

INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF CHITAY NECH *ET AL.* V. GUATEMALA

JUDGMENT OF MAY 25, 2010
(Preliminary Objections, Merits, Reparations, and Costs)

In the *Case of Chitay Nech et al.*,

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

Diego García-Sayán, President;
Leonardo A. Franco, Vice-President;
Manuel E. Ventura Robles, Judge;
Margarette May Macaulay, Judge;
Rhadys Abreu Blondet, Judge;
Alberto Pérez Pérez, Judge;
Eduardo Vio Grossi, Judge, and
María Eugenia Solís García, Judge *ad hoc*;

Also present,

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

Pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and with Articles 30, 32, 38, 59, 60, and 61 of the Rules of Procedure of the Court (hereinafter "the Rules"), delivers the following Judgment.

I

INTRODUCTION OF THE CASE AND OBJECT OF THE CONTROVERSY

1. On April 17, 2009, pursuant to Articles 51 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") presented to the Court a petition against the Republic of Guatemala (hereinafter "the State" or "Guatemala"). The initial request was presented

before the Commission on March 2, 2005¹ by Pedro Chitay Rodríguez (hereinafter “Pedro Chitay” or “Pedro”), Alejandro Sánchez Garrido, Astrid Odete Escobedo Barrondo and the Azmitia Dorantes Association for Development and Comprehensive Promotion (AADDPI). The Commission adopted the Admissibility Report No. 7/07, in which it declared the admissibility of the case. Later, on October 31, 2008, the Commission approved the Report on Merits No. 90/08, pursuant to the terms of Article 50 of the Convention.² The report recommended that the State, among other measures, carry out a complete, impartial, effective, and timely investigation to judge and sanction those responsible as well as to recognize their international responsibility for the facts. This report was notified to the State on November 17, 2008. After considering that Guatemala had not adopted its recommendations, the Commission decided to bring the present case to the jurisdiction of the Court. The Commission designated Mr. Santiago A. Canton, Executive Secretary, as Delegate, and Ms. Elizabeth Abi-Mershed, Assistant Executive Secretary, Karla I. Quintana Osuna and Isabel Madariaga, as legal advisors.

2. The petition deals with the alleged forced disappearance of the Mayan indigenous political leader *Kaqchikel*, Florencio Chitay Nech (hereinafter “Florencio Chitay” or “Mr. Chitay Nech”), which occurred as of April 1, 1981, in Guatemala City, and the ensuing lack of due diligence in the fact-finding investigation, as well as the denial of justice to the detriment of his next of kin. Said disappearance was allegedly executed by armed men exiting a vehicle. Mr. Chitay Nech opposed resistance until one of the men pointed the barrel of a gun at his son, who was a minor, Estermerio Chitay Rodríguez (hereinafter “Estermerio Chitay” or “Estermerio”) who was with him, and therefore he quit resisting and got into the vehicle. According to the petition, a claim was filed this same day before the National Police – for which no action was taken. On October 12, 2004, a habeas corpus appeal was filed, which was declared inadmissible. At a later date, on March 2, 2009, the Executive Director of the Presidential Commission Coordinator of Executive Policy in Human Rights Matters (hereinafter “COPREDEH”) presented before the Public Prosecutor an accusation and formal claim for the forced disappearance of Mr. Chitay Nech. Notwithstanding, according to that alleged, the facts have not been investigated and those responsible have not been prosecuted nor punished after 29 years since the forced disappearance of Florencio Chitay Nech, and his whereabouts are still unknown.

According to Article 72(2) of the Inter-American Court’s Rules of Procedure that entered into force on March 24, 2009, “[c]ontentious cases which have been submitted to the consideration of the Court before January 1, 2010, will continue to be processed, until the delivery of a judgment, in accordance with the previous Rules of Procedure.” Hence, the Rules of Procedure of the Court applied in this case correspond to the instrument approved by the Court at its XLIX regular session held from November 16 to 25, 2000, partially reformed by the Court at its LXXXII regular session held from January 19 to 31, 2009.

¹ The applicants alleged that the denounced facts configured violations to the Articles 4, 5, 7, 8, 17, 23, and 25 of the American Convention, regarding the obligations that derive from Article 2 of the same instrument, as well as violations to Article II of the Inter-American Convention on Forced Disappearances of Persons. (Annexes to the Application, Appendix 2, f. 56)

² In the Report of Merits No. 90/08 the Commission concluded that the State violated the rights established in the Articles 3 (Right to Juridical Personality), 4 (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), 17 (Rights of the Family), 19 (Rights of the Child), 23 (Right to Participate in Government) and 25 (Right to Judicial Protection), of the Convention, in relation to Article 1.1(Obligation to Respect Rights) of said instrument, and Articles I and II of the Inter-American Convention on Forced Disappearance of Persons, for the Forced Disappearance of Florencio Chitay Nech. Likewise, concluded that the State violated Articles 5 (Right to Humane Treatment), 17 (Rights of the Family), 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the Convention, against the next of kin of the alleged victim. (Annexes to the Application, Appendix 1, f. 52)

3. The Commission requested the Court to declare that the State be responsible for the violation of the following rights recognized in the Articles: a) 3 (Right to Juridical Personality), 4 (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty), and 23 (Right to Participate in Government) of the Convention, in relation with Article 1(1) (Obligation to Respect Rights) of the same instrument, as well as Articles I and II of the Inter-American Convention on Forced Disappearance of Persons (hereinafter, "ICFDP"), to the detriment of Florencio Chitay Nech; b) 8 and 25 (Right to a Fair Trial and Right to Judicial Protection) of the Convention, in relation to Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of said treaty, to the detriment of Florencio Chitay Nech and his children, Encarnación, Pedro, Eliseo, Estermerio, and María Rosaura, all with the last name of Chitay Rodríguez; c) 5 (Right to Humane Treatment) and 17 (Rights of the Family) of the Convention, in relation with Article 1(1) of the same instrument, to the detriment of Encarnación, Pedro, Eliseo, Estermerio and María Rosaura, all with the last name of Chitay Rodríguez, and d) 19 (Rights of the Child) of the Convention, in relation with Article 1(1) of the same instrument, to the detriment of the then underage Estermerio Chitay. Finally, the Commission requested the Tribunal to order the State to adopt various non-pecuniary measures, as well as the payment of costs and expenses.

4. On July 17, 2009, Ms. Astrid Odete Escobedo Barrondo and Mr. Carlos María Pelayo Möller, representatives of the alleged victims (hereinafter "the representatives"), presented a written brief containing pleadings, motions, and evidence (hereinafter "brief of pleadings and motions"). In addition to that indicated by the Commission, the representatives sustained, *inter alia*, that the State is responsible for the violation of the rights recognized in Articles 21 (Right to Property) and 22 (Freedom of Movement and Residence) of the Convention, in relation with Articles 1(1) and 2 of the same instrument, to the detriment of Florencio Chitay Nech, his wife Marta Rodríguez Quex, his sister-in-law Amada Rodríguez Quex, and his children Encarnación, Pedro, Eliseo, Estermerio, and María Rosaura, all with the last name of Chitay Rodríguez. Also, they maintained that the State is responsible for the violations of Articles 8 and 25 of the Convention, in relation with Articles 1(1) and 2 of the same instrument, as well as Articles 5 and 17 of the Convention, in relation with Article 1(1) of the same treaty, to the detriment of the children of Florencio Chitay, as well as to the detriment of Marta and Amada, both with the last name of Rodríguez Quex. Regarding the alleged violation of Article 19 of the Convention, they requested that it be declared to the detriment of those who were children at the time, Eliseo, Estermerio and María Rosaura, with the last name of Chitay Rodríguez. Finally, the representatives requested the Tribunal to order the State to adopt various pecuniary and non-pecuniary reparation measures, and to reimburse the costs and expenses of the present case incurred throughout the process, ranging from the request brought before the Commission to the proceedings carried out before the Court.

5. On October 19, 2009, the State presented its brief of preliminary objections, the answering to the petition, and comments on the brief of motions and pleadings, (hereinafter "response to the petition"). In said brief, the State expressed that it "partially accepted the petition." Notwithstanding, the State denied its international responsibility regarding the alleged violation of Articles 3, 8, and 25 of the Convention. Also, the State brought forth two preliminary objections, one regarding the lack of exhaustion of domestic remedies in relation with Articles 21 and 22 of the Convention alleged by the representatives, and another regarding the "objection to reach a friendly settlement." On June 12, 2009, the State named Ms. Delia Marina Dávila Salazar as State Agent and Ms. María Elena de Jesús Rodríguez López as Alternate Agent.

6. On the 4th and 9th of December, 2009, the Commission and the representatives, respectively, presented their allegations on the acknowledgments and the preliminary objections made by the State, in conformity with Article 38(4) of the Rules of Procedure of the Court.

II PROCEEDING BEFORE THE COURT

7. The application was notified to the State³ and to the representatives on May 15, 2009. During the process before this Tribunal, as well as for the presentation of the principal briefs referred by the parties (*supra* para. 1,4, and 5), the Presidency of the Court (hereinafter "the Presidency") ordered, through the Order of December 21, 2009,⁴ the reception of statements given before a public notary (affidavit) by the alleged victim, five testimonies and three expert witness reports,⁵ which were timely offered by the parties.⁶ Through the same Order, the Court called the parties to a public hearing in order to hear the statements of the three alleged victims⁷ and of the three proposed expert witnesses, according to the case, by the Commission, the representatives, and the State, as well as the final oral arguments regarding the preliminary objections and the eventual merits of the case, reparations, and costs. Finally, the Presidency fixed a time period of until March 3, 2010, in order for the parties to present their respective briefs of final arguments.

8. On December 20, 2009, the representatives filed objections to the testimony of Ms. María Eugenia Solís García as Judge *ad hoc* in the present case, arguing that a position as Executive Director of the Commission for the Monitoring and Support of the Strengthening of Justice [Commission Seguimiento y Apoyo al Fortalecimiento de la Justicia], would be incompatible with the role of *ad hoc* Judge. On January 25, 2010,⁸ the Court decided to reject the objection filed.⁹

9. The public hearing was held on February 2, 2010, during the LXXXVI Regular Period

³ When the petition was notified to the State, it was Reportd of its right to designate an *ad hoc* Judge for the consideration of this case. On June 12, 2009, the State appointed Mrs. María Eugenia Solís García.

⁴ Cf. *Case Chitay Nech et. al. V. Guatemala*. Order of la Presidenta of la Corte of 21 of December of 2009.

⁵ On January 15, 2010 the representatives Reportd that "For circumstances of major force related to questions of Elath [...] it will not be possible that Mr. Juan Diego Castrillón Orrego present his expert opinon before the Court, and as such they refused to forward it."

⁶ On December 9, 2009 the representatives referred their observations regarding the definitive list of witnesses and experts offered by the Commission and the State, and challenged César Augusto Dávila Gómez's expert opinion proposed by the State.

⁷ On January 8, 2010 the representatives brought to the Court's attention that Mr. Estermerio Chitay Rodríguez could not testify in person, to which they requested the Court receive him by means of affidavit. On January 11, 2010, the Secretariat following instructions of the President of the Court, authorized the representatives to send the above-mentioned declaration by means of affidavit.

⁸ Cf. *Case of Chitay Nech and others v. Guatemala*. Order of the Court of January 25, 2010, to which Judge Vio Grossi entered a dissenting opinion.

⁹ To this effect, it indicated that "there it has not been demonstrated that the functions and organic location of the above mentioned office corresponds to that of a high civil servant of the Executive, nor that there exists a hierarchic ordinary subordination of the same, in that they do not present the grounds of incompatibility established in the Rules of Procedure of the Court." In addition, the Court estimated that "it was not possible to detach the supposed 'direct interest' of Ms. María Eugenia Solís García in the present case".

of Sessions of the Court, at the seat of the Tribunal.¹⁰

10. On February 25 and 26, 2010, the Secretariat of the Court, following the instructions of the President, and in conformity with Article 47 of the Rules of Procedure of the Court, required the Inter-American Commission, the representatives, and the State to offer certain information or documentation as evidence in order to better resolve the case.

11. On March 3, 2010, the Commission and the State issued their final written arguments about the preliminary objections and the eventual merits, reparations, and costs. The State attached an annex to their brief of final arguments. On March 4, 2010, the representatives submitted the final arguments and on March 17, 2010, presented the annexes submitted in said brief. On April 7, 2010, the Commission informed that it did not have observations to make on the annexes of the final arguments presented. On April 13 and 16, 2010, the representatives and the State presented, respectively, their observations to the annexes and the final written arguments.

12. On the 9th, 10th, and 15th of March on 2010, the Commission, the State and the representatives, submitted the evidence required to better resolve the issues of February 25, 2010. Likewise, on April 13 and 16, 2010, the State and the representatives, respectively, issued the evidence required in order to better resolve the issues of March 26, 2010. On May 3, 2010, the representatives and the State presented their observations on the information submitted by the parties as evidence.

III

PARTIAL ACKNOWLEDGEMENT OF THE STATE'S INTERNATIONAL LIABILITY

13. In the response to the application, the State made a partial acknowledgement of its international liability and pointed out that "by attending to policies [...] regarding human rights, [it communicated] its partial acknowledgement of the facts denounced" by the Commission in regards to the violation of the rights enshrined in Articles 4, 5, 7, 17, 19, and 23 of the Convention, in relation with Article 1(1) of the same and Articles I and II of the ICFDP. The State added that it "did not acknowledge the facts of the alleged violation of Articles 3, 8, and 25 of the Convention, in connection with Article 1(1) [of this treaty]." In regards to the arguments of the representatives concerning the alleged violation of Articles 21 and 22 of the Convention, the State filed a preliminary objection alleging the failure to exhaust domestic remedies.

14. During the public hearing held in the present case, the State reiterated its acknowledgement of international liability and requested the Court to declare that the controversy has ceased regarding the arguments of law made on Articles 4, 5, 7, 17, 19, and 23 of the Convention. Notwithstanding, the State indicated that it "only accept[ed] the facts related with the violation of the rights which are the object of the acknowledgement [...], not the facts that in the response to the application [...] it described as not accepted."

¹⁰ At this hearing, the following appeared: a) for the Inter-American Commission: Santiago Canton, Executive Secretary and Lilly Ching Soto, Karla Quintana Osuna and Daniel Rodríguez, advisers; b) for the representatives: Astrid Odete Escobedo Barrondo, Carlos Maria Pelayo Möller, Bernard Duhaime and Alejandro Sanchez Garrido, and c) for the State: Dora Ruth of the Valley Cobar, President of COPREDEH; Maria Elena of Jesus Rodríguez Lopez, Alternative Agent; Héctor Manfredo Maldonado Méndez, Justice of the Supreme Court of Justice and Enma Estela Hernández Tuy, Adviser. Likewise, they testified as alleged victims: Pedro and Encarnación, of surnames Chitay Rodríguez and the experts: Rosalina Tuyuc; Edgar Armando Gutiérrez Girón and César Augusto Dávila Gómez.

15. In the matter of reparations requested, the State manifested its will to include within a process of friendly settlement some of the reparations and to negotiate the content of others with the purpose of having recourse to the National Program of Restitution (hereinafter "NPR"). In the public hearing, the State reiterated the proposal regarding an economic reparation fixed in consideration of its economic situation and opposed the payment of the costs and expenses.

16. The Commission considered that the controversy had ceased regarding the violations that the State had acknowledged, as well as the facts upon which they are founded, for which it expressed that it positively valued the acknowledgement of liability made by the State and requested that the Court to include in its Judgment a detailed account of the facts of the case in its Judgment. In turn, the representatives argued that the State, by making an acknowledgement of liability accepted the full jurisdictional authority of the Court in order to examine the case. In this regard, it referred to the affirmation of the State in its response to the application in the sense that "the facts described by the [Commission] are susceptible to being acknowledged by the Court," for which the representatives requested that the principle of *estoppel* be applied regarding the arguments of the State that contradict this affirmation. Likewise, they manifested that the acknowledgement of liability implicitly carries with it the acceptance of the facts and that the State did not make any type of clarification in this regard in the response to the application, which was the procedural moment to do so. Finally, they pointed out that given the issues raised by the State, the controversy regarding some points of fact, law, reparations, and costs and expenses would persist.

17. In accordance with Articles 56(2) and 58 of the Rules of Procedure of the Court,¹¹ and in the exercise of its powers of international judicial protection of human rights, the Court can determine if a recognition of international liability made by a defendant State offers a sufficient base, in the terms of the American Convention, to continue the hearing of the merits and to determine the eventual reparations, and costs and expenses.¹²

18. Due to the fact that processes before this Court refer to the protection of human rights, a question of international public order that transcends the will of the parties, the Tribunal must ensure that the acts of acknowledgement are acceptable for the ends that the Inter-American System of Human Rights (hereinafter "Inter-American System") looks to satisfy. In this work, it is not limited only to verifying the formal conditions of the

¹¹ In this regard, the Articles 56(2) and 58 of the Court Rules of Procedure of the Court establish that:

Article 56. Discontinuance of a Case

[...]

2. If the respondent informs the Court of its acquiescence to the claims of the party that has brought the case or the claims of the alleged victims or their representatives, the Court shall decide, after hearing the opinions of the other parties to the case, whether to accept such acquiescence, and rule upon its juridical effects. In that event, the Court shall determine the corresponding reparations and costs.

Article 58. Continuation of a Case.

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

¹² Cf. *Case Myrna Mack Chang V. Guatemala*. Merits, Reparations and Costs. Judgment of 25 of November of 2003. Series C No. 101, para. 105; *Case Radilla Pacheco V. México*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 23 of November of 2009. Series C No. 209, para. 60, and *Case of the Dos Erres Massacre v. Guatemala*. Preliminary Exception, Merits, Reparations and Costs. Judgment of 24 of November of 2009. Series C No. 211, para. 28.

mentioned acts, but rather that the nature and gravity of the violations alleged must be confronted as well as the demands and interests of justice, the particular circumstances of the specific case, and the attitude and position of the parties.¹³

19. The Court understands that the State has acknowledged the facts that constitute alleged violations of Articles 4, 5, 7, 17, 19, and 23 of the Convention, and that in the petition – the factual framework of this proceeding –,¹⁴ they can be found in paragraphs 37 to 79 of the same. Regarding the contested claims of law, this Tribunal considers that according to the acknowledgement made by the State, the controversy regarding the violation of the Articles of the Convention, in relation to Article 1(1), as well as Articles I and II of the ICFDP, to the detriment of Florencio Chitay Nech and his children, has ceased. Notwithstanding, in the corresponding chapters of the present Judgment, some considerations in this respect will be made.

20. On the other hand, the Tribunal warns that the controversy among the parties remains regarding the facts of the alleged violation of Article 3 of the Convention, as well as of Articles 8(1) and 25(1) of the same, in relation with Articles 1(1) and 2 of this treaty. Likewise, the controversy persists regarding Articles 21 and 22 of the mentioned Convention, which will be resolved by the Court in its pronouncement regarding the preliminary objections brought forth by the State. Finally, the controversy persists regarding the ruling of the eventual reparations, costs and expenses.

21. The Court positively values the partial admission of facts and the acknowledgement made by the State regarding some claims. As such, taking into account the attributions regarding this Tribunal as an international organ of protection of human rights, it finds it necessary to dictate a judgment in which the facts and the relevant elements of the merits are determined, as well as the corresponding consequences, since the issuance of the judgment contributes to the reparation for the next of kin of Florencio Chitay Nech, to avoid that similar facts are repeated, and to satisfy, in sum, the goals of the Inter-American jurisdiction on human rights.¹⁵

IV PRELIMINARY OBJECTIONS

22. In its response to the petition, the State brought forth two preliminary objections; one relative to the lack of exhaustion of domestic remedies, and the other regarding the “objection to reach a friendly settlement.” The Court will now analyze the origin of the preliminary objections in the order that they were raised.

A) Preliminary objection of lack of exhaustion of domestic remedies of the internal jurisdiction regarding the rights contained in Articles 21 (Right to

¹³ Cf. *Case Kimel V. Argentina*. Merits, Reparations and Costs. Judgment of 2 of May of 2008. Series C No. 177, para. 24; *Case González et al. (“Cotton Fields”) V. México*. Preliminary Exception, Merits, Reparations and Costs. Judgment of 16 of November of 2009. Series C No. 205, para. 25, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 61.

¹⁴ Cf. *Case Masacre of Mapiripán V. Colombia*. Merits, Reparations and Costs. Judgment of 15 of September of 2005. Series C No. 134, para. 59; *Case Radilla Pacheco V. México*, *supra* note 12, para. 62, and *Case Of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 222.

¹⁵ Cf. *Case Masacre of Mapiripán V. Colombia*. Merits, Reparations and Costs, *supra* note 14, para. 69; *Case Kawas Fernández V. Honduras*. Merits, Reparations and Costs. Judgment of 3 of April of 2009. Series C No. 196, para. 35, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 66.

Property) and 22 (Freedom of Movement and Residence) of the American Convention.

23. Regarding the objection of lack of exhaustion of domestic remedies, the State, in connection with Article 21 of the Convention, claimed that the “petitioners did not file judicial actions of any type to claim (their) right to property” and that no legal obstacles exists to do so, in virtue of the Civil Code which “establishes the absence of the individual at hand regarding representation in trial and the administration of goods by the relatives of said absent person.”¹⁶ Then, the State indicated that in line with the principles of subsidiarity and complementarity, the Court did not have the jurisdiction to examine the case. During the public hearing, the State argued that the preliminary objections attacked specific points of controversy and not those accepted in the acknowledgement, for which they did not lose their preliminary nature. In its final arguments, the State added that a) the Commission did not include Articles 21 and 22 of the Convention in its brief of the petition, nor did it make any factual reference to the facts that may be considered as violations, nor was it included in the initial request, and therefore, was not considered in the Report on Admissibility or the Merits issued by the Commission; b) it reiterated that the representatives have not presented judicial remedies in order to claim the rights to property, and c) it stated that the process of absence and alleged death do not comply with the requirement of promptness and judicial economy; nevertheless, these have been used by the next of kin of the victims of the forced disappearance, with the goal of obtaining the declaration of the alleged death of their disappeared family member in order to assert their civil rights.

24. For its part, in the submission of comments to the preliminary objections raised, the representatives noted that the objections raised by the State were inadmissible because the recognition of responsibility made by the State also implies the recognition of the full jurisdiction of the Tribunal in order to hear the case. They also indicated that: a) regarding the guidelines that the Tribunal has developed in order to analyze that objection, this one lacks the formal requirements and precision required; b) that the forced displacement of the Chitay Rodriguez family and the loss of their lands are a consequence of the forced disappearance of Florencio Chitay Nech. The discussion in turn of the lack of exhaustion of domestic remedies must not be centered on mere civil remedies, but the absence of effective remedies in order to investigate, prosecute, and sentence the alleged perpetrator for said disappearance. In that regard, the Commission in its Admissibility Report of the present case estimated, the objection contemplated in Article 46(2)(c) of the Convention is applicable because an unjustified delay has been produced in the decision of the remedies of the internal jurisdiction. Once the Commission has reached a determination on the admissibility of a request, previous analysis of the arguments of the parties, this decision is of “definitive” and “indivisible” character and the principle of procedural preclusion is in effect. In the present case the decision of the Commission in the Report of Admissibility would not have to be checked or modified; c) that the process of absence is not the principal remedy that must be exhausted in cases of forced disappearance of persons, even existing it would have been inadequate, and d) that the arguments of the State regarding this preliminary objection would be closely linked with the merits of the case, especially regarding the efficiency of the domestic remedies regarding the disappearance of Mr. Chitay Nech, the access to justice and its consequences, for which the Court may accumulate this objection to the merits and analyze it to resolve if the State is responsible for the alleged violation of Articles 8 and 25 of the Convention. In the final arguments, the representatives manifested that the loss of property of Florencio Chitay Nech is part of the

¹⁶ In this regard, the State pointed to Articles 42, 47, and 55 of the Civil Code of Guatemala.

factual framework of the process¹⁷ and that in their allegations they are “clarifying and explaining these facts” already raised in the petition and “pointing out the direct and continued consequences” of the forced disappearance of Mr. Chitay Nech and the forced displacements of his nuclear next of kin.

25. The Inter-American Commission indicated that the “violations alleged by the representatives [in relation with Articles 21 and 22 of the Convention] were not considered in [its] report on the merits nor in the petition”, which is why it did not have observations to formulate in this regard. In the final arguments, in consideration of the request of the Tribunal in the public hearing, the Commission provided that “in the various briefs presented by the petitioners during the processing before the Court, they did not claimed the loss of lands that would have belonged to Mr. Florencio Chitay Nech, nor the impossibility of his next of kin to recoup the lands. [...] [N]either did they make reference to a possible violation of Article 21 of the Convention with a basis in those hypothesis. For this reason, this was not considered by the Commission within the Reports on Admissibility and Merits. The Commission also observed that in the processing before it, evidentiary elements were not alleged in this regard”.

26. In consideration of those arguments, this Tribunal will examine if the facts provided in the petition, which constitute the factual framework of this case, serve as grounds for the allegation of Article 21 of the Convention.

27. In the present case, the facts raised in the petition make reference, on the one hand, to the fact that Florencio Chitay cultivated certain lands that he had inherited, and on the other hand, to the fact that he was the object of various threats and harassments, and that his home was attacked three times, to which he and his next of kin escaped to Guatemala City. Nevertheless, the representatives in order to establish said violation made reference to the loss of the lands that had belonged to Mr. Chitay Nech and the impossibility that his next of kin could recover the lands.

28. In this regard, the Court observes that the Commission was emphatic in pointing out that the representatives in various briefs presented before the Court did not claim the loss of lands that had belonged to Mr. Chitay Nech, nor the impossibility that his next of kin could recover the lands and neither did they make reference to a possible violation of Article 21, the reason for which it was not considered in the Reports on Admissibility and Merits. The Court affirms that the Commission did not consider the referenced facts, therefore the argument of the representatives regarding whether the principle of procedural preclusion must be applied to the facts at hand is inadmissible.

29. Of that shown, this Court considers that the facts alleged in the petition do not make reference to or establish that Mr. Chitay was ever deprived of his property, but rather: 1) that he cultivated land; b) that he was the object of threats and harassments; c) that his home was attacked, and d) that he fled to the city of Guatemala. The facts argued by the representatives consist of new facts, because they are not found within the factual framework of the petition. Consequently, given that no foundation exists in the petition to claim the alleged violation of Article 21, it is not necessary to analyze the material aspects of the objection, namely, if domestic remedies had been offered and exhausted, and if the

¹⁷ The representatives argued that the “annexes of the petition were elements of the same” and that “in the present Case, [...] in [a]nnex 1 of the [petition] the testimony of Pedro Chitay Rodriguez was introduced [where] reference was made to the land lost by the families,” to which it should be determined that the “forced abandonment and loss of lands [...] forms part of the factual framework of the proceeding.”

State, by opposing this objection had specified the domestic remedies that had not yet been exhausted and if it had demonstrated that those remedies were available, adequate, and effective. Therefore, this Tribunal admits this preliminary objection in connection with that regulation.

30. On the other hand, in consideration of the arguments made by the representatives related to the attacks at Mr. Chitay Nech's the home, acts that are within the factual framework of the petition and may have affected his right to property, this Tribunal considers it timely to clarify that it lacks jurisdiction to issue a ruling, because these acts occurred prior to the recognition of the jurisdiction of the Court by the State on March 9, 1987, and do not constitute continued violations that would permit the Court to issue a ruling in this regard.

31. Regarding the lack of exhaustion of domestic remedies in relation with Article 22 of the Convention, the State alleged in the response to the petition that "at no moment was the freedom of movement and residence of the petitioners impeded or prohibited, and as such, it is not responsible for any alleged violation to Article 22." In this regard, the Court notes that said argument is not a preliminary objection but rather one of merit. Additionally, the Court notes that once the State had identified said argument as a failure to exhaust domestic remedies, it did not establish, in accordance with the generally recognized principles of International Law,¹⁸ the domestic remedies that had not been exhausted, and in this case, whether these remedies were available and appropriate, suitable, and effective.

32. Later, in its final arguments, the State provided in a general manner that the Commission did not include in the petition the Articles 21 and 22, nor did it make factual reference to the facts that may have been violations, those of which were not considered in the Report on Admissibility and Merits of the Commission.

33. On the subject, the Court finds that said argument in regards with Article 22 is extemporaneous because the answer to the petition is the proper procedural moment to challenge the preliminary objections of a right claimed for the first time before the Court. Notwithstanding the aforementioned, the Tribunal reiterates its jurisprudence in the sense that "the alleged victim, his next of kin, and his representatives may invoke distinct rights other than those encompassed in the petition of the Commission, based on the facts presented by it."¹⁹ The Tribunal notes also that the factual framework of the petition establishes facts,²⁰ those of which may lead to legal consequences because of the

¹⁸ Cf. *Case Velásquez Rodríguez V. Honduras*. Preliminary Exceptions. Judgment of 26 of 1987. Series C No. 1, para. 91; *Case Garibaldi V. Brasil*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 23 of September of 2009. Series C No. 203, para. 46, and *Case Usón Ramírez V. Venezuela*. Preliminary Exception, Merits, Reparations and Costs. Judgment of 20 of November of 2009. Series C No. 207, para. 19.

¹⁹ Cf. *Case of Five Pensioners V. Perú*. Merits, Reparations and Costs. Judgment of 28 of February of 2003. Series C No. 98, para. 155; *Case Radilla Pacheco V. México*, *supra* note 12, para. 148, and *Case Of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 161.

²⁰ In this sense, the facts noted in the application of the Commission, highlight that Mr. Chitay Nech and other family members fled to Guatemala City as a consequence of the diverse acts of harassment and kidnapping attempts of Florencio Chitay, and attacks against his home, which occurred in 1980. Likewise, according to the declarations of the family members of Florencio Chitay, transcribed in paragraph 188 of the application, it is evident that subsequent to the disappearance of Florencio Chitay, at least Marta Rodríguez Quex and four of her sons returned to San Martín Jilotepeque.

complexity of the phenomenon of internal displacement, which will be analyzed in the merits together with other evidentiary elements. (*infra* Capítulo IX).

34. Subsequently, the Court finds that the preliminary objection raised by the State in relation with Article 22 of the Convention is inadmissible for lack of foundation and because it refers to matters of the merits of the case.

B. Preliminary objection of “objection to reach a friendly settlement”

35. The State indicated that on various occasions, it manifested to the petitioners its “good will to reach a friendly settlement [...] which was not accepted by [them, and their] negativity [...] was always present.” The State added that the Commission “assumed the conciliatory route had been exhausted without making greater attempts,” and that it should have granted the State the opportunity to comply with the recommendations. Therefore, the Commission proposed to the Court “to consider this objection as a means of resolution of the present case.”

36. The Commission pointed out that, during the processing of the case before it, the chance to arrive at a friendly settlement was in the hands of the parties, but that the representatives did not show interest in becoming involved in this process. It added that it was clear that unity between the parties would be difficult, and the Commission proceeded with the analysis of the merits of the case, in accordance with that provided in Article 50(1) of the Convention, in virtue that for the existence of a friendly settlement, willingness between the parties is required, and this did not occur.

37. The representatives argued that such preliminary objection is inadmissible in the means that it does not seek to question the jurisdiction of the Court. On the other hand, it pointed out that the State made no effort to approach the alleged victims until after the issuance of the report of Article 50 of the Convention.

38. The Tribunal has sustained that the “preliminary objection” is where the admissibility of a petition or the jurisdiction of the Court are questioned in order to hear a determined case or any aspect of it, regarding the individual, the matter, the time, or the place.²¹

39. In the present case, the State objected to the failure to reach a friendly settlement. In this regard, the Tribunal finds that said procedure is not obligatory and an omission to carry it out does not contravene the admissibility or jurisdiction of the Court to resolve the litigation. As a consequence, the Tribunal declares as inadmissible the second preliminary objection imposed by the State.

V JURISDICTION

40. The Inter-American Court is competent, in the terms of Article 62(3) of the Convention, to hear the present case because Guatemala has been a State Party to the Convention since May 25, 1978, and recognized the contentious jurisdiction of the Court on March 9, 1987. Also, the State ratified the ICFDP on February 25, 2000.

²¹ Cf. *Case Las Palmeras V. Colombia*. Preliminary Exceptions. Judgment of 4 of February of 2000. Series C No. 67, para. 34; *Case Escher et. al. V. Brasil*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 6 of July of 2009, para. 15, and *Case Garibaldi V. Brasil, supra* note 18, para. 17.

VI
PRIOR CONSIDERATIONS
Determination of the alleged victims in the present case

41. This Tribunal finds it relevant to determine who must be considered as the alleged victims in this case. In the first paragraph and the foot note on page 1 of the petition, the Commission identified as alleged victims Florencio Chitay Nech and his children: Encarnación, Pedro, Eliseo, Estermerio, and María Rosaura, all with the last name of Chitay Rodríguez. In the Report on Merits, the Commission indicated as alleged victims Florencio Chitay and his next of kin. Nevertheless, the Commission, both in the public hearing as well as in its final written arguments, requested the Court to consider Marta Rodríguez Quex, the wife of Mr. Chitay Nech, who died on February 26, 1999,²² as an alleged victim for the violation of Articles 5, 17, 8, and 25 of the Convention, "given that the spirit of the Report on Merits and of the petition was to include all the members of the Chitay Rodriguez family." On the other hand, in the written brief of pleadings and motions, the representatives also indicated that Marta and Amada, the sister-in-law of Mr. Chitay Nech, both with the last name of Rodriguez Quex, were alleged victims of the supposed violations. Subsequently, at the public hearing and in its final written arguments, the representatives requested that the community of San Martín Jilotepeque be included as a alleged victim of the violations of human rights.

42. In its response to the petition, the State did not refer expressly to the identity of the alleged victims in the present case, but indicated that Amada Rodríguez Quex was not to be included within the beneficiaries of the economic reparations, in virtue of the fact that the written brief of pleadings and motions "at no moment states Amada is a victim of the supposed violation committed by the State, but rather that she was a witness."

43. The Tribunal pointed out that in the Report on the Merits No. 90/08, the Commission noted that the alleged victims of the case were Florencio Chitay Nech and his next of kin, without specifying who was included within the expression "next of kin." Nevertheless, in the petition, the Commission clarified that "it [would] utilize the expression 'victim' only to refer to Florencio Chitay Nech and 'next of kin of the victim' to refer to his sons and daughter." The Court observes that the Commission did not argue the existence of difficulties in the timely determination of all the next of kin of Mr. Chitay Nech as alleged victims.²³

44. The Tribunal has established in its jurisprudence that the alleged victims must be stated in the petition, which must correspond with the Commission's Report to which Article 50 of the Convention makes reference. In addition, in accordance with Article 34(1) of the Rules of Procedure of the Court, it corresponds to the Commission rather than to this Tribunal to identify with precision, at the appropriate procedural opportunity, the alleged victims in a case before this Court.²⁴ Judicial security demands, as a general rule, that all

²² Cf. Certificate of Death of Marta Rodríguez Quex processed by the Civil Registrar of the Republic of Guatemala, No. 1842839 written in book 61, act 117, folio 213 (anexos to the brief on motions and pleadings, annex 11, f. 1377).

²³ Cf. *Case Radilla Pacheco V. México*, *supra* note 12, para. 110.

²⁴ Cf. *Case of the Ituango Massacre V. Colombia*. Preliminary Exception, Merits, Reparations and Costs. Judgment of 1 of July of 2006. Series C No. 148, para. 98; *Case Radilla Pacheco V. México*, *supra* note 12, para. 108, and *Case Of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 20.

the alleged victims are duly identified in both briefs, removing the possibility of adding new alleged victims in the petition.²⁵

45. Based on the aforementioned and in the partial acknowledgement of responsibility by the State, the Tribunal considers as alleged victims Florencio Chitay Nech and his children Encarnación, Pedro, Eliseo, Estermerio, and María Rosaura, all with the last name of Chitay Rodriguez, over whom no controversy exists among the parties regarding their identification as victims. The Court notes that for procedural reasons, due to the fact that the Commission in the petition did not include Marta Rodriguez Quex as an alleged victim, who is alleged to have equally suffered due to the circumstances, she cannot be considered an alleged victim before this Tribunal. Nevertheless, the Court highlights that the lack of a determination of violations to her detriment in this international instance does not pose an obstacle to preclude the possibility that the State, in its discretion, adopt reparation measures in her favor.²⁶

46. Regarding Amada Rodriguez Quex, this Court has affirmed that she was not identified as an alleged victim in the Report on the Merits of Article 50 nor in the petition. Regarding the request of the representatives to include the community of San Martín Jilopetque as an alleged victim, it is fitting to observe that on one hand, it was not alleged at the proper procedural point in time and neither was it included in the Report on Merits or in the petition as an alleged victim. Consequently, it does not correspond to the Court to make a decision about the supposed violations alleged by the representatives to the detriment of the aforementioned parties.

VII EVIDENCE

47. Based on the stipulations of Article 44 and 45 of its Rules of Procedures, as well as in the jurisprudence of the Tribunal regarding the evidence and its assessment,²⁷ the Court will proceed to examine and assess the elements of documentary evidence submitted by the parties at the various procedural opportunities, as well as the statements offered by affidavit and those received at the public hearing. In this regard, the Tribunal will obey the rules of competent analysis, within the corresponding legal framework.²⁸

1. Documental, testimonial and expert witness evidence

48. The statements offered before a public notary (affidavit) by the following witnesses and experts were received:

²⁵ Cf. *Case Radilla Pacheco V. México*, *supra* note 12, para. 110, and *Case Of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 20.

²⁶ Cf. *Case Radilla Pacheco V. México*, *supra* note 12, para. 111.

²⁷ Cf. *Case of the "White Van" (Paniagua-Morales et al.)V. Guatemala*. Reparations and Costs. Judgment of 25 of May of 2001. Series C No. 76, para. 50; *Case Dacosta Cadogan V. Barbados*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 24 of September of 2009. Series C No. 203, para. 32, and *Case Of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 55.

²⁸ Cf. *Case of the "White Van" (Paniagua-Morales et al.)V. Guatemala*. Merits. Judgment of 8 of March of 1998. Series C No. 37, para. 76; *Case Radilla Pacheco V. México*, *supra* note 12, para. 67, and *Case Of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 55.

a) *Eliseo Chitay Rodríguez* (hereinafter “Eliseo Chitay” or “Eliseo). Alleged victim. Proposed by the representatives. He testified regarding the forced disappearance of his father and the consequences that this had on him and his family;

b) *Estermerio Chitay Rodríguez*. Alleged victim. Proposed by the representatives and by the Commission. He testified regarding the disappearance of his father, the supposed threats, persecution, and fragmentation of his family and the consequences of such situations;

c) *Luis Alfonso Cabrera Hidalgo*.²⁹ Witness. Proposed by the Commission. He testified on the alleged violence unleashed against political leaders, especially those of the Guatemalan Christian Democracy party (hereinafter “DCG”) during the armed conflict; the alleged connection; the work of Florencio Chitay Nech with the DCG party, and the public denouncement of said party before the media about his disappearance;

d) *Gabriel Augusto Guerra*. Witness. Proposed by the representatives. He testified about the role and activities of Florencio Chitay Nech as a community leader and member of the Municipal Council of San Martín Jilotepeque, his economic activities, and his family activities, the supposed acts of harassment against him, and his next of kin, his forced disappearance and the consequences of this for his family and his community;

e) *Claudia Elisa Sesam López*. Witness. Proposed by the representatives. She testified about the leadership of Florencio Chitay Nech among the members of the DCG party and other indigenous communities and the effects of the forced disappearance on the Chitay Rodríguez family;

f) *Julián Zet*. Witness. Proposed by the representatives. He declared about the profile and relevance of Florencio Chitay Nech in his community, the makeup of his economic and social life, the alleged persecution and harassment against the Chitay Rodríguez family, the disappearance and the consequences for his family and his community;

g) *Pablo Werner Ramírez*. Witness. Proposed by the representatives. He testified about the role of Florencio Chitay Nech as a political leader within the DCG party and his influence through years in such a role;

h) *Mónica Pinto*.³⁰ Expert witness. Proposed by the Commission. She gave expert opinions about the patterns of forced disappearances during the time of internal conflict in Guatemala, particularly regarding indigenous leaders, and

i) *María Eugenia Morales Aceña de Sierra*.³¹ Expert witness. She gave expert opinions about the discoveries of the Unified Registry of Forced Disappearances (RUDFOR), about the patterns of forced disappearances and the context of the facts, and how the disappearance of Florencio Chitay Nech fit into this context.

49. Regarding the evidence given in the public hearing, the Court heard the testimony of the following persons:

²⁹ Declaration was authenticated by a public notary.

³⁰ Declaration was authenticated by a public notary.

³¹ The expert opinion was authenticated by a public notary.

a) *Pedro Chitay Rodríguez and Encarnación Chitay Rodríguez* (hereinafter “Encarnación Chitay” or “Encarnación”). Alleged victims. Proposed by the Commission and the representatives. They testified about the activities and the environment that their father developed before the events occurred, the forced disappearance and its cause, the supposed obstacles and the harassments faced by the family in the search for their father, and the subsequent search for justice in this case, the supposed threats, persecution, and fragmentation of their family and the consequences of all these situations. In addition, Encarnación testified about the alleged persecution which she was subjected to;

b) *Rosalina Tuyuc*. Expert witness. Proposed by the Commission. She gave expert opinions about the persecution that indigenous leaders in Guatemala during the internal armed conflict;

c) *Edgar Armando Gutiérrez Girón*. Expert witness. Proposed by the representatives. He gave expert opinions about the context and the pattern of the phenomenon of forced disappearances in Guatemala during the internal armed conflict, and concretely during the 1980s, and

d) *César Augusto Dávila Gómez*. Expert witness. Proposed by the State. He gave expert opinions about the creation and actual function of the PNR, the attention and reparation given to victims of violations of human rights that go before said tribunal.

2. Assessment of Documentary Evidence

50. In this case, as in others,³² the Tribunal admits the evidentiary value of those documents presented at the opportune moment by the parties that were neither disputed, objected to, or had their authenticity placed in doubt. The documents issued by the representatives and the State together with their final written arguments, as well as those issued as evidence in order to better resolve the case as requested by the Tribunal (*supra* paras. 11 and 12), the Court incorporates them into the body of evidence, in application of that provided in Article 47(2) of the Rules of Procedure of the Court, except those that exceed the purpose of the request.

51. Despite the aforementioned, regarding the evidence requested by the Tribunal on March 26, 2010,³³ in order to better resolve the case, regarding the submission of a suitable document in relation to the life expectancy in Guatemala in the year 1981, the Court notes that the representatives sent information about the year 1979 and 1987, not regarding the year 1981 as it was requested; therefore, this Court does not admit the above-mentioned information. Regarding the tables of minimum wages from 1980 up to the date issued by the Ministry of Labor and Social Precaution requested also as evidence to resolve the case, the representatives indicated that in Guatemala the amount of minimum wage does not correlate with the cost of real life, for which they mentioned and attached the report called “the minimum wage in the rural area in Guatemala” of the Coordination of NGOs and cooperatives. In consideration of the aforementioned, the State,

³² Cf. *Case Velásquez Rodríguez V. Honduras*. Merits. Judgment of 29 of July of 1988. Series C No. 4, para. 140; *Case Radilla Pacheco V. México*, *supra* note 12, para. 70, and *Case Of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 58

³³ In addition, the Court requested as proof to better resolve the regulations which reference the National Compensation Program.

in its observations to the evidence and taking into account that the request of the Court was not made in order to give a new procedural opportunity to the parties to expand their arguments or to present additional evidence, this Court does not admit the above-mentioned report of the Coordination of NGOs and cooperatives.

52. In their brief of April 7, 2010, the representatives indicated that they would send their "observations about the briefs of the final arguments sent by the Commission and the State and their annexes." Given that this brief was not a foreseen action in the Rules of Procedure of the Court nor was it requested by the Tribunal, the Court will not take into account the arguments presented by the representatives at said time, and will only incorporate those observations that refer to the documentary evidence submitted by the State as an annex to the final arguments.

53. In addition, in the communication of May 3, 2010, related to the observations regarding the evidence to better resolve the issue sent by the State on April 13, 2010, the representatives requested that the brief be included as supervening evidence and they noted their electronic link,³⁴ as evidence in accordance with the Article 46(3) of the Rules of Procedure. This was sent to the State, with no objections. This Court admits the above-mentioned report which contains statistics regarding the lack of execution of the budget of the PNR, that will be valued together with the body of evidence and on the basis of sound judgment.

54. The Court notes that both the Commission as well as the representatives offered as reports³⁵ as evidence and gave their electronic link. In this regard, the Court has established that if a party offers at least the direct electronic link to the documents that it cites as evidence and it is possible to access this document, the legal certainty and the procedural equity will not be affected, because its location is immediately available to the Tribunal and the other parties.³⁶ In this case, no opposition or observations existed from the other parties about the content and authenticity of the documents.

55. Regarding the press documents presented by the parties, this Tribunal has considered that they may be evaluated when they deal with public and well-known facts or declarations of State employees, or when they corroborate aspects related with the case³⁷ together with the rest of the body of evidence.

³⁴ "Null Execution of the Budget of the National Compensation Program (the compensation does not reach the victims or their families)," published on March 25, 2010 by the NGO Mutual Support Grpu, available online at <http://gam.org.gt/comunic/2010/Abr/comunicado060410-3.pdf>.

³⁵ Report from the Commission for Historical Clarification, "*Guatemala, Memoria del Silencio*" [*Guatemala, Memories of Silence*] (hereinafter, "CEH, *Guatemala: Memory of Silence*"), Guatemala Office of Service for National Unity Projects, 1999. Available at http://shr.aaas.org/guatemala/ceh/gmds_pdf/, and Office for Human Rights of the Archbishop of Guatemala (ODHAG) "*Guatemala Nunca Más*", [*Guatemala Never Again*], Report by the Interdiocesan Project "Recuperación de la Memoria Histórica" [Recooperation of Historical Memory] (hereinafter "REMHI, *Guatemala Nunca Más*"). Available at <http://www.fundacionpdh.org/lesahumanidad/Reports/guatemala/ReportREMHI-Tomo1.htm> (annexes to the brief on motions and pleadings, annexes 8, 9 and 12).

³⁶ Cf. *Case Escué Zapata V. Colombia*. Merits, Reparations and Costs. Judgment of 4 of July of 2007. Series C No. 165, para. 26; *Case Radilla Pacheco V. México*, *supra* note 12, para. 86, and *Case Of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 58.

³⁷ Cf. *Case Velásquez Rodríguez V. Honduras*. Merits, *supra* note 32, para. 146; *Case Radilla Pacheco V. México*, *supra* note 12, para. 77, and *Case Of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 67.

3. Assessment of the statements of the alleged victims and of the testimonial and expert evidence

56. Regarding the testimonies given before a public notary by the alleged victims, Eliseo and Estermerio, the witnesses Gabriel Augusto Guerra, Julian Zet, and Pablo Werner Ramirez, and the testimony given by the alleged victims Pedro and Encarnacion and the expert witnesses Rosalina Tuyuc and Edgar Armando Gutierrez Giron at the public hearing, the Court admits them and finds them pertinent only in regards to the purpose which was defined in the Order requesting they be submitted (*supra* para. 7) together with the other elements of the body of evidence. In accordance with the jurisprudence of this Tribunal, the testimony given by the alleged victims cannot be evaluated in an isolated manner but must be evaluated with the evidence of the proceedings,³⁸ because it is useful in the sense that they may provide better information about the alleged violations and their consequences.

57. Regarding the expert witness Monica Pinto, the State expressed that “the expert witness referred [...] to the possible actions and guarantees that could be requested of the State so as to deal with the issue of reparations [, nevertheless] the testimony must have been limited to the points [...] regarding the expert opinion.” The Tribunal considers it pertinent to point out that the experts can refer both to the specific points of the *litis* as well as any other point relative to the controversy, as long as they limit themselves to the object for which they were summoned³⁹ and their conclusions must be sufficiently well-founded. Following this criteria, the Court finds it pertinent to admit this expert opinion in a strict sense to the purposes defined by the Presidency in the Order that established the request for said testimony (*supra* para. 7) and taking into account the observations of the State in this regard, which the Tribunal values together with the body of evidence and in accordance to the rules of competent analyses.

58. Regarding the expert testimony of Maria Eugenia de Sierra, the State expressed that “the expert witness [...] based her expertise in various studies[, nevertheless] in no[ne] [of such] document[s] was data revealed that demonstrated the background of antecedents or claims carried out before the National Police regarding the forced disappearance of Mr. Chitay Nech.” The Court notes that what was expressed by the State does not regard the purpose of the expert testimony as defined by the Presidency (*supra* para. 7), because the object of the expert opinion was not to prove the existence of claims in relation to the forced disappearance of Mr. Chitay Nech. On the contrary, the Tribunal observes that what was expressed by the expert fits the purpose of the expert testimony regarding the pattern of forced disappearances in Guatemala and the context of the facts, and as such it considers it pertinent and values it in accordance with the body of evidence of the present case and the rules of competent analysis.

59. Regarding the testimony of Luis Alfonso Cabrera Hidalgo, the State expressed that “it refers more to the political life of the witness [rather than to] the objective of the testimony.” The Tribunal observes that effectively, the witness refers to his political life,

³⁸ Cf. *Case of the “White Van” (Paniagua-Morales et al.) V. Guatemala*. Reparations and Costs, *supra* note 27, para. 70; *Case Radilla Pacheco V. México*, *supra* note 12, para. 93, and *Case Of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 63.

³⁹ Cf. *Case González et al. (“Cotton Fields”) V. México. Convocation to Public Hearing*. Order of the President of the Court of 18 of March of 2009, Considering Clause 75; *Case of Reverón Trujillo V. Venezuela*. Preliminary Exception, Merits, Reparations and Costs. Judgment of 30 of June of 2009. Series C No. 197, para. 42, and *Case Radilla Pacheco V. México*, *supra* note 12, para 97.

notwithstanding, it is through such events that the witness can discuss, in his testimony, the activities of Mr. Chitay Nech, and which is adjusted to the objective defined by the Presidency, in relation to the violence carried out against political leaders and the nexus between Florencio Chitay and the DC party (*supra* para. 48(c)). Therefore, the Court admits the testimony and evaluates it with the body of evidence and in accordance to the rules of competent analysis.

60. Regarding the testimony of Claudia Elisa Sesam, the State expressed that “a witness is ‘the person that presents or acquires direct and true knowledge of something’[and that] the witness manifest[ed] in her testimony that she did not had the opportunity to personally know Mr. Florencio Chitay Nech[,] for which [...] said testimony lacks evidentiary value.” The Court observes that the State’s observations refer to the evidentiary value of said testimony, that which will be taken into consideration at the corresponding procedural opportunity, in light of the body of evidence and the rules of competent analysis.

61. In regards to the expert witness of Cesar Augusto Davila Gomez offered by the State, the representatives in their final written arguments requested that this testimony be considered as ordinary testimony evidence and not as that rendered by an expert witness, because “the conditions for it to be considered an expert opinion, for its academic and experimental qualification, and for the characteristics of its presentation, were not fulfilled.” In this regard, the Tribunal dismisses the observations of the representatives and admits said declaration as expert testimony, in accordance with the Order of the Presidency (*supra* para. 7), which assesses it in accordance with the body of evidence in the present case and the rules of competent analysis.

62. Having carried out an examination of the evidentiary elements that make up the case file, the Court goes on to analyze the alleged violations.

VIII

FORCED DISAPPEARANCE OF FLORENCIO CHITAY NECH (ARTICLES 7, 5, 4, 3, AND 23 OF THE AMERICAN CONVENTION, IN ACCORDANCE WITH ARTICLE 1(1) OF THE CONVENTION, AND ARTICLES I, II, AND III OF THE INTER-AMERICAN CONVENTION ON THE FORCED DISAPPEARANCE OF PERSONS)

63. In the present chapter, the Court will analyze in the light of the partial recognition of international liability, the facts and violations of human rights enshrined in the American Convention, as well as the lack of fulfillment of the ICFDP, argued in the present case.

1. Context of the case and facts regarding the forced disappearance of Florencio Chitay Nech.

A) Context of the case

64. In Guatemala, between the years of 1962 and 1996, an internal armed conflict took place that brought great human, material, institutional, and moral costs.⁴⁰ During such conflict, the State applied the denominated “National Security Doctrine”.⁴¹ It has been

⁴⁰ Cf. CEH, *Guatemala: Memory of Silence*, *supra* note 35, Tome V, Chapter IV, page 21, para. 2; *Case Tiu Tojin V. Guatemala*. Merits, Reparations and Costs. Judgment of 26 of November of 2008. Series C No. 190, para. 48, and *Case of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 70.

⁴¹ Cf. CEH, *Guatemala: Memory of Silence*, *supra* note 35, Tome I, Chapter II, page 83, para. 23.

deemed that “more than two hundred thousand people” were victims of arbitrary execution and forced disappearance as a consequence of the political violence.⁴² According to the Commission for Historical Clarification (hereinafter “CEH”), the State forces and paramilitary groups were responsible for 93% of the human rights violations, including 91% of the forced disappearances. Of the total, “80% were carried out by the Army, 12% were carried out by the Civil Self-Defense Patrols, 8% were committed by other security forces, principally by the National Police. [Likewise] 11% of the disappearances [...] committed by the Army, were carried out with the CSDP, and 6% were carried out with military delegates.”⁴³ In the framework of that doctrine, the intervention of military power increased to face the subversion, a concept which included any person or organization that represented any form of opposition to the State to which the notion of “the ‘internal enemy,’ intrinsic to the National Security Doctrine, expanded even more each time for the State.”⁴⁴

65. The CEH concluded that, in application of such doctrine, 91% of the violations it registered were carried out during years 1978 and 1983, under the dictatorships of the Generals Romeo Lucas García (1978-1982) and Efraín Ríos Montt (1982-1983).⁴⁵ On the date of the disappearance of Florencio Chitay Nech, General Romeo Lucas García exercised the role of President of the Republic and Commander in Chief of the Army,⁴⁶ and General Ángel Aníbal Guevara Rodríguez was the Minister of National Defense.⁴⁷

66. Specifically during the years 1980 and 1983, several phenomena occurred that affected authority and leadership of the indigenous structures, forced disappearance being among them.⁴⁸ In terms of ethnicity, “83.3% of the victims of human rights violations and acts of violence registered by the [CEH] belong to some Mayan ethnicity, 16.5% belong to the ladino group, and 0.2% to other groups.”⁴⁹

67. As it has been established in other cases regarding Guatemala heard by this Tribunal, forced disappearance of persons in that country constituted a practice of the State during the time of the internal armed conflict, which was carried out mainly by agents of its security forces. They would be clandestinely detained without giving notice to a competent, independent, and impartial judicial authority; they were physically and psychologically

⁴² Cf. CEH, *Guatemala: Memory of Silence*, supra note 35, Tome IV, Chapter IV, page 21, para. 2, and *Case Tiu Tojin V. Guatemala*, supra note 40, para. 48.

⁴³ Cf. CEH, *Guatemala: Memory of the Silence*, supra note **, Chapter XI: Volume 2, par 2053 y 2057.

⁴⁴ Cf. CEH, *Guatemala: Memory of Silence*, supra note 35, Tome V, Chapter IV, page 24, para. 15 and Tome II, Chapter XI, page 426, para. 2094. Cf. expert opinion of María Eugenia Morales Aceña of Sierra authenticated before a public notary on 13 of January of 2010 (brief of Preliminary Exceptions, Merits, Reparations and Costs, Tome IV, f. 568 Bis).

⁴⁵ Cf. CEH, *Guatemala: Memory of Silence*, supra note 35, Tome V, Chapter IV, pág 42, para. 82, and *Case of the Dos Erres Massacre*, supra note 12, para. 71.

⁴⁶ Cf. CEH, *Guatemala: Memory of Silence*, supra note 35, Tome I, Chapter I, page 184, para. 588.

⁴⁷ Cf. CEH, *Guatemala: Memory of Silence*, supra note 35, Tome I, Chapter I, page 193, para. 622.

⁴⁸ Cf. CEH, *Guatemala: Memory of Silence*, supra note 35, Tome II, Chapter III, page 167, para. 4339, and expert opinion of Mónica Pinto authenticated ante public notary on 30 of December of 2009 (brief of Preliminary Exceptions, Merits, Reparations and Costs, Tome IV, f. 519).

⁴⁹ CEH, *Guatemala: Memory of Silence*, supra note 35, Tome II, Chapter II, page 321, para. 1745. Cf. *Case Tiu Tojin*, supra note 40, para. 48.

tortured in order to obtain information, and in most cases, this caused their death.⁵⁰ Furthermore, forced disappearances had the goal of punishing, not only the victim, but also the political or social collectivity to which the victim belonged and the victim's own family. As such, the report, *Guatemala, Never Again* [Guatemala, Nunca Mas] indicated that "[t]he selective murders of leaders often had a dimension of harassment towards the families, be it before or after the facts of violence [...] The harassment towards the civil population by the military forces had, in many parts of the country, a communitarian dimension. The accusations of participation and support of the guerilla involved, globally, many of the communities that were denominated as "guerilleras."⁵¹

68. Within the conflict, terror became a weapon of social repression, especially against groups such as unions, universities, political parties, cooperatives, rural leagues, and church members, among others, to whom all sorts of aggression and threats were directed.⁵²

69. According to the CEH, numerous arbitrary executions were directed to political party members, in particular, of the Guatemalan Christian Democracy.⁵³ Likewise, executions took place in a reiterated and systematic manner of persons belonging to the Mayan groups that stood out as community leaders.⁵⁴

B) Facts regarding the detention and subsequent disappearance

B.1. About Florencio Chitay Nech

70. Florencio Chitay Nech, *kaqchikel* Mayan, was born in the Quimal Village, Semetabaj Hamlet, on March 2, 1935⁵⁵ and dedicated his life to agriculture.⁵⁶ He married Marta

⁵⁰ Cf. CEH, *Guatemala: Memory of Silence*, supra note 35, Tome II, Chapter XI, page 428, para. 2099. *Case Bámaca Velásquez V. Guatemala*. Merits. Judgment of 25 of November of 2000. Series C No. 70, para. 132; *Case Molina Theissen V. Guatemala*. Merits. Judgment of 4 of May of 2004. Series C No. 106, para. 40.1, and *Case Tiu Tojín*, supra note 40, para. 49.

⁵¹ Cf. REMHI, *Guatemala Nunca Más*, supra note 35, Chapter IV, pages 7 and 8, fs. 1012 and 1013.

⁵² Cf. CIDH, *Report on the Human Rights Situation in the Republic of Guatemala*, approved on 13 of October of 1981. Chapter II B, para. 3; CIDH, *Report on the Human Rights Situation in the Republic of Guatemala*, OEA/Ser.L/V/II.66, approved on 3 of October of 1985. Introduction, para. 27; CIDH, *Annual Report on Guatemala, 1990-91*, OEA/Ser.L/V/II.79 rev. 1, Doc. 12, 22 of February of 1991, Selection of victims, para. 223; CEH, *Guatemala: Memory of Silence*, supra note 35, Tome II, Chapter XI, page 426, para. 2094; expert opinion of Edgar Armando Gutiérrez Girón rendered during the public hearing at the Court on 2 of February of 2010, and *Case Molina Theissen V. Guatemala*, supra note 50, para. 40.2.

⁵³ Cf. CEH, *Guatemala: Memory of Silence*, supra note 35, Tome II, Chapter X, page 394, para. 1989; statement of Luis Alfonso Cabrera Hidalgo authenticated by public notary on 7 of January of 2010 (brief of Preliminary Exceptions, Merits, Reparations and Costs, Tome IV, fs. 527 a 530); statement of Pablo Werner Ramírez Rivas rendered before public notary on 7 of January of 2010 (brief of Preliminary Exceptions, Merits, Reparations and Costs, Tome IV, fs. 588 and 589), and Press releases, *El Gráfico*, "DC: 'La represión evita elecciones libres'", [the Repressions avoids free elections] date illegible; *La Hora* "Situación de Violencia: Analizan Líderes of DC", [Situation of Violence: Leaders of the DC are Analyzed] 25 of April of 1981 (annexes to the brief of motions and pleadings, annex 1, fs. 958 to 962).

⁵⁴ Cf. CEH, *Guatemala: Memory of Silence*, supra note 35, Tome II, Capítulos X and XI, pages 367 and 429, paras. 1884 and 2102.

⁵⁵ Cf. Certified copy of expired license No. 12, 203, of Florencio Chitay Nech (annexes to the brief, annex 5, f. 120), and statement of Pedro Chitay Rodríguez rendered during the public hearing at the Court on 2 of February of 2010.

⁵⁶ Cf. Certified copy of expired license No. 12, 203, of Florencio Chitay Nech, supra note 55; statement of Pedro Chitay Rodríguez rendered before public notary on 10 of May of 2007 (annexes to the brief, annex 1, f. 80);

Rodríguez Quex, and with her procreated children: Encarnación, Pedro, Eliseo, Estermerio and María Rosaura, all of them with the last name Chitay Rodríguez⁵⁷.

71. Florencio Chitay Nech was part of several social causes, community work, and cultural activities, cooperatives and religious causes, among others.⁵⁸ Later, in 1973 he joined rural movements of the region and initiated his political participation by affiliating with the DCG Party and got involved with the cooperative movement.⁵⁹

72. In 1977, the DCG Party presented Florencio Chitay Nech as a candidate for First Councilman⁶⁰ in the municipal electoral race of San Martín Jilotepeque, Department of Chimaltenango. As a consequence of said electoral race, Mr. Chitay Nech was elected.⁶¹ At that moment, such Municipal Council was integrated almost entirely by indigenous people.

73. According to the report of the CEH, on November 21, 1980 the Mayor of the Municipality of San Martín Jilotepeque, Felipe Álvarez, disappeared by a contingent integrated by military and civilians.⁶² Furthermore, on January 6, 1981, Mario Augusto García Roca, Second Councilman of the Municipality of San Martín Jilotepeque, also disappeared.⁶³

statement of Pedro Chitay Rodríguez, *supra* note 55, and statement of Julián Zet rendered before public notary on 6 of January of 2010 (brief of Preliminary Exceptions, Merits, Reparations and Costs, Tome IV, f. 586).

⁵⁷ Cf. Certified copy of expired license No. 12, 203, of Florencio Chitay Nech, *supra* note 55, and statements of Estermerio, Encarnación, Eliseo, and María Rosaura, all with the last name Chitay Rodríguez, rendered before public notary on 8 of May, 10 of February, 19 and 26 of April of 2007, respectively (annexes of the brief, annex 1, fs. 74, 77, 80, 86, and 88), and statement of Pedro Chitay, *supra* note 56.

⁵⁸ Cf. Statement of Luis Alfonso Cabrera Hidalgo rendered before a public notary on 10 of October of 2005 (annexes of the petition, annex 1, f. 94); statements of Marco Vinicio Cerezo Arévalo and Egidio Hernández Sutuj rendered before public notary on 8 of December of 2008 (annexes of the petition, annex 1, fs. 96 and 100); Statement of Jorge Gustavo Navas Martínez rendered before public notary on 12 of December of 2008 (annexes of the petition, annex 1, f. 98); Statement of Gabriel Augusto Guerra rendered before public notary on 5 of January of 2010 (brief of Preliminary Exceptions, Merits, Reparations and Costs, Tome IV, f. 578); statement of Pedro Chitay Rodríguez, *supra* note 55, and statement of Encarnación Chitay Rodríguez rendered during the public hearing at the Court on 2 of February of 2010.

⁵⁹ Cf. Statements of Egidio Hernández Sutuj and Jorge Gustavo Navas Martínez, *supra* note 58, and statement of Eliseo Chitay Rodríguez rendered before public notary on 6 of January of 2010 (brief of Preliminary Exceptions, Merits, Reparations and Costs, Tome IV, f. 571).

⁶⁰ According to Article 206 of the Electoral and Political Parties Law, as well as Article 54 of the Municipal code, both of them of the Republic of Guatemala, the First Council man is a charge of community service which functions are: the exercise of role of the Mayor in its absence, to propose measures to avoid abuse and corruption, to issue reports, to integrate and participate in Commissions, to supervise the administrative action of the Mayor, among others. (Available at http://tse.org.gt/descargas/Ley_Electoral_y_de_Partidos_Policos.pdf and <http://www.chmguatemala.gob.gt/informacion/legislacion-ambiental/legislacion-comun-de-relevancia-ambiental/Codigo%20Municipal.pdf>)

⁶¹ Cf. CEH, *Guatemala: Memory of Silence*, *supra* note 35, Tome VIII, Annex II, Case No. 707; Statement of Luis Alfonso Cabrera Hidalgo, *supra* note 58; statements of Marco Vinicio Cerezo Arévalo and Egidio Hernández Sutuj, *supra* note 58, fs. 96 and 100; Statement of Jorge Gustavo Navas Martínez, *supra* note 58, and Statement of Norberto Álvarez Capir rendered before a public notary on 12 of December of 2008 (annexes of the petition, annex 1, f. 102), and statement of Pedro Chitay Rodríguez, *supra* note 55.

⁶² Cf. CEH, *Guatemala: Memory of the Silence*, *supra* note 36, Volume VIII, Cases Presented, Annex II, Case 707, page 175.

⁶³ Cf. CEH, *Guatemala: Memory of the Silence*, *supra* note 36, Volume VIII, Cases Presented, Annex II, Case 707, page 175.

74. As a consequence of the disappearance of the Mayor, Florencio Chitay Nech assumed responsibility as Mayor.⁶⁴ Starting on June, 1980, Mr. Chitay Nech received several anonymous notes "in which he was invited to neglect all the activities he carried out, meaning to leave his office at the municipality; to retire from the cooperative and rural movements, since all those actions were considered subversive."⁶⁵ Furthermore, in 1980, several threats perpetrated against Florencio Chitay Nech and his next of kin took place, such as kidnapping attempts and attacks against his residence (*infra* para. 128). Hence, the Chitay Rodríguez family fled to Guatemala City,⁶⁶ wherein they settled in a rental room.⁶⁷

B.2 Detention and later disappearance of Florencio Chitay Nech

75. Days before his disappearance, Florencio Chitay Nech spoke to his older sons and expressed to them that "he felt persecuted, that something could happen to him."⁶⁸ On April 1, 1981, Mr. Chitay Nech left his residence in Guatemala City to buy firewood, accompanied by his son Estermerio Chitay. In front of the firewood store, a group of armed men got out of a vehicle, said the name of Florencio Chitay Nech, and tried to get him in the vehicle with the use of force, hitting him in the head. One of the men took the kid from the arm and pointed his gun at him, so Mr. Chitay Nech stopped resisting and got in the vehicle. Later, Estermerio ran to his house and told his family what had happened.⁶⁹

76. The next of kin of Florencio Chitay Nech, having found out about his detention, went to the National Police,⁷⁰ a fact that will be examined in Chapter X. Likewise, they looked for him in hospitals and morgues without obtaining any information.⁷¹ Later, on April 25, 1981, the leaders of the DCG party publicly denounced the kidnapping of Florencio Chitay Nech during a press conference,⁷² which was reported via means of communication.⁷³

⁶⁴ Cf. Statement of Eliseo Chitay Rodríguez, *supra* note 57, f. 86; Statement of Jorge Gustavo Navas Martínez, *supra* note 58; Statement of Luis Alfonso Cabrera Hidalgo, *supra* note 58; statement of Pedro Chitay Rodríguez, *supra* note 55, and statement of Encarnación Chitay Rodríguez, *supra* note 58.

⁶⁵ Cf. Petition No. P-208-05 of the representatives on 2 of March of 2005 (annexes of the petition, f. 504); statement of Pedro Chitay Rodríguez, *supra* note 55, and statement of Encarnación Chitay Rodríguez, *supra* note 58.

⁶⁶ Cf. Statement of Pedro Chitay Rodríguez, *supra* note 55; statement of Encarnación Chitay Rodríguez, *supra* note 58, and Statement of Julián Zet, *supra* note 56, f. 585.

⁶⁷ Cf. Statement of Pedro Chitay Rodríguez, *supra* note 55, and Statement of Encarnación Chitay Rodríguez *supra* note 57, f. 77.

⁶⁸ Cf. Statement of Pedro Chitay Rodríguez, *supra* note 55.

⁶⁹ Cf. Statement of Estermerio Chitay Rodríguez, *supra* note 57, fs. 74 and 75; statement of Pedro Chitay Rodríguez, *supra* note 55, and statement of Encarnación Chitay Rodríguez, *supra* note 58.

⁷⁰ Cf. Statement of Pedro Chitay Rodríguez, *supra* note 55, and statement of Encarnación Chitay Rodríguez, *supra* note 58.

⁷¹ Cf. Statement of Pedro Chitay Rodríguez, *supra* note 55.

⁷² Cf. Statement of Luis Alfonso Cabrera Hidalgo, *supra* note 58, and Statement of Marco Vinicio Cerezo Arévalo, *supra* note 58.

⁷³ Cf. Press releases, *El Gráfico*, "DC: 'La represión evita elecciones libres'", and *La Hora*, "Situación of Violencia Analizan Líderes of DC", *supra* note 53. It is also relevant to note that there are imprecisions regarding the date of the press release, given that this Article is dated 25 of April 1981 and it describes the press conference of the day before, when the facts of the petition, allegations of the parties, and statements of the alleged victims took place on the same date of 25 of April of 1981.

77. In turn, in the CEH Report, the case of Florencio Chitay Nech was documented as a credited case of forced disappearance. In this sense, the CEH Report points out that “the [M]unicipal [C]ouncil of San Martín Jilotepeque was completely dismantled. The forced disappearance of Felipe Álvarez was followed by the forced disappearance of the [F]irst [C]ouncilman, Mr. Florencio Chitay Nech.”⁷⁴

78. As a consequence of the abovementioned, the surviving members of the Municipal Council of San Martín Jilotepeque jointly resigned and requested that new elections be called on January 8, 1981.⁷⁵

79. More than 29 years after the facts took place, Florencio Chitay Nech is still missing, and there is no knowledge regarding his whereabouts or the location of his remains.

2. Forced Disappearance as a multiple violation of human rights

80. As stated before, (*supra* para. 19) there is no controversy regarding the facts and the rights that formed the forced disappearance of Florencio Chitay Nech, apart from that regarding the violation of the acknowledgement of his right to juridical personality, established in Article 3 of the American Convention, since the State denied its international liability (*supra* para. 20).

81. Despite the aforementioned statements, the Court reiterates its constant jurisprudence in the sense that, when analyzing an alleged forced disappearance, the continuous nature and its multi-offensive character shall be taken into account.⁷⁶

82. The Court notes that attention from the international community to this phenomenon is not recent. The Working Group on Forced and Involuntary Disappearances of Persons of the United Nations developed, from its conception in the decade of the 80s, an operative definition of the phenomenon, highlighting in the definition the unlawful detention by agents or governmental agencies or organized groups of private individuals acting in the name of the State or counting on its support, authorization, or consent.⁷⁷

83. Likewise, the definition of the Declaration on the Protection of Persons against Forced Disappearance of 1992⁷⁸, establishes that forced disappearances occur in cases where:

a person is arrested, detained, or transported against their will, or that they are deprived of their liberty by another means by governmental agents of any sector or level, by organized groups, or

⁷⁴ Cf. CEH, *Guatemala: Memory of Silence*, *supra* note 35, Tome VIII, Annex II, Case No. 707, page 175. It should be noted that the Report mentions that the forced disappearance of Florencio Chitay Nech occurred on 10 of December of 1980, nevertheless, as it was established, his disappearance occurred on 1 of April of 1981.

⁷⁵ Cf. CEH, *Guatemala: Memory of Silence*, *supra* note 35, Tome VIII, Annex II, Case No. 707.

⁷⁶ Cf. *Case Molina Theissen V. Guatemala*. Merits, *supra* note 50, para. 41; *Case of the Serrano Cruz Sisters V. El Salvador*. Preliminary Exceptions. Judgment of 23 of November of 2004. Series C No. 118, para. 100, and *Case Heliodoro Portugal V. Panamá*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 12 of August of 2008. Series C No. 186, para. 112.

⁷⁷ Cf. Human Rights Commission. Report of the Working Group on Forced and Involuntary Disappearance of Persons, report carried out on the Sri Lanka visit by three members of the Working Group, 7 to 18 of October of 1991, E/CN.4/1992/18/Add. 1 of 5 of January of 1992.

⁷⁸ Approved by the General Assembly in its Order 47/133 of 18 of December 1992, A/RES/47/133.

private individuals who act in the name of the Government or with its direct or indirect support, its authorization, or consent, followed by an absence of information or a refusal to acknowledge that deprivation of liberty or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees

84. For its part, Articles II and III of the ICFDP⁷⁹ define forced disappearance as:

the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

[...]

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

85. The Court has taken into account that in the definitions of the Working Group on Forced and Involuntary Disappearances of Persons of the United Nations, the Declaration on the Protection of All Persons against Forced Disappearance of the UN, the ICFDP, other international instruments⁸⁰, the Jurisprudence of the European System of Human Rights⁸¹, the Jurisprudence of the United Nations organs,⁸² as well as in the Rome Statute,⁸³ concurrent and constitutive elements of forced disappearance are pointed out: a) the deprivation of liberty; b) the direct intervention of state agents or their acquiescence, and c) the refusal to acknowledge the detention and to reveal the situation or the whereabouts of the interested person.⁸⁴

86. The Court has verified the international consolidation in the analysis of this crime that configures a grave violation of human rights, given the particular relevance of the transgressions that it entails and the nature of the injured rights,⁸⁵ implicating a clear

⁷⁹ Cf. *Travaux préparatoires* of the CIDFP.

⁸⁰ Cf. UN, International Convention for the Protection of Persons Against Forced Disappearance, Article 2.

⁸¹ Cf. Eur. Ct. H.R., *Case of Kurt v. Turkey*, 15/1997/799/1002, May 25, 1998, paras. 124 to 128; *Case of Çakici v. Turkey*, Application no. 23657/94, 8 July 1999, paras. 104 to 106; *Case of Timurtas v. Turkey*, Application no. 23531/94, 13 June 2000, paras. 102 to 105; *Case of Tas v. Turkey*, Application no. 24396/94, November 14, 2000, paras. 84 to 87; *Case of Cyprus v. Turkey*, *supra* note 24, paras. 132 to 134 and 147 to 148.

⁸² Cf. United Nations Human Rights Committee, *Ivan Somers v. Hungría*, Communication No. 566/1993, 57^o Period of Sessions, CCPR/C/57/D/566/1993 (1996), July 23, 1996, par. 6.3; *case of E. y A.K. v. Hungría*, Communication No. 520/1992, 50^o Period of Sessions, CCPR/C/50/D/520/1992 (1994), May 5, 1994, par. 6.4, and *case of Solorzano v. Venezuela*, Communication No. 156/1983, 27^o Period of Sessions, CCPR/C/27/D/156/1983 (1986), March 26, 1986, par. 5.6.

⁸³ Cf. Statute of the International Criminal Court (Rome Statute), Document of the UN A/CONF.183/9, July 17, 1998. This instrument defines "forced disappearance of persons" as "the apprehension, the detention or the kidnapping of persons by one State or political organization, or with its authorization, support, or consent, followed by the omission to inform on the deprivation of liberty or to provide information regarding the whereabouts of the remains of said persons, with the intention of constricting their means to a legal remedy for a prolonged period.

⁸⁴ Cf. *Case Gómez Palomino V. Perú*. Merits, Reparations and Costs. Judgment of 22 of November of 2005. Series C No. 136. para. 97; *Case Heliodoro Portugal V. Panamá*, *supra* note 76, para. 110, and *Case Ticona Estrada et. al. V. Bolivia*. Merits, Reparations and Costs. Judgment of 27 of November of 2008. Series C No. 191, para. 55.

⁸⁵ In the relevant part, the ICFDP, in the preamble, establishes that: "Considering that the forced disappearance of persons of persons violates numerous non-derogable and essential human rights enshrined in the

abandonment of the essential principles in which the Inter-American System is founded,⁸⁶ and which prohibition has reached the character of *jus cogens*.⁸⁷

87. In that regard, the analysis of forced disappearance must cover the totality of the group of facts that are presented to be considered by the Tribunal in the present case.⁸⁸ Only in this manner, the legal analysis of forced disappearance is consistent with the complex violation of human rights that it entails,⁸⁹ with its continuous or permanent character, and with the necessity of considering the context in which the facts took place, in order to analyze its prolonged effects over time and to focus on its consequences in a comprehensive manner.⁹⁰

88. In consideration of the foregoing, in the present case, although the facts that make up the beginning of the forced disappearance of Florencio Chitay Nech occurred in 1981, prior to the adjudicatory jurisdiction of this Court, such facts are prolonged to this day due to their continuous or permanent character.

A. Forced Disappearance: Articles 7, 5, 4, and 3 (Rights to Personal Liberty, Humane Treatment [Personal Integrity] and Juridical Personality) of the American Convention

89. While analyzing an alleged forced disappearance, it must be taken into account that the deprivation of liberty of the individual shall be understood as the beginning of the configuration of a complex violation that is prolonged in time until the situation and the whereabouts of the alleged victim are known. The analysis of a possible forced disappearance should not focus on the detention, or the possible torture, or the risk of losing a life, in an isolated, divided, and fragmented manner, instead the focus shall be on the group of facts that are presented in the case under consideration before the Court, taking into account the Jurisprudence of the Tribunal when interpreting the American Convention, as well as ICFDP for those States that have ratified it.⁹¹

90. Regarding Article 7 of the American Convention, the court has reiterated that any restriction to the right of personal liberty shall only take place for the causes and in the conditions established beforehand by the Political Constitutions, or by the laws issued

American Convention on Human Rights, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights”.

⁸⁶ Cf. *Case of las Hermanas Serrano Cruz V. El Salvador*. Preliminary Exceptions, *supra* note 76, paras. 100 a 106; *Case Anzualdo Castro V. Perú*. Preliminary Exception, Merits, Reparations and Costs. Judgment of 22 of September of 2009. Series C No. 202, para. 59, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 139.

⁸⁷ Cf. *Case Goiburú et. al. V. Paraguay*. Merits, Reparations and Costs. Judgment of 22 of September of 2006. Series C No. 153, para. 84; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 59, and *Case Radilla Pacheco V. Méxco*, *supra* note 12, para. 139.

⁸⁸ Cf. *Case Heliodoro Portugal V. Panamá*, *supra* note 76, para. 112; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 59, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 146.

⁸⁹ Cf. *Case Velásquez Rodríguez V. Honduras*. Merits, *supra* note 32, para. 185; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 59, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 122.

⁹⁰ Cf. *Case Goiburú et. al. V. Paraguay*, *supra* note 87, para. 85; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 59, and *Case Radilla Pacheco*, *supra* note 12, para. 122.

⁹¹ Cf. *Case Heliodoro Portugal V. Panamá*, *supra* note 76, para. 112; *Case Ticona Estrada et. al. V. Bolivia*, *supra* note 84, para. 56, and *Case Anzualdo Castro V. México*, *supra* note 86, para. 67.

according to them (material aspect) and furthermore, with strict attachment to the procedures objectively defined in the same (formal aspect).⁹²

91. The Court deems it sufficiently credited that Florencio Chitay Nech was detained by agents of the State or private individuals, whom acted with acquiescence, and that more than 29 years have passed since his detention and the whereabouts of his remains are still unknown.

92. In this sense, every time there are reasonable motives to suspect that a person has been subject to forced disappearance, an investigation should be initiated.⁹³ This investigation is independent from the file of a petition, since in cases of forced disappearance, international law imposes the obligation of investigating the case *ex officio*, without delay, and in a serious, impartial, and effective manner. This is a fundamental and conditional element for the protection of certain rights affected by such situation, such as personal liberty, humane treatment [personal integrity], and life.⁹⁴ Nevertheless, in any case, every state authority, public or private official, that has had notice of acts of the forced disappearance of persons, shall immediately report said facts.⁹⁵

93. In consideration of the foregoing, the Tribunal concludes that Florencio Chitay Nech was unlawfully detained and due to the fact he was considered an "internal enemy", given his condition as cooperative and political leader (*supra* paras. 64, 69, 71, 72, and 74; *infra* para. 112). Likewise, it can be determined that the detention and later disappearance of Florencio Chitay Nech was hidden by the authorities, to the extent that they did not initiate a serious and effective investigation given the disappearance, omitting their duty of guarantee of the violated rights, and without giving, to this date, response about the whereabouts of Mr. Chitay Nech.

94. Regarding Article 5 of the American Convention, this Tribunal has held that the forced disappearance is a violation of the right to human treatment because "the mere fact of prolonged isolation and coercive lack of communication, represents a cruel and inhumane treatment, [...] in contradiction to paragraphs 1 and 2 of the [Article 5 of the Convention],"⁹⁶ therefore "it results evident that in a victim of forced disappearance has had their personal integrity violated in all its dimensions."⁹⁷

⁹² *Case Gangaram Panday V. Suriname*. Merits, Reparations and Costs. Judgment of 21 of January of 1994. Series C No. 16, para. 47. *Cf. Case Servellón García et. al. V. Honduras*. Merits, Reparations and Costs. Judgment of 21 of September of 2006. Series C No. 152, para. 89, and *Case Ticona Estrada et. al. V. Bolivia*, *supra* note 84, para. 57.

⁹³ *Cf.* Article 12(2) of the International Convention for the Protection of all Persons against Forced Disappearances and Article 13 of the Declaration on the Protection of All Persons against Enforced Disappearance. Furthermore, the Declaration and the Programme of Action of Vienna, approved by the World Conference of Human Rights, on June 25, 1993, establishes that: Además, la Statement and el Programa of Acción of Viena aprobados por la Conferencia Mundial of Derechos Humanos el 25 of June of 1993, establece que: "[i]t is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction and, if allegations are confirmed, to prosecute its perpetrators" (para. 62).

⁹⁴ *Cf. Case of la Masacre of Pueblo Bello V. Colombia*. Merits, Reparations and Costs. Judgment of 31 of January of 2006. Series C No. 140, para. 145; *Case Anzualdo Castro*, *supra* note 86, para. 65, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 143.

⁹⁵ *Cf. Case of la Masacre of Pueblo Bello V. Colombia*, *supra* note 94, para. 145; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 65, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 143.

⁹⁶ *Cf. Case Velásquez Rodríguez V. Honduras*. Merits, *supra* note 32, para. 187; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 85, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 153.

95. Likewise, the Court has acknowledged that “subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a specific case.”⁹⁸ Furthermore, the Tribunal has established that forced disappearance has often involved secret execution without having a trial, followed by concealment of the body with the purpose of erasing any material evidence of the crime and pursuing the impunity of those responsible.⁹⁹

96. In this sense, in relation with Article 4 of the American Convention, the Court has considered that due to the nature of the forced disappearance, the victim is in an aggravated situation of vulnerability, from which the risk of several rights being violated arises, among those, the right to life. This situation is accented before a systematic pattern of human rights violations. In the same manner, the Court has established that the lack of investigation of the events represents an infraction of the legal duty established in Article 1(1) of the Convention in relation with Article 4(1) of the same, which is to guarantee to every person subject to their jurisdiction the inalienability of life and the right not to be arbitrarily deprived of it, which includes the reasonable prevention of situations that could result in a restraint to such right.¹⁰⁰

97. Regarding Article 3 of the Convention, the Commission and the representatives coincided in stating that, due to the forced disappearance, the right of Florencio Chitay to juridical personality was violated, leaving him outside the legal and institutional rules of procedure and in a situation of total vulnerability before his captors. In that respect, the State did not accept responsibility for the violation of this right for considering that it does not have a legal content of its own, as it has been previously stated by this Tribunal.

98. According to its most recent Jurisprudence, due to the multiplicity and complexity of this grave violation of human rights, this Tribunal, in the *Case of Anzualdo Castro v. Perú*, reconsidered its previous position and deemed possible that, in cases of this nature, the forced disappearance may entail a specific violation of the referred right: despite the fact that the disappeared person can no longer exercise and enjoy other rights, and eventually all the rights to which he or she is entitled, his or her disappearance is not only one of the most serious forms of placing the person outside the protection of the law but it also entails a denial of that person's existence and to place him or her in a sort of limbo or uncertain legal situation before society, the State, and even the international community.¹⁰¹

99. In attention to the foregoing, although this Court had established, in previous cases that such definition did not refer expressly to the acknowledgement of the right to juridical

⁹⁷ *Case Ticona Estrada et. al. V. Bolivia*, *supra* note 84, para. 58.

⁹⁸ *Case Velásquez Rodríguez V. Honduras*. Merits, *supra* note 32, para. 175; *Case Ticona Estrada et. al. V. Bolivia*, *supra* note 84, para. 59, and *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 85..

⁹⁹ *Cf. Case Velásquez Rodríguez V. Honduras*. Merits, *supra* note 32, para. 157; *Case Ticona Estrada et. al. V. Bolivia*, *supra* note 84, para. 59, and *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 85.

¹⁰⁰ *Cf. Case Velásquez Rodríguez V. Honduras*. Merits, *supra* note 32, para. 188; *Case Ticona Estrada et. al. V. Bolivia*, *supra* note 84, para. 60, and *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 86.

¹⁰¹ *Cf. Case Anzualdo Castro V. Perú*, *supra* note 86, para. 90, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 157.

personality within the elements of definition of the complex crime of this practice¹⁰², it shall be noted that in application of the principle of effective application and of the needs of protection in cases of persons and groups in situations of vulnerability; this Tribunal, according to the evolution of the international *corpus juris* regarding this matter,¹⁰³ has interpreted in an ample manner Article II of ICFDP, that has permitted the conclusion that the negative consequence of the denial to acknowledge the deprivation of liberty or the whereabouts of the person is, altogether with the other elements of the disappearance, “the *subtraction from the protection of the law*,”¹⁰⁴ or likewise, the violation of the personal and legal security of the individual, that directly impedes the acknowledgement of juridical personality.

100. Furthermore, such consequence is evident when, from the *modus operandi* of this practice, deliberate intention follows, not only to leave the individual outside the exercise of the applicable legal remedies and procedural guarantees, but also from other rights, whether Civil or Political, as well as his or her extraction from their community and family group, as it is configured in the present case. (*infra* para. 121).

101. Therefore, the State should respect and guarantee the means and legal conditions for the right to juridical personality to be exercised freely and fully by those that are entitled to it.¹⁰⁵ Said acknowledgement determines its effective existence before the society and the State, that allows him or her to be entitled to rights and obligations, to exercise them, and to have legal capacity to act, which constitutes a right inherent to the human being that cannot be derogated by the State according to the American Convention.¹⁰⁶

102. Consequently, the Court reiterates that in the cases of forced disappearance of persons the victim is left in a situation of legal indetermination that makes impossible, hinders, or nullifies the possibility of the person to be entitled to or to exercise in an effective way his or her rights in general, which constitute one of the gravest forms of breaching the State obligations to respect and guarantee human rights.¹⁰⁷ This turns into a violation to the right to recognition as a person before the law of Florencio Chitay Nech.

103. In light of the aforementioned, the Court finds that the State is responsible for the forced disappearance of Florencio Chitay Nech and violated the rights enshrined in Articles 7(1) (Right to Personal Liberty), 5(1) and 5(2) (Right to Humane Treatment [Personal Integrity]), 4(1) (Right to Life), and 3 (Right to Juridical Personality) of the American Convention, in relation with Article 1(1) (Obligation to Respect Rights), to his detriment.

¹⁰² Cf. *Case Bámaca Velásquez V. Guatemala*. Merits, *supra* note 50, para. 180, and *Case Ticona Estrada et. al. V. Bolivia*, *supra* note 84, para. 69.

¹⁰³ Cf. *Case Sawhoyamaya Indigenous Community V. Paraguay*. Merits, Reparations and Costs. Judgment of 29 of March of 2006. Series C No. 146, para: 189; *Case of Saramaka People V. Suriname*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 28 of November of 2007. Series C No. 172, para. 166, and *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 89.

¹⁰⁴ *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 96.

¹⁰⁵ Cf. *Case Sawhoyamaya Indigenous Community V. Paraguay*, *supra* note 103, para. 189; *Case of Saramaka People V. Paraguay*, *supra* note 103, para. 166, and *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 88.

¹⁰⁶ Cf. Article 27 (Suspension of Guarantees) of the American Convention.

¹⁰⁷ Cf. *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 101, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 157.

3. Forced disappearance and the right to participation and political representation in the present case

104. The Commission and the representatives coincide in expressing that the State is responsible for the violation to Article 23 of the Convention, in relation with Article 1(1) of that treaty, against Florencio Chitay Nech, given that the purpose of his forced disappearance was the direct damage, and even more, the absolute suppression of the exercise of his political rights. In this sense, the repression unleashed against him had the purpose of depriving him from all political participation and, in general, participation in the social and political structures of which he formed a part, as well as the complete annihilation of the leadership and structure of the municipality.

105. The representatives, in their written brief of final arguments, added that such violation was carried out in two levels: a) the right to directly participate in the leadership of political affairs in conditions of equality, given that his character as indigenous and cooperative leader constituted the motive for his disappearance and there exists a general pattern of harassment against the Mayans, and b) the right of the indigenous community of Quimal de San Martín Jilotepeque to participate through their freely elected representatives since the violation to the rights of the elected indigenous also affected the rights of the electors. In turn, the State acknowledged its responsibility for the violation of this right (*supra* para. 13).

106. The Court has pointed out that “according to Articles 23, 24, 1(1) and 2 of the Convention, the State has the obligation of guarantying the enjoyment and application of such rights according to the principles of equality and non-discrimination, and shall adopt the necessary measures to guarantee its full exercise [...], considering the situation of weakness and destitution of the members of certain sectors or social groups.”¹⁰⁸

107. The political rights established in the American Convention, as well as in several international instruments,¹⁰⁹ allow the strengthening of the democracy and political pluralism. In particular, the right to effective political participation implies that the citizens have, not only the right, but also the possibility to participate in the leadership of public affairs. Furthermore, it has been recognized that the effective exercise of political rights constitutes an end in itself, and at the same time, a fundamental means that democratic societies have to guarantee the other human rights established in the Convention.¹¹⁰

¹⁰⁸ *Case Yatama V. Nicaragua*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 23 of June of 2005. Series C No. 127, para. 201. *Cf. Juridical Condition and Rights of Migrants*. Advisory Opinion OC-18/03 of 17 of September of 2003. Series A No. 18, para. 89; *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of 28 of August of 2002, para. 46, and Human Rights Commission. *General Observation No. 25*, General comments adopted by the Human Rights Commission, Article 25 – Participation in public matters, the right to vote. HRI/GEN/1/Rev.7 at 194 (1996).

¹⁰⁹ *Cf.* Some of this international instruments are: Inter-American Democratic Charter (Articles 2, 3 and 6); American Convention on Human Rights (Article 23); American Declaration on the Rights and Duties of Men (Article XX); Universal Declaration of Human Rights (Article 21); International Covenant on Civil and Political Rights, (Article 25) of 1993; Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3); and African Charter of Human and People’s Rights “Chapter of Banjul” (Article 13).

¹¹⁰ *Cf.* Organization of American States. *Inter-American Democratic Charter*. Approved in the twentieth plenary session of the OAS Assembly, celebrated on September 11, 2001 during the Twenty eight Period of Sessions, Article 3. Acknowledges that: [e]ssential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government. *Cf.* UN. Human Rights Council, Background

108. In the present case, it is evident that the pattern of harassment against the population considered an “internal enemy” (*supra* paras. 64 and 93), conformed mostly of the Mayan people, was aimed at damaging not only the social foundations,¹¹¹ but also their leaders, and social and political representatives. The motive within which the forced disappearance of Florencio Chitay Nech took place, as well as those of other members that exercised public charges, shows the clear intention of the State to dismantle all forms of political representation that threatened their “National Security Doctrine” (*supra* para. 64).

109. In that sense, the expert opinion of Mónica Pinto reveals that “[t]he implementation of the [D]octrine of [N]ational [S]ecurity had a specific expression in the policy of forced disappearances [, being] the indigenous leaders [...] one of the most frequent targets of this policy.”¹¹² Likewise, from the expert opinion rendered by Edgar Armando Gutiérrez Girón, it follows that “the different police and [...] military bodies regularly persecuted [, among others,] political leaders.”¹¹³

110. In that extent, Florencio Chitay Nech, after being appointed as First Councilman and later designated Mayor of the Municipality, was subject to specific threats and was impeded from exercising his public functions in service of the community, after his formation and active participation as its leader.¹¹⁴

111. Likewise, the expert Rosalina Tuyuc, who made reference before the Court of the persecution that the indigenous leaders experienced in Guatemala during the internal armed conflict, expressed that:

[F]or History, for tradition, for custom, for good faith, many of the leaders of [the] country are born, are formed and put their knowledge to the service of the community, every leader starts a process from the smallest charge to the highest charge, within it all the community leaders in [the] country were mainly target of the persecution of the army[. I]t was believed that as a consequence of the influence of the leaderships [,] the army mainly[,] saw them as a great threat because it saw the community work, the social work, the solidarity of the community, and this was seen as a problem of communism.

[W]hen the communities saw how they lost their leader one after the other, their hope for development fled[. E]very leader meant a very deep loss and a grand step backwards for our villages because every leader that grows, [...] grows due to his or her gift of service, gift of management, gift for hearing and orienting the community[. N]ot having a guide anymore is [...] a moment of darkness, a leader was always a light, and when the light is not there anymore[,] the communities were essentially left in darkness without knowing what to do in search of solutions to the community problems.

Historically, the official system was very racist, excluding the indigenous peoples, and when it comes to be that an indigenous person reaches a position of authority this also means that they are going to come and demand that problems be solved, and, that is why in many places in where there was indigenous corruption, it was also where there was more persecution.

document by the independent expert on minority issues, Gay McDougall, on minorities and effective political participation. Forum on Minority Issues. Geneva, 12–13 November 2009, para. 1.

¹¹¹ Cf. *Case of la Masacre Plan of Sánchez V. Guatemala*. Merits. Judgment of 29 of April of 2004. Series C No. 105, para. 42.7; *Case Myrna Mack Chang V. Guatemala*, *supra* note 12, para. 139, and *Case of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 71.

¹¹² Expert opinion of Mónica Pinto, *supra* note 48.

¹¹³ Expert opinion of Edgar Armando Gutiérrez Girón, *supra* note 52.

¹¹⁴ Cf. Statement of Luis Alfonso Cabrera Hidalgo, *supra* note 53; Statement of Julián Zet, *supra* note 56, f. 584, and Statement of Pablo Werner Ramírez Rivas, *supra* note 53.

112. The Court also observes that from the several testimonies rendered during the process, the leadership of Florencio Chitay Nech is noticeable. Thus, Pablo Werner Ramírez Rivas declared that “[d]uring the time of the armed conflict many of the great leaders [...] of the [DCG] Party were lost, and as a consequence of their labor and municipal leadership [, Florencio Chitay Nech] was kidnapped.”¹¹⁵ Likewise, Gabriel Augusto Guerra pointed out that Mr. Chitay Nech “was not only a leader on the municipal level, but also on the department [provincial] level, and the national level.”¹¹⁶ In turn, Julian Zet declared that he “had to live next to [Florencio Chitay alias] don Lencho [...], leader of [his] village, that fought for the wellbeing of [the] community, paying with his life, offering it to the service of [the people].”¹¹⁷

113. Due to the foregoing, with the harassment and later disappearance of Florencio Chitay Nech, not only was the exercise of his political right shattered during the period of his charge, but he was also prevented from fulfilling a mandate and a vocation within the process of formation of community leaders. Likewise, the community was deprived of the representation of one of its leaders in the various forums of its social structure, and principally in access to the full exercise of the direct participation of an indigenous leader in the structures of the State, where the representation of groups in situations of inequality becomes a necessary prerequisite for the self-determination and the development of the indigenous communities within a plural and democratic State.

114. In this sense, the Court has acknowledged that the State shall guarantee that “the members of the indigenous and ethnic communities [...] are able to participate in the making of decisions regarding matters and policies that affect or may affect their rights and the development of such communities, in a manner that they can integrate themselves into the State institutions and organs and participate in a direct manner proportional to their population in the leadership of public affairs [...] and in accordance with their values, traditions, customs and forms of organization.”¹¹⁸ The contrary affects the lack of representation in the institutions charged with adopting policies and programs that could affect their development.¹¹⁹

115. The Court notices that in the development of the represented political participation, those elected exercise their charge by mandate or designation¹²⁰ and in representation of a community. This duality is both the right of the individual to exercise the mandate or designation (direct participation) as well as in the right of the community to be represented. In this sense, the violation of the first reverberates in the damage of the other right.

¹¹⁵ Statement of Pablo Werner Ramírez Rivas, *supra* note 53.

¹¹⁶ Statement of Gabriel Augusto Guerra, *supra* note 58.

¹¹⁷ Statement of Julián Zet, *supra* note 56.

¹¹⁸ *Case Yatama V. Nicaragua*, *supra* note 108, para. 225.

¹¹⁹ *Cf. Case Yatama V. Nicaragua*, *supra* note 108, para. 227.

¹²⁰ The Court has established that “the right to have access of public duties in general conditions of equality protects the access, in a direct manner, the participation in design, implementation, development, and execution of state policy via public functions. It is understood that these general conditions of equality are directed both to access and public functions by popular vote as well as by designation.” *Case Yatama V. Nicaragua*, *supra* note 108, para. 200.

116. In the present case, Florencio Chitay Nech was deliberately obstructed, by the structure of the State, from participating in his democratic exercise in representation of his community, which according to their vision and tradition was elected to serve and contribute to the construction of their free development.¹²¹ Likewise, the Tribunal notices that it is unreasonable that while the indigenous population is one of the majoritarian populations in Guatemala, their indigenous representation from leaders such Florencio Chitay Nech was shattered.

117. Therefore, the State did not fulfill its duty to respect and guarantee the political rights of Florencio Chitay Nech, given that due to his forced disappearance, configured as a selective disappearance, he was deprived from the exercise of the right to political participation in representation of his community, recognized in Article 23(1), subparagraph a) of the American Convention.

4. Breaches of the ICFDP in the present case

118. The representatives alleged the violation of Articles I(a), II, and III of the ICFDP.

119. In regard to Article I(a)¹²² of the ICFDP, that entered into force in March 28, 1996, and that was ratified by the State in February 2000, and taking into consideration that the forced disappearance of Florencio Chitay Nech subsists to this date, the Court finds that the State has breached its obligation to not practice, permit, or tolerate such practice.

120. For its part, Article II¹²³ of the ICFDP does not constitute an obligation in itself, instead it contains a definition of the concept of forced disappearance, to which the Court considers that said Article has not been met in the *cas de espèce*. Lastly, regarding the argument of the representatives of the alleged breach of Article III of the ICFDP,¹²⁴ the

¹²¹ Cf. *Case Yatama V. Nicaragua*, *supra* note 108, paras. 225, 226 and 227.

¹²² The text of Article I of the ICFDP establishes that States Party to the Convention undertake:

- a. Not to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees;
- b. To punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories;
- c. To cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons;

d. To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.

¹²³ The text of Article II of the ICFDP notes that for the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

¹²⁴ The text of Article III of the ICFDP notes that the States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined.

Court observes that the representatives did not alleged such breach, instead it was not until their final arguments that they referred to it. Hence the Tribunal deems that it is extemporaneous, and breaches the guarantees of defense, adversarial principle and good faith in the procedure of the parties.¹²⁵

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121. In conclusion, the Court deems that the State is responsible for the forced disappearance of Florencio Chitay, given that he was deprived of his liberty in an illegal manner by agents of the State or private citizens with the acquiescence of the State, and to this date his whereabouts remain unknown. The foregoing took place in a systematic context of selective forced disappearances in Guatemala, directed, among others, against indigenous leaders, with the objective of dismantling all forms of political representation through the terror and thus shattering the popular participation that was contrary to the State policy. Specifically, the *modus operandi* and the subsequent concealment of his whereabouts to which Mr. Chitay Nech was subjected, reflects the deliberate intention to remove him from the legal sphere and to impede the exercise of both his civil and political rights. The aggravated situation, to which he was subjected, undoubtedly caused him feelings of anguish, fear and defenselessness that implied the violation of his right to humane treatment and to life. Consequently, the Court finds that the State is responsible for the violation of the rights established in the Articles 7(1) (Right to Personal Liberty), 5(1) and 5(2) (Right to Personal Integrity), 4(1) (Right to Life), 3 (Right to Juridical Personality), and 23(1) (Right to Participate in Government) of the American Convention, in relation with Article 1(1) (Obligation to Respect Rights) of the same, in relation with Article I(a) of the ICFDP, to the detriment of Florencio Chitay Nech, for his forced disappearance.

IX FORCED DISPLACEMENT (ARTICLE 22), RIGHTS OF THE FAMILY (ARTICLE 17) AND CHILDREN (ARTICLE 19), IN RELATION TO ARTICLE 1(1) OF THE AMERICAN CONVENTION

122. In the present Chapter, the Court shall analyze the alleged violation to the protection of the family and the child, acknowledged in Articles 22, 17, and 19 of the American Convention.

1. Context and background

123. The displacement of the indigenous Mayan population during the internal armed conflict in Guatemala, as well as the terror and uprooting, have been documented in various reports. In this sense, the report, *Guatemala, Memories of the Silence*, pointed out that:

The States Parties may establish mitigating circumstances for persons who have participated in acts constituting forced disappearance when they help to cause the victim to reappear alive or provide information that sheds light on the forced disappearance of a person.

¹²⁵ Cf. *Case of la Masacre of Pueblo Bello V. Colombia*, supra note 94, para. 225, and *Case Perozo et. al. V. Venezuela*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 28 of January of 2009. Series C No. 195, para. 290.

Displacement of the civilian population is notable [...] due to its massive character and its destructive effect. [...] It implies the dismemberment of families and communities, at the same time that the cultural ties that conformed their cohesion were altered. The terror without precedent [...] unleashed the massive fleeing of diverse people, whose majority was formed by Mayan communities [...]. The estimate of those displaced oscillates between 500 thousand and one million and a half persons in the most affected period (1981-1983), adding those that were internally displaced and those that were obligated to seek refuge outside the country. [...] For some families the displacement was not longer than a few weeks; some others remained outside their community for years. Nevertheless[,] the grade of destruction and the effects that took place during their absence were frequently similar.¹²⁶

124. In the same sense, the report, *Guatemala, Never Again*, stated that:

Due to the material destruction of their belongings, their goods obtained and built over a lifetime and the fear of losing their lives, the inhabitants of these forced communities were dispersed and displaced to go to different places because of fear. [...] For some of them, it serves as a stimulus to go back to their devastated communities, for others, on the other hand, it is not; due to the horror of the facts that obligated them to leave their community. Despite the desire to come back and recover their property, the fear makes them stay in the new location in which they settled.¹²⁷

125. The violence of the armed conflict had a grave impact on the indigenous Mayan families, since it did not only cause, in many cases, the disappearance of one of the parents and/or separation of the children, but it also signified the abandonment of their communities and traditions.¹²⁸

126. The Tribunal observes that the larger part of the indigenous Mayan population, specifically that of rural areas, live in communities which represent the minimum unit of social organization with an authority system of its own. The communities are territorial spaces, generally villages or hamlets, that have a legal-political structure based around an auxiliary Mayor's office, that constitute a grid of social, economic, cultural, and religious relations.¹²⁹

127. This context is the framework of the situation of the indigenous Mayan *kaqchikel* family Chitay Rodríguez, that was formed by the father Florencio Chitay Nech, the mother Marta Rodríguez Quex and the children Encarnación, Pedro, Eliseo, Estermerio and María Rosaura Chitay Rodríguez, that resided in the Municipality of San Martín Jilotepeque, Department of Chimaltenango (*supra* para. 70).

128. Florencio Chitay Rodríguez suffered three kidnapping attempts and attacks against his domicile. In November 1980, the first attack against the family domicile was registered, during which the kidnappers came to his home and shot machine guns at his house. The second attack took place a few days after; this time they entered the interior of the house and shot. At that moment, the children were spending the night in the house of their next

¹²⁶ CEH, *Guatemala: Memory of Silence*, *supra* note 35, Tome IV, Chapter III, pages 119 and 120, para. 4193.

¹²⁷ REMHI, *Guatemala Nunca Más*, *supra* note 35, fs. 1387 and 1388.

¹²⁸ Cf. Expert opinion of Rosalina Tuyuc rendered during the public hearing at the Court on February 2, 2010.

¹²⁹ CEH, *Guatemala: Memory of Silence*, *supra* note 35, Tome IV, Chapter III, page 164, para. 4328.

of kin as decided by Mr. Chitay Nech. In the third attack, the assailants came into the house, and not finding Mr. Chitay Nech, set some of the belongings of the family on fire.¹³⁰

129. As a consequence of these attacks, the Chitay Rodríguez family fled to Guatemala City (*supra* para.74). Florencio Chitay Nech traveled using a road that was not guarded by the Army. Some days later, Encarnación and Marta Rodríguez Quex, traveled with María Rosaura Chitay Rodríguez (hereinafter “María Rosaura Chitay” or “María Rosaura”) under her arm, took the same route. For their part, Pedro, Eliseo and Estermerio took the route guarded by the Army and pretended to be sons of a cousin, and given that they were minors, they were not asked for documents.¹³¹ At that moment, María Rosaura; Estermerio; Eliseo; Pedro, and Encarnación, were 8 months old, and 5, 9, 12, and 15 years of age,¹³² respectively.

130. Upon their arrival to Guatemala City, the Chitay Rodríguez family moved into a rental room (*supra* para. 74). While, Mr. Chitay Nech worked at a refrigeration workshop, his wife sold tortillas.¹³³ On April 1, 1981, Florencio Chitay Nech was illegally detained in front of his 5 year old son, Estermerio Chitay. The child was pointed at with a gun by one of the kidnappers, so his father would not resist. (*supra* para. 75).

131. After several weeks of the forced disappearance of Florencio Chitay Nech, Marta Rodríguez Quex with her children Pedro, Eliseo, Estermerio, and María Rosaura Chitay Rodríguez returned to San Martín Jilotepeque. In that sense, the representatives indicated that the members of the Chitay Rodríguez family stayed in San Martín Jilotepeque until approximately 1984, the year in which they left permanently when finding out that the persons that had taken their father were looking for the surviving members of the family.

132. The Court observes that neither the Commission nor the representatives pointed out what happened specifically in the period between the return of the next of kin of Mr. Chitay Nech to the community of San Martín Jilotepeque and after March 9, 1987, when Guatemala acknowledged the adjudicatory jurisdiction of the Tribunal. However, considering the context in which the facts took place, the declarations of the alleged victims, the witnesses, as well as the reports of the experts, the Tribunal has proved the following:

133. Once Florencio Chitay disappeared, the Chitay Rodríguez family stayed in Guatemala City for approximately two months. Due to their precarious condition, they went back to

¹³⁰ Cf. Statement of Encarnación Chitay Rodríguez, *supra* note 57; Statement of Pedro Chitay Rodríguez, *supra* note 56, fs. 80 and 8; Statement of Eliseo Chitay Rodríguez, *supra* note 57; statement of Pedro Chitay Rodríguez, *supra* note 55; statement of Encarnación Chitay Rodríguez, *supra* note 58, and Statement of Gabriel Augusto Guerra, *supra* note 58, fs. 577 and 578.

¹³¹ Cf. Statement of Encarnación Chitay Rodríguez, *supra* note 57; Statement of Estermerio Chitay Rodríguez, *supra* note 57; Statement of Pedro Chitay Rodríguez, *supra* note 56, f. 81; statement of Encarnación Chitay Rodríguez, *supra* note 58, and Statement of Estermerio Chitay Rodríguez rendered before public notary on 11 of January of 2010 (brief of Preliminary Exceptions, Merits, Reparations and Costs, Tome IV, fs. 592 and 593).

¹³² Cf. Birth certificates of Encarnación Chitay Rodríguez, Pedro Chitay Rodríguez and Eliseo Chitay Rodríguez, rendered on 31 of May of 2007 by the Civil Registry of the Municipality of San Martín Jilotepeque, Department of Chimaltenango (brief of Preliminary Exceptions, Merits, Reparations and Costs, Tome V, fs. 889, 890 and 915), and birth certificates of Estermerio Chitay Rodríguez and María Rosaura, both Chitay Rodríguez rendered on 1 of June of 2007 by the Civil Registry of the Municipality of San Martín Jilotepeque, Department of Chimaltenango (brief of Preliminary Exceptions, Merits, Reparations and Costs, Tome V, fs. 892 and 893).

¹³³ Cf. Statement of Pedro Chitay Rodríguez, *supra* note 55, and statement of Encarnación Chitay Rodríguez, *supra* note 58.

the municipality,¹³⁴ where they faced hardship in their attempts to reside there, given that their next of kin and her husband's next of kin, did not want to receive them because of the fear of suffering reprisals.¹³⁵ The only family member that offered them help was the father of Marta Rodríguez Quex,¹³⁶ who offered them room and food in the village of Xejujú, located approximately eight kilometers from San Martín Jilotepeque, where they lived until new acts of violence took place.¹³⁷ They tried to rebuild their house in the municipality and to inhabit it, but they could not stay, since there was a context of stigmatization from their neighbors.¹³⁸ Meanwhile, Encarnación Chitay, as the older son, at 15 years of age, stayed in Guatemala City to work, where he was subject to persecution,¹³⁹ and did not return to San Martín Jilotepeque because he felt they "would kill him," and he did not have contact with his family for approximately five and a half years.¹⁴⁰ Pedro and Eliseo did not stay with their mother in their place of origin for very long, since they also had to move to the capital city. In 1983, Pedro Chitay entered a boarding school to study with a scholarship,¹⁴¹ whereas Eliseo Chitay had to move to the capital to help an aunt, who paid for studies, but after she passed away, it became necessary to move back to the Municipality of San Martín Jilotepeque, and he dedicated himself to work to help his family.¹⁴² The Chitay family never again lived in their community in a definitive and continuous form.

134. The next of kin of Florencio Chitay Nech could not return to live in their house in San Martín Jilotepeque in a permanent manner.¹⁴³ Currently, María Rosaura lives in Spain;¹⁴⁴ Eliseo and Estermerio live in United States,¹⁴⁵ and Pedro¹⁴⁶ and Encarnación¹⁴⁷ live in Guatemala.

¹³⁴ In this regard, he indicated "we staid in the city for approximately 2 months." Cf. Statement of Pedro Chitay Rodríguez, *supra* note 55.

¹³⁵ Statement of Pedro Chitay Rodríguez, *supra* note 56, f. 83.

¹³⁶ Cf. Statement of Eliseo Chitay Rodríguez, *supra* note 57; Statement of Amada Rodríguez Quex rendered before public notary on 19 of April of 2007 (annexes of the petition, annex 1, f. 92); statement of Pedro Chitay Rodríguez, *supra* note 55; statement of Encarnación Chitay Rodríguez, *supra* note 58, and Statement of Estermerio Chitay Rodríguez, *supra* note 131.

¹³⁷ Cf. Statement of Gabriel Augusto Guerra, *supra* note 58, and statement of Pedro Chitay Rodríguez, *supra* note 55.

¹³⁸ Statement of Pedro Chitay, *supra* note 55, wherein he stated "[w]e were the object of persecution there and from then on the house we had in the municipality we couldnt live in it because the neighbors spoke poorly of my father, they believed what people were saying, that who knows what he was involved in and thats why it happened to him."

¹³⁹ Statement of Encarnación Chitay Rodríguez, *supra* note 57, f. 78; Statement of Pedro Chitay Rodríguez, *supra* note 56, f. 83, and Statement of Amada Rodríguez Quex, *supra* note 136.

¹⁴⁰ Statement of Encarnación Chitay Rodríguez, *supra* note 58.

¹⁴¹ Cf. Statement of Pedro Chitay Rodríguez, *supra* note 55.

¹⁴² Cf. Statements of Eliseo and María Rosaura, ambos Chitay Rodríguez, *supra* note 57, fs. 86 and 89, and Statement of Pedro Chitay Rodríguez, *supra* note 55.

¹⁴³ Regarding the possibility of returning to San Martín in a permanent sense, Encarnación Chitay indicated that "if [...] returned to San Martín [they] would kill" and that "it was very difficult for us to return to San Martín [...] because of the insecurity." (Cf. Statement of Encarnación Chitay Rodríguez, *supra* note 58). In this regard, Pedro Chitay stated that as a consequence of the facts "with [his] brothers they were terrified of men in uniform" and that "they were very afraid when they returned to Guatemala [from Costa Rica]." Cf. Statement of Pedro Chitay Rodríguez, *supra* note 55.

¹⁴⁴ Cf. Statement of Pedro Chitay Rodríguez, *supra* note 55.

2. The forced displacement, the disintegration of the Chitay Rodriguez family and the effects on the cultural life of the indigenous children

A. *The forced displacement of the Chitay Rodriguez family*

135. The representatives alleged that as a result of the acts of intimidation and persecution that the members of the Chitay Rodriguez family suffered, they were obligated to escape suddenly from San Martín Jilotepeque and to move to Guatemala City, leaving all of their belongings either abandoned or destroyed. Since then it has been impossible to return to their place of origin, given that no authority has intervened in order to protect them, and there still exists a great amount of insecurity in the area, for which they fear they are targets of reprisals from the persons that took their father. Finally, they noted that for the children of Florencio Chitay Nech, the forced displacement implicated the loss of their culture, traditions, language and ancestral past which had an “even more dramatic effect given the fact that they are indigenous, as a result of the cultural value that the lands have from the point of view of the Mayan culture.”

136. The Commission did not allege the violation of the freedom of movement and residence. Nevertheless, in the application, paragraphs 69, 70, 187, and 188, it described that the Chitay Rodriguez family was obligated to escape to Guatemala City due to the harassments and persecutions against them.

137. The State did not make specific allegations to distort the claims of the representatives, but only mentioned that “the State of Guatemala, at no moment impeded or prohibited the freedom of movement and residence of the petitioners, and as such the State is not responsible for the supposed violation of Article 22.”

138. As previously considered, the Court finds it necessary to point out that in the present case, the supposed violation of Article 22 of the Convention, which was not alleged before the Commission, is based on the fact that Mr. Chitay Nech and his next of kin were objected to various acts of harassment and threats, for which they had to escape from San Martín Jilotepeque to Guatemala City (*supra* para. 74). The Tribunal has stated that the State had the opportunity to refer to said allegation in various procedural opportunities. Nevertheless, it did not present any specific arguments regarding the alleged violation, and only opposed the objection of non-exhaustion of domestic remedies, which was resolved by the Tribunal (*supra* para. 31 and 34). Consequently, the Court considers that the lack of claims regarding Article 22 in the processing before the Commission has not affected the procedural balance of the parties, nor has diminished the right of defense of the State regarding it having the opportunity to present its arguments and evidence through the process before this Tribunal.

¹⁴⁵ Cf. Statement of Pedro Chitay Rodríguez, *supra* note 55; statement of Eliseo Chitay Rodríguez, *supra* note 59, and statement of Estemerio Chitay Rodríguez, *supra* note 131.

¹⁴⁶ Cf. Statement of Pedro Chitay Rodríguez, *supra* note 55.

¹⁴⁷ Cf. Statement of Encarnación Chitay Rodríguez, *supra* note 58.

139. Article 22(1) of the Convention recognizes the freedom of movement and residence.¹⁴⁸ In this sense, the Court has established in other cases¹⁴⁹ that this Article also protects the right to not be displaced forcibly within the territory of a State Party.

140. In this regard, the Tribunal has considered that the Guiding Principles on Internal Displacements of the United Nations¹⁵⁰ are particularly relevant in order to define the content and scope of Article 22 of the American Convention,¹⁵¹ which define those forcibly displaced “as the persons or groups of persons that have been seen as forced or obligated to escape or run from their homes or their place of habitual residence, in particular as a result of or in order to avoid the effects of an armed conflict, of situations of generalized violence, of violations of their human rights [...], and that have not crossed an internationally recognized State border.”¹⁵²

141. This Tribunal has established that as a result of the complexity of the phenomenon of internal displacement and of the high range of human rights that are affected or put at risk, and in attention to the circumstances of special vulnerability or defenselessness in which the displaced are generally found, their situation can be understood as a *de facto* condition of vulnerability.¹⁵³ This situation, in compliance to the American Convention, obligated the States to adopt measures of a positive character in order to help with the effects of their condition of weakness, vulnerability and defenselessness, including *vis-à-vis*, regarding the actions and practices of third parties.¹⁵⁴

¹⁴⁸ Regarding Article 22(1) of the Convention, it established that “[e]very person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.”

¹⁴⁹ Cf. *Case of the Mapiripan Massacre V. Colombia*, *supra* note 14, para. 188, and *Case of the Ituango Massacre V. Colombia*, *supra* note 24, para. 207.

¹⁵⁰ Cf. Human Rights Commission, Guiding Principles on Internal Displacement of the United Nations, E/CN.4/1998/53/Add.2 of 11 of February of 1998, p. 5. Annex. Introduction: Reach and Purpose. Numeral 2. Available at <http://www.hchr.org.co/documentoseReports/documentos/html/Reports/onu/resdi/E-CN-4-1998-53-ADD-2.html>. Said principles have been recognized by the international community. See also, United Nations, General Assembly, Protection and assistance for internally displaced, A/RES/64/162, of 17 of March of 2010, p.1. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/471/58/PDF/N0947158.pdf?OpenElement>; Cf. Council of Europe, Committee of Ministers, Recommendation Rec(2006)6 to member states on internally displaced persons, 5 April, 2006. Available at <https://wcd.coe.int/ViewDoc.jsp?id=987573&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>; African Union, *Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)*, 23 October 2009, article 1, K). Available at <http://www.unhcr.org/4ae9bede9.html>; Human Rights Council, Report presented by the representative of the General Secretariat on the human rights of internally displaced persons, Walter Kalin. A/HRC/13/21/Add.3, p. 4. II.4. Available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-21-Add.3.pdf>.

¹⁵¹ Cf. *Case of the Moiwana Community V. Suriname*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment 15 of June of 2005. Series C No. 124, para. 111; *Case of the Mapiripan Massacre V. Colombia*, *supra* note 14, para. 171, and *Case of the Ituango Massacre V. Colombia*, *supra* note 24, para. 209.

¹⁵² Cf. Guiding Principles on Internal Displacement of the United Nations, *supra* note 150, para. 2. In this regard, the General Assembly of the OAS has recommended that the States use the Guiding Principles based on the development of their policies and to integrate them in their domestic legislation to promote implementation. Cf. AG/RES. 2508 (XXXIX-O/09) “Internal Displacement,” Approved by the fourth plenary session, on 4 of June of 2009, operative paragraph 2 (available at: www.oas.org/dil/esp/AG-RES_2508-2009.doc).

¹⁵³ Cf. *Case of the Mapiripan Massacre V. Colombia*, *supra* note 14, para. 177, and *Case of the Ituango Massacre V. Colombia*, *supra* note 24, para. 210.

¹⁵⁴ Cf. *Case of the Mapiripan Massacre V. Colombia*, *supra* note 14, para. 179, and *Case of the Ituango Massacre V. Colombia*, *supra* note 24, para. 210.

142. On the other hand, this Tribunal has signaled that the freedom of movement and residence may be vulnerable to restrictions *de facto* if the State has not established the conditions nor foreseen the means that would permit it to be exercised,¹⁵⁵ for example when a person is a victim of threats and harassments and the State does not provide the necessary guarantees so that they can move and reside freely in the territory where these actions took place, including when the threats and harassments come from non-state actors.¹⁵⁶

143. In the present case, the Court notes that the next of kin of Florencio Chitay Nech had to escape from their community in order to protect their lives against the grave threats and constant persecutions that they suffered along with the other close members of the community, which are framed in the context of systematic violence, characterized by the implementation of the "Doctrine of National Security" by the part of the State against the indigenous Mayan groups and their political leaders in particular. (*supra* paras. 64, 108, 121, 123, 124).

144. This situation of harassment continued even after the move and affected various members of the extended family and other figures of the municipality. In this regard, the father of Florencio Chitay Nech, Pedro Chitay, and his brother, Jose Carlos Chitay Nech, had been victims of kidnapping in 1985; Eleodoro Onion Camay, husband of the sister of Florencio, had been kidnapped and murdered in 1988; Martin Chitay was kidnapped and murdered in 1990, and his sister, Rose Chitay Aguin, had been assassinated together with her new-born son in a massacre that occurred in the neighborhood of Semetabaj. Together with the aforementioned, as was indicated in the Report of the CEH, on November 21, 1980, Felipe Alvarez, municipal mayor of San Martín Jilotepeque had been the victim of a forced disappearance and his children were beaten, and then three of his children were disappeared.¹⁵⁷ Also, on January 6, 1981, the forced disappearance of Mario Augusto Garcia Roca, the Second Council of the Municipality of San Martín Jilotepeque took place.¹⁵⁸

145. Additionally, this Tribunal finds that the forced disappearance affected the members of the Chitay Rodriguez family in a particularly grave manner due to their connection with the Mayan indigenous group. As recognized by the expert witness Rosalina Tuyuc, the energetic connection with the land has a fundamental importance in the Mayan vision, for which the abandonment of the community not only was made material for the families that had to flee, but also signified a greater cultural and spiritual loss. She stated that:

Many of the sons of the farm workers, or of the Mayans, have their principal connection with Mother Earth [...] For the vision of the Mayan peoples, principally this is the connection with the land, with the air, with the water, with the forests, and when one is outside of the community, he or she has practically no energetic connection, and it is this that many of the thousands and hundreds of orphan sons now do not know because the movement of these energies, for having

¹⁵⁵ Cf. *Case of the Moiwana Community V. Suriname*, *supra* note 151, paras. 119 and 120; *Case of the Mapiripan Massacre V. Colombia*, *supra* note 14, para. 170, and *Case Valle Jaramillo V. Colombia*. Merits, Reparations and Costs. Judgment of 27 of November of 2008. Series C No. 192, para. 139.

¹⁵⁶ Cf. *Case Valle Jaramillo V. Colombia*, *supra* note 155, para. 139.

¹⁵⁷ Cf. CEH, *Guatemala: Memory of Silence*, *supra* note 35, Tome VIII, Annex II, Case No. 707.

¹⁵⁸ Cf. CEH, *Guatemala: Memory of Silence*, *supra* note 35, Tome VIII, Annex II, Case No. 707.

been denied, induced to be outside their community [...] and outside of the ancestral customs of the indigenous peoples. [...]

"[T]his cultural loss is non-quantifiable [so that] in many families, it signifies a self-prohibition [...] of not speaking the language, of not using their dress, not saying where one is from, not saying who is their father, who is their mother, to hide the identity, and to hide the last name, because to talk of an indigenous last name signifies immediate death."

146. Also, the displacement of the next of kin of Florencio Chitay Nech out of his community provoked a rupture with his cultural identity, which signified the total eradication of any reference to the life that he had before the persecution, including his culture, language and his ancestral past.¹⁵⁹

147. Consequently, conforming to the constant jurisprudence on indigenous matters, through which the relationship of the indigenous groups with their territory has been recognized as crucial for their cultural structures and their ethnic and material survival,¹⁶⁰ the Tribunal considers that the forced displacement of the indigenous peoples out of their community or from their members can place them in a special situation of vulnerability, that for its destructive consequences regarding their ethnic and cultural fabric, generates a clear risk of extinction and cultural or physical rootlessness of the indigenous groups,¹⁶¹ for which it is indispensable that the States adopt specific measures of protection¹⁶² considering the particularities of the indigenous peoples, as well as their customary law, values, uses, and customs,¹⁶³ in order to prevent and revert the effects of said situation.

148. Regarding the return to his community, the Tribunal observes that until now, the next of kin of Florencio Chitay Nech have not been able to return in a permanent manner to San Martin Jilotepeque, due to the well-founded fear that the possibility continues of suffering reprisals as a consequence of what has happened to their father and persons close to their family. Said fear continues affecting also the other next of kin and friends of the Chitay Rodriguez family that know of the facts and for which reason they decided not to give testimony.¹⁶⁴ In this sense, the next of kin of Mr. Chitay Nech have expressed their conviction of not being able to return to San Marin Jilotepeque while they do not have

¹⁵⁹ According to the representatives, the Chitay Rodriguez siblings were obligated to not use their father's last name and to identify themselves using their mothers last name, Rodriguez, and to leave their Mayan cultural heritage unattended, so as to maintain their father's memory alive and accomplish his wishes.

¹⁶⁰ The Court has determined that the culture of the members of the indigenous communities corresponds to a particular form of life, of being, seeing, and acting in the world, constituted from their close link with their traditional lands and natural resources, not only because they provide their means of subsistence, but also because they constitute an element part of their cosmovision, religiosity and, therefore, of their cultural identity. *Cf. Case Yakye Axa Indigenous Community V. Paraguay*, Judgment of Merits, Reparations and Costs of 17 of June of 2005, para. 135; *Case Sawhoyamaxa Indigenous Community V. Paraguay*, Judgment of 29 of March of 2006, para. 118.

¹⁶¹ *Cf. Order 004/009* rendered on 26 of January of 2009, Constitutional Court of Colombi, part 4, page 11. Available at <http://www.acnur.org/biblioteca/pdf/6981.pdf>.

¹⁶² *Cf. Guiding Principles on Internal Displacement*, *supra* note 150, Principle 9.

¹⁶³ *Cf. Case Yakye Axa Indigenous Community V. Paraguay*, *supra* note 160, para. 63; *Case Sawhoyamaxa Indigenous Community V. Paraguay*, *supra* note 103, para. 83, and *Case of Saramaka People V. Suriname. Preliminary Exceptions*, *supra* note 103, para. 178.

¹⁶⁴ *Cf. Statement of Pedro Chitay Rodriguez*, *supra* note 56, f. 85, and *Statement of María Rosaura Chitay Rodríguez*, *supra* note 57, f. 90.

security and justice from the State authorities.¹⁶⁵ Also, Encarnacion Chitay Rodriguez has declared that “if [...] he returned to San Martin, [they] would be killed” and that “it is very difficult that [they] retur[n] to San Marin [...] for the same insecurity.”¹⁶⁶ The Court takes note that despite having knowledge of the acts of persecution that were suffered, the corresponding authorities have not carried out an effective criminal investigation about the forced disappearance of Florencio Chitay Nech nor provided the guarantees of security necessary for his next of kin.

149. In this regard, it fits to signal that coinciding with the international community, this Tribunal reaffirms that the obligation of guarantee for the States to protect the rights of displaced persons carries with it not only the duty to adopt measures of prevention, but also to carry out an effective investigation of the supposed violation of those rights¹⁶⁷ and to provide the necessary conditions for a dignified and safe return¹⁶⁸ to their habitual place of residence or voluntary resettlement in another place in the country. As such, their full participation in the planification and manner in which they should return or be reintegrated, should be guaranteed.¹⁶⁹

150. Therefore, if Guatemala has not restricted the freedom of movement and residence of the members of the nuclear family of Florencio Chitay Nech in a formal manner, the Court finds that in this case, said freedom is limited by a grave *de facto* restriction, that originates with the threats and harassments that have provoked their splitting up, as well as the well-founded fear generated by all that occurred to their father, other family members, and the members of the community, combined with the lack of an investigation and procedure of those responsible for the facts, which have kept them away from their community. The State has not complied neither with its duty to guarantee this right, nor has it established the conditions or foreseen the means that could permit those members of the Chitay Rodriguez family to return in a safe and dignified manner to their community,¹⁷⁰ with respect to which they have an important cultural link. Finally, the State has not granted an integral reparation that restitutes the vulnerable rights and guarantees, among other things, guarantees of non-repetition of such situation.

¹⁶⁵ Encarnación Chitay Rodríguez stated that “if [...] she returned to San Martin [they] would kill” and that “it is very difficult that they return due to the same insecurity.” *Cf.* Statement of Encarnacion Chitay Rodríguez, *supra* note 58.

¹⁶⁶ Statement of Encarnación Chitay Rodríguez, *supra* note 58. Moreover, the representatives argued that “since the moment of displacement to date, there exists a founded fear that constitutes an obstacle to the possibility of the Chitay family returning to San Martín Jilotepeque given that there exists no clarification regarding the facts of the disappearance of Florencio Chitay Nech”.

¹⁶⁷ *Cf.* Report presented by the General Secretariat on human rights of internally displaced persons, Walter Kalin, *supra* note 150, para. 69; *Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)*, *supra* note 150, Article 3(1)g and h), and article 7(4).; Recommendation Rec (2006)6 of the Committee of Ministers to the member States on Internally Displaced Persons *supra* note 150, para. 5. Moreover, the Rome Statute, *supra* note 83, criminalizes the forced move of the population, which can constitute crimes against humanity (Article 7(1)(d)) or war crimes (Article 8(2)(a)(vii), b(viii), and e(viii)).

¹⁶⁸ *Cf.* Recommendation Rec (2006)6 of the Committee of Ministers to the member States on Internally Displaced Persons, *supra* note 150 para. 12; AG/RES. 2508 (XXXIX-O/09) “Internally Displaced,” *supra* note 152.

¹⁶⁹ *Cf.* Guiding Principles on Internal Displacement, *supra* note 150, Principle 28.

¹⁷⁰ *Cf. Case of the Moiwana Community V. Suriname*, *supra* note 151, para. 120, and *Case of the Mapiripan Massacre V. Colombia*, *supra* note 14, para. 170.

151. In conclusion of the foregoing, this Tribunal considers that the forced disappearance has been maintained since the recognition of the adjudicatory Jurisdiction of the Court effectuated on March 9, 1987. As a consequence, the Court considers that the State has not guaranteed to the members of the Chitay Rodríguez family their right of movement and residence for which it is responsible for the violation of Article 22 of the American Convention, in relation to Article 1(1) of the same, to the detriment of Encarnación, Pedro, Estermerio, Eliseo, and María Rosaura, all with the last name of Chitay Rodríguez.

B. The impacts on the Chitay Rodríguez family and on the cultural life of the indigenous children.

152. Both the Commission as well as the representatives alleged that the Chitay Rodríguez family was disintegrated as a consequence of the constant threats and persecutions that they suffered before, during, and after the disappearance of Florencio Chitay. They coincided also in their manifestation that Estermerio Chitay witnessed, as a five-year-old, how his father was beaten and forcibly disappeared, which constituted a violation to the rights of the child.

153. Additionally, the representatives alleged the violation of the rights of the child to the detriment of Eliseo, Estermerio, and Maria Rosaura Chitay Rodrigez because “[t]he familial disintegration and the forced constitution of a single parent home [constituted specific violations] to the rights of the child, that [...] when as a consequence of an act of the State signifies a full denial of the call to protect the family[,] because it presents obstacles to the possibility of comprehensive and healthy growth of the child and [...] does not permit the permanence of a family foundation carried out by a man and a woman [...].” Also, the representatives highlighted that the children of Florencio Chitay Nech were seen as forced to live in a culture that was not their own, which caused them the loss of their identity and cultural uproot.

154. For its part, the State recognized its responsibility for these facts and accepted the responsibility for the alleged violations regarding Articles 17 and 19 of the Convention, in relation to Article 1(1) of the same.

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155. To highlight first, the Court observes that the alleged fact on which the Commission and the representatives alleged the violation of Article 19 of the Convention in regard to Estermerio Chitay is based upon the fact that on April 1, 1981, he, as a five-year-old, witnessed his father being beaten and forcibly disappeared. The Court will not give a ruling about such allegation, since the fact occurred before March 9, 1987, the date on which Guatemala recognized the adjudicatory jurisdiction of the Court. Regarding Articles 17 and 19 of the Convention regarding Pedro, Encarnacion, Eliseo, Estermerio and Maria Rosaura Chitay Rodriguez, this Tribunal notes that if the allegations of the Commission and the representatives are based on the threats, the families displacement, harassments, and the forced disappearance of Florencio Chitay Nech, acts that occurred prior to the Court’s jurisdiction, these facts determined that the family structure remain disintegrated until after this date, the reason for which this Tribunal affirms its jurisdiction in order to hear of the same and of its international juridical consequences.

B.1 The disintegration of the Chitay Rodríguez family

156. Article 17 of the American Convention recognizes that the family is the natural and fundamental element of the society and has the right to protection from the society and the State. The protection of the family and its members is guaranteed also in Article 11(2) of the Convention that encompasses the prohibition of arbitrary or abusive interferences with the family,¹⁷¹ as well as by Article 19, that determines the protection of the rights of the child by the family, society, and State.¹⁷²

157. Due to the importance of the right to the protection of the family, the Court has established that the State is obligated to favor the development and strengthening of the familial nucleus¹⁷³ and that the separation of the children from the family constitutes, under certain circumstances, a violation of their right to family recognized in Article 17 of the American Convention.¹⁷⁴ In this way, “[t]he child has the right to live with his/her family, called to satisfy their material, psychological, and emotional needs. The right of each person to receive protection against arbitrary and illegal interferences with the family forms a part, implicitly, of the right to the protection of the family and the child.”¹⁷⁵

158. In this regard, the Court, in the *Consultative Opinion No. 17* relating to the *Legal Condition and Human Rights of Children*, recognized that the mutual enjoyment of the coexistence between parents and children constitutes a fundamental element in the life of the family,¹⁷⁶ and it observed that the European Court has established that the objective of Article 8 of the European Convention on Human Rights is not only to preserve the individual against arbitrary interferences of the public authorities,¹⁷⁷ but that, in addition, this Article imposes positive obligations on the State in favor of the effective respect to family life.¹⁷⁸

159. In the present case, the Court also recognizes the special significance that the coexistence of the family has in the context of an indigenous family, which is not limited to the familial nucleus but also includes the distinct generations that make up the family and

¹⁷¹ The Court has established that “[a]rticle 11 of the Convention prohibits all arbitrary or abusive intervention in the private life of persons, enunciating several aspects of it, such as the private life of their families, their domicile, or their mail.” *Cf. Case Tristán Donoso V. Panamá*. Preliminary Exception, Merits, Reparations and Costs. Judgment of 27 of January of 2008. Series C No. 192, para. 55, and *Case Escher et. al. V. Brasil*, *supra* note 21, para. 113.

¹⁷² *Cf. General Observation No. 19*, General comments adopted by the Human Rights Commission, Article 23 – the family. 39^o period of sessions, U.N. Doc. HRI/GEN/1/Rev.7 of 27 of July of 1990, para. 1.

¹⁷³ *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02, *supra* note 108, para. 66.

¹⁷⁴ *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02, *supra* note 108, paras. 71 and 72, and *Case of the Dos Erres Massacre Vs Guatemala*, *supra* note 12, para. 188.

¹⁷⁵ *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02, *supra* note 108, para. 71, and *Case of the Dos Erres Massacre Vs Guatemala*, *supra* note 12, para. 189.

¹⁷⁶ *Juridical Condition and Human Rights of the Child*. Advisory Opinion, OC-17/02, *supra* note 108, para. 72. *Cf. Eur. Court H.R., Case of Buchberger v. Austria, Judgment of 20 December 2001*, para. 35, *Eur. Court H.R., Case of T and K v. Finland, Judgment of 12 July 2001*, para. 151, *Eur. Court H.R., Case of Elsholz v. Germany, Judgment of 13 July 2000*, para. 43, *Eur. Court H.R., Case of Bronda v. Italy, Judgment of 9 June 1998, Reports 1998 a IV*, para. 51, and *Eur. Court H.R., Case of Johansen v. Norway, Judgment of 7 August 1996, Reports 1996 a IV*, para. 52.

¹⁷⁷ *Cf. Juridical Condition and Human Rights of the Child*. Advisory Opinion, OC-17/02, *supra* note 108, para. 72.

¹⁷⁸ *Cf. Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 189. *Cf. Eur. Court H.R., Case of Olsson v. Sweden, judgment of March 24, 1988, Series A, n. 130*, para. 81.

includes the community of which the family forms a part. In this regard, the expert witness Rosalina Tuyuc indicated the grave effects that the Mayan families suffered as a consequence of the forced disappearances and the displacement, and she stated that:

[t]he armed conflict sadly took the right of many families to be there as a family [...], for us the significance of having family means being with the grandfather, the grandmother, with the father, with the mother, with all the siblings, with the aunts and uncles [, and this] was one of the biggest impacts because many of the sons and daughters had to separate, some completely and others maybe even though under situations of poverty, misery, displacements [...] two or three children stayed together with the mother. Nevertheless, [in many cases] this was not possible and therefore the impact was that the coexistence of the family was lost [as well as] to be under the nucleus of the land where they were born.

160. Also, she signaled that the disappearance of the father or the mother not only signified a change in the roles in the sense that the surviving father has to assume the role of the mother and of the father at the same time, but that above all, this impeded the parents transmitting their knowledge in an oral manner, conforming to the traditions of the Mayan family. In this sense, she expressed that:

The Mayan families [...] never abandoned their children, the girls are always with their mother, [...] with the father [...] if it is a boy so that it corresponds to make their time equal they are together with the father to see how to prepare the land, how to classify the seeds, how the times of the rain are, of summer, of the drought, or of floods, and it is in this way that [...] with [the loss of one of the parents] a long path of learning and oral education is cut short.

161. Also, the Chitay Rodriguez brothers were prohibited from enjoying from the coexistence of their family due to the well-founded fear of returning to their place of origin, when other next of kin had disappeared, as well as the need to feed and educate themselves. Therefore, they had to grow up separated due to the fact that while their mother returned to San Martín Jilotepeque with Estermerio and María Rosaura, the other brother Encarnacion had to stay to work in the capital, his brother Pedro was admitted to a seminar, and Eliseo went to help an aunt in the capital. This Court notes that this situation of rupture of the family structure is evident today, given that the three younger siblings live abroad and only the two older brothers reside in their country of origin. (*supra* para. 133 and 134).

162. The Court takes into account that the forced disappearance had as its purpose to punish not only the victim but also his community and his family. (*supra* para. 67). In the present case, the Tribunal considers that, the forced disappearance of Florencio Chitay Nech aggravated the situation of displacement and the cultural uproot that the family suffered. In this way, the disintegration of their land affected the members of the Chitay Rodriguez family in a particularly grave manner due to their condition as Mayan indigenous persons.

163. Due to the prior considerations and the assent by the State, the Court finds that there was a direct effect on the members of the Chitay Rodriguez family due to the constant threats and persecutions that they suffered, the displacement of which they were the victims, the uproot from of their community, the fragmentation of their familial nucleus, and the loss of the essential figure of their father that they suffered through the disappearance of Florencio Chitay Nech, which was aggravated in the cultural context of this case, and subsisted after March 9, 1987, constituting a lack of fulfillment on the part of the State of its obligation to protect each person against arbitrary or illegal interferences against their family. Consequently, the Court considers that the State is responsible for the violation of the right of the protection of the family recognized in Article 17 of the Convention, in

relation to Article 1(1) of the same, to the detriment of Encarnación, Pedro, Eliseo, Estermerio, and María Rosaura Chitay Rodríguez.

B.2 *The right to cultural life of indigenous children*

164. Article 19 of the American Convention establishes that “[e]ach child has the right to the measures of protection that their condition as a minor child requires from their family, from society, and from the State.” According to the criteria of the Court, “this disposition must be understood as an additional and complementary right that the treaty establishes that for them to have physical and emotional development they need special protection.”¹⁷⁹ So the State must assume a special position of guarantor with greater care and responsibility, and must take measures especially oriented in the principle of the best interest of the child.¹⁸⁰ This principle is founded “in the dignity itself of the human being, in the characteristics themselves of children, and the need to provide the means of development for them, taking full advantage of their potential.”¹⁸¹ In this sense, the State must give special attention to the needs and to the rights of children, in consideration of their particular condition of vulnerability.¹⁸²

165. The Court has affirmed repeatedly that both the American Convention as well as the Convention on the Rights of the Child form part of the international *corpus juris* of protection of children,¹⁸³ and in various contentious cases has defined the content and scope of the state obligations that derive from Article 19 of the American Convention in light of the rules of the Convention on the Rights of the Child.¹⁸⁴

166. Taking into account that highlighted, it is evident that the measures of protection that the State must adopt vary in accordance with the particular circumstances of the case and of the personal condition of the children. The Tribunal makes note that in the present case, at the moment that the State recognized the contentious jurisdiction of the Court, on March 9, 1987, the alleged victims, Eliseo, Estermerio, and María Rosaura Chitay Rodríguez, *kaqchikel* Mayan indigenous persons, they were 15, 10, and 7 years old, respectively, and therefore, were still children.

¹⁷⁹ Cf. *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02, *supra* note 108, paras. 53, 54 and 60; *Case “Juvenile Reeducation Institute” V. Paraguay*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 2 of September of 2004. Series C No. 112, para. 147; *Case González et al. (“Cotton Fields”) V. México*, *supra* note 13, para. 408, and *Case of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 184.

¹⁸⁰ Cf. *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02, *supra* note 108, paras. 56 and 60; *Case Bulacio V. Argentina*, Merits, Reparations and Costs. Judgment of 18 of September of 2003. Series C No. 100, paras. 126 and 134; *Case Sawhoyamaya Indigenous Community V. Paraguay*, *supra* note 103, para. 177, and *Case Servellón García V. Honduras*, *supra* note 92, para. 116.

¹⁸¹ *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02, *supra* note 108, para. 56; Cf. *Case Masacre of Mapiripán V. Colombia*, *supra* note 14, para. 152, and *Case Masacres of Ituango V. Colombia*, *supra* note 24, para. 244.

¹⁸² *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 184.

¹⁸³ Cf. *Case of the “Children of the Street” (Villagrán Morales et. al.) V. Guatemala*. Merits. Judgment of 19 of November of 1999. Series C No. 63. paras. 194 and 196; *Case of the Gómez Paquiyauri Brothers V. Perú*. Merits, Reparations and Costs. Judgment of 8 of July of 2004. Series C No. 110, para. 166, and *Case “Juvenile Reeducation Institute” V. Paraguay*, *supra* note 179, para. 148.

¹⁸⁴ Cf. *Case of los “Children of the Street” (Villagrán Morales et. al.) V. Guatemala*. Merits, *supra* note 183, paras. 194 a 196; *Case “Juvenile Reeducation Institute” V. Paraguay*, *supra* note 179, para. 161, and *Case of the Gómez Paquiyauri Brothers V. Perú*, *supra* note 183, paras. 167 and 168.

167. The Court observes that due to the context of familial disintegration previously accredited, this had repercussions, in an accentuated manner, on the condition of the children. Due to the particularities of the case *sub judice*, the Court finds it important to note the special measures of protection that the States must adopt in favor of indigenous children. The Court deems that a State, in addition to the obligations which must be guaranteed to all persons under its jurisdiction, must also comply with an additional and complementary obligation defined in Article 30¹⁸⁵ of the Convention on the Rights of the Child,¹⁸⁶ which gives content to Article 19 of the American Convention and consists of the obligation to promote and protect the rights of indigenous children to live in accordance with their own culture, religion, and language.¹⁸⁷

168. In its General Observation No. 11, the Committee on Rights of the Child has considered that “[t]he effective exercise of the rights of indigenous children to culture, religion, and language constitute essential foundations of a culturally-diverse State,”¹⁸⁸ and that this right constitutes an important recognition of the traditions and collective values of

¹⁸⁵ Article 30 states that “[i]n those States in which ethnic, religious or linguistic minorities exist, a child who pertains to this community or is indigenous, shall not be denied their corresponding rights, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” This disposition originates from Article 27 of the International Covenant on Civil and Political Rights, adopted by the General Assembly during Order 2200 A (XXI), 16 of December of 1966, which recognizes this right of minorities without mentioning indigenous persons explicitly. Article 27 of the ICCPR establishes: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

¹⁸⁶ Convention on the Rights of the Child, A.G. res. 44/25, anexo, 44 U.N. GAOR Supp. (No. 49) p. 167, UN Doc. A/44/49 (1989), came into force on September 2, 1990. The State of Guatemala signed said Convention on January 26, 1990 and ratified it on June 6, 1990.

¹⁸⁷ The Convention on the Rights of the Child, aside from Article 30, contains various provisions that highlight the importance of the Convention on the Rights of the Child, moreover Article 30, contains various provisions that highlight the importance to the cultural life of the rights of the indigenous child for their development and formation. In this sense, the Preamble states: “States Party to the present Convention, [...] [...] [t]aking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child.” Article 2, subsection 1 establishes the obligation of the State to assure the application of the rights established in the Convention, without distinction, by “ethnic origin.” In the same sense, Article 17 subsection d states that: “the States shall [...] [e]ncourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous.” Article 20, subsection 3 determines that, when children are deprived of their family environment, the State has to adopt special measures and in considering them, “[...] due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.” In this same line, Article 29 subsection 1 states that “ En la misma línea, el artículo 29 inciso 1 señala que “States Parties agree that the education of the child shall be directed to [t]he development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; [as well as t]he preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.” Lastly, Article 31 determines that: “States Parties recognize the right of the child to [...] participate freely in cultural life and the arts. [...] States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.”

¹⁸⁸ Cf. U.N. Committee on the Rights of the Child. General Observation N° 11 (2009). The indigenous children and their rights due to the convention, February 12, 2009, par. 82.

indigenous cultures.¹⁸⁹ Also, taking into consideration the deep material and spiritual relationship of the indigenous peoples with their traditional lands (*supra* para. 145), this Tribunal finds that within the general obligation of States to promote and protect the cultural diversity of indigenous persons, there is also a special obligation to guarantee the right to cultural life of indigenous children.

169. In this sense, the expert witness Rosalina Tuyuc described the sufferings of the members of the indigenous communities that had to leave, and in particular the cultural and spiritual loss that the displaced indigenous children suffered, as well as the impossibility for them to receive an oral education (*supra* paras. 159 and 160). Additionally, taking into account that the development of the child is a holistic concept that covers physical, mental, spiritual, moral, psychological and social development,¹⁹⁰ the Court finds that for the full and harmonious development of their personality, the indigenous children in agreement with their world vision, preferably require to grow and be raised within their natural and cultural environment, particularly because they possess a distinctive identity that roots them with their land, culture, religion, and language.

170. Therefore, because the then indigenous children Eliseo, Estermerio, and María Rosaura, all of the last name Chitay Rodríguez, were deprived of their right to cultural life, this Court considers that the State is responsible for the violation of Articles 19 of the American Convention, in relation with Article 1(1) of the same, to their detriment.

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171. Of that previously expressed, the Court verifies that the motive of the forced displacement, the fragmentation of the family, as well as the cultural uprooting that Encarnación, Pedro, Eliseo, Estermerio, and María Rosaura Chitay Rodríguez, suffered, constitute violations of the rights of movement and residence and protection of the family, as well as the protection of children regarding the last three. Therefore, the Tribunal considers that the State is responsible for the violation of Articles 22 and 17 of the American Convention, in relation with Article 1(1) of the same, to the detriment of Encarnación and Pedro, both with the last name of Chitay Rodríguez. Also, the State is responsible for the violation of Articles 22, 17, and 19 of the Convention, in relation to Articles 1(1) of the same, to the detriment of Eliseo, Estermerio, and María Rosaura, all with the last name of Chitay Rodríguez.

X

ARTICLES 8(1) (RIGHT TO A FAIR TRIAL) AND 25(1) (JUDICIAL PROTECTION), IN RELATION WITH ARTICLES 1(1) (OBLIGATION TO RESPECT RIGHTS) AND 2 (DOMESTIC LEGAL EFFECTS) OF THE AMERICAN CONVENTION AND ARTICLE I OF THE INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCES

¹⁸⁹ Cf. *Observación General No. 11* (2009), *supra* note 188, para. 16. Cf. U.N. Committee on the Rights of the Child. General Observation N° 11 (2009). The indigenous children and their rights due to the convention, February 12, 2009, par. 16

¹⁹⁰ Cf. U.N. Committee on the Rights of the Child. General Observation N° 5 of November 27, 2003, paragraph 12. This concept of holistic development has been accepted in earlier Jurisprudence of the Court. See, *Case of Juvenile Reeducation Institute V. Paraguay*, para. 161.

172. In this chapter, the Court will examine the allegations related to the right to a fair trial and the obligation to carry out effective investigations, in relation with the detention and later forced disappearance of Florencio Chitay Nech. In this regard, the Tribunal affirms its jurisdiction beginning on March 9, 1987, the date on which the adjudicatory jurisdiction of the Court was recognized by the State, to hear the alleged violations. Also, the Court will take into account the context, the facts of the case *sub judice* and the alleged evidence in the case file in order to determine if Guatemala is responsible for the alleged violation of Articles 8(1) and 25(1) of the American Convention, in relation with Articles 1(1) and 2 of this instrument, and Article I of the ICFDP, which are considered together in this chapter.

1. Context and facts

A. Context

173. The Commission alleged that “the facts of the present case are framed within the context of extreme violence and persecution, in which impunity constituted one of the principle mechanisms of a system in whose framework the most indescribable atrocities were committed.” For its part, the representatives highlighted that what occurred in the case of Florencio Chitay Nech and his next of kin “is part of a systematic pattern of impunity.” The State has not denied nor alleged lack of knowledge of this situation.

174. The Court observes that various reports that analyzed the internal conflict in Guatemala and the following situation¹⁹¹ illustrate that the denial of justice and impunity persist, due to the phenomena of terror and intimidations that developed, with cumulative and lasting effects, for which the population did not report the violations of their human rights to the authorities, even when the violence dropped.¹⁹²

175. During the public hearing, the expert witness Edgar Armando Gutierrez Giron indicated that the next of kin of the victims of armed conflict “are said to still feel persecuted [...] because when they had tried to go to the institution, to the headquarters, to the police stations, courts, etc., the next of kin were immediately identified and submitted to a pattern of persecution of threats, harassment, and that this pattern continued for years.” Also, he manifested that “Guatemala still faces a grave problem of impunity, the rate of crime without punishment of crimes against the right to life continues high, with 97% to 98% of impunity,” and that “the first judgment of a case for forced disappearance occurred in December of the year [2009].”

176. Combined with the aforementioned, this Court has stated in recent decisions, that “the undue delay in the judicial system of Guatemala,¹⁹³ as well as violations of the right to

¹⁹¹ Cf. CEH, *Guatemala: Memory of Silence*, 1999, *supra* note 35; CIDH, *Fifth Report on the Human Rights Situation in Guatemala*, OEA/Ser.L/V/II.III, Doc. 21 rev, of 6 of April of 2001 (annexes of the petition, annex 9), and CIDH, *Justice and Social Inclusion: the Problems with Democracy in Guatemala*, OEA/Ser.L/V/II.118, Doc. 5 rev. 1, 29 of December of 2003 (annexes of the petition, annex 9).

¹⁹² Cf. CEH, *Guatemala: Memory of Silence*, *supra* note 35, Tome IV, Chapter III, pages 15 and 24, paras. 3899 and 3918; CIDH, *Fifth Report on the Human Rights Situation in Guatemala*, *supra* note 191, paras. 19, 50, 52 and 55, and CIDH, *Justice and Social Inclusion: the Problems with Democracy in Guatemala*, *supra* note 191, para. 241.

¹⁹³ “The system of administration of justice of Guatemala is inefficient in guaranteeing compliance of the law and protection of human rights of victims and family members in almost all of the human rights violations

due process"¹⁹⁴ [and] highlighted the *Cases of Myrna Mack Chang, Maritza Urrutia, Plan de Sanchez Massacre, Molina Theissen, Tiu Tojín* and the [*The Dos Erres Massacre*¹⁹⁵], all regarding violations of human rights during the armed conflict in Guatemala, in which 13, 11, 22, 22, 17, and [27] years, respectively, after the facts occurred the obligation of the State to investigate and end the impunity, continues to be unsatisfied."¹⁹⁶

177. Of that expressed previously, the Court considers that during the period in which the facts of the present case occurred in Guatemala there existed a pattern of denial of justice and of impunity, which lasted after March 9, 1987 until the current date. Said practice implied, in many cases, acts destined to terrorize and intimidate the population with the purpose of avoiding the reporting of the facts that violated human rights and particularly affected the indigenous population. For the effects of the present case, the Court must establish in what measure the context – as a background – and the investigation of the facts subsequent to the recognition of the adjudicatory jurisdiction of the Tribunal by the the State, can be framed within the pattern of impunity and denial of justice.

B. Facts

178. As was already established, Florencio Chitay Nech was detained on April 1, 1981, in Guatemala City (*supra* para. 75) According to the petition, this same day the wife of the alleged victim, Marta Rodriguez Quex, accompanied with her two older sons Encarnacion and Pedro filed a complaint regarding the detention and forced disappearance of Mr. Chitay Nech at the National Civil Police station located on the San Juan Road, in front of La Florida.¹⁹⁷ This was also indicated by the representatives.

179. This Tribunal makes note that if in the elements of evidence offered by the parties in the present case, the record of statements does not contain the testimonies given by two of the sons before the National Police, they made reference to said situation. Like that, in the public hearing, Pedro Chitay manifested before the Court that the police “never paid attention [to them], they only saw that they were writing, they did not kno[w] if they were

committed since then.” *Case Tiu Tojin V. Guatemala*, *supra* note 40, para. 51, and *Case of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para 134.

¹⁹⁴ “[T]o date, the tribunals of justice in Guatemala have been unable to investigate effectively, process, prosecute, and punish those responsible for the violations of human rights” and that “[i]n numerous occasions the tribunals of justice have acted subordinate to the Executive Power or the influence of the military, in ‘applying norms or legal provisions contrary to due process or not applying those that correspond.’” *Case Bámaca Velásquez V. Guatemala. Supervision of Compliance*. Order of the Court of 27 of January of 2009, para. 22, and *Case of the Dos Erres Massacre*, *supra* note 12, para 134. Cf. *Case Myrna Mack Chang V. Guatemala*, *supra* note 12, para. 134.13.

¹⁹⁵ Cf. *Case of the Dos Erres Massacre*, *supra* note 12, para. 134.

¹⁹⁶ Cf. *Case Myrna Mack Chang V. Guatemala*, *supra* note 12, para. 272; *Case Maritza Urrutia V. Guatemala*. Merits, Reparations and Costs. Judgment of 27 of November of 2003. Series C No. 103, para. 176; *Case Masacre Plan of Sánchez V. Guatemala*. Reparations and Costs. Judgment of 19 of November of 2003. Series C No. 116, para. 95; *Case Molina Theissen V. Guatemala*. Reparations and Costs. Judgment of 3 of July of 2004. Series C No. 108, para. 79, and *Case Tiu Tojin V. Guatemala*, *supra* note 40, citing *Case Bámaca Velásquez V. Guatemala. Supervision of Compliance*, *supra* note 194, para. 23; *Case of the Dos Erres Massacre*, *supra* note 12, para. 134.

¹⁹⁷ Cf. Statement of Encarnación Chitay Rodríguez, *supra* note 57, f. 78; Statement of Eliseo Chitay Rodríguez, *supra* note 57, f. 86; Statement of Estermerio Chitay Rodríguez, *supra* note 57, f. 75; Statement of Pedro Chitay Rodríguez, *supra* note 56, f. 82; Statement of Eliseo Chitay Rodríguez, *supra* note 59, f. 572; Statement of Estermerio Chitay Rodríguez, *supra* note 131, f. 593; statement of Pedro Chitay Rodríguez, *supra* note 55, and statement of Encarnación Chitay Rodríguez, *supra* note 58.

writing [their] testimony” and that “the agents that helped [them], [...] noted something but did not help [them] and [they] did not even move them to a room or to a place where they c[ould] offer [their] testimony, they remained only facing the check-in desk where they arriv[ed], there they at[tended] [them] and did not [give them] much time, they told [them] ‘that’s it’ and ‘you can go.’”¹⁹⁸

180. In this regard, the State in the procedure before the Court has sustained that “no report existed before the competent authority in order to carry out an investigation,” as alleged by the representatives, given that no evidence exists of it. Nevertheless, in the procedure before the Commission, the State in its communication given on January 10, 2006, responded to that indicated by the representatives in the petition regarding the presentation of a report before the National Police¹⁹⁹ and in its brief of April 21, 2006, the State noted that “[a]s demonstrated by the petitioners in the case, the domestic remedies have not been exhausted, as stated prior, there is only one complaint in the criminal proceeding.”

181. In consideration of that expressed by the parties and of the actions carried out in the internal jurisdiction, the Court concludes it proven that the next of kin of Flornecio Chitay went to the National Police Station to report the detention and disappearance of the alleged victim, without formally raising an action to record the complaint.

182. On April 25, 1981, the directors of the DCG party, at a press conference, publicly denounced the kidnapping of Florencio Chitay Nech (*supra* para. 76).

183. After the recognition of the adjudicatory jurisdiction of the Court by the State, in the year 1999, the Report of the CEH registered the disappearance of Florencio Chitay Nech. (*supra* para. 77).

184. Previously, on October 12, 2004, Pedro Chitay raised an appeal of habeas corpus before the First Court of Criminal Peace on daytime duty in Guatemala City,²⁰⁰ with the goal that the authority that had detained Florencio Chitay Nech be ordered to give a detailed report about the facts that motivated his detention. On October 14, 2004, this court took as received and raised an appeal of a habeas corpus and “order[ed] the authorities [...] to present to the offended, an original accompanied with a copy, of the process and background that there was or to give a report about the facts.”²⁰¹ Of parts of the case file No. 2452-2004, it can be stated that the court carried out an investigation before the National Civil Police, the General Board of the Penitentiary System, and the Center for Provisional Detention, which indicated they did not have any records regarding the

¹⁹⁸ Statement of Pedro Chitay Rodríguez, *supra* note 55. Cf. Statement of Encarnación Chitay Rodríguez, *supra* note 58.

¹⁹⁹ In the communication of the State of 10 of January of 2006 before the Commission stated that “due to the fact tha Mr. Florencio Chitay Nech, appears in the Report of the Commission for Historical Clarification, as a disappeared person on 10 of December of 1980, (date that does not coincide with that established by the petitioners in the petition, established that Florencio Chitay Nech disappeared on 1 of April of 1981, and is also note din the complaint presented before the National Police and the personal exhibition presented in the Case)” (brief of Preliminary Exceptions, Merits, Reparations and Costs, prueba para mejor resolver remitida por la Comisión el 9 of March of 2010, Tome V, f. 903).

²⁰⁰ Cf. Request of Personal Exhibition in favor of Florencio Chitay Nech of 12 of October of 2004 (annexes of the petition, annex 6, fs. 127 and 128).

²⁰¹ Cf. Order of the First Court of Criminal Peace Orders of the Peace Judge of Orders of the Peace Judge of 14 of October of 2004 (annexes of the petition, annex 6, f. 133).

detention of Florencio Chitay Nech.²⁰² On November 4, 2004, the Second Court of the First Criminal Instance, Narcotic-Activity and Offenses against the Environment of Guatemala declared inadmissible the appeal and the decision was notified to Pedro Chitay on November 23, 2004.²⁰³

185. On March 2, 2009, the COPREDEH presented a report before the Public Ministry with foundation in Articles 298 and 300 of the Code of Criminal Procedure (Decree 51-92 of the Congress of the Republic), for the forced disappearance of Florencio Chitay Nech,²⁰⁴ which was assigned to the Public Prosecutor's Office on Human Rights, under the case file No. MP-2009-28,390. The Public Prosecutor's Office required information about the disappearance of Florencio Chitay Nech from various State institutions,²⁰⁵ and summoned the next of kin to make statements. Likewise, it required information from the Supreme Electoral Tribunal regarding the DCG party, and about the elections held in the year 1978 in San Martín Jilotepeque, all of which indicated they did not possess information or had not yet responded. Also, the Public Prosecutor's Office had established some lines of investigation.²⁰⁶ In August of 2009, Encarnacion and Pedro, both with the last name of Chitay Rodriguez, went to report before the Public Prosecutor and during the months of October or November of the same year, they left their samples of DNA at the Anthropology Forensic Foundation of Guatemala.²⁰⁷

186. To date, the investigation is in its initial stage and thus has not offered results, and no accusation was been formalized, nor have the whereabouts of Florencio Chitay Nech been located.

2. The lack of effective investigation

187. The Commission and the representatives alleged the violation of the rights to truth, to a fair trial and to judicial protection because the State has not carried out an investigation of the facts to identify and punish those responsible, although it had knowledge of the same, and for the same it must have begun the investigation *motu proprio*, even in absence of a report from the next of kin, because the kidnapping was a crime which may be prosecuted *ex officio*. The State has not justified the delay of more than twenty-nine years in investigating the facts, nor has it determined the whereabouts of the remains of Florencio Chitay. The Commission manifested that after filing the report, the next of kin of Mr. Chitay Nech could not present another judicial action due to the monitoring and threats they suffered, and for the fear of their mother that another member of their familial nucleus could be forcibly disappeared. Regarding what the appeal of habeas

²⁰² Cf. Orders of the Judge of Peace of 15 of October of 2004 and of the National Civil Police of 18 of October of 2004 (annexes of the petition, annex 6, fs. 130 and 134).

²⁰³ Cf. Order of the Second Criminal Instance Court, Narco-activiy and Offenses to the Environment, of 4 of November of 2004 (brief of Preliminary Exceptions, Merits, Reparations and Costs, prueba para mejor resolver presentada por el Estado el 10 of March of 2010, Tome V, f. 882).

²⁰⁴ Cf. Complaint filed by the Executive Director of COPREDEH (annexes to the response to the petition, annex III, fs. 1631 a 1634).

²⁰⁵ Cf. Letters to the Public Proecutor on March 25, 2009 to the Citizen Registry, to the Unified Tributary Registry, of the National Civil Police, and of 26 of March of 2009 to the Supreme Electoral Court, the Office of Criminal Investigation, and the historical archive (annexes to the response petition, annex III, fs. 1670 a 1692).

²⁰⁶ Cf. Report of Investigation of 14 of May of 2009 (annexes to the response petition, annex III, fs. 1699 a 1701).

²⁰⁷ Cf. Statement of Pedro Chitay Rodriguez, *supra* note 55.

corpus, the Commission indicated that the State should have initiated an investigation into the facts denounced, in conformity with Article 109 of Decree No. 1-86 of the Law of Protection, Disclosure and Constitutionality, that obligates the tribunal to immediately order the investigation if there are indications that a person has been forcibly disappeared.

188. Also, the representatives signaled, among others, that: a) the report raised by the State was one of mere formalism, given that no result had been obtained; b) attempts to make advancements in the investigations have fallen on the next of kin, as documentation offered by them was lost and asked for again, and it was them who looked for Mr. Chitay Nech in morgues and hospitals, and c) that State agents came to look for the alleged victims at their homes in an irregular manner, without identifying themselves, presenting themselves as bank workers. Also, the representatives alleged in a general manner that the remedies in order to resolve the situation that generated the forced disappearance of Florencio Chitay Nech have not been effective. Also, they signaled that the Guatemalan legislation contemplates that the utilization of "Special Inquiry Procedure," is not of an obligatory character for the next of kin of the victims nor constitutes a means of impunity for that resolved in the appeal of habeas corpus raised.

189. For its part, the State alleged that the lack of an effective investigation of the facts is due to the lack of knowledge of the same, which was attributable to the petitioners because they should have announced the disappearance of Florencio Chitay, as national remedies of a judicial character existed at that time. It signaled that the only existent report is the one presented by the COPREDEH on March 2, 2009. The State referred to various steps of investigation carried out by the Public Prosecutor's Office. Consequently, the State required the Court to take into account the efforts made to comply with the recommendations of the Commission and that to declare that Guatemala has not incurred the violation of Articles 8 and 25 of the Convention, in relation to Article 1(1) of the same. The State did not present arguments related with the right to the truth alleged by the representatives. Also, the State indicated that the next of kin of Florencio Chitay did not present a remedy of habeas corpus immediately after the disappearance as is established by law, but that it was made twenty three years later, which demonstrated "the bad use of the existent remedies." It added, that after being declared inadmissible, said remedy was not attended by the "Special Process of Inquiry," and that "the only purpose of the habeas corpus was to reactivate the process so as to bring the case before the Inter-American System of Human rights," and that the mere fact that a remedy does not produce a favorable result to the claimant does not demonstrate, in itself, the lack of existence or the exhaustion of all the efficient domestic remedies.

190. The Court has established that the State has the obligation to provide effective judicial remedies to the persons that allege to be victims of violations of human rights (Article 25), remedies that must be summarized in conformity with the legal rules of due process (Article 8(1)), each of them within the general obligation, charged to the States, to guarantee the free and full exercise of the rights recognized by the Convention to each person found under its jurisdiction (Article 1(1)).²⁰⁸

191. It corresponds to analyze whether the State has carried out the investigation of the facts with due diligence and in a reasonable time period, and if the remedy of habeas corpus has constituted an effective recourse to assure the right of access to justice of the alleged victims.

²⁰⁸ Cf. *Case Velásquez Rodríguez V. Honduras*. Preliminary Exceptions, *supra* note 18, para. 91; *Case Radilla Pacheco V. México*, *supra* note 12, para. 190, and *Case Of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 104

192. The Tribunal has understood that for a criminal investigation to constitute an effective remedy that assures the right to access to justice of the alleged victims, as well as to guarantee the rights that have been infringed, the investigation must be carried out with seriousness and not be a simple formality condemned from the onset to be unsuccessful, and it must have a purpose and be assumed by the States as a legal duty and not as a simple formality for private interests that depend on the procedural initiatives of the victim or his next of kin or of the contribution by these private individuals of the probative elements.²⁰⁹

193. Regarding the forced disappearance of persons, the Court has affirmed that "given the particular gravity of these crimes and the nature of the rights infringed upon, the prohibition of forced disappearance of persons and of the correlative duty to investigate them and punish those responsible has reached a character of *jus cogens*."²¹⁰ From there, each time that there are reasonable motives to presume that a person has been submitted to forced disappearance, an investigation must be initiated²¹¹ *ex officio*, without delay, in a serious, impartial and effective manner.²¹² In any case, all state authorities, public or private employees that have notice of the acts of the forced disappearance of persons must report it immediately.²¹³

194. In the present case, it has been demonstrated that before the recognition of the adjudicatory jurisdiction of the Court, effective March 9, 1987, the next of kin of the alleged victim came to the National Police Station on the San Juan Road to report the detention of Florencio Chitay Nech and days after, the DCG party publicly denounced his kidnapping, combined with the fact that Mr. Chitay Nech was recognized as a political director for the charges that he had occupied in the Municipal Council of San Martín Jilotepeque, which made him a public figure. As a result of this, the Court considers that the argument of the State that it did not know of the facts which occurred on April 1, 1981, is not admissible, as it is evident that the State authorities had knowledge of the same. Also, prior to March 9, 1987, two other opportunities were highlighted for the State to have had knowledge of the facts, namely: a) in 1999, in the Report of the CEH, the disappearance of Florencio Chitay Nech was registered in the case No. 707, and b) on October 12, 2004, with the presentation of an appeal of habeas corpus, which confirmed that, even after having formal notice of the facts with the presentation of this appeal, the State did not consequently act with its duty to immediately begin an exhaustive investigation.²¹⁴ In agreement with the facts between March 9, 1987, and March 1, 2009, the State did not promote any investigation and it was not until recently, on March 2, 2009, that it initiated certain procedures of investigation with

²⁰⁹ Cf. *Case Velásquez Rodríguez V. Honduras*. Merits, *supra* note 32, para. 177; *Case Garibaldi V. Brasil*, *supra* note 18, para. 113, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 139.

²¹⁰ Cf. *Case Goiburú et. al. V. Paraguay*, *supra* note 87, para. 84; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 59, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 139.

²¹¹ Cf. *Case Radilla Pacheco V. México*, *supra* note 12, para. 143.

²¹² Cf. *Case of la Masacre of Pueblo Bello V. Colombia*, *supra* note 94, para. 145, *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 65, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 143.

²¹³ Cf. *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 65, and *Case Radilla Pacheco Vs México*, *supra* note 12, para 143.

²¹⁴ Cf. *Case Radilla Pacheco V. México*, *supra* note 12, para. 200.

the presentation of a formal report of the forced disappearance of Mr. Chitay Nech on behalf of the COPREDEH.²¹⁵

195. In conformity with the legislation in effect at the moment of the facts,²¹⁶ the State should have carried out a serious, independent, impartial and effective investigation of the facts having reasonable motives to presuppose the forced disappearance of Florencio Chitay Nech. It was not until March 2, 2009, that COPREDEH raised the report referred to. For this Tribunal, the lack of a State's response is a determinative element in the evaluation of whether there was a lack of fulfillment of the content of Articles 8(1) y 25(1) of the American Convention, that has a direct relationship with the principle of effectiveness that must regulate the investigations.²¹⁷ As such, the Court finds that the State failed to comply with its obligation to investigate with the diligence and seriousness required.

196. In addition, for the investigation to be conducted in a serious and impartial manner and as a legal duty in itself, the right of access to justice requires that the determination of the facts be effective in that the investigation takes place in reasonable time, because in attention to the need to guarantee the rights of the persons afflicted, a prolonged delay can constitute, for said persons, a violation of their judicial guarantees.²¹⁸ Even more so if in the cases of forced disappearance, the passage of time has a direct proportional relationship with the limitation – and in some cases, the impossibility – of obtaining evidence and/or statements, making it difficult and even nullifying or deeming ineffective the execution of evidentiary procedures carried out to clarify the material facts of the investigation,²¹⁹ to identify the possible perpetrators and participants, and to determine the eventual criminal perpetrators.²²⁰

²¹⁵ The Article 201 TER, Decree No. 48-1995 reforms the Penal Code (Decree 17-1973) of 14 of July of 1995. Forced Disappearance, establishes that: “[the crime of forced disappearance is committed by one, who by order, with the authorization and support of State authorities, deprives, in any manner, the liberty of one or more persons, for political reasons, hiding their whereabouts, refusing to reveal their purpose, or recognize their detention, as well as by State official or employee, whether or not this individual forms part of the security organs of the State, that orders, authorizes, or supports or acquiesces to said actions. Said crime of forced disappearance, the deprivation of liberty of one or more persons, even without political reason, when committed by officials of the security organs of the State, in their official capacities, when acting arbitrarily or in abuse of power. Likewise, those members of groups of organized groups such as gangs with terrorist, insurgent, or subversive purposes, or with any other criminal purpose, commit the crime of forced disappearance, when they kidnap, acting as members of said group or gang. The offense is considered in continuation so long as the victim is not free. A conviction of forced disappearance will be punished with thirty-five years in prison. The death penalty shall be imposed in the place of the maximum prison sentence, when the victim of the forced disappearance is found seriously hurt or injured, with psychological trauma or permanente harm or death.”

²¹⁶ Cf. Articles 68 and 112 of Decree No. 52-73 Code of Criminal Procedure of Guatemala (annexes of the petition, annex 7, fs. 147 and 148).

²¹⁷ Cf. *Case García Prieto et. al. V. El Salvador*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 20 of November of 2007. Series C. No. 168, para. 115; *Case Garibaldi V. Brasil*, *supra* note 18, para. 132, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 201.

²¹⁸ Cf. *Case Hilaire, Constantine and Benjamin et. al. V. Trinidad and Tobago*. Merits, Reparations and Costs. Judgment of 21 of June of 2002. Series C No. 94, para. 145; *Case Radilla Pacheco V. México*, *supra* note 12, para. 191, and *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 132.

²¹⁹ Cf. *Case Heliodoro Portugal V. Panamá*, *supra* note 76, para. 150; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 135, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 215.

²²⁰ Cf. *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 135, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 215.

197. This Tribunal considers that in the present case, the time that has passed is excessively more than the time period that can be considered reasonable for the State to begin the corresponding investigative procedures, especially given the time that the investigation will take, barely being in its initial phase, and the processing of the criminal procedure with its distinct stages, until the firm judgment. This lack of investigation during such a large period of time constitutes a flagrante denial of justice and a violation of the right to access to justice of the alleged victims.

198. As such, the allegation of the State is inadmissible, that before the inadmissibility of the appeal of habeas corpus, it would correspond to the alleged victims to request the Special Inquiry Procedure from the Supreme Court of Justice,²²¹ given that this would impart on them an obligation that corresponds to the State, particularly when more than 29 years have passed since the disappearance of Mr. Chitay Nech and 23 years since that State recognized the adjudicatory jurisdiction of the Tribunal, without the State carrying out an effective investigation of the facts, which constitute a prosecutable offence *ex officio*.

199. Combined with the aforementioned, in consideration of the context in which the forced disappearance of Mr. Chitay Nech occurred, this Court finds that the facts of the present case are clearly framed in a systematic pattern of denial of justice and impunity, given that the investigation is found in an initial phase, and as such those responsible still have not been identified, prosecuted, and eventually punished nor has a reparation been made to the next of kin of the alleged disappeared victim. In this regard, impunity has been defined by this Court as “the lack, as a whole, of investigation, persecution, capture, judgment and punishment of those responsible of the violations of the rights protected by the American Convention.”²²² Also, this Court has established that the State must remove all the obstacles, *de facto y de jure*, that maintain the impunity²²³ and that this must be eradicated though the determination of the responsibilities both general – of the State – as well as individual – criminal, and other kinds, of their agents and their prosecutors.²²⁴

200. Due to the aforementioned, this Tribunal finds that, in conformity with Article I(b) of the ICFDP, the State must sanction effectively and within a reasonable time period those responsible for the forced disappearances that occur within its jurisdiction, assuring that it complies with the same nature of the punishment and avoiding impunity. The Court observes that in the time that has passed since the disappearance of Florencio Chitay Nech until the current date, the State has not complied with that established in said rule.

201. As such, in regard to the request of the representatives in the sense that the Court orders the investigation of the acts of harassment and investigations suffered by the next of kin of Florencio Chitay before and after his disappearance, this Court considers that the acts referred to cannot be seen in an isolated manner, but should be seen within the framework of the obstacles that were placed to impede a diligent and effective

²²¹ The Article 467 of the Guatemalan Criminal Code the remedy of Special Investigation establishes that the Supreme Court of Justice, at the request of any person, intime the Public Prosecutor to Report on the investigations and order a mandate to an investigator.

²²² Cf. *Case of the “White Van” (Paniagua-Morales et al.) V. Guatemala*. Merits, *supra* note 28, para. 173; *Case Radilla Pacheco V. México*, *supra* note 12, para. 212, and *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 234.

²²³ Cf. *Case La Cantuta V. Perú*. Merits, Reparations and Costs. Judgment of 29 of November of 2006. Series C. No. 162, para. 226; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 125, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 212.

²²⁴ Cf. *Case Goiburú et. al. V. Paraguay*, *supra* note 87, para. 131; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 87, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 153.

investigation of the disappearance of Mr. Chitay Nech. Such facts are converted into other means to perpetuate the impunity of the present case and impede that the truth of what happened.

202. In this sense, this Tribunal has established that for the State to comply with that provided in Article 25 of the Convention, it is not enough that the remedies are foreseen by the Constitution or the law or that they are formally admissible, but rather that they be effective in the terms of such rule.²²⁵ Said effectiveness presupposes that, in addition to the existence of formal remedies, there be results or answers to the violations of rights,²²⁶ which implies that the remedy be suitable to combat the violation and that its application be made effective by competent authorities.²²⁷ Therefore, those remedies that, for the general conditions of the country or for the particular circumstances of a case give illusory results, cannot be considered effective.²²⁸

203. In this regard, the remedy of habeas corpus represents the suitable means to guarantee liberty, control the respect for life and integrity of a person, and impede the disappearance or the indetermination of the place of detention.²²⁹

204. In relation to the habeas corpus remedy raised by Pedro Chitay,²³⁰ the Court notes that despite the gravity of the alleged facts and the context in which they occurred, the State authorities indicated only that they did not rely upon information about Florencio Chitay, which impeded the carrying out of the necessary investigations to locate the whereabouts of the alleged victim, that until today remain unknown. The State did not demonstrate that the State authorities took all the steps within their reach to determine his whereabouts. The State, having knowledge of the facts, should have initiated without delay an investigation *ex officio* to identify, prosecute, and eventually punish those responsible, as well as to locate the whereabouts of the alleged victim, but to the contrary, the habeas corpus remedy was declared inadmissible, which demonstrates the denial of justice.

²²⁵ Cf. *Case Ximenes Lopes V. Brasil*. Preliminary Exception. Judgment of 30 of November of 2005. Series C No. 139, para. 4; *Case Usón Ramírez V. Venezuela*, *supra* note 18, para 129, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 296.

²²⁶ Cf. *Case Tribunal Constitucional V. Perú*. Merits, Reparations and Costs. Judgment of 31 of January of 2001. Series C No. 71, para. 90; *Case Acevedo Buendía et. al. ("Discharged and Retired Employees of the Office of the Comptroller") V. Perú*. Preliminary Exception, Merits, Reparations and Costs. Judgment of 1 of July of 2009. Series C No. 198, para. 69; *Case Bayarri V. Argentina*. Preliminary Exception, Merits, Reparations and Costs. Judgment of 30 of October of 2008. Series C No. 187, para. 102, and *Case Usón Ramírez V. Venezuela*, *supra* note 18, para. 129.

²²⁷ Cf. *Case Acosta Calderón V. Ecuador*. Merits, Reparations and Costs. Judgment of 24 of June of 2005. Series C No. 129, para. 93; *Case Claude Reyes et. al. V. Chile*. Merits, Reparations and Costs. Judgment of 19 of November of 2006. Series C No. 151, para. 131, and *Case Usón Ramírez V. Venezuela*, *supra* note 18, para. 129.

²²⁸ Cf. *Judicial Guarantees in the State of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*. Advisory Opinion OC-9/87 del 6 of October of 1987. Series A No. 9, para. 24; *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") V. Perú*, *supra* note 226, para. 69; *Case Reverón Trujillo V. Venezuela*, *supra* note 39, para. 61, and *Case Usón Ramírez V. Venezuela*, *supra* note 18, para. 129.

²²⁹ Cf. *Case Neira Alegria et. al. V. Perú*. Merits. Judgment of 19 of January of 1995. Series C. No. 20, para. 82; *Case Cantoral Benavides V. Perú*. Merits. Judgment of 18 of August of 2000. Series C No. 69, para. 165, and *Case Bámaca Velásquez V. Guatemala*, *supra* note 50, para 192. See also, *the Habeas Corpus under suspensión of guarantees* (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights). Advisory Opinion OC-8/87 del 30 of January of 1987. Series A No. 8, para. 35

²³⁰ Article 88 of Decree 1-86 of the Amparo Law, Personal Exhibition and Constitutionality, establishes that the remedy for personal exhibition orders the corresponding authorities to present the offender, accompanied by the original or a copy of the procederes or background that details a report on the facts of the detention.

205. On the other hand, the Commission and the representatives alleged that the State had not carried out the necessary steps to learn what happened to Florencio Chitay and to determine his whereabouts. The aforementioned has not permitted his next of kin to know what happened or to end the suffering and harm caused by these facts.

206. The Tribunal reiterated that the right to know the truth is subsumed in the right of the victim or his next of kin to obtain from the competent authorities of the State the clarification of the facts of violations and the corresponding perpetrators, by way of an investigation and judgment that is foreseen in Articles 8 and 25 of the Convention,²³¹ which constitutes a form of reparation.²³²

207. As a consequence, given that until the current date the whereabouts of Florencio Chitay are unknown and the State has not informed on the steps of an investigation taken to locate him, this Tribunal finds that the State has not conducted an effective investigation in a manner that guarantees the right of the next of kin of Florencio Chitay Nech to know the truth about what happened to him and his whereabouts.

208. Finally, the representatives alleged that at the beginning of the investigation, the judicial authorities lost the documentation presented by the next of kin of Mr. Chitay Nech, which was requested again from Pedro Chitay. This was not disputed by the State. In this regard, this Court considers that said situation constitutes a lack of diligence attributable to the State, given that the omission of the public employees regarding the fulfillment of their inherent duties cannot be blamed on the victims, undermining the State responsibility.

209. Due to the foregoing, the Court finds that the State has not fulfilled its duty to investigate *ex officio*, within a reasonable time period, and in a serious, impartial, and effective manner, the forced disappearance of Florencio Chitay Nech, so as to identify, judge and eventually punish those responsible for the facts and to, in this way, avoid impunity, nor has the State carried out the necessary steps to look for and locate the whereabouts of the alleged victim. Besides, the State has not acted with due diligence to guarantee the access to justice of the alleged victims. As a consequence, the Tribunal concludes that the State is responsible for the violation of the right to a fair trial and judicial protection consecrated in Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) to the detriment of Encarnación, Pedro, Eliseo, Estermerio, and María Rosaura, all with the last name of Chitay Rodríguez, as well as the lack of fulfillment of the obligation consecrated in Article I(b) of the ICFDP.

3. Regarding the alleged violation of Article 2 of the Convention

210. The Commission alleged that the apparatus of the State of Guatemala did not adopt the necessary measures to make effective the rights and liberties established in the Convention, in accordance with Article 2 of the same, to the detriment of Florencio Chitay Nech.

211. In its brief of motions and pleadings, the representatives manifested that “in Guatemala, no law exists that sanctions the crime of disappearance *per se*” and they

²³¹ Cf. *Case Gómez Palomino V. Perú*, *supra* note 84, para. 78; *Case Radilla Pacheco V. México*, *supra* note 12, para. 180, and *Case of the Dos Erres Massacre v. Guatemala*, *supra* note 12, paras. 149 and 151.

²³² Cf. *Case Velásquez Rodríguez V. Honduras*. Merits, *supra* note 32, para. 181; *Case Tiu Tojín V. Guatemala*, *supra* note 40, para. 103, and *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 179.

requested legal reforms on the subject of forced disappearance to rectify the existing definitions. In their final arguments, they alleged that although in Guatemala the crime of forced disappearance is codified, said criminal codification is not applied by those in charge of the administration of justice given that there have been few cases that have been submitted, and that conforming to that established by this Tribunal “while this criminal norm is not properly adequate, the State will continue to not comply with Article 2 of the American Convention and Article III of the ICFDP.”

212. The State did not make a specific declaration regarding the alleged violation of Article 2 of the Convention.

213. It is necessary to mention that the general duty of the State to adapt its internal law to the rules of the American Convention in order to guarantee the rights consecrated in it, established in Article 2, implies the adoption of measures in two ways. On the one hand, the suppression of the norms and practices of any nature that entail violations of the guarantees foreseen in the Convention. On the other hand, the expedition of the norms and the development of legal practices for the effective observance of said guarantees.²³³

214. In this regard, the Court has noted that the crime of forced disappearance was codified in the Penal Code of Guatemala in 1996. Also, this Tribunal observes that the report raised by COPREDEH was for the crime of forced disappearance. It notes also that the internal criminal process is now in its initial stages of investigation, to which, of the elements offered, it is not possible to establish the existence of a practice of lack of application of the criminal codification referred to by the judicial authorities in the present case, as was alleged by the representatives. Therefore, the Court considers that it lacks sufficient elements to make a ruling regarding the existence of the obstacles alleged by the representatives, and therefore, to declare a violation of the guarantees foreseen in Article 2 of the American Convention.

215. Regarding the alleged lack of fulfillment of Article III of the ICFDP on the part of the representatives, the Court refers to that resolved in the present Judgment, in the sense that it deals with an extemporaneous request (*supra* para. 120).

XI

ARTICLE 5(1) (THE RIGHT TO HUMANE TREATMENT [PERSONAL INTEGRITY]) OF THE AMERICAN CONVENTION, IN RELATION WITH ARTICLES 1(1) (OBLIGATION TO RESPECT RIGHTS) OF THE SAME

216. In consideration of the acknowledgement by the State regarding the facts and the recognition of responsibility for the violation of Article 5 of the Convention and of the violations declared prior, the Court will analyze in this chapter the alleged physical and psychological affects suffered by the Chitay Rodriguez siblings.

217. The Commission founded said violation in the fact that when Mr. Chitay Nech and his next of kin fled to Guatemala City, “they were obligated to radically change their lifestyle, with which did not imply the end of danger and persecutions, and with them, the fear and consequential anguish.” Also, the Commission signaled that the lack of

²³³ Cf. *Case Castillo Petruzzi et. al. V. Perú*. Merits, Reparations and Costs. Judgment of 30 of May of 1999. Series C No. 57, para. 207; *Case Reverón Trujillo V. Venezuela*, *supra* note 39, para. 60, and *Case of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 122.

investigation into the forced disappearance constituted a source of suffering and additional anguish for the next of kin.

218. The representatives alleged the violation of said Article based on, *inter alia*, that the next of kin of Florencio Chitay Nech had been victims of suffering due to the displacement, persecution, shortages, and difficulties that they faced due to the disappearance of he who “acted as the head and supporter of the family,” the lack of clarification of the facts, the impossibility of carrying out a mourning period, the disintegration of their family, the rejection of the community, and the lack of investigation.

219. The State recognized its international responsibility for the violation of Article 5 of the Convention, to the detriment of the next of kin of Florencio Chitay Nech. (*supra* para. 13).

220. The Tribunal has reiterated in its jurisprudence that the next of kin of the victims of violations of human rights can be, on their own, victims.²³⁴ In particular, in cases that involve the forced disappearance of persons, it is possible to understand that the violation of the right to physical and moral integrity of the next of kin of the victim is a direct consequence, precisely, of this phenomenon, which causes them severe suffering based in the same fact, and increases, among other factors, with the constant denial by State authorities to provide information about the whereabouts of the victim or to begin an efficient investigation in order to clarify what happened.²³⁵ Also, this Tribunal has found that it can declare a violation of the right to physical and moral integrity of the direct next of kin of victims of certain violations of human rights such as forced disappearance, by applying a presumption *iuris tantum* regarding mothers and fathers, sons and daughters, husbands and wives, and permanent domestic partners (hereinafter, “direct next of kin”), so long as this corresponds to the particular circumstances of the case. Regarding said direct next of kin, it corresponds to the State to rebut said presumption.²³⁶

221. In this regard, the Court remembers that in the other cases it has considered of the continued deprivation of the truth regarding the whereabouts of a disappeared person, this constitutes a form of cruel and inhuman treatment for the close next of kin.²³⁷ Also, the Tribunal has indicated that given facts of forced disappearance of persons, the State has the obligation to guarantee the right to personal integrity of the next of kin by way of effective investigative routes. Even more, the absence of effective remedies has been considered by the Court as a source of suffering and additional anguish for the victims and their next of kin.²³⁸

²³⁴ Cf. *Case Castillo Páez V. Perú*. Merits. Judgment of 3 of November of 1997. Series C No. 34, Punto Resolutivo cuarto; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 105, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 161.

²³⁵ Cf. *Case Blake V. Guatemala*. Merits. Judgment of 24 of January of 1998. Series C No. 36, para. 114; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 105, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 161.

²³⁶ Cf. *Case Valle Jaramillo et. al. V. Colombia*, *supra* note 155, para. 119; *Case Kawas Fernández V. Honduras*, *supra* note 15, para. 128, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 162.

²³⁷ Cf. *Case Trujillo Oroza V. Bolivia*. Reparations and Costs. Judgment of 27 of February of 2002. Series C No. 92, para. 114; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 113, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 166.

²³⁸ Cf. *Case Blake V. Guatemala*, *supra* note 235, para. 114; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 113, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 167.

222. Also, the Tribunal has established that the clarification regarding the whereabouts of the person is of utmost importance that the next of kin, as this permits the next of kin to relieve their anguish and the suffering caused by the uncertainty of the whereabouts of their disappeared next of kin.²³⁹

223. In the present case, the suffering caused by the impact of the forced disappearance of Florencio Chitay Nech, are evidenced in the statements made by his next of kin. In this sense, Eliseo Chitay expressed that he and his next of kin needed “to know the truth about what happened, of why the kidnapping happened, and the reason why they have [had] to experience sadness, anguish, hunger, and each one of the members of [his] family [...] has had to be separated at young age to safeguard [their] lives, [...] never enjoy[ing] their childhood, [their] youth, at a young age they [had] to work to earn their daily sustenance[, and, in addition] there was a deep sadness [because] they had to be alone in another country.” Also, Pedro Chitay testified that he and his next of kin had psychological problems, and they were not able to vent, and that they feel terror when they see uniformed army officers, and fear at the thought of returning now to Guatemala. For his part, Encarnacion Chitay expressed that the day of the forced disappearance of his father was “the saddest day of [his] life” and that he felt “sadness and pain [for] not being able to be with [his] brothers” and above all, of not being able to be at the side of his father and mother [, which] is the most sacred and divine thing for a being human, and [they] have not lived it.”

224. Also, Claudia Elisa Sesam Lopez expressed that, being the partner of Encarnacion Chitay, “she also experienced the disintegration of the family along with him[,] [...] they had to move forward themselves, the saddest and most unfortunate thing [is] not being able to return to their communities. [. Also,] all of them suffered from some sickness [and] all of them of course had emotional and psychological problems that are still untreated.”

225. In the present case, as it was established, the Court granted full legal effects to the partial recognition of international responsibility of the State regarding Article 5 of the Convention. This Tribunal notes also that from the testimonies given by the next of kin of Florencio Chitay Nech and the violations declared in the prior chapters, they have suffered harm to their personal integrity. In addition, the denial of justice and the lack of knowledge of the whereabouts of Mr. Chitay Nech that persist to date have given the alleged victims a new traumatic impact that has generated feelings of indignation, frustration, and even terror. The Tribunal observes that said experiences have impacted their social relationships, altered their family dynamic and their sense of belonging to an indigenous community, which has continued to cause suffering and fear.

226. For that expressed, this Tribunal considers that the effects, both psychological as well as physical, suffered by the members of the Chitay Rodriguez family, understood comprehensively in the complexity of the phenomenon of a forced disappearance, remain while the factors of verified impunity persist,²⁴⁰ which, at the same time, prevent closure of the mourning process they have lived for many years. Consequently, this Court considers that the State is responsible for the violation of the right to humane treatment recognized in Article 5(1) of the Convention, in relation with Article 1(1) of the same to the detriment

²³⁹ Cf. *Case Ticona Estrada et. al. V. Bolivia*, *supra* note 84, para. 155.

²⁴⁰ Cf. *Case Goiburú et. al. V. Paraguay*, *supra* note 87, para. 103; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 114, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 172.

of Encarnación, Pedro, Eliseo, Estermerio, and María Rosaura, all with the last name of Chitay Rodríguez.

XII REPARATIONS (*Application of Article 63(1) of the Convention*)

227. Based its decisions in this regard in Article 63(1) of the American Convention,²⁴¹ the Court has indicated that each violation of an international obligation that has produced harm involves the duty to adequately repair the harm,²⁴² and that this rule picks up on a customary rule that constitutes one of the fundamental principles of contemporary International Law regarding the responsibility of a State.²⁴³

228. In consideration of the violations of the American Convention and ICFDP declared in the foregoing chapters, the Tribunal will analyze the claims presented by the Commission and the representatives, as well as the positions of the State, in light of the fixed criteria in the jurisprudence of the Court in relation with the nature and scope of the obligation to repair,²⁴⁴ so as to provide measures that will repair the harm caused to the victims.

A. *Injured Party*

229. The Tribunal reiterates that the injured party is considered to be, in the terms of Article 63(1) of the Convention, those that have been declared as victims of the violation of any of the rights enshrined in the same. Therefore, this Tribunal considers the “injured party,” to be Mr. Florencio Chitay Nech, and his children Encarnación, Pedro, Eliseo, Estermerio, and María Rosaura, all with the last name of Chitay Rodríguez, who in their character as victims of the violations declared in Chapters VIII, IX, X, and XI, shall be the creditors of that which the Tribunal orders in continuation. In the case of Maria Rodriguez Quex, the State must take into account that suggested in paragraph 45 of the present Judgment, in the sense that the State, could at its discretion, adopt measures of reparation in her favor.

B. *Obligation to investigate the facts and identify, judge and, if it is the case, sanction those responsible*

²⁴¹ Article 63(1) of the Convention states that “[i]f the Court finds that there has been a violation of a right or freedom protected by [the] 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.”

²⁴² Cf. *Case Velásquez Rodríguez V. Honduras*. Reparations and Costs. Judgment of 21 of July of 1989. Series C No. 7, para. 25; *Case Radilla Pacheco V. México*, *supra* note 12, para. 327, and *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 223.

²⁴³ Cf. *Case of the “Children of the Street” (Villagrán Morales et. al.) V. Guatemala*. Reparations and Costs. Judgment of 26 of May of 2001. Series C No. 77, para. 62; *Case Cantoral Benavides Vs Perú*. Reparations and Costs. Judgment of 3 of December of 2001. Series C No. 88, para. 40, and *Case Bámaca Velásquez V. Guatemala*. Reparations and Costs. Judgment of 22 of February of 2002. Series C No. 91, para. 38.

²⁴⁴ Cf. *Case Velásquez Rodríguez V. Honduras*. Reparations and Costs, *supra* note 242, paras. 25 a 27; *Case Usón Ramírez V. Venezuela*, *supra* note 18, para. 159, and *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 288.

230. Both the Commission as well as the representatives requested the Court to order the State to carry out an effective investigation of the facts to establish and sanction all the perpetrators and accomplices involved in the kidnapping and later disappearance of Mr. Chitay Nech, as well as those responsible for the obstruction of the investigation.

231. The State indicated that on March 2, 2009, it began an investigation with the report represented by COPREDEH, and that the victims did not appear to give their testimony, "which demonstrated their intention to not collaborate with the internal jurisdiction in order to [clarify] the disappearance of Florencio Chitay Nech." The State also requested the Court to take into account the efforts that it has made to comply with the Report on the Merits of the Commission.

232. In the present Judgment, the Court has established the violation of Articles 8(1) and 25(1) of the Convention due to the prolonged delay of the State to begin the investigations in the present case, which has not allowed for the guarantee of an effective remedy, nor access to justice for the victims, within a reasonable time period, which covers the clarification of the facts, the investigation, persecution, capture, prosecution, and eventual punishment of all those allegedly responsible for the forced disappearance in a way that examines in a complete and exhaustive form the harm caused by these acts. (*supra* para. 209).

233. The Tribunal observes that the report raised on March 2, 2009, was presented for the crime of forced disappearance, being that the facts of the present case occurred prior to the codification of this crime in the Guatemalan Penal Code. Given that the whereabouts of Florencio Chitay Nech continue to be unknown and the crime of forced disappearance has a permanent character, the Court finds that pursuant to the principle of legality, the concept of forced disappearance constitutes the criminal codification applicable in the investigation, trial and eventual sanction of the facts committed in the present case.

234. As it has been done in other cases,²⁴⁵ the Tribunal gives value to the publication of the report of the CEH, in which the registered case No. 707, makes reference to the disappearance of Florencio Chitay, as an effort that has contributed to the search for and determination of the truth of a historic period of Guatemala. Taking into account the aforementioned, the Court considers it pertinent to specify that the "true history" contained in this report is not complete nor a substitute for the obligation of the State to establish the truth and to assure the judicial determination of individual and State responsibilities through judicial processes as well.²⁴⁶

235. Taking into account that expressed, as well as the jurisprudence of this Tribunal,²⁴⁷ the Court finds that the State must efficiently lead the investigation that takes place in the domestic jurisdiction regarding the forced disappearance of Florencio Chitay Nech to determine all those responsible for the facts of this case and to effectively apply the sanctions and consequences that the law provides. The State must direct and conclude the

²⁴⁵ Cf. *Case La Cantuta V. Perú*, *supra* note 223, paras. 223 and 224; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 180, and *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 232.

²⁴⁶ Cf. *Case Almonacid Arellano et. al. V. Chile*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 26 of September of 2006. Series C No. 154, para. 150; *Case Radilla Pacheco V. México*, *supra* note 12, para. 179, and *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 232.

²⁴⁷ Cf. *Case Baldeón García V. Perú*. Merits, Reparations and Costs. Judgment of 6 of April of 2006. Series C No. 147, para. 199; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 181, and *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 233.

investigations and pertinent proceedings in a reasonable time period, with the goal of establishing all the truth of the facts, with attention to the criteria indicated regarding the investigations in cases of forced disappearances removing all obstacles, *de facto* and *de jure*, that maintain this case in a state of impunity (*supra* paras. 200, 204, 207 to 209). In particular, the State must:

- a) continue without greater delay, in a diligent and effective manner, with the investigation initiated on March 2, 2009, taking into account the criminal codification applicable for crimes of forced disappearance, all the facts of the disappearance and the systematic pattern of violations of human rights existing in this time period, so that the investigation is conducted in consideration of the complexity of these facts and the context in which they occurred, avoiding omissions in the collection of evidence and in the application of logical lines of investigation;
- b) determine all the alleged perpetrators and accomplices of the forced disappearance of Mr. Chitay Nech. The Court also reiterates that in consideration of the gravity of the facts, the State cannot apply laws of amnesty nor make arguments regarding the statute of limitations, retroactivity of the criminal law, *res judicata*, nor the principle of *non bis in idem*, or any other similar exception to their responsibility in order to excuse this obligation, and
- c) assure that the authorities in charge of the investigation have within their reach and can use all the logistical and scientific resources necessary for the collections and processing of evidence, and in particular, have the means to access the documents and pertinent information to investigate the facts denounced and to promptly carry out those acts essential to the clarification of the situation of Florencio Chitay, and that the persons that participated in the investigation, among them, victims, witnesses, and operators of justice, count on due guarantees of security and that they abstain from acts that implicate the obstruction of the investigative process.

236. This Tribunal considers it necessary to reiterate that in compliance with the obligation of guarantees consecrated in Article 1(1) of the American Convention, the State has the duty to avoid and combat impunity(*supra* para. 199). To comply with said obligation, the State must combat it with all the legal avenues available, because impunity “provides for the chronic repetition of the violations of human rights and the total defenselessness of the victims and their next of kin.”²⁴⁸

237. Based on the jurisprudence of the Court,²⁴⁹ during the investigation and judgment, the State must assure the full access and capacity to act in all stages of the investigation, of the next of kin of the victim, in accordance with the domestic law and the norms of the American Convention. Additionally, the results of the proceedings must be publicly

²⁴⁸ Cf. *Case of the “White Van” (Paniagua-Morales et al.) V. Guatemala*. Merits, *supra* note 28, para. 173; *Case Garibaldi V. Brasil*, *supra* note 18, para. 141, and *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 201.

²⁴⁹ Cf. *Case del Caracazo V. Venezuela*. Reparations and Costs. Judgment of 29 of August of 2002. Series C No. 95, para. 118; *Case Anzualdo Castro V. Perú*, *supra* note 18, para. 87, and *Case Radilla Pacheco V. México*, *supra* note 12, paras. 247 and 334.

disseminated so that Guatemalan society knows the facts which are the object of the present case, as well as those responsible.²⁵⁰

B.1 Determination of the whereabouts of Florencio Chitay Nech

238. The Commission and the representatives requested the Court to order the State to carry out the search, identification, and delivery of the mortal remains of Mr. Chitay Nech. In addition, the representatives indicated that this obligation includes that the State “will cover the expenses for the movement and burial in the place that [they] indicate and in agreement with [their] customs” and traditions of the indigenous Mayan *kaqchikel* community. For its part, the State, even though it did not present any specific allegations in this regard, expressed that said measure should be included within friendly settlement procedure.

239. In this regard, the expert witness Rosalina Tuyuc, referring to those disappeared, noted that the families have not yet been able to bid farewell and let them go, they have not had a dignified burial in which to take a candle, a flower, or go to talk, because for them, the deceased continue existing; they are the energetic source of life for the family, community, and their people.

240. As has been established in the present Judgment, as part of the duty to investigate, the State must carry out an effective search for the whereabouts of the victim. (*supra* paras. 204 and 209), so that the right of the next of kin to know the whereabouts of the same²⁵¹ constitutes a measure of reparation and, therefore, an expectation for the State to satisfy.²⁵² Likewise, this permits the next of kin to alleviate the anguish and suffering caused by said uncertainty.²⁵³

241. In the case where the mortal remains are found, they must be delivered to their next of kin, having genetic proof of kinship, as soon as possible and without any costs incurred. In addition, the State must cover the funeral costs, in common agreement with the next of kin.²⁵⁴ To receive the body of the victim is of utmost importance to the next of kin, given that it permits them to bury the remains in accordance with their beliefs and close the mourning process.

C. Measures of Satisfaction, Rehabilitation, and Guarantee of Non-Repetition

242. The Tribunal will determine other measures that seek to repair the non-pecuniary damage that does not have a pecuniary nature, and will provide for measures that extends

²⁵⁰ Cf. *Case del Caracazo V. Venezuela*, *supra* note 249, para. 118; *Case Radilla Pacheco V. México*, *supra* note 12, para. 335, and *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 236.

²⁵¹ Cf. *Case Goiburú et. al. V. Paraguay*, *supra* note 87, para. 171; *Case La Cantuta V. Perú*, *supra* note 223, para. 231, and *Case Ticona Estrada et. al. V. Bolivia*, *supra* note 84, para. 155.

²⁵² Cf. *Case Neira Alegría et. al. V. Perú*. Reparations and Costs. Judgment of 19 of September of 1996. Series C No. 29, para. 69; *Case La Cantuta V. Perú*, *supra* note 223, para. 231, and *Case Ticona Estrada et. al. V. Bolivia*, *supra* note 84, para. 155.

²⁵³ Cf. *Case Ticona Estrada et. al. V. Bolivia*, *supra* note 84, para. 155.

²⁵⁴ Cf. *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 185.

to public reach or repercussion.²⁵⁵

C.1 Satisfaction

a) Publication of the Judgment and Radio Transmission

243. The representatives requested the Court to order the State to publish the Judgment in Spanish in a newspaper of daily national circulation, and in *Kaqchikel* language in a newspaper of local circulation in the zone in which the *Kaqchikel* community lives, given that “in the area in which [...] Florencio Chitay Nech exercised his political leadership and in which he carried out his activities, such language [is] spoken”. The State made no statement in that sense.

244. As it has been established by this Tribunal in other cases²⁵⁶, the State shall publish, once in the Official Gazette and in another newspaper with national circulation, Chapter I; and paragraphs 19, 20, and 21 of Chapter III, paragraphs 64, 67, 68, 70 to 72, 74, to 76, 79, 88, 89, 91, 93, 99 to 103, 108, 110, 113, 116, 117, and 12 of Chapter VIII; paragraphs 126 to 129, 133, 134, 138, 140, 141, 143, 144, 146 to 148, 150, 151, 161 to 163, 166, 167, 170, and 171 of Chapter IX; paragraphs 177, 186, 194, 195, 197 to 200, 204, 207, 209 of Chapter X; paragraphs 225 and 226 of Chapter XI, paragraphs 229, 235, 237, 240, 241, 244, 245, 248, 251, 256 of Chapter XII; all of them including the names of each chapter and the corresponding section -without the corresponding footnotes-, as well as the operative paragraphs of the Judgment, and in another newspaper of wide national circulation, publish the official summary of the Judgment rendered by the Court. In addition, as it has been done by the Court in prior occasions,²⁵⁷ the present Judgment should be published on the official web site of the State, taking into account the nature of the publication ordered to be carried out, for a period of one year. To carry the publications in the newspaper and via internet, the State has a period of six and two months, respectively, as of the notification of the present Judgment.

245. As it has done before,²⁵⁸ the Tribunal takes into account the requests of the representatives, as well as the fact that the next of kin of the victims belong to the Mayan people and that their native language is *Kaqchikel*, a reason why it deems appropriate that the State gives publicity, through a radio station of ample coverage in the Department of Chimaltenango, the official summary of the Judgment rendered by the Court. The foregoing, shall be done in Spanish and Mayan *Kaqchikel*, and for that purpose, the State shall make the corresponding interpretation. The broadcast shall be carried out every first Sunday of the month on at least 4 occasions. For this, the State has the term of one year, after the notification of the present Judgment.

²⁵⁵ Cf. *Case of the “Children of the Street” (Villagrán Morales et. al.) V. Guatemala*. Reparations and Costs, *supra* note 243, para. 84; *Case Usón Ramírez V. Venezuela*, *supra* note 18, para. 164, and *Case of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 255.

²⁵⁶ Cf. *Case Barrios Altos V. Perú*. Reparations and Costs. Judgment of 30 of November of 2001. Series C No. 87, Punto Resolutivo 5 d); *Case Radilla Pacheco V. México*, *supra* note 12, para. 350, and *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 256.

²⁵⁷ Cf. *Case of the Hermanas Serrano Cruz V. El Salvador*, *supra* note 76, para. 195; *Case Radilla Pacheco V. México*, *supra* note 12, para. 350, and *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 256.

²⁵⁸ Cf. *Case Tiu Tojin V. Guatemala*, *supra* note 40, para. 108.

b) *Public act of acknowledgement of international liability*

246. The representatives requested that a public act of acknowledgement of international responsibility be carried out, led by the President of the Republic, in which the State asks the Chitay Rodríguez family and the community in which Florencio Chitay carried out his public activity for forgiveness. At the same time, they requested this act to be carried out in San Martín Jilotepeque, and with wide national coverage and with simultaneous interpretation in *Kaqchikel*.

247. The State pointed out that “it expressed its goodwill to include the [aforementioned] request within a process of [f]riendly [s]ettlement.” Likewise, the State pointed out that the PNR includes as a form of compensation, the restoration of the dignity of the victims.

248. In that regard, the Tribunal positively assesses that the State implement mechanisms to dignify the victims of the internal armed conflict. Nevertheless, this Tribunal deems it necessary for the State to carry out a public act of acknowledgement of responsibility for the facts of the present case as reparation to memory of Florencio Chitay Nech, which should be carried out in both Spanish and *kaqchikel*. In such act, reference should be made to the human rights violations declared in the present Judgment. Likewise, it should be carried out through a public ceremony in presence of high ranking State officials, and the next of kin of Mr. Chitay Nec. The State and the next of kin of Mr. Chitay Nech and/or their representatives should agree upon the modality of fulfillment of the public act of acknowledgement, as well as the specifics required, such as the place and the date in which it shall be carried out.²⁵⁹

c) *Measures in memory of Florencio Chitay Nech*

249. The representatives requested the Court that the Semetabaj Institute be named Florencio Chitay and the career choice of agronomist expert for youth of the region be implemented for youth that do not have access to secondary education. On the other hand, they requested the designation of a school, that shall receive financial recourses to grant “Florencio Chitay” scholarships so as to encourage the leadership of indigenous children and youth in Guatemala. In turn, the State reiterated its willingness to include the designation of: street, square, school, town hall, or center, with the name of the victim, within a process of friendly settlement.

250. It should be pointed out that several expert opinions and declarations presented before this Tribunal, have highlighted the importance of the labor of the indigenous leaders in their communities, and particularly the municipal, departmental, and national, labor and leadership, of Florencio Chitay, who always fought for the wellbeing of his community and served selflessly. (*supra* para. 112).

251. In the particular case, with the purpose of preserving the memory Florencio Chitay Nech in the community that he belonged to, the State, in coordination with the victims, shall place, in a public place significant to the next of kin, in the community of San Martín de Jilotepeque, a commemorative plaque with the name Florencio Chitay Nech and reference to the activities he carried out. This plaque will serve to raise the public conscience to avoid the repetition of facts like those that occurred in the present case, and

²⁵⁹ Cf. *Case Radilla Pacheco V. México*, *supra* note 12, para. 353, and *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 262.

to carry on the memory of the victim.²⁶⁰ The aforementioned shall be carried out within the term of a year after the notification of the present Judgment.

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252. Regarding the other satisfaction measures requested by the representatives, related to the construction of the Florencio Chitay Nech Municipal Museum and support to the cooperative, R.L. Unión San Martín, the Court considers that the issuance of the present Judgment and the reparations ordered in this Chapter are sufficient to remedy the violations suffered as a consequence of the forced disappearance of which Florencio Chitay was a victim.²⁶¹

C.2 Rehabilitation

a) Medical and Psychological Attention to the Victims

253. The representatives requested that this Tribunal order medical and psychological evaluations of the next of kin of Florencio Chitay Nech be performed, in order to immediately provide them with the adequate treatment according to the diagnosis, with the participation of all professionals, according to their necessities, regardless of their place of residence and the cost.

254. The State “manifest[ed] its goodwill to include the [aforementioned] request within a process of [f]riendly [s]ettlement.” Furthermore, it pointed out that the PNR contemplates the attention of individual cases that require help through clinical intervention, as a result of the violations suffered during the internal armed conflict, which are treated by psychologists of the National Mental Health Program of the Ministry of Public Health and Social Assistance, and that within the measures of reparation and rehabilitation workshops have been carried out with the persons that will receive economic compensation prior to the delivery of the compensation.

255. In this regard, the Court values the actions carried out by the State in order to finally give medical and psychological attention to the victims of the armed conflict. However, the court deems, as it has done in other cases,²⁶² that it is necessary to adopt a measure of reparation that gives adequate attention to the psychological and physical suffering of the victims, which stem from the violations already established in the present Judgment, as it has been stated pursuant to the violation to Article 5(1) of the Convention.

256. Therefore, in order to contribute to the reparation of these damages, the Tribunal charges the State with the obligation to freely and immediately render the medical and psychological treatment that the victims require, with their prior informed consent, and for the time necessary, to include the free provision of medicines in Guatemala. The psychological and psychiatric treatment shall be provided by State personnel and

²⁶⁰ Cf. *Case Benavides Cevallos V. Ecuador*. Merits, Reparations and Costs. Judgment of 19 of June of 1998. Series C No. 38, para. 48.5; *Case Myrna Mack Chang V. Guatemala*, *supra* note 12, para. 286, and *Case of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 265.

²⁶¹ Cf. *Case Radilla Pacheco V. México*, *supra* note 12, para. 359.

²⁶² Cf. *Case Barrios Altos V. Perú*, *supra* note 256, para. 45; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 203, and *Case of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 269.

institutions.²⁶³ Furthermore, when providing such treatment, the circumstances and the particular necessities of each victim shall be considered, in a manner in which they receive family and individual treatments, according to that agreed upon by each one of them and after their individual evaluation.²⁶⁴

C4. Guarantees of non-repetition

257. The representatives requested that this Tribunal order the State to modify the dispositions regarding the procedures of absence and death alleged so as to adapt them to international standards, and move forward with the projects that have been pending since 2007. Likewise, they requested that the State modify the PNR structure, in order to make it into a program of legal nature, independent from the executive's discretion, as a "State plan, and not as a government plan subject to the particularities of each government period." Furthermore, they requested that "steps be taken to improve aspects in which the PNR has been highly ineffective, such as impunity, land recuperation, and victim identification."

258. Regarding the procedures of absence and death alleged, the State, in its final written arguments, emphasized its concept and performance, and concluded that "in Guatemala, [such procedures] have been carried out by [...] the next of kin of disappeared persons, that have been, for the most part, solved favorably, however, it is considered that, as it is currently regulated, the process of absence and alleged death does not respond to the Guatemalan social reality, a consequence of the internal armed conflict that lasted 36 years, as it was established by the Court [...] in the Molina Theissen case."

259. Regarding the PNR, the State pointed out that it appeals to several measures to achieve an integral reparation for the victims of the internal armed conflict.²⁶⁵ In the same sense, it manifested that "the programs [...] have been created according to its economic possibilities, [and that its] interest and political will has always been expressed." Therefore, it stated that "the hard work that has been carried out is reflected through the [PNR] and the advancements that have been accomplished as a result of the management of its actual administration [, to which it considered] that the claims of the petitioners in this sense are unfounded." The State requested that the Court "take note of the great advancements [...] through such program, as a mechanism for the attention and reparation which the petitioners have not yet used."

260. The Court notices that in the present case it has not ruled on the merits regarding the provisions of domestic law regarding the forced disappearance and absence and alleged death, as well as the modification of the PNR, and as such it is not possible to establish reparations in that sense. Nevertheless, the Court observes that, regarding the dispositions of domestic law, regarding the procedure of absence and alleged death, the Court ruled on this in the *Case of Molina Theissen v. Guatemala*, and continues evaluating the fulfillment of

²⁶³ Cf. *Case Barrios Altos V. Perú*, *supra* note 256, paras. 42 a 45; *Case Radilla Pacheco V. México*, *supra* note 12, para. 358, and *Case of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 270.

²⁶⁴ Cf. *Case 19 Comerciantes V. Colombia*. Merits, Reparations and Costs. Judgment of 5 of July of 2004. Series C No. 109, para. 278; *Case Radilla Pacheco V. México*, *supra* note 12, para. 358, and *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 270.

²⁶⁵ It pointed out, that those measures include: 1. Dignification of the victims; 2. Cultural redress; 3. Psycho-social Reparation; 4. Material Restitutin, and 5. Economic redress.

that ordered in said Judgment in the procedure for monitoring of compliance.²⁶⁶

D. Compensation

D.1 Pecuniary damages

261. The Court has developed in its jurisprudence the concept of pecuniary damages and the situations in which it shall be compensated.²⁶⁷

262. The Commission requested the Court to adequately repair the next of kin of the victim, including both the moral and the material aspects." The representatives made specific requests regarding the pecuniary damages that include the loss of earnings and the consequential damages. In turn, the State "acknowledge[d] the right that Encarnación, Pedro, Eliseo[,and] Estermerio[, as well as] María Rosaura, all of last name Chitay Rodríguez, might be entitled to an economic reparation for the [p]ecuniary or [n]on pecuniary damages caused by the disappearance of Mr. Florencio Chitay Nech." Nevertheless, it considered that the amount sought exceeded the calculations considered by the State.

i. Consequential damages.

263. The representatives argued that the Chitay Rodríguez family, "due to the persecution and [...] disappearance of Mr. [Chitay Nech], incurred several expenses and loss of several assets." They added that, "the move of Florencio Chitay Nech and the next of kin to the capital city, caused expenses that amount to approximately Q. 500.00 [(five hundred quetzales)]." Likewise, they pointed out that "[t]he family has incurred expenses in the investigation regarding the whereabouts [of Mr Chitay Nech], that amount to [Q. 500.00 (five hundred quetzales)] as of 1981."²⁶⁸ Furthermore, they requested the Court to concede, in equity, [t]he value of the assets lost,²⁶⁹ that amounts to US\$ 200,000.00 (two hundred thousand Dollars of the United States of America) or its equivalent in Guatemalan currency, in favor of Mr. Florencio Chitay Nech, that shall "be divide[d] in equal parts among [his children]." Nevertheless, they pointed out that "[t]he next of kin insists on getting back the plots of land that belonged to Mr. Chitay Nech, however, [...] only a few plots of land have been [...] recuperated."

²⁶⁶ In the mentioned Case, the Tribunal ordered the State to undertake an expedited proceeding that allows for the taking of a statement of absence and presumption of death by forced disappearance.

²⁶⁷ This Court has established that the material harm assumes "the loss of income to the victim, the costs effectuated with motive in the facts, and the consequences of pecuniary nature that are connected with the facts of the Cases." *Case Bámaca Velásquez V. Guatemala*. Reparations and Costs, *supra* note 243, para. 43; *Case Radilla Pacheco V. México*, *supra* note 12, para. 360, and *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 275.

²⁶⁸ The representatives noted that the quantity of Q200.00 (two hundred quetzales) of 1981 corresponds to date to Q. 9,000.000 (nine thousand quetzales), equivalent to US\$1,125.00 (one thousand, one hundred and twenty-five dollars of the United States of America). Likewise, they indicated that the use of referente in quetzales of 1981 that "as a salary base, that which Florencia Chitay Nech would have eared in his work, reflected in quetzales of 2009. A preliminary estimate based in the index of cost to the consumer and minimum salary in quetzales of 1981, multiplied by ten to reach its equivalent in the year 2009. On the other hand, it refers to the type of change, one quetzal of 1980 is equivalent to one U.S. dollar, while eight quetzales in 2009 are equivalent to one U.S. dollar. If the difference is taken into account, the base salary must be multiplied by eight to reach its equivalent in 2009 quetzales."

²⁶⁹ The representatives noted that the quantity items form the actual value of loss of the land in the Department of Chimaltenango that oscilates in eleven dollars for square.

264. The State argued that “the amount of the compensation should be taken into account [,] since the chronic financial difficulties it faces are already widely known.” Likewise, it pointed out that the “programs implemented by [the] government regarding the compensation of the victims of the internal armed conflict, have been created according to [the] economic possibilities, in a continuous, permanent, long term effort to repair, in a pecuniary, manner the victims or the victims next of kin.” Therefore, it requested that “the economic reparation [...] be set in consideration of the economic situation of the State, having as an option, the ability to make the payment through [PNR].”

265. The Court finds that the actions and procedures carried out by the next of kin of Mr. Chitay Nech to locate him, generated expenses that shall be considered as consequential damages, in particular, those referring to the actions of the search for his whereabouts that will be included when establishing the corresponding compensation in the present Section. Nevertheless, regarding the aforementioned loss of property that, according to the representatives, Mr. Chitay Nech had at the moment the facts occurred, the Tribunal points out that it has previously decided not to refer to the alleged violation of Article 21 of the American Convention (*supra* paras. 29 and 30), and thus it is not possible to establish an amount of compensation in this regard.

266. Consequently, the Court establishes in equity a compensation of US\$ 1,000.00 (one thousand Dollars of the United States of America), as compensation for the concept of consequential damages. The aforementioned amount shall be distributed equally among each one of the sons and the daughter, and shall be delivered to each one of them within a term of one year after the notification of the present Judgment.

ii) *Loss of earnings*

267. The representatives, in their brief of motions and pleadings, alleged that Mr. Florencio Chitay had an approximate income of Q.1,000.00 (one thousand quetzales) for his job as a municipal Councilman, as well as for the commercialization of the products from the lands he cultivated, as well as that at the moment of his disappearance he was 46 years old; and that according to reports of the World Health Organization, the life expectancy rate for men in Guatemala is of 71 years old. In consideration of the foregoing, for the concept of loss of earnings, they requested the amount of US\$185,000.00 (one hundred eighty five thousand Dollars of the United States of America).” Later, in their brief of final arguments, they requested the Court to order the State: a) the designation of an actuarial between the parties, to determine the value of the loss of earnings for the agriculture and lumber activities of Mr. Chitay Nech, taking into account the number of hectares of land, the products typically cultivated between 1981 and today, as well as the level of productivity of the area. The foregoing, departing from the amount of US\$1,000.00 (one thousand Dollars of the United States of America); b) the amount of US\$20,000.00 (twenty thousand Dollars of the United States of America) for the earnings that he would have received as a member of the Integral Cooperative R.L., and c) the amount of US\$129,310.00 (one hundred twenty nine thousand, three hundred ten Dollars of the United States of America) for the earnings that he would have obtained, since he had great chances of becoming a congressman. Consequently, for this same concept they requested the amount of US\$497,310.00 (four hundred ninety seven thousand, three hundred ten Dollars of the United States of America) in favor of Florencio Chitay Nech, to be paid equally among his sons and daughter.

268. The State made reference to its economic situation as well as to the PNR, pointing

out that the amount requested for pecuniary damages exceeded the calculations considered by the State, "according to the Actuarial Study made by the graduate Eduardo Bran, economist consultant expert in this matter," who estimated that the amount for loss of earnings rose to US\$23,479.32 (twenty three thousand four hundred seventy nine Dollars of the United States of America with thirty two cents).²⁷⁰

269. The Court considers, as it has done in other cases regarding forced disappearances,²⁷¹ that in this case, in which the whereabouts of the victim are unknown, it is possible to apply compensation criteria regarding loss of earnings that includes the earnings that the victim would have earned in his probable life.

270. In the present case, the Tribunal observes that the representatives, in their final arguments, included under the concept of loss of earnings several items corresponding to several sources of income of Mr. Florencio Chitay Nech. The same were not pointed out in their brief of pleadings and motions, nor were they properly sustained, which resulted in a different amount than that originally requested for that concept. In other words, they did not make specific allegations in this regard, nor did they offer sufficient evidence that would allow the Tribunal to determine the amount of such loss, if it indeed occurred, and if it was directly caused by the facts of the case,²⁷² nor were they presented in the first procedural opportunity that it was granted for that purpose, that is, in their brief of pleadings and motions.²⁷³

271. Therefore, the Court has no elements, besides those alleged, that allow it to prove the requests of the representatives, nor the causal link with the facts of the present case, and the violations declared in the present Judgment, altogether with the fact that it was not alleged in the timely procedural moment. Therefore, the Court will only evaluate those items that have been properly alleged and proven. Moreover, for the determination of loss of income, the Court takes into consideration that pursuant to that argued by the representatives and the State, there is a disparity regarding the life expectancy of the victim.²⁷⁴

272. Consequently, as the Court decides to establish, in equity, the amount of US \$ 75,000.00 (Seventy five thousand Dollars of the United States of America) or their equivalent in quetzales, for the loss of earnings of Florencio Chitay Nech, an amount that shall be distributed equally between each of his offspring and paid in a term of a year, as of the notification of this Judgment.

²⁷⁰ Cf. "Financial Study of Loss of Income in the case of Florencio Chitay Nech" carried out by Attny. Eduardo Bran (economist of council) on September of 2009 (annexes to the response petition, f. 1770).

²⁷¹ Cf. *Case Velásquez Rodríguez V. Honduras*. Reparations and Costs, *supra* note 242, paras. 46 and 47; *Case Castillo Páez V. Perú*. Reparations and Costs. Judgment of 27 of November of 1998. Series C No. 43, para. 75, and *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 213.

²⁷² Cf. *Case Tristán Donoso V. Panamá*, *supra* note 171, para. 184, and *Case Acevedo Buendía et. al. ("Discharged and Retired Employees of the Office of the Comptroller") V. Perú*, *supra* note 226, para. 117.

²⁷³ Cf. *Case of la Masacre of Pueblo Bello V. Colombia*, *supra* note 94, para. 225, and *Case Perozo et. al. V. Venezuela*, *supra* note 125, para. 290.

²⁷⁴ According the represenataives, the life expectancy of a Guatemalan man is 71 years of age, pursuant to the statistic of the World Health Organization, for the year of 2006. On its behalf, the State indicated that, pursuant to the Latin American Center on Demographics, life expectancy Turing the five year period of 1980-1985 was of 56.8 years of age, but in the study carried out by Eduardo Bran, provided by the State, the life expectancy was 56.1 years of age (brief of Preliminary Exceptions, Merits, Reparations and Costs, escrito of solicitudes and argumentos, Tome V, f. 264 and annexes to the response petition a la demanda, f. 1105).

D.2 Non-pecuniary damage

273. The Court has developed in its jurisprudence, the concept of non-pecuniary damage and the situations in which it shall be compensated.²⁷⁵

274. The Commission requested the Tribunal to “adequately repair the next of kin of the victim, and to include the moral as well as the material aspect.” The representatives requested the Court to order the State to pay US\$80,000.00 (eighty thousand Dollars of the United States of America) exempt from any encumbrance or tax in favor of Florencio Chitay Nech and payable in equal parts among his children, in virtue of the non-pecuniary damage that he suffered due to the forced disappearance to which he was submitted. They also requested the payment of US\$50,000.00 (fifty thousand Dollars of the United States of America) for each one of the next of kin²⁷⁶ for the suffering that the forced disappearance of their father generated and its consequences. Also, in the final arguments they asked that the State grant an additional quantity of US\$50,000.00 (fifty thousand dollars of the United States of America) to Encarnación Chitay because “during all these years he has felt guilty for not accompanying Mr. Chitay Nech on the day of his disappearance.” Furthermore, they requested the additional sum of US\$50,000.00 (fifty thousand dollars of the United States of America) in favor of Estermerio Chitay, because “he was with [Mr. Chitay Nech] on the day that he was kidnapped[, and also] of the anguish that he felt when he saw that [his father] was captured, and physically assaulted.” For its part, the State made illusion to its economic situation as well as to PNR in the manner that it was referred to previously. (*supra* para. 15).

275. The international jurisprudence has established repeatedly that a judgment can constitute a *per se* form of reparation.²⁷⁷ Notwithstanding, considering the circumstances of the case *sub judice*, the suffering caused by the violations committed to the victims, as well as the change to their lifestyle conditions and the rest of the pecuniary or non-pecuniary damages that they suffered as a consequence of the violations declared to the detriment of the Chitay Rodríguez siblings of Articles 5(1), 17, 22, 8(1) and 25(1) of the Convention, as well as the effects derived from Article 19 of the same, the Court finds it pertinent to fix a quantity, in equity, as compensation for non-pecuniary damages.²⁷⁸

276. In that regard, the Tribunal considers, as has been signaled in other cases,²⁷⁹ that the non-pecuniary damages inflicted on Florencio Chitay Nech are evident, and it is human

²⁷⁵ The Court has established that nonpecuniary harm “can be composed of the suffering and harm caused to the victim directly and those alleged, the impairment of significative value to persons, such as alterations, of a nonpecuniary nature, to their living conditions of the victim or family.” *Case of the “Children of the Street” (Villagrán Morales et. al.) V. Guatemala*. Reparations and Costs, *supra* note 243, para. 84; *Case Radilla Pacheco V. México*, *supra* note 12, para. 271, and *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 255.

²⁷⁶ The representatives pointed out as next of kin Encarnación, Pedro, Eliseo, Estermerio and Maria Rosaura, all with the last of Chitay Nech, as well as Marta Rodríguez Quex. Likewise, they requested the awarded amount to be distributed equally, among all their offspring.

²⁷⁷ Cf. *Case Neira Alegría et. al. V. Perú*. Reparations and Costs, *supra* note 252, para. 56; *Case Radilla Pacheco V. México*, *supra* note 12, para. 374, and *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 290.

²⁷⁸ Cf. *Case Neira Alegría et. al. V. Perú*. Reparations and Costs, *supra* note 252, para. 56; *Case Garibaldi V. Brasil*, *supra* note 18, para. 193, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 374.

²⁷⁹ Cf. *Case Neira Alegría et. al. V. Perú*. Reparations and Costs, *supra* note 252, para. 56; *Case Garibaldi V. Brasil*, *supra* note 18, para. 193, and *Case Radilla Pacheco V. México*, *supra* note 12, para. 374.

nature that each person submitted to forced disappearance experience profound suffering, anguish, terror, impotence, and insecurity, for which this harm does not require evidence. Also, regarding the next of kin, the Court reiterates that the suffering caused to the victim “extends to the intimate members of the family, especially those that had emotional and close contact with the victim.”²⁸⁰ The Tribunal has also estimated that the suffering and death of a person – in this case, the forced disappearance – gives rise to his sons, daughters, partner or spouse, mother and father, a non-pecuniary damage, which does not need to be demonstrated.²⁸¹

277. In relation to the amount of additional compensation requested by the representatives in favor of Encarnacion and Estermerio, the Court notes that said request was not presented at the proper procedural moment, that is, in the brief of motions and pleadings. Namely, the representatives requested said additional compensation in favor of the two brothers for the first time in the final arguments and did not attach suitable elements that permit the Court to eventually evaluate the particular consequences of such facts of the victims. It corresponds to note that this Court, in examining the violation of Article 5(1) of the Convention, took into account the effects to the psychological and moral integrity that each one of the victims, among them Encarnacion and Estermerio, had suffered as a consequence of the forced disappearance of Florencio Chitay Nech, which constitutes a causal nexus for the reparations that the Tribunal fixes in this regard. Consequently, this Tribunal will not fix additional compensation for Encarnacion and Estermerio Chitay Rodriguez for non-pecuniary damage as was requested by the representatives.

290. In attention to the compensation ordered by the Court in other cases of forced disappearances of persons, in consideration of the circumstances of the present case, the entity, character, and gravity of the violations committed, the suffering caused to the victims in a physical, moral, and psychological sense,²⁸² the Court finds it pertinent to fix in equity the compensation of US\$ 80,000.00 (eighty thousand Dollars of the United States of America) in favor of Florencio Chitay Nech, as compensation for non-pecuniary damage. Likewise, considering that the next of kin of Florencio Chitay experienced various forms of suffering and anguish due to the disappearance of their loved one, the lack of clarity regarding his whereabouts, the forced displacement which occurred, the denial of justice, as well as the change in family environment and the remaining consequences of a non-pecuniary nature that they suffered,²⁸³ the Court finds it pertinent to fix in equity the compensation of US\$ 40,000.00 (forty thousand dollars of the United States of America) in favor of each one of the following persons: Encarnación and Pedro, with the last name of Chitay Rodríguez. Also, for the same reason and in consideration of the afflictions to the rights of the child, the Court fixes in equity the compensation of US\$ 50,000.00 (fifty thousand Dollars of the United States of America) in favor of each one of the following: Eliseo, Estermerio and María Rosaura, all with the last name of Chitay Rodríguez.

²⁸⁰ Cf. *Case Las Palmeras V. Colombia*. Reparations and Costs. Judgment of 26 of November of 2002. Series C. No. 96, para. 55; *Case Goiburú et. al. V. Paraguay*, *supra* note 87, para. 159, and *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 220.

²⁸¹ This criteria has been maintained in other Cases, equally regarding sons, daughters, partners or spouses, among others. Cf. *Case of la Masacre of Pueblo Bello V. Colombia*, *supra* note 94, para. 257; *Case Goiburú et. al. V. Paraguay*, *supra* note 87, para. 159, and *Case Anzualdo Castro V. Perú*, *supra* note 86, paras. 220 and 221.

²⁸² Cf. *Case Ticona Estrada et. al. V. Bolivia*, *supra* note 84, para. 109.

²⁸³ Cf. *Case Ticona Estrada et. al. V. Bolivia*, *supra* note 84, para. 109, and *Case Dos Erres Massacre V. Guatemala*, *supra* note 12, para. 226.

E. *Costs and Expenses*

279. As has been signaled previously by the Court in prior opportunities, the costs and expenses are understood within the concept of reparations enshrined in Article 63(1) of the American Convention.²⁸⁴

280. The Commission requested the Court order the State “to pay the costs and expenses duly proven by [the representatives], taking into consideration the special characteristics of the present case.”

281. The representatives expressed that from the time the report was raised before the Commission until the measures carried out before the Court, the Chitay family and the representatives have incurred expenses that arise to the amount of, approximately, [US\$10,000.00 (ten thousand Dollars of the United States of America)].” Also, they requested the amount of US\$15,000.00 (fifteen thousand Dollars of the United States of America) for fees and US\$6,200.00 (six thousand two hundred Dollars of the United States of America) for expenses related to the public hearing held in the present case. They added that to the “subtotal of pecuniary damage, six percent (6%) must be added for annual interest, calculated since the date of the facts until the moment of payment” and that “the total must be added the corresponding quantity of professional fees pursuant to that established in Decree [No]. 111-96 of the Congress, ‘Tariffs of lawyers, arbitrators, attorney generals, judicial authorities, experts, auditors and trustees.’”

282. Previously, in their final arguments, they reiterated the request for US\$10,000.00 (ten thousand dollars of the United States of America) for expenses, they requested the amount of US\$458,189.00 (four hundred fifty-eight thousand, one hundred eighty-nine dollars of the United States of America) for fees, and for future expenses they requested the sum of US\$20,000.00 (twenty thousand dollars of the United States of America). Nevertheless, the representatives together with said brief presented several tables, in which they made a chart of said items. In the table corresponding to the expenses, they indicated the sum of US\$13,911.00 (thirteen thousand, nine hundred eleven dollars of the United States of America) and, regarding professional fees, they presented two tables: one that indicated the sum of US\$347,189.00 (three hundred forty seven thousand, one hundred eighty-nine dollars of the United States of America); and another that indicated the amount of US\$357,089.00 (three hundred fifty seven thousand, eighty nine dollars of the United States of America). Finally, the representatives manifested that “they have not made a contract of agreement with the alleged victims related to the costs and expenses of litigation, nevertheless, the lawyer Astrid Odete Escobedo Barrondo, due to her exercise of the mandate, agreed to 10% for said exercise, and the lawyer Carlos María Pelayo Möller did not make any agreement for the exercise of the mandate.”

283. For its part, the State signaled that “it should not be condemned to pay the costs and expenses for the failure of the representatives to negotiate a friendly settlement.” The State, in its observations to the annexes issued by the representatives together with the final arguments, also presented its observations in three orders: expenses, professional fees, and future expenses. In the first place, regarding expenses, the State sustained, on the one hand, that the telephone expenses that the representatives tried to charge were unreasonable, and on the other hand, quantified the equivalent expenses as “excessive” for

²⁸⁴ Cf. *Case Garrido and Baigorria V. Argentina*. Reparations and Costs. Judgment of 27 of August of 1998. Series C. No. 39, para. 79; *Case Radilla Pacheco V. México*, *supra* note 12, para. 376, and *Case of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 296.

the purchase of three computers. Besides, it questioned that many expenses that were charged were improper as they were personal expenses of the representatives or for the lack of demonstration of the necessary and reasonable connection to the case. Furthermore, within the concept of expenses, the State considered that the amount for the area of expenses denominated "*per diem* of Carlos Pelayo Möler" must be included in the group of fees. Secondly, in relation with the professional fees, the State alleged that if, in principle, the lawyer Astrid Odete Escobedo Barrondo had convened –through a contract of mandate for legal representation- with the next of kin of Mr. Chitay Nech to charge 10 percent (10%) of the reparations received by them, subsequently she presented "a type of receipt for fees" for US\$169.400.00 (one hundred sixty nine thousand, four hundred dollars of the United States of America). The State also questioned the excessiveness of the remuneration for the psychologist Berta Graciela Escobedo Barrondo, who is also the sister of the legal representative. Equally, it referred to the number of persons that made up the team of representation as excessive and that no receipts had been presented for the payments of the services rendered, but only "receipts in simple paper." Third, in reference to future expenses, the State considered that those were too high.

284. The Tribunal has signaled that "the claims of the victims or their representatives in regards to costs and expenses, and the evidence that sustains it, must be presented to the Court in the first procedural moment granted, namely, in the brief of motions and pleadings, without detriment that such claims are updated at a later time, pursuant to the new costs and expenses that are incurred in the proceeding before this Court."²⁸⁵ Also, the Court reiterates that "the remission of evidentiary documents is not sufficient but it is required that the parties make an argument that relates the evidence with the fact that it is considered to represent, and that, when dealing with allegations of economic spending, the areas are to be established with clarity and justification."²⁸⁶

285. Regarding the repayment of the costs and expenses, it corresponds to the Tribunal to prudently consider its reach, which covers the expenses generated before the authorities of the internal jurisdiction, as well as those generated during the course of the proceeding before the Inter-American System, taking into account the circumstances of the specific case and the nature of the international jurisdiction of the protection of human rights. This consideration can be made with a basis in the principle of equity and taking into account the expenses signaled by the parties, as long as their *quantum* is reasonable.²⁸⁷

286. In this regard, the Court stated that the representatives incurred expenses related with the processing of the present case before the Commission and before this Tribunal relative to transportation, courier services, communication and notary services, among others, for which together with the brief of final arguments they issued the proof of payment of said expenses. The representatives also requested the payment of fees.

²⁸⁵ Cf. *Case Molina Theissen V. Guatemala*. Reparations and Costs, *supra* note 196, para. 122; *Case Anzualdo Castro V. Perú*, *supra* note 86, para. 228, and *Case of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 302.

²⁸⁶ *Case Chaparro Álvarez and Lapo Ñíguez V. Ecuador*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 21 of November of 2007. Series C No. 170, para. 277; *Case Reverón Trujillo V. Venezuela*, *supra* note 39, para. 201, and *Case of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 301.

²⁸⁷ Cf. *Case Garrido and Baigorria V. Argentina*. Reparations and Costs, *supra* note 284, para. 82; *Case Radilla Pacheco V. México*, *supra* note 12, para. 381, and *Case of the Dos Erres Massacre v. Guatemala*, *supra* note 12, para. 300.

287. Regarding the fees, in the brief of final arguments of the representatives, in relation with the processing of the case before the Inter-American System, they signaled that “the expenses and costs that are given through this procedure come about from the work of a working group divided among [professionals that are residents of] Canada, Mexico, Guatemala, and Colombia, a total of eighteen persons,”²⁸⁸ who gave advice and legal assistance and collection, and requested, in the table titled “professional fees” the payment of US\$ 96,000.00 (ninety six thousand dollars of the United States of America)²⁸⁹ distributed among 12 persons who made up the working team that offered the notary services,²⁹⁰ psychological services,²⁹¹ and legal assistance,²⁹² without presenting proof of payment or a breakdown of the fees. This Court observes that it is reasonable in the processing of a case to incur a series of derogations related with assistance and the offering of services, but it must be remembered that that which is requested must be duly justified, and be that which the Court will evaluate at the moment of the fixing the corresponding amount.

288. In addition, it fits to signal that the representatives did not remit the respective proof of payments of expenses and costs that they had supposedly incurred at the moment of the presentation of the brief of motions and pleadings, without detriment that it could have been updated at a later moment. Referring to the expenses presented: a) numerous proof of payments that existed at the moment of the remittance of the brief of motions and pleadings were not presented at this opportunity,²⁹³ and b) some proof of payments did not have a direct relationship with the processing of the case or were supported by any justification.²⁹⁴ Regarding the fees, some areas indicated fees without justification.²⁹⁵ This Court will take into account, when fixing the amount for concept of costs and expenses, the moment that it was requested, if it was duly founded, and if it has a direct relationship with the present case. The Tribunal also calls attention to the variations in the amounts requested, which also will be evaluated.

289. In consideration of all the aforementioned and the observations of the State, the Court fixes in equity a total quantity of US\$ 10,000.00 (10,000.00 dollars of the United States of America) for the costs and expenses incurred in the litigation of the present case.

²⁸⁸ Bernard Duhaime, Alejandro Sánchez Garrido, Wilson of los Reyes Aragón, María del Pilar Gutiérrez Perilla, Christian González Chacón, Ligia María del Valle Vega, Juan Manuel of la Cruz Estrada, Carolina Illescas, Tirsá Rebeca Jiménez Navas, Julie Dubé Gagnon, Sebastián Beaulieu, Nicolas Abran, Francisco Reina, Adriana Padron, Mylene Bellerose, Gabriel Legaré, Maryse Decarie-Daigneault and Marc Perron.

²⁸⁹ Nevertheless, it is important to note that the table bears the heading “professional fees in the Case Florencio Chitay Nech et. al. V. Guatemala” requesting the amount of US\$81,689.00 (eighty-one thousand, six hundred and nine Dollars of the United States of America).

²⁹⁰ Juan Pablo Pons Castillo and Sharon Karina Hernández Rivas.

²⁹¹ Bertha Graciela Escobedo Barrondo, for rendering psychological attention to Pedro and Encarnación Chitay Rodríguez, without noting the date of service nor justification.

²⁹² Bernard Duhaime, Alejandro Sánchez Garrido, Wilson of los Reyes Aragón, María del Pilar Gutiérrez Perilla, Christian González Chacón, Ligia María del Valle Vega, Juan Manuel of la Cruz Estrada, Carolina Illescas and Tirsá Rebeca Jiménez Navas.

²⁹³ In particular, the receipts refer to expenses carried out between June 2003 and August 2007.

²⁹⁴ Between them there are receipts of expenses related to *souvenirs* of “Kiosco Britt” (necklaces, shirts, and chocolates), a medical consultation and an ultrasound, 3 portable computers, and alcoholic beverages.

²⁹⁵ In particular, for the alleged loss of the job of the Attorney Astrid Escobedo Barrondo given her of the case in the System.

Said quantity must include the future costs of potential expenses to be incurred by the Chitay Rodriguez family or their representatives at the domestic level and during the process of supervision of compliance of the Judgment. In this case, given that the accredited legal representative agreed upon a quote *litis* as fee, pursuant to the contract of representation,²⁹⁶ this Tribunal will not rule on this matter.

F. Method of fulfillment of the payment ordered

290. The State must effectuate the payment for the indemnities for pecuniary and non-pecuniary damages directly to the beneficiaries, and the payment for the costs and expenses directly to Pedro Chitay, within a time period of one year beginning from the notification of the present Judgment, in the terms of the following paragraphs.

291. The corresponding payments for the indemnities for pecuniary and non-pecuniary harm suffered directly by Florencio Chitay Nech, shall be distributed in equal shares among his heirs.

292. In case that the beneficiaries pass away prior to the delivery of their respective compensation, it will be directly given to his or her heirs, pursuant to the applicable internal law.

293. The State shall comply with the monetary obligations by means of payment in US dollars or the equivalent in the national currency, using the exchange rate in effect in the New York Stock Exchange, on the day prior to the payment.

294. If, for causes attributable to the beneficiaries of the compensation or their successors, respectively, it is not possible to pay the amounts determined within the term indicated, the State will deposit this amount in their name in an account or certificate of deposit at a reliable Guatemalan financial institution, in US dollars, and under the most favorable financial conditions allowed by law and banking practices. If after 10 years the assigned amount has not been claimed, the amounts will be returned to the State along with the interest accrued.

295. The amounts assigned in the present Judgment as reparation and reimbursement of costs and expenses shall be given to the victims in their in a integral manner, pursuant to that which has been established in this Judgment, without reductions stemming from eventual financial reasons.

296. If the State were to be delayed, it should pay interest on the amount owed corresponding to late interest rates for banks in Guatemala.

XIII

OPERATIVE PARAGRAPHS

309. Therefore,

THE COURT

²⁹⁶ Cf. Contract for representation of victims and special judicial mandate with representation, celebrated in Guatemala City on December 15, 2008, in favor of Attny. Astrid Odete Escobedo Barrondo (annexes of the petition, annex 10, fs. 352 and 353).

DECIDES,

Unanimously, to,

1. Partially admit the preliminary objection of non-exhaustion of domestic remedies raised by the State, in conformity with paragraphs 22 to 34 of the present Judgment.
2. Declare as inadmissible the preliminary objection alleged of "objection to agree upon a friendly settlement," raised by the State, in conformity with paragraphs 38 and 39 of the present Judgment.

DECLARES,

Unanimously, to,

3. Accept the partial recognition of international liability made by the State, in the terms of the paragraphs 19 to 21 of the present Judgment.
4. The State is responsible for the forced disappearance of Florencio Chitay Nech, and as a consequence, violated the right to personal liberty, to humane treatment [personal integrity], to life, to the right to juridical personality, and to the right to participate in government enshrined in Articles 7(1), 5(1), 5(2), 3, 4(1), and 23(1) of the American Convention on Human Rights, in relation with the obligation to respect and guarantee rights, contained in Article 1(1) of the same, and with Article I(a) of the Inter-American Convention on Forced Disappearance of Persons, to the detriment of Florencio Chitay Nech, in the terms of the paragraphs 80 to 121 of the present Judgment.
5. The State is responsible for the violations to the right of freedom of movement and residence and the right to protection of the family, recognized in Articles 22 and 17 of the Convention, in relation with Article 1(1) of the Convention, to the detriment of Encarnacion and Pedro, with the last name of Chitay Rodriguez, in the terms of paragraphs 138 to 163 and 171 of the present Judgment.
6. The State is responsible for the violations to the right of freedom of movement and residence, the right to protection of the family, and the rights of the child, enshrined in Articles 22, 17, and 19 of the American Convention on Human Rights, in relation with the Article 1(1) of this instrument, to the detriment of Eliseo, Estermerio, and María Rosaura, all with the last name of Chitay Rodríguez, in the terms of paragraphs 138 to 171 of the present Judgment.
7. The State is responsible for the violation of the rights to a fair trial and judicial protection recognized in Articles 8(1) and 25(1) of the American Convention on Human Rights, in relation with Article 1(1), to the detriment of Encarnación, Pedro, Eliseo, Estermerio and María Rosaura, all with the last name of Chitay Rodríguez, as well as the noncompliance of the obligation enshrined in Article I(b) of the Inter-American Convention on the Forced Disappearance of Persons, in the terms of paragraphs 117, 191 to 209 of the present Judgment.
8. The State is responsible for the violation of the right to personal integrity recognized in Article 5(1) of the American Convention on Human Rights, in relation with Article 1(1) of the Convention, to the detriment of Encarnacion, Pedro, Eliseo, Estermerio, and Maria Rosaura, all with the last name of Chitay Rodriguez, in the terms of the paragraphs 220 to

226 of the present Judgment.

9. The Court did not find a violation of the right to domestic legal effects, consecrated in Article 2 of the American Convention on Human Rights, nor the lack of fulfillment of Articles II and III of the Inter-American Convention on the Forced Disappearance of Persons, in conformity with paragraphs 120, 214, and 215 of the present Judgment.

10. The Court does not find that it is necessary to rule on the alleged violation of the right to property enshrined in Article 21 of the American Convention on Human Rights, in conformity with paragraphs 26 to 30 of the present Judgment.

AND DECLARES,

unanimously, that,

11. This Judgment constitutes, *per se*, a form of reparation.

12. The State must manage efficiently, with due diligence and within a reasonable time period, the investigation and, if it is the case, the criminal processes started in relation with the detention and prior forced disappearance of Florencio Chitay Nech, to determine the corresponding criminal perpetrators and effectively apply the punishment and consequences applicable by the law, in the terms of paragraphs 232 to 237 of the present Judgment.

13. The State must continue with the effective search for and tracking of Florencio Chitay Nech, in the terms of paragraphs 239 to 241 of the present Judgment.

14. The State shall publish, once in the Official Gazette and in another newspaper with national circulation, Chapter I; and paragraphs 19, 20, and 21 of Chapter III, paragraphs 64, 67, 68, 70 to 72, 74, to 76, 79, 88, 89, 91, 93, 99 to 103, 108, 110, 113, 116, 117, and 12 of Chapter VIII; paragraphs 126 to 129, 133, 134, 138, 140, 141, 143, 144, 146 to 148, 150, 151, 161 to 163, 166, 167, 170, and 171 of Chapter IX; paragraphs 177, 186, 194, 195, 197 to 200, 204, 207, 209 of Chapter X; paragraphs 225 and 226 of Chapter XI, paragraphs 229, 235, 237, 240, 241, 244, 245, 248, 251, 256 of Chapter XII; all of them including the names of each chapter and the corresponding section -without the corresponding footnotes-, as well as the operative paragraphs of the Judgment. The State must transmit the official summary via radio each first Sunday of the month on at least four occasion. The foregoing, should be carried out in Spanish and in Mayan *kaqchikel*. In addition, the State must public the entire Judgment on the official web site of the State, in the terms of paragraph 244 and 245 of the present Judgment.

15. The State must carry out a public act of recognition of responsibility in relation to the facts of the present case and apology in memory of Florencio Chitay Nech, in which reference must be made to the human rights violations declared in the present Judgment, in the presence of high ranking State officials and the next of kin of Mr. Chitay Nech. Said act must be carried out in Spanish and in Mayan *kaqchikel*, in the terms of paragraph 248 of the present Judgment.

16. The State must name a recognized street in San Martín Jilotepeque with the name of Florencio Chitay Nech and place a commemorative plaque with his name that makes reference to his activities, in the terms of paragraphs 250 and 251 of the present Judgment.

17. The State must offer psychological and/or psychiatric attention to the victims declared in the present Judgment if they request it, immediately and in an adequate and effective manner, through specialized public health institutions, to the victims declared in this Judgment whom request it, in the terms of paragraphs 255 and 256 of the same.

18. The State must pay the fixed quantities in paragraphs 266, 272, 278, and 289 of the present Judgment, as compensation for pecuniary and non-pecuniary damages and the reimbursement of the costs and expenses, as it corresponds, within a time period of one year, beginning from the notification of the present Judgment, in the terms of paragraphs 265 and 266, 269 to 272, 275 to 278, and 284 to 289 of the same.

16. The State shall submit, within one year from the date of notification of this Judgment and for the purpose of its supervision, a report on the measures adopted in compliance with the Judgment. The Court shall close the instant case once the State has fully complied with the provisions established herein.

Written in Spanish and English, the Spanish text being authentic, in San Jose, Costa Rica on May 25, 2010.

Sergio García Ramírez
Presidente

Alirio Abreu Burelli

Oliver Jackman

Antônio A. Cançado Trindade

Cecilia Medina Quiroga

Manuel E. Ventura Robles

Diego García-Sayán

Pablo Saavedra Alessandri
Secretario

Comuníquese y ejecútese,

Pablo Saavedra Alessandri
Secretario

Sergio García Ramírez
Presidente