Specially, it claimed that the State failed to conduct investigations and procedures "sufficiently diligent to determine the whereabouts or the responsible." The representatives emphasized that "the domestic proceedings have not provided effective recourse to ensure the next-of-kin access to justice and […] full reparation in the instant case." The State claimed that "it is not responsible for the violation of the rights to a fair trial and judicial guarantees" of Mr. Anzualdo Castro and his relatives.

122. The Court has established that States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to ensure the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1(1))[146].

123. In order for a criminal investigation to be an effective recourse in order to ensure the right to access to justice of the alleged victims, as well as to guarantee the rights that have been abridged in the instant case, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof [147].

124. The right to access justice implies the effective determination of the facts under investigation and, if applicable, of the corresponding criminal responsibilities in a reasonable time; therefore, considering the need to guarantee the rights of the injured parties[148], a prolonged delay may constitute, in itself, a violation of the right to a fair trial[149]. Besides, because it is a forced disappearance, the right to access justice includes the determination of the fate or whereabouts of the victim (*supra* para. 118).

125. In these cases, impunity[150] will not be eliminated unless it is accompanied by the determination of the general responsibility- of the State- and individuals- criminal and of its agents or of individuals.[151] In complying with this obligation, the State is

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146 *Cf. Case of Velásquez Rodríguez V. Honduras. Preliminary Objections*, supra note 6, para. 91; Case of Yvon Neptune *V.* Haití, supra note 38, para 77*; and Case of Zambrano Vélez et al. V. Ecuador, supra* note 38*,* para. 114.

147 *Cf. Case of Velásquez Rodríguez V. Honduras.* Merits, supra note 11, para. 177; Case of *Kawas Fernández V. Honduras, supra* note 14, para. 101; Case of Valle Jaramillo *et al. V.* Colombia, supra note 145 para. 100; and Case of Heliodoro Portugal *V.* Panamá, supra note 58, para. 144.

148 *Cf. Case of Bulacio V. Argentina.* Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para. 114; Case of *Kawas Fernández V. Honduras, supra* note 14, para. 112; *Case of Valle Jaramillo et al. V. Colombia*, supra note 145 para. 154

149 *Cf. Case of Hilaire, Constantine and Benjamín et al. V.* Trinidad and Tobago. Merits, Reparations and Costs. Judgment of June 21, 2002. Series C No. 94, para. 145; *Case of Valle Jaramillo et al. V. Colombia*, supra note 145 para. 154; and Case of Heliodoro Portugal *V.* Panamá, supra note 58, para. 148.

150 In this regard, the Court has defined impunity as "the overall lack of investigation, arrest, prosecution and conviction of those responsible for violations of the rights protected by the American Convention." *Cf. Case* of the "White Van" (Paniagua Morales *et al.*) *V.* Guatemala, Merits, supra note 12, para. *173; Case of Tiu Tojín V. Guatemala.*, supra note 59, para . 69, and Case of the *Miguel Castro-Castro Prison V. Perú.* Merits, Reparations and Costs*. Supra* note 9, para. 405.

151 *Cf. Case* of Goiburú *et al. V.* Paraguay, supra note 59, para. 131; Case of Perozo *et al. V.* Venezuela, supra note 6, para. 298; and Case of Rios *et al. V.* Venezuela, supra note 6, para. 283.

required to remove all obstacles, legal and factual, contributing to impunity[152]. The investigations must be conducted in line with the rules of due process of law, which implies that the bodies of administration of justice must be organized in a manner so that its independence and impartiality is guaranteed[153] and the prosecution of grave human rights violations is made before regular courts[154], in order to avoid impunity and search for the truth[155]. Moreover, given the nature and gravity of the facts, particularly since they occurred in a context of systematic human rights violations, and since the access to justice is a peremptory rule under International Law, the need to eliminate impunity gives rise to an obligation for the international community to ensure inter-State cooperation by which they must adopt all necessary measures to ensure that such violations do not remain unpunished, either by exercising their jurisdiction to apply their domestic law and the international law to prosecute it and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so[156].

126. The Court shall now analyze whether the State has diligently conducted criminal investigations within a reasonable time and if such investigations provided an effective recourse to ensure the alleged victims their right to access justice. To such purpose, the Tribunal may examine the corresponding domestic proceedings.

127. Given that it is possible to differentiate two stages as to the development of the criminal investigations conducted as to the disappearance of Kenneth Ney Anzualdo, the Court shall analyze next, on the one hand, the first investigation opened in 1993 and provisionally closed in 1995 and, on the other hand, the investigations opened as from 2002. To that end, the Court shall take into account the evidence furnished and the arguments submitted regarding the actions taken in the following proceedings: a) First Investigation: Office of the Fifth Provincial Prosecutor for Criminal Matters of Callao (assigned number 227-93-III); b) Investigations opened after the year 2002: before the Office of the Special Provincial Prosecutor on Forced Disappearances, Extrajudicial Executions, and Clandestine Graves; before the Office of the Fifth Supra-Provincial Criminal Prosecutor (assigned number 50-2002); before the Office of the Third Supra-Provincial Criminal Prosecutor (assigned number 04-2007); before the Office of the Special Human Rights Prosecutor ; investigation informed by the State as preliminary objection, and the investigation against former president Fujimori and extradition proceedings (case number 45-2003).

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[152] *Cf. Case* of *La Cantuta V. Peru*, supra note 58, *para.* 226; Case of *Kawas Fernández V. Honduras, supra* note 14, para. 192; *Case of Valle Jaramillo et al. V. Colombia*, supra note 145 para. 232.

[153] *Cf. Case* of Reverón Trujillo *V.* Bolivia, *supra* note 11, para. 67 and 68; and *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") V. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182, para. 55, among others.

[154] *Cf. Case of Velásquez Rodríguez V. Honduras.* Merits, supra note 11, para. 180; Case of the 19 Tradesmen *V.* Colombia. Merits, Reparations and Costs. Judgment of July 5, 2004. Series C N. 109, para. 173 and 174, and Case of the Rochela Massacre *V. Colombia*, supra note 13, para. 200.

[155] The Court has established, in this regard, that "[t]hose remedies that, owing to the general conditions of the country or even the particular circumstances of a case, are illusory cannot be considered effective." Judicial Guarantees in States of Emergency (art. 27.2, 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24.

[156] Case of Goiburú *et al. V.* Paraguay, supra note 59, para. 131; and Case of La Cantuta *V.* Perú, supra note 58, *para.* 160.

a) Regarding the first investigation opened in 1993[157]

128. As to the first criminal investigation, the Commission argued that the fact that the Peruvian State has ordered the opening and closure of the investigations on several occasions, and that the record of the proceedings has been reported missing, are clear indications of the lack of due diligence. It specified that "there is no evidence [...] that the initial investigations included a reenactment of events, adoption of effective measures to investigate the existence of clandestine detention centers in the basements of the SIE facilities, or a search for the corpse [...] at that facility." It also mentioned that "nor were key persons summoned to give statements, such as SIE personnel, police officers, and other officials on duty at the time of the events."

129. The representatives presented similar arguments; they listed some of the actions required before the existence of reasons to believe that a person was subjected to forced disappearance, and pointed out that the Prosecutor's Office failed to investigate into the possible vehicle in which Kenneth was transported and mentioned that measures were adopted at the request of the next-of-kin, that the testimonies were taken in an intimidating manner and that no additional key persons were summoned to render testimonies. Moreover, regarding the initial complaint, the representatives stated that "the Office of the Fifth Prosecutor oriented the investigation, not to elucidate the facts and the possible whereabouts of Kenneth and to avoid, in this way, the consummation of his disappearance, but to the hypothetical connection of Kenneth with subversive activities that may 'justify' the facts" and that though the Prosecutor's Office acknowledged the possibility that he was detained by state officers, it decided to close the investigation.

130. The Court notes that the first investigation was opened due to the criminal complaint filed by the father of the victim, twelve days after his disappearance, by the end of 1993[158]. During the conduct of this investigation, several testimonies were taken[159], including the statement of Mr. Santiago Cristóbal Alvarado Santos[160]. In addition, a search was conducted at the domicile of the Anzualdo family, in which certain objects of Kenneth's room were seizured, including "subversive material" from newspaper clipping, leaflets and university documents, agenda and personal

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157 Investigation before the Office of the Fifth Provincial Prosecutor for Criminal Matters of Callao (assigned number 227-93-III).

158 According to the Commission and the representatives, on December 28, 1993 the next-of-kin of Kenneth Ney filed a complaint with the Office of the Provincial Prosecutor for Criminal Matters of Callao. The State did not contest this fact.

159 *Cf.* Statement of Marly Arleny Anzualdo Castro rendered before the Office of the Fifth Provincial Prosecutor for Criminal Matters of Callao on January 14, 1994 (record of evidence, Volume V, appendix 11 to the application, pages 1732-1734),statement of Felix Vicente Anzualdo Vicuña rendered before the Office of the Fifth Provincial Prosecutor for Criminal Matters of Callao on January 17, 1994 (record of evidence, volume V, appendix 11 to the application, pages 1735- 1737); statement of Rubén Dario Trujillo Mejía rendered before the Office of the Fifth Provincial Prosecutor for Criminal Matters of Callao on January 24, 1994 (record of evidence, volume V, appendix 11 to the application, pages 1740-1742); statement of Milagros Juana Olivares Huapaya rendered before the Office of the Fifth Provincial Prosecutor for Criminal Matters of Callao on February 10, 1994 (record of evidence, Volume V, appendix 11 to the application, pages 1743- 1744) and statement of Yheimi Torres Tuanama before the Office of the Fifth Provincial Prosecutor for Criminal Matters of Callao, on February 11, 1994 (record of evidence, Volume V, appendix 11 to the application, pages 1745- 1747).

160 *Cf.* statement rendered by Santiago Cristóbal Alvarado Santos before the Office of the Fifth Provincial Prosecutor for Criminal Matters of Callao, on January 14, 1994 (record of evidence, volume V, appendix 11 to the application, pages 1729-1731).

photography, among other things[161]. Furthermore, on April 26, 1994 an inspection and verification procedure was carried out at the Detention Center, at Callao Naval Base, where it was asked if, between December 15 and 25, 1993, Mr. Anzualdo was admitted "as detainee", to which they answered that "no civilian is admitted as detainee"[162]. Finally, an inspection was conducted at the premises where it was verified that no civilian personnel were at said place[163].

131. Even though some procedures were carried out, the truth is that it spring from the court file that said investigation was not correctly and timely oriented since its beginning by the authorities in charge of it, and that certain crucial actions to determine the fate or whereabouts of Mr. Anzualdo Castro, such as to forward communications to detention centers and official agencies where people deprived of liberty could be or conduct inspections into said premises, were not immediately taken. In this sense, the only measure adopted was the inspection and verification more than four months after the disappearance, which had a negative result. Moreover, the authorities did not summon other eyewitnesses of the moment in which Mr. Anzualdo Castro was forced to get off the bus and arrested.

132. Besides, the lack of effectiveness of this first investigation is deduced from the content of the decision to provisionally close the investigation issued on June 3, 1994 by the Office of the Fifth Prosecutor for Criminal Matters of Callao, which held, without any serious logical ground , that "it is deduced that the aforementioned is a sympathizer of the seditious group [Sendero Luminoso], based on the seized newspapers, and, therefore, he may have been intercepted by members of the Navy or the police, or, alternatively, he may have gone underground "[164]. It does not spring from said decision, even though the Prosecutor's Office acknowledged that there might have been state officers involved in the disappearance of Mr. Anzualdo Castro, any measure tending to elucidate if he was detained by a state authority or to identify the responsible and determine the possible criminal responsibilities. The Office of the First Superior Court Prosecutor upheld the provisional closure of the proceedings[165].

133. The fact that the body in charge of the investigation closed- though, provisionally- the investigation into the forced disappearance of Mr. Anzualdo Castro without exhausting any of the investigative hypothesis mentioned, based on an alleged connection with *Sendero Luminoso*, proves that it acted in a manner that is not consistent with its role to conduct a formal, objective, thorough and effective investigation. In this sense, the Court has already established that "the principle of legality ruling the acts performed by public officials, which governs the activities of

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[161] *Cf.* search warrant issued by the Deputy Prosecutor of the Office of the Fifth Provincial Prosecutor for Criminal Matters of Callao of January 17, 1994 (record of evidence, volume V, appendix 11 to the application, pages 1738-1739).

[162] *Cf.* Inspection and verification record, Detention Center at the Naval Base of Callao of April 26, 1994 (record of evidence, volume V, appendix 11 to the Application, pages 1748-1749).

[163] *Cf.* Inspection and verification record, Detention Center at the Naval Base of Callao of April 26, 1994 (record of evidence, volume V, appendix 11 to the Application, pages 1748-1749).

[164] *Cf.* Decision issued by the Office of the Attorney General, Office of the Fifth Provincial Prosecutor of Callao, on June 3, 1994 (record of evidence, Volume V, Appendix 2 to the application, pages 1615/1616 and appendix 11 to the application, pages 1750/1).

[165] *Cf.* appeal in complaint appeal filed before the First Superior Court Prosecutor of Callao, on October 27, 2004 (record of evidence, volume V, appendix 10 to the application, pages 1725-1726) and report of the Office of the Fifth Provincial Prosecutor for Criminal Matters of Callao of November 26, 1997 (record of evidence, volume V, appendix 11 to the application, pages 1753-1754).

Public Attorneys, imposes on them the obligation to carry out their duties acting on the basis of the regulations defined in Constitution and statute. That way, prosecutors must watch for the law to be correctly applied and seek the truth of the facts as they are, acting professionally, loyally and in good faith"[166].

134. It is appropriate to recall that in cases of forced disappearance, it is essential the prompt and immediate action of prosecution and judicial authorities, by the order of timely and necessary measures addressed to determine the whereabouts of the victim or the place where he or she could be found alive. Nevertheless, it was six years after the disappearance, in 1999, that the Prosecutor's Office ordered the forwarding of official letters, within the framework of further investigative measures, to different public institutions in order to locate the whereabouts of Mr. Anzualdo[167], without obtaining any result, since the required institutions did not send any response to the authorities charged with the investigation and there is no evidence of any reiteration[168]. Later on, the Prosecutor's Office requested that the proceedings continue since up to that moment "it [has been] not possible to determine the whereabouts"[169].

135. In this regard, this Tribunal has established that in order to conduct an effective and expedious investigation, the investigating body must use all the means at its disposal to carry out all measures and investigations necessary to shed light on the fate of the victims and identify the responsible for the forced disappearance[170]. For this, the State will guarantee that the authorities in charge of the investigation have the logistic and scientific resources necessary to collect and process evidence, and more specifically, the power to access to the documents and information relevant to the investigation of the facts denounced and that they be able to obtain evidence of the locations of the victims[171]. Furthermore, it is fundamental that the investigating authorities have unrestricted access to detention centers, regarding the

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166 *Cf. Case* of Tristán Donoso *V.* Panamá. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193, para. 165.

167 It was requested to the Identification and Marital Status Record Office of Lima, to forward the registration of Kenneth Ney Anzualdo Castro together with his date and photograph in order to collect information about a possible recent registration in some part of the country; it was requested to the Callao Harbormaster's Office information regarding the discovery of a corpse in the Peruvian coast; it was requested to the Bureau of Immigration and Naturalization information of any possible migratory movement of Kenneth Ney Anzualdo Castro; it was requested to the Directorate of State Security of PNP [National Police of Peru] and to the National Antiterrorism Bureau of PNP information regarding the possible detention of Kenneth Ney Anzualdo Castro. There was no response whatsoever. *Cf.* Report N. 337-DPMP-DIVPOLJUD-JPPC of September 14, 1999 (record of evidence, volume V, appendix 11 to the application, pages 1755-1756).

168 *See* Report N. 337-DPMP-DIVPOLJUD-JPPC of September 14, 1999 (record of evidence, volume V, appendix 11 to the application, pages 1755-1756).

169 Order of the Office of the Fifth Provincial Prosecutor for Criminal Matters of Callao, of September 15, 1999 (record of evidence, volume V, appendix 11 to the application, page 1759).

170 *Cf. Case of Velásquez Rodríguez V. Honduras.* Merits, supra note 11, para. *174; Case of Tiu Tojín V. Guatemala.*, supra note 59, para . 77; Case of Heliodoro Portugal *V.* Panama, supra note 58; para. 144; Case of García Prieto *et al. V.* El Salvador. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 168, para. *101; Case of the Serrano Cruz Sisters V.* El Salvador. *Merits, Reparations and Costs; supra note 90*, para. 83. See also, Article X of the Inter-American Convention on Forced Disappearance of Persons and Article 12 of the International Convention on the Protection of All People from Enforced Disappearance.

171 *Case of Tiu Tojín V. Guatemala.*, supra note 59, para . 77. See also, Article X of the Inter-American Convention on Forced Disappearance of Persons and Article 12 of the International Convention on the Protection of All People from Enforced Disappearance.

documentation as well as the people[172]. The Court repeats that the passage of time has a directly proportionate relationship to the constraints – and, in some cases, the impossibility – of obtaining evidence or testimonies that help clarify the facts under investigation and even invalidates the practice of procedures for taking evidence in order to shed light on the facts of the investigation[173], identify the possible perpetrators and participants and determine the possible criminal responsibilities[174]. It is worth mentioning that these resources and elements contribute to the effective investigation, but the lack of them does not exonerate state authorities from making the necessary efforts to comply with this obligation.

136. Following this line of thought, the Tribunal understands that the actions of the judicial authorities and the Attorney General's Office, in this case, are framed in what the Truth and Reconciliation Commission established, as to the fact that the systematic practice of forced disappearance was also favored by the generalized scenario of impunity of the then prevailing severe violations of human rights, fostered and tolerated by the absence of civil liberties and the inefficacy of legal institutions to cope with the said systematic violations of human rights[175].

137. In the chapter on the forced disappearances of its final report, the Truth and Reconciliation Commission noted that "the complaints of the next-of-kin of the disappeared people, in most of the cases, were followed by the inaction or not sufficient effective measures of the Judiciary and the prosecuting authorities; [which is] evidenced by their lack of willingness to investigate and even, hinder the investigation"[176]. And it cited, as way of example, the testimony rendered by the father of Kenneth, who stated that:

> […] the questions made by the prosecutor were "disturbing", they have consulted with an attorney […] the attorney said nothing; in the statements, there were things that the sister of Kenneth had not said; they re-made the statement. The authorities did not really investigate[177].

138. Furthermore, the Truth and Reconciliation Commission determined that the Peruvian Judiciary failed to adequately comply with its mission to combat impunity of the state agents who committed grave human rights violations, which contributed to that situation. This situation "was heightened after the coup d' état of 1992", due to a "clear interference in the Judiciary based on massive dismissals of judges, provisional

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172 *Cf. Case* of Myrna Mack Chang *V.* Guatemala. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C No. 101, para. *180 and 181; Case of Tiu Tojín V. Guatemala.*, supra note 59, para . 77; and Case of *La Cantuta V. Perú*, supra note 58, *para.* 111. See also, Article X of the Inter-American Convention on Forced Disappearance of Persons and Article 12 of the International Convention on the Protection of All People from Enforced Disappearance.

173 *Cf. Case* of Heliodoro Portugal *V.* Panamá, *supra* note 58, para. 150; Case of Perozo *et al. V.* Venezuela, supra note 6, para. 319.

174 In this regard, the expert witness Baraybar held that "… the main enemy is time, in a situation of forced disappearance or in any other; the best would be to conduct an immediate investigation, in forensic terms, into the facts after their occurrence, […] time deteriorates the things, time produces a series of phenomena that, basically, can alter the evidence until such item of evidence becomes useless; bones can be altered, by the effect of water, soil, whatever…." *Cf.* expert opinion rendered by expert witness José Pablo Baraybar Do Carmo at the public hearing held before the Inter-American Court on April 2, 2009.

175 *Cf. Case* of *La Cantuta V. Peru*, supra note 58, *para.* 92.

176 Final Report of the CVR, 2003, volume VI, chapter 1.2 *Forced Disappearance of people by state agents*, pages 110, available at http://www.cverdad.org.pe/ifinal/index.php

177 CVR, testimony record N° 100079 rendered by Felix Vicente Anzualdo Vicuña (record of evidence, volume V, appendix 31 to the application, pages 1844-1865).

appointments and the creation of administrative bodies not involved with the judicial system, apart from the ineffectiveness of the Constitutional Tribunal "[178]. Another widespread practice confirmed by the Truth and Reconciliation Commission was that the Attorney General's Office did not comply with its duty to properly investigate into the crimes based on its lack of independence from the Executive Power[179].

139. Finally, the representatives claimed that the State violated the principle to be assumed innocent to the detriment of Mr. Anzualdo Castro in view of the content of the decision to close the investigation of June 3, 2004. In this regard, inasmuch as this case does not deal with the innocence or guilt of Mr. Anzualdo Castro (*supra* para. 36) the representatives' argument is not admissible, since the presumption of innocence corresponds to "an accused person" and, in said investigation, he was not the accused, but precisely the victim. Without detriment to the foregoing, the Court notes that several state agencies linked Mr. Anzualdo Castro or his family to the group *Sendero* Luminoso, who were perceived by society and stigmatized by the State as "terrorists" or the next- of- kin of "terrorists", with all the negative consequences this implies[180]. This led, in the practice, to close the investigation into his disappearance without having determined any responsible and carried out the necessary measures to determine his fate or whereabouts.

140. In conclusion, upon assessing the lack of objectivity with which the authorities acted when deciding to provisionally close the investigation, their attitude towards the victim, the lack of identification of the responsible, the testimonies taken at the request of the party, the lack of search for evidence at the place of the facts, the lack of investigation of the possible places where the victim could have been taken, the lack of verification of the registries at the detention centers and the manner in which the investigation was solved, allows to conclude that this first investigation was not seriously, effectively and thoroughly carried out.

b) Regarding the investigations carried out as of the year 2002[181]

141. Regarding this second stage, the representatives argued that it was also characterized by the lack of due diligence, since there have been no progress in the investigations as of the year 2002, despite the fact there was new information about the facts. They alleged that "the transfer of the case from some prosecutor's offices to other offices during the proceeding, the lack of coordination between them and the duplication of investigations have contributed to the lack of due diligence in the investigation." According to the State, the different complaints filed with several instances prove that the State respects the right to effective judicial protection and due process.

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178 *Cf.* Final Report of the CVR, 2003, volume VIII, *General Conclusions*, para. 123-131, available at http://www.cverdad.org.pe/ifinal/index.php

179 *Cf.* Final Report of the CVR, 2003, volume VIII, *General Conclusions*, para. 123-131, available at http://www.cverdad.org.pe/ifinal/index.php

180 *Cf. mutatis mutandi,* Case of the *Miguel Castro- Castro Prison V. Perú*. Merits, Reparations and Costs. *Supra* note 9, para. 359.

181 Investigation before the Office of the Special Provincial Prosecutor on Forced Disappearances, Extrajudicial Executions, and Clandestine Graves; Office of the Fifth Supra-Provincial Criminal Prosecutor (assigned number 50-2002); and the Office of the Third Supra-Provincial Criminal Prosecutor (assigned number 04-2007); as well as the Investigation before the Office of the Special Human Rights Prosecutor ; investigation informed by the State in its preliminary objection and investigation against former President Fujimori and extradition proceedings (case number 45-2003).

142. The Tribunal notes that as of the year 2002, the authorities opened a new investigation into the facts, at the request of the father of Mr. Anzualdo, who together with the father of another disappeared person, lodged a petition to reopen the investigation with the Office of the Special Provincial Prosecutor on Forced Disappearances, Extrajudicial Executions, and Clandestine Graves[182]. It fell upon the State to verify the reasons why it has not been possible to determine, up to the present, the fate of Mr. Anzualdo Castro, to locate his whereabouts, or to determine the corresponding criminal responsibility of the perpetrators, which the State did not do. Hence, it does not spring from the facts the reasons of the number and frequency of the changes made as to the authority in charge of the investigations: It spring from the evidence that said Office of the Special Provincial Prosecutor on Forced Disappearances, Extrajudicial Executions and Clandestine Graves became the Office of the Fifth Supra-Provincial Prosecutor[183], which was, in turn, deactivated and the duties of the parties to a suit redistributed, and therefore, the Office of the Third Supra-Provincial Criminal Prosecutor took over the investigation, under case file No. 04-2007[184].

143. In this sense, the Tribunal agrees with the representatives in that it is not clear that the changes of prosecutor's offices assigned to the investigation or the number of case -files opened, at the same time, by the different prosecutor's offices, favored the development and effectiveness of the investigation. On the contrary, its progress was hindered by the existence of segmented parallel inquiries regarding the alleged responsible and in which the authorities are investigating, also, different complex facts.

144. For example, on November 10, 2006 the Office of the Fifth Supra-Provincial Criminal Prosecutor decided to close the preliminary investigation against former President Fujimori Fujimori[185]. Nevertheless, after the filing of a motion for reconsideration[186] before the Superior Court, the Office of the Second Special Criminal Prosecutor for Organized Crime decided to vacate the appeal

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182 *Cf.* Motion to reopen investigations into the abduction and forced disappearance filed by Félix Vicente Anzualdo Vicuña and Javier Roca Obregón before the Office of the Special Prosecutor on Forced Disappearances, Extrajudicial Executions and Clandestine Graves, of October 10, 2002 (record of evidence, volume V, appendix 14 to the Application, page 1767).

183 *Cf.* Order issued by the Office of the Special Human Rights Prosecutor of May 7, 2008 (record of evidence, volume VIII, appendix 18 to the brief of pleadings and motions, pages 3011-3013).

184 *Cf.* Order issued by the Office of the Special Human Rights Prosecutor of May 7, 2008 (record of evidence, volume VIII, appendix 18 to the brief of pleadings and motions, pages 3011-3013).

185 On November 10, 2006 the Office of the Fifth Supra-Provincial Criminal Prosecutor noted that the Special Criminal Chamber of the Supreme Court reported that there was a proceeding under way in that venue against Alberto Fujimori Fujimori for the crime of forced disappearance to the detriment of Kenneth Ney Anzualdo Castro, and two other people, which resulted in undue interference in judicial functions [Avocamiento Indebido] and, therefore, it decided "to close the investigation until the proceeding before the Court concludes or until the latter adopts an appropriate decision with respect to the alleged participation of other persons." *Cf.* Decision issued by the Office of the Fifth Supra-Provincial Criminal Prosecutor in the case file Nº 50-2002 of November 10, 2006 (record of evidence, volume V, Appendix 17 to the application, pages 1784-1785).

186 A motion for reconsideration was immediately filed with the Superior Court against such decision of November 10, 2006 in which it was mentioned that the proceedings against the former President did not involve other alleged participates; and therefore both proceedings could be conducted. *Cf.* motion for reconsideration filed before the Office of the Fifth Supra-Provincial Criminal Prosecutor on November 28, 2006 (record of evidence, volume V, Appendix 18 to the application, pages 1787-1789).

decision[187]. Moreover, it emphasized that the proceedings have remained for many years in the possession of different prosecutor's offices and pointed out that "to date, nor the police or the prosecution authority had carried out a meaningful, thorough, and conscientious preliminary investigation, as warranted in cases of alleged crimes against humanity." Therefore, it ordered the appropriate Provincial Criminal Prosecutor's Office to directly take over this investigation and adopt a series of measures[188]. On April 11, 2007 the Prosecutor's Office decided to expand the investigation and ordered the measures required by the Superior Court [189] .

145. This hindrance was also reflected on the several activities arisen as of 2005 [190] in relation to the request to transfer the proceedings to the Office of the Special Prosecutor for Human Rights, which was investigating into the complaints filed against Vladimiro Montesinos and other people involved[191]. That request had a favorable resolution and therefore, since May 7, 2008 that Prosecutor's Office is conducting the investigation[192].

146. As to the investigations that link the then high-ranking government authorities to the forced disappearance of Mr. Anzualdo Castro, none of the two investigations had resulted in the prosecution and possible conviction of the responsible. In the proceedings against Montesinos, the investigation regarding Mr. Anzualdo Castro was consolidated in May 2008 (*supra* para. 145) and up to the present, no information about the progress of such investigation has been reported to this Court.

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187 *Cf.* Decision issued by the Office of the Second Special Criminal Prosecutor for Organized Crime in case file Nº 02-2007 of March 20, 2007 (record of evidence, volume V, Appendix 19 to the application, page 1794).

188 The Office of the Second Prosecutor ordered, among other measures, to take certain statements or "declarations"; collect information on the career and non-commissioned officers who were on duty October and December 1993; obtain certified copies of the evidence provided by the next -of -kin of the victims and procedural documentation that were related to the disappearance of Kenneth Ney Anzualdo Castro and Martin Javier Roca Casas, contained in the record of case 45-03 before the Special Chamber of the Supreme Court; amended signed statement from Ricardo Manuel Uceda Pérez. *Cf.* decision issued by the Office of the Second Special Criminal Prosecutor for Organized Crime in the case file Nº 02-2007 of March 20, 2007 (record of evidence, volume V, Appendix 19 to the application, pages 1794- 1795).

189 *Cf.* order issued by the Office of the Third Supra-Provincial Prosecutor of April 11, 2007 (record of evidence, volume VI, appendix 37 to the application, pages 1976-1977).

190 *Cf.* order issued by the Office of the Special Prosecutor on Forced Disappearances, Extrajudicial Executions and Clandestine Graves in case-file N° 50-2002 of April 13, 2005 (record of evidence, volume V, appendix 15 to the application, page 1778); motion for reconsideration filed before the office of the Special Prosecutor on Forced Disappearances, Extrajudicial Executions and Clandestine Graves in case file N° 50-2002 on May 3, 2005 (record of evidence, volume V, appendix 16 to the application, page 1782); order issued by the Office of the Fourth Prosecutor before the National Superior Criminal Court in case file N° 50-2002 on July 6, 2005 (record of evidence, Volume V, appendix 16 to the application, pages 1780-1781); request to transfer the preliminary investigation N° 04-2007 before the Office of the Special Prosecutor for Human Rights of April 4, 2008 (record of evidence, volume VIII, appendix 18 to the brief of pleadings and motions, pages 3023-3026); and order issued by the Office of the Third SupraProvincial Prosecutor on April 21, 2008 (record of evidence, volume VIII, appendix 18 to the brief of pleadings and motions, pages 3015-3030).

191 Said Offices of Special Provincial Prosecutors were created on November 10, 2000 by the resolution of the Solicitor's General, in order to take up the investigations into the complaints filed against Vladimiro Montesinos Torres. After twenty days, by means of another resolution of the Solicitor's General, said Prosecutor's offices were awarded broader powers "to take up the investigation into any third parties that may have participated in the facts subject-matter of the investigation." Order issued by the Office of the Third Supra -Provincial Criminal Prosecutor on April 21, 2008 (record of evidence, volume VIII, appendix 18 to the brief of pleadings and motions, page 3018).

192 *Cf.* Order issued by the Office of the Special Human Rights Prosecutor of May 7, 2008 (record of evidence, volume VIII, appendix 18 to the brief of pleadings and motions, pages 3011-3013).

147. Moreover, the State pointed out that it was adopting the necessary measures to avoid impunity since the Office of the Provincial Special Prosecutor for Human Rights has filed a complaint for the alleged commission of the crime against humanity- forced disappearance (*supra* para. 12). As to that complaint, the representatives held that even though it is a progress, it does not include the perpetrators of the forced disappearance.

148. In this regard, according to evidence, on December 17, 2008 this Prosecutor's Office arraigned several accused people for the alleged crime against humanity – forced disappearance- to the detriment of the society and Kenneth Ney Anzualdo Castro, among other people, and for breach of the peace as conspiracy to commit a crime against the State[193]. On March 31, 2009 it was issued the order to commence the preliminary proceedings. Regarding this new investigation against Montesinos, there is no information either about the measures adopted. In this way, the State has not provided a satisfactory explanation about the need, opportunity and relevance of instituting a new criminal proceeding for the same facts that were being investigated.

149. As to the extradition proceeding and investigation conducted against former President Fujimori, this Court notes that even though the request for extradition was declared admissible by the President of the Special Criminal Chamber of the Supreme Court of Justice of Peru for the crime of forced disappearance to the detriment of Mr. Anzualdo Castro et al[194], the Supreme Court of Chile tuned down the request in relation to the crimes of abduction committed at the "basements of the SIE"[195]. In this regard, the Tribunal has not received information about the

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193 *Cf.* complaint of the Office of the Special Provincial Prosecutor on Crimes against Humanity of December 17, 2008 (record of evidence, volume XII, appendix to the brief of the State of March 26, 2009, pages 4402-4422).

194 *Cf.* order for preliminary proceedings to commence issued by the Office of the Investigating Magistrate of the Permanent Criminal Chamber of the Supreme Court of Justice of Peru of January 5, 2004 (record of evidence, volume V, appendix 6 to the application, pages 1698-1704); final report of the Investigating Magistrate's Office of September 1, 2004 (record of evidence, volume VII, appendix 39 to the application, pages 2421-2427); opinion N° 167-2004-MP-FSC of the Supreme Attorney's Office for the Second Instance before the Special Criminal Chamber of the Supreme Court of December 10, 2004 (record of evidence, volume VII, pages 2429-2435 and 2478/2479); Report of the Ad Hoc Attorney General's Office for the cases of Fujimori- Montesinos of July 16, 2007 (record of evidence, volume V, appendix 35 to the application, pages 1900-1901); request for identification of Kenneth Ney Anzualdo Castro as aggrieved party presented on November 29, 2005 (record of evidence, volume V, appendix 21 to the application, pages 1797-1799); notice of the court order to expand of February 8, 2006 (record of evidence, volume V, appendix 22 to the application, page 1801); Request to Expand the Active Extradition, filed by the Ad Hoc Attorney General's Office of March 21, 2006 (record of evidence, volume VIII, Appendix 16 to the brief of pleadings and motions, pages 2909-2936); Decision of the Special Criminal Chamber of the Supreme Court of Justice of the Republic, of May 5, 2006 (record of evidence, volume X, Appendix 31 to the response to the application, pages 4068-4073); Supreme Final Decision of the First Transitory Criminal Chamber of the Supreme Court of Justice of June 21, 2006 (record of evidence, volume V, appendix 1 to the application, pages 1598-1613); decision of the First Transitory Criminal Chamber of the Supreme Court of Justice of July 13, 2006 (record of evidence, volume V, appendix 23 to the application, pages 1803-1806) and opinion of the prosecutor N° 038-2007-2°FSP-MP-FN of July 31, 2007 (record of evidence, volume VII, appendix 39 to the application, pages 2496- 2527).

195 On June 7, 2007 the State Attorney to the Supreme Court of Chile concluded that the Supreme Court of Chile should dismiss the request for extradition of Fujimori filed by the Government of Peru for the crimes of abduction "Basements of SIE." In the decision of September 21, 2007 the Second Criminal Court of the Supreme Court of Chile decided to reject the extradition regarding the case of forced disappearance of Kenneth Ney Anzualdo Castro inasmuch as "the existence of illicit acts, subject-matter of said requests, is not justified." *Cf.* report of the State's Attorney Office to the Supreme Court of Chile of June 7, 2007 (record of evidence, volume VIII, appendix 17 to the brief of pleadings and motions, pages 2938-2992) and excerpts of the judgments of July 11, 2007 and September 21, 2007 (record of evidence, volume VIII, appendix 17 to the brief of pleadings and motions, pages 2993-2008) and volume X, appendix 31 to the response to the application, pages 4090-4094).

impact that said decision would have on the development of the investigation conducted in Peru for the case of Mr. Anzualdo.

150. The Court deems appropriate to recall that, in the terms of the obligation to investigate, Peru must ensure the effective identification, investigation, prosecution and, if applicable, punishment of all the perpetrators and instigators of the forced disappearance of Mr. Anzualdo Castro; to such end, it shall not resort to the application of legal concepts that threaten the pertinent international obligations.

151. Finally, the representatives pointed out that no action has been carried out in any of the investigations in order to shed light on the whereabouts of Mr. Anzualdo Castro or in order to locate his mortal remains. Therefore, based on the report of the expert witness Baraybar, the representatives emphasized the negligence of the authorities in not conducting a DNA testing on the remnants of bones found in the incinerators of the basements of the SIE and they also highlighted the fact that it is unknown who is in charge of taking care of such remains at present. In addition, the State presented, in the final argument, a directive that regulates the investigation conducted by the prosecuting authority as a result of the finding of human remains related to grave human rights violations[196].

152. This Court notes that the investigations initiated since the year 2002 are based on new information that indicates that Mr. Anzualdo was taken to the basements of SIE. However, from the information available regarding the existence of incinerators and human bone remains of said office[197], it does not spring that the investigating authorities have adopted measures to compare the remains found with the DNA of the relatives of the people that could have been in said basements[198].

153. In short, even though the State has conducted important investigations to get to the bottom of the complex structure of the people involved in the planning and execution of grave human rights violations committed during the internal conflict of Peru, these investigations have not been oriented until recently and within certain limitations, to the determination of the participation of said structures in the forced disappearance of Mr. Anzualdo Castro.

154. To conclude, the principle of due diligence required that the proceedings be carried out taking into account the complexity of the facts, the context in which they

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196 Internal directive of the Public Prosecutor's Office Nº 011-2001-MP-FN of September 8, 2001 (Record of evidence, volume XIII, appendix to the final arguments of the State, pages 4526 to 4531).

197 On August 25, 2004 a criminal expert assessment, related to the inspection and taking of sample to determine the elements incinerated in the Second Basement (*Almacén de recuperacion ingenieria* - Warehouse of engineering recovery) of the Army's Intelligence Service, was forwarded to the Office of the Investigating Magistrate of the Special Criminal Chamber of the Supreme Court of Justice. Said expert assessment reveals that it was determined, by means of a forensic anthropologic examination, that one of the samples taken on June 11, 2004 at the internal base of the incinerator of the second basement of the Intelligence Service corresponds to a human bone structure. *Cf.* Official letter Nº 4237-04-DIRCRI-DIVLACRI-DEPING-PNO of August 19, 2004 (Record of evidence, volume VIII, Appendix 14 to the brief of pleadings and motions, pages 2831 to 2864).

198 The expert witness Baraybar emphasized, regarding the inspection conducted in the year 2004, that "the approach of the forensic investigation in cases of forced disappearance is very specific and different from the approach applied to normal criminal investigations, which is basically the best approach for this kind of examination, that is, to basically focus on the object; the object of the study, finally, is the recovered object and not the context; but, no samples of the relatives were taken; no DNA was processed; no inspections were conducted in the area where the remains could be located; no universe of probable victims was determined; there are many levels, let say, together, but time is the enemy." Expert opinion rendered by expert witness José Pablo Baraybar Do Carmo at the public hearing held before the Inter-American Court on April 2, 2009.

occurred, and the patterns that explain why the events occurred, ensuring that there were no omissions in gathering evidence or in the development of logical lines of investigation[199]. In this sense, it is essential the adoption of all the measures necessary to view the systematic patterns that allowed the commission of serious human rights violations as well as the mechanisms and structures through which impunity was ensured.

c) Regarding the reasonable time in the length of the proceedings

155. As to the reasonable time of length of the proceedings, the Commission as well as the representatives alleged that the State violated Article 8(1) of the Convention. La primera resaltó el tiempo que han tardado los procesos sin resultados tangibles respecto de los responsables, la falta de evacuación de pruebas y la posición activa de los familiares desde la primera denuncia. Los representantes sostuvieron que este no es un caso complejo, por tratarse de la desaparición de una única persona bajo una práctica sistemática y un *modus operandi* establecido, aunque reconocieron que la participación de agentes estatales y el ambiente de impunidad y miedo que imperaba en la época de los hechos podían entrañar cierta complejidad, lo que no justifica una falta o retardo.

156. Article 8(1) of the American Convention establishes as one of the elements of due process that the courts decide on the cases submitted to them within a reasonable time. In that respect, the Court found that is necessary to take into account four aspects to determine the fairness of such term: a) the complexity of the matter, (b) the procedural activities carried out by the interested party, (c) the conduct of judicial authorities[200], and the impairment to the legal situation of the individual involved in the proceeding[201]. However, the appropriateness of applying these criteria to determine the reasonability of the term of a proceeding depends of the circumstances of each case[202], since in cases such like this, the State's duty to wholly serve the purposes of justice prevails over the guarantee of reasonable time[203]. In any event, it falls upon the State to demonstrate the reasons why a proceeding or several proceedings have lasted more than a reasonable time to be conducted. Otherwise, the Court has broad powers to make its own analysis of this matter.

157. In the instant case, the Court notes that the inquiry into the facts was of a certain complexity, considering not only that it dealt with a forced disappearance in which the perpetrators tried to eliminate any trace or evidence, but also the refusal to provide information about the whereabouts and the number of possible responsible. Nevertheless, in the first period, the judicial authorities acted negligently and without

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199 *Cf. Case of the Serrano Cruz Sisters V. El Salvador. Merits, Reparations and Costs; supra note 90*, para. 88 and 105, and Case of the Rochela Massacre *V. Colombia*, supra note 13, para. 158.

200 *Cf. Case of Genie Lacayo V. Nicaragua.* Merits, Reparations and Costs. Judgment of January 29, 1997. Series C No. 30, para. 77; Case of Heliodoro Portugal *V.* Panamá, *supra* note 58, para. 149; Case of *Bayarri V. Argentina.* Preliminary Objections, Merits, Reparations and Costs. Judgment of October 30, 2008. Series C Nº 187, para. 107.

201 *Cf. Case of Valle Jaramillo et al. V. Colombia*, supra note 145 para. 155 and Case of Kawas Fernández *V.* Honduras, supra note 14, para. 112.

202 *Cf. Case of the "Maripirán Massacre" V. Colombia, supra* nota 39, para. 214; Case of the Pueblo Bello Massacre *V.* Colombia, *supra* note 75, para. 171. In a similar case, Case of García Asto and Ramírez Rojas *V.* Perú. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 25, 2005. Series C No. 137, para. 167.

203 *Cf. Case* of *La Cantuta V. Peru*, supra note 58, *para.* 149.

the promptness that the facts required (*supra* paras. 134 and 140). At all times, the next-to-kin adopted an active position, informing the authorities about all they knew and expediting the investigations. Regarding the new investigations opened as of the year 2002, it is not possible to disassociate the hindrances and delays verified in the prior period, which led the investigations and proceedings to last more than 15 years since the occurrence of the facts. Such proceedings are still opened, without having the authorities determined the fate or whereabouts of the victim, as well as prosecuted and possible punished the responsible, which, in whole, has exceeded the term that may be considered reasonable to such effects. Based on the foregoing, the Court considers that the State failed to comply with the requirements of Article 8(1) of the Convention.

C. On the lack of adaptation of domestic legislation (Article 2 of American Convention in relation to Articles I, II and III ICFDP)

C.1 Amnesty Laws

158. The Commission requested the Court to declare that the State failed to comply with its obligation to adapt domestic legislation, given the fact that, according to it, "while amnesty laws 26.492 and 26.479 remained in force, the investigations in connection with this complaint, though provisionally closed until new evidence should come to light, were in effect terminated, because said laws made it impossible to proceed with the investigation or prosecute State agents." In this way, it alleged that those laws were a delaying factor in the investigations and an obstacle to shed light on the circumstances of the disappearance, while they were in force, which is attributable to the State.

159. Regarding its subsequent application, the representatives asserted that "by virtue of the Court's determination of incompatibility of said laws with the Convention, those laws have not been applied and have no legal effect in Peru"; therefore, they agreed with the Commission in that it seems unnecessary to adapt the domestic legislation to additional measures in order to effectively guarantee the elimination of the judicial effects of the amnesty laws. However, while they were applied and produced effects, "the Peruvian State violated the rights to a fair trial and judicial protection in relation to the obligation to protect and guarantee and to adapt the domestic legislation to the international standards, to the detriment of Kenneth Ney Anzualdo Castro."

160. The State did not submit allegations in this regard.

161. In relation to the general duty of each State Party to adjust its domestic law to the provisions of the Convention, enshrined in Article 2 of the American Convention,[204] for the purposes of this debate, it is necessary to recall that the Court has already analyzed the content and scope of the amnesty laws Nº 26.479 and Nº. 26.492 in the case of *Barrios Altos vs. Perú*, by which in the Judgment on the merits of March 14, 2001, it concluded that amnesty laws "are incompatible with the American Convention [...] and consequently, lack legal effect"[205]. The Court

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[204] *Cf. Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) V. Chile. Merits, Reparations and Costs.* Judgment of February 5, 2001. Series C No. 73, para. 87; Case of Heliodoro Portugal *V.* Panamá, *supra* note 58, para. 179; and Case of La Cantuta *V.* Perú, supra note 58, *para.* 171 and 172.

[205] *Cf. Case of Barrios Altos V. Peru*, *supra* note 125, para. 41 to 44 and operative paragraph four.

interpreted the Judgment on the Merits delivered in that case in the sense that the "enactment of a law that is manifestly incompatible with the obligations undertaken by a State Party to the Convention is *per se* a violation of the Convention for which the State incurs international responsibility [and] given the nature of the violation that amnesty laws No. 26.479 and No. 26.492 constitute, the effects of the decision in the judgment on the merits of the Barrios Altos Cases are general in nature"[206]. This was repeated by the Court in the case of *La Cantuta*[207].

162. In the instant case and in light of the temporal scope in which said laws were applied, it spring that from the investigations analyzed, the only ones on which said laws could have produced an effect were the investigations conducted before the Office of the Fifth Provincial Prosecutor for Criminal Matters of Callao and the writ of habeas corpus. The remaining investigations were opened as of the year 2002. Nevertheless, from the actions taken in the proceedings mentioned, it does not spring that the enforcement of amnesty laws would justify the omissions or negligent acts. On the contrary, in 1999 the Office of the Fifth Prosecutor ordered expanded measures and to continue with the investigations (*supra* para. 134). In this way, it is not clear whether, in the instant case, there were specific acts to which the amnesty laws were applied, which had a real incidence in the investigations carried out. It has neither been alleged nor proven that, after the year 2001, the State stopped adopting the pertinent measures to eliminate the effects that these laws could somehow produce.

163. Without detriment to the foregoing, it is pertinent to recall that, in the context in which the events occurred, that law constituted a general obstacle to the investigations into serious human rights violations in Peru. In this regard, this Tribunal has already declared in the case of *La Cantuta V. Perú* that during the time in which the amnesty laws were applied, the State breached its obligation to adjust its domestic law to the Convention, pursuant to Article 2 thereof; as a result, since they were declared incompatible *ab initio* with the Convention such "laws" have not been capable of having effects, nor will it have them in the future[208].

C.2 Classification of the crime of forced disappearance

164. The representatives alleged that the State has failed to comply with its obligation to appropriately classify the crime of forced disappearance. They based their argument on that, in the case of *Gómez Palomino*, the Court ordered the State to adopt the measures necessary to amend its criminal legislation so as to adapt it to the international standards within a reasonable time, in spite of which, up to the date, Article 320 of the Criminal Code has not been modified and it is still being applied by the domestic courts, "with serious implications for the proceedings instituted against people accused of forced disappearance in Peru." The Commission did not present any claim in that respect. Moreover, the State only pointed out that the Congress of the Republic of Peru would be adopting the amendment of said law.

165. As to the forced disappearance of people, the duty to adjust the domestic legislation to the provisions of the American Convention implies the autonomous classification of the crime and the definition of the punishable acts that make it up. In

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206 *Cf. Case* of *Barrios Altos V. Peru.* Interpretation of the Judgment on the Merits. Judgment of September 3, 2001. Series C No. 83, para. 18 and operative paragraph two.

207 *Cf. Case* of *La Cantuta V. Peru*, supra note 58, *para.* 165-189.

208 *Cf. Case* of *La Cantuta V. Peru*, supra note 58, *para.* 189.

the case of *Gómez Palomino*, the Court had the opportunity to examine and render a decision on the adaptation of the criminal definition of forced disappearance in force under the Peruvian legislation since the year 1992 to the text of the American Convention and the ICFDP[209].

166. In the instant case, the Court deems that no specific connection between the lack of effectiveness, diligence and completeness in the investigations and the unsuitability of the criminal type of forced disappearance to the conventional parameters has been proven. It is noteworthy that the investigations carried out by the authorities have dealt with the facts and framed them within the crime of forced disappearance, considering even its insufficient content; none of the decisions prove that, due to that incorrect classification, the State's Attorney have shifted the burden of the proof onto the petitioners. Hence, it seems not possible for the Court to note, and the representatives neither specifically assert it, that in the instant case the incorrect classification had been a specific element that hindered the effective development of the investigation or proceedings instituted due to the forced disappearance of Mr. Anzualdo Castro.

167. Without detriment to the foregoing, so long as that criminal law is not correctly adapted, the State continues failing to comply with Articles 2 of the American Convention and III of the ICFDP[210].

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168. In the instant case, more than 15 years have elapsed since the forced disappearance of Mr. Anzualdo Castro, yet the whole truth about the facts or his whereabouts has not been determined. Since the moment of his disappearance, stat agents have adopted measures to hide the truth of what happened: apart from the use of the secret detention center in the basements of SIE, it has been possible to verify the lack of diligence in the investigations, specially due to the initial decision to close the criminal investigation, the groundless rejection of the writ of habeas corpus and the lack of prosecution of all the perpetrators and participants of the facts. The Tribunal finds that the domestic criminal proceedings have not provided effective recourses to determine the fate or whereabouts of the victim, or to guarantee the right to access justice and know the truth, by means of the investigation and possible punishment of the responsible and the full reparation of the consequences that resulted from the violations. The existing legal framework, after the disappearance of Mr. Anzualdo Castro, has not favored the effective investigation into the facts.

169. Based on the foregoing reasons, the Court concludes that the State violated the rights embodied in Articles 8(1) and 25(1) of the American Convention, in conjunction with Articles 1(1) and 2 therein and I(b) and III of the ICFDP, to the

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[209] At that time, the Court deemed that, as to the wrongdoers and the refusal to acknowledge the deprivation of liberty and to disclose the fate or whereabouts of the detained person, the classification of Article 320 of the Criminal Code was incomplete, given the fact that it did not contain all the forms of criminal involvement provided in Article II of the Inter-American Convention on Forced Disappearance of Persons, this is, state officials or individuals; it did not include within its elements, the refusal to acknowledge the deprivation of liberty or to provide information about the fate or whereabouts of detained persons and leaving no trace or evidence; finally, while the phrase "duly proven disappearance" complicates statutory "construction" thereof, since it was not possible to know whether such due proof must precede the criminal report or complaint or who should produce such proof either: the victim itself or his or her next-of-kin, or the State. *Cf. Gomez Palomino V. Peru, supra* note 63, paras. 98-110.

[210] *Cf. Case* of *Gómez Palomino V Perú.* Monitoring Compliance with Judgment. Order of the Inter-American Court of July 1, 2009, considering clauses 29-32.

detriment of the next-of-kin of Mr. Anzualdo Castro.

VIII
REPARATIONS
(Application of Article 63(1) of the Convention)[211]

170. It is a principle of International Law that any violation of an international obligation that has caused damage entails the duty to provide adequate reparation[212]. All aspects of this obligation to make reparations are regulated by international law[213]. The Court has based its decisions in this particular subject on the provisions of Article 63(1) of the American Convention.

171. In the response to the application, the State has indicated that it is not its responsibility to repair the injured party. Despite having expressed its pain for the victims, the State indicated its generic rejection of the reparations requested by the Commission and the representatives, given that "if the Court declares the State's responsibility, these forms of compensations shall follow a domestic guideline of reparation given by the Reparations Committee who is acting under certain criteria." In the same line of thought, the State pointed out, regarding the measures of satisfaction and guarantees of non-repetition, that any decision of the Court in this regard "must analyze what could be developed in the Peruvian society, who is living a reconciliation process."

172. The Court values that Peru counts on a Full Reparation Plan, by which it acknowledges *collective and symbolic reparations in the field of health, education, housing, and restitution of rights as well as economic reparation* for the victims of the violence during the conflict.[214] Furthermore, the Court notes that the representatives observed, and the State did not contest it, that up to the date, Kenneth Ney Anzualdo Castro is not registered with the Victims' Registry[215], which constitutes a pre-requisite for the recognition of the right to obtain individual reparations[216], and his next-of-kin have not been capable of receiving reparations within the framework of that system.

173. In consideration of the violations of the American Convention and the Inter-American Convention on Forced Disappearance of Persons so declared in the preceding chapters, the Tribunal shall address the requests for reparations made by

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

[212] *Cf. Case of Velásquez Rodríguez V. Honduras. Reparations and Costs.* Judgment of July 21, 1989. Series C Nº. 7, para. 25; Case of *Escher et al. V. Brazil*, supra note 6, para. 221; case of Acevedo Buendía *et al. ("Discharged and Retired Employees of the Comptroller") V.* Peru. Supra note 11, para. 108.

[213] *Cf. Case of Aloeboetoe et al. V. Surinam*. Merits. Judgment of December 4, 1991. Series C No. 11, para. 44; Case of Escher *et al. V. Brazil*, supra note 6, para. 221; case of Acevedo Buendía *et al. ("Discharged and Retired Employees of the Comptroller") V.* Peru. Supra note 11, para. 108.

[214] The Full Reparations Plan was approved by Law 28.592 on July 29, 2005.

See Electronic consultation to the Victims' Registry [*Registro Único de Víctimas*]. Available at http://www.registrodevictimas.gob.pe/ruv/ConsultasLinea/Libro01/ConsultaWebInscritosRUVLibro01.aspx

[216] The Victims' Registry is the body in charge of the identification and individualization of the victims that shall be benefited from the programs of the Full Reparation Plan.

the Commission and the representatives, as well as the State's observations thereof, in light of the criteria embodied in the Court's case-law in connection with the nature and scope of the obligation to make reparations [217], in order to adopt the measures required to redress the damage caused to the victims.

A) Injured Party

174. The Commission requested the Court to consider Mr. Anzualdo Castro, in his capacity as direct victim of the forced disappearance, as beneficiary of the right to reparation and it identified his father, mother and siblings as the beneficiaries. The representatives agreed with the Commission in that regard and the State did not refer to this specific aspect.

175. The Court considers as "injured party", under the terms of Article 63(1) of the Convention, Kenneth Ney Anzualdo Castro; his father, Félix Vicente Anzualdo Vicuña; his mother, Iris Isabel Castro Cachay de Anzualdo (dead); his sister, Marly Arleny Anzualdo Castro and his brother, Rommel Darwin Anzualdo Castro, all of them as victims of the facts that constituted the forced disappearance of Mr. Anzualdo Castro. Therefore, they shall be beneficiaries and shall be entitled to the reparations as may be set by the Tribunal as compensation for pecuniary and non-pecuniary damage.

B) Obligation to investigate into the facts and identify prosecute and, if applicable, punish the responsible

B.1) Investigation, determination, prosecution and, if applicable, punishment of all the perpetrators and instigators.

176. The Inter-American Commission requested the Court to order the State to conduct a thorough, impartial, effective and prompt investigation of the facts in order to identify and punish all the perpetrators and instigators. The representatives also requested the Court to order the State to guarantee the next-of-kin of the victim "the full access and capacity in all the procedural instances" and to publicly and broadly disseminate the results of the investigations.

177. In the final oral arguments, the representatives considered it was convenient for the Court to decide over "the specific obligations of the States Parties to the Convention to investigate and punish the crimes against humanity and, specially, the forced disappearance." Likewise, they requested the Court to recall its case-law regarding the "incompatibility of amnesty laws and other factors excluding responsibility with the American Convention", since in "November 2008, Bills Nº 2844/2008 and 2848/2008 were presented to the Congress, which constitute a serious threat to the fight against impunity in Peru." They pointed out that it was confirmed by the witness Carlos Rivera Paz, who informed that "the president of the Defense Commission of the Congress [...] has publicly proposed a new amnesty law for military officers being investigated and accused of having committed human rights violations"[218].

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[217] *Cf. Case of Velásquez Rodríguez V. Honduras. Reparations and Costs,* supra note 212, para. 25-27; Case of Garrido and Baigorria *V.* Argentina. Reparations and Costs. Judgment of August 27, 1998. Series C No. 39, para. 43; Case of "*White Van*" (*Paniagua Morales et al.) V. Guatemala*; Reparations and Costs; supra note 9, para. 76-79.

[218] *Cf.* Affidavit of Carlos Martin Rivera Paz of March 17, 2009 (record of evidence, volume XI, page 4379).

178. In that regard, the State indicated that "it is respectful of the human rights and the due process and the guarantees of access to justice [...] [therefore] its goal is to individualize the person or persons who were the perpetrators of the forced disappearance of Kenneth Ney Anzualdo Castro." In order to do so, it recalled the existence of a criminal proceeding that is pending.

179. The State is under a duty to use all means available to fight the situation of impunity surrounding the instant case, as impunity fosters the chronic repetition of human rights violations and the total defenselessness of the victims and their next of kin, who are entitled to learn about truth of the facts.[219] Therefore, the acknowledgment and the exercise of this right to know the truth, in a specific situation, becomes a relevant means for redress (*supra* para. 118).[220]

180. As with other cases,[221] the Court views as a significant first step towards reparation the publication of Peru's Truth and Reconciliation Commission Final Report, which includes the case of Mr. Anzualdo Castro, as effort that has contributed to the search for and determination of the truth in a historical period of Peru. Without detriment to the foregoing, the Court considers it is appropriate to establish that the recognition of "historical truths" contained in that report should not be understood as a substitute to the obligation of the State to establish the truth and ensure the judicial determination of individual and state responsibilities through the corresponding jurisdictional means[222]. This is how the State understood it when it kept open the investigations after the report was issued.

181. Based on the foregoing, as well as the case- law of this Tribunal[223], the Court orders the State to effectively carry out the criminal proceedings that are in process and any future proceedings in relation to the forced disappearance of Kenney Ney Anzualdo Castro, in order to determine the corresponding responsibilities of the perpetrators and instigators for the facts of the case and to apply the appropriate legal provisions. The State must conduct and conclude the corresponding investigations and proceedings within a reasonable time, in order to establish the whole truth of the facts, in light of the criteria mentioned regarding the investigations in cases of forced disappearance (*supra* para. 135).

182. The Court recalls that, in compliance with this obligation, the State must remove all obstacles, both factual and legal, that hinder the effective investigation into the facts and the development of the corresponding legal proceedings, and use all available means to expedite such investigations and proceedings, in order to ensure the non-repetition of facts such as these. Specially, this is a case of forced disappearance that occurred within a context of a systematic practice or pattern of disappearances perpetrated by state agents; therefore, the State shall not be able to

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219 *Cf. Velásquez Rodríguez V. Honduras.* Merits, supra note 11, para. 174; Case of *Kawas Fernández V. Honduras, supra* note 14, para. 190; and Case of Heliodoro Portugal *V.* Panamá, supra note 58, para. 244.

220 *Cf. Velásquez Rodríguez V. Honduras.* Merits, supra note 11, para. 181; Case of *Kawas Fernández V. Honduras, supra* note 14, para. *190; Case of Tiu Tojín V. Guatemala.*, supra note 59, para . 103.

221 *Cf. Case* of *La Cantuta V. Peru*, supra note 58, *para.* 223 and 224.

222 *Cf. Case of Zambrano Vélez et al. V. Ecuador, supra* note 38*,* para. 128; Case of Almonacid Arellano *et al. V.* Chile, supra note 9, para. 150.

223 *Cf. Case* of Baldeón García *V.* Perú. Merits, Reparations and Costs. Judgment of April 6, 2006; Series C No. 147, para. 199; Case of *Kawas Fernández V. Honduras, supra* note 14, para. 191; Case of Perozo *et al. V.* Venezuela, supra note 6, para. 414.

argue or apply a law or domestic legal provision, present or future, to fail to comply with the decision of the Court to investigate and, if applicable, criminally punish the responsible for the facts. For this reason and as ordered by this Tribunal since the delivery of the Judgment in the case of *Barrios Altos V. Peru*, the State can no longer apply amnesty laws, which lack legal effects, present or future (*supra* para. 163), or rely on concepts such as the statute of limitations on criminal actions, *res judicata* principle and the double jeopardy safeguard or resort to any other measure designated to eliminate responsibility in order to escape from its duty to investigate and punish the responsible[224].

183. Pursuant to the case-law of this Tribunal[225], during the investigation and prosecution, the State must ensure full access and procedural capacity of the victim's next-of-kin in all the stages of this investigation, in accordance with the domestic law and the rules of the American Convention. In addition, the results of the proceeding must be made known to the public, for the Peruvian society to know the truth of the instant case, as well as its responsible[226].

B.2) Determination of the whereabouts of Kenneth Ney Anzualdo Castro

184. The Inter-American Commission requested the Court to order the State to "avail itself of all means necessary to investigate, identify and disclose the whereabouts of Mr. Kenneth Ney Anzualdo, or "his remains", in which case the State shall deliver his remains to his next- of- kin and should this not be possible, "provide them with corroborated and convincing information regarding the whereabouts thereof." The representatives requested that the State complies with the foregoing, bearing in mind certain procedures and technical criteria. The State did not submit specific allegations in this regard.

185. The Tribunal recalls that the whereabouts of Mr. Anzualdo Castro has still not been established; as a consequence, the State must, as a means for redress of the right to truth of the next-of-kin[227], immediately proceed to search for and locate him or his mortal remains, by means of a criminal investigation or another effective and appropriate procedure (*supra* párr. Should the mortal remains be found, they must be delivered to the next-of-kin, prior genetic verification of blood relationship, as soon as possible and at no cost. Also, the State must cover the burial expenses, in common agreement with the next-of-kin.

B.3) Criteria to identify the persons that disappeared during the internal conflict

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224 *Cf. Case of Barrios Altos V. Peru*. Merits, *supra* note 141, para. 41 to 44; Case of *Cantoral Huamaní and García Santa Cruz V. Peru*, supra note 121, para. 190; and Case of La Cantuta *V.* Perú, supra note 58, *para.* 187.

225 *Cf. Case of Caracazo V. Venezuela. Reparations and Costs*. Judgment of August 29, 2002. Series C No. 95, para. 118; Case of *Kawas Fernández V. Honduras, supra* note 14, para. 194; *Case of Valle Jaramillo et al. V. Colombia*, supra note 145 para. 233.

226 *Cf. Case of the Caracazo V. Venezuela. Reparations and Costs*. Supra note 225, para. 118; Case of *Kawas Fernández V. Honduras, supra* note 14, para. 194; *Case of Valle Jaramillo et al. V. Colombia*, supra note 145 para. 233.

227 *Cf. Case of the Caracazo V. Venezuela. Reparations and Costs*. Supra note 225, para. 122 and 123; Case of Ticona Estrada *V.* Bolivia; *supra* note 63, para. 84; and Case of La Cantuta *V.* Peru, supra note 58, paras. 231 and 232.

186. The Commission as well as the representatives considered it was relevant the approach made by the expert witness Baraybar, in relation to the adoption of a public policy tending to identify and determine, "in an standardized manner", the universe of people who disappeared during the conflict- not definitive so far-, to continue searching for the remains as well as to establish a bank of genetic data that would allow the possible delivery of such remains to the victims' next-of-kin.

187. The State mentioned that there is, currently, "a law regarding the investigation carried out by the prosecuting authorities in relation to the findings of mortal remains in graves"; it specifically furnished the internal Directive Nº 011-2001-MP-FN, issued by the Attorney's Office on September 8, 2001. In addition, the State alleged that between 2006 and 2009, the "Specialized Forensic Team at the National Level of the Public Prosecutor's Office has participated in the exhumation of a hundred and four (104) clandestine graves." Furthermore, it informed that the "Public Prosecutor's Office has executed three Projects with the United States Development Program (UNDP) that strengthen the work of the Offices of the Special Prosecutors on Forced Disappearances, Extrajudicial Executions and Burials, which have been carried out up to the present"[228]. In addition, the State has submitted the Final Report of the Project 00014429-PER/02/U39 on the "Strengthening of the Office of the Special Prosecutor on Forced Disappearances, Extrajudicial Executions and Burials."

188. The Court notes that, in its expert examination, expert witness Baraybar emphasized some drawbacks in the investigations it furnished; he expressed that the State does not count on a public policy that allow elucidating the forced disappearances perpetrated between 1980 and 2000, and he highlighted there were serious methodological deficiencies, including the absence of activities aimed at "defining the universe of people that are being searched." Moreover, the Tribunal views as a positive step the domestic legislation of the Office of the Attorney's General as well as the measures adopted by the Public Prosecutor's Office. In particular, the Court notes that there is no coincidence as to the number of forced disappeared perpetrated during the internal conflict in Peru, though it is clear that the percentage of victims identified so far, is very low in comparison to the total number announced by entities such as the Truth and Reconciliation Commission.[229]

189. This Tribunal urges the State to continue making all the necessary efforts and to adopt the administrative and legal measures and public policies that may correspond, to determine the people that disappeared during the internal conflict and, if applicable, identify their mortal remains by means of the most effective technical and scientific means and, as long as it is possible and scientifically advisable, by the standardization of the investigation criteria. To that end, the Tribunal considers it is necessary for the State to establish, among other measures it need to adopt, a system of genetic information to allow the determination and elucidation of the blood relationship of the victims, as well as their identification.

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[228] *Cf.* supplemental argument of the Peruvian State, according to which the projects are the following: Project Nº 00046682 "Support of the Spanish Agency for International Cooperation (AECI) to the Offices of Special Prosecutor on Forced Disappearance, Extrajudicial Executions and Burials"; Project Nº 00048665 "Burials and Identification of Disappeared Victims and Legal Recourse of the corresponding Criminal proceedings." Project Nº 00049629 "Implementation of the DNA Laboratory for the Office of the Special Prosecutor on Burials", in charge of the National Office of the Institute of Legal Medicine.

[229] *Cf.* Final Report of the CVR, 2003, volume VI, chapter 1.2 *Forced Disappearance of people by state agents*, pages 73-81, available at http://www.cverdad.org.pe/ifinal/index.php

B.4) Appropriate classification of the crime of forced disappearance

190. The representatives requested the Court to order the State "the adjustment of the criminal definition of forced disappearance to the international norms, in particular, to Article II of the ICFDP, by means of the reform, as soon as possible, of section 320 of the Criminal Code." The State alleged that "[t]he Congress of the Republic of Peru, through the Prior Ruling on the Bill Nº 1707/2007-CR, is classifying the 'Crimes against the International Law on Human Rights and International Humanitarian Law', among other aspects, mainly, it is modifying section 320 [...] of the Criminal Code."

191. The Tribunal views as a positive step what the State informed, but it recalls that said adaptation of the domestic legislation has been ordered in the Judgment delivered in the case of *Gómez Palomino.* In this regard, the Court repeats that the State must adopt all measures necessary to amend, within a reasonable period of time, its criminal law in order to render it consistent with the international standards on forced disappearance of persons, paying special attention to the provisions of the American Convention and the Inter-American Convention on Forced Disappearance.[230]

B.5) Training of justice administrators

192. The representatives requested the Court to order the State to establish a training process aimed at the operators of the specialized judicial system, at those who hear cases involving serious human rights violations and at the Ombudsman of Peru. In addition, they requested the Court to order the State to provide the judicial system with the necessary resources to carry out its functions. The State argued that "[t[he training of the Justices is provided by the *Academia de la Magistratura* [Magistracy Academy], an entity that completely fulfils its role", and presented the statistics about the progress made in the prosecution of 34 cases brought to justice by the National Criminal Chamber, upon the recommendation of the Truth and Reconciliation Commission.

193. The violations attributable to the State in the instant case were perpetrated by state agents. Moreover, the violations were heightened by the existence, at the time of the events, of a widespread context of impunity for serious human rights violations fostered by judicial operators. As a result, without detriment to the existence of training programs in Peru imparted by the *Academia de la Magistratura* for judicial officers, the Tribunal considers equally necessary for the State to implement, within a reasonable time, permanent education programs on human rights addressed to members of the intelligence services, the Armed Forces, as well as judges and prosecutors. Said programs must mention, specially, the instant Judgment and the international human rights treaties and, specifically, the treaties related to forced disappearance of people and torture.

C) Measures of satisfaction and guarantees of non-repetition

C(1) Publication of the pertinent parts of the instant Judgment

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230 *Cf. Case* of *Gómez Palomino V. Peru*, supra note 63, *para.* 149.

194. The Court deems appropriate, as ordered in other cases[231], that the State shall publish at least once, in the Official Gazette and in another newspaper of wide national circulation, chapters 30 to 203 of this Judgment, with the corresponding headings and subheadings but without the corresponding footnotes and the operative paragraphs therein. To such end, said publications shall be made within six months following notice of this Judgment.

C(2) Public act of acknowledgement of international responsibility

195. The Inter-American Commission requested the Court to order the State to organize a public act of acknowledgment of international responsibility for the facts and to apology to the victim and his next-of-kin, in consultation with the latter, in order to make sure his memory is preserved. The representatives requested the Court to order the State that, in such public act, "the maximum authority, on behalf of the State, apology to the next-of-kin of Kenneth Ney Anzualdo Castro", who shall read the relevant parts of the Judgment and also, to disseminate such act by a public media with a high rating in Peru, for which the State must consult with the next-of-kin the details of the event."

196. In addition, the representatives recalled, in the final arguments, the words of Marly Arleny Anzualdo Castro, who, during the public hearing, requested the Tribunal "a place of memory for students like my brother." Consequently, the representatives requested the Court to order the State to, in common agreement with the next-of-kin and having previously coordinated with them, "vindicate his memory, by erecting a commemorative plaque in an appropriate place at *Universidad Técnica de Callao*."

197. The State considered it was necessary to wait for the results of the investigation conducted into the disappearance of Anzualdo Castro to carry out any kind of act. In addition, it objected to such request upon considering that the same "was unnecessary bearing in mind the goal of the Project of the 'Museum of Memory'", which would "represent with objectivity and displaying broad spirit, the tragedy that Peru went through as a consequence of the subversive activities of *Sendero Luminoso* and *Movimiento Revolucionario Túpac Amaru* during the last two decades of the twentieth century, in order to reveal to the Peruvian society the tragic consequences that result from ideological fanatism, breach of law and the violation of human rights, in order for our country not to recall such terrible experiences".[232] Likewise, the State "considers that the erection of a plaque, bust or another symbolic form of redress is not feasible at any public institution- like the *Universidad del Callao"*- considering the initiative described of the "Museum of Memory."

198. The Court has determined, when analyzing the merits of the case, the seriousness of the facts and the violations committed in the instant case. In turn, the Court has noted that the description of the victim Kenneth Ney Anzualdo Castro as terrorist and his connection with the group Sendero Luminoso affected the investigations in relation to his forced disappearance and that such description on the part of the State was kept in this proceeding, which did not refer to his guilt or

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[231] *Cf. Case of Barrios Altos V. Perú. Reparations and Costs*. Judgment of November 30, 2001. Series C No. 87, Operative Paragraph 5 d); Case of Escher *et al. V.* Brazil, *supra* note 6, para. 239; case of Acevedo Buendía *et al. ("Discharged and Retired Employees of the Comptroller") V.* Peru. Supra note 11, para. 141.

[232] *Cf.* Supreme Decision Nº 059-2009-PCM issued by the President of the Cabinet on March 31, 2009 (record of evidence, volume XIII, pages 4572 and -4573).

innocence in certain facts. The Tribunal deems that the use of this language has contributed to the stigmatization and revictimization of Kenneth Ney Anzualdo Castro and his next-of-kin and they keep suffering because of that.

199. The Court recalls that the "criminal", "subversive" or "terrorist" threat invoked by the State in justification of certain activities carried out, may certainly constitute a legitimate reason for a State to deploy the security forces in specific cases. However, the State's fight against crime must always be exercised within limits and according to procedures that preserve both public safety and the fundamental rights of the human person subjected to its jurisdiction[233]. The conditions in a country, however difficult, do not release a State Party to the American Convention from its treaty-based obligations, which particularly prevail in cases such as the present one[234]. It is necessary to recall that, no matter the conditions of each State, International Law strictly prohibits torture, forced disappearance and summary and extralegal executions and said prohibition is a non-derogable norm of International Law[235].

200. Consequently, the Court considers it is highly important the vindication of the name and dignity of Kenneth Ney Anzualdo Castro and his next-of-kin. The State's proposal to replace the act of acknowledgement with the "Museum of Memory" does not constitute an adequate individual measure of satisfaction, even though the Tribunal acknowledges that these types of initiatives are important in order to recover and build the historical memory of a society. Based on the foregoing, the Court considers it is necessary for the State to organize a public act of acknowledgment of responsibility for the forced disappearance of Kenneth Ney Anzualdo Castro and to apology to him and his next-of-kin, in particular for the treatment afforded to them since he disappeared. This act must be organized in the presence and, if possible, with the consent and cooperation of the relatives, if they wish so. High-ranking State's authorities must be present in the act, which must held within the term of six months, as from notice of this Judgment and the authorities shall make their best efforts to provide the most widely dissemination of the act in the media.

201. Furthermore, in order to preserve the memory of Mr. Anzualdo Castro and as a guarantee of non-repetition, the Court considers it is appropriate to accept the request of Marly Arleny Anzualdo Castro and to order the State to erect a plaque in the Museum of Memory, in the presence of the next-of-kin, if they wish so, by means of a public act. Given that the Museum is being implemented, the erection of the plaque must be done within the term of two years, as of notice of this Judgment.

C.3) Medical and Psychological Treatment

202. The representatives requested the Court to order the State to provide the next -of -kin with medical and psychological treatment, free of charge, in order for them to have access to a quality medical center, widely known in the country and

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233 *Cf. Case of Velásquez Rodríguez V. Honduras.* Merits, supra note 11, para. 154*; Case of Zambrano Vélez et al. V. Ecuador, supra* note 38*,* para. 96, and Case of the *Miguel Castro- Castro Prison V. Perú.* Merits, Reparations and Costs*. Supra* note 9, para. 240.

234 *Cf. Case of Bámaca Velásquez V. Guatemala.* Merits, supra note 42, para. 207*; Case of Zambrano Vélez et al. V. Ecuador, supra* note 38*,* para. 96; and Case of Goiburú *et al. V.* Paraguay, supra note 59, para. 89.

235 *Cf. Case of Barrios Altos V. Peru*, *supra* note 141*,* para. 41*; Case of Zambrano Vélez et al. V. Ecuador, supra* note 38*,* para. 96, and Case of the Rochela Massacre *V.* Colombia, supra note 13, para. 132.

chosen by the victims, including the cost of the necessary medicines if applicable, after the medical evaluation of each one of them. The State objected to this request.

203. Upon verifying the suffering caused to the next-of-kin of Mr. Anzualdo Castro, the Tribunal deems it is convenient to order the State to provide medical, psychological and psychiatric treatment, free of charge, in an immediate, adequate and effective way, by means of specialized public health care institutions, to those next-of-kin who were considered victims by this Tribunal. The State shall take into account the sufferings of each one of the beneficiaries, for which it shall previously conduct a physical and psychological evaluation. Moreover, the treatment must be provided for as long as they need it and must include the medicines they may eventually require.

D) Reparation, compensations, costs and legal expenses

D(1) Pecuniary damage

204. The Court's case law has developed the concept of pecuniary damage and the cases in which compensation therefore is due.[236]

205. The Commission requested the Court to establish an appropriate amount of compensation, under the principle of equity, for pecuniary damage and it considered that the injured party is entitled to such claims. The representatives, in addition, presented specific requests as to pecuniary damage.

D.1.i) Consequential damages

206. As to the expenses incurred in order to determine the whereabouts of Kenneth Ney Anzualdo Castro, the representatives noted the activities carried out by his next-of-kin to try to locate him since the day of his disappearance, which involved travelling to different parts of the country; therefore, they incurred in expenses amounting to, approximately, US$ 900.00. Moreover, the family spent US$ 1.000 in the hiring of an investigator's services. Even Mr. Rommel Anzualdo Castro economically helped the rest of the family from Spain. In turn, considering there are no receipts of the expenses incurred in light of the lapse of time, they request the Court to equitably determine the reimbursement for the expenses incurred by the entire family regarding the criminal complaint, the participation of the Truth and Reconciliation Commission and the judicial actions taken. Regarding the health expenses, the representatives also requested the Court to equitably determine the amount that may correspond for medical care and medicines for Mrs. Iris Isabel Castro Cachay de Anzualdo, who, after the disappearance of her son, had health problems that implied expenses. Moreover, they stated that the son of Marly Arleny Anzualdo had to go to psychological sessions on six occasions due to the disappearance of his uncle, and such expenses form part of the pecuniary damage. Finally, the representatives pointed out that the Anzualdo family was forced to close the small shop they run, from December 1993 to April 1994, which they considered it constituted damage to family wealth and requested the Court to equitably determine the compensation that may correspond in that regard.

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[236] This Tribunal has established that pecuniary damage involve "the loss of or detriment to the victims' income, the expenses incurred as a result of the facts and the monetary consequences that have a causal nexus with the facts of the sub judice case." *Cf. Case of Bámaca Velásquez V. Guatemala. Reparations and Costs, supra note 9. Para.* 43; Case of Perozo *et al. V.* Venezuela, supra note 6, para. 405; and case of Ríos *et al. V.* Venezuela, supra note 6, para. 396.

207. The State asserted that "there is no evidence proving" the existence of the expenses alleged by the representatives.

208. The Court acknowledges that the activities and steps taken by the next-of-kin of Mr. Anzualdo Castro to try to locate him resulted in expenses that may be considered as consequential damage, in particular, the activities carried out before the different civil, administrative and judicial authorities. It is not proven the hiring of the investigator. Regarding what they mentioned about the business that the Anzualdo family had to close, the Tribunal acknowledges that it could have been related to the disappearance, though it is not clear that the main reason has been such disappearance; therefore, it is not appropriate to determine a specific amount in that regard.

209. Regarding the health treatment for the next-of-kin, even though they did not furnish any data as to the costs of the medical treatment of Mrs. Castro Cachay de Anzualdo, the Tribunal assumes that the family paid for them, in order to determine the compensation corresponding to pecuniary damage. As to the psychological treatment of the son of Marly Arleny Anzualdo Castro, the Court notes that no receipt or estimation in this connection was submitted; besides, the Commission and the representatives did not include him as beneficiary of the reparations in their claims. Therefore, the Tribunal shall not determine compensation in that regard.

210. The Court bears in mind that the Anzualdo family has not preserved the supporting documentation of the expenses mentioned, which is reasonable after the lapse of more than 15 years since the disappearance; therefore, the Court equitably determines the amount of US$ 15.000,00 (fifteen thousand dollars of the United States of America). This sum must be delivered to Mr. Félix Anzualdo Vicuña, who shall distribute it among the members of his family, as it may correspond.

D.1.ii) Loss of Income

211. The representatives considered that the standard of lost of income must be applied to the instant case, since Mr. Anzualdo Castro is still disappeared and, should he not be, he would live for another 43 years, given that the life expectation at the time of the events was of 67.88 years; therefore, he would have finished his studies in the first semester of 1995 and he would have begun his career as economist in that same year. Even though the updated loss of income would amount to US$ 124.273, 00 based on the minimum salary in Peru from 1994 to 2008, the loss of income in the instant case would be of US$ 248.546,00 given the minimum salary of an employee in the area of financial intermediation and business in Peru[237]. Considering a deduction of 25% from such amount as personal expenditure, the representatives requested the Court to order the State to pay the next-of-kin of Kenneth Ney Anzualdo Castro the amount of US $186.410, 00 as loss of income.

212. The State claims that it is not appropriate to cover the compensation for the victims and that, according to the formula used by the representatives, "a very long period was assumed as a period of constant income, which is not in accord with the reality of [such] country, taking into account unemployment." Furthermore, it claims

[237] They pointed out, as criterion, the Monthly Basic Pay Table for the professional sector in Peru for the years 1995 to 2007, published by the International Labour Organization (record of evidence, volume VIII, pages 3041-3053).

that the causal nexus between the alleged violations and the loss of income is not proven.

213. The Court considers, as with previous cases on forced disappearance[238], that in this case in which the whereabouts of the victim is unknown, it is possible to apply the compensation criteria for the loss of income of the victim, which includes income that the victim would have received during his remaining life expectancy.

214. As has been proven, Kenneth Ney Anzualdo Castro was studying at the School of Economic Sciences of the Professional School of Economy of *Universidad Nacional del Callao* when he was made disappeared by state agents and he was 25 years of age at the time of the events (*supra* para. 33). He was finishing the last part of the university course and, therefore, he would have probably begun his professional career in the year 1995. As observed by the representatives, if he had graduated from economy, during his work life, Mr. Anzualdo Castro would have earned a salary according to his profession, that is, a higher salary than the minimum salary in force in Peru. The Court takes into account the date submitted by the representatives regarding the salaries in Peru and the life expectation of Mr. Anzualdo Castro at the moment of his birth, information that the State did not contest. It is irrelevant to consider, as the State intends, the unemployment rate in Peru, given the fact that otherwise there would be no base to calculate what a university student would have not earned in the market. Based on the foregoing, the Court equitably determines the amount of US$ 140.000 (a hundred and forty million dollars of the United State of America) in favor of Kenneth Ney Anzualdo Castro, as loss of income as a result of his forced disappearance.

D(2) Non-pecuniary Damage

215. The Commission considered that the non-pecuniary damage as a result of the forced disappearance of Mr. Anzualdo Castro is evident, since it can be presumed that the injured party "went through an intense psychological suffering, anguish, pain and alteration in his life plans as a result of the state actions and the lack of justice."

216. The representatives alleged that it is reasonable to assume that Mr. Anzualdo was subjected to interrogatories and tortures. They claim that the amount of US $100.000 as moral damage is in line with the recent case-law of this Tribunal. Regarding the next-of-kin, the representatives argued that it is reasonable to presume that the parents of a victim of forced disappearance have morally suffered and that the inaction of the Peruvian authorities has caused "a profound suffering" to the next-of-kin. Therefore, they requested the Court to order the State to pay the amount of US$ 80.000,00 in favor of each one of the next-of-kin (*supra* para. 175).

217. The State sustains that it should not compensate the victims for non-pecuniary damage and that the amount requested for them is not in line with the recent case-law of the Court. As a result, it requests the Court to equitably determine the corresponding amount should it be necessary.

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238 *Cf. Case* of Velásquez Rodríguez *V.* Honduras. Reparations and Costs, supra note 212, para. 46 and 47; Case of Godínez Cruz *V.* Honduras. Reparations and Costs. Judgment of July 21, 1989. Series C N. 8, para. 44 and 45; *Case of Benavides Cevallos V. Ecuador*, supra note 111, para. 48 and Case of *Castillo Páez V. Perú.* Reparations and Costs. Judgment of November 27, 1998. Series C No. 43, para. 75.

218. In it case-law, the Tribunal has determined several ways in which the non-pecuniary damage could be compensated[239]. The non-pecuniary damage may include both the suffering and distress caused to the direct victims, and the impairment of values that are highly significant to them, as well as other sufferings that cannot be assessed in financial terms, to the living conditions of the victims or their families. Since it is not possible to assign the non-pecuniary damage a precise monetary equivalent, it may only be compensated by the payment of a sum of money for the full reparation of the victim or the assignment of goods or services, determined by the Court, applying judicial discretion and the principle of equity as well as the execution of acts or works of a public nature or repercussion, which have effects such as recovering the memory of the victims and commitment to the efforts to ensure that human rights violations do not happen again.[240] The first aspect of the non-pecuniary reparation is analyzed in this section and the second aspect has been analyzed in the previous section of this chapter.

219. The international case-law has repeatedly established that a judgment constitutes *per se* a form of reparation[241]. However, in view of the circumstances of the instant case, the sufferings that the violations have caused to the victim and his next -of -kin, the changes in the standards of living, and the other non-pecuniary consequences they bore, the Court deems it appropriate to award compensation for non-pecuniary damage, assessed on equitable grounds.[242]

220. The Court considers, as in similar cases,[243] that the non-pecuniary damage sustained by Mr. Anzualdo Castro is evident, since it is human nature that a person subjected to forced disappearance suffers from deep pain, anguish, terror, impotence and insecurity. As a result, this damage need not be proven.

221. As to the next-of-kin, the Court repeats that the suffering caused to the victim "extends to the closest members of the family, particularly those who were in close affective contact with the victim."[244] Also, the Tribunal has also considered that the suffering or death – in this case, the forced disappearance – of a person causes non-pecuniary damage to his daughters, sons, wife or companion, mother and father, which does not have to be proved[245].

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239 *Cf. Case* of the "Street Children" (Villagrán Morales *et al.*) *V.* Guatemala. Reparations and Costs. Judgment of May 26, 2001. Series C No. 77, para. 84; Case of Perozo *et al. V.* Venezuela, supra note 6, para. 405; and Case of Rios *et al. V.* Venezuela, supra note 6, para. 396.

240 *Cf. Case* of the "Street Children" (*Villagrán Morales et al.*) *V.* Guatemala. Reparations and Costs, supra note 239, para. 84; Case of Perozo *et al. V.* Venezuela, supra note 6, para. 405; and Case of Rios *et al. V.* Venezuela, supra note 6, para. 396.

241 *Cf. Case of Neira Alegría et al. V. Perú. Reparations and Costs.* . Judgment of September 19, 1996. Series C No. 29, para. 56; case of Acevedo Buendía *et al. ("Discharged and Retired Employees of the Comptroller") V.* Peru. Supra note 11, para. 133 and Case of Kawas Fernández *V.* Honduras, supra note 14, para. 184.

242 *Cf. Case of Neira Alegría et al. V. Perú.* Reparations and Costs, *supra* note 241 para. 56; case of Acevedo Buendía *et al. ("Discharged and Retired Employees of the Comptroller") V.* Peru. Supra note 11, para. 133 and Case of Kawas Fernández *V.* Honduras, supra note 14, para. 184.

243 *Cf. Case* of the 19 Tradesmen *V.* Colombia, supra note 156, para. 248; Case of *La Cantuta V. Peru,* supra note 58, *para.* 217; and Case of Goiburú *et al. V.* Paraguay, supra note 59, para. 157,

244 *Cf. Case of Las Palmeras V. Colombia.* Reparations and Costs. Supra note 145, para. 55; Case of *La Cantuta V. Peru,* supra note 58, *para.* 218; and Case of Goiburú *et al. V.* Paraguay, supra note 59, para. 159.

245 This criterion has been held in similar cases regarding the daughters, sons, wife or companion, mother, father, among other peoples. *Cf. Case of the Pueblo Bello Massacre V. Colombia, supra* nota 75,

222. In light of the compensations determined by the Tribunal in other cases on forced disappearance of people, the circumstances of the instant case, the relevance, nature and seriousness of the violations committed, the suffering caused to the victims and the treatment afforded to them, the time elapsed since the disappearance, the denial of justice as well as the change of the life plans and the remaining non-pecuniary consequences that they suffered, the Court deems pertinent to equitably determine the amount of US$ 80.000,00 (eighty thousand dollars of the United States of America) in favor of Kenneth Ney Anzualdo Castro, as compensation for non-pecuniary damage. Likewise, the Tribunal equitably determine the amount of US$ 50.000,00 (fifty thousand dollars of the United States of America) in favor of the following persons: Félix Vicente Anzualdo Vicuña; Marly Arlene Anzualdo Castro and Iris Isabel Castro Cachay de Anzualdo and US$ 20.000 (twenty thousand dollars of the United States of America) in favor of Rommel Darwin Anzualdo Castro as non –pecuniary compensation.

D(3) Costs and Expenses

223. As held by the Court in prior cases, costs and expenses are included within the concept of reparation as enshrined in Article 63(1) of the American Convention[246].

224. The Commission requested the Court to order the State to pay "the costs and expenses incurred by the next-of-kin of the victim and their representatives in the processing of the case, both at the national level, as well as before the Inter-American system."

225. As to the expenses incurred by the Anzualdo family, the representatives noted that, in the initial stage of the investigations, the family hired the services of an attorney, who charged US$ 225.00 for each brief filed. They claim that the family has not preserved the receipts of said expenses and, therefore, they requested the Court to equitably determine such amount, taking into account that the proceedings were instituted more than 14 years ago. As to the proceeding before the Court, APRODEH and CEJIL have bore the total expenses derived from the production of evidence and ensuring the access of the victims during the public hearing before the Court, except for the payment of € 80 in which Rommel Anzualdo Castro incurred to send his affidavit to the representatives from Spain, where he lives.

226. They also requested the Court to equitably determine an amount for the expenses of APRODEH in its capacity as representatives. They note that APRODEH has represented the victim at the domestic as well as the international level since the year 1994 and that it has incurred in several administrative and honoria. In the final arguments, they indicated that they covered some of the expenses as part of its participation in the public hearing, including the trips of a representative and an expert witness. They requested the Court to equitably determine the expenses incurred by APRODEH.

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para. 257; Case of *La Cantuta V. Perú,* supra note 58, *para.* 218; and Case of Goiburú *et al. V.* Paraguay, supra note 59, para. 159.

[246] Case of Garrido and Baigorria *V.* Argentina. Reparations and Costs; supra note 217, para. 79; Case of Escher *et al. V.* Brazil, supra note 6, para. 255; case of Acevedo Buendía *et al. ("Discharged and Retired Employees of the Comptroller") V.* Peru. Supra note 11, para. 146.

227. Furthermore, they pointed out that CEJIL has represented the victim and his next-of-kin since April 13, 1998. They assert that it has incurred in administrative expenses, honoria as well as a travel made to collect evidence. In the brief of pleadings and motions, they requested the Court to equitably determine the amount of US$ 7.000,00 as expenses for CEJIL. In the final written arguments, they requested the Court to take into account the expenses incurred during the processing of the case before the Court, which they calculated that it amounts to approximately US$ 5.500,00.

228. The Tribunal has considered that "the claims of the victims or their representatives as to costs and expenses and the supporting evidence must be offered to the Court at the first occasion granted to them, that is, in the brief of requests and motions, without prejudice to the fact that such claim may be later on updated, according to new costs and expenses incurred during the processing of the case before this Court."[247]

229. In the instant case, the Court notes that the representatives filed evidence of the expenses incurred in the forwarding of the documents of Rommel Anzualdo Castro to CEJIL, the takings of four declarations and legalization of two signatures before a notary public and the trips to Santo Domingo of a representative of APRODEH, three lawyers of CEJIL, a witness and an expert witness. Regarding some of the expenses mentioned, it is not clear which of them correspond, specifically, to expenses incurred in light of the instant case. The Tribunal takes into account the expenses mentioned by the representatives in relation to the activities carried out at the domestic level by APRODECH and the expenses incurred during the processing of the instant case before the Commission and the Court. The expenses in which the Anzualdo family incurred are covered by the compensation mentioned as pecuniary damage (*supra* para. 210).

230. As a result, the Court equitably determines the amount of US$ 14.000,00 (fourteen thousand dollars of the United States of America) in favor of CEJIL and APRODEH, as costs and expenses. Said amounts must be paid to Mr. Félix Anzualdo Vicuña, who shall deliver the corresponding amounts to the representatives. Said amount includes future expenses that the Anzualdo family and the representatives may incur at the domestic level or during the procedure of monitoring compliance with this Judgment.

D(4) Method of Compliance with the Payments Ordered

231. The State should make the payment of these amounts for the concept of pecuniary and non-pecuniary damages directly to the beneficiaries, as well as the *reimbursement of costs and expenses*, within the period of one year, as from the time of service of the present Judgment, under the terms of the following paragraphs.

232. The payments corresponding to the compensations for pecuniary and non-pecuniary damage directly suffered by Mr. Kenneth Ney Anzualdo Castro (*supra para.* 214 and 222) *shall be delivered to his father,* Mr. Félix Vicente Anzualdo Vicuña.

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[247] *Cf. Case* of Molina Theissen *V.* Guatemala. Reparations and Costs. Judgment of July 3, 2004. Series C Nº. 108, para. 122; Case of Escher *et al. V.* Brazil, supra note 6, para. 259; and Case of Reverón Trujillo *V.* Bolivia, *supra* note 11, para. 200.

233. As to the amounts ordered as reparations and compensations in favor of Iris Isabel Castro Cachay de Anzualdo, who died on October 26, 2006, the amounts determined shall be delivered to her heirs; therefore, 50% of the amounts determined shall be delivered to Mr. Felix Vicente Anzualdo Vicuña and the remaining 50% shall be shared, in equal parts, between Mrs. Marly Arleny Anzualdo Castro and Mr. Rommel Darwin Anzualdo Castro.

234. Should the beneficiaries die before the pertinent above compensatory amounts are paid thereto, such amounts shall inure to the benefit of their heirs, pursuant to the provisions of the applicable domestic legislation.

235. The State must discharge its pecuniary obligations by tendering United States dollars or an equivalent amount in the Peruvian legal currency, at the New York, USA exchange rate between both currencies prevailing on the day prior to the day payment is made.

236. If, due to reasons attributable to the beneficiary of the above compensatory amounts or his heirs, respectively, they were not able to collect them within the period set for that purpose, the State shall deposit said amounts in an account held in the beneficiaries' name or draw a certificate of deposit from a reputable Peruvian financial institution, in US dollars and under the most favorable financial terms allowed by the legislation in force and the customary banking practice in Peru. If after ten years compensation set herein were still unclaimed, said amounts plus accrued interests shall be returned to the State.

237. The amounts allocated in this Judgment as compensation and reimbursement of costs and expenses shall be delivered to the persons mentioned in their entirety in accordance with the provisions hereof, and may not be affected, reduced, or conditioned on account of current or future tax purposes.

238. Should the State fall into arrears with its payments, Peruvian banking default interest rates shall be paid on the amounts due.

VIII
OPERATIVE PARAGRAPHS

239. Therefore:

THE COURT,

DECLARES:

Unanimously that:

1. The State is responsible for the forced disappearance of Mr. Kenneth Ney

Anzualdo Castro and, as a result, it violated the rights to personal liberty, humane treatment, life and juridical personality, embodied in Articles 7(1), 7(6), 5(1), 5(2), 4(1) and 3 of the American Convention on Human Rights, in relation to the duty to respect and ensure those rights, contained in Article 1(1) thereof, as well as in conjunction with Article I of the Inter-American Convention on Forced Disappearance of Persons, to the detriment of Kenneth Ney Anzualdo Castro, under the terms of paragraphs 33 to 103 of this Judgment.

2. The State violated, as a consequence of the forced disappearance of Kenneth Ney Anzualdo Castro, the right to humane treatment, fair trial and judicial protection, enshrined in Articles 5(1), 5(2), 8(1) and 25 of the American Convention on Human Rights, in conjunction with the duty to respect and ensure those rights and to adopt domestic legal provisions, contained in Articles 1(1) and 2 thereof and I.b) and III of the Inter-American Convention on Forced Disappearance of Persons, to the detriment of Félix Vicente Anzualdo Vicuña, Iris Isabel Castro Cachay de Anzualdo, Marly Arleny Anzualdo Castro and Rommel Darwin Anzualdo Castro, under the terms of paragraphs 104 to 169 of this Judgment.

3. The State did not violate the right to freedom of thought and expression, recognized in Article 13 of the American Convention on Human Rights, based on the reasons expressed in paragraphs 116 to 120 of this Judgment.

AND ORDERS:

Unanimously that:

4. This Judgment is, *per se,* a form of redress.

Unanimously that:

5. The State must effectively conduct the criminal proceedings in process and any future proceeding in relation to the forced disappearance of Kenneth Ney Anzualdo Castro, to determine, within a reasonable time, the perpetrators and instigators who are responsible for the facts of this case and effectively impose the punishments and consequences according to the law, for which it must remove all obstacles, both factual and legal, that hinder the appropriate investigation into the facts and shall not apply any law or domestic legal provision, present or future, to escape from this obligation, under the terms of paragraphs 179 to 183 of this Judgment.

Unanimously that:

6. The State shall immediately proceed to search for and locate Kenneth Ney Anzualdo Castro or, if applicable, his mortal remains, by means of the criminal investigation or any other adequate and effective procedure under the terms of paragraphs 185 of this Judgment.

Unanimously that:

7. The State must continue making all the necessary efforts and adopt the administrative and legal measures and public policies that may correspond, to determine and identify the people who disappeared during the internal conflict according to the most effective technical and scientific means and, as long as it is possible and scientifically advisable, by the standardization of the investigation criteria, for which it is convenient to establish a system of genetic information that would allow the determination and elucidation of the blood relationship of the victims and their identification, under the terms of paragraphs 188 and 189 of this Judgment.

Unanimously that:

8. The State must adopt the necessary measures to reform, within a reasonable time, its criminal legislation as to forced disappearance of persons, in order to render it consistent with the international standards, paying special attention to the terms of the American Convention and the Inter-American Convention on Forced Disappearance of Persons, under the terms of paragraphs 165 to 167 and 191 of this Judgment.

Unanimously that:

9. The State must implement, within a reasonable time, permanent education programs on human rights addressed to members of the intelligence services, the Armed Forces, as well as judges and prosecutors, under the terms of paragraphs 193 of this Judgment.

Unanimously that:

10. The State must publish, within six months, as of notice of this Judgment, once, in the Official Gazette and in another newspaper with widespread circulation, paragraphs 30 to 203 and the operative paragraphs of this Judgment, under the terms of paragraph 194 of this Judgment.

Unanimously that:

11. The State must organize, within the term of six months, as of notice of this Judgment, a public act of acknowledgment of international responsibility for the forced disappearance of Kenneth Ney Anzualdo Castro and to apologize to him and his next-of-kin, under the conditions and terms of paragraphs 198 to 200 of this Judgment.

Unanimously that:

12. The State must erect a plaque in the Museum of Memory, in the presence of the next-of-kin, if they so wish, in a public act, within the term of two years, as of notice of this Judgment, under the conditions and terms of paragraphs 201 of this Judgment

Unanimously that:

13. The State must adopt the necessary measures to provide, immediately as of notice of this Judgment, the next-of-kin of Mr. Kenneth Ney Anzualdo Castro, with the appropriate treatment, by means of health public services, for as long as they need it and including the medicines, under the conditions and terms of paragraphs 203 of this Judgment.

By six votes to one,

14. The State must pay Félix Vicente Anzualdo Vicuña, Marly Arleny Anzualdo Castro and Rommel Darwin Anzualdo Castro the amounts determined in paragraphs 210, 214, 222 and 230 of this Judgment, as compensation for pecuniary and non-pecuniary damage, and reimbursement of costs and expenses, as it may correspond, within the term of one year as of notice of this Judgment, under the terms and conditions of paragraphs 231 to 238 herein.

Judge ad hoc García Toma dissenting.

Unanimously that:

15. The Court shall monitor full compliance with this Judgment, by virtue of its authority and in compliance with its duties according to the American Convention, and shall consider this case closed once the State has fully complied with what was decided in this Judgment. The State must forward to the Tribunal a report on the measures adopted to comply with the judgment, within the term of one year as of notice of this Judgment.

Judge García Ramírez advised the Court of his Concurring Opinion and Judge *ad hoc* García Toma advised the Court of its Partially Dissenting Opinion, which accompany this Judgment.

Done in Spanish and English, the Spanish text being authentic, in San José, Costa Rica, on September 22, 2009.

Cecilia Medina Quiroga
President

Sergio García Ramírez

Manuel E. Ventura Robles

Leonardo A. Franco

Margarette May Macaulay

Rhadys Abreu Blondet

Victor Oscar Shiyin García Toma
Judge *ad hoc*

Pablo Saavedra Alessandri
Secretary

So ordered,

Cecilia Medina Quiroga
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN RELATION TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE CASE OF *ANZUALDO CASTRO V. PERU* OF SEPTEMBER 22, 2009

1. The Inter-American Court has made an excellent development of case-law in a particularly relevant subject for human rights, frequented on multiple occasions: the forced disappearance of persons, as referred to in the Judgment in the case of *Anzualdo Castro*, issued on September 22, 2009, to which I attach this opinion. It is a violation – or a set of violations, combined in only one legal precept- receiver of particularly horrible facts, which had been widely condemned by the Inter-American jurisdiction, constantly and unanimously.

2. The Judgment in *Anzualdo Castro* and my personal opinion come on top of this tendency to condemn without exception. Forced disappearances correspond to a practice that has been common under strong authoritarian regimes established beyond the strict limits that marked the democratic criminal system in the Rule of Law. This is related, though closely related, to the criminal Law of the enemy, who creates a body of law to punish, using special provisions, the opponents (the "non-citizens"). The disappearance and other expressions of the same nature react in disregard of the Law, in an automatic and brutal form: they do not judge, they eliminate.

3. The forced disappearance constitutes - together with extra-legal executions, torture, massacres and systematic alterations of due process- the more characteristic expression of an overwhelming and defiant authoritarianism that seems to be in retreat. However, it always lies ahead of us, waiting for the mistakes or fatigue of the Rule of Law to recover territories from which it has retreated.

4. The issue of forced disappearance has been present in the first cases brought to this Court's attention and it continued appearing in other cases, like a constant pain. Reference is made to such issue in some reservations to the American Convention or certain restrictions to the subject-matter jurisdiction of the Tribunal, imposed upon the signing of it or acknowledgment of its advisory jurisdiction, limits that the tribunal itself has examined on previous occasions. The same issue appears, certainly, among the topics that have been subjects of reflection and controversies within the realm of

the international criminal law, finally contemplated in the Rome Statute and the corresponding elements of crime.

5. Today, our regional *corpus juris* is compiled in a convention on this subject and the world system has created a treaty of the same nature- after such convention- that reflects the universal condemnation and establishes its terms. The Inter-American Convention on Forced Disappearance of Persons contains, among other provisions, a description of the forced disappearance and confers upon the Court subject-matter jurisdiction to hear violations of these provisions – and legal interests embodied in such provisions- which make up such treaty. This description informs on the composition of the criminal definitions, the inclusion of which is binding on the States Parties to such Convention, according to what the Court has mentioned, contributing in this way to the fulfillment of the domestic bodies of law under the standards provided for in international documents. In this and in other judgments, the Court itself has urged the adoption, as elements of crime, of the description of disappearance contained in binding international treaties.

6. The evolution of the subject-matter jurisdiction of the Inter-American Court – expansive jurisdiction that constitutes a valid data about the growing judicial oversight of human rights- already comprises, apart from the American Convention, in what it refers to, other treaties: Protocol of San Salvador (in a very restricted way, which deserves a profound review); Inter-American Convention to Prevent and Punish Torture; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Belém do Pará (that the Court applied, for the first time, in the groundbreaking Judgment delivered in the case of *Castro-Castro Prison*, in which I included the explanation about the jurisdiction in the opinion related to such decision) and Inter-American Convention on Forced Disappearance of Persons.

7. I trust that the future brings other situations of adjudicatory jurisdiction of the Court, not only in relation to treaties or protocols in force, but by the way of new and desirable development of human rights Law, which should include certain issues frequently dealt with, under the form of special conventions. Some of them are already embodied by global rules and all of them relate to matters or groups of people whose best protection probably requires specific treaties, given their characteristics within the American region: indigenous people, minors, migrants, due process, adults, individuals deprived of liberty, relevant behaviors from the view point of bioethics, among others.

8. The members of the Inter-American Court who participated in the delivery of the first judgments in adjudicatory cases - a generation of judges who deserve the greatest appreciation; I have always expressed this and I now repeat it- played an important role in the judicial oversight of human rights when they analyzed, without any conventions on this matter, the characteristics of forced disappearance. This is what happened in the case of *Velásquez Rodríguez* who is still taken into account by those who study and apply the International Law on Human Rights. It was then- and it still is, due to its remarkable importance and the great reception it had in jurisprudence and doctrine- a unique ruling that honor those who sign it and rests on the foundation of outstanding case-law developed by the Inter-American Court.

9. In that early judgment, the Court asserted, among other concepts, two main elements of the forced disappearance, namely: its continuous or permanent character (in the way of similar crimes, examined under the Peruvian theory and legislation) and its multiple-offensive nature: violation of several human rights, This perception of the Tribunal coincides, certainly, with the descriptions contained in the treaties to which I previously referred. It is around such perception that the subsequent case-law of the Inter-American Court – with interested expressions- has been developed, which derives, so far, in the judgment in *Anzualdo Castro.*

10. When agreeing with my colleagues in the delivery of the judgment in the case of *Anzualdo Castro*, I had to reflect on certain aspects of the complex precept of forced disappearance and make myself some questions, to which I answered, to myself, in the same way the judgment did. However, the path has been difficult. Some of the questions still exist. I would like to present them again, as I did in the past, without setting aside, for that reason, the provisional answers – or final perhaps, for the Court and for me, who also sign the judgment- that exist in the foundation and development of this important judicial decision. Maybe, I have to envy- it is just an expression, of course- those who never doubt and are able to present their ideas as from absolute certainties. I doubt. The doubt is usually resolved with a reference that tips the scale: *pro persona*, in the double sense of the benefit of a victim of a specific violation and the development of the general protection of human beings. *Pro persona*, of course, with a reasonable basis. Otherwise, there would be mere impulse, subjectivity, and perhaps arbitrariness.

11. That the forced disappearance constitutes a continuous or permanent violation of several rights – and it would be the same if it dealt with only one right or liberty – does not seem to generate, at the moment, further controversies. If we follow the doctrine of the continuous crime (taking into account the healthy practice, required by the reason, of observing the whole historical and current Law at the time of solving particular cases and we do not intend unveiling law and concepts in each judgment we sign) we will come to the conclusion that the violence of a legal interest covered by a right or a freedom continues in time as long as the criminal conduct of such violation exists (in other words, so long as the described behavior continues in time). It is not about that the consequence or effect of such behavior still exists- obvious existence, as noted in the case of murder- but that this behavior continues in time without interruption so that it keeps such violation alive, valid, and present.

12. There is no doubt either, at the present, about the autonomy of the precept of disappearance, once the various concurrent elements that make it up are present (hence, deprivation of liberty, refusal to acknowledge it and to disclose the whereabouts of the victim). These elements entail an infringement of specific rights, which involve the general harm by which the disappearance is characterized. This is the way in which, together with several elements, the concept and description of the forced disappearance, under the terms of the conventions describing it, are formed. Certainly, there may be other violations also autonomous that generate a set of violations committed by one or several acts, without loosing the relevance that they naturally entail and merge into one.

13. Instead, it does not seem to be so established, and it is certainly not, the determination of the content that we give to the expressions multiple violation, plural violation, pluri-offensive fact and other similar terms. What rights does this precept affect? Which are the concepts of violation that the forced disappearance entails? Do we have to add definitions of violation, in spite of the descriptions contained in an international convention – that we are applying- and that are inherent to the nature of the facts under study and classification? Has the interpreter a kind of freedom of "imagination" to include or exclude elements discretionally, appealing to the needs of prevention and punishment that may be dealt with, perfectly, without sacrificing the rule and logic and that may go beyond the nature of the facts?

14. In order to answer to these questions, I believe it is essential to accept a rule and to dismiss the temptation. The rule that I accept is the following: the rights violated by certain facts described in the set of human rights rules are precisely those contained in such description, not others, so long as this is not modified. It seems patently obvious. Perhaps it is. But it cannot be spontaneously and easily admitted, or its consequences accepted, for that reason. The temptation that needs to be dismissed is that: to combine in the precept all the rights, all the liberties that we may have with certain effort of our imagination, skill or will, under the belief that suffice it to say that there is a violation of right in order for such violation to exist or that such combination implies more condemnation and better prevention, and that for this reason, it frees the interpreter from restricting to the nature and limits of the precept it applies.

15. The forced disappearance affects the liberty of the victim and the possibility of having access to justice. These are the main, remarkably rights that the disappearance violates. The descriptions contained in the international treaties follow that direction, in a precise and clear manner. If we were- but we are not, though the analogy helps- establishing the classification of crimes committed by means of a certain fact that affects legal interests subjected to criminal protection, we surely would conclude that there are crimes against liberty and crimes against justice (under the expressions that may correspond according to the technique used to classify by the respective codes). We could also say, going beyond the precise regulatory description of the facts, that the disappearance entails an infringement of the mental integrity of the victim, given that it causes to the victim- we have to presume it, but it is perfectly reasonable to assume- anguish, pain, fear, suffering, which are the relevant features of the violation of the mental integrity. This conclusion does not go beyond the facts of the disappearance, but naturally derives from them.

16. Up to here what is evident, and perhaps very evident, to put forward, with soundness and competence, the most firm condemnation and the most efficient prevention and prosecution of forced disappearance. I would use another reference, just by way of example: The condemnation that we address against abduction (and I highlight- do not misinterpret- that it is no way my intention to dissolve the disappearance in the abduction: both precepts have been differentiated for a while, distinction that I emphasize) and the direct and effective fight that the State must start against such serious criminal behavior, do not require us to say, in addition, that

the abduction is simultaneously murder, though eventually it may end in that, in which case there will be concurrence of offenses.

17. In the foregoing paragraph I have mentioned elements that are interesting for some of the questions I made on occasion of forced disappearance. Obviously, the disappearance, which places the individual outside any possibility of continue living in the same conditions he or she was doing it, hinders the exercise- not the entitlement, which is different- of several rights and liberties. For example, the disappeared person can no longer participate in public demonstrations; freely express his or her thought in the media or even, in closed places; move from one place to another; receive the benefits of special measures acknowledged for children and adolescents; get married; administer and enjoy his or her property, among others. Could we infer- I insist: it is a question- that the plural violation of rights, such as the disappearance is, necessarily includes (and we should so declare) violations of the right to expression, freedom of movement, family, property, that the disappeared individual is not able to exercise precisely in light of his or her deprivation of liberty and access to justice?

18. These questions in relation to the violated rights due to the disappearance (which have still not been extended to expression, movement, special protective measures, property, and marriage and so on, but that could be cast on these, using the same logic) lead to think about the right to protection of life. It is noticeable that many cases of disappearance end in deprivation of life (and in this way the abduction ends, continuous crime and the murder appears, instantaneous crime) in the same way that many abductions end in the murder of the victim, which in turn, turns into the injured party of the murder: two conducts, two periods of time, two crimes (though some national texts mention abduction or rape "resulting" in murder, forgetting that the result of abduction is abduction - it is its nature-, the result of rape is rape and the result of murder is murder).

19. It seems evident that the forced disappearance ceases when the disappeared person is found or when the disappearance ends with the deprivation of life. The arbitrary deprivation of liberty and the deprivation of life cannot coexist, that is to say, exist simultaneously. Of course, the fact that the disappeared person is found or dies does not erase such violation. In the second situation- arbitrary deprivation of life- there is a new violation that is added to the previous one: there will be violation of the right to liberty and violation of the right to life, but no aggravated violation - due to the death of the victim- of liberty. If a court assumes that the missing person has died

(taking into account the pattern of behavior of the repressive State or the time elapsed between the disappearance and the judicial analysis of this fact) and therefore, such assumption produces full legal effects, the court would be, strictly speaking, sustaining that the disappearance has ended and instead, another situation and another violation have arisen: arbitrary deprivation of life. Then, the court would enter into the analysis of both violations, successive, and the consequences thereof.

20. The issue seems to have been solved – I do not know if for ever or for the moment- in favor of the idea that the forced disappearance entails an infringement of the right to protection of life taking into account that such disappearance may lead to death. This point of view puts the idea of risk in the center of the scene. In order to assume that death is the ultimate data of the disappearance, the analyst notes, as I said a pattern followed in many cases of disappearance, the context in which this occurs and the possibility of assuming, in time, that the individual deprived of liberty has finally lost his or her life. Therefore, an uncertain fact, not proven but probable, is added to the unequivocal precept of disappearance: the risk of violation of another legal interest, though this violation has still not been committed (and not even tried, perhaps).

21. In line with these considerations, it can be mentioned that the State responsible for the disappearance has violated the duty to ensure the right to life. This obligation implies the adoption – what has not happened- of all the measures necessary to protect such right and avoid putting it at risk. Under the same or very similar reasoning, can we bring up other violations, very different and distant, bearing in mind that the facts prove, in the case of the missing person, that the State has neither taken the necessary measures to ensure the individual the exercise of such other rights to which I referred, including but not limited to, in the previous paragraphs?

22. The judgment to which this opinion refers introduces a relevant novelty. In fact, it considers that the forced disappearance violates the right to juridical personality, embodied in chapter 3 of the American Convention. This statement of the judgment also entails questions that I mention herein. Upon considering that there is violation of this precept (not in the specific case and for the circumstances of the case, which may be sufficient to prove that other violation, but in any hypothesis of forced disappearance, *per se*), the Court agrees with the approach that have put forward, for quite some time, some parties to the cases before the Inter-American system.

23. In order to assess whether there is a violation of Article 3, it is essential to observe the current descriptions on forced disappearance: do they include the violation of the right to juridical personality? It is then crucial to establish the situation in which such violation would occur, that is to say, to establish what the juridical personality is, in the first place, and what said right to personality implies, in the second place. The first question has an easy and safe answer: Nor the United States Convention or the Inter-American Convention in this field contains reference to the right to juridical personality when they describe, impliedly or expressly, the precept of forced disappearance. Until the delivery of the Judgment to which this opinion is attached, the case-law of the Inter-American Court has neither contemplated it. Rather, it had considered that the disappearance did not imply an infringement of said right.

24. Since there is no clear and direct reference to such matter in the conventions and the precedents established by the Inter-American Tribunal, it is vital to examine whether the disappearance includes, based on its own nature, the violation of the right mentioned herein. This is what the Court has done, not without also contemplating some statements about the violation of the juridical personality, made by other considerable sources.

25. Nevertheless, in order to ensure that such violation exists, considering the nature of the forced disappearance, it is necessary to define, as I said before, what is the right to juridical personality. It has been generally understood- as the Inter-American Court has deemed- that the juridical personality implies the capacity of the individual to be entitled to legal rights and obligations. That being the case, the recognition of juridical personality implies the affirmation that an individual has said capacity. The right to recognition entails the possibility of demanding the recognition of the capacity to be entitled to rights and obligations.

26. We are, then, before a right of enormous relevance. The State could not deprive a human being from the capacity to acquire rights, though it could certainly establish legal methods to exercise such rights. But this is a different thing. The capacity to exercise rights, in conjunction with considerations related to age, mental health and other factual information with legal effects, does not affect, in itself, the entitlement to rights. It is also a different thing- an issue of fact, not of law- the creation of obstacles, material disturbance, and arbitrary denial of the State as to the exercise of rights.

27. If this is like that- I use a conditional form: "if it is"-, the forced disappearance, a fact attributable to the State, does not seem to necessarily involve a denial or disregard for the entitlement to rights, like there would be if an individual was to be considered "a thing", and not "an individual" (which occurs in cases of slavery, for example) or if the personality of a social aggregate would be explicitly denied (as with the case of indigenous groups, examined by the Inter-American Court), with the resulting violation of individual rights that may find its source, framework and protection in the collective rights of a group to which the personality is denied.

28. The Judgment delivered in the case of *Anzualdo Castro*, which causes many questions, has set out the clarification of the issue under certain concepts that are the basis, according to the decision itself, for the thesis by which there is a violation of Article 3. I am not referring to mere statements taken from recognized sources, but to the arguments with which the tribunal analyzes the recognition or disregard of the juridical personality. It considers that this connection between forced disappearance and the violation of Article 3 of the American Convention constitutes a piece of information about the evolution of the international law on human rights and it analyzes the disregard of the juridical personality by reference to the possibility/impossibility of exercising rights.

29. In this aspect, the Judgment of the case of *Anzualdo Castro* deems that the disappeared individual is placed outside the legal framework, given this situation. He is in a kind of legal uncertainty, a limbo, a vacuum, outside the protection of the law. He is deprived of having access to justice, of the recourses that justice provides to him, as well as the protection (which is true, as we have seen, and it is established in international treaties).

30. The Judgment goes, then, on the description of situations of fact and the narration of infinite and evident obstacles that are contrary to the exercise of the victim's rights. At some moment, it indicates, though it does not insist, that it is denied to the individual the capacity of being entitled to rights, it is eliminated or cancelled by an act attributable to the State. However, the main argument points to the impossibility of exercise rights. This does not derive from a disregard *de jure*, but from a disturbance *de facto.*

31. Are we talking, then, of the disregard of the juridical personality, with all that it entails or are we referring to an extreme and very serious impediment to the exercise of rights, which indisputably exists in the forced disappearance? If it is the last option, then what it is being violated is the exercise of rights whose entitlement- token of the juridical personality- remains with the existence of the person that has disappeared, but not died. Therefore the juridical personality subsists.

32. It is worth remembering that Civil Law has developed certain precepts addressed to ensure the existence of rights of he who disappears (precepts historically developed, certainly, by events different to the ones that determine the forced disappearance that violates the right to freedom and access to justice), like the declaration of absence and, to an extent, the presumption of death. Hence, the person declared to be absent is not deprived of all the rights – that is, his juridical personality is not disregarded-, but it is therefore noticeable his or her impossibility to exercise rights he or she is entitled to and does not lose, and certain individual is appointed to exercise or preserve them while the absent person returns. In sum, his juridical personality continues. I emphasize that I am not strictly comparing the absence under the terms of Civil Law to the forced disappearance under the terms of Criminal Law and International Law on human rights, but invoking information of such disappearance that allow to note the difference between the capacity to be entitled to and the capacity to exercise, precisely in a situation that is marked by the absence/disappearance of the holder of rights.

33. Perhaps, I could resort to another example. When a State agent seriously injures a person, entirely depriving such individual from the capacity to reason and even, the capacity for consciousness, it generates a situation that prevents the victim, totally and absolutely, from exercising any right. It constitutes, of course, a violation of the right to humane integrity. Should we also sustain that there is a violation of the right to juridical personality because the victim is, in fact, in a kind of limbo or vacuum? It will be said, of course, that other people could exercise some rights of the injured party, acting on his or her behalf. This could happen in the case of the disappeared person.

34. Maybe the analysis of the elements that make up the forced disappearance is not finished. There are areas pending a careful evaluation. The existence of several and different arguments, which are good arguments in the end, coupled with the

consideration *pro persona* to which I referred before, can tip the balance that explains an opinion. However, this path has been difficult. An edge and a razor strictly legal that do not modify the rejection and the condemnation- proven on multiple occasions- against forced disappearance, which constitute a flagrant violation of the human dignity, as the Court has held and we, the members, had repeated. It must be condemned, pursued and punished without pause or concession.

Sergio García Ramírez
Judge

Pablo Saavedra Alessandri
Secretary

PARTIALLY DISSENTING OPINION
OF JUDGE *AD HOC* VICTOR OSCAR SHIYIN GARCÍA TOMA

As to the issue of the reparations, I deem that the *quantum* of such reparations regarding the pecuniary and non-pecuniary damage, costs and expenses has been established without any specific technical ground, under the discretionary criteria that is more and more discussed. Based on this reason, I have the need to point out that I do not have any objective parameter to consider as tiny, reasonable or excessive the sums established by the Court.

It is worth mentioning that the amounts of reparations that the defendant State has, with all its efforts, been paying to victims or next-of-kin for acts of terrorism (civilians, political authorities and police and military officers); as well as the cases related to the HIV/AIDS infection at State hospitals are, in no way, comparable. Therefore, it is clear that between the *quantum* determined by the Court and the defendant State within the area of reparations, there is a remarkably and unjustified asymmetry and disparity.

In the future, it would be important for the Court to rely on specialized experts and to determine precise rules for the establishment of said reparations. It should not be ignored the fiscal reserves, average income levels of the defendant State, among other aspects. This would allow the reparations to advance legal security.

***JUDGE AD HOC* VICTOR OSCAR SHIYIN GARCÍA TOMA**