tome III, annex 20, folios 6381 a 6386).
[FN95] Cf. Right to Memory and Truth, supra note 67, folio 5763, and statement rendered by Mrs. Schmidt de Almeida, supra note 94. The bodily remains of the third person were exhumed in 1996, during the search carried out by the Special Commission, supra note 94.
[FN96] Cf. Right to Memory and Truth, supra note 67, folio 5763, and statement rendered by Mrs. Schmidt de Almeida, supra note 94. Regarding the identification of Mrs. Maria Lúcia Petit da Silva, Cf. The statement rendered by Mrs. Laura Petit da Silva during the public hearing held on May 20, 2010.

[FN97] The bodily remains of Bérgson Gurjão Farias were identified on July 7, 2009 after the most advanced DNA analysis was carried out. Cf. Trip Report, supra note 94, folio 6385.

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ii. Searches carried out by the Special Commission

96. The Special Commission [FN98] carried out its first mission in May 1996, with the support of the Argentine Forensic Anthropology Team, [FN99] wherein no excavations were done. [FN100] Then, in June and July of 1996, the Special Commission and the Argentine Forensic Anthropology Team carried out a second mission, wherein they found three bodily remains, but only one was compatible with the search criteria. [FN101] Finally, in March 2004, another mission was carried out, wherein nothing resulted. [FN102]

[FN98] The Special Commission also has jurisdiction to "carry out efforts regarding the search of the bodies of the disappeared persons when there was evidence of where they were located." Cf. Law No. 9.140/95, Article 4(II), supra note 87, folio 5567.

[FN99] Cf. Trip Report, supra note 94, folios 6381 to 6388; Technical Report of the first visit by the Argentine Forensic Anthropological Team carried out in the Araguaia region on May 8 to 11, 1996 (case file of annexes to the application, appendix 3, tome III, folios 2439 to 2449), and Right to Memory and Truth, supra note 67, folios 5607 and 5763.

[FN100] Cf. Trip Report, supra note 94, folio 6382.

[FN101] Cf. Right to Memory and Truth, supra note 67, folio 5763; Trip Report, supra note 94, folio 6385, and statement rendered by Mrs. Schmidt de Almeida, supra note 94. Also cf. Technical report of the second mission of the Argentine Forensic Anthropological Team of July 25, 1996 (case file of annexes to the application, appendix 3, tome III, folios 2450 to 2458).

[FN102] Cf. Trip Report, supra note 94, folio 6383. Similarly, cf. Report of the Argentine Forensic Anthropological Team regarding the mission of March 4 to 13, 2004, (case file of annexes to the application, appendix 3, tome III, annex 43, folios 1435 a 1446).

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iii. Searches carried out by other organs of the State

97. In July 2001, the Federal Public Prosecutor's Office carried out a mission in the Araguaia region, also with the support of the Argentine Forensic Anthropology Team. [FN103] Subsequently, in October of 2001, with the support of the Human Rights Commission of the Chamber of Members of Parliament, the mission of the Federal Public Prosecutor's Office found eight bodily remains, those of which have yet to be identified. [FN104] The Public Prosecutor's Office made another trip to the region, in December 2001, without specific results. [FN105]

[FN103] This mission was a result of the preliminary investigations No. MPF/SP 103/2001, MPF/PA 011/2001 and MPF/DF OS/2001. See Trip Report, supra note 94, folios 6382 and 6383. The bodily remains found were sent to Brasilia but they were not identified. In its report of August 2, 2001, the Argentine Forensic Anthropological Team reiterated its recommendations regarding the human and logistical resources necessary for future searches and emphasized the

importance of field work and of finding experts in the region. In this regard, cf. Report of the Argentine Forensic Anthropological Team of August 21, 2001 (case file of annexes to the application, appendix 3, tome III, annex 42, folios 1429 a 1434).
[FN104] Cf. Trip Report, supra note 94, folio 6386 and final written arguments of the State (case file on the merits, tome IX, folios 4931 to 4933).
[FN105] Cf. Trip Report, supra note 94, folios 6382 and 6383.

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iv. Searches carried out by the Interministerial Commission

98. On October 2, 2003, the State created an Interministerial Commission, via Decree No. 4.850, to investigate the circumstances of the disappearances that occurred in the context of the Guerrilha do Araguaia, with the purpose of obtaining information that would allow for the localization of the bodily remains of its members, their identification, transport, and burial, as well as the issuance of the respective death certificates. [FN106] The Interministerial Commission requested the collaboration of the Armed Forces in order to establish "who had [been deprived of life], where they had been buried, and how this had occurred." [FN107] Nevertheless, the Armed Forces argued that "they did not have at their disposal any documentation related to that which had occurred in the Araguaia region between 1972 and 1974" and they affirmed, "that all the documents related to the repression carried out by the military regime against the [Guerrilha do Araguaia] were destroyed in various periods based on the legislation in force." [FN108] The work of the Interministerial Commission ended in March 2007, after carrying out three expeditions to the Araguaia region without finding any bodily remains. [FN109] These expeditions occurred twice in August 2004, and they counted on the participation of experts from the Federal Police and the support of the Armed Forces, and in another occasion in December 2006, [FN110] with the support of experts from the Federal Police. [FN111] In its final Report issued on March 8, 2007, [FN112] the Interministerial Commission, inter alia, recommended: a) the "declassification all grade types of confidential documents related to [the episode of the Guerrilha do Araguaia]"; b) the "revision of the legislation related to the issue of access and confidential information and public documents;" c) new procedures in the search for bodily remains in the region of Araguaia to be conducted by the Special Commission; d) the creation of an administrative authority that is permanently open by the Ministry of Defense to receive testimonies and documents on the location of the bodily remains of the disappeared persons, and e) that "the Armed Forces proceed […] to [a] formal 'rigorous investigation' for the construction of a specific and detailed table of operations carried out [against the G]uerilla, calling on and formally listening to the agents that are still alive to date."

[FN106] Cf. Report of the Interministerial Commission created by Decree No. 4850 of October 2, 2003 (brief of annexes to the answer to the application, tome I, annex 1, folios 5529 to 5531). The Interministerial Commission was formed by representatives of the Ministry of Justice, of the Civil House, of the Ministry of Defense, of the Special Secretariat for Human Rights, and of the Office of the Attorney General of the Union.
[FN107] Report of the Interministerial Commission, supra note 106, folio 5531.
[FN108] Report of the Interministerial Commission, supra note 106, folio 5531.

[FN109] Cf. Report of the Interministerial Commission, supra note 106, folios 5527 to 5537.
[FN110] Cf. Trip Report, supra note 94, folios 6382 and 6383.
[FN111] Cf. Trip Report, supra note 94, folios 6384 and 6385.
[FN112] Cf. Report of the Interministerial Commission, supra note 106, folios 5535 to 5537.

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v. Genetic Bank and Tocantins Working Group

99. As of September 2006, the State began the creation of a DNA Bank, in attempts to collect samples of blood of all of the next of kin of the disappeared so as to create a genetic profile of each of the disappeared persons. [FN113] In total, "142 samples of blood of the [next of kin] have been collected of 108 politically disappeared persons." [FN114]

[FN113] Cf. Right to Memory and Truth, supra note 67, folios 5611 and 5612, and Report of the Interministerial Commission, supra note 106, folio 5534.
[FN114] Final written arguments of the State, supra note 104, folio 4933.

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100. In 2009, via Order No. 567 of the Ministry of Defense, the State created the Tocantins Working Group in order to coordinate and carry out the necessary steps to locate, recognize, and identify the bodies of the members of the Guerrilla and the soldiers who died during the Guerrilha do Araguaia, in compliance with the Judgment of the Ordinary Action (infra para. 192). [FN115] This group has executed 23 expeditions to recognize and excavate in the Araguaia region. [FN116] Said group is supervised by the Interinstitutional Committee, [FN117] and, in April of 2010, the activities of said Group were postponed for a year. [FN118] To date, the Court has not been informed if any other bodily remains have been found. [FN119]

[FN115] Cf. Order No. 567 of the Ministry of Defense of April 29, 2009 (brief of annexes to the answer to the application, tome III, folio 6390).
[FN116] Cf. General Report of field work activities of 209 of the Tocantins Working Group (case file of annexes to the final written arguments of the State, tome II, annex 36, folios 9488 and 9494).
[FN117] Cf. Decree of the Ministry of Defense of July 17, 2009 (case file of annexes to the answer to the application, tome IV, annex 29, folios 6703 to 6772), and final written arguments of the State, supra note 104, folio 4951.
[FN118] Cf. Order No. 713 of the Ministry of Defense of April 30, 2010 (case file of annexes to the final written arguments of the State, tome II, annex 21, folio 9123).
[FN119] Cf. General Report of field work activities of 2009 of the Tocantins Working Group, supra note 116, folios 9465 to 9572.

C. Enforced disappearance as a multiple and continued violation of human rights and the obligation to respect and guarantee rights

101. This Court considers it appropriate to reiterate the legal foundations that support an integral perspective regarding enforced disappearance given the plurality of conducts that, united for a single purpose, harm in a permanent manner, while they persist, legal interests protected by the Convention. [FN120]

[FN120] Cf. Case of Radilla Pacheco v. México, supra note 24, para. 138, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 57.

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102. The Court notes that attention from the international community to the enforced disappearances phenomenon is not recent. The Working Group on Enforced and Involuntary Disappearances of Persons of the United Nations developed, from its conception in the decade of the 80s, an operative definition of the phenomenon, highlighting in the definition the unlawful detention by agents or governmental agencies or organized groups of private individuals acting in the name of the State or counting on its support, authorization, or consent. [FN121] The conceptual elements established by said Working Group, were retaken subsequently, in the various international instruments (infra para. 104).

[FN121] Cf. Case of Chitay Nech et al., supra note 25, para. 82, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 58. Cf. Moreover, Report of the Working Group on Enforced or Involuntary Disappearances, Commission on Human Rights, 37th period of sessions, U.N. Doc. E/CN.4/1435, of January 22, 1981, para. 4, and Report of the Working Group on Enforced and Involuntary Disappearances, Commission on Human Rights, 39th period of sessions, U.N. Doc. E/CN.4/1983/14, of January 21, 1983, paras. 130 to 132.

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103. On the other hand, in international law, the jurisprudence of the Court has been a precursor to the consolidation of a comprehensive perspective of the seriousness and the continued or permanent nature of the concept of enforced disappearance of persons, wherein the act of disappearance and its execution commence with the deprivation of liberty of the person, followed by the lack of information regarding the whereabouts, and continues until the whereabouts of the disappeared person are found and the true identity is revealed with certainty. In conformity with the abovementioned, the Court has reiterated that enforced disappearance constitutes a multi-offensive violation to various rights protected by the American Convention that places the victims in a state of complete defenselessness, giving rise to other related infringements, becoming particularly serious when carried out as part of a systematic pattern or practice or tolerated by the State. [FN122]

[FN122] Cf. Case of Anzualdo Castro v. Perú. Preliminary Objection, Merits, Reparations, and Costs. Judgment of September 22, 2009. Series C No. 202, para. 59; Case of Radilla Pacheco v. México, supra note 24, para. 139, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 59.

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104. The multi-offensive characterization, in regard to the affected rights and continuous or permanent nature of the enforced disappearance, has been clearly expressed in a constant manner by the jurisprudence of this Court since its first contentious case, more than twenty years ago, [FN123] even before the definition contained in the Inter-American Convention on the Forced Disappearance of Persons. [FN124] This characterization is consistent with other definitions in different international instruments [FN125] that indicate concurrent and constitutive elements of enforced disappearance: a) the deprivation of liberty; b) the direct intervention of State agents or their acquiescence, and c) the refusal to acknowledge the detention and to reveal the situation or the whereabouts of the interested person. [FN126] In previous occasions, this Court has noted that, in addition, the jurisprudence of the European Court of Human Rights, [FN127] the decisions of various instances of the United Nations organs [FN128], as well as the various Constitutional Courts and other high tribunals of the American States, [FN129] coincide with the indicated characterization. [FN130]

[FN123] Cf. Case of Velásquez Rodríguez. Merits, supra note 25, para. 155; Case of Chitay Nech et al., supra note 25, paras. 81 and 87, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 60.

[FN124] Said Convention establishes that "enforced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees."

[FN125] Cf. Article 2 of the International Convention for the Protection of All Persons against Enforced Disappearance, U.N. Doc. A/RES/61/177, of December 20, 2006; Article 7, numeral 2, subsection i) of the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, of July 17, 1998, and Working Group on Enforced or Involuntary Disappearance of Persons, General Comment to Article 4 of the Declaration on the Protection of All Persons against Enforced Disappearances of January 15, 1996. Report to the Commission on Human Rights. U.N. Doc. E/CN. 4/1996/38, para. 55.

[FN126] Cf. Case of Gómez Palomino v. Perú. Merits, Reparations, and Costs. Judgment of 22 de noviembre de 2005. Series C No. 136, para. 97; Case of Chitay Nech et al., supra note 25, para. 85, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 60.

[FN127] Cf. E.C.H.R, Case of Kurt v. Turkey, Application No. 15/1997/799/1002, Judgment of 25 May 1998, paras. 124 to 128; E.C.H.R, Case of Çakici v. Turkey, Application No. 23657/94, Judgment of 8 July 1999, paras. 104 to 106; E.C.H.R, Case of Timurtas v. Turkey, Application No. 23531/94, Judgment of 13 June 2000, paras. 102 a 105; E.C.H.R, Case of Tas v. Turkey, Application No. 24396/94, Judgment of 14 November 2000, paras. 84 to 87, and Case of Cyprus v. Turkey, Application No. 25781/94, Judgment of 10 May 2001, paras. 132 to 134 and 147 to 148.

[FN128] Cf. H.R.C. Case of Ivan Somers v. Hungría, Communication No. 566/1993, Report of July 10, 1996, para. 6.3; Case of E. and A.K. v. Hungría, Communication No. 520/1992, Report of May 5, 1994, para. 6.4, and Case of Solórzano v. Venezuela, Communication No. 156/1983, Report of March 26, 1986, para. 5.6.

[FN129] Cf. Supreme Court of Justice of the Bolivarian Republic of Venezuela, Case of Marco Antonio Monasterios Pérez, Judgment of August 10, 2007, (declaring the pluri-ofensive and permanent nature of the crime of enforced disappearance); Supreme Court of Justice of the Nation of Mexico, Thesis: P./J. 87/2004, "Enforced disappearance of persons. The period of the statute of limitation initiates [when] the victim appears or fate is known" (affirming that the enforced disappearances are permanent crimes and that the statute of limitation should be calculated as of the date of the perpetration of the act has ceased); Criminal Chamber of the Supreme Court of Chile, Case of Caravana, Judgment of July 20, 1999; Plenary of the Supreme Court of Chile, Case of removal of immunity of Pinochet (Caso de desafuero de Pinochet), Judgment of August 8, 2000; Court of Appeals of Santiago de Chile, Case of Sandoval, Judgment of January 4, 2004 (all declaring that the crime of enforced disappearance is continous, against humanity, non expiring and not subject to amnesty); Federal Chambers of Appeals of Criminal and Correctional Matters of Argentia, Case of Videla et al., Judgment of September 9, 1999 (declaring that the enforced disappearances are continous crimes against humanity); Constitutional Court of Bolivia, Case of José Carlos Trujillo, Judgment of November 12, 2001; Constitutional Court of Peru, Case of Castillo Páez, Judgment of March 18, 2004 (declaring, for purposes of that ordered by the Inter-American Court in the same case, that enforced disappearances is a permanent crime until the wherabouts of the victim are known), and the Supreme Court of Justice of Uruguay, Case of Juan Carlos Blanco and Case of Gavasso et al., Judgments of October 18 and 17, 2002, respectively.
[FN130] Cf. Case of Goiburú et al. v. Paraguay. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153, para. 83; Case of Chitay Nech et al., supra note 25, para. 85, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 60.
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105. The Court has verified the consolidation, at the international level, of the analysis of this crime, which constitutes a serious human rights violation given the particular relevance of the violations it encompasses and the nature of the injured right. [FN131] The practice of enforced disappearance implies a gross abandonment of the essential principles upon which the Inter-American System of Human Rights is founded [FN132] and its prohibition is of jus cogens nature. [FN133]

[FN131] Cf. Case of Goiburú et al., supra note 130, para. 84; Case of Chitay Nech et al., supra note 25, para. 86, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 61.
[FN132] Cf. Case of Velásquez Rodríguez. Merits, supra note 25, para. 158; Case of Chitay Nech et al., supra note 25, para. 86, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 61.
[FN133] Cf. Case of Goiburú et al., supra note 130, para. 84; Case of Chitay Nech et al., supra note 25, para. 86, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 61.
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106. The State's obligation to prevent encompasses all the measures of a legal, political, administrative and cultural nature that promote the safeguard of human rights. [FN134] As such, the deprivation of liberty in legally recognized facilities and the existence of a record of the detainees constitute fundamental safeguards, inter alia, against enforced disappearance. In

contrario sensu, the commissioning and maintenance of clandestine detention centers constitutes per se an infringement to the obligation to guarantee, because it directly threatens the right to personal liberty, personal integrity, life [FN135], and juridical personality. [FN136]

[FN134] Cf. Case of Velásquez Rodríguez. Merits, supra note 25, para. 175; Case of González et al. ("the Cotton Field") v. México. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 252, para. 252, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 63.
[FN135] Cf. Case of Anzualdo Castro, supra note 122, para. 63, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 63.
[FN136] Cf. Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 63.

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107. Now, given that one of the objectives of enforced disappearance is to prevent the exercise of legal remedies and the relevant procedural guarantees, when a person is kidnapped, detained, or experiences any other form of deprivation of liberty in order to carry out the enforced disappearance of the person, if the victim cannot access the available remedies, its fundamental that the next of kin or other close persons have access to quick and effective procedures or judicial remedies so as to allow for the determination of the whereabouts or medical condition of said person or to identify the authority that ordered the deprivation of liberty or made it effective. [FN137]

[FN137] Cf. Case of Anzualdo Castro v. Perú, supra note 122, para. 64; Case of Radilla Pacheco, supra note 24, para. 141, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 64.

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108. In short, each time there is reasonable cause to suspect that a person was subject to an enforced disappearance an investigation must be initiated. [FN138] This obligation is independent from the filing of a complaint, given that in cases of enforced disappearance, international law and the general obligation to guarantee require the obligation to investigate the case ex officio, without delay, and in a serious, impartial, and effective manner. This is a fundamental and determinant element for the protection of certain rights affected by such situation. [FN139] In any case, every State authority, public official or individual, that has had notice of acts of the enforced disappearance of persons, must immediately report said facts. [FN140]

[FN138] Cf. Case of Radilla Pacheco, supra note 24, para. 143; Case of Chitay Nech et al., supra note 25, para. 92, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 65.
[FN139] Cf. Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations, and Costs. Judgment of 31 de enero de 2006. Series C No. 140, para. 145; Case of Chitay Nech et al. v. Guatemala, supra note 25, para. 92, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 65.

[FN140] Cf. Case of Anzualdo Castro, supra note 122, para. 65; Case of Chitay Nech et al., supra note 25, para. 92, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 65.

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109. For an investigation to be effective, the State must establish the appropriate normative framework to develop the investigation, which implies regulation in its domestic legislation the crime of enforced disappearance as an autonomous crime, given that the criminal prosecution is an appropriate instrument to prevent future violations of human rights of this nature. [FN141] Moreover, the State must guarantee that no normative or other type of obstacles prevent the investigation of said acts, and where applicable, the punishment of those responsible.

[FN141] Cf. Case of Gómez Palomino v. Perú, supra note 126, paras. 96 and 97; Case of Radilla Pacheco, supra note 24, para. 144, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 66.

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110. Based on the foregoing, it can be concluded that acts which constitute enforced disappearance are of a continuous or permanent nature, and that its consequences involve multi-offensive violations to the human rights recognized in the American Convention while the whereabouts of the victim are not determined or the bodily remains not found, to which, States have the corresponding duty to investigate, and eventually, punish those responsible, pursuant to the obligations derived from the American Convention. [FN142]

[FN142] Cf. Case of Radilla Pacheco, supra note 24, para. 145, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 67.

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111. As such, in the present case, the analysis of enforced disappearances should encompass the facts presented for the consideration of the Court, in their entirety. [FN143] Only in this manner, is the legal analysis of this phenomenon consistent with the complexity of the human rights violations it entails, [FN144] with its continued or permanent nature, and with the need to consider the context in which the facts occurred, so as to analyze the prolonged effects in time and fully understand the consequences, [FN145] taking into account the corpus juris of the Inter-American and international systems of protection. [FN146]

[FN143] Cf. Case of Heliodoro Portugal, supra note 23, para. 112; Case of Chitay Nech et al., supra note 25, para. 87, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 67.
[FN144] Cf. Case of Heliodoro Portugal, supra note 23, para. 150; Case of Chitay Nech et al., supra note 25, para. 87, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 68.
[FN145] Cf. Case of Goiburú et al, supra note 130, para. 85; Case of Chitay Nech et al., supra note 25, para. 87, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 68.
[FN146] Cf. Case of Radilla Pacheco, supra note 24, para. 146, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 68.

D. The enforced disappearance of the members of the Guerrilha do Araguaia

112. The Inter-American Court notes that in the proceeding before it, the State did not contradict nor did it expressly recognize its international responsibility for the alleged enforced disappearance of the members of the Guerrilha do Araguaia. Nevertheless, in a repeated manner, Brazil referred to its domestic recognition of responsibility and the various measures of reparation adopted regarding the victims of the military regime, including various of the alleged victims in the present case.

113. In particular, the State referred to the Law No. 9.140/95, which in Article 1 establishes:

For all legal effects, the persons included in Annex 1 of this Law are recognized as deceased, for having participated, or for having been accused of participating, in political activities, during the period of September 2, 1961, to August 15, 1979, and that for said reason, were detained by public agents, having been disappeared since then, without any news from them. [FN147]

[FN147] Law No. 10.536/02 expanded the period foreseen in Article 1 of the Law No. 9.140/95 of October 5, 1988.

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114. Brazil included in the referenced Annex 1, and as a consequence, considered as disappeared victims a total of 60 persons, indicated as alleged victims in the present case. [FN148] The terms of the Law No. 9.140/95 do not leave any doubt regarding the assumed responsibility of the State in relation to those disappearances and on the reproach attributed to said conduct, characterized as an illicit act of the most serious degree. In the presentation of motives for said norm, the following is stated: [FN149]

The recognition by the State of the disappeared persons and those who have not perished for natural causes [...] means the reestablishment of the fundamental rights of said persons as a form of reparation that […] reaches the level of justice that the State of Brazil owes to those whom its agents caused harm.
[...] the list of [disappeared persons] contains 136 persons that were detained by State agents […] who pertained to various arms of what was known as the security system of the regime of state of emergency in Brazil, and as of then, no news of these persons were heard. In this way, the illicit acts of a severe nature carried out by public agents or those in the service of the public power, were characterized: they were to care for those under their responsibility and did not.

[FN148] In Annex I of the Law No. 9.140/95 the State also recognized Mrs. Maria Lúcia Petit da Silva as a victim of enforced disappearance, thereby raising the number of victims of members of the Guerrilha do Araguaia recognized by the State to 61 persons. For purposes of this Judgment, the Court does not consider Mrs. Petit da Silva as a victim of enforced disappearance in virtue of the rule of jurisdiction ratione temporis of the Court (supra para. 16).

[FN149] Motives Exposition No. MJ/352 of Law No. 9.140/95, of August 28, 1995 (brief of annexes to the answer to the application, tome I, annex 6, folios 5571 and 5572).
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115. On the other hand, the referenced Law created the Special Commission on Political Deaths and Disappearances of Persons so as to, among other roles, locate the bodily remains of the disappeared persons, recognize them as victims, and where applicable, authorize the payment of compensation. In its final report, the Special Commission dedicated a chapter to the facts of the Guerrilha do Araguaia and determined 62 persons as victims, indicated as disappeared victims in the present case. [FN150]

[FN150] In addition to the 60 alleged victims of this case recognized Law No. 9.140/95, the Book Right to Memory and Truth recognized, among others, Messers. Antônio Pedro Ferreira Pinto and Pedro Matias de Oliveira (or "Pedro Carretel") as victims of enforced disapeparance during Guerrilha do Araguaia. Both are alleged victims in the present case.
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116. In addition, in the public hearing Brazil noted that "it reaffirms its responsibility for the violations of human rights which occurred during the tragic episode known as the Guerrilha do Araguaia." Moreover, the processing of the present case before this Court, in a reiterated manner, the State noted that via Law No. 9.140/95 as well as the Special Commission recognized, domestically, its responsibility for the deaths and enforced disappearances inter alia, of the members of the Guerrilha do Araguaia. [FN151] Among other manifestations, the State expressly affirmed that:

[b]y way of the approval of Law No. 9.140/95, the State of Brazil promoted the official recognition of its responsibility on the deaths and disappearances that occurred during the military regime […];
[i]n addition [to said] explicit recognition […] on August 29, 2007, the State of Brazil launched the Book-Report "Right to Memory and Truth – Special Commission on Political Deaths and Disappearances of Persons," during a public act carried out at the Planalto Palace, seat of the Federal Government, with the presence of the President of the Republic, of several Ministers of State, of members of the Legislative Power, and of the next of kin of the victims of the military regime. In this event, the President of the Republic, in his discourse, referred to the recognition of responsibility of the State of Brazil regarding the issue of the deaths of the opposition.
[The Report of the Special Commission] contains the official version on the violations of human rights, committed by agents of the State, reinforcing the public recognition of the responsibility of the State of Brazil. [FN152]

[FN151] Cf. Case file on the merits, tome II, folios 553 and 554. Moreover, during the processing of the case before the Inter-American Commission, the State expressed in similar terms, that "[t]he implementation of the Law [No.] 9.140/95 is that the Governor of Brazil assumed de facto the objective responsibility for the 'politically disappeared," which includes, evidently, the acknowledgment of civil and administrative responsibility of its public agents. In

relation to the criminal responsibility of these public agents, Law [No.] 6.683 of August 28, 1979, applies, which is called the "Amnesty Law," brief of February, 1997 (case file of annexes to the application, appendix 3, tome I, folio 1716). In addition, the State noted that "[a]t the level of international protection, the acknowledgment of responsibility [effectuated] by the State is considered a relevant demonstration of good faith in the observance of principles related to international treaties on human rights." The State also requested the Commission to consider "the acknowledgment of the deceased, effectuated by Law [No.] 9.140/9[5], as well as the State responsibility for the practiced acts." Cf. brief of observations regarding the additional arguments of the representatives, May 7, 2007 (case file of annexes to the application, appendix 3, folios 2675 and 2677).
[FN152] Brief of the answer to the application (case file on the merits, tome III, folios 553 and 554).
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117. The Inter-American Commission recognized "the good faith of the State in accepting the 'arbitrary detention, torture of the victims and their disappearance,' pursuant to the severity and continued or permanent nature of the crime of enforced disappearance and of the extermination policy of the State in place against opposition groups, via the Armed Forces, in the region of Araguaia." On their behalf, the representatives requested the Court to take note of the State's recognition of the facts and the acceptance of responsibility, and that the reach of said manifestations be incorporated into the Judgment.

118. Based on the aforementioned, the Court concludes that there is no controversy regarding the facts of the enforced disappearance of the members of the Guerrilha do Araguaia nor of the State's responsibility in this regard. Nevertheless, there is a discrepancy regarding the number of victims. The Inter-American Commission affirmed that there were 70 persons of the Guerrilla whom were victim to enforced disappearance, while the representatives indicated 69 victims. [FN153] On its behalf, the State, via Law No. 9.140/95, recognized its responsibility for the disappearance of 60 alleged victims in the present case, [FN154] and subsequently, in the Report of the Special Commission on Political Deaths and Disappearances of Persons, also recognized as victims, among others, Mr. Antônio Ferreira Pinto and Mr. Pedro Matias de Oliveira (also known as Pedro Carretel), [FN155] who are known as alleged victims in this case. As a consequence, the number of persons recognized domestically as disappeared victims of the Guerrilha do Araguia by Brazil rose to 62 of the 70 persons indicated by the Commission as victims of enforced disappearance before this Court.

[FN153] The representatives did not consider Mr. Josias Gonçalves de Souza as an alleged victim of enforced disappearance in the present case.
[FN154] The State also recognized its responsibility for the enforced disappearance of Mrs. Maria Lúcia Petit da Silva, whose bodily remains were identified subsequent to said acknowledgment. In this sense, Mrs. Petit da Silva is not considered disappeared but rather executed extrajudicially (supra note 148). Cf. Law No. 9.140/95, Annex I, supra note 87, folios 5 to 15.
[FN155] Cf. Right to Memory and Truth, supra note 67, folio 785.
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119. To the contrary, there are eight persons indicated as alleged victims of enforced disappearance by the Inter-American Commission whom were not recognized domestically by the State as disappeared persons, nor were they recognized in Law No. 9.140/95, nor by the Special Commission. Said persons were peasants of the region of Araguaia and were identified as "Batista," "Gabriel," "Joaquinzão," José de Oliveira, Josias Gonçalves de Sousa, Juarez Rodriguez Coelho, Sabino Alves da Silva, and "Sandoval."

120. The Court recalls that Law No. 9.140/95 established a procedure for the next of kin to request recognition and the consequential compensation, from the Special Commission, regarding their disappeared or deceased next of kin during the military dictatorship. [FN156] Regarding the eight abovementioned peasants, during its fifteen years of operation, the Special Commission received only one request for recognition of responsibility in regard to "Joaquinzão" (or Joaquim de Sousa). On May 31, 2005, the Special Commission denied this request, among other reasons, given doubts it had regarding the identity of the alleged victim. [FN157] On the other hand, there was not a request made by the next of kin of the other abovementioned peasants for recognition before the Special Commission. Therefore, the Special Commission did not rule on the nature of the victims nor did it include them in the list of disappeared persons of the Guerrilha do Araguaia. [FN158] Neither the Inter-American Commission nor the representatives provided evidence of them. The Court does not count on information regarding the existence or identity of the next of kin of these alleged victims. Based on the aforementioned, the Inter-American Court does not have sufficient evidentiary elements to make a ruling regarding the eight abovementioned persons, and as such, establishes a period of twenty-four months, as of notification of this Judgment, for irrefutable evidence to be provided, pursuant to domestic legislation, regarding "Batista," "Gabriel," "Joaquinzão," José de Oliveira, Josias Gonçalves de Souza, Juarez Rodrigues Coelho, Sabino Alves da Silva, and "Sandoval," that would allow the State to identify them, and where necessary, consider them victims in the terms of Law No. 9.140/95 and of the present Judgment, adopting the appropriate remedial measures in their favor. This conclusion does not prevent nor preclude the possibility that, once the term expires, in domestic law, said people be considered victims in the future if the State, in good faith, says so and adopts the appropriate measures of reparation in their favor upon their identification.

[FN156] Cf. Law No. 9.140/95, supra note 87, Article 7.

[FN157] Cf. Right to Memory and Truth, supra note 67, folio 5830. In its final written arguments, the State reported that the case of "Joaquinzão" before the Special Commission was reopened in 2009 and is newly under analysis. In the case that he is recognized as a disapeared person, compensation would be provided for his next of kin (case file on the merits, tome IX, folio 8632).

[FN158] Cf. Right to Memory and Truth, supra note 67, folios 5821, 5822, 5828, 5833 and 5834.

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121. As a conclusion, according to that indicated by the State and the previous considerations, the Court considers proved that between 1972 and 1974, in the region known as Araguaia, State agents were responsible for the enforced disappearance of 62 persons identified as victims in the

present case. Thirty-eight years have passed since the beginning of the enforced disappearances, and only the bodily remains of two of them have been identified. [FN159] The State continues without defining the whereabouts of the remaining 60 disappeared victims, meanwhile, to date, it has not given a determinant response regarding their location. In this regard, the Court reiterates that enforced disappearance has a permanent and continues while the whereabouts of the victim remain unknown or their bodily remains are found, in a way that allows for their identity to be ascertained with certainty. [FN160]

[FN159] The two victims of enforced disappearance identified are: Messers. Lourival Moura Paulino and Bérgson Gurjão Farias, respectively, in 2008 and 2009. The third identified person, in the year 1996, was Mrs. Maria Lúcia Petit da Silva, supra notes 96, 148 and 154. In regard to the identification of Mr. Lourival Moura Paulino in 2008, the Court notes that only the representatives presented this information. Nevertheless, the Court considers him as identified victim for purposes of the present Judgment.[FN160] Cf. Case of La Cantuta v. Perú. Merits, Reparations, and Costs. Judgment of November 29, 2006. Series C No. 162, para. 114, and Case of Heliodoro Portugal, supra note 23, para. 34, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 82.

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122. Likewise, the Court reiterates that the enforced disappearance of persons constitutes a multi-offensive violation that begins with a deprivation of liberty contrary to Article 7 of the American Convention. [FN161] On the other hand, as the Court has established, the subjection of detainees to repressive official bodies, State agents, or private persons whom act under said acquiescence or tolerance, that with impunity carry out acts of torture and murder, represent itself an infringement to the obligation to prevent violations to the right to personal integrity and right to life, established in Articles 5 and 4 of the American Convention, even when the torture or deprivation of liberty of persons cannot be demonstrated in the specific case. [FN162] Moreover, since its first contentious case, [FN163] the Court has also affirmed that the practice of disappearance has entailed frequently the execution of the detainees, in secret and without a trial, followed by the hiding of the body so as to erase any material evidence of the crime and seek the impunity of those who committed it, which implies a brutal violation of the right to life, recognized in Article 4 of the Convention. This fact, together with the lack of an investigation of the facts, represents an infraction to the legal obligation of the State, established in Article 1(1) of the Convention, in relation to Article 4(1) of the same treaty, that being the right to guarantee all persons subject to its jurisdiction, the inviolability of life and the right to not be deprived arbitrarily of life. [FN164] Finally, the Court has concluded that the enforced disappearance entails a specific infringement to the right to juridical personality established in Article 3 of the American Convention, given that the enforced disappearance not only seeks to extract the person from the legal system, but also to deny his or her existence and leaving the person in a state of legal limbo or undetermined situation before society and the State. [FN165]

[FN161] Cf. Case of Velázquez Rodriguez, Merits. supra note 25, para. 155.

[FN162] Cf. Case of Velásquez Rodríguez, Merits. supra note 25, para. 175; Case of Chitay Nech et al., supra note 25, para. 95, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 95.
[FN163] Cf. Case of Velázquez Rodriguez, Merits. supra note 25, para. 157.
[FN164] Cf. Case of Velázquez Rodriguez, Merits. supra note 25, para. 188.
[FN165] Cf. Case of Anzualdo Castro, supra note 122, para. 90; Case of Chitay Nech et al., supra note 25, para. 98, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 98.
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123. The Inter-American Court highlights the gravity of the facts, those of which occurred during 1969 and 1974, which fall in the framework of "the most extreme repressive phase […] of the military regime in Brazil" (supra paras. 86 and 87). In this regard, in its Final Report, the Special Commission on Political Deaths and Disappearances of Persons characterized the period in which the facts of the present case occurred in the following manner:

in an atmosphere of true "terror of State," the regime launched [a] sudden and devastating attack [against] the opposition groups […] in first place, against the organizations that worked in the large capital cities […]. Between 1972 and 1974, it combated and exterminated a large Guerrilla base that the [Communist Party of Brazil] held in a training camp in the region of Araguaia […]. [FN166]

[FN166] Right to Memory and Truth, supra note 67, folio 5592.
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124. The enforced disappearances particularly affected the members of the Guerrilha do Araguaia, one of the "groups with the highest number of disappeared activists," [FN167] who represent half of those politically disappeared in Brazil. [FN168]

[FN167] Right to Memory and Truth, supra note 67, folios 5614, 5761 and 5762. In the same sense, see the motives exposition No. MJ/352, supra note 149.
[FN168] Cf. Right to Memory and Truth, supra note 67, folio 5758.
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125. In consideration of the above mentioned, the Court concludes that the State is responsible for the enforced disappearances, and therefore, of the violation of the right to juridical personality, to life, to personal integrity, and personal liberty established in Articles 3, 4, 5, and 7, respectively, in relation to Article 1(1) of the American Convention, to the detriment of: Adriano Fonseca Fernandes Filho, André Grabois, Antônio Alfredo de Lima (or Antônio Alfredo Campos), Antônio Carlos Monteiro Teixeira, Antônio de Pádua Costa, Antônio Ferreira Pinto, Antônio Guilherme Ribeiro Ribas, Antônio Teodoro de Castro, Arildo Aírton Valadão, Áurea Elisa Pereira Valadão, Bérgson Gurjão Farias, Cilon Cunha Brum, Ciro Flávio Salazar de Oliveira, Custódio Saraiva Neto, Daniel Ribeiro Callado, Dermeval da Silva Pereira, Dinaelza Santana Coqueiro, Dinalva Oliveira Teixeira, Divino Ferreira de Souza, Elmo Corrêa, Francisco Manoel Chaves, Gilberto Olímpio Maria, Guilherme Gomes Lund, Helenira Resende de Souza

Nazareth, Hélio Luiz Navarro de Magalhães, Idalísio Soares Aranha Filho, Jaime Petit da Silva, Jana Moroni Barroso, João Carlos Haas Sobrinho, João Gualberto Calatrone, José Huberto Bronca, José Lima Piauhy Dourado, José Maurílio Patrício, José Toledo de Oliveira, Kléber Lemos da Silva, Líbero Giancarlo Castiglia, Lourival de Moura Paulino, Lúcia Maria de Souza, Lúcio Petit da Silva, Luiz René Silveira e Silva, Luiz Vieira de Almeida, Luiza Augusta Garlippe, Manoel José Nurchis, Marcos José de Lima, Maria Célia Corrêa, Maurício Grabois, Miguel Pereira dos Santos, Nelson Lima Piauhy Dourado, Orlando Momente, Osvaldo Orlando da Costa, Paulo Mendes Rodrigues, Paulo Roberto Pereira Marques, Pedro Alexandrino de Oliveira Filho, Pedro Matias de Oliveira ("Pedro Carretel"), Rodolfo de Carvalho Troiano, Rosalindo Souza, Suely Yumiko Kanayama, Telma Regina Cordeiro Corrêa, Tobias Pereira Júnior, Uirassú de Assis Batista, Vandick Reidner Pereira Coqueiro, and Walkíria Afonso Costa.

VIII. RIGHT TO JUDICIAL GUARANTEES [RIGHT TO A FAIR TRIAL] AND TO JUDICIAL PROTECTION, IN RELATION TO THE OBLIGATION TO RESPECT AND ENSURE RIGHTS AND THE RIGHT TO ADOPT DOMESTIC LEGAL EFFECTS

126. In the present case, State responsibility for enforced disappearance of victims is not in controversy (supra paras. 116 and 118). Nevertheless, the parties disagree in regard to the international obligations of the State derived from the American Convention on Human Rights ratified by Brazil in 1992, and that, in turn recognized the contentious jurisdiction of this Court in 1998. As such, the issue that the Inter-American Court must resolve in the present case is whether the Amnesty Law, approved in 1979, is compatible with the rights enshrined in Articles 1(1), 2, [FN169] 8(1), [FN170] and 25 [FN171] of the American Convention, or in other words, if it can maintain its legal effects once the State became internationally obligated as of ratification of the American Convention.

[FN169] Article 2 of the American Convention establishes:
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.
[FN170] Article 8(1) of the American Convention establishes:
Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
[FN171] Article 25(1) of the American Convention establishes:
Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

A. Arguments of the parties

127. The Inter-American Commission reminded that the State indicated that the investigation and punishment of those responsible for the enforced disappearance of the victims and the execution of Maria Lúcia Petit da Silva is impossible due to the Amnesty Law. Given the interpretation of the State to said norm, in addition to the failure to investigate and criminally punish, neither the next of kin of the victims nor Brazilian society have been able to know the truth of what took place. The application of amnesty laws to perpetrators of serious human rights violations is contrary to the obligations established in the Convention and in the Inter-American Court's jurisprudence. In cases of execution and enforced disappearance, the Articles 8 and 25 of the Convention establish that the next of kin of the victims have the right that said death or disappearance be effectively investigated by the state authorities, that those responsible be prosecuted, and where applicable, punished, and that the harm to the next of kin be repaired. Moreover, no law or norm in domestic law, such as the provisions of the amnesty, the rules on statute of limitations and other exceptions to responsibility, can impede a State from complying with this obligation, especially when it deals with serious violations of human rights that constitute crimes against humanity, such as the enforced disappearance in the present case, given that said crimes are not subject to amnesty or a statute of limitations. The obligation to guarantee the rights protected in Articles 4, 5, and 7 of the American Convention carries with it the obligation to investigate the facts that affected said substantive rights. Said Law cannot continue to impede the investigation of the facts. Based on the aforementioned, the Commission considered that the State incurred in violations of Articles 8(1) and 25 of the American Convention, in accordance with Articles 1(1) and 2 of the same, to the detriment of the 70 victims disappeared in the Guerrilha do Araguaia and of their next of kin, as well as Maria Lúcia Petit da Silva and her next of kin.

128. The representatives concurred with the arguments of the Commission on the obligation to investigate and punish the human rights violations in the present case. While States are obligated to remove all factual and legal obstacles that impede the exhaustive legal clarification of violations of the American Convention, in the present case, there are various legal obstacles. In regard to the Amnesty Law, the interpretation that has been utilized in the domestic forum is the one that considers "derived crimes" to be all of those which were committed by State agents, including the serious violations of human rights. Said interpretation constitutes a major obstacle for the guarantee of the right to access justice and the right of the next of kin of the disappeared persons to know the truth, which has created a situation of total impunity. The Federal Supreme Tribunal has endorsed such interpretation most recently, which thus increases the obstacle that said law represents for the investigation of the facts for the ensuing effects and erga omnes effectiveness of the decision. Finally, they noted the irrelevance of the context of the creation of the Amnesty Law for International Law, given that they considered that while this Law impedes the persecution of those responsible for grave human rights violations, it would be contrary to the international obligations of the State. The Amnesty Law was not the result of a process of balanced negotiation, given that its content did not consider the positions and necessities demanded by its consignees and next of kin. As such, to attribute consent to the amnesty for the repression of the agents of the campaign and the next of kin of the disappeared is to deform history.

129. On the other hand, the representatives noted that the statute of limitations is a second legal obstacle for the investigation of the facts and the punishment of those responsible, as seen

in cases wherein said rule was applied to criminal conduct during the military regime. The third obstacle is the failure to codify the crime of enforced disappearance in Brazilian law, to which they indicated that: a) in dealing with a crime of a permanent nature, the criminal prohibition is applicable while the criminal conduct continues; b) the failure to codify said crime in the Brazilian legal code implies a Non-compliance of the State of the provisions in Article 2 of the Convention and imposes upon the State the obligation to apply its criminal law in a compatible manner with its conventional obligations, in a manner that seeks to avoid said conduct from continuing in impunity, and c) the principle of legality should not be to the detriment of the trial and the punishment of the acts that, at the time of their commission, were crimes pursuant to the general legal obligations recognized by the international community. A fourth legal obstacle is the intervention of the military justice system, given that within domestic law there are recent antecedents that open the possibility for it to occur in violation of the Inter-American and international parameters. Based on all of the above mentioned, they concluded that the State violated Articles 8 and 25 of the American Convention, in relation to Articles 1(1) and 2 of the treaty. Moreover, given that the State did not adopt effective measures to avoid, prevent, and punish acts of torture suffered by the disappeared persons, it violated Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

130. The State requested the Court to recognize all the actions taken in the domestic forum and shared its considerations on the process of political transition and the evolution of the handling of the matter as of the alleged applications by Brazilian society. The amnesty concession is usually justified by the perception that the punishment of the crimes against human rights, once the hostilities ended, can come to represent an obstacle in the transition process, perpetuating a climate of distrust and rivalry between various national political groups in the nation, to which in periods such as this, alternative means to criminal persecution are sought to reach a national reconciliation as a way of adjusting the necessities of justice and peace, such as patrimonial reparation of victims and their next of kin and the establishment of truth commissions. The Amnesty Law was approved in this specific context of transition to democracy and of a need for national reconciliation, for which the State requested "precaution" in applying in Brazil the specific solutions adopted by the Commission and the Court for other States. As such, it highlighted that the Amnesty Law was preceded by a public debate, aside from being "considered by many as an important step in the national reconciliation process."

131. In relation to the arguments of the Commission and the representatives regarding the alleged obligation to not apply the established rules on statute of limitations and non-retroactivity of the criminal law, Brazil argued that the only constitutional hypotheses where the rule on the non-applicability of the statute of limitations is allowed is in regard to the practice of racism and armed groups that disrupt constitutional order and the Democratic State. The American Convention recognizes in Article 9 the principles of legality and non-retroactivity and the Inter-American Convention on Forced Disappearance of Persons "recognizes in Article VII, expressly, the statute of limitations for said crimes." On the other hand, it reported that the codification of the crimes against humanity occurred in 1998 with the approval of the Rome Statute, and it indicated that international custom cannot be a source that creates criminal legal standards given that it does not offer legal certainty, as laws do in the strictest sense. The principle of legality is one of the winning principles in the field of human rights, as such, constitutes an ironclad clause

of the Brazilian Constitution that cannot be abolished, including via constitutional amendment, and thus requested the Court to apply this.

132. In addition, the State argued that all human rights should be guaranteed in an equal manner and, as such, harmony should be sought between the principles and rights established in the American Convention with the aid of the principle of proportionality. In the present case, there is an apparent collision between the principle of guarantee of non-repetition from which the obligation of the State to promote the criminal persecution of the perpetrators of crimes against humanity stems, and the principle of legality. It considered that the best option to safeguard the colliding principles is the full respect of Article 9 and the satisfactory respect of Article 1, both of the American Convention. As a consequence, the Court must consider that the measures already adopted by the State are sufficient, given that the other option would imply complete ignorance of the principle of legality.

133. Finally, the State highlighted the bilateralness and reciprocity of the amnesty laws as distinctive characteristics, given that it did not encompass only the agents of the State, but also, from the onset, its purpose was to encompass both sides of the political-ideological spectrum. It also noted that the restriction established in the second paragraph of Article 1 of the mentioned law, which excluded the application of certain benefits regarding specific conduct, was not applied by Brazilian jurisprudence, arguing that this created a disproportionate application of the Amnesty, given that it was general and unrestricted. To understand the merits of the Amnesty Law it is necessary to take into account that this law functions in a broad and gradual process of political change and redemocratization of the country.

B. Facts related to the Amnesty Law

134. On August 28, 1979, after the endorsement by the National Congress, Law No. 6.683/79 was approved, which granted amnesty in the following terms: [FN172]

Art. 1. Amnesty is granted to all whom, in the period between September 2, 1961, and August 15, 1979, committed political crimes or derived crimes to these, electoral crimes, to those who had their political rights suspended, and to direct or indirect public servants of the administration, of foundations that belong to the public power, to the public servants of the legislative and judicial powers, to the military, leaders, and union representatives, who were punished based on institutional and complementary acts.
§ 1.- For effects of this Article, derived crimes are those crimes of any nature related to political crimes or carried out with political motivation.
§ 2.- Those excluded from the benefit of this amnesty are persons who were convicted for the crimes of terrorism, assault, kidnapping, and personal attacks.

[FN172] Law No. 6.683, of August, 28, 1979 (case file of the answer to the application, tome IV, annex 33, folio 6824).

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135. Under said law, to date, the State has not investigated, processed, or criminally punished those responsible for the human rights violations committed during the military regime, including those of the present case. [FN173] This continued given that "the official interpretation [of the Amnesty Law] automatically absolves all of the [h]uman [r]ights violations committed by agents of the political repression." [FN174]

[FN173] Cf. Partial report on compliance with the recommendations of the Inter-American Commission of March 2009 (brief of annexes to the answer to the application, tome I, annex 4, folios 5548, 5551 and 5552); Right to Memory and Truth, supra note 67, folios 5593 and 5615, and Merits Report No. 91/08, supra note 4, folio 3625. Cf. Also the statement of Mr. dos Santos Junior rendered at the public hearing on May 20, 2010. Likewise, cf. supra note 151.
[FN174] Right to Memory and Truth, supra note 67, folio 5595.

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136. On April 29, 2010, the Federal Supreme Court, in a seven to two vote, [FN175] declared the Non-compliance Action of the Fundamental Principle filed by the Order of Attorneys in Brazil as inadmissible and affirmed the force of the Amnesty Law and the constitutionality of the interpretation of paragraph 1º of Article 1º. (supra paras. 44 and 58). Said decision has an erga omnes effect to which no remedy applies. [FN176] Among other foundational basis, the vote of the Judge Rapporteur highlighted that the Amnesty Law was "a calculated law," [FN177] not one for the future, and, as such, it must "be interpreted, as a whole with its text, the reality of and the historic moment in which the law was decreed and not the current reality." In this sense, the Law implemented "a political decision [in] a moment of conciliatory transition in 1979" given that "all were absolved, some absolving themselves." The law effectively included in the amnesty all "political agents who participated in derived crimes against the political opposition, those detained or not, during the military regime." [FN178] The political agreement carried out by the political class that permitted the transition to a State of law "resulted in a particular text, [and therefore], only the Legislative Power could change it. It is not incumbent on the Supreme Federal Court to change normative texts that concede amnesty." Lastly, regarding the reception or not of Law No. 6.683/79 in the new democratic constitutional order, it indicated that "[the Amnesty] [L]aw of 1979 did not pertain to the declined order. It is integrated in the new [constitutional] order, created in the origin of the new fundamental norm," and as such, its adaptation to the Constitution of 1988, "is unquestionable." [FN179]

[FN175] Vote of the Rapporteur Minister in the Non-Compliance Action of the Fundamental Principle No. 153 resolved by the Federal Supreme Court (case file on the merits, tome VI, folios 2598 to 2670); DVD with videos of the oral support (case file on the merits, tome VII, folio 3885), and votes of the Ministers of the Federal Supreme Court (case file on the merits, tome VI, folios 2577 to 2597 and 2671 to 2704, and tome VII, folios 3839 to 3884).
[FN176] Cf. Law No. 9.882/99, Articles 10 and 12. Availabe at http://www.planalto.gov.br/ccivil_03/Leis/L9882.htm; last visited on November 20, 2010. Similarly, cf. expert opinion of Mr. Langaro Dipp rendered at the public hearing held on May 21, 2010.

[FN177] According to the Rapporteur, the law-measures "directly regulate specific interests, appearing immediatly and specifically. They consist of a special administrative act[.] The law-measures are an administrative act that [is updated] by the agent of the Administration, [and they entail] the specific sought-after request, to which they are addressed. For this reason, they are laws only in the formal sense, not being, nevertheless, in the material sense." Vote of the Rapporteur Minister, supra note 175, folio 2641.
[FN178] According to the Rapporteur, "what characterizes this amnesty is its objectivity, what matters is that it refers to one or more crimes, not to specific persons[.] The amnesty [is] conceeded to non-determined persons." Vote of the Rapporteur Minister, supra note 175, folio 2617.
[FN179] Vote of the Rapporteur Minister, supra note 175, folios 2598 to 2670.

C. Obligation to investigate, and where applicable, punish grave human rights violations in international law

137. Since its first judgment, this Court has highlighted the importance of the State's obligation to investigate and punish for human rights violations. [FN180] The obligation to investigate, and where applicable prosecute and punish, has particular importance given the severity of the crimes committed and the nature of the injured rights, particularly given that the prohibition of enforced disappearance of persons and its related obligation to investigate and punish those responsible have, for much time now, reached a nature of ius cogens. [FN181]

[FN180] Cf. Case of Velásquez Rodríguez. Merits. supra note 25, para. 166.
[FN181] Cf. Case of Goiburú et al., supra note 130, para. 84; Case of Chitay Nech et al., supra note 25, para. 193, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 197.
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138. The Court reiterates that the obligation to investigate human rights violations is a positive measure that must be adopted by States to guarantee the rights recognized in the Convention. [FN182] The duty to investigate is an obligation of means, and not of results, which should be assumed by the State as a legal obligation in and of itself and not as a simple formality condemned from the onset to be unsuccessful, or a matter of particular interests, which depends on the procedural initiative of the victims or their next of kin or of the bearing of evidence from the private sector. [FN183] From this obligation, once the State authorities are notified of the facts, they must initiate ex officio and without delay, a serious, impartial, and effective investigation. [FN184] This investigation must be carried out in all of the available legal venues and be aimed at determining the truth.

[FN182] Cf. Case of Velásquez Rodríguez. Merits, supra note 25, paras. 166 and 176; Case of Fernández Ortega et al. supra note 53, para. 191, and Case of Rosendo Cantú et al. supra note 45, para. 175.

[FN183] Cf. Case of Velásquez Rodríguez. Merits, supra note 25, para. 177; Case of Fernández Ortega et al., supra note 53, para. 191, and Case of Rosendo Cantú et al., supra note 45, para. 175.
[FN184] Cf. Case of the Masacre of Pueblo Bello, supra note 139, para. 143; Case of Rosendo Cantú et al., supra note 45, para. 175, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 65.
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139. The Court has also noted that from Article 8 of the Convention, what can be gathered is that victims of human rights violations, or their next of kin, should have ample possibilities to be heard and act in the respective procedures, in the search to ascertain the facts and in the punishment of those responsible, as well as the search for due reparation. Moreover, the Court has noted that the obligation to investigate and the corresponding right of the alleged victim or their next of kin cannot be gathered merely from the conventional norms of international law which are imperative for the States Parties, but also from the right to investigate ex oficio certain illicit conduct and the norms that permit the victims or their next of kin to file a complaint or present a lawsuit, evidence, or applications, or any other matter, in order to participate procedurally in the criminal investigation with the hope of establishing the truth of the facts. [FN185]

[FN185] Cf. as an example, the Code of Criminal Procedure in Brazil, Articles:
Article 14. The victim or his legal representative, and the accused may request a procedure, to be held or not, according to the authority.
Article 27. Any person of society can promote the initiative of Public Prosecution, in cases in which the public action corresponds, by providing, in writing, information on the facts and the responsibility and indicating the time, place, and the elements of evidence.
Article 268. In all the terms of the Public Action, the offended person may act in the aid of the public prosecutor's office, the victim or his legal representative or, where necessary, any person referred to in Article 31.
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140. In addition, the obligation pursuant to international law to prosecute, and if criminal responsibility is determined, punish the perpetrators of human rights violations, stems from the obligation to guarantee rights enshrined in Article 1(1) of the American Convention. This obligation implies the obligation of States Parties to organize their governmental apparatus, and in general, all of the structures in which public power is manifested, in a way that assures individuals the free and full exercise of their human rights. [FN186] As a consequence of this obligation, the States must prevent, investigate, and punish all violations to the human rights enshrined in the Convention, and also, seek the reestablishment, if it is possible, of the violated right, and where applicable, the reparation of the harm produced given the violation of the human rights. [FN187] If the State's apparatus functions in a way that assures the matter remains with impunity, and it does not restore, in as much as is possible, the victim's rights, it can be ascertained that the State has not complied with the obligation to guarantee the free and full exercise of those persons within its jurisdiction. [FN188]

[FN186] Cf. Case of Velásquez Rodríguez. Merits, supra note 25, para. 166; Case of González et al. ("Cotton field"), supra note 134, para. 236, and Case of the Dos Erres Massacre v. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 24, 2009. Series C No. 211, para. 234.

[FN187] Cf. Case of Velásquez Rodríguez. Merits, supra note 25, para. 166; Case of Ticona Estrada et al. v. Bolivia. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 191, para. 78, and Case of Garibaldi, supra note 18, para. 112.

[FN188] Cf. Case of Velásquez Rodríguez. Merits, supra note 25, para. 176; Case of Kawas Fernández v. Honduras. Merits, Reparations and Costs. Judgment of April 3, 2009 Series C No. 196, para. 76, and Case of González et al. ("Cotton Field"), supra note 134, para. 288.

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141. The obligation to investigate, and where applicable, punish the serious violations of human rights have been affirmed by all of the international systems for the protection of human rights. In the universal system, the United Nations Human Rights Committee established in its first cases that States must investigate, in good faith, violations to the International Covenant on Civil and Political Rights. [FN189] Subsequently, it considered in its constant jurisprudence that the criminal investigation and the ensuing prosecution are corrective measures that are necessary for violations of human rights. [FN190] In particular, in cases of enforced disappearance, the Committee concluded that States must establish that which has occurred to the disappeared victims and bring justice to those responsible. [FN191]

[FN189] Cf. H.R.C. Case of Larrosa v. Uruguay. Communication No. 88/1981, Views adopted on 25 March 1983, para. 11.5, and H.R.C. Case of Gilboa v. Uruguay. Communication No. 147/1983, Views adopted on 1 November 1985, para. 7.2.

[FN190] Cf. H.R.C. Case of Sathasivam v. Sri Lanka. Communication No. 1436/2005, Views adopted on 8 July 2008, para. 6.4; H.R.C. Case of Amirov v. Russian Federation. Communication No. 1447/2006, Views adopted on 2 April 2009, para. 11.2, and H.R.C. Case of Felipe and Evelyn Pestaño v. The Philippines. Communication 1619/2007, Views adopted on 23 March 2010, para. 7.2.

[FN191] Cf. H.R.C. Case of Bleier v. Uruguay. Communication 37/1978, Views adopted on 29 March 1982, para. 15; H.R.C. Case of Dermit v. Uruguay. Communication 84/1981, Views adopted on 21 October 1982, para. 11.a, and H.R.C. Case of Quinteros v. Uruguay. Communication 107/1981, Views adopted on 25 March 1983, paras. 15 and 16.

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142. In this same sense, the Committee against Torture of the United Nations also decided that when there is reason to suspect acts of torture have occurred against a person, the States must carry out investigations in an immediate and impartial manner, administered by competent authorities. [FN192]

[FN192] Cf. C.A.T., Case of Qani Halimi-Nedzibi Vs. . 8/1991, Views adopted on November 30, 1993, para. 13.5; C.A.T. Case of Saadia Ali v. Tunisia.

Communication No. 291/2006, Views adopted on November 21, 2008, para. 15.7, and C.A.T. Case of Besim Osmani v. Serbia. Communication No. 261/2005, Views adopted on May 8, 2009, para. 10.7.

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143. The former United Nations Commission on Human Rights recognized that demanding the responsibility of the perpetrators of serious violations of human rights is one of the essential elements for all effective reparations for the victims, and "are a key factor in establishing a justice system that is fair, equitable, and in short, that provides for reconciliation and just stability in all societies, including those in conflict or post-conflict, and which pertain to the transitional processes." [FN193]

[FN193] Cf. Commission on Human Rights. Impunity. Order 2005/81, 61st period of sessions, U.N. Doc. E/CN.4/RES/2005/81, of April 21, 2005. In the same sense, see also Commission on Human Rights. Impunity. Orders: 2004/72, 60th period of sessions, U.N. Doc. E/CN.4/RES/2004/72, of April 21, 2004; 2003/72, 59th period of sessions, U.N. Doc. E/CN.4/RES/2003/72, of April 25, 2003; 2002/79, 58th period of sessions, U.N. Doc. E/CN.4/RES/2002/79, of April 25, 2002; 2001/70, 57th period of sessions, U.N. Doc. E/CN.4/RES/2001/70, of April 25, 2001; 2000/68, 56th period of sessions, U.N. Doc. E/CN.4/RES/2000/68, of April 27, 2000, and 1999/34, 55th period of sessions, U.N. Doc. E/CN.4/RES/1999/34, of April 26, 1999.

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144. Various special rapporteurs of the United Nations indicated that the obligation to respect and enforce respect the international human rights norms includes the right to adopt measures to prevent the violations, as well as the obligation to investigate them, and where necessary, adopt measures against the perpetrators. [FN194]

[FN194] Cf. Final report of rapporteur Cherif Bassiouni. Civil and political rights, in particular the questions related to: independence of the judiciary, administration of justice, impunity. The right to restitution, compensation and rehabilitation of victims of serious human rights violations and fundamental freedoms, presented in virtue of order 1999/33 of the Commission on Human Rights, U.N. Doc. E/CN.4/2000/62, of January 18, 2000, Annex: Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, Principle 3, page 7. Cf. also, Report of Diane Orentlicher, independent expert charged with updating the principles for the fight against impunity. Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Commission on Human Rights, U.N. Doc. E/CN.4/2005/102/Add.1, of February 8, 2005, Principle 1, page. 7.

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145. For its part, in the European System, the European Court of Human Rights has considered that in cases of violations to the right to life or to personal integrity, the idea of an "effective remedy" implies, in addition to the payment in compensation, where applicable, and

without detriment to any other available remedy in the national system, the obligation of the respondent State to carry out an exhaustive and effective investigation, which allows for the identification and punishment of those responsible, as well as the effective access for the petitioner in the investigation procedures. [FN195]

[FN195] Cf. E.C.H.R. Case of Aksoy v. Turkey, Application 21987/93, Judgment of 18 December 1996, para 98; E.C.H.R. Case of Aydin v. Turkey. Application 23178/94, Judgment of 25 September 1997, para 103; E.C.H.R. Case of Selçuk and Asker v. Turkey. Applications 23184/94 and 23185/94, Judgment of 24 April 1998, para 96; E.C.H.R. Case of Kurt v. Turkey. Application 24276/94, Judgment of 25 May 1998, para 139, and E.C.H.R. Case of Keenan v. United Kingdom. Application 27229/95, Judgment of 3 April 2001, para 123.

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146. In the same sense, in the African System, the African Commission on Human and Peoples' Rights, has sustained that offering total and complete immunity against the processing and prosecution of human rights violations, as well as the lack of adoption of measures that guarantee that the perpetrators of these violations be punished and that the victims be duly compensated, does not only prevent individuals from obtaining a remedy for the violations, denying them their right to an effective remedy, but also promotes impunity and constitutes a violation of the international obligation of States. [FN196]

[FN196] Cf. A.C.H.P.R. (African Commission on Human and Peoples' Rights), Case of Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire, Communication No. 246/2002, July 2008, paras. 97 and 98.

D. Non-compatibility of amnesties related to serious human rights violations with international law

147. Amnesties or similar forms have been one of the obstacles alleged by some States in the investigation, and where applicable, punishment of those responsible for serious human rights violations. [FN197] This Court, the Inter-American Commission on Human Rights, the organs of the United Nations, and other universal and regional organs for the protection of human rights have ruled on the non-compatibility of amnesty laws related to serious human rights violations with international law and the international obligations of States.

[FN197] In the present case, the Court refers generally to the term "amnesties" to refer to norms that, independent of the term used, seek the seem purposes.

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148. As it has been decided prior, this Court has ruled on the non-compatibility of amnesties with the American Convention in cases of serious human rights violations related to Peru (Barrios Altos and La Cantuta) and Chile (Almonacid Arellano et al.).

149. In the Inter-American System of Human Rights, of which Brazil forms part by a sovereign decision, the rulings on the non-compatibility of amnesty laws with conventional obligations of States when dealing with serious human rights violations are many. In addition to the decisions noted by this Court, the Inter-American Commission has concluded, in the present case and in others related to Argentina, [FN198] Chile, [FN199] El Salvador, [FN200] Haití, [FN201] Perú, [FN202] and Uruguay, [FN203] its contradiction with international law. Moreover, the Commission recalls that:

it has ruled on numerous occasions in key cases wherein it has had the opportunity to express its point of view and crystallize its doctrine in regard to the application of amnesty laws, establishing that said laws violate various provisions of both the American Declaration as well as the Convention. These decisions which coincide with the criteria of other international organs on human rights regarding amnesties, have declared in a uniform manner that both the amnesty laws as well as other comparable legislative measures that impede or finalize the investigation and judgment of agents of [a] State that could be responsible for serious violations of the American Declaration or Convention, violate multiple provisions of said instruments. [FN204]

[FN198] Cf. IACHR. Report No. 28/92, Cases 10.147; 10.181; 10.240; 10.262; 10.309, and 10.311. Argentina, of October 2, 1992, paras. 40 and 41.
[FN199] Cf. IACHR. Report No. 34/96, Cases 11.228; 11.229; 11.231, and 11.282. Chile, of October 15, 1996, para. 70, and IACHR. Report No. 36/96. Chile, of October 15, 1996, para. 71.
[FN200] Cf. IACHR. Report No. 1/99, Case of 10.480. El Salvador, of January 27, 1999, paras. 107 and 121.
[FN201] Cf. IACHR. Report No. 8/00, Case of 11.378. Haití, of February 22, 2000, paras. 35 and 36.
[FN202] Cf. IACHR. Report No. 20/99, Case of 11.317. Perú, of February 23, 1999, paras. 159 and 160; IACHR. Report No. 55/99, Cases 10.815; 10.905; 10.981; 10.995; 11.042 and 11.136. Perú, of April 13, 1999, para. 140; IACHR. Report No. 44/00, Case of 10.820. Perú, of April 13, 2000, para. 68, and IACHR. Report No. 47/00, Case of 10.908. Perú, April 13, 2000, para. 76.
[FN203] Cf. IACHR. Report 29/92. Cases 10.029, 10.036, and 10.145. Uruguay, of October 2, 1992, paras. 50 and 51.
[FN204] IACHR. Report No. 44/00, Case of 10.820. Perú, of April 13, 2000, para. 68, and IACHR. Report No. 47/00, Case of 10.908. Perú, of April 13, 2000, para. 76. In the same sense, cf. IACHR. Report No. 55/99, Cases 10.815; 10.905; 10.981; 10.995; 11.042, and 11.136. Perú, of April 13, 1999, para. 140.

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150. In the universal system, in its report to the Security Council, entitled The rule of law and transitional justice in societies that suffer or have suffered conflicts, the Secretary General of the United Nations noted that:

[…] the peace agreements approved by the United Nations cannot promise amnesty for crimes of genocide, war, or crimes against humanity, or serious infractions of human rights […]. [FN205]

[FN205] Report of the Secretary-General to the United Nations Security Council. The rule of law and transitional justice in conflict and post-conflict societies. U.N. Doc. S/2004/616, of August 3, 2004, para. 10.

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151. In the same sense, the United Nations High Commissioner for Human Rights concluded that amnesties and other analogous measures contribute to impunity and constitute an obstacle to the right to the truth in that they block an investigation of the facts on the merits [FN206] and that they are, therefore, incompatible with the obligations incumbent on States given various sources of international law. [FN207] More so, in regards to the false dilemma between peace and reconciliation, on the one hand, and justice on the other, it stated that:

[t]he amnesties that exempt from criminal sanction those responsible for atrocious crimes in the hope of securing peace have often failed to achieve their aim and have instead emboldened their beneficiaries to commit further crimes. Conversely, peace agreements have been reached without amnesty provisions in some situations where amnesty had been said to be a necessary condition of peace and where many had feared that indictments would prolong the conflict. [FN208]

[FN206] Cf. Report of the Office of the High Commissioner of the United Nations for Human Rights. Right to the Truth. UN Doc. A/H.R.C/5/7, of June 7, 2007, para. 20.
[FN207] Cf. Office of the High Commissioner of the United Nations for Human Rights. Rule-of-law Tools for Post-conflict States: Amnesties. HR/PUB/09/1, Published for the United Nations, New York and Geneva, 2009, page. V.
[FN208] Cf. Office of the High Commissioner of the United Nations for Human Rights. Rule-of-law Tools for Post-conflict States, supra note 207, page. V.

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152. In line with the abovementioned, the Special Rapporteur of the United Nations on the issue of impunity, stated that:

[t]he perpetrators of the violations cannot benefit from the amnesty while the victims are unable to obtain justice by means of an effective remedy. This would lack legal effect in regard to the actions of the victims relating to the right to reparation. [FN209]

[FN209] Final report, revised, on the issue of the Impunity of perpetrators of human rights violations (civil and political rights) prepared by Mr. Louis Joinet pursuant to order 1996/119 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities U.N. Doc. E/CN.4/Sub.2/1997/20/Rev1, of October 2, 1997, para. 32.

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153. In the same manner, the World Conference on Human Rights which took place in Vienna in 1993, in its Declaration and Program of Action, emphasized that States “should derogate legislation that favors the impunity of those responsible for serious human rights violations, […]

punish the violations," highlighting that in those cases States are obligated first to prevent them, and once they have occurred, to prosecute the perpetrators of the facts. [FN210]

[FN210] Cf. World Conference on Human Rights, Vienna Declaration and Program of Action. U.N. Doc. A/CONF.157/23, of July 12, 1993, Program of Action, paras. 60 and 62.

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154. On its behalf, the Working Group on Enforced or Involuntary Disappearances of the United Nations has handled, on various occasions, the matter of amnesties in cases of enforced disappearances. In its General Observations regarding Article 18 of the Declaration on the protection of all persons against enforced disappearance, it noted that it considers amnesty laws to be contrary to the provisions of the Declaration, even when it has been approved in referendum or by another similar type of consultation process, if, directly or indirectly, due to its application or implementation it terminates the State's obligation to investigate, prosecute, and punish those responsible for the disappearances, if it hides the names of those who perpetrated said acts, or if it exonerates them. [FN211]

[FN211] Cf. United Nations Working Group on Enforced or Involuntary Disappearance of Persons. General Comment on Article 18 of the Declaration on the protection of all persons from enforced disappearance. Report presented in the 62nd period of sessions of the Commission on Human Rights. U.N. Doc. E/CN.4/2006/56, of December 27, 2005, para. 2, subsections a, c, and d.

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155. In addition, the same Working Group stated its worry that in situations of post-conflict, amnesty laws are promulgated or other measures adopted that have impunity as a consequence, [FN212] and it reminded States that:

in combating disappearances, effective preventive measures are crucial. Among them, it highlights […] bringing to justice all persons accused of having committed acts of enforced disappearance, ensuring that they are tried only by competent civilian courts, and that they do not benefit from any special amnesty law or other similar measures likely to provide exemption from criminal proceedings or sanctions, and providing redress and adequate compensation to victims and their families. [FN213]

[FN212] Cf. United Nations Working Group on Enforced or Involuntary Disappearance of Persons, supra note 211, para. 23.

[FN213] United Nations Working Group on Enforced or Involuntary Disappearance of Persons. Informe, supra note 211, para. 599. In the same sense, cf. Working Group on Enforced or Involuntary Disappearance of Persons. Report of the Human Rights Council, 4th period of sessions. U.N. Doc. A/H.R.C/4/41, of January 25, 2007, para. 500.

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156. Also, at the universal level, the organs for the protection of human rights established by treatises have maintained the same criteria on the prohibition of amnesties that prevent the investigation and punishment of those who commit serious human rights violations. The Human Rights Committee, in its General Observation 31, stated that States should assure that those guilty of infractions recognized as crimes in international law or in national legislation, —among others torture and other acts of cruel, inhumane, or degrading treatment, summary deprivations of life, and arbitrary detention, and enforced disappearances— appear before the justice system and do not attempt to exempt the perpetrators of their legal responsibility, as has occurred with certain amnesty laws. [FN214]

[FN214] Cf. H.R.C., General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant. U.N. Doc. CCPR/C/21/Rev.1/Add.13, of May 26, 2004, para. 18. This General Comment broadened the content of Comment 20, which refered only to acts of torture, to other serious human rights violations. In this regard, also cf. H.R.C. General Comment 20: Replaces General Comment 7, prohibition on torture and cruel and inhumane treatment (art. 7), U.N. A/47/40(SUPP), Annex VI, A, of March 10, 1992, para. 15.

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157. Likewise, the Human Rights Committee ruled on the matter, also in the proceedings of individual applications and in its country reports. In the case of Hugo Rodríguez v. Uruguay, it noted that it cannot accept the posture of a State of not being obligated to investigate human rights violations committed during a prior regime of given an amnesty law, and it reaffirmed that amnesty in regards to serious human rights violations are incompatible with the International Covenant of Civil and Political Rights, reiterating that they contribute to the creation of an atmosphere of impunity that can undermine upon the democratic order and bring about other serious human rights violations. [FN215]

[FN215] Cf. H.R.C., Case of Hugo Rodríguez v. Uruguay, Communication No. 322/1988, UN Doc. CCPR/C/51/D/322/1988, Report of August 9, 1994, paras. 12.3 and 12.4. Likewise, the Commitee has reiterated its posture when drafting the final comments to the reports presented by the States Parties to the International Covenant of Civil and Political Rights, in which it indicated the amnesties contributed to create “an atmosphere of impunity,” and affect the Rule of Law. Similarly cf. H.R.C., Consideration of reports submitted by States Parties under Article 40 of the Covenant, regarding: Peru, U.N. Doc. CCPR/C/79/Add.67, of July 25, 1996, para. 9, and in a similar sense, Yemen, U.N. Doc. CCPR/C/79/Add.51, of October 3, 1995, numeral 4, para. 3; Paraguay, U.N. Doc. CCPR/C/79/Add.48, of October 3, 1995, numeral 3, para. 5, and Haití, U.N. Doc. CCPR/C/79/Add.49, of October 3, 1995, numeral 4, para. 2.

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158. On its behalf, the Committee against Torture also expressed that the amnesties that prevent the investigation of acts of torture, as well as the judgment and eventual punishment of those responsible, are in violation of the Convention against Torture and other Cruel, Inhumane, and Degrading Treatment. [FN216]

[FN216] Cf. C.A.T., General Comment 2: Implemenation of Article 2 by States Parties. U.N. Doc. CAT/C/GC/2, of January 24, 2008, para. 5, and C.A.T., Final observations regarding the test of the reports presented by the State parties regarding Article 19 of the Convention, in relation to: Benin, U.N. Doc. CAT/C/BEN/CO/2, of February 19, 2008, para. 9, and Ex Republic of Yugoslava of Macedonia, U.N. Doc. CAT/C/MKD/CO/2, of May 21, 2008, para. 5.

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159. Similarly, in the universal system, although in other branches of international law, as in international criminal law, amnesties or analogous norms have also been deemed inadmissible. The International Criminal Tribunal for the former Yugoslavia, in a case related to torture, considered that it would not make sense to sustain on the one hand the proscription of the serious human rights violations, and on the other hand to authorize state measures that authorize or condone, or amnesty laws that absolve its perpetrators. [FN217] In the same sense, the Special Court for Sierra Leone considered that the amnesty laws of said country were not applicable to serious international crimes. [FN218] This universal tendency has been consolidated via the incorporation of the mentioned standard, in the elaboration of the statutes of special tribunals most recently created in the forum of the United Nations. As such, both the United Nations Agreement with the Republic of Lebanon and with the Kingdom of Cambodia, as well as the Statutes that create the Special Tribunal for Lebanon, the Special Court for Sierra Leone, and the Extraordinary Chambers of the Courts of Cambodia, have included in their texts clauses that indicate that the amnesties that are conceded do not constitute an impediment to the processing of those responsible for crimes that are within the scope of the jurisdiction of said tribunals. [FN219]

[FN217] Cf. I.C.T.Y., Case of Prosecutor v. Furundžija. Judgment of 10 December, 1998. Case No. IT-95-17/1-T, para. 155.

[FN218] Cf. S.C.S.L., Case of Prosecutor v. Gbao, Decision No. SCSL-04-15-PT-141, Appeals Chamber, Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, 25 May 2004, para. 10; S.C.S.L., Case of Prosecutor v. Sesay, Callon and Gbao, Case No. SCSL-04-15-T, Judgment of the Trial Chamber, 2 March 2009, para. 54, and S.C.S.L, Case of Prosecutor v. Sesay, Callon and Gbao, Case No. SCSL-04-15-T, Trial Chamber, Sentencing Judgment, 8 April 2009, para. 253.

[FN219] Cf. Agreement between the United Nations and the Republic of Lebanon related to the establishment of a Special Tribunal for Lebanon, Article 16 and Statute of the Special Tribunal for Lebanon, Article 6; Order 1757 of the Security Council of the United Nations. U.N. Doc. S/RES/1757, of May 30, 2007; Statue for the Special Tribunal of Sierra Leona, of January 16, 2002, Article 10; Agreement between the United Nations and the Royal Government of Cambodia for the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, of March 6, 2003, Article 11, and Law on the establishment of the Extroardinary Chambers in the Courts of Cambodia for the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, with amendments approved on October 27, 2004 (NS/RKM,1004/006), new Article 40.

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160. The illegality of the amnesties related to serious violations of human rights vis-à-vis international law have been affirmed by the courts and organs of all the regional systems for the protection of human rights.

161. In the European System, the European Court of Human Rights considered that it is of the highest importance, in what pertains to an effective remedy, that the criminal procedures which refer to crimes, such as torture, that imply serious violations of human rights not be obstructed by statute of limitations or allow amnesties or pardons in this regard. [FN220]

[FN220] Cf. E.C.H.R., Case of Abdülsamet Yaman v. Turkey, Judgment of 2 November 2004, Application no. 32446/96, para. 55.

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162. In the African System, the African Commission on Human and Peoples' Rights considered that amnesty laws cannot protect the State that adopts them from complying with their international obligations, [FN221] and noted, in addition, that in prohibiting the prosecution of perpetrators of serious human rights violations via the granting of amnesty, the States not only promote impunity, but also close off the possibility that said abuses be investigated and that the victims of said crimes have an effective remedy in order to obtain reparation. [FN222]

[FN221] Cf. A.C.H.P.R., Case of Malawi African Association and Others v. Mauritania, Communication. Nos. 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, Decision of 11 May 2000, para. 83.

[FN222] Cf. A.C.H.P.R., Case of Zimbabwe Human Rights NGO Forum v. Zimbabwe, Communication No. 245/2002, Decision of 21 May 2006, paras. 211 and 215.

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163. In the same sense, various member States of the Organization of American States, by way of their highest tribunals of justice, have incorporated the mentioned standards, taking into account in good faith their international obligations. The Supreme Court of Justice of the Nation of Argentina ruled in the Case Simón, to revoke the amnesty laws that in said country constituted a normative obstacle for the investigation, prosecution, and eventual punishment of facts that entailed human rights violations: [FN223]

[T]o the extent that, [the amnesties], tend to "neglect" gross human rights violations, they are contrary to the provisions of the American Convention on Human Rights and International Covenant on Civil and Political Rights, and are, therefore constitutionally intolerable. [FN224]

[T]he translation of the findings of the Inter-American Court in "Barrios Altos" to the Argentine case is imperative, if the decisions of the mentioned International Tribunal are to be interpreted in good faith as jurisprudential guidelines. Certainly, it is possible to find various arguments that distinguish [the Argentine case from the case of Barrios Altos], but such distinctions would be purely anecdotal. [FN225]

[T]o the extent that [the amnesties laws] hinder the investigation and effective punishment of acts contrary to the rights recognized in these treaties, prevent the fulfillment of the duty to guarantee that the State of Argentina has committed to, and are inadmissible. [FN226]
Similarly, any regulation of domestic law which, invoking reasons for "pacification" provides for the grant of any form of amnesty to allow impunity for serious human rights violations perpetrated by the regime that the provision benefits, is contrary to clear and binding provisions of international law, and must be effectively suppressed. [FN227]
[I]n order to comply with international treaties on human rights, the suppression of the [amnesty] laws cannot be postponed and must continue in such a way that from them no regulatory obstacle can be derived for the persecution of facts that are the subject of this case. This means that those who were beneficiaries of such laws cannot invoke the prohibition of retroactivity of the harshest criminal law nor res judicata. [T]he subjection of the Argentine State to the Inter-American jurisdiction prevents the principle of "retroactivity" of the criminal law from being invoked to violate the obligations undertaken in regard to the persecution of gross violations of human rights. [FN228]

[FN223] Cf. Supreme Court of Justice of the Nation of Argentina. Case of Simón, Julio Héctor et al. s/illegal deprivation of liberty, etc., Causa 17.768, Order of June 14, 2005, Considering clause 31.
[FN224] Supreme Court of Justice of the Nation of Argentina. Case of Simón, Julio Héctor et al. s/illegal deprivation of liberty, etc., supra note 223, Considering clause 26.
[FN225] Supreme Court of Justice of the Nation of Argentina. Case of Simón, Julio Héctor et al. s/illegal deprivation of liberty, etc., supra note 223, Considering clause 24.
[FN226] Supreme Court of Justice of the Nation of Argentina. Case of Simón, Julio Héctor et al. s/illegal deprivation of liberty, etc., supra note 223, Considering clause 25.
[FN227] Supreme Court of Justice of the Nation of Argentina. Case of Simón, Julio Héctor et al. s/illegal deprivation of liberty, etc., supra note 223, Considering clause 26.
[FN228] Supreme Court of Justice of the Nation of Argentina. Case of Simón, Julio Héctor et al. s/illegal deprivation of liberty, etc., supra note 223, Considering clause 31. Moreover, regarding the role of the legislature and the judiciary in regard to the determination of unconstitutionality of the law, the Supreme Court noted that “considering that Law 25.779 [annulled the amnesty laws], from a formalist perspective, could be deemed unconstitutional, in that it, upon declaring it null and void, violated the division of powers, by usurping the powers of the Judicial Branch, which is the only constitutional body deemed to declare such laws or normative acts null with legal effectiveness.[…] the solution that the Congress considered corresponds to the case […] in a way deprives the judges of the final decision on the matter.” Supreme Court of Justice of the Nation of Argentina. Case of Simón, Julio Héctor et al. s/illegal deprivation of liberty, etc., supra note 223, Considering clause 34.

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164. In Chile, the Supreme Court of Justice concluded that the amnesties regarding enforced disappearance would encompass only a specific period in time and not the entire length of time of the enforced disappearance nor its effects: [FN229]

[A]lthough the mentioned Law Decree explicitly stated that amnesty was granted for acts committed between September 11, 1973, and March 10, 1978, the crime commenced on January 7, 1975 […], creating the certainty that on March 10, 1978, the date of expiration of the period laid down in Article 1st of L.D. 2191, Sandoval Rodriguez had not appeared and there was no news of him, nor of the place where his remains could be found, in the event of his death […], which makes the alleged amnesty inapplicable, given that the kidnapping continued even after the expiration of the period covered by this order of extinction of criminal liability. [FN230]
[T]he Chilean government imposed upon itself, in signing and ratifying [international treaties], the obligation to ensure the safety of persons, [...] banning measures aimed at protecting the harm committed against individuals or the impunity of the perpetrators, considering in particular that international agreements must be fulfilled in good faith. [That] Supreme Court, in various decisions, has recognized that the domestic sovereignty of the State […] recognizes its limits in regard to the rights which emanate from human nature; values that are superior to any norms that may be available to State authorities, including the Constituent Power, which prevents them from being unknown. [FN231]

[FN229] Cf. Supreme Court of Justice of Chile. Decision of the Plenary on the instance that will see the implementation of the Amnesty Act in the case of the kidnapping of "MIR" activist Miguel Ángel Sandoval, Rol No. 517-2004, Case of 2477, of November 17, 2004, Considering clause 33.
[FN230] Cf. Supreme Court of Justice of Chile. Case of the kidnapping of "MIR" activist Miguel Ángel Sandoval, supra note 229, Considering clause 33.
[FN231] Supreme Court of Justice of Chile. Case of the kidnapping of "MIR" activist Miguel Ángel Sandoval, supra note 229, Considering clause 35.
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165. Most recently, the same Supreme Court of Justice of Chile, in the case of Lecaros Carrasco, annulled a verdict of not guilty and invalidated the application of the Chilean amnesty in Decree Law No. 2.191 of 1978 via a replacement Judgment in the following terms: [FN232]

[T]he crime of kidnapping [...] has the character of a crime against humanity, and therefore, it is not necessary to invoke amnesty as a cause to extinguish criminal responsibility. [FN233]
[T]he amnesty law enacted by the de facto authority which took on the "Supreme Command of the Nation," [...] must be interpreted in a way that conforms with the protective covenants of fundamental rights of the individual and sanctions the serious violations committed against them during the period in which said legal body is in force. [FN234]
[T]he mentioned prohibition of the auto-exoneration not only concerns the obvious situations in which those in power have used the advantageous position which they held to extinguish responsibility, as is the case with self-given amnesty, but it also implies a suspension of the effectiveness of preexisting institutions, such as […] the statute of limitations for criminal proceedings, designed to operate in a state of social peace in which they are called to serve, but not in the situations of harm to the institutions in which the State was set up, and for the specific benefit of those that provoked said breakdown. [FN235]

[FN232] Supreme Court of Justice of Chile, Case of Claudio Abdón Lecaros Carrasco followed for the crime of aggravated kidnapping, Rol No. 47.205, Recurso No. 3302/2009, Order 16698, Judgment of Appeals, and Order 16699, Judgment of Replacement, of May 18, 2010.
[FN233] Supreme Court of Justice of Chile, Case of Claudio Abdón Lecaros Carrasco, Judgment of Reemplazo, supra note 232, Considering clause 1.
[FN234] Supreme Court of Justice of Chile, Case of Claudio Abdón Lecaros, Judgment of Reemplazo, supra note 232, Considering clause 2.
[FN235] Supreme Court of Justice of Chile, Case of Claudio Abdón Lecaros Carrasco, Judgment of Reemplazo, supra note 232, Considering clause 3.

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166. On the other hand, the Constitutional Court of Peru, in the case of Santiago Martín Rivas, in resolving an extraordinary remedy and a remedy of violations to constitutional rights, discussed the scope of the State's obligations in the manner: [FN236]

[T]he Constitutional Court considers that the obligation of States to investigate the facts and punish those responsible for the violation of human rights declared in the Judgment of the Inter-American Court of Human Rights includes not only the nullity of those processes where the amnesty laws […] had been applied, after the declaration that such laws had no legal effect, but also any practice intended to prevent the investigation and punishment for violations of the rights to life and personal integrity. [FN237]
The obligations assumed by the Peruvian State with the ratification of treaties on human rights include the duty to guarantee those rights that, in accordance with International Law, are irrevocable and for which the State is internationally obligated to sanction said involvement. In response to the mandate contained in […] the Constitutional Procedural Code, treaties are sought which have crystallized the absolute prohibition of those who have committed unlawful acts, and pursuant to International Law can not be granted amnesty, as this would be contrary to the standards of minimum protection to the dignity of the human person. [FN238]
[T]he issuance of amnesty laws is of the judicial-constitutional competence of the Congress of the Republic, in such a way that the judicial rulings which are issued pursuant to constitutionally legitimate amnesty laws lead to the configuration of the constitutional res judicata. The control of the amnesty laws, however, part of the presumption that the criminal legislature intended to carry out within the scope of the Constitution and respect for fundamental rights. [FN239]
[Said assumption] does not operate when it is proven that during the exercise of the competence to enact amnesty laws, the criminal legislator intended to also cover up the commission of crimes against humanity. Nor when the exercise of said competence was used to "guarantee" impunity for serious violations of human rights. [FN240]
On the merits[,] the Tribunal considers that amnesty laws [in question] are null and void and lack, ab initio, legal effect. Therefore, the orders enacted so as to guarantee impunity of the violation of human rights by [state agents] are also null and void. [FN241]

[FN236] Cf. Constitutional Court of Peru, Case of Santiago Martín Rivas, Extraordinary Remedy, Case file No. 4587-2004-AA/TC, Judgment of November 29, 2005, para. 63.
[FN237] Constitutional Court of Peru, Case of Santiago Martín Rivas, Extraordinary Remedy, supra note 236, para. 63.

[FN238] Constitutional Court of Peru, Case of Santiago Martín Rivas, Constitutional Tort Action, Case file No. 679-2005-PA/TC, Judgment of March 2, 2007, para. 30.
[FN239] Constitutional Court of Peru, Case of Santiago Martín Rivas, Constitutional Tort Action, supra note 238, para. 52.
[FN240] Constitutional Court of Peru, Case of Santiago Martín Rivas, Constitutional Tort Action, supra note 238, para. 53.
[FN241] Constitutional Court of Peru, Case of Santiago Martín Rivas, Constitutional Tort Action, supra note 238, para. 60.
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167. In the same sense, the Supreme Court of Justice of Uruguay ruled recently on the Expiry Law of the Punitive Claim of the State in said country, considering that:

[no one] denies that a law enacted by a special majority and in extraordinary cases, the State may decide to waive punishment for criminal facts. [However, the law is unconstitutional because, in the case, the Legislative Power exceeded the constitutional scope for awarding amnesties [FN242] [because] to declare the expiration of criminal prosecutions, in any case, exceeds the powers of the legislators and invades the forum of a function constitutionally assigned to judges, so that, for whatever reason, the legislature could not be attributed with the power of deciding that the period had expired regarding prosecution for certain crimes. [FN243]
[C]urrent regulation of human rights is not based on the position of sovereign States, but in the person as holder, given his or her status as such, of essential rights that can not be ignored based on the exercise of the constituent power, neither original nor derivative. [FN244]
In this framework, [the amnesty law] under consideration affected the rights of many people (notably, the victims, the next of kin, or those harmed by the human rights violations mentioned above), their right to a remedy, an impartial and exhaustive investigation to ascertain the facts, to identify those responsible and to impose the appropriate penalties has been frustrated; to the extent that the legal consequences of the law regarding the right to judicial guarantees are incompatible with the [A]merican Convention [on] Human Rights. [FN245]
To summarize, the unlawfulness of an amnesty law enacted for the benefit of military and police officials who committed [serious violations of human rights], whom enjoy impunity during de facto regimes, has been declared by courts, of both the international community and the States that went through similar processes experienced by Uruguay during the same period in time. Such rulings, given the similarity with the issue under analysis and the relevance they have had, could not be ignored in the examination of the constitutionality of Law [No.] 15.848 and have been taken into account by the Corporation to issue the present ruling. [FN246]

[FN242] Supreme Court of Justice of Uruguay, Case of de Nibia Sabalsagaray Curutchet, Judgment No. 365/09, order of October 19, 2009, Considering clause III.2, paras. 8 and 9.
[FN243] Supreme Court of Justice of Uruguay, Case of de Nibia Sabalsagaray Curutchet, supra note 242, Considering clause III.2, para. 13.
[FN244] Supreme Court of Justice of Uruguay, Case of de Nibia Sabalsagaray Curutchet, supra note 242, Considering clause III.8, para. 6.
[FN245] Supreme Court of Justice of Uruguay, Case of de Nibia Sabalsagaray Curutchet, supra note 242, Considering clause III.8, para. 11.

[FN246] Supreme Court of Justice of Uruguay, Case of de Nibia Sabalsagaray Curutchet, supra note 242, Considering clause III.8, para. 15.

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168. Finally, the Constitutional Court of Colombia, in various cases, has taken into consideration the international obligations in cases of serious human rights violations and the obligation to avoid the application of domestic amnesty provisions:

Forms such as the laws of final measure that impede access to justice, the blank amnesties for any crime, the self-amnesties (namely, the criminal benefits which the legitimate and illegitimate holders of power grant themselves and whom were accomplices in the crimes committed), or whichever other form it takes so as to prevent victims from a obtaining an effective judicial recourse to make their rights count, have been considered as being in violation of the international obligation of States to promote legal remedies for the protection of human rights. [FN247]

[FN247] Constitutional Court of Colombia, Review of Law 742, of June 5, 2002, Case file No. LAT-223, Sentencia C-578/02, of July 30, 2002, section 4.3.2.1.7.

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169. Moreover, the Supreme Court of Justice of Colombia indicated that "the norms related to [hu]man [r]ights form part of the great group of provisions of General International Law, those of which are recognized as ius cogens norms, reason for which, they are irrevocable, imperative […] and non-disposable." [FN248] The Supreme Court of Colombia recalled that the jurisprudence and recommendations of international organisms on human rights must serve the preferential criteria of interpretation in both constitutional and ordinary justice and cited the jurisprudence of this Court regarding the unacceptability of the amnesty provisions for cases of serious human rights violations. [FN249]

[FN248] Supreme Court of Justice of Colombia, Chamber of Criminal Annulment. Case of the Segovia Massacre. Act number 156, of May 13, 2010, page. 68.
[FN249] Cf. Supreme Court of Justice of Colombia, Chamber of Criminal Annulment. Case of the Segovia Massacre, supra note 248, pages. 69 and 71.

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170. As is evident from the content of the preceding paragraphs, all of the international organs for the protection of human rights and several high courts of the region that have had the opportunity to rule on the scope of amnesty laws regarding serious human rights violations and their compatibility with international obligations of States that issue them, have noted that these amnesty laws impact the international obligation of the State to investigate and punish said violations.

171. This Court has previously ruled on the matter and has not found legal basis to part from its constant jurisprudence that, moreover, coincides with that which is unanimously established

in international law and the precedent of the organs of the universal and regional systems of protection of human rights. In this sense, regarding the present case, the Court reiterates that "amnesty provisions, the statute of limitation provisions, and the establishment of exclusions of responsibility that are intended to prevent the investigation and punishment of those responsible for serious violations to human rights such as torture, summary, extrajudicial, or arbitrary executions, and enforced disappearance are not admissible, all of which are prohibited for contravening irrevocable rights recognized by International Law of Human Rights." [FN250]

[FN250] Cf. Case of Barrios Altos v Perú. Merits. Judgment of March 14, 2001. Series C No. 75, para. 41; Case of La Cantuta, supra note 160, para. 152, and Case of the Dos Erres Massacre, supra note 186, para. 129.

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172. The Inter-American Court considers that the manner in which the Amnesty Law has been interpreted and applied by Brazil (supra paras. 87, 135 and 136) has affected the international obligation of the State in regard to the investigation and punishment of serious human rights violations because it prevented the next of kin in the present case from being heard before a judge, pursuant to that indicated in Article 8(1) of the American Convention and violated the right to judicial protection enshrined in Article 25 of the Convention given the failure to investigate, persecute, capture, prosecute, and punish those responsible for the facts, failing to comply with Article 1(1) of the Convention. In addition, in applying the provisions of the Amnesty Law preventing the investigation of the facts and the identification, prosecution, and possible punishment of the possible responsible of continued and permanent violations such as enforced disappearances, the State failed to comply with its obligation to adapt its domestic law enshrined in Article 2 of the American Convention.

173. The Court deems it necessary to emphasis that, under the general obligations enshrined in Article 1(1) and 2 of the American Convention, the States Parties have the obligation to take measures of all kinds to assure that no one is taken from the judicial protection and from the exercise of their right to a simple and effective remedy, in the terms of Articles 8 and 25 of the Convention. In a case such as the present, once the American Convention has been ratified, it corresponds to the State to adopt all the measures to revoke the legal provisions that may contradict said treaty as established in Article 2, such as those that prevent the investigation of serious human rights violations given that it leads to the defenselessness of victims and the perpetuation of impunity and prevent the next of kin from knowing the truth.

174. Given its express non-compatibility with the American Convention, the provisions of the Brazilian Amnesty Law that impedes the investigation and punishment of serious human rights violations lack legal effect. As a consequence, they cannot continue to represent an obstacle in the investigation of the facts in the present case, nor for the identification and punishment of those responsible, nor can they have equal or similar impact regarding other cases of serious human rights violations enshrined in the American Convention that occurred in Brazil. [FN251]

[FN251] Cf. Case of Barrios Altos. Merits, supra note 250, para. 44; Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 119, and Case of La Cantuta, supra note 160, para. 175.

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175. In regard to the that argued by the parties regarding whether the case deals with an amnesty, self-amnesty, or "political agreement," the Court notes, as is evident from the criteria stated in the present case (supra para. 171), that the non-compatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, "self-amnesties." Likewise, as has been stated prior, the Court, more than the adoption process and the authority which issued the Amnesty Law, heads to its ratio legis: to leave unpunished serious violations in international law committed by the military regime. [FN252] The non-compatibility of the amnesty laws with the American Convention in cases of serious violations of human rights does not stem from a formal question, such as its origin, but rather from the material aspect as they breach the rights enshrined in Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention.

[FN252] Cf. Case of Almonacid Arellano et al., supra note 251, para. 120.

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176. This Court has established in its jurisprudence that it is conscious that the domestic authorities are subject to the rule of law, and as such, are obligated to apply the provisions in force of the legal code. However, when a State is a Party to an international treaty such as the American Convention, all of its organs, including its judges, are also subject to it, wherein they are obligated to ensure that the effects of the provisions of the Convention are not reduced by the application of norms that are contrary to the purpose and end goal and that from the onset lack legal effect. The Judicial Power, in this sense, is internationally obligated to exercise "control of conventionality" ex officio between the domestic norms and the American Convention, evidently in the framework of its respective jurisdiction and the appropriate procedural regulations. In this task, the Judicial Power must take into account not only the treaty, but also the interpretation that the Inter-American Court, as the final interpreter of the American Convention, has given it. [FN253]

[FN253] Cf. Case of Almonacid Arellano et al., supra note 251, para. 124; Case of Rosendo Cantú et al., supra note 45, para. 219, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 202.

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177. In the present case, the Court notes that the control of conventionality was not exercised by the competent authorities of the State, but rather, the decision of the Federal Supreme Court confirmed the validity of the interpretation of the Amnesty Law without considering the international obligations of the Brazil derived from international law, particularly those established in Article 8 and 25 of the American Convention, in relation with Articles 1(1) and 2

of the same. The Court deems it timely to recall that the obligation of a State to comply with international obligations voluntarily contracted corresponds to a basic principle of law of international responsibility of States, backed by international and national jurisprudence, according to which States must comply with their conventional international obligations in good faith (pacta sunt servanda). According to that previously held by this Court and established in Article 27 of the Vienna Convention on the Law of Treatises of 1969, States cannot, due to domestic order reasons, not to assume their already established international obligations. The conventional obligations of States Parties bind all the powers and organs of the State, those of which must guarantee compliance with conventional obligations and its effects (effet utile) in the design of its domestic law. [FN254]

[FN254] Cf. International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights). Advisory Opinion OC- 14/94, of December 9, 1994. Series A No. 14, para. 35; Case of the Miguel Castro-Castro Prison v. Perú. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, para. 394, and Case of Zambrano Vélez et al. v. Ecuador. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, para. 104. Likewise, cf. I/A Court H.R., Case of Castillo-Petruzzi et al. v. Peru. Compliance with Judgment. Order of November 17, 1999. Series C No. 59. Considering clause 3; Case of De la Cruz Flores v. Perú. Compliance with Judgment. Order of the Inter-American Court of Human Rights of September 1, 2010, Considering clause 5.

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178. In relation to the application of the principle of proportionality made by the State, amongst the various measures adopted as a guarantee of non-repetition so as to comply with Article 1(1) of the American Convention and the principle of legality enshrined in Article 9 of the same treaty (supra para. 132), the Court positively values the numerous measures of reparation and non-repetition adopted by Brazil, which will be discussed in the chapter on reparations in the present Judgment. While these measures are important, they are not sufficient given that they have failed in providing access to justice for the next of kin of the victims. In this regard, the Court notes that in applying the principle of proportionality, the State has omitted any mention of victims' rights arising under Articles 8 and 25 of the American Convention. Indeed, said proportionality is made between the State’s obligations to respect and guarantee and the principle of legality, but the right to judicial guarantees [fair trial] and judicial protection of the victims and their next of kin are not included in the analysis, which have been sacrificed in the most extreme way in the present case.

179. In addition, regarding the alleged offense to the principle of legality and retroactivity, the Court has already noted (supra paras. 110 and 121) that enforced disappearance is a crime of a continuous and permanent nature, and its effects do not stop until the whereabouts or location of the victim are determined and the victim’s identity established, hence the effects of the internationally unlawful act in question continue occurring. Therefore, the Court finds that, at any rate, there would be no retroactive application of the crime of enforced disappearance, given that the facts of the present case, that are left in impunity by the application of the Amnesty Law,

go beyond the temporal scope of said norm because of the continuing or permanent nature of enforced disappearance.

180. Based on the previous considerations, the Inter-American Court concludes that given the interpretation and the application it has given to the Amnesty Law, which lacks legal effects regarding serious human rights violations, in the abovementioned terms (particularly, supra paras. 171 to 175), Brazil has not complied with its obligation to properly conform its domestic law with the Convention, contained in Article 2 thereof, in relation with Articles 8(1), 25, and 1(1) of the same treaty. In addition, the Court concludes that because of the failure to investigate the facts, as well as the prosecution and punishment of those responsible, the State violated the rights to judicial guarantees [fair trial] and judicial protection enshrined in Articles 8(1) and 25(1) of the American Convention, in relation with Articles 1(1) and 2 of the same, to the detriment of the following next of kin of the victims: Zélia Eustáquio Fonseca, Alzira Costa Reis, Victória Lavínia Grabois Olímpio, Criméia Alice Schmidt de Almeida, João Carlos Schmidt de Almeida, Luiza Monteiro Teixeira, João Lino da Costa, Benedita Pinto Castro, Odila Mendes Pereira, José Pereira, Luiza Gurjão Farias, Junília Soares Santana, Antonio Pereira de Santana, Elza da Conceição Oliveira (or Elza Conceição Bastos), Viriato Augusto Oliveira, Maria Gomes dos Santos, Rosa Cabello Maria (or Rosa Olímpio Cabello), Igor Grabois Olímpio, Julia Gomes Lund, Carmem Navarro, Gerson Menezes Magalhães, Aminthas Aranha (or Aminthas Rodrigues Pereira), Julieta Petit da Silva, Ilma Hass, Osoria Calatrone, Clotildio Calatrone, Isaura de Souza Patricio, Joaquim Patricio, Elena Gibertini Castiglia, Jardilina Santos Moura, Joaquim Moura Paulino, José Vieira de Almeida, Acary V. de S. Garlippe, Dora Grabois, Agostim Grabois, Rosana Moura Momente, Maria Leonor Pereira Marques, Otilia Mendes Rodrigues, Francisco Alves Rodrigues, Celeste Durval Cordeiro, Luiz Durval Cordeiro, Aidinalva Dantas Batista, Elza Pereira Coqueiro, Odete Afonso Costa, Angela Harkavy, José Dalmo Ribeiro Ribas, Maria Eliana de Castro Pinheiro, Roberto Valadão, Diva Soares Santana, Getúlio Soares Santana, Dilma Santana Miranda, Dinorá Santana Rodrigues, Dirceneide Soares Santana, Terezinha Souza Amorim, Aldo Creder Corrêa, Helenalda Resende de Souza Nazareth, Helenice Resende de Souza Nazareth, Helenilda Resende de Souza Nazareth, Helenoira Resende de Souza Nazareth, Wladmir Neves da Rocha Castiglia, Laura Petit da Silva, Clovis Petit de Oliveira, Lorena Moroni Barroso, Breno Moroni Girão, Ciro Moroni Girão, Sônia Maria Haas, Elizabeth Silveira e Silva, Luiz Carlos Silveira e Silva, Luiz Paulo Silveira e Silva, Maristella Nurchis, and Valeria Costa Couto.

181. On the other hand, the Inter-American Court has information that 24 family members indicated as alleged victims passed away prior to December 10, 1998. Regarding these persons, the Court will not declare State responsibility given the rule of jurisdiction ratione temporis. [FN255] In addition, the Court has information that another 38 family members passed away, even though, from the body of evidence, the respective dates in which the deaths occurred cannot be concluded. [FN256] In regard to said persons, the Court will allow their next of kin or their legal representatives to present to the Court, in a period of six months, as of the date of notification of the present Judgment, the documentation that evinces the date of death is subsequent to December 10, 1998 in order to confirm their nature as victims in the present case, pursuant to the abovementioned criteria.

[FN255] Cf. Case of the Serrano-Cruz Sisters v. El Salvador. Merits, Reparations, and Costs. Judgment of 1 de marzo de 2005. Series C No. 120, para. 144. According to the information provided by the Commission and the representatives, the next of kin whom passed away prior to Brazil's acknowledgment of the Courts jurisdiction, are the following: Adriano Fonseca (father, 1984), Maria Jardilina da Costa (mother, 1993), Benedita de Araújo Ribas (mother, 1995), Walter Sheiba Pinto Ribas (father, 1996), José Ferreira de Souza (father, in 1980's), Irene Guedes Corrêa (mother, 1986), Edgar Corrêa (father, 1993), Antonio Olímpio Maria (father, 1980), Euthália Resende de Souza Nazareth (mother, 1996), Adalberto de Assis Nazareth (father, 1965), Idalisio Soares Aranha (father, 1964), José Bernardino da Silva Júnior (father, 1949), Cyrene Moroni Barroso (mother, 1992), Benigno Girão Barroso (father, 1995), Ildefonso Haas (father, 1989), Adaíde Toledo de Oliveira (mother, 1992), José Sebastião de Oliveira (father, 1970), Jovina Ferreira (mother, 1979), Lilita Silveira and Silva (mother, 1993), René de Oliveira and Silva (father, 1986), Silvio Marques Camilo (father, 1964), Francisco de Assis Batista (father, 1970), Edwin da Costa (father, 1997), and Heleneide Resende de Souza Nazareth (sister, years 1980).

[FN256] It involves Gerson da Silva Teixeira (father), Raimundo de Castro Sobrinho (father), Helena Almochdice Valadão (mother) and Altivo Valadão de Andrade (father), Gessiner Farias (father), Eloá Cunha Brum (mother) and Lino Brum (father), Maria de Lourdes Oliveira (mother) and Arédio Oliveira (father), Hilda Quaresma Saraiva (mother) and Dário Saraiva Leão (father), América Ribeiro Callado (mother) and Consueto Callado (father), Francisca das Chagas Pereira (mother) and Carlos Gentil Pereira (father), João Carlos Lund (father), Ermelinda Mazzaferro Bronca (mother) and Huberto Atteo Bronca (father), Anita Lima Piauhy Dourado (mother) and Pedro Piauhy Dourado (father), Karitza Lemos da Silva (mother) and Norival Euphorosino da Silva (father), Luigi Castiglia (father), José Augusto de Souza (father), Joana Vieira de Almeida (esposa), Rosalina Carvalho Nurchis (mother) and José Francisco Nurchis (father), Helena Pereira dos Santos (mother) and Pedro Francisco dos Santos (father), Antonia Rivelino Momente (mother) and Álvaro Momente (father), Rita Orlando dos Santos (mother) and José Orlando da Costa (father), Geny de Carvalho Troiano (mother) and Rodolfo Troiano (father), Lindaura Correia de Souza (mother) and Rosalvo Cipriano (father), and Arnobio Santos Coqueiro (father).

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182. Lastly, the Court will refer, as it has done in a constant manner, to the guidelines that the investigations of the State should follow, in the corresponding subsection on the obligation to investigate in the Chapter regarding reparations in the present Judgment. In regard to the alleged non-compliance with Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture argued by the representatives, the Court deems that it is not necessary to rule on these allegations given that they refer to the same facts that have been analyzed under other conventional obligations.

IX. RIGHT TO FREEDOM OF THOUGHT AND EXPRESSION, FAIR TRAIL [JUDICIAL GUARANTEES]) AND JUDICIAL PROTECTION, IN RELATION WITH THE OBLIGATION TO RESPECT RIGHTS AND THE OBLIGATION TO UNDERTAKE DOMESTIC LEGAL EFFECTS

183. The Court, in order to determine whether the State is responsible for the alleged violations of Article 13, [FN257] 8(1), and 25, in relation to Articles 1(1) and 2, all of the

American Convention, it will synthesize the arguments of the parties, establish the facts it considers proven, and will make the appropriate considerations on the judicial procedures and the normative framework related to the right to seek and receive information.

[FN257] Article 13 of the American Convention, in what is relevant, establishes:
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.

A. Arguments of the parties

184. The Inter-American Commission held that in the present case there is an undue restriction on the right to access information, given that: a) there is no legitimate interest in reserving information related to gross violations of human rights; the State has not proven a current, imperative or obligatory purpose in order to maintain as restricted the information required by the victims, and disclosure of information cannot impose certain, objective, serious and present harm to national security; b) the next of kin's lack of knowledge of the truth and the continued lack of information is a situation "comparable to torture"; c) the State could never deny access to information to judges or autonomous organs of investigation that could verify the legitimate objective of the restriction, and d) freedom of expression and access to information contribute to the guarantee to the truth, to justice, and to reparation, thus avoiding new gross human rights violations from arising. In addition, the various laws and decrees that have governed the right to access to information in Brazil do not comply with the standards established by the Inter-American System given that the scope and contents of the right to access to information are regulated by provisions of an administrative nature and none of the regulations of this right define or limit the causes of restriction. And also, said regulations: a) do not include administrative procedures that assure the appropriate processing and resolution of requests for information, the terms to answer, nor the possibility to contest the denial of the provision of information with a quick and effective remedy; b) do not contemplate the obligation to appropriately found the reasons for denying requests for information, and c) contemplate periods of unlawful restriction. Moreover, States have the positive obligation to produce and conserve information, to which they are obligated to implement measures that permit the custody, management, and access to records or archives. Given the aforementioned, the Inter-American Commission requested the Court to declare the State responsible for the violation of Article 13 of the Convention, in conjunction with Articles 1(1) and 2 of the same instrument, and to order the State to reform its domestic legal regime so as to be in conformity with Article 2, in relation with Article 13 of the American Convention. On the other hand, in regard to the Ordinary Action 82.00.24682-5, the Inter-American Commission considered that the State did not justify the more than 25 years that have passed until a final judgment was rendered. The other judicial remedies

filed in order to obtain information regarding the Guerrilha do Araguaia also have not been effective to date, nor have they produced a final judgment. Based on the unjustified delay and the ineffective actions filed of a non-criminal nature, the Commission requested the Court to determine that the State violated Articles 8 and 25 of the Convention, consistent with Article 1(1) of the same, to the detriment of the disappeared victims and their next of kin, as well as the next of kin of the executed person.

185. The representatives agreed, in substance, with the arguments of the Commission and added that the silence, the refusal to disclose documents, or the failure of the authorities to prove the destruction of said documents, clearly demonstrates the State's violation to access to information. Despite the alleged destruction of documents on behalf of the Armed Forces, in 2010, the Air Force handed over various documents, those of which were copies of documents obtained by the Special Commission. Therefore, these files, while they do not provide sufficient information to ascertain the whereabouts of the victims, they demonstrate that the documents exist and had not been disclosed previously. The mechanisms created by the State, the inefficiency of the class actions filed to access information, and the search missions carried out by the State, as well as the legislative and administrative measures on the restriction to access to confidential information in State custody, have prevented the reconstruction of the facts, and consequently, to the truth. Given the foregoing, they argued that the State violated the rights and obligations enshrined in Articles 1(1), 2, 8, 13, and 25 of the Convention.

186. The State reiterated the existence of various norms that regulate the systematization and publication of information on those politically deceased and disappeared, approved during the constitutional regime. Nevertheless, the legal panorama that regulates this right will be substantially reformed if the legislative proposal of Law No. 5.228 of the Executive Power, sent to the National Congress in February 2009, is approved (infra paras. 291 and 293). On the other hand, Brazil recalled the various measures adopted, among them the Project Memories Revealed, and emphasized the achievements obtained by the Special Commission, which was able to reconstruct many episodes of death and enforced disappearances that occurred during the military regime. Likewise, it reported on the wide and complex archive system, which is available for consultation, depending on the "release" of the legal terms of their classification. In the framework of compliance of the judgment of the Ordinary Action, on July 10, 2009, it handed over copies of thousands of pages of documents on the Guerrilha do Araguaia, which represent all the information known and recorded in the forum of the Union regarding the Guerrilla. It affirmed that the specific documents related to the Guerrilha do Araguaia are not restricted due to public and State security reasons. Likewise, the Army, the Navy and the Air Force reported that they do not have a single document in their archives from that period given that they have destroyed them pursuant to the regulations in force during that period. The Navy informed that specific documents disseminated via the media regarding the Guerrilla, had been extracted by unlawful means from the archives prior to their destruction. The Air Force also indicated that despite the fact that documents had been destroyed; some documents that contained generic information were made available to the National Archive. The destruction of documents related to the military regime took place pursuant to Decree No. 79.099, of January 6, 1977, to which individual responsibilities of officials cannot be determined. Lastly, Brazil considered that the Public Civil Suit filed by the Federal Public Prosecutor's Office had been

fully attended to in the orders of the Ordinary Action 82.00.24682-5, wherein, in December 2009, it presented a request informing the Rapporteur Judge the loss of purpose of the remedy.
B. Facts related to access to information

187. Some next of kin of the members of the Guerrilha do Araguaia have promoted, since 1982, actions of a non-criminal nature in order to establish the circumstances of the enforced disappearances, the localization of the bodily remains, as well as to access to official documents on the military operations in the region. On its behalf, the Federal Public Prosecutor's Office also established actions of a civil nature with similar objectives.

1. Ordinary Action No. 82.00.24682-5

i. Prior facts to the jurisdiction ratione temporis of the Court

188. On February 19, 1982, 22 family members of 25 disappeared persons of the Guerrilla, initiated a lawsuit of a civil nature against the Federal State before the First Federal Court of the Federal District (hereinafter "First Federal Court"), requesting the Union to report on the burial of their next of kin, in such a way as to allow for the issuance of death certificates, the transport of the bodily remains, and the provision of the official report of the Ministry of War of January 5, 1975 on the military operations of war against the Guerrilha do Araguaia. [FN258]

[FN258] Cf. Initial Petition of the Ordinary Action (Ação Ordinária para Prestação de Fato), Action No. 82.00.24682-5, of February 19, 1982 (case file of annexes to the brief of pleadings and motions, tome I, annex 1, folios 3835 to 3855).
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189. On March 27, 1989, the action was rejected without an evaluation of the merits, given that the request was "legally and materially impossible to fulfill." [FN259] Due to the filing of a motion for appeal by the plaintiffs, [FN260] the Federal Regional Court of the First Region (hereinafter, "the Federal Regional Court") reversed said judgment on October 1993, and ordered that the procedural instructions be carried out so as to judge the merits of the cause. [FN261]

[FN259] Cf. Judgment of First Federal Court of the Federal District of March 27, 1989 (case file of annexes to the application, tome I, annex 10, folio 70).
[FN260] Cf. Motion for appeal presented by the plaintiffs of April 19, 1989 (case file of annexes to the application, tome I, annex 11, folios 72 to 79).
[FN261] Cf. Decision of the First Chamber of the Federal Regional Tribunal of the First Region published on October 11, 1993 (case file of annexes to the application, tome I, annex 12, folio 80).
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190. Between March 1994 and April 1996, the Union filed three remedies and the competent tribunals rejected all. [FN262] Therefore, on June 22, 1998, the proceeding returned to the judge of first instance so as to initiate the procedural instruction in compliance with the judgment of

October 1993 of the Federal Regional Court. The judge of first instance required the State to send the report on the Guerrilha do Araguaia. [FN263] On November 11, 1998, the State presented another remedy. [FN264]

[FN262] The first of them was the Remedy of Embargo of Declaration filed by the Union on March 24, 1994, against the Decision of the Federal Regional Tribunal (case file of annexes to the application, tome I, annex 13, folios 81 to 87), which was rejected on March 12, 1996 (case file of annexes to the application, tome I, annex 14, folios 88 to 94), also available on: http://www.trf1.jus.br/Processos/ProcessosTRF/; proceeding 89.01.06733-1, last visited on October 8, 2010. The Union filed, also on April 29, 1996, a Special Remedy (case file of annexes to the application, tome I, annex 15, folios 95 to 96), which was not admitted on November 20, 1996 (case file of annexes to the application, tome I, annex 16, folios 102 and 103). Given the non-admission of the Special Remedy, the Union filed a Tort Action in Special Remedy No. 144015-DF on December 19, 1996. Similarly available on: http://www.trf1.jus.br/Processos/ProcessosTRF/; procedure 89.01.06733-1, last visited on October 8, 2010. Said remedy was not admitted by the Superior Tribunal of Justice on April 22, 1998 (case file of annexes to the application, tome I, annex 23, folio 205), also available on: http://www.stj.jus.br; procedure REsp 873371-DF, last visited on October 8, 2010.

[FN263] Cf. Office of the First Federal Court of the Federal District of October 19, 1998 (case file of annexes to the brief of pleadings and motions, tome I, annex 3, folio 3899).

[FN264] Cf. Tort Action filed by the Union on November 11, 1998 (case file of annexes to the application, tome I, annex 17, folios 104 to 112).

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ii. Facts subsequent to the ratione temporis jurisdiction of the Court

191. On February 21, 2000, the Federal Regional Court dismissed the abovementioned remedy. [FN265] On April 25, 2000, the Brazilian Army submitted a document to the Union, which was incorporated in the case file of the Ordinary Action,, wherein it was affirmed that "there are no documents or any other information to be presented to [the] authorities, at this moment [and] that [on the] 11th of [November, 1982], the then Cabinet of the Army clarified that the documents had been previously offered to the Office of the Regional Prosecutor General of the Republic." [FN266] In June of 2003, the First Federal Court finally analyzed the merits of the case and ruled the action was in order. As such, it ordered the declassification and presentation of all information related to the military operations against the Guerrilha do Araguaia, and to report on the places where in the disappeared were buried, among other measures. [FN267] In August of 2003, the Union appealed said decision. [FN268] The Federal Regional Tribunal rejected the appeal in December of 2004. [FN269] Subsequently, on July 8, 2005, the State filed a Special Remedy and an Extraordinary Remedy. [FN270] The first was declared partially admissible by the Supreme Court of Justice, in what regards the determination of the judicial body charged with executing the judgment of first instance, and the Federal Regional Court did not admit the second. [FN271] On October 9, 2007, this decision became final. [FN272] In May of 2008, the brief was resent to the First Federal Court to initiate the execution of the judgment, which was ordered on March 12, 2009. [FN273]

[FN265] Cf. Decision of the Tribunal Regional Federal of February 22, 2000 in the Tort Action No. 1998.01.00.084211-3. Also available at: http://www.trf1.jus.br/Processos/ProcessosTRF/; last visited on October 8, 2010.
[FN266] Cf. Order No. 723/A2 of the Cabinet Chief of the Major of the Army of April 25, 2000 (case file of annexes to the brief of pleadings and motions, tome I, folio 3900).
[FN267] Cf. Judgment of First Federal Court of June 30, 2003 (case file of annexes to the application, tome I, annex 21, folios 134 to 180).
[FN268] Cf. Motion for partial appeal filed by the Union on August 27, 2003 (case file of annexes to the application, tome I, annex 22, folios 181 to 201).
[FN269] Cf. Decision of the Tribunal Regional Federal on the appeal filed by the Union, published on December 14, 2004 (case file of annexes to the application, tome I, annex 23, folios 202 to 261). Also available at http://www.trf1.jus.br/Processos/ProcessosTRF/; last visited on October 8, 2010.
[FN270] Cf. Special Remedy of the Union filed on July 8, 2005 (case file of annexes to the application, tome I, annex 24, folios 262 to 273), and Extraordinary Remedy of the Union filed on July 8, 2005 (case file of annexes to the brief of pleadings and motions, tome I, annex 15, folios 4027 to 4035).
[FN271] Cf. Judgment of the Superior Tribunal of Justice published on September 20, 2007 (case file of annexes to the application, tome I, annex 25, folios 274 a 282). Also available at: http://www.stj.jus.br; last visited on October 8, 2010, and Decision of the Tribunal Regional Federal of March 16, 2006 (case file of annexes to the brief of pleadings and motions, tome I, annex 16, folios 4039 to 4041).
[FN272] Cf. Certificate of the Superior Tribunal of Justice of October 9, 2007 (case file of annexes to the brief of pleadings and motions, tome I, annex 21, folio 4076).
[FN273] Cf. Procedure 2003.01.00.041033-5. Available at: http://www.trf1.jus.br/Processos/ProcessosTRF/; last visited on October 8, 2010.

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192. So as to comply with the judgment ordered in the framework of the Ordinary Action, the State established, in April 2009, the Tocantins Working Group (supra para. 100). Regarding the documents on the Guerrilla, in July 2009, the Attorney General of the Union presented before the Ordinary Action proceeding various documents, among others, the report drafted by the Ministry of Defense "Informaciones sobre la Guerrilha do Araguaia" [Information on the Guerrilha do Araguaia], of 21,000 pages of documents and archives of the former National Information Services which was under the custody of the National Archive and that consist of documents which pertain to the three secret services of the Armed Forces. As such, the State, in the Ordinary Action, offered information gathered by various organs of the State in distinct periods, that of which, it noted, constitutes all of the documentation available from the Union regarding the military operations, particularly in what regards the armed conflicts, the capture and detention of civilians, the recognition of bodies, and the identification of members of the Guerrilla. [FN274] The mentioned report of the Ministry of Defense indicates that since the end of 2003, in what regards the Armed Forces, specific investigation procedures were initiated in order to obtain information on the combat used against the Guerrilla and on the possible localization of the bodily remains of the disappeared persons. [FN275]

[FN274] Cf. Brief of the Attorney General of the Union submitted to the First Federal Court on July 10, 2009 (case file on the merits, tome VI, folios 3218 a 3251). The Court notes that Mr. Antunes da Silva, in his expert report, indicated that "[o]n December 4, 2008, 21,319 pages of documents were delivered to the First Federal Court, of the body of evidence of the extinct National Information Service." Nevertheless, in the Report on the Guerrilha do Araguaia elaborated by the Ministry of Defense and submitted to the proceeding of the Ordinary Action in July of 2009, it states that on December 15, 2008, "[the] Subcheif of Legal Matters of the Civil House [submitted] to the Ministry of Defense […] copies of the record under the custody of the National Archive, in a total of approximately 20,000 […] pages, as part of the compliance of the judgment issued in Action 82.00.24682-5." Likewise, of the body of evidence it is evident that the execution of the Judgment of the Ordinary Action was ordered on March 12, 2009. Given the stated, the Court cannot hold that the evidence provided in the case file if more than 20,000 pages were submitted in the proceedings of the Ordinary Action prior to formal delivery on July 10, 2009. Cf. Expert report by Mr. Jaime Antunes da Silva before a public notary (case file on the merits, tome IV, folios 1430 a 1433), and Ministry of Defense. Information on the Guerrilha do Araguaia, supra note 81, folios 3443 and 3454.

[FN275] Cf. Ministry of Defense. Information on the Guerrilha do Araguaia, supra note 81, folio 3481.

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2. Other judicial procedures

193. By means of a request of the next of kin, [FN276] in 2001, the Offices of the Prosecutor General's of the Republic in the states of Pará, São Paulo, and of the Federal District, initiated public civil investigations No. 1/2001, 3/2001, and 5/2001, respectively, in order to gather information on the Guerrilha do Araguaia. The prosecutors elaborated, in January of 2002, a "Partial Report on the Investigation of the Guerrilha do Araguaia." [FN277] As a consequence of said investigations, on August 9, 2001, the Federal Public Prosecutor's Office filed a Public Civil Suit (No. 2001.39.01.000810-5) against the Union, aimed at ending the influence imposed on the inhabitants of the Araguaia region with the use of social assistance, of the Armed Forces, as well as obtaining from the Union all documentation that contains information on the military actions of war against the Guerrilla. [FN278] On December 19, 2005, the First Federal Court declared the action partially admissible. [FN279] Following the filing of remedy by the Union in March 2006, [FN280] the judgment of first instances was partially reformed by means of the decision of July 26, 2006, and as such only the obligation to exhibit, confidentially, all the documents that contained information on the military actions on the Guerrilla was maintained. [FN281] In September, 2006, the Union filed a Special Remedy [FN282] and an Extraordinary Remedy [FN283] against this last ruling. The Special Remedy was not accepted by the Superior Court of Justice according to the decision of August 18, 2009. [FN284] After the denial of the Extraordinary Remedy by Federal Regional Tribunal, the Union filed a Tort Action before the Federal Supreme Court. In the context of this remedy, on December 7, 2009, the Union requested that the court declare loss of objective, given that the request for exhibition of documents related to the Guerrilha do Araguaia made in the Public Civil Suit has been answered by way of the judgment of the Ordinary Action No. 82.00.24682-5, that which is of a res judicata nature. [FN285]

[FN276] Cf. Statement of Mr. Marlon Alberto Weichert rendered at the public hearing on May 20, 2010.
[FN277] Cf. Federal Public Prosecutor's Office. Partial Report of the Investigation on the Guerrilha do Araguaia. Investigation Nos. 1/2001 – Pará, 3/2001 – São Paulo, and 5/2001 – Federal District, of January 28, 2002 (case file of annexes to the application, tome I, annex 26, folios 283 to 308).
[FN278] Cf. Judgment of Federal Judge of First Instance, Judiciary Section of Pará - Subsection Marabá, of December 19, 2005 (case file of annexes to the application, tome I, annex 27, folio 309). Also available at: http://processual.trf1.jus.br., last visited on October 8, 2010.
[FN279] Cf. Judgment of Federal Judge of First Instance, Judiciary Section of Pará - Subsection Marabá, supra note 278, folio 320.
[FN280] Cf. Motion for appeal filed by the Union on March 24, 2006 (case file of annexes to the application, tome I, annex 28, folios 322 to 329).
[FN281] Cf. Decision of the Federal Regional Tribunal of the First Region of July 26, 2006 (case file of annexes to the application, tome I, annex 29, folio 330).
[FN282] Cf. Special Remedy presented by the Union on September 19, 2006 (case file of annexes to the application, tome I, annex 30, folios 331 to 338).
[FN283] Cf. Extraordinary Remedy presented by the Union on September 19, 2006 (case file of annexes to the application, tome I, annex 31, folios 339 to 346).
[FN284] Cf. Decision of the Superior Tribunal of Justice of August 18, 2009 (case file on the merits, tome VIII, annex 17, folios 4079 to 4084).
[FN285] Cf. Petition of the Union in the framework of Tort Action No. 770.247/PA, presented on December 7, 2009 (case file of annexes to the final written arguments of the State, tome I, annex 27, folios 9190 to 9193).

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194. On the other hand, on December 19, 2005, the Federal Public Prosecutor's Office and the Commission of the Next of Kin of those Politically Deceased and Disappeared of the Institute of Studies on State Violence presented an application of Legal Notification to the President of the Republic, the Vice President, and other high ranking officials of the government and Armed Forces, regarding the declassification of confidential documents that were of the interest of the next of kin of the politically deceased and disappeared persons, in order for them to know the truth and locate the bodily remains of their loved ones, as well as to allow the Federal Public Prosecutor's Office to have access to said content. [FN286]

[FN286] Cf. Judicial Notification of December 19, 2005 (case file of annexes to the application, tome I, annex 32, folios 347 to 367).

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3. Normative Framework

195. The right to access to information is enshrined in Article 5 of the Federal Constitution of 1988 [FN287] and is regulated, inter alia, by the following decrees and laws: a) Law No. 8.159,

of 1991, which regulates the national policy of public and private archives, access and restrictions to public documents, among other orders; [FN288] b) Decree No. 2.134, of 1997, which regulates Article 23 of the Law No. 8.159, on the categorization of public secret documents; [FN289] c) Decree No. 4.553, of 2002, which regulates the protection of data, information, documents, and restricted material, concerning to the security of the society and of the State in Federal Public Administration forum; [FN290] d) Decree No. 5.301, of 2004, which created the Commission for the Investigation and Analysis of Confidential Information; [FN291] e) Law No. 11.111, of 2005, which introduced the possibility of permanent confidentiality of official records classified as ultra-secretive, [FN292] and f) Decree No. 5.584, of 2005, which regulates the hand over to the National Archive of documents under custody of the Brazilian Intelligence Agency (ABIN), and provides for the application of the restrictions enshrined in Decree No. 4.553. [FN293]

[FN287] El Article 5, subsection XXXIII, of the Federal Constitution establishes that "all have access to receive, from public institutions, public information of their particular interest or of a collective or general interest, those of which shall be offered in the legal period, under penalty of responsibility, except for those whose confidentiality is necessary for the safety of society and of the State" (case file of annexes to the final written arguments of the State, tome I, annex 4, folio 8751).
[FN288] Cf. Law No. 8.159 of January 8, 1991 (case file of annexes to the final written arguments of the State, tome I, annex 14, folios 9062 to 9065).
[FN289] Cf. Decree No. 2.134 of January 24, 1997 (case file of annexes to the application, tome I, annex 3, folios 16 to 21).
[FN290] Cf. Decree No. 4.553 of December 27, 2002 (case file of annexes to the final written arguments of the State, tome I, annex 16, folios 9070 to 9082).
[FN291] Cf. Decree No. 5.301 of December 9, 2004 (case file of annexes to the final written arguments of the State, tome I, annex 17, folios 9084 to 9086).
[FN292] Cf. Law No. 11.111, of May 5, 2005 (case file of annexes to the final written arguments of the State, tome I, annex 15, folios 9067 and 9068).
[FN293] Cf. Decree No. 5.584 of November 18, 2005 (case file of the answer to the application, tome I, annex 2, folios 5539 and 5540).

C. Right to freedom of thought and expression

196. The Court has established that, pursuant to the protection offered by the American Convention, the right to freedom of thought and expression consists of "not only the right and freedom to express ones own opinion, but also of the right and freedom to seek, receive, and impart information and ideas of all kinds." [FN294] Like the American Convention, other international human rights instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, establish a positive right to seek and receive information. [FN295]

[FN294] Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 30; Case of López Álvarez v. Honduras. Merits, Reparations and Costs. Judgment of February 1, 2006. Series C No. 141, para. 163, and Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 76.
[FN295] Cf. Case of Claude Reyes et al., supra note 294, para. 76.
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197. The Court has also established that Article 13 of the Convention, in expressly stipulating the rights to seek and receive information, protects the right of every person to request access to information under State control, with the conditions permitted under the regime of restrictions of the Convention. As a consequence, said Article protects the right of persons to receive said information and the positive obligation of the State to provide it, in a way that the person will be able to know this information or receive a well-founded response when, under one of the reasons permitted by the Convention, the State is able to limit access to it in that specific case. Said information must be handed over without the necessity of having to prove a direct interest or personal involvement in the procurement of said information, with the exception of the cases where a legitimate restriction applies. Its surrender to a person ought to allow for the circulation of said information within society in a way that allows persons to know it, obtain access to it, and evaluate it. [FN296] In this manner, the right to freedom of thought and expression enshrines the protection of the right to access information under State control, which also establishes, in a clear manner, the two dimensions—the individual and social—of the right to freedom of thought and expression, which must be guaranteed by the State in a simultaneous manner. [FN297]

[FN296] Cf. Case of Claude Reyes et al., supra note 294, para. 77.
[FN297] Cf. Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Judgment of February 5, 2001. Series C No. 73, para. 67; Case of López Álvarez, supra note 294, para. 163, and Case of Claude Reyes et al., supra note 294, para. 77.
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198. In this regard, the Court has highlighted that, the existence of a regional consensus of States that comprise the Organization of American States on the importance of access to public information. Moreover, the necessity to protect the right to access public information has been the objective behind specific orders issued by the General Assembly of the OAS, [FN298] wherein "[i]t urg[ed] States Parties to respect and ensure the access to public information of all persons and [to promote] the adoption of legal provisions or of another nature that are necessary to assure its recognition and effective application." [FN299] Likewise, the General Assembly, in diverse orders, considered that access to public information is an indispensable requisite for democracy to function, for increased transparency, and for good governance and that in a representative and participatory democratic system, the citizenry exercises its constitutional rights by means of wide-ranging freedom of expression and access to information. [FN300]

[FN298] Cf. Case of Claude Reyes et al., supra note 294, para. 78.

[FN299] General Assembly of the OAS, AG/RES. 2514 (XXXIX-O/09) of June 4, 2009 on "Access to Public Information: Strengthening of Democracy," Operative Paragraph 2.
[FN300] Cf. General Assembly of the OAS, Orders AG/RES. 1932 (XXXIII-O/03) of June 10, 2003; AG/RES. 2057 (XXXIV-O/04) of June 8, 2004, AG/RES. 2121 (XXXV-O/05) of June 7, 2005; AG/RES. 2252 (XXXVI-O/06) of June 6, 2006, AG/RES. 2288 (XXXVII-O/07) of June 5, 2007, AG/RES. 2418 (XXXVIII-O/08) of June 3, 2008, and AG/RES. 2514 (XXXIX-O/09) of June 4, 2009, all of them on "Access to Public Information: Strengthening of Democracy." ["Acceso a la Información Pública: Fortalecimiento de la Democracia."]
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199. On the other hand, the Inter-American Court has determined that, in a democratic society, it is indispensable that State authorities be governed by a principle of maximum disclosure, which establishes the presumption that all information is accessible, subject to restricted system of exceptions. [FN301]

[FN301] Cf. Case of Claude Reyes et al., supra note 294, para. 92.
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200. Moreover, this Court has determined that all persons, including the next of kin of the victims of gross human rights violations, have the right to know the truth. As a consequence, the next of kin of the victims and society must be informed of all that occurred in regard to said violations. [FN302] In the same sense, the right to know the truth has also been recognized in various instruments of the United Nations and by the General Assembly of the Organization of American States. [FN303]

[FN302] Cf. Case of 19 Tradesmen v. Colombia. Merits, Reparations and Costs. Judgment of July 5, 2004. Series C No. 109, para. 261; Case of Carpio Nicolle et al. v. Guatemala. Merits, Reparations and Costs. Judgment of November 22, 2004. Series C No. 117, para. 128, and Case of Myrna Mack Chang v. Guatemala. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C No. 101, para. 274.
[FN303] Cf. inter alia, Report of the Office of the High Commissioner of the United Nations for Human Rights. Study on the Right to the Truth, U.N. Doc. E/CN.4/2006/91 of January 9, 2006; General Assembly of the OAS, Orders: AG/RES. 2175 (XXXVI-O/06) of June 6, 2006, AG/RES. 2267 (XXXVII-O/07) of June 5, 2007; AG/RES. 2406 (XXXVIII-O/08) of June 3, 2008; AG/RES. 2509 (XXXIX-O/09) of June 4, 2009, and AG/RES. 2595 (XL-O/10) of July 12, 2010, and Report of Diane Orentlicher, independant expert charged with updating the principles for the fight against impunity (E/CN.4/2005/102) of February 18, 2005. In the same sense, the former Commission on Human Rights of the United Nations, in the Updated Set of principles for the protection and promotion of human rights through action to combat impunity, de 2005, established, inter alia, that: i) "Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes, (principle 2); ii) A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives

and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments, (principle 3); iii) Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate, (principle 4), and iv) States must take appropriate action, including measures necessary to ensure the independent and effective operation of the judiciary, to give effect to the right to know. Appropriate measures to ensure this right may include non-judicial processes that complement the role of the judiciary. Regardless of whether a State establishes such a body, it must ensure the preservation of, and access to, archives concerning violations of human rights and humanitarian law. Cf. in the Set of Principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1) of February 8, 2005.

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201. For its part, the Inter-American Court has considered the content of the right to know the truth in its jurisprudence, in particular in cases of enforced disappearance. Since the case of Velásquez Rodríguez, the Court affirmed the existence of a "right of the next of kin to know the fate of the victims, and where possible, the location of their remains." [FN304] The Court also recognized that the right of the next of kin of the victims of gross human rights violations to know the truth is enshrined in the right to access to justice. [FN305] Moreover, the Court has considered the obligation to investigate is a measure of reparation, given the need to remedy the violation of the right to know the truth in the specific case. [FN306] Similarly, in the present case, the right to know the truth is related to the Ordinary Action filed by the next of kin, which is linked to access to justice and to the right to seek and receive information enshrined in Article 13 of the American Convention.

[FN304] Case of Velásquez Rodríguez. Merits, supra note 25, para. 181.
[FN305] Cf. Case of Velásquez Rodríguez. Merits, supra note 25, para. 181; Case of Kawas Fernández, supra note 188, para. 117, and Case of Anzualdo Castro, supra note 122, parr. 118.
[FN306] Cf. Case of Velásquez Rodríguez. Merits, supra note 25, para. 181; Case of Kawas Fernández, supra note 188, paras. 190, and Case of Anzualdo Castro, supra note 122, parr. 118.

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202. Finally, the Court has also established that in cases of violations of human rights, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or pending procedures. [FN307] Moreover, when it comes to the investigation of punishable facts, the decision to qualify the information as secretive or to refuse to hand it over cannot stem solely from a State organ whose members are charged with committing the wrongful acts. [FN308] In the same sense, the final decision on the existence of the requested documentation cannot be left to its discretion.

[FN307] Cf. Case of Myrna Mack Chang, supra note 302, para. 180; Case of Tiu Tojín v. Guatemala. Merits, Reparations and Costs. Judgment of November 26, 2008. Series C No. 190, para. 77, and Case of Radilla Pacheco, supra note 24, para 258.
[FN308] Cf. Case of Myrna Mack Chang, supra note 302, para. 181.

D. Legal actions and access to information

203. The Court can rule on the State's actions regarding the presentation of information only for facts that occurred after December 10, 1998, the date from which the Court has jurisdiction on the alleged violations of the Convention attributable to Brazil (supra para. 18).

1. Ordinary Action No. 82.00.24682-5

204. When the ratione temporis jurisdiction of the Court commenced, on December 10, 1998, after 16 years in proceedings, the Ordinary Action was in process (supra paras. 188 to 191). In this context, on April 9, 1999, the State, via the Attorney General's Office of the Union, presented a brief, wherein it indicated that, as a consequence of a new direction taken due to the consolidation of the democratic regime, the Law No. 9.140/95 was promulgated, which recognized as deceased the persons disappeared in the period between September 2, 1961, and August 15, 1979, and that the Special Commission was created, commissioned to, among its other tasks, carry out the efforts to locate the bodies of the disappeared persons. It indicated that, in addition, "given that the efforts of the Federal Government by means of the Special Commission […] have been proven […], no excuse is conceivable, if it had available information necessary for locating the burial places, to omit this information in the face of the natural and unquestionable right of the actors." Similarly, it considered that "given that there is no minimal evidence regarding the existence an alleged report on the Guerrilha do Araguaia, the Union is not able to attend the decision […] in which there was a request for presentation of the mentioned document, and […] that it doesn't even know if it even existed in the past." [FN309] It concluded that the Ordinary Action filed was not justified given that the arguments of the actors had been attended to with the recognition of the deceased persons and the ensuing issuance of death certificates by means of Law No. 9.140/95, and that the only specific provision to remain outstanding, the localization of the graves, would be materially impossible, given the work carried out in the framework of the mentioned Law. [FN310]

[FN309] Brief of the Untion of April 9, 1999, addressed to the Federal Judge of First Instance (case file of annexes to the application, tome I, folio 120).
[FN310] The Federal Judge of First Instance issued a judgment on March 15, 2000, wherein it rejected a request by the Union made in its brief of April 9, 1999, and noted that "[given] the requirement of said report […] the Authority did not attend to said order, arguing that the [documents] were already in the hands of the [Attorney General of the Republic]. As such, the former Minister of the Army did not deny the existence of said report, as was done by the [Union]"; based on this, it gave a period of 30 days to the Union to present a report. Cf. Decision of the Federal Judge of First Instance of March 15, 2000 (case file of annexes to the application, tome I, annex 19, folio 126).

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205. In its judgment of June 30, 2003, the Federal Judge of First Instance noted that "[i]t is still not [appropriate to] discuss the loss of object of the present action in regard to those that were contemplated in the proceeding of Law [No.] 9.140/95," [FN311] given that "the administrative procedure established by [this law] is not able to satisfy the pretension of the actors, because it deals with a broad request that encompasses fundamental rights such as the right to the truth, or to the protection of the family, or the right to offer those deceased, in honor of tradition, a dignified eternal burial." [FN312] It added that the information provided to date, "corroborates with the information provided in the orders by the actors, supports their arguments and confirms their doubts. Various of them are the testimonies of the existence of the Guerrilla and of the massacre of the members of the Guerrilla, and there is no way of ignoring said reality." [FN313]

[FN311] Federal Judge of First Instance of June 30, 2003, supra note 267, folio 164.
[FN312] Federal Judge of First Instance of June 30, 2003, supra note 267, folio 146.
[FN313] Federal Judge of First Instance of June 30, 2003, supra note 267, folio 144.

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206. As well, in the same judgment, the Judge highlighted that it is not appropriate to deny the historical importance of the facts of the case and that "[t]imes such as those, of […] systematic violation of fundamental rights, should not be forgotten or ignored." [FN314] It indicated that "the information [presented] by the [Union] is the information that allows access of the authors to the bodily remains of their family members" and that "[i]f the State apparatus acts in a manner that the violations of human rights remain in impunity and the victim is not repaired (to the extent possible) in the full exercise of their rights, the State violates the conventional obligation in the international forum." [FN315] It noted that the facts which reference the Ordinary Action constitute "serious violations to human rights" and, in applying the jurisprudence of this Court, it determined that the truth of what occurred must be shared with the next of kin in a detailed manner given that it is their right to know what really took place. [FN316] As a consequence of the foregoing, the Federal Judge of First Instance requested the Union to lift the secrecy and present all information regarding the military operations related to the Guerrilla. [FN317]

[FN314] Federal Judge of First Instance of June 30, 2003, supra note 267, folio 144.
[FN315] Federal Judge of First Instance of June 30, 2003, supra note 267, folios 145 and 149.
[FN316] Cf. Federal Judge of First Instance of June 30, 2003, supra note 267, folios 152 and 162.
[FN317] Cf. Federal Judge of First Instance of June 30, 2003, supra note 267, folio 178.

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207. On August 27, 2003, the Federal State, by means of the Attorney General's Office, filed an appeal against the mentioned decision, wherein, inter alia, it questioned the waiver of the secrecy of said information and reiterated that the request of the petitioners was being attended to via Law No. 9.140/95. [FN318] It also reported that the Special Commission, in the context of

the application of said law, "required and collected documents and information from the Armed Forces and other public organs, aside from having carried out missions to the [r]egion of Araguaia, in order to gather information and search for the bodily remains." [FN319]

[FN318] Cf. Partial appeal of August 27, 2003, supra note 268, folio 195.
[FN319] Partial appeal of August 27, 2003, supra note 268, folio 194.

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208. In response to this remedy, on December 2, 2004, the Regional Federal Court recognized the existence of "several evasions made by the responsible authorities regarding the presentation of the legal information requested during the process" and it considered "the decision […] adopted by [the Federal First Judge] to be appropriate particularly in regard to broad access to all the data related to the historic event, as a way to make possible the track down of the bodily remains of those disappeared for political motivations, reflected by the next of kin, [plaintiffs] in this action." It concluded that said information does not necessarily need to be freed of all secrets, but rather that it should be accessible to the next of kin who requested it. [FN320]

[FN320] Cf. Judgment of Federal Regional Tribunal published on December 14, 2004, supra note 269, folios 247, 248, and 252.

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209. In July of 2009, the Attorney General of the Union offered information on the Guerrilha do Araguaia to the Ordinary Action, kept in archives of various state departments in compliance with that ruled in the Judgment (supra para. 192).

210. Of the foregoing, it is evident that, although the State had alleged the implementation of mechanisms established in Law No. 9.140/95, wherein, inter alia, the disappeared persons during the period of the Guerrilla were declared deceased and the searches for their bodily remains had begun to take place, the fact is that said acts did not respond to the obligations formulated in the framework of the Ordinary Action. Moreover, the Attorney General's Office of the Union expressed, during the proceeding, that there was a lack of evidence regarding the existence of a report on the Guerrilha do Araguaia, in order to justify the inability to comply with that requested, although in 2009, it offered substantial documentation obtained from diverse sources at distinct times (supra paras. 192 and 209). What draws the attention of the Court is that the State did not proceed to render all of the information under its protection when requested to do so within the parameters of the Ordinary Action, [FN321] especially when the First Federal Court noted that the purpose of said action could not be deemed satisfied merely by the actions carried out by the State in regard to the referenced Law, given that other obligations remained, among others, the right to access to information of the next of kin of the victims. Moreover, the Court highlights that the State had indicated that by means of the Special Commission documents and information had been gathered on the Guerrilha do Araguaia, (supra para. 207), these documents were not offered to the Judge of the Ordinary Action until 2009.

[FN321] In addition to the various documents and information collected, among other bodies, by the Special Commission and the Interministerial Commission, of the evidence in the present case, there are other sources of documentation related to the Guerrilla; for example, the Ministry of Defense in its official report on Guerrilha do Araguaia stated that in 1993 "three reports by the Army, Marines, and Air Force were sent to the Ministry of Justice, those of which compiled the available information in regard to each one of the disappeared persons in the framework of said Forces, among them those disappeared in the Guerrilha do Araguaia," Ministry of Defense "Information on the Guerrilha do Araguaia," supra note 81. Moreover, in 2006, the Marines reported to the Minister of Defense that subsequent to "[another] investigation carried out in the document records under custody of [that] Command, no secret documents were [found] that were produced or [archived in the era of the Guerrilla]," to which it indicated that "this could be the result of the fact that the data that then existed in the archives of this institution, were sent to the Ministry of Justice, by means of Note No. 24, of February 5, 1993, of the former Minister of the Marines, facts that were included in the Report of the Commission of Political Deaths and Dissapeared [Comisión de Muertos y Desaparecidos Políticos], carried out by the Ministry of Justice in 2001," order of the Marines of Brazil addressed to the Ministry of State of Defense on March 15, 2006 (case file of annexes to the final written arguments of the State, annex 24, folio 9168). In the report of July 10, 2009, presented by the Union in the proceeding of the Ordinary Action, it is stated that "[i]n attention to the deliberations of the Interministerial Commission, the Armed Forces elaborated a report based on rigorous investigative procedures initiated to collect information on the Guerrilha do Araguaia and on the possible burial sites of the politically disappeared [...]"; moreover,, "[o]n March 8, 2007, they presented a Final Report of the Interministerial Commission [that included] particularly [...] the reports of the Armed Forces carried out in 1993 [...]," brief of the Attorney General of the Union of July 10, 2009, supra note 274, folios 3230 and 3233.

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211. In the opinion of this Court, the State cannot seek protection in arguing the lack of existence of the requested documents; rather, to the contrary, it must establish the reason for denying the provision of said information, demonstrating that it has adopted all the measures under its power to prove that, in effect, the information sought did not exist. It is essential that, in order to guarantee the right to information, the public powers act in good faith and diligently carry out the necessary actions to assure the effectiveness of this right, particularly when it deals with the right to the truth of what occurred in cases of gross violations of human rights such as those of enforced disappearances and the extrajudicial execution in this case. To argue in a judicial proceeding, as was done in this case, the lack of evidence regarding the existence of certain information, without at least noting what procedures were carried out to confirm the nonexistence of said information, allows for the discretional and arbitrary actions of the State to provide said information, thereby creating legal uncertainty regarding the exercise of said right. It is worth mention that the Federal Judge of the First Instance ordered the Union to render documents, on June 30, 2003, in a period of 120 days, to which six years passed, wherein the Union filed various remedies before it was effectuated, resulting in the defenseless of the next of kin of the victims and it affected their right to receive information, as well as their right to know the truth of what occurred.

212. Based on the preceding considerations, the Court concluded that the State violated the right to seek and receive information enshrined in Article 13 of the American Convention, in relation with Articles 1(1), 8(1), and 25, to the detriment of Julia Gomes Lund, Maria Leonor Pereira Marques, Antonio Pereira de Santana, Elza Pereira Coqueiro, Alzira Costa Reis, Victória Lavínia Grabois Olímpio, Roberto Valadão, Julieta Petit da Silva, Aminthas Aranha (or Aminthas Rodrigues Pereira), Zélia Eustáquio Fonseca, Acary Vieira de Souza Garlippe, Luiza Monteiro Teixeira, and Elza da Conceição de Oliveira (or Elza Conceição Bastos).

213. On the other hand, the Court has information on four next of kin indicated as alleged victims whom filed the Ordinary Action, who passed away prior to December 10, 1998. Regarding these persons, the Court will not rule on the State's responsibility due to the rule on ratione temporis jurisdiction. In addition, the Court has information that notes that five next of kin whom filed said action passed away, even though, of the body of evidence, their dates of death cannot be inferred conclusively. In relation to said persons, the Court has stated (supra para. 181) that their next of kin or legal representatives must present to the Court, in a period of six months as of notification of the present Judgment, the documentation that proves that the date of death is subsequent to December 10, 1998, so as to confirm their condition as victims in the present case, pursuant to the abovementioned standards. [FN322]

[FN322] The people that died before Brazil acknowledged the contentious jurisdiction of the Court are: Lulita Silveira and Silva, Cyrene Moroni Barroso, Edwin Costa and Walter Pinto Ribas. On the other hand, the persons that are deceased whose date of death was not specified are Ermelinda Mazzaferro Bronca, Rosalvo Cipriano de Souza, Helena Pereira dos Santos, Eloá Cunha Brum and Consueto Ferreira Callado (supra notes 255 and 256).

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2. Public Civil Suit

214. Regarding the Public Civil Suit (supra para. 193), the Court notes the similarity between the objectives among this Action and the Ordinary Action, namely, the presentation of all information related to the military operations against the Guerrilha do Araguaia (supra para. 188 and 193). Both actions were decided in the first instance and confirmed by superior tribunals, and regarding the Pubic Civil Suit, the State requested the Federal Supreme Court to dismiss its own remedy, with the decision pending (supra para. 186).

215. While the objectives of said actions are similar, the judgment of first instance issued in the Public Civil Suit, confirmed by the Regional Federal Court, refers to the exhibition of documents "in a secret hearing" with the exclusive presence of representatives of the Federal Public Prosecutor's Office and of the Ministry of Defense, to which access to said documents by the victims is not guaranteed. As such, even when the decision of the judge of first instance may come to be implemented, its effect does not comply with the requirements of Article 13 of the American Convention.

216. In addition, the Court noted that, regardless of the lack of a final decision on the Public Civil Suit (supra para. 214), that ordered until this moment is, materially, encompassed in the

operative paragraphs of the judgment of the Ordinary Action, in such a way that the purpose of the judgment of the Public Civl Suit would be complied with in the orders of the Ordinary Action. Likewise, this entails an action that could not be filed by the victims, to which the Court considers that it is not an appropriate remedy to guarantee the right of the next of kin to seek and receive information. As such, it will not make additional considerations in this regard.

3. Legal Notification

217. The Legal Notification (supra para. 194) which was presented in order for the authorities to proceed with the declassification of secret documents of interest to the next of kin of the those politically deceased and disappeared persons to know the truth and locate the whereabouts of the bodily remains of their loved ones, as well as to allow the Federal Public Prosecutor's Office to have access to the content of these documents to then carry out the necessary measures to assign responsibility to those who violated human rights during the military dictatorship. [FN323]

[FN323] Judicial Notification, supra note 286, folio 351.

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218. The Court notes that, regarding this action, it does not have any information subsequent to its presentation within the body of evidence. Likewise, according to civil procedure legislation of the State, these types of applications are carried out before a judge so as "to establish responsibility, to promote the conservation and the protection of one's rights or to manifest any intention in a formal manner […], and to request that the defendant is notified." [FN324]Beyond representing the formal notification of a claim, the Court does not have sufficient elements that allow it to corroborate the effects of said action or whether it requires the authorities, to whom the action was addressed, to act. Based on the foregoing, the Court will not make additional considerations in this regard.

[FN324] Article 867 of the Brazilian Code of Civil Procedure states that the purpose of said petition is "to prevent responsibility, promote the conservation and safeguard of rights or to manifest whichever intention in a formal manner."

E. Duration of the Ordinary Action

219. This Court has noted that the right to access to justice should assure, in a reasonable period of time, the right of the alleged victims or their next of kin that all the necessary is done in order to know the truth of what occurred, and where applicable, the punishment of those responsible. [FN325] The unreasonableness of the period for the development in the legal procedure constitutes, first hand, by itself, a violation of judicial guarantees. [FN326] In this regard, the Court has considered four elements to determine the reasonability of the period: a) the complexity of the matter, b) the procedural actions of the interested parties, c) the conduct of the judicial authorities, [FN327] and d) the harm generated in the legal situation of the persons involved in the process. [FN328]

[FN325] Cf. Case of Bulacio v. Argentina. Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para 114; Case of Garibaldi, supra note 18, para. 133, and Case of the Dos Erres Massacre, supra note 186, para. 105.
[FN326] Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, Reparations and Costs. Judgment of June 21, 2002. Series C No. 94, para. 145; Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations and Costs. Judgment of November 27, 2008. Series C No. 192, para. 154, and Case of Garibaldi v. Brasil, supra note 18, para. 133.
[FN327] Cf. Case of Genie Lacayo v. Nicaragua. Merits, Reparations, and Costs. Judgment of January 29, 1997. Series C No. 30, para. 77; Case of Radilla Pacheco, supra note 24, para. 244, and Case of Comunidad Indígena Xákmok Kásek v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, de 2010 Series C No. 214, para. 133.
[FN328] Cf. Case of Valle Jaramillo et al., supra note 326, para. 155; Case of Radilla Pacheco, supra note 24, para. 244, and Case of Comunidad Indígena Xákmok Kásek, supra note 327, para. 133.

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220. The Court observes that the delay in the development of the Ordinary Action cannot be justified due to the complexity of the matter. In effect, in the present case, the purpose of the Ordinary Action, in what is appropriate here, is access to official documents on the military operations against the Guerrilla do Araguaia. In regard to the access to information in State custody, the Court considers that this does not deal solely with a complex request to which a broad delay in the response is justified. The Ordinary Action was filed in 1982 and the judgment of first instance was issued in 2003, 21 years later. On the other hand, since the issuance of said decision until the State initiated compliance of it in 2009, more than six years had passed.

221. In regard to the second element to be considered, of the procedural actions of the next of kin, it is evident that in no moment these have attempted to obstruct the judicial process, much less to delay any decision in this regard; to the contrary, they have come forth at diverse opportunities in order to advance the resolution of the legal procedure. [FN329] Therefore, the next kin whom filed an Ordinary Action, at no point in time, hindered its development.

[FN329] Cf. inter alia: Brief of the plaintiffs in response to the remedy of the Union, submitted on October 28, 2003 (case file of annexes to the brief of pleadings and motions, tome I, annex 5, folios 3901 to 3940); petioner's brief of November 17, 2004 (case file of annexes to the brief of pleadings and motions, tome I, annex 7, folios 3954 to 3963); brief of the plaintiffs in response to the remedy of the Union, submitted on May 4, 2007 (case file of annexes to the brief of pleadings and motions, tome I, annex 19, folios 4058 a 4072), and petitioner's brief of July 8, 2008 (case file of annexes to the brief of pleadings and motions, tome I, annex 7, folios 4079 to 3963).

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222. With respect to the conduct of the authorities in the judicial proceedings, on December 10, 1998, the date in which Brazil recognized the jurisdiction of the Court, there was a pending

decision regarding a remedy of the State opposing a determination by a judge of first instances for it to present information on the Guerrilha do Araguaia. Nevertheless, after an appeal and other remedies filed by the State, those of which were rejected by the superior tribunals (supra paras. 191 and 204 to 208), the decision became res judicata on October 9, 2007 (supra para. 191). It took more than seven months for the case files to return, on May 2008, to the judge of first instance in attempts to initiate the execution of the ruling. [FN330] Finally, despite said final decision, the execution of the judgment did not commence until 18 months later, on March 12, 2009 (supra para. 191). Even though the judicial authorities ordered the handover of documentation, the Federal State did not offer it based on various arguments and filing numerous motions, ultimately being provided several years after the request. In effect, the Court notes that during the processing of the Ordinary Action, the State affirmed in 1999, that "there was no minimal reasonable evidence of the existence of an alleged 'report on the [G]uerrilha do Araguaia,'" and in April of 2000, the Ministry of Defense reported on the non-existence of the mentioned report (supra para. 191), while, on July of 2009, the Union presented extensive documentation on the Guerrilha do Araguaia (supra paras. 192 and 210).

[FN330] Cf. Information from the Federal Judge of First Instance, proceeding 82.00.24682-5. Available at http://processual.trf1.jus.br., last visited on October 8, 2010.

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223. In regard to the harm generated due to the length of the procedure in the legal situation of the persons involved, as has been done in previous cases, [FN331] the Court does not consider it necessary to analyze this element in order to determine the unreasonableness of the term of the Ordinary Action filed in the present case.

[FN331] Case of Kawas Fernández, supra note 188, para. 115, and Case of Garibaldi, supra note 18, para. 138.

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224. The Court states that, since December 10, 1998, nine years have passed to date before the decision became final, on October 9, 2007, and 11 years passed before its execution was ordered, on March 12, 2009, thus excessively surpassing a period, which could be deemed reasonable.

225. The Inter-American Court, as a consequence, concluded that the Ordinary Action in the present case exceeded a reasonable period, and therefore, Brazil violated the right to fair trial [judicial guarantees] established in Article 8(1) of the American Convention, in relation to Articles 13 and 1(1) of the treaty, to the detriment of the persons stated in the terms of paragraph 212 and 213 of the present Judgment.

F. Normative Framework

226. The Commission and the representatives referred in their respective briefs to the non-compatibility of the domestic law and the American Convention in what regards the right to information. Nevertheless, they did not specifically demonstrate the facts in which the normative

framework is the foundation for the alleged restrictions on access to information. This Court notes that of all the norms indicated by the parties, only the Law No. 8.159/91 was applied to the case in what matters, which constituted the legal foundations used by judicial organs to request the State to provide information on the Guerrilha do Araguaia within the Ordinary Action proceeding. Brazil did not base its denial of the information on the Guerrilla on any restriction established in the law, but rather in the alleged non-existence of said information, and then, in the alleged loss of the purpose of said action given the enactment of Law No. 9.140/95.

227. Given the lack of application in the present case of laws and decrees mentioned by the Commission and the representatives in the Ordinary Action filed by the next of kin, the Court does not deem it necessary to carry out an analysis of the existent regulations in Brazil on the right to access information. Notwithstanding the aforementioned, the Court notes that the State informed on the Draft Bill No. 5.228/09, presented by the Executive Power before the National Congress, which would substantially reform the normative framework that regulates this right. Said draft bill establishes, inter alia, that "access to information necessary for the legal and administrative protection of fundamental rights cannot be denied" and that "access to information or documents that discuss actions that imply violations of human rights practiced by public agents or mandates of public authorities cannot be subject to restrictions." [FN332] For their part, the representatives spoke positively on the same, indicating that said draft bill "is welcome" and that its adoption by the National Congress should be done quickly.

[FN332] Article 16 of Bill No. 5228/09 that regulates access to information, of May 5, 2009 (brief of annexes to the answer to the application, tome III, annex 18, folio 366).

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228. The Court values the initiative of the State to present a draft bill with the purpose of optimizing and strengthening the normative framework of the right to freedom of thought and expression established in Article 13 of the American Convention in relation to the right to access public information in State custody. The Court considers that the States, so as to appropriately guarantee right to seek and receive public information under State control, must adopt the necessary measures, among others, the approval of legislation wherein the content is compatible with Article 13 of the American Convention and with the jurisprudence of this Tribunal. Likewise, this right entails the obligation of the State to incorporate in its legal code an effective and suitable remedy that can be used by the citizenry and to resolve eventual controversies.

229. Of course, the right to access to public information in State custody is not an absolute right, given that it may be subject to restrictions. Nevertheless, these must first be previously established by law—in a formal and material sense—so as to assure that they not be subject to the discretion of the public power. Second, the restrictions established by law must respond to an objective allowed in Article 13(2) of the American Convention, namely, they must be necessary to assure "the respect for the rights and reputation of others" or "the protection of national security, public order, or public health or morals." The limitations imposed must be necessary in a democratic society and oriented to satisfy an imperative public interest. This implies that from all the possible alternatives there must be elected those measures that restrict or interfere in the

most minimal possible manner the effective exercise of the right to seek and receive information. [FN333]

[FN333] Cf. Advisory Opinion OC-5/85, supra note 294, para. 46; Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs. Judgment of August 31, 2004. Series C No. 111, para. 96, and Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 85.

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230. Moreover, to guarantee the full and effective exercise of this right, it is necessary that the legislation and the State procedures are governed by the principles of good faith and maximum disclosure, in a way that all information in State power is presumed public and accessible, subject to a limited regime of exceptions. Likewise, all denials of information must be motivated and founded, to which the State is responsible for the burden of proof on the impossibility of presenting said information, and given doubts or empty legal arguments, the right to access to information will be favored. [FN334] On the other hand, the Court recalls that indicated regarding the obligation of State authorities to not seek protection in mechanisms such as State secrets or confidentiality of information in cases of human rights violations. (supra para. 202).

[FN334] Cf. IACHR. Right to access to information in the Inter-American legal framework, Special Rapporteur on Freedom of Expression, 2010.

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231. Also, the Court highlights the obligation to guarantee the effectiveness of an appropriate procedure for the processing and resolution of the requests for information, that sets the dates for the resolution and presentation of information, and that this is done under the responsibility of officials that are duly qualified. [FN335] Finally, given the denial of access to determined information under State control, the State must guarantee the existence of a simple, quick, and effective remedy before an independent organ, distinct from the one that denied the request, that can determine if their was a harm to the right to access information, and where applicable, resolve that the corresponding authority present said information. [FN336]

[FN335] Cf. Case of Claude Reyes, supra note 294, para. 163.
[FN336] Cf. Case of Claude Reyes, supra note 294, para. 137.

X. RIGHT TO HUMANE TREATMENT [PERSONAL INTEGRITY] IN RELATION WITH THE OBLIGATION TO RESPECT RIGHTS

A. Arguments of the parties

232. The Commission argued that the violation of the psychological and moral integrity of the next of kin is a direct consequence of the enforced disappearances and of the certainty of the

death of the executed person. The next of kin, whom carried out the first search expeditions for the disappeared in the region, contest the lack of a criminal investigation of the facts, so as to ascertain the circumstances of the disappearance and the execution of their loved ones, based on the application of the Amnesty Law and other norms that prevent access to official documents. The evidence that, prior to their execution, the disappeared persons were tortured and that some were decapitated, have severely affected the next of kin. In a similar manner, regarding the victim whose bodily remains were identified in 1996, the suffering of the next of kin was aggravated until the identification and continues as the circumstances of the death are unknown and those responsible remain unpunished. The absence, lack of justice and information after the passage of thirty years and the omission of the authorities to act have created a state of anxiety, restlessness, lack of trust, despair, impotence, and anguish for the family members, seriously harming their emotional stability and right to personal integrity. Based on the aforementioned, the Commission argued that the State violated the right to personal integrity enshrined in Article 5 of the American Convention, in relation to Article 1(1) of the same treaty, to the detriment of certain next of kin of the alleged disappeared victims and of the executed person.

233. The representatives substantially agreed with the arguments of the Commission, adding that, to date, the next of kin could not recover the bodily remains of their loved ones and give them a proper burial. Adding to this, despite the complaints and judicial and administrative initiatives in place to ascertain the facts, there has been a systematic refusal by the authorities to reveal information that allegedly is contained in the official archives in relation to the facts of the present case, causing harm to their psychological and emotional integrity. Given the abovementioned, they argued that the State violated Article 5 of the Convention, in relation to Article 1(1), to the detriment of the next of kin of the victims.

234. The State noted that since the beginning of the process of redemocratization, much has been done to heal the suffering of the next of kin of the victims and to reveal the historic facts of the prior period in time. Similarly, it argued that it has carried out, among other efforts, actions to effectuate payment of compensation to the next of kin of the victims, to locate and identify the bodily remains of the victims of the repression, and to guarantee the right to information and the truth.

B. Considerations of the Court

235. The Court has considered in numerous cases that the next of kin of the victims of violations of human rights can also be victims themselves. [FN337] In this regard, this Court has determined that it can presume a harm to the right to mental and moral integrity of direct family members of victims of certain violations of human rights by applying a presumption iuris tantum regarding mothers and fathers, daughters and sons, husbands and wives, and permanent companions (hereinafter “direct family members”), when and if they correspond to the specific circumstances of the case. In the case of said direct family members, it corresponds to the State to disprove said presumption. [FN338] In other cases, the Court should analyze whether the evidence in the case file evinces harm to the personal integrity of the alleged victim. Regarding those people whom the Tribunal will not presume a harm to personal integrity for not being a direct family member, the Court will assess, for example, if there is a particularly close connection between said persons and the victims of the case that would allow for the

determination of harm to their personal integrity, and as such, a violation of Article 5 of the Convention. This Court may also evaluate if the alleged victims have involved themselves in the search for justice in the specific case, [FN339] or if they have endured suffering as a consequence of the facts of the case or because of the subsequent actions or omissions of the State authorities in light of the facts. [FN340]

[FN337] Cf. Case of Castillo Páez v. Perú. Merits. Judgment of November 3, 1997. Series C No. 34, Operative Paragraph Fourth; Case of Chitay Nech et al., supra note 25, para. 220, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 126.
[FN338] Cf. Case of Valle Jaramillo et al., supra note 326, para. 119; Case of Chitay Nech et al., supra note 25, para. 220, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 127.
[FN339] Cf. Case of Bámaca Velásquez v. Guatemala. Merits. Judgment of November 25, 2000. Series C No. 70, para. 63; Case of Kawas Fernández, supra note 188, para. 129, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 127.
[FN340] Cf. Case of Blake v. Guatemala. Merits. Judgment of January 24, 1998. Series C No. 36, para. 114; Case of Rosendo Cantú et al., supra note 45, para. 137, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 127.

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236. In this manner, the Court presumes a violation to the right to personal integrity of the direct family members of Maria Lúcia Petit da Silva and of the disappeared persons, regarding whom the State did not rebut the presumptions nor did it make specific reference to them. [FN341]

[FN341] The direct family members considered victims for purposes of this case are the Messers. and Mesdames: Zélia Eustáquio Fonseca, Alzira Costa Reis, Victória Lavínia Grabois Olímpio, Criméia Alice Schmidt de Almeida, João Carlos Schmidt de Almeida, Luiza Monteiro Teixeira, João Lino da Costa, Benedita Pinto Castro, Odila Mendes Pereira, José Pereira, Luiza Gurjão Farias, Junília Soares Santana and Antonio Pereira de Santana, Elza da Conceição Oliveira (or Elza Conceição Bastos), Viriato Augusto Oliveira, Maria Gomes dos Santos, Rosa Cabello Maria (or Rosa Olímpio Cabello), Igor Grabois Olímpio, Julia Gomes Lund, Carmem Navarro, Gerson Menezes Magalhães, Aminthas Aranha (or Aminthas Rodrigues Pereira), Julieta Petit da Silva, Ilma Hass, Osoria Calatrone, Clotildio Calatrone, Isaura de Souza Patricio, Joaquim Patricio, Elena Gibertini Castiglia, Jardilina Santos Moura, Joaquim Moura Paulino, José Vieira de Almeida, Acary V. de S. Garlippe, Dora Grabois, Agostim Grabois, Rosana Moura Momente, Maria Leonor Pereira Marques, Otilia Mendes Rodrigues, Francisco Alves Rodrigues, Celeste Durval Cordeiro, Luiz Durval Cordeiro, Aidinalva Dantas Batista, Elza Pereira Coqueiro and Odete Afonso Costa.

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237. In regard to the siblings and other next of kin indicated by the Commission in its Article 50 report and in the application brief, [FN342] the Court notes that, pursuant to its jurisprudence, they are not considered direct family members and thereby harm to their integrity cannot be

presumed in the terms of Article 5(1) of the American Convention. As a consequence, the Court must assess the evidence provided. [FN343]

[FN342] The non-direct family members indicated correctly by the Commision are the Messers. and Mesdames: Angela Harkavy, José Dalmo Ribeiro Ribas, Maria Eliana de Castro Pinheiro, Roberto Valadão, Diva Soares Santana, Getúlio Soares Santana, Dilma Santana Miranda, Dinorá Santana Rodrigues, Dirceneide Soares Santana, Terezinha Souza Amorim, Aldo Creder Corrêa, Helenalda Resende de Souza Nazareth, Laura Petit da Silva, Clovis Petit de Oliveira, Lorena Moroni Girão Barroso, Breno Moroni Girão, Ciro Moroni Girão, Sônia Maria Haas, Elizabeth Silveira and Silva, Maristella Nurchis, Valeria Costa Couto, Helenice Resende de Souza Nazareth, Helenilda Resende de Souza Nazareth, Helenoira Resende de Souza Nazareth, Wladimir Neves da Rocha Castiglia, Luiz Carlos Silveira and Silva, and Luiz Paulo Silveira and Silva. Likewise, although Heleneide Resende de Souza Nazareth was indicated as an alleged victim by the Commission, the Court notes that the case file states her date of death as having occured in the 1980s (supra note 256).
[FN343] Cf. Case of Kawas Fernández, supra note 188, para. 135.
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238. Based on the testimonial declarations, as well as the expert report and other documents in the case file, the Tribunal finds that it has been demonstrated that of the non direct family members, one or several of the following circumstances have taken place: a) among them and the disappeared victims there was a close connection, and in some cases, together with their parents and other siblings, they formed a single nuclear family; [FN344] b) they have involved themselves in several actions such as the search for justice or information regarding the whereabouts via individual actions or via the formation of different groups, which participated in investigation expeditions to the place where the facts occurred, or in the filing of proceedings before the domestic or international jurisdiction; [FN345] c) the disappearance of their siblings has caused physical and emotional scars; [FN346] d) the facts have affected their social relations, in addition to having caused a breakdown in the family dynamic; [FN347] e) the harm they have lived has increased given the State's omission regarding the lack of information and investigation and the denial of access to State archives, [FN348] and f) the lack of determination of the whereabouts of their siblings has kept alive the hope of finding them, or the inability to identify their bodily remains has prevented them and their family members from providing a proper burial, disturbing their healing process and perpetrating suffering and uncertainty. [FN349]

[FN344] Cf. Statement by Mrs. Laura Petit da Silva in the public hearing held on May 20, 2010; statement by Elizabeth Silveira and Silva in the public hearing held on May 20, 2010, in which she also mentioned her siblings; statement of Mrs. Diva Soares Santana rendered before a public notary (case file on the merits, tome IV, folio 1531); statement of Mr. Aldo Creder Corrêa before a public notary (case file on the merits, tome IV, folio 1599 and 1604); statement of Mr. Clovis Petit de Oliveira rendered before a public notary (case file on the merits, tome IV, folio 1609, 1615 and 1621); statement by Mrs. Dilma Santana Miranda rendered before a public notary (case file on the merits, tome IV, folio 1628); statement of Mrs. Dinorá Santana Rodrigues rendered

before a public notary (case file on the merits, tome IV, folio 1632); statement of Mrs. Dirceneide Soares Santana rendered before a public notary (case file on the merits, tome IV, folio 1642); statement by Mrs. Helenalda Resende de Souza Nazareth rendered before a public notary, wherein she refered to her sisters (case file on the merits, tome IV, folio 1651); statement by Mrs. Lorena Moroni Girão Barroso rendered before a public notary, in which she also mentioned her siblings (case file on the merits, tome IV, folio 1667); statement by Mrs. Maria Eliana de Castro Pinheiro rendered before a public notary (case file on the merits, tome IV, folio 1681); Statement by Mrs. Maristella Nurchis rendered before a public notary (case file on the merits, tome IV, folio 1685); statement by Mrs. Sônia Maria Haas rendered before a public notary (case file on the merits, tome IV, folio 1704); statement by Mrs. Terezinha Souza Amorim rendered before a public notary (case file on the merits, tome IV, folios 1714 and 1715), and statement by Mrs. Valeria Costa de Couto rendered before a public notary (case file on the merits, tome IV, folio 1722).

[FN345] Cf. Statement by Mrs. Laura Petit da Silva in the public hearing, supra note 344; statement by Mrs. Elizabeth Silveira and Silva in the public hearing, supra note 344; statement of Mrs. Diva Soares Santana rendered before a public notary, supra note 344, folios 1535 a 1538; statement of Mrs. Aldo Creder Corrêa rendered before a public notary, supra note 344, folios 1601, 1602 and 1606; statement by Mr. Clovis Petit de Olivieira rendered before a public notary, supra note 344, folio 1612 and 1618; statement of Mrs. Dinorá Santana Rodrigues rendered before a public notary, supra note 344, folio 1634; statement of Mrs. Dirceneide Soares Santana rendered before a public notary, supra note 344, folio 1643; statement of Mr. Jose Dalmo Ribeiro rendered before a public notary (case file on the merits, tome IV, folio 1662); statement by Mrs. Lorena Moroni Girão Barroso rendered before a public notary, supra note 344, folios 1672 and 1673; statement of Mrs. Elena Gilbertini Castiglia rendered before a public notary, wherein she spoke also of her grandson (case file on the merits, tome IV, folio 1645); statement by Mrs. Eliana de Castro Pinheiro rendered before a public notary, supra note 344, folio 1682; statement by Mrs. Sônia Maria Haas rendered before a public notary, supra note 344, folios 1705, 1708 a 1711; statement by Mrs. Terezinha Souza Amorim rendered before a public notary, supra note 344, folio 1715; statement by Mrs. Valeria Costa de Couto rendered before a public notary, supra note 344, folio 1725; Angela Harkavy participated as a petitioner in the case before the Inter-American Commission as of January 10, 1997, maintaining said position during the entire procedure, and Mr. Roberto Valadão was a petitioner in the Ordinary Action 82.0024682-5, holding this position to date.

[FN346] Cf. Statement by Mrs. Laura Petit da Silva in the public hearing, supra note 344; statement by Elizabeth Silveira e Silva in the public hearing, wherein she also referred to her brothers, supra note 344; statement of Mrs. Diva Soares Santana rendered before a public notary, supra note 344, folio 1533; statement of Mr. Clovis Petit de Oliveira rendered before a public notary, supra note 344, folio 1612; statement of Mrs. Aldo Creder Corrêa rendered before a public notary, supra note 344, folio 1602, 1603 and 1605; statement of Mrs. Dinorá Santana Rodrigues rendered before a public notary, supra note 344, folio 1634; statement of Mrs. Dirceneide Soares Santana rendered before a public notary, supra note 344, folio 1643; statement by Mrs. Helenalda Resende de Souza Nazareth rendered before a public notary, supra note 344, folios 1652 a 1654; statement by Mrs. Lorena Moroni Girão Barroso rendered before a public notary, supra note 344, folios 1670, 1671 and 1674; statement by Mrs. Maria Eliana de Castro Pinheiro rendered before a public notary, supra note 344, folio 1682; Statement by Mrs. Maristella Nurchis rendered before a public notary, supra note 344, folio 1685; statement by

Mrs. Sônia Maria Haas rendered before a public notary, supra note 344, folios 1706 and 1708; statement by Mrs. Terezinha Souza Amorim rendered before a public notary, supra note 344, folio 1715, and statement by Mrs. Valeria Costa de Couto rendered before a public notary, supra note 344, folio 1726.

[FN347] Cf. Statement by Mrs. Laura Petit da Silva in the public hearing, supra note 344; statement by Elizabeth Silveira and Silva in the public hearing, supra note 344; statement of Mrs. Diva Soares Santana rendered before a public notary, supra note 344, folio 1532; statement of Mrs. Aldo Creder Corrêa rendered before a public notary, supra note 344, folios 1601 and 1603; statement of Mr. Clovis Petit de Oliveira rendered before a public notary, supra note 344, folios 1613 and 1616; statement by Mrs. Dilma Santana Miranda rendered before a public notary, supra note 344, folio 1630; statement of Mrs. Dirceneide Soares Santana rendered before a public notary, supra note 344, folio 1643; statement by Mrs. Lorena Moroni Girão Barroso rendered before a public notary, supra note 344, folio 1674; statement by Mrs. Eliana de Castro Pinheiro rendered before a public notary, supra note 344, folio 1682; statement by Mrs. Sônia Maria Haas rendered before a public notary, supra note 344, folio 1682, and statement by Mrs. Valeria Costa de Couto rendered before a public notary, supra note 344, folio 1724.

[FN348] Cf. Statement by Mrs. Laura Petit da Silva in the public hearing, supra note 344; statement by Elizabeth Silveira and Silva in the public hearing, supra note 344; statement of Mrs. Diva Soares Santana rendered before a public notary, supra note 344, folio 1533; statement of Mrs. Aldo Creder Corrêa rendered before a public notary, supra note 344, folio 1603; statement of Mr. Clovis Petit de Oliveira rendered before a public notary, supra note 344, folios 1613 and 1614; statement of Mrs. Dinorá Santana Rodrigues rendered before a public notary, wherein she discusses the suffering of the next of kin for the lack of clarification regarding the facts by the State, supra note 344, folio 1634, statement of Mrs. Dirceneide Soares Santana rendered before a public notary, supra note 344, folio 1643; statement by Mrs. Helenalda Resende de Souza Nazareth rendered before a public notary, supra note 344, folio 1654; statement of Mr. Jose Dalmo Ribeiro rendered before a public notary, supra note 345, folio 1663; statement by Mrs. Lorena Moroni Girão Barroso rendered before a public notary, supra note 345, folio 1675; statement by Mrs. Maria Eliana de Castro Pinheiro rendered before a public notary, supra note 345, folio 1682; statement by Mrs. Sônia Maria Haas rendered before a public notary, supra note 344, folios 1710 a 1712; Statement by Mrs. Maristella Nurchis rendered before a public notary, supra note 344, folio 1685; statement by Mrs. Terezinha Souza Amorim rendered before a public notary, supra note 344, 1715, and Mr. Roberto Valadão was a petitioner in the Ordinary Action 82.0024682-5, holding this position to date, supra note 345.

[FN349] Cf. Statement by Mrs. Laura Petit da Silva in the public hearing, supra note 344; statement by Elizabeth Silveira and Silva in the public hearing, supra note 344; statement by Mrs. Diva Soares Santana rendered before a public notary, supra note 344, folio 1533; statement by Mr. Clovis Petit de Olivieira rendered before a public notary, supra note 344, folio 1613; statement by Mrs. Dilma Santana Miranda rendered before a public notary, supra note 344, folio 1630; statement by Mrs. Helenalda Resende de Souza Nazareth rendered before a public notary, supra note 344, folio 1654; statement by Mrs. Lorena Moroni Girão Barroso rendered before a public notary, supra note 344, folio 1675; statement by Mrs. Maria Eliana de Castro Pinheiro rendered before a public notary, supra note 344, folio 1682; statement by Mrs. Sônia Maria Haas rendered before a public notary, supra note 344, folio 1707; statement by Mrs. Terezinha Souza Amorim rendered before a public notary, supra note 344, folio 1715; Statement by Mrs. Maristella Nurchis rendered before a public notary, supra note 344, folio 1685, and statement by

Mrs. Valeria Costa de Couto rendered before a public notary, supra note 344, folios 1725 and 1726.

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239. In the present case, the violation to the right to personal integrity of the mentioned next of kin of the victims can be confirmed given the impact that the enforced disappearance of their loved ones has generated for them and for their family nucleus, the failure to ascertain the circumstances of their death, the lack of knowledge regarding their final whereabouts, and the impossibility of properly burying the bodily remains. [FN350] In this regard, the expert witness Endo indicated that "one of the situations that makes up a large part of the suffering for decades is the absence of a proper burial, the disappearance of the bodies, […] and the unwillingness of the following governments to search for the bodily remains of their next of kin," [FN351] which has "perpetrated the memory of the disappeared person, and hampers the psychological detachment from said person and the next of kin that remain alive," thus preventing closure. [FN352]

[FN350] Cf. Statements rendered by the indicated alleged victims and the expert psychological report of Mr. Paulo César Endo on April 16, 2010 (case file on the merits, tome V, folios 2262 to 2283).
[FN351] Cf. Expert psychological report of Mr. Paulo Cesar Endo, supra note 350, folio 2273.
[FN352] Cf. Expert psychological report of Mr. Paulo Cesar Endo, supra note 350, folios 2271 and 2272.

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240. In this regard, the Court recalls that, pursuant to its jurisprudence, the deprivation of access to the truth of the facts of the location of a disappeared person constitutes a form of cruel and inhumane treatment for close relatives. [FN353] Likewise, the Court has established that ascertaining the final whereabouts of the disappeared victim will permit the next of kin to heal from the anguish and suffering caused by uncertainty of the location of their disappeared family member. [FN354]

[FN353] Cf. Case of Trujillo Oroza v. Bolivia. Reparations, and Costs. Judgment of February 27, 2002. Series C No. 92, para. 114; Case of Chitay Nech et al., supra note 25, para. 221, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 130.
[FN354] Cf. Case of Ticona Estrada et al., supra note 187, para, 155, and Case of Chitay Nech et al., supra note 25, para. 222.

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241. Moreover, the Court considered that the violation of the right to integrity of the next of kin is also due to the lack of effective investigations to ascertain the facts, the lack of initiatives to punish those responsible, the lack of information regarding the facts, and in general, in regard to the impunity that remains in the case, which has generated feelings of frustration, impotence, and anguish. [FN355] In particular, in cases that involve enforced disappearances of persons, it is possible to understand that the violation of the right to psychological and moral integrity of the

next of kin of the victims is a direct consequence of this phenomenon that causes severe suffering, which tends to increase, among other factors, given the constant failure of the State authorities to offer information regarding the whereabouts of the victims or to initiate an effective investigation in order to ascertain information on what occurred. [FN356]

[FN355] Cf. Statements rendered by the indicated alleged victims and the expert psychological report of Mr. Paulo César Endo, supra note 350, folios 2262 to 2283.
[FN356] Cf. Case of Blake. Merits, supra note 340, para. 114; Case of Chitay Nech et al., supra note 25, para. 220, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 126.

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242. The Court finds that the uncertainty and lack of information from the State about what occurred, which remains to date in a large sense, has been a source of suffering and anguish, and of a feeling of insecurity, frustration, and helplessness for the next of kin, given the failure of the public authorities to investigate the facts. [FN357] Similarly, the Court noted that before the enforced disappearance of persons, the State has the obligation to guarantee the right to personal integrity of the next of kin also by means of effective investigations. These effects, fully encompassed in the complexity of enforced disappearances, remain in existence while the verified factors of impunity persist. [FN358]

[FN357] Cf. Case of Blake. Merits, supra note 340, para. 114; Case of Heliodoro Portugal, supra note 23, para. 174, and Case of Kawas Fernández, supra note 188, para. 139.
[FN358] Cf. Case of Goiburú et al., supra note 130, para. 103; Case of Radilla Pacheco, supra note 24, para. 172, and Case of Chitay Nech et al., supra note 25, para. 226.

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243. Consequently, despite the initiatives carried out by the State via Law No. 9.140/95, the compensation ordered to some of the next of kin of the victims, [FN359] and the advances carried out by the Special Commission, among others, the Court considers that the State violated the right to personal integrity established in Article 5 of the American Convention, in relation to Article 1(1) of the same instrument, to the detriment of the following individuals: Zélia Eustáquio Fonseca (mother), Alzira Costa Reis [FN360] (mother and wife), Victória Lavínia Grabois Olímpio [FN361] (daughter and wife), Criméia Alice Schmidt de Almeida (partner) and João Carlos Schmidt de Almeida (son), Luiza Monteiro Teixeira (mother), João Lino da Costa (father), Benedita Pinto Castro (mother), Odila Mendes Pereira (mother) and José Pereira (father), Luiza Gurjão Farias [FN362] (mother), Junília Soares Santana (mother) and Antonio Pereira de Santana (father), Elza da Conceição Oliveira (or Elza Conceição Bastos) (mother) and Viriato Augusto Oliveira (father), Maria Gomes dos Santos (mother), Rosa Cabello Maria (or Rosa Olímpio Cabello) (mother), Igor Grabois Olímpio [FN363] (son), Julia Gomes Lund (mother), Carmem Navarro (mother) and Gerson Menezes Magalhães (father), Aminthas Aranha (o Aminthas Rodrigues Pereira), (mother), Julieta Petit da Silva [FN364] (mother), Ilma Hass (mother), Osoria Calatrone (mother) and Clotildio Calatrone (father), Isaura de Souza Patricio (mother) and Joaquim Patricio (father), Elena Gibertini Castiglia (mother), Jardilina Santos Moura (mother) and Joaquim Moura Paulino (father), José Vieira de Almeida (son), Acary V. de

S. Garlippe (mother), Dora Grabois (mother) and Agostim Grabois (father), Rosana Moura Momente (daughter), Maria Leonor Pereira Marques (mother), Otilia Mendes Rodrigues (mother) y Francisco Alves Rodrigues (father), Celeste Durval Cordeiro (mother) and Luiz Durval Cordeiro (father), Aidinalva Dantas Batista (mother), Elza Pereira Coqueiro (mother), Odete Afonso Costa (mother), direct family members of the disappeared or executed victims, as well as other non-direct family members, Angela Harkavy (sister), José Dalmo Ribeiro Ribas (brother), Maria Eliana de Castro Pinheiro (brother), Roberto Valadão (brother), Diva Soares Santana (sister), Getúlio Soares Santana (brother), Dilma Santana Miranda (sister), Dinorá Santana Rodrigues (sister), Dirceneide Soares Santana (sister), Terezinha Souza Amorim (sister), Aldo Creder Corrêa [FN365] (brother), Helenalda Resende de Souza Nazareth (sister), Helenice Resende de Souza Nazareth (sister), Helenilda Resende de Souza Nazareth (sister), Helenoira Resende de Souza Nazareth (sister), Wladmir Neves da Rocha Castiglia (nephew), Laura Petit da Silva [FN366] (sister), Clovis Petit de Oliveira [FN367] (sister), Lorena Moroni Barroso (sister), Breno Moroni Girão (brother), Ciro Moroni Girão (brother), Sônia Maria Haas (sister), Elizabeth Silveira e Silva (sister), Luiz Carlos Silveira e Silva (brother), Luiz Paulo Silveira e Silva (brother), Maristella Nurchis (sister), and Valeria Costa Couto (sister).

[FN359] Cf. Statement by Mrs. Valeria Costa de Couto rendered before a public notary, supra note 344, folio 1726; Statement by Mrs. Maristella Nurchis rendered before a public notary, supra note 344, folio 1686; Statement by Mr. João Carlos Schmidt de Almeida Grabois rendered before a public notary, (case file on the merits, tome IV, folio 1657), and Statement by Mrs. Rosana de Moura Momente rendered before a public notary (case file on the merits, tome IV, folio 1690).

[FN360] Mrs. Alzira Costa Reis is also the wife and mother of two disappeared persons of the Guerrilha do Araguaia, Messers. Maurício Grabois and André Grabois, respectively.

[FN361] Mrs. Victória Lavínia Grabois Olímpio is, likewise, sister of one of the disappeared persons of the Guerrilha de Araguaia, Mr. André Grabois.

[FN362] The representatives reported in their brief of April 20, that Mrs. Luíza Gurjão Farias did not make a statement before the public notary given that "she passed away on February 21, 2010, before being able to recognize the signature she made in a statement made for the Inter-American Court," (case file on the merits, tome IV, folio 1594).

[FN363] Mr. Igor Grabois Olímpo is also the nephew and grandson, respectively, of two disappeared persons of the Guerrilha de Araguaia, Messers. André Grabois and Maurício Grabois.

[FN364] Mrs. Julieta Petit da Silva is the mother of two disappeared persons of the Guerrilha do Araguaia, Messers. Jaime and Lúcio Petit da Silva, and of Mrs. Maria Lúcia Petit da Silva.

[FN365] Mr. Aldo Creder Corrêa is the brother of the two disappeared persons of the Guerrilha do Araguaia, Messers. Elmo Corrêa and Maria Célia Corrêa.

[FN366] Mrs. Laura Petit da Silva is the sister of the two disappeared persons of the Guerrilha do Araguaia, Messers. Jaime and Lúcio Petit da Silva, and of Mrs. Maria Lúcia Petit da Silva.

[FN367] Mr. Clovis Petit da Silva is the brother of the two disappeared persons of the Guerrilha do Araguaia, Messers. Jaime and Lúcio Petit da Silva, and of Mrs. Maria Lúcia Petit da Silva.

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244. On the other hand, regarding the 24 next of kin indicated as alleged victims whom passed away prior to December 10, 1998, the Court will not rule on the State's responsibility due to the rule on ratione temporis jurisdiction (supra para. 181). Lastly, in regard to the 38 deceased next of kin whose dates of death have not been established, the Court has ordered that their next of kin or their legal representatives must present to the Court, in a period of six months as of notification of the present Judgment, the documentation that evinces that the date of death is subsequent to December 10, 1998, so as to confirm their condition as victims in the present case (supra para. 181).

XI. REPARATIONS (Application of Article 63(1) of the Convention [FN368])

[FN368] Article 63(1) of the American Convention states:
1. 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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245. Based on the provisions of Article 63(1) of the American Convention, the Court has indicated that any violation of an international obligation that has produced harm entails the obligation to repair it adequately [FN369] and that this provision "embodies a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility." [FN370]

[FN369] Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, para. 25; Case of Rosendo Cantú et al., supra note 45, para. 203, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 231.
[FN370] Cf. Case of Castillo Páez v. Perú. Reparations and Costs. Judgment of November 27, 1998. Series C No. 43, para. 50; Case of Rosendo Cantú et al., supra note 45, para. 203, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 231.

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246. This Court has established that reparations must be related to the facts of the case, the violations that have been declared, the damage proven, and the measures requested to repair the respective damage. Consequently, the Court must respect all these factors to ensure that its ruling is appropriate and in keeping with the law. [FN371]

[FN371] Cf. Case of Ticona Estrada et al., supra note 187, para. 110; Case of Rosendo Cantú et al., supra note 45, para. 204, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 262.

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247. The Commission expressed that it recognizes and appreciates the various measures to repair that have been adopted by the State, but added that these are not sufficient given the context of the present case.

248. The representatives noted that, despite acknowledging the recent willingness of the State of Brazil in adopting measures, principally, in regards to the recovery of memory of the victims of the military dictatorship in the country, the measures indicated by the State are insufficient, inadequate, and are not in line with the parameters established by the Inter-American System on reparations for gross violations of human rights.

249. The State expressed that it does not intend to deny the right of the next of kin of the victims to a material and symbolic reparation in accordance with the facts of the application. Nevertheless, it considered that all of the petitions formulated by both the Commission and the representatives were or are being carried out. In addition, Brazil referenced other cases in which the Court assessed the amount paid at the domestic level and took them into consideration when determining the payment at the international level in order to avoid "a real compensatory bis in idem." Lastly, it considered that the Court should consider the public expenses incurred in regard to the implementation of measures of non-repetition, the search for memory and the truth, and the payment of compensation measures.

250. The Court will proceed by analyzing the claims of the Commission and of the representatives, as well as the arguments of the State, so as to order measures designed to repair the damage caused to the victims. The Court notes and positively values the various measures of reparation adopted by the State, those of which are indicated in each of the following sections.

A. Injured Party

251. Under Article 63(1) of the American Convention, anyone declared a victim of the violation of any right embodied therein is considered an injured party. The victims in the present case are the following persons: Adriano Fonseca Fernandes Filho, André Grabois, Antônio Alfredo de Lima (or Antônio Alfredo Campos), Antônio Carlos Monteiro Teixeira, Antônio de Pádua Costa, Antônio Ferreira Pinto, Antônio Guilherme Ribeiro Ribas, Antônio Teodoro de Castro, Arildo Aírton Valadão, Áurea Elisa Pereira Valadão, Bérgson Gurjão Farias, Cilon Cunha Brum, Ciro Flávio Salazar de Oliveira, Custódio Saraiva Neto, Daniel Ribeiro Callado, Dermeval da Silva Pereira, Dinaelza Santana Coqueiro, Dinalva Oliveira Teixeira, Divino Ferreira de Souza, Elmo Corrêa, Francisco Manoel Chaves, Gilberto Olímpio Maria, Guilherme Gomes Lund, Helenira Resende de Souza Nazareth, Hélio Luiz Navarro de Magalhães, Idalísio Soares Aranha Filho, Jaime Petit da Silva, Jana Moroni Barroso, João Carlos Haas Sobrinho, João Gualberto Calatrone, José Huberto Bronca, José Lima Piauhy Dourado, José Maurílio Patrício, José Toledo de Oliveira, Kléber Lemos da Silva, Líbero Giancarlo Castiglia, Lourival de Moura Paulino, Lúcia Maria de Souza, Lúcio Petit da Silva, Luiz René Silveira e Silva, Luiz Vieira de Almeida, Luiza Augusta Garlippe, Manoel José Nurchis, Marcos José de Lima, Maria Célia Corrêa, Maurício Grabois, Miguel Pereira dos Santos, Nelson Lima Piauhy Dourado, Orlando Momente, Osvaldo Orlando da Costa, Paulo Mendes Rodrigues, Paulo Roberto Pereira Marques, Pedro Alexandrino de Oliveira Filho, Pedro Matias de Oliveira ("Pedro Carretel"), Rodolfo de Carvalho Troiano, Rosalindo Souza, Suely Yumiko Kanayama, Telma Regina

Cordeiro Corrêa, Tobias Pereira Júnior, Uirassú de Assis Batista, Vandick Reidner Pereira Coqueiro, y Walkíria Afonso Costa. Asimismo, también son víctimas los siguientes familiares directos: Zélia Eustáquio Fonseca, Alzira Costa Reis, Victória Lavínia Grabois Olímpio, Criméia Alice Schmidt de Almeida, João Carlos Schmidt de Almeida, Luiza Monteiro Teixeira, João Lino da Costa, Benedita Pinto Castro, Odila Mendes Pereira, José Pereira, Luiza Gurjão Farias, Junília Soares Santana, Antonio Pereira de Santana, Elza da Conceição Oliveira (or Elza Conceição Bastos), Viriato Augusto Oliveira, Maria Gomes dos Santos, Rosa Cabello Maria (or Rosa Olímpio Cabello), Igor Grabois Olímpio, Julia Gomes Lund, Carmem Navarro, Gerson Menezes Magalhães, Aminthas Aranha (or Aminthas Rodrigues Pereira), Julieta Petit da Silva, Ilma Hass, Osoria Calatrone, Clotildio Calatrone, Isaura de Souza Patricio, Joaquim Patricio, Elena Gibertini Castiglia, Jardilina Santos Moura, Joaquim Moura Paulino, José Vieira de Almeida, Acary V. de S. Garlippe, Dora Grabois, Agostim Grabois, Rosana Moura Momente, Maria Leonor Pereira Marques, Otilia Mendes Rodrigues, Francisco Alves Rodrigues, Celeste Durval Cordeiro, Luiz Durval Cordeiro, Aidinalva Dantas Batista, Elza Pereira Coqueiro, Odete Afonso Costa. In the same sense, the Court considers as victims the following non-direct family members: Angela Harkavy, José Dalmo Ribeiro Ribas, Maria Eliana de Castro Pinheiro, Roberto Valadão, Diva Soares Santana, Getúlio Soares Santana, Dilma Santana Miranda, Dinorá Santana Rodrigues, Dirceneide Soares Santana, Terezinha Souza Amorim, Aldo Creder Corrêa, Helenalda Resende de Souza Nazareth, Helenice Resende de Souza Nazareth, Helenilda Resende de Souza Nazareth, Helenoira Resende de Souza Nazareth, Wladmir Neves da Rocha Castiglia, Laura Petit da Silva, Clovis Petit de Oliveira, Lorena Moroni Barroso, Ciro Moroni Girão, Breno Moroni Girão, Sônia Maria Haas, Elizabeth Silveira e Silva, Luiz Carlos Silveira e Silva, Luiz Paulo Silveira e Silva, Maristella Nurchis, and Valéria Costa Couto. The abovementioned persons will be considered beneficiaries of the reparations ordered by this Court. Lastly, also considered injured party are those persons who were deceased as of December 10, 1998, determined pursuant to that established in the present Judgment (supra paras. 181, 213, 225, and 244).

252. Notwithstanding the abovementioned, the Court recalls that it has set a period of 24 months as of notification of this Judgment, for those interested to present irrefutable evidence, in conformity with the legislation and domestic procedures, regarding "Batista," "Gabriel," "Joaquinzão," José de Oliveira, Josias Gonçalves de Souza, Juarez Rodrigues Coelho, Sabino Alves da Silva, and "Sandoval," so as to allow the State to identify them, and were applicable, consider them victims in the terms set by Law No. 9.140/95 and the present ruling, adopting the appropriate reparation measures in their favor.

B. Obligations to investigate the facts, prosecute, and where necessary, punish those responsible and determine the whereabouts of the victims

1. Obligation to investigate the facts, prosecute, and where necessary, punish those responsible

253. The Commission requested that the Court orders the State to carry out, by means of the civil [ordinary] law jurisdiction, a comprehensive, effective, and impartial legal investigation of the enforced disappearances of the present case and of the execution of Mrs. Petit da Silva, in accordance with legal due process, in order to identify the intellectual and physical perpetrators

of said violations and to criminally punish them. To this end, the State must take into account that said crimes are not bound by a statute of limitations and not subject to amnesties. As such, Brazil must adopt all the necessary measures to assure that the Amnesty Law and the secrecy laws do not continue representing an obstacle for the criminal persecution of gross violations of human rights. In addition, it requested the publication of said investigation in order for Brazilian society to be aware of what occurred during this period of its history.

254. The representatives requested the Court to order Brazil to investigate the facts, as well as to prosecute and punish all those responsible in a reasonable period of time, and to order the State not to use provisions of its domestic law, such as the statute of limitations, res judicata, non-retroactivity of criminal law, and ne bis in idem, or any other exceptions to responsibility, to be exempt from its obligation. The State must remove all the de facto and de iure obstacles that maintain the impunity of the facts, such as those related to the Amnesty Law. In addition, they requested that the Court orders the State to: a) judge all the proceedings in relation with gross violations of human rights in the ordinary justice system; b) allow all the next of kin of the victims full access and legitimacy to act in all the procedural stages of the case, pursuant to domestic laws and to the American Convention, and c) publicly and widely disclose the results of the investigations for the knowledge of Brazilian society.

255. The State did not specifically address the investigation of the facts and only noted that the analysis of the Amnesty Law cannot be separated from the moment in which it was enacted nor from the foundations from which it is established. On the other hand, it recalled that the decision of the Federal Supreme Court in the Non-compliance Action of the Fundamental Principle 153 considered the Amnesty Law to be entirely legitimate in light of the new constitutional legal system.

256. In Chapter VIII of the present Judgment, the Court established the violation of the right to judicial guarantees and due judicial protection for the failure to investigate, prosecute, and eventually punish those responsible for the facts of the present case. Taking into account the foregoing, as well as its jurisprudence, this Court orders that the State must effectively conduct a criminal investigation of the facts of the present case in order to ascertain them, determine the corresponding criminal responsibility, and the effectively apply the punishment and consequences provided by law. [FN372] This obligation must be satisfied in a reasonable period of time, considering the criteria on investigations indicated in cases of this type, [FN373] inter alia:

a) to initiate the corresponding investigations in relation to the facts of the present case, taking into account the systematic violations of human rights that existed in said period, in order to allow for the proceeding and appropriate investigations to be carried out in consideration of the complexity of these facts and the context in which they occurred, thereby avoiding omissions in the gathering of evidence and in the logical lines of investigation;
b) to determine the physical and intellectual perpetrators of the enforced disappearances of the victims and of the extrajudicial execution. Furthermore, as this deals with gross violations ohuman rights, and taking into account the nature of the facts and the continued or permanent nature of enforced disappearances, the State many not apply the Amnesty Law to the benefit of the perpetrators, as well as other analogous provisions, the statute of limitations, non-

retroactivity of the criminal law, res judicata, ne bis in idem, or any other similar exception that excuses responsibility of this obligation, in the terms of paragraphs 171 to 179 of this Judgment, and

c) to ensure that: i) the competent authorities carry out the corresponding investigations ex officio, and that in this manner they have at their disposition and use all the logistical and scientific resources which may be necessary to collect and process the evidence, and in particular, that they have the means to access the relevant documentation and information in order to investigate the allegations and promptly carry out the essential actions and investigations to ascertain what occurred to the deceased person and to the disappeared person of the present case; ii) those who participate in the investigations, among them, the next of kin of the victims, witnesses, an operators of justice, have at their disposition the due guarantees for security, and iii) the authorities abstain from carrying out acts that imply an obstruction to the development of the investigative process.

[FN372] Cf. Velásquez Rodríguez. Merits, supra note 25, para. 174; Case of Rosendo Cantú et al., supra note 45, para. 211, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 237.

[FN373] Cf. Case of the Dos Erres Massacre, supra note 186, para. 233; Case of Manuel Cepeda Vargas, supra note 18, para. 216 and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24 para. 237.

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257. In particular, the State must guarantee that the criminal cases initiated due to the facts of the present case against the alleged perpetrators who were or are military officials, be carried out within the ordinary jurisdiction and not within the military jurisdiction. [FN374] Finally, the Court considers that, based in its jurisprudence, [FN375] the State must ensure the next of kin of the victims full access and the capacity to take part in all the stages of the investigation and trial of those responsible, pursuant to domestic law and to the American Convention. In addition, the results of the corresponding procedures should be publically disclosed thereby permitting Brazilian society to know the facts of the present case, as well as those responsible. [FN376]

[FN374] Pursuant to its jurisprudence, the Inter-American Court refers to the ordinary or common jurisdication as being the criminal and non-military jurisdiction. Cf. Case of Radilla Pacheco, supra note 24, para. 332; Case of Fernández Ortega et al., supra note 53, para. 229, and Case of Rosendo Cantú et al., supra note 45, para. 212.

[FN375] Cf. Case of the Caracazo v. Venezuela. Reparations and Costs. Judgment of August 29, 2002. Series C No. 95, para. 118; Case of Chitay Nech et al., supra note 25, para. 237, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 238.

[FN376] Cf. Case of the Caracazo. Reparations and Costs, supra note 375, para. 118; Case of Manuel Cepeda Vargas, supra note 18, para. 217, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 238.

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2. Determination of the whereabouts of the victims

258. The Commission requested the Court to order Brazil to strengthen, by means of financial and logistical resources, the efforts undertaken in the search and burial of the disappeared victims whose bodily remains have yet to be found and identified.

259. The representatives appreciated the efforts carried out by the State to locate the bodily remains of the disappeared victims in this case, but expressed that the whereabouts and circumstances of the disappearance of these persons is still unknown. They requested the Court to order the State to proceed, immediately, in finding, locating and identifying the victims of this case, ensuring that the guarantees of due diligence be respected, which are essential in the investigation of cases of this magnitude, as well as the impartiality and effectiveness of the procedures. This work must be planned, directed, and effectuated by an interdisciplinary team that is particularly prepared for this task, under the control of judicial authorities, in order to ensure the validity and integrity of the evidence obtained. Likewise, they requested that the State determines the identity of the located bodily remains from the earlier missions made in the Araguaia region and that these bodily remains be delivered quickly to the next of kin upon proof of kinship. The State must cover all the costs, and must respect the traditions and customs of the next of kin of the victims. In addition, they indicated that the consolidation of a bank of DNA samples from the next of kin of the victims is necessary. In particular, regarding the Tocantins Working Group, they stated that it is not an appropriate mechanism to carry out the search for the disappeared persons of the Guerrilla, given that it does not satisfy the abovementioned criteria.

260. The State reported that as of 2006, 13 expeditions were carried out in the Araguaia region with the intention of locating the bodies of the disappeared members of the Guerrilla, some by the next of kin of the disappeared members and others by public institutions. Moreover, the investigations on the possible "Operation Cleansing" are still underway, in which, so as to end the Guerrilha do Araguaia, the soldiers supposedly removed from the terrain all of the bodily remains of the members of the Guerrilla for their subsequent incineration. In particular, on the Tocantins Working Group, the State noted that it was created so as to coordinate and execute the necessary activities in locating, recognizing, and identifying the bodies of the members of the Guerrilla and of the soldiers who died in the Guerrilha do Araguaia. Subsequently, the Interinstitutional Committee for the Oversee of the Tocantins Working Group was created whose activities are also followed by the judicial authorities, and it relies on the participation of the Federal Public Prosecutor's Office. Furthermore, it noted that a team for interviews and the contextualization of facts was also created, comprised exclusively of civilians, to interview the local population and collect new data on the burial locations. On the other hand, Brazil reported that in 2006 a bank of DNA samples of the next of kin of the victims was created to facilitate the identification of the bodily remains found, which has to date collected samples from 142 family members of 108 politically disappeared persons. While it has used the technology and available resources for identification of the bodily remains, in some cases the results were inconclusive due to poor conditions of the remains found and to the deficient technology available at the time they were found, but it continues laboring to identify all the bodies found, using new techniques and the help of different institutions.

261. This Court has established that the right to next of kin of the victims to identify the whereabouts of the disappeared persons, and where applicable, to know the location of their

bodily remains is a measure of reparation, and as such creates the corresponding obligation of the State to satisfy said expectation. [FN377] Receiving the bodies of the disappeared persons is of utmost importance for the next of kin, given that it permits them to provide for a burial pursuant to their beliefs, as well as to close the grieving process they have been living all these years. In addition, the Court considered that the location where the bodily remains are found can be a valuable place to obtain information regarding the perpetrators of the violations or the institutions to which they belong. [FN378]

[FN377] Cf. Case of Neira Alegría et al. v. Perú. Reparations and Costs. Judgment of September 19, 1996. Series C No. 29, para. 69; Case of Chitay Nech et al., supra note 25, para. 240, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 214.
[FN378] Cf. Case of the Dos Erres Massacre v. Guatemala, supra note 186, para. 245.

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262. The Court positively values that Brazil has adopted measures to progress in the search for the victims of the Guerrilha do Araguaia. In this sense, it is necessary that the State carry out all the possible efforts to determine, in the briefest period possible, the whereabouts of the disappeared persons. The Court highlights that the next of kin have been anticipating this information for more than 30 years. Where appropriate, the bodily remains of the disappeared persons, previously identified, should be delivered to the next of kin as soon as possible and at no cost to them, in order for a proper burial to be carried out pursuant to their beliefs. Furthermore, the State should cover the funeral costs in agreement with the next of kin. [FN379] Also, the Court notes the creation of the Tocantins Working Group to effectuate the search for the disappeared persons in the framework of the Ordinary Action, and it also notes that the Working Group should count on the participation of the Federal Public Prosecutor's Office.

[FN379] Cf. Case of La Cantuta, supra note 160, para. 232; Case of Chitay Nech et al., supra note 25, para. 241, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 242.

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263. The Court notes that the search for the bodily remains was ordered in the framework of Ordinary Action No. 82.00.24682-5 and, therefore, is under the supervision of the judge that rendered said measure, and to whom the information obtained must be submitted. [FN380] In this sense, the Court considers that the searches carried out for the disappeared victims on behalf of the State, be it by the Tocantins Working Group, or any other subsequent or complimentary actions that are necessary for locating and identifying the disappeared persons, such as, for example, the criminal investigation ordered in the present Judgment (supra paras. 256 and 257), should be carried out in a systematic and rigorous manner, have the adequate human and technical resources, taking into account the relevant norms on the matter, [FN381] all of the measures necessary to locate and identify the remains of the disappeared victims, and then return them to their family members.

[FN380] Cf. Case of Gomes Lund et al. (Guerrilha do Araguaia). Request for Provisional Measures regarding Brazil. Order of July 15, 2009, Considering clause 10.
[FN381] Such as those established in the United Nations Manual on the Prevention and Effective Investigation of Extrajudicial, Summary, or Arbitrary Executions. In this regard, cf. Case of the Mapiripán Massacre v. Colombia. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, para. 305, and Case of the Dos Erres Massacre, supra note 186, para. 247.

C. Other measures of rehabilitation, satisfaction, and non-repetition

1. Rehabilitation

i. Medical and psychological care

264. The Commission requested the Court to order the State to adopted measures for the physical and psychological treatment of the next of kin of the disappeared victims and the executed person.

265. The representatives noted that the State has the obligation to offer medical and psychological assistance, free of charge, to the next of kin of the disappeared victims in the Guerrilha do Araguaia, in a manner that allows them access to quality health centers to receive the necessary assistance, to which they requested that this assistance be carried out by nationally recognized health centers of the choose of the next of kin and not by the Public Health Services as indicated by the State. This measure should also include the cost of the medications, so that the next of kin do not incur additional cost. Therefore, they requested that Brazil carry out individual medical evaluations of the next of kin and that the necessary treatment should correspond to the particular needs of each person.

266. The State highlighted that in the Ordinary Action presented by the next of kin against the Union, they requested various measures but never an “integral reparation.” Nevertheless, it reported that in Brazil the Public Health Service allows for universal access to health care at all the assistance levels.

267. The Court finds, as it has done in other cases, [FN382] that a measure of reparation that provides appropriate care for the physical and psychological effects suffered by the victims is necessary. Consequently, the Court deems it convenient to order the State to provide the victims, per their requests, free of charge and immediately, appropriately, and effectively, with the medical and psychological or psychiatric care by means of public health institutions. Therefore, the specific injuries or impairments of each person must be considered by means of a prior physical and psychological assessment. Moreover, the treatment must be provided in Brazil for the time necessary and it must include the provision, free of charge, of medication that may be required.

[FN382] Cf. Case of Barrios Altos v. Perú. Reparations and Costs. Judgment of November 30, 2001. Series C No. 87, paras. 42 and 45; Case of Rosendo Cantú et al., supra note 45, para. 252, and Case of Ibsen Cárdenas and Ibsen, supra note 24, para. 253.

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268. In particular, psychological and psychiatric treatment must be provided by State personnel and institutions specialized in attending to victims of acts of violence such as those that occurred in this case. In the circumstance that the State lacks the personnel or institutions that may offer this level of necessary care, it must have recourse to specialized private or civil society institutions. When providing this treatment, the specific circumstances and needs of each victim must be considered, so that they are offered individual and family treatment, as agreed upon by each of them, and following an individual evaluation. [FN383] Lastly, this treatment must be provided, insofar as possible, in the institutions nearest to their place of residence. In the same way, those who requested this measure of reparation, or their legal representatives, have six months from the notification of this Judgment to inform the State of their specific requests for psychological or psychiatric treatment.

[FN383] Cf. Case of 19 Tradesmen. Merits, Reparations and Costs, supra note 302, para. 278; Case of Fernández Ortega et al., supra note 53, para. 252, and Case of Rosendo Cantú et al., supra note 45, para. 253.

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269. In addition, the Court notes that Mrs. Elena Gibertini Castiglia, mother of disappeared person Líbero Giancarlo Castiglia, resides in the city of San Lucido, Italia, [FN384] and, as such, will not have access to public health services in Brazil, pursuant to that ordered in the present section. Therefore, the Court considers it pertinent to determine that, if Mrs. Gibertini Castiglia requests medical, psychological or psychiatric care, in the terms of the prior paragraph, the State must offer her the amount of US$ 7,500.00 (seven thousand, five hundred dollars of the United States of America) for expenses related to medical and psychological or psychiatric care, in order for her to receive care in the place where she resides. [FN385]

[FN384] Cf. Statement by Mrs. Elena Gibertini Castiglia rendered before a public notary, supra note 345, folio 1645.

[FN385] Cf. Case of the Miguel Castro-Castro Prison, supra note 254, para. 450, and Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114, para. 249.

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2. Satisfaction

i. Publication of the Judgment

270. The Commission requested the Court to order the State to publish the Judgment that the Court will render in a newspaper of national circulation.

271. The representatives requested the Court to order the State to publish the chapters of the Judgment related to the facts proven, the Articles of the Convention that were violated, and the operative part of the Judgment in its Official Gazette and in a newspaper of wide national circulation. In addition, they requested the publication of a book with the entire content of the Judgment.

272. The State indicated that this request could only be headed to if there was a condemnatory judgment by the Court.

273. As it has ordered on other occasions, [FN386] the Court considers that, as a measure of satisfaction, the State must publish once in the Official Gazette, the present Judgment, including the respective titles and subtitles of each chapter, without the corresponding footnotes, and the operative paragraphs hereto. Likewise, the State must: a) publish the official summary of the Judgement issued by the Court in a newspaper with widespread national circulation, and b) publish this Judgment in its entirety on an appropriate web site of the State of Brazil, taking into account the characteristics of the publication that has been ordered, and it must remain available for, at least, one year. Lastly, considering the request of the representatives to publish this decision in book form, the Court deems it appropriate to order, in addition, that the State publish the Judgment on an appropriate web site in electronic book form. Said publications must be carried out in a period of six months from the notification of this Judgment.

[FN386] Cf. Case of Barrios Altos. Reparations and Costs, supra note 382, Operative Paragraph 5(d); Case of Rosendo Cantú et al., supra note 45, para. 229, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 244.

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ii. Public act of acknowledgment of international responsibility

274. The Commission requested the Court to order the State to acknowledge its international responsibility, as well as to carry out acts of symbolic importance that guarantee the non-repetition of the violations which occurred in the present case.

275. The representatives expressed that none of the actions of a symbolic nature indicated by the State, (infra para. 276) refer exclusively to the disappeared persons in Brazil and that none of these acts were effectuated in consultation with the next of kin of the victims in the present case, an indispensable element in order to carry out said measure. Though the State has recognized its responsibility for the enforced disappearances in the domestic forum, it has not recognized said responsibility in the international forum, nor has it recognized its responsibility for the violations of the right to judicial protection and judicial guarantees, as well as the right to personal integrity and access to information of the victims and their next of kin. Based on the foregoing, the representatives requested the Court to order the State of Brazil to carry out a public act of acknowledgment of international responsibility and official apology for the gross human rights violations perpetrated against the victims in the present case, specifically for the denial of justice. They considered that several representatives of the three powers of the State should attend said

act; that the act should be agreed to by the representatives of the victims beforehand, and that the expenses should be covered by the State. Lastly, considering that some of the next of kin live far away, they requested the transmission of the public act by means of radio, newspapers, and television, with wide national coverage and during a time where there is a large public audience.

276. The State noted that it officially acknowledged its responsibility for the deaths and enforced disappearances that occurred during the period of military regime, inter alia, by means of Law No. 9.140/95 and the Report "Right to Memory and Truth" of the Special Commission on Political Deaths and Disappearances of Persons, which was presented in a public act with the presence of the President of the Republic, of various authorities and next of kin of the victims of the military regime. Likewise, the Minister of Justice, in the name of the State, carried out an official apology via a public act carried out on June 18, 2009, in which the benefits of a political amnesty were granted to 44 peasants of the region, who were pursued in order to give information on the Guerrilha do Araguaia. In addition, other measures of a non-pecuniary nature were carried out. In regard to the project "Right to Memory and Truth," carried out by the Special Secretariat on Human Rights of the Presidency of the Republic, the State noted several actions: a) the publication and distribution in public schools of the Report Right to Memory and Truth; b) three other publications [FN387] in order to highlight relevant aspects of the fight against the military regime; c) the photographic exposition "the Dictatorship in Brazil 1964-1985," and d) the project "Memories 'Essential Persons,'" that consists of panels and sculptures placed in various public places. Furthermore, the projects of the Amnesty Commission, include, among others: a) the "Project Cultural Amnesty," which encompasses public hearings of the Amnesty Commission where the applications for reparations of the victims of the military regime are analized by means of the "Amnesty Caravans"; b) the "I Encuentro de Torturados de la Guerrilha do Araguaia," ["First Encounter of Tortured Persons of the Guerrilha do Araguaia"]; c) the project "Memorial de Amnistía Política en Brasil" ["Political Amnesty Memorial in Brazil"]; d) the campaign for donation and collection of information "Caminos para la Democracia" ["Pathways to Democracy"]; e) the creation of a Working Group for the project "Marcas de Memoria: Historia Oral de la Amnistía Política en Brasil" ["Memory Scars: Oral History of the Political Amnesty in Brazil"]; f) the publication of the Magazine Political Amnesty and Transitional Justice, and g) the creation of the Political Amnesty Memorial in Brazil, in Belo Horizonte, Brazil. Regarding the recovery of the memory of Guerrilha do Araguaia, the State emphasized the Museum "Paraense Emílio Goeldi," wherein the activities consist, among others, in the spreading of knowledge and heritage related to the amazonic region, and the collection and systematization of information on the Guerrilla. Lastly, the State reported on the tributes made to the victim Bergson Gurjão Farias.

[FN387] The books "Right to Memory and Truth – The descendants of Men and Women who crossed the Ocean on board of Slave Trade Boats and were Killed in the Conflict against the Military Regime" and "History of the Children marked by the Dictatorship" were published on May and December 2009, respectively, while the book "Fight, Feminine Noun" was published on April of 2010.

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277. The Inter-American Court positively values the initiatives of acknowledgment of domestic responsibility and the numerous measures of reparation reported by the State. Nevertheless, as it has done in other cases, [FN388] for the domestic acknowledgment to reach its full effect, the Court deems that the State must carry out a public act of acknowledgment of its international responsibility, in relation with the facts of the present case, referring to the established violations in the present Judgment. The act should be carried out during a public ceremony, in the presence of high-ranking national authorities and of the victims in the present case. The State should agree on the terms of compliance of the public act of acknowledgment with the victims or their representatives, as well as the particularities required, such as location and date for it to be carried out. Said act should be disseminated via the media, and the State has a period of one year as of the notification of the present Judgment to carry out the act.

[FN388] Cf. Case of Kawas Fernández, supra note 188, para. 202; Case of Fernández Ortega et al., supra note 53, para. 244, and Case of Rosendo Cantú et al., supra note 45, para. 226.

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iii. "Day of the politically disappeared in Brazil" and memorial

278. The representatives requested the Court to order the State to designate a day such as the "day of the politically disappeared," during which activities are carried out to remember the disappeared persons during the military dictatorship, to help create a culture of conscience regarding the severity of the facts which occurred, and to guarantee their non-repetition. Likewise, they requested the construction of a memorial so the next of kin of the victims can visit it in order to remember the victims and carry out the activities of the day of the politically disappeared in Brazil. Said memorial must include a permanent, simple, and sensitive exposition of the victims and their next of kin, as well as it may include temporary expositions.

279. The State noted that the creation of a commemorative day to remember the politically disappeared persons in Brazil depends on its domestic law, pursuant to Article 61 of its Political Constitution. In addition, the designation of a commemorative date alluded to in the national forum will be joined with the commemoration of the International Day of the Politically Disappeared Person on August 30th of each year.

280. The Court notes that the reason for which a day distinct from the International Day of the Politically Disappeared Person is necessary has not been stated, nor has the reason why the commemorations related to the disappeared persons of the Guerrilla do Araguaia cannot be celebrated on the same day. Similarly, the eventual insufficiency of the measures of reparation adopted by Brazil, requiring the construction of a memorial, has also not been founded. The Court thus considers the issuance of the present Judgment, the measures provided in it, and the various actions adopted by the State, as sufficient measures of reparation. Based on the foregoing, the Court does not find it necessary to order the additional measures of reparation indicated in the present section.

3. Guarantees of non-repetition

i. Human rights education in the Armed Forces

281. The Commission requested the Court to order the State to implement, in a reasonable period of time, education programs on human rights within the Armed Forces, at all hierarchical levels, which should include the present case and the regional and international human rights instruments, specifically those related to enforced disappearance and torture.

282. The State expressed that as a consequence of its adherence to the conventions of the United Nations, it began to invest in human rights education for the Armed Forces. The "National Defense Strategy" expressly provides that the educational institutions of the three Armed Forces will expand their subjects for the military training programs in Constitutional Law and Human Rights. As such, the Academy of the Air Force teaches "General Law," which encompasses the subject of human rights in what regards the analysis of constitutional provisions regarding the fundamental rights and guarantees. In the Army, the subject of "Law," encompasses matters of constitutional law and human rights, including international humanitarian law. In the Navy, the content on human rights is handled under the subject matter of "Constitutional Law," specifically in the study of "fundamental rights and guarantees of man," a subject that is also provided in a broad manner under the subject of "International Humanitarian Law."

283. The Court positively values the information of Brazil on the training programs for the Armed Forces. This Court considers it important to strengthen the institutional capacities of the State via the training of the members of the Armed Forces on the principles and norms of human rights protection and on the limits to which they are subject. [FN389] As such, the State must continue with the actions carried out and implement, in a reasonable period of time, a program or permanent and obligatory course on human rights, directed at all the hierarchical levels of the Armed Forces. As part of this formation, the present Judgment should be included, as well as the jurisprudence of the Inter-American Court on enforced disappearances of persons, on other serious human rights violations, and on the criminal military jurisdiction, in addition to the international human rights obligations of Brazil derived from the treaties of which it is a Party.

[FN389] Cf. Case of the Rochela Massacre v. Colombia, Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, para. 303; Case of Fernández Ortega et al., supra note 53, para. 262, and Case of Rosendo Cantú et al., supra note 45, para. 249.

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ii. Codification of the crime of enforced disappearance

284. The Commission requested the Court to order the State to codify the crime of enforced disappearance in its domestic legal code, pursuant to the elements outlined by related international instruments.

285. The representatives expressed that the State must codify the crime of enforced disappearance, considering it to be continuous or permanent, until the whereabouts of the victim are determined. The appropriate codification of enforced disappearance must include: a) the

elimination, ab initio, of legal institutions such as amnesties or statute of limitations; b) the elimination of the military justice jurisdiction; c) the investigation of all of the actions of the implicated persons, and d) the determination of a punishment proportional to the gravity of the crime. Regarding the Draft Bill No. 4038/08, that codifies the crime of enforced disappearance of persons, they noted that it calls for the incorporation of the Rome Statute into the domestic law of Brazil, which only provides for the crime of enforced disappearance of persons within the context of crimes against humanity. Regarding the Draft Bill No. No. 301/07, which intends to define conducts that constitute crimes in violation of international humanitarian law and to establish norms for the legal cooperation of the International Criminal Court, they considered that it also is not appropriate, among other reasons, given that it also describes the criminal conduct within a generalized or systematic attack against the civilian population. Therefore, they requested the Court to order the State to codify the crime of enforced disappearance of persons in its legal system, pursuant to the parameters of the Inter-American System.

286. The State recognized the importance of the codification of the crime of enforced disappearance and indicated that the absence of said codification does not prevent it from being subsumed under another crime. Nevertheless, the codification of the crime of enforced disappearance in the Brazilian domestic legal code is being examined by the Legislative Power, by means of two Draft Bills: a) No. 4.038/08, presented in September of 2008, wherein its Article 33 defines the crime against humanity of enforced disappearance, b) No. 301/07, wherein its Article 11 also codifies enforced disappearance. Finally, the State noted that Legislative Decree No. 116 of 2008, is currently being processed before the National Congress, which ratifies the Inter-American Convention on Forced Disappearance of Persons. It informed that the abovementioned Legislative Decree has been approved by the Chamber of Representatives and is currently being processed by the Commission of Foreign Relations of the Federal Senate.

287. In accordance with the foregoing, the Court urges the State to continue with the legislative processing and to adopt, in a reasonable period of time, all the measures necessary to ratify the Inter-American Convention on the Prevention and Punishment of Forced Disappearance of Persons. On the other hand, pursuant to the obligation enshrined in Article 2 of the American Convention, Brazil must adopt the necessary measures to codify the crime of enforced disappearance of persons in conformity with the Inter-American standards. This obligation links all the State powers and organs together. In this sense, as this Court has indicated previously, [FN390] the State should not limit itself to merely pushing forward the corresponding bill, but rather should assure its prompt approval and entry into force, pursuant to the established procedures in the domestic legal code. While complying with this measure, the State should adopt all the actions that guarantee the effective prosecution, and where necessary, punishment of the facts which make up the crime of enforced disappearance by means of the existent measures in place in domestic law.

[FN390] Cf. Case of Radilla Pacheco, supra note 24, para. 344.

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iii. Access, systematization, and publication of documents in State custody

288. The Commission requested the Court to order the State to carry out all the necessary legal actions and modifications in order to make public all the documents related to the military operations against the Guerrilha do Araguaia.

289. The representatives requested the Court to order the State to: a) ensure that all State institutions and authorities be obligated to cooperate with the handover of information and the full access to all the archives and records on the possible whereabouts of the disappeared victims in the present case; b) demand the delivery of the documents that are unlawfully in the hands of private individuals; c) the adaptation of Brazilian domestic law with the international parameters of protection to the right to access information; d) duly prove the alleged destruction of official documents and investigate through the courts their destruction in order to identify, prosecute, and eventually punish those responsible, and e) visit the offices of the Armed Forces, by investigators and individuals specialized in archives foreign to the military structure, whom should be granted the broadest level of access to the pertinent military archives. In particular, regarding the Draft Bill Law No. 5.228/09 that will modify the rules on access to information in the power of the State, the representatives noted that "it is welcome," but emphasized that the processing before the Legislative Power must be streamlined in order for it be approved as soon as possible.

290. The State noted it has adopted various measures to transform the documentary body of evidence, previously restricted, in instruments that guarantee and affirm human rights, and added that all the documents of which there is knowledge of on the Guerrilha do Araguaia are in the National Archive, available for consultation, though it recognized that said documents do not offer final information on the location of the bodily remains of the victims. In regard to the alleged existence of documents related to the Guerrilla do Araguaia under custody of the Armed Forces, it noted that all the existent documents were presented and that Decree No. 79.099/77, in force until June 24, 1997, permitted the destruction of the documents. The investigative procedures in the forum of the Armed Forces concluded that the destruction of the documents was made pursuant to said Decree. In addition, it indicated that 98% of the available documents in the National Archive correspond to records produced by organs and entities of the State.

291. Lastly, on the Brazilian legislation that regulates the right to information and that considers restrictions to access based on the security of the State and society, Brazil emphasized that the State secrecy does not fall on any document related to the Guerrilha do Araguaia. Nevertheless, it reported that on May 5, 2009, the President of the Republic presented Draft Bill 5.228/09 to the National Congress, providing a new outlook to the right to information that treats the guarantee of access to information as a general rule. Article 16 of the bill establishes that "access to necessary information for the legal and administrative protection of fundamental rights cannot be denied" and that "the information of documents that discusses conduct which implies violations of human rights carried out by public agents or mandates of public authorities cannot be subject to restrictions on accessibility." The bill also encompasses a reduction on the periods of confidentiality of the documents. Said project was approved by the Chamber of Representatives and is being analyzed by the Senate.

292. The Court positively values the various initiatives of Brazil in its attempts to systematize and make public the documents related to the period of the military regime, including those related to the Guerrilha do Araguaia. In particular, on the collection and systematization of

information on the Guerrilla, pursuant to the information of the State and the expert report of expert Antunes da Silva, [FN391] under the framework of the Ordinary Action No. 82.00.24682-5, being processed by the First Federal Court of the Federal District, 21,319 pages of documents were presented, distributed in 426 tomes of evidence from the former National Information Service. Subsequently 28 tomes of documents were added that contain thematic information on the raid operations in the conflict zone. On February 3, 2010, approximately 50 million documents, of which 63 correspond to the Guerrilha do Araguaia, were received from the Regional Coordination Office of the body of information of the secret service of the Commander of the Air Force. Based on the aforementioned, the Court deems that it does not need to rule on an additional measure of reparation in this regard, notwithstanding that the State must continue to develop the initiatives for the systematization and publication of all the information on the Guerrilha do Araguaia, as well as the information related to the human rights violations which occurred during the military regime, guaranteeing access to this information.

[FN391] Cf. Expert report by Mr. Jaime Antunes da Silva, supra note 274, folios 1430 to 1433.

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293. On the other hand, in regard to the adaptation of the normative framework of access to information, the Court notes that the State reported that it is processing a draft bill that, among other reforms, proposes a reduction in the periods allowed for restricting access to documents and establishes the elimination of the same regarding those that are related to violations of human rights, to which the representatives expressed their approval. Based on the foregoing, the Court urges the State to adopt the legislative and administrative measures, and any other measures, that are necessary to strenghten the normative framework of access to information, pursuant to the Inter-American standards of protection on human rights, such as those indicated in the present Judgment (supra paras. 228 to 231).

iv. Creation of a Truth Commission

294. The representatives requested the Court to order the State to create a Truth Commission that complies with the international parameters of autonomy, independence, and public consultation for its integration and that is equipped with appropriate resources and attributions. In regard to the Draft Bill that is currently in the Congress, they expressed their worry, among other aspects, because the seven members of the National Truth Commission are elected under the discretion of the President of the Republic, without consulting the public, and as such, without guarantees of independence and that allows for the participation of soldiers as commissioners, thereby severely affecting its credibility.

295. Brazil highlighted the future constitution of a National Truth Commission that would be composed of seven members, elected by the President of the Republic among Brazilians of distinguishable competence and ethical conduct, committed with the defense of democracy and the constitutional institutionalization, as well as with the respect of human rights. The Commission will be able to require any information and document directly from the public organs and entities, promote public hearings, determine the elaboration of expert investigations

and procedures, require assistance from entities in gathering testimonies from persons in any way related to the facts and examined circumstances, among other powers.

296. The Court values positively the actions carried out by the State to advance the understanding and recognition of the facts of the present case. Specifically, the Court appreciates the various initiatives of the State in advancing the clarification of the facts by, among others, the Special Commission on Political Deaths and Disappearances of Persons, the Interministerial Commission, the creation of the Revealed Memories Archive, and the commencement of the monitoring of compliance with the judgment of the Ordinary Action No. 82.00.24682-5, efforts that have contributed to the clarification of the facts of the present case and other events during the military regime in Brazil.

297. In regard to the establishment of a National Truth Commission, the Court considers that it is an important mechanism, among others that already exist, to comply with the obligation of the State to guarantee the right to the truth of what occurred. In effect, the establishment of a Truth Commission, depending on its objective, procedures, structure, and purpose of its mandate, can contribute to the construction and preservation of the historic memory, clarification of the facts, and determination of the institutional, social, and political responsibilities of specific historic periods in a society. [FN392] As such, the Court values the initiative of creating a National Truth Commission and urges the State to implement it, using criteria of independence, competence, and transparency in the selection of its members and with the resources and attributions that permit it to effectively comply with its mandate. Nevertheless, the Court deems it appropriate to highlight that the activities and information that this Commission will eventually obtain do not substitute the obligation of the State to establish the truth and ensure the legal determination of individual responsibility by means of criminal legal procedures. [FN393]

[FN392] Cf. Case of Zambrano Vélez et al., supra note 254, para. 128; Case of Anzualdo Castro, supra note 122, para. 119, and Case of Radilla Pacheco, supra note 24, para. 74.
[FN393] Cf. Case of Almonacid Arellano et al., supra note 251, para. 150; Case of Chitay Nech et al., supra note 25, para. 234, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 158.

D. Compensation, costs, and expenses

1. Pecuniary damage

298. The Court has developed in its jurisprudence the concept of pecuniary damages and the situations in which it shall be compensated. This Court has established that pecuniary damage encompasses the "loss or detriment to earnings of the victims, the expenses incurred based on the facts, and the consequences of a pecuniary nature that have a causal link with the facts of this case." [FN394]

[FN394] Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and Costs. Judgment of February 22, 2002. Series C No. 91, para. 43; Case of Rosendo Cantú et al., supra note 45, para. 270, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 260.

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299. The Commission considered that the sum of pecuniary compensation that has been agreed upon by means of domestic procedures within Brazil must be recognized as part of the reparation. Based on the aforementioned, it requested the Court, given the nature of the case, to establish in equity, a sum for the compensation of pecuniary damage.

300. The representatives acknowledge the State's efforts to compensate the next of kin of the victims, given that many of them have received compensation in the domestic forum. Said sums should be recognized as part of the reparation and discounted from the value that is determined by the Court. Nevertheless, none of the laws that regulate the payment of reparation that was provided, defines in an explicit manner, the reasons for said compensation, nor do they differentiate between reparations for pecuniary and non-pecuniary damage. On the other hand, they noted that given the impossibility of proving the medical expenses incurred by the family members for the suffering caused by the disappearance of the victims, the representatives requested the Court to determine the corresponding value in equity. In regard to consequential damage, they agreed that said concept encompasses the loss suffered by the next of kin for having dedicated their lives to the search for justice. Given that there are many expenses that have been incurred over more than 30 years by the next of kin, to which they have not saved all the receipts, they requested the Court to establish a sum in equity. Moreover, considering the impossibility of determining with precision the professional activities carried out by the victims at the time the facts occurred, because these individuals were living in clandestine circumstances, they requested the Court to adopt standards established in Brazilian domestic law for similar situations in order to determine the loss of earnings owed to the next of kin of the victims. In this sense, they requested the Court to apply the standard criteria established in Law No. 10.559/02, and to indicate that the ordered reparations in the present Judgment do not impede the next of kin from exercising their rights in domestic procedures for the payment of other compensations, those of which are complementary, and in conformity with domestic law.

301. The State noted that Law No. 9.140/95 empowered the next of kin of the deceased and disappeared persons to request pecuniary reparation. [FN395] In May of 2007, the State sent to the Inter-American Commission a list of the disappeared persons of the Guerrilha do Araguaia whose next of kin received compensation. Of this total of 62 people recognized by the State, it reported that four families had not received compensation, because of an express waiver by the families or because no one submitted a request. As such, it indicated that it had paid compensation to 58 victims. [FN396]

[FN395] Pursuant to Article 10 of the Law No. 9.140/95, the compensation shall be paid to the couples, companions, descendants, ascendents, and collaterals until the fourth grade, of the victims, and shall never be less than R$ 100,000.00.

[FN396] Adriano Fonseca Fernandes Filho, André Grabois, Antônio Alfredo de Lima, Antônio Carlos Monteiro Teixeira, Antônio de Pádua Costa, Antônio Ferreira Pinto, Antônio Guilherme

Ribeiro Ribas, Antônio Teodoro de Castro, Arildo Aírton Valadão, Áurea Eliza Pereira Valadão, Bérgson Gurjão Farias, Cilon Cunha Brum, Ciro Flávio Salazar de Oliveira, Custódio Saraiva Neto, Daniel Ribeiro Callado, Dermeval da Silva Pereira, Dinaelza Santana Coqueiro, Dinalva Oliveira Teixeira, Divino Ferreira de Souza, Elmo Corrêa, Gilberto Olímpio Maria, Guilherme Gomes Lund, Helenira Resende de Souza Nazareth, Idalísio Soares Aranha Filho, Jaime Petit da Silva, Jana Moroni Barroso, João Carlos Haas Sobrinho, João Gualberto Calatrone, José Huberto Bronca, José Lima Piauhy Dourado, José Maurílio Patrício, José Toledo de Oliveira, Kléber Lemos da Silva, Líbero Giancarlo Castiglia, Lourival de Moura Paulino, Lúcia Maria de Souza, Lúcio Petit da Silva, Luiz René Silveira and Silva, Luiz Vieira de Almeida, Luiza Augusta Garlippe, Manoel José Nurchis, Marcos José de Lima, Maria Célia Corrêa, Maurício Grabois, Miguel Pereira dos Santos, Nelson Lima Piauhy Dourado, Orlando Momente, Osvaldo Orlando da Costa, Paulo Mendes Rodrigues, Paulo Roberto Pereira Marques, Rodolfo de Carvalho Troiano, Rosalindo Souza, Suely Yumiko Kanayama, Telma Regina Cordeiro Corrêa, Tobias Pereira Júnior, Uirassú de Assis Batista, Vandick Reidner Pereira Coqueiro, amd Walkíria Afonso Costa. Cf. Compensation paid to the next of kin of the disappeared persons of the Guerrilha do Araguaia, supra note 93, folios 9110 to 9115.

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302. The Court notices that the State did not differentiate between pecuniary and non-pecuniary damage in regard to the compensation derived from Law No. 9.140/95. Notwithstanding the abovementioned, the Court notes that the State did in fact pay compensation to the next of kin of 58 victims of enforced disappearance in the present case. In regard to Mr. Francisco Manoel Chaves and Mr. Pedro Matias de Oliveira ("Pedro Carretel"), no family members came forward to request recognition or compensation before the Special Commission established by Law No. 9.140/95. [FN397] In regard to the next of kin of Mr. Hélio Luiz Navarro de Magalhães and Mr. Pedro Alexandrino de Oliveira Filho, the Court notes that although their mothers required information on them from the Special Commission, they did not wish to request compensation. [FN398]

[FN397] Cf. Right to Memory and Truth, supra note 67, folios 792, 793, 840, and 841.
[FN398] Cf. Compensation paid to the next of kin of the disappeared persons of the Guerrilha do Araguaia, supra note 93, folios 9112 and 9114, and Right to Memory and Truth, supra note 67, folios 822, 823, 841, and 842.

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303. The Court considers, as it has done in other cases, [FN399] that of the national mechanisms that exist to determine forms of reparation, these procedures should be evaluated and encouraged. If these mechanisms do not satisfy standards of objectivity, reasonability, and effectiveness to properly repair the human rights violations declared by this Court, recognized in the Convention, the Court, in the exercise of its subsidiary and complimentary competence, should order the appropriate reparations. In this sense, it has been established that the next of kin of the disappeared victims had access to an administrative process, which determined compensation "of reparative purposes" for the enforced disappearances and deaths of the direct victims. [FN400] The Court positively values the actions of the State in this sense and deems that the sums established by Law No. 9.140/95 and paid to the next of kin of the victims "for

reparative purposes," are reasonable in terms of its jurisprudence and assumes that this compensation includes both the pecuniary and non-pecuniary damages to the disappeared victims. On the other hand, in the cases where compensation has not been claimed by the next of kin of Mr. Francisco Manoel Chaves, Mr. Pedro Matias de Oliveira ("Pedro Carretel"), Mr. Hélio Luiz Navarro de Magalhães, and Mr. Pedro Alexandrino de Oliveira Filho, the Court requires the State to establish the possibility that in a period of six months as of the notification of the present Judgment, those interested, may present a request, if they so wish, for compensation using the criteria and mechanisms established in domestic law by Law No. 9.140/95.

[FN399] Cf. Case of Manuel Cepeda Vargas, supra note 18, para. 246.
[FN400] Law No. 9.140/95, supra note 87, Article 11.

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304. On the other hand, in regard to medical and other expenses related to the search for their next of kin indicated by the representatives, the Court notes that receipts were not provided for these alleged expenses, neither was noted the particular harm suffered by each family member that would found such request, nor were each of the activities in which they participated or the costs incurred individualized. Notwithstanding the aforementioned, the Court assumes that the next of kin of the victims incurred, since December 10, 1998, to date, among others, expenses related to medical services and care and those related to the search for information and the bodily remains of the disappeared victims to the present date. Based on the foregoing, the Court determines, in equity, the payment of US$ 3.000 (three thousand dollars of the United States of America) in favor of each of the next of kin considered victims in the present Judgment (supra para. 251). The compensation offered in the present Judgment, shall not pose an obstacle to the other reparations that, eventually, could be issued in the domestic law.

2. Non-pecuniary damage

305. The Court has developed in its jurisprudence the concept of non-pecuniary damage and the assumptions under which it must be compensated. The Court has established that non-pecuniary damage consists of "the suffering and the harm caused to the direct victims and their relatives, the erosion of values of great significance to people, as well as the alterations of a non-pecuniary nature, in the living conditions of the victim or the victim's family." [FN401]

[FN401] 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 Rosendo Cantú et al., supra note 45, para. 275, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 278.

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306. The Commission requested the Court to, heading to the nature of this case, establish a sum in equity for the compensation of non-pecuniary damage.

307. The representatives noted that moral damage should be subject to an established monetary compensation based on standards of equity. The victims were detained without legal formalities or judicial controls; they were taken to military bases were they were tortured and then disappeared, to which they requested that for each disappeared person and for Maria Lúcia Petit da Silva, based on moral damage, the Court establish a sum of US $100,000.00 (one hundred thousand dollars of the United States of America). On the other hand, regarding the next of kin of the victims, they considered that the enforced disappearances generated anguish, insecurity, frustration, and defenselessness, given the omission of the public authorities to investigate the facts. As such, they requested that in establishing the sum for compensation, the Court consider factors such as the type of crime, the failure to identify those responsible, and the impact on the life plan and physical and mental health of the next of kin of the victims, such as the following circumstances: a) lack of knowledge regarding the whereabouts of the victims; b) recognition of responsibility by the State more than 20 years after the facts took place; c) the impossibility of accessing justice and the lack of information; d) the denial of justice for more than 30 years; e) the public declarations of soldiers affirming that they had tortured and executed the victims without there being any further investigation, and f) the declarations against the honor of the disappeared victims. As a consequence, they requested US $80,000.00 (eighty thousand dollars of the United States of America) for each of the next of kin of the victims.

308. The State highlighted that, in addition to the payment of pecuniary compensation in the framework of Law No. 9.140/95, several acts of a symbolic and educational nature were carried out, which promoted the recovery of memory and the truth of the facts that occurred during the military regime.

309. The Court has held that the monetary reparations ordered in the domestic forum “of a reparative purpose” for the enforced disappearances are appropriate in the present case. As such, it will not order the payment of additional sums for the concept of non-pecuniary damage suffered by the victims of enforced disappearance.

310. On the other hand, in regard to non-pecuniary damage suffered by the next of kin of the disappeared victims, the Court recalls that international jurisprudence has repeatedly established that the Judgment may constitute per se a form of reparation. [FN402] Nevertheless, considering the circumstances of the case sub judice, the suffering that such committed violations caused to said next of kin, the prevailing impunity in the case, as well as the changes in their living conditions, and the other consequences of an intangible or non-pecuniary nature suffered by them, the Court deems it appropriate to establish a sum, in equity, as compensation for non-pecuniary damage to the family members indicated as victims in the present case. [FN403]

[FN402] Cf. Case of Neira Alegría et al.. Reparations and Costs, supra note 377, para. 56; Case of Rosendo Cantú et al., supra note 45, para. 278, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 282.

[FN403] Cf. Case of Neira Alegría et al.. Reparations and Costs, supra note 377, para. 56, Case of Rosendo Cantú et al., supra note 45, para. 278, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 282.

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311. In regard to its jurisprudence, in consideration of the circumstances of the present case, the violations committed, the suffering caused, and the treatment received, the time elapsed, the denial of justice and information, as well as change in living conditions and the remaining consequences of a non-pecuniary nature suffered, the Court sets, in equity, a sum of US $ 45,000.00 (forty-five thousand dollars of the United States of America) for each direct relative, and US $ 15,000.00 (fifteen thousand dollars of the United States of America) to each non-direct relative, considered victims in the present case and indicated in paragraph 251 of the present Judgment. The compensation offered in the present Judgment, shall not pose an obstacle to the other reparations that, eventually, could be issued in the domestic law.

3. Costs and expenses

312. As the Court has indicated on previous occasions, costs and expenses are included within the concept of reparation embodied in Article 63(1) of the American Convention. [FN404]

[FN404] Cf. Case of Garrido and Baigorria v Argentina. Reparations and Costs. Judgment of August 27, 1998. Series C No. 39, para. 79; Case of Rosendo Cantú et al., supra note 45, para. 280, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 34, para. 284.

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313. The Commission requested the Court to order the State to pay costs and expenses incurred in the processing of the present case.

314. The representatives requested the Court to set, in equity, a sum to the benefit of the Commission of the Next of Kin of the Deceased and Disappeared and of the Grupo Tortura Nunca Máis of Río de Janeiro, for the expenses incurred in the elaboration of the applications and the documentation in the case, reserving the right to request future for expenses. Subsequently, they specified that they did not incur additional expenses subsequent the brief of pleadings and motions. Likewise, the Center for Justice and International Law incurred expenses for trips to San José and to Washington, communications, photocopies, stationary, mailings related to the follow-up of the present case, as well as trips to locate and meet with the next of kin of the victims, in addition to the corresponding expenses related to the care given to the case and the investigation, compilation, and presentation of evidence, the interviews carried out, and the preparation of the various procedural stages. In particular, the Center for Justice and International Law incurred US$ 45,196.53 (forty-five thousand, one hundred and ninety-six dollars of the United States of America and fifty-three cents) in expenses from 1999 until July of 2009, and US$ 33,733.93 (thirty-three thousand, seven hundred and thirty-three dollars of the United States of American and ninety-three cents) for expenses incurred after the presentation of the brief of pleadings and motions.

315. The State requested the Court to consider “as costs, only those expenses carried out in a reasonable and indispensable manner for the participation of the alleged victims and their representatives in the procedures before the Inter-American System.” Moreover, the State contested the following costs carried out by the representatives in relation to: a) the “purchase of

books and other supporting materials" not related with this case, and b) costs related to office supplies, food in national territory, and trips within Brazil not related to the case. Lastly, the State noted a difference in the value requested by the representatives as an expense for the psychological expert report and the receipt effectively presented to justify said expense.

316. Regarding reimbursement of costs and expenses, the Court must prudently assess their scope, which includes the expenses incurred before the authorities of the domestic jurisdiction, as well as those incurred during the proceedings before the Inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment can be made based on the principle of equity and taking into account the expenses indicated by the parties, provided that the quantum is reasonable. [FN405]

[FN405] Cf. Case of Garrido and Baigorria, supra note 405, para. 82; Case of Rosendo Cantú et al., supra note 45, para. 284, and Case of Ibsen Cárdenas and Ibsen Peña, supra note 24, para. 288.

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317. The Court has indicated that "the claims of the victims or their representatives concerning costs and expenses, and the evidence to support them, must be submitted to the Court at the first procedural occasion granted to them, namely, in the brief of pleadings and motions, notwithstanding the possibility that these claims may be updated subsequently, in keeping with the new costs and expenses that may have been incurred as a result of the proceedings before this Court." [FN406] Furthermore, the Court reiterates that it is not sufficient that the parties merely submit probative documents; rather they are required to submit arguments that connect the evidence to the fact that it is supposed to represent, and in the case of alleged financial disbursements, the items and their justification must be clearly explained. [FN407] Lastly, the Court notes that of the receipts submitted to the Court, regarding some expenditures the relation made to the present case is not clear.

[FN406] 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. 275; Case of Fernández Ortega et al., supra note 53, para. 298, and Case of Rosendo Cantú et al., supra note 45, para. 285.
[FN407] Cf. Case of Chaparro Álvarez and Lapo Iñiguez, supra note 406, para. 277; Case of Fernández Ortega et al., supra note 53, para. 298, and Case of Rosendo Cantú et al., supra note 45, para. 285.

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318. Notwithstanding the foregoing, the Court has found that the representatives incurred various costs before this Court in relation with fees, the gathering of evidence, transport, and communication services, among others, in the domestic and international processing of the present case. Taking into account the aforementioned, the Court determines, in equity, that the State must provide a sum of US$ 5,000.00 (five thousand dollars of the United States of

America), US$ 5,000.00 (five thousand dollars of the United States of America), and US$ 35,000.00 (thirty-five thousand dollars of the United States of America) in favor of the Grupo Tortura Nunca Mais, of the Commission of the Next of Kin of the Deceased and Disappeared of São Paulo and of the Center for Justice and International Law, respectively, for costs and expenses. In the supervision procedure of compliance with the present Judgment, the Court may order the State to reimburse the victims and their representatives for reasonable costs that are duly proven.

4. Method of compliance with the payments ordered

319. The State must pay the compensation for pecuniary and non-pecuniary damage and the reimbursement of costs and expenses established in this Judgment directly to those indicated herein, within one year of notification of the Judgment, under the terms of the following paragraphs.

320. Should any of the beneficiaries die before they have received the respective compensation, it shall be delivered directly to their heirs, in accordance with the applicable domestic laws.

321. The State must comply with its pecuniary obligations by payment in dollars of the United States of America or the equivalent amount in Brazilian currency, using the exchange rate in force in the New York Stock Exchange the day before the payment to make the respective calculation.

322. If, for reasons that can be attributed to the beneficiaries of the compensation or to their heirs, it is not possible to pay the amounts established within the time indicated, the State shall deposit the amount in their favor in an account or a deposit certificate in a solvent Brazilian financial institute in dollars of the United States of America and in the most favorable financial conditions permitted by law and banking practice. If, after ten years, the compensation has not been claimed, the amounts shall revert to the State with the accrued interest.

323. The amounts allocated in this Judgment as compensation and for reimbursement of costs and expenses must be delivered to the persons indicated in whole, as established in this Judgment, without any deduction arising from possible taxes or charges.

324. If the State should fall into arrears, it shall pay interest on the amount owed, corresponding to the banking interest on arrears in Brazil.

XII. OPERATIVE PARAGRAPHS

325. Therefore,

THE COURT

DECIDES,

unanimously to:

1. Admit partially the preliminary objection on lack of jurisdiction ratione temporis filed by the State, pursuant to the paragraphs 15 to 19 of the present Judgment.
2. Dismiss the remaining preliminary objections filed by the State, in the terms of the paragraphs 26 to 31 and 38 to 42 and 46 to 49 of the present Judgment.

DECLARES,

unanimously, that:

3. The provisions of the Brazilian Amnesty Law that prevent the investigation and punishment of serious human rights violations are not compatible with the American Convention, lack legal effect, and cannot continue as obstacles for the investigation of the facts of the present case, neither for the identification and punishment of those responsible, nor can they have equal or similar impact regarding other serious violations of human rights enshrined in the American Convention which occurred in Brazil.
4. The State is responsible for the enforced disappearance, and therefore, the violation of the rights to juridical personality, to life, to personal integrity, and to personal liberty, established in Articles 3, 4, 5, and 7 of the American Convention on Human Rights, in relation to Article 1(1) of said instrument, to the detriment of the persons indicated in paragraph 125 of the present Judgment, in the terms of paragraphs 101 to 125 of the present Judgment.
5. The State has not complied with its obligation to adapt its domestic law to the American Convention on Human Rights, pursuant to Article 2, in relation to Articles 8(1), 25, and 1(1) thereof, as a consequence of the interpretation and application given to the Amnesty Law in cases of serious violations of human rights. Likewise, the State is responsible for the violation of the rights to fair trail [judicial guarantees] and judicial protection enshrined in Articles 8(1) and 25(1) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 of said instrument, for failure to investigate the facts of the present case, prosecute, and punish those responsible, to the detriment of next of kin of the disappeared persons and the executed person indicated in paragraphs 180 and 181 of the present Judgment, in the terms of paragraphs 137 to 182 thereof.
6. The State is responsible for the violation of the right to freedom of thought and expression enshrined in Article 13 of the American Convention on Human Rights, in relation to Articles 1(1), 8(1), and 25 of the same instrument, for the harm to the right to seek and receive information, as well as to the right to know the truth. Likewise, the State is responsible for the violation of the rights to fair trial [judicial guarantees] established in Article 8(1) of the American Convention, in relation to Articles 1(1) and 13(1), given the lapse of a reasonable period for the Ordinary Action, all to the detriment of the next of kin indicated in paragraphs 212, 213, and 225 of the present Judgment, in conformity with that expressed in paragraphs 196 to 225 of the Judgment.
7. The State is responsible for the violation of the right to humane treatment [personal integrity], enshrined in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of the same, to the detriment of the next of kin indicated in paragraphs 243 and 244 of the present Judgment, pursuant to that stated in paragraphs 235 to 244 thereof.

AND ORDERS,

unanimously, that:

8. This Judgment constitutes per se a form of reparation.
9. The State must effectively conduct, within the ordinary jurisdiction, the criminal investigation of the facts of the present case in order to ascertain them, determine those criminally responsible, and effectively apply the punishment and consequences which the law dictates, in the period of time established in paragraphs 256 to 257 of this Judgment.
10. The State must carry out all efforts to determine the whereabouts of the disappeared persons, and where applicable, identify and return the bodily remains to the next of kin, pursuant to that established in paragraphs 261 to 263 of the present Judgment.
11. The State must provide the medical and psychological treatment as required by the victims, and where necessary, pay the established sum, in the terms of paragraphs 267 to 269 of the present Judgment.
12. The State must carry out the publications ordered, in conformity with that established in paragraph 273 of the present Judgment.
13. The State must carry out a public act of acknowledgment of its international responsibility in regard to the facts of the present case, in conformity with paragraph 277 of the present Judgment.
14. The State must continue in the development of training programs, and implement, in a reasonable period of time, a permanent and obligatory program or course on human rights, directed at all the hierarchical levels of the Armed Forces, pursuant to that established in paragraph 283 of the present Judgment.
15. The State must adopt, in a reasonable period of time, the necessary measures to codify the crime of enforced disappearance of persons in conformity with Inter-American standards, pursuant to that established in paragraph 287 of the present Judgment. While complying with this measure, the State must adopt all actions that guarantee an effective prosecution, and where applicable, punishment regarding the constituent facts of enforced disappearance by means of the existent mechanisms in the domestic forum.
16. The State must continue to develop the search initiatives, and systematization and publication of all the information on the Guerrilha do Araguaia, as well as the information regarding the human rights violations which occurred during the military regime, guaranteeing access thereto, in the terms of paragraph 292 of the present Judgment.
17. The State must pay the quantities fixed in paragraphs 304, 311, and 318 of the present Judgment, as compensation for pecuniary and non-pecuniary damage, and the reimbursement of costs and expenses, in the terms of paragraphs 302 to 305, 309 to 312 and 316 to 324 thereof.
18. The State must carry out a summons in, at least, one newspaper of broad national circulation and one in the region where the facts occurred in the present case, or by other appropriate means, in order for, in a period of 24 months as of the notification of the Judgment, the next of kin of the persons indicated in paragraph 199 of the present Judgment, provide irrefutable evidence that would allow the State to identify them, and where applicable, consider them victims in the terms set by Law No. 9.140/95 and of this Judgment, in the terms of paragraphs 120 and 252 thereof.
19. The State should allow, for a period of six months as of notification of this Judgment, the next of kin of Messers. Francisco Manoel Chaves, Pedro Matias de Oliveira (“Pedro Carretel”),

Hélio Luiz Navarro de Magalhães, and Pedro Alexandrino de Oliveira Filho, to present, if they so wish, their requests for compensation using the standards and mechanisms established in domestic law by Law No. 9.140/95, pursuant to the terms of paragraph 303 of the present Judgment.

20. The next of kin or their legal representatives offer the Court, in a period of six months as of notification of the present Judgment, documentation that evinces that the death of said persons indicated in paragraphs 181, 213, 225, and 244 is subsequent to December 10, 1998.

21. The Court will monitor the full compliance with this Judgment, in the exercise of its attributions and in compliance with its obligations pursuant to the American Convention on Human Rights, and will conclude the present case once the State has entirely satisfied the dispositions herein. In a period of one year as of the notification of this Judgment, the State must offer the Court a brief regarding the measures adopted to satisfy compliance.

Judge Roberto de Figueiredo Caldas rendered a Concurring Opinion before the Court, that which accompanies the present Judgment.

Written in Spanish, Portuguese, and English, the Spanish text being authentic, in San Jose, Costa Rica on November 24, 2010.

Diego García-Sayán
President

Leonardo A. Franco
Manuel Ventura Robles
Margarette May Macaulay
Rhadys Abreu Blondet
Alberto Pérez Pérez
Eduardo Vio Grossi

Roberto de Figueiredo Caldas
Ad hoc Judge

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION FROM JUDGE AD HOC ROBERTO DE FIGUEIREDO CALDAS IN REGARD TO THE JUDGMENT FROM THE INTER-AMERICAN COURT OF HUMAN

RIGHTS IN THE CASE OF GOMES LUND ET. AL. ("GUERRILHA DO ARAGUAIA") VS. BRAZIL OF NOVEMBER 24, 2010

I. INTRODUCTION

1. The present concurring vote, agreeing, in a general sense, with the collective groundings and conclusions of the Court, all of which have been unanimous, serves to explain and emphasize some fundamental issues for the Brazilian and Continental societies, beyond their respective States, [FN408] from the perspective of one judge, a national of where the serious events and crimes against human rights occurred.

[FN408] One necessary explanation for the understanding of the Brazilian public in general: the terms "State" or "States," quoted throught the judgment, and also in this vote, mean "Country" or "countries." The usual practice in Brazil is to use the term "State" to mean a subdivision of the country and not the country as a whole. This is because the Brazilian geopolitical division is in states and not in provinces as is done in much of the Americas.

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2. The case at hand involves a debate of transcendental importance for society and for the State as a whole, particularly with respect to the Judicial Branch, which will face an unprecedented case where the decision taken by an International Tribunal is completely opposite to domestic jurisprudence which, until this point, has settled.

3. Established Brazilian jurisprudence, having, as a matter of fact, been approved by a recent decision from the highest body of the Judicial Branch—the Federal Supreme Tribunal—clashed over this Court's soft jurisprudence, by halting observance of jus cogens, that is, of decisive norms which are obligatory to the States, contained in the American Convention on Human Rights [FN409] (also known as "the Pact of San Jose, Costa Rica" from here on, also referred to as "Convention"). In short summary, the reason why the State is found guilty in this Judgment, is as follows:

a) enforced disappearance and violated rights of the 62 disappeared persons [FN410] – violation of the rights to juridical personality, right to life, to personal integrity and to personal liberty (Articles 3 [FN411], 4 [FN412], 5, [FN413] and 7 [FN414]), the right to a fair trial and of the right to judicial protection (Articles 8 [FN415] and 25 [FN416]), in regard to the obligation to respect rights therein and the obligation to adopt domestic legal effects (Articles 1(1) [FN417] and 2 [FN418] all of the Convention);
b) application of the Amnesty Law as an impediment to the investigation, trial and punishment –violation of the rights to a fair trial and to judicial protection (Articles 8(1) and 25), in regard to the obligation to respect rights recognized by the Convention and the obligation to adopt domestic legal effects (Articles 1(1) and 2), to the detriment of the next of kin of the disappeared victims and of the executed person;
c) inefficiency of non-criminal judicial actions – violation of the rights to a fair trial and to judicial protection (Articles 8(1) and 25), in regard to the obligation to respect rights recognized

by the Convention (Article 1(1)), to the detriment of the next of kin of the disappeared victims and of the executed person;

d) lack of access to information regarding the fate of the disappeared victims and of the executed person – violation of the rights to freedom of thought and expression (article 13), in regard to the obligation to respect rights recognized by the Convention (Article 1(1)), to the detriment of the next of kin of the disappeared victims and of the executed person, and

e) lack of access to justice, to the truth, and to information – violation of the right to personal integrity (Article 5), in regard to the obligation to respect rights recognized by the Convention (Article 1(1)), to the detriment of the next of kin of the disappeared and of the executed person, for the violation and suffering caused by the impunity of those responsible.

[FN409] It is my opinion that the language used in the judgments and judicial decisions should be as simple and accessible as possible to the common citizen. After all, they should be aimed at society as a whole, not just to scholars.

[FN410] Adopted in San Jose, Costa Rica, in the framework of the Organization of American States, on November 22, 1969, and entered into international force on July 18, 1978. Brazil acceded on July 9, 1922, and ratified it on September 25, 1992.

[FN411] We will use the term “person” in place of “human being” or “man” in the general sense, pursuant to, the report on Article 1(2) of the Convention: “For the purposes of this Convention, "person" means every human being.”

Article 3. Right to Juridical Personality

Every person has the right to recognition as a person before the law.

[FN412] Article 4. Right to life

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

[FN413] Article 5. Right to humane treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

[FN414] Article 7. Right to personal liberty

1. Every person has the right to personal liberty and security.

2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that

anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

[FN415] Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the 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.

[FN416] Article 25. Judicial Protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

[FN417] Article 1. Obligation to Respect Rights

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

[FN418] Article 2 of the Convention establishes:

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.

II. SUPREME COURTS AND THE INTER-AMERICAN COURT OF HUMAN RIGHTS – CONSTITUTIONAL CONTROL AND CONVENTIONALITY CONTROL

4. Continuing with the brief incursion regarding current relevant topics, if supreme courts or national constitutional tribunals are incumbent upon constitutional control and of having the last word within the internal legal frame of the States, the conventionality control is incumbent upon the Inter-American Court of Human Rights as well of having the last word on issues regarding human rights. This is what results from formally recognizing the jurisdictional competence of the Court, by a State, which is what has been done by Brazil. [FN419]

[FN419] The acknowledgment of the jurisdiction was made by Brazil on December 10, 1998 and notes that “[t]he Brazil declares that it recognizes, for an undefined period, as binding, ipso facto, the jurisdiction of the Inter-American Court of Human Rights, in all of the cases related to the interpretation and application of the American Convention on Human Rights, pursuant to Article 62 of the same, under the reservation of reciprocity, and for facts subsequent to this Declaration.” Cf. B- 32: American Convention on Human Rights. 4. Brazil. Recognition of jurisdiction of the Court. Available at

http://www.cidh.oas.org/Basicos/Portugues/d.Convencao_Americana_Ratif..htm Last access on October 4, 2010.

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5. For all States of the American Continent, which have willingly adopted it, the Convention [FN420] is the equivalent to a supranational Constitution pertaining to Human Rights. All public powers and national spheres, as well as the respective Federal, state and municipal legislatures of all adherent States are under obligation to respect it and conform it.

[FN420] Adopted in San Jose, Costa Rica, in the framework of the Organization of American States due to the Inter-American Specialized Conference on Human Rights, on November 22, 1969, entered into international force on July 18, 1978. Brazil acceded on July 9, 1922, and ratified it on September 25, 1992.

III. ADAPTATION OF DOMESTIC LAW TO THE NORMS OF THE AMERICAN CONVENTION

6. National Constitutions must be interpreted, or if necessary, even amended to maintain a harmony with the Convention and with the jurisprudence of the Inter-American Court of Human Rights. In accordance with Article 2 of the Convention, States Parties undertake to adopt measures to eliminate those legal norms and practices of any sort that would violate it; conversely, they also commit themselves to edit legislation and to develop actions conducive to an overall and effective respect for the Convention. [FN421]

[FN421] Cf. Case of “The Last Temptation of Christ” (Olmedo Bustos et al) v. Chile. Merits, Reparations, and Costs. Judgment of February 5, 2001. Series C No. 73, para 85 and following.

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7. A good example of jurisprudence is case of The Last Temptation of Christ (Olmedo Bustos and others v. Chile. Judgment of February 5, 2001. Series C No. 73), as it is observed from the arguments, in regard to the exact interpretation and reach that must be given to Article 2 of the American Convention:

89. The Court recalls that on January 20, 1997, the Court of Appeals of Santiago delivered a judgment in the case, which was confirmed by the Supreme Court of Justice of Chile on June 17, 1997. Because it did not agree with the ground for these judgments, the government of Chile submitted to Congress, a draft constitutional reform to eliminate cinematographic censorship on April 14, 1997. The Court evaluates and underlines the importance of the Government’s initiative in proposing said constitutional reform, because it may lead to adapting domestic laws to the content of the American Convention with regard to freedom of thought and expression. However the Court observes that, despite the time that has elapsed since the draft reform was submitted to Congress, the necessary measures have not yet been adopted to eliminate

cinematographic censorship, as established in Article 2 of the Convention, and thus allow exhibition of the film “The Last Temptation of Christ.” (Emphasis added)

8. The concurring opinion from Judge Cançado Trindade in that case, contains even sharper statements:

“4. [...] The American Convention, together with other human rights treaties, "were conceived and adopted on the basis of the assumption that the domestic legal orders ought to be harmonized with the conventional provisions, and not vice versa” (paragraph 13). Definitively, I warned that, “[I]t cannot be legitimately expected, that such conventional provisions be ‘adapted’ or subordinated to the solutions of constitutional law or of internal public law, which vary from country to country [...]. The American Convention, as well as other human rights treaties, seek, a contrario sensu, to have in the domestic law of the States Parties, the effect of improving it, in order to maximize the protection of the recognized rights, bringing about, to that end, whenever necessary, the revision or revocation of national laws [...] which do not conform to its standards of protection.” (paragraph 14) (Emphasis added)

9. In regard to the fourth item in paragraph 40 of the same vote, Judge Cançado Trindade states:

[T]he very existence and applicability of a norm of domestic law (be it infra-constitutional or constitutional), can, per se engage the responsibility of a Party State under a human rights treaty. (Emphasis added)

10. Therefore, in defense of the guarantee of the supremacy of Human Rights, particularly when degraded by crimes against humanity, it becomes necessary to recognize the importance of said international judgment and to immediately incorporate it into the domestic body of laws, to allow for investigation, prosecution, and punishment those crimes, which were then, protected by an interpretation of the Amnesty Law, which as an end result, is a Law that generates impunity, lack of trust regarding protection from the State, and a eternally opened social wound, needing to be healed by the calm and more incisive application of Law and Justice.

VI. ACKNOWLEDGEMENT OF RESPONSIBILITY BY THE STATE

11. The Court, by law, rules on the acknowledgment of international responsibility effectuated by the State.

12. Article 53(2) of the Rules of Procedure establishes that “if the respondent were to inform the Court of its unlawful actions to the claims of the plaintiff and to those of the representatives of the alleged victims, its next of kin or representatives, the Court, having heard the views of the parties in the case, will decide on the sources of the acquiescence and its legal effects.”

13. Therefore, the Court, in exercising its inherent powers of international judicial protection of human rights, may establish its free conviction on whether the recognition of international responsibility by a State provides sufficient substance in the terms of the Convention, in order to

monitor or not the merits and the determination of reparations and costs. For that, the Court must analyze the situation presented in individual cases. [FN422]

[FN422] IA Court of HR. Case of Montero Aranguren et al. vs. Venezuela. Judgment of July 5, 2006. Series C N° 150, para. 39; Case of Baldéon García. Judgment of April 6, 2006. Series C N° 147. para. 38; Case of Acevedo Jaramillo et al. Judgment of February 7, 2006. Series C N° 144, para. 173; and Case of Blanco Romero et al. Judgment of November 28, 2005. Series C N° 138, para. 55.

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14. In this case, the Brazilian state, throughout the proceedings before the Inter-American Human Rights System, did not dispute liability for the acts regarding the arbitrary and illegal detention, torture, and enforced disappearance, along the lines proposed by the Law No. 9140, to December 4, 1995. [FN423] On the contrary, in its answer to the final written arguments of the representatives of November 2006, in the proceedings before the Inter-American Commission on Human Rights, the State acknowledged "[the] feeling of anxiety of the next of kin of the disappeared persons of the Guerrilha do Araguaia, believing in the supreme right of all individuals to the opportunity to mourn their dead, a ritual which includes the burial of their remains." [FN424]

[FN423] Application of the IACHR, para. 41. Preamble of Law No. 9.140/95 establishes that the law, among others, "recognizes as deceased persons those that were disappeared due to their participation, or accusal of participation, in political activities, in the period of September 2, 1961 to August 15, 1979."
[FN424] Observations of the State of May 2007, para. 10. Appendix III of the Application of the IACHR.

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15. In the book-report of the Special Commission on Political Deaths and Disappearances of Persons – CEMDP [FN425] the State recognized that the Law No. 9.140/95 "signed the responsibility of the State for the deaths, guaranteed compensatory reparation, and principally, made official the historical recognition that these Brazilians [...] died fighting as political opponents of a regime that arose violating the democratic constitutionality erected in 1946." [FN426]

[FN425] Created by Law No. 9.140/95.
[FN426] Special Secretariat of Human Rights. Right to Memory and Truth, op. Cit., p. 30.

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16. Thus, given that the Commission noted the cited recognition, the representatives considered that this has full legal effects to the proceedings before the Court and requested that the Court note the admission of the facts and acceptance of responsibility made by Brazil, and that its reach be incorporated into this Judgment. They stressed, however, the limited stamp of

said factual recognition and fought for more thorough analysis of the fact in order to obtain statements of factual recognition of the State.

17. The Court accepted the recognition of the facts and acceptance of responsibility made by the State and recognized their efforts and good faith at present, however it understood that such recognition did not occur in a full and effective manner in regard to the violations brought to be considered by the Court. Instead, the State's acknowledgment holds significant limitations, so much so that its current defense is currently that of not permitting the investigation, prosecution, and punishment of those responsible for the implementation of the Amnesty Law in interpretation judged incompatible with the Convention, devices that lack legal effect.

V. JURISDICTION TO CLASSIFY CRIMES SUCH AS CRIMES AGAINST HUMANITY

18. Nevertheless, the question on the merits in the Case of the Guerrilha do Araguaia does not deal with the discussion on the specific jurisdiction of the Court to proceed with the material expansion of jus cogens, I make some comments on the possibility and relevance of examining the crimes against humanity. In the case Goiburú, the judgment of the case Almonacid demonstrated that jus cogens transcends the Law of Treaties and encompasses International Law in general, including International Law of Human Rights.

19. It defies the purpose for which the Court was established in not allowing that certain rights be regarded as imperative. The Court can, and beyond this, has the obligation to attribute jus cogens nature to those rights most dear to the person, the core components of protection ("hard core of human rigths"), so as to protect and comply with the objective of protecting human rights covered by the American Convention.

20. The notion of the crime against humanity was established in the beginning of the last century, being consubstantiated in the preamble of the Hague Convention on the Laws and Customs of War (1907), under which States Parties submit themselves to the guarantees and the rule of international law principles advocated by the established customs among civilized nations, by the laws of humanity, and the dictates of public conscience. [FN427]

[FN427] Cf. Case of Almonacid Arellano et al. versus Chile. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 94.

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21. Similarly, attention should be paid to the role played by the Nuremberg Charter in establishing the elements which characterize crimes against humanity. The existence of an international custom was recognized, as an expression of international law prohibiting such crimes (Case Almonacid, paragraph 96). Unlike in this case, Almonacid referred to a single attack, thus harder to classify as a crime against humanity, and even so, this Court established the precedent.

22. Former President of the Court, A.A. Cançado Trindade, in his separate vote in the case of Almonacid, recalled that the configuration of crimes against humanity is a manifestation of the universal juridical conscience, of its rapid response to crimes that affect humanity as a whole. He stressed that with the passage of time, the rules that came to define "crimes against humanity" emanated from customary international law, and unfolded, conceptually, later, in the framework of international humanitarian law, and more recently in the domain of jus cogens, of imperative law (Almonacid, paragraph 28).

23. The crimes of enforced disappearance, extrajudicial summary executions, and torture perpetrated by the State to systematically repress the Guerrilha do Araguaia are examples of crimes against humanity. As such, they deserve different treatment, that is, their judgment can not be prevented by the passage of time, such as statute of limitations or provisions of amnesty norms.

24. The General Assembly of the Organization of the United Nations adopted on November 26, 1968, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. It should be noted that it is not a characteristic of this Convention that it is the creator-innovator of Law, but rather that it is conciliatory, reason for which, though not ratified by the State, should be applied by the State. In the same sense, in 1974, the European Council has drafted the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes.

25. They did so not by an imposition of negotiation talks. It was not the result, then, of conclusions reached by the process of negotiating, signing, ratifying and parliamentary referendum that presupposes the adoption of any international treaty. For the sake of the truth, such supranational instruments only recognize that which international custom has determined.

26. Also, in what regards the 1969 Vienna Convention, a multilateral treaty to consolidate the usual rules of conclusion of treaties between sovereign states took place. Since its effective entry into international force in 1980, it took 29 long years until Brazil internalized the Convention, coming to do so with the imposition of two reservations to the terms of the Convention.

27. On the other hand, 42 years after its adoption at the international level, Brazil remains without proper ratification of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, despite having signed it. That omission was certainly the result of political pressure from the group of soldiers who carried out the atrocities described in this proceeding. However, this lack of ratification is overcome, since, as the Court understood, its mandatory compliance is derived from international custom and not from the act of ratification. The applicability of these crimes comes as a category of general international law, which is not born from the Convention, but it is recognized in it (Case Almonacid, paragraphs 152 and 153).

28. It is good to emphasize that although this Court has jurisdiction to safeguard and interpret the American Convention on Human Rights, in some cases it is led to take cognizance of crimes. The Court will lack, for obvious reasons, of criminal jurisdiction to try individuals for crimes, but it does have the authority to review the facts and to apply the consequences within its sphere

of action, condemning the State that allowed or acted for the commission of crimes. And upon hearing the case, the Court is obliged to apply the law to the particular circumstances under penalty of unjustifiable omission. And in classifying a crime as one against humanity or as a serious crime "against human rights, the Court does so incidently (obeter dictim) and not bound by criminal law, domestic, or international.

29. The examination of the concept of the field of international criminal law should not disturb the Court or the national courts, given that the clear convergence of several divisions of international law, which is being dispursed by the doctrine and jurisprudence is not of today. It is so because the boundaries between the sub-branches such as Human Rights, Humanitarian Law, and International Criminal Law are long. Its standards and sources are necessarily complementary, but there would be a serious divergence between the interpretations of those legal niches and those would never be uniformized, with the regrettable legal uncertainty for humanity.

VII. CONCLUSION

30. Finally, it is wise to remember that the international jurisprudence, customs, and doctrine establish that no law or rule of law, such as provisions of an amnesty, the statute of limitations, and other exclusionary punishments, should prevent a State from meeting its inalienable obligation to punish crimes against-humanity, because they are insurmountable in the existence of an assaulted individual, in the memories of the components of their social circle, and in the transmissions for generations of all humanity.

31. It is necessary to surpass the intensified positivism, because only then will there enter a new era of respect for the rights of the individual, helping to end the cycle of impunity in Brazil. It is necessary to show that justice works equally in the punishment of anyone who practices serious crimes against humanity, so that the imperative of law and justice always allows that such cruel and inhumane practices never be repeated, never forgotten, and that they always be punished.

Roberto de Figueiredo Caldas
Judge Ad hoc

Pablo Saavedra Alessandri
Secretario