INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE GELMAN v. URUGUAY

JUDGMENT OF FEBRUARY 24, 2011
(Merits and Reparations)

The Inter-American Court of Human Rights (hereinafter "the Inter-American Court," "the Court," or "the Tribunal"):

Composed of the following judges:

Diego García-Sayán, President;
Leonardo A. Franco, Vice-President;
Manuel E. Ventura Robles, Judge;
Margarette May Macaulay, Judge;
Rhadys Abreu Blondet, Judge; and
Eduardo Vio Grossi, Judge

also present:

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant with Articles 62(3) and 63(1) of the American Convention of Human Rights (hereinafter "the Convention" or "the American Convention") and with Articles 31, 32, 34, 62, 64, 65 and 67 of the Rules of Procedure of the Court[1] (hereinafter "the Rules of Procedure"), orders the present Judgment in the case of Juan Gelman, María Claudia García Iruretagoyena de Gelman and María Macarena Gelman García Iruretagoyena with the Eastern Republic of Uruguay (hereinafter "the State" or "Uruguay"), denominated "Gelman v. Uruguay."

Pursuant to Article 19(1) of the Inter-American Court Rules of Procedure in the present case (*infra* note 1), that establish that: "[i]n the cases referred to in Article 44 of the Convention, a Judge who is a national of the respondent State shall not be able to participate in the hearing and deliberation of the case." Judge Alberto Pérez Pérez, of Uruguayan nationality, recused himself from participating in the processing and deliberation of this case and and signing of this Judgment.

[1] The Court Rules of Procedure applied in the present case are those approved in the LXXXV Regular Period of Sessions held on November 16 and 18, 2009, and that came into force on January 1, 2010, pursuant to that approved in Article 78 therein. The aforementioned, without detriment to that

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established in Article 79(2) of the Rules of Procedure, which establish that "[i]n cases in which the Commission has adopted a report under article 50 of the Convention before the these Rules of Procedure have come into force, the presentation of the case before the Court will be governed by Articles 33 and 34 of the Rules of Procedure previously in force." The Report on the Merits in this case was issued by the Inter-American Commission on July 18, 2008 (*infra* note 4).

I
INTRODUCTION OF THE CASE AND THE PURPOSE OF THE CONTROVERSY.

1. On January 21, 2010, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") presented, pursuant to Articles 51 and 61 of the Convention, an application against the Eastern Republic of Uruguay in relation to the case of Juan Gelman, María Claudia García de Gelman, and María Macarena Gelman García[2] (hereinafter "the case of Gelman") v. Uruguay.[3] On March 9, 2007, the Commission adopted Admissibility Report No. 30/07, wherein it declared the admissibility of the case and on July 18, 2008, approved, under the terms of Article 50 of the Convention, the Report on the Merits No. 32/08.[4]

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[2] Also mentioned as María Macarena Tauriño Vivian, due to the facts of the case.

[3] The Commission appointed as delegats Ms. Luz Patricia Mejía, Commissioner, and Mr. Santiago A. Canton, Executive Secretary; and as legal advisors Ms. Elizabeth Abi-Mershed, Deputy Executive Secretary, Christina Cerna and Lilly Ching, attorneys of the Executive Secretary.

[4] In this report, the Commission concluded that the State is responsible for the violation of Articles 3, 4, 5, and 7, in relation to Article 1(1) of the American Convention, with Articles I.b, III, IV, and V of the Inter-American Convention on the Forced Disappearance of Persons and with Articles 6 and 8 of the Inter-American Convention to Prevent and Punish Torture and Articles I, XVIII and XXVI of the American Declaration on the Rights and Duties of Man, to the detriment of María Claudia García; of Articles 1(1), 2, 8(1) and 25 of the American Convention, Articles I.b, III, IV, and V of the Inter-American Convention on

2. The facts alleged by the Commission relate to the enforced disappearance of María Claudia García Iruretagoyena de Gelman since late 1976, subsequent to her detention in Buenos Aires, Argentina, during the advanced stages of her pregnancy, to which it is presumed that she was then transported to Uruguay where she gave birth to her daughter, who was then given to an Uruguayan family; actions which the Commission notes were committed by Uruguayan and Argentine State agents in the context of "Operation Cóndor," and, to date, the whereabouts of María Claudia García as well as the circumstances in which the disappearance took place remain unknown. Furthermore, the Commission alleged the suppression of identity and nationality of María Macarena Gelman García Iruretagoyena, daughter of María Claudia García de Gelman and Marcelo Gelman and the denial of justice, impunity, and in general, the suffering caused to Juan Gelman, his family, María Macarena Gelman, and the next of kin of María Claudia García, as a consequence of the failure to investigate the facts, prosecute, and punish those responsible under Law No. 15.848 or the Expiry Law (hereinafter "the Expiry Law"), promulgated in 1986 by the democratic government of Uruguay.

3. The Commission requested that the Court, as a consequence, conclude and declare that the State is responsible for the violation of:

a). The right to a fair trial and judicial protection recognized in Articles 8(1) and 25 in relation to Articles 1(1) and 2 of the American Convention on Human Rights, and in relation to Articles I(b), III, IV, and V of the Inter-American Convention on Forced Disappearance of Persons, as well as Articles 1, 6, 8, and 11 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Juan Gelman, María Claudia García de Gelman, María Macarena Gelman, and their next of kin;

b). the right to juridical personality, life, personal liberty, humane treatment, and the obligation to punish these violations in a serious and effective manner, recognized in Articles 3, 4, 5, 7, and 1(1) of the American Convention in relation to Articles 1(b), III, IV, and V of the Inter-American Convention on Forced Disappearance of Persons and Articles 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of María Claudia García;

Forced Disappearance of Persons and Articles 1, 6, 8, and 11 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of the next of kin of María Claudia García; Articles 5(1) and 1(1) of the Convention to the detriment of Juan Gelman, his family and María Macarena Gelman; Articles 3, 11, 17, 18, 19, 20, and 1(1) of the American Convention, Article XII of the Inter-American Convention on Forced Disappearance of Persons and Articles VI, VII, and XVII of the American Declaration on the Rights and Duties of Man, to the detriment of Juan Gelman and his family and of María Macarena Gelman. In this report, the Commission made the following recommendations to the State: a) carry out a complete and impartial investigation in order to identify and punish those responsible for the human rights violations in the case; b) adopt the legislative or any measures necessary to revoke Law 15.848 or the Expiry Law of the State; c) create a domestic mechanism, with binding legal powers and authority over all the State bodies to supervise these recommendations; and d) order full reparation for the next of kin that includes compensation and symbolic acts that guarantee the non-repetition of the acts committed.

c). the right to personal integrity, recognized in Article 5(1), in relation to Article 1(1) of the American Convention, regarding Juan Gelman, María Macarena Gelman, and their next of kin;

d). the right to the recognition of juridical personality, the protection of honor and dignity, the right to a name, special measures of protection for the child, and the right to nationality, recognized in Articles 3, 11, 18, 19, and 20, respectively, in relation to Article 1(1) of the American Convention, regarding María Macarena Gelman; and,

e). the right of protection of the family, recognized in Article 17 of the American Convention and Article XII of the Inter-American Convention on Forced Disappearance of Persons, in relation to Article 1(1) of the American Convention, regarding Juan Gelman, María Macarena Gelman, and their next of kin.

The Commission ultimately requested the Court to order specific measures of reparation from the State.

4. On April 24, 2010, the representatives of the alleged victims (hereinafter "the representatives") [5] presented, in the terms of Article 40 of the Rules of Procedure, the written brief containing pleadings, motions, and evidence (hereinafter "the brief pleadings and motions"), wherein—referencing the mentioned facts in the application of the Commission—provided more information on said facts, and in general, agreed with that alleged by the Commission. Nevertheless, they requested that the Court also declare the following: a) the noncompliance with the State obligation to act with due diligence to prevent, investigate, and punish violence against women, contained in Article 7(b) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (hereinafter "Convention of Belém do Pará"), to the detriment of Maria Claudia García, and b) the violation of the right to the truth, to the detriment of the next of kin of Maria Claudia García "and of Uruguayan society" (Articles 1(1), 13, 8, and 25 of the American Convention). Lastly, the representatives requested various measures of reparation.

[5] Mr. José Luis González has been the representative since the beginning of this case and Ms. Viviana Krsticevic, Ariela Peralta, Liliana Tojo, Alejandra Arancedo, and Martine Lemmens, of the Center for Justice and International Law Centro (CEJIL), have acted as representatives in the proceedings before the Court.

5. On August 12, 2010, the State presented its brief in response to the application and observations on the brief of pleadings and motions (hereinafter "the answer to the application"), wherein "it recogniz[ed] the violation of the Human Rights of Mrs. María Claudia García Iruretagoyena de Gelman and María Macarena de Gelman García during the de [f]acto government in Uruguay between June 1973 and February 1985". Although the State did not refer particularly to most of the alleged facts and law presented by the Commission and the representatives, it highlighted the actions being carried out to offer a reparation to the next of kin and to the alleged victims.[6]

II.
PROCEEDINGS BEFORE THE COURT

6. The application was notified to the State and the representatives on February 23, 2010. On April 22, 2010, the State presented, in an anticipated manner, a brief denominated "answer to the application," to which on June 10, 2010, the Secretariat, following the instructions of the plenary of the Court, reported that said brief could not be filed, given that, in the terms of Article 41 of the Rules of Procedure, the State was to give its position on the case once filed before the Inter-American Commission, and when filed, on the brief of pleadings, motions, and evidence, and that said brief was presented prior to the expiration of the period established for the representatives to do so. Once the State's response and its annexes were received, (*supra* para. 5), it was forwarded to the Commission and the representatives, and following the instructions of the President, the date of September 20, 2010, was established as the deadline for the presentation of observations regarding the acknowledgement of responsibility by the State.

7. By means of the Order of September 10, 2010, the President of the Court accepted a request to replace the expert offered by the Commission, ordered that the submission of declarations rendered before a public notary (*affidavit)* by the witnesses and experts offered by the Commission and representatives, and convened the parties to a public hearing in Quito, Ecuador, to hear the declarations of the alleged victims, witnesses, and experts, proposed by the representatives, as well as the oral arguments of the parties, and the observations of the Commission regarding the merits and possible reparations.

8. On September 15 and 20, 2010, the representatives and Commission submitted their observations regarding the acknowledgment of State responsibility.

9. By means of the Order of September 23, 2010, the President of the Court accepted the request for replacement of one of the witnesses offered by the representatives for said individual to render a declaration at the public hearing.

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[6] The State appointed Mr. Carlos Mata Prates as its agent.

10. On September 24 and 26, 2010, after an extension, the representatives submitted the declarations rendered before a public notary (*affidavit*). By means of the note of September 29, 2010, the Secretariat forwarded the declarations, and in the terms set forth in the Order of the President (*supra* para. *7*), granted a period of 7 days for the parties to present the observations they deemed relevant, which were not formulated by any of the parties.

11. On September 27, 2010, the State submitted a brief wherein it was noted that "it recognizes [Mr.] Juan Gelman as a victim in the proceeding." Following instructions by the President of the Court, the Secretariat indicated to the Commission and the representatives the possibility of presenting their observations concerning what was manifested by the State during the public hearing.

12. On October 5, 2010 the Commission requested the granting of a new deadline for María Elena Salgueiro to present an expert opinion submitted by means of an *affidavit*, to which the President of the Court held that since Commission had decided on September 24, 2010, not to present the expert opinion, said request was not sufficiently substantiated, and as such the Court did not further consider the matter.

13. The public hearing was held on November 15 and 16, 2010, during the XLII Extraordinary Sessions of the Court, held in Quito, Ecuador, wherein the President, at the end of the Sessions, set December 10, 2010, as the deadline for submission of the final written arguments. [7]

14. On November 10, 2010, the representatives requested that, based on Article 57 of the Rules of Procedure, "documentary evidence dated October 7, 2010," be incorporated to the case file. Following instructions of the President, the Secretariat informed the Commission and the State that any observations regarding this request needed to be submitted no later than November 19, and none were made.

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[7] Initially, the public hearing was set for October 2010, pursuant to the Order of the President, but on October 1, 2010, the Secretariat Reportd the parties that the XLII Extraoardinary Period of Sessions of the Court had been rescheduled, to which the hearing would be held on November 15 and 16 of that same year. Appearing: a) for the Inter-American Commission, Inter-American Commission, Ms. María Silvia Guillén, delegate, Mr. señor Santiago Canton, Executive Secretary, Ms. Silvia Serrano and Ms. Lilly Ching, advisors; b) for the representatives, Ms. Viviana Krsticevic, Ms. Ariela Peralta, Ms. Liliana Tojo, Ms. Alejandra Vicente, and Ms. Martine Lemmens, of CEJIL, and c) for the State, Mr. Carlos Mata Prates, Agente, and Ms. María Amelia Bastos Peirano, legal advisors. For this same reason, the initial period noted for the presentation of written final motions and comments was modified, and, upon a verbal request by the representatives prior to the public hearing, and the non-objection by the State and Commission, the period was set for December 10, 2010.

15. On December 1 and 2, 2010, Messers. Jorge Errandonea and Carlos María Pelayo and Mrs. Carolina Villadiego Burbano, in collaboration with the International Clinic for the Defense of Human Rights of the University of Quebec in Montreal, and the *Latin American and Caribbean Committee for the Defense of Women's Rights* [Comité de América Latina y el Caribe para la Defensa de los Derechos Humanos de la Mujer] (CLADEM), submitted an *amici curiae* in relation to the case.

16. On December 10, 2010, the representatives and the State presented their final written arguments and the Commission presented its final written comments.

17. On December 20 and 29, 2010, the representatives and the State submitted documents as annexes to their final written arguments. These were forwarded to the parties. The State presented, on January 20, 2011, its observations on the documentation supporting the costs sent by the representatives.

III
JURISDICTION

18. Uruguay has been a State Party to the American Convention since April 19, 1985, and recognized the Court's contentious jurisdiction that same date. The State is also Party to the Inter-American Convention to Prevent and Punish Torture since November 10, 1992; to the Inter-American Convention on Forced Disappearance of Persons since April 2, 1996, and to the Inter-American Convention for the Prevention, Punishment, and Eradication of Violence against Women ("Convention of Belem do Para"), since April 2, 1996. As a consequence the Court has jurisdiction to hear the present case, in the terms of Article 62(3) of the American Convention, and the respective dispositions of the other international treaties whose non-compliance is alleged.

IV
PARTIAL ACKNOWLEDGMENT OF INTERNATIONAL RESPONSIBILITY

A. Scope of the acknowledgment

19. In its response to the petition, the State argued that "taking into consideration the principle of institutional continuity, it recognizes that it violated the human rights of […] Ms. María Claudia García Iruretagoyena de Gelman and Ms. María Macarena de Gelman García during the de [f]acto government's rule in Uruguay between June 1973 and February 1985." Subsequently, the State informed the Tribunal "it recognizes Mr. Juan Gelman as a victim in the proceedings" (*supra* para. 11).

20. During the hearing, the State reiterated that its responsibility in this case was already explicitly acknowledged by a domestic regulation, Law 18.596, dated September 18, 2009 concerning "the State Illegitimacy Action between June 13, 1968 and February 28, 1985 – Acknowledgment and Reparation to the Victims,"[8] whose terms establish the acknowledgment. Responding to questions from the judges during the hearing regarding whether the act of acknowledgment included all the provisions of the Convention alleged to have been violated, the State agent argued that "in principle, the scope of the State's acknowledgment encompasses all of the norms of the Convention."

21. In its final allegations, the State pointed out, referring to the scope of its acknowledgment, that it "should be framed according to the regulatory system of the Republic, which, naturally, is integrated with domestic and international law" and that said act "is limited to a period of time wherein a de facto government ruled in Uruguay." That is, the State maintains that when claims alleging human rights violations are filed, "the situation is necessarily associated with that period in time […] although there are some exceptions given that some matters are still pending," emphasizing, in this respect, regarding whether its acknowledgment means the facts are proven, and that the same is framed within the provisions of Articles 1 and 2 of the abovementioned Law No. 18.596 and that the report of the Commission for Peace "contains a detailed and chronological analysis of the acknowledged facts."

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[8] Law Nº 18.596 of September 18, 2009: "CHAPTER I: RECONGNITION ON BEHALF OF THE STATE.

Article 1 – It recognizes the violation of the rule of law that prevented individuals from exercising their fundamental rights, in violation of human rights or international humanitarian norms, during the period between June 27, 1973 to February 28, 1985.

Article 2 – It acknowledges the responsibility of the Uruguan government in carrying out the systematic practice of torture, forced disappearances and arbitrary imprisonment/illegal detention, murders, aniquilación de personas en su integridad psicofísica, political exile or social banishment, in the period between June 13, 1968 to June 26, 1973, marked by the systematic application of the Prompt Security Measures and inspired by the ideological framework of the National Security Doctrine.

Article 3 – It recognizes the right to full reparation to all persons who, by act or omission of the State, are defined under Articles 4 and 5 of this Act. Such reparations shall become effective – when appropriate – with adequate measures of restitution, compensation, rehabilitation, satisfaction measures, and guarantees of non-repetition.

22. Likewise, in relation to Articles 8 and 25 of the Convention, the State pointed out that "it is aware that initially the complaint filed by Juan Gelman was understood to fall within the scope of the Executive Branch of the era and under the Expiry Law; nevertheless, a criminal court reopened the case in August 2008." Concerning the actions of the judicial bodies, the State implied that "the fall of the dictatorship meant the adoption of various measures – legislation, amnesty laws, replacement of officials who had been unfairly dismissed, reparations for victims, judicial and administrative investigations – that is, the adoption of a complex system," adding that, in that sense, "under the constitutional system of the Republic, there exists separation of powers, by which the Executive Branch is prohibited from giving directions of any kind to a judge regarding the investigation of a case," and that "the same applies to the other alleged violations, given that these violations occurred during the de facto government that ruled Uruguay, and following the restoration of democratic order, attempts were made to bring the State's conduct back under the rule of law, […] whereby, with some exceptions, these violations are limited to the period in question." The State mentioned that this "does not imply a lack of acknowledgment that María Macarena Gelman was found in 2000 and that the [location and identification] of María Claudia García's bodily remains a pending issue for the State."

23. The representatives argued that, according to the State's answer, the State's act cannot be considered an "acknowledgment" in accordance with the Court's Rules of Procedure and jurisprudence, since it does not clearly and precisely indicate the scope of the facts and rights that it appears to be acknowledging or challenging; the only definite parameter it appears to establish is a time reference that does not fit the period of the facts at issue. Considering the aforementioned, they requested the application of Article 41(3) of the Rules of Procedure of the Court so as to establish the State's acknowledgment of the facts and claims put forth in the application and the brief of pleadings and motions**.** Moreover, they considered relevant, as a form of acknowledgment of State responsibility, the arguments made by the Minister of Foreign Relations on October 7, 2010, before a parliamentary commission, since his opinions "are regarded as indicative of what any individual would consider to be the State's position." They also noted that at the Supreme Court hearing of the case of *Sabalsagaray* (*infra* para. 148), the Executive and Legislative Branches assented to the unconstitutionality exception raised by the Prosecutor's Office, and therefore, it is their understanding that the State "has recognized the unconstitutionality and non-conformity with the Convention of the Expiry Law," for which they requested that the principle of estoppel be applied.

24. The Commission stated that it valued the partial acknowledgment of international responsibility made by the State, even though it observed that "the language used was vague," making it difficult to unambiguously determine its extent. With this in mind, the Commission added that although the State acknowledged the violation of the human rights of María Claudia García and María Macarena Gelman, "the language utilized suggests the existence of possible time limit, which is contrary to the ongoing nature of the violations committed against both [alleged victims]." It also noted that "the acknowledgment did not make reference to the established violations to the rights of the next of kin." The Commission concluded that there remains a dispute about facts and violations in the present case not covered in the act of acknowledgment, as well as about possible reparations and costs, requesting that "said partial acknowledgment be accepted, and that the Court affirm its jurisdiction over the present matter, [declare] the alleged rights as violated," and that in its Judgment, "it include a detailed description of the facts and human rights violations."

25. Article 62 of the Rules of Procedure of the Court, which establishes that:

> [i]f the respondent informs the Court of its acceptance of the facts or its total or partial acquiescence to the claims stated in the presentation of the case or the brief submitted by the alleged victims or their representatives, the Court shall decide having heard the opinions of all those participating in the proceedings and at the appropriate procedural moment, whether to accept that acquiescence, and shall rule upon its juridical effects.

26. Consistent with this and in accordance with Article 64 of the Rules of Procedure of the Court, and in the exercise of its powers of international judicial protection of human rights—a matter of international public order that transcends the will of the parties—the Court can determine whether the acknowledgment of international responsibility made by the defendant State offers a sufficient basis, in the terms of the American Convention, to continue the hearing of the merits and to determine the possible reparations,[9] in order that the acknowledgment is acceptable for purposes of the Inter-American System of Human Rights, which seeks to satisfy, and so that it does not impede in the administration of justice in the case. Thus, the Court does not limit its authority to confirming, recording, or taking note of the acknowledgment or verifying the formal conditions of such actions,[10] but rather it must weigh them against the nature and gravity of the alleged violations, the demands and interests of justice, the particular circumstances of the specific case, and the attitude and position of the parties, in order to determine, insofar as is possible, and in the exercise of its competence, the truth of what occurred in the case.[11]

27. With this in mind, the Article 41(1)(a) of the Rules of Procedure states that in the State's answer to the application, the State shall indicate whether it accepts the facts and claims or whether it contradicts them. Additionally, Article 41(3) therein it provides that the Court "may consider those facts that have not been expressly denied and those claims that have not been expressly contested as accepted."

28. Although the State did not specify the facts it accepts and the violations it recognized, but rather, even objected to some of the reparations requested, it is clearly willing to accept the alleged facts and violations, in particular, those relating to the three victims in this case. Thus, the State's acknowledgment constitutes a partial admission of the facts, as well as a partial acquiescence to the claims set forth in the Commission's application and in the representatives' brief of pleadings and motions. Therefore, although limited to those human rights violations, which occurred during "the de [f]acto government that reigned in Uruguay between June 1973 and February 1985," Article 41 of the Rules of Procedure is fully applicable to this case.

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9 *Cf. Case of Myrna Mack Chang V. Guatemala. Merits, Reparations and Costs.* Judgment of November 25, 2003. Series C No. 101, para. 105; *Case of Rosendo Cantú et al. V. México*. *Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 31, 2010 Series C No. 216, para. 21, and *Case of Ibsen Cárdenas and Ibsen Peña V. Bolivia*. *Merits, Reparations and Costs*. Judgment of September 1, 2010 Series C No. 217, para. 33.

10 *Cf. Case of Kimel V. Argentina. Merits, Reparations and Costs.* Judgment of May 2, 2008. Series C No. 177, para. 24; *Case of Rosendo Cantú et al., supra* note 9, para. 22, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 34.

11 *Cf. Case of Manuel Cepeda Vargas V. Colombia. Preliminary Objections, Merits and Reparations.* Judgment of May 26, 2010. Series C No. 213, para. 17.

29. The State's partial acknowledgment is a positive contribution to the developments in this proceeding, to the validity of the principles underlying the American Convention, and to the conduct to which the States are bound pursuant to their commitments as States Parties to international human rights instruments.[12]

30. On these terms, the Court considers, as in other cases,[13] that this acknowledgment generates full legal effect in accordance with the provisions in question and that it adds important symbolic value in regard to the prevention and reoccurrence of similar events.

31. The facts of this case were neither contested nor challenged on the record, and, as it shall be seen, said facts are duly proven on the record. The time limit set forth in said acknowledgment is irrelevant to the analysis of the merits and reparations in the present case. In addition, controversy persists regarding the determination of the consequences of the events that have occurred since February 1985. In such a way, the Tribunal finds it necessary to deliver a Judgment establishing the facts and determining the merits of the case, as well as the consequences in regard to the appropriate reparations[14].

B. Alleged victims in the present case

32. It is appropriate to emphasize that when presenting its arguments, the Commission argued that the violations of the rights to personal integrity, to judicial guarantees, to judicial protection, and to the protection of the family, were committed to the detriment of Juan Gelman, María Claudia García, and María Macarena Gelman, as well as "their next of kin."[15] The representatives only identified those three individualized persons as alleged victims, and the State acknowledged its responsibility for the violations committed to their detriment. Given that the Commission did not identify, in the report issued based on Article 50 of the Convention, what relatives it referred to, the Court deems as alleged victims in the present case only the three persons mentioned.

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12 *Cf. Case of Trujillo Oroza V. Bolivia. Merits.* Judgment of January 26, 2000. Series C No. 64, para. 42; *Case of Rosendo Cantú et al., supra* note 9, para. 25, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 37.

13 *Cf. Case of Acevedo Jaramillo et al. V. Perú. Preliminary Objections, Merits, Reparations and Costs*. Judgment of February 7, 2006. Series C No. 144, paras. 176 to 180; *Case of Tiu Tojín V. Guatemala. Merits, Reparations and Costs.* Judgment of November 26, 2008. Series C No. 190, para. 21, and *Case of Kimel V. Argentina*, *supra* note 10, paras. 23 to 25. See also, *Case of Manuel Cepeda Vargas*, *supra* note 11, para. 18.

14 *Cf. Case of the Mapiripan Massacre V. Colombia*. *Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C No. 134, para. 69; *Case of Rosendo Cantú et al., supra* note 9, para. 26, and *Case of Ibsen Cárdenas and Ibsen Peña*, *supra* note 9, para. 38.

15 The next of kin mentioned indirectly in some parts of the application, are Juan Antonio García Irureta-Goyena and Alejandro Martín García Cassinelli, father and brother, respectively, and María Claudia García Iruretagoyena de Gelman.

V
EVIDENCE

33. Based on the stipulations of Articles 46, 49, and 50 of the Rules of Procedures, as well as the jurisprudence of the Court,[16] the Court will assess the documentary evidentiary elements submitted by the parties in the various procedural opportunities, as well as the declarations offered by the alleged victims, the testimony and expert reports rendered through sworn statements before a public notary and in the public hearing before the Court. Therefore, the Court will heed to the rules of sound judgment and competent analysis, within the corresponding legal framework. [17]

A. Documentary, testimonial, and expert evidence

34. The Tribunal received the declarations rendered before a public notary by the experts specified in the present section, concerning the topics mentioned next. The content of said declarations are included in the corresponding chapter:

a. *Ana Deutsch*, psychologist, who presented an expert opinion on: i) the psychological effects of the enforced disappearance of María Claudia García Iruretagoyena on her daughter Macarena, on Juan Gelman , and her family nucleaus; and, ii) the psychological consequences for Macarena Gelman due to her birth in clandestine circumstances, the suppression of her identity, as well as the impunity at hand in the case.

b. *Pablo Chargoñia*, attorney, who presented technical information on: i) the effects of the Expiry Law [Amnesty Law] of the State and the situation of the investigations in regard to Uruguayan justice; and, ii) the characteristics of the criminal investigations in Uruguay related to the serious human rights violations that occurred during the dictatorship.

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[16] *Cf. Case of "White Van" (Paniagua Morales et al.) V. Guatemala. Reparations and Costs.* Judgment of May 25, 2001. Series C No. 76, para. 50; *Case of Gomes Lund et al. (Guerrilha do Araguaia) V. Brazil*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 51, and *Case of Cabrera García and Montiel Flores V. México*. *Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 26, 2010 Series C No. 220, para. 24.

[17] *Cf. Case of "White Van" (Paniagua Morales et al.) V. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37, para. 76; *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 51, and *Case of Cabrera García and Montiel Flores*, *supra* note 16, para. 24.

c. *Gabriel Mazzarovich*, Uruguayan journalist, who testified about: i) aspects regarding the structure of repression that prevailed in Uruguay at the time the events in the complaint occurred; ii) the human rights violations that took place in said context; and, iii) the alleged concealment of information regarding the facts of this case and the human rights violations which offered during the de facto government, in particular, on the investigation of those facts, and

d. *Roger Rodriguez*, Uruguayan journalist, who testified about: i) aspects of the structure of repression that prevailed in Uruguay at the time the events in the complaint occurred; ii) the human rights violations that occurred in said context; and, iii) the alleged concealment of information regarding the facts of this case and the human rights violations which offered during the de facto government, in particular, on the investigation of those facts.

35. Moreover, the Court heard, in the public hearing, the declarations of the following victims, witnesses,[18] and experts:[19]

a) *Juan Gelman*, alleged victim, who testified about: i) the measures taken to locate his granddaughter and know the truth regarding that which occurred to María Claudia García de Gelman; ii) the reunion between him and his granddaughter María Macarena Gelman García; iii) the complaints filed and the response from Uruguayan justice as well as other procedures carried out in the search for justice; and, iv) "the consequences which followed for him and his family after the filing of the complaint and his expectations in regard to the case before the Inter-American Court";

b) *María Macarena Gelman García Iruretagoyena*, alleged victim, who testified about: i) the impact on the various aspects of her life caused by the circumstances of her birth, the alleged suppression of her true identity, the encounter with her grandfather and other relationships regarding her biological family, as well as the lack of knowledge, to date, of her mother's whereabouts; ii) the procedures taken before the justice system to know the truth about what occurred; and, iii) the obstacles set in place by public authorities in the search for and identification of the bodily remains of her mother and in the pursuit of justice in the case;

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[18] Pursuant to that ordered in the Order of the President, witness Mr. Eduardo Galeano, offered by the representatives, was admitted. Notwithstanding, on September 15, 2010, the representatives requested the replacement of witness Eduardo Galeano with witness Mrs. Sara Méndez in order to appear before the Court, because Mr. Eduardo Galeano could not make a declaration for "personal reasons of *force majeur.*" Given the foregoing, the President issued the Order of September 23, 2010, admitting the replacement of the witness that had been requested by the representatives and ordered the testimonial declaration be provided by Sara Méndez in the public hearing to be held in the present case.

[19] *Cf.* Resolución de convocatoria dictada por la Presidencia de la Corte el 10 de septiembre de 2010, punto resolutivo sexto, and Resolución de sustitución de testigo dictada por la Presidencia de la Corte el 23 de septiembre de 2010, punto resolutivo primero.

c) *Gerardo Caetano*, historian, who provided technical information on: i) the existence and access to information held by the State in relation to this case, as well as information on the period of dictatorship in Uruguay; ii) the barriers faced in the access to information concerning said period in history and the facts related to the serious human rights violations committed in the context of a de facto government, in particular, those violations directly related to the present case; iii) technical specifications concerning the filing and classification of documents, particularly aspects of information concerning the Operation Condor; iv) the participation of Uruguayan authorities in Operation Condor and the repressive coordination between Argentina and Uruguay; and v) the difficulties still encountered in relation to the establishment of the truth and the construction of a collective memory for the Uruguayan people regarding the serious violations committed during the de facto government.

d) *Mirtha Guianze*, Attorney of the Public Prosecutor's Office for the Defense of Uruguay, who provided information on: i) the effects of the Expiry Law in relation with the investigations of serious human rights violations that occurred during the Uruguayan dictatorship; ii) the additional constraints faced by the justice system in the handling of cases involving serious human rights violations committed during the de facto government; and, iii) the nature of the participation of victims in Uruguayan criminal proceedings; And,

e) *Sara Mendez*, a witness who testified about: i) the efforts carried out by Juan Gelman and Macarena Gelman in their search for truth and justice regarding the facts in the complaint; ii) the impact of this search in the lives of both individuals; and, iii) the consequences that the alleged impunity in this case generally caused.

B. Assessment of the documentary evidence.

36. In this case, as in others,[20] the Tribunal admits the evidentiary value of those documents presented in a timely manner by the parties, particularly because they were not contested or objected, nor their authenticity questioned. Almost all of the documentary evidence offered is found under this.

37. On the other hand, the Court admits, exceptionally, documents sent by the parties in different procedural opportunities, finding them relevant and useful for the determination of the facts and their possible judicial consequences, without prejudice of the considerations to be realized hereinafter.

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[20] *Cf. Case of Velásquez Rodríguez V. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 140; *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 54, and *Case of Cabrera García and Montiel Flores, supra* note 16, para. 27.

38. The representatives enclosed with their final arguments proof of expenses related to the present case. The Tribunal will only consider those documents enclosed with the closing argument that refer to the costs and expenses that had incurred in relation with the proceedings before this Court, subsequent to the brief of pleadings and motions.

C. Assessment of the testimonies by the alleged victims and the expert opinions

39. With respect to the testimonies and expert opinions rendered in the public hearing and by sworn statements, the Court considers that they are relevant inasmuch as they adhere to the purpose defined by the President in the Order requesting them (*supra* para. 7). These shall be assessed in the corresponding chapter together with the body of evidence.[21]

40. According to the jurisprudence of this Tribunal, statements rendered by the alleged victims cannot be assessed separately, but rather, must be evaluated along with the rest of the body of evidence, as they are useful and may provide further information on the alleged violations and the consequences thereof.[22] Based on the foregoing, the Court admits the declarations, which will be assessed using the mentioned standards.

VI
MERITS

VI.1
THE RIGHT TO JURIDICAL PERSONALITY, TO LIFE, TO PERSONAL INTEGRITY AND TO PERSONAL LIBERTY OF MARÍA CLAUDIA GARCÍA IRURETAGOYENA DE GELMAN, IN RELATION TO THE OBLIGATION TO RESPECT AND GUARANTEE RIGHTS (AMERICAN CONVENTION AND INTER-AMERICAN CONVENTION ON THE FORCED DISAPPEARANCE OF PERSONS).

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21 *Cf. Case of Loayza Tamayo V. Perú*. *Merits*. Judgment of September 17, 1997. Series C No. 33, para. 43; *Case of Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* note 16, para. 67, and *Case of Cabrera García and Montiel Flores*, *supra* note 16, para. 37.

22 *Cf. Case of Loayza Tamayo*. *Merits*, *supra* note 21, para. 43; *Case of Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* note 16, para. 69, and *Case of Cabrera García and Montiel Flores*, *supra* note 16, para. 39.

41. For the purpose of examining the alleged responsibility of the State of Uruguay for the violation of the right to juridical personality, to life, to personal integrity, and to personal liberty, of María Claudia García, in relation to the obligation to respect and guarantee rights established in the American Convention, and with the regulations of the Inter-American Convention on Forced Disappearance of Persons that are allegedly violated, the Tribunal will summarize the allegations of the parties, establish the facts it considers proven and not controversial, and will make the appropriate considerations. In the present case, the facts have fundamentally been established, with basis in the non-controversy of the State and the information provided by the Commission and the representatives. The State did not make reference to these arguments, but it did acknowledge the human rights violations against Maria Claudia García in their entirety (*supra* paras. 19 to 22), reason for which in the following section the State's arguments are not included.

A. Arguments and claims of the parties.

42. The Commission alleged that:

a. the unlawful and arbitrary detention, the torture, and the enforced disappearance of María Claudia García were a consequence of a police and military intelligence operation, planned and executed in a clandestine manner by the Argentine security forces, apparently, with the close collaboration of the Uruguayan security forces, which is consistent with the *modus operandi* of such act sin the context of Operation Condor;

b. although there are doubts about whether Maria Claudia Garcia remained in Uruguay or was delivered to the Argentine authorities, regardless of the case, the State has the obligation to clarify that regarding her whereabouts, given that she was under its custody;

c. there is sufficient evidence "to reasonably assert that the death of Maria Claudia Garcia de Gelman at the hands of State officials whom had her in custody in a context of a State policy that targeted sectors of the civilian population was a crime against humanity"; and

d. therefore, the State is responsible for the violation of the rights to life, to personal integrity, to personal liberty, to juridical personality, and to the obligation to "punish these violations in a serious and effective manner," recognized in Articles 3, 4, 5, 7, and 1(1) of the American Convention, Articles I(b), III, IV, and V of the Inter-American Convention on Forced Disappearances of Persons and Articles 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Maria Claudia Garcia.

43. The representatives argued that:

a. the enforced disappearance of Maria Claudia Garcia, carried out by State officials operating under the protection of Operation Condor, involved an "automatic and immediate" violation of her right to personal liberty;

b. her enforced disappearance is a multiple violation to various rights protected by the Convention, those of which, committed in a context of a systematic pattern, constitute a crime against humanity;

c. since it came into force for the State and given the continuous nature of the crime of enforced disappearance and that, to date, the whereabouts of María Claudia García remain unknown, the Inter-American Convention on the Forced Disappearance of Persons is "directly applicable to the case";

d. Uruguay, contrary to its State obligation to maintain those persons deprived of liberty in detention centers that are officially recognized and to present the detainee before a competent judicial authority without delay;

e. in relation to the alleged violation of Article 5 of the Convention, and in consideration of the definition of the crime of torture established in Article 2 of the Inter-American Convention to Prevent and Punish Torture, as well as the definition of violence against women contained in Articles 1 and 2 of the Convention of Belém do Pará, the unlawful detention, solitary confinement, and suffering inflicted on María Claudia García are particularly serious given her vulnerability due to the advanced state of pregnancy, which "allow for the inference that María Claudia [García] was a victim of psychological torture during the time she was in detention." Said facts constitute an "immediate" violation to her personal integrity due to the acts of torture;

f. the enforced disappearance of Maria Claudia "can be understood as a brutal violation of [her] right to life," not only because the practice frequently implies the secret executions of the prisoners, but also because the State did not adopt the measures necessary to protect and preserve this right; and,

g. in relation to Article 3 of the Convention, the enforced disappearance, and subsequent denial and obstruction of the truth by the State, prevented María Claudia García from exercising her rights, such as that of being able to file a complaint to question the legality of her detention and the "right of legal recognition of her maternity."

B. The military dictatorship and the Operation Condor, context in which the facts against Maria Claudia Garcia occurred

44. This case has unique historic importance, as the facts began to perpetrate in a collaboration between Argentine authorities in the context of the systematic practice of arbitrary detention, torture, execution and enforced disappearances perpetrated by the intelligence and security forces of the Uruguayan dictatorship, in the setting of the

national security doctrine and the Operation Condor, [23] whose existence was established by this Tribunal in the case of *Goiburú and others v. Paraguay* in the following way:

> "Most of the Southern Cone's dictatorial governments assumed power or were in power during the 1970s, [24] and this permitted the repression of the so-called "subversive elements" at the inter-State level. The ideological basis of all these regimes was the "national security doctrine," which regarded leftist movements and other groups as "common enemies," whatever their nationality. Thousands of citizens of the Southern Cone sought to escape repression in their country of origin, taking refuge in bordering countries. The dictatorships therefore created a common "defense" strategy.
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> This was the context of the so-called "Operation Condor," a code name given to the alliance of the security forces and intelligence services of the

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[23] The existence of the "national security doctrine" and of Plan Condor has been recognized by the Court. *Cf. Case of Goiburú et al. V. Paraguay***.** *Merits, Reparations and Costs*. Judgment of September 22, 2006. Series C No. 153, paras. 61.5 to 61.8. Moreover, *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007 Tome I, Pages. 21, 73, 283 and ss (Case file of annexes to the brief of motions and pleadings, annex 10, CD 1); *Nunca Más [Never Again]*. Final Report of the National Commission on Forced Disappearance of Persons, Buenos Aires, Eudeba, 1984, chapter 1.K; *La coordinación represiva en Latinoamérica [Repressive coordination in Latin America]*, available at: http://www.desaparecidos.org/arg/conadep/nuncamas/, Last visited on February 23, 2011; Criminal Court of First instance of 7º round of Montevideo, captioned orders: "Bordaberry Arocena, Juan Maria- Diez delitos de homicidio muy especialmente agravados en reiteración real a título de co-autor", [Bordaberry Arocena, Juan Maria-Diez aggravated homocide by co-perpetrator] IUE 1-608/2003, Judgment of February 9, 2010, available at: http://www.pensamientopenal.com.ar/01042010/latinoamerica06.pdf, Last visited on February 23, 2011; Comisión Nacional sobre Prisión Política and Tortura [National Commission on Political Detention and Torture], Report, Santiago de Chile, Chapter III, "Context," 2004 pages. 175 and 196, available at: http://www.comisionvalech.gov.cl/ReportValech.html, Last visited on February 23, 2011; Report of the National Commission on Truth and Reconciliation, Volume I, Tome I, Second Part, Chapter I.B.1, National Corporation of Reparation and Reconciliation, reedition 1999, Santiago de Chile, pages. 37 and 38, available at: http://www.ddhh.gov.cl/filesapp/tomo1.zip , Last visited on February 23, 2011; *Assembleia Legislativa do Estado do Rio Grande do Sul - Escola do Legislativo*, National Archives of Brazil. "*A ditadura de seguranca nacional no rio grande do sul (1964-1985): História and Memória. Conexão Repressiva and Operação Condor*", organizadores Enrique Serra Padrós, Vânia M. Barbosa, Vanessa Albertinence Lopez, Ananda Simões Fernandes. – Porto Alegre, Corag, 2009. Volume 3, pages. 35 and ss. Available at: http://www.portalmemoriasreveladas.arquivonacional.gov.br/media/Ditadura-3-Golpe.pdf, Last visited on January 31, 2011; *House of Lords, Judgments - Regina v. Bartle and the Commissioner of Police for the Metropolis and others EX Parte Pinochet (on appeal from a Divisional Court of the Queen's Bench Division),* November 25, 1998, Available at: http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd981125/pino01.htm, Last visited on February 23, 2011; National Court of Madrid, Central Court of Instruction, Number Five; Indictment against Augusto Pinochet Ugarte, docket 19/97, December 10, 1998 Available at http://www.archivochile.com/Dictadura_militar/pinochet/juicios/DMjuiciopino80030.pdf, Last visited on February 23, 2011

[24] Uruguay, 1973; Chile, 1973; Argentina, 1976; Brazil, 1964; Bolivia, 1971; Paraguay, 1954, and Perú, 1968 and 1975.

> Southern Cone dictatorships in their repression of and fight against individuals designated "subversive elements." The activities deployed as part of this Operation were coordinated basically by the military personnel of the countries involved. The Operation systematized and improved clandestine coordination between the "security forces and military personnel and intelligence services" of the region. The system of codes and communications had to be efficient for "Operation Condor" to function, and so that the lists of "most wanted subversives" could be managed easily by the different States.
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> […] In other words, the grave acts took place in the context of the flagrant, massive and systematic repression to which the population was subjected on an inter-State scale, because State security agencies were let loose against the people at a transborder level in a coordinated manner by the dictatorial Governments concerned.
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> The Court observes that, during the 1970s, in absolute contradiction to the principal objects and purposes of the organization of the international community established universally in the Charter of the United Nations,[25] and the regional community in the Charter of the Organization of American States[26] and the American Convention itself, the intelligence services of several countries of the Southern Cone of the Americas established a criminal inter-State organization with a complex assemblage, the scope of which is still being revealed today; in other words, there was a systematic practice of "State terrorism" at an inter-State level.
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> This operation also benefited from the general situation of impunity of the grave human rights violations that existed at the time, promoted and tolerated by the absence of judicial guarantees and the ineffectiveness of the judicial institutions to deal with or contain the systematic human rights violations. This is closely related to the obligation to investigate the cases of extrajudicial executions, forced disappearances and other grave human rights violations." [27]

45. In the case of Uruguay, after the period from June 13, 1968, until June 26, 1973, which was marked by the systematic application of "Prompt Security Measures," and

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[25] The "peoples of the United Nations resolved […] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small […] to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." (Preamble)

[26] "The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence." (Article 1)

[27] *Case of Goiburú et al., supra* note 23, paras. 61.5, 61.6, 62, 72, and 73.

inspired by the ideological framework of the National Security Doctrine,[28] on June 27, 1973, the President-elect Juan María Bordaberry, with the support of the Armed Forces, dissolved the Chambers and carried out a coup,[29] commencing a period of "civil-military dictatorship"[30] which extended until February 28, 1985,[31] and in which "daily forms of surveillance and control of society," were implemented, "and, more specifically, forms of repression against leftist political organizations." [32]

46. In the decade of the 1970s, transnational operations were established in the region in order to eliminate the guerilla groups, in the context of a counterinsurgency campaign that justified the expansion of the scope of action beyond the territorial limits, although in 1960 the Conference of American Armies—an organization of hemispheric security—had been created that was inspired by the "national security doctrine," which met in secret sessions to discuss possible strategies and arrangements for joint operations. [33]

47. In the case of Argentina, these activities started to become evident in late 1973, and in the beginning of 1974,[34] by way of the persecution of leftist rebels, including the arrests, kidnappings, transport, and murder on behalf of the military and paramilitary.[35]

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28 *Cf.* Article 2º of the Law Nº 18.596 of September 18, 2009, *supra* note 8, folio 5004.

29 *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note, 23, page 106; Criminal Court of First instance of 7º round, captioned orders: "Bordaberry Arocena, Juan Maria", *supra* note 23; Criminal Court of First instance 11º round of Montevideo. Judgment of November 16, 2006, that decrees imprisonment pending trial of the accused (amongst which Juan Maria Bordaberry is found), available at http://memoriaviva5.blogspot.com/2008/12/Judgment-del-juez-roberto-timbal.html, Last visited on February 23, 2011.

30 *Cf.* Demasi, C., Marchesi, A., Markarian, V., Rico, A. and Yaffé, J, Civic Military Dictatorship in Uruguay 1973-1985, Montevideo, Edition by la Banda Oriental (Case file of annexes to the brief of motions and pleadings, Annex 17, folios 2417 a 2563); Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *Supra* note 23, Page 15.

31 *Cf.* Draft and presentation of arguments by the Executive Power for the creation of Law 18.596 (case file of annexes to the petition, appendix III, folios 1320- 1325); Article 1º of Law 18.596, *supra* note 8; C. Demasi, A. Marchesi, V. Markarian, A. Rico and J. Yaffé; Civic Military Dictatorship in Uruguay 1973-1985, *supra* note 30, folios 2417 to 2563.

32 *Cf.* Historical Investigation on Detainees and Disappeared Persons, *supra* note 23, page 73. The investigation adds "the surveillance, the control, the monitoring was carried out against all the political parties under the dictatorship," page 74.

33 According to the basic text, the Charter of the Conference of the American Armies declared, among other things, that the mission of the armies is "to protect the continent from the aggressive actions of the International Communist Movement." In this regard, *Cf.* J.P. McSherry, Los Estados Depredadores: la Operation Condor and la Guerra Encubierta en América Latina [Predatory States: Operation Condor and Covert War in Latin America] (Spanish edition, Uruguay, Edition of the Banda Oriental, 2009), page 88 (Case file of annexes to the brief of motions and pleadings, Annex 19, folio 2867).

34 *Cf.* McSherry, Los Estados Depredadores: la Operation Condor and la Guerra Encubierta en América Latina [Predatory States: Operation Condor and Covert War in Latin America], page 109, *supra* note 33, folio 2877.

48. In February of 1974, a meeting was held in Buenos Aires with the participation of officials of the police security forces of Argentina, Chile, Brazil, Uruguay, Paraguay, and Bolivia, in what would be the first talks regarding the establishment of a covert cooperation plan,[36] and later that same year, discussions began regarding the idea of creating a continental network of anti-communist information.[37]

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[35] *Cf*. Historical Investigation on Detainees and Disappeared Persons, *supra* note 23, Section 2, pages. 281 and ss; U.S Department of State, "Embassy Buenos Aires to SecState," February 12, 1975; Uruguayan Embassy of Buenos Aires to the Ministry of Foreign Affairs, telex C654/20, March 12, 1975, C. Demasi, A. Marchesi, V. Markarian, A. Rico and J. Yaffé, *Civic Military Dictatorship, Uruguay 1973-1985*, page 280, *supra* note 30, folio 2547; McSherry, Los Estados Depredadores: la Operation Condor and la Guerra Encubierta en América Latina [Predatory States: Operation Condor and Covert War in Latin America], pages. 126 and 127, *supra* note 33, folio 2886.

[36] *Cf.* CIA, *The National Intelligence Daily*, June 23, 1976; CIA, "Classified Reading Material re: Condor for Ambassador Landau and Mr. Propper", 22 de agosto de 1978; Henry Kissinger Cable, "South America: southern Cone Security Practices" July 20, 1976; en McSherry, Los Estados Depredadores: la Operation Condor and la Guerra Encubierta en América Latina [Predatory States: Operation Condor and Covert War in Latin America], page 121, *supra* note 33, folios 2883 and 2884; C. Demasi, A. Marchesi, V. Markarian, A. Rico and J. Yaffé, *Civic Military Dictatorship, Uruguay 1973-1985*, page 279 *supra* note 30, folio 2546; John Dinges, *Operation Condor. Una década de terrorismo internacional en el Cono Sur [A Decade of International Terrorism in the Southern Cone]*,Ediciones B. Chile, 2004, Santiago de Chile, page109 (Case file of annexes to the brief of motions and pleadings, Annex 18, folio 2661).

[37] *Cf*. C. Demasi, A. Marchesi, V. Markarian, A. Rico and J. Yaffé, Civic Military Dictatorship in Uruguay *1973-1985*, [page. 279 *supra* nota 30, folio 279.

49. By November 1975, the cooperation of military intelligence solidified even more with the formalization of the so-called "Operation Cóndor," which facilitated the creation of parallel military structures that acted in secret and with great autonomy,[38] adopted as a State policy of the leading governments,[39] and directed by military bodies principally from Chile, Argentina, Uruguay, Paraguay, Bolivia, and Brazil. [40]

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[38] *Cf. Case of Goiburú et al.***,** *supra* note 23, paras. 61.6- 61.8. See also Comisión Nacional sobre Prisión Política and Tortura [National Commission on Political Detention and Torture], Report, Santiago de Chile, Chapter III, "Context" *supra* note 23; Central Intelligence Agency CIA, General Report. CIA Activities in Chile, September 18, 2000, Available at: https://www.cia.gov/library/reports/general-reports-1/chile/index.html#10, Last visited on February 23, 2011: "Knowledge of "Operation Condor." *Within a year after the coup, the CIA and other US Government agencies were aware of […] cooperation among regional intelligence services to track the activities of and, in at least a few cases, kill political opponents. This was the precursor to Operation Condor, an intelligence-sharing arrangement among Chile, Argentina, Brazil, Paraguay and Uruguay established in 1975*". Moreover, Criminal Court of First instance of 7º round, captioned orders: "Bordaberry Arocena, Juan Maria", *supra* note 23; Assembleia Legislativa do Estado do Rio Grande do Sul - Escola do Legislativo, Archivo Nacional de Brazil. "A ditadura de seguranca nacional no rio grande do sul (1964-1985): História and Memória. Conexão Repressiva and Operação Condor", *supra* note 23, and; C. Demasi, A. Marchesi, V. Markarian, A. Rico and J. Yaffé, *Civic Military Dictatorship, Uruguay 1973-1985*, *supra* note 30, p. 281, folio 2547, and J.P. McSherry, McSherry, Los Estados Depredadores: la Operation Condor and la Guerra Encubierta en América Latina [Predatory States: Operation Condor and Covert War in Latin America], *supra* note 33, p.146, folio 2896.

[39] *Cf.* Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 036 of March 26, 2009, "Gavazzo Pereira, Jose Nino. Arab Fernandez, Jose Ricardo- a crime of deprivation of liberty," recod 98-247/2006, (Case file of annexes to the petition, Appendix III Vol 3, folio 1243); Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 037 of March 26, 2009, "Silveira Quesada, Jorge Alberto.- Ramas Pereira, Ernesto Avelino.- Medina Blanco, Ricardo Jose.- Vazquez Bisio, Gilberto Valentin.- Maurente, Luis Alfredo.- Sande Lima, Jose Felipe- a crime of deprivation of liberty", record 2-43332/2005, (Case file of annexes to the petition, Appendix III Vol 3, folio 1101); Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 0159 of October 21, 2009, "Alvarez Armellino, Gregorio Conrado.- Larcebeau Aguirregaray, Juan Carlos.- Repeat crimes of aggravated homocide," record 2- 20415/2007, (Case file of annexes to the petition, Appendix III Vol 3, folio 1537)

[40] *Cf.* Federal Chamber in Criminal and Correctional Matters of the Federal Capital, Chamber I, "González Fausto, M. et al." Claim 37.299, Judgment of July 21, 2006. Considering clause III.a Available at: http://www.pjn.gov.ar/Publicaciones/00004/00036756.Pdf, Last visited on February 23, 2011; Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 036 of March 26, 2009, *supra* note 39, folio 1243; Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 037 of March 26, 2009, *supra* note 39, folio 1101; Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 0159 of October 21, 2009, *supra* note 39, folio 1537; National Court of Madrid, Central Court of Instruction Number Five, Order requesting Extradition of Pinochet to the Government of England, Docket 19/97-J, November 3, 1998. Available at http://www.archivochile.com/Dictadura_militar/pinochet/juicios/DMjuiciopino80039.pdf, Last visited on February 23, 2011; Indictment against Augusto Pinochet Ugarte, Docket 19/97, December 10, 1998, *supra* note 23; Central Intelligence Agency CIA, General Report. CIA Activities in Chile, September 18, 2000, *supra* note 38.

50. A letter sent by the Office of National Intelligence (DINA) of Chile, on October 29, 1975, extending an invitation to the first work meeting of National Intelligence in order to create a structure "similar to that of INTERPOL in Paris, but dedicated to subversion," [41] thereby marking a reunion which took place between November 25 to 30, 1975 in Santiago, Chile. In the Closing Act of said reunion the foundation for Operation Cóndor was established. [42]

51. The Operation Condor operated in three main areas, first, in political surveillance activities of dissident exiles and refugees; second, in the operation of covert counterinsurgency actions, in which the role of the actors was completely confidential; and, third, in joint actions of extermination, directed at specific groups or individuals for which special teams of assassins were created, operating within and outside their countries, including in the United States and Europe. [43]

52. This operation was very sophisticated and organized, and had ongoing training, advanced communications systems, intelligence and strategic planning centers, as well as a parallel system of clandestine prisons and torture centers so as to be able to receive the foreign prisoners arrested under Operation Condor. [44]

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[41] J.P. McSherry, McSherry, Los Estados Depredadores: la Operation Condor and la Guerra Encubierta en América Latina [Predatory States: Operation Condor and Covert War in Latin America], *supra* note 33, p. 146, folio 2896; C. Demasi, A. Marchesi, V. Markarian, A. Rico and J. Yaffé, *supra*, *Civic Military Dictatorship, Uruguay 1973-1985*, note 30, p 281, folio 2547.

[42] The document was signed by representatives of Chile, Argentina, Uruguay, Paraguay, and Bolivia. *Cf*. Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 036 of March 26, 2009, *supra* note 39, folios 1100 to 1101; Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment of 037 of March 26, 2009, *supra* note 39, folios 1242 to 1243; Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 0159 of October 21, 2009, *supra* note 39, folio 1537; C. Demasi, A. Marchesi, V. Markarian, A. Rico and J. Yaffé, *Civic Military Dictatorship, Uruguay 1973-1985*, *supra* note 30, p. 281, folio 2547.

[43] *Cf*. National Court of Madrid, Central Court of Instruction Number Five, Order requesting Extradition of Pinochet to the Government of England, *supra* note 40; Indictment against Augusto Pinochet Ugarte, Docket 19/97, December 10, 1998, *supra* note 23; Federal Chamber in Criminal and Correctional Matters of the Federal Capital, Chamber I, "González Fausto, M. et al." Claim 37.299, *supra* note 40; ARA Monthly Report (July) "The 'Third World War' and South America" August 3, 1976. Harry Shlaudeman, Deputy Secretary for Latin America, addresed to the Secretary of State of the United States of America.. Available at: http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB125/condor05.pdf, Last visited on February 23, 2011. Highlights the high degree of coordination in Operation Condor, as well as the agreed upon actions to monitor and implement objectives within and outside of their territories, J.P. McSherry, Los Estados Depredadores: la Operation Condor and la Guerra Encubierta en América Latina [Predatory States: Operation Condor and Covert War in Latin America], *supra* note 33, p. 209, folio 2896; United States, The National Security Archive, August 12, 1976. Available at: http://www.gwu.edu/~nsarchiv/news/20010306/condortel.pdf, Last visited on February 23, 2011. .

[44] *Cf*. Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 036 of March 26, 2009, *supra* note 39, folios 1100 to 1102; Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 037 of March 26, 2009, *supra* note 39, folios 1242 to 1244; Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 0159 of October 21, 2009, *supra* note 39, folios 1538 to 1540 and J.P. McSherry, Los Estados Depredadores: la Operation Condor and la Guerra Encubierta en América Latina [Predatory States: Operation Condor and Covert War in Latin America], *supra*, note 33, p. 151, folio 2898.

53. One of the clandestine detention centers was "Automotives Orletti," located in an abandoned garage in Buenos Aires, Argentina, which served as a torture center and was operated by death squadrons and units composed of Uruguayan and Argentine military officials. [45]

54. In these type of detention centers, the majority of the cases entailed the following fates for the detainees: a) their release, b) the legalization of their detention, or c) their death. while in captivity in those detention centers, in particular in Automotives Orletti, these persons deprived illegally of their freedom were subjected systematically to extortion methods, torture, and inhumane and degrading treatment." [46]

55. Citizens of several countries, among them, Uruguayan, Bolivian, and Chilean citizens were detained in Automotives Orletti and later transported to their countries where they were then handed over to the military bodies of Operation Cóndor. [47]

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[45] *Cf.* Nunca Más [Never Again]. Final Report of the National Commission on Forced Disappearance of Persons; chapter 1.D: *Centros Clandestinos de Detención* [Clandestine Detention Centers] *(C. C.D), supra* note 23; Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note, 23, pages. 105, 292, 384 to 388; Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 036 of March 26, 2009, *supra* note 39, folios 1254; Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 037 of March 26, 2009, *supra* note 39, folios 1111 to 1112; Appeals Tribunal TAP 2° Round of Montevideo, Interlocutory Judgment No 24 of February 28, 2007, record 98/247/200, Rapporteur Dr. Alfredo Gómez Tedeschi. Uruguay. Available at: http://www.espectador.com/1v4_contenido_print.php?id=90016, Last visited on February 23, 2011; J. P. McSherry, Los Estados Depredadores: la Operation Condor and la Guerra Encubierta en América Latina [Predatory States: Operation Condor and Covert War in Latin America], *supra*, note 33, p. 37, folio 2841; C. Demasi, A. Marchesi, V. Markarian, A. Rico and J. Yaffé, *supra*, *Civic Military Dictatorship, Uruguay 1973-1985*, *supra* note 30, p 284, folio 2549; National Chamber of Criminal Appeals, Buenos Aires, "Guillamondegui, Néstor Horacio et al. s/jurisdiction - Record 12.014 - Chamber IV - Claim 10.983," of July 30, 2009, Connectivity. Claims "Automotives Orletti" and "Plan Cóndor." Art. 42 inc. 4 CPPN, Available at: http://magisneuquen.org/index.php?option=com_content&view=article&id=122:jurisprudencia&catid=58:penal&Itemid=132, Last visited on February 23, 2011; John Dinges, *Operation Condor. Una década de terrorismo internacional en el Cono Sur [A Decade of International Terrorism in the Southern Cone]*, page 281, *supra* note 36, folio 2747.

[46] *Cf.* Preliminary statement of Eduardo Rodolfo Cabanillas before the The National Court of Federal Criminal and Correctional Matters No 3, on September 4, 2006, (case file of evidence, Tome 8, annexes to the answer to the petition, folios 4492 and 4493). Statement of Roger Rodríguez, rendered before the notary public on September 23, 2010, evidence, folio 5111; C. Demasi, A. Marchesi, V. Markarian, A. Rico and J. Yaffé, *supra*, *Civic Military Dictatorship, Uruguay 1973-1985*, *supra* note 30, page 284, folio 2549, and *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note 23, Tome I, page 293.

[47] *Cf.* J.P. McSherry, Los Estados Depredadores: la Operation Condor and la Guerra Encubierta en América Latina [Predatory States: Operation Condor and Covert War in Latin America], *supra*, note 33, page 32, folio 2838; John Dinges, *Operation Condor. Una década de terrorismo internacional en el Cono Sur [A Decade of International Terrorism in the Southern Cone]*, pages. 282 and 337, *supra* note 36, folio 2748; Nunca Más [Never Again]. Final Report of the National Commission on Forced Disappearance of Persons; chapter 1.K: *Centros Clandestinos de Detención (C. C.D) [Clandestine Detention Centers], supra* note 23; Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 036

56. As of 1976, and after the military coup in Argentina, the number of disappearances and extrajudicial executions of exiles and refugees in said country soared.[48] In some cases under a false set-up, the refugees were identified as terrorist invaders, [49] and thus, for example, between July and October of that year, joint operations were undertaken of Argentine and Uruguayan military bodies that involved the kidnapping of more than 60 Uruguayans in Buenos Aires. [50]

57. The Uruguayan Air Force stated, pursuant to the "Report of the Investigative Commission on the fate of 33 detained citizens in the period from June 27, 1973, to March 1, 1985," [51] which was presented in August 2005 by the Commander and Chief of the Army per the request of President Tabaré Vázquez, that the flights of the persons detained in Buenos Aires, Argentina, and transported to Montevideo, Uruguay, were ordered by the General Commander of the Air Force at the request of the Defense Information Services (SID) and coordinated by said service. [52]

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of March 26, 2009, *supra* note 39, folios 1244; Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 037 of March 26, 2009, *supra* note 39, folios 1102.

48 *Cf.* J.P. McSherry, Los Estados Depredadores: la Operation Condor and la Guerra Encubierta en América Latina [Predatory States: Operation Condor and Covert War in Latin America], *supra*, note 33, pages. 151, 152 and 155, folios 2898, 2899, and 2900; U.S Department of State, "UNHCR discusses Chilean, Uruguayan refugee matter," December 26, 1984, Collection: State Argentina Declassification Project (1975-1984), pages. 3 and 4, para. 6. Available at: http://foia.state.gov/documents/Argentina/0000A8AD.pdf, Last visited on February 23, 2011.

49 *Cf.* John Dinges, *Operation Condor. Una década de terrorismo internacional en el Cono Sur [A Decade of International Terrorism in the Southern Cone]*,pages. 148 and 193, *supra* note 36, folios 2681 and 2703; J.P. McSherry, Los Estados Depredadores: la Operation Condor and la Guerra Encubierta en América Latina [Predatory States: Operation Condor and Covert War in Latin America], *supra*, note 33, page 174, folio 2910.

50 A confidential telegram on November 2, 1976, of the United States Ambassador in Argentina, Robert Hill, reveals that Uruguayan and Argentine forces acted together to detain Uruguayan refugees in Argentina: "[...] the kidnappings of Uruguayan refugees in July and September were carried out by Argentine and Uruguayan security forces, acting clandestinely and in cooperation." *Cf.* U.S Department of State "Subject: GOA Silent on Uruguay Revelation of Terrorist Plot", Para. 3. Available at: http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB73/761102dos.pdf, Last visited on February 23, 2011; U.S Department of State, "UNHCR discusses Chilean, Uruguayan refugee matter," December 26, 1984, *supra* note 48; J.P. McSherry, Los Estados Depredadores: la Operation Condor and la Guerra Encubierta en América Latina [Predatory States: Operation Condor and Covert War in Latin America], *supra* note 33, p.155, folio 2900.

51 *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note 23, Tome IV, Report of the Uruguayan Air Force, August 8, 2005, pages. 93; Judgment 036 of March 26, 2009, *supra* note 39, folios 1244; Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 037 of March 26, 2009, *supra* note 39, folio 1102.

52 *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note 23, Tome IV, Report of the Uruguayan Air Force, August 8, 2005, pages. 93; Judgment 036 of March 26, 2009, *supra* note 39, folios 1244; Criminal Court of First Instance on Criminal Matters of 19° round of Montevideo, Judgment 037 of March 26, 2009, *supra* note 39, folio 1102.

58. Some Uruguayan survivors—after being transported to Montevideo—were taken to a clandestine prison (called "a safe house") where they underwent daily torture. After the course of various months, they were transported to another clandestine prison. The kidnappers used various techniques and codes to avoid being easily recognized by the detainees, and given the autonomy granted to them, they were able to carry out other criminal activities such as extortion and looting that, in principle, were not tied to the combat objectives against subversive activities. [53]

59. By 1977, collaborative operations were carried out between Paraguay, Argentina, and Uruguay; at the end of that year, a second wave of coordinated repression by the militaries of Argentina and Uruguay took place—operations that were directed, this time around, mostly at leftist groups that had links in both countries—wherein, again, there were transfers of prisoners by military planes of both countries and repeated exchanges of detainees, many of whom remain disappeared to this day. [54]

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[53] *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note 23, Tome I, page 293; Testimony of Roger Rodríguez, rendered before a notary public on September 23, 2010, evidence, folio 5111; C. Demasi, A. Marchesi, V. Markarian, A. Rico and J. Yaffé, *supra*, *Civic Military Dictatorship, Uruguay 1973-1985*, *supra* note 30, page 284, folio 2549.

[54] Though on a smaller scale, the joint operations continued, during the following years. According to various analysts, despite the fact that the joint activities decreased, the collaboration networks and exchange of information continued even through the post-dictatorship period. *Cf.* C. Demasi, A. Marchesi, V. Markarian, A. Rico and J. Yaffé, *supra*, *Civic Military Dictatorship, Uruguay 1973-1985*, *supra* note 30, page p 291, folio 2552.

60. In this sense, the clandestine operations in many cases involved the kidnapping and abduction of infants, many of whom were new-borns or born in captivity,[55] where once the parents were executed, the children were handed over to military or police families.[56]

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[55] *Cf.* United Nations, Human Rights Council, Mission to Argentina, A/HRC/10/9/Add.1, January 5, 2009, Report from the Working Group on Forced and Involuntary Disappearances, paragraph 10: "A specific phenomenon that occurred in the country during the military dictatorship from 1976 to 1983 in Argentina was the disappearance of children, and of children born in captivity. Children were abducted, stripped of their identity and taken from their families. There was also a frequent abduction of children by military leaders who brought the children into their family as childrens*";* Historical Investigation on Disappeared Prisoners, in compliance with Article 4° of Law 15.848, *supra* note 23, Tome I, page *22*; Oral Tribunal on Federal Criminal Matters no. 6 of the Federal Capital, Buenos Aires, Argentina, Claim no. 1278 captioned "REI, Víctor Enrique s/abduction of minors under ten years of age," available at http://www.derechos.org/nizkor/arg/doc/rei1.html, Last visited on February 23, 2011*;* IACHR, Report on the human rights situation in Argentina, OEA/Ser.L/V/II.49, doc. 19, April 11, 1980, Recommendations of the IACHR to the Government of Argentina, I.b); Federal Court No 4, Secretary No 7. Federal Chamber on Criminal and Correctional Matters, Chamber II, Argentina, Claim 17.890 "Del Cerro J. A. s/queja", November 9, 2001, available at http://www.desaparecidos.org/nuncamas/web/investig/menores/fallos2_069.htm, Last visited on February 23, 2011; United Nations,Human Rights Commission. Question of human rights of all persons under any form of detention or imprisonment and in particular: a question of disappeared persons whose whereabouts are unknown. Report of the Working Group on Enforced or Involuntary Disappearances of January 22, 1981,E/CN.4/1435, paragraphs170 and 171.

[56] *Cf.* Historical Investigation on Disappeared Prisoners, in compliance of Article 4° of the Law 15.848, *supra* note 23, Tome I, page 22, Tome III, pages. 681 and ss; Final Report of the National Commission on Forced Disappearance of Persons, *supra* note 23, Chapter II, A. Disappeared Children and pregnant women.The internal regulations of Uruguay also recognize this reality by referring to the children abducted and disappeared during the military dictatorship: Law No. 15.848 or Expiry Law, Article 4.- *[…] The presiding judge will forward the claim to the Executive Branch testimony of the claim filed […] reffering to […] minors of [age…] kidnapped under similar conditions;* Law 18.596, *supra* note 8, Article 9.- *The State of Uruguay […]shall* issue a document certifying the status of victim and corresponding institutional responsibility that has affected the human dignity of those who had [...] G) Been born during the imprisonment of his or her mother, or while children, have remained detained with their mother or father. H) those children who have remained disappeared. Article 10 .- The victims as defined in articles 4 and 5 of this Act [...] children who have been abducted or have been in captivity with their parents, will be eligible to receive, free and for life, medical benefits that include psychological, psychiatric, dental and pharmacological care to ensure comprehensive health coverage under the National Comprehensive Health Care System. Article 11 .- The following shall receive compensation, once [...] C) The victims who as children have been disappeared for more than thirty days, [...]. D) The victims, having been born during the imprisonment of his or her mother, or who were children who have been detained with their mother or father [...]. Moreover, the Order of the President of the Republic No. 858/2000 of August 9, 2000, Creation of the Commission for Peace, in Historical Investigation on Disappeared Prisoners, in compliance with Article 4° of the Law 15.848, *supra* note 23, Tome IV, page 320, *HAVING SEEN: deemed necessary to consolidate national peace and seal forever the peace among Uruguayans totake steps possible to determine the status of the detainees - who disappeared during the de facto regime, and the disappeared children in similar conditions.* The report also contains the personal files of cases of abducted children and/or those born in captivity, Final Report of the Commission for Peace, April 10, 2003, annex 5.2 (Case file of evidence to the Brief of Pleadings, Motions, and Evidence, Folios 2115 and ss.); Testimony of Roger Rodríguez, rendered before a notary public of September 23, 2010, evidence, folio 5112.

61. Argentine jurisprudence has signaled in a number of orders that, "in the self-denominated period of National Reorganization, minors [of age] were abducted from the custody of their parents[, and this practice constituted] a public and evident act."[57] The pregnant women detained in this context of counterinsurgency were left alive until they had given birth, to then abduct their children,[58] while, in many cases, the children were handed over to families of military and police officers,[59] after their parents were disappeared or executed.[60]

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[57] *Cf.* Court of First Instance in Civil and Commercial Matters No. 10, Morón, Argentina, "Mónaco de Gallicchio, Darwinia Rosa c/Siciliano, Susana s/annulment of adoption." Expte. 275. Judgment, August 9, 1991.

[58] *Cf.* In the judgement of crimes against humanity in the Case of Adolfo Scilingo, the Spanish National Court says that children were taken away to be educated away from the "ideology of their natural family environment,'" National Court of Madrid, section Three, c of April 19, 2005, Central Court of Instruction Number Five, available at http://www.derechos.org/nizkor/espana/juicioral/doc/Judgment.html, Last visited on February 23, 2011; in the final report of the National Commission on Forced Disappearance of Persons in Argentina (CONADEP), it mentions that babies "born again were usually" inserted into another family environment as an ideological choice of 'what should be their salvation,'" *Cf.* Final Report of the National Commission on Forced Disappearance of Persons, Chapter II, A.Disappeared Children and Pregnant Women, supra note 23,IACHR, Annual Report of the Inter-American Commission on Human Rights, OEA / Ser. L/V/II.74, Doc 10 rev. 1, September 16, 1988, Chapter V.

[59] *Cf.* Judgment for crimes against humanity in the Case of Adolfo Scilingo, *supra* note 58: "Regarding children born in E.S.M.A., the families of sailors who would like to adopt a child had to contact the Task Force. This was carried out amongst the official record, in the wardroom it was said when there was a birth and whether it was male or female."

[60] *Cf.* Federal Chamber on Criminal and Correctional Matters, Sala II, Claim 17.890, *supra* note 55: according to the testimony and records incorporated to the Claim, a pattern could be established, [...] in cases where children were appropriated or not returned to the blood family, the parents of those children were killed or disappeared"; Historical Investigation on Disappeared Prisoners, in compliance with Article 4° of the Law 15.848, *supra* note 23, Tome III, section 6, pages. 679 and ss; Final Report of the National Commission on Forced Disappearance of Persons, Chapter II, A. Disappeared Children and pregnant women, *supra* note 23; Law 15.848, *supra* note 23; Law 18.596, *supra* note 8; Resolution of the President of the Republic No. 858/2000, *supra* note 23; Federal Court on Criminal and Correctional Matters No 1, Secretariat 2, San Isidro, Argentina, Claim No. 1284/85, captioned "Videla, Jorge Rafael et al. s/ alleged infraction of Arts. 146, 293 and 139, inc. 2nd. Of the Penal Code," available at http://www.desaparecidos.org/nuncamas/web/investig/menores/fallos2_06.htm, Last visited on February 23, 2011.

62. Generally, the politics of “abduction of minors” took place in the following stages: a) the children were abducted "from their parents when they could be suspected of having ties to subversive or dissident politicians of the de facto regime, pursuant to the intelligence reports, or were abducted during the clandestine detention of their mother," b) later they were taken to "places situated within the grounds of the armed force, or under their control," c) the "abducted minors [of age] were given to members of the armed or security forces, or to third parties, with the intention that they be remain hidden from their legitimate guardians," d) "in the framework of the ordered abductions, and with the intention of hindering the reestablishment of the family bond, the civil status of the children was suppressed, registering them as children of those who had them or were hiding them," and e) "false information was stated in the documents and birth certificates of the minors [of age] to accredit their identities." [61]

63. As of the results achieved by the illegal kidnapping and abductions, these could correspond a) to a form of trafficking for the irregular adoption of children, b) to a form of punishment for their parents or grandparents due to an ideology that opposed the authoritarian regime or, c) a deeper, ideological motivation, in relation to a willingness to forcefully transfer the children of members of opposition groups, in that way avoiding that the families of the disappeared persons could develop "potentially subversive elements." [62]

C. *Enforced disappearance as a multiple and continuing human rights violation and the duties of respect and guarantee*

64. Due to the particular relevance of the transgressions that it entails and the nature of the injured rights, the concept of enforced disappearance of persons has been consolidated, internationally, as a serious human rights violation. [63]

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[61] *Cf*. Federal Court on Criminal and Correctional Matters No 1, Secretariat 2, San Isidro, Argentina, Claim No. 1284/85, *supra* note 60; Judgment for crimes against humanity in the Case of Adolfo Scilingo, *supra* note 58.

[62] *Cf*. IACHR, Annual Report of the Inter-American Commission on Human Rights, *supra* note 58.

[63] *Cf. Case of Goiburú et al., supra* note 23, para. 84; *Case of Case of Chitay Nech et al. V. Guatemala*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of May 25, 2010. Series C No. 212, para. 86, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 61.

65. This characterization is consistent with other definitions included in different international instruments[64] that similarly mention the following as concurring and constitutive elements of enforced disappearance: a) the deprivation of freedom; b) the direct intervention of State agents or their acquiescence; and c) the refusal to acknowledge the detention and reveal the fate or whereabouts of the affected person. [65] Additionally, the jurisprudence of the European Human Rights System[66] and the decisions of different bodies of the United Nations[67] and several Constitutional Courts and high national courts of the American States[68] agree with the indicated characterization. [69]

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

65 *Cf. Case of Gómez Palomino V. Perú. Merits, Reparations and Costs.* Judgment of November 22, 2005. Series C No. 136, para. 97; *Case of Chitay Nech et al., supra* note 63, para. 85, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 60.

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

67 *Cf.* H.R.C. *Case of de Ivan Somers V. Hungría*, Communication No. 566/1993, Report of July 23, 1996, para. 6.3; *Case of de E. and A.K. V. Hungría*, Communication No. 520/1992, Report of May 5, 1994, para. 6.4, and *Case of de Solórzano V. Venezuela*, Communication No. 156/1983, Report of March 26, 1986, para. 5.6.

68 *Cf.* Supreme Tribunal of Justice of the Bolivarian Republic of Venezuela, *Case of Marco Antonio Monasterios Pérez*, Judgment of August 10, 2007 (declaring the multioffensive and permanent nature of the crime of enforced disappearance); Supreme Court of Justice of Mexico, Thesis: P./J. 87/2004, "Enforced Disappearance of Persons. The period in which the statute of limitations begins to run is [when] the victim or their whereabouts appears" (affirming that the enforced disappearances are pemanent crimes and that the statute of limitations begins to run when the perpetration ceases); Criminal Chamber of the Supreme Court of Chile, *Case of Caravana*, Judgment of July 20, 1999; Plenary of he Supreme Court of Chile, *Case of de desafuero de Pinochet*, Judgment of August 8, 2000; Appeals Court of Santiago de Chile, *Case of Sandoval*, Judgment of January 4, 2004 (all declaring that the crime of enforced disappearance is continous, a crime against humanity, the statute of limitations does not apply, and it is not amnesty is available for it); Federal Chamber of Appeals on Criminal and Correctional Matters of Argentina, *Case of Videla et al.*, Judgment of September 9, 1999 (declaring that enforced disappearance is a continous crime against humanity); Constitutional Tribunal of Bolivia, *Case of José Carlos Trujillo*, Judgment of November 12, 2001; Constitutional Tribunal of Peru, *Case of Castillo Páez*, Judgment of March 18, 2004 (declaring, because of that ordered by the Inter-American Court of Human Rights in the same case, that enforced disappearance is a permanent crime until the whereabouts of the victim are established).

69 *Cf. Case of Goiburú, supra* note 23, para. 83; *Case of Chitay Nech et al., supra* note 63, para. 85, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 60.

66. The international community has known the phenomenon of enforced disappearance of persons since the 1980s. The Working Group on Enforced or Involuntary Disappearances of Persons of the United Nations developed, in that decade, an operative definition of the phenomenon, highlighting the illegal detention by State agents or government branches or by an organized group or private individuals allegedly acting on behalf of, or with the support, permission, or acquiescence of the State. [70] The elements established by the mentioned Working Group have subsequently been used in definition of different international instruments.

67. Recently, the aforementioned Working Group, in consideration of the definitions contained in the Declaration, in the International Convention, and in the Rome Statute, and in the American Convention, broadened the concept of enforced disappearance, *inter alia*, in the following terms:

> 3. The Working Group has stated, in its General Comment on Article 4 of the Declaration that, although States are not bound to follow the definition contained in the Declaration strictly in their criminal codes, they shall ensure that the act of enforced disappearance is defined in a way that clearly distinguishes it from related offenses such as abduction and kidnapping.
>
> 5. In accordance with article 1.2 of the Declaration, any act of enforced disappearance has the consequence of placing the persons subjected thereto outside the protection of the law. […]
>
> 6. Indeed, under the Methods of Work clarification occurs when the whereabouts of the disappeared persons are clearly established irrespective of whether the person is alive or dead. However, this does not mean that such cases would not fall within the definition of enforced disappearance included in the Declaration, if (i) the deprivation of liberty took place against the will of the person concerned, (ii) with involvement of government officials, at least indirectly by acquiescence, and (iii) state officials thereafter refused to acknowledge the act or to disclose the fate or whereabouts of the person concerned […]

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[70] *Cf. Case of Chitay Nech et al., supra* note 63, para. 82, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 58. *Cf.* moreover, Report of the Working Group on Enforced or Involuntary Disappearance, Human Rights Commission, 37º period of sessions, U.N. Doc. E/CN.4/1435, of January 22, 1981, para. 4, and Report of the Working Group on Enforced or Involuntary Disappearance, Human Rights Commission, 39º period of sessions, U.N. Doc. E/CN.4/1983/14, of January 21, 1983, paras. 130 to 132.

> 7. Under the definition of enforced disappearance contained in the Declaration, the criminal offense in question starts with an arrest, detention, or abduction against the will of the victim, which means that the enforced disappearance may be initiated by an illegal detention or by an initially legal arrest or detention. That is to say, the protection of a victim from enforced disappearance must be effective upon the act of deprivation of liberty, whatever form such deprivation of liberty takes, and not be limited to cases of illegitimate deprivations of liberty.[71]

68. The Working Group on Enforced Disappearances of Persons of the United Nations, added:

> 1. Enforced disappearances are prototypical continuous acts. The act begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.

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[71] Working Group on Enforced Disappearances, *General Comment on the definition of enforced disappearance.* Available at http://www2.ohchr.org/english/issues/disappear/docs/disappearance_gc.doc, last visited on February 23, 2011.

> 3. The Working Group has stated, in its General Comment on article 4 of the Declaration that, although States are not bound to follow the definition contained in the Declaration strictly in their criminal codes, they shall ensure that the act of enforced disappearance is defined in a way that clearly distinguishes it from related offences such as abduction and kidnapping.
>
> 5. In accordance with article 1.2 of the Declaration, any act of enforced disappearance has the consequence of placing the persons subjected thereto outside the protection of the law. […].
>
> 6. […] Indeed, under the Methods of Work clarification occurs when the whereabouts of the disappeared persons are clearly established irrespective of whether the person is alive or dead. However,s this does not mean that such cases would not fall within the definition of enforced disappearance included in the Declaration, if (i) the deprivation of liberty took place against the will of the person concerned, (ii) with involvement of government officials, at least indirectly by acquiescence, and (iii) state officials thereafter refused to acknowledge the act or to disclose the fate or whereabouts of the person concerned. […]
>
> 7. Under the definition of enforced disappearance contained in the Declaration, the criminal offence in question starts with an arrest, detention or abduction against the will of the victim, which means that the enforced disappearance may be initiated by an illegal detention or by an initially legal arrest or detention. That is to say, the protection of a victim from enforced disappearance must be effective upon the act of deprivation of liberty, whatever form such deprivation of liberty takes, and not be limited to cases of illegitimate deprivations of liberty.

2. Even though the conduct violates several rights, including the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment and also violates or constitutes a grave threat to the right to life, the Working Group considers that an enforced disappearance is a unique and consolidated act, and not a combination of acts. Even if some aspects of the violation may have been completed before the entry into force of the relevant national or international instrument, if other parts of the violation are still continuing, until such time as the victim's fate or whereabouts are established, the matter should be heard, and the act should not be fragmented.

3. Thus, when an enforced disappearance began before the entry into force of an instrument or before the specific State accepted the jurisdiction of the competent body, the fact that the disappearance continues after the entry into force or the acceptance of the jurisdiction gives the institution the competence and jurisdiction to consider the act of enforced disappearance as a whole, and not only acts or omissions imputable to the State that followed the entry into force of the relevant legal instrument or the acceptance of the jurisdiction.

4. The Working Group considers, for instance, that when a State is recognized as responsible for having committed an enforced disappearance that began before the entry into force of the relevant legal instrument and which continued after its entry into force, the State should be held responsible for all violations that result from the enforced disappearance, and not only for violations that occurred after the entry into force of the instrument. [72]

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[72] Working Group on Enforced or Involuntary Disappearance, General Comment on Enforced Disappearance as a Continuous Crime. Available at http://www2.ohchr.org/english/issues/disappear/docs/GC-EDCC.pdf, Last visited on February 23, 2011.

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69. Also, the Declaration on the Protection of All Persons from Enforced Disappearances of 1992,[73] establishes that enforced disappearances occur in cases where:

> *persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different Branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.*

70. In turn, Articles 2 and 5 of the International Convention for the Protection of All Persons from Enforced Disappearance of 2007 defines enforced disappearance as:

> the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.
>
> […] The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

70. For its part, Articles II and III of the Inter-American Convention on the Forced Disappearance of Persons define enforced disappearance as:

> 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 remedy to the applicable legal remedies and procedural guarantees.

> 4. The Working Group considers, for instance, that when a State is recognized as responsible for having committed an enforced disappearance that began before the entry into force of the relevant legal instrument and which continued after its entry into force, the State should be held responsible for all violations that result from the enforced disappearance, and not only for violations that occurred after the entry into force of the instrument.

[73] Approved by the General Assembly in its Resolution 47/133 of December 18, 1992, A/RES/47/133.

> [...]
>
> This offense shall be deemed continuing or permanent as long as the fate or whereabouts of the victim has not been determined.

72. In this case, it is necessary to reiterate the legal basis which sustains a comprehensive perspective given that the enforced disappearance of persons entails a plurality of actions, that combined toward a single purpose, permanently violate legal rights protected by the Convention. [74]

73. In light of a comprehensive perspective given the gravity and continued or permanent nature of the act of enforced disappearance of persons, the act is maintained while the whereabouts of the disappeared person remain unknown and identity is not ascertained.

74. The enforced disappearance of persons constitutes a multiple violation of several rights protected by the American Convention, thereby placing the victim in a state of complete defenselessness, implying other related violations, particularly serious when said harm forms part of a systematic pattern or practice which is applied or tolerated by the State. [75]

75. The practice of enforced disappearance of persons constitutes an inexcusable abandonment of the essential principles on which the Inter-American System of Human Rights is founded, [76] and whose prohibition has reached the character of *jus cogens.* [77]

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[74] *Cf. Case of Radilla Pacheco V. México. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2009. Series C No. 209, para. 138, and *Case of Ibsen Cárdenas and Ibsen Peña*, *supra* note 9, para. 57.

[75] *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, supra* note 74, para. 139, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 59.

[76] *Cf. Case of Velásquez Rodríguez. Merits, supra* note 20, para. 158; *Case of Chitay Nech et al., supra* note 63, para. 86, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 61.

[77] *Cf. Case of Goiburú et al., supra* note 23, para. 84; *Case of Chitay Nech et al., supra* note 63, para. 86, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 61.

76. Pursuant to Article I, subparagraphs a) and b), of the Inter-American Convention on the Forced Disappearance of Persons, the States Parties undertake to not practice or tolerate the enforced disappearance of persons under any circumstance and to punish those responsible within the realm of their jurisdiction; this is in accordance with the State's obligation to respect and guarantee the rights included in Article 1(1) of the American Convention, that which, as established by this Court, can be fulfilled in various manners, in light of the specific right the State to guarantee and of the specific needs of protection.[78]

77. The State's preventive obligations encompass all those judicial, political, administrative, and cultural measures that promote and safeguard human rights, [79] and as such, the deprivation of liberty in legally recognized centers and the existence of registries within said centers constitutes fundamental safeguards, *inter alia*, against enforced disappearance, and in *contrario sensu*, the operation of clandestine centers constitutes *per se* a violation of the obligation to guarantee, for directly assaulting the right to personal liberty, to personal integrity, to life, [80] and to juridical personality. [81]

78. In that regard, in this case, the analysis of enforced disappearance must encompass the totality of the facts presented for the Court's consideration, [82] given that only in this manner, the legal analysis of enforced disappearance is consistent with the complex violation of human rights that it entails, [83] with its continuous or permanent nature, and with the necessity of considering the context in which the facts took place. in order to analyze its prolonged effects over time and focus, comprehensively, on the consequences at hand, [84] considering the *corpus juris* of Inter-American System and international protection. [85]

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78 *Cf. Case of the Mapiripan Massacre, supra* note 14, *paras. 111 and 113; Case of Anzualdo Castro supra* note 75, para. 62, and *Case of Radilla Pacheco, supra* note 74, para. 142.

79 *Cf. Case of Velásquez Rodríguez. Merits, supra* note 20, para. 175; *Case of González et al.s ("Campo Algodonero") V. México*. *Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 16, 2009. Series C No. 205, para. 252, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 63.

80 *Cf. Case of Anzualdo Castro, supra* note 75, para. 63, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 63. In the same sense, *Cf.* Article XI of the Inter-American Convention on Forced Disappearance of Persons.

81 *Cf. Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 63.

82 *Cf. Case of Heliodoro Portugal V. Panamá. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 186, para. 112*; Case of Chitay Nech et al., supra* note 63, para. 87, *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 67.

83 *Cf. Case of Heliodoro Portugal, supra* note 82, para. 150; *Case of Chitay Nech et al., supra* note 63, para. 87, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 68.

84 *Cf. Case of Goiburú et al., supra* note 23, para. 85; *Case of Chitay Nech et al., supra* note 63, para. 87, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 68.

85 *Cf. Case of Radilla Pacheco, supra* note 74, para. 146, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 68.

D. The enforced disappearance of María Claudia García Iruretagoyena de Gelman.

D.1 Facts

79. María Claudia García Iruretagoyena Casinelli was born on January 6, 1957, in Buenos Aires, Argentina. She worked at a shoe factory and was a student of Philosophy and Letters at the University of Buenos Aires. [86]

80. She was married to Marcelo Ariel Gelman Schubaroff and at the moment she was deprived of her liberty, she was 19 years old and in an advanced state of pregnancy (around 7 months).[87]

83. She was detained at dawn on August 24, 1976, with her husband, Marcelo Ariel Gelman Schubaroff, and her sister-in-law, Nora Eva Gelman Schubaroff, who were Juan Gelman's children, along with a friend named Luis Edgardo Peredo, at their home in Buenos Aires, by "Uruguayan and Argentine military commandos." [88] Nora Eva Gelman and Luis Eduardo Pareda were released four days later. [89]

82. María Claudia García and Marcelo Gelman were transferred to the clandestine detention center known as "Automotives Orletti," in Buenos Aires, Argentina, where they remained together for some days but were subsequently separated. [90]

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[86] *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, Tome II, Personal case files of the Detained Disappeared Persons, Uruguay, *supra* note 23, Section 1, page 195 (Case file of annexes to the brief of motions and pleadings, annex 10, CD 1).

[87] *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, Tome II, Personal case files of the Detained Disappeared Persons, Uruguay, Section 1, page 196, *supra* note 23.

[88] *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note 23, Tome I, pages. 116, Tome II, Personal case files of the Detained Disappeared Persons, Uruguay, Section 1, page 196, Tome III, page 714; Final Report of the Commission for Peace, *supra* note 56, annex 5.2, para. 1b, folio 2201.

[89] *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, Tome II, Personal case files of the Detained Disappeared Persons, Uruguay, *supra* note 23, Section 1, page 196; Preliminary Statement of Eduardo Rodolfo Cabanillas (case file of evidence, Tome 8, annexes to the answer to the petition, folio 4496).

[90] *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note 23, Tome II, Personal case files of the Detained Disappeared Persons, Uruguay, Section 1, page 196, Tome III page 714; Declaration rendered by Juan Gelman during the public hearing; Final Report of the Commission for Peace, *supra* note 56, annex 5.2, para. 1b, folio 2201.

83. Marcelo Gelman was tortured since the beginning of his captivity at the clandestine detention center "Automotives Orletti," [91] where he remained with other prisoners until approximately late September or October of 1976, at which time he was transferred. [92] Marcelo Ariel's remains were discovered in 1989 by the Argentine Forensic Anthropology Team, who determined that he had been killed in October of 1976. [93]

84. María Claudia García was secretly transferred to Montevideo by Uruguayan authorities (possibly by Uruguayan Air Force officials) during the first days of October 1976, [94] in an advanced state of pregnancy, [95] in the so-called "Second Flight." She was placed in the headquarters of the Defense Information Service (hereinafter "SID" for the acronym in Spanish) of Uruguay, located in Montevideo, on the corner of Boulevard Artigas and Palmar. [96]

85. María Claudia García remained captive in the headquarters of SID - Division III. She was kept on the main floor of the building, separated from the other prisoners. In late October or early November, she was transferred to the Military Hospital, where she gave birth to a baby girl. [97]

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91 *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note 23, Tome II, page 196; Preliminary Statement of Eduardo Rodolfo Cabanillas Sánchez of March 21, 2003 before the Judge of 1st Instruction on Criminal Matters of the 2nd Round. (case file of evidence, Tome 8, annexes to the answer to the petition, folio 4495).

92 *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note 23, Tome II, Personal case files of the Detained Disappeared Persons, Uruguay, Section 1, page 197; Declaration rendered by Juan Gelman during the public hearing; statement rendered by Sara Méndez during the public hearing.

93 *Cf.* Preliminary Statement of Eduardo Rodolfo Cabanillas Sánchez of March 21, 2003 before the Judge of 1st Instruction on Criminal Matters of the 2nd Round. (case file of evidence, Tome 8, annexes to the answer to the petition, folio 4495).

94 *Cf.* Final Report of the Commission for Peace, *supra* note 56, annex 5.2, para. 1b, folio 2201; *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of the Law 15.488 of 2007, *supra* note 23, Tome I page 293, Tome II page 195 and 199, Tome III Page 648, Tome IV, Report of the General Commander of the Army, August 8, 2005, pages. 82.

95 *Cf.* Final Report of the Commission for Peace, *supra* note 56, annex 5.2, para. 1b, folio 2201; Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note 23, Tome I, page 293, Tome II, pages. 195 and 200, Tome IV, Report of the General Commander of the Army, August 8, 2005, pages. 82.

96 *Cf.* Final Report of the Commission for Peace, *supra* note 56, annex 5.2, para. 1b, folio 2201; Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note 23, Tome I, page 370, Tome IV, Report of the General Commander of the Army, August 8, 2005, pages. 82; Statement of Alicia Raquel Cadena Revela (Case file of annexes to the brief of motions and pleadings, annex 2, Peice 1, CD 1) Page 125 S/ PDF; on the transport of María Claudia García on the second flight, *Cf.* Testimony of Roger Rodríguez, rendered before a notary public on September 23, 2010, evidence, folio 5107.

97 *Cf.* Final Report of the Commission for Peace, *supra* note 56, annex 5.2, para. 1b, folio 2201; Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488

86. After the birth, mother and daughter were returned to the SID[98] and held in a room on the ground floor. They were separated from the rest of the prisoners, [99] except for two other children, the Julien-Grisonas brothers, with whom they shared the abovementioned space. [100]

87. On December 22, 1976, the SID prisoners were evacuated; María Claudia García and her daughter were transported to another clandestine detention center known as the Valparaíso Base. [101]

88. María Claudia García's newborn daughter was abducted from her and removed from the SID towards, approximately, the end of December 1976 (*infra* para. 106)**.**

89. After the birth of María Macarena Gelman García, there are two versions[102] regarding María Claudia García's fate: the first, that she was transferred to a clandestine military base where she was killed and her remains buried, [103] and the second, that after her daughter was abducted from her, she was turned over to the Argentine security forces of "Automotives Orletti." Said forces came to Montevideo, took her back to Argentina by a boat departing from the Carmelo port, and killed her in the neighboring country. [104]

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of 2007, *supra* note 23, Tome III, page 714, Tome IV, Report of the General Commander of the Army, August 8, 2005, pages. 82.

98 *Cf.* Final Report of the Commission for Peace, *supra* note 56, annex 5.2, para. 1b, folio 2201; Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note 23, Tome IV, Report of the General Commander of the Army, August 8, 2005, pages. 82.

99 *Cf.* Final Report of the Commission for Peace, *supra* note 56, annex 5.2, para. 1b, folio 2202; Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note 23, Tome III page 714; Other prisoners in clandestine detention centers gave testimony on some circumstances that involved pregnancy and the birth of the daughter, *Cf.* Statement of Alicia Raquel Cadena Revela, *supra* note 96 pages 125 and 126.

100 *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note 23, Tome III, page 714; Tome I pages. 370 and 371; Testimony of María del Pilar Nores Montedónico a Juan Gelman; Testimony of the surviving uruguayans of the illegal detention centers of Orletti and the SID, provided by Juan Gelman, who maintained contact with them in Montevideo.

101 *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note 23, Tome III page 714; Testimony of the surviving uruguayans of the illegal detention centers of Orletti and the SID, provided by Juan Gelman, who maintained contact with them in Montevideo; Statement of Alicia Raquel Cadena Revela, *supra* note 96 pages 125 and 126.

102 *Cf.* Final Report of the Commission for Peace, *supra* note 56, annex 5.2, para. 1b, folio 2202.

103 *Cf.* Final Report of the Commission for Peace, *supra* note 56, annex 5.2, para. 1b, folio 2202; Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note 23, Tome IV, Report of the General Commander of the Army, August 8, 2005, pages. 82.

104 *Cf.* Final Report of the Commission for Peace, *supra* note 56, annex 5.2, para. 1b, folio 2202.

90. Juan Gelman, Marcelo Gelman's father and María Claudia García Iruretagoyena's father-in-law, and his wife, Mara Elda Magdalena La Madrid Daltoe, carried out their own investigation to ascertain what had happened to their son, daughter-in-law, and the granddaughter they assumed had been born during her parents' captivity. [105]

D.2 Legal classification

91. In the manner that María Claudia was deprived of her liberty during the advanced stages of her pregnancy, kidnapped in Buenos Aires by Argentine forces and possibly Uruguayan authorities in a context of illegal detentions in clandestine centers ("Automotores Orletti" and SID) and subsequently transported to Montevideo under the "Operation Condor," her deprivation of liberty was clearly illegal, in violation of Article 7(1) of the Convention, and can only be understood as the constitution of a complex violation of rights that is an enforced disappearance. It also constitutes a flagrant breach of the State´s obligation to keep persons deprived of liberty in officially recognized detention-centers, and to present them without delay before the competent judicial authority.

92. In the cases of enforced disappearance of persons, the right to juridical personality, recognized in Article 3 of the American Convention, is violated as the victims are left in an undetermined juridical situation that prevents, impairs, or nullifies the possibility of said persons to be entitled to their rights or to effectively exercise their rights, generally, thereby constituting one of the most serious breaches of the State obligation to respect and guarantee human rights. [106]

93. Her transport from Argentina to Uruguay was intended to remove her from the protection of the law in both States, in both her stay in clandestine detention centers and the fact that she was forced to leave her country without any immigration controls, thereby annulling her juridical personality, denying her existence, and leaving her in a sort of legal limbo or situation of legal uncertainty before society and the State, to which, as such, constitutes a violation of her right to juridical personality, recognized in Article 3 of the Convention. [107]

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[105] *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note 23, Tome II pages. 205 and siguientes; Declaration rendered by Juan Gelman during the public hearing; Rodríguez: "The Gelman Case. Journalism and human rights" (Cruz del Sur Edition, Uruguay, 2006), evidence, folios 2987 and ss.

[106] *Cf. Case of Anzualdo Castro, supra* note 75, para. 101, and *Case of Radilla Pacheco, supra* note 74, para. 157.

[107] *Cf. Case of Anzualdo Castro, supra* note 75, para. 90; *Case of Chitay Nech et al., supra* note 63, para. 98, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 98.

94. On the other hand, the enforced disappearance of María Claudia García is in violation of the right to personal integrity because the mere prolonged isolation and coercive solitary confinement, represents cruel and inhumane treatment, which is contrary to that stated in paragraphs 1 and 2 of Article 5 of the Convention." [108]

95. Moreover, once detained she was under the control of repressive official bodies, State officials, or individuals whom act with the acquiescence or tolerance of the State, whom carry out acts of torture and murder with impunity, which represent, in and of themselves, a breach to the right to prevent violations of personal integrity and life, established in Articles 5 and 4 of the American Convention, even assuming that the facts of torture or deprivation of life of the persons in the specific case cannot be proven. [109]

96. Even though there is no categorical information about what happened to María Claudia after the abduction of her daughter, the practice of enforced disappearances have often entailed, on the one hand, the execution of those detained, in secrecy and without trial, followed by the concealment of the bodily remains in order to erase all material evidence of the crime and to allow for the impunity of those responsible, that which is a brutal violation of the right to life, recognized in Article 4 of the Convention.

97. The state of pregnancy in which she was in when detained constituted a condition of particular vulnerability, reason for which—in her case—there was differential treatment. In turn, in Argentina she had been separated from her husband and later transported to Uruguay without knowing his fate, which in itself represented a cruel and inhumane act. Subsequently, she was retained in a clandestine center of detention and torture, SID, where her given differential treatment in regard to other detainees, seeing as she was separated from these, was not carried out in order to comply with the special obligation to protect her, but rather in what regards her unlawful detention, her transfer to Uruguay, and her possible enforced disappearance, which was, the use of her body in order to give birth, and for her daughter to be breastfeed, who was given to another family after being abducted and her identity substituted for another.(*infra* paras. 106 to 116). The facts of the case reveal a particular conception of women that threatens freedoms entailed in maternity, that which forms an essential part of the free development of the female personhood. The foregoing is even more serious if one considers, as indicated, that her case took place in a context of disappearances of pregnant women and illegal abductions of children in the framework of Operation Condor.

98. The mentioned acts committed against Maria Claudia García can be classified as

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[108] *Cf. Case of Velásquez Rodríguez, supra* note 20, paras. 156 and 187; *Case of Chaparao Álvarez and Lapo Iñiguez V. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 171, and *Case of Anzualdo Castro, supra* note 75, para. 85.

[109] *Cf. Case of Velásquez Rodríguez, supra* note 20, para. 175; *Case of Ticona Estrada et al. V. Bolivia. Merits, Reparations and Costs.* Judgment of November 27, 2008. Series C No. 191, para. 59, and *Case of Anzualdo Castro, supra* note 75, para. 85.

one of the most serious and reprehensible forms of violence against women,[110] perpetrated against her by State officials from Argentina and Uruguay, which severely affected her personal integrity, were clearly based on her gender, and caused damage to her physical and psychological suffering, and contributed to her feelings of serious anguish, desperation, and fear she experienced by living with her daughter in a clandestine detention center, where one normally could hear the torture inflicted on the other prisoners in SID[111] and not knowing the fate of her daughter when they were separated, [112] as well as being unable to foresee her final fate. All this constitutes an affectation of such magnitude that it should be qualified as the most serious form of violation of her psychological integrity.

99. This enforced disappearance constitutes, due to the nature of the injured rights, a violation of a *jus cogens* principle, especially serious because it occurred in the context of a systematic practice of "State-sponsored terrorism," at an inter-state level. [113]

100. The preparation and execution of the arrest and subsequent disappearance of María Claudia García could not have been perpetrated without the knowledge or higher orders of the military, police, and intelligence headquarters at the time, or without the collaboration, acquiescence, or tolerance, manifested in various actions, carried out in a coordinated or concatenated manner, by members of the security forces and intelligence services (and even diplomats) of the States involved, wherein State agents not only grossly failed in the obligations to prevent and protect against violations of the rights of the alleged victims, enshrined in Articles 1(1) of the American Convention, but also used the official investiture and resources provided by the State to commit the violations.

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110 *Cf.*, In this sense, Articles 1 and 2 of the Convention of Belem do Para. As has been noted previously by this tribunal, the Convention on the Elimination of Discrimination of all forms of Violence against Women has maintained the definition of discrimination against women to "include violence based on sex, that is, violence directed at a women [i] because hse is a women or[ii] because it affects her in a disporportionate form." Moreover, it has also noted that "[t]he violence against women is a form of discrimination that severly impedes the enjoyment of rights and freedoms as to those of man." *Cf., In this regard, Case of González et al.s ("Campo Algodonero"), supra* note 79, para. 395; *Case of Fernández Ortega et al.. V. México. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 30, 2010 Series C No. 215, para. 129, and *Case of Rosendo Cantú et al. supra* note 9, para. 120.

111 Testimony of Sara Méndez. Rendered by Juan Gelman during the public hearing.

112 *Cf., mutatis mutandi*, *Case of del Penal Miguel Castro Castro V. Perú. Merits, Reparations and Costs*. Judgment of November 25, 2006. Series C No. 160, para. 103.

113 As such, it may be classified as a crime against humanity.

101. In consideration of the preceding, in relation with the enforced disappearance that continues to this date, the Court finds that the State is responsible for the violation of the personal liberty, to the personal integrity, to the right to juridical personality, and to life of María Claudia García Iruretagoyena de Gelman, recognized in Articles 7(1); 5(1) and 5(2); 3 and 4(1), given the failure to comply with the obligation to respect and guarantee rights, established in Article 1(1) of the American Convention, in relation with Articles I and XI of the Inter-American Convention on the Forced Disappearance of Persons.[114]

VI.2
RIGHT TO JURIDICAL PERSONALITY, RIGHTS OF THE CHILD, PROTECTION OF THE FAMILY, RIGHT TO A NAME, RIGHT TO NATIONALITY, AND RIGHT TO HUMANE TREATMENT [PERSONAL INTEGRITY] OF MARÍA MACARENA GELMAN GARCÍA IRURETAGOYENA, AND TO RIGHT TO HUMANE TREATMENT [PERSONAL INTEGRITY] OF JUAN GELMAN, AND THE OBLIGATION TO RESPECT RIGHTS

102. In the present chapter the Court will analyze, in the light of the acknowledgment of international responsibility, the facts and alleged violations of human rights presented by the Commission and the representatives to the detriment of María Macarena Gelman, namely: the right to juridical personality, the protection of the family, the right to a name, the rights of the child, the right to nationality, the right to humane treatment [personal integrity], and the right to privacy [honor and dignity], recognized in the Articles 3, 17, 18, 19, 20, 5, and 11 of the Convention, respectively. Likewise, in this chapter the Tribunal will assess the alleged violations of the rights recognized in the Articles 5 and 11 of the Convention, to the detriment of Juan Gelman.

A. Arguments of the parties.

103. The Commission alleged that:

a. in relation to Article 3 of the American Convention, that: "[t]he appropriation of María Macarena by the security forces of Uruguay prevented her from having a true juridical personality upon reaching adult age";
b. María Macarena did not know her true identity, since she lived with a false identity and a false private life, even though she was unaware that it was false;
c. not knowing the truth that her biological mother had been disappeared, the juridical personality of Maria Macarena prevented her from seeking a remedy in

[114] In various cases, the Court has analyzed, or declared the violation, of the provisions mentione din the Inter-American Convention on Forced Disappearance. In this regard, see the following cases: Case of Blanco Romero et al. V. Venezuela, arts. I, X and XI; Case of Heliodoro Portugal V. Panamá. arts. I and II; Case of Tiu Tojín V. Guatemala, art. I; Case of Ticona Estrada V. Bolivia, arts. I, III and XI; Case of Anzualdo Castro V. Perú, arts. I and II; Case of Radilla Pacheco V. México, arts. I and II; Case of Ibsen Cárdenas V. Bolivia, arts. I and XI; and Case of Chitay Nech et al. V. Guatemala.

the Uruguayan judicial system in order to investigate the circumstances of her birth in captivity and the circumstances that resulted in the death of her mother while under the custody of the Uruguayan security forces;

d. the "impunity offered by the State to the perpetrators of the crimes of kidnapping, arbitrary and illegal detention, and extrajudicial execution perpetuated the false superstructure of the lie that Maria Macarena lived for the first 23 years of her life";
e. Uruguay did not offer María Macarena special measures of protection required by children, to which Article 19 of the Convention was violated to her detriment;
f. in relation to Article 17 of the Convention, "[t]he fact that the State did not investigate the fate of Maria Claudia and the disappearance of her daughter, born in captivity, also contributed to the suffering of Juan Gelman and his next of kin, since they did not know if their granddaughter was alive or dead, and they were unable to share a family life during the childhood and adolescent years of Maria Macarena, a situation that was even more moving, given what had occurred to her parents";
g. in regard to Article 20 of the American Convention, "[g]iven that María Macarena is the daughter of Argentine parents born in Uruguay [and] notwithstanding, given that the State did not clarify the circumstances of her birth, she was deprived of her Argentine nationality and identity";
h. in regard to Article 18 of the Convention, "[t]he appropriate of María Macarena by the security forces of Uruguay prevented her from knowing her true name and identity, given that she lived with a false name, though she was unaware that it was false";
i. concerning Article 5 of the Convention, the suffering and pain of Juan Gelman and María Macarena Gelman caused by the enforced disappearance of María Claudia García and by the non-existence of an investigation on the subject, as well as the fact that the State have not determined her destiny; and
j. the State violated Article 11 of the Convention, by the breach of the right to privacy of María Macarena Gelman.

104. The representatives alleged that:

a. María Macarena Gelman "[w]as registered with false facts of birth," to which "the appearance of legality, created by means of the false registration of her birth, promoted that she live, grow, and develop in total ignorance of her true juridical personality," and "as a consequence, she was prevented from exercising—including up to adulthood—the rights and obligations she was afforded as daughter of María Claudia García and Marcelo Gelman," that corresponded to her under law;
b. "[t]he State [...] had the obligation to provide the documents that demonstrated her existence and real identity, but the State omitted to take the necessary measures for a baby born in captivity and lacking the protection of her parents, and thereby, in a situation of extreme vulnerability in the face of the actions of

State officials and third parties, to be returned to her family of origin and afforded her true juridical personality";

c. "in this case, the birth registration of María Macarena was [...] completely flawed," because "[f]or all legal effects, […] she was obligated to assume a false juridical personality, illegally created, without her consent" and from there, the State failed in its obligation to reestablish, "in the civil registry, the real circumstances of the birth of María Macarena, as well as making known her true identity and recognizing her legitimate juridical personality";

d. "the legal effects as a consequence of the denial of her name and her identity were such that they deprived her during said time, among others, of her hereditary rights, and to hold the nationality of her parents";

e. at time that Uruguay recognized the jurisdiction of this Court, "Maria Macarena was still a child, and as such, the State owed her additional and complementary special protection that her status and particular circumstances required". Nevertheless, Uruguay did not take the necessary measures to protect these rights nor did it reverse "the condition of helplessness of Maria Macarena" and "to the contrary, the State guaranteed, through its silence and obstruction, that the crimes committed against Maria Macarena would be perpetuated through the course of time, impeding her right to grow and develop with her biological family";

f. "[i]n addition, these violations affected, in a particular manner, the rights and obligations of the grandparents and other next of kin, those of whom were denied the opportunity to form part of the life of their granddaughter, to contribute to her development, and to watch her grow";

g. the State violated the "right to nationality when it denied Maria Macarena Gelman Garcia the parent-child relationship with Maria Claudia Garcia and Marcelo Gelman, both citizens of Argentina, which entitled her, from the moment of her birth, to the Argentine nationality held by her parents." This nationality, nevertheless, due to the lack of awareness of its true nature—unknown since her childhood years—from the actions and omissions of Uruguay in this case, by not reversing the false identity imposed on Maria Macarena, in turn provoked an arbitrary deprivation of her right to nationality;

h. "the violation of this law persisted in time, which forced Maria Macarena to live with a family that was not her biological family, with a name different than the one given to her by her parents, under a false identity that affected her right to develop in a society and culture of her own and to exercise the rights to which her juridical personality entitled her, such as the right to receive the nationality of her parents."

i. under Article 18 (of the Convention), Uruguay was required to return to María Macarena "her true name, surname, kinship, and identity." Though, María Macarena "was able—by means of the personal efforts and investigations of Juan Gelman—to rectify her irregular juridical situation and recover her true identity," "her right to a name was violated for many years, thereby affecting her development, her life plan, her family ties, and the exercise of her rights for a long period of time, which has permanently scarred her life and the lives of her next of kin";

j. “[f]rom the date that Macarena knew her true origins [...] she has been committed to finding justice and to know the whereabouts of Maria Claudia," to which "the lack of response by the Uruguayan authorities has caused her deep suffering" and the frustration and helplessness due to the impunity that still veils the enforced disappearance; and,
k. "the absolute lack of State action in this case in order to reunify the family, and to restore the true identity of Mary Claudia, represented a clear violation of the rights of Maria Macarena, Juan Gelman, and their next of kin [...] to the protection of their dignity and honor."

105. The State did not refer specifically to these allegations, but did acknowledge the violations of the human rights of María Macarena Gelman García as a whole (*supra* paras. 19 to 22).

B. Facts regarding the situation of María Macarena Gelman García

106. Concerning the facts of the enforced disappearance of María Claudia García (supra paras. 44 to 63 and 79 to 90), on January 14, 1977, María Claudia García’s daughter was placed in a basket and left on the doorstep of the family of Uruguayan police officer Ángel Tauriño,[115] located in the Punta Carretas neighborhood in Montevideo, Uruguay, with a note indicating that the baby girl had been born on November 1, 1976, and that her mother could not care for her. [116]

107. Ángel Tauriño and his wife, who had no children, picked up the basket and kept the baby girl. They registered her as their own daughter two years later and baptized her as María Macarena Tauriño Vivian. [117]

108. In the framework of the investigations conducted by Juan Gelman and his wife, Mara Elda Magdalena La Madrid Daltoe (*supra* para. 90) resulted in some information from different sources regarding the circumstances of the kidnapping and disappearance of Maria Claudia Garcia, as well as on the birth, and around 1997, they also began to learn about their granddaughter who had been born in captivity. They continued their discrete inquiries without much success, that is, until the beginning of 1998, when they contacted Ms. Sara Méndez, who had been detained at Automotives Orletti and subsequently transferred to the SID headquarters in Montevideo, and who was able to provide them with the information necessary to reconstruct what had happened to María

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115 *Cf.* Statement rendered by María Macarena Gelman during the public hearing, and Statement of Juan Gelman during the public hearing.

116 *Cf.* Statement of María Macarena Gelman before the Inter-American Commission, evidence, folio 245.

117 *Cf.* Baptisim certificate of María Macarena Tauriño Vivian, issued on December 17, 1999, evidence, folios 243 and 3310, and birth cerficate No. 1568, evidence, folios 3311 and 3714.

Claudia García. [118]

109. As a result of information, Juan Gelman and his spouse, who resided in Mexico, traveled continuously to Buenos Aires and Montevideo to interview various persons who had been detained and taken to locations where María Claudia García had been held captive. He also interviewed some current and former government officials who agreed to provide fragmented versions of what had happened. [119]

110. Towards the end of November 1999, a neighbor couple from Montevideo contacted Juan Gelman to tell him about a two-month old baby girl who had appeared on the doorstep of the police officer, Ángel Julián Tauriño, an event that at the time had caused an uproar in the neighborhood because it was well-known that Ángel Tauriño and his wife could not have children, something they fervently longed for. [120]

111. Given the circumstances, and in order to contact the girl they knew was their granddaughter, Juan Gelman requested the help of the Bishop of San Jose, Monsignor Pablo Galimberti in late January 2000, who in turn, contacted Mrs. Vivián Tauriño and explained the situation to her. Mrs. Vivián Tauriño's husband, Ángel Julián Tauriño, Chief of Police of San Jose, had died in October 1999. [121]

112. As a result of her conversation with Galimberti, Mrs. Vivián de Tauriño revealed to María Macarena Tauriño how she had come to form part of the family. [122]

113. On March 31, 2000, María Macarena Tauriño met her paternal grandfather, Juan Gelman, for the first time, and learned about the events surrounding the disappearance of her biological parents. [123]

114. As a result of the mentioned facts, María Macarena Tauriño agreed to a DNA test that same year, to determine the possible kinship with the Gelman family, which resulted

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[118] *Cf*. Testimony of Mara La Madrid, rendered before a notary public ib March 13, 2003, evidence, folio 3658 and ss.

[119] *Cf*. Declaration rendered by Juan Gelman during the public hearing, and Testimony of Mara La Madrid, *supra* note 118, evidence, folios 3360 and ss.

[120] *Cf*. Declaration rendered by Juan Gelman during the public hearing, and Testimony of Mara La Madrid, *supra* note 118, evidence, folio 3677.

[121] *Cf*. Declaration rendered by Juan Gelman during the public hearing, and Testimony of Mara La Madrid, *supra* note 118, evidence, folios 3380.

[122] *Cf*. Statement rendered by María Macarena Gelman during the public hearing. Regarding this fact, Juan Gelman stated that he interpreted it as an "act of love." In this regard, *Cf*. Declaration rendered by Juan Gelman during the public hearing.

[123] *Cf.* Complaint original presented by María Macarena Gelman and Juan Gelmanante of the Inter-American Commission, evidence, folios 98 and 150; additional comments on the merits presented by the representatives of María Macarena Gelman and Juan Gelman during the proceeding before the Commission, , evidence, folio 1916, and Mauricio Rodríguez: "The Gelman Case. Journalism and human rights" (ediciones Cruz del Sur, Uruguay, 2006), evidence, folios 2989 and 3002.

in a 99.998% positive identification.[124]

115. Subsequently, María Macarena Tauriño Vivián brought a motion to reclaim legitimate parentage before the 17º Family Court in Montevideo, and on March 8, 2005, the Court ordered the nullification of her birth certificate, wherein it stated that she was the legitimate child of Angel Tauriño Rodríguez and Esmeralda Vivián, and issued her one registering her as the legitimate daughter of Marcelo Ariel Gelman and María Claudia García Iruretagoyena, born in Montevideo on November 1, 1976, paternal granddaughter of Juan Gelman Burichson and Berta Schubaroof, both Argentine citizens, and maternal granddaughter of Juan Antonio García Iruretagoyena, a citizen of Spain, and María Eugenia Cassinelli, an Argentine citizen, respectively. [125]

116. Thereafter, María Macarena decided to go ahead and amend all pertinent documents and civil registries to reflect her name change from María Macarena Tauriño to María Macarena Gelman Garcia Iruretagoyena.[126]

C. The abduction and suppression of the identity of the girl Maria Macarena Gelman as a form of enforced disappearance

117. Given that this concerns the daughter of a disappeared woman, abducted a few days after being born in captivity, and subsequently withheld and separated from her mother just a few weeks after being born, and her identity being suppressed upon being handed over to a family that was not her own, beyond what alleged by the Commission and the representatives, the Court will analyze the legal qualification of the case. [127]

118. The facts of the case reveal that the personal integrity of María Macarena Gelman García could have been affected by the circumstances around her birth and her first weeks of life. [128] Nevertheless, it is clear that the infringement of María Macarena

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124 *Cf.* Final Judgment of First Instance of March 8, 2005. Family Court of 17th Round, in captioned orders "Tauriño Vivian María Macarena V. Vivian Esmeralda- Gelman Burichson Juan- Schubaroff Berta- García Iruretagoyena Juan A. Civil Status Actions," evidence, folios 363, 373 and 374.

125 *Cf.* Final Judgment of First Instance of March 8, 2005, *supra* note 124, evidence, folios 362 to 381.

126 *Cf.* Statement rendered by María Macarena Gelman during the public hearing; Statement of María Macarena Gelman before the Inter-American Commission, evidence, folio 246.

127 In the *Case of The Dos Erres Massacre V. Guatemala*, The Court noted "the special gravity of being able to attribute to a State Party to the Convention the charge of having applied or tolerated within its territory a systematic practice of abductions and illegal retention of minors", but the facts were not considered enforced disappearance. *Case of The Dos Erres Massacre V. Guatemala*. *Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 24, 2009. Series C No. 211, paras. 177 and 199.

128 Scientific evidence shows that diet, stress, physical and psychological stress experienced by the mother during pregnancy has systemic effects that affect children [...] that can even alter the childs

Gelman García's right to psychological integrity occurred from the moment she discovered her true identity, that is, that the violation to her psychological and moral integrity is a consequence of both the enforced disappearance of her mother Maria Claudia Gelman and of the violation of her right to know the truth about her own identity, saying, that the violation of her mental and integrity is a consequence the enforced disappearance of her mother and having found out the circumstances around the death of her biological father, as well as the violation of her right to know the truth of her own identity, of the lack of effective investigations to ascertain the facts and the whereabouts of Maria Claudia Garcia and, in general, of the impunity that remains in the case, that which has generated feelings of frustration, helplessness, and anguish.

119. Along those lines, Ms. María Macarena Gelman stated before the Court, how this serious infringement in her life circumstances has affected her life plan since the moment she became aware of her true identity when she was almost 24 years old. From that time on, after claiming her legal relationship before the Uruguayan judicial system and registering herself as the legitimate daughter of Marcelo Gelman and María Claudia García, she then started investigating her true origins and the circumstances surrounding her mother's disappearance. She expressed that since that time, she "ha[s] dedicated my life to this endeavor," and "the search has absorbed [her]," she started "losing motivation and ha[s] not been able to enjoy any more, as [she] is always on guard and thinking that more can happen again," stating that her "life plan does not go beyond a month, traveling between Montevideo and Buenos Aires." She concluded that "currently [her] life is not much more than that."[129] In this regard, Ms. Deutsch, an expert witness, noted that "she has been affected at the most intimate level of her being: her identity," given that in finding out what had occurred, "her inner world crumbled." The expert witness stated that Maria Macarena Gelman "presents symptoms that disrupt her life, keeping her from taking over the planning for her future, and cause her pain." [130]

120. The foregoing reveals that the abduction of children by State agents in order for them to be illegitimately delivered and raised by another family, modifying their identity and without informing their biological family about their whereabouts, as demonstrated in the case, constitutes a complex act that involves a series of illegal actions and violations of rights to conceal the facts and impede the restoration of the relationship of the minors of age and their family members.

121. In the first place, as a child, Maria Macarena Gelman, had the right to special measures of protection, which under Article 19 of the Convention corresponds to the family, society, and the State. Therefore, the rights recognized in Articles 3, 17, 18, and 20 of the Convention should be interpreted, in consideration of the *corpus juris* of the

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subsequent physical development. *Cf.* National Commission onPolitical Detention and Torture, *supra* note 23, Ch. V, page 255.

[129] *Cf*. Statement rendered by María Macarena Gelman during the public hearing.

[130] *Cf*. Expert Report of Ana Deutsch rendered before a notary public on November 17, 2010, evidence, folio 5130.

rights of the child[131] and, in particular, in the specific circumstances of the present case, in harmony with the other provisions that affect children, particularly Articles 7, 8, 9, 11, 16, and 18 of the Convention on the Rights of the Child.

122. In this manner, the referred situation affected what has been named the right to identity, although it is right that is not found expressly established in the Convention, it is possible to determine it on the basis of that provided in Article 8 of the Convention on the Rights of the Child, which established that said right encompasses the right to nationality, to a name, and to family relationships. Likewise, it can be conceptualized as the collection of attributes and characteristics that allow for the individualization of the person in a society, and, in that sense, encompasses a number of other rights according to the subject it treats and the circumstances of the case. [132]

123. In accordance, the General Assembly of the Organization of American States (hereinafter "the OAS") indicated "that the recognition of the identity of persons is one of the means through which observance of the rights to juridical personality, a name, nationality, civil registration, and family relationships is facilitated, among other rights recognized in international instruments, such as the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights." [133] Likewise, it established "that failure to recognize one's identity can mean that a person has no legal proof of his or her existence, which makes it difficult to fully exercise his or her civil,

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131 *Cf*. Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17 of August 28, 2002. Series A No. 17, para. 24. See also: IACHR, Report: The children and their rights in the Inter-American Human Rights Protection, Second Edition, OEA / Ser. Doc L/V/II.133 34, Washington, October 29, 2008, paras. 43 and 44.

132 The right to identity is under the national laws of several American States, such as the Code of Children and Adolescents in Uruguay which establishes the right to identity as one of the essential rights of children. It has also been recognized by international law in some states, such as:

a. The cases of the Colombian Constitutional Court, in the sense that "personal identity is a right of a broad sense, encompassing other rights [... and] is a set of attributes, qualities, both biological and those that precisely allow the identification of a subject in society "(in this Regard, see Judgement of guardianship T-477/1995 of October 23, 1995) and

b. the Constitutional Tribunal of Peru, noting that "everyone has the right to identity, a right that encompasses both the right to a name, to know ones parents and keep their last names, related to having a nationality and the requirement of State recognition before the law "(in This Regard, see, Second Chamber, Judgement of Constitutional tort remedy of July 25, 2005).

133 *Cf*. OAS "Inter-American Program for Universal Civil Registry and 'Right to Identity,'" resolution AG / RES. 2286 (XXXVII O/07) of June 5, 2007, resolution AG / RES. 2362 (XXXVIII-O/08) of 3 June 2008, and resolution AG / RES. 2602 (XL-O/10) on follow-upprogram, June 8, 2010. On this aspecto, the Inter-American Juridical Committee considered that the American Convention on Human Rights, although not for the right to express identity under that name, does include, as we have seen, the right to name, the right to nationality and the law on the protection of the family. In this Regard, *Cf*. Inter-American Juridical. Committee, Opinion "on the scope of the right to identity", resolution CJI / doc. 276/07 rev. 1,August 10, 2007, paras. 11.2 and 18.3.3, ratified by resolution CJI/RES.137 (LXXI-O/07) of August 10, 2010.

political, economic, social, and cultural rights." [134] In the same sense, the Inter-American Juridical Committee expressed that the right to identity is consubstantial to the attributes and human dignity. Consequently, it is an enforceable basic human right *erga omnes* as an expression of a collective interest of the overall international community that does not admit derogation or suspension in cases provided in the American Convention on Human Rights. [135]

124. In relation to the illicit abduction and appropriation of children, Argentine jurisprudence determined that it affected the right to identity of the victims every time that the children's civil status had been changed and there had been an attribution of birth information that hindered knowing the true identity, eliminating any indication of the true origin and preventing contact with the true family members. [136] In this same sense, the Federal Chamber of Appeals of La Plata,[137] in relation to the identity of children abducted in Argentina, and citing a minority opinion of the Federal Chamber of Appeals of La Plata, stated that "[t]he social recognition of the prevailing right of the family to educate the children they biologically bring to life, is based on the fact that entails a strong scientific basis, which is a genetic inheritance from accumulated cultural experiences by the previous generations," adding that "the personality is not formed, then, in a process only determined through the transmission of attitudes and values by the parents and other members of the family group, but also by the hereditary dispositions of the person, whereupon the normal way of formation of the identity is a result of the biological family," concluding that "the right of the child is, primarily, the right to acquire and develop an identity, and, consequently, to the acceptance and integration by the family nucleus to which the child is born into." [138]

125. On the other hand, the right to protection of the family and to live within it, recognized in Article 17 of the Convention implies that, the State must not only offer and directly execute measures for the protection of children, but that it also must favor, in the broadest sense, the development and strengthening of the family nucleus.[139] Thus, the

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134 *Cf.* OEA, Resoluciones AG/RES. 2286 (XXXVII-O/07); 2362 (XXXVIII-O/08), and 2602 (XL-O/10), *supra* note 133.

135 *Cf.* Inter-American Juridical Committee, Opinion, *supra* note 133, para. 12.

136 *Cf.* Oral Tribunal on Federal Criminal Matters No. 6 of the Federal Capital de Argentina, captioned orders "REI, Víctor Enrique s/abductionof minors under 10 years of age", *supra* note 55.

137 *Cf.* Federal Appeals Chamber of La Plata, Argentina, Third Chamber, in captioned orders "C., O.O. s/infraction of articles 139 section 2° and 293 of the Penal Code," Claim No. 08.787, of December 9, 1988, minority vote of Judge Leopoldo Schiffrin.

138 *Cf.* Oral Tribunal on Federal Criminal Matters No. 6 of the Federal Capital of Argentina, captioned orders " Zaffaroni Islas, Mariana s/ av. circumstances surrounding the disappearance - FURCI, Miguel Ángel-González de FURCI, Adriana", Claim No. 403, on August 5, 1994, vote of Judge Mansur in the majority position.

139 *Cf.* Advisory Opinion OC-17, *supra* note 131, para. 66; *Case of of the Serrano Cruz Sisters V. El Salvador. Merits, Reparations and Costs*. Judgment of March 01, 2005. Series C No. 120, para. 141, and *Case of Chitay Nech, supra* note 63, para. 157.

separation of children from their family constitutes, under certain conditions, a violation of the mentioned right, [140] since even the legal separations of a child from his or her family can proceed only if they are duly justified as being in the best interest of the child, and are under exception, and where possible, temporary. [141]

126. Specifically in the early childhood years of María Macarena Gelman, there was an illegal interference by the State in her biological family, which violated the right to protection of the family, by making it impossible or difficult for her to stay with her family nucleus and to establish a relationship with them. The State had knowledge of the existence of María Macarena Gelman and her situation, but until the year 2000, it failed to take any step to guarantee her right to family.

127. As regards the right to a name, recognized in Article 18 of the Convention, and also established in various other international instruments, [142] the Court has established that it constitutes a basic and essential element of the identity of every person, without which an individual cannot be recognized by society or registered before the State. [143] The first and last name are "essential to formally establish the link between the different family members." [144] This right implies, therefore, that States must ensure that the person is registered under the name chosen by his or her parents, at the time of registration, without any restriction on the right or interference with the decision to choose a name and that once the person is registered, that it be possible to preserve and reestablish this name and surname. In this case, María Macarena Gelman lived with a different name and identity for over 23 years. Her name change, as a means of suppressing her identity and keeping secret the enforced disappearance of her mother, was maintained until the year 2005, when the Uruguayan authorities recognized her affiliation and accepted her name change.

128. On the other hand, the right to nationality, enshrined in Article 20 of the Convention, forming a legal relationship between the person and the State and is, on the

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140 *Cf.* Advisory Opinion OC-17, *supra* note 131, paras. 71 and 72; and 72; *Case of The Dos Erres Massacre, supra* note 127, para. 187, and *Case of Chitay Nech et al., supra* note 63, para. 157.

141 *Cf.* Advisory Opinion OC-17, *supra* note 131, para. 77.

142 *Cf.* among others, the International Covenant on Civil and Political Rights, Article 24.2; Convention on the Rights of the Child, Article 7(1); *African Charter on the Rights and Welfare of the Child*, Article 6(1), and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 29. The European Court of Human Rights affirmed that the right to a name is protected by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, eventhough it is not specifically mentioned, *Cf.* T.E.D.H., *Stjerna v. Finland*, Application No. 18131/91, Judgment of 25 November 1994, para. 37, and T.E.D.H., *Case of Burghartz v. Switzerland*, Application No. 16213/90 Judgment of 22 February 1994, para. 24.

143 *Cf. Case of of the Yean and Bosico girls V. Dominican Republic*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 8, 2005. Series C No. 130, para. 182, and *Case of The Dos Erres Massacre, supra* note 127, para. 192.

144 *Cf. Case of of the Yean and Bosico girls, supra* note 143, para. 184, and *Case of The Dos Erres Massacre, supra* note 127, para. 192.

one hand, a prerequisite to be able to exercise specific rights, [145] and on the other hand, a right of non-extendible nature recognized in the American Convention, [146] as well as in other international instruments. It therefore involves the obligation of the State to establish a relationship, both to provide the individual with legal protection in its relationships and to protect the individual from the arbitrary deprivation of nationality, and therefore, of all the political rights and those civil rights that it entails. [147] It also imports, when children are involved, the obligation to consider the specific protection that is involved, for example, that they not be arbitrarily denied a family medium[148] and that they not be retained and illicitly transferred to another State. [149] In the present case, illegal transfer of Maria Macarena Gelman's her mother to another State in her state of pregnancy with the mentioned purpose (*supra* para. 97), prevented the birth of the girl in the mothers country of origin where she normally would have been born and acquired Uruguayan nationality because of an arbitrary situation, in violation of the right recognized in Article 20(3) of the Convention.

129. In this case, the facts affected the right to personal liberty given that, in addition to the fact that the girl was born in captivity, her physical retention by State agents, without the consent of her parents, implied an infringement to her liberty, in the broadest terms of Article 7(1) of the Convention. While children are subject to human rights, this right implies the possibility of all human beings to self-determination and to freely choose the circumstances and options regarding their existence. In the case of children, they exercise this right in a progressive manner in the sense that the minor of age develops a greater level of personal autonomy with time,[150] to which in their infancy they carry this out by way of their next of kin. Thus, the separation of a child from his or her next of kin implies, necessarily, a threat to the exercise of the child's liberty.

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145 *Cf. Case of of the Yean and Bosico girls*, *supra* note 143, para. 137.

146 *Cf. Case of of the Yean and Bosico girls*, *supra* note 143, para. 136. In this regard, the Court recognized not subject to suspension as a a non-derrogable nucleus of rights. *Cf. Case of the Pueblo Bello Massacre V. Colombia*. *Merits, Reparations and Costs*. Judgment of January 31, 2006. Series C No. 140, para. 119, and *Case of González et al.s ("Campo Algodonero")*, *supra* note 79, para. 244. The Court recalls that its jurisprudence considers the right to a nationality as not subject to suspension. In this regard, *Cf. El Hábeas Corpus Bajo Suspensión de Garantías (arts. 27.2, 25.1 and 7.6 American Convention on Human Rights)*. Advisory Opinion OC-8 of January 30, 1987. Series A No. 8, para. 23.

147 *Cf. Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*. Advisory Opinion OC-4 of January 19, 1984. Series A No. 4, para. 34; *Case of Castillo Petruzzi et al. V. Perú*. *Merits, Reparations and Costs*. Judgment of May 30, 1999. Series C No. 52, para. 100, and *Case of of the Yean and Bosico girls*, *supra* note 143, para. 139.

148 Convention on the Rights of the Child, Article 16.

149 Convention on the Rights of the Child, Article 11, and Inter-American Convention on International Return of Childrend, Article 4º.

150 *Cf.* See Committee on the Rights of the Child. General Comment 7: Implementing child rights in early childhood, 40 session, UN DocCRC/C/GC/7/Rev.1, September 20, 2006. para. 17.

130. The proven facts also affected the right to life, enshrined in Article 4(1) of the Convention, to the detriment of Maria Macarena Gelman, in the extent that, due to said separation, her survival and development was placed at risk, that which the State was obligated to ensure, pursuant to the provisions of Article 19 of the Convention and Article 6 of the Convention on the Rights of the Child, particularly through the protection of the family and the non-interference of an unlawful or arbitrary nature in the family life of the children, given that family plays an essential role in their development. [151]

131. The situation of a child whose family identity has been illegally altered and caused by the enforced disappearance of a parent, as is the case concerning María Macarena Gelman, ceases only when the truth about said identity is revealed by any medium and the victim is guaranteed the factual and juridical means to recover a true identity and, where appropriate, a family relationship, with the relevant legal effects to follow. As such, the State did not guarantee her right to juridical personality, in violation of Article 3 of the Convention.

132. In recognition of the foregoing, the abduction and suppression of the identity of María Macarena Gelman García as a consequence of the detention and subsequent transfer of her pregnant mother to another State can be qualified as a particular form of enforced disappearance of persons, for having the same purpose or effect, upon leaving her clueless due to the lack of information regarding the fate or whereabouts or the denial of acknowledgment, in the terms of the mentioned Inter-American Convention. This is consistent with the concept and the constituent elements of enforced disappearance already addressed (*supra* paras. 64 to 78), amongst these, the definition contained in the International Convention for the Protection of all Persons from Enforced Disappearance from 2007 which in its Article 2 refers to "and other form of deprivation of liberty." Furthermore, this situation is anticipated in Article 25 of this International Convention,[152] and it has been recognized by various international bodies on human rights protection. [153]

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[151] *Cf.* Advisory Opinion OC-17, *supra* note 131, paras. 66 and 71. In the same sense, Article 16 of the Additional Protocol to the Convention on the American Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" provides that "[e]very minor child has the right to grow under protection and responsibility of their parents, save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother."

[152] International Convention for the Protection of All Persons Against Enforced Disappearance, Article 25:

1. Each State Party shall take the necessary measures to prevent and punish under its criminal law:

(*a*) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance.

[153] *Cf.* Report of the Working Group on Enforced or Involuntary Disappearance on its Mission to El Salvador, Human Rights Council 7th period of sessions, U.N. Doc. A/HRC/7/2/Add.2, of October 26, 2007, para. 23: "[o]ne phenomenon that occurred during the armed conflict in El Salvador was the enforced disappearance of children. According to the sources consulted, the phenomenon was part of a deliberate strategy within the violence institutionalized by the State during the period of conflict.According to those sources, the children were abducted during the execution of military operations after which their families

In the case of Uruguay, its domestic provisions recognize abducted children as victims of enforced disappearances. [154]

D. Violation of the rights to family and humane treatment [personal integrity] to the detriment of Mr. Juan Gelman.

133. The facts also affected Juan Gelman's right to personal integrity, in particular, the right to respect his psychological integrity enshrined in Article 5(1) of the Convention, given that the next of kin of the victims of human rights violations may be, in turn, victims, [155] and in cases that involve the enforced disappearance of persons, it is possible to understand that the violation of the right to psychological and moral integrity of the family of the victim is a direct consequence of this phenomenon, causing them severe pain as a consequence of the act itself, that which is heightened, among other factors, by the continued refusal of State authorities to provide information about the whereabouts of

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were executed or forced to flee to save their lives. Children were frequently taken away by military chiefs who brought them up as their own Children"; Report of the Working Group on Enforced or Involuntary Disappearance in its Mission to Argentina, Human Rights Council, 10° period of sessions, U.N. Doc. A/HRC/10/9/Add.1, of December 29, 2008, para. 10: "A specific phenomenon that occured[...] during the military dictatorship [...] was the enforced disappearance of children, and of childrenborn in captivity. Children were abducted, stripped of their identity and taken from their families. There was also frequent abduction of children by military leaders who included the children in their families," and Report of the Working Group on Enforced or Involuntary Disappearance, Human Rights Council, 10° period of sessions, U.N. Doc. A/HRC/10/9, of February 25, 2009, para. 456: "children are also victims of disappearances, both directly and indirectly." The disappearance of a child, the wrongful removal and the loss of a parent due to their disappearance are serious violations of children's rights." On the recognition of the phenomenon of enforced disappearance of children in situations of armed conflict or military dictatorships, see Committee on the Rights of the Child, Consideration of Reports submitted by States parties under Article 44 of the Convention in respect of: Argentina, 31° period of sessions, U.N. Doc. CRC/C/15/Add.187, of October 9, 2002, paras. 34 and 35; El salvador, 36° period of sessions, U.N. Doc. CRC/C/15/Add.232, of June 30, 2004, paras. 31 and 32; El Salvador, 53° period of sessions, U.N. Doc. CRC/C/SLV/CO/3-4, of February 17, 2010, paras. 37 and 38, and Guatemala, 55° period of sessions, U.N. Doc. CRC/C/GTM/CO/3-4, of October 25, 2010, para. 87. Finally, see also Human Rights Commission of the United Nations, *Issue of enforced or involuntary disappearance*, resolutions: 53ª sessions, U.N. Doc. E/CN.4/RES/1995/38, of March 3, 1995, para. 23; 57ª session, U.N. Doc. E/CN.4/RES/1997/26, of April 11, 1997, para. 2.d; 51ª session, U.N. Doc. E/CN.4/RES/1998/40, of April 17, 1998, para. 2.d; 55ª session, U.N. Doc. E/CN.4/RES/1999/38, of April 26, 1999, para. 2.d; 60ª session, U.N. Doc. E/CN.4/RES/2000/37, of April 20, 2000, para. 2.d, and 51ª session, U.N. Doc. E/CN.4/RES/2002/41, of April 23, 2002, para. 2.d.

[154] *Cf.* Law 18,596 on the recognition and redress to victims of unlawful state action between June 13, 1968 and February 28, 1985, whose Article 9, section G, recognizes "the victim status and institutional responsibility of the [State] for having affected the human dignity of those who had [...] [been] born during the imprisonment of his or her mother, or who children who have been disappeared," supra note 8, pages 5006 and 5007, and Resolution of the President of the Republic No. 858/2000, supra note 23, which highlights the need to "take steps possible to determine the status of the Detained Disappeared Persons in the de facto regime, as well as children disappeared under the same conditions," page 277.

[155] *Cf. Case of Castillo Páez V. Perú. Merits.* Judgment of November 3, 1997. Series C No. 34, Punto Resolutivo cuarto; *Case of Ibsen Cárdenas and Ibsen Peña*, *supra* note 9, para. 126, and Case of *Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* note 16, para. 235.

the victim or to initiate an effective investigation to ascertain that which occurred.[156] Moreover, the deprivation of access to the truth regarding the whereabouts of a disappeared person constitutes a form of cruel and inhumane treatment to the close relatives[157] and which entails harm to the psychological and moral integrity of the direct next of kin of the victims of certain human rights violations. [158]

134. The violation of the right to personal integrity in the case of Juan Gelman is also apparent, due to the consequences he suffered because of the facts of the case and to the search for justice. In his testimony before the Court, Mr. Juan Gelman stated that not knowing the truth of what occurred to María Claudia affected him deeply; and that besides the fact that he was deprived of the lives of his son and of his daughter in law, he was also deprived of 23 years of his granddaughter's life, whom he did not see grow up, take her first steps, nor hear her say the words "grandpa", to which, all of the above, created a feeling of emptiness, which he, as well as Macarena, are both trying to overcome and surpass looking forward towards the future, as they face the impossibility of recreating the past. Expert witness Deutsch pointed out that Juan Gelman can speak about the facts, but that it is difficult to express his feelings as a "matter of double modesty: personal, and also for not (emotionally) carrying the other one." Besides imagining the last moments of Marcelo and Maria Claudia's lives, he faced some obstacles to get her granddaughter's search going, due to an inability to focus, and he has chosen not to verbally express his pain opting to find solace in writing his poems.

135. The facts of the case reveal the serious interference by the State in the family of Mr. Gelman, which violated the right to protection of the family, by making it impossible or difficult for him to be with his family and reestablish a relationship with it. His search for justice is paradigmatic in these kinds of situations of enforced disappearance, and it is first and foremost thanks to his own actions that the facts of this case have been revealed.

136. Finally, in relation with Article 11 of the Convention, the Tribunal considers that the Commission and the representatives have not provided clear and different arguments than those argued regarding the alleged violations of the rights analyzed and that head to the judicial content of this norm. In any case, the Court deems that it is not fit to analyze the facts of the present case under the Article 11 of the Convention.

E. Conclusion

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156 *Cf Case of Blake V. Guatemala. Merits.* Judgment of January 24, 1998. Series C No. 36, para. 114; *Case of Ibsen Cárdenas and Ibsen Peña*, *supra* note 9, para. 126, and Case of *Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* note 16, para. 241.

157 *Cf. Case of Trujillo Oroza*, *supra* note 12, para. 114; *Case of Ibsen Cárdenas and Ibsen Peña*, *supra* note 9, para. 130, and Case of *Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* note 16, para. 240.

158 *Cf. Case of Valle Jaramillo et al. V. Colombia. Merits, Reparations and Costs. Judgment of* November 27, 2008. Series C No. 192, para. 119; *Case of Ibsen Cárdenas and Ibsen Peña*, *supra* note 9, para. 127, and Case of *Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* note 16, para. 235.

137. The Court declares that the State is responsible for having violated, from the birth of María Macarena Gelman García until the moment that she recovered her true and legitimate identity, the right to juridical personality, to life, to personal integrity, to personal liberty, to family, to a name, to the rights of the child, and to nationality, recognized in Articles 3, 4, 5, 7, 17, 18, 19, and 20(3) of the Convention, in relation to Articles 1(1) therein, and I and XI of the Inter-American Convention on the Forced Disappearance of Persons, to her detriment.

138. Moreover, the State is responsible for the violation of the rights to personal integrity and family, recognized in Articles 5 and 17 of the American Convention, in relation to Article 1(1), to the detriment of Mr. Juan Gelman.

VI.3
RIGHT TO A FAIR TRIAL [JUDICIAL GUARANTEES] AND JUDICIAL PROTECTION IN RELATION WITH THE OBLIGATION TO RESPECT RIGHTS, THE DUTY TO ADOPT DOMESTIC LEGAL EFFECTS, AND OBLIGATIONS TO INVESTIGATE OF THE AMERICAN CONVENTION AND THE INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCES OF PERSONS.

139. In the present section, the Tribunal will examine the allegations referring to the right to access justice and the obligation to realize effective investigations in accordance with the characterization of the facts, under the established in Articles 1(1), 2, 8(1), and 25 of the Convention, and I and XI of the Inter-American Convention on Forced Disappearances of Persons.

A. Arguments and claims of the parties.

140. The Commission argued that:

a. there is sufficient evidence in this case to "reasonably assert that the death of María Claudia García Gelman at the hands of State officials whom had her in custody in the context of a State policy that targeted sectors of the civilian population was a crime against humanity," and thus, not subject to amnesty;

b. the Expiry Law prevented the victim's next of kin from being heard by a judge, violating the right to judicial protection. Said law also prevented the investigation, arrest, prosecution, and conviction of those responsible for the acts against María Claudia García Gelman and obstructed the clarification of her fate and whereabouts;

c. the approval of the Expiry Law after the date of Uruguay's ratification of the American Convention means that the State failed to comply with its obligation to adopt domestic legal effects as mandated by Article 2. That the law has not been applied by the Uruguayan courts in several cases is a significant development, but it does not sufficiently meet the requirements of Article 2 of the Convention;

d. not only did Uruguay "fail to repeal the Expiry Law or render it ineffective, it also did not provide a remedy allowing for the reopening of judicial proceedings that have been closed pursuant to the Expiry Law." Similarly, the October 19, 2005 decision of the Court of Appeals of Uruguay that prevented the reopening of the investigation of Maria Claudia Garcia's enforced disappearance should be subject to a judicial remedy providing for the reopening of a decision deemed to be *res judicata* when crimes against humanity are involved;

e. when the abovementioned Court of Appeals affirmed the application of the Expiry Law in October of 2005, Uruguay was already party to the Rome Statute, which identifies enforced disappearances as a crime against humanity;

f. in light of the general obligations established in Articles 1(1) and 2 of the American Convention, Uruguay violated Articles 8 and 25 of the Convention since April 19, 1985, for failing to adopt the necessary measures to protect Juan Gelman and María Macarena's rights to judicial protection and to simple and effective recourse;

g. Uruguay undertook additional obligations in regard to due process and the judicial protection of victims when it ratified the Inter-American Convention on the Forced Disappearance of Persons on April of 1996 and the Inter-American Convention to Prevent and Punish Torture on November 10, 1992. Given that the acts perpetrated against María Claudia constituted "cruel and inhumane treatment tantamount to torture," the State is responsible for the violation of Articles 1, 6, 8, and 11 of the Inter-American Convention to Prevent and Punish Torture; and,

h. the State should have criminalized the act of enforced disappearance, but it did not do so until 2006. Consequently, the State violated Articles I(b), III, IV, and V of the Inter-American Convention on the Forced Disappearance of Persons for its delay in criminalizing the act of enforced disappearance and for failing to thoroughly investigate the fate of María Claudia García.

141. The representatives alleged that:

a. suggested an analysis of the elements of to establish a reasonable period of time to argue that the involvement of State officials and the impunity that has prevailed for years due to the Expiry Law in effect, as well as the military secret that continues to operate to date with a certain tolerance from the State, do not justify its failure to investigate or delay in doing so, rather, they increase the State's responsibility;
b. all the preliminary investigations regarding the disappearance of María Claudia García Iruretagoyena and Macarena Gelman García's birth in captivity, as well as the suppression of her identity, were the result of Juan Gelman's tireless and private efforts, who tried to investigate the facts, "unsuccessfully, for over eight years." Moreover, since the investigation was reopened in 2008, most of the evidence submitted to the court has been made available by means of the personal efforts and investigations carried out by the relatives.;

c. by permitting Law No. 15.848 to remain in force and by protecting those who have direct knowledge of the facts under a "military secret" claim, as well as neglecting to investigate the facts, Uruguay violated Articles 8 and 25 of the Convention because, for years, it failed to provide access to judicial remedy for crimes against humanity;

d. the State's did not exercise due diligence on various occasions, such as: the repeated efforts by the Public Prosecutor's Office to file the case within the scope of the Expiry Law; the judge and prosecutors' lack of attention to Macarena Gelman's requests in February of 2008 to the Court of First Instance on Criminal Matters of Second Round to process the pending evidence; the lack of lines of investigation into testimonial statements in other criminal courts and witnesses in the present case; and the failure to summon public and military officials who might have relevant information;

e. no information has been gathered to establish the location and circumstances of the birth of María Macarena Gelman, nor has there been any investigation in relation to the medical staff that worked at the place where she was allegedly born;

f. the Expiry Law grants the Executive Branch jurisdiction to decide whether a case falls within the scope of said law, and consequently, allows the Executive Branch to close a case or to archive the records, making it impossible to prosecute those responsible for committing crimes against humanity;

g. the criminal justice system in effect in Uruguay essentially recognizes no right to the victims, which in the present case, impeded Juan Gelman from appealing the December 2003 and October 2005 decisions on file, in violation of Article 8(1) of the Convention; and,

h. lastly, affirmed that the State violated the victims' right to know the truth regarding the events, having withheld information relevant to the case and failing to provide the mechanisms necessary to do so, which is evidenced, in their opinion, by the fact that the Commission for Peace's Report did not provide much more information than what Juan and Macarena Gelman found out on their own; in the limits that the State itself placed on access to information to prepare the report "Historical Investigation on the Disappeared"; and on the fact that State officials, in all levels of government and even in democracy, concealed information in their possession regarding the facts, concluding that the right to truth "is covered jointly by Articles 1(1), 8, 13, and 25" of the Convention and in violation occurred to the detriment of Juan and Macarena Gelman and "society as a whole," and

i. the State obligation to identify those responsible is reinforced by the provision in the Inter-American Convention on Forced Disappearance of Persons, in light of the facts being considered crimes against humanity.

142. Although the State did not refer specifically to the arguments of the Commission and the representatives regarding the obligation to investigate the facts, in addition to its recognition of responsibility (*supra* paras. 19 to 22), it referred to the following:

a) that upon Uruguay's return to democracy, the State proceeded to adapt its conduct to the rule of law, as set out, *inter alia*, by the American Convention of Human Rights, though this "does not negate that […] María Macarena Gelman was found in 2000 and that the whereabouts of the remains of […] María Claudia García is still a pending issue for the State of Uruguay";

b) that the Commission for Peace was created by Presidential Resolution No. 858/2000 dated August 9, 2000. On April 10, 2003, the Commission for Peace submitted its Final Report where it presented its findings, including, among the analyzed cases, the case of María Claudia García Iruretagoyena;

c) President Tabaré Vásquez's inaugural speech on March 1, 2005, declaring that the enforced disappearance cases submitted for consideration to the Executive Branch resulting from that provided for in the Expiry Law, are "excluded from said law";

d) a Presidential Order, dated June 23, 2005, informing the Judicial Branch that the case at hand was excluded from the Expiry Law;

e) without denying that "initially, the Executive Branch in power at the time, determined that Juan Gelman's complaint fell within the scope of the Expiry Law," recently, the case was reeponed by judicial decree of August 4, 2008, by Maria Macarena Gelman, who presented supervening evidence in this regard, and currently, the case is at the Second Criminal Court;

f) the shift in the jurisprudence of the Supreme Court of Uruguay was evinced in Judgment No. 365, which was rendered on October 19, 2009 in the case of *"Sabalsagaray Curuchet, Blanca Stela, Charge, Unconstitutionality of Articles 1, 3 and 4 of Law No. 15.848,"* which unanimously, declared the referenced provisions inapplicable and reasoned that while the ruling applies to the "specific case at hand, pursuant to the system of unconstitutional laws provided for in the Uruguayan Constitution, it is reasonable to expect that this law will govern in future similar cases," since "the Supreme Court of Justice, a body of original and exclusive jurisdiction to rule on the matter in conformity with Article 257 of the Constitution, may, […] issue an advance ruling in similar cases";

g) the Legislative Branch's tender of various projects intended to repeal the Expiry Law;

h) similar to the efforts of the courts, the Executive Branch continues conducting investigations to clarify the abovementioned facts relating to the human rights violations that occurred between 1973 and 1985, including those relating to María Claudia García Iruretagoyena, investigations which shall continue until the whereabouts of the persons disappeared during said period are known. In addition to the existing mechanisms, there is a project to "[d]evelop a protocol for the collection and identification of the remains of disappeared persons";

i) the Presidency created, in March 2005, a Working Group to conduct archeological investigations regarding the collection and identification of disappeared persons and said group is collaborating with various military units in performing its task; based on the evidence adduced, it appears that these investigations will continue;

j) the Minister of Foreign Affairs drafted a bill that will soon be submitted to the Legislature. The bill proposes to annul Articles 1, 2, 3, and 4 of the Expiry Law as well as to consider the statute of limitations interrupted in admitted cases, during the period of said law; and,

k) similarly, the Legislative Branch has presented various projects aimed at leaving the above-referenced Expiry Law without legal effect, and on October 20, 2010, the House of Representatives approved an amendment which eliminates the effects of said law; the amendment is currently being discussed by the Senate of the Republic.

B. Facts regarding the investigation carried out by the State

143. Considering that, together with the aforementioned facts, which have been

adequately proven (*supra* paras. 44 to 63, 79 to 90, and 106 to 116), provide an account of what happened to María Claudia García and María Macarena Gelman. However, there are other acts carried out by the State which, either directly or indirectly, relate to the actions taken to ascertain these situations. Pursuant to the reports of the Commission, the representatives, and the State, if it so corresponds, and the information on record. The Court notes that although in this context there are various references to Argentina, the present case was only presented in relation with Uruguay. Nonetheless, the representatives provided information concerning the investigations and claims initiated in Argentina in relation with the facts of the present case. [159]

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[159] These facts are:

a) On August 25, 1976, María Teresa Laura Moreira filed a complaint with the Argentine police and on September 12, 1977, Mr. Juan Antonio García Iruretagoyena filed a complaint Court of Instruction denouncing said facts.

b) On May 20, 1987, Nora Eva Gelman, who was detained at the same time as the Gelman García couple again denounced the kidnapping and illegal detention of María Claudia García Iruretagoyena and her husband

c.) In October of 2005, the Argentine government announced that it would seek the extradition of military officers involved in the disappearance of María Claudia García Iruretogoyena and the suppression of the identity of María Macarena Gelman García

d) On November 10, 2005, the Argentine government, through the Secretariat of Human Rights of the Ministry of Justice and Human Rights, filed a criminal complaint as part of the "Operation Condor Megacause" with Federal Court No. 7, Secretary No. 14. The complaint, titled "Videla Jorge Rafael, et al./Illegal Deprivation of Personal Liberty," investigates, among other things, the enforced disappearance of María Claudia García.

e) In the complaint, the Secretariat of Human Rights identifies the members of the Uruguayan Armed Forces who participated in the events and requested the extradition of José Ricardo Arab Fernández, Juan Manuel Cordero Piacentini, José Nino Gavazzo Pereira, Ricardo José Medina Blanco, León Tabaré Pérez Alegre, Ernesto Avelino Ramas Pereira, Juan Antonio Rodríguez Buratti, Jorge Alberto Silveira Quesada, and Gilberto Valentín Vásquez

f) Around May 2006, the Argentine government sent said requests to Uruguay.

g)Subsequently, the Uruguayan authorities, in compliance with existing extradition treaty between Argentina and Uruguay, ordered the detention of the military officers José Ricardo Arab Fernández, Juan Manuel Cordero Piacentini, José Nino Gavazzo Pereira, Ricardo José Medina Blanco, León Tabaré Pérez Alegre, Ernesto Avelino Ramas Pereira, Juan Antonio Rodríguez Buratti, Jorge Alberto Silveira Quesada, AND Gilberto Valentín Vásquez. Said detentions were carried out beginning on May 5, 2006.

h)On December 1, 2006, the Judge of the First Criminal Court of Uruguay, Juan Carlos Fernández Lecchini, ordered the extradition of Gilberto Valentín Vásquez, Ernesto Avelino Ramas Pereira, Jorge Alberto Silveira Quesada, Ricardo José Medina Blanco, Josí Nino Gavazzo Pereira, and José Ricardo Arab Fernández, under a series of conditions, including that they may be transferred to Argentina only after they complete their sentences resulting from the criminal proceedings instituted in Uruguay.

i)Around November of 2008, and pursuant to several appeals, the Uruguayan Supreme Court partially confirmed the ruling of Judge Lecchini, granting the extradition of four military officers and pending the decision of two appeals.

j)Manuel Cordero, identified as one of the perpetrators of the enforced disappearance of María Claudia García Iruretagoyena, had fled and was a fugitive in Brazil. He was extradited by Brazil to Argentina in the context of cause of action of Operation Condor and was prosecuted by the Argentinea justice system on February 9, 2010.

B.1 *Actions concerning the Expiry Law*

144. The Expiry Law was approved on December 22, 1986, by the Uruguayan Parliament.[160] The Expiry Law provides as follows:

> Article 1.- It is recognized that, as a consequence of the logic of events stemming from the agreement between the political parties and the Armed Forces signed in August 1984, and in order to complete the transition to full constitutional order, the State relinquishes the exercise of penal actions with respect to crimes committed until March 1, 1985, by military and police officials either for political reasons or in fulfillment of their functions and in obeying orders from superiors during the de facto period.
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> Article 2. - The abovementioned article does not cover:
> a) Judicial proceedings in which indictments have been issued at the time this law goes into effect;
> b) Crimes that may have been committed for personal economic gain or to benefit a third party;

[160] According to the Commisison in its application, when elections were called , held in November 1984, Julio María Sanguinetti was elected President of Uruguay during the November 1984 elections and was inagurated on March 1, 1985. Among the measures adopted was to reinstate the 1967 Constitution. He then reestablished the independence of civil justice and legalized trade unions, political parties, and administrative aspects who had been banned by the military regime. Moreover, he pardoned all persons awaiting trial by military courts and received an overwhelming legislative approval of the Law of National Pacification (*Ley de Pacificación Nacional*), which pardoned all but 65 of the country's 800 remaining political prisoners, but contained a provision expressly denying amnesty to members of the military and police force responsible for human rights abuses during the military dictatorship. The political crisis stemming from lawsuits alleging human rights violations committed during the de facto government in Uruguay set the background for the Expiry Law. Regarding the filing of the criminal complaints and the subsequent legal proceedings, military officials refused to appear personally before the civilian courts. According to the Commission, as of 1986, President Sanguinetti "began searching in Parliament for a political solution to the issue of rendition of the military accounts." Similarly, in the judicial sphere, in November 1986, the Uruguayan Supreme Court upheld the civilian courts' claim to jurisdiction in two key cases implicating members of the Uruguayan armed forces in disappearances. The decision cleared the way for these cases to proceed in civilian courts and it was expected that the Supreme Court would rule similarly in the remaining cases. On December 1, 1986, President Sanguinetti delivered a public a statement issued by seventeen retired generals who had held top command positions during the military dictatorship, in which they acknowledged and assumed full responsibility for human rights abuses committed by their subordinates during the anti-subversive campaign and indicated that such excesses would not be repeated. Sanguinetti declared that the statement deserved "a response of equal grandeur of spirit." In order to meet the December 23rd deadline (the same date that several military and police officers were due to appear in civilian court) and to avert what Sanguinetti publicly called "an imminent institutional crisis," a majority of *Colorado* and *Blanco* legislators in both Parliamentary chambers approved Law the Expiry on December 22.

> Article 3. - For the purposes contemplated in the above articles, the court in pending cases will request the Executive Branch to submit, within a period of thirty days of receiving such request, an opinion as to whether or not it considers the case to fall within the scope of Article 1 of this law. If the Executive Branch considers this law to be applicable, the Court will dismiss the case. If, on the other hand, the Executive Branch does not consider the case to fall under this law, the court will order judicial proceedings to continue. From the time this law is promulgated until the date the court receives a response from the Executive Branch, all pretrial proceedings in cases described in the first paragraph of this article will be suspended.
>
> Article 4. - Notwithstanding the abovementioned, the court will remit to the Executive Branch all testimony offered until the date this law is approved, regarding persons allegedly detained in military or police operations who later disappeared, including minors allegedly kidnapped in similar circumstances. The Executive Branch will immediately order the investigation of such incidents. Within a 120-day period from the date of receipt of the judicial communication of the denunciation, the Executive Branch will inform the plaintiffs of the results of these investigations and place at their disposal all information gathered[161].

145. Pursuant to the promulgation of the Expiry Law, the Supreme Court of Justice was called to render a decision on the constitutionality of the law, given that attorneys representing victims and relatives of the disappeared filed writs with the Supreme Court challenging the constitutionality of the law,[162] as well as arguments presented by judges *ex oficio* who heard the complaints.

146. In 1988, the Supreme Court of Justice upheld the Law's constitutionality by a 3 to 2 majority vote, which, in accordance with Uruguayan constitutional law**,** only had binding effects in the specific case. The majority found that despite the omission of the term "amnesty" in the text, the legislative intent was to confer an "authentic amnesty" on the security forces. [163]

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[161] Law No. 15.848, *supra* note 56.

[162] *Cf.* Report of Americas Watch, "Challenging Impunity: The The Expir Law and the Referendum Campaign in Uruguay", March 12, 1989, evidence, folios 1789 and 1790.

[163] *Cf.* Supreme Court of Justice of Uruguay, captioned orders "Detta,Josefina; Menotti, Noris; Martínez, Federico; Musso Osiris; Burgell, Jorge s/unconstitutionality of the Law 15.848. Arts.1, 2, 3 and 4", Judgment No. 112/87, resoluiton of May 2, 1988, evidence, folios 2256 to 2318. *Cf.* see also, Supreme Court of Uruguay, captioned orders "Macchi Torres, Jessi. Homicide. Unconstituitonality ex oficio Law Nº 15.848, arts. 1º and 3º", Judgment No. 232/1988, and captioned orders "Whitelaw Agustoni, Agustín Germán; Barredo Longo, Fernando José. Complaint. Unconstitutionality," Judgment Nº 224/1988, both cited in the Case of Sabalsagaray Curutchet, *infra* note 163, Supreme Court of Justice of Uruguay. Case of "Sabalsagaray Curutchet Blanca Stela –Complaint of the Exception of Unconstitutionality," Judgment No. 365, of October 19, 2009, evidence, folios 2325 to 2379 folios 1479 and 1480.

147. In April 16, 1989, a group of citizens and relatives of detainees and disappeared persons, known as the *National Commission Pro Referendum against the Expiry Law* [Comisión Nacional pro Referéndum contra la Ley de Caducidad de la Pretensión Punitiva del Estado], promoted and obtained the signatures of more than 25% of the votes (approximately 630,000), based upon which a motion for referendum against the Expiry Law was filed. The motion was rejected by the Uruguayan electorate, since only 42.4% voted in favor of the referendum and the rest opposed it. [164]

148. On October 19, 2009, the Supreme Court of Uruguay rendered Judgment No. 365 in the case of "*Sabalsagaray Curuchet Blanca Stela*," where it declared the unconstitutionality of Articles 1, 3, and 4 of the Law and resolved the inapplicability in the specific case at hand (*infra* para. 239).[165]

149. On October 25, 2009, the Expiry Law was submitted to a referendum. The referendum – held alongside the presidential election and through a "popular initiative," which required the prior support of over two hundred fifty thousand (250,000) signatures – called for a constitutional amendment that would nullify the Expiry Law and nullify Articles 1, 2, 3, and 4 thereof. The proposed amendment garnered only 47.7% of the votes, and thus, it was rejected.[166]

150. On October 29, 2010, the Uruguayan Supreme Court of Justice issued another ruling in the case *"Human Rights Organizations,"*[167] [Organizaciones de Derechos Humanos] wherein, through the mechanism of "anticipated order," in which it reiterates that established in the case of Sabalsagaray (*supra* para. 148) on the exception of unconstitutionality of the Expiry Law, thereby conforming the arguments in the referenced judgment.

B.2 Actions of the Executive Branch.

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[164] *Cf.* Electoral Court, Testimony regarding the result of the referendum of 1989, Act No. 6336, of June 22, 1989, approved on August 23, of this year, evidence, folios 3463 to 3468 (percentage calculated by the Secretariat based on the information presented by the parties), and Peace Service and Justicia-Uruguay, *Human Rights in Uruguay. Report 2009*, Montevideo, Uruguay, 2009, evidence, folio 3175.

[165] *Cf.* Supreme Court of Justice of Uruguay. Case of "Sabalsagaray Curutchet Blanca Stela – Complaint of the Exception of Unconstitutionality", *infra* note 163, Judgment No. 365, of October 19, 2009, evidence, folios 2325 to 2379.

[166] *Cf.* Electoral Court, Testimony of the outcome of the plebiscite of October 25, 2009, evidence, folios 3469 a 3471. The support to the initiative was materialized thru the introduction of the voting envelope for the national presidential, vice presidential and legislative member's elections, which was a pink sheet, containing only one option for "YES", In order to approved the proposal, more than half of the votes were needed. The proposal reached 47,7% of the votes that were casted and 43.15 % of the valid votes.

[167] Supreme Court of Justice of Uruguay. Captioned orders "Organization of human rights – complaint – unconstitutionality exception – arts. 1°, 3°, 4° of the Law N° 15.848 – Record IUE 2-21986/2006", Judgment No. 1525, of October 29, 2010, evidence, folios 5205 to 5207.

151. Between April and May of 1999, Juan Gelman and his wife requested a meeting with former-President of Uruguay, Mr. Julio María Sanguinetti. On May 7, 1999, they finally met with the Secretary of State, Dr. Elías Bluth, who listened to [Juan Gelman and his wife's] reconstruction of the facts based on their individual investigation, and requested that Juan provide him with a written summary for the President to read of what occurred. In the days following, Dr. Elías Bluth personally contacted Juan Gelman and informed him that the President was sensitive to his plight and that he would do everything possible to ascertain the truth, without ever contacting Juan Gelman again. [168]

152. In an open letter, published in October 1999, Juan Gelman denounced the former-President Julio María Sanguintti for not keeping his promise to conduct an investigation. The letter read, in part:

> "[...] I hope you never suffer such anguish, the burden of this dual emptiness. You are regarded as the most learned of the presidents of Latin America and surely you remember this phrase by your fellow countryman, the great poet Lautréamont: 'Not even with the ocean can you wash a single intellectual bloodstain.' Even more so when there is real blood in between. The layers of silence which veil the theft of babies are an intellectual stain that does not cease to encompass more, because the silence itself prolongs it. Mr. President: 'Did you order the investigation you promised? And, if so, does a sense of humanity not inspire you to communicate the result to me? And, if you did not order it, does this sense of humanity not compel you to do so?'[169]

153. According to former-Senator Rafael Michelini, during a confidential meeting held in June of 2000, the former-President of the Republic, Jorge Battle Ibáñez, said that "in the case of María Claudia, they knew absolutely everything […] including who had killed her, naming [a] police officer […] as the perpetrator, except for the exact location of María Claudia's bodily remains, though specifying that they already knew the zone and area where the remains were." [170]

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168 *Cf.* Declaration rendered by Juan Gelman during the public hearing, and Testimony of Mara La Madrid, *supra* note 118, evidence, folios 3674 and 3675.

169 *Cf.* Open letter of Juan Gelman to the President of the Republic, published in the newspaper *La República* on February 28, 2000, evidence, folios 3340 to 3342. Mr. Gelman interpreted the attitude of President Sanguinetti as a lack of political will to ascertain the facts. In this regard, *Cf.* Declaration rendered by Juan Gelman during the public hearing.

170 *Cf.* Historical Investigation on Detained and Disappeared Persons in compliance with Article 4 of the Law 15.488 de 2007, Tome II, Section 1: Uruguay, section A: Detained Disappeared Persons, personal case file of García Iruretagoyena Cassinelli de Gelman, María Claudia, evidence, annex 10 to the brief of pleadings and motions, CD 1, page 210 (complementary pages. 199, 202, 207 and 217). See also, Declaration rendered by Juan Gelman during the public hearing, and Testimony of Mara La Madrid, *supra* note 118, evidence, folio 3686.

154. The Commission for Peace[171] was created through a Presidential Resolution of August 9, 2000, by former-President Jorge Battle for the purpose of "receiving, analyzing, classifying, and compiling information on the enforced disappearances that occurred during the de facto regime."[172] Said Commission was granted broad authority to receive documents and testimony but had to adhere to the utmost discretion and confidentiality,[173] and it was given 120 days to make its findings. [174]

155. The Final Report of the Commission for Peace was made public on April 10, 2003.[175] The report was formally submitted to former-President of the Republic, Mr. Jorge Battle, who, by Decree of April 16, 2003, and acting within the powers of the Council of Ministers, officially accepted said Final Report and pursuant to Resolution No. 448/2003 and adopted it as "the official version of the facts regarding the detainees and disappeared persons during the de facto regimen." He ordered it published in its entirety except for the attachments containing private information for the families who had filed claims. [176]

156. Regarding the Uruguayans who had been transferred to clandestine detention centers in Argentina, said report established that "*those persons involved were arrested and transferred by intelligence forces cooperating with one another in an unofficial, or not recognized as official, manner.*" [177]

157. With regard to María Claudia García Iruretagoyena de Gelman, the Report explains:

> […] 54.-
> [This Commission] considers one complaint as partially confirmed based on coinciding material facts that have been adequately proven, which allow us to

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171 *Cf.* Resolution of the President of the Republic No. 858/2000, *supra* note 23, evidence, folio 2107.

172 Article 1 of the Resolution of the President of the Republic No. 858/2000, *supra* note 23, evidence, folio 2107.

173 Article 3 of the Resolution of the President of the Republic No. 858/2000, *supra* note 23, evidence, folio 2107.

174 Article 7 of the Resolution of the President of the Republic No. 858/2000, *supra* note 23, evidence, folio 2107.

175 *Cf.* Final Report of the Commission for Peace, *supra* note 56. In the final report, the Commission for Peace stated that it was not granted investigative functions, neither was it granted coercive authority to collect information; (para. 12); it also highlighted the limitations and main difficulties faced in order to fulfill its mission, and explicitly recognized that "an effort was definitely made, not to achieve "a truth" or "the most convenient truth" but rather "the possible truth." (para. 38), folios 286 and 293.

176 *Cf.* Resolution of the President of the Oriental Republic of Uruguay No. 448/2003, of April 10, 2003, evidence, folio 2110.

177 *Cf.* Final Report of the Commission for Peace, *supra* note 56, Chapter III. Principle Conclusions. B) Complaint regarding alleged disappeared persons in Uruguay. B.4) Complaint referring to foreigners, evidence, folios 299.

> infer that the person described in Annex No. 5(2) was detained in Argentina and transferred to our country where she was kept in a clandestine detention center and gave birth to a daughter who was abducted from her and given to an Uruguayan family. The circumstances surrounding her death, however, have not been fully confirmed. [178]

158. In the annex 5(2) to the Final Report of the Commission for Peace Some of the aforementioned facts are described, and it explains that no concrete measures were taken to begin an investigation, "making it impossible to verify the circumstances surrounding her death and the subsequent fate of her bodily remains." It concludes that there is no logical explanation for the kidnapping of the young woman who had no ties to Uruguay, but that it is firmly believed that she was killed after her baby was abducted from her. [179]

159. In March 2005, the administration of President Tabaré Vásquez pledged to begin excavating military grounds in order to determine the fate of the many citizens who were detained and disappeared during the military dictatorship[180] and pursuant to this, decided to undertake the investigations needed, with special instruction to locate the remains of María Claudia García. [181] These tasks were later suspended, but according to a report to the Inter-American Commission, this would not impede "the Government of Uruguay from [continuing] with its task of searching for the remains of the detained-disappeared citizens[, to which] it will continue with its investigation." [182]

160. On December 26, 2006, the Executive Branch issued a resolution declaring the culmination of the first phase of investigations of the enforced disappearances that occurred within the nation. Furthermore, it ordered that the reports submitted by the Commanders in Chief of the Armed Forces, as well as the report from the University of the Republic, be published. [183]

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178 *Cf.* Final Report of the Commission for Peace, *supra* note 56, para. 54, evidence, folio 299.

179 *Cf.* Final Report of the Commission for Peace, *supra* note 56, annex 5.2, evidence, folios 2201 to 2203.

180 *Cf.* Opening address by former-President Miguel Vazquez, on 1 March 2005, Evidence, pages 5030-5032. The measure adopted by the President included field work consisting of earth removal, in places of possible sites that could have been somehow linked to specific or suspected claims, technically proven, as sites where clandestine cemeteries could have existed. Thus with two objectives in mind, entry to military Battalions was resolved: to find bodily remains of murdered people, and to confirm if, an unearthing operation on those grounds had previously taken place, consisting on the ulterior removal of corpses, in order to not leave their traces behind.

181 *Cf.* Report presented by the State on December 14, 2006 during the proceeding before the Inter-American Commission, evidence, folio 603, wherein it was indicated that "the physical location of the remains [...] and the determination of the bitter and heartbreaking circumstances of the death of Maria Claudia, remain the unwavering obligation of the Uruguayan Government."

182 Report presented by the State on December 14, 2006, *supra* note 182, evidence, folio 603.

183 Resolution of the President of the Oriental Republic of Uruguay No. 832/2006, of December 26, 2006, evidence, folio 2113.

161. In 2007, the Executive Branch commissioned the publication of the book, *Historical Investigation on Disappeared Detainees in compliance with Article 4 of Law [No.] 15.848* ["Investigación Histórica sobre Detenidos Desaparecidos en cumplimiento del artículo 4 de la Ley [No.] 15.848"] The book contains a historical account of the case studies of the disappeared detainees in Uruguay and the surrounding region (Argentina, Chile, Bolivia, and Colombia) and the international efforts carried out by the victims' next of kin. Moreover, it gives a detailed account of María Claudia García's disappearance and references the sources consulted to establish the facts, as well as the relevant information sheets from the Historical Research Commission. [184]

162. During the public hearing before this Court, the State submitted the *Archeological Investigations on Disappeared Persons developed in the Battalion No. 14 Parachute/Paratroopers by the working group created under the President of the Republic.* ["Investigaciones Arqueológicas sobre Detenidos – Desaparecidos desarrollados en el Batallón Nº 14 de Paracaidistas, realizado por el Grupo de Trabajo creado en el ámbito de la Presidencia de la República"]. The report refers to the fieldwork carried out by the State between 2005 and 2010 and Chapter III, part one, of said report deals with information gathered from the investigations that took place between August 2005 and October 2006. [185]

B. 3 Actions of the Judicial Branch.

163. On June 19, 2002, Juan Gelman, through his representatives, filed a criminal complaint before the Fourth Criminal Court denouncing the detention and disappearance of María Claudia García Iruretagoyena, as well as abduction of her daughter and the subsequent suppression of the child's civil status, [186] but the proceeding was interrupted when a controversy arose regarding jurisdiction. Once the jurisdiction was determined for the Court of First Instance of the Second Criminal Court (hereinafter "Criminal Court of Second Round), on December 13, 2002, it decided that, in order to determine if the facts in the complaint were related to the other circumstances in the case file separated before the same Court and if it followed to include the case in the scope of the Expiry Law, the

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184 *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of Law 15.488 of 2007, *supra* note 23, pages. 195 and ss.

185 *Cf.* Archeological Investigations on Detained Disappeared Persons developed in the Parachute Battalion No. 14, pages. 82 and ss, and expert report provided by Martha Guianze during the public hearing, in which she stressed that there was no judicial involvement in the initiatives of the executive branch for excavations, which are executed by agreements of the Presidency of the Republic with the University of the Republic, with experts from the University who often do pro bono work, not under the supervision of the judge and that said, judges and prosecutors often turn to theexcavation sites but have not yet achieved coordination necessary for a protocol that exists to determine that these evidences are transferable to the trial with all the procedural guarantees.

186 Criminal complaint filed on July 19, 2002 before the Criminal Court of Fourth Round, evidence, folios 386 a 402.

case would be officially opened to receive evidence and it began summoning various witnesses. [187]

164. Statements were taken and the relevant annexes were submitted between December 2002 and September 2003, in order for the Public Prosecutor to issue an opinion, which inspired the National Prosecutor in the Criminal Court of Fourth Round to request that "the investigations be closed" due to the applicability, in his opinion, of the Expiry Law. [188]

165. The Court of Second Round did not accede to the Prosecutor's request due to the fact that pursuant to Article 3 of Law No. 15.848, only the Executive Branch may decide to close such cases. As a result, the issue was turned over to the Executive Branch to determine whether the facts fell within the scope of the Law. [189]

166. On November 28, 2003, the Executive Branch, through the Supreme Court, informed the Court of Second Round that the case fell within the scope of the Expiry Law. [190]

167. On September 2, 2003, the then-presiding judge issued a precautionary measure to preserve the grounds of the Military Battalion No. 13 of the Infantry of the National Army,[191] which ordered the Municipality to suspend the work that it was doing on the grounds, [192] seeking protection in international law, arguing that "even if the current investigation is closed, the relatives of the victims still have a right to know where the bodily remains are located or to at least obtain information to ascertain their fate." However, not too long after, the same judge ordered the closure of the investigation.

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187 Judicial Resolution of the Court of Second Round on December 13, 2002, evidence, annex 2, peice 1, page 23.

188 Report of the Agent of the Public Prosecutors Enrique Möller Mendezde of September 1, 2003, evidence, folio 417.

189 Resolution of the Court of Second Round of October 15, 2003, evidence, folios 420 to 422.

190 Official letter of the President of the Republic on November 28, 2003, in response to the requirement of the Criminal Court of First instance of Second Round, , evidence, folios 424 to 426.

191 The military grounds belonging to the 13th and 14th Battalion were assigned as burial grounds for those detained and disappeared during the Uruguayan military dictatorship. A report from the Commander in Chief of the Uruguayan Army, Angel Bertolotti, sent to President Vazquez in 2005 made to contribute to the effort to cast a light on the fate of the bodily remains of those detained and disappeared in the period of time from June 27, 1973 to March 1, 1985, informs that burial of disappeared persons before 1976, were done in the grounds of Battalion Number 13. *Cf.* Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of the Law 15.488 of 2007, *supra* note 23, Report of the General Commander of the Army, August 8, 2005, page 82, and Hearing on October 3, 2007, in orders "Medina, Ricardo et al.. Ficha 2-43332/2006", evidence, annex 2, peice 4, pages. 107 to 119

192 Judicial Resolution of September 2, 2003, evidence, Annex 2, peice 2, pages. 2 to 5.

168. Juan Gelman filed an administrative motion to revoke the Executive Branch's November 2003[193] decision. The motion was rejected because the decision was an act of the Government, and thus, "lacks an administrative nature" and consequently, the mentioned decision "does not admit the administrative [remedies]"[194] And, so, the judge assented to the closure of the investigations by means of the decision of December 2, 2003. [195] This decision could not be challenged because Uruguayan criminal law severely limits the direct and autonomous participation of the victim in the proceeding. [196]

169. Juan Gelman's attorney filed a motion seeking to have Article 3 of the Expiry Law declared unconstitutional because it violated various rights recognized in the Uruguayan Constitution. [197] The Supreme Court denied the motion in a judgment issued on November 15, 2004. [198]

170. On June 10, 2005, Juan Gelman's attorney once again sought, before the Court of Second Round in Montevideo, the reopening of the investigation based on new evidence consisting of three newspaper articles relating to the killing of María Claudia and other persons who had disappeared during the dictatorship. [199]

171. The Court of Second Round again requested that the Executive Branch decide whether these acts were covered by the Expiry Law, and on June 23, 2005, President Tabaré Vásquez's administration responded that they were not.[200]

172. As such, on next June 27th, the Court reopened the investigation, ordered various

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193 Brief of Juan Gelman, no date, requesting revocation of the decision of the Executive Branch ofNovember 28, 2003, Evidence, pages 424 to 436.

194 Resolution No. 82.572 of the President of the Republic, on February 2, 2005, dismissed the remedy for revocation, evidence, annex 2, peice 2 and 3, pages 543 and 544.

195 Order No. 3134 of December 2, 2003, Court of Second Round, described in the Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of the Law 15.488 of 2007, *supra* note 23, Tome II, page 213, and in the Official letter 2242/2008 of the Court of Second Round that Reportd on the content of the resolution, evidence, annex 2, peice 2 and 3, page 41.

196 The Code of Criminal Procedure of Uruguay:

> "Article 83 (restrictive character). The injured party and the civil party responsible shall not have more intervention or powers than those established in the preceding Articles."
>
> "Article 80 (Powers of instruction). The injured party and the responsible civil third party can request at the sumarial stages of the proceeding all the useful steps to verify the crime and the identification of the perpetrators, subject to the judges decision, **without appeal**." (the underlined is not original).

197 Brief of Juan Gelman, no date, requesting the Statement of unconstituitonality of Article 3° of the Expiry Law, evidence, folios 445 to 457.

198 Supreme Court of Justice of Uruguay, Judgment No. 332, of November 15, 2004, evidence, folios 460 and 471.

199 *Cf.* request to reopen the file of proceedings and prosecution of the presumarial instance by Juan Gelman to the Court of Second Round, Evidence, folios 476 to 483.

200 *Cf.* Note of the Executive Branch to the President of the Supreme Court of Justice of Uruguay, June 23, 2005, evidence, folio 499.

precautionary measures and ordered evidence. As a precautionary measure to preserve the evidence, the Judge ordered, among other things, that the Executive Branch report on "any ongoing action relating to the search for bodily remains in both military and nonmilitary grounds" and on any updates thereof. [201]

173. In July 2005, Juan Gelman's representative presented the Court Prosecutor and the Attorney General of the Nation a request that the acting prosecutor, Enrique Möller Méndez, be removed from the cause of action. Even before the proceedings had formally begun, Méndez had publicly stated to the press that he maintained his position and juridical interpretation and that he would once again request that the case be closed, just like he had done in July of 2003, [202] wherein Juan Gelman's request was denied.

174. On August 8, 2005, the attorney of the Public Prosecutor's Office again requested that the investigation be closed, because, in his view, the case fell within the scope of the Expiry Law. He further argued that the earlier decision to close the investigation was of *res judicata* nature, to which the Judge did not consider whether the Expiry Law applied to the crimes alleged, but rather that it established a *sui generis* proceeding that granted the Executive Branch the power to authorize or deny the judicial proceeding and that *res judicata* could not be argued because there was no proceeding or person related therein, and this act allowed for the continuation of the investigation. [203]

175. On August 11, 2005, in compliance with the precautionary measures the Judge had ordered, the former-State Secretary, Gonzalo Fernández, submitted a certified copy, in the pretrial proceedings stage, of the *Report of the Investigation Committee on the Fate of 33 Citizens Detained between June 27, 1973 and March 1, 1985* ["Informe de la Comisión Investigadora sobre el Destino Final de 33 Ciudadanos Detenidos en el Período comprendido entre el 27 de junio de 1973 y el 1 de marzo de 1985"]. The President of the Republic had requested the General Military Commander to complete the report "in secrecy and in order to further ascertain the fate of those detained during the de facto regimen (June 27, 1973-March 1, 1985) and to determine the whereabouts of their bodily remains, whose detention had not, to date, been recognized by the Institution." [204]

176. The report describes "Operación Zanahoria," an operation carried out in 1984 to exhume and cremate the remains of disappeared persons who had been killed and buried on military grounds. "Operación Zanahoria" also provided for the trituration [grinding] and subsequent cremation of those bodily remains that could not be cremate, that which

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[201] Judicial Resolution of June 27, 2005, electronic evidence, annex 2, peice 2 and 3, pages. 284 and 285.

[202] Request for removal of Prosecutor presented by Juan Gelman, electronic evidence, annex 2, peice 2 and 3, pages. 319 to 324.

[203] *Cf.* Judicial Resolution of August 16, 2005, electronic evidence, annex 2, peice 2 and 3, pages. 346 to 372.

[204] Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of the Law 15.488 of 2007, *supra* note 23, Report of the General Commander of the Army, August 8, 2005, pages. 74 to 82.

was not possible in all cases. Annex 1 details all the information it has on each case. In relation to María Claudia García, it provides:

> "22. María Claudia García Irureta de Gelman
> […]
> After giving birth in the Military Hospital, she was once again transferred to the same detention location.
> In December of 1976, she was separated from her daughter and transferred to the properties of the Batallón I Parac. Nº 14, where she was killed.
> Her remains were buried at the site and would not have been exhumed in 1984, remaining to this day in said area." [205]

177. The Public Prosecutor's Office filed a motion to replace and appeal against the abovementioned August 2005 Court, which denied the replacement, to be revoked on October 19, 2005, by the Court of Appeals, which ordered that the case be archived. The rationale for this decision was essentially a deferral to prosecutorial discretion.[206] Juan Gelman's lawyer was personally notified of this order of the Court of Appeals on November 9, 2005. [207]

178. On February 27, 2008, María Macarena Gelman appeared before the Second Criminal Court and requested the reopening of the case arguing that there were supervening facts.[208] The Public Prosecutor's Office accepted the arguments and resolved

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[205] Historical Investigation on Detainees and Disappeared Persons in compliance with Article 4 of the Law 15.488 of 2007, *supra* note 23, Report of the General Commander of the Army, August 8, 2005, page 82.

[206] Cf. The Court of Appeals ruled that the prosecution, obligated to carry out the process, did not consider the prerequisites to have been exhausted. The order only serves to facilitate the indictment by the prosecution. If the prosecutor believes that there is no basis for prosecution, the judge is bound by this decision and can not instruct alone instruct the proceeding.

[207] *Cf*. Notification Action No. 934 of the Court of Second Round, on November 9, 2005, evidence, folio 512.

[208] *Cf*. Request to reopen the preDocket presented by María Macarena Gelman to the Court of Second Round, evidence, annex 2, peice 2 and 3, pages. 497 and 510. It alleged the following: a report issued by the Uruguayan Air Force dated August 8, 2005, connected to the reported facts on the Commission for Peace Report, were reference is made regarding flights that were ordered by the Air Force General Command on request of SID (the Comand in Cheaf from the three branches of the Air Force received an order from President Vázquez in order to create written reports pertaining to activities performed by their respective forces during the military dictatorship); the findings of human remains and/or bodily parts assumed to be human, some of them belonging to disappeared persons during the last military dictatorship; journalistic repots dated from years 2006 and 2007 which refer to the existence of clandestine cementeries: colonel Coronel Gilberto Vázquez' confesions, whereby he offers details regarding the aquissition of real state where the clandestine detention center "Base Valparaíso"would have been installed; journalistic reprt from 2008 connected to the alleged confesion of Colonel Jorge Silveira who would have confirmed that Gavazzo was the killer of María Claudia.

to enable the reopening of the investigation,[209] to which on August 4, 2008, the judge ordered that the case be reopened, reasoning, on the one hand, that given that there were two contradicting Executive Branch decisions, (supra paras. 168 and 172), it should accept the latter as prevailing, and on the other hand, accept the provision of evidence.[210]

179. On October 13, 2008, a forensic anthropologist from the Montevideo legal morgue submitted to the court Report No. 782 wherein the expert comparison was reported. For this, in 2005, he was given 44 bags, based on human bodily remains of more than one hundred individuals, which were collected from the Vichadero Cemetery. The report contains an expert comparision on skull-photograph comparisons, including a comparison of one of the skulls contained in the bags with pictures of María Claudia Garcia. Although the pictures were not of high quality. It was concluded that there was a 93.5% chance that the skull belonged to María Claudia Garcia. [211]

180. On October 31, 2008, the judge ordered the formation of a Medical Board to asses the feasibility of the DNA testing of the bodily remains that had been studied, and requested, on November 18th of that same year, information on whether the DNA testing could be attempted, to which, in December 2008, samples taken from the skull were sent to the Laboratory of Human Genetics in Spain. [212]

181. María Macarena Gelman requested that the Argentine Forensic Anthropology Team intervene and inspect the bodily remains. She also requested that the samples taken from the skull be transferred to a laboratory in Cordoba, Argentina, without prejudice that another sample be tested in Uruguay. At the hearing on March 11, 2009, the court

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209 *Cf*. Opinion of the Public Prosecutor on April 22, 2008, evidence, annex 2, peice 2 and 3, pages. 518 and 523. To support its decision, the Prosecutor stated that "[...] Law No. 15,848, […] did not establish an amnesty for certain categories of crimes, but rather established a procedure sui generis which gives the Executive Branch the means to render a binding opinion regarding whether the possibility corresponds to investigate and prosecute by the justice system." He noted that, "in this case on record, we are witnessing two contradictory statements of the Executive Branch." He added that "not forseeing the solution regarding the issue in the text of the law, bearing in mind the nature of an act of government [...]." Moreover, he indicated that "[b]eing a contradictory prosecutor on prior occasions, is no obstacle to resuming the presumarial investigation [...].Moreover, he noted that the procedural obstacle has disappeared for justice to proceed in the investigation and possible judgment of the case."

210 Judicial Resolution of reopening of the presummarial stage, No. 315 of August 4, 2008, evidence, annex 2, piece 2 and 3, pages 546 tot 555. The judge ordered: collection of information and documents on the excavations at the 13th Battalion of the Infantry of the Army and 14th Battalion Parachute Infantry was given; also given was the order to receive the statements of Jose Lopez Mazz, Roger Rodriguez, and Julio Cesar Barbosa. He requested from the Ministry of the Interior the information on the domiciles of Ariel Lopez Silva, José Norberto Narváez Cores and asked the Ministry to forward the certified copy of the personal files of Ricardo Medina Blanco, José Sande Lima, Hugo Campos Hermida. Similarly, he asked the Immigration Department for the list of passengers admitted to Uruguay from Buenos Aires, Argentina, in October 1976, among others.

211 *Cf*. Report No. 782 of the Forensic Anthropology Laboratory of October 13, 2008, evidence, annex 2, peice 2 and 3, pages. 649 to 670.

212 *Cf*. Report No. 794 of the Forensic Anthropology Laboratory of December 11, 2008, evidence, annex 2, peice 4, pages. 138 to 143.

ordered an additional expert opinion by a forensic anthropologist from the Forensic Anthropology Division of Criminal Investigation at the Legal Medical Institute of Peru. The Court granted the Argentine Forensic Anthropology Team permission to be present, but prohibited any type of technical manipulation or a technical opinion from said team. On March 16, 2009, an expert comparison of the skull was performed and it resulted in a "positive identification." [213] However, in August 2009, the genetic tests yielded negative results.

182. At the time of the present judgment, this matter is under pretrial investigation, but there has been little progress. No one has been formally accused, charged, or punished and María Claudia Garcia de Gelman's whereabouts have not been determined.

C. The obligation to investigate in the jurisprudence of this Court.

183. This Court has emphasized the importance of the State's duty to investigate and punish human rights violations, [214] obligation to investigate and, where appropriate, prosecute and punish, is particularly important given the seriousness of the crimes committed and the nature of the infringed rights, particularly because the prohibition of enforced disappearance and its corresponding obligation to investigate and punish those responsible has reached *jus cogens* nature. [215]

184. The obligation to investigate human rights violations falls within the positive measures that States must adopt in order to ensure the rights recognized in the Convention[216] and is an obligation of means rather than of results, which must be assumed by the State as legal obligation and not as a mere formality preordained to be ineffective that depends upon the procedural initiative of the victims or their next of kin, or upon the production of evidence by private parties. [217]

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213 Forensic Anthropological Report of March 17, 2009, requested by the Court of Second Round, evidence, annex 2, peice 4, page 320.

214 *Cf. Case of Velásquez Rodríguez. Merits, supra* note 20, paras. 166; *Case of Cabrera García and Montiel Flores supra* note 16, para. 215; *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 137.

215 *Cf. Case of Goiburú et al., supra* note 23, para. 84; *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 137, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 197.

216 *Cf. Case of Velásquez Rodríguez. Merits, supra* note 20, para. 167; *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 138; *Case of Rosendo Cantú et al., supra* note 9, para. 175.

217 *Cf. Case of Velásquez Rodríguez. Merits, supra* note 20, para. 177; *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 138; *Case of Rosendo Cantú et al., supra* note 9, para. 175.

185. In regard to enforced disappearance and given that one of its objectives is to prevent the exercise of the appropriate legal remedies and procedural guarantees, if the victim itself cannot access the remedies available, it is fundamental that the next or kin or other people close to the person be able to access prompt and effective proceedings or judicial remedies as means to determine their whereabouts or state of health or to identify the authority that ordered the deprivation of liberty or made it effective. [218]

186. Specifically, any time there is reason to suspect that a person has undergone an enforced disappearance, an investigation shall be initiated. [219] This obligation exists regardless of the filing of a complaint, since in cases of enforced disappearance international law and the general duty to guarantee, impose the obligation to investigate the case *ex officio*, without delay, and in a serious, impartial, and effective manner. [220] This investigation should be carried out in all available legal mediums and be aimed at obtaining the truth. This is a fundamental and conditioning element for the protection of certain rights affected by these situations, [221] which encompasses in any case, all state authorities, public officials, or individuals who have received news about acts regarding the enforced disappearance of persons, all of whom shall denounce them immediately. [222]

187. Article 8 of the Convention establishes that the victims of human rights violations, or their next of kin, should have wide-ranging possibilities of being heard and taking part in the respective proceedings, both in order to ascertain the facts and punish those responsible, as well as to seek due reparation.

188. The obligation to investigate and the corresponding right of the alleged victims or the next of kin is not only evident from the conventional [treaty-based] norms of international law that are binding for the State Parties, but also arise from domestic law regarding the obligation to investigate *ex officio* certain unlawful conduct, as well as from the norms that permit the victims or their next of kin to denounce or file complaints, evidence or petitions, or take any other measure in order to play a procedural role in the criminal investigation so as to establish the truth of the facts. [223]

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[218] *Cf. Case of Anzualdo Castro, supra* note 75, para. 64; *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 107, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 64.

[219] *Cf. Case of Radilla Pacheco, supra* note 74, para. 143; *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 65, and *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 108.

[220] *Cf. Case of the Pueblo Bello Massacre, supra* note 146, para. 143*; Case of Ibsen Cárdenas and Ibsen Peña, supra* note *9, para. 65, and Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 108.

[221] *Cf. Case of the Pueblo Bello Massacre, supra* note 146, para. 145; *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 65, and *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 108.

[222] *Cf. Case of Anzualdo Castro, supra* note 75, para. 65; *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 65.

[223] *Cf. Case of Cabrera García and Montiel Flores, supra* note 16, para. 192, and *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 139.

189. The mentioned international obligation to prosecute, and if criminal responsibility is determined, punish the perpetrators of the human rights violations, is encompassed in the obligation to respect rights enshrined in Article 1(1) of the American Convention and implies the right of the States Parties to organize all of the governmental apparatus, and in general, all of the structures through which the exercise of public power is expressed, in a way such that they are capable of legally guaranteeing the free and full exercise of human rights. [224]

190. As part of this obligation, the States must prevent, investigate, and punish all violations of the rights recognized in the Convention, and seek, in addition, the reestablishment, if possible, of the violated right and, where necessary, repair the damage caused by the violation of human rights. [225]

191. 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. [226]

192. The satisfaction of the collective dimension of the right to truth requires the procedural determination of the most complete historical record possible. This determination must include a description of the patterns of joint action and should identify all those who participated in various ways in the violations and their corresponding responsibilities. [227]

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[224] *Cf. Case of Velásquez Rodríguez. Merits, supra* note 20, para. 166; *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 65; *Case of The Dos Erres Massacre, supra* note 127, para. 234, and *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 140.

[225] *Cf. Case of Velásquez Rodríguez. Merits, supra* note 20, para. 166; Case of Garibaldi V. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 23, 2009. Series C No. 203, para. 112, and *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 140.

[226] *Cf. Case of Velásquez Rodríguez. Merits, supra* note 20, para. 176; *Case of González et al.s ("Campo Algodonero"), supra* note 79, para. 288, and *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 140.

[227] *Cf. Case of of the Rochela Massacre V. Colombia. Merits, Reparations and Costs*. Judgment of May 11, 2007. Series C No. 163, para. 195; *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 158, and *Case of Chitay Nech et al., supra* note 63, para. 234.

193. When a State has ratified an international treaty such as the American Convention, all of its bodies, including its judges, are also subject to such a treaty, and this obligates them to ensure that the effects of the provisions of the Convention are not diminished by the application of norms contrary to its object and purpose. The Judicial Branch must exercise "control of conformity with the Convention" *ex officio* of the harmonization of the domestic norms with the American Convention, evidently within the framework of their respective jurisdictions and the corresponding procedural rules. In this task, the Judicial Branch should bear in mind not only the treaty, but also the corresponding interpretation made by the Inter-American Court, the final interpreter of the American Convention. [228]

194. Justice, to be such, must be opportune, and reach the desired or awaited *effet utile* with the action, and particularly dealing with cases of serious human rights violations, the principle of effectiveness of the investigation of the facts and the determination of the punishment of those responsible must prevail. [229]

D. Amnesty Laws in the opinion of other international bodies.

195. 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.[230] 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.

196. 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),* Chile *(Almonacid Arellano et al.)*, and Brazil *(Gomes Lund et al.).*

197. In the Inter-American System of Human Rights, of which Uruguay 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

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[228] *Cf. Case of Almonacid Arellano et al. V. Chile*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 26, 2006. Series C No. 154, para. 124; *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 176, and *Case of Cabrera García and Montiel Flores*, *supra* note 16, para. 225.

[229] *Cf. Case of García Prieto et al. V. El Salvador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 20, 2007. Series C. No. 168, para. 115; *Case of Chitay Nech et al., supra* note 63, para. 195; and *Cf. Case of Radilla Pacheco, supra* note 74, para. 201.

[230] 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.

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[231], Chile[232], El Salvador[233], Haití[234], Perú[235] and Uruguay[236] its contradiction with international law. The Inter-American Commission recalled 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" and that "[t]hese decisions which coincide with the standards of other international bodies 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. [237]

198. In the Universal forum, 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:

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231 *Cf*. IACHR. Report No. 28/92, Casos 10.147; 10.181; 10.240; 10.262; 10.309, and 10.311. Argentina, of October 2, 1992, paras. 40 and 41.

232 *Cf*. IACHR. Report on the Merits No. 34/96, Casos 11.228; 11.229; 11.231, and 11.282. Chile, of October 15, 1996, para. 70, and IACHR. Report on the Merits No. 36/96. Chile, of October 15, 1996, para. 71.

233 *Cf*. IACHR. Report on the Merits No. 1/99, Case of 10.480. El Salvador, of January 27, 1999, paras. 107 and 121.

234 *Cf*. IACHR. Report No. 8/00, Case of 11.378. Haití, of February 24, 2000, paras. 35 and 36. While the Case is not specifically about the conformity with the Convention of amnesty laws, the Commission takes up its position on amnesty laws and analyzes it in light of the principle of continuity of the States.

235 *Cf*. IACHR. Report on the Merits No. 20/99, Case of 11.317. Perú, of February 23, 1999, paras. 159 and 160; IACHR. Report on the Merits No. 55/99, Casos 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, of April 13, 2000, para. 76.

236 *Cf*. IACHR. Report 29/92. Case of 10.029, 10.036 and 10.145. Uruguay, of October 2, 1992, paras. 50 and 51.

237 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, Casos 10.815; 10.905; 10.981; 10.995; 11.042, and 11.136. Perú, of April 13, 1999, para. 140.

> "[…] 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 […]."[238]

199. 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[239] on the merits and that they are, therefore, incompatible with the obligations incumbent on States given various sources of international law. [240] 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." [241]

200. In line with the aforementioned, 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." [242]

201. The General Assembly of the United Nations established in Article 18 of the Declaration on the Protection of all Persons from Enforced Disappearance that "persons who have or are alleged to have committed [enforced disappearance] shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction." [243]

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238 Report of the General Secretariat of the Security Council of the United Nations. *The rule of law and transitional justice in societies that suffer or have suffered from conflict.* U.N. Doc S/2004/616, August 3, 2004, para. 10.

239 *Cf.* Report of the Office of the High Commissioner of the United Nations for Human Rights. *Right to the Truth.* UN Doc. A/HRC/5/7, of June 7, 2007, para. 20.

240 *Cf.* Office of the High Commissioner of the United Nations. *Instruments of the rule of law in societies that have emerged from conflict.* Amnesties. HR/PUB/09/1, United Nations Publication, New York and Geneva, 2009, page V.

241 *Cf.* Office of the High Commissioner of the United Nations. *Instruments of the rule of law in societies that have emerged from conflict, supra* note 207, page V.

242 Revised final report on the issue of impunity for perpetrators of human rights violations (civil and political rights) prepared by Mr. Louis Joinet pursuant to decision 1996/119 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. U.N. DocE/CN.4/Sub.2/1997/20/Rev1 of October 2, 1997, para. 32.

243 *Cf.* United Nations, General Assembly, Resolution 47/133 of December 18, 1992.

202. 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. [244]

203. 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 Comments 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. [245]

204. In addition, he same Working Group stated its concern that in situations of post-conflict, amnesty laws are promulgated or other measures adopted that have impunity as a consequence, [246] 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. [247]

205. Also in the universal forum, the bodies of human rights protection established by treaties have maintained the same standards concerning the prohibition of amnesties that prevent the investigation and punishment of those who commit serious human rights crimes. The Human Rights Committee, in its General Comment 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

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

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

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

[247] Working Group on Enforced or Involuntary Disappearance of the United Nations. Report, *supra* note 211, para. 599. Similarly, *Cf.* Working Group on Enforced or Involuntary Disappearance of the United Nations. Report to the Human Rights Council, 4º period of sessions. U.N. Doc. A/HRC/4/41, of January 25, 2007, para. 500.

enforced disappearances—appear before the justice system and not attempt to exempt the perpetrators of their legal responsibility, as has occurred with certain amnesty laws.[248]

206. The Human Rights Committee ruled on the matter in the proceedings of individual petitions and in its country reports, noting in the case of *Hugo Rodríguez v. Uruguay*, that it cannot accept the posture of a State of not being obligated to investigate human rights violations committed during a prior regime given an amnesty law, and it reaffirmed that amnesty laws in regard to serious human rights violations are incompatible with the aforementioned International Covenant o 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. [249]

207. It also made reference to the Uruguayan Expiry Law, during its final comments made in 1993[250] and 1998.[251] In these comments, the Committee noted that the Expiry Law violated Articles 2-3 (right to an effective remedy to all of the victims of human rights violations), Article 7 (cruel treatment of the victim's next of kin) and Article 16 (right to juridical personality) of the Covenant. It also recommended that the State of

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248 *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 referred to acts of torture, and other seirous human rights violations. See also *Cf.* H.R.C. *General Comment 20: Replaces General Comment 7, prohibition of torture and cruel treatment or punishment (art. 7)*, U.N. A/47/40(SUPP), Annex VI, A, of March 10, 1992, para. 15.

249 *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. Moreover, the Committee has reiterated its position upon formulating the final observations to the reports presented by the States Parties to the International Covenant on Civil and Political Rights, in which the amnisties contribute to the creation of "an atmosphere of impunity" and affect the Rule of Law. Similarly, *Cf.* H.R.C., *Final Comments regarding the examination of the reports presented by the States Parties in virtue of Artcile 40 of the Covenant*, regarding: Perú, 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.

250 *Final Comments of the Human Rights Committee: Republic of Uruguay*, UN Doc. CCPR/C/79/Add.19, May 5, 1993, para. 7.

251 *Final Comments of the Human Rights Committee: Republic of Uruguay*, UN Doc. CCPR/C/79/Add.90, 8 abril de 1998, Section C. Principal subjects of concern and recommendations: The Committee expresses once again its deep concern about the Ley de Caducidad de la Pretensión Punitiva del Estado (Expiry Law of the Punitive Powers of the State) and its profound anxiety about the implications of the Law with regard to compliance with the Covenant. In this regard, the Committee emphasizes the obligation of States parties, under article 2, paragraph 3, of the Covenant, to ensure that all persons whose rights or freedoms have been violated shall have an effective remedy through remedy to the competent judicial, administrative, legislative or other authority. The Committee notes with deep concern that in a number of cases the maintenance of the Expiry Law effectively excludes the possibility of investigation into past human rights abuses and thereby prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses. The Committee also considers that the Expiry Law violates article 16 of the Covenant in respect of the disappeared persons and article 7 in respect of their family members."

Uruguay take the legislative measures necessary to correct the effects of the Expiry law and to assure that the victims of said violations have access to useful and effective remedies in the domestic courts.

208. The Committee against Torture also expressed that the amnesties that prevent the investigation of acts of torture, as well as the judgment and possible punishment of those responsible, are in violation of the Convention against Torture and other Cruel, Inhumane, and Degrading Treatment. [252]

209. Also in the universal forum, in another branch of international law –that is- international criminal law, amnesties or similar norms have been considered 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 statute of limitations on 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.[253] Similarly, the Special Court for Sierra Leone considered that the amnesty laws of said country were not applicable to serious international crimes. [254] This universal tendency has been consolidated through the incorporation of the mentioned standard in the development of the statutes of the special tribunals recently created within the United Nations. In this sense, both the United Nations Agreement with the Republic of Lebanon and 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 shall not constitute an impediment to the processing of those responsible for crimes that are within the scope of the jurisdiction of said tribunals. [255]

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[252] *Cf.* C.A.T., *General Comment 2: Application of Article 2 for the State Parties.* U.N. Doc. CAT/C/GC/2, of January 24, 2008, para. 5, and C.A.T., *Final Comments regarding the examination of the reports presented by States Parties in conformity with Article 19 of the Convention* on: Benin, U.N. Doc. CAT/C/BEN/CO/2, on February 19, 2008, para. 9, and Former Republic of Yugoslava of Macedonia, U.N. Doc. CAT/C/MKD/CO/2, of May 21, 2008, para. 5.

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

[254] *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.

[255] *Cf.* Agreement between the UN and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, Article 16 and Statute of the Special Tribunal for Lebanon, Article 6, Resolution 1757 of the Security Council of the United Nations. U.N. DocS/RES/1757 of May 30, 2007, Statute of the Special Court for Sierra Leone, January 16, 2002, Article 10, Agreement between the United Nations and the Royal Government of Cambodia for the Prosecution under the Cambodian Law of Crimes Committed during the Period of the Democratic Kampuchea, from March 6, 2003, Article 11 and Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with amendments adopted on October 27, 2004 (NS / RKM, 1004/006), new Article 40.

210. Likewise, in an interpretation of Article 6-5 of the Protocol II Additional to the Geneva Convention on International Humanitarian Law,[256] the ICRC stated that amnesties cannot protect perpetrators of war crimes:

> [w]hen it adopted paragraph 5 of Article 6 of Additional Protocol II, the USSR declared, in the reasoning of its opinion, that it could not be interpreted in such a way that it allow war criminals or other persons guilty of crimes against humanity to escape severe punishment. The ICRC agrees with this interpretation. An amnesty would also be inconsistent with the rule requiring States to investigate and prosecute those suspected of committing war crimes in international armed conflicts[257](…).

211. This norm of International Humanitarian Law and interpretation of Article 6-5 of the Protocol has been adopted by the Inter-American Commission on Human Rights[258] and the Human Rights Committee of the United Nations.[259]

212. 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.

213. 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. [260] In other cases, it highlighted that when an agent of the State is accused of crimes violating the rights of Article 3 in the European Convention (Right to life), the

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256 *Cf.* Article 6-5 of the Protocol II Additional to the Geneva Conventions, "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

257 *Cf.* International Committee of the Red Cross, Customary International Humanitarian Law, vol. I, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, 2007, page 692. Also, the standard 159 of Customary International Humanitarian Law states that the persons suspected or accused of committing war crimes, or sentenced for them, may not receive amnesties. Standard 159,International Committee of the Red Cross, Customary International Humanitarian Law, vol. I, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, 2007, page 691.

258 *Cf.* IACHR, Report on the Human Rights Situation in El Salvador, Case of No. 11.138, in, document OEA/Ser.L/V/II.85, Doc. 28 rev. on February 11, 1994, General conclusions, para. C.

259 *Cf.* among others, *Final observations of the Human Rights Committee: Lebanon*, U.N. Doc. CCPR/C/79/Add.78, May 5, 1997, para. 12, and *Final observations of the Human Rights Committee: Croatia*, U.N. Doc., CCPR/ CO/71/HRV, of April 4, 2001, para. 11.

260 *Cf.* T.E.D.H., *Case of Abdülsamet Yaman v. Turkey*, Judgment of 2 November 2004, Application No. 32446/96, para. 55.

criminal proceedings and judgment should not be obstructed, and the granting of amnesty is not permitted. [261]

214. 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, [262] 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. [263]

E. Amnesty laws and Domestic Jurisprudence in tribunals of States Parties to the Convention.

215. Likewise, various member States of the Organization of American States, by way of their highest tribunals of justice, have applied the mentioned standards, and therefore, have complied in good faith with the international obligations assumed by their respective States. 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 legislative obstacle for the investigation, prosecution, and possible punishment of facts that entailed human rights violations:

> [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.
>
> [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.
>
> [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.

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[261] *Cf.* T.E.D.H. *Case of Yeter v. Turkey*, Judgment of 13 January 2009, Application No. 33750/03, para. 70.

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

[263] *Cf.* A.C.H.P.R., *Case of Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/02, Decision of 21 May 2006, paras. 211 and 215.

> 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.
>
> [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 prosecution 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 "non-retroactivity" of the criminal law from being invoked to violate the obligations undertaken in regard to the prosecution of gross violations of human rights.[264]

216. The Supreme Court of Justice of Chile 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: [265]

> [A]lthough the Decree explicitly stated in a comment 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 1º of D.L. 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. [266]

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[264] 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*., Order of June 14, 2005 Considering clause 34.

[265] *Cf.* Supreme Court of Justice of Chile. *Decision of the plenary regarding the instance that will hear the application of the Amnesty Law in the case of the abduction of mir Miguel Ángel Sandoval*, Rol No. 517-2004, Case of 2477, of November 17, 2004, Considering clause 33.

[266] Supreme Court of Justice of Chile. *Case of the abduction of mir Miguel Ángel Sandoval*, *supra* note 265, Considering clause 33.

> [[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. [267]

217. 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: [268]

> [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. [269]

> [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. [270]

> [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. [271]

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267 Supreme Court of Justice of Chile. *Case of the abduction of mir Miguel Ángel Sandoval*, *supra* note 265, Considering clause 35.

268 Supreme Court of Justice of Chile, *Case of Claudio Abdón Lecaros Carrasco for the crime of aggravated kidnapping*, Rol No. 47.205, Remedy No. 3302/2009, Resolution 16698, Appeals Judgment, and Resolution 16699, Replacement Judgment, of May 18, 2010.

269 Supreme Court of Justice of Chile, *Case of Claudio Abdón Lecaros Carrasco*, Replacement Judgment, *supra* note 268, Considering clause 1.

270 Supreme Court of Justice of Chile, *Case of Claudio Abdón Lecaros*, Replacement Judgment, *supra* note 268, Considering clause 2.

271 Supreme Court of Justice of Chile, *Case of Claudio Abdón Lecaros Carrasco*, Replacement Judgment, *supra* note 268, Considering clause 3.

218. 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 and the nullity of amnesty laws: [272]

> [T]he Constitutional Tribunal 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. [273]
>
> The obligations assumed by the Peruvian government with the ratification of treaties on human rights include the duty to guarantee those rights, 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. [274]
>
> [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. [275]
>
> [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 encompass the commission of crimes against humanity. Nor when the exercise of said competence was used to "guarantee" impunity for serious violations of human rights. [276]

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[272] *Cf.* Constitutional Tribunal of Peru, *Case of Santiago Martín Rivas*, Extraordinary Remedy, Case file No. 4587-2004-AA/TC, Judgment of November 29, 2005, para. 63.

[273] Constitutional Tribunal of Peru, *Case of Santiago Martín Rivas*, Extraordinary Remedy, *supra* note 272, para. 63.

[274] Constitutional Tribunal of Peru, *Case of Santiago Martín Rivas,* Constitutional tort remedy, Case file No. 679-2005-PA/TC, Judgment of March 2, 2007, para. 30.

[275] Constitutional Tribunal of Peru, *Case of Santiago Martín Rivas*, Constitutional tort remedy, *supra* note 274, para. 52.

[276] Constitutional Tribunal of Peru, *Case of Santiago Martín Rivas,* Constitutional tort remedy, *supra* note 274, para. 53.

> 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. [277]

219. In the same sense, the Supreme Court of Uruguay ruled in regard to the Expiry Law, 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, [278] the Legislative Power exceeded the constitutional scope for awarding amnesties [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. [279]
>
> [...] no political agreement or its logical corollary can reverse the original or delegated representation of sovereignty and, therefore, is absolutely unacceptable to issue a valid legal, effective or acceptable norm. [...] Thus, when art. 1 of Law No. 15.848 recognizes another source of normative law, it departs significantly from [its] constitutional makeup. [...] [Article 3 of Law No. 15.848] conditions the jurisdictional activity to a decision of the Executive Branch, with absolute efficiency, which collides ostensibly with the powers of the Judge to establish responsibility for the commission of crimes [...]
>
> [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. [280]
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> 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

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[277] Constitutional Tribunal of Peru, *Case of Santiago Martín Rivas*, Constitutional tort remedy, *supra* note 274, para. 60.

[278] Supreme Court of Justice of Uruguay, *Case of Nibia Sabalsagaray Curutchet*, Judgment No. 365 *supra* note 163, paras. 8 and 9.

[279] Supreme Court of Justice of Uruguay, *Case of Nibia Sabalsagaray Curutchet*, *supra* note 163, Considering clause III.2, para. 13.

[280] Supreme Court of Justice of Uruguay, *Case of Nibia Sabalsagaray Curutchet*, *supra* note 163, Considering clause III.8, para. 6.

> 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.[281]
>
> 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.[282]

220. The Supreme Court of Justice in Honduras held that the decrees of 199-87 and 87-91 of amnesty were unconstitutional and held that Section 205.16 of the Honduran Constitution grants Congress the power to concede amnesty for political crimes and those in relation; however, that provision does not give the authority to grant this benefit for crimes that were aimed at "threatening the existence and internal state of security, the system of government and citizen's rights." For the Supreme Court, the Decree199-87 and Decree 87-91 "serve only to incorporate the behavior of the military in the form of a political offense, in reality being that the alleged crimes committed by the military were performed under the cover that they were an act of service or because of it [...]." With this, the Honduran Supreme Court declared its unconstitutionality based on the merits, and therefore, the inapplicability of Decree No. 199-87 issued on December 11, 1987, and No. 87-91 issued on June 24, 1991 that provided for unconditional amnesty.[283]

221. Furthermore, the Constitutional Chamber of the Supreme Court of Justice of El Salvador declared the legal impossibility of implementing the Law on General Amnesty for the Consolidation of Peace in cases of gross violations of human rights, and thus opened the possibility for criminal judges, upon hearing specific cases of human rights violations that occurred during the internal armed conflict, to consider the inapplicability Amnesty Law. [284]

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[281] Supreme Court of Justice of Uruguay, *Case of Nibia Sabalsagaray Curutchet*, *supra* note 163, Considering clause III.8, para. 11.

[282] Supreme Court of Justice of Uruguay, *Case of Nibia Sabalsagaray Curutchet*, *supra* note 163, Considering clause III.8, para. 15.

[283] Supreme Court of Justice of the Republic of Hondorus, captioned orders – "RI20-99 – Unconstituitonality of Decree Number 199-87 and of Decree Number 87-91", June 27, 2000.

[284] Constitutional Chamber of the Supreme Court of Justice of El Salvador, Judgment 24-97/21-98, of September 26, 2000.

222. The Constitutional Court of Colombia, in various cases, has noted the obligation to avoid the application of domestic amnesty provisions in cases of serious human rights violations:

> Those such as the laws of final measure that impede access to justice, the blank amnesties for any crime, the self-amnesties (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 remedy 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. [285]

223. Likewise, the Supreme Court of Justice of Colombia indicated that "the norms related to [h]uman [r]ights form part of the great group of provisions of General International Law, those of which are recognized as *[j]us cogens* norms, reason for which, they are irrevocable, imperative […] and non-disposable." [286] The Supreme Court of Colombia recalled that the jurisprudence and recommendations of international organisms on human rights must serve the preferential standards 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. [287]

224. As follows from the previous paragraphs, all international bodies on human rights protection and high domestic courts of the region who have had the opportunity to rule on the scope of amnesty laws on serious violations of human rights and their incompatibility with these States' international obligations, have concluded that the mentioned laws violate the States international duty to investigate and sanction said violations.

F. Amnesty laws and the Jurisprudence of this Court.

225. This Court has established that "amnesty provisions, the statute of limitation provisions, and the establishment of exclusions of responsibility that are intended to prevent the investigation and punish 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." [288]

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[285] Constitutional Court of Colombia, Revision of the Law 742, of June 5, 2002, Case file No. LAT-223, Judgment C-578/02, of July 30, 2002, section 4.3.2.1.7.

[286] Supreme Court of Justice of Colombia, Criminal Appeals Chamber. *Case of of the Segovia Massacre*. Act number 156, of May 13, 2010, page 68.

[287] Cf. Supreme Court of Justice of Colombia, Criminal Appeals Chamber. *Case of of the Segovia Massacre*, *supra* note 248, pages. 69 and 71.

[288] *Cf. Case of Barrios Altos V Perú. Merits*. Judgment of March 14, 2001. Series C No. 75, para. 41; *Case of The Dos Erres Massacre*, *supra* note 127, para. 129, and *Case of Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* note 16, para. 171.

226. In this sense, amnesty laws are, in cases of serious violations of human rights, expressly incompatible with the letter and spirit of the Pact of San José, given that they violate the provisions of Articles 1(1) and 2, that is, in that they impede the investigation and punishment of those responsible for serious human rights violations and, consequently, impede access to victims and their families to the truth of what happened and to the corresponding reparation, thereby hindering the full, timely, and effective rule of justice in the relevant cases. This, in turn, favors impunity and arbitrariness and also seriously affects the rule of law, reason for which, in light of International Law, they have been declared to have no legal effect.

227. In particular, amnesty laws affect the international obligation of the State in regard to the investigation and punishment of serious human rights violations because they prevent the next of kin from being heard before a judge, pursuant to that indicated in Article 8(1) of the American Convention, thereby violating the right to judicial protection enshrined in Article 25 of the Convention precisely for the failure to investigate, persecute, capture, prosecute, and punish those responsible for the facts, thereby failing to comply with Article 1(1) of the Convention.

228. 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 the exercise of their right to a simple and effective remedy, in the terms of Articles 8 and 25 of the Convention, and 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 thereof, 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 prevents the next of kin from knowing the truth regarding the facts.

229. The incompatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, "self-amnesties," and 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 committed in international law. [289] The incompatibility 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 in what regards the rights enshrined in Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention.

G. The investigation of the facts and the Uruguayan Expiry Law.

230. The way in which, at least for a period of time, the Expiry Law adopted in Uruguay has been interpreted and applied, on the one hand, has affected the State's international obligation to investigate and punish human rights violations relating to the

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[289] *Cf. Case of Almonacid Arellano et al. V. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 26, 2006. Series C No. 154, para. 120, and *Case of Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* note 16, para. 175.

enforced disappearance of María Claudia García Iruretagoyena and of María Macarena Gelman García, as well as the situation regarding the latter in relation to her abduction and the concealment of her identity, due to the prevention of the victim's next of kin from being heard by a judge, pursuant to that stated in Article 8(1) of the American Convention and has, on the other hand, violated the right to judicial protection enshrined in Article 25 of that instrument because of the failure to investigate, persecute, capture, prosecute, and punish those responsible for the facts, thereby also failing to comply with Article 1(1) and 2 of the Convention, referring to the adaption of domestic law to the Convention. [290]

231. The failure to investigate the serious human rights violations committed in the present case, which occurred in the context of systematic patterns, evince the noncompliance with international obligations of the State, established by non-extendible norms. [291]

232. Given its express incompatibility with the American Convention, the provisions of the Expiry Law that impede the investigation and punishment of serious violations of human rights have no legal effect and, therefore, can not continue to obstruct the investigation of the facts of this case and the identification and punishment of those responsible, nor can they have the same or similar impact on other cases of serious violations of human rights enshrined in the American Convention that may have occurred in Uruguay. [292]

233. The obligation to investigate the facts in the case of enforced disappearance is specified in the provisions of Articles III, IV, V, and XII of the Inter-American Convention on Forced Disappearance of Persons, in regard to the investigation of enforced disappearance as a continuing offense, the establishment of jurisdiction to investigate said crime, the cooperation between States for the criminal prosecution and possible extradition of the alleged perpetrators, and access to information regarding the places of detention.

234. Similarly, given the involvement, not only of a systematic pattern in which multiple authorities may have been involved, but also of a cross-border/interstate operation, the State should have used and applied the appropriate legal instruments for the analysis of the case, the criminal codifications that are in-line with the facts, and the design of an appropriate investigation able to collect and systematize the vast and diverse information that has been reserved or made not easily accessible and includes the necessary inter-state cooperation.

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290 *Cf. Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 175.

291 *Cf. Case of Goiburú et al., supra* note 23, paras. 93 and 128; *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 61 and 197, and *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 137.

292 *Cf. Case of Barrios Altos. Merits, supra* note 288, para. 44; *Case of La Cantuta V. Perú. Merits, Reparations and Costs.* Judgment of November 29, 2006. Series C No. 162, para. 175, and *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 174.

235. In the same sense, the procedures initiated by Juan Gelman and the one opened in 2008 through the efforts of Maria Macarena Gelman, were brought under the crime of homicide, thereby excluding other crimes such as torture, enforced disappearance, and theft of identity, which allows the claim to be declared, by the domestic tribunal, as prescribed by law.

236. It is necessary to reiterate that this is a case of serious violations of human rights, particularly enforced disappearance, and therefore it is this codification that should have priority in the investigations that appropriately should be opened at the domestic level. As established by this Court, given the involvement of a crime of a permanent nature, namely, that the crime is prolonged in time, when the codification of enforced disappearance enters into force, the new law applies, without this implying a retroactive application. [293] In this sense, tribunals of the highest levels of the States of the American continent have rendered rulings and applied criminal norms in cases concerning acts that began to toll before the respective criminal codification entered into force. [294]

237. In order for, in the present case, the investigation to be effective, the State should have and must apply an appropriate regulatory framework to develop it, which implies the regulation and application in domestic law of enforced disappearance of persons, given that criminal prosecution is an appropriate instrument to prevent future human rights violations of this nature, [295] and furthermore, the State must ensure that no normative or any other obstacles prevent the investigation of such acts and, where appropriate, the sanction of those responsible. [296]

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[293] *Cf. Case of Tiu Tojín, supra* note 13, para. 44, para. 87; *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 201, and *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 179.

[294] *Cf.* Supreme Court of Justice of Peru, Judgment of March 18, 2006, Exp: 111-04, D.D Cayo Rivera Schreiber; Constitutional Tribunal of Peru, Judgment of March 18, 2004, Case file No. 2488-2002-HC/TC, para. 26 and Judgment of December 9, 2004, Case file No. 2798-04-HC/TC, para. 22; Supreme Court of Justice of México, Thesis: P./J. 49/2004, Federal Judicial Weekly and its Gazette, Novena Época, Plenum,Constitutional Chamber of the Supreme Tribunal of Justice of the Bolivarian Republic of Venezuela, Judgement of August 10, 2007,and Constitutional Court of Colombia, Judgment C-580/02 of July 31, 2002.

[295] *Cf. Case of Goiburú et al., supra* note 23, para. 92; *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 66, and *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 109.

[296] *Cf. Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 109. In this regard, the Statement of the Acting Minister of Foreign Affairs of Uruguay before the Parlementary Commission, regarding the Gelman Case, which indicated "there is a worrisome point which must be considered: the legal investigations open in the year 2008 are still in the pre-summarial stage, without any formal accusations against any of the alleged perpetrators," that "this procedural situation of the claim exposes her to risk of being affected by a possible new application of the Expiry Law," that "if the investigations close without the presentation of an accusation it could be that a new attempt to reopen by the family mebers allows for a new request for an Opinion by the Executive power in the terms established by Article 3 of the Expiry Law, and because it involved an act by the Government, it is possible that it change its position as it did before in these same actions considering, for example, that the case if deemed protected by the Expiry Law," "that is, that in the actual state of the claim the possibility exists that the report by the Executive branch be reversed, declaring that this claim is not protected by the Law. In this way, a new request by the families could be protected by the Law and finish this process without an accusation."

238. The fact that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct democracy, does not automatically or by itself grant legitimacy under International Law. The participation of the public in relation with the law, using methods of direct exercise of democracy, -referendum (paragraph 2 of Article 79 of the Constitution of Uruguay) - in 1989 and "plebiscite (letter A of Article 331 of the Constitution of Uruguay) regarding a referendum that declared as null Articles 1 and 4 of the Law – therefore, October 25, 2009, should be considered, as an act attributable to the State that give rise to its international responsibility.

239. The bare existence of a democratic regime does not guarantee, *per se*, the permanent respect of International Law, including International Law of Human Rights, and which has also been considered by the Inter-American Democratic Charter.[297] The democratic legitimacy of specific facts in a society is limited by the norms of protection of human rights recognized in international treaties, such as the American Convention, in such a form that the existence of one true democratic regime is determined by both its formal and substantial characteristics, and therefore, particularly in cases of serious violations of nonrevocable norms of International Law, the protection of human rights constitutes a impassable limit to the rule of the majority, that is, to the forum of the "possible to be decided" by the majorities in the democratic instance, those who should also prioritize "control of conformity with the Convention" (*supra* paras. 193), which is a function and task of any public authority and not only the Judicial Branch. In this sense, the Supreme Court of Justice has exercised an appropriate control of conformity with the Convention in respect to the Expiry law, by establishing, *inter alia*, that "the limits of the sovereignty of the majority lies, essentially, in two aspects: the guardianship of the fundamental rights (first, amongst all, the right to life and personal liberty, and there is no will of the majority, nor the general interest, nor the common good wherein these can be sacrificed) and the subjection of the public authorities to the law." [298] Other domestic

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297 *Cf.* General Assembly of the OAS, Resolution AG/RES. 1 (XXVIII-E/01) of September 11, 2001.

298 Supreme Court of Justice del Uruguay, *Case of Nibia Sabalsagaray Curutchet*, *supra* note 163:

> [...] The ratification which took place in the referendum appeal brought against the Law in 1989 does not project any significant consequence in relation to the constitutional analysis to be performed [...]
>
> Moreover, the direct exercise of popular sovereignty by way of a derogatory referendum derogatory of the laws sanctioned by the Legislature only have the aforementioned possible range, but the rejection of the waiver by the public does not extend its effectiveness to the point of providing coverage to a rule of constitutional law flawed "ab origine" for violating rules or principles laid down or approved by the Charter. As Luigi says Ferrajoli, constitutional rules which establish the principles and fundamental rights guarantee the material dimensions of the "substantial democracy," which refers to that which can not be decided or is to be decided by the majority, linking the legislation, under penalty of invalidity, with the enforcement of fundamental rights and other axiological principles established by it [...] The author characterizes as the metajuridical fallacy the confusion between the paradigm of the rule of law and a political democracy, in which a rule is legitimate only if it is desired by the majority [...]."

courts have also referred to the limits of democracy in relation to the protection of fundamental rights. [299]

[299] Because domestic tribunals have ruled, based on international obligations, with respect to the threshold value of, be it, the legislative Branch or the mechanisms of direct democracy, as in the cases of:

a). The Constitutional Chamber of the Supreme Court of Costa Rica, on August 9, 2010, stated that it was not constitutionally valid to subject to popular vote (referendum) a bill that would allow for civil unions between persons of the same sex that was pending before the Legislative Assembly, because such a means could not be used to decide issues of human rights guaranteed in international treaties. In this regard, the Constitutional Court noted that "the human rights enshrined in the instruments of public international law - declarations and conventions on the matter- are a substantial bulwark of freedom configuration of the legislature, both ordinary and eminently popular through the referendum. [...] The reforming or constituent power-derived –in regard to the constituting power- is limited by the essence of human and fundamental rights, so that, by way of partial amendment of the constitution, can not reduce or curtail the essence of those [...]. It is necessary to add that the rights of the minorities, because of its undeniable nature, are an eminently technical legal issue that must be held by the ordinary legislative majorities and not prone to denial "Constitutional Chamber of the Supreme Court of Costa Rica, Judgement No 2010013313 on August 10, 2010, Case File 10-008331-0007-CO, Considering clause VI.

b). The Constitutional Court of stated that a democratic process requires certain rules that limit the power of the majority expressed in the polls to protect the minority: "the old identification of the people with the majority expressed in the polls is not enough to attribute a democratic nature to a regime that, in actuality, is also based in the respect of the minority […] The institutionalization of the people prevents soveriegnty that lies within from functioning as a pretext for the exercise of its power unknown to any legal limit and detached from any form of control. The democratic process, if genuine and truly is so, requires the establishment and maintenance of rules that channel the manifestations of popular will, and prevent a majority from speaking on behalf of the people to the exlcusion of some [...].” Constitutional Court of Colombia, Judgment C-141 of 2010 of February 26, 2010, M.P. Humberto Antonio Sierra Porto, where it decides on the constitutionality of Law 1354 of 2009, of the summons to a constituitonal referendum.

c) The Federal Constitution of the Swiss Confederation in Article139.3 states that "when a popular initiative does not respect theprinciple of unity of form, the unit of matter or the mandatory provisions of international law, the Federal Assembly will declare it totally or partially void." The Swiss Federal Council, in a report by March 5, 2010 on the relationship between international law and domestic law, ruled on the norms it considered as imperative to international law. In that regard, it noted that these standards are: rules prohibiting the use of force between states, the prohibitions on torture, genocide and slavery as well as the core of international humanitarian law (prohibition of attack on physical integrity, hostage taking, attacks on the dignity of persons and carrying out of executions without trial by a regularly constituted court) and the intangibles of the guarantees of the European Convention of Human Rights. http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/cintla.Par.0052.File.tmp/La%20relation%20entre%20droit%20international%20et%20droit%20interne.pdf, last accessed on February 23, 2011.(translation of the Secretariat of the Court).

d) The jurisprudence of various courts of the United States, for example in the case Perry v. Schwarzenegger, in which it states that the referendum on same-sex couples was unconstitutional because it prevented the State of California from meeting its obligation not to discriminate against people who wanted to marry in accordance with Amendment 14 of the Constitution. In this way, the Supreme Court declared "the fundamental rights can not be put to a vote; they do not depend on the outcome of elections." Perry v.Schwarzenegger (Challenge to Proposition 8) 10-16696, Court of Appeals for the Ninth Circuit, United States. In the Case of Romer v. Evans, the Supreme Court overturned the initiative that would have prevented the legislature from adopting a standard that would protect gays and lesbians from anti-discrimination. *Romer, Governor of Colorado, et al. v. Evans et al. (94-1039), 517 U.S. 620 (1996).* United States Supreme Court. Finally, in the Case of West Virginia State Board of Education v Barnette, the United States Supreme Court ruled that the right to freedom of expression protected the students from the rule that required them to salute the flag of the United States

240. In addition, in applying the provisions of the Expiry Law (which, for all intensive purposes constitutes an amnesty law) and thereby impeding the investigation of the facts and the identification, prosecution, and possible punishment of the possible perpetrators of continued and permanent injuries such as those caused by enforced disappearance, the State fails to comply with its obligation to adapt its domestic law enshrined in Article 2 of the Convention.

H. Conclusion

241. The interpretation of the Executive Branch of the State, dated June 23, 2005, the case subject to this proceeding be expressly excluded from the application of the Expiry Law, means that, regarding the specific case of María Claudia García de Gelman, the Law is no longer to be an obstacle that prevents the investigation and punishment of those responsible. Nonetheless, the main obstacle for the investigations in this case has been the validity and application of the Expiry Law, which, as stated by various domestic

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and of the oath of allegiance to it. In that vein, the Court held that the essential purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, placing them beyond the reach of majorities and officials, and conferring the status of legal principles to be applied by the courts. The right of individuals to life, liberty and property, freedom of expression, freedom of press, freedom of worship and assembly, and other fundamental rights may not be voted on, do not depend on election results." *West Virginia State Board of Education v Barnette*, 319 U.S. 624, (1943), 319 U.S. 624, June 14, 1943, Supreme Court of the United States.

e) The Constitutional Court of South Africa refused a referendum on capital punishment, considering that a majority can not decide on the rights of the minority, which in this case are those marginalized by society were identified by the Court, as people could who could be subject to the corporal punishment: "[...] In the same sense, the issue of constitutionality of the death penalty can not be put to a referendum, where the opinion of the majority would prevail over the wishes of any minority. The main reason for establishing the new legal order, and to vest the judicial power to review all legislation in the courts, is to protect the rights of minorities among other people who are not in a position to adequately protect their rights through the democratic process. Those entitled to claim this protection include the socially excluded and marginalized people in our society. Only if there is a will to protect those who are worse off and the weakest among us, then we can be sure that our rights will be protected. [...]. *Constitutional Court of South Africa, State v. Tand M Makwanyane Mchunu,* Case No. CCT/3/94, June 6, 1995, para. 88.

f) The Constitutional Court of Slovenia, in the Case of the so-called "Erased" (people who do not have a legal immigration status), decided that it is not possible to hold a referendum on the rights of an established minority; the Court struck down a referendum that sought to revoke the legal residency status of a minority. In this regard, the court noted: "the principles of a State governed by the principle of legality, the right to equality before the law, the right to personal dignity and security, the right to seek redress for violations of human rights, and the authority of the Constitutional Court, should be prioritized over the right to make decisions in a referendum."Judgement of the Constitutional Court of Slovenia June 10, 2010, U-II-1/10. *Referendum on the confirmation of the Act on Amendments and Modifications of the Act on the Regulation of the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia*, para. 10.

authorities, the State does not contest the necessity to revoke it, although, however, it does not do so.

242. It is evident that the investigations in the State related to this case, have exceeded any standard of reasonableness regarding the length of the proceedings, to which, notwithstanding that this entails a case of serious violations of human rights, it has not given priority to the principle of effectiveness in the investigation of the facts and determination and, where applicable, the necessary punishment for those responsible. [300]

243. All persons, including the next of kin of the victims of gross human rights violations, have, pursuant to Articles 1(1), 8(1), and 25, as well as in certain circumstances Article 13 of the Convention, [301] 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. [302] This right has also been recognized in various instruments of the United Nations and by the General Assembly of the Organization of American States,[303] and whose content, in particular cases of enforced disappearance, is

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[300] *Cf. Case of the Pueblo Bello Massacre, supra* note 146, para. 171; *Case of the Mapiripan Massacre, supra* note 14, para. 214; and *Case of La Cantuta, supra* note 292, para. 149. See, also, *mutatis mutandi*, *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 166.

[301] Recently, in the Case of Gomes Lund et al., the Court noted that under the facts involved, the right to know the truth was related to an action brought by relatives to access certain information, related to access to justice and the right to seek and receive information as enshrined in Article 13 of the Convention, reason for which it was analyzed under this norm.

[302] *Cf.* Case of *Myrna Mack Chang, supra* note 9, para. 274; *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 Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 200.

[303] *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, Resolutions: 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, Independent expert responsible for updating the set of principles to combat impunity (E/CN.4/2005/102) of February 18, 2005. In the same sense, the former Human Rights Commission of the United Nations, in the Set of Principles for the protection and promotion of human rights through action to combat impunity, of 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

part of the "right of the next of kin to know the fate of the victims, and where possible, the location of their remains," [304] encompassed in the right to access to justice and the obligation to investigate—forms of reparation to know the truth in the specific case. [305]

244. The Inter-American Court concludes that the State violated the rights to fair trial [judicial guarantees] and judicial protection provided for in Articles 8(1) and 25(1) of the American Convention, in relation to Articles 1(1) and 2 thereof, and of the mentioned norms of the Inter-American Convention on Forced Disappearance of Persons, for failing to effectively investigate the disappearance María Claudia García Iruretagoyena, and the abduction, suppression of identity, and delivery of María Macarena Gelman to a third party, to the detriment of Juan and Maria Macarena Gelman.

246. Due to the interpretation and application that has been given to the Expiry Law, which lacks legal effect in regard to human rights violations in the terms indicated above (*supra* para. 232), the State has not fulfilled its obligation to adapt its domestic legislation to the Convention, contained in Article 2 thereof, in relation to Articles 8(1), 25, and 1(1) thereof and Articles I(b), III, IV, and V of the Inter-American Convention on Forced Disappearance of Persons.

VII

REPARATIONS

(Application of Article 63 (1) of the American Convention)

247. On the basis of Article 63 (1) of the Convention, the Court has indicated that any violation of an international obligation that has produced damage entails the obligation to repair this adequately, [306] and that this provision "embodies a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility." [307]

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protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1) of February 8, 2005.

[304] *Case of Velásquez Rodríguez. Merits, supra* note 20, para. 181; *Case of Anzualdo Castro, supra* note 75, para. 118, and *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 201.

[305] *Cf. Case of Velásquez Rodríguez. Merits, supra* note 20, para. 181; *Case of Anzualdo Castro, supra* note 75, para. 118, and *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 201.

[306] *Cf. Case of Velásquez Rodríguez V. Honduras. Reparations and Costs.* Judgment of July 21, 1989. Series C No. 7, para. 25; *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 245, and *Case of Cabrera García and Montiel Flores, supra* note 16, para. 209.

[307] *Cf. Case of Castillo Páez V. Perú. Reparations and Costs.* Judgment of November 27, 1998. Series C No. 43, para. 50; *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 245, and *Case of Cabrera García and Montiel Flores, supra* note 16, para. 209.

248. This Tribunal has established that the reparations should have a link with the facts of the case, the declared violations, the accredited damage, as well as the requested mean to repair the respective damages. Therefore, the Court should observe said concurrence to pronounce itself properly and in conformity with the law. [308]

A. Injured party

249. The injured party in this case is considered to be María Claudia García, María Macarena Gelman García and Juan Gelman. This has been recognized by the State, and is being declared in this judgment.

B. Obligation to investigate the facts and to identify, prosecute and, where appropriate, punish those responsible and adopt all the necessary domestic legislative measures

B.1 Investigation, prosecution and, where appropriate, punishment of those responsible

250. The Commission, as well as the representatives requested that the State make a full, impartial, effective, and prompt investigation of the facts, in order to establish and sanction the intellectual and material perpetrators of all who participated in the events.

251. In addition to what was pointed out it the acknowledgment of responsibility, the State, in its final arguments, expressed that the present convincing administrative and judicial interpretation that has been given to the norm has led to the resounding lack of application of the law in this case, and in general, by the decisions of the Supreme Court "which evinces a radical change that has been put to use regarding the effects and the scope" of the Expiry Law. It also noted that the House of Representatives approved a bill that interprets the Expiry Law, which "suppresses [its] effects", and which would "be handled within the Senate."

252. The Court determines that, after assessing the proven facts and in conformity with the declared violations, the State must investigate the facts, and identify, prosecute, and where appropriate, punish those responsible for the enforced disappearance of María Claudia García Iruretagoyena and Maria Macarena Gelman. The latter, due to her abduction, suppression and substitution of her identify, as well as related facts.

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[308] *Cf. Case of Ticona Estrada et al., supra* note 109, para. 110; *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 246, and *Case of Cabrera García and Montiel Flores, supra* note 16, para. 210.

253. For this, given that the Expiry Law lacks the effects because of its incompatibility with the American Convention and the Inter-American Convention on Forced Disappearance of Persons, in as much as it can impede the investigation and possible sanction of those responsible for serious human right violations, the State must guarantee that this never again becomes an impediment for the investigation of the facts at hand, and of the identification, and if applicable, punishment of those responsible for the facts and similar serious violations of human rights that took place in Uruguay.

254. Consequently, the State should ensure that no other analogous norm, such as a statute of limitations, non-retroactivity of the criminal law, res judicata, *ne bis in idem* or any other similar law exonerating responsibility, be applied and that the authorities refrain from carrying out acts that would implicate the obstruction of the investigative process.

255. The State must conduct the investigation in an effective manner so that it is done in a reasonable amount of time, be it by ordering either the necessary speed to the existing open claim or by ordering a new one, depending on what is most beneficial to the investigation, and furthermore, ensuring that the competent authorities conduct the corresponding *ex officio* investigations, having at their disposal the necessary authorization and remedies, allowing those of whom are part of the investigation, among them the victim's relatives, witnesses, and administrators of justice, be assured the due guarantees of security. [309]

256. Particularly, the Court considers that, with basis in its jurisprudence[310], the State must ensure the full access and capacity to act of the next of kin of the victims in every stage of the investigation and prosecution of those responsible. Additionally, the result of the corresponding proceedings should be disseminated publically in order for Uruguayan society to know of the facts of the present case, as well as to know those responsible for them. [311]

B.2 Determination of the whereabouts of María Claudia

257. The Commission and the representatives requested that the State be ordered to employ all necessary means to determine the whereabouts of Maria Claudia Garcia de Gelman, or of her bodily remains; whatever the case may be. The representatives

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[309] *Cf. Velásquez Rodríguez. Merits, supra* note 20, para. 174; *Case of Rosendo Cantú et al.*, *supra* note 9, para. 211; *Case of Ibsen Cárdenas and Ibsen Peña*, *supra* note 9, para. 237-c, and *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 256-c.

[310] *Cf. Case of del Caracazo V. Venezuela. Reparations and Costs*. Judgment of August 29, 2002. Series C No. 95, para. 118; *Case of Ibsen Cárdenas and Ibsen Peña*, *supra* note 9, para. 238, and *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 257.

[311] *Cf. Case of del Caracazo. Reparations and Costs*, *supra* note 310, para. 118; *Case of Manuel Cepeda Vargas*, *supra* note 11, para. 217, and *Case of Ibsen Cárdenas and Ibsen Peña*, *supra* note 9, para. 238.

requested, in addition, that the State "make available to the justice system, as well as to her next of kin, and to Uruguayan society as a whole," the documents in its possession that pertain to grave human rights violations committed during the de facto government.

258. The desire of the victim's next of kin to identify the whereabouts of their disappeared ones and, where applicable, to know of their bodily remains, and to receive them and bury them according to their believes, thus bringing closure to their grieving process experienced throughout the years, constitutes a right, in addition to the right of the victims to know the truth, [312] which—as a measure of reparation for the transgression—generates the corresponding obligation of the State to honor and guarantee it, in addition to contributing helpful information regarding the perpetrators of the violations or about the institutions to which they belong. [313]

259. Consequently, as a form of reparation of the victims right to the truth, [314] the State must continue its effective investigation and immediate localization of María Claudia Garcia, or of her bodily remains, be it by a criminal investigation or through other efficient and appropriate proceedings. Carrying out said procedures must be in accordance with international standards. [315]

260. The referred procedure should be reported to her next of kin, securing, as far as possible, assure their presence. If the bodily remains of María Claudia Garcia are to be found, these must be given to her next of kin as soon as possible, including proof of previously conducted genetic parentage testing. Furthermore, the State must pay for funeral expenses, if applicable, in agreement with the next of kin. [316] The costs of all the abovementioned should be assumed by the State.

C. Other means of satisfaction and guarantees of non-repetition

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312 *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 Ibsen Cárdenas and Ibsen Peña*, *supra* note 9, para. 214, and *Case of Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* note 16, para. 261.

313 *Cf. Case of The Dos Erres Massacre*, *supra* note 127, para. 245, and *Case of Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* note 16, para. 261.

314 *Cf. Case of del Caracazo. Reparations and Costs*, *supra* note 310, paras. 122 and 123; *Case of Anzualdo Castro*, *supra* note 75, para. 185, and *Case of Radilla Pacheco*, *supra* note 74, para. 336.

315 See, among others, those set forth in the UN Manual on Effective Investigation and Prevention of Extrajudicial, Arbitrary, and Summary Executions; Comments and Recommendations adopted by consensus at the International Conference of governmental and nongovernmental organizations in the framework of the Project "missing persons and their families," of the International Committee of the Red Cross; and the *Protocol Model for Forensic Investigation of Suspicious Deaths due to violation of Human Rights*, of the Office of the High Commissioner of the United Nations.

316 *Cf. Case of La Cantuta*, *supra* note 292, para. 232; *Case of Ibsen Cárdenas and Ibsen Peña*, *supra* note 9, para. 242, and *Case of Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* note 16, para. 262.

C.1. Satisfaction

i. Public act of acknowledgment of international responsibility and recovery of the memory of María Claudia García de Gelman.

261. The Commission requested that the State be ordered to take the necessary measures to "acknowledge its international responsibility for the denounced acts in the case" and proposed "the carrying out of a public act and to make amends to the victim and her relatives, […] aimed at recovering historic memory." Additionally, the Commission requested in its final arguments: a) the holding of certain acts of symbolic importance that guarantee the non-repetition of the crimes committed in the present case, and b) acts that can only be determined with negotiations between the petitioners and the State, such as a day for the yearly celebration in commemoration and memory of the victims of the "de facto government."

262. In the same sense, the representatives requested that the Court order the State to carry out a public act of acknowledgment of responsibility at the SID's headquarters, wherein the highest authority –representing the State-, refer to the facts in the present case and to the human rights violations that took place during the authoritarian era of the recent past, making the "relevant parts" of this Judgment known, and expressly recognizing the responsibility of the Republic of Uruguay for its participation in Operation Condor, […] and offering an apology to the next of kin of María Claudia García." They added that "[s]uch event must be disseminated by a public media source of wide national coverage, and during a peak hours so as to reach the highest audience volume," and the next of kin of the victims should agree upon the modality of fulfillment, ensuring their participation.

263. Likewise, the representatives requested a) ordering the State to "[p]lace a memorial plaque in the chamber where María Claudia García de Gelman was illegally detained together with her daughter, including some information regarding the persons who were held there, having previously obtained their consent, and public access to this room must be guaranteed, and b) that SID's headquarters, where the Center for National Advanced Studies for education in the Military is currently in operation, "be used for functional purposes related to State policies on human rights."

264. The State indicated that on "May 21, 2009, the Mayor of Montevideo awarded a title of distinguished visiting citizens to 11 young Uruguayans and Argentines, victims of the dictatorships of both countries," whom among them stood María Macarena Gelman, and stated that "this honorary recognition made by the Government of Montevideo, was intended to strengthen the memory of the society and to contribute to her and her parent's reparation, as well as that of all victims of grave violations of human rights in the recent past." Likewise, the State emphasized that the Executive declared the project of a Memorial in Remembrance of the Detained-Disappeared of national interest, which was erected in the Vaz Ferreira Park, in the Cerro of Montevideo. Concerning the memorial plaque, the State indicated that "the Executive assumes the commitment to guarantee public access to the section of SID where María Claudia and Macarena were detained and to place a memorial plaque in said location."

265. In former occasions, the Court has favorably valued those acts carried out by the State that have an effect on the recovery of the memory of the victims, the recognition of their dignity, and consolation of their relatives, [317] such as those mentioned in the foregoing paragraph.

266. As a result, as the Court has ordered in other cases, [318] it deems that the State should carry out a public act of acknowledgment of international responsibility regarding the facts of the current case, addressing the violations established in the present Judgment, and said act must take place in a public ceremony carried out by high-ranking national authorities and in the presence of the victims of the present case. The State should come to an agreement with the victims or their representatives regarding the manner in which said public act of acknowledgment is to take place, such as place and date. The act should be disseminated through the means of communication, and for its fulfillment, the State must comply within a year as of the legal notice of this Judgment.

267. Likewise, according to its obligation, and within one year, the State should unveil, in the SID building where the victims were detained, a plaque containing an inscription with their names, the period of time in which they were illegally detained there.

268. The Court does not consider that the harm caused by the SID, where the Center for National Advanced Studies for education in the Military is currently in operation, a functional destination related to State policy of human rights, has any relation to the facts of the case and the declared violations, and it is therefore not relevant to attend to the requests made by the representatives.

269. Concerning other requests made by the Commission, the Court notes that they were not presented in a timely manner, that is, when the case was submitted to this Tribunal. The mentioned requests are, therefore, time-barred, and will not be considered.

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317 *Cf. Case of Masacre de Pueblo Bello, supra* note 146, para. 254; *Case of Manuel Cepeda Vargas, supra* note 11, para. 223, and *Case of Ibsen Cárdenas and Ibsen Peña, supra* note 9, para. 248.

318 *Cf. Case of Kawas Fernández V. Honduras*. *Merits, Reparations and Costs*. Judgment of April 3, 2009 Series C No. 196, para. 202; *Case of Rosendo Cantú et al., supra* note 9, para. 226, and *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 277.

ii. Publication of the judgment

270. The representatives requested that the State be ordered to publish the pertinent sections of the Judgment in the Official Gazette and in a newspaper of wide national circulation, as well as the entire Judgment on the web site of the Presidency of the Republic. The State did not refer to the matter.

271. The Court finds, in line with its reiterated jurisprudence[319] on the matter at hand, that the State must publish, within a period of six months, as of the legal notice of this Judgment:

a) only once, in the Official Gazette, this Judgment, with the respective names of each chapter and the corresponding sections –without footnotes;
b) in a different newspaper of wide national circulation, and only once, the official summary of the present Judgment drafted by this Court;
c) the entire Judgment, in an official website, which should be available for a period of one year.

C.2. Guarantees of non-repetition

i. Creation of specialized units to carry out the investigation of complaints of serious human rights violations and elaboration of a protocol for the collection and identification of the bodily remains.

272. The representatives requested that the State be ordered to "create specialized units within the Prosecutors' Office and the Judicial Branch, which would carry out the investigation of complaints of grave violations of human rights" to which it must "administratively reorganize the financial, technical, and administrative resources" in order to guarantee their operation." They based this requirement on the lack of organization in the Prosecutors' Office and the Judicial Branch to efficiently respond to causes of this nature and on the lack of comprehensive investigative strategies, in addition to their workload and lack of specialization and exclusive attention to theses issues.

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[319] *Cf Case of Barrios Altos V. Perú. Reparations and Costs*. Judgment of November 30, 2001. Series C No. 87, Punto Resolutivo 5.d); *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 273, and *Case of Cabrera García and Montiel Flores, supra* note 16, para. 217.

273. The State informed that a "bill has been drafted by which specialized units in the Prosecutor's Office as well as in the Judicial Branch are created, with jurisdiction to participate in complaints of serious human rights violations." Likewise, it informed that a "project has been prepared, whereby an Interministerial Commission is created for the purpose of ascertaining the fate of the disappeared individuals between the years 1973 to 1985 [sic] as well as to 'Produce a Protocol for the gathering of, and information on, the remains of the disappeared individuals.'" In its final arguments, the State emphasized the creation of the National Institute of Human Rights, a body under the Legislative Branch of the Republic. It stated that the organization of the criminal courts in Uruguay is a topic in permanent discussion and that the Executive Branch forwarded to the Legislative Branch a draft bill of a new Criminal Procedure Code which would introduce, among others, an oral and public process, whereby the prosecuting attorneys participate and are responsible for the coordination and order of the inquiries.

274. The Court values that the State has initiated activities to continue the investigations to determine the fate of the disappeared during the military dictatorship in Uruguay. The Court assesses positively the State's offer to create an Interministerial Commission in charge of promoting the investigation to ascertain the fate of the disappeared individuals between the years 1973 to 1985, to which it recommends that the participation of a representative of the victim of said events be ensured who would be able to channel relevant information and would be subject to the confidentiality that such information requires, and of a representative of the Public Prosecutor's Office acting as contact to compile such information.

275. Furthermore, the Court positively values the State's disposition to establish a "Protocol for the collection and information of the bodily remains of the disappeared persons," and it orders the State to indeed adopt it, making this known to the responsible authorities for its immediate implementation.

ii. Training for the operators of justice

276. The representatives asked the Court to order the State to conduct "permanent training on human rights for the operators of justice, to include the creation of a specific work protocol for the collection and identification of the bodily remains of disappeared individuals."

277. The State, in its response to the petition, reported that, since 2007, it has carried out trainings to "educate on Human Rights, from an ethical and regulatory perspective, thereby enabling all citizens, among other things, to have access to the Administration of Justice and to the effective validity of the principle of equality before the law." It also indicated that the Center for Judicial Studies of Uruguay, taught various seminars where topics of human rights are discussed.

278. Based on what has been stated in the case file, the Court, without detriment to the programs of human rights training for public operators that already exists in Uruguay, orders the State to implement, at the Center for Judicial Studies of Uruguay, in a reasonable period of time and with the corresponding budgetary means, permanent human rights programs, offered to district attorneys and judges of the Judicial Branch of Uruguay, that entail courses or training programs on the diligent investigation and judgment of acts which constitute enforced disappearance of persons and abductions of minors.

iii. Public access to the State files

279. The representatives requested the Court to order the State to guarantee "public access to files located in the State's agencies and to establish a mechanism of systematization, identification, maintenance, update, and organization for them, […] allowing effective access and responsible use […] and ensuring that the authorities in charge of the criminal investigation explain the human rights violations."

280. The State highlighted that the Law 18.381 of October 17, 2008, should be taken into account, a law wherein: a) the goal is the promotion of transparency in the administrative function of all public organizations, whether of the State or not, and also the guarantee of the fundamental right of persons to have access to public information, b) it recognizes the right to have access to public information and c) establishes standards, and for classification of information and that it creates a specialized agency which has already been regulated. Thereby, "within the aforementioned law, the victims requests are fulfilled."

281. In relation to that indicated by the State, the representatives states that following a 2007 study in the General Archive of the University of the Republic that found 32 repositories with documentation of human rights violations (five private and 27 public), which, in regards to access "in 30% of the cases is free and without restrictions, and in 50% of the cases it is restricted, which means, that permission must be requested and the request must be justified, and this can be denied." In the great majority of the cases, the standards used to allow or deny the request, is not clear." They noted that the existing legal framework (Law of the National Archive System of 2007, Law of Protection of Personal Information of 2008 and the Law of Access to Public Information of 2008) has not been regulated and a public policy which would comply with international standards has not been designed. Therefore, they requested that the State authorize, without restrictions, the access to the records and other information in the hands of institutions and employees or former employees of the State, with the objective of collaborating with the criminal investigations to clarify the human rights violations."

282. The Court positively values that there exists a law, which in Uruguay protects the right to access public information, as informed by the State. Although the application of this norm has not been made in favor of the victims in the present case, the Court has noted that one of the limitations to progress with the investigation is the information concerning the serious violations of human rights taken place during the dictatorship which rests in different national security archives that are found to be dispersed and whose control is not adequate. [320] Given that this information could be useful for the employees who execute the judicial investigations concerning the facts of the present case, the State should adopt the appropriate and adequate measures to guarantee the technical and systematical access to this information, means that should be supported by the appropriate assigned budget.

iv. Others claims

283. The Commission requested that the State be ordered "[t]o create an effective internal mechanism, with binding legal powers and with authority over all bodies of the State, to ensure full compliance with that ordered in the Court's judgment."

284. The State expressed that, in compliance with the constitutional system of Uruguay, the Nation adopt a form of government of a democratic republic; that the Branches of government mentioned in the Constitution are the Executive Branch, the Legislative Branch, and the Judicial Branch, and that, at the same time, each one of them exercises a predominant legal function, be it administrative, legislative, or jurisdictional, which conceptually implies the separation of powers among the different systems in those bodies and the consequences entailed from this form of organization." It also stated that Uruguay is a country that prides itself on being respectful of International Law as well as of the jurisdictional judgments which is in consonance with its best tradition, thus its commitment to comply with the Court's judgment in the current case is not in any possible way doubtful; therefore, Uruguay stated that there is no need to create "domestic mechanism[s]" to that effect.

285. The Court finds that the Commission did not support, neither in general terms or given the particularities of this case, in any specific circumstance, its request with respect to establishing a mechanism for the compliance of this Judgment. Considering the State's commitment to comply with this Judgment, there is no need for such a requirement.

D. Indemnifications, costs, and expenses

286. The representatives informed that Mr. Juan Gelman had affirmed his decision to be excluded as a beneficiary of the reparations regarding compensation, and the Court will therefore abstain from determining this.

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[320] Expert Report of Mr. Gerardo Caetano rendered during the public hearing before the Inter-American Court.

287. The State cited several provisions of the aforementioned Law 18.596 of September 18, 2009, and stated that "it is in accordance with guidelines established therein that the victims shall be compensated."

D.1. Pecuniary damage

288. The Commission requested that, without detriment to the representatives' wishes, "the Court fix in equity an amount of compensation that corresponds to consequential damages and loss of earnings."

289. The representatives included in this concept the expenses that Maria Macarena Gelman has had to incur in order to seek justice and the truth, as well as covering medical and psychological expenses since she learned of the events. They claimed that as of ten years ago and up until today, María Macarena has incurred expenses related to travel, lodging, transportation, telephone calls, and administrative and judicial costs, for all of which she does not have receipts, since such expenses took place over the years. Therefore, they petitioned, that an amount be fixed, in equity and for consequential damages, for the State to reimburse María Macarena Gelman García for incurred expenses. They added that Maria Macarena Gelman has "decid[ed] to donate to the non-governmental organization *Childrens Villages SOS* ['Aldeas Infantiles SOS']" the amount that, eventually, the Court establish for this.

290. The Court has developed in its jurisprudence the concept of pecuniary damage and the amounts corresponding. It has established that pecuniary damage encompass the "loss of, or detriment to, the victims' income, expenses made as a result of facts and consequences of a pecuniary nature with a causal connection to the facts of the case." [321]

291. The Court fixes an amount, of $ 5,000.00 (five thousand dollars of the United States of America) in favor of María Macarena Gelman for expenses incurred as a result of the search of her mother.

292. As of loss of income, the representatives indicated that María Claudia Garcia was 19 years old at the time of her disappearance, and that, according to available data regarding life expectancy in Argentina in that era it was of 72 years, to which 53 years remained. Along the same lines, she could have been expected to have completed her university studies in 1982, approximately, and would have then started her professional career. They stated that the minimum wage in Argentina in 1976 was US$200, and updating that amount to the current value and applying a formula based on various standards, had she not been detained in disappearance, that amount would be US$ 312,512.02, which should be increased by 50%, since she would have received higher income due to her professional studies in Philosophy and Letters, and then subtracting 25% due to personal expenses. Therefore, they requested that the State pay María

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[321] *Cf. Case of Bámaca Velásquez V. Guatemala. Reparations and Costs.* Judgment of February 22, 2002. Series C No. 91, para. 43; *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 298, and *Case of Cabrera García and Montiel Flores, supra* note 16, para. 248.

Macerna, as heiress of María Claudia García, an amount of US$385,326.02 for loss of earnings, for income not obtained by the latter.

293. In regard to income that María Claudia García would have received during the likelihood of her lifespan, had the enforced disappearance not occurred, the Court decides to fix in equity and based on loss of earnings, the corresponding amount of US $300,000.00 (three hundred thousand dollars of the United States of America) or its equivalent in Uruguayan pesos, which should be distributed in equal parts among the beneficiaries according to applicable law.

D.2. Non-pecuniary damage

294. The Commission argued that the non- pecuniary damage as a consequence of María Claudia García's disappearance is evident, as are the detrimental consequences resulting from denying access to justice to her next of kin and that it is presumed that her next of kin have experienced intense psychological harm, anguish, pain and suffering, and a change in their life plans as these relate to government actions, lack of justice in a reasonable period time, and the corresponding punishment for those involved in the events.

295. In regard to "moral damage," the representatives requested that a sum of $100,000.00 USD (one hundred thousand dollars of the United States of America) be set, which should be awarded to her heiress, María Macarena Gelman. As of María Macarena, they alleged that Uruguay had violated her personal integrity in "two dimensions": for the disappearance of her mother and for the conditions around her birth and suppression of her identity. They requested, in view of "the drastic change in [her] life, "imposing different life circumstances that modified [the] plans and projects that could have been realized under ordinary conditions of existence," to which the State violated her life plans, which is ongoing, given that Maria Macarena Gelman devotes all of her efforts to the search for truth regarding the fate of her mother and her earliest days of life, as well as to the search for justice. As such, the representatives requested that the State pay María Macarena Gelman the amount of $250,000.00USD (two hundred and fifty thousand dollars of the United States of America).

296. International jurisprudence has repeatedly established that a judgment can constitute *per se* a form of reparation. [322] Bearing in mind that non-pecuniary damage encompasses "pain and suffering caused to the victim and her next of kin, infringement of principles which are highly significant to persons, as well as non-pecuniary alterations in the victim's lifestyle conditions or that of her relatives." [323]Likewise, it is necessary to

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[322] *Cf. Case of Neira Alegría et al.. Reparations and Costs*, *supra* note 312, para. 56; *Case of Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* note 16, para. 310, and *Case of Cabrera García and Montiel Flores*, *supra* note 16, para. 260.

[323] *Case of 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 Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* note 16, para. 305, and *Case of Cabrera García and Montiel Flores*, *supra* note 16, para. 255.

consider the circumstances of the case *sub judice*, for the harm the violations inflicted upon the victims, given the profound effect the facts had on María Claudia García, particularly because of her state of pregnancy.[324] In turn, particularly relevant is the change in their lifestyle conditions and the remaining non-pecuniary consequences suffered by Maria Macarena Gelman. Consequently, the Court establishes in equity and for non-pecuniary damages, [325] the amount of:

a) USD $ 100,000.00 (hundred thousand dollars of the United States of America) in favor of María Claudia García de Gelman;

b) USD $ 80,000.00 (eighty thousand dollars of the United States of America) in favor of María Macarena Gelman García.

297. The Court takes into account the expressed decision of Mr. Juan Gelman of being excluded as a beneficiary of compensation (*supra* para. 286). Nonetheless, the Tribunal recognized the profound harm that the facts of the case have had in his life, his incessant search for justice in Uruguay and Argentina, expressed in his active attempts in the investigations something that without a doubt has had a great economic impact, and has altered his and his family's lives.

D.3 Costs and expenses

298. According to the Courts jurisprudence, the costs and expenses are established within the concept of reparations contained in the provisions of Article 63(1) of the American Convention. [326]

299. The Commission requested the Court to order the State to make the payment of costs and expenses, duly proven by the representatives.

300. The representatives stated that CEJIL has acted as representative of the alleged victims and their relatives since the initial petition was filed before the Commission in May of 2006, having incurred from September of 2005 to this date, expenses which mainly focus on the process of investigating and gathering evidence, processing the case

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[324] *Cf. Case of Goiburú et al., supra* note 23, para. 160.b.v.

[325] *Cf. Case of Neira Alegría et al. V. Perú. Reparations and Costs, supra* note 312, para. 56; *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 310, and *Case of Cabrera García and Montiel Flores, supra* note 16, para. 260.

[326] *Cf. Case of Garrido and Baigorria V. Argentina. Reparations and Costs*. Judgment of August 27, 1998. Series C. No. 39, para. 79; *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 312, and *Case of Cabrera García and Montiel Flores, supra* note 16, para. 262.

before the Commission and then later before the Court, including expenses incurred in relevant travel, mostly to Montevideo or to Buenos Aires, in order to carry out meetings with the counterparts, and other expenses. They included costs for the corresponding mail, photocopies, and provided an estimate for telephone calls, internet, and supplies used. Thus, in their brief of pleadings and motions they requested a total of US$7,626.33. In their final arguments, the representatives specified, with respect to expenses regarding the hearing which took place in Quito, production of affidavits, correspondence, printing expenses, copies made, travel expenses, telephone calls and internet, among others, it comes to a total of US$26,986.53. Furthermore, they requested that the State cancel out said amount for costs and expenses directly with the representatives.

301. Lastly, they made a request for future costs, recognizing that CEJIL will incur in expenses for what remains of the rest of the proceeding of the case before the Court which encompasses those expenses necessary for the disbursement, knowledge, and appropriate compliance of the Judgment. Therefore, they requested "in the corresponding procedural stage" that it be given the opportunity to present amounts and updated receipts of the expenses it would be incurring.

302. Costs and expenses include those incurred before the authorities in the domestic jurisdiction as well as those before the Inter-American System. With regards to this, the Tribunal reiterated that the claims of the victims or of their representatives concerning costs and expenses, and the evidence to support them, must be submitted at the first procedural occasion that they are granted, that is, in the brief of pleadings and motions, notwithstanding the possibility that these claims may be updated at a later time, in keeping with the incurred costs and expenses that may have been later incurred as a result of the proceedings." [327] 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. [328]

303. The Court observes that the receipts sent regarding some of the expenses, do not clearly identify their relation to the expenses in connection with the present case. Notwithstanding the aforementioned, the Court determines that the representatives incurred various expenses before the Court, related to, among others, the collection of evidence, transportation, and communication services in the processing of the present case at the domestic and international level. The Court repeats that it must prudently assess such expenses, considering the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. Such assessment must be made based on the principle of equity and taking into account the expenses indicated by

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[327] *Cf. Case of Chaparao Álvarez and Lapo Íñiguez, supra* note 108, para. 275; *Case of Vélez Loor, Case of Vélez Loor V. Panamá*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2010 Series C No. 218, para. 318, and *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 317.

[328] *Cf. Case of Chaparao Álvarez and Lapo Iñiguez, supra* note 108, para. 277; *Case of Rosendo Cantú et al., supra* note 9, para. 285, and *Case of Gomes Lund et al. (Guerrilha do Araguaia), supra* note 16, para. 317.

the parties, provided that the *quantum* is reasonable, [329] to which reimbursement from the State to the victims or their representatives may be ordered for those expenses it deems reasonable and duly proven.

304. The Court determines, in equity, that the State must deliver a sum of US$ 28,000.00 (twenty thousand dollars of the United States of America) for cost and expenses, to the representatives of María Macarena Gelman and Juan Gelman. Likewise, it points out that in the monitoring of compliance procedures of the present Judgment, the Court may provide the reimbursement on behalf of the State to the victims or their representatives for reasonable expenses that may be incurred in this procedural stage.

D.4 Method of compliance with the payments ordered

305. 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 legal notice of the Judgment, under the terms of the following paragraphs.

306. Should any of the beneficiaries pass away before they have received the respective compensation, this shall be delivered directly to their heirs, in accordance with the applicable domestic laws.

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

308. 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 Uruguayan financial institute in dollars of the United States of America and in the most favorable financial conditions permitted by law and banking practice.

309. If, after 10 years, the compensation has not been claimed, the amounts shall revert to the State with the accrued interest.

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

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[329] *Cf. Case of Garrido and Baigorria*. *Reparations and Costs*, *supra* note 327, para. 82; *Case of Gomes Lund et al. (Guerrilha do Araguaia)*, *supra* note 16, para. 316, and *Case of Cabrera García and Montiel Flores*, *supra* note 16, para. 266.

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

VIII.

OPERATIVE PARAGRAPHS

312. Therefore,

THE COURT

DECLARES,

unanimously, that:

1. It accepts the partial acknowledgment of international responsibility of the State, in the terms established in paragraphs 25 to 31 of the present Judgment.

2. The State is responsible for the enforced disappearance of María Claudia García Iruretagoyena de Gelman, wherein it violated her right to juridical personality, to life, to humane treatment [personal integrity], and to personal liberty, recognized in Articles 3, 4, 5, and 7, in relation to Article 1(1) of the American Convention on Human Rights and Articles I and XI of the Inter-American Convention on Forced Disappearance of Persons, in the terms of paragraphs 44 to 63 and 79 to 101 of the Judgment.

3. The State is responsible for the suppression and substitution of the identity of María Macarena Gelman García, which took place since her birth, until her true identity was determined and expressed as a form of enforced disappearance, to which, in said period, her right to juridical personality, to life, to humane treatment [personal integrity], to personal liberty, to family, to a name, and to the rights of the child, and to nationality, recognized in Articles 3, 4(1), 5(1), 7(1), 17, 18, 19, and 20(3), in relation to Article 1(1) of the American Convention on Human Rights in Articles I and XI of the Inter-American Convention on Forced Disappearance of Persons, in the terms of paragraphs 106 to 132 and 137 of the Judgment.

4. The State is responsible for the violation of the right to humane treatment [personal integrity] and the protection of the family, recognized in Articles 5(1) and 17, in relation to Article 1(1) of the American Convention on Human Rights, to the detriment of Mr. Juan Gelman, pursuant to paragraphs 133 to 135 and 138 of the Judgment.

5. The State is responsible for the violation of the right to fair trial [judicial guarantees] and judicial protection enshrined in Articles 8(1) and 25(1), in relation to Articles 1(1) and 2 of the American Convention on Human Rights and Articles I(b) and IV of the Inter-American Convention on Forced Disappearance of Persons, for the failure to effectively investigate the facts in the present case, as well the prosecution and punishment of those responsible, to the detriment of Mr. Juan Gelman and María Macarena Gelman García, pursuant to paragraphs 225 to 246 of the Judgment.

6. The State has not complied with its obligation to adopt domestic law to the American Convention on Human Rights, provided in Article 2, in relation to Articles 8(1), 25, and 1(1) thereof and to Articles I(b), III, IV, and V of the Inter-American Convention on Forced Disappearance of Persons, as a consequence of the interpretation and application it has given to the Expiry Law regarding serious human rights violations, in conformity with paragraphs 237 to 241 and 246 of the Judgment.

7. It does not follow to issue a pronouncement on an alleged violation of the right to freedom of thought and expression and the right to privacy [honor and dignity], recognized in Articles 13 and 11, respectively, of the Convention, nor of the norms of the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Prevention, Punishment and Eradication of Violence against Women (the "Belén do Pará Convention"), whose violation was alleged.

AND DECIDES,

Unanimously, that:

8. This Judgment constitutes *per se* a form of reparation.

9. The State must, within a reasonable period of time, conduct and carry out effectively the criminal investigation of the facts of the present case, in order to ascertain them, determine the corresponding criminal, civil, and administrative responsibilities and apply the consequential sanctions provided by law, in accordance with that established in paragraphs 252 to 256 and 274 and 275 of the Judgment.

10. The State should continue and accelerate the search and immediate location of Maria Claudia Garcia Iruretagoyena, or of her bodily remains, and, where appropriate,

deliver them to her next of kin, after genetic parentage testing, all in accordance with that established in paragraphs 259 and 260 of the Judgment.

11. The State must guarantee that the Expiry Law, for lacking effects due to its incompatibility with the American Convention and the Inter-American Convention on the Forced Disappearance of Persons, as far as it can hinder the investigation and possible sanction of those responsible for serious human right violations, will never again be an impediment to the investigation of the facts and for the identification, and were applicable, punishment of those responsible, in conformity with paragraphs 253 and 254 of the Judgment.

12. The State must, **within a period of one year,** carry out a public act of acknowledgment of international responsibility for the facts of the present case, in conformity with paragraph 266 of this Judgment.

13. The State must locate, within the building of the Information Defense System (SID), accessible to the public, within a period of one year, a memorial plaque with the inscription of the names of the victims and all persons that were illegally detained in said place, pursuant to that in paragraph 267 of the Judgment.

14. The State must carry out, in a period of six months, the publications provided for in paragraph 271 of this Judgment.

15. The State must implement, in a reasonable period and with the respective budgetary provisions, a permanent human rights program, directed at the agents of the Public Prosecutor's Office and the judges of the Judicial Branch of Uruguay, in conformity with paragraph 278 of the present Judgment.

16. The State must adopt, within a period of two years, the appropriate measures to guarantee the technical and systematical access to the information regarding serious violations of human rights that occurred during the dictatorship that are held in State archives, in conformity with paragraph 274, 275 and 282 of the Judgment.

17. The State must pay, within a period of one year, the amounts established in paragraphs 291, 293, 296, and 304 of the present Judgment, for compensation of pecuniary and non-pecuniary damage and the reimbursement of costs and expenses that correspond, in conformity with paragraphs 305 to 311 of this Judgment.

18. Pursuant to that established in the American Convention, the Court will monitor the full compliance with this Judgment and will conclude the case once the State has entirely satisfied said provisions. In a period of one year as of the legal notice of this Judgment, the State must offer the Court a brief regarding the measures adopted to satisfy compliance.

Judge Vio Grossi made his Concurring Opinion known to the Court, that which accompanies this Judgment.

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

Diego García-Sayán
President

Leonardo A. Franco

Manuel E. Ventura Robles

Margarette May Macaulay

Rhadys Abreu Blondet

Eduardo Vio Grossi

Pablo Saavedra Alesandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE EDUARDO VIO GROSSI
CASE OF GELMAN V.URUGUAY
JUDGMENT OF FEBRUARY 24, 2011
(Merits and Reparations)

I formulate this concurring opinion to the cited judgment, calling attention to various issues discussed in it.

The first is in relation to the close relationship between the situation of María Claudia García Iruretagoyena de Gelman and her daughter, María Macarena Gelman García, which, definitely, form a unit. In this sense, the enforced disappearance of the first, in that context, and the birth of the latter and her subsequent separation, abduction, and hand over to a third party, can be explained jointly and reciprocally. One could not have occurred without the other. Considering, in this way, the facts of the case, would lead one to also deem that which occurred to María Macarena Gelman as an enforced disappearance, and thus the clarification of those facts is also intimately linked to that which occurred to her mother, María Claudia García. In this sense, the situation at issue is one considered in Article II of the Inter-American Convention on the Forced Disappearance of Persons, upon establishing the elements of enforced disappearance of persons, to be the act of "*depriving a person or persons of his [or her] or their freedom," "an absence of information on the whereabouts of that person,*" thereby "*impeding his or her remedy to the applicable legal remedies and procedural guarantees*."[1]

It should be evident, therefore, that in this case, what would be involved is the deprivation of liberty of two persons and that the lack of information about the whereabouts of one would prevent the exercise of remedies and procedural guarantees of the other. For this reason, then, both realities essentially constitute one international illegal act, although it obviously affects various rights enshrined in the Convention, and the victims of the violation of these are several persons, principally Maria Macarena Gelman and her grandfather Juan Gelman. And from there, as well, it could also be deemed that while the enforced disappearance of Maria Claudia Garcia does not come to an end, neither does that of Maria Macarena Gelman, although at the moment she is not deprived of her freedom and her identity has been established. Maybe, that which has been analyzed could have been better assessed if the judgment had stemmed from a single narration of the facts of the case presented prior to the basic foundations of law used to determine each of the corresponding violations of the relevant provisions.

A second aspect of the ruling that it is worth emphasizing is the partial acknowledgment made by the State. Indeed, that fact, which is assesed, allows for a more specific

[1] Article II of the Inter-American Convention on Forced Disappearance of Persons: *"For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her remedy to the applicable legal remedies and procedural guarantees."*

treatment of the case, since, in recognition thereof, the facts of the case could be divided into two periods. The first, includes those facts that occurred during the military dictatorship, that is, until February 1985, and the second, those facts which have taken place since. Therefore, would acknowledgment allows for a for a distinction, providing more clarity, to the undisputed facts of the case and, therefore, deems them as proven, especially when some of them, particularly those referring to the context in which they developed in regard to Maria Claudia Garcia de Gelman and María García Macarena Gelman, are at this stage of historical development, "public and notorious facts" and therefore there is no need for them to be repeated, developed, or proven in the case. Also, it is possible that one narration of the facts in the judgment at hand, and carried out prior to the partial acknowledgment made by the State, would have made it possible to define more precisely those facts that occurred before the month where they were indicated as being effectively recognized, thereby further considering the scope of such a unilateral act.

The foregoing leads to the third observation, namely, that said acknowledgment would center the discussion around that which occurred during the democratic reign that the State has had since 1985 to date, and particularly, in regard to the application, in the case at issue and in terms of that period, of the Expiry Law. Under this perspective, it must be taken into account that, in regard to the origin of laws and their possible international unlawfulness, determined pursuant to International Law, and as a consequence, regardless of what Domestic Law provides,[2] the State incurs international responsibility for any fact attributable to it and that constitutes a violation of its international obligations. For said purposes, it is considered an act of the State pursuant to International Law, in particular, international custom,[3] the behavior of any body of the State, be it that it exercises legislative, executive, judicial powers, or powers of any other type.[4] From this, it is evident, as a consequence, that for an action deemed to be internationally unlawful to be attributable to the State, it merely needs to be carried out

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[2] Article 3 of the Draft Articles prepared by the International Commission on International Law of the United Nations on State Responsibility for Internationally Wrongful Acts, encompassed in Resolution approved by the General Assembly [*on the basis of the Report of the Sixth Commission (A/56/589 and Corr.1)*] 56/83. State Responsibility for internationally wrongful acts, *85th plenary session, December 12, 2001, Official Documents of the General Assembly,* Fifty-sixth Session, Supplement No. 10 and corrections (A/56/10 and Corr.1 and 2). 2 Ibid., Paras. 72 and 73. "Characterization of an act of the State as internationally wrongful. The qualification of the act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

Article 27 Internal law and observance of treaties: *International law and the observance of treatises. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."*

[3] Expressed in the Draft Articles Prepared for the International Law Commission of the UN on State Responsibility for Internationally Wrongful Acts.

[4] "Article 4.1 of the same text: "The conduct of any State bodyshall be considered an act of that State under international law, whether the bodyexercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as a bodyof the central Government or of a territorial unit of the State."

by any State body, among these, those that carry out legislative functions, to which the direct pronouncements of the citizenry related to the approval or ratification of a law could be deemed as part of these functions, and as such, that it, in the exercise of its powers, constitutes a part of the legislative body. So as to encompass more, and in what regards actions that are attributable to the State, the pertinent State body may also exercise powers of "any other type," that is, distinct from those that are executive, legislative, or judicial, which could include, among others, those that correspond to democracy. Therefore, also all of the citizenry, in the exercise of this or legislative functions, could infringe a rule of International Law, and consequently, compromise the State's international responsibility.[5] It is for this reason that it is deemed that the mere existence of a democratic regimen does not guarantee, *per se*, the permanent respect of International Law, including the International Law of Human Rights. In this way it has been considered by the Inter-American Democratic Charter,[6] which notes in its Article 3 that the respect for human rights is an essential element of a democratic society and in its Article 7 that it is indispensable for the effective exercise of fundamental freedoms and human rights. It also reiterates this in Article 8 that every person who believes their rights to have been violated has the right to file a complaint or petition before the Inter-American System of Human Rights, to which it only excludes, for these cases, the remedy before the political Inter-American bodies charged with defending the effective exercise of a representative democracy.

Related to the foregoing and also worth noting is the attitude assumed by the State, from June 23, 2005, of excluding this case from the application of the Expiry Law. On that day, the government of President Mr. Tabaré Vazquez informed the Supreme Court of Uruguay that the facts concerning this case were not covered by that Law, thereby allowing, the resumption of the court proceedings aimed at determining the facts and possible punishment of those responsible. Thus, this body of law ceased to be, from that date, as stated in this judgment, an obstacle. In a way that, therefore, the action of the State created a new situation where, at least in regard to this case, it stopped violating its international obligation to investigate and adjusted, for that matter, its conduct to comply with International Law; left pending, however, is the opportunity for the exercise of justice and its final resolution in the legislation.

Also, another separate observation should be considered regarding the participation of Argentina in the events in question. While it is true that the application in this in this case was filed solely in connection with the Oriental Republic of Uruguay and that, in the allegations, the Commission reiterated the foregoing, excluding said State from the suit at

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[5] This would be even more evident when the norm of international law that is violated is *jus cogens*, that is, the meaning of Article 53 of the Vienna Convention on the Law of Treaties and that also includes that which is custom in the matter, imperative norms of general international law, and therefore, accepted and recognized by the international community of States as a whole as a norm where no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.

[6] Resolution of the General Assembly of the OAS approved on September 11, 2001.

hand, to which the Court lacks jurisdiction over it,[7] it is also true that international law addresses the situation where a third State has cooperated in the illicit act,[8]to which it may have been more convenient to expressly mention this circumstance in order for the corresponding institutions to take, if they deemed fit, the appropriate actions to enable the complete clarification of the facts of the case and establish responsibility that follows.

It is also important to highlight the treatment in the judgment given to the violation of the rights of María Macarena Gelman García concerning the suppression and substitution of her identity as enshrined in the Pact of San Jose. The judgment alludes to the "Right to Identity," but expressly recognizes that it is not expressly provided for in this Convention. Perhaps it is for this reason that in its operative paragraphs, the judgment does not expressly mention that the State violated this right. And although it would include the rights provided in this normative text, it also encompasses others referred to therein. The *Right to Identity* would therefore be more broad than the sum of the rights to the family, a name, a nationality, and to the rights of the child referred to by the American Convention on Human Rights.[9] That is why the reference made by the judgment in regard to such right, should be understood precisely in relation to the function of the jurisprudence of the Court, which, as an auxiliary source of international law, does not create law, but interprets the meaning and scope established by an independent source, be it a treaty, custom, general principles of law, or unilateral legal act.[10] In that sense, what is done with that reference should be understood as a catalyst for the competent bodies of the Organization of American States (OAS) or the States Parties of the Convention, if they so deem, to expressly and pursuant to the Convention enshrine and develop said law, thereby allowing that in the future and when the pertinent law is vague or in question, and is therefore susceptible to various alternative applications, the jurisprudence of the Court interpret it, establishing its true meaning and scope. In short, it must be taken into account that, in this regard, the Court need not head exclusively nor principally to its own jurisprudence, but rather to that which is established in the corresponding international law, established by a treaty, custom, general principles of law or unilateral legal acts, in force for the State Party to the case. From there, consequently, the relevance of citing and

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[7] Art 61(1) of the Convention: "1. Only the States Parties and the Commission shall have the right to submit a case to the Court."

[8] Article 16, Draft Articles of the International Law Commission of the UN on State Responsibility for Internationally Wrongful Acts. Article 16. Aid or assistance in the commission of an internationally wrongful act. A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

b) the act would be internationally wrongful if committed by that State."

Article 47. Plurality of responsible States. 1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

[9] CJI/RES.137 (LXXI-O/07).The scope of the Right to Identity.

[10] Article 38.1.d. of the Statute of the International Court of Justice." "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

reproducing, in the judgments of the Court, the applicable rules subject to its interpretation can be concluded.

EVG.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE EDUARDO VIO GROSSI
CASE OF GELMAN V.URUGUAY
JUDGMENT OF FEBRUARY 24, 2011
(Merits and Reparations)

I formulate this concurring opinion to the cited judgment, calling attention to various issues discussed in it.

The first is in relation to the close relationship between the situation of María Claudia García Iruretagoyena de Gelman and her daughter, María Macarena Gelman García, which, definitely, form a unit. In this sense, the enforced disappearance of the first, in that context, and the birth of the latter and her subsequent separation, abduction, and hand over to a third party, can be explained jointly and reciprocally. One could not have occurred without the other. Considering, in this way, the facts of the case, would lead one to also deem that which occurred to María Macarena Gelman as an enforced disappearance, and thus the clarification of those facts is also intimately linked to that which occurred to her mother, María Claudia García. In this sense, the situation at issue is one considered in Article II of the Inter-American Convention on the Forced Disappearance of Persons, upon establishing the elements of enforced disappearance of persons, to be the act of "*depriving a person or persons of his [or her] or their freedom," "an absence of information on the whereabouts of that person,*" thereby "*impeding his or her remedy to the applicable legal remedies and procedural guarantees*."[11]

It should be evident, therefore, that in this case, what would be involved is the deprivation of liberty of two persons and that the lack of information about the whereabouts of one would prevent the exercise of remedies and procedural guarantees of the other. For this reason, then, both realities essentially constitute one international illegal act, although it obviously affects various rights enshrined in the Convention, and the victims of the violation of these are several persons, principally Maria Macarena Gelman and her grandfather Juan Gelman. And from there, as well, it could also be deemed that while the enforced disappearance of Maria Claudia Garcia does not come to an end, neither does that of Maria Macarena Gelman, although at the moment she is not deprived of her freedom and her identity has been established. Maybe, that which has been analyzed could have been better assessed if the judgment had stemmed from a single narration of the facts of the case presented prior to the basic foundations of law used to determine each of the corresponding violations of the relevant provisions.

A second aspect of the ruling that it is worth emphasizing is the partial acknowledgment made by the State. Indeed, that fact, which is assesed, allows for a more specific

[11] Article II of the Inter-American Convention on Forced Disappearance of Persons: *"For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her remedy to the applicable legal remedies and procedural guarantees."*

treatment of the case, since, in recognition thereof, the facts of the case could be divided into two periods. The first, includes those facts that occurred during the military dictatorship, that is, until February 1985, and the second, those facts which have taken place since. Therefore, would acknowledgment allows for a for a distinction, providing more clarity, to the undisputed facts of the case and, therefore, deems them as proven, especially when some of them, particularly those referring to the context in which they developed in regard to Maria Claudia Garcia de Gelman and María García Macarena Gelman, are at this stage of historical development, "public and notorious facts" and therefore there is no need for them to be repeated, developed, or proven in the case. Also, it is possible that one narration of the facts in the judgment at hand, and carried out prior to the partial acknowledgment made by the State, would have made it possible to define more precisely those facts that occurred before the month where they were indicated as being effectively recognized, thereby further considering the scope of such a unilateral act.

The foregoing leads to the third observation, namely, that said acknowledgment would center the discussion around that which occurred during the democratic reign that the State has had since 1985 to date, and particularly, in regard to the application, in the case at issue and in terms of that period, of the Expiry Law. Under this perspective, it must be taken into account that, in regard to the origin of laws and their possible international unlawfulness, determined pursuant to International Law, and as a consequence, regardless of what Domestic Law provides,[12] the State incurs international responsibility for any fact attributable to it and that constitutes a violation of its international obligations. For said purposes, it is considered an act of the State pursuant to International Law, in particular, international custom,[13] the behavior of any body of the State, be it that it exercises legislative, executive, judicial powers, or powers of any other type.[14] From this, it is evident, as a consequence, that for an action deemed to be internationally unlawful to be attributable to the State, it merely needs to be carried out

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[12] Article 3 of the Draft Articles prepared by the International Commission on International Law of the United Nations on State Responsibility for Internationally Wrongful Acts, encompassed in Resolution approved by the General Assembly [*on the basis of the Report of the Sixth Commission (A/56/589 and Corr.1)*] 56/83. State Responsibility for internationally wrongful acts, *85th plenary session, December 12, 2001, Official Documents of the General Assembly,* Fifty-sixth Session, Supplement No. 10 and corrections (A/56/10 and Corr.1 and 2). 2 Ibid., Paras. 72 and 73. "Characterization of an act of the State as internationally wrongful. The qualification of the act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."

Article 27 Internal law and observance of treaties: *International law and the observance of treatises. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."*

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[14] "Article 4.1 of the same text: "The conduct of any State bodyshall be considered an act of that State under international law, whether the bodyexercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as a bodyof the central Government or of a territorial unit of the State."

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