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Inter-American Court of Human Rights

Case of the Serrano-Cruz Sisters *v.* El Salvador

Judgment of March 1, 2005
(Merits, Reparations and Costs)

In the *Case of the Serrano Cruz Sisters*,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges[*]:

Sergio García Ramírez, President
Alirio Abreu Burelli, Vice President
Oliver Jackman, Judge
Antônio A. Cançado Trindade, Judge
Cecilia Medina Quiroga, Judge
Manuel E. Ventura Robles, Judge, and
Alejandro Montiel Argüello, Judge *ad hoc*;

also present,

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

pursuant to Article 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Articles 29, 31, 56 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"),[1] delivers this judgment.

I
INTRODUCTION OF THE CASE

1. On June 14, 2003, in accordance with the provisions of Articles 50 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") filed an application against the State of El Salvador (hereinafter "the State" or "El Salvador") before the Court, originating from petition No. 12,132, received by the Secretariat of

[*] Judge Diego García-Sayán excused himself from hearing this case in accordance with Articles 19(2) of the Court's Statute and 19 of its Rules of Procedure.

[1] This judgment is delivered under the Rules of Procedure adopted by the Inter-American Court of Human Rights at its forty-ninth regular session in an order of November 24, 2000, which entered into force on June 1, 2001, and under the partial reform adopted by the Court at its sixty-first regular session by an order of November 25, 2003, in force since January 1, 2004.

the Commission on February 16, 1999.

2. In its application, the Inter-American Commission indicated that the alleged "capture, abduction and forced disappearance of the then children Ernestina and Erlinda Serrano Cruz" (hereinafter "Ernestina and Erlinda Serrano Cruz", "Ernestina and Erlinda", "the Serrano Cruz sisters" or "the alleged victims"), who were "7 and 3 years old, respectively [commenced as of June 2, 1982, when] they were [allegedly] captured […] by soldiers, members of the Atlacatl Battalion of the Salvadoran Army, during a [military] operation" known as "*Operación Limpieza*" [Operation Cleansing] or the "*guinda de mayo,*" in the municipality of San Antonio de la Cruz, Chalatenango Department, from May 27 to June 9, 1982. "Around fourteen thousand soldiers" allegedly took part in this operation.

According to the Commission, during the operation, the Serrano Cruz left their home to protect their lives. However, only María Victoria Cruz Franco, Ernestina and Erlinda's mother, and one of her sons were able to cross "the military barricade on the way to the village of Manaquil." Dionisio Serrano, Ernestina and Erlinda's father, and his children Enrique, Suyapa (who was carrying her 6-month old baby), Ernestina and Erlinda Serrano Cruz, together with a group of villagers crossed the mountains in the direction of the settlement of "Los Alvarenga," which they reached after walking for three days. Once there, they hid for another three days, despite the lack of food and water. Suyapa Serrano Cruz decided to hide with her baby near the place where her father and siblings were, so as not to endanger them because her baby cried. Dionisio Serrano and his son, Enrique, went to fetch water from a nearby river "at the insistence of his daughters." Finding themselves alone, the children Ernestina and Erlinda began to cry and were discovered by "the military patrols." The Commission stated that Suyapa Serrano Cruz was sure the soldiers took her sisters, because she heard one soldier ask the others whether they should take the girls or kill them, to which another soldier replied that they should take them. When she no longer heard any noise, Suyapa began to look for her two sisters; then her father returned and he also searched around the place where he had left them.

The Commission indicated that Ernestina and Erlinda Serrano Cruz "were last seen 21 years ago, when a Salvadoran Armed Forces helicopter took them" from the site of these events to a place known as "La Sierpe" in the city of Chalatenango. The Commission stated that there is no evidence to prove reliably whether the soldiers who captured the girls handed them over to the International Committee of the Red Cross or to the Salvadoran Red Cross. The Commission also indicated that these facts form part of a pattern of forced disappearances in the context of the armed conflict, allegedly "perpetrated or tolerated by the State."

The Commission stated that Mrs. Cruz Franco was in Honduras "as a refugee in a camp," with her daughter, Suyapa. It also indicated that, because "the facts occurred at a time when domestic legal remedies were inoperative," it was only on April 30, 1993, that María Victoria Cruz Franco, the alleged victims' mother, filed a complaint before the Chalatenango Trial Court for the alleged disappearance of Ernestina and Erlinda. The girls' mother filed the complaint "a month and a half after the Salvadoran population recovered its faith in its Judiciary," following publication of the United Nations Truth Commission's report on March 15, 1993. On November 13, 1995, Mrs. Cruz Franco filed a petition for *habeas corpus* before the Constitutional Chamber of the Supreme Court of Justice. The Chamber rejected it, considering that this remedy was not appropriate for investigating the whereabouts of the sisters. In this regard, the Commission indicated that "the whereabouts of Ernestina and Erlinda

Serrano Cruz have not been ascertained, and those responsible have not been identified or punished."

The Commission filed the application in this case for the Court to decide whether the State had violated Articles 4 (Right to Life), 7 (Right to Personal Liberty), 18 (Right to a Name) and 19 (Rights of the Child) of the American Convention, in relation to Article 1(1) (Obligation to Respect Rights) thereof, to the detriment of Ernestina and Erlinda Serrano Cruz. The Commission also requested the Court to decide whether the State had violated Articles 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), 17 (Rights of the Family) and 25 (Judicial Protection) of the Convention, in relation to Article 1(1) (Obligation to Respect Rights) thereof, to the detriment of Ernestina and Erlinda Serrano Cruz and of their next of kin. The Commission requested the Court to rule on the international responsibility of the State of El Salvador, for having incurred in a continuing violation of its international obligations "[the] effects [of which…] continue over time owing to the forced disappearance of the [alleged] victims on June 2, 1982, and, particularly, as of June 6, 1995, the date on which the State accepted the contentious jurisdiction of the Court."

II
PROCEEDING BEFORE THE COURT[2]

3. On June 14, 2003, the Inter-American Commission filed an application before the Court (*supra* para. 1), to which it attached documentary evidence; it also offered testimonial and expert evidence.

4. On September 1, 2003, the representatives of the alleged victims and their next of kin (hereinafter "the representatives") submitted their requests and arguments brief, to which they attached documentary evidence; they also offered testimonial and expert evidence.

5. On October 31, 2003, the State submitted a brief filing preliminary objections, answering the application, and with observations on the requests and arguments brief, to which it attached documentary evidence; it also offered testimonial and expert evidence.

6. On January 16, 2004, the Commission and the representatives submitted briefs, in which they presented their arguments on the preliminary objections filed by the State. The representatives included appendixes with their brief.

7. On April 1, 2004, the representatives submitted a brief advising that María Victoria Cruz Franco, the alleged victims' mother, had died on March 30, 2004.

8. On August 23 and 27, 2004, the State forwarded the testimonial statements and expert witness report made before public notary by four witnesses and an expert witness (affidavits).

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[2] The procedure followed for processing this case before the Inter-American Commission is described in the judgment on preliminary objections delivered by the Court on November 23, 2004. The judgment on preliminary objections also contains the description of the proceedings before the Court up until November 22, 2004; this will not be repeated in this judgment, which will only describe the principal procedural actions. In this regard, *cf. Case of the Serrano Cruz Sisters.* Preliminary objections. Judgment of November 23, 2004. Series C No. 118, paras. 3-47.

9. On August 23, 2004, the representatives transmitted the statements made before public notary (affidavits) by three witnesses, and the sworn statements of three expert witnesses. The representatives also presented the videos with the statements made before public notary (affidavits) by the three witnesses.

10. On August 27, 2004, the Inter-American Commission forwarded the sworn statement made by an expert witness.

11. On September 1, 2004, the Inter-American Commission and the representatives filed briefs with which they transmitted observations on the sworn written statements made before public notary (affidavits) presented by the State (*supra* para. 8). The representatives included several documents as appendixes to their brief.

12. On September 3, 2004, the State forwarded its observations on the sworn written statements presented by the Commission and the representatives, as well as on the statements and videos submitted by the representatives (*supra* paras. 9 and 10).

13. On September 6, 2004, the State submitted a brief, to which it attached documentation, and requested the Court to admit the evidence it had attached.

14. On September 7 and 8, 2004, the Court held a public hearing on preliminary objections and merits, reparations, and costs.

15. On September 9, 2004, in response to the request made by the Court during the public hearing, the representatives of the alleged victims and their next of kin forwarded a copy of Legislative Decree No. 486, "General Amnesty Act for the Consolidation of Peace," issued on March 20, 1993, and judgment No. 24-97/21-98, delivered by the Constitutional Chamber of the Supreme Court of Justice of El Salvador on September 26, 2000.

16. On September 10, 2004, the Ombudsman of El Salvador submitted a brief, attaching a copy of his "Report on the forced disappearance of Ernestina and Erlinda Serrano Cruz, its current impunity and the pattern of violence surrounding such disappearances], published on September 2, 2004. The representatives also presented a copy of this report on September 6, 2004.

17. On October 7, 2004, the State submitted its final written arguments on preliminary objections and merits, reparations, and costs, with several appendixes. El Salvador also forwarded some of the documents that the President of the Court had requested as helpful evidence.

18. On October 8, 2004, the Inter-American Commission and the representatives remitted their final written arguments on preliminary objections and merits, reparations, and costs.

19. On October 18, 2004, the State submitted a brief with which it remitted a copy of "Executive Decree No. 45, signed by the President of the Republic and the Minister of the Interior, creating the Inter-institutional Commission to find the children who disappeared as a result of the armed conflict in El Salvador."

20. On November 22, 2004, the representatives forwarded a brief and its

appendixes in which they presented "information they considered fundamental" with regard to the "supervening fact of the submission of the executive decree[, presented by the State," providing for the creation of the Inter-institutional Commission to find the children who disappeared as a result of the armed conflict in El Salvador (*supra* para. 19).

21. On November 23, 2004, the Court delivered judgment on the preliminary objections filed by the State (*supra* para. 5), in which it decided:

Unanimously,

1. To admit the first preliminary objection *ratione temporis* filed by the State, entitled "Lack of jurisdiction owing to the terms in which the State of El Salvador recognizes the jurisdiction of the Inter-American Court of Human Rights," in accordance with paragraphs 73, 78 and 96 of this judgment, with regard to facts or acts that occurred prior to June 6, 1995, the date on which the State deposited the instrument recognizing the Court's jurisdiction with the OAS General Secretariat.

By six votes to one,

2. To admit the first preliminary objection *ratione temporis* filed by the State, entitled "Lack of jurisdiction owing to the terms in which the State of El Salvador recognizes the jurisdiction of the Inter-American Court of Human Rights," in accordance with paragraphs 73, 79, 95 and 96 of this judgment, with regard to facts or acts that began prior to June 6, 1995, and which continued after that date on which the State accepted the jurisdiction of the Court.

Dissenting Judge Cançado Trindade.

By six votes to one,

3. To reject the first preliminary objection *ratione temporis* filed by the State, entitled "Lack of jurisdiction owing to the terms in which the State of El Salvador recognizes the jurisdiction of the Inter-American Court of Human Rights," in accordance with paragraphs 84, 85, 93, 94 and 96 of this judgment, with regard to the alleged violations of Articles 8 and 25 of the Convention, in relation to Article 1(1) thereof, and to any other violation whose facts or commencement occurred after June 6, 1995, the date on which the State deposited the instrument recognizing the jurisdiction of the Court with the OAS General Secretariat.

Dissenting Judge *ad hoc* Montiel Argüello.

Unanimously,

4. To reject the preliminary objection entitled "Non-retroactivity of the application of the crime of forced disappearance of persons", in accordance with the first and second operative paragraphs and paragraphs 78, 79 and 106 of [the] judgment.

Unanimously,

5. To reject the second preliminary objection entitled "Lack of jurisdiction *rationae materiae*,*"* in accordance with the first and second operative paragraphs and paragraphs 78, 79 and 120 of [the] judgment.

Unanimously,

6. To reject the third preliminary objection entitled "Inadmissibility of the application owing to ambiguity or inconsistency between the object and the plea, and the body of the text," because this is not a true preliminary objection, in accordance with paragraph 127 of [the] judgment.

By six votes to one,

7. To reject the fourth preliminary objection filed by the State regarding "failure to exhaust

domestic remedies," in accordance with paragraphs 141 and 142 of [the] judgment.

Dissenting Judge *ad hoc* Montiel Argüello

[…]

22. On January 19, 2005, on the instructions of the President and in accordance with the provisions of Article 45(2) of the Court's Rules of Procedure, the Secretariat sent a note to the State requesting its cooperation in forwarding the to Court, by January 28, 2005, at the latest, a copy of any other measures that had been taken in the criminal proceedings before the Chalatenango Trial Court, "Case No. 112/93," after September 6, 2004.

23. On January 28, 2005, responding to the President's request (*supra* para. 22), the State filed a brief with an appendix, in which it indicated that "the Public Prosecutor's office-Chalatenango Subregional Branch, […] ha[d] ordered the Trial Court […] to issue an official communication to the Minister of National Defense requesting him to authorize the Commander of the Fourth Infantry Brigade of Chalatenango to make the relevant log book available for inspection [, … and] to advise whether during the period between 1982 and 1993, there [was] any record of a possible adoption relating to the children, Erlinda and Ernestina Serrano Cruz." The State attached a copy of the communication issued by the Prosecutor on January 21, 2005.

24. On January 31, 2005, in response to the President's request (*supra* para. 22), the State transmitted a certified copy of the communication notifying the Prosecutor of the decision issued by the Chalatenango Trial Court on January 27, 2005, ordering the measures that the Prosecutor had requested in the official communication of January 21, 2005 (*supra* para. 23).

III
JURISDICTION

25. Under the terms of Articles 62 and 63(1) of the Convention, the Court has jurisdiction to consider the merits, reparations and costs in this case, since El Salvador has been a State Party to the American Convention since June 23, 1978, and accepted the contentious jurisdiction of the Court on June 6, 1995.

26. The State filed four preliminary objections, three of which have been rejected and one of which has been partially accepted by the Court in the judgment on preliminary objections delivered on November 23, 2004 (*supra* para. 21). In this judgment, the Court partially accepted the preliminary objection of "Lack of jurisdiction *Ratione temporis,"* and decided that it did not have competence to consider facts or acts that occurred prior to June 6, 1995, the date on which the State deposited the instrument recognizing the Court's jurisdiction with the General Secretariat of the Organization of American States (hereinafter "OAS"), nor did it have competence to consider facts or acts which began prior to June 6, 1995, and which extended until after that date. Additionally, in the said judgment, when partially rejecting the said preliminary objection, the Court decided that it did have competence to consider "the alleged violations of Articles 8 and 25 of the Convention, in relation to Article 1(1) thereof, and any other violation, whose facts or commencement of execution were subsequent" to the date on which the State accepted the Court's jurisdiction. Hence, in this judgment, it will examine the legal

facts or acts subsequent to or which commenced after that date. Consequently, the Court decided that it would not rule on the alleged forced disappearance of Ernestina and Erlinda Serrano Cruz, which was alleged to have occurred in June 1982 and, accordingly, on any of the allegations that support violations related to this disappearance.

IV
PRIOR CONSIDERATIONS

27. The Court considers it necessary to establish that, even though it will not rule on the alleged violation of the Convention by El Salvador with regard to some of the facts affirmed by the Commission concerning the alleged forced disappearance of the children, it will take into consideration the facts described to the extent that is necessary to contextualize the alleged violations that took place after June 6, 1995, the date on which the State accepted the Court's jurisdiction.

28. The foregoing considerations concerning the alleged forced disappearance of Ernestina and Erlinda Serrano Cruz are necessary because, in the domestic sphere in El Salvador, there is a criminal case before the Chalatenango Trial Court "against members of the Atlacatl Battalion" to investigate what happened to the Serrano Cruz sisters. Regarding the crime under investigation, the Court has noted that, in El Salvador at the time of the facts described in the application, the crime of forced disappearance was not typified and that, in the internal case file, different criminal categories are mentioned such as "removal from personal care (*sustracción del cuidado personal*) of the children, Erlinda and Ernestina Serrano" and "abduction"; moreover, in the international proceeding, the State has indicated that it is investigating "the crime of deprivation of liberty of the children, Ernestina and Erlinda Serrano." When ruling on the facts or acts that occurred after June 6, 1995, including those related to the alleged violations of judicial guarantees and judicial protection, the Court will sometimes have to refer to what is being investigated in that proceeding; however, it should not be understood that it is ruling on State responsibility for what happened prior to June 6, 1995, because it lacks jurisdiction to do so.

29. In addition, the internal armed conflict that took place in El Salvador from 1980 to 1991 is a historical fact that is not disputed. Consequently, the Court considers it necessary to emphasize that, without ruling on the alleged forced disappearance of the children, Erlinda and Ernestina Serrano Cruz, it will take into account the said armed conflict and the alleged facts described by the parties to the extent necessary to place the instant case in context.

V
EVIDENCE

30. Before examining the evidence provided, the Court will make some observations, in light of the provisions of Articles 44 and 45 of the Rules of Procedure which have been developed in its case law and are applicable to this case.

31. The adversary principle, which respects the right of the parties to defend themselves, applies to matters pertaining to evidence. This principle is embodied in Article 44 of the Rules of Procedure, as regards the time at which the evidence

should be submitted to ensure equality between the parties.[3]

32. According to the Court's practice, at the commencement of each procedural stage, the parties must indicate the evidence they will offer at the first opportunity they are given to communicate with the Court in writing. Moreover, in exercise of the discretional powers included in Article 45 of its Rules of Procedure, the Court or its President may request the parties to provide additional probative elements as helpful evidence; and this shall not provide a new opportunity for expanding or completing the arguments or offering fresh evidence, unless the Court expressly permits it.[4]

33. In the matter of receiving and weighing evidence, the Court has indicated that its proceedings are not subject to the same formalities as domestic proceedings and, when incorporating certain elements into the body of evidence, particular attention must be paid to the circumstances of the specific case and to the limits imposed by respect for legal certainty and the procedural equality of the parties. Likewise, the Court has taken international case law into account; by considering that international courts have the authority to assess and evaluate the evidence according to the rules of sound criticism, it has always avoided a rigid determination of the *quantum* of evidence needed to support a judgment. This criterion is true for international human rights courts, which have greater latitude to evaluate the evidence on the pertinent facts, in accordance with the principles of logic and on the basis of experience.[5]

34. Based on the foregoing, the Court will now proceed to examine and weigh all the documentary probative elements forwarded by the Commission, the representatives and the State at different procedural opportunities and as helpful evidence requested by the Court and its President, as well as the testimonial and expert evidence given before the Court during the public hearing, all of which comprise the body of evidence in this case. To this end, the Court will respect the principles of sound criticism within the applicable legal framework.

A) DOCUMENTARY EVIDENCE

35. The documentary evidence submitted by the Commission, the representatives and the State included testimonial statements and expert reports made before public notary (affidavits) and sworn statements (*supra* paras. 8, 9 and 10), as requested by the President in his order of August 6, 2004, and the Court considers it necessary to summarize them.

TESTIMONIES

a) Proposed by the Inter-American Commission and the representatives

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[3] *Cf. Case of Lori Berenson Mejía.* Judgment of November 25, 2004. Series C No. 119, para. 62; *Case of Carpio Nicolle et al..* Judgment of November 22, 2004. Series C No. 117, para. 54; and *Case of the Plan de Sánchez Massacre. Reparations (Art. 63(1) American Convention on Human Rights).* Judgment of November 19, 2004. Series C No. 116, para. 27.

[4] *Cf. Case of Lori Berenson Mejía, supra* note 3, para. 63; *Case of Molina Theissen*. *Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of July 3, 2004. Series C No. 108, para. 22; and *Case of Herrera Ulloa*. Judgment of July 2, 2004. Series C No. 107. para. 56.

[5] *Cf. Case of Lori Berenson Mejía, supra note 3,* para. 64; *Case of Carpio Nicolle et al., supra* note 3, para. 55; and *Case of the Plan de Sánchez Massacre. Reparations*, *supra* note 3, para. 28.

1. José Fernando Serrano Cruz, the alleged victims' brother

He is the son of María Victoria Cruz Franco and Dionisio Serrano Morales, both of whom are deceased; he has eight living siblings and had four more siblings who have died. He is 31 years old; he is a radio operator and he is blind. His sisters, Ernestina and Erlinda, were born in Santa Anita canton, San Antonio de La Cruz jurisdiction, Chalatenango Department, and were registered and baptized. Ernestina was thin, dark-skinned, and had black hair. Erlinda was plump, with pale skin and blond hair.

The witness referred to the military operation carried out in May 1982 as "the most extensive that took place at the time." He also referred to what happened to his family when they fled from their home to protect themselves, particularly what happened to his sisters, Ernestina and Erlinda. Owing to this operation, on May 28, 1982, the witness and his family moved from Santa Anita to Los Amates canton, San Isidro Labrador jurisdiction. While there, they heard shots and the soldiers coming closer, so they decided to return to Santa Anita. They traveled to Los Alvarenga canton, Nueva Trinidad. Since dawn was approaching, they decided to hide in the woods so that the soldiers would not see them. It was then that the Serrano Cruz family separated. The witness, his mother and his sister, Rosa, managed to reach Los Conacaste canton, where they asked "other people […] about the other members of the family," and they were told that the witness's father, his siblings José Enrique, Erlinda, Ernestina, Suyapa and the latter's son, had last been seen in Los Alvarenga canton. Approximately, one month later, the witness's family, with the exception of Ernestina and Erlinda, was reunited. The witness's mother asked her husband about the girls, and he "decided not to say that [Ernestina and Erlinda] had disappeared, which suggested that they were dead." However, subsequently, Enrique, the witness's brother, told his mother that Ernestina and Erlinda "were not dead, but that the soldiers "had taken them" when Suyapa was taking care of them while he and his father were looking for water for the girls. The witness's family was profoundly affected emotionally, especially his mother; she began to suffer from a variety of illnesses and was constantly crying and having nightmares.

In 1985, there was a very violent military operation during which the witness's father and a nephew died. The witness's mother was able to submit the case to the *Asociación Pro-Búsqueda* and the Public Prosecutor's office. The complaint before the Public Prosecutor's office did not accomplish anything; there was no response from the State.

The witness asked that "justice should be done, because, to date, there has been no response from the Government to clarify his sisters' case."

2. Andrea Dubón Mejía, a young woman who disappeared during the armed conflict in the 1982 "*guinda de mayo*" and was found

She is 29 years old, has a university degree in Social Work and comes from El Sitio canton, Arcatao jurisdiction, Chalatenango Department. She was seven years old when the so-called "*guinda de mayo*" military operation took place; she was taken by helicopter with a group of people to the Chalatenango Red Cross. There were about 30 other children there and no one took down any

information to identify them. The witness was at the Red Cross for about a month and does not know whether the Red Cross took any action to seek and find her family. Subsequently, the witness and five children, including María Elsy Dubón, were transferred by ambulance to the SOS Village in Santa Tecla. There, the personnel always tried to give them as much as possible, but it was insufficient; she felt very alone and sad because of all she had endured. In the SOS Village they knew the witness as Andrea Serrano, because the Director of the Village gave her that name and provided her with an identity document; he did the same for other children. A file was prepared on each boy and girl in the SOS Village. At times, the Red Cross female volunteers wanted to take a child, but the Village authorities never allowed this.

Neither the Red Cross, nor the SOS Village authorities, nor the State tried to trace the witness's family. She was reunited with her family with the help of a cousin and the *Asociación Pro-Búsqueda*. She considers that the State should create an institution to seek the children who disappeared.

b) Proposed by the Inter-American Commission and the representatives, and presented by the latter

3. María Victoria Cruz Franco, the alleged victims' mother[6]

The witness was 61 years old when she gave her testimony. She was the widow of Dionisio Serrano Morales and mother of 12 children, all Serrano Cruz: Marta, Suyapa, Socorro (deceased), Arnulfo, Irma (deceased), Enrique (deceased), Fernando, Juan (deceased), Ernestina, Erlinda, Rosa and Oscar.

During the war, members of the El Salvador Armed Forces set fire to the witness's house and, consequently, burned the birth certificates and photographs of her children. During the armed conflict, the Registry Office of the Mayor's office of San Antonio de La Cruz was also burnt down. The children Ernestina and Erlinda Serrano Cruz were born in the witness's home in Santa Anita, San Antonio de La Cruz. They were both baptized, but in different places. Ernestina had pale skin, black hair and "curls", with a "blue vein" that crossed her face, and she was very subdued. Erlinda had pale skin, "light blue eyes," thick, straight, blond hair, a large nose and was very lively.

The witness referred to the military operation, owing to which she had to flee from her home with her family for protection, particularly what happened to her daughters, Ernestina and Erlinda. When they fled, the family traveled together at first, but then they separated because the witness, together with her children, Fernando and Rosa, got lost on hearing shots when they were close to a military patrol. They met again about one month later at their home, when the members of the family "began arriving one by one" at different times, except for Ernestina and Erlinda who never arrived. She asked where her daughters Ernestina and Erlinda were, but they did not want to say they were lost, until Enrique, one of the witness's sons, made "signs" to her that they were lost. The witness's husband was murdered from a helicopter while he was looking after his rice field on the edge of the Manaquil River.

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[6] Mrs. Cruz Franco died on March 30, 2004, almost four months after she made this statement.

With the aid of the United Nations High Commissioner for Refugees (UNHCR), the witness went with her family to live in Mesa Grande, Honduras, for two years. While she was in Mesa Grande, Narcisa Orellana told her that it was being broadcast on the radio that the children had appeared in La Sierpe de Chalatenango and that the Red Cross might have them. The witness did not mention this information to anyone, because she did not have documentation to be able to travel to Chalatenango. The witness heard two people, who have since died, say that they had seen the girls: Paula Serrano, who was in the helicopter in which they were taken and knew them, and "Narcisa", wife of her cousin, Eustaquio Franco, who saw them descend from the helicopter in La Sierpe.

The witness went to the Attorney General's office twice to report what had happened to Ernestina and Erlinda, accompanied by a member of the *Asociación Pro-Búsqueda*. The first time they were received very discourteously by a lawyer, who threatened to call the police. The second time, they were received by another lawyer, who did not believe her either. Twice, she visited a judge, who, in principle, did not believe her and then "received her satisfactorily."

She would like her children to be returned to her, to be able to see them.

c) Proposed by the State

4. Roque Miranda Ayala, cousin of the alleged victims' father

The witness is a second cousin of Dionisio Serrano, father of Erlinda and Ernestina Serrano Cruz. He knew Dionisio and his wife, María Victoria Cruz Franco, very well because they lived nearby in San Antonio de La Cruz, in Santa Anita canton, Los Castros settlement. The witness saw them for the last time in 1980 before he went to Honduras and, at that time, "he did not know of any daughters with the names, Ernestina and Erlinda, both Serrano Cruz".

5. Blanca Rosa Galdámez de Franco, former neighbor of the alleged victims' mother

The witness resides in San José Las Flores, Chalatenango Department and is 61 years old. She knew the Serrano Cruz family very well, especially María Victoria Cruz Franco, because they were born and lived in the same place. At the time of the armed conflict, Mrs. Cruz Franco and the witness belonged to the "*masas*" (masses) of the Farabundi Martí National Liberation Front (FMLN), and were constantly moving from one place to another when the members of the Salvadoran Air Force or Armed Forces arrived. She did not see the Armed Forces take any of Mrs. Cruz Franco's daughters, in any of the places to which they traveled. The witness had no knowledge of the existence of Ernestina and Erlinda, she only knew Mrs. Cruz Franco's five other children. Mrs. Cruz Franco did not mention the alleged disappearance of the children, nor did she express sadness about their loss, as she did when they killed her husband, Dionisio, and her two-year old grandson. Following the death of her next of kin, Mrs. Cruz Franco and her family sought refuge in Mesa Grande,

Honduras.

The witness's husband, Mardoqueo Franco Orellana, constantly said to her: "what was [María Victoria Cruz Franco] thinking about to invent the loss of these children, because, if it was true, we [would] have known about it, because we were together in 'the masses' of the Farabundi Martí National Liberation Front."

6. Antonio Miranda Castro, older brother of the alleged victims' mother

The witness is 75 years old and lives in Los Amates canton, San Isidro Labrador, Chalatenango Department. He is the elder brother of María Victoria Cruz Franco on their father's side, and had known her very well since he was about 10 years old. The witness did not know Ernestina and Erlinda Serrano Cruz and, consequently, did not know about their alleged abduction. He knew Mrs. Cruz Franco's deceased husband, Dionisio Serrano Morales, and the rest of her children, who belonged to "the masses" of the Farabundi Martí National Liberation Front during the armed conflict.

In 1980, the witness lived very near the Serrano Cruz family and affirmed that "he had not seen [his sister] with any children called Erlinda and Ernestina," nor had he observed that she was pregnant at that time. He considers that Mrs. Cruz Franco "want[ed] to prove something that [was] not true, since the aim [was] clear, […] she [sought] financial benefit." When the witness found Mrs. Cruz Franco in Mesa Grande, Honduras, she never told him about the existence of Ernestina and Erlinda, or about their alleged abduction or loss.

7. Mardoqueo Franco Orellana, distant relative of the alleged victims' mother

The witness is 59 years old and lives in San José Las Flores, Chalatenango Department. He is a distant relative of María Victoria Cruz Franco, who he "knew exceedingly well" and also the whole family, since he had lived very near them for a long time in Santa Anita canton, San Antonio de La Cruz jurisdiction. The witness knew some of Mrs. Cruz Franco's children; however, he never met Ernestina and Erlinda Serrano Cruz, or heard about their alleged abduction. He had close contacts with the Serrano Cruz family because they both belonged to "the masses" of the Farabundi Martí National Liberation Front (FMLN). When they were in Los Alvarenga canton he does "not remember that there was a confrontation between the guerrilla and the Armed Forces […] and was certain that a helicopter never landed to abduct people or children."

The witness knew about the military operation called "*guinda de mayo*," when "there was [a] confrontation between the Front and the Army." At that time, he moved from one place to another with Dionisio Serrano, María Victoria Cruz and their family. He does not remember "having observed that the Army took Mrs. Cruz Franco's daughters or children," nor does he recall that they made "any comment related to the disappearance of Erlinda and Ernestina."

EXPERT WITNESS REPORTS

a) Proposed by the Inter-American Commission and the representatives

1. Rosa América Laínez Villaherrera, psychologist

The expert witness is 42 years old and is a Salvadoran psychologist. She referred to the psychological care provided by *Pro-Búsqueda* from 1995 to 1999 to young people who had disappeared during the war and were later found, and to their next of kin.

The expert witness referred to the psychological impact and the post-traumatic situation of families with disappeared children. The principal psychological effects are the alteration of mourning patterns, guilt feelings, uncertainty regarding the fate of the children, impotence, sadness and anguish. María Victoria Cruz Franco took part in the *Pro-Búsqueda* "attention" process. The feeling of guilt is more deeply rooted in women, owing to the way in which they conceive the maternal role. The next of kin of disappeared persons pass on the mandate to find them to the new generations. Now that María Victoria is deceased, her family must continue the search for Ernestina and Erlinda.

She referred to the fate of children separated from their biological families during the armed conflict, and also to the traumas and identity conflicts suffered by those who were found. The children were forced to adapt to having little stability in their lives, and to the uncertainty of not knowing their true identity or who would be responsible for them.

Following the investigations carried out by *Pro-Búsqueda* more than 153 young people have been able to find their families, after 15 years or more of separation. She referred to the different feelings experienced by the young people who were reunited with their families. The young people's identities were also affected legally, because, in many case, instead of going through an adoption process, the substitute families merely registered the children as their own; this resulted in an individual having two birth certificates with two different identifies. In other cases, the lawyers working on adoptions for families abroad changed the legal identity deliberately.

She referred to psycho-social reparation, which implies knowing the truth, official acknowledgement of the facts, justice being done, reunification and the reconstruction of relationships, experiences and affective ties with other people.

2. Douglass Cassel, legal adviser to the Truth Commission for El Salvador

The expert witness is a professor and Director of the International Human Rights Center of the Law Faculty of Northwestern University, Chicago. During 1992 and 1993, he worked as legal adviser to the Truth Commission for El Salvador, sponsored by the United Nations.

He referred to the Truth Commission's mandate; to the legal norms applied by the Commission; to the patterns of violence during the armed conflict and to the investigations in typical cases, some of which served to illustrate the practice of the forced disappearance of children; to the massacres and indiscriminate attacks by the Armed Forces on civilian peasant populations, who were considered to sympathize with or be providing material support to the guerrilla; to the recommendations made by the Truth Commission; and to the lack of subsequent criminal proceedings. He also referred to the systematic shortcomings of justice in El Salvador, especially the failure to investigate crimes committed with the direct or indirect support of the State apparatus, which was not capable of controlling the power of the military and whose "web of corruption, timidity and weakness […] made the work of the judicial system very difficult," and to the victims' fear of submitting complaints before official or judicial instances.

The Truth Commission recommended a series of judicial reforms to El Salvador. The inability of the courts to apply the law in cases of violent acts committed with the direct or indirect protection of the public authorities forms an integral part of the reality in which the facts investigated by the Commission occurred. Despite the judicial and legislative reforms that have been made since the conflict, criminal justice has not been meted out to those responsible for the grave human rights violations indicated by the Truth Commission. In March 1993, "strongly pressured by the Army, the legislative and executive powers adopted an amnesty law that effectively made it impossible [to conduct] a criminal proceeding against those who were allegedly responsible" for the said violations.

3. David Ernesto Morales Cruz, Deputy Ombudsman

The expert witness is a lawyer. From 1990 to 2004, he occupied the following positions: legal collaborator and investigator in the San Salvador Archdiocesan Legal Protection Office (OTLA); Head of the Investigation Department of the Ombudsman's Office; Director of the project to strengthen this Office in the area of public safety and criminal policies; Deputy Ombudsman for Civil and Political Rights of the said Office; and Deputy Ombudsman for the Defense of Human Rights, a position that he occupied when he gave his expert report.

He referred to the so-called "scorched earth" military strategy put in practice from 1980 to 1982 against the civilian population who were believed to sympathize or collaborate with the guerrilla. The forced disappearance of children of both sexes was frequent during these operations.

For many years, the Serrano Cruz family was the victim of the indiscriminate persecution endured by the rural populations in the north and west of Chalatenango. The military operation, known as "*Operación Limpieza*" (*Operación Limpieza*), carried out in 1982, was one of the largest and most extensive. Owing to the conditions in which the Serrano Cruz found themselves after the disappearance of Erlinda and Ernestina, together with thousands of Salvadorans, they had no possibility of access to justice.

During the first years of the armed conflict, the remedy of *habeas corpus* was utterly ineffective for locating and obtaining the liberty of those who had been disappeared forcibly. Between 1984 and 1986, a large number of petitions for *habeas corpus* were filed, and they were totally ineffective in cases of detentions and forced disappearances. The denial of the remedy of *habeas corpus* in favor of disappeared persons continued throughout the 1990s. As of the judgment delivered in case 379-2000 in favor of the children, Ana Julia and Carmelina Mejía Ramírez, the restrictive concept of *habeas corpus* as a procedure limited to protecting the victim only in cases of illegal detention and not in cases of forced disappearance was overruled. In this regard, positive progress was made in case law, "because *habeas corpus* was considered admissible for cases of disappearance." However, the Constitutional Chamber "annulled the effectiveness of the remedy," because it did not integrate the obligation to take measures to establish the whereabouts of disappeared persons into the *habeas corpus* procedure. The Army high command repeatedly denied the existence of the crimes and hindered investigations. Those who took steps to trace their next of kin suffered persecution and placed their lives in danger.

In its final report, the Truth Commission recommended a thorough judicial reform and the resignation of all the member of the Supreme Court of Justice. Following the armed conflict, the justice system has been incapable of initiating reliable and effective investigations into the crimes that occurred during this conflict. In El Salvador, "a situation of impunity has been created," which is clearly reflected in the 1993 Amnesty Act. Most of the cases brought before the courts when the conflict ended were filed, owing to application of the said law or the statute of limitations, and many proceedings concerning forced disappearance were filed, based on the argument that the investigations had been exhausted without achieving effective results.

In 1998 and 2003, the El Salvador Ombudsman's Office issued public reports on the pattern of forced disappearances of children during the conflict, and its impunity. The expert witness referred to the recommendations made by the Office in this regard, which have not been complied with.

b) Proposed by the representatives

4. Ana C. Deutsch, psychologist

The expert witness interviewed the Serrano Cruz family on February 14, 2004. She conducted individual interviews with Ernestina and Erlinda's mother and with the following siblings: Suyapa, Martha, Rosa and José Fernando, all Serrano Cruz. She was unable to interview Arnulfo and Oscar Serrano Cruz, Ernestina and Erlinda's brothers; however, the family indicated that they suffered just as much. She reached the following conclusions: the children's disappearance created an "ambiguous area" in the life of the family owing to the uncertainty of not knowing where they were and to the hope that they would appear at any moment. The uncertainty, ambiguity and impotence caused the members of the family great sorrow and were a "source of permanent anxiety" that was renewed each day. The disappearance of the children was very harsh for the mother, owing to their age at the time they disappeared.

The family's anguish due to the disappearance of the children increased after the war had ended, because they renewed the search for them with the "help of institutions," without success. Owing to the disappearance of the Serrano Cruz children, their siblings suffered many psychological and physical problems, such as depression, a reduction in self-esteem, anguish, stress, etc. They all suffered and suffer chronic symptoms of "post-traumatic stress." With time, the traumatic impact has become more severe and the despair has increased, together with the feelings of impotence and anguish. Even though Ernestina and Erlinda disappeared more than 20 years ago, they continue to be "a present absence" in the family; this sentiment has increased since the search for them was set in motion, and the family's sadness has also been rekindled.

The Serrano Cruz family was unable to process their pain and emotions adequately; as a result, they attributed the onset of the illnesses suffered by some of the family members to the suffering; for example, the diabetes and high blood pressure of Ernestina and Erlinda's mother. One of the consequences of post-traumatic stress is that the victim finds it difficult to relate what has happened coherently; the person cannot recall events with precision or communicate them to others clearly.

With regard to reparations, for the psychological treatment to be effective, people need to know the truth about the facts; in other words, to clarify the uncertainty about the whereabouts of the disappeared.

c) Proposed by the State

5. Marcial Vela Ramos, retired Army officer

The expert witness is a retired Army officer; he is 54 years old. He referred to the commencement of the internal armed conflict in El Salvador and to the operations organized by the guerrilla in Chalatenango and the support they received.

The expert witness referred to the orders and the conduct of the Armed Forces during the conflict concerning non-combatants. During the conflict, prior to any military operation, written orders were issued setting out the "rules of combat"; these included evacuation and respect for the lives and safety of "the masses," prisoners of war, and any children who were found. People were evacuated by helicopter or on foot. When they had been found, they were handed over to the corresponding authorities; namely, "the mayors' offices, the Salvadoran Red Cross, or the International Red Cross." The orders and the conduct of the Armed Forces were always to evacuate non-combatants and not to deprive them of their live or liberty.

B) TESTIMONIAL EVIDENCE

36. On September 7 and 8, 2004, the Court received the statements of the witnesses proposed by the Inter-American Commission on Human Rights, the representatives of the alleged victims and their next of kin, and the State during a

public hearing (*supra* para. 14). The Court summarizes the relevant parts of these statements below.

a) Proposed by the Inter-American Commission and the representatives

1. Suyapa Serrano Cruz, the alleged victims' sister

She is the daughter of María Victoria Cruz Franco and Dionisio Serrano Morales, and an elder sister of Ernestina and Erlinda Serrano Cruz. The witness's parents had 12 children: Martha, the witness, Socorro, Arnulfo, Irma, Enrique, Fernando, Juan, Ernestina, Erlinda, Rosa and Oscar. Ernestina had the same color skin as the witness, long, light brown "somewhat split" hair, brown eyes, a round face, with a "greenish" vein and another vein standing out over one eye, "she was quite small, but […] was able to talk well." Erlinda was "darker" with straight hair; "she was unable to talk well yet." She does not remember the dates on which Erlinda and Ernestina were born, but recalls that they were baptized.

The witness referred to the "*guinda de mayo*" that took place during the armed conflict, when she had to flee with her family for fear of dying at the hands of the Army, and also to what happened to her family, particularly to Ernestina and Erlinda. When they fled from the Army, her mother and her siblings, Fernando and Rosa, were able to cross the river to reach Chichilco, while she, her baby, the witness's father, and the witness's siblings, Erlinda, Ernestina and Enrique, took refuge in a wooded area known as "Los Alvarenga." Erlinda and Ernestina were constantly asking for water and cried a great deal, especially Erlinda, who was the youngest and had an injury in her shoulder. Her father and brother Enrique went to seek water while the girls, the baby and she waited. When they heard the sound of shots and shouts approaching, the witness separated from the girls because her baby was crying a lot and she feared that they would be found. She heard when the soldiers found the girls, and shouted to each other about what they should do with them; they said they would take them even though the helicopter was not arriving until the following day. When she heard the shouts retreating from the area where she was hidden, she went to look for the children, without success. Then, she met up with her father and brother and, again, they went to the place where the facts took place to search for the two children, but they did not find them. The witness's mother asked about the girls and blamed the witness and her father for not bringing them, so she had to explain what had happened to her mother.

After her father and her nephew died in June 1985, machine-gunned down from a helicopter, the witness and her family went to live under difficult conditions in Mesa Grande, Honduras. The witness's mother informed the witness that, when they were in Mesa Grande, Esperanza Franco had told her that the girls had been handed over to the Red Cross. They remained in Honduras only until 1987, because her mother decided to return to El Salvador to seek the girls. The witness and her family were frightened to look for the girls because they had no assistance. In 1992, the witness's mother visited the court to file a complaint, but no one listened to her and she was asked to leave. On April 30, 1993, her mother filed a complaint before the Chalatenango Trial Court; however, she did not describe clearly how the facts

occurred because she was frightened. When the witness went to the Chalatenango court to make a statement, they told her that they would do everything possible to help her, but she has "not felt that they will receive help because many years have elapsed and she has not sensed […] any change." She considers that the authorities have shown no interest in finding Ernestina and Erlinda. It has been very hard not knowing anything about Ernestina and Erlinda and having to imagine the conditions in which they are living.

Finding Ernestina and Erlinda would mean a great deal. Even though "the wounds cannot be healed," the witness and her family would feel "great happiness." There have been many cases of children who are reunited with their families and she hopes that this will happen with her sisters.

2. María Elsy Dubón de Santamaría, a young woman who disappeared during the armed conflict in the 1982 "*guinda de mayo*" and who was found

She was living with her family in Chalatenango at the beginning of June 1982, when they had to flee because helicopters of the Armed Forces began to bomb the zone. The witness and her father were separated from the rest of her family. Two soldiers in uniform killed her father; she begged them not to kill her, and they took her to a military camp. The following morning, they transferred her by helicopter to a military barracks in Nueva Trinidad, where she was kept with other children for about two weeks. It was then decided to hand the children over to the Red Cross, where there were other children. A soldier gave the witness's name to the Red Cross; perhaps he knew it because her father was carrying her identification "papers" in his shirt pocket. The Armed Forces delivered a list of the boys and girls to the Red Cross. The Red Cross did not ask her what had happened to her family. She noticed that, in the Red Cross, the number of children gradually decreased; they told her that the children had been handed over to their families. Finally, she was transferred to the Santa Tecla SOS Village, together with five other children. While in the Village she retained her own name. The people working there did not ask her what had happened to her family, but told her that her family had died, and registered her again in the Mayor's office with "data invented by the director of the Village." While she was there, none of the children were adopted, because "the ethics of the Villages [were] that children were not provided for adoption." The Red Cross female volunteers returned to the Village two months later to take the witness and the other children, but the Village volunteers did not allow this. The living conditions were satisfactory there, but she missed her family. In 1994, some time after leaving the Village, the witness met up with her family and was very happy because she had thought them dead.

She had not made a statement about these events before any court or authority previously. She felt she had to appear before the Inter-American Court, because many people needed and hoped to be reunited with a family member.

3. Juan María Raimundo Cortina Garaígorta, priest and Director of the *Asociación Pro-Búsqueda*

He has degrees in Classical Humanities and Philosophy and a doctorate in Engineering; he is the Director of the *Asociación Pro-Búsqueda*. He arrived in El Salvador in 1955. In 1989, owing to the murder of his Jesuit colleagues, he decided to stay, helping the communities of Chalatenango.

Based on *Pro-Búsqueda's* experience, throughout the armed conflict in El Salvador, there was a systematic pattern of disappearance of young boys and girls during military operations. The case of Ernestina and Erlinda fits perfectly into the general pattern of the disappearance of children during the conflict. The Armed Forces and the humanitarian institutions that held the children did nothing to find their families. They were taken to orphanages and barracks or they were "sold in adoption." It was sufficient for a judge to declare a child in a state of material and moral abandon for its adoption to be authorized. These adoptions were based on the lie that the children were orphans and abandoned. 126 children have been found abroad "in 11 countries of the Americas and Europe." All of them have been naturalized as citizens of the country in which they live and almost all of them do not speak their mother tongue. *Pro-Búsqueda* informs the young person who is found of his real identity, his relationships and his real name so that he can decide what he wants to do.

During the armed conflict it was almost impossible to report a disappearance, because the families of those who disappeared did not have documents, there were road blocks, and they had no money. The communities in which the witness worked decided to try to find the disappeared children. After the initial successes, people began to seek his group to tell them about other disappeared children. In August 1994, the *Asociación Pro-Búsqueda* was created. Up until September 2004, 246 search requests had been resolved, and 475 cases remained to be solved. He knows of more than 40 cases of children who disappeared during the armed conflict who are in the homes of Armed Forces officers; it was *vox populi* that children were given away in the military barracks.

The witness referred to the creation of the Truth Commission. Because people were frightened of going to San Salvador to make a statement, the Commission went to Chalatenango to receive statements. In Guarjila canton, three women stated that, during the "*guinda de mayo,*" the Army had taken their children. One of them was María Victoria Cruz Franco, Ernestina and Erlinda's mother. The Truth Commission's March 1993 report did not mention the case of the disappeared children, probably because it did not have time to investigate the facts concerning the disappearance of children. The Truth Commission included the disappearances of children in the global situation of disappearances, and described 30 typical cases of large-scale massacres and some cases of disappearance.

The witness explained some of *Pro-Búsqueda*'s techniques to trace disappeared children. Regarding the help provided by the State of El Salvador in this search, "unfortunately," help had only been received from the Ombudsman's Office and the Attorney General's Office, and they have had "some access" to the files of the Supreme Court of Justice. They have had a "bad experience with the other State entities." They have not had access to the information in military installations. The State has demonstrated a

considerable lack of concern for the situation of the children who disappeared. The Salvadoran Red Cross provided some help when they started searching, but then its attitude changed and they were told that it had lost all the files. Sometimes the orphanages did not provide them with any information. The "Children's Villages" did not help *Pro-Búsqueda* either, because they considered that the Association was "interfering."

Through his work in *Pro-Búsqueda*, he had close contact with the Serrano Cruz family, especially with María Victoria Cruz Franco, the alleged victims' mother, who, from the outset, told him that the children "were disappeared and that she wanted to find them." This was why she appeared before the Truth Commission. María Victoria was always trying to find the children in her own way; always asking for help in her search. About one month after the Truth Commission's report was published, he accompanied Mrs. Cruz Franco to the Chalatenango court to ask about the whereabouts of the disappeared children; they were told that they should not ask and that "nothing could be done because the Atlacatl Battalion had been disbanded." Several days later, they visited the Attorney General's Office where they were received and treated in a "demeaning manner." Even though the war had ended, they were told that they would be reported to the National Police. He heard the children's mother say she was very afraid to mention that her daughters had disappeared in a "*guinda*"; this was worse than saying they had disappeared from their own home. Saying that she was in her home, meant that she had not fled. Fear paralyzes people and makes them change their version of the facts. He knows that María Victoria was not a member of the guerrilla. Shortly before Ernestina and Erlinda's mother died, she was going blind as a result of diabetes, and she said to the witness "I hope that I don't lose my sight because I may still be able to see my daughters." "I feel that Ernestina and Erlinda are alive somewhere." The day of the hearing before the Court, she received a telephone call from El Salvador telling her that, through DNA-testing, a girl child had been found who had disappeared in the "*guinda de mayo*," when Erlinda and Ernestina had also disappeared. The child had lived in an orphanage for more than 10 years and the orphanage never gave the information to *Pro-Búsqueda*. The children who disappeared in the "*guinda de mayo*" and who were traced by *Pro-Búsqueda* were found alive; they did not discover any who had died.

A positive measure the State should adopt to facilitate family reunification would be to create a national tracing commission. As of 1999, this has been proposed to the Legislative Assembly on three occasions and has not been approved. Both Amnesty International and the Committee on the Rights of the Child have recommended that this commission be created. The witness considers that, with the information the Armed Forces and some humanitarian organizations could provide, it would be possible to find 10 or 12 more children quite rapidly. Orphanages should also provide information.

He knew of no case in which someone had been accused of being responsible for the forced disappearance of a child during the armed conflict. Nonetheless, documents exist with the names of people and places related to the disappearance and handing over of several children. Although the justice system and the reliability of some of its members have improved, judicial proceedings are still unsatisfactory in El Salvador. The Truth Commission's recommendations concerning the reform of the judicial system have not been

complied with adequately.

b) Proposed by the State

4. Ida María Gropp de García, former President of the Santa Tecla SOS Children's Village

She is German and has lived in El Salvador since 1968. In addition to her work as a translator, as of 1979, she began to work in the Santa Tecla SOS Children's Village, located in La Libertad Department. In 1982, she was elected president of the board of directors of this village. The vision of SOS Children's Villages was "to prove all the children in the world with a family where they c[ould] grow up with respect, love and responsibility."

On June 6, 1982, the Salvadoran Red Cross female volunteers (*damas voluntarias*) brought six children, aged from twenty days to eight years to the Santa Tecla Village. According to comments made by the director of the Village to the witness, the Red Cross female volunteers said the children came from the area of Chalatenango where there had been an attack by the Armed Forces; that the latter had found the children alone and had delivered them to the Red Cross. However, they did not give the Village any document with information on these children. In the Village they had to fill in a questionnaire when each child arrived, with information on their health and whether anything was known about their family. She did not know whether these children talked about what had happened to them, but she did know that one of the girls wrote down what had happened. The Villages registered the boys and girls in the mayors' offices; when they did not know the name of the children, they gave them a name, and when they did not know the date of birth, they estimated their age.

In 1984, a woman came to the Village representing the refugees in Mesa Grande, Honduras and looking for one of the girls who had been brought by the Red Cross female volunteers on June 6, 1982. On January 15, 1994, a truck with 30 people arrived at the Village, led by someone from the Chalatenango Human Rights Commission, to see the children who had arrived in 1982.

SOS Children's Villages never gave up any of the children they had received for adoption, because the philosophy was to take care of the children permanently until they were able to look after themselves. The SOS Villages did not try and find the children's families because it was very dangerous during the war and because it was not their responsibility; however, sometimes the next of kin arrived looking for children and, at times, they could not refuse to hand over the children, but they had some bad experiences because the parents later abandoned them. The only entity that asked them for information on the children who were brought to the Villages as a result of the armed conflict was *Pro-Búsqueda*, none of the State authorities asked them for information or exercised any supervision. The SOS Villages have no connection with the State.

5. Jorge Alberto Orellana Osorio, retired Army officer

He is a retired Army officer. In 1982 he was an artillery commander and his mandate was to support all units. He referred to the onset of the armed conflict in El Salvador and to the situation of the civilian population in 1982 in the zone of Chalatenango. The Armed Forces never attacked the civilian population. He referred to the damage produced in the mayors' offices by "terrorist criminals." He was not a member of the Atlacatl Battalion, but he was responsible for providing it with support once, in operations in the northern sector of Usulután. He does not know whether that Battalion was in Chalatenango in June 1982, neither does he know whether there had been a military operation known as "*Operación Limpieza*."

During the armed conflict, the Army kept a written record of its military operations, with the description of the mission, the unit or battalion responsible, the sector in which it would be carried out, and the date it would commence, as well as the procedures to follow with regard to military personnel and civilians. The witness explained the procedure followed by the Armed Forces to evacuate the "masses"; namely, the civilians who supported the "terrorist criminals" or guerrilla. Children were abandoned due to different circumstances. When the Armed Forces found a child, it attempted to find out whether it was from the area; they asked it about its family and where it lived, and they accompanied the child back to its home if this was nearby. No record was kept of such cases. Generally, in El Salvador, "a child has family or acquaintances"; therefore, a member of the family usually looked for him. Owing to the places the units were located during operations, they did not draw up lists of the people who were evacuated; they merely carried out the evacuation and handed over the people to a superior unit. When the military operation had ended, the unit or battalion prepared a report for the superior unit, in which it noted the number of civilians who had been evacuated, "so many men, women and children"; it did not record the names, but it did record that it had found a civilian population or a specific number of people and had decided to evacuate them. These reports were confidential. Nevertheless, the information could be provided orally to interested parties, although the latter could not see the written reports. He considers that the Army would continue to refuse access to these written reports

The superior unit to the one that carried out the operation was responsible for handing over the people who had been evacuated to the Red Cross. Generally, the mayor or priest of the nearest village was called as a witness to the handing over to the Red Cross. From the onset of operations, the Armed Forces were given written orders to hand such persons over to the Red Cross. He believes the Red Cross personnel were responsible for making an official record of those who were handed over into their care, and for trying to find the next of kin of the children. The Red Cross received no support from any State institution in this work; it was frowned upon that any other institution should become involved. He is unaware of there being any record of civilians evacuated by the Armed Forces.

Each brigade or military detachment had a "logbook" in which the duty-officer recorded the events of the day. The entry and departure of vehicles and troops were recorded. Usually, civilians were not allowed in the barracks, but in some cases they could have been taken there. In that case, the logbook would only have reflected that a child had been brought to the barracks from

a specific sector and that he or she was handed over to the Red Cross at a specific time. Those who kept the logbooks were administrative personnel who worked within each unit; they could not record what happened during the operations because they were not taken to the combat zone. The Armed Forces considered that international humanitarian law should be applied; consequently, before they went out on operations, the soldiers received a briefing.

The Truth Commission or the Commission *ad-hoc* had investigated some of his colleagues and ordered their removal owing to the 1980 to 1982 military operations, but they were not tried by a court. He was unaware of any military or administrative personnel appropriating children from the conflict zones, or of any cases of children being put up for adoption or sale by the Army, or of children being forcible recruited into the Army.

6. María Esperanza Franco Orellana de Miranda, witness in the domestic criminal proceedings

In June 1982, her mother lived in Chalatenango. She knew María Victoria Cruz Franco. She had never heard about the refugee camp in Mesa Grande, Honduras. She made two statements before the Chalatenango Court in the proceedings concerning what happened to Ernestina and Erlinda. In the first statement she said that she saw when the girls were taken from a helicopter and handed over to the Red Cross. In the second statement, she said that she had seen nothing and had said that she saw the girls because María Victoria Cruz Franco asked her to do so. She does not remember the year in which María Victoria made this request. The correct statement is the one that she is making before the Inter-American Court; that is, "she saw nothing" and did not know Ernestina and Erlinda Serrano Cruz. The witness's mother told her that people were saying that "the children who were lost, were Victoria's children," but her mother never told her that she knew Ernestina and Erlinda.

She was interviewed by the prosecutor who arrived accompanied by a driver and two armed policemen. None of them threatened her. The prosecutor asked her to tell the truth. She did not tell the prosecutor the same facts that she had declared the first time. She was taken by car to the Chalatenango Court to make a statement. One of her sons accompanied her. She was frightened because she "did not know what was happening." When she saw the armed policemen she "thought that the situation was very bad"; she thought they might do something to her. Subsequently, the prosecutor and "possibly" some police agents visited her four or five times. The prosecutor did not tell her his name, but showed her a "small card," however, she is unable to read. The prosecutor and the State's representatives in the proceedings before the court asked her to make a statement in Costa Rica. She told them about a problem she had with a piece of land; they accompanied her to look for the owner of the land, but since the latter was not at home, they agreed to return later. She also received a visit from the Ombudsman's Office, who asked her not to accompany the prosecutor and the State's representative because she did not know them. She specified the amount of money that the State had granted her for traveling expenses to give testimony in the public hearing before the Court, an amount which she considered "a small amount" of money; then, she corrected herself and said

that she considered it "quite a large amount."

7. Miguel Uvence Argueta Umaña, prosecutor responsible for the case of Ernestina and Erlinda Serrano Cruz

Since 1998 he has been Head of the Private Patrimony Unit of the Chalatenango Prosecutor's office. He took on the case of the Serrano Cruz children in January 2002 as the special prosecutor; however, he took the first measures in October 2003. Before the witness, many other prosecutors had been in charge of the investigation of this case, which was normal.

When he began to investigate the case, the witness was "focusing" on the Armed Forces records because he thought he would be able to find important information there. However, around October 2003, the Deputy Ombudsman told him that he should visit the place where the Serrano Cruz family lived in 1982 and talk to the people. He began to interview people living in the area where the family lived, which is a rural area, because "it was necessary to find some clue" about the possible whereabouts of the Serrano Cruz girls, and also to find out whether the children were known. He interviewed four witnesses who stated that they knew the Serrano Cruz family and lived near to them, but who did not know Ernestina and Erlinda. He believed what they told him. He also decided to interview Esperanza Franco Orellana again; in a statement made previously, she had declared that, when she was in La Sierpe with her mother, the latter had told her that she had seen María Victoria Cruz Franco's daughters descend from a helicopter.

When the witness re-interviewed Mrs. Franco Orellana, she told him that she had lied in her previous statement, because Mrs. Cruz Franco had asked her to say that she had seen the children get into a Red Cross vehicle, but the truth was that she did not know the Serrano Cruz girls. The day after this interview, the investigators who accompanied the witness took Mrs. Franco Orellana to the court to give testimony. Accompanied by one of the State's representatives in the proceeding before the Court, he visited Esperanza Franco Orellana to ask her to accompany them to San José, Costa Rica, to give testimony before the Court. Mrs. Franco Orellana told them that she would think about it and that one of her children was ill and she had a problem because she had not been given the title deeds to her house. They told her that they could coordinate with the authorities to provide medical care to her son in a public hospital and, regarding the legal problem, they told her that she should seek the aid of the Ombudsman, but they did not give her any money to solve these problems. The witness specified the amount of money that the State gave to the State's representative before the Court, to Mrs. Franco Orellana and to himself, as traveling expenses to appear before the Court.

He did not interview any member of the Serrano Cruz family because "they were not well disposed towards the prosecutor"; it was a precaution that had to be taken because the case was before the Inter-American Court. He does not know the members of the Serrano Cruz family; he never spoke to them. In addition, he did not interview them because "they had been interviewed several times," and there were inconsistencies in the statements made by the children's mother, who had not described the girls.

Judicial inspections of the logbooks of the Fourth Brigade and of the No. 1 Military Detachment were pending when he was assigned to investigate the case of the Serrano Cruz sisters. Previously, other prosecutors had requested the judge to order the inspection of the logbooks. In June 2003, the judge ordered an inspection of the Fourth Brigade's logbook, but when they visited the brigade, the head of the brigade told them that the judge must submit a request to the Chief of the General Staff. Regarding the pending inspections, he has "not taken any steps recently owing to [his] workload"; he has not made a new request to the judge to order the pending inspections to be made.

The files where birth certificates were registered were destroyed owing to the armed conflict; accordingly, a law was enacted to regulate how new birth certificates could be registered. To find indications of the identity of the Serrano Cruz girls, the witness's superior sent official communications to the churches in the nearest places to verify whether they had really been baptized. With regard to Erlinda, in the record of baptisms, it appears that she was baptized in February 1979 and that she was born in 1978, while, when her mother registered her in the mayor's office of San Antonio de la Cruz, she indicated that the child was born in July 1979. He requested that an expert provide a report on this record to verify its authenticity, because "if this baptismal certificate existed, obviously, these children existed." Neither the witness nor the representatives of the State in the proceeding before the Court had seen the said record before the expert report was requested. He asked the judge in charge of the case to put forward the date of this expert report in order to present the results in the public hearing before the Inter-American Court. A graphalogical examination was made of the said baptismal record, "subsequently, a physiochemical analysis was carried out," but this was all part of a single expert report. The physiochemical analysis was made by a different expert from the one who made the graphalogical analysis. The expert report has still not been submitted; they merely drew up an official record when they visited the parish. Previously, it was common that children born in rural areas were not registered correctly.

C) Assessment of the evidence

Assessment of the Documentary Evidence

37. In this case, as in others,[7] the Court accepts the probative value of the documents presented by the parties at the appropriate procedural opportunity or as helpful evidence, in accordance with Article 45(2) of it Rules of Procedure, that were not contested or opposed, and whose authenticity was not questioned. Likewise, the Court accepts, in accordance with Article 44 of the Rules of Procedure, the evidence presented by the representatives and the State concerning facts that were supervening to the filing of the application (*supra* paras. 7, 19 and 20).[8]

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[7] *Cf. Case of Lori Berenson Mejía*, *supra* note 3, para. 77; *Case of Carpio Nicolle et al., supra* note 3, para. 70; and *Case of the Plan de Sánchez Massacre. Reparations*, *supra* note 3, para. 39.

[8] *Cf. Case of De la Cruz Flores*. Judgment of November 18, 2004. Series C No. 115, para. 58; *Case of Myrna Mack Chang*. Judgment of November 25, 2003. Series C No. 101, para. 128; and *Case of Bulacio*. Judgment of September 18, 2003. Series C No. 100, para. 57.

38. With regard to the sworn written statements and expert reports made before notary public (affidavits) by the witnesses and expert witnesses proposed by the Commission and endorsed by the representatives and the State (*supra* para. 8 and 9), and also the videos of the statements made before notary public (affidavits) by Fernando Serrano Cruz, Andrea Dubón Mejilla and María Victoria Cruz Franco, which were presented by the representatives (*supra* para. 9), in response to the order of the President of August 6, 2004, the Court admits them to the extent that they correspond to the purpose defined in the said order and assesses them with the body of evidence, applying the rules of sound criticism and taking into account the observations submitted by the parties (*supra* paras. 11 and 12).

39. Regarding the sworn statements that were not made before notary public by the expert witnesses, Rosa América Laínez Villaherrera and David Ernesto Morales Cruz, proposed by the Commission and endorsed by the representatives, and by the expert witness, Ana C. Deutsch, proposed by the representatives (*supra* paras. 9 and 10), the Court accepts them and assesses them with the body of evidence, applying the rules of sound criticism and taking into account the States objections.[9] On other occasions, the Court has accepted sworn statements that were not made before notary public and has established that the procedure is a measure to ensure that justice is done, because justice cannot be sacrificed to mere formalities, without legal certainty and the procedural equality of the parties being affected. Since the proceedings before this international Court relate to human rights violations and, consequently, protect the principle of the historical truth, it has a less formal character that a proceeding before the domestic authorities.[10]

40. The State indicated that "the sworn written statement [made by María Victoria Cruz Franco,] differs from the video that was submitted, although it is affirmed that they were simultaneous[;] the filming is abruptly cut twice; [… and] the CEJIL representative and the other person conducting the interview induce the witness." The Court accepts the video submitted by the representatives and the respective sworn statement (*supra* para. 9); however, it will assess the content of the video and the sworn statement together with the body of evidence, taking into account the State's observations (*supra* para. 12) and applying the rules of sound criticism. Additionally, the Court will bear in mind that María Victoria Cruz Franco died before the public hearing before the Court was held and that the sworn statement and the video of this statement are the only way in which the Court can examine the most recent direct testimony of the mother of Ernestina and Erlinda Serrano Cruz. In this regard, since she is the alleged victims' mother and had a direct interest in the case, her statement must be assessed together with all the evidence in the proceedings and not in isolation. As the Court has indicated, in matters concerning merits and reparations, the statements of the alleged victims, and their next of kin, are useful insofar as they can provide more information on any

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[9] *Cf. Case of Lori Berenson Mejía*, *supra* note 3, para. 78; *Case of Carpio Nicolle et al., supra* note 3, para. 72; and *Case of the "Juvenile Reeducation Institute".* Judgment of September 2, 2004. Series C No. 112, para. 85.

[10] *Cf. Case of Lori Berenson Mejía*, *supra* note 3, para. 82; *Case of the Gómez Paquiyauri Brothers*. Judgment of July 8, 2004. Series C No. 110, para. 58; and *Case of Molina Theissen*. *Reparations*, *supra* note 4, para. 23.

alleged violations and their consequences.[11]

41. The Court considers that the documents presented by the State attached to its brief of September 6, 2004 (*supra* para. 13) and to its final written arguments (*supra* para. 17) are helpful for deciding this case, particularly since they were not contested or opposed, and their authenticity was not questioned, so they are added to the body of evidence, pursuant to Article 45(1) of the Rules of Procedure

42. The State objected to the "Report [of the Ombudsman's Office issued on September 2, 2004] on the forced disappearance of the children, Ernestina and Erlinda Serrano Cruz, its current impunity and the pattern of violence surrounding such disappearances," which was submitted by this Office and by the representatives (*supra* para. 16). The Court considers this report helpful and will assess it within the body of evidence, applying the rules of sound criticism and taking into account the State's observations. Accordingly, it is added to the body of evidence pursuant to Article 45(1) of the Rules of Procedure.

43. In the case of the newspaper articles submitted by the parties, the Court considers that, even though they are not documentary evidence, *stricto sensu*, they can be assessed to the extent that they refer to well-known public facts, or statements by State officials, or corroborate aspects of the instant case.[12]

44. Also, in application of the provisions of Article 45(1) of the Rules of Procedure, the Court incorporates into the body of evidence of this case the Constitutional Procedures Act promulgated on January 14, 1960, the Penal Code promulgated on February 13, 1973, and the Code of Criminal Procedure promulgated on October 11, 1973, since they are helpful for deciding this case.

Assessment of the Testimonial and Expert Evidence

45. Regarding the statements made by the three witnesses proposed by the Commission and endorsed by the representatives and the four witnesses proposed by the State (*supra* para. 36), the Court accepts them to the extent that they correspond to the purpose that was defined by the President in the order of August 6, 2004, and assesses their probative value, taking into account the observations of the parties. In this regard, the Court considers that, since Suyapa Serrano Cruz is one of the alleged victims' sisters and has a direct interest in the case, her testimony (*supra* para. 36) must be assessed together with all the evidence in the proceedings and not in isolation. For the reasons the Court has mentioned above (*supra* para. 40), this testimony is helpful in the instant case.[13]

46. In view of the foregoing, the Court will assess the probative value of the documents, statements and expert reports submitted in writing or made before it. The evidence presented during the proceedings has been incorporated into a single

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[11] *Cf. Case of Lori Berenson Mejía, supra* note 3, para. 78; *Case of Carpio Nicolle et al.*, *supra* note 3, para. 71; and *Case of the Plan de Sánchez Massacre. Reparations*, *supra* note 3, para. 46.

[12] *Cf. Case of Lori Berenson Mejía, supra* note 3, para. 80; *Case of De la Cruz Flores, supra* note 8, para. 70; and *Case of the "Juvenile Reeducation Institute"*, *supra* note 9, para. 81.

[13] *Cf. Case of Lori Berenson Mejía, supra* note 3, para. 78; *Case of Carpio Nicolle et al.*, *supra* note 3, para. 71; and *Case of the Plan de Sánchez Massacre. Reparations*, *supra* note 3, para. 46.

body of evidence which will be considered as a whole.[14]

VI
PROVEN FACTS

47. Having examined the documents and the statements of the witnesses, the reports of the expert witnesses, and the arguments of the Commission, the representatives, and the State during these proceedings, the Court considers that the following facts have been proved

BACKGROUND AND HISTORICAL CONTEXT

48(1) From approximately 1980 to 1991, El Salvador was engaged in an internal armed conflict during which forced disappearances occurred. The consequences of the latter were examined and discussed by the Truth Commission for El Salvador sponsored by the United Nations, the Inter-American Commission on Human Rights, international organizations, State authorities and bodies, and other organizations.

48(2) On May 31, 1996, the *Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos* (hereinafter "*la Asociación Pro-Búsqueda*" or "*Pro-Búsqueda*") filed a complaint before the Ombudsman's Office concerning the alleged disappearance of 145 children during the armed conflict in El Salvador; among them, the Association reported the case of the alleged disappearance of the sisters, Ernestina and Erlinda Serrano Cruz, in June 1982 in Chalatenango. Their mother, María Victoria Cruz Franco, initiated the search for her daughters, Ernestina and Erlinda, and resorted to State authorities and non-governmental organizations, such as *Pro-Búsqueda,* in order to trace her daughters and discover what had happened to them.

48(3) Based on Pro-Búsqueda's complaint, the Ombudsman's office undertook several investigations into cases of children who had been victims of forced disappearance during the internal armed conflict. On February 5, 1998, the Ombudsman's Office asked the Chalatenango Trial Court to provide information "on the current status of the Ernestina and Erlinda case." On February 9, 1998, the Chalatenango Trial Court advised the Ombudsman's Office that case No. 112/93 filed against members of the Atlacatl Battalion for the abduction of Ernestina and Erlinda Serrano Cruz had been "totally investigated, and it ha[d] not been possible to substantiate the alleged crime or the whereabouts of the children." Two decisions and one report of the Ombudsman's Office referred specifically to the case of the sisters, Ernestina and Erlinda Serrano Cruz. A decision of March 30, 1998, indicated, *inter alia,* that, in the criminal case filed concerning what happened to Ernestina and Erlinda, there had been a violation "of due legal process[,] owing to acts that constituted denial of justice and failure to comply with the right to receive prompt justice[, …] which could be attributed to the judge with jurisdiction." It recommended she "be more attentive to the principle of procedural diligence." On May 27, 1998, the Chalatenango Trial Court filed the criminal proceedings (*infra* para. 48(25)).

48(4) In the second decision, dated February 10, 2003, the Ombudsman's Office reiterated, *inter alia,* the operative paragraphs of the decision of March 30, 1998,

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[14] *Cf. Case of Lori Berenson Mejía, supra* note 3, para. 87; *Case of Carpio Nicolle et al.*, *supra* note 3, para. 75; and *Case of the Plan de Sánchez Massacre. Reparations*, *supra* note 3, para. 48(

and considered that "it [was] possible and necessary to explore the use of other mechanisms for the State to fulfill its duty towards the children who disappeared" during the armed conflict and their next of kin, since this phenomenon constituted a crime against humanity. In this regard, the Ombudsman's Office stated that the creation of a national tracing commission appeared to be a viable option. On March 14, 2003, the Ombudsman's Office notified this decision to the Chalatenango Trial Court, and gave the Public Prosecutor's office 45 days to provide it with information on the progress made in the criminal investigations.

48(5) On September 2, 2004, since the State authorities had not complied with the recommendations made by the Ombudsman's Office in the two decisions (*supra* paras. 48(3) and 48(4)) or with the obligation to inform this institution about the respective investigations, the Ombudsman's Office issued a special report "on the forced disappearance of the children, Ernestina and Erlinda Serrano Cruz, its current impunity and the pattern of violence surrounding such disappearances." In the report, the Ombudsman's Office described, *inter alia,* the pattern of forced disappearance of children that occurred during the armed conflict and examined in detail the impunity in the case of the Serrano Cruz sisters.

48(6) The *Asociación Pro-Búsqueda* has received around 721 requests to trace children who disappeared during the armed conflict and has resolved about 246 of them. The *Asociación Pro-Búsqueda* has found children in several different situations: integrated into a family in El Salvador or abroad by adoption within the judicial system (formal adoptions) or by *de facto* adoption or appropriation by civilians and members of the Armed Forces; brought up in orphanages or in military facilities, and it has learned of 12 cases of children who were murdered. It has found children in El Salvador and in 11 other countries of the Americas and Europe. *Pro-Búsqueda* is investigating 126 cases of international adoption, and also cases of alleged victims of the illicit trafficking in children.

48(7) Almost half the young people located by *Pro-Búsqueda* had been adopted by families abroad; they had therefore lost their nationality, customs and traditions and, depending on the country of their adoptive parents, they had also lost their mother tongue. These children find meeting and re-assimilating into their biological families very difficult. Searching for, tracing and finding the disappeared children, and also the process of family reunification when the search is successful, is a complex experience in the construction of the lives and identities of those found and their families. The children who are found and their families suffer traumas and identity conflicts. Also, in many case, those who are found avoid any emotional involvement as a defense mechanism in the face of the suffering and changes to which they are subjected.

48(8) In April 1999, the *Asociación Pro-Búsqueda* published a report in which it indicated that "there were at least [50] orphanages operating in El Salvador during the time of the conflict." A document of the Salvadoran Red Cross mentioned that the "program to provide counseling and care to [the] displaced ha[d] been implemented most widely in Chalatenango[, … from where] they […had] brought 52 [orphaned children] ranging from new-born babies to just two of 12 years old]. For the information of the Executive Committee, these] children [were] accommodated in[:] the Rosa Virginia Home, the *Centro de Observaciones de Menores*, *Tutelar de Menores*, the Guirol Home in Santa Tecla, SOS Villages […]." Most of the children who were sent to the orphanages at that time came from the armed conflict. Some of the approximately 52 cases of children who disappeared during the military

operation known as the "*guinda de mayo*" in 1982 have been resolved and all the young people that the *Asociación Pro-Búsqueda* has traced were found alive.

48(9) In its investigations, *Pro-Búsqueda* only received State assistance from the Attorney General's Office and from the Ombudsman's Office. In collaboration with the latter, it reviewed and verified the files of the orphanages that were operating during the armed conflict. *Pro-Búsqueda* also had access to files before the domestic courts, but not to information filed in military facilities.

48(10) While the Special Transitory Act to establish the civil status of undocumented persons affected by the conflict was in force, María Victoria Cruz Franco registered some of her children in the mayor's office, including her daughters, Ernestina and Erlinda Serrano Cruz. The law was intended "for cases when, owing to the violence experienced by El Salvador, an individual's birth could not be registered normally in the respective registry office of the mayor's office, or for cases in which an individual had been registered, but the records no longer exist[ed], because they had been destroyed." This law established that "[t]he registrations will be made in the registry office and the certifications issued by the respective head of the registry office or the local mayor for the effects set out in the Civil Code and other laws."

48(11) Most of the children who entered an orphanage during the armed conflict had no documents to identify them, so they were registered in the mayors' offices with other first and last names; usually those of one of the persons who had brought them up or of a fictitious person. This meant that relevant information, such as first and last names, and place and date of birth, was altered, which made it very difficult to trace them.

48(12) On October 13, 1999, the *Asociación Pro-Búsqueda* submitted a proposal for a draft "law to create a national commission to trace the children who disappeared as a result of the internal armed conflict" to the Legislative Assembly of El Salvador. However, on November 22, 2000, the *Asociación Pro-Búsqueda* was notified that it was not possible to obtain "the consensus required for a favorable opinion" on the adoption of the draft law, since a "similar commission" already existed, known as the "Attorney General's Committee (*Mesa del Procurador),* because, in August 2000, the Attorney General had invited several State institutions and the *Asociación Pro-Búsqueda* to a meeting in order to advance "investigations into the disappearance of children during the armed conflict." However, the Attorney General only obtained the support of *Pro-Búsqueda* for this initiative. "Given the ineffectiveness of the measures taken […] and the absence of results," the *Asociación Pro-Búsqueda* withdrew from the committee in March 2002, and, subsequently, repeated its request that the Legislative Assembly adopt the law creating a national tracing commission.

48(13) On October 5, 2004, the President of El Salvador issued Executive Decree No. 45, creating the "Inter-institutional Commission to trace children who disappeared as a result of the armed conflict in El Salvador." The decree indicated that this commission "would have the mandate of collaborating with the public institutions involved in or responsible for the protection of children, in the search for children who were involuntarily separated from their families," and of promoting reunification with their next of kin. In addition, the Decree established that the Commission would be composed only of State authorities, but that "it c[ould] rely on the collaboration of other public institutions, […] and of private organizations that were also working to achieve the purpose of the Commission."

48(14) On January 23, 1992, the Legislative Assembly issued Legislative Decree No. 147 "National Reconciliation Act," "granting an amnesty to all those who ha[d] participated as direct or indirect perpetrators or accomplices in committing ordinary political crimes[,] associated crimes, and ordinary crimes committed by at least 20 persons, prior to January 1, 1992, with the exception of the ordinary crime of abduction included in Article 220 of the Penal Code." However, the State considered that the restrictions included in this law did not allow its general application to "all those who, irrespective of the sector to which they belonged in the armed conflict, participated in violent acts that left a mark on society," which "was incompatible with the development of the democratic process." Consequently, the State emitted Legislative Decree No. 486 "General Amnesty Act to consolidate Peace," which entered into force on March 22, 1993, granting an "ample, absolute and unconditional amnesty to all those who, in any way, participated in committing political crimes, related common crimes, and common crimes committed by at least 20 persons, before March 1, 1992, even if judgment has been delivered against such persons, and whether or not proceedings have been initiated for the same crimes, and this benefit is conceded to all those who participated." In addition, this decree established that, *inter alia,* those who had taken part in committing crimes of abduction and extortion would not be granted amnesty.

HABEAS CORPUS PETITION FILED BY THE ALLEGED VICTIMS' MOTHER

48(15) On November 13, 1995, María Victoria Cruz Franco asked the Constitutional Ch amber of the Supreme Court of Justice to grant a writ of *habeas corpus* in favor of her daughters, Ernestina and Erlinda Serrano Cruz, owing to their "alleged abduction by members of the Atlacatl Battalion in [the] military operation carried out on June 2, 1982" and indicated, *inter alia,* that "Captain José Alfredo Jiménez Moreno[,] Officer Rolando Adrian Ticas[,] governmental and non-governmental institutions[…] and the Salvadoran Red Cross c[ould] have information" on their whereabouts.

48(16) On November 20, 1995, the Constitutional Chamber of the Supreme Court of Justice appointed a "university graduate" as "executing officer" for the writ of *habeas corpus* to order "the authorit[ies] who [had] restricted the] liberty [of the sisters, Ernestina and Erlinda Serrano Cruz]" to present them and explain the motive for this restriction.

48(17) On December 6, 1995, the executing officer visited the Ministry of National Defense and notified the "head of the Legal Department" of the Ministry [of the writ of *habeas corpus*]. The latter stated that Captain José Alfredo Jiménez Moreno and Officer Rolando Adrián Ticas were "no longer enrolled in the institution" and provided their addresses, which "m[ight] not be the addresses where they [were] currently registered." On December 6 and 7, 1995, the executing officer visited those addresses to find the captain and the officer. However, she was unable to find them, because no one knew the former at the address she had been given, and she was unable to find the latter's address.

48(18) On December 9, 1995, the executing officer visited the Salvadoran Red Cross and notified the head of its Tracing Office of the writ of *habeas corpus*; the latter showed her a document certifying that on June 16, 1982, "a kind of aide mémoire or report was drawn up[, which indicated] that [the] program to provide counseling and

care to [the] displaced ha[d] been implemented most widely in Chalatenango[, … whence] they […] brought 52 [orphaned children] ranging from new-born babies to just two of twelve years old]. For the Executive Committee's information, these] children [were] accommodated in[:] the Rosa Virginia Home, the *Centro de Observaciones de Menores*, *Tutelar de Menores*, the Guirol Home in Santa Tecla, SOS Villages […]." In the official record of this procedure, the executing officer noted that "in these documents, there [was] no mention of the whereabouts of the children, Ernestina Serrano Cruz and Erlinda Serrano Cruz, because [the Salvadoran Red Cross] [did] not conduct investigations […] and only assisted those persons in need; consequently, there was no type of document that [… would] indicate the whereabouts of the children in [that] office." The executing officer for the writ of *habeas corpus* did not visit the centers indicated in the document shown to her by the head of the Salvadoran Red Cross Tracing Office.

48(19) On January 17, 1996, the executing officer returned the file to the Constitutional Chamber of the Supreme Court of Justice so that it could take a decision, since it was not "possible to notify Captain José Alfredo Jiménez Moreno and Officer Rolando Adrián Ticas[, …] as she did not have the exact addresses of their places of residence (*supra* paras. 48(15) and 48(17)).

48(20) On February 12, 1996, the Constitutional Chamber of the Supreme Court of Justice asked the Chalatenango Trial Court to forward the file of case No. 112/93 on the criminal proceedings "file[d] against the Armed Forces of the Atlacatl Battalion for the crime of the abduction of the children, Ernestina and Erlinda Serrano," "in order to decide the petition for *habeas corpus* in favor" of the said sisters. On February 27, 1996, the Constitutional Chamber received the file.

48(21) On March 14, 1996, the Constitutional Chamber of the Supreme Court of Justice decided to discontinue the *habeas corpus* procedure "because the procedural grounds for establishing a violation of the constitution had not been established," on the basis that "*habeas corpus* [… was] not an appropriate means of investigating the whereabouts of a persons illegally detained 13 years previously […] by members of the Atlacatl Battalion, [the military leaders of which] c[ould] not be notified[, since this battalion] no longer exist[ed] owing to the Peace Agreements." The Constitutional Chamber "forward[ed] [this decision] to the Chalatenango Trial Judge, together with case No. 112/93, so that the Trial Court [could] continue investigating the reported facts" and then advise the Chamber. The file of the proceeding before the Chalatenango Trial Court does not contain any information that the court advised the Constitutional Chamber about the investigations.

CRIMINAL PROCEEDINGS BEFORE THE CHALATENANGO TRIAL COURT

48(22) By June 6, 1995, the date on which El Salvador accepted the Court's jurisdiction, case No. 112/93, corresponding to the criminal proceedings initiated by the complaint submitted by María Victoria Cruz Franco on April 30, 1993, had been filed by the Chalatenango Trial Court. The proceedings had been "instituted against the armed forces of the Atlacatl Battalion for the criminal offence of abduction of the children, Erlinda and Ernestina Serrano Cruz," "during [the] military operation on June 2, 1982," known as the "*guinda de mayo*." This investigation had been filed since September 22, 1993, almost five months after the investigation into the facts began, because "the […] preliminary investigation had been carried out and [the identity of the persons or persons who had abducted the [said] children [had not

been] established," and "it consisted of 28 folios."

48(23) On April 19, 1996, the Chalatenango Trial Court issued a decision it which it decided "to comply with the measures ordered [by the Constitutional Chamber of the Supreme Court of Justice] in the order" of March 14, 1996, regarding the petition for *habeas corpus* filed by the mother of the Serrano Cruz sisters (*supra* para. 48(15) and 48(21)). The criminal file does not contain a decision to reopen the proceedings; nevertheless, with this decision of April 19, 1996, it can be inferred that the Court decided to reopen the investigation into the abduction of the sisters, Ernestina and Erlinda Serrano Cruz, "against members of the Armed Forces of the Atlacatl Battalion," reported by María Victoria Cruz Franco on April 30, 1993. The file of the proceedings before the Chalatenango Trial Court contains no record of the Constitutional Chamber having been informed about the investigations carried out during these proceedings, despite the Chamber's request (*supra* para. 48(21)).

48(24) At the date of this judgment, approximately eight years and ten months have elapsed since the criminal proceedings were reopened (*supra* para. 48(23)), and not one member of the Atlacatl Battalion, against which criminal case No. 112/93 was filed, has been named during the investigations under these proceedings. No one has been criminally accused and no indictment has been filed naming someone as the person guilty of the crime under investigation. In addition, throughout this lapse of time, the proceedings have remained at the investigation stage, and the fate of the sisters, Ernestina and Erlinda Serrano Cruz, has not been explained.

48(25) Approximately two years and one month after the reopening of the proceedings (*supra* para. 48(23)), they were filed by an order of May 27, 1998, on the basis that "the […] criminal proceedings have been totally exhausted (and [as] it had not been possible to establish who had abducted them, the proceedings [were] filed, in accordance with Art[icle] 125(2) [of the 1973 Penal Code], and the final part of [Article] 126 of this Code." The said Article 125(2) of the Penal Code, entitled "Prescription of criminal proceedings," establishes that criminal proceedings will prescribe "after ten years, in the case of crimes punishable with a maximum term of imprisonment of more than 15 years," unless the law stipulates otherwise. The said Article 126 *in fine* of the Penal Code, entitled "Commencement of the prescription," establishes that "[i]n those cases in which proceedings have been initiated, if they are abandoned, the prescription period will be calculated beginning on the date of the last judicial action."

48(26) Three months after the representatives filed the petition before the Inter-American Commission and almost a year after the order had been issued for the case to be filed (*supra* para. 48(25)), the criminal investigation was reopened. The criminal proceedings file contains no record of the formal reopening of the investigation, but it does record that the proceedings were activated by a document of May 17, 1999, in which the prosecutor requested a complete certification "of the 132 folios" of the file, arising from "instructions from the senior prosecutor, so as to make a more detailed and thorough examination of [this] case."

48(27) During the investigation stage of the criminal proceedings, the Chalatenango Trial Court ordered, always at the prosecutor's request, or received procedural records, in relation to: a) testimonial statements of the mother and a sister of the alleged victims, and the summons of a deceased person; b) the International Committee of the Red Cross, the Salvadoran Red Cross, a hospital, and the Attorney General's office; c) the Armed Forces; and d) determination of the existence and

identity of the alleged victims. During the investigation, the court did not order and the prosecutors did not request any records in relation to orphanages or children's homes, despite the information received from the Red Cross (*supra* para. 48(18)), nor did they try to summon the members of the Army named by the alleged victims' mother to make statements (*supra* para. 48(15)).

a) *Testimonial statements of the mother and a sister of the alleged victims, and summons of a deceased person*

48(28) On May 6, 1996, the Chalatenango Trial Court ordered that the statement made before that Court by María Victoria Cruz Franco should be expanded, to provide "new information […] and witnesses who c[ould] testify about the abduction of her […] daughters, Ernestina Serrano and [E]rlinda Serrano." On June 4, 1996, María Victoria Cruz Franco stated that "she c[ould] not provide any new information or witnesses who could testify in that regard," but "she believe[d] that her daughters had been adopted by foreigners and hope[d] that they w[ould] return as had many of the disappeared." On July 11, 1996, María Victoria Cruz Franco appeared before the Chalatenango Trial Court and stated that two new witnesses, Esperanza Franco Orellana and Suyapa Serrano Cruz, could testify about the abduction of her daughters; she gave their addresses. Seven months later, the alleged victims' mother was summoned by that court to "provide the exact address of the witness, Esperanza Franco"; at which time, she declared that "she d[id] not know the exact address […], but would make the necessary inquiries."

48(29) On June 7, 1996, the Chalatenango Trial Court found that "the […] investigation had been sufficient." It therefore granted a hearing to the prosecutor "so that it could decide on the merits of the evidence." On June 19, 1996, even though Victoria Cruz Franco had stated in her petition for *habeas corpus* (*supra* para. 48(15)) that the witness, Paula Serrano, was deceased, the prosecutor assigned to the case decided that the case had not been "sufficiently investigated," because the witness, Paula Serrano, had not testified. On July 4, 1996, the Chalatenango Trial Court considered that the summons of Paula Serrano had been complied with "as she did not live in the village [of San José de las Flores] and her whereabouts were unknown," according to information supplied by the local magistrate's court.

48(30) On July 19, 1996, Suyapa Serrano Cruz gave testimony before the Chalatenango Trial Court, and stated that some "soldiers […] took her sisters" during a 1982 military operation in Los Alvarenga canton, Nueva Trinidad jurisdiction, Chalatenango Department, and provided the address of Esperanza Franco Orellana, proposed as a witness by the alleged victims' mother (*supra* para. 48(28)).

b) Procedural actions related to the International Committee of the Red Cross, the Salvadoran Red Cross, a hospital, and the Attorney General's office

48(31) Neither the Chalatenango Trial Court nor the prosecutor requested any information from the institutions named in the document that the head of the Salvadoran Red Cross Tracing Office submitted during the *habeas corpus* proceeding (*supra* para. 48(18)), to the officer executing that recourse. The document gave the names of the places where the 52 children who had been brought by this institution from Chalatenango under the program to provide counseling and care to the

displaced had been accommodated. The children ranged from newborn babies to 12 years old.

48(32) On July 12, 1996, the Chalatenango Trial Court issued a letter rogatory to the Ilobasco Trial Court, Cabañas Department, to receive the statement of Esperanza Franco Orellana, who had been named as a witness by María Victoria Cruz Franco (*supra* para. 48(28)). This letter rogatory was never received by the said Ilobasco Court, and was therefore repeated on September 18, 1996. On February 17, 1997, almost five months after the letter rogatory had been issued, the Chalatenango Trial Court received official communication No. 431 issued by the Ilobasco Trial Court, advising that it had not been possible to summon Esperanza Franco, "since she was not known at the address provided" for notifying the summons.

48(33) In her statement before the Chalatenango Trial Court on July 19, 1996 (*supra* para. 48(30)), Suyapa Serrano Cruz stated that her family had received news that her sisters, Ernestina and Erlinda, had been handed over to the International Red Cross from Esperanza Franco, and provided the latter's address.

48(34) On July 30, 1997, the prosecutor assigned by the Special Crimes Unit stated that the "summons of Esperanza Franco […] of July 12, [1996 (*supra* para. 48(32))] […] d[id] not include the complete address" and, consequently, Mrs. Franco had not been found. He also indicated that the complete address could be found in the statement made by Suyapa Serrano Cruz on July 19, 1996 (*supra* para. 48(30)), and requested that "Esperanza Franco be formally summoned […] to testify as a witness."

48(35) On September 23, 1997, María Esperanza Franco Orellana de Miranda testified before the Chalatenango Trial Court, more than 14 months after Mrs. Cruz Franco had provided her name as a witness of the facts (*supra* para. 48(28)). In her statement, Mrs. Franco Orellana indicated, *inter alia*, that on June 2, 1982 "she was in the Sierpe district [with] her mother[, who] told her she had seen [when] the children, Ernestina [and Erlinda] Serrano, were taken from an Armed Forces helicopter," so "they drove to the place where [this] helicopter had landed," and it was then that "she saw they were putting [the said] children in a Red Cross vehicle"; she did not know whether this was the national or the international Red Cross.

48(36) On September 2, 1996, the prosecutor assigned by the Special Crimes Unit filed a brief, in which he requested the Chalatenango Trial Court to "issue an official communication to the International Committee of the Red Cross requesting it to advise whether Herlinda [(*sic*)] and Ernestina [Serrano Cruz] were among the children [it attended] in 1982 [… and] to the Hospital Director, Dr. Luis Edmundo Vásquez, requesting him to advise whether his institution had provided medical care to the child, Herlinda [(*sic*)] in June" 1982, since information had been received that "this child had been injured by a bullet from a firearm." The court issued these official communications on September 3, 1996.

48(37) On September 23, 1996, the Director of the National Hospital, Dr. Luis Edmundo Vásquez advised the Chalatenango Trial Court, that Ernestina and Erlinda Serrano "did not receive medical care in July 1982, [because] the information cards[,] list of patients[,] and record of interned patients ha[d] been reviewed and the said children were not registered." The dates forwarded by the Hospital correspond to July 1982, and do not refer to the records for June that year, contrary to the Trial Court's request. The court did not make another request for the hospital

to provide the information for June 1982. The Hospital's report did not mention cases of girl children interned owing to gunshot wounds, but merely indicated that the hospital could not trace the names of these children. Additionally, the court did not ask for information based on data other than the first and last names of the children. The file of the criminal proceedings does not show that the Trial Court took any action with regard to other hospitals.

48(38) On September 23, 1996, the Executive Secretary of the Salvadoran Red Cross informed the Chalatenango Trial Court that "the children, HERLINDA *(sic)* AND ERNESTINA [Serrano Cruz] were not among the children [the] Red Cross took care of in 1982, under the displaced persons program." The Trial Court did not receive any information from the International Committee of the Red Cross (ICRC), from which it had requested this information. Additionally, the court only requested information based on the first and last names of the alleged victims.

48(39) On October 21, 1997, in response to the orders of the Chalatenango Trial Court at the request of the prosecutor assigned by the Special Crimes Unit, personnel of the Fourteenth Magistrate's Court of San Salvador visited the central offices of the Salvadoran Red Cross to inspect the 1982 records of the Displaced Persons Counseling and Attention Program. The Director General of the Salvadoran Red Cross stated that "he d[id] not have [the] 1982 records on counseling and care for displaced persons, since the International Red Cross […] offices in […] Guatemala had those documents or records, […] because, as a result of the peace agreements, this institution had left" El Salvador. On December 4, 1997, around a month and a half after this inspection, the Chalatenango Trial Court received the respective report. On May 27, 1998, the Chalatenango Trial Court decreed that the proceedings should be filed (*supra* para. 48(25)), even though the inspection of the Red Cross records had not been completed.

48(40) On June 28, 1999, the new deputy prosecutor of the Special Crimes Unit requested that "an official communication be sent to the International Committee of the Red Cross, with offices in Guatemala, [asking it] to advise whether it had attended the children," Ernestina and Erlinda Serrano Cruz.

48(41) On July 2, 1999, one year and seven months after the Fourteenth Magistrate's Court of San Salvador had advised that the required records were at the International Committee of the Red Cross (*supra* para. 48(39)), the Chalatenango Trial Court issued an official communication to the Minister of Foreign Affairs requesting his "assistance, for the Ministry of Foreign Affairs to request the [said] Committee[, …with] offices in Guatemala, to advise whether their offices had cared for the children, Ernestina and Erlinda Serrano Cruz, and what had happened to them."

48(42) On November 3, 2000, one year and four months after the request to the Ministry of Foreign Affairs (*supra* para. 48(41)), the assistant prosecutor of the Special Crimes Unit sent the Chalatenango Trial Court a communication dated May 30, 2000, signed by the Regional Representative of the International Committee of the Red Cross for Central America and the Caribbean, addressed to the Chargé d'affaires of the Embassy of El Salvador in Guatemala, in which this Committee advised that, "in El Salvador, they had not received any request from the next of kin of Erlinda and Ernestina Serrano Cruz to look for them [and their] files contained no record that representatives of [this institution] had taken charge of them in Chalatenango."

48(43) On October 2, 2000, after one year and three months during which no measures of any type were taken in the criminal proceedings, an assistant agent of the Public Prosecutor's office requested the Chalatenango Trial Court to order six persons to testify, based on the June 1982 payroll forwarded by the President of the Salvadoran Red Cross. Five of them were selected from among 51 persons on the payroll, and the sixth was the president of the Red Cross female volunteers (*damas voluntarias*) in October 2000. The President of the Red Cross stated that, in 1982, volunteers had been working with the institution, and also Swiss representatives of the International Committee of the Red Cross, "supported by a numerous group of national employees with offices in several departments of the country." Additionally, the Public Prosecutor's assistant requested that an official communication be sent "for the second time," to the Director of the International Committee of the Red Cross with offices in Guatemala, asking him to advise whether the children had been received by the ICRC. On November 17, 2000, the Chalatenango Trial Court issued a letter rogatory to the Second Magistrate's Court of San Salvador to receive the statements of the said witnesses.

48(44) On May 11, 2001, almost six months after the Chalatenango Trial Court had requested the Second Magistrate's Court of San Salvador to receive the statements of these six witnesses (*supra* para. 48(43)), the Chalatenango Trial Court issued an official communication requesting the justices of the Supreme Electoral Tribunal to provide the addresses of these persons.

48(45) On July 31, 2001, the Secretary General of the Supreme Electoral Tribunal advised that "he [had] found eight homonyms" with regard to two of the said witnesses and forwarded the respective codified information. He indicated that, of the four remaining witnesses, "there [was] no one with th[ose] name[s] in the Electoral Register kept by the institution." On September 24, 2001, almost two months after the first communication had been sent, the Supreme Electoral Tribunal sent the Chalatenango Trial Court the requested electoral information on two persons, but this information was provided "in code, once again." Even though, on August 15, 2001, the Trial Court requested that the information should be sent decoded, the Supreme Electoral Tribunal again sent the information coded. There is no record in the file of the criminal proceedings that the testimony of the five persons who were selected from the 51 persons who appeared on the payroll of the Red Cross in June 1982 (*supra* para. 48(43)) was received, or that other persons who worked for the institution in 1982 and were also on the payroll were summoned.

48(46) On August 27, 2001, the prosecutor assigned to the proceedings presented a brief with the list of the persons who were working for the Salvadoran Red Cross in May 2001 and indicated that "when the names were compared" with the June 1982 payroll of personnel, he had found that, on the current list, "there [were] persons [who were employed in 1982] and who were still employed" by this institution; consequently, four persons could be summoned to testify. Nevertheless, the brief did not request that three persons who were on both lists should be summoned to testify, without indicating the reason. Also, in this brief, the prosecutor gave the address of the president of the Red Cross female volunteers in August 2001 (*supra* paras. 48(43) and 48(45)). During the criminal proceedings, only two of the four witnesses requested by the prosecutor gave testimony. One of them, who testified on September 21, 2001, before the Second Magistrate's Court of Ahuachapan, stated that "he never […] live[d] or work[ed] in any part of Chalatenango," that "in the cases of those who disappeared during the war, it was the International Committee

of the Red Cross that traced them and returned them to their next of kin, the Salvadoran Red Cross was not responsible for this, […] so he knew nothing about the disappearance of" the sisters, Ernestina and Erlinda Serrano Cruz." The second witness, who testified on September 24, 2001, before the Second Magistrate's Court of San Salvador, stated that he was unaware of "the abduction of two children in [1996] *(sic)*."

48(47) On February 4, 2002, following some judicial formalities, the president of the Red Cross female volunteers at that time testified before the Public Prosecutor's office and stated that "she kn[ew] nothing" about Ernestina and Erlinda Serrano Cruz (*supra* para. 48(43) and 48(46)). In addition, she indicated that, in the case of children, "the files [of the work of the Salvadoran Red Cross were] kept by each branch or unit of volunteers" in the form of "a record card with information on the identity of the child, as well as the place to which he or she would be handed over" and that "the files [of that era] had been destroyed owing to the [1986] earthquake." On March 14, 2002, the said President also testified before the Second Magistrate's Court of San Salvador. In addition to the information she had provided in her previous testimony, she added that in "during the war, they were present in many places and that the [Salvadoran] Red Cross were never alone[, but were always accompanied by] a member of the International Red Cross and that […] they never had direct contact with the Army; that the children collected were taken to institutions such as Rosa Virginia or Padre Mucci, that is *(sic)* the SOS Villages, or the Children's Home, or the Salvadoran Children's Council." She indicated that, "with regard to the record cards, she did not make them out, but she signed them and they were kept by the Salvadoran Red Cross [; …] she supposed that […] Father John Cortina was given some record cards because he carries photocopies of them with him." The file of the criminal proceedings contains no record that the prosecutor or the judge investigated the institutions to which the children who were found were handed over according to this witness.

48(48) On April 9, 2002, when the prosecutor assigned to the proceedings indicated that the order to the Second Magistrate's Court of Santa Ana for it to take the statement of a witness who was a messenger of the Salvadoran Red Cross in 2001 (*supra* para. 48(46)) had not been acted on, the Chalatenango Trial Court issued an official communication to this Magistrate's Court requesting it to carry out this measure. The statement was not made during the criminal proceedings.

48(49) On January 21, 2005, two days after the President of the Inter-American Court had requested the State to submit information on any other measure taken during the criminal proceedings before the Chalatenango Trial Court since September 6, 2004 (*supra* para. 22), the prosecutor assigned to the proceeding requested, for the first time, that an official communication be sent to the Attorney General's office requesting it to provide information on whether the names of the sisters, Ernestina and Erlinda Serrano Cruz, appeared in the adoption records from May 1982 to May 1993. This request does not contain any data, other than the names, which would allow the sisters to be traced based on another aspect. On January 27, 2005, the Chalatenango Trial Court decided to issue an official communication to the Attorney General's Office, requesting this information. The criminal proceedings file does not record whether this communication was ever issued.

c) Procedural actions related to the Armed Forces

48(50) The captain and the officer who were allegedly members of the Atlacatl

Battalion, and who the alleged victims' mother had indicated should be summoned to provide information during the *habeas corpus* procedure, were never summoned to testify. No reference was made to this evidence during the criminal proceedings.

48(51) On October 7, 1997, at the request of the prosecutor assigned by the Special Crimes Unit, the Chalatenango Trial Court issued an official communication to the Joint Chief of Staff of the Armed Forces, requesting information concerning the identity "of the officer responsible for the military operation carried out in Los Alvarenga canton[, and also] the list of the members of the Atlacatl Battalion who took part in the operation [carried out] on June 22, [1982]." On November 4, 1997, the Joint Chief of Staff of the Armed Forces advised that his "files did not contain the name of the officer responsible for this military operation, or the list of personnel who took part in it"; he also stated that, "on June 22, 1982, the ATLACATL Battalion was involved in a military operation in Morazán Department." The Joint Chief of Staff did not submit any type of general information on this battalion, nor was this requested by the court, despite the failure to provide the specific information required.

48(52) On December 10, 1997, the prosecutor assigned by the Special Crimes Unit stated that, since, in the proceedings, two dates appeared on which the "disappearance of the children" could have occurred, "another official communication should be sent to the Joint Chief of Staff of the Armed Forces[,] requesting him to provide information on the identity of the commanding officer [… and] the list of the members of the Atlacatl Battalion who took part in the military operation on June 2, 1982." The following day, the court sent an official communication to the Joint Chief of Staff of the Armed Forces and on January 28, 1998, he advised that, according to his record of June 2, 1982, the 'Atlacatl' Battalion "was not operating in Los Alvarenga canton, Nueva Trinidad jurisdiction." The Joint Chief of Staff did not provide any further general information on the said battalion, such as the names of its members; and the court did not request this, despite the failure to provide the specific information that had been requested. The Chalatenango Trial Court filed the case on May 27, 1998 (*supra* para. 48(25)).

48(53) On March 30, 2001, the prosecutor assigned by the Special Crimes Unit requested that a judicial inspection be carried out of the logbook of the Salvadoran Air Force, and also of the records of the Armed Forces corresponding to the months of June and July 1982, "in order to establish whether there had been a military presence in [the] said month[s] and year and […] to trace the children," Ernestina and Erlinda Serrano Cruz.

48(54) On April 2, 2001, the Chalatenango Trial Court cautioned the prosecutor assigned to the court that he should decide "where he want[ed] to establish the military presence [during the months of June and July 1982]; and also explain what he wished to prove with the requested inspection, in relation to the whereabouts of the children." On April 20, 2001, the prosecutor answered the said caution and indicated that "the prosecutor's office want[ed] to establish the military presence where the children [Ernestina and Erlinda Serrano Cruz] were abducted in Santa Anita canton, municipality of San Antonio de [L]a Cruz, Chalatenango[…,] allegedly [by] members of the Atlacatl Battalion, [in the] military operation carried out on June [2, 1982]." The prosecutor assigned to the case stated that "what he wished to establish" with "the requested inspection of the records of the Armed Forces General Staff [was] whether the Armed Forces had really been present at the site of the facts […,] and if so[,] to establish which military base was there, in order to interview

some people about the case."

48(55) On May 3, 2001, at the request of the prosecutor assigned to the case, the Chalatenango Trial Court ordered the inspection of the logbooks of the No. 1 Military Detachment of Chalatenango, who were based in La Sierpe district during June and July 1982. This inspection was carried out on July 16, 2001, two month and thirteen days after the court ordered it (*infra* para. 48(57)) and after two requests from the prosecutor (*infra* para. 48(56)). However, during the procedure, the court did not order the judicial inspection of the records of the Joint General Staff of the Armed Forces and the logbooks of the Air Force, which had been requested by the prosecutor assigned to the proceeding (*supra* paras. 48(53) and *infra* para. 48(68)).

48(56) On June 26, 2001, the prosecutor assigned to the proceedings filed a brief before the Chalatenango Trial Court stating that "the judicial inspection[s] in the logbooks of the Salvadoran Air Force[…], and in the records of the Armed Forces for [the] month[s] of June and July [1982]" had not been carried out (*supra* paras. 48(53), 48(54) and 48(55)). On July 12, 2001, the prosecutor repeated his request that this judicial inspections of the Air Force logbooks and the records of the Armed Forces should be carried out as soon as possible, and also requested the judicial inspection of the logbooks, files and records that the No. 1 Military Detachment of Chalatenango kept during June and July 1982, which had been ordered by the said court (*supra* para. 48(55)). The prosecutor also requested that a judicial inspection be carried out of the logbooks, files and records of the Fourth Infantry Brigade of El Paraíso, Chalatenango.

48(57) On July 16, 2001, the Chalatenango Trial Court indicated that the judicial inspection of the logbooks of the No. 1 Military Detachment should be carried out on August 9, 2001, and issued an order for the El Paraíso Magistrate to inspect the logbooks of the Fourth Infantry Brigade of El Paraíso, Chalatenango, more than three months after the prosecutor assigned to the proceeding had first requested these inspections (*supra* paras. 48(53)).

48(58) Regarding the inspection of the logbooks of the No. 1 Military Detachment of Chalatenango (*supra* para. 48(55) and 48(57)), on July 26, 2001, the Chalatenango Trial Court issued an official letter to the Commander of the detachment informing him of the date and time fixed for carrying out the said judicial inspection.

48(59) Regarding the inspection of the logbooks of the El Paraíso Fourth Infantry Brigade (*supra* para. 48(56)), the Chalatenango Trial Court only sent the order to the respective Magistrate's Court on August 7, 2001.

48(60) On August 9, 2001, the judicial inspection of the logbooks, files and records for June and July 1982 of the No. 1 Military Detachment of Chalatenango was carried out (*supra* para. 48(55) and 48(57)). Nevertheless, it was only possible to inspect the "logbook of the Third Fusiliers Company," because "the […] person responsible for the general files [of this] Military Detachment" stated that "none of the other logbooks requested could be found." "No information of any kind" about the sisters, Ernestina and Erlinda Serrano Cruz, was found in the logbook inspected. Also, while the said inspection was being carried out, the No. 1 Military Detachment's personnel officer stated that "the logbook of the captain of the barracks w[ould] be provided" on August 23, 2001, to verify any information concerning the Serrano Cruz sisters and that he would try and find information on the sisters. The judge told this officer that she would forward the pertinent passages of the case she was investigating to

the detachment, "describing the place from where the said children were brought, and also the place where they were handed over to the Red Cross."

48(61) On August 15, 2001, the Chalatenango Trial Court indicated that the judicial inspection of the "logbook of the captain of the barracks" should be carried out on August 23, 2001. However, on August 20, 2001, the Chalatenango Trial Court issued an official communication to the No. 1 Military Detachment's personnel officer informing him that the procedure "would not be carried out on the [23rd …], but […] on the [28th] of the same month and year, in working hours." The file of the criminal proceedings contains no mention of the reason why the said inspection of the logbook of the captain of the barracks of the No. 1 Military Detachment of Chalatenango was not carried out on the day initially specified.

48(62) On October 11, 2001, the prosecutor assigned to the proceedings requested that "the date and time for carrying out the inspection of the logbooks of the No. 1 Military Detachment and also of the El Paraíso Fourth Brigade be established as soon as possible." Consequently, on October 16, 2001, the Chalatenango Trial Court indicated that the inspection of the logbooks of the No. 1 Military Detachment should be carried out on October 25, 2001. As regards the inspection pending in the El Paraíso Fourth Infantry Brigade, the Chalatenango Trial Court indicated that "it was awaiting information on what had been decided," since, on August 7, 2001, an official communication had been issued to the El Paraíso Magistrate's Court (*supra* para. 48(59)). It did not reiterate the order to that court or insist that the requested inspection be carried out.

48(63) The Chalatenango Trial Court did not carry out the judicial inspection of the logbook of the captain of the barracks of the No. 1 Military Detachment of Chalatenango on October 25, 2001, because the general "files [of that detachment] had been transferred from one place to another and […] were in disarray[,] so that this logbook had not been found." The judge and the prosecutor were taken to the place where the files were kept and confirmed that "they were […] in disarray; [they] were shown several logbooks, which they had to sort out." The judge asked "whether the same measure could be ordered […] one month later, […] when the files were in order," to which the Detachment's personnel officer replied that they would be sorted out "within about 15 days [… and] asked for the telephone numbers" of the prosecutor's office and the court "to advise [them] when the files were in order."

48(64) On November 27, 2001, the El Paraíso Magistrate's Court and the prosecutor visited the Fourth Infantry Brigade to carry out the judicial inspection of the logbooks, files and records of this institution for the months of June and July 1982. Almost four months had elapsed since the Chalatenango Trial Court ordered this Magistrates Court to carry out this inspection (*supra* para. 48(59)). However, the Brigade delivered official communication No. 286 to the court, advising that "it d[id] not have the required information […] as it did not have any files from those dates[,] because they had been destroyed by terrorist criminals in an attack of [March] 31, 1987" "when forces of the Farabundi Martí National Liberation Front (FMLN), attacked [the said] military unit[,] so that there are no files from [1980] to March [1987]."

48(65) On January 23, 2002, the prosecutor assigned to the proceedings, who had been appointed on January 11, 2002, requested that "a second inspection [be made] of the logbooks and records" of the No. 1 Military Detachment of Chalatenango, "which ha[d] remained pending" for almost three months, since the first inspection

had not been carried out because the files were in disarray (*supra* para. 48(63)). On February 4, 2002, the Chalatenango Trial Court issued an official communication to this detachment for the inspection to be carried out. On March 1, 2002, the Military Detachment authorized the inspection of the logbooks and records it had kept during 1982.

48(66) On March 13, 2002, the Chalatenango Trial Court and the assigned prosecutor visited the No. 1 Military Detachment in that city to carry out the judicial inspection of the logbooks, files and records of this detachment, as indicated by that court in the official communication of February 4, 2002 (*supra* para. 48(65)). However, at the detachment, they were informed that the logbooks to be inspected were at the El Paraíso Fourth Infantry Brigade; accordingly, they went to this Brigade accompanied by a representative of the No. 1 Military Detachment of Chalatenango. They did not inspect the logbooks because "the Commander of [the said] Brigade […] state[d that …] before this could be done, authorization had to be requested from the Ministry of National Defense."

48(67) On January 21, 2005, two days after the President of the Inter-American Court had requested the State to present information on any measures taken in the criminal proceedings since September 6, 2004 (*supra* para. 22), and approximately two years and ten months after the Commander of the Fourth Brigade had stated that authorization was required to inspect the logbooks (*supra* para. 48(66)), the prosecutor assigned to the proceedings requested the Chalatenango Trial Court to issue an official communication to the Ministry of National Defense requesting authorization to carry out the judicial inspection of the logbooks of the No. 1 Military Detachment. This inspection had been ordered by the court for the first time three years and seven months previously (*supra* para. 48(55)). On January 27, 2005, the Chalatenango Trial Court decided to issue an official communication to the Ministry of National Defense requesting authorization to carry out this inspection. The criminal case file does not record whether the communication was ever issued.

d) Procedural measures relating to determination of the existence and identity of the alleged victims

48(68) On August 21, 2003, the National Civil Police sent official communication No. 027/03 to the Chalatenango Trial Court advising that an application had been filed against El Salvador before the Inter-American Court of Human Rights, and that the Ministry of Foreign Affairs had therefore asked "all the State institutions that had intervened in any way, or could make any contribution, to part in" Case of the Serrano Cruz Sisters. Accordingly, the National Civil Police requested the Chalatenango Trial Court to provide a certified copy of the proceedings.

48(69) On January 11, 2002, a new prosecutor had taken over the investigation. Approximately one year and eight months later, on October 16, 2003, he took the first measures in the proceedings. These focused principally on an investigation of the Armed Forces' records, because he believed that "there ha[d] to be something there." However, in October 2003, the Deputy Ombudsman told him that he should visit the place where the Serrano Cruz family lived in 1982 and talk to the people.

48(70) On October 16, 22 and 23, 2003, almost one year and seven months after the last judicial action, the Chalatenango Trial Court summoned Ramón Miranda Cruz, Antonio Miranda Castro, Roque Miranda Ayala, Mardoqueo Franco Orellana and

Blanca Rosa Galdámez de Franco to testify as witnesses because, on those dates, the prosecutor informed the court that he "had heard out-of-court [… that these persons c[ould] provide information that w[ould] help clarify the facts under investigation." The last four of the five persons indicated as witnesses by the prosecutor and summoned by the court were also proposed as witnesses before the Inter-American Court by the State's Agents in their brief of October 31, 2003, filing preliminary objections, answering the application and providing observations on the requests and arguments brief (*supra* para. 5). On October 17 and 23, 2003, the following day and the same day as the Chalatenango Trial Court had issued the summons, the testimonies of these five witnesses were heard; they stated, *inter alia,* that they did not know that Ernestina and Erlinda Serrano Cruz were the daughters of María Victoria Cruz Franco and that they did not know the girls.

48(71) On October 29, 2003, the prosecutor assigned to the case filed a brief before the Chalatenango Trial Court, in which he requested that María Esperanza Franco Orellana de Miranda should be summoned again, because "he h[ad] heard out-of-court that the said witness ha[d] information which c[ould] lead to clarification of the facts under investigation." The same day, instead of summoning Mrs. Franco Orellana, the Chalatenango Trial Court "summon[ed] María Victoria CRUZ FRANCO to appear [… on October 29]." This summons was delivered to the prosecutor assigned to the case. On October 29, 2003, the day that the summons was issued in the name of Mrs. Cruz Franco, María Esperanza Franco Orellana de Miranda made a second statement before the Chalatenango Trial Court. In this statement, Mrs. Orellana de Miranda, contradicting what she had said in her first statement made on September 23, 1997, before the Chalatenango Trial Court (*supra* para. 48(35)), stated that "it [was] not true that [… she had seen] the children, Erlinda and Ernestina SERRANO descend from a helicopter or get into a Red Cross vehicle[, … because] she had never known or seen the [Serrano Cruz sisters] or heard their names before." María Esperanza Franco Orellana de Miranda was also proposed as a witness before the Inter-American Court by the State's Agents in their brief of October 31, 2003, filing preliminary objections, answering the application and providing observations on the requests and arguments brief (*supra* para. 5).

48(72) On July 2, 2004, the assigned prosecutor filed a brief before the Chalatenango Trial Court in which he stated that "he consider[ed] it necessary to inspect" the baptismal records of the Parish of San Juan Bautista in Chalatenango, because "he ha[d] heard that the child, Ernestina [(*sic*)] Serrano, [had been] baptized in this parish." Accordingly, to "verify the authenticity of [these] records," he requested that an official communication should be sent "to the Technical and Scientific Police Unit [requesting them to make a] graphalogical analysis." On August 25, 2004, the prosecutor requested the court to correct the name, Ernestina, which should have been Erlinda; the same day the court corrected the name.

48(73) On July 8, 2004, the Chalatenango Trial Court indicated that the graphalogical analysis should be made on August 17, 2004, during the judicial inspection of the baptismal registration of Erlinda Serrano Cruz in the baptismal records of the parish of San Juan Bautista. However, the Technical and Scientific Police Unit indicated that no experts were available on that date; consequently, the court decided that it should be made on September 2, 2004. Given the change of date decided by the Chalatenango Trial Court for this inspection, on August 19, 2004, the prosecutor assigned to the case indicated that taking this measure on the later date "[was] too late[, …] because the hearing before the Inter-American Court was imminent." He therefore asked for a new date and time to be established for conducting the judicial

inspection. In addition, the prosecutor requested that the supplementary register of the Chalatenango Diocese should be inspected and subjected to an expert appraisal, because the Bishop of Chalatenango had issued the "baptismal certificate of the child, Ernestina Serrano Cruz, [...] in a new supplementary baptismal register for the parish, since the files of the Parish of San José Las Flores had been destroyed." On August 20, 2004, the court accepted the prosecutor's request.

48(74) On August 24, 2004, the Chalatenango Trial Court, the assigned prosecutor and a graphology expert visited the Parish of San Juan de Dios to inspect tome 53 of the baptismal records, where the baptismal registration of Erlinda Serrano Cruz appeared. On that occasion, the judge drew up an official record, in which she noted that the graphology expert had indicated that the "register consist[ed] of 600 pages filled with different documents, with different handwriting and with much of the writing crossed out." The following day, the prosecutor considered it necessary to practice "a physiochemical examination of the handwriting of this entry[,]to determine whether there were several kinds of ink or any other element"; he therefore requested "the seizure of tome 53, folio 482 of the baptismal [register,] so that the Technical and Scientific Police Unit of San Salvador could carry out this examination." The court indicated in the record of the inspection that it had not been possible to inspect the supplementary register of the Diocese of Chalatenango, "owing to an error in remitting the official communications."

48(75) On August 27, 2004, the Chalatenango Trial Court, the prosecutor and two experts visited the Parish of San Juan Bautista in that city to inspect the baptismal registers containing the entry relating to Erlinda and the supplementary register which contained the entry relating to Ernestina (*supra* para. 48(73)) and to carry out the physiochemical analysis of the former and the graphalogical analysis of the latter. The expert appointed to carry out the physiochemical analysis and the analysis of the ink, "to verify whether the ink used to register the baptism of the child, Erlinda Serrano, [had been] altered," indicated that different tones of ink were used for different items in the said entry; he therefore asked the judge to seize the register containing the entry on Erlinda, so "that [it could be] taken and analyzed by the Technical and Scientific Police Unit of San Salvador."

48(76) On August 27, 2004, the Chalatenango Trial Court, based on Article 183 of the 1973 Code of Criminal Procedure, which refers to the seizure of "objects or instruments relating to a crime," requested the Bishop of the Diocese of Chalatenango to hand over tome 53 of the baptismal register containing the entry relating to the baptism of Erlinda. On August 30, 2004, the court and the prosecutor seized the said tome of the baptismal register and delivered it to the Technical and Scientific Unit of the National Civil Police (*supra* para. 48(75)).

48(77) On September 2, 2004, the Technical and Scientific Unit of the National Civil Police forwarded to the Chalatenango Trial Court the result of the graphalogical and physicochemical analysis of tome 53 of the baptismal register regarding the registration of the baptism of Erlinda Serrano Cruz, and also tome 6 of the supplementary baptismal register regarding the entry relating to the baptism of Ernestina Serrano Cruz (*supra* para. 48(73) and 48(74)). With regard to the inspection of the former, the expert in the analysis of questionable documents concluded that "the form certifying the baptism of the child, ERLINDA SERRANO, has been completed with two types of handwriting [… and] the support [(paper …] has been altered in the area above where the words 'Dionisio Serrano' appear." Regarding the entry for Ernestina Serrano Cruz, this expert stated that he did "not

observe any type of alteration." In addition, the expert in the analysis of questionable documents had remitted tome 53 of the baptismal register to the Physicochemical Section for it to be examined, where it was concluded that the inks used were of different tones and that some items were written with "different writing."

WITH REGARD TO ERNESTINA AND ERLINDA SERRANO CRUZ AND THEIR NEXT OF KIN

48(78) Ernestina Serrano Cruz was born on October 9, 1975, in San Antonio de La Cruz, Chalatenango; she was 19 years old when El Salvador accepted the contentious jurisdiction of the Inter-American Court.

48(79) Erlinda Serrano Cruz was born between August 1978 and 1979 in San Antonio de La Cruz, Chalatenango, and was 16 to 18 years old when El Salvador accepted the contentious jurisdiction of the Inter-American Court. It is not possible to determine her exact date of birth, because, as a result of the destruction of the registry departments of the mayors' offices during the armed conflict, the Serrano Cruz children's mother registered Erlinda in the office of the Mayor of San Antonio de La Cruz, based on the Special Transitory Act to establish the civil status of undocumented persons affected by the conflict (*supra* para. 48(10)) and indicated a different birth date from the one that appears on the baptismal certificate in the Parish of San Juan Bautista.

48(80) The next of kin of Ernestina and Erlinda Serrano Cruz were their mother, María Victoria Cruz Franco, who died on March 30, 2004; and their father, Dionisio Serrano Morales, who died in 1985. Their siblings would have been: Martha, Suyapa, Arnulfo, José Fernando, María Rosa, Oscar, Socorro, Irma, José Enrique and Juan, all Serrano Cruz; but, of these, the last four are already deceased.

48(81) Ernestina and Erlinda Serrano Cruz's mother died before the State determined what had happened to her two daughters and established their whereabouts.

48(82) The *Asociación Pro-Búsqueda* assumed several expenses that the next of kin of Ernestina and Erlinda Serrano Cruz incurred for medicines and psychological treatment, as well as for investigating their whereabouts.

48(83) The next of kin of Ernestina and Erlinda Serrano Cruz have taken various measures to find them and have participated in the judicial proceedings. The *Asociación Pro-Búsqueda* covered the expenses arising from processing the domestic proceedings. The representatives of the alleged victims and their next of kin, the *Asociación Pro-Búsqueda* and CEJIL, assumed the expenses arising from resorting to the inter-American system for the protection of human rights.

VII
VIOLATION OF ARTICLES 8(1) AND 25 OF THE CONVENTION IN RELATION TO ARTICLE 1(1) THEREOF (JUDICIAL GUARANTEES AND JUDICIAL PROTECTION)

Arguments of the Commission

49. Regarding the alleged violation of Articles 8(1) and 25 of the Convention, in

relation to Article 1(1) thereof, the Commission alleged that:

a) "The El Salvador Judiciary prevented the Serrano Cruz family from discovering the whereabouts of Ernestina and Erlinda." "The criminal investigation against the members of the Atlacatl Battalion has never made any progress." "The entire series of judicial actions that have been carried out do not meet the parameters of diligence and effectiveness required by international law for the investigation of human rights violations." The State has not identified or punished those responsible for what happened to Ernestina and Erlinda Serrano Cruz;

b) "Even though, in this case, the Salvadoran State has the responsibility of determining what happened to the Serrano Cruz sisters as of June 1982, it has not done so." Albeit this was its obligation, the State did not submit evidence to disprove the reported fact, "nor did it provide any evidence that it had conducted an investigation to determine what happened";

c) "In its observations on the merits of the case, […] the State merely described an investigation characterized by the mechanical repetition of court proceedings, with no action that would show its determination to conduct an investigation, clarify the facts and punish those responsible; even though it had full authority over all the basic elements of the investigation";

d) After the application had been filed, the proceedings conducted in the Case of the Serrano Cruz Sisters "by the Salvadoran judicial authorities were aimed at sowing doubts about the very existence of the Serrano Cruz sisters; incriminating the family, owing to alleged collaboration with the FMLN guerrilla, and even modifying the testimony that María Esperanza Franco de Orellana had given in the domestic jurisdiction. The testimony that Mrs. Franco de Orellana gave before the Court confirmed clearly that she had received offers of help for several personal matters from the prosecutor, Miguel Uvence, and also her previous statements regarding her fear of the prosecutors." In the months before the public hearing before the Court, the judicial investigation was completely paralyzed. The judicial authorities committed grave omissions in the collection of evidence; and

e) The State did not respect the right to judicial protection, in the context of due process, as required by Articles 8 and 25 of the Convention. "Consequently, the State is responsible for the violation of both articles to the detriment of Ernestina and Erlinda Serrano Cruz and their sister and mother."

Arguments of the representatives of the alleged victims and their next of kin

50. With regard to Articles 8(1) and 25 of the Convention, in relation to Article 1(1) thereof, the representatives stated that they endorsed the arguments submitted by the Commission and considered that "there had been a double violation of Articles 8 and 25 of the Convention: first, concerning the Serrano children and, second, in relation to their next of kin." Regarding the violation of these rights, they stated that:

a) The State had the obligation to conduct an exhaustive and impartial investigation to determine the whereabouts of the children, and identify and

punish those responsible within a reasonable time. "In the case of the Serrano sisters, the investigation was characterized by being incomplete, partial and slow";

b) María Victoria Cruz Franco filed the complaint before the domestic judicial system by submitting a report on the disappearance of her daughters; subsequently, she filed a petition for *habeas corpus* in their favor. However, "the whereabouts of the [Serrano Cruz sisters] have not been discovered and those responsible for their disappearance have not been identified or punished. More than eight years have elapsed since the case was reported to the competent authorities and, to date, the legal proceedings have come no closer to clarifying the facts, punishing those responsible and […] making reparation to the victims and their next of kin";

c) When deciding the petition for *habeas corpus* filed by María Victoria Cruz Franco, the Constitutional Chamber of the Supreme Court of Justice stated that, under Salvadoran legislation, this remedy was "not appropriate to investigate the whereabouts of the Serrano Cruz sisters, and was contrary to the criteria of the court." The Constitutional Chamber's response, added to the fact that the criminal investigation against members of the Atlacatl Battalion is still at the pre-trial investigation stage, "results in the denial of justice";

d) In the criminal proceedings, various measures seeking to clarify whether the children were abducted from the zone by the Army have not been taken, despite the existence of several relevant probative elements. The Army has not provided any information that could help clarify the case, "such as a record with information on the children who were allegedly evacuated from the conflict zones during "*Operación Limpieza*" or the '*Guinda de Mayo*'";

e) The Salvadoran authorities have not taken any steps to trace the children. "During the proceedings, they have not taken a statement from any member of the Army, and they have not obtained documents that could provide relevant information." "All the measures to trace documentation that could contribute relevant information to the case have been denied by the different military authorities in the various inquiries undertaken by the Chalatenango Trial Court." No investigation has been made into whether the girls were transferred to a children's home or given up in adoption. María de Gropp stated in her testimony before the Court that "no State authority had asked her for information about the fate of the children from the war";

f) "In recent months, the investigation has been aimed at proving that the children do not exist. The measures taken by the assigned prosecutor and the trial judge raise serious doubts about the impartiality of the investigation, and the authenticity of the evidence collected." First, there are indications that María Esperanza Franco was coerced into making her final statement. Second, "the partiality of the proceedings is demonstrated, because the end purpose of the investigation has become to defend the State before the Court and not to identify and punish those responsible. Both the trial judge and the prosecutor in the case have affirmed this." Even though an expert from the National Civil Police verified that, throughout the baptismal records where Erlinda is registered, there are changes in the ink and in the handwriting and "crossings out," the prosecutor asked for the records to be re-examined and,

to this end, requested they be confiscated;

g) "The State has unjustifiably delayed decisions on domestic remedies, particularly with regard to progress in the criminal case […]. The evident complexity of the case does not exempt the State from conducting a thorough and prompt investigation." The failure of El Salvador to comply with this obligation has had serious consequences for the collection of evidence;

h) The criminal case has been filed, even though some investigations were pending. The unjustified delay in providing justice in this case results from the indifference of those in charge of administering justice and from obstruction, by act or omission, by the Executive Power. Likewise, the Legislature has made a "decisive contribution to impunity with the adoption of the amnesty law," which has allowed "the vast majority of crimes against humanity committed during the war, as well as grave human rights violations, to remain unpunished." In this case, there is a significant possibility that impunity will prevail, either by application of the amnesty law or by a declaration that the case has prescribed;

i) The remedy of *habeas corpus* and the criminal complaint have not resulted in finding the Serrano Cruz sisters, or punishing those responsible. "The denial of justice endured by the Serrano family in its search for them is therefore obvious";

j) The siblings of Ernestina and Erlinda Serrano Cruz have the right to know what happened to their sisters, as did their mother, father and deceased siblings. "This is especially important because, as can be inferred from the testimonies that Elsy Dubón and Father Jon Cortina gave before the Court, and also from some documentary evidence presented during the proceeding, it is possible that Erlinda and Ernestina are alive." The need to know the whereabouts of Ernestina and Erlinda "provides a glimmer of hope for the disappeared children – today, young women – to learn their identity." "They, their next of kin, and society as a whole must know what happened to them and they, in particular, must know that they have a family waiting for them with open arms"; and

k) They requested the Court "to declare that the Salvadoran State is responsible for the failure to conscientiously investigate, prosecute and punish those responsible; and also for violation of the right to truth."

Arguments of the State

51. With regard to Articles 8(1) and 25 of the Convention, in relation to Article 1(1) thereof, the State alleged that it had not violated these norms and stated:

a) The petition for *habeas corpus* filed by Ernestina and Erlinda's mother was not appropriate to identify the authors of the punishable facts; they must be tried by the corresponding criminal instance. Also, since it was filed 13 years after the alleged detention of the Serrano Cruz sisters, it was not appropriate for discovering their whereabouts;

b) "The criminal proceedings before the Chalatenango Trial Court […] are

evidence of the investigation carried out to clarify the facts, […] since the Armed Forces were summoned, the Red Cross was summoned, the witnesses were summoned and the relevant expert reports were requested." The fact that this investigation was unsuccessful was due to the "inconsistencies and false statements of the mother and sister of the alleged victims";

c) Investigations have been conducted into where the Atlacatl Battalion was located when the children allegedly disappeared. They have not produced results that would allow the two children to be traced, because "none of the witnesses could identify the members of the Armed Forces who allegedly took part in gathering up the abandoned children." "The discrepancies in the time, place, participants and other circumstances in the statements prevented the judge from obtaining satisfactory results, since these depend on the veracity of the statements." Owing to the contradictory statements, it has been necessary to "investigate the veracity of [the] case" in order to discover the identity of the Serrano Cruz sisters. "Moreover, there is no crime involved in gathering up two children to ensure they are cared for, if they have been abandoned." Even though the Chalatenango judge declared the complaint inadmissible because it referred to "a conduct that was not typified as a crime," the investigation continued.

d) "The Chalatenango Trial Court has begun a new investigation to trace the Serrano Cruz sisters and the first results it has obtained are the testimonies of other members of the family who have no recollection of the existence of the [Serrano Cruz] sisters; this means that the State must request new statements from all the participants";

e) "Since the case is before the Inter-American Court, it is necessary to wait until it has been decided before continuing with the case and the investigations [… . F]or example, María Victoria Cruz Franco's children must testify […,] and the Fourth Infantry Brigade must be investigated more thoroughly concerning possible files with information about what happened, and also statements must be taken from the Brigade's officers. Much more evidence must be sought in the case and it is also urgent to establish the whole historical context […]. The investigation needs to be reoriented, so that it is not just the Atlacatl Battalion that is alleged to be responsible; the possible participation of other units must be verified, as well as which of the two statements is true; that of María Victoria Cruz Franco or that of her daughter, Suyapa Serrano, or whether they are both false […]. The investigation needs to be reoriented, checking the dates of birth of the girls […]." "The other children of the Serrano Cruz family have not been summoned to testify, because this is against the law, since the international proceedings are pending";

f) It requested the Court to decide that inconsistent or false statements affect the legal obligation of the State to investigate and obtain an effective result. "The parameters of diligence and effectiveness that are supposedly compulsory under international law can only be required for the proceedings of international organs, otherwise State sovereignty would be affected";

g) The inter-institutional commission created by the State in July 2003 to provide follow up on this case, conducted several investigations and visited the head office of the Salvadoran Red Cross and the office of the

representative of the International Committee of the Red Cross seeking information that could provide evidence on the whereabouts of Ernestina and Erlinda. Unfortunately, it was unsuccessful. The State will continue to conduct an exhaustive investigation into the case in the ordinary courts and also through a commission; and

h) The Amnesty Act has not been used in this case, or invoked by the State; consequently, the Court does not have jurisdiction to "rule on an alleged violation that has not been committed against the alleged victims."

Considerations of the Court

52. Article 8(1) of the American Convention establishes that:

> 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

53. Article 25 of the American Convention stipulates that:

> 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
>
> 2. The States Parties undertake:
>
> a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
>
> b) to develop the possibilities of judicial remedy; and
>
> c) to ensure that the competent authorities shall enforce such remedies when granted.

54. The Court recalls that the purpose of international human rights law is to provide the individual with the means to protect internationally recognized human rights before the State (its bodies, agents and all those who act in its name), and that it is a basic principle of the law of the international responsibility of the State, embodied in international human rights law, that all States are internationally responsible for any and every act or omission of any of their powers or bodies that violates internationally enshrined rights.[15]

55. Since the Court lacks jurisdiction to hear facts or acts that occurred before or that began to be executed before June 6, 1995 (*supra* para. 26), the substantial aspect of the dispute in this case before the Court is not whether the Serrano Cruz sisters were disappeared by the State, but whether the domestic proceedings ensured access to justice according to the standards of the American Convention.

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[15] *Cf. Case of the Gómez Paquiyauri Brothers*, *supra* note 10, paras. 71-73; *Case of the 19 Tradesmen*. Judgment of July 5, 2004. Series C No. 109, para. 181; and *Case of Herrera Ulloa*, *supra* note 4, para. 144.

56. In the international jurisdiction, the parties and the matter in dispute are, by definition, different from those in the domestic jurisdiction.[16] As it has on other occasions,[17] when examining possible violations of rights embodied Articles 8(1) and 25 of the American Convention, the Court has powers to establish the State's international responsibility as a result of the alleged violation of those rights, but not to investigate and punish the individual conduct of State agents.

57. In similar cases, the Court has stated that "[i]n order to clarify whether the State has violated its international obligations, owing to the acts of its judicial organs, the Court may have to examine the respective domestic proceedings."[18]

58. Accordingly, given the characteristics of the case and the nature of the alleged violations, the Court must examine all the domestic judicial proceedings to gain a thorough understanding of them and establish whether these proceedings ran counter to the standards concerning judicial guarantees and protection, as well as the right to an effective recourse, embodied in Articles 8 and 25 of the Convention.

59. The proven facts have established that, following the petition for *habeas corpus* filed by the mother of the Serrano Cruz sisters (*supra* para. 48(15)), two domestic courts heard the case: the Constitutional Chamber of the Supreme Court of Justice of El Salvador heard the *habeas corpus* procedure and the Chalatenango Trial Court heard the criminal proceedings. The Court will now examine the alleged violation of Articles 8(1) and 25 of the Convention in relation to these two proceedings.

60. On repeated opportunities, the Court has declared that the State has the obligation to avoid and combat impunity, which the Court has defined as "the absence of any investigation, pursuit, capture, prosecution and conviction of those responsible for the violations of rights protected by the American Convention."[19] In this regard, the Court has cautioned that:

> [...] the State has the obligation to combat that situation with all available legal means, because impunity leads to the chronic repetition of human rights violations and to the total defenselessness of the victims and their next of kin.[20]

61. The Court has repeatedly stated that the obligation to investigate must be complied with "in a serious manner and not as a mere formality preordained to be

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[16] *Cf. Case of the Gómez Paquiyauri Brothers*, *supra* note 10, para. 73; *Case of the 19 Tradesmen*, *supra* note 15, para. 181; and *Case of Cesti Hurtado. Preliminary objections.* Judgment of January 26, 1999. Series C No. 49, para. 47.

[17] *Cf. Case of Lori Berenson Mejía*, *supra* note 3, para. 92; *Case of the Gómez Paquiyauri Brothers*, *supra* note 10, para. 73; and *Case of the 19 Tradesmen*, *supra* note 15, para. 181.

[18] *Cf. Case of Lori Berenson Mejía*, *supra* note 3, para. 133; *Case of the 19 Tradesmen*, *supra* note 15, para. 182; and *Case of Herrera Ulloa*, *supra* note 4, para. 146.

[19] *Cf. Case of the Gómez Paquiyauri Brothers*, *supra* note 10, para. 148; *Case of the 19 Tradesmen*, *supra* note 15, para. 175; and *Case of Maritza Urrutia*. Judgment of November 27, 2003. Series C No. 103, para. 126.

[20] *Cf. Case of Carpio Nicolle et al., supra* note 3, para. 126; *Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 95; and *Case of Tibi.* Judgment of September 7, 2004. Series C No. 114, para. 255.

ineffective."[21] The investigation conducted by the State in compliance with this obligation "must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the Government."[22]

62. The Court has also referred on many occasions to the right of the next of kin of the alleged victims to know what happened and who was responsible for the respective facts. The Court has reiterated that everyone, including the next of kin of victims of serious human rights violations, has the right to know the truth. Consequently, the next of kin of the victims, and society as a whole, must be informed of everything that happened in relation to the said violations. International human rights law has been developing this right to the truth;[23] when it is recognized and exercised in a specific situation, it constitutes an important measure of reparation. Therefore, in this case, the right to know the truth gives rise to an expectation of the next of kin of the alleged victims that the State must satisfy.[24]

63. This Court has also stated that:

> From Article 8 of the Convention it is evident that the victims of human rights violations, or their next of kin should have substantial possibilities of being heard and acting in the respective proceedings, both to clarify the facts and punish those responsible, and to seek due reparation.[25]

64. Consequently, the next of kin of the alleged victims have the right to expect, and the States the obligation to ensure, that what befell the alleged victims will be investigated effectively by the State authorities; that proceedings will be filed against those allegedly responsible for the unlawful acts; and, if applicable, the pertinent penalties will be imposed, and the losses suffered by the next of kin repaired.[26]

65. The obligatory investigation by the State must be carried out with due diligence, because it must be effective.[27] This implies that the investigating body must, within a reasonable time, take all necessary measures to try and obtain

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[21] *Cf. Case of Bulacio, supra* note 8, para. 112; *Case of Juan Humberto Sánchez.* Judgment of June 7, 2003. Series C No. 99, para. 144; and *Case of Bámaca Velásquez.* Judgment of November 25, 2000. Series C No. 70, para. 212.

[22] *Cf. Case of the 19 Tradesmen*, *supra* note 15, para. 184; *Case of Bulacio, supra* note 8, para. 112; *Case of Juan Humberto Sánchez, supra* note 21, para. 144; and *Case of Bámaca Velásquez, supra* note 21, para. 212.

[23] *Cf. Case of Carpio Nicolle et al.*, *supra* note 3, para. 128; *Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 97; and *Case of Tibi, supra* note 20, para. 257.

[24] *Cf. Case of Carpio Nicolle et al.*, *supra* note 3, para. 128; *Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 97; and *Case of Tibi, supra* note 20, para. 257.

[25] *Cf. Case of the 19 Tradesmen*, *supra* note 15, para. 186; *Case of Las Palmeras.* Judgment of December 6, 2001. Series C No. 90, para. 59; and *Case of Durand and Ugarte.* Judgment of August 16, 2000. Series C No. 68, para. 129.

[26] *Cf. Case of the 19 Tradesmen*, *supra* note 15, para. 187; *Case of Las Palmeras, supra* note 25, para. 65; and *Case of Durand and Ugarte, supra* note 25, para. 130.

[27] *Cf. Case of Carpio Nicolle et al.*, *supra* note 3, para. 129; *Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 98; and *Case of Tibi, supra* note 20, para. 258.

results. The Court will examine the State's actions in this case from these two points of view: a) respect for the principle of reasonable time, and b) the effectiveness of the *habeas corpus* procedure and of the criminal proceedings.

a) Respect for the principle of reasonable time

66. The right to access to justice is not exhausted by the processing of domestic proceedings, but it also ensures the right of the victim or his next of kin to know the truth of what happened and for those responsible to be punished, within a reasonable time.[28]

67. With regard to the principle of reasonable time established in Article 8(1) of the American Convention, this Court has established that three elements should be taken into account in determining whether the time in which the proceeding was conducted was reasonable: a) the complexity of the case; b) the procedural activity of the interested part, and c) the conduct of the judicial authorities.[29]

68. The Court has confirmed that since the criminal proceedings were reopened in April 1996 (*supra* para. 48(23)) and until the date of this judgment, the proceedings have remained at the investigation stage for approximately 7 years and 10 months and, furthermore, they was filed for one year. The investigation stage of the proceedings is still open and to date no one has been indicted.

69. The Court considers that a prolonged delay, such as the delay in this case, constitutes, in itself, a violation of the right to a fair trial.[30] This unreasonableness, however, may be invalidated by the State, if the latter explains and proves that the delay is directly related to the complexity of the case or to the conduct of the parties to the case.

70. Based on the case history described in the chapter on proven facts, the Court acknowledges that the matter under investigation by the national courts in this case is complex and that this should be borne in mind when assessing the reasonableness of the time.

71. Nevertheless, the Court observes that the delays in the criminal proceedings examined in this case have not occurred because of the complexity of the case, but rather owing to the inaction of the judicial body, which is inexplicable. On several occasions during the investigation stage, long periods of time elapsed when the prosecutor did not ask the judge to take any measures and when the judge did not order any measures *de oficio*. Likewise, both the prosecutor and the judge have let months, and even more than a year, elapse before requesting and ordering the execution of a measure that had not been taken at the first procedural opportunity.

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[28] *Cf. Case of the 19 Tradesmen*, *supra* note 15, para. 188; *Case of Myrna Mack Chang*, *supra* note 8, para. 209; and *Case of Bulacio*, *supra* note 8, para. 114.

[29] *Cf. Case of Tibi, supra* note 20, para. 175; *Case of Ricardo Canese*. Judgment of August 31, 2004. Series C No. 111, para. 141; and *Case of the 19 Tradesmen*, *supra* note 15, para. 190. Likewise, *cf. Wimmer v. Germany,* no. 60534/00, §23, 24 February 2005; *Panchenko v. Russia,* no. 45100/98, § 129, 08 February 2005; and *Todorov v. Bulgaria,* no. 39832/98, § 45, 18 January 2005.

[30] *Cf. Case of Ricardo Canese*, *supra* note 29, para. 142; *Case of the 19 Tradesmen*, *supra* note 15, para. 191; and *Case of Hilaire, Constantine and Benjamin et al.*. Judgment of June 21, 2002. Series C No. 94, para. 145.

For example, with regard to the procedural actions relating to the Red Cross, the prosecutor and the judge let almost one year and eight months elapse from the moment, during the procedure of inspecting the records, when the Director General of the Salvadoran Red Cross stated that he "d[id] not have [the] records for the work of counseling and attention to the displaced for 1982, because the International Red Cross ha[d] those documents or records," to take steps to request information from the International Committee of the Red Cross (*supra* para. 48(59)). In the case of the procedural actions concerning the Armed Forces, for example, the prosecutor and the judge let three months elapse before they made another request and ordered the inspection of the logbooks and records of the No. 1 Military Detachment of Chalatenango, which had remained pending when the first inspection was not carried out because the files were in disarray (*supra* para. 48(63) and 48(65)). Likewise, in 2002, a new prosecutor took over the investigation, but almost one year and eight months elapsed before he took the first measures in the proceedings (*supra* para. 48(69)).

72. Regarding this aspect of the lapse of time without any procedural action being taken, the Court observes that, although the State declared "it was firmly decided […] to continue the search" for Ernestina and Erlinda Serrano Cruz during the public hearing on September 8, 2004, no action was taken in the criminal proceedings before the Chalatenango Trial Court from September 6, 2004, until January 21, 2005. It was only after the President of the Inter-American Court had requested the State to present information on any action that had been carried out in these criminal proceedings that, two days later, the prosecutor in the case requested the court to order two measures (*supra* para. 48(49) and 48(67)).

73. Furthermore, the State has not proved that the actions of the next of kin of Ernestina and Erlinda Serrano Cruz caused any of these delays. To the contrary, the Court has confirmed that, as of the *habeas corpus* procedure, the alleged victims' mother submitted information, as did Suyapa Serrano Cruz, the alleged victims' sister (*supra* para. 48(15) and 48(30)). As a result of this information, the head of the Red Cross Tracing Office provided important information to the proceedings, which, had it been corroborated or investigated, would have allowed the judicial authorities to take more diligent, effective and prompt action concerning the investigation into what befell Ernestina and Erlinda Serrano Cruz, the determination of their whereabouts and the punishment of those responsible (*supra* para. 48(18), 48(43), 48(45), 48(46) and 48(47)). Likewise, the alleged victims' mother supplied the names of two soldiers who might have been involved (*supra* para. 48(15)), and the latter did not testify during the *habeas corpus* procedure "because the exact addresses of their places of residence did not exist" (*supra* para. 48(19)) and they were not summoned during the criminal proceedings (*supra* para. 48(24) and 48(50)).

74. In view of the foregoing, the Court considers that the principle of reasonable time embodied in the American Convention has been disregarded in the criminal proceedings before the Chalatenango Trial Court.

b) Effectiveness of the habeas corpus procedure and the criminal proceedings

75. The guarantee of an effective remedy "constitutes one of the basic pillars, not only of the American Convention, but also of the rule of law in a democratic society

in the meaning of the Convention."[31] This guarantee to protect the rights of the individual includes not only the direct safeguard of vulnerable individuals but, also, the next of kin, who, owing to the specific circumstances and events of the case, are those who file the claim in the domestic order.[32]

76. Also, the Court has said that Article 25(1) of the Convention incorporates the principle of the effectiveness of the procedural protection mechanisms or instruments designed to ensure those rights. As the Court has already stated, according to the Convention:

> States Parties have an obligation to provide effective judicial remedies to the victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction.[33]

77. When considering the effectiveness of the domestic remedies in this case, the Court will examine first the effectiveness of the remedy of *habeas corpus* and, in particular, the State's argument that this remedy was not appropriate to trace the Serrano Cruz sisters, because the criminal proceedings were the suitable way to establish their whereabouts and the consequent responsibilities.

78. In this regard, it is worth reiterating that the remedy of *habeas corpus* was filed on November 13, 1995, by the alleged victims' mother (*supra* para. 48(15)) and that, on March 14, 1996, the Constitutional Chamber of the Supreme Court of Justice decided to dismiss the *habeas corpus* procedure, on the basis that "*habeas corpus* […] [was] not a means of investigating the whereabouts of a person detained illegally thirteen years previously […] by members of the Atlacatl Battalion, [whose military leaders] c[ould] not be summoned[, because this Battalion] no longer exist[ed]" (*supra* para. 48(21)). As has been established (*supra* para. 48(22)), the filed criminal proceedings were reopened on April 19, 1996 (s*upra* para. 48(23)), as a result of this decision of the Constitutional Chamber on *habeas corpus*, because it ordered that this decision "should be remitted to the Chalatenango Trial Judge, together with case 112/93, so that he could continue investigating the reported facts" and then inform the Chamber.

79. In its case law, the Court has established that, among essential judicial guarantees, *habeas corpus* represents the appropriate means of guaranteeing liberty, controlling respect for a person's life and integrity, and preventing his disappearance or ignorance about his place of detention, and also to protect the individual from torture or other cruel, inhuman or degrading punishment or treatment.[34] The Court considers that *habeas corpus* can be an effective remedy for discovering the whereabouts of a persons or clarifying whether a situation that

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[31] *Cf. Case of Tibi*, *supra* note 20, para. 131; *Case of the 19 Tradesmen*, *supra* note 15, para. 193; and *Case of Maritza Urrutia*, *supra* note 19, para. 117.

[32] Cf. *Case of Carpio Nicolle et al.*, *supra* note 3, paras. 78 and 82(f); *Case of the 19 Tradesmen*, *supra* note 15, para. 193; and *Case of Maritza Urrutia*, *supra* note 19, para. 119.

[33] *Cf. Case of the 19 Tradesmen*, *supra* note 15, para. 194; *Case of Las Palmeras, supra* note 25, para. 60; and *Case of Godínez Cruz. Preliminary objections*. Judgment of June 26, 1987. Series C No. 3, para. 93.

[34] *Cf. Case of the Gómez Paquiyauri Brothers*, *supra* note 10, para. 97; *Case of Juan Humberto Sánchez, supra* note 21, para. 122; and *Case of Bámaca Velásquez, supra* note 21, para. 192.

harms personal liberty has occurred, even though the person in favor of whom it is filed is no longer in the State's custody, but has been handed over into the custody of an individual or even though considerable time has passed since a person disappeared.

80. The Court finds that, according to the provisions of Article 38 and 40 of the Salvadoran Constitutional Procedures Act, the purpose of the remedy of *habeas corpus* in El Salvador has similar characteristics to those stated in the preceding paragraph. In El Salvador, the remedy encompasses harm to the right to personal liberty when the person is in the custody or in the power of the authorities or an individual. Under this law, the officer responsible for executing the *habeas corpus* procedure has broad powers to request information from State authorities and individuals, and article 74 of the law on "responsibilities of officials in the *habeas corpus* procedure," establishes that "[n]o authority, court or jurisdiction shall received privileged treatment in this matter."

81. In this regard, the Court considers it important to note that, in another case decided on March 20, 2002, when resolving a petition for *habeas corpus* owing to the alleged disappearance of two sisters by members of the Atlacatl Battalion in an operation carried out in Morazán in 1981, the Constitutional Chamber of the Supreme Court of Justice "acknowledge[d] the constitutional violation of the right to physical liberty" of the said persons, on the basis that it was admissible to modify the jurisprudential principles of the Constitutional Chamber in relation to *habeas corpus*, "so that such serious alleged acts of harm to the right to liberty as forced disappearance and others that might occur were not excluded from the remedy of *habeas corpus*." This Chamber stated that *habeas corpus* "is available to individuals so that they may respond to possible violations of their right to physical liberty, and it is essential to broaden the scope of its control, so that it can include the cases of forced disappearances of persons, the effects of which differ according to the circumstances of each specific case."

82. Finally, regarding the State's argument that the remedy of *habeas corpus* was not appropriate to identify the authors of the punishable facts, but rather it was the criminal proceedings alone that were admissible, article 76 of the Constitutional Procedures Act establishes that, once the *habeas corpus* has been processed, the court that has ordered it "shall order the person or authority who has held the beneficiary in detention or custody to be prosecuted, if it appears that they have committed an offense, and shall remit a certified copy of the proceedings to the competent court, if this is different from the one ordering the *habeas corpus*, or to the corresponding authority or body if a prior declaration of admissibility is necessary in order to open a case." In this way, the use of the remedy of *habeas corpus* does not exclude a subsequent criminal proceedings based on information gathered during the remedy.

83. The Court has stated (*supra* para. 65) that due diligence requires the investigating body to carry out all measures and investigations necessary to try and obtain the required result. Otherwise, the investigation is not effective in the terms of the Convention.

84. An examination of the processing of the petition for *habeas corpus* shows, on the one hand, that the court that processed this remedy had, under the powers conferred on it by domestic law, the possibility of furthering the task of discovering the whereabouts of Ernestina and Erlinda Serrano Cruz and, on the other hand, that

the alleged inappropriateness of the remedy did not necessarily stem from the time that had elapsed from the moment when the alleged event took place, but from the lack of an effective and appropriate investigation.

85. The Court has noted that during the investigation, the head of the Salvadoran Red Cross Tracing Office showed the executing officer a document with important information on the places where the Red Cross took 52 children, aged from new-born to 12 years old, found in Chalatenango in June 1982 (*supra* para. 48(18)). The file of the *habeas corpus* procedure does not contain a copy of this document, because the executing officer merely drew up a record of this action and recorded part of the contents of the document. The executing officer conducted an incomplete investigation, because she did not visit the centers indicated in the document, and Ernestina and Erlinda could have been taken to one of them. In the official record of this action, the executing officer concluded that "the whereabouts of the children, Ernestina Serrano Cruz and Erlinda Serrano Cruz, [were] not mentioned in those documents, since [the Salvadoran Red Cross] d[id] not conduct investigations […] and only provided assistance to those who needed it; consequently, no type of official document that […] [might] indicate the whereabouts of the children [was] to be found in [that] office." During the *habeas corpus* procedure no effort was made to locate the soldiers who, according to the alleged victims' mother, could have been asked to provide information (*supra* para. 48(15) and 48(17)).

86. The Court considers that, despite the time that had elapsed since the alleged disappearance of Ernestina and Erlinda, the remedy of *habeas corpus* could have been effective to determine the whereabouts of the alleged victims or to make significant progress in this regard, if the relevant procedural actions had been carried out diligently, given the extensive powers of the executing officer and the obligation of the State authorities to provide the latter with any information she requested. Moreover, the information provided by the Red Cross and by Ernestina and Erlinda's mother could have been investigated. To the contrary, this proceeding was dismissed once the executing officer had conducted a few, insufficient actions regarding two of the requests to seek information indicated by the alleged victims' mother and she did not even manage to summon the two soldiers named by the latter (*supra* para. 48(15) and 48(19)). The executing officer did not take the initiative to take any measure or make any request for information, over and above the actions requested by the alleged victims' mother.

87. Having established that the remedy of *habeas corpus* could have been effective in determining the whereabouts of the alleged victims in this case, or have contributed to significant progress in this regard (*supra* para. 86), the Court will examine the effectiveness of the remedy of *habeas corpus* and of the criminal proceedings before the Chalatenango Trial Court. To this end, it will examine the diligence with which the judges conducted these proceedings, and also the diligence with which the prosecutor requested and the judges ordered the probative actions needed to determine what happened to Ernestina and Erlinda, trace their whereabouts, and investigate and punish those responsible.

88. This Court has establishes that, as the competent authority to lead the process, the judge has the obligation to conduct it[35] in a manner that took into account the reported facts and their context so as to manage the proceedings as

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[35] *Cf. Case of Myrna Mack Chang*, *supra* note 8, para. 207.

diligently as possible in order to determine the facts and establish the corresponding responsibilities and reparations, avoiding delays and omissions when requesting evidence. The criminal proceedings concerning what happened to Ernestina and Erlinda Serrano Cruz, which have remained at the investigation stage, were processed under the 1973 Code of Criminal Procedure, according to which the judge shared the obligation to advance the investigation of crimes with the Public Prosecutor's Office.

89. In its decision of March 14, 1996, the Constitutional Chamber of the Supreme Court of Justice dismissed the *habeas corpus* procedure and "forward[ed this decision] to the Chalatenango Trial Judge, together with case 112/93, so that she c[ould] continue investigating the reported facts" and then inform the Chamber. Nevertheless, the Court has observed that, according to the file of the criminal proceedings before the Chalatenango Trial Court, there is no evidence that this court informed the Constitutional Chamber about the investigations it conducted. In addition, this court did not take into consideration the information that appeared in the file of the *habeas corpus* procedure to make inquiries in the places where the Red Cross took 52 children, aged from new-born to 12 years old, found in Chalatenango in June 1982 (*supra* para. 48(18)), and did not attempt to summon the soldiers mentioned by the alleged victims' mother (*supra* para. 48(50)). The court even summoned someone to testify who was deceased, as the alleged victims' mother had indicated in the *habeas corpus* procedure (*supra* para. 48(29)).

90. The Court has observed that approximately two years and one month after the reopening of the criminal proceeding (*supra* para. 48(23)), it was filed by a decision of May 27, 1998 (*supra* para. 48(25)), because the proceedings [had been] sufficient investigated" and "the person or persons who [had] abducted the children" had not been identified, even though, during the two years of investigation, the prosecutor and the judge had assumed a passive attitude in the investigation and left the procedural initiative rest with the alleged victims' mother (*supra* para. 48(28) and 48(30)).

91. The Court has confirmed that neither the *habeas corpus* procedure nor the criminal proceedings took into account the characteristics of the reported facts, the situation of armed conflict affecting El Salvador at the time the facts under investigation allegedly occurred, or the different situations in which people who disappeared during the armed conflict when they were children have been found (*supra* para. 48(6)). For example, even though many children who entered children's homes and orphanages during the armed conflict and who lacked identity documents were registered in the mayors' offices with other first and last names (*supra* para. 48(11)), the judges and prosecutors did not take this fact into consideration when investigating the whereabouts of the alleged victims and requesting information from the International Committee of the Red Cross, the Salvadoran Red Cross, a hospital, the Armed Forces, and the Attorney General's office, but based their inquiries and requests on the first and last names of the alleged victims (*supra* para. 48(18), 48(36), 48(37), 48(38), 48(40), 48(41), 48(42), 48(49) and 48(61)).

92. Several times, when requesting information, the Chalatenango Trial Court was satisfied with very limited information provided in response. Indeed, on one occasion, it requested information for June 1982 from a hospital and when the hospital director replied with information for July 1982, it failed to make another request for the information for June 1982 (*supra* para. 48(37)).

93. In addition, at times, the Chalatenango Trial Court requested very specific information and, when this was not forthcoming, it did not ask for more general information. For example, it requested information from the Joint General Staff of the Armed Forces regarding "the identity of the officer in charge of the military operation in the Los Alvarenga canton[, and also] the list of the members of the Atlacatl Battalion who took part in the operation [carried out] on […] June 22, 1982" (*supra* para. 48(51)). When the Joint Chief of Staff of the Armed Forces responded that the files did not include the name of the officer in charge of this military operation "or the list of those who took part in it" and that "on June 22, 1982, the ATLACATL Battalion was conducting a military operation in Morazán Department," the court did not ask for any general information about this battalion and the soldiers who were members of it, or about other military operations conducted at the end of May and in June 1982 in the Chalatenango area.

94. In relation to this way of proceeding, in his special report of September 2, 2004, on the "forced disappearance of the children, Ernestina and Erlinda Serrano Cruz, its current impunity and the pattern of violence surrounding such disappearances" (*supra* para. 48(5)), the Ombudsman's Office stated that:

> This Office considers that it was extremely probable that [the Joint] Chief of Staff [of the Armed Forces …] may have denied information that the military institution would have been able to provide, in order to contribute to the impunity of those responsible or [..] that he made his statement before the judicial authority without conducting even the minimum pertinent investigation. This is clear because a simple journalistic investigation at the time […] shows that the military operation and the participation of the Belloso and Atlacatl Battalions were public events, widely covered by the press, and that the Commander of the Atlacatl Battalion […] gave details of the operation publicly, and was identified as the person in charge of the military operation.

95. Regarding the procedural actions concerning the Armed Forces, the Court observes that the judicial authorities did not assume a diligent attitude that took advantage of the information in the different files and logbooks of the Armed Forces, which could have been very useful to clarify the facts under investigation. It would have been possible to find the information needed to identify the soldiers who took part in operations in the area of the reported facts in 1982 in these files and logbooks, and also to find information on the places where children were found at the time of the reported facts. In this regard, the witness, Jorge Alberto Orellana Osorio (*supra* para. 36), who is a retired Army officer, explained in the public hearing before the Court that, during the armed conflict, the Army kept a written record of its military operations, in which it noted the mission to be carried out, the respective unit or battalion, the sector in which it would be carried out, and the date on which it would commence, together with the procedures to be followed. The witness stated that, once a military operation had concluded, the unit or battalion made out a report for the superior unit, in which it noted the number of civilians who had been evacuated, "men, women and children." The names were not included, merely the fact that a civilian population or a determined number of persons had been found and that it had been decided to evacuate them.

96. In this regard, the criminal proceedings file contains information that, although the prosecutor requested that inspections of the logbooks of the Air Force and the files of the Joint General Staff of the Armed Forces should be ordered, the judge did not order these measures to be taken, and no reason was given for this (*supra* para. 48(53), 48(54) and 48(55) and 48(68)). Also, owing to a lack of diligence, only the logbook of the Third Fusiliers Company was inspected and the judicial inspection of the remaining logbooks of No. 1 Military Detachment of

Chalatenango was not carried out, merely because the general files of this detachment were in disarray (*supra* para. 48(61) and 48(65)) and because access to the records was denied, since "the procedure of requesting authorization from the Ministry of National Defense" was required (*supra* para. 48(66)). On January 27, 2005, two days after the President of the Inter-American Court had asked the State to provide helpful evidence (*supra* para. 48(67)), the Chalatenango Trial Court decided to issue an official communication to the Ministry of National Defense requesting authorization to carry out the said inspection, at the prosecutor's request. Likewise, owing to lack of diligence in the criminal proceedings, the statements of five of the 51 people who appeared on the Salvadoran Red Cross payroll in June 1982 were not received – a request that the prosecutor had made to the judge in October 2000 (*supra* para. 48(43) and 48(44)). The statements of three other people who had worked for the Red Cross in June 1982 and who still worked for this organization in 2001 were not received either (*supra* para. 48(45)).

97. As part of the lack of diligence in the investigation into what happened to Ernestina and Erlinda Serrano Cruz, it should be underscored that neither the executing officer of the *habeas corpus*, nor the prosecutor and the Chalatenango Trial Court requested any action in relation to orphanages or children's homes, despite the information provided by the Red Cross (*supra* paras. 48(18) and 48(47)); nor was any member of the Armed Forces summoned to declare. Likewise, it was only on January 21, 2005, two days after the President of the Inter-American Court had asked the State to submit information on any action that had been taken in the criminal proceedings before the Chalatenango Trial Court after September 6, 2004 (*supra* para. 22), that, for the first time, the prosecutor requested that an official communication should be sent to the Attorney General's office asking it to provide information on whether the names of the sisters, Ernestina and Erlinda Serrano Cruz, appeared in the adoption records between May 1982 and May 1993. This request contains no information, other than the names, that would allow the alleged victims to be traced based on other characteristics. On January 27, 2005, the Chalatenango Trial Court decided to send an official communication to the Attorney General's office requesting this information (*supra* para. 48(49)). In this regard, it should be stressed that these procedures, which were omitted, were very important, because Ernestina and Erlinda may be alive, since the children who disappeared in the 1982 "*guinda de mayo*" and who were traced by the *Asociación Pro-Búsqueda* were found alive.

98. Furthermore, the Chalatenango Trial Court did not conduct any investigations in the institutions mentioned by the president of the Red Cross female volunteers in her statement, to which the children who were found were taken (*supra* para. 48(47)). It should also be pointed out that the court did not order any measures unless the prosecutor requested them; furthermore, it did not order several measures that were requested with regard to the Armed Forces (*supra* para. 48(53), 48(54) and 48(55)).

99. The Court has noted that, since the application filed before the Court was notified to the State, the prosecutor and the judge in the criminal proceedings seem to have directed the investigation at taking measures to determine the existence and identity of the alleged victims rather than at the crime that was the subject of the proceedings. As the prosecutor explained to the Court in his testimony during the public hearing (*supra* paras. 36 and 48(69)), he initially focused the investigation on seeking information in the records of the Armed Forces because he thought that "there ha[d] to be something there." However, in October 2003, the Deputy Ombudsman told him he should visit the place where the Serrano Cruz family lived in

1982 and talk to people.

100. With regard to this change in the course of the investigation, it is worth noting that, in October 2003, the prosecutor requested the judge to summon five people to testify, because he had "received out-of-court information [… that the said] people c[ould] provide information that [would] help clarify the facts under investigation." These people were summoned by the judge the same day or the day after the prosecutor made the request, and all of them testified the day of the summons or the following day that they did not know that Ernestina and Erlinda Serrano Cruz were María Victoria Cruz Franco's daughters and that they did not know the girls. The Court observes that, a few days later, these people were proposed as witnesses before the Inter-American Court by the State Agents, in their brief with preliminary objections, answering the application and observations on the requests and arguments brief.

101. Also, at the end of October 2003, the prosecutor requested the Chalatenango Trial Court to again summon María Esperanza Franco Orellana de Miranda to testify (*supra* para. 48(35) and 48(71)), because he had "received out-of-court information that the said witness c[ould] provide information that [would] help clarify the […] facts under investigation." The day that the prosecutor submitted the request that Ms. Franco Orellana de Miranda's testimony should be heard, the judge, instead of summoning her, summoned the alleged victims' mother to testify. However, the judge did receive the testimony of the person the prosecutor had requested. In her second statement, Ms. Franco Orellana, contradicted what she had said in her first statement, made on September 23, 1997 (*supra* para. 48(35)), and stated that "it [was] not true that [… she had seen] the children, ERLINDA AND ERNESTINA SERRANO, descend from a helicopter and get into a Red Cross vehicle[, … because she] never knew or saw the [Serrano Cruz sisters] and had never heard their names before." The State's Agents in the proceedings before the Court also proposed this person as a witness. At the request of the prosecutor, the judge also ordered that expert appraisals should be carried out to verify the authenticity of the baptismal records of Erlinda and Ernestina Serrano Cruz kept by the Catholic Church, even though, in addition to these records, the births of Ernestina and Erlinda had been registered, because while the Special Transitory Act to establish the civil status of undocumented persons affected the conflict was in force, María Victoria Cruz Franco had registered her daughters, Ernestina and Erlinda Serrano Cruz, in the respective mayors' offices (*supra* para. 48(10)). The baptismal register where the baptism of Erlinda Serrano Cruz was registered was seized, based on article 183 of the 1973 Code of Criminal Procedure, which refers to the seizure of "objects or instruments relating to a crime" (*supra* para. 48(76)).

102. The Court can only note that these efforts to prove the alleged victims did not exist conflict with the fact that, in its investigations into cases of children who disappeared during the armed conflict, the Salvadoran Ombudsman's Office referred specifically to the case of Ernestina and Erlinda Serrano Cruz in two decisions and one report (*supra* para. 48(3), 48(4) and 48(5)). In the decision issued on March 30, 1998, it stated, *inter alia,* that, in the criminal proceedings concerning what happened to Ernestina and Erlinda, a violation "of due process of law [was occurring,] owing to acts that denied justice and failed to comply with the right to receive justice promptly[, …] which could be attributed to the competent judge"; and it recommended that she should "be more diligent regarding the principle of procedural effectiveness." In his special report of September 2, 2004, "into the forced disappearance of the children, Ernestina and Erlinda Serrano Cruz, its current

impunity and the pattern of violence surrounding such disappearances," the Ombudsman's Office made a detailed analysis of impunity in the case of the Serrano Cruz sisters.

103. In his testimony in the public hearing before this Court (*supra* para. 36), the prosecutor demonstrated that he had not maintained his impartiality in the investigation and that the line of investigation in the criminal proceedings was not totally separate from the State's defense before the Inter-American Court. In this regard, the prosecutor explained that he took the decision not to interview any of the alleged victims' direct next of kin, because "it was a necessary precaution, since the case had already been filed before the Inter-American Court" and because, in his opinion, the mother and one of the sisters of the alleged victims "were not well disposed towards the prosecutor"; albeit, he accepted that he did not know them. Another action that has caught the Court's attention is that, when the State's Agent visited Ms. Franco Orellana to ask her to appear before the Inter-American Court to testify, he did so accompanied by the prosecutor responsible for the investigation before the Chalatenango Trial Court, which shows that the latter did not maintain his independence in his investigative functions in the criminal proceedings, but became involved in the task of the State's Agent defending El Salvador in the international proceedings. Also, the prosecutor acknowledged during the public hearing before the Court that he had not requested the judge to order the pending judicial inspections on military premises, because he "ha[d] not taken any actions recently owing to [his] workload" (*supra* para. 36). However, this prosecutor urged the judge to order expert appraisals to verify the authenticity of the baptismal records of the alleged victims and even requested that the date of these appraisals be advanced "as the audience before the Inter-American Court was imminent." In this regard, in its decision of September 2, 2004 (*supra* para. 48(5)), the Ombudsman's Office stated that:

> […] it is worth noting that the prosecutor, formally (in a written request), acknowledged that his motive or interest in moving the procedure forward promptly responded to the need to present it to the Inter-American Court of Human Rights, which makes it clear that his activity is not focused on investigating the crime itself, or obtaining justice for the victims, but rather on defending the Salvadoran State, which is on trial before the Inter-American Court.

104. As has been shown, while the case was being processed before the Inter-American Court, the criminal investigation underway before the Chalatenango Trial Court was directed principally at contributing to the State's defense in the international proceedings before the Court and not to investigating the reported facts in the criminal proceedings.

105. Based on the foregoing analysis, the Court has established that, in both the proceedings before the Constitutional Chamber of the Supreme Court of Justice and the proceedings before the Chalatenango Trial Court, there have been serious omissions in gathering evidence owing to the failure of the prosecutors to request and the judges to order the necessary probative measures to determine what happened to Ernestina and Erlinda Serrano Cruz, discover their whereabouts and investigate and punish those responsible. The Court understands that, for different reasons, this is a complex case; this means that the judicial authorities should have taken into account the characteristics of the reported facts and the situation of armed conflict in the country at the time when the facts under investigation allegedly occurred. However, the Court finds that the investigations were not carried out with the efficiency that the case warranted and that the judges did not fulfill their

obligation to conduct the said proceedings diligently.

106. Based on the foregoing, the Court considers that the *habeas corpus* procedure and the criminal proceedings have not complied with the standards of access to justice and due process enshrined in the American Convention. The State did not respect the principle of reasonable time in the criminal proceedings processed before the Chalatenango Trial Court and neither of the two proceedings has been processed diligently in a manner that would ensure their effectiveness in determining what happened to Ernestina and Erlinda Serrano Cruz, discovering their whereabouts, and investigating and punishing those responsible.

107. In view of the foregoing, the Court declares that the State has violated Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Ernestina and Erlinda Serrano Cruz and their next of kin.

VIII
VIOLATION OF ARTICLE 5 (RIGHT TO HUMANE TREATMENT) OF THE CONVENTION IN RELATION TO ARTICLE 1(1) THEREOF

Arguments of the Commission

108. With regard to Article 5, the Commission indicated that:

a) The Serrano Cruz girls were permanently isolated from their family and community environment against their will and that of their parents. This "forced isolation" constitutes a violation of the physical and mental integrity of the sisters, which continues to this day, to the extent that they continue to be deprived of their identity and from contact with their biological family owing to the failure to comply with the obligation to investigate what occurred; and

b) The mother and sister of Erlinda and Ernestina Serrano Cruz have suffered from the moment that the forced disappearance occurred. Not knowing the whereabouts of the alleged victims causes profound anguish to their next of kin who do not know where they are and whether they are well, "a matter regarding which no authority has provided them with information."

Arguments of the representatives of the alleged victims and their next of kin

109. With regard to Article 5 the representatives stated that:

a) The next of kin of Erlinda and Ernestina Serrano Cruz have endured frustration and impotence owing to the failure of the public authorities to investigate the facts; and

b) "If it is traumatic for an adult to flee his home to save his life, seeking refuge desperately in a safe place and becoming separated from his family, for these children it must have been an extremely harrowing experience, which continued over time, because they were never reunited with their family and, what is worse, their whereabouts are unknown."

Arguments of the State

110. With regard to Article 5 the State indicated that:

a) "The children could have suffered harm to their personal integrity when the alleged facts occurred, but this suffering was not caused voluntarily, deliberately or culpably by State agents." The children were found abandoned in the midst of a battle, so that, if the Army gathered them up and took them, this is a conduct that is allowed and obligatory in armed conflict; it does not imply taking the children into custody because they are detained, but responds to the Army's obligation to evacuate abandoned children and orphans, handing them over to the Red Cross, in accordance with humanitarian law. In this regard, the State, after "rescuing [the children] from where they were abandoned, almost immediately put them in a helicopter and handed them over to a Red Cross vehicle";

b) The statements made by the mother and sister of the alleged victims both affirm that they were abandoned by their next of kin; and

c) Even though ignorance of the whereabouts of a person causes great anguish to the next of kin, the suffering cannot be attributed to the State in this case, because it has been proved that a humanitarian organization took charge of the Serrano Cruz children. This organization communicated directly with the alleged victims' mother. The absence of files that allow the whereabouts of the alleged victims to be determined "can be attributed to events in which [the State] had no direct intervention."

Considerations of the Court

111. Article 5 of the American Convention establishes that:

> 1. Every person has the right to have his physical, mental, and moral integrity respected.
>
> 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
>
> […]

112. For years, the next of kin of Ernestina and Erlinda have lived with feelings of family disintegration, insecurity, frustration, anguish and impotence owing to the failure of the judicial authorities to investigate the reported facts diligently and within a reasonable time and to adopt any other measure to determine the whereabouts of Ernestina and Erlinda. The suffering of Ernestina and Erlinda's next of kin has been aggravated because, since the case was filed before the Inter-American Court, they have had to contend with the fact that the criminal investigation before the Chalatenango Trial Court has been addressed principally at helping the State's defense in the international proceedings before the Court and not at investigating the facts reported in the criminal proceedings. Also, because the prosecutor and the judge appear to have directed the investigation at taking measures relating to determining the existence and identity of the alleged victims and not to the crime that was the subject of the proceedings (*supra* para. 99). For years, Ernestina and Erlinda's next of kin have seen how other families have been reunited with family

members who disappeared during the armed conflict, due principally to searches undertaken by the *Asociación Pro-Búsqueda*; but their family has received no assistance from the State to this end. In this regard, all the young people who disappeared during the military operation known as the 1982 "*guinda de mayo*" who have been traced by the *Asociación Pro-Búsqueda* were found alive (*supra* para. 48(8)).

113. This failure to investigate what happened to Ernestina and Erlinda and their whereabouts has been and continues to be a source of suffering for their next of kin, who are still hoping to find them alive and achieve family reunification. In this regard, the expert witness, Ana Deutsch, stated that the uncertainty of the next of kin who do not know where Ernestina and Erlinda are "was aggravated when, once the war had ended[,] the family renewed the search with the help of institutions […] and did not succeed in discovering their whereabouts. With the passing of the years, the traumatic impact became more severe. […] Events spiraled, and this led to frustration and gave way to an exacerbation or worsening of the emotional condition of all of them." For example, in her testimony before the Court during the public hearing, Suyapa Serrano Cruz, Ernestina and Erlinda's sister, stated that finding Ernestina and Erlinda "would mean a great deal" to her family and herself; that although "wounds cannot be healed," they would feel "very happy," since there had been "many cases of children who are reunited" with their families and she hoped that this would happen with her sisters (*supra* para. 36). In his sworn statement of August 19, 2004, José Fernando Serrano Cruz, Ernestina and Erlinda's brother, stated that, "as a member of the family, he hoped to discover the girls' whereabouts at some moment[,] that investigations would be conducted[. T]his gave them strength to carry on, and although it did not console them much, at times it gave the family serenity, with the hope of finding them one day." Likewise, almost four months before she died, Ernestina and Erlinda's mother mentioned in her sworn statement of December 5, 2003 (*supra* para. 35) that "the only thing that she want[ed was] to have [her] daughters returned to her, and if [she] could ask the judges something, it [was] that they at least show [her] daughters" to her. In his testimony before the Court during the public hearing (*supra* para. 36), Father Cortina stated that "shortly before Erlinda and Ernestina's mother died, she was going blind as a result of diabetes, and she told him that she hoped she would not lose her sight, because perhaps she could still see her daughters. Likewise, regarding Erlinda and Ernestina's mother, the expert witness, Ana Deutsch, stated that:

> María Victoria had the typical symptoms of post-traumatic stress and depression. She could not sleep well, she was very irritated at times, she never stopped thinking of her disappeared daughters, she was extremely sad, […] she complained of chest pains[, …] and that is the surest description of anguish.

114. The mother of Ernestina and Erlinda Serrano Cruz died with the hope that her daughters were alive and that one day her family could be reunited; she died before the State had determined what had happened to her two daughters or established their whereabouts. The impossibility of knowing the fate of her daughters and the constant sense of being able to find them alive caused feelings of guilt and impotence. The frustration of not having the help and collaboration of the State authorities to determine what happened to Erlinda and Ernestina and, if applicable, to punish those responsible, and also to determine their whereabouts and achieve family reunification profoundly affected the physical and mental integrity of their next of kin.

115. In view of the foregoing, the Court declares that the State violated the right

to humane treatment embodied in Article 5 of the American Convention, in relation to Article 1(1) thereof, to the detriment of the next of kin of Ernestina and Erlinda Serrano Cruz.

IX
VIOLATION OF ARTICLES 17, 18 AND 19 OF THE AMERICAN CONVENTION IN RELATION TO ARTICLE 1(1) THEREOF (RIGHTS OF THE FAMILY, RIGHT TO A NAME, RIGHTS OF THE CHILD)

Arguments of the Commission

116. With regard to Article 17 of the Convention, in relation to Article 1(1) thereof, the Commission indicated that:

a) "The lack of diligence in the investigation and determination of the whereabouts [of Erlinda and Ernestina Serrano Cruz], constitute [a] violation of the rights protected by Article 17 of the Convention";

b) According to Protocol II to the Geneva Conventions of 12 August 1949, the State has the obligation not only to allow the family to carry out a search, but also to provide the family with "timely measures" such as the identification and registration of children to ensure reunification; and

c) The State did not adopt any measure to comply with the obligations established for the protection of the Serrano Cruz sisters.

117. With regard to Article 18 of the Convention, in relation to Article 1(1) thereof, the Commission stated that:

a) As the International Jurists Commission had indicated, the right to identity, particularly in the case of children and of forced disappearance, is a complex legal issue that acquired relevance with the adoption of the Convention on the Rights of the Child. This right has been recognized by case law and by legal writings as both an autonomous right and as the expression of other rights or as a constituent element of these. The right to identity is intimately associated with the right to the recognition of legal personality, the right to a name, a nationality, and a family and to have family relationships. The total or partial suppression or modification of the right of the child to preserve his identity and its intrinsic elements entails State responsibility;

b) Children who are victims of political events have the right to recover the memory of their natural parents, to know that the latter did not abandon them, to have contact with their natural family in order to nurture and give continuity to their affective memory. In turn, the next of kin of disappeared children or children born in captivity have the right to insist on knowing their whereabouts and to participate in educating them and bringing them up as is most appropriate for their welfare and development;

c) The Commission's experience in other countries with similar situations to those of this case is that children's names are changed when they are handed over to people other than their biological family. "The case file

contains probative elements that this practice also occurred in El Salvador during the armed conflict";

d) In this case, "[t]he State's obligation to clarify the facts and establish the whereabouts of the two disappeared children persist [… because, if] they are still alive, Ernestina and Erlinda Serrano Cruz have the right to know their origin, which is complemented by the right of their next of kin to know their whereabouts";

e) "If they are still alive, it is not known whether [the sisters, Erlinda and Ernestina Serrano Cruz,] retain their parents last names, even though these names were legally registered before their disappearance"; and

f) The State authorities permitted changes in the names of children with "complete ease and indifference," and "names were invented and dates of birth of children changed," all of which was "registered in municipal mayors' offices, which are State bodies, without any kind of control that these changes of names and identity were legal." Consequently, the State also failed to comply with the obligations contained in Article 1(1) of the American Convention.

118. With regard to Article 19 of the Convention, in relation to Article 1(1) thereof, the Commission stated that:

a) It includes both positive and negative obligations for the State, which failed to comply with either by "failing to take any measures to return [the sisters, Ernestina and Erlinda Serrano Cruz,] to their family," "not determining […] their whereabouts" and not compensating the children for the violations they suffered. Since June 1995, "the judicial authorities of El Salvador have had the treaty-based obligation to do justice by taking all the necessary investigative measures to determine the whereabouts of the Serrano Cruz sisters, identify those responsible for the violations committed against them, and make reparation to their next of kin"; and

b) "If [the State] had made the least effort to reunite [the children, Ernestina and Erlinda,] with their next of kin, there would be some record or information that would allow them to be found."

Arguments of the representatives of the alleged victims and their next of kin

119. With regard to Article 17 of the Convention the representatives stated that:

a) The separation of a child from its family should be exceptional and temporary. If children are separated from their parents due to circumstances beyond anyone's control, the State authorities have the obligation to reunite them as promptly as possible;

b) Principle 17 of the United Nations Guiding Principles on Internal Displacement establishes that families which are separated by displacement should be reunited as quickly as possible and that all appropriate steps shall be taken to expedite such reunions. The principle also stipulates that the responsible authorities shall facilitate inquiries made by family members and

shall encourage and cooperate with the work of humanitarian organizations engaged in the task of family reunification;

c) The measures taken by State agents were far from efficient and tending to reunify the Serrano Cruz sisters with their family; they have not established any mechanism or body responsible for investigating and providing information on the whereabouts of the disappeared children to their next of kin. The State has not acted with due diligence to give the Serrano Cruz children and their family the possibility of a reunion during or after the conflict; and

d) "Far from taking any measure in this regard, [the State] ensured non-reunification through different acts and omissions," such as creating obstacles to prevent Ernestina and Erlinda being found and by the way in which it has carried out the criminal investigation "with a lack of impartiality and diligence," or by the refusal to provide information. In this regard, the representatives indicated expressly that these arguments were related to the State's arguments concerning the alleged violation of Articles 8 and 25 of the Convention.

120. With regard to Article 18 of the Convention, in relation to Article 1(1) thereof, the representatives stated that:

a) The right to a name is linked intrinsically to recognition of personal identity, which also implies belonging to a family and to a community. In this regard, the Court should use the Convention on the Rights of the Child to interpret the content of Article 18 of the American Convention;

b) The right to a name has two dimensions. First, the right of all children to have a name and be duly registered; failure to respect this right means that a child would not be recognized by the State or society, and this would make it possible for the child to be trafficked, abducted or subjected to other treatment incompatible with the enjoyment of its rights. The second dimension is the right to preserve identity, including nationality, name and family relationships pursuant to the law, without unlawful interference;

c) "The sisters, [Ernestina and Erlinda Serrano Cruz,] disappeared after they had been separated from their family due to a military operation in their community by the Salvadoran Army. This violation continues, because it is a consequence of the disappearance and […] the lack of information on their whereabouts";

d) The positive obligation embodied in Article 18 of the Convention results from the registration of the children in the corresponding registry office, which is the State's express recognition of a child's identity and its membership in a family, a society and a culture. Conversely, the negative obligation refers to the State authorities abstaining from divesting a person of "the duly registered name that he has already been given, without a corresponding procedure or proceeding";

e) The fact that the Serrano Cruz sisters were registered in the corresponding registry office does not exclude the possibility that they were subsequently divested of their real names, for example, by being given up in

adoption to another family. "Since there were more than 50 orphanages in the country and in view of the frequent adoptions of children found without their parents or family members, it is reasonable to think that the Serrano [Cruz] sisters were deprived of their name, and could have been given up in adoption or integrated into a home that would take care of them against their will and without the permission of their family." Today, Ernestina and Erlinda do not know the first and last names they were given by their parents, they have the right to know this and to know they were not abandoned;

f) The State made the work of entities such as *Pro-Búsqueda* very difficult, when they took on the task that should have been carried out by the State. The State has not taken effective measures to allow the disappeared children to recover their identity;

g) "The State […] has also violated the right to identity of the children [Ernestina and Erlinda Serrano Cruz], by trying to deny their existence before the Court"; and

h) They requested the Court to establish the responsibility of the Salvadoran State for not respecting the provisions of Article 18 of the American Convention on Human Rights, "to the detriment of the two children and their next of kin."

121. With regard to Article 19 of the Convention, in relation to Article 1(1) thereof, the representatives stated:

a) In their requests and arguments brief: that the State had not complied with its obligation to provide measures of protection "because it had not taken any measure to return the children and reunite the family." Likewise, "[t]here is no evidence that the children received the due care (both medical and psychological) and the consequent compensation to which they had a right." The representatives also stated that the anguish caused to the children, Erlinda and Ernestina Serrano Cruz, by not knowing their origins and also by their family and cultural identity crisis, "considered in connection with the State's obligation to adopt special measures of protection in their favor, result in a violation of the right of the children to expect a life project that should be tended and promoted by the public authorities so that it evolves to their benefit and to the benefit of the society to which they belong"; and

b) In their final written arguments: that they "recognized that the Court could only rule on the violation of the right to be subject to measures of special protection in relation to Erlinda Serrano Cruz, who attained her majority after June 6, 1995." In this regard, they stated that the State has not "presented any record of a State entity showing that the children were handed over" to the Red Cross or to the International Committee of the Red Cross. The State "failed to take any measure to identify and find [the family of Erlinda Serrano Cruz] in order to return her to its bosom."

Arguments of the State

122. With regard to Article 17 of the Convention, the State alleged that:

a) The Court must determine whether only the mother of Ernestina and

Erlinda Serrano Cruz should be considered the alleged victim of the violation of the said article, "or whether it should be considered that their siblings were also affected." In this regard, the most usual rule is to decide that it is the heirs who have a right to compensation. The presumption that the siblings of the children, Ernestina and Erlinda Serrano Cruz, suffered owing to their disappearance, is invalidated by the declarations of Suyapa Serrano Cruz during the public hearings before the Inter-American Commission;

b) "In relation to the way in which the alleged facts affected the siblings [of Ernestina and Erlinda], the State indicates that Enrique Serrano Cruz has already died" and that, presumably, Oscar Serrano Cruz had not been born, because he is not mentioned when the facts allegedly occurred. The situation of the siblings, Martha, Arnulfo, Rosa and Fernando is different; Suyapa Serrano Cruz does not mention that they were affected by the alleged facts. In addition, these siblings "[did not] appear before the domestic proceedings, nor have they carried out any action that would suggest that they were affected." Consequently, the Court should not consider the siblings Fernando, Enrique (deceased), Martha, Arnulfo, Oscar and Rosa Serrano Cruz to be next of kin affected by the disputed facts;

c) When the Court is asked to expand the concept of the family according to the customs, traditions and *de facto* circumstances of the community, the Commission and the representatives must prove that the alleged facts caused prejudice to this community;

d) "The sisters [Ernestina and Erlinda] were left abandoned in a combat zone; […] gathering up two children and handing them over to the ICRC or to the Red Cross implied complying with a positive obligation established by humanitarian law, and does not contradict the provisions of article 38(4) of the Convention on the Rights of the Child";

e) The reunification of the Serrano Cruz family was not possible for unknown causes that cannot be attributed to the State.

123. With regard to Article 18 of the Convention the State indicated that:

a) The alleged victims' mother registered them on April 27, 1993, under the provisions of the Special Transitory Act to establish the civil status of undocumented persons affected by the conflict. "[T]he children were registered by their parents after their alleged disappearance, thus [the parents] failed to comply with the positive obligation established by Article 18 of the American Convention";

b) It made inquiries "about the existence of the 'baptismal certificates' of both children in local churches and neighboring sectors, without success. In this regard, it requested the prosecutor to investigate whether the baptismal certificates existed. Likewise, close relatives were consulted and also neighbors of the alleged victims' mother, but none of those interviewed recalled the existence of the victims before the conflict, even though they recall the names of her other children";

c) It has not been proved that the State violated Article 18 of the Convention, in the sense of having deprived the Serrano Cruz sisters of their

name following their alleged disappearance, by giving them up in adoption to other families. "This does not rule out that, having been seen for the last time in the care of the Red Cross, the latter or some orphanage may have felt the obligation to register the children under another name since their filiation had not been established at that time, owing to the conduct of their parents." The State complied with the positive obligation and did not violate the negative one, "because the children did not have the right to recognition as persons before the law";

d) The State has carried out, insofar as possible, the investigations required to discover the fate of the Serrano Cruz children. The physical existence of the Serrano Cruz children is uncertain, hence their whereabouts are unknown. "[D]uring the search, […] a reasonable doubt has arisen about the identity of the Serrano Cruz children and the circumstances in which the facts occurred." "Added to the financial interest [of the mother of the children, Erlinda and Ernestina], there is an altered baptismal certificate, [the date of which] is incompatible [with] the date of […] the birth certificate," which "has been altered";

e) It has been shown that, should the reported facts be true, it was not the State or its agents who directly or indirectly changed these children's names in order to hand them over to people other than their biological family; and

f) "All Salvadorans must work together to find the best solutions for everyone in a climate of harmony, respect and objectivity, leading to the truth about the whereabouts of the children; […] a humanitarian effort to trace them must be made involving all sectors of Salvadoran society, through permanent, organized initiatives that can truly achieve this objective, such as a tracing commission." "The State is firmly decided to continue the search using the legal instruments that are in force and operating. Furthermore, it reiterates [its] willingness to work within a tracing commission," which is "institutional, organized, duly structured and which, in conjunction with civil society organizations, efficiently and effectively contributes to the effort to trace children who were lost during the past conflict, with the humanitarian goal of helping reunite the Salvadoran families that were separated owing to the conflict, in the context and with the goal of knowing the truth." This tracing commission already has the support of the highest State authorities, and is expected to start functioning shortly." The State has invited Father Juan Cortina to take part in this effort, but has not received a reply from him.

124. With regard to Article 19 of the Convention the State indicated that:

a) The alleged victim, Ernestina Serrano Cruz, would have been 19 years and 8 months when El Salvador accepted the Court's jurisdiction;

b) In accordance with Article 3(2) of the Convention on the Rights of the Child, "if the Salvadoran Army found both children abandoned […], the act of picking them up and subsequently handing them over to a humanitarian organization, is in keeping with the protection and care necessary for their welfare." The "conduct of the Armed Forces, should the facts have occurred as they have been related before the national and the international courts, is

in accordance with article" 20 of this Convention;

c) "Suyapa Serrano Cruz hid the facts stated before the national court, as regards the intervention of the Salvadoran Red Cross or [the] ICRC, which refer to both children having been delivered to these organizations by the Army";

d) There is evidence concerning another child of 7 years old who was also abandoned and then picked up by the Armed Forces and delivered to the Salvadoran Red Cross. "[F]rom what this child said, it can be inferred that it is probable that a child of 7 years old is unable to recall his own name under certain circumstances"; and

e) There is evidence that "some effort was made to reunite the Serrano Cruz children with their mother." The Salvadoran Red Cross explained that its files were destroyed in the 1986 earthquake and the International Committee of the Red Cross stated that "there is no information regarding the children in its files in Geneva."

Considerations of the Court

125. The Court will not rule on the alleged violations of Articles 17, 18 and 19 of the Convention, because it does not have jurisdiction to rule on possible violations arising from facts or acts that occurred prior to June 6, 1995, or that began to be executed before that date on which El Salvador deposited the instrument accepting the Court's jurisdiction with the OAS General Secretariat, as decided by the Court in the judgment on preliminary objections (*supra* para. 21).

X
VIOLATION OF ARTICLE 4 (RIGHT TO LIFE) OF THE AMERICAN CONVENTION IN RELATION TO ARTICLE 1(1) THEREOF

Arguments of the Commission

126. With regard to Article 4 of the Convention in relation to Article 1(1) thereof, the Commission indicated that:

a) The State had not responded specifically to the violations of the American Convention. To this day, the "whereabouts [of Ernestina and Erlinda] are unknown or whether they are alive or dead." "The hope that Ernestina and Erlinda are alive is supported by children in similar cases who have been found." This matter has no precedent in the Court's history; consequently, the intervention of the inter-American system for the protection of human rights has special relevance. "By October 8, 2004, the *Asociación Pro-búsqueda* had found 247 'children,' who are now adults, and who were taken into custody by the Armed Forces […], remained disappeared for many years and, following and intensive search operation organized by the [said] Association, in which State entities played no part, were found and reunited with their families and their true identities;

b) "In several cases in which the States in question had failed to investigate allegations of deprivation of life, the international courts have determined that those States violated this fundamental right." The failure to clarify the facts is attributed to "the complete absence of adequate measures of investigation, which correspond exclusively to the State"; and

c) "The State […] wants the Court to apply the principle of estoppel," because the Commission and the representatives have stated that the sisters, Ernestina and Erlinda Serrano Cruz, "were given up in adoption." However, neither the Commission, nor the petitioner, nor the representatives "could be certain that [the sisters] have been adopted, because they have no probative elements about the children's whereabouts, which should have been provided by the State."

Arguments of the representatives of the alleged victims and their next of kin

127. The representatives referred to the alleged violation of Article 4 of the Convention in their requests and arguments brief, and stated that "they harbor[ed] the hope that Erlinda and Ernestina [were] still alive," although "their whereabouts were unknown and, what is worse, whether they are alive or dead" and that "the State has the obligation to look for them and to provide detailed information about the children's whereabouts and, if applicable, disprove that it was responsible for the violations to which they were [allegedly] subjected."

Arguments of the State

128. With regard to Article 4 of the Convention, the State indicated that:

a) "In their briefs, the plaintiffs and the representatives of the alleged victims have stated that the Serrano Cruz children were given up in adoption"; therefore, the State "invokes the principle of estoppel"; consequently, the allegation regarding the violation of Article 4 of the Convention should not be admissible. In addition, the alleged victims' mother and a member of *Pro-Búsqueda* also presumed they had been given up in adoption;

b) It had not violated this article, "because it had not arbitrarily deprived the children of their lives (negative obligation), [and] also it had taken the appropriate measures to protect and preserve this right of the Serrano Cruz children by picking them up in a combat zone and in a state of abandon, [and] handing them over to the Salvadoran Red Cross (positive obligation), as established in humanitarian law"; and

c) It regrets "that, despite its efforts, to date, it has been impossible to trace the Serrano Cruz children, since the Salvadoran Red Cross and the ICRC do not have any information or files that would allow this to be clarified." The Salvadoran Red Cross and the ICRC handed children over to orphanages and children's homes.

Considerations of the Court:

129. Regarding the right to life, Article 4(1) of the American Convention stipulates that:

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

130. The Court considers that, in the instant case, the body of evidence does not contain reliable elements leading to the conclusion that the sisters, Ernestina and Erlinda Serrano Cruz, were arbitrarily deprived of the right to life. In this regard, the Court considers that, since it lacks jurisdiction to rule on the alleged forced disappearance of Ernestina and Erlinda, it cannot presume, as in other cases in which the alleged facts are based on the crime of forced disappearance, that the right to life has been violated.

131. In this regard, as mentioned previously in this judgment (*supra* para. 97), it is possible that the sisters, Ernestina and Erlinda Serrano Cruz, are alive, since the young people found by the *Asociación Pro-Búsqueda* who disappeared in the 1982 "*guinda de mayo,*" when they were children, were found alive (*supra* para. 48(8)).

132. Based on the foregoing considerations, the Court will not rule on the alleged violation of Article 4 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Ernestina and Erlinda Serrano Cruz, because it lacks jurisdiction to rule on possible violations that arose from facts or acts that occurred prior to June 6, 1995, or that began to be executed before that date, on which El Salvador deposited the instrument accepting the Court's jurisdiction with the OAS General Secretariat, as decided by the Court in the judgment on preliminary objections (*supra* para. 21).

XI
REPARATIONS
APPLICATION OF ARTICLE 63(1)

OBLIGATION TO REPAIR

133. As stated in the preceding chapters, the Court has decided that the State is responsible for the violation of Articles 8(1) and 25 of the American Convention to the detriment of Ernestina and Erlinda Serrano Cruz and their next of kin, and of Article 5 thereof to the detriment of the latter, all in relation to Article 1(1) of the Convention. This Court has established that it is a principle of international law that any violation of an international obligation that has produced damage entails the obligation to repair it adequately.[36] In this regard, the Court has based itself on Article 63(1) of the American Convention, which stipulates:

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

Consequently, the Court will now consider the measures needed to repair the damage caused to Ernestina and Erlinda Serrano Cruz and their next of kin owing to the said violations of the Convention.

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[36] *Cf. Case of Lori Berenson Mejía*, *supra* note 3, para. 230; *Case of Carpio Nicolle et al.*, *supra* note 3, para., 85; and *Case of De la Cruz Flores*, *supra* note 8, para. 138.

134. As the Court has indicated, Article 63(1) of the American Convention reflects a customary norm that constitutes one of the basic principles of contemporary international law on State responsibility. When an unlawful act occurs, which can be attributed to a State, this gives rise immediately to its international responsibility for violating the international norm, with the consequent obligation to cause the consequences of the violation to cease and to repair the damage caused.[37]

135. Whenever possible, reparation of the damage caused by the violation of an international obligation requires full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation. If this is not possible, as in the instant case, the international Court must determine a series of measures to ensure that, in addition to guaranteeing respect for the violated rights, the consequences of the violations are remedied and compensation paid for the damage caused.[38] It is also necessary to add any positive measures the State must adopt to ensure that the harmful acts, such as those that occurred in this case, are not repeated.[39] The responsible State may not invoke provisions of domestic law to modify or fail to comply with its obligation to provide reparation, all aspects of which (scope, nature, methods and determination of the beneficiaries) are regulated by international law.[40]

136. As the term indicates, reparations consist of measures tending to eliminate the effects of the violations that have been committed. Their nature and amount depend on both the pecuniary and non-pecuniary damage that as been caused. Reparations should not make the victims or their successors either richer or poorer.[41] In this regard, the reparations established should be proportionate to the violations that have previously been declared.

137. The Court will now proceed to examine the claims submitted by the Commission and the representatives of the victims and their next of kin concerning reparations, in light of the above-mentioned criteria and the probative elements gathered during the proceedings in order to determine who are beneficiaries of the reparations and then to establish measures of reparation that would repair the pecuniary and non-pecuniary damage; also to decide other forms of reparation and, lastly, costs and expenses.

A) BENEFICIARIES

138. The Court will now summarize the arguments of the Inter-American

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[37] *Cf. Case of Carpio Nicolle et al.*, *supra* note 3, para. 86; *Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 52; and *Case of De la Cruz Flores*, *supra* note 8, para. 139.

[38] *Cf. Case of Carpio Nicolle et al.*, *supra* note 3, para. 87; *Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 53; and *Case of Tibi*, *supra* note 20, para. 224.

[39] *Cf. Case of Carpio Nicolle et al.*, *supra* note 3, para. 88; *Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 54; and *Case of the "Juvenile Reeducation Institute"*, *supra* note 9, para. 260.

[40] *Cf. Case of Lori Berenson Mejía, supra* note 3, para. 231; *Case of Carpio Nicolle et al.*, *supra* note 3, para. 87; and *Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 53.

[41] *Cf. Case of Carpio Nicolle et al., supra* note 3, para. 89; *Case of Tibi*, *supra* note 20, para. 225; and *Case of the "Juvenile Reeducation Institute"*, *supra* note 9, para. 261.

Commission, the representatives, and the State concerning who should be considered beneficiaries of any reparations ordered by the Court.

Arguments of the Commission

139. The Commission stated that "[owing to] the nature of this case, the beneficiaries of the reparations ordered as a result of the human rights violations perpetrated by the Salvadoran State against the Serrano Cruz [sisters] are: María Victoria Cruz Franco (the victims' mother), [who] unfortunately […] has since died, Suyapa Serrano Cruz Franco (the victims' sister) and José Fernando Serrano Cruz (the victims' brother)."

Arguments of the representatives of the victims and their next of kin

140. The representatives argued that:

a) The closest relatives are considered "victims." Therefore, "the following persons are holders of the right to reparation as victims: Erlinda Serrano Cruz (disappeared victim), Ernestina Serrano Cruz (disappeared victim), María Victoria Cruz Franco (mother of Erlinda and Ernestina Serrano Cruz), Suyapa Serrano Cruz (sister of Erlinda and Ernestina Serrano Cruz), José Fernando Serrano Cruz (brother of Erlinda and Ernestina Serrano Cruz), Martha Serrano Cruz (sister of Erlinda and Ernestina Serrano Cruz), Arnulfo Serrano Cruz (brother of Erlinda and Ernestina Serrano Cruz), Rosa Serrano Cruz (sister of Erlinda and Ernestina Serrano Cruz) and Oscar Serrano Cruz (brother of Erlinda and Ernestina Serrano Cruz)"; and

b) The next of kin of Erlinda and Ernestina Serrano Cruz "have the right to reparation from two different perspectives: first, as successors or beneficiaries of the reparations that the State of El Salvador must pay as a result of the violations to the rights of the Serrano Cruz [sisters] and, second, as victims *per se*."

Arguments of the State

141. The State indicated that:

a) "The next of kin of the alleged victims could in no way be considered injured parties and successors and beneficiaries, because El Salvador has not violated the children's right to life, since the presumption of death […] cannot be applied, because there is a legitimate presumption and proven facts that both the children are still alive";

b) The Court "cannot rule on facts that took place prior to the date on which the State accepted the Court's jurisdiction; [… therefore] it has no jurisdiction to decide that the amount of the reparations […] be extended to the alleged violation of the right to life, which signifies that the next of kin cannot claim reparations as successors or beneficiaries of both children"; and

c) "Although the Serrano Cruz family nucleus can be considered extensive, and includes the siblings of the children, Erlinda and Ernestina, for the purposes of this judgment […] the following siblings [should not be considered] next of kin affected by the disputed facts: Fernando Serrano

Cruz, Enrique Serrano Cruz (deceased), Martha Serrano Cruz, Arnulfo Serrano Cruz, Oscar Serrano Cruz and Rosa Serrano Cruz, because it has not been proved that they were affected by the alleged facts of the disappearance of their sisters[; since,] as they did not testify or prove their alleged suffering, this cannot be presumed."

Considerations of the Court

142. The Court will now proceed to determine who should be considered "injured parties" in the terms of Article 63(1) of the American Convention.

143. First, the Court considers that Ernestina and Erlinda Serrano Cruz are the "injured party," as direct victims of the violations of the rights embodied in Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) thereof; consequently they will be beneficiaries of the reparations that the Court establishes for non-pecuniary damage.

144. Furthermore, the next of kin of the victims will be beneficiaries of the reparations that the Court establishes as direct victims of the violations of the rights embodied in Articles 5, 8(1) and 25 of the Convention, in relation to Article 1(1) thereof. The Court considers that María Victoria Cruz Franco, mother of Ernestina and Erlinda Serrano Cruz, and also their siblings, Martha, Suyapa, Arnulfo, José Fernando, María Rosa and Oscar, all Serrano Cruz, are entitled to reparation, as the injured party in this case. Since Ernestina and Erlinda's father died in 1985, prior to the date of which El Salvador accepted the Court's jurisdiction, and four of Ernestina and Erlinda's siblings, namely Socorro, Irma, José Enrique and Juan, all Serrano Cruz, also died before that date, none of them is considered a victim of the violations that have been declared, or a beneficiary of the reparations established in this judgment.

145. The mother of Ernestina and Erlinda Serrano Cruz, and their siblings Martha, Suyapa, Arnulfo, José Fernando, María Rosa and Oscar, all Serrano Cruz, will also be the beneficiaries of any reparations that the Court establishes, in their capacity of injured party as a direct consequence of the violations committed to the detriment of Ernestina and Erlinda. In this regard, the Court reiterates that it is presumed that an individual's suffering causes non-pecuniary damage to their parents and siblings, and it is not necessary to prove this.[42]

146. With regard to the compensation that would correspond to María Victoria Cruz Franco, Ernestina and Erlinda's mother, the Court has stated and will repeat that the right to compensation for the damage suffered by the victims up until the time of her death is transmitted by succession to her heirs, and that it is a common rule in most legislations that a person's heirs are their children.[43]

B) PECUNIARY DAMAGE

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[42] *Cf. Case of the Gómez Paquiyauri Brothers*, *supra* note 10, para. 197; *Case of the 19 Tradesmen*, *supra* note 15, para. 229; and *Case of Maritza Urrutia*, *supra* note 19, paras. 169 and 169(b).

[43] *Cf. Case of the Gómez Paquiyauri Brothers*, *supra* note 10, para. 198; *Case of Molina Theissen*. *Reparations*, *supra* note 4, para. 49; and *Case of Bulacio*, *supra* note 8, para. 85.

Arguments of the Commission

147. In this regard, the Commission stated that:

a) "The next of kin of Ernestina and Erlinda Serrano Cruz expended substantial financial resources […] to discover the whereabouts of the sisters";

and requested the Court:

b) To establish, "the amount of the compensation corresponding to indirect damage (*daño emergente*) and loss of earnings, in fairness, pursuant to its ample powers in this matter," so that it sets "a substantial precedent in the inter-American system regarding loss of earnings and the situation of disappeared children"; and

c) "Should the Serrano Cruz sisters appear alive, to rule on compensation for the damage to the life project suffered by the victims."

Arguments of the representatives of the victims and their next of kin

148. The representatives requested the Court:

a) "To determine, in fairness, an amount that the State must pay to the family for the expenses incurred and for the losses" of the pecuniary assets they possessed, including "their home[,] which was burned down and destroyed by the constant bombing […], their corn harvests, basic grains kept from the previous harvests, domestic animals," owing to the operations of the Salvadoran Armed Forces;

b) To order that the State pay the loss of earnings of Ernestina and Erlinda as of June 1995, since it has jurisdiction to do this. The amount corresponding to the loss of earnings of Ernestina Serrano Cruz is US$68,796.00 (sixty-eight thousand seven hundred and ninety-six United States dollars) and of Erlinda Serrano Cruz is US$74,520.00 (seventy-four thousand five hundred and twenty United States dollars);

c) With regard to indirect damage, they requested the Court to "determine, in fairness, an amount the State must pay to the family for expenses incurred and losses" of their pecuniary assets. The Serrano Cruz family incurred diverse expenses in order to find Ernestina and Erlinda Serrano Cruz. It also incurred various health-related expenses "owing […] to the impairment [of the health of] the children's mother (which led to her death)," as well as travel expenses in order to find Ernestina and Erlinda; and

d) "Throughout all [the] years of the [Serrano Cruz] family's suffering, without obtaining any information about the whereabouts of [Erlinda and Ernestina Serrano Cruz], particularly the suffering of their mother and [their] siblings, mental health care has been necessary, on both an individual and a group basis; this has been possible through the Psychology Unit of the *Asociación Pro-Búsqueda*." The *Asociación Pro-Búsqueda* assumed various expenses for the medicines, psychological care, and travel expenses of the next of kin, in 1995, 1996, 2000, 2001 and 2003.

Arguments of the State

149. With regard to pecuniary damage, the State affirmed that:

a) It does not accept the amounts claimed, "because violation of the right to life and humane treatment has not been proved; consequently, the way the amounts have been calculated is not valid, because the calculation relates to the consequences of this violation";

b) In relation to loss of earnings, "since Erlinda and Ernestina were minors, they did not generate earnings, and they had no family obligations. Also, their next of kin are now adults and never required any earnings by the children for their maintenance";

c) Regarding indirect damage, it stated that:

i. "The children's mother returned to El Salvador in 1993 […]. In this assumption, María Victoria Cruz Franco did not incur in any expenses in relation to the search before 1993";
ii. "Owing to their financial situation, the Serrano Cruz family could not have incurred significant expenses in relation to the search for their daughters, rather it was the *Asociación Pro-Búsqueda* which incurred the expenses on their behalf";
iii. "Regarding the medical care and the expenses in the national jurisdiction, […] both items continue to be free in El Salvador[, … and] the possible indirect damage to María Victoria Cruz Franco, as a cause of her possible diabetes, […] cannot be attributed" to the State;
iv. "The Court cannot establish compensation for the expenses [incurred by the *Asociación Pro-Búsqueda*], as it can for those of the next of kin, since none of the Association's rights have been violated."

Considerations of the Court

150. In this section, the Court will determine the pecuniary damage, which presumes the loss of or harm to the income of the victims, the expenditure incurred as a result of the facts, and the pecuniary consequences that have a causal link to the facts of the case *sub judice.*[44] In this regard, when applicable, it will establish an amount that seeks to compensate the patrimonial consequences of the violations declared in this judgment. To decide the claims regarding pecuniary damage, the Court will take into account the evidence gathered in this case, its own case law and the arguments of the parties.

151. According to its decision in the judgment on preliminary objection (*supra* para. 21), the Court cannot rule on requests for reparations for pecuniary damage that are based on alleged violations relating to the alleged disappearance of Ernestina and Erlinda or on facts or acts that occurred before June 6, 1995, or which began to be executed before that date on which the State deposited the instrument

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[44] *Cf. Case of the "Juvenile Reeducation Institute"*, *supra* note 9, para. 283; *Case of the Gómez Paquiyauri Brothers*, *supra* note 10, para. 205; and *Case of the 19 Tradesmen*, *supra* note 15, para. 236.

accepting the Court's jurisdiction with the OAS General Secretariat.

152. The Court considers that, in the instant case, compensation for pecuniary damage must include the expenditure for medicines and psychological care that Ernestina and Erlinda's next of kin required as a result of the suffering caused by the separation of the family, and the uncertainty, frustration, anguish and impotence given the failure of the judicial authorities to investigate diligently what happened to Ernestina and Erlinda and determine their whereabouts within a reasonable time. In addition, it should include the expenses incurred by Ernestina and Erlinda's next of kin in order to discover their whereabouts. In this regard, the Court notes that some of those expenses were assumed by the *Asociación Pro-Búsqueda*, representatives of the victims and their next of kin, and that these expenses were generated as a result of the violations declared in this judgment. The Court considers that the State must compensate those expenses, because they have a direct causal link to the violations in this case, and do not relate to expenditure incurred in order to obtain access to justice (*infra* paras. 206 and 207), but to expenses incurred in the search for Ernestina and Erlinda, and also to pay for the medicines and care needed to treat the damage to the physical and psychological health of the victims' next of kin. Although, no vouchers were submitted with regard to these expenses, based on the expert reports of Ana Deutsch and Laínez Villaherrera and the testimonies of two of Ernestina and Erlinda' siblings and of Father Juan Cortina, the Court establishes, in fairness, the amount of US$555.00 (five hundred and fifty-five United States dollars) or the equivalent in Salvadoran currency, for the said expenses incurred by the next of kin, some of which were assumed by *Pro-Búsqueda*. This amount shall be delivered to Suyapa Serrano Cruz, Erlinda and Ernestina's sister, who shall reimburse the corresponding amount to the *Asociación Pro-Búsqueda*.

C) NON-PECUNIARY DAMAGE

Arguments of the Commission

153. The Commission stated that:

a) The children's next of kin, particularly their mother and "the sister" made a great effort to find them and to ensure that those responsible for their capture and subsequent disappearance were criminally punished, with all the emotional stress that this signified;

b) "The impunity that prevails in this case has caused the next of kin a tangible feelings of insecurity. As a result of the violations, the family of the victims has also suffered non-pecuniary damage that the Salvadoran State is obliged to repair"; and

c) It is necessary to take "into consideration the situation of Ernestina and Erlinda Serrano Cruz, that of their next of kin, María Victoria Cruz Franco, Suyapa Serrano Cruz and José Fernando Serrano Cruz" and determine, in fairness, an amount corresponding to the non-pecuniary damage suffered by each of them.

Arguments of the representatives of the victims and their next of kin

154. The representatives stated that:

a) The Serrano Cruz family disintegrated as a result of the military raid, the loss of two of its members, and the denial of justice by the authorities;

b) "For more than 20 years the Serrano family have been taking different measures – some before the authorities and others before other organizations – in order to find Ernestina and Erlinda, and they have knocked on a multitude of doors merely to obtain justice. To date, […] they have not traced the [children who are] young women today, and justice has not been done in the case";

c) "Although the whole family has suffered," those most affected are: Suyapa Serrano, sister of Ernestina and Erlinda Serrano Cruz, and María Victoria Cruz Franco, their mother, who "has had to live with the remorse of not having protected her daughters, and also not finding them";

d) "The Serrano family has not been able to mourn the possible death of the children. In this regard, […] the impossibility of mourning for disappeared children [causes] their families 'instability and sorrow,' because it supposes that they should consider them dead";

e) The feeling of sorrow "is aggravated owing to the indifference of the authorities […, because] the family resort[ed] to different State bodies to investigate the facts, without obtaining any result; […] they have been treated in an unseemly fashion and they have been accused of trying to make money out of the memory of the children. [Moreover], instead of giving them a reasonable answer about the whereabouts of the children, the State has insisted in trying to demonstrate that Ernestina and Erlinda never existed";

f) The testimonies of the children's mother and their siblings make it clear that "the suffering they endured owing to the disappearance of the children was very intense; their lives have not been the same since June 1982";

g) The Court should establish "an amount to compensate the next of kin of Ernestina and Erlinda for the violation 'of the rights to judicial guarantees, due process, and access to an effective recourse'"; and

h) They requested the Court to establish, in fairness, the reparation that the State must pay for the non-pecuniary damage caused to Ernestina and Erlinda and their family, based on the gravity of the facts, the sorrow suffered and the consequences that persist.

Arguments of the State

155. Regarding the alleged non-pecuniary damage, the State indicated that:

a) "It is not true that the Serrano Cruz family have been looking for the children for 20 years." It has been proved that they only returned from Mesa Grande, Honduras, in 1993. An Amnesty Act was enacted in El Salvador in 1983, which permitted the reinsertion of the population that had collaborated with the guerrilla. Additionally, the Intergovernmental Human Rights Commission existed in 1983, which "allowed disappeared persons to be traced." The Serrano Cruz family "did not have recourse" to these

mechanisms to look for the children;

b) "Even though the family nucleus of the Serrano Cruz family can be considered extensive, including the siblings of the children, Erlinda and Ernestina, for the effects of the judgment […] the following siblings should not be considered next of kin affected by the disputed facts: Fernando Serrano Cruz, Enrique Serrano Cruz (deceased), Martha Serrano Cruz, Arnulfo Serrano Cruz, Oscar Serrano Cruz and Rosa Serrano Cruz, because it has not been proved that they were affected by the alleged disappearance of their sisters[; because] this cannot be presumed as they did not testify and neither was their alleged suffering confirmed"; and

c) "With regard to the non-pecuniary damage, [it] considers that the Court should establish this, if it has jurisdiction to do so."

Considerations of the Court

156. Non-pecuniary damage can include the suffering and hardship caused to the direct victims and to their next of kin, the harm of objects of value that are very significant to the individual, and also changes, of a non-pecuniary nature, in the living conditions of the victims. Since it is not possible to allocate a precise monetary equivalent to non-pecuniary damage, it can only be compensated in two ways in order to make integral reparation to the victims. First, by the payment of a sum of money that the Court decides by the reasonable exercise of judicial discretion and in terms of fairness. Second, by performing acts or implementing projects with public recognition or repercussion, such as broadcasting a message that officially condemns the human rights violations in question and makes a commitment to efforts designed to ensure that it does not happen again. Such acts have the effect of restoring the memory of the victims, acknowledging their dignity, and consoling their next of kin.[45] The first aspect of reparation for non-pecuniary damage will be considered in this section and the second in section (D) of this chapter

157. International case law has established repeatedly that the judgment constitutes, *per se*, a form of reparation.[46] However, owing to the circumstances of the case *sub judice*, the sufferings that the facts caused to the persons who have been declared victims in this case and their next of kin, the change in the living conditions of all of them, and the other consequences of a non-pecuniary nature that they suffered, the Court considers it pertinent that compensation should be paid, in fairness, for non-pecuniary damage.

158. The non-pecuniary damage to the Serrano Cruz sisters and their next of kin is evident, because the absence of a serious and diligent investigation by the State authorities to determine what happened to them and, if appropriate, identify and punish those responsible, and the failure to adopt adequate measures that would help determine their whereabouts, prevented the emotional recovery of the next of kin and caused all of them non-pecuniary damage.

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[45] Cf. *Case of the Plan de Sánchez Massacre. Reparations, supra* note 3, para. 80; *Case of Tibi*, *supra* note 20, para. 242; and *Case of the "Juvenile Reeducation Institute"*, *supra* note 9, para. 295.

[46] *Cf. Case of Lori Berenson Mejía, supra* note 3, para. 235; *Case of Carpio Nicolle et al., supra* note 3, para. 117; and *Case of the Plan de Sánchez Massacre. Reparations*, *supra* note 3, para. 81.

159. With regard to the mother and siblings of Ernestina and Erlinda Serrano Cruz, the Court has presumed that the suffering or death of a person causes his parents and siblings non-pecuniary damage, which does not have to be proved.[47] Based on the testimony of the next of kin and the expert reports, the Court considers that they have suffered as a result of the uncertainty about what happened to Ernestina and Erlinda and about their whereabouts. In this regard, the Court emphasizes that it is inherent in human nature that a person feels sorrow when he does not know what has happened to a child or a sibling, particularly when this is aggravated by impotence in the face of the failure of the State authorities to instigate a diligent investigation into what happened. As the Court has established, the suffering caused to the victim "extends to the closest members of the family, particularly those who were in close affective contact with the victim."[48]

160. Bearing in mind the different facets of the damage adduced by the Commission and the representatives, the testimonial evidence and the expert reports in the proceedings, the Court establishes, in fairness, compensation for non-pecuniary damage, based on the following parameters:

a) To establish compensation for the non-pecuniary damage suffered by Ernestina and Erlinda Serrano Cruz, the Court takes into account that this is a case in which the facts investigated by the Chalatenango Trial Court refer to their alleged abduction by members of the Atlacatl Battalion during a military operation (*supra* para. 48(22)) and which provides an example of the repercussions of the problem of the children who disappeared during the armed conflict. The Court considers that the absence of access to justice and a diligent investigation during the *habeas corpus* procedure and the criminal proceedings (*supra* paras. 106 and 107) have not allowed their whereabouts to be determined and, should they be alive, have prevented them from being able to re-establish their family relationships and know their true origins, and this has caused them non-pecuniary damage that must be repaired. The Court establishes, in fairness, the sum of US$50,000.00 (fifty thousand United States dollars) or the equivalent in Salvadoran currency, for non-pecuniary damage in favor of Ernestina Serrano Cruz, and the same amount in favor of Erlinda Serrano Cruz;

b) When determining the compensation corresponding to María Victoria Cruz Franco, the mother of Ernestina and Erlinda Serrano Cruz, and to their siblings, Suyapa and José Fernando, it should be taken into account that these family members had the closest contact with the children before the facts occurred that are under investigation by the Chalatenango Trial Court. Also, Oscar Serrano Cruz has been the brother of Ernestina and Erlinda who suffered most, because he lived with their mother and had to accompany her and take care of her while she was looking for them and making efforts to ensure that the State authorities would try and trace them. These members of the family started the search for Ernestina and Erlinda in order to know what happened to them and, should they be found alive, to achieve family

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[47] *Cf. Case of the Gómez Paquiyauri Brothers*, *supra* note 10, para. 197; *Case of the 19 Tradesmen*, *supra* note 15, para. 229; and *Case of Maritza Urrutia*, *supra* note 19, para. 169.

[48] *Cf. Case of the Gómez Paquiyauri Brothers*, *supra* note 10, para. 218; *Case of the 19 Tradesmen*, *supra* note 15, para. 249; and *Case of Molina Theissen*. *Reparations*, *supra* note 4, para. 48(

reunification. This search has affected them psychologically and has increased the feelings of family disintegration, insecurity, guilt, frustration and impotence owing to the failure of the judicial authorities to investigate the facts diligently and adopt measures to trace them. Likewise, it must be borne in mind that, despite the obstacles she encountered, Ernestina and Erlinda's mother continued searching for her daughters and retained the hope of finding them, until the time of her death. The Court has also taken into consideration the damage suffered as a result of the delay in the investigation and the lack of access to justice and guarantees of due process during the *habeas corpus* procedure and the criminal proceedings (*supra* paras. 106 and 107). All the above situations resulted in great sorrow, impotence, insecurity, anguish, sadness and frustration for the victims' next of kin, which have seriously affected their lives, and their family and social relationships. The Court establishes, in fairness, the sum of US$80,000.00 (eighty thousand United States dollars) or the equivalent in Salvadoran currency, for the non-pecuniary damage suffered by María Victoria Cruz Franco, and the sum of US$30,000.00 (thirty thousand United States dollars) or the equivalent in Salvadoran currency, for this concept, in favor of each of the following siblings: Suyapa, José Fernando and Oscar, all Serrano Cruz; and

c) In the case of the siblings Martha, Arnulfo and María Rosa, all Serrano Cruz, based on the testimonies of the next of kin and the expert reports, and also the presumptions established above (*supra* para. 159), it can be concluded that all of them have suffered as a result of the uncertainty about what befell Ernestina and Erlinda and their whereabouts. The Court establishes, in fairness, the sum of US$5,000.00 (five thousand United States dollars) or the equivalent in Salvadoran currency, for non-pecuniary damage, for each of the following siblings: Martha, Arnulfo and María Rosa, all Serrano Cruz.

161. With regard to the payment of the compensation, the provisions described in paragraphs 208 to 216 of this judgment shall apply.

D) Other forms of reparation (Measures of Satisfaction and Guarantees of Non-repetition)

Arguments of the Commission

162. The Commission requested the Court to order the State:

a) "To adopt the necessary measures to give legal effect in the domestic sphere to the obligation to effectively investigate and punish those responsible for the abduction and forced disappearance of the Serrano Cruz sisters";

b) To conduct a serious, complete and effective investigation in order to trace the sisters, Ernestina and Erlinda Serrano Cruz, and, should it be established that they have been murdered, adopt all necessary measures to deliver their remains to their next of kin. If Erlinda and Ernestina are found alive in El Salvador or in any other State, "all necessary measures should be taken to ensure that family reunification is possible, and to provide psychological and logistic support to the next of kin who require it in that

context, as well as any reasonable expenses they have to incur to achieve the reunion. [… I]t is very important that Ernestina and Erlinda Serrano Cruz should be informed of their origins, to allow them to rebuild their identity and be reunited with their family"; and

c) "To reform domestic criminal laws and criminal procedure so as to classify the forced disappearance of persons as a crime, and establish a penalty that corresponds to its gravity. Likewise, […] to adopt all necessary measures to ratify the Inter-American Convention on the Forced Disappearance of Persons."

Arguments of the representatives of the victims and their next of kin

163. The representatives requested the Court to order the State to take the following measures:

a) With regard to the obligation to investigate the facts and arrive at the truth, it should undertake "an effective investigation that results in a prompt, independent and impartial trial in which the masterminds and perpetrators of the abduction and subsequent disappearance of the children are punished. [… This investigation should] fulfill two objectives: on the one hand, it should find the two young women and, on the other hand, it should identify and punish the officials responsible for their disappearance." They requested the Court to "declare Legislative Decree No. 486 null and void […], since it is incompatible with the provisions of the American Convention […]";

b) As measures of satisfaction in favor of the Serrano family:

i) The head of the Executive Power, as the representative of the Salvadoran State, should make a public statement acknowledging the human rights violations committed in this case; and

ii) The complete judgment delivered by the Court should be published in the official gazette and in other national newspapers with widespread circulation. This should be done three times, at one month intervals. In addition, it is essential that the proven facts and operative paragraphs of the judgment be published in the bulletin with the widest circulation within the Salvadoran Armed Forces;

c) As "[m]easures to help find the whereabouts of the young people who are still disappeared";

i) "A commission [should be established,] to […] trace the young people who are alive and, if they agree, facilitate contact with their biological families. [… This commission] would have its head office in San Salvador and would carry out its activities throughout national territory […];

ii) In relation to the "Inter-institutional Tracing Commission" created by Executive Decree No. 45 of October 5, 2004, they stated that this "Commission[,] as it was set up[,] is a far cry from the proposal submitted by *Pro-Búsqueda,* [… because] it is composed exclusively of State institutions […,] which could be seen as an impediment to ensuring the impartiality, autonomy and independence with which this entity must work." In addition, "the Commission should not take a collaborative approach, but be an entity that heads actions to trace the disappeared children, […] with a functional structure and

[…] suitable personnel";

iii) "It should send instructions to its consulates in the United State, Canada and Europe, so that they join the campaign to trace the young people and facilitate contact with the national tracing commission proposed above." The State should also "create a web page with relevant information on the cases that have not yet been resolved." Furthermore, the State should "distribute a bi-monthly written publication to those departments where the disappearance of children has been documented with the information contained on the web page";

iv) It should set up "a special fund for reparations to the young people who are found and their families." "Although these measures go beyond the instant case," they would truly illustrate "[the] willingness of the State to make reparation to the victims of the war"; and

v) It should adopt "a State program to provide free psychological care to those who are found, to their families and to the families that have not yet found a loved one, who was under 18 years old at the time they disappeared"; and

d) With regard to the "measures to avoid reoccurrence of the reported facts";

i) It should distribute "a documentary in which the population is informed of the *modus operandi* of the Armed Forces in the abduction and illegal adoption of children during the conflict […]"; and

ii) The Legislative Assembly of El Salvador should designate "a day dedicated to the disappeared children";

e) With regard to "other measures";

i) "It should provide a human rights training program to the Armed Forces […]";

ii) "It should modify [the] Penal Code to harmonize it with the parameters established by the bodies that protect the inter-American system and those embodied in the special inter-American instruments, […] in order to classify the crime of forced disappearance of persons adequately"; and

iii) It should take the necessary measures to repeal Legislative Decree 486 of March 20, 1993, in order to guarantee the right to the truth and the right to a fair trial with due guarantees.

Arguments of the State

164. The State argues as follows:

a) "The investigation […] continues in the Chalatenango First Trial Court, […] and] it will do everything necessary to establish what happened to the said children using all legal means";

b) With regard to adopting the measures necessary to ratify the Inter-American on the Forced Disappearance of Persons and classify forced disappearance as a crime, "[t]he Penal Code of El Salvador [in force since] April 28, 1998, already contemplates forced disappearance as one of the elements of the crime of aggravated homicide; it has also classified as a

crime forced disappearance committed by an public official or employee, forced disappearance committed by an individual and the disappearance of persons committed culpably." However, Salvadoran law does not consider that this is a continuous crime "and, would not allow it to be classified as continuous or permanent, unless the principle of non-retroactivity embodied in the Constitution was respected";

c) Regarding the request to adapt Salvadoran laws so as to eliminate any legal obstacles preventing justice in this case, "the Chalatenango Trial judge has never ruled that it is not possible to investigate, prosecute and punish those who are allegedly guilty of the facts in this case, owing to the Amnesty Act"; and

d) In a communication of October 18, 2004, the State submitted a photocopy of "Executive Decree No. 45 [of October 5, 2004,] creating the Inter-institutional Commission to trace children who disappeared as a result of the armed conflict in El Salvador."

Considerations of the Court

165. In this section, the Court will determine those measures of reparation that seek to repair the non-pecuniary damage and will also decide on measures of a public nature.[49]

a) Obligation to investigate the reported facts, identify and punish those responsible and conduct a genuine search for the victims

166. The Court has concluded, *inter alia*, that El Salvador violated Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Ernestina and Erlinda Serrano Cruz and their next of kin, because the procedure concerning the petition for *habeas corpus* filed by Erlinda and Ernestina's mother, and also the criminal proceedings reopened as a result of the decision on *habeas corpus*, have not been effective in determining what happened to Ernestina and Erlinda Serrano Cruz, tracing them, and investigating and punishing those responsible, because they were processed without due diligence (*supra* paras. 106 and 107). Likewise, in the criminal proceedings before the Chalatenango Trial Court, which is at the investigation stage, the principle of reasonable time embodied in the American Convention has not been respected. Also, since the case was submitted to the Inter-American Court, the criminal investigation before the Chalatenango Trial Court has been addressed principally at defending the State in the international proceedings before the Court and not at investigating the facts reported in the criminal proceedings (*supra* para. 104).

167. Moreover, in addition to not adopting the necessary judicial measures to trace Ernestina and Erlinda, the State has not adopted other types of measures required to attain this objective.

168. The next of kin of Ernestina and Erlinda Serrano Cruz have the right to know

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[49] *Cf. Case of the Plan de Sánchez Massacre*. *Reparations, supra* note 3, para. 93; *Case of De la Cruz Flores*, *supra* note 8, para. 164; and *Case of the "Juvenile Reeducation Institute"*, *supra* note 9, para. 314.

what happened to them and, if a crime has been committed, to know that those responsible will be punished.[50] As the Court has stated, "whenever there has been a human rights violation, the State has a duty to investigate the facts and punish those responsible, […] and this obligation must be complied with in a serious manner and not as a mere formality."[51]

169. These measures benefit not only the next of kin of the victims, but also society as a whole, because, by knowing the truth about such crimes, they can be prevented in the future.[52]

170. The Court has established that the State has the obligation to avoid and combat impunity, which the Court has defined as "the absence of any investigation, pursuit, capture, prosecution and conviction of those responsible for the violations of rights protected by the American Convention."[53]

171. With regard to the State's obligation to investigate and, if appropriate, punish those responsible, the criminal proceedings reopened in the Chalatenango Trial Court are still at the investigation stage. However, the Inter-American Court observes that when filing these proceedings on May 27, 1998, that court based this action on articles 125(2) and 126 of the Penal Code in force, which regulated the prescription of criminal proceedings (*supra para.* 48(25)), without going into detail on this point. The Court also notes that, as the State has argued (*supra* para. 51(h)), the General Amnesty Act to consolidate the peace, which establishes that, *inter alia,* those who have taken part in committing the crimes of abduction and extortion shall not enjoy [the] amnesty, has not been applied in the domestic criminal proceedings. However, this law is still in force in El Salvador and has been applied in other cases.

172. The Court observes that the State must ensure that the domestic proceedings to investigate what happened to Ernestina and Erlinda and, if appropriate, punish those responsible, has the desired effect. The State must abstain from using figures such as amnesty and prescription or the establishment of measures designed to eliminate responsibility, or measures intended to prevent criminal prosecution or suppress the effects of a conviction.[54] This Court repeats that, in relation to compliance with the obligation to investigate and punish:

> […] all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international

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[50] *Cf. Case of Carpio Nicolle et al.*, *supra* note 3, para. 127; *Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 96; and *Case of Tibi*, *supra* note 20, para. 256.

[51] *Cf. Case of Carpio Nicolle et al.*, *supra* note 3, para. 127; *Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 96; and *Case of Tibi*, *supra* note 20, para. 256.

[52] *Cf. Case of the 19 Tradesmen*, *supra* note 15, para. 259; and *Case of Bámaca Velásquez. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of February 22, 2002. Series C No. 91, para. 77.

[53] *Cf. Case of the Gómez Paquiyauri Brothers*, *supra* note 10, para. 148; *Case of the 19 Tradesmen*, *supra* note 15, para. 175; and *Case of Maritza Urrutia*, *supra* note 19, para. 126.

[54] *Cf. Case of the Gómez Paquiyauri Brothers*, *supra* note 10, para. 148; *Case of the 19 Tradesmen*, *supra* note 15, para. 263; and *Case of Maritza Urrutia*, *supra* note 19, para. 126.

human rights law.[55]

173. The Court has also established that public officials and individuals who hinder, deviate or unduly delay investigations to clarify the truth about the facts must be punished, applying, in this regard, the provisions of domestic law with the greatest rigor.[56]

174. Furthermore, regarding the crime under investigation in the criminal proceedings before the Chalatenango Trial Court to discover what happened to Ernestina and Erlinda, the Court has noted that there are several different criminal categories in the domestic file, such as "removal from personal care," "deprivation of liberty" and "abduction." When the facts under investigation in these proceedings occurred, the forced disappearance of persons was not classified as a crime. As of 1999, it was incorporated into the Salvadoran Penal Code as the crime of "forced disappearance of persons." However, the Court observes that this classification was not adapted to international standards on forced disappearance of persons as regards the description of the elements of the criminal classification and the penalty corresponding to the gravity of the crime. The Court considers that El Salvador should classify this crime appropriately and adopt the necessary measures to ratify the Inter-American Convention on the Forced Disappearance of Persons.

175. In light of the above considerations, the Court considers that El Salvador must investigate the facts reported in this case effectively, in order to trace Ernestina and Erlinda, find out what happened to them and, if appropriate, identify, prosecute and punish all the masterminds and perpetrators of the violations committed against them, for the criminal and any other effects that may result from the investigation into the facts. In the criminal proceedings before the Chalatenango Trial Court, the next of kin of Ernestina and Erlinda must have full access and capacity to act, at all stages and in all instances, in accordance with domestic law and the norms of the American Convention. Lastly, the Court decides that the result of the criminal proceedings must be publicized, so that Salvadoran society may know the truth of what happened.

176. When investigating the facts, the States must not repeat the acts and omissions indicated in the Court's considerations on the violation of Articles 8(1) and 25 of the Convention (*supra* paras. 52 to 107). The characteristics of the reported facts and the situation of armed conflict which El Salvador was experiencing when the facts under investigation allegedly occurred must be taken into account, so that the inquiries are not based merely on the given names and surnames of the victims, because, for different reasons, they may not have kept those names (*supra* para. 48(11)).

177. Complying with the said obligations is of great importance for repairing the damage suffered for years by the next of kin of Ernestina and Erlinda, because they have lived with feelings of family disintegration, uncertainty, frustration, anguish and impotence, given the failure of the judicial authorities to investigate the reported facts diligently, and also the State's lack of interest in tracing them by adopting other measures.

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[55] *Cf. Case of Carpio Nicolle et al.*, *supra* note 3, para.130; *Case of the Gómez Paquiyauri Brothers*, *supra* note 10, para. 233; and *Case of the 19 Tradesmen*, *supra* note 15, para. 262.

[56] *Cf. Case of El Caracazo. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of August 29, 2002. Series C No. 95, para. 119.

178. Should the State, when complying with its obligation to investigate and trace Ernestina and Erlinda Serrano Cruz, determine that they have died, the State must comply with the right of the next of kin to know where their remains are and, if possible, deliver the remains to their siblings so that they may honor them according to their beliefs and customs.[57] The Court has stated that the mortal remains of a person must be treated with respect because of their significance to their next of kin.[58]

179. Even though more than 22 years have elapsed since Ernestina and Erlinda were last seen by their next of kin, the Court considers it probable that they are still alive, since the children who disappeared in the 1982 "*guinda de mayo*" and who have been traced by the *Asociación Pro-Búsqueda* were found alive, and it is alleged that Ernestina and Erlinda also disappeared in the 1982 "*guinda de mayo*" (*supra* para. 48(8)). As revealed by information submitted to these proceedings, the *Asociación Pro-Búsqueda* has been able to trace approximately 246 young people who disappeared during the armed conflict for different reasons, even though it has not received the required cooperation from the State in its search. The Court considers that the active participation of the State and all its authorities and institutions in the search will make a very important contribution to resolving the problem of the children who disappeared during the armed conflict.

180. Based on the foregoing, the Court considers it fair and just to order El Salvador, in compliance with its obligation to investigate the reported facts, to identify and punish those responsible and to conduct a genuine search for the victims, to eliminate all the obstacles and mechanisms *de facto* and *de jure* that hinder compliance with these obligation in this case, using all possible means, either through the criminal proceedings or by the adoption of other suitable measures.[59]

181. The State must use all the appropriate financial, technical, scientific and other means to trace Ernestina and Erlinda Serrano Cruz, requesting the cooperation of other States and international organizations, should this be necessary.

182. The Court will now refer to some of the measures the State must adopt in order to trace Ernestina and Erlinda.

b) Establishment of a national commission to trace the young people who disappeared when they were children during the armed conflict, with the participation of civil society

183. The Court takes into account that on October 5, 2004, the President of El Salvador issued Executive Decree No. 45, creating the "Inter-institutional Commission to trace children who disappeared as a result of the armed conflict in El Salvador." However, the Court notes that this Decree did not contain specific

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[57] *Cf. Case of the 19 Tradesmen*, *supra* note 15, para. 265; *Case of Molina Theissen*. *Reparations*, *supra* note 4, para. 85; and *Case of Juan Humberto Sánchez, supra* note 21, para. 187.

[58] *Cf. Case of the 19 Tradesmen*, *supra* note 15, para. 265; *Trujillo Oroza case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of February 27, 2002. Series C No. 92, para. 115; and *Case of Bámaca Velásquez. Reparations*, *supra* note 52, para. 81.

[59] *Cf. Case of Carpio Nicolle et al.*, *supra* note 3, para. 134; and *Case of Myrna Mack Chang*, *supra* note 8, para. 77.

regulations on the functions or the working methods of the commission in order to fulfill its mandate, but merely indicated that these would be determined in its internal organizational and operational regulations." The Court was not informed of whether the respective regulations had been issued.

184. The Court will now make some observations on the parameters that a national commission to trace young people who disappeared when they were children during the armed conflict should comply with, and how it should function. The State could comply with this measure of reparation through the "inter-institutional commission to trace children who disappeared as a result of the armed conflict in El Salvador," if it adheres to the parameters established by the Court to comply with this measure, or it could create a new commission that complies with the parameters.

185. The decree that created the above-mentioned commission stipulated that "its purpose was to collaborate, together with the public institutions involved or responsible for the protection of children, in tracing children who were separated involuntarily from their next of kin" (*supra* para. 48(13)). However, the Court observes that the function of the commission cannot be limited to "collaboration"; rather it must take the initiative to adopt the necessary measures to investigate and collect evidence about the possible whereabouts of the young people who disappeared when they were children during the armed conflict, and thereby facilitate the determination of what happened and family reunification.

186. In this regard, the Court emphasizes that, when implementing initiatives aimed at tracing and locating disappeared children and facilitating family reunification, the State must evaluate why the initiative established at the suggestion of the Attorney General, known as the "Attorney General's Committee" (*Mesa del Procurador*) (*supra* para. 48(12)) was unsuccessful. The State must ensure that all its institutions and authorities are obliged to cooperate by providing information to the national tracing commission and by providing access to all files and records that could contain information on the possible fate of these young people.

187. Likewise, the independence and impartiality of the members of the national tracing commission must be ensured, and it must have the necessary human, financial, logistic, scientific and other resources to be able to investigate and trace the whereabouts of young people who disappeared during the armed conflict when they were children.

188. The Court has noted with concern that Decree No. 45 establishes that the abovementioned inter-institutional tracing commission will be composed only by State authorities, even though "it c[ould] count on the collaboration of other public institutions such as the Supreme Court of Justice, the Ombudsman's Office, […] and private institutions working to achieve the same purpose as the Commission." In this regard, it should be stressed that, according to the evidence submitted in this case, the positive results in tracing and finding young people who disappeared during the armed conflict when they were children, and achieving their family reunification and recovery of family ties were not the product of the diligent action of the State, but of the initiatives of the *Asociación Pro-Búsqueda* and the next of kin of the disappeared (*supra* para. 48(6) and 48(9)). Therefore, the Court considers that the national tracing commission must include State institutions that have demonstrated some interest in resolving this problem and others who should be members because of

their functions, and also that civil society should participate through non-governmental organizations that have been engaged in this search or that are specialized in working with young disappeared persons, such as the *Asociación Pro-Búsqueda*.

c) Creation of a search web page

189. This Court considers that a database should be established by creating a web page for tracing the disappeared children. The database should be set up with the given names and surnames, possible physical characteristics and any other existing information about the Serrano Cruz sisters and their next of kin.

190. The web page should include the addresses and telephone numbers of several State institutions (such as, the Attorney General's Office, the Ombudsman's Office, the National Civil Police, the Immigration Department, the Ministry of Foreign Affairs, Embassies and Consulates of El Salvador, the Chalatenango Trial Court, and State institutions for the protection of children, youth and the family), the national tracing commission (*supra* paras. 183 to 188), and non-governmental organizations such as *Pro-Búsqueda,* so that, if the Serrano Cruz sisters are alive and contact this page, they and anyone who has information about them can find the next of kin, and the pertinent governmental or non-governmental institutions, or forward information on Ernestina and Erlinda and their whereabouts.

191. In this regard, the Court considers it essential that, using this web page, the State should adopt the necessary measures to coordinate national links with the different governmental and non-governmental authorities and institutions mentioned above, and also international links with the web pages of other States, national institutions or associations, and international organizations engaged in trying to trace children and young people who have disappeared, in order to promote, participate and collaborate in the establishment and development of an international search network.[60] The State shall comply with the foregoing within six months of notification of this judgment.

d) Creation of a genetic information system

192. The Court emphasizes the importance of using science to identify the people who disappeared and their next of kin, in order to determine the relationships and establish contacts between those who are seeking someone who disappeared and those who became separated from their families involuntarily and who are seeking them. In this regard, the Court has noted that Father Juan Cortina Garaígorta stated in the public hearing before the Court that the investigative techniques used by *Pro-Búsqueda* "to be able to find the children involved in the conflict," included the "elaboration […] of a DNA genetic code […]." In this regard, the priest stated that "more than 1,500 [to] 1,800 DNA tests [were] being carried out." However, the Courts notes that the State has not collaborated in developing this investigative technique; rather *Pro-Búsqueda* has received help from abroad.

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[60] In this regard, there are web pages aimed at tracing disappeared persons in which El Salvador could participate. They include the one developed by the project coordinated and financed by the Swedish Save the Children within the framework of the Regional Program for Latin American and the Caribbean. The address of this project's site is as follows: www.latinoamericanosdesaparecidos.org.

193. Consequently, the Court considers that the State must adopt all necessary measures to create a system of genetic information that allows genetic data that can contribute to determining and clarifying the relationships and identification of the disappeared children and their next of kin to be obtained and conserved.[61] The State must comply with this reparation within a reasonable time.

e) Public act to acknowledge responsibility and to make amends to the sisters, Ernestina and Erlinda Serrano Cruz, and their next of kin

194. As it has in other cases,[62] the Court considers it necessary, in order to repair the damage caused to the victims and their next of kin and to avoid repetition of facts such as those of this case, to order the State to organize a public act acknowledging its responsibility for the violations declared in this judgment and to make amends to the victims and their next of kin. This act should be carried out by means of a public ceremony in the city of Chalatenango, in the presence of senior State authorities and members of the Serrano Cruz family.[63] The State shall provide the necessary means to facilitate the presence of these persons at the said act.[64] Also, the State shall disseminate this act through the media,[65] and on the Internet. The State has one year from notification of this judgment to carry out this act.

f) Publication of this judgment

195. Furthermore, and has it has ordered on other occasions,[66] the Court considers that, as a measure of satisfaction, the State must publish at least once, in the official gazette and in another daily newspaper with national circulation, Chapter I entitled "Introduction of the case", Chapter III entitled "Jurisdiction" and Chapter VI entitled "Proven Facts", and also the operative paragraphs of this judgment. The Court also considers that a link should be established to the complete text of this judgment on the web search page for disappeared persons (*supra* paras. 189 to 191). The State must comply with the foregoing, within six months of notification of this judgment

g) Designation of a day dedicated to the children who disappeared during the armed conflict

196. The Court considers that El Salvador should designate a day dedicated to the children who, for different reasons, disappeared during the internal armed conflict, in

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61 *Cf. Case of Molina Theissen*. *Reparations*, *supra* note 4, para. 91(b).

62 *Cf. Case of Carpio Nicolle et al.*, *supra* note 3, para. 136; *Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 100; and *Case of the "Juvenile Reeducation Institute"*, *supra* note 9, para. 316.

63 *Cf. Case of Carpio Nicolle et al.*, *supra* note 3, para. 136; *Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 100; *and Case of the Gómez Paquiyauri Brothers*, *supra* note 10, para. 234.

64 *Cf. Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 100.

65 *Cf. Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 100; and *Case of Myrna Mack Chang*, *supra* note 8, para. 278.

66 *Cf. Case of Lori Berenson Mejía*, *supra* note 3, para. 240; *Case of Carpio Nicolle et al.*, *supra* note 3, para. 138; and *Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 103.

order to make society aware of the need for "all Salvadorans […] to work together to find the best solutions […] leading to the truth about the whereabouts of the children," as the State affirmed in the public hearing before the Court. The State shall comply with this measure within six months of notification of this judgment.

h) Medical and psychological care

197. In his affidavit, José Fernando Serrano Cruz, Ernestina and Erlinda's brother, referred to the physical and psychological problems that his family suffered as a result of the facts of this case, particularly those suffered by his mother. Likewise, the expert witness, Ana Deutsch, stated in her sworn statement that victims and their next of kin require psychological treatment to improve their mental health. The Court considers that a measure must be ordered that will lessen the physical and psychological problems of the next of kin of Ernestina and Erlinda resulting from the circumstances of the violation.[67]

198. In order to help repair the physical and psychological damage, the Court decides that the State has the obligation to provide, through its specialized health institutions, the free medical and psychological treatment required by the victims' next of kin, including the medicines they need, in view of the problems suffered by each of them, following individual evaluation. The Court considers it desirable that a specialized non-governmental institution, such as the *Asociación Pro-Búsqueda*, should be allowed to take part in this evaluation and in the implementation of the treatment. In addition, if Erlinda and Ernestina are found alive, the State must also provide them with the said medical and psychological treatment.

199. Bearing in mind the opinion of the expert witness, Rosa América Laínez Villaherrera, who has evaluated and treated many young people who were found, their next of kin, and families who continue seeking the disappeared (*supra* para. 35), when providing the said psychological treatment, the specific circumstances and needs of each person must be considered, so that individual, family and collective treatment is offered, as agreed with each of them following an individual evaluation.

200. Within six months, El Salvador must inform the next of kin of Ernestina and Erlinda and *Pro-Búsqueda* of the names of the health establishments or specialized institutes in which the said medical and psychological treatment will be offered, and provide this treatment.

201. Finally, the Court considers that this judgment constitutes, *per se,* a form of reparation.[68]

E) Costs and Expenses

Arguments of the Commission

202. The Commission requested the Court to "order the State of El Salvador to pay

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[67] *Cf. Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 106; *Case of De la Cruz Flores*, *supra* note 8, para. 168; and *Case of the "Juvenile Reeducation Institute"*, *supra* note 9, para. 318.

[68] *Cf. Case of Lori Berenson Mejía*, *supra* note 3, para. 235; *Case of Carpio Nicolle et al.*, *supra* note 3, para. 117; and *Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 81.

the costs that are duly proved by [the representatives]," which were incurred at the national level during the processing of the judicial proceedings and at the international level during the processing of the case before the Inter-American Commission "as well as those that result[ed] from processing the application before the Court."

Arguments of the representatives of the victims and their next of kin

203. The representatives stated that they had incurred expenses at the domestic and the international levels and requested reimbursement of the following expenses for the *Asociación Pro-Búsqueda* and CEJIL:

a) A total of US$39,323.96 (thirty-nine thousand three hundred and twenty-three United States dollars and ninety-six cents) in favor of the *Asociación Pro-Búsqueda*;[69]

b) A total of US$7,252.77 (seven thousand two hundred and fifty-two United States dollars and seventy-seven cents) in favor of CEJIL[70] for expenses incurred in the international proceeding; and

c) They stated that their request for reimbursement was "legitimate, because it was not designed to enrich either of the organizations, but to reimburse the expenses they had incurred, partially or totally."

Arguments of the State

204. The State argued that:

a) "It was not responsible for the expenses that the *Asociación Pro-Búsqueda* had incurred in the pursuit of its objectives as an association, or for the expenses that it had incurred in the search for the children, since the said organization was established" for that purpose;

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[69] Regarding the expenses incurred by the *Asociación Pro-Búsqueda*, they indicated that they should be reimbursed for: travel expenses for employees: US$84.52 (eighty-four United States dollars and fifty-two cents); travel expenses for next of kin: US$122.97 (one hundred and twenty-two United States dollars and ninety-seven cents); lawyers' fees and salaries: US$28,262.19 (twenty-eight thousand two hundred and sixty-two United States dollars and nineteen cents); medication costs for the next of kin: US$400.68 (four hundred United States dollars and sixty-eight cents); advisory services and seminars: US$1,916.51 (one thousand nine hundred and sixteen United States dollars and fifty-one cents); mental health workshops: US$32.39 (thirty-two United States dollars and thirty-nine cents); miscellaneous travel expenses for hearings in the United States: US$8,006.51 (eight thousand and six United States dollars and fifty-one cents); fuel expenses: US$84.57 (eighty-four United States dollars and fifty-six cents); photocopies and miscellaneous materials: US$80.82 (eighty United States dollars and eighty-two cents); and communications (telephone, fax, mail): US$332.78 (three hundred and thirty-two United States dollars and seventy-eight cents).

[70] Regarding the reimbursement of expenses incurred by CEJIL while litigating the case before the Commission, the representatives indicated that the amount includes the following concepts: hearing before the Inter-American Commission in October 2000: US$1,116.68 (one thousand one hundred and sixteen United States dollars and sixty-eight cents); hearings before the Inter-American Commission in November 2001: US$2,501.35 (two thousand five hundred and one United States dollars and thirty-five cents); trips to El Salvador in March and July 2003: US$824.00 (eight hundred and twenty-four United States dollars) and US$2,336.84 (two thousand three hundred and thirty-six United States dollars and eighty-four cents), respectively; telephone and fax: US$300.00 (three hundred United States dollars); correspondence: US$73.90 (seventy-three United States dollars and ninety cents); and supplies: US$100 (one hundred United States dollars).

b) Since "CEJIL is a non-profit association, it cannot be presumed that there is a representation contract involving payment, which would enable it to charge for the expenses it incurred on behalf of the Serrano family"; and

c) "The reparations […] transcend the conditions of those they represent" because:

i) Regarding the lawyers' salaries and honoraria, "no lawyers ha[d] taken part in either the proceedings in the domestic jurisdiction or the proceedings in the international jurisdiction," since there was no evidence of their participation in the domestic proceedings or in the international proceedings. "Moreover, the petition was submitted to the Commission in 1999 and honoraria are claimed as of 1997";

ii) Regarding travel expenses for employees and the next of kin, "the description of these travel expenses includes the years 1995 to 1998, which precede the petition submitted to the Commission in 1999. Also, in the domestic jurisdiction, the plaintiff's domicile establishes the jurisdiction";

iii) Regarding the expenses for medicines and mental health workshops, these are "not item[s] that can be considered of a jurisdictional nature, and would be included in the reparations to the next of kin";

iv) The honoraria of Calixto Zelaya for advisory services in the cases filed before the courts and for the preparation of the cases before the Commission, cannot be attributed "to this case alone";

v) "Expenses incurred for an alleged trip to Los Angeles are included, and it cannot be presumed [that] this was undertaken for jurisdictional activities"; and

vi) Fuel expenses cannot be considered "of a jurisdictional nature, since […] the Serrano family lives in Chalatenango and […] does not have significant fuel expenses."

Considerations of the Court

205. As the Court has indicated on previous occasions,[71] costs and expenses are included in the concept of reparation embodied in Article 63(1) of the American Convention, because the measures taken by the victims or their representatives in order to obtain justice at the domestic and the international level imply expenditure that must be compensated when the State's international responsibility has been declared in a judgment against it. For purposes of reimbursement, the Court must prudently assess their scope, which includes the expenses incurred before the authorities of the domestic jurisdiction, and also those incurred during the proceedings before the inter-American system, taking into account the circumstances of each specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be based on the principle of fairness and by taking into account the expenses indicated and authenticated by the parties, providing the *quantum* is reasonable.

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[71] *Cf. Case of Carpio Nicolle et al.*, *supra* note 3, para. 143; *Case of the Plan de Sánchez Massacre*. *Reparations*, *supra* note 3, para. 115; and *Case of De la Cruz Flores*, *supra* note 8, para. 177.

206. For the present purposes, costs include those related to the stage of access to justice at the national level, and those related to justice at the international level before the two organs of the inter-American system for the protection of human rights: the Commission and the Court.[72]

207. The Court takes into account that the next of kin of Ernestina and Erlinda Serrano Cruz acted through representatives, before both the Commission and the Court. The Court considers that it is fair to order the State to reimburse the sum of US$38,000.00 (thirty-eight thousand United States dollars) or the equivalent in Salvadoran currency, to the *Asociación Pro-Búsqueda* for the costs and expenses it incurred in the domestic sphere and in the international proceedings before the inter-American system for the protection of human rights, and to reimburse the sum of US$5,000.00 (five thousand United States dollars) or the equivalent in Salvadoran currency, to CEJIL for the costs and expenses incurred in the said international proceeding.

F) MEANS OF COMPLIANCE

208. To comply with this judgment, El Salvador shall pay the compensation for pecuniary and non-pecuniary damage (*supra* paras. 152 and 160), reimburse the costs and expenses (*supra* para. 207), and adopt the measure of reparation relating to the organization of a public act acknowledging its responsibility for the violations declared in this judgment and in reparation to the victims and their next of kin (*supra* para. 194), within one year of its notification. The State shall adopt the measures of reparation relating to the operation of a national commission to trace the young people who disappeared when they were children during the armed conflict, with the participation of civil society (*supra* paras. 183 to 188), the creation of a search web page (*supra* para. 189 to 191), publication of this judgment (*supra* para. 195), and designation of a day dedicated to the children who disappeared during the internal armed conflict (*supra* para. 196), and shall provide medical and psychological treatment to the next of kin of Ernestina and Erlinda (*supra* paras. 197 to 200), within six months of its notification. El Salvador shall comply with the obligation to investigate the reported facts, identify and punish those responsible (*supra* paras. 166 to 182), and adopt the measure of reparation relating to the creation of a genetic information system (*supra* paras. 192 and 193), within a reasonable time.

209. The State shall comply with its obligations of a pecuniary nature by payment in United States dollars or the equivalent in Salvadoran currency.

210. The payment of the compensation established in favor of Ernestina and Erlinda Serrano Cruz shall be deposited in an account or deposit certificate in their name in a reputable Salvadoran banking institution in United States dollars and in the most favorable financial conditions permitted by Salvadoran legislation and banking practice. If, after 10 years, the compensation has not been claimed, the amount shall be given, with the earned interest, to the siblings of Ernestina and Erlinda in equal parts, who will have two years to claim it, after which, if it has not been claimed, it shall be returned to the State.

211. The payment of the compensation for non-pecuniary damage corresponding

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[72] *Cf. Case of Carpio Nicolle et al.*, *supra* note 3, para. 144; *Case of Tibi, supra* note 20, para. 269; and *Case of the "Juvenile Reeducation Institute", supra* note 9, para. 329.

to María Victoria Cruz Franco, Ernestina and Erlinda's mother (*supra* para. 160(b)), shall be divided equally among her children.

212. The payment of the compensation in favor of the siblings of Ernestina and Erlinda Serrano Cruz shall be made directly to them. If any of them shall have died, the payment shall be made to the heirs.

213. The payments corresponding to reimbursement of the costs and expenses arising from the measures taken by the *Asociación Pro-Búsqueda* and CEJIL in the domestic proceedings and in the international proceedings before the inter-American system for the protection of human rights shall be made to these representatives, as established in paragraph 207 of this judgment.

214. The amounts allocated in this judgment as compensation for pecuniary and non-pecuniary damage and for reimbursement of costs and expenses shall not be affected, reduced or conditioned by current or future taxes or charges. Consequently, the total amount shall be delivered to the beneficiaries as established in this judgment.

215. If, due to causes that can be attributed to the next of kin of the victims, beneficiaries of the payment of compensation (*supra* paras. 152 and 160), they are unable to receive it within the period indicated, the State shall deposit such amounts in favor of the beneficiaries in an account or a deposit certificate in a reputable Salvadoran banking institution in United States dollars in the most favorable conditions permitted by banking practice and legislation. If, after ten years, the compensation has not been claimed, the amount shall be returned to the State with the interest earned.

216. If the State should delay payment, it shall pay interest on the amount owed, corresponding to banking interest on arrears in El Salvador.

217. Pursuant to its consistent practice, the Court reserves the power inherent its attributes to monitor complete compliance with this judgment. The case shall be considered closed when the State has fully complied with the operative paragraphs of this judgment. Within one year of notification of this judgment, El Salvador shall provide the Court with a report on the measures adopted to comply with this judgment.

XII
OPERATIVE PARAGRAPHS

218. Therefore,

THE COURT,

DECLARES:

By six votes to one, that:

1. The State has violated the right to judicial guarantees and judicial protection

embodied in Articles 8(1) and 25 of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Ernestina and Erlinda Serrano Cruz and their next of kin, in the terms of paragraphs 53 to 107 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

By six votes to one, that:

2. The State has violated the right to humane treatment embodied in Article 5 of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of the next of kin of Ernestina and Erlinda Serrano Cruz, in the terms of paragraphs 111 to 115 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

By five votes to two, that:

3. It will not rule on the alleged violations of the rights of the family, the right to a name, and the rights of the child, embodied in Articles 17, 18 and 19 of the American Convention on Human Rights, respectively, in the terms of paragraph 125 of this judgment.
Dissenting Judges Cançado Trindade and Ventura Robles.

By six votes to one, that:

4. It will not rule on the alleged violation of the right to life embodied in Article 4 of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of Ernestina and Erlinda Serrano Cruz, in the terms of paragraphs 130 to 132 of this judgment.
Dissenting Judge Cançado Trindade.

AND DECIDES:

By six votes to one, that:

5. This judgment constitutes *per se* a form of reparation, in the terms of paragraphs 157 and 201 thereof.
Dissenting Judge ad hoc Montiel Argüello.

6. The State shall, within a reasonable time, carry out an effective investigation into the reported facts in this case, identify and punish those responsible and conduct a genuine search for the victims, and eliminate all the obstacles and mechanisms *de facto* and *de jure*, which prevent compliance with these obligations in the instant case, so that it uses all possible measures, either through the criminal proceedings or by adopting other appropriate measures, and shall publicize the result of the criminal proceedings, in the terms of paragraphs 166 to 182 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

7. The State shall adopt the following measures to determine the whereabouts of Ernestina and Erlinda Serrano Cruz: establishment of a national commission to trace the young people who disappeared during the armed conflict when they were children, with the participation of civil society; creation of a search web page; and creation of a genetic information system, in the terms of paragraphs 183 to 193 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

8. The State shall, within one year, organize a public act acknowledging its responsibility for the violations declared in this judgment and in reparation to the victims and their next of kin, in the presence of senior State authorities and the members of the Serrano Cruz family, in the terms of paragraphs 194 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

9. The State shall publish, within six months, at least once in the official gazette and in another national newspaper, Chapter 1, entitled "Introduction of the case," Chapter III, entitled "Jurisdiction" and Chapter VI, entitled "Proven facts," as well as the operative paragraphs of this judgment, and shall also establish a link to the complete text of this judgment in the search web page, in the terms of paragraph 195 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

10. The State shall designate, within six months, a day dedicated to the children who disappeared during the internal armed conflict for different reasons, in the terms of paragraph 196 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

11. The State shall provide free of charge, through its specialized health institutions, the medical and psychological treatment required by the next of kin of the victims, including the medicines they require, taking into consideration the health problems of each one, after making an individual evaluation, and within six months, inform the next of kin of Ernestina and Erlinda Serrano Cruz in which health centers or specialized institutes they will receive the said medical of psychological care, and provide them with the treatment, in the terms of paragraphs 197 to 200 of this judgment. If Ernestina and Erlinda Serrano Cruz are found alive, the State shall also provide them with the said medical and psychological treatment, in the terms of paragraph 198 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

12. The State shall pay Suyapa Serrano Cruz the amount established in paragraph 152 of this judgment in reparation for the pecuniary damage suffered by the next of kin of the victims, part of which was assumed by the *Asociación Pro-Búsqueda*, in the terms of paragraph 152 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

13. The State shall pay, in compensation for non-pecuniary damage caused to the victims and their next of kin, the amounts established in paragraph 160 of this judgment, in favor of Ernestina Serrano Cruz, Erlinda Serrano Cruz, María Victoria Cruz Franco, Suyapa, José Fernando, Oscar, Martha, Arnulfo and María Rosa, all Serrano Cruz, in the terms of paragraph 160 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

14. The State shall pay the amounts established in paragraph 207 of this judgment to the *Asociación Pro-Búsqueda*, for the costs and expenses generated in the domestic sphere and in the international proceedings before the inter-American system for the protection of human rights, and to CEJIL, for the costs and expenses it incurred in the said international proceedings, in the terms of paragraph 207 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

15. The State shall pay the compensations, reimburse the costs and expenses, and adopt the measures of reparation established in the eighth operative paragraph of this judgment, within one year of its notification, in the terms of paragraph 208 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

16. The State shall adopt the measures of reparation ordered in paragraphs 183 to 191 and 195 to 200 of this judgment within six months of its notification.
Dissenting Judge ad hoc Montiel Argüello.

17. The State shall adopt the measures of reparation ordered in paragraphs 166 to 182, 192 and 193 of this judgment within a reasonable time, in the terms of the said paragraphs.
Dissenting Judge ad hoc Montiel Argüello.

18. The State shall comply with its pecuniary obligations by payment in United States dollars or the equivalent in Salvadoran currency, in the terms of paragraph 209 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

19. The State shall deposit the compensation ordered in favor of Ernestina and Erlinda Serrano Cruz in a deposit certificate or account in a reputable Salvadoran banking institution and in the most favorable financial conditions permitted by Salvadoran legislation and banking practice. If, after 10 years, the compensation has not been claimed, the amount shall be given, with the earned interest, to the siblings of Ernestina and Erlinda in equal parts, who will have two years to claim it, after which, if it has not been claimed, it shall be returned to the State, in the terms of paragraph 210 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

20. The payment of the compensation corresponding to María Victoria Cruz Franco, mother of Ernestina and Erlinda Serrano Cruz, shall be given to her children in equal parts, in the terms of paragraph 211 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

21. The payment of the compensation established in favor of the siblings of Ernestina and Erlinda Serrano Cruz shall be made directly to them. If any of them have died, the payment shall be made to the heirs, in the terms of paragraph 212 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

22. The payments of compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses, shall not be affected, reduced or conditioned by current or future taxes or charges, in the terms of paragraph 214 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

23. If, due to causes that can be attributed to the next of kin of the victims, beneficiaries of the payment of compensation, they are unable to receive it within the said period of one year, the State shall deposit such amounts in their favor in an account or a deposit certificate in a reputable Salvadoran banking institution in United States dollars, in the terms of paragraph 215 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

24. Should the State fall in arrears, it shall pay interest on the amount owed corresponding to the bank interest on payments in arrears in El Salvador, in the terms of paragraph 216 of this judgment
Dissenting Judge ad hoc Montiel Argüello.

25. It shall monitor compliance with this judgment and shall file the instant case, when the State has fully implemented all its provisions. Within one year of notification of this judgment, the State shall provide the Court with a report on the measures taken to comply with it, in the terms of paragraph 217 of this judgment.
Dissenting Judge ad hoc Montiel Argüello.

Judge Cançado Trindade informed the Court of his Dissenting Opinion on the third and fourth operative paragraphs, Judge Ventura Robles informed the Court of his Dissenting Opinion on the third operative paragraph, and Judge *ad hoc* Montiel Argüello informed the Court of his Dissenting Opinion on the first and second, and fourth to twenty-fifth operative paragraphs. These opinions accompany the judgment.

Done, at San José, Costa Rica, on March 1, 2005, in Spanish and English, the Spanish text being authentic.

Sergio García Ramírez
President

Alirio Abreu Burelli

Oliver Jackman

Antônio A. Cançado Trindade

Cecilia Medina Quiroga

Manuel E. Ventura Robles

Pablo Saavedra Alessandri
Secretary

So ordered,

Sergio García Ramírez
President

Pablo Saavedra Alessandri
Secretary

DISSENTING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I regret that I am unable to share the majority decision of the judges of the Inter-American Court of Human Rights in the third and fourth operative paragraphs, and the principle it adopted on these points in the considering paragraphs 125 and 130 to 132, respectively, of the judgment on merits and reparations in *The Serrano Cruz Sisters v. El Salvador*, because the Court based the judgment on its previous decision (judgment on preliminary objections of November 23, 2004) concerning the first preliminary objection *ratione temporis* (and, in reality, *ratione materiae* also) filed by the respondent State.

2. I consider that this objection, accepted by the Court with my dissenting opinion, prevented it, unduly, from considering facts and acts that began to be executed prior to the date on which the State accepted the Court's compulsory jurisdiction (June 6, 1995) and which continued after the date of that acceptance and up until the present – a decision which I opposed for the reasons described in my previous dissenting opinion (judgment on preliminary objections of November 23, 2004).

3. That decision has conditioned the Court's judgment on merits and reparations, leading it, in the instant case, to limit its powers of protection under the Convention – a limitation that I consider unacceptable. Consequently, in this dissenting opinion to the judgment on merits and reparations in the *Serrano Cruz Sisters* case, I am obliged to record my personal observations justifying my position.

4. My observations relate to seven specific points, which are: (a) the need to overcome excesses of State voluntarism; (b) the development and relevance of the right to identity; (c) the key importance of the rights of the child in this case; (d) the broad scope of the right to life; (e) subsistence of State responsibility even though the Court limited its own jurisdiction in this case; (f) the need for the compulsory international jurisdiction of the Inter-American Court to be automatic; and (g) the perennial challenge of the issue of the relationship between time and law.

I. Towards overcoming excesses of State voluntarism

5. In my above-mentioned dissenting opinion in the judgment on preliminary objections in this case, I stated that:

> "By protecting fundamental values shared by the international community as a whole, contemporary international law has overcome the anachronic voluntarist conception belonging to a distant past. Contrary to what some rare, nostalgic survivors of the apogee of positivism-voluntarism presume, the methodology of interpreting human rights treaties developed on the basis of rules of interpretation embodied in international law (such as those stipulated in Articles 31 to 33 of the 1969 and 1986 Vienna Conventions on the Law of Treaties) applies to both the substantive provisions (on the protected rights) and the clauses that regulate international protection mechanisms – based on the principle *ut res magis valeat quam pereat*, which corresponds to the so-called *effet utile* (sometimes called the principle of effectiveness), amply supported by international case law." (para. 7)

6. Indeed, it would be inadmissible to subordinate the operation of the treaty-based protection mechanism to conditions that were not expressly authorized by Article 62 of the American Convention, because this would not only affect immediately the

effectiveness of the operation of this mechanism, but also fatally impede its possibilities for future development. Also, as I added in this dissenting opinion, from the Court's experience, it is clear that:

> "The primacy of considerations of *ordre public* over the will of individual States; [both the European and the Inter-American Court …] have set very high standards of State conduct and a certain degree of control over the imposing of undue restrictions by States; and it is encouraging to see that they have strengthened the position of the individual as a subject of international human rights law, with full procedural capacity." (para. 47)

7. Some years ago, before this case of the *Serrano Cruz sisters*, in *Blake v. Guatemala*, a preliminary objection of lack of jurisdiction *ratione temporis* filed by the respondent State and partially accepted by this Court led to an undue fragmentation of the continued crime of forced disappearance of persons, and I adopted a position against this in the separate opinions that I presented at all stages of the processing of the case (1996 to 1999) before the Court. When it ruled on the case, the forced disappearance of the victim had ended with the identification of his whereabouts (i.e. his remains).

8. The situation in *The Serrano Cruz Sisters v. El Salvador* is of even greater concern. The first preliminary objection filed by the respondent State and wholly admitted by the Court in its judgment of November 23, 2004 (first and second operative paragraphs) results not in fragmentation, but in the Court's total failure to consider the continued crime of forced disappearance of persons, and all the results of that disappearance, which persist up until the present. In addition, the limitation, allegedly *ratione temporis,* filed by the respondent State (in the said preliminary objection) as regards facts or acts that "began to be executed" before the date on which the State accepted the Court's jurisdiction and which continue *after* that date until the present, does not fall within any of the conditions for accepting the Court's jurisdiction (under Article 62 of the American Convention), nor is it merely of a *ratione temporis* nature.

9. As I recalled in my dissenting opinion in the judgment on preliminary objections in this case, the respondent State itself made it plain, by its arguments, that its purpose was very clearly to exclude consideration of each and every human rights violation that had originated in the internal armed conflict which plagued the country and its people for more than a decade (1980-1991) from the jurisdiction of the Inter-American Court. In my opinion, the terms of the acceptance of the Court's jurisdiction by the State of El Salvador exceeded the conditions stipulated in Article 62 of the American Convention, by unduly excluding from its possible consideration facts and acts *subsequent* to this acceptance, that "began to be executed" prior to it.

10. The respondent State's objection was thus of a *ratione temporis* and *ratione materiae* nature, forming an *imbroglio* of indeterminate time and broad, general and undefined scope; this objection was accepted by the Court for reasons that I fail to understand, when the Court should have declared them inadmissible and invalid. As I stated in my above-mentioned dissenting opinion:

> "By proceeding in this way, accepting the terms of this preliminary objection, the majority of the members of the Court accepted State voluntarism, leaving unprotected those who consider themselves the victims of the continuing human rights violations of a particular gravity that occurred during the Salvadoran armed conflict, as a result of the documented

practice of the forced disappearance of children and the elimination of their identity and name during this armed conflict."[1] (para. 16)

11. By accepting State voluntarism, the Court limited itself unduly and regressively,[2] and unfortunately it did so in an important human rights case that represents a microcosm of one of the greatest tragedies suffered by the countries of Latin America in recent decades: the tragedy of the children who disappeared in the Salvadoran armed conflict. As I stated in my previous dissenting opinion in this case (judgment on preliminary objections),

> "(...) ironically, in the second operative paragraph of this judgment in the *Serrano Cruz Sisters v. El Salvador*, what has been transformed into a "continuing situation" by a decision of the majority of the members of the Court, is not the *situation* allegedly violating human rights that was submitted to the Court's consideration and decision, but rather the continuing situation imposed by the State on the Court that prevents it from exercising its jurisdiction; namely, to examine and rule on the matter – which, in my opinion, is almost a juridical absurdity. It is well known that the history of juridical thought, and even human thought in general, does not make linear progress, but I sincerely hope that, in a temporal dimension, the second operative paragraph of this judgment of the Court is only a stumbling block that has to be overcome, a mishap on the long road that has to be traveled.
>
> In keeping with the Court's recent case law, its judgment in the *Trujillo Oroza* case (*supra*), its abovementioned judgments on competence in the *Constitutional Court* and *Ivcher Bronstein* cases, and on preliminary objections in the *Hilaire*, *Benjamin* and *Constantine* cases, are also notable international advances in international case law in general and its legal grounds. The last two cases are today part of the history of human rights in Latin America, with widespread positive repercussions on other continents; moreover, they have created expectations of continued progress in the Court's case law in the same direction."[3] (paras. 22 and 23).

12. The consequences of the Court's decision in the previous judgment on preliminary objections in this case, extend to this judgment on merits and reparations.

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[1] For a report that reveals that human cruelty has no limits, or borders (since this practice occurred in internal armed conflicts in other countries also) cf. Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos, *El Día Más Esperado - Buscando a los Niños Desaparecidos de El Salvador*, San Salvador, UCA Editores, 2001, pp. 11-324; Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos, *La Problemática de Niñas y Niños Desaparecidos como Consecuencia del Conflicto Armado Interno en El Salvador*, San Salvador, APBNND, 1999, pp. 4-80; Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos, *La Paz en Construcción - Un Estudio sobre la Problemática de la Niñez Desaparecida por el Conflicto Armado en El Salvador*, San Salvador, APBNND, [2002], pp. 3-75; Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos, "*En Búsqueda: Identidad - Justicia - Memoria*", 4 *Época* - San Salvador (2003), pp. 3-15; and cf. Amnesty International, *El Salvador - Dónde Están las Niñas y los Niños Desaparecidos?* London/San Salvador, A.I., 2003, pp. 1-10. Cf. also: Office of the Ombudsman, *Caso Ernestina and Erlinda Serrano Cruz* (Informe de la Sra. Procuradora para la Defensa de los Derechos Humanos sobre las Desapariciones Forzadas de las Niñas, Ernestina and Erlinda Serrano Cruz, Su Impunidad Actual y el Patrón de la Violencia en que Ocurrieron Tales Desapariciones), San Salvador, PDDH, 2004, pp. 1-169 (internal circulation).

[2] Previously, for example, in *Trujillo Oroza v. Bolivia* (judgment on merits of February 27, 2002), the Court considered the continued crime integrally, as a whole, as it should be – which meant, as I stated in my separate opinion in this case (paras. 2-19), that it is possible to overcome the contingencies of the classic principles of the law of treaties when there is awareness of this need; *boni judicis est ampliare jurisdictionem*. Thus the Court gave expression to the superior values that underlie the norms for the protection of human rights, shared by the whole international community (paras. 20-22). In addition, in its judgments on preliminary objections in the *Hilaire* case (and in the *Benjamin* and *Constantine* cases (2001), with regard to Trinidad and Tobago), the Inter-American Court considered rightly that, if it accepted the limitations filed by the States in their own terms in the instruments accepting its compulsory jurisdiction, this would deprive it of its powers and make the rights protected by the American Convention illusory (para. 93, and cf. para. 88).

[3] Cf., e.g. A. Salado Osuna, *Los Casos Peruanos ante la Corte Interamericana de Derechos Humanos*, Lima, Edit. Normas Legales, 2004, pp. 94-131.

Constricted by the hermeneutic hermetism of its previous judgment on preliminary objections in this case, the Court eluded the necessary development of case law to be consequent with its advanced evolutionary interpretation of the American Convention. This evolutionary interpretation is applicable, I believe, in relation to the provisions of the American Convention of both a substantive and procedural nature.[4]

II. A lost opportunity to develop case law

1. The relevance of the right to identity

a) The meaning and scope of the right to identity

13. Given the circumstances of this case, I do not see how it is possible to avoid the question of the *right to identity* of the two sisters who are still disappeared, Ernestina and Erlinda Serrano Cruz. It is an issue on which the Court should have *developed case law*, because, in my opinion, there is no way in which the right to identity can be disassociated from the legal personality of the individual as a subject of domestic and international law. Therefore, the Court should have examined jointly the alleged violations in this case to the right to a name (Article 18 of the American Convention) and the rights of the family (Article 17 of the Convention). Respect for the right to identity enables the individual to defend his rights and, consequently, also has an impact on his legal and procedural capacity in both domestic and international law.

14. The right to identity presumes the right to know personal and family information, and to have access to this, to satisfy an existential need and safeguard individual rights. This right also has an important cultural (in addition to social, family, psychological and spiritual) content, and is essential for relationships between each individual and the rest of society, and even for his understanding of the outside world, and his place in it.

15. Without a specific identify, one is not a *person*. The individual is constituted as a being that includes his supreme purpose within himself, and realizes this throughout his life, under his own responsibility. In this optic, safeguarding his right to an identity becomes essential. The legal personality is expressed as a legal category in the sphere of law, as the unitary expression of the aptitude of a human being to be a holder of rights and obligations at the level of regulated human relations and behavior.[5]

16. The right to identity expands the protection of the human being; it exceeds the category of subjective rights rooted in the sphere of law; it also supports the legal personality as a category in itself in the conceptual sphere of law. The identity expresses what is most personal in each human being, extending to his relationships

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[4] Cf. A.A. Cançado Trindade, "The Interpretation of the International Law of Human Rights by the Two Regional Human Rights Courts, *in Contemporary International Law Issues: Conflicts and Convergence* (Proceedings of the III Joint Conference ASIL/Asser Instituut, The Hague, July 1995), The Hague, Asser Instituut, 1996, pp. 157-162 and 166-167; A.A. Cançado Trindade, "Le développement du Droit international des droits de l'homme à travers l'activité et la jurisprudence des Cours Européenne et Interaméricaine des Droits de l'Homme" (Discours du Président de la Cour Interaméricaine des Droits de l'Homme), *in* CourEDH, *Cour Européenne des Droits de l'Homme - Rapport annuel 2003*, Strasbourg, CourEDH, 2004, pp. 41-50; A.A. Cançado Trindade, "La Interpretación de Tratados en el Derecho Internacional y la Especificidad de los Tratados de Derechos Humanos, *in Estudios de Derecho Internacional en Homenaje al Prof. E.J. Rey Caro* (ed. Z. Drnas de Clément), vol. I, Córdoba/Argentina, Ed. Drnas/Lerner, 2003, pp. 747-776.

[5] Cf., in this regard, e.g., L. Recaséns Siches, *Introducción al Estudio del Derecho*, 12a. ed., Mexico, Ed. Porrúa, 1997, pp. 150-151, 153, 156 and 159.

with his fellow human being and with the outside world. The concept of the right to identity began to be developed more thoroughly in the 1980s and 1990s.

17. The concept of individual *subjective rights* has a longer history, originating in particular in the jusnaturalism school of thought in the seventeenth and eighteenth centuries, and systematized in legal doctrine throughout the nineteenth century. However, in the nineteenth century and at the beginning of the twentieth century, this concept continued to be framed in domestic public law, emanating from the public authorities, and influenced by legal positivism.[6] Subjective rights were conceived as the prerogative of the individual as defined by the legal system in question (objective law).[7] It is not surprising that the right to identity transcends subjective rights.

18. However, as I stated in my concurring opinion in the Court's Advisory Opinion No. 17 on the *Juridical Status and Human Rights of the Child* (2002), it cannot be denied that:

> "The crystallization of the concept of individual subjective right, and its systematization, achieved at least an advance towards a better understanding of the individual as a *titulaire* of rights. And they rendered possible, with the emergence of human rights at international level, the gradual overcoming of positive law. In the mid-XXth century, the impossibility became clear of the evolution of Law itself without the individual subjective right, expression of a true "human right."[8]
>
> The emergence of universal human rights, as from the proclamation of the Universal Declaration of 1948, came to expand considerably the horizon of contemporary legal doctrine, disclosing the insufficiencies of the traditional conceptualization of the subjective right. The pressing needs of protection of the human being have much fostered this development. Universal human rights, superior to, and preceding, the State and any form of politico-social organization, and inherent to the human being, affirmed themselves as opposable to the public power itself.
>
> The international juridical personality of the human being crystallized itself as a limit to the discretion of State power. Human rights freed the conception of the subjective right from the chains of legal positivism. If, on the one hand, the legal category of the international juridical personality of the human being contributed to instrumentalize the vindication of the rights of the human person, emanated from International Law, - on the other hand the *corpus juris* of the universal human rights conferred upon the juridical personality of the individual a much wider dimension, no longer conditioned by the law emanated from the public power of the State " (paras. 47 and 49-50).

19. The right to identity reinforces the protection of human rights, protecting each individual against the denigration or violation of his "personal truth."[9] The right to identity, which encompasses the attributes and characteristics that individualize each human being, seeks to ensure that the individual is faithfully represented in his projection towards his social environment and the outside world.[10] Hence, its relevance

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[6] L. Ferrajoli, *Derecho y Razón - Teoría del Garantismo Penal*, 5a. ed., Madrid, Ed. Trotta, 2001, pp. 912-913.

[7] Ch. Eisenmann, "Une nouvelle conception du droit subjectif: la théorie de M. Jean Dabin", 60 *Revue du droit public et de la science politique en France et à l'étranger* (1954) pp. 753-774, esp. pp. 754-755 and 771.

[8] J. Dabin, *El Derecho Subjetivo*, Madrid, Ed. Rev. de Derecho Privado, 1955, p. 64.

[9] C. Fernández Sessarego, *Derecho a la Identidad Personal*, Buenos Aires, Edit. Astrea, 1992, pp. 99-100 and 126.

[10] Cf. *ibid*., pp. 113 and 115.

which has a direct impact on the legal personality and capacity of the individual in both domestic and international law.

b) Components of the right to identity

20. Even thought the right to identity is not expressly established in the American Convention, its material content is implied, *in the circumstances of the specific case*, particularly from Articles 18 (Right to a Name) and 17 (Rights of the Family) of the American Convention, in relation to Article 1(1) thereof. The violation of these and other rights expressly established in the American Convention results in the obligation of the respondent State to make reparation.

21. The right to identity, like the right to the truth, is inferred by specific rights embodied in the American Convention; it is more a necessary development of case law that, in turn, leads to the progressive development of the *corpus juris* of international human rights law. Thus, other international human rights instruments – subsequent to the American Convention on Human Rights, such as the 1989 United Nations Convention on the Rights of the Child[11] and the 1990 United Nations Convention on the Protection of the Rights of All Migrant Workers and their Families, effectively recognize the right to identity as such.[12]

22. The right to identity, in *the Serrano Cruz Sisters* case heard under the American Convention, is inferred particularly from the right to a name and the rights of the family (Articles 18 and 17 of the Convention, respectively). But, in other circumstances, in another case, it could equally be inferred from other rights embodied in the Convention (such as the right to juridical personality (Article 3); the right to personal liberty (Article 7); the right to freedom of conscience and religion (Article 12); the right to freedom of thought and expression (Article 13), and the right to nationality (Article 20)).

23. The right to a name, established in the American Convention (Article 18), is also expressly recognized in the Convention on the Rights of the Child (Article 7(1)) and in the African Charter on Human and Peoples' Rights (Article 6(1)). And, although the European Convention on Human Rights does not establish it expressly, the European Court of Human Rights has stated that this right is inferred by Article 8 (Right to Private and Family Life) of the Convention.

24. The European Court understands that, "the name of an individual concerns his private and family life, because it is a means of personal identification and a connection with the family."[13] What is involved is not the name *per se*, but rather the name as an "asset of personal identity," designating the individual, who is identified with it,[14] and by which he exercises and defends his individual rights. The right to identity, made up of the material content of the right to a name and the rights of the family, not only

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[11] In particular Articles 7 and 8.

[12] Also, in a world marked, nowadays, by so many internal armed conflicts, which victimize women and children particularly, it is not surprising that the United Nations General Assembly has urged and called on all the States Members to respect the right of children to preserve their identity (including respect for the rights to a name and family relationships (resolution 58/57 of 22 December 2003).

[13] Cf. ECourtHR, *Stjerna v. Finlandia*, Judgment of November 25, 1994, Series A, no. 299-A, p. 60, para. 37; ECourtHR, *Burghartz v. Suiza*, Judgment of February 22, 1994, Series A, no. 280-B, p. 28, para. 24.

[14] C. Fernández Sessarego, *op. cit. supra* no. (9), pp. 25 and 75.

expands the list of individual rights, but also contributes to strengthening the protection of human rights.

25. Its other component in this case, the rights of the family, is expressly established in both the American Convention (Article 17) and in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador, Article 15), among other international treaties.[15] In its Advisory Opinion No. 17 on the *Juridical Status and Human Rights of the Child*, the Court stated that recognition of the family as a natural and fundamental component of society, with the right to protection by society and the State was a fundamental principle of international human rights law;[16] in the words of the Court,

> "In principle, the family should provide the best protection of children against abuse, abandonment and exploitation. And the State is under the obligation not only to decide and directly implement measures to protect children, but also to favor, in the broadest manner, development and strengthening of the family nucleus. In this regard, "[r]ecognition of the family as a natural and fundamental component of society," with the right to "protection by society and the State," is a fundamental principle of International Human Rights Law, enshrined in Articles 16(3) of the Universal Declaration, VI of the American Declaration, 23(1) of the International Covenant on Civil and Political Rights and 17(1) of the American Convention [on Human Rights]" (para. 66).

The Court added that the right to protection of the family acquires even greater relevance when a child is separated from its family.[17] In this case, the rights of the family require the State to take positive measures.

c) The key importance of the rights of the child

26. In the public hearing before the Court in this case on September 7 and 8, 2004, the Director of the *Asociación Pro-Búsqueda* (J.M.R. Cortina Garaícorta) gave testimony[18] and, among other probative elements considered by the Court, described the context of the instant case:

> "(...) During the armed conflict in El Salvador, there was a systematic pattern of child disappearance during military operations. The case of Erlinda and Ernestina fits perfectly into the general pattern of child disappearance during the conflict. The Armed Forces and the humanitarian institutions that kept the children did nothing to find their families; they were taken to orphanages and to military barracks or they were 'sold in adoption.' It was sufficient for a judge to declare that a child had been materially and morally abandoned for its adoption to be authorized. These adoptions were based on the lie of abandonment and that the children were orphans. 126 children have been found abroad, in 11 countries of America and Europe. All of them have been naturalized as citizens of the country in which they live and almost all of them do not speak their mother tongue. (...)

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[15] Also in the United Nations Covenant on Civil and Political Rights (Article 23), the United Nations Covenant on Economic, Social and Cultural Rights(Article 10(1)), the United Nations Convention on the Rights of the Child (Article 8), The European Convention on Human Rights (Article 8). and cf., also, on family reunification, Protocol II to the 1949 Geneva Conventions on international humanitarian law (Article 4(3)(b)).

[16] On the importance of the principles of international human rights law in international public law and in all legal systems, cf. ICourtHR, Advisory Opinion on the *Juridical Status and Rights of Undocumented Migrants* (OC-18/03, of September 17, 2003, Series A, no. 18), concurring opinion of Judge A.A. Cançado Trindade, pp. 213-267, paras. 1-89.

[17] Cf. I/ACourtHR, *Juridical Status and Human Rights of the Child* Advisory Opinion OC-17/02, of August 28, 2002, Series A, no. 17, pp. 105-106, para. 71.

[18] Its transcription is summarized in paragraph 36(a)(3) of this judgment, where the quotation reproduced below is to be found.

> (...) The *Asociación Pro-Búsqueda* was established in August 1994. Up until September 2004, it had resolved 246 requests to trace children and still had 475 cases to resolve. It knows of more than 40 cases of children who disappeared during the armed conflict who are in the homes of Army officers; it was *vox populi* that children were given away in the military barracks. (...)
>
> (...) The March 1993 report of the Truth Commission did not mention the case of the disappeared children, probably because it did not have time to investigate the facts of the disappearance of children. The Truth Commission included the disappearance of children in the global situation of disappearances, and described 30 cases of major massacres and some cases of disappearances as examples. (...)"

27. In his testimony before the Court, the Director of the *Asociación Pro-Búsqueda* also stated that:

> "It was a phenomenon that occurred in El Salvador; usually, when these children were brought to the shelters, a judge's decision [...] declaring that the children had been materially and morally abandoned was sufficient for the judge to order their adoption. [...] The costs of the adoptions depended on where they were carried out; they ranged from five to eight thousand dollars, up to twenty thousand. We have one case in which we were told of a "fattening-up" home, in file 36-A-12-83; it states that the cost of these children, who had been abducted [...] was from 15 to 20 thousand dollars; money which, afterwards, these people shared among themselves and with others [...]. [...] this home, [...] I would call it a child trafficking home [...]. I believe that these adoptions, even if they may have been legal, because they were authorized by a judge, were unlawful, because they were based on the lie [...] that the children had been orphaned or materially and morally abandoned."[19]

28. Given the circumstances of this case, the Court should have also considered the alleged violations of the rights of the child, bearing in mind the provision of Article 19 of the American Convention which establishes that "every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State." This provision occupies a central position in the consideration of this case which occurred in the context of the tragedy of the children who disappeared during the Salvadoran armed conflict from 1980-1991. In my opinion, the Court should have established that, pursuant to Article 19 of the Convention, the rights of the child had been violated in the instant case to the detriment of the sisters, Ernestina and Erlinda Serrano Cruz.

29. The two sisters, who continue disappeared to this day, were children when the original facts under investigation by the Chalatenango Trial Court occurred and, today, they would be 29 years old and probably 27 years old, respectively. The case occurred in the context of a true human tragedy (during the 1980-1991 Salvadoran armed conflict), about which the *Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos* has gathered information that speaks for itself,[20] and cannot be avoided. The victims were the disappeared children and also their immediate families, according to the expanded

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[19] ICourtHR, Transcription of the public hearing on preliminary objections and possible merits, reparations and costs in the case of the Serrano Cruz Sisters v. El Salvador, held on September 7 and 8, 2004, at the seat of the Court, San José, Costa Rica, Inter-American Court of Human Rights, 2005, p. 15 of this testimony. (for internal circulation) [in Spanish only]

[20] Cf., e.g., Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos, *La Problemática de Niñas y Niños Desaparecidos como Consecuencia del Conflicto Armado Interno en El Salvador*, El Salvador, San Salvador, 1999, pp. 29-35; Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos/Save the Children, *Un Estudio sobre la Problemática de la Niñez Desaparecida por el Conflicto Armado en El Salvador*, El Salvador, San Salvador, 2002, pp. 24-26.

notion of victim[21] supported by the *consistent case law* of the Court since *Blake v. Guatemala* (judgment on merits of January 24, 1998).

30. However, in a case such as *The Serrano Cruz Sisters v. El Salvador*, which occurred in the context of a true human tragedy that resulted in hundreds of victims, the human rights violations, in addition to affecting the direct victims and the indirect victims (their next of kin), had an impact on the whole social tissue. In this regard, I stated in my separate opinion in the "Street Children" case (Villagrán Morales et al. *v. Guatemala*, judgment on reparations, of May 26, 2001), that:

> "(..) although those responsible for the established order do not realize it, the suffering of those who are excluded is inexorably projected on the whole social body. [...] Human suffering has both an individual and a social dimension. Thus, the damage caused to each human being, however humble, affects the whole community. As this case reveals, the victims proliferate among the immediate surviving next of kin who are also forced to live with the torment of the silence, indifference and oblivion of those around them" (para. 22).

31. In this case, the most recent inventory drawn up by the *Asociación Pro-Búsqueda*, which forms part of the case file, lists 698 children who disappeared during the Salvadoran armed conflict, aged at the time from less than one year to 18 years old.[22] Faithful compliance with Article 19 of the American Convention, in circumstances such as those of the instant case, which occurred in the context of this human tragedy, require the immediate search for, tracing, finding, family reunion,[23] and psychological treatment of the disappeared children who are found. Most efforts in this regard have been undertaken by civil society entities (such as, above all, the *Asociación Pro-Búsqueda*[24]), moved by human solidarity, and not by the public authorities,[25] who have the duty to protect all those subject to their jurisdiction.

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[21] A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International de La Haye* (1987), chapter XI ("The Evolution of the Notion of Victim or of the Condition of the Complainant in the International Protection of Human Rights"), pp. 243-299.

[22] Some of the children identified were found alive in different situations, in orphanages or with families in El Salvador and abroad, in the Americas and in Europe (through *de facto* "adoptions" or undue appropriation by civilians and members of the Army). The *Asociación Pro-Búsqueda* is investigating 126 cases of international adoptions, and also cases of alleged victims of the illicit trafficking of children (with the possible alteration of first and last names).

[23] As required also by the United Nations Convention on the Rights of the Child, Article 39.

[24] As expressly stated by the United Nations Committee on the Rights of the Child under the Convention on the Rights of the Child (UN, doc. CRC/C/15/Add.232, of 30 June 2004, para. 31), which attributed the tracing and identification of almost 250 children principally to the *Asociación Pro-Búsqueda*, and has expressed its "concern" because the State had not "played a larger role in the investigation into the disappearance of 700 other children" during the Salvadoran armed conflict from 1980-1991 (*Ibíd*., p. 7, para. 31).

[25] The respondent State even questioned the very existence of the sisters, Erlinda and Ernestina Serrano Cruz, in this case before the Inter-American Court, and did not adopt all necessary measures to determine their whereabouts and safeguard their right to identity (which includes the right to a name and the right to the protection of the family), a situation which persists until today. The Serrano Cruz sisters, who continue disappeared, were sought by their mother before she died, and continue to be sought by their living siblings. Moreover, the United Nations Human Rights Committee, under the Covenant on Civil and Political Rights, has urged the State of El Salvador to present "detailed information on the number of children found alive and those who perished during the 1980-1991 armed conflict; UN, document CCPR/CO/78/SLV, of 22 August 2003, p. 5, para. 19.

d) The fundamental right to a decent life

32. I do not see how to avoid considering the right to life, as the Inter-American Court has in this case, to my regret. In my opinion, the hypothesis and the constant references in considering paragraphs 130 to 132 of this judgment are entirely unsatisfactory. In its acclaimed judgment on merits in the *"Street Children" case (Villagrán Morales et al. v. Guatemala*, of November 29, 1999, paragraph 144), which already belongs to the history of the international protection of human rights in Latin America, this same Court stated that:

> "The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it"

33. The State has not complied with this obligation in the instant case. The right to life, in the sense defended by the Court five years ago, was violated in this case, to the detriment of the sisters, Ernestina and Erlinda Serrano Cruz, who are still disappeared. I consider that this is what the Court should have established in this judgment. I cannot see how it can be maintained that two children who disappeared in an armed conflict have had their right to a decent life preserved. Nor do I see how it is possible to fail to rule in this regard, as the Court failed to do in this judgment. Moreover, I do not see how the two children who are still disappeared have been able to develop an authentic life project. The two disappeared sisters are innocent and silent, but not forgotten, victims of the age-old violence of man against man.

34. What is the reason for armed conflicts? There is no reason. They lead to nothing; they are a desperate race towards nothing. All combatants become pathetic objects of the conflict. They no longer think; they just kill, abduct children (ending their innocence and identity), and become engines of destruction. They are unable to think, because they have entered the vacuum of nothingness. They have brutalized themselves, because killing and destroying is their profession; for nothing. Absolutely nothing. Already in the eighth century A.D., Homer, in the *Iliad*, affirmed with insuperable force and strength of expression, with penetrating words that should be read attentively by the numerous unscrupulous and irresponsible apologists of the use of force nowadays:

> "War - I know it well, and the butchery of men.
> Well I know, shift to the left, shift to the right
> my tough tanned shield. That's what the real drill,
> defensive fighting means to me. I know it all,
> (...) I know how to stand and fight to the finish,
> twist and lunge in the War-god's deadly dance.
> (...) Ah for a young man
> all looks fine and noble if he goes down in war,
> hacked to pieces under a slashing bronze blade -
> he lies there dead... but whatever death lays bare,
> all wounds are marks of glory. When an old man's killed
> and the dogs go at the gray head and the gray beard
> (...) - that is the cruelest sight
> in all our wretched lives!"[26]

[26] Homer, *The Iliad*, N.Y./London, Penguin Books, 1991 [re-ed.], pp. 222 and 543-544, verses 275-278,

35. Given the increasing vulnerability of the individual in our violent world, which has not learned the lessons of the past, the right to life calls for greater protection of the individual, as advocated by this Court in the "*Street Children*" case (*supra*). Another example, along the same lines, is to be found in the recent case law of the European Court of Human Rights: in *Cyprus v. Turkey* (judgment of May 10, 2001), for example, the European Court established that the right to life (Article 2 of the European Convention on Human Rights) had been violated, owing to the failure of the respondent State to comply with the procedural obligation to investigate the whereabouts of the disappeared persons.[27]

36. In its judgments in three other recent cases against Turkey – *Kaya* (February 19, 1998),[28] *Ogur* (May 20, 1999)[29] and *Irfan Bilgin* (July 17, 2001)[30] – the European Court also maintained that Article 2 of the European Convention (right to life) had been violated owing to the failure of the respondent State to conduct an "effective investigation" into the circumstances of the death of the respective victims. In *Kiliç v. Turkey* (judgment of March 28, 2000), the European Court established that this right had been violated owing to the failure of the public authorities to take "reasonable measures available to them to prevent a real and immediate risk to the life of Kemal Kiliç";[31] the Court took identical decisions in the *Mahmut Kaya* (Judgment of March 28, 2000)[32] and *Akkoç* (Judgment of October 10, 2000)[33] cases, both relating to Turkey.

37. In *Velikova v. Bulgaria* (Judgment of October 4, 2000), the European Court again declared that Article 2 of the Convention (right to life) had been violated owing to the lack of an "effective investigation" into the death of the victim;[34] that Court considered that:

> "(...) the right to life ranks as one of the most fundamental provisions in the Convention. In the light of the importance of the protection afforded by Article 2, the Court must subject to the most careful scrutiny complaints about deprivation of life."[35]

38. In *Nachova and others v. Bulgaria* (Judgment of February 26, 2004), when deciding that Article 2 of the European Convention (together with Article 14) had been violated, the European Court reaffirmed the fundamental nature of the non-derogable right to life (under Article 2 of the Convention), and added that:

280-281 and 83-89, respectively.

27 ECourtHR, petition No. 25781/94, *Cyprus v. Turkey*, paras. 132-136.

28 ECourtHR, petition No. 158/1996/777/978, *Kaya v. Turkey*, para. 92.

29 ECourtHR, petition No. 21594/93, *Ogur v. Turkey*, para. 93.

30 ECourtHR, petition No. 25659/94, *Irfan Bilgin v. Turkey*, para. 145.

31 ECourtHR, petition No. 22492/93, *Kiliç v. Turkey*, para. 77.

32 ECourtHR, petition No. 22535/93, *Mahmut Kaya v. Turkey*, para. 101.

33 ECourtHR, petitions Nos. 22947/93 and 22948/93, *Akkoç v. Turkey*, para. 94.

34 ECourtHR, petition No. 41488/98, *Velikoca v. Bulgaria*, para. 84.

35 *Ibid*., para. 68.

> "The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted so as to make its safeguards practical and effective."[36]

39. The two international human rights courts (the Inter-American and the European Courts) have thus proceeded to develop case law on the right to life, based on the reiterated affirmation of its fundamental nature, either by recognizing its comprehensive normative or material content, or by surrounding this right with all the measures – regarding both prevention and investigation – that tend to maximize its protection. We must continue resolutely in this direction.

e) Conclusion

40. In my concurring opinion in *Five Pensioners v. Peru* (Judgment on merits and reparations of February 29, 2003) I recalled that:

> "(...) The [Inter-American] Court has consciously moved in the correct direction, in the exercise of one of its inherent powers, and taking both the American Convention and its *interna corporis* as living instruments, that require an *evolutionary* interpretation (as stated in its *consistent case law),*[37] to attend to the changing needs of the protection of the individual" (para. 16).

41. The Inter-American Court, in keeping with its evolutionary interpretation of the American Convention,[38] could not avoid, as it did in this judgment, proceeding to develop the necessary case law to which I referred above. In summary, I do not see how the Court could fail to conclude that the respondent State has violated the right to identity (with its components embodied in Articles 18 and 17 of the American Convention, *supra*, on the rights to a name and to the protection of the family) in relation to Article 1(1) of the Convention, to the detriment of Ernestina and Erlinda

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[36] ECourtHR, petitions Nos. 43577/98 and 43579/98, *Nachova and Others v. Bulgaria*, para. 92, and cf. para. 175.

[37] Cf., in this regard, the *obiter dicta in*: Inter-American Court of Human Rights (ICourtHR), Advisory Opinion OC-10/89, on the *Interpretation of the American Declaration on the Rights and Duties of Man in the Framework of Article 64 of the American Convention on Human Rights*, of July 14, 1989, paras. 37-38; ICourtHR, Advisory Opinion OC-16/99, on the *Right to Information on Consular Assistance within the Framework of Due Process of Law*, of October 1, 1999, paras. 114-115, and concurring opinion of Judge A.A. Cançado Trindade, paras. 9-11; ICourtHR, the *"Street Children" case (Villagrán Morales et al. v. Guatemala*), judgment on merits of November 19, 1999, paras. 193-194; ICourtHR, *Cantoral Benavides v. Peru*, judgment on merits of August 18, 2000, paras. 99 and 102-103; ICourtHR, *Bámaca Velásquez v. Guatemala*, judgment on merits of November 25, 2000, Separate opinion of Judge A.A. Cançado Trindade, paras. 34-38; ICourtHR, the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, judgment on merits and reparations of August 31, 2001, paras. 148-149; ICourtHR, *Bámaca Velásquez v. Guatemala*, judgment on reparations of February 22, 2002, separate opinion of Judge A.A. Cançado Trindade, para. 3.

[38] Illustrated, with such emphasis, in its three historic and pioneering Advisory Opinions Nos. 16, 17 and 18, regarding, respectively, *The Right to Information on Consular Assistance in the Framework of Due Process of Law* (OC-16/99, of October 1, 1999, Series A, no. 16, paras. 32, 34, 36 and 42); *Juridical Status and Human Rights of the Child* (OC-17/02, of August 28, 2002, Series A, no. 17, paras. 20-22); and *Juridical Status and Human Rights of Undocumented Migrants* (OC-18/03, of September 17, 2003, Series A, no. 18, paras. 54 and 120). and also in its judgments in the *"Street Children" case (Villagrán Morales et al. v. Guatemala)*, judgment of November 19, 1999, Series C, no. 63, paras. 192, 193 and 194; *Cantoral Benavides v. Peru* judgment of August 18, 2000, Series C, no. 69, paras. 98, 100 and 101; *Bámaca Velásquez v. Guatemala*, judgment of November 25, 2000, paras. 126, 157 and 209; *the Gómez Paquiyauri Brothers v. Peru*, judgment of July 8, 2004, Series C, no. 110, paras. 165 and 166; the *"Children's Rehabilitation Institute" v. Paraguay*, judgment of September 2, 2004, Series C, no. 112, para. 148; and *Tibi v. Ecuador*, judgment of September 7, 2004, Series C, no. 114, para. 144, among others.

Serrano Cruz, because it has not determined the whereabouts of the two sisters, who are still disappeared, re-establishing their names and family ties.

42. Also, I do not see how the Court could fail to conclude that the respondent State has violated the rights of the child (Article 19 of the Convention), in relation to Article 1(1), to the detriment of Erlinda Serrano Cruz, who was under 18 years old when El Salvador accepted the Court's contentious jurisdiction. And, I do not see how the Court could fail to reaffirm the right to life in its most ample dimension, meaning a decent life, which was not respected by the respondent State to the detriment of the sisters, Ernestina and Erlinda Serrano Cruz, who are still disappeared. I can only hope that this judgment on merits and reparations, and the previous judgment on preliminary objections in the instant case are only a momentary setback and very soon the Inter-American Court will return to its line of evolutionary interpretation and its case law of the past five years, which emancipates the individual and has placed the Court in the vanguard of the international protection of human rights.

III. Subsistence of State responsibility even though the Court limited its own jurisdiction

43. There is a final very important matter to examine in this dissenting opinion. Even though the Inter-American Court, in a decision which I believe to be incorrect, has limited its own jurisdiction, to the point of depriving itself of any consideration of the forced disappearance of the sisters, Ernestina and Erlinda Serrano Cruz, which still persists, the responsibility of the respondent State still subsists for the facts that have been proved in this case. Since the views expressed in my previous opinions for this Court appear to have evaporated with the winds of time, as if I was just talking to myself, I will rescue my reflections of almost a decade ago from apparent *oblivion*.

44. I do so, knowing that it is possible that no one will take them into account, in a post-modern world that cultivates "virtual reality"; in which, people increasingly have many opinions but read very little, talk a great deal but think very little. I do so, even if it is just for myself, because, like Ionesco's rhinoceros, *je ne capitule pas* – even in a world in which the energies of those who practice the law of post-modernity seem to be almost entirely occupied by interminable[39] meetings and seminars and by rushed and frenetic computer screens, and not by the silent, tranquil, supportive and instructive company of books that invite reflection. In brief, I do it moved by a sentiment of duty as a judge of this Court.

45. As I stated in my dissenting opinion (paragraph 24(19)) in *Genie Lacayo v. Nicaragua* (order of the Court on the request for review of judgment of September 13, 1997), and in my separate opinion (paras. 32-36) in *Blake v. Guatemala* (judgment on merits of January 24, 1998), I understand that it is as of the accession to or ratification of the American Convention on Human Rights that a new State Party undertakes to respect all the rights protected by the American Convention and to ensure their free and full exercise (starting with the fundamental right to life). The acceptance by a State of the compulsory jurisdiction of the Court refers only to the legal proceedings before the Court in a specific human rights case.

46. Even though, the Court can only rule on a case after this acceptance of its jurisdiction by the State, in accordance with Article 62 of the Convention, this does not

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[39] Not to mention insupportable.

exempt the State from its responsibility for violations of the rights embodied in the Convention from the time it becomes a party to it. Even though the Court is unable to rule on a case before its contentious jurisdiction has been accepted (a question of *jurisdiction*), the treaty-based obligations of the State Party, assumed from the moment it accedes to the Convention or ratifies it, subsist (a question of *international responsibility*).

47. Hence, the moment from which El Salvador undertook to protect all the rights embodied in the American Convention, starting with the fundamental rights to a decent life and to humane treatment (Articles 4 and 5), was the moment of its ratification of the Convention on June 23, 1978 – that is, prior to all the events that occurred during the Salvadoran armed conflict (1980-1991). The time following its acceptance of the Court's contentious jurisdiction, on June 6, 1995, would only determine the possibility of having recourse to the Court to decide a specific case under the Convention, in the terms of Article 62 thereof.

48. But, it would never determine this based on a State-imposed restriction that is not established in Article 62 of the Convention, and even less if the intention was to encompass – as it did – facts and acts that "began to be executed" prior to the date of the State's acceptance of the Court's contentious jurisdiction and *that continue following* this date and *until the present.* This possibility simply does not exist under the American Convention, or under treaty law, applied from the perspective of an international human rights tribunal such as the Inter-American Court.

49. The issue of invoking the State party's *responsibility* for complying with its treaty-based obligations should not be confused with the issue of the State's *submission* (moreover, in terms that I consider unacceptable) to the Court's *jurisdiction*. The two become possible at different moments: the former, which is of a substantive or material nature, as of the ratification of the Convention by the State (or as of its accession thereto), and the latter, which is of a jurisdictional nature, as of its acceptance of the Court's contentious jurisdiction. Each and every State Party to the Convention, even if it has not accepted the compulsory jurisdiction of the Court - or has accepted it with limitations *ratione temporis* - remains bound by the provisions of the Convention from the time of its ratification or of accession thereto.

50. Even though most members of the Court have not wished to rule on all the rights violated in this case of the *Serrano Cruz Sisters,* owing to the "hybrid limitation" *ratione temporis* and *ratione materiae* of the Court's jurisdiction, nothing prevented them from stating that the respondent State in the instant case, as well as all the States Parties to the American Convention on Human Rights, are bound by all the protected rights from the date on which they ratify or accede to the Convention.

51. Despite the Court's silence on the rights to life, to a name, and to the protection of the family, and the rights of the child, the observations made by the Inter-American Commission on Human Rights on all these rights in its report No. 37/03 of March 4, 2003, in this case are still valid.[40] Since, together with the Court, the Commission has competence "with respect to matters relating to the fulfillment of the commitments made by the States Parties" (Article 33 of the American Convention), the latter undertake to heed the measures adopted in its reports. Consequently, El Salvador, as a

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[40] ICHR, *Report 37/03 - Case 12,132 (El Salvador)*, doc. OEA/Ser.L/V/II.117-Doc.43, of March 4, 2003, p. 33, and cf. pp. 19-34.

State Party to the Convention, will know that it should comply not only with the operative paragraphs of this judgment of the Court, but also bear in mind *bona fide* the considerations of the other supervisory organ of the American Convention and the Court's associate, and the other treaty-based obligations relating to the rights protected by the American Convention that arise from its ratification of the latter.

IV. The need for the compulsory international jurisdiction of the Inter-American Court to be automatic

52. The Inter-American Court of Human Rights[41] has, on different occasions, been imposing limits to excesses of State voluntarism. To my satisfaction, over the last five years, this Court has safeguarded the integrity of the protection mechanism of the American Convention on Human Rights and also the primacy of considerations of *ordre public* over the "will" of individual States. It has also established higher standards for the conduct of the State and a certain measure of control over undue restrictions by the States, thus strengthening the position of the individual as a subject of international human rights law, endowed with juridical and procedural capacity.

53. With regard to the grounds for its jurisdiction in contentious matters, its judgments on jurisdiction in *the Constitutional Court* and *Ivcher Bronstein v. Peru* cases (1999), and its judgments on preliminary objections in the *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* cases (2001) provide exemplary and eloquent illustrations of its firm position in defense of the integrity of the protection mechanism of the American Convention.[42] I regret, however, that I am unable to say the same with regard to the decision of the Court (on preliminary objections, and merits and reparations) in this case – although I dare hope that the Court will soon return to its cutting-edge case law on the grounds for its jurisdiction in contentious matters, in defense of the individual.

54. In this case, the Court denied itself the possibility of examining the whole of a *continued situation* of forced disappearance of persons, including acts that occurred *after* the acceptance of its jurisdiction in contentious matters by the respondent State, by acceding to an undue restriction imposed by the latter (in its instrument of acceptance), which attempted to remove from the Court's jurisdiction all the acts that constitute the continued situation if they "began to be executed" before the State's said acceptance of the Court's jurisdiction. The Court ceded to the excess of State voluntarism by accepting a "hybrid limitation *ratione temporis* and *ratione materiae*, which is not authorized by Article 62 of the Convention. I regret that I cannot agree with the majority of the members of the Court in this regression in its case law.

55. The notion of *continued situation* was conceived in international human rights law in order to provide protection – for example, in the case of a complex and extremely serious crime such as the forced disappearance of persons[43] - and so as not to deprive an international human rights court of its jurisdiction, as has occurred in this

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[41] In the same way as the European Court of Human Rights.

[42] As do the judgments of the European Court in *Belilos v. Suiza* (1988), *Loizidou v. Turkey* (preliminary objections, 1995), and in *I. Ilascu, A. Lesco, A. Ivantoc and T. Petrov-Popa v. Moldovia and the Russian Federation* (2001).

[43] Which, owing to its "extreme gravity," is "considered as continued or permanent while the fate or whereabouts of the victim has not been established" – as determined in Article III of the Inter-American Convention on the Forced Disappearance of Persons of 1994.

case. The notion of *continued situation*, which constitutes normative progress in international human rights law concerning protection against grave human rights violations, was used here not to expand the protective jurisdiction to the origin of such violations but, the reverse, to remove the respondent State from this jurisdiction until the present, thus depriving the Court – by acceding to this merely formalistic interpretation – of exercising its treaty-based obligation to protect.

56. The notion of *continued situation*, which supports a procedural advance in international human rights law by contributing to the effectiveness of the right of international individual petition, was degraded in this case, because it was used to render this right of petition illusory. Consequently, in this case it was precisely the fundamental clauses (*cláusulas pétreas)* – as I have always called them within this Court[44] – that were removed from the international protection of the American Convention; namely, those relating to the right to individual international petition and to the acceptance of the Court's jurisdiction on contentious matters. In international human rights law, the notion of *continued situation* was conceived to protect individual victims and not the respondent State, as had surrealistically occurred in this case.

57. It was precisely to avoid difficulties such as the one that arose in this case, and that could arise again in future cases that, in the *draft protocol to the American Convention on Human Rights, to strengthen its protection mechanism* (2001) – which I prepared after having been appointed to do so by my colleagues, the judges of the Court – I proposed an amendment to Article 62 of the American Convention in order to make the jurisdiction of the Inter-American Court *automatically compulsory* (for all the States Parties to the Convention and without any interpretative declarations or restrictions), among several other matters.[45] I recalled this proposal in my separate opinions (para. 39) in *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (judgments on preliminary objections of September 1, 2001), and I repeat it with even greater emphasis in this dissenting opinion.

58. My position on this matter is firmly anti-"realist." When I presented this *draft protocol* in my successive reports to the to the General Assembly, Permanent Council, and Committee on Juridical and Political Affairs of the Organization of American States (OAS) in 2001, 2002 and 2003, I remember that no formal objection was made to it; nevertheless, nothing has been done in this regard to date. Perhaps my proposals were also dispersed by the winds of the implacable and cruel passage of time. Fortunately, at the time my reports to the OAS were always very well received by the delegations of the Member States. Nevertheless, at times I detected a look of surprise from a few delegates (as if they had just heard a proposal from a visitor from outer space), although they were always very attentive and polite to me.

59. These few ill-dissimulated looks of surprise caused me a mixture of dismay and sorrow. Indeed, it is difficult to escape the impression that, throughout the history of law, it has been the "realists," in the same way as the positivists, who have least

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[44] A.A. Cançado Trindade, "Las Cláusulas Pétreas de la Protección Internacional del Ser Humano: El Acceso Directo a la Justicia Internacional y la Intangibilidad de la Jurisdicción Obligatoria de los Tribunales Internacionales de Derechos Humanos", *in El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI - Memoria del Seminario* (Noviembre de 1999), vol. I, 2a. ed., San José, Costa Rica, Inter-American Court of Human Rights, 2003, pp. 3-68.

[45] Cf. A.A. Cançado Trindade, *Informe: Bases para un Proyecto de Protocolo a la Convención Americana de Derechos Humanos, para Fortalecer Su Mecanismo de Protección*, tome II, 2a. ed., San José, Costa Rica, Inter-American Court of Human Rights, 2003, pp. 1-64.

understood the relationship between the time factor and law. Imprisoned in their self-sufficiency, which simplifies everything, they continue cultivating a pitifully *static* vision of the legal system and the social acts that it seeks to regulate.

60. "Realists" and positivists have shown that they are blind to the world of *values*, submissive to relations of power and domination, and insensible to the need to situate legal solutions in time, to respond to changing human needs. "Realists" and positivists only known how to work with the present; we cannot expect them to understand what they are unable to express. They suffer from an atemporal shortsightedness that leads them to continue trying to make abstractions of the effects of the passage of time in the search for and application of legal solutions. They are slaves to the primacy of their own conceptual hermetism.

61. Nowadays, in the domain of protection, the instruments of international law must be used to strengthen the international jurisdiction of human rights protection, not to weaken it. It is only in this way that we can continue struggling to preserve the integrity of the protection mechanism of the American Convention on Human Rights. While serving as a judge of this Court, I would not like Article 62 of the American Convention on Human Rights to suffer the same fate as Article 36(2) of the Statute of the International Court of Justice (ICJ).[46] I could not be silent in that event.

62. The automatic nature of the jurisdiction of an international court, such as the Inter-American Court of Human Rights, is a *necessity* for the international community in our region. For those of us who believe in the primacy of law over force,[47] it is an urgent necessity. Moreover, it is already a reality for some international tribunals such as the European Court of Human Rights,[48] the International Criminal Court, and the Court of Justice of the European Communities. The permissive and voluntarist practice under Article 36(2) of the ICJ Statute[49] cannot, in any way, serve as a model for the actions and decisions of the Inter-American Court. The law, which is and must be the same for everyone, is above the 'will" of the States.

63. Hence, the categorical imperative for the compulsory jurisdiction of the Inter-American Court to be automatic, in order to end difficulties such as those that arose in this case. There is no reason for an international human rights tribunal such as the Inter-American Court to accede, as the Court in The Hague has in deciding litigations that are essentially among States, to the extreme expressions of State voluntarism, by accepting undue restrictions formulated by the States in their instruments accepting the optional clause on compulsory jurisdiction (Article 36(2) of the ICJ Statute). The Inter-American Court decides on disputes of another nature, between States and the

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[46] As I explained in detail in my dissenting opinion in the previous judgment of the Court on preliminary objections (2004) in this case of *the Serrano Cruz Sisters v.* El *Salvador*, and also in my separate opinions in this Court's judgments on preliminary objections (2001) in *Hilaire*, *Benjamin* and *Constantine et al.*, in relation to Trinidad and Tobago.

[47] Cf., in this regard, e.g., A.A. Cançado Trindade and A. Martínez Moreno, *Doctrina Latinoamericana del Derecho Internacional*, tome I, San José, Costa Rica, Inter-American Court of Human Rights, 2003, pp. 5-64; A.A. Cançado Trindade and F. Vidal Ramírez, *Doctrina Latinoamericana del Derecho Internacional*, vol. II, San José, Costa Rica, Inter-American Court of Human Rights, 2003, pp. 5-66.

[48] Since Protocol No. 11 to the European Convention on Human Rights came into force.

[49] An attempt has already been made, in vain, to limit the excesses of State voluntarism under that provision; cf. S.A. Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice*, Dordrecht, Nijhoff, 1995, pp. 1-128.

individuals under their respective jurisdictions and if we proceed with the same logic as the inter-State litigation before the ICJ, we will be depriving those individuals of the protection to which they have a right under the American Convention.

64. By virtue of the principle *ut res magis valeat quam pereat*, which corresponds to the so-called *effet utile* (sometimes called the effectiveness principle), which has wide support in case law, the States Parties to human rights treaties must ensure that treaty provisions have the appropriate effects within their respective domestic legal systems. I consider that this principle applies not only to the substantive norms of human rights treaties (i.e. those concerning the protected rights), but also to the procedural norms, particularly those referring to the right of individual international petition and the acceptance of the jurisdiction of the international judicial organs of protection on contentious matters – namely, the fundamental clauses (*cláusulas pétreas*) of the international protection of human rights.

65. These treaty-based norms, which are essential to the effectiveness of the international protection system as a whole, must be interpreted and applied so that their safeguards are truly practical and effective, taking into account the special nature of human rights treaties and their implementation through the collective guarantee. We are privileged to be part of the gratifying historical process of the emancipation of the individual *vis-à-vis* the State and we must act in conformity with this exalted mission.

66. We have to go beyond the mere resolution of specific cases and reveal the nature of law and, imbued with this spirit, indicate how the protection system can evolve to respond to the individual's growing and changing needs for protection. A case such as this one would have been a unique opportunity for the Court to do this; since, it has not done so, I will record my personal observations in this dissenting opinion, in the hope that perhaps they will serve for something more than my imagined dialogue with myself.

V. Epilogue: The time factor and law, the eternal challenge

67. I could not conclude this dissenting opinion in the instant case without referring to my final concern. Time, or more precisely the passage of time, is the greatest enigma of human existence. It has occupied human thought throughout history. It is surrounded by mystery, which has prompted the successive intellectuals who have approached it at very different historical moments to search for a meaning with eloquent forms of expression – as exemplified by the penetrating words in this regard of, for example, Plato in his *Dialogues*, Seneca in his *Letters to Lucilius*, Saint Augustine in his *Confessions*, Marcel Proust in his *À la recherche du temps perdu*, and Jorge Luis Borges in his *Historia de la Eternidad* and his *Elogio de la Sombra*. However, I suspect that no one can say with certainty how he has learned to deal with the passage of time.

68. We know, for example, that chronological time is not biological time, that biological time is not psychological time, that digital time is not existential time. We also know that time is different for each age, that the time of children (who live in the moment) is not the time of adults (who live each day), and that the time of adults is not the time of the elderly (who live their life history). We know that time, which gives children their innocence, ends up allowing the elderly the profit from the lessons of their own existence. But, who can say with any certainty that he knows how to come to terms with the passage of time?

69. The passage of time has also challenged legal science, as I have indicated in several of my opinions in this Court, and in my books.[50] The complexity of the relationship between the time factor and law has been illustrated by the difficulties encountered by the Court to decide this case of the Serrano Cruz sisters. I suspect that despite all its efforts over the past century (for example, clarifying the principle of inter-temporal law[51]), legal science has not learned to come to terms with the passage of time either.

70. As I stated in my separate opinion in *Blake v. Guatemala* (merits, 1998),

> "The time of human beings certainly is not the time of the stars, in more that one sense. The time of the stars, [...] besides being an unfathomable mystery which has always accompanied human existence from the beginning until its end, is indifferent to legal solutions devised by the human mind; and the time of human beings, applied to their legal solutions as an element which integrates them, not seldom leads to situations which defy their own legal logic - as illustrated by the present *Blake* case. One specific aspect, however, appears to suggest a sole point of contact, or common denominator, between them: the time of the stars is inexorable; the time of human beings, albeit only conventional, is, like that of the stars, implacable - as also demonstrated by the present *Blake* case" (para. 6).

71. Eight years later, the result of this case of the Serrano Cruz sisters has also demonstrated this, perhaps even more eloquently (or even alarmingly), because the judgment on merits delivered by the Court in the case, with which I disagree, challenges even more strongly its own juridical logic. We are still in the first stages of developing the treatment that legal science should accord to the difficult relationship between the time factor and law.

72. The temporal dimension is present also in the part of this judgment concerning non-pecuniary reparations, with which I agree. Operative paragraph 10, for example, illustrates this clearly, when it determines correctly that the respondent State must designate a day dedicated to the children who, for different reasons, disappeared during the Salvadoran armed conflict. There is no oblivion; time imbues the history of each and every one of us with memory. I will repeat what I stated in this regard in my separate opinion in the case of *the Plan de Sánchez Massacre v. Guatemala* (judgment on merits of April 29, 2004):

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[50] Cf., regarding the time factor and law, A.A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Ed. Renovar, 2002, pp. 3-6; A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre/Brasil, S.A. Fabris Ed., 1999, pp. 336-338.

[51] A matter that was examined by the *Institut de Droit International* at its sessions in Rome (1973) and Wiesbaden (1975); cf. 55 *Annuaire de l'Institut de Droit International* (1973) pp. 33, 27, 37, 48, 50, 86, 108 and 114-115; 56 *Annuaire de l'Institut de Droit International* (1975) p. 536-541; and cf. M. Sorensen, "Le problème dit du droit intertemporel dans l'ordre international – Rapport provisoire", 55 *Annuaire de l'Institut de Droit International* (1973) pp. 35-36. With regard to the influence of the passage of time in the continuity of the rules of international law, cf. K. Doehring, "Die Wirkung des Zeitablaufs auf den Bestand völkerrechtlicher Regeln", *Jahrbuch 1964 der Max-Planck-Gesellschaft*, Heidelberg, 1964, pp. 70-89. With regard to the time factor and treaties, cf. G.E. do Nascimento e Silva, "Le facteur temps et les traités", 154 *Recueil des Cours de l'Académie de Droit International de La Haye* (1977) p. 221-295. With regard to the time factor and international litigation, cf. S. Rosenne, *The Time Factor in the Jurisdiction of the International Court of Justice,* Leyden, Sijthoff, 1960, pp. 11-75; A.A. Cançado Trindade, "The Time Factor in the Application of the Rule of Exhaustion of Local Remedies in International Law", 61 *Rivista di Diritto Internazionale* (1978) pp. 232-257. and cf., in general, e.g, E. McWhinney, "The Time Dimension in International Law, Historical Relativism and Intertemporal Law", *in Essays in International Law in Honour of Judge M. Lachs* (ed. J. Makarczyk), The Hague, Nijhoff, 1984, pp. 184-199; M. Chemillier-Gendreau, "Le rôle du temps dans la formation du droit international", *in Droit international - III* (ed. P. Weil), Paris, Pédone, 1987, pp. 25-28.

> "Memory is enduring, it resists the erosion of time, it surges up from the depths and darkness of human suffering; since the routes of the past were traced and duly trod, they are already known, and remain unforgettable. (...)" (para. 41)

73. Indeed, there is no oblivion there can be no oblivion. The sisters, Ernestina and Erlinda Serrano Cruz, who have remained disappeared since June 2, 1982, are still present in the memory of their loved ones, and their drama is now consigned to the annals of international human rights case law. There is no oblivion. in *À la recherche du temps perdu*, a classic work on the passage of time, Marcel Proust suggests, with subtlety and sophistication, that even though memory is spontaneous, it is a protection against the passage of time, a safeguard against oblivion and indifference; memory, inescapable, even though involuntary, is a means of escape from the fading of events that results from the passage of time.

74. In the end, memory is a means of resisting the transitory nature of human existence. States that seek to forget and impose forgetfulness of the abuses perpetrated in the past, end up causing an added harm to their own people. States that seek to restrict, *ratione temporis* and *ratione materiae*, the scope of the jurisdiction (*juris dictio*) of an international human rights tribunal such as this Court end up by prejudicing their own people and obstructing the progress of international law - human rights law - with regard to jurisdiction. And the international courts that accede to the excesses of State voluntarism end up by ceasing to exercise fully their function and duty to protect.

75. Nevertheless, in this case, the designation of a day dedicated to the memory of the children who disappeared during the Salvadoran armed conflict is an example of the reaction of the law to the effects of the passage of time, because there can be no oblivion. The collective memory will also help to acknowledge the suffering of all the Salvadoran people and, in particular, vindicate the children who lost their innocence and identity prematurely (and some their very life), victims of the millenary ritual of uncontrolled human violence, described with perennial actuality in Homer's *Iliad* – sacrificed in armed conflicts typical of the brutal and desperate race towards nothingness of the combatants.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra Alessandri
Secretary

THE SERRANO CRUZ SISTERS V. EL SALVADOR

Judgment on merits, reparations, and costs

DISSENTING OPINION OF JUDGE MANUEL E. VENTURA ROBLES ON THE THIRD OPERATIVE PARAGRAPH

1. I dissent from the majority opinion in the case of the Serrano Cruz Sisters v. El Salvador, stated in the third operative paragraph. According to this, the Court did not rule on the alleged violations of the rights of the family, the right to a name and the rights of the child because, in the Court's opinion, it lacked jurisdiction to rule on possible violations originating from facts or acts that occurred before June 6, 1995, or which began to be executed before that date, since it had decided this in its judgment on preliminary objections in this case of November 23, 2004.

2. In my opinion, if the Court was obliged to limit its jurisdiction in this case owing to the way in which the State of El Salvador accepted the Court's contentious jurisdiction pursuant to Article 62 of the American Convention on Human Rights, it has imposed a limitation on itself in this judgment, because it has accepted a restrictive interpretation that adversely affects the victims. This has deprived the Court of the historic possibility of ruling on the violation of the rights of the family, the right to a name and the rights of the child in a case concerning the search for individuals who disappeared when they were children in the context of an internal armed conflict and, consequently, of ruling on the right to identity of such persons.

3. I consider that the Court imposed a limitation on itself in this case, because, if most of the judges ruled in favor of autonomous violations of the American Convention occurring after El Salvador's acceptance of the Court's jurisdiction, specifically violations of Articles 8, 25 and 5, they should also have declared that Articles 17, 18 and 19 had been violated since, following the date of acceptance, several facts have occurred related to the violation of the latter provisions, in the context of the lack of a domestic investigation to determine what happened to Ernestina and Erlinda Serrano Cruz. In particular, these facts are closely related to the violations of Articles 8 and 25 of the Convention (access to justice and due process) which have been declared in the judgment. The violations of these articles were declared owing basically to violation of the principle of reasonable time and because the *habeas corpus* procedure and the criminal proceedings concerning the disappearance of Ernestina and Erlinda Serrano Cruz were not effective in tracing their whereabouts, or investigating and punishing those responsible. In other words, in this case, the logical and necessary consequence of declaring that Articles 8 and 25 of the Convention had been violated was to declare that Articles 5, 17, 18 and 19 had also been violated, and not merely Article 5, as I will explain below.

4. In the instant case, the State authorities' lack of due diligence in processing the petition for *habeas corpus* and the criminal proceedings meant that the information needed to find Ernestina and Erlinda could not be obtained. Consequently, should they be alive, it impeded reunification with their biological family and also, if applicable and if they so wished, re-establishment of the given name and surnames assigned by their parents, thus constituting the violation, to the detriment of Ernestina and Erlinda and their next of kin, of the rights of the family

and the right to a name, as well as the rights of the child to the detriment of Erlinda, who was a minor when El Salvador accepted the Court's jurisdiction.

5. Owing to the specific facts of this case, the logical and necessary consequence of the foregoing was the violation of the right to identity of Ernestina and Erlinda and their next of kin, because, without a family and without a name, there is no identity. The right to identity as such is not expressly recognized in the American Convention. However, I believe it important to indicate that the Convention protects this right, based on an evolutionary interpretation of the content of other rights embodied therein and, in this case in particular, based on an examination of Articles 17, 18 and 19 thereof. In this regard, I believe it important to emphasize that this would not be the first time the Court has ruled on a right that is not explicitly established in this instrument. In previous judgments, as well as in paragraph 62 of this judgment, the Court has referred to the right to the truth,[1] which is not expressly embodied in the American Convention; while, in other cases, it has referred to the violation of the right to a decent life, which is not expressly established in this Convention either, and even encompasses the protection of other rights expressly protected in other treaties.[2]

6. In my opinion, the text of the Court's judgment in this case, in relation to the violation of Articles 17, 18 and 19 of the Convention, should have been drafted as follows:

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125. Given the characteristics of this case, the Court considers it pertinent to examine jointly the aspects related to the alleged violations of Articles 17 (Rights of the Family) and 18 (Right to a Name) of the Convention, to the detriment of the sisters, Ernestina and Erlinda Serrano Cruz and of their next of kin, and also the alleged violations of Article 19 (Rights of the Child) of the Convention with regard to Ernestina and Erlinda.

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[1] *Cf. Case of Carpio Nicolle et al.*. Judgment of November 22, 2004. Series C No. 117, para. 128; ICourtHR *Case of the Plan de Sánchez Massacre*. *Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of November 19, 2004. Series C No. 116, para. 97; *Case of Tibi.* Judgment of September 7, 2004. Series C No. 114, para. 257; *Case of the Gómez Paquiyauri Brothers*. Judgment of July 8, 2004. Series C No. 110, para. 230; *Case of the 19 Tradesmen*. Judgment of July 5, 2004. Series C No. 109, para. 261; *Case of Molina Theissen*. *Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of July 3, 2004. Series C No. 108, para. 81; *Case of Myrna Mack Chang*. Judgment of November 25, 2003. Series C No. 101, para. 274; *Case of Bulacio*. Judgment of September 18, 2003. Series C No. 100, para. 114; *Case of Trujillo Oroza. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of February 27, 2002. Series C No. 92, para. 114; *f. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of February 22, 2002. Series C No. 91, para. 76; *Case of Cantoral Benavides. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of December 3, 2001. Series C No. 88, para. 69; *Case of the "Street Children" (Villagrán Morales et al.). Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of May 26, 2001. Series C No. 77, para. 100; *Case of the "Panel Blanca" (Paniagua Morales el al.). Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of May 25, 2001. Series C No. 76, para. 200; *Case of Barrios Altos.* Judgment of March 14, 2001. Series C No. 75, para. 47 and 48; *Case of Bámaca Velásquez.* Judgment of November 25, 2000. Series C No. 70, paras. 200-202; and *Case of Castillo Páez*. Judgment of November, 1997. Series C No. 34, paras. 86 and 90.

[2] *Cf. Case of the "Juvenile Reeducation Institute"*. Judgment of September 2, 2004. Series C No. 112*,* paras. 152, 159, 164, 167, 170 and 171; and *Case of the "Street Children" (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 144, 147 and 191.

126. In the case of the rights of the family, Article 17 of the Convention establishes that:

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
>
> 2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.
>
> […]

127. With regard to the right to a name, Article 18 of the American Convention stipulates that:

> Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.

128. In relation to the rights of a child, Article 19 of the American Convention indicates that:

> Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state

129. The Court emphasizes that, in the instant case, the historical context of the alleged violations of the American Convention is the armed conflict in which El Salvador was engaged from 1980 to 1991 (*supra* para. 48(1)). In 1996, the *Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos* filed a complaint before the Ombudsman's Office in which it set out the issue of the children who disappeared during the armed conflict by describing several cases, including that of the sisters, Ernestina and Erlinda Serrano Cruz. The facts of this case were being investigated by the Chalatenango Trial Court in a criminal proceedings "filed against members of the Atlacatl Battalion under the inappropriate criminal offence of abduction from personal care (*sustracción del cuidado personal*) of the minors, Erlinda and Ernestina Serrano," "in [a military] operation of June 2, 1982," known as the "*guinda de mayo*" (*supra* para. 48(2)).

130. In this regard, this Court bears in mind that, at the date of this judgment, should they be alive, Ernestina Serrano Cruz would be 29 years old and Erlinda Serrano Cruz would be between 26 and 27 years old (*supra* para. 48(78) and 48(79)), and also that the internal armed conflict in which El Salvador was engaged has ceased. Accordingly, the Court considers that, even though Ernestina and Erlinda Serrano Cruz would be adults now, it cannot fail to take into account that they were children at the time of the facts under investigation by the Chalatenango Trial Court (*supra* para. 48(22)), and one of them, Erlinda, was a child when El Salvador accepted the Court's jurisdiction. Hence, the Court will examine the overall problem of the search for the children who disappeared during the internal armed conflict, which, in many cases, has now been transformed into the search for youths and adults. This problem also has an impact on the next of kin of those who disappeared (*supra* para. 48(1), 48(4) and 48(7)) and dealing with it requires the State to comply with its post-conflict obligations.

131. The Court observes that, due to the characteristics of this case, the alleged victims, Ernestina and Erlinda Serrano Cruz, and their next of kin, who continue to search for them, are an example of the current problems that El Salvador must face

in relation to determining what happened to the children who disappeared during the internal armed conflict. The Court must examine the problem comprehensively, bearing in mind that, as has been proved, the search for, tracing and finding of the disappeared children, as well as the process of family reunification should the search be successful, is a complex situation for rebuilding the lives and identities of those who are found, their biological families and Salvadoran society itself (*supra* para. 48(7)).

132. The Court observes that every person has the right to an identity. This is a complex right which, on the one hand has a dynamic aspect linked to the evolution of the personality of the individual, and includes a series of attributes and characteristics that allow each person to be individualized as unique. Personal identity starts from the moment of conception and its construction continues throughout the life of the individual, in a continuous process that encompasses a multiplicity of elements and aspects which exceed the strictly biological concept and correspond to the biographical and "personal reality" of the individual. These elements and attributes, which comprise personal identity, include such varied aspects as a person's origin or "biological reality," and his cultural, historical, religious, ideological, political, professional, family and social heritage, as well as more static aspects relating, for example, to physical traits, name and nationality.

133. Diverse international legal instruments recognize the right to personal identity.[3] In El Salvador, an individual's right to identity is enshrined in Article 203 of the Family Code on the rights of children, and in Article 351(3) of this code, on the fundamental rights of minors.

134. Even though the right to identity is not explicitly established in the American Convention, it is protected in this treaty based on an evolutionary interpretation[4] of the contents of the rights embodied, *inter alia*, in Articles 3, 4, 5, 11, 12, 13, 17, 18, 19 and 20 thereof. Depending on the facts, there could be a violation of the right to identity if one or several of these provisions are infringed. In other words, the right to identity would not always be violated when one of these articles is violated, and the matter must be examined on a case-by-case basis.

135. Given the nature of the facts of this case, the Court will examine the possible violation of Articles 17 and 18 of the American Convention, in relation to Article 1(1) thereof, and whether it violates the right to identity of the sisters, Ernestina and Erlinda Serrano Cruz, and their next of kin. The Court observes that the rights to protection of the family and to a name establish a protection that provides content to the individual's right to an identity, and some of the rights that the Commission and the representatives alleged were violated in this case are elements of this comprehensive legal figure.

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[3] *Cf.* The United Nations Convention on the Rights of the Child, Articles 7, 8 and 29(1); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Articles 17, 21 and 31; the Declaration on Race and Racial Prejudices, Articles 1(3) and 5(1); and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 1(1).

[4] *Cf. Case of the Serrano Cruz Sisters. Preliminary Objections.* Judgment of November 23, 2004. Series C No. 118, para. 119; *Case of Tibi*. Judgment of September 7, 2004. Series C No. 114, para. 144; and *Case of the "Juvenile Reeducation Institute"*. Judgment of September 2, 2004. Series C No. 112, para. 148.

136. The Court explains that, in the instant case, it will not rule on the alleged violation of Article 19 of the American Convention to the detriment of the sisters, Ernestina and Erlinda Serrano Cruz, separately from its consideration of the rights to the protection of the family and to a name, and also the possible violation of their right to identity, but will include its decision in that respect when ruling on the other rights that are alleged to have been violated. In this regard, this Court, among other norms, will give particular consideration to Articles 7 and 8 of the United Nations Convention on the Rights of the Child, because they embody the right to identity explicitly and directly.

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137. In relation to the "Promotion and protection of the right of the child," the General Assembly of the United Nations, when ruling on identity, family relationships and the registration of the birth of children, "in particular children in particularly difficult situations," in its resolution 58/157 of December 22, 2003, urged and called upon States:

> […] to undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law, without unlawful interference and, where a child is illegally deprived of some or all of the elements of his or her identity, to provide appropriate assistance and protection with a view to speedily re-establishing his or her identity;
>
> [...] to ensure, as far as possible, the right of the child to know and be cared for by his or her parents[.]

138. Given that the exercise of the right to identity allows the individual to have access to personal and family information that will enable him to construct his own personal history and biography, the Court considers that the right to identity is an essential element of the life of all individuals and not only of children; moreover, its exercise is essential for establishing relationships with the different members of the family, and between each individual and society and the State. Consequently, in the instant case, the Court will examine two rights that form part of the content of the right to personal identity: a) the rights of the family; and b) the right to a name.

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a) Rights of the family

139. The rights of the family, which are expressly established in Article 17 of the American Convention and Article 15 of the Additional Protocol to the American Convention on Human Rights in the matter of Economic, Social and Cultural Rights ("Protocol of San Salvador"), are one of the elements that give content to the right to identity.

140. As the Court has stated previously, recognition of the family as the natural and fundamental element of society, with the right to be protected by society and the State, is a basic principle of international human rights law.[5] In addition to being

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[5] *Cf. Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para.

established in the American Convention and in the said Protocol of San Salvador, it is also embodied in a significant number of international legal instruments,[6] and also in Article 32 of the Constitution of El Salvador.

141. In this regard, the Court considers that everyone has the right to live in contact with or maintain direct contact or personal relationships with their family, given that the family, as a natural and fundamental element of society, is, in principle, "called on to satisfy [the] material, affective and psychological needs"[7] of every individual. Likewise, the Court underscored the importance of this right with regard to all the members of the family, such as parents and siblings, when it affirmed that the State was obliged to promote the development and strengthening of the family nucleus as comprehensively as possible.[8]

142. Accordingly, the Court agrees with the European Court that the mutual enjoyment of the coexistence of parents and children is a basic factor in the life of the family,[9] and that, even when parents are separated from their children, family coexistence should be guaranteed.[10] The Court understands, in line with the views of the European Court, that measures which prevent the enjoyment of family relations interfere in the rights of the family, embodied in Article 17 of the American Convention.[11] One of the most serious interferences is that which results in the separation of a family.[12]

143. The right of every individual to receive protection against arbitrary or illegal interference in their family forms an implicit part of the right to the protection of the

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[6] This is established in: Article 16(3) of the Universal Declaration of Human Rights; Article 10(1) of the International Covenant on Economic, Social and Cultural Rights; Article 23 of the International Covenant on Civil and Political Rights; the preamble and Article 8 of the Convention on the Rights of the Child; Article 18 of the African Charter on the Rights and Welfare of the Child; Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms amended according to the provisions of Protocol 11 and completed by Protocols 1 and 6; Articles 4 and 22 on the Declaration on Social Progress and Development; point 16 of the Proclamation of Teheran; Articles 1 and 2 of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with particular reference to foster placement and adoption nationally and internationally; and Article 6 of the Declaration on the Elimination of Discrimination against Women.

[7] *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion* OC-17/02 of August 28, 2002. Series A No. 17, para. 71.

[8] *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion* OC-17/02 of August 28, 2002. Series A No. 17, para. 66.

[9] *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion* OC-17/02 of August 28, 2002. Series A No. 17, para. 72. Likewise *Cf. Haase v. Germany,* no. 11057/02, § 82, ECHR 2004-III; *Kosmopoulou v. Greece,* no. 60457/00, §47, 5 February 2004; and Hoppe *v. Germany,* no. 28422/95, §44, 5 December 2002.

[10] *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion* OC-17/02 of August 28, 2002. Series A No. 17, para. 72. Likewise *Eur. Court H.R.*, *Case of Berrehab v. the Netherlands, Judgment of 21 June 1988, Series A no. 138*, para. 21.

[11] *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion* OC-17/02 of August 28, 2002. Series A No. 17, para. 72. Likewise *Cf. Haase v. Germany,* no. 11057/02, § 82, ECHR 2004-III; Kosmopoulou *v. Greece,* no. 60457/00, § 47, 5 February 2004; and *Venema v. The Netherlands*, no. 35731/97, §71, ECHR 2002-X.

[12] *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion* OC-17/02 of August 28, 2002. Series A No. 17, para. 72.

family, and is expressly recognized in various international legal instruments.[13] This protection acquires special relevance when examining the separation of the family[14] and the failure to adopt the necessary measures to seek those who disappeared when they were children and whose families have asked the State to determine their whereabouts in order to re-establish the ties that bind them, when possible. In this regard, the Court understands that the protection of the family includes not only the State's obligation to allow family coexistence, but also its obligation to promote family relations through the different State agencies. The Court observes that, while what happened to Ernestina and Erlinda has not been determined, their next of kin cannot re-establish family relations with them.

144. Notwithstanding the special circumstances in which the Serrano Cruz sisters were separated from their family and the justification or lack of justification for this, the Court considers that the State should have used all possible means to determine their whereabouts and, if applicable, reunite them with their next of kin[15] as soon as circumstances permitted.

145. Paragraph 3(b) of Article 4 (Fundamental guarantees) of the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) establishes that "all appropriate steps shall be taken to facilitate the reunion of families temporarily separated."

146. Likewise, Principle 17 of the United Nations Guiding Principles on Internal Displacement of 11 February 1998 establishes that "[e]very human being has the right to respect of his or her family life" and that "[f]amilies which are separated by displacement should be reunited as quickly as possible." In this regard, the Principle stipulates that "[a]ll appropriate steps shall be taken to expedite the reunion of such families." This Principle also establishes that "[t]he responsible authorities shall facilitate inquiries made by family members and encourage and cooperate with the work of humanitarian organizations engaged in the task of family reunification."

147. Furthermore, this Court considers it necessary to emphasize that Article 39 of the Convention on the Rights of the Child establishes the State's obligation "to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, […] or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

148. With regard to these State obligations, the Court observes that, given the grave post-conflict consequences of a historical situation such as the one experienced by El Salvador, the fact that this conflict has ended and that individuals who were children at the time are now young people or adults, does not exempt the

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[13] *Cf.* Indeed, this is contemplated Articles 12 of the Universal Declaration on Human Rights, Article V of the American Declaration of the Rights and Duties of Man, Article 17 of the International Covenant on Civil and Political Rights, Article 11(3) of the American Convention on Human Rights and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[14] *Cf.* Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 71.

[15] *Cf. Haase v. Germany*, no. 11057/02, § 84, ECHR 2004-III; *Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, § 49, ECHR, 2003-V; and *Mehemi v. France (no. 2)*, no. 53470/99, §45, ECHR 2003-IV.

State from its obligation to comply with the international obligations that are pending and from the obligation to adopt the necessary measures to repair the violations that were committed. In this regard, the Ombudsman's Office in its "Report […[on the forced disappearance of the children, Ernestina and Erlinda Serrano Cruz, its current impunity and the pattern of violence in which such disappearances occurred" of September 2, 2004, stated that:

> Following the disappearances, impunity was ensured by the military authorities' lack of records of such cases, the denial of information to the next of kin and the human rights organizations (even during the post-conflict decade), the failure to promote any measures that would make family reunification possible, and the context of military harassment of villages that were victimized during the years after the armed conflict.

149. In this regard, the Court stresses that the right to co-existence and to maintain family relations implies that the State should adopt appropriate measures at the national and the international level to ensure the union or the reunification of families that have been separated. These obligations acquire greater relevance when the separation of the members of a family responds to such special circumstances as those indicated in this case (*supra* para. 48(1), 48(2), 48(3), 48(4), 48(5), 48(6), 48(7), 48(8) and 48(11)).

150. In this regard, during the public hearing and in its final written arguments, the State declared that it had the "firm decision" and "determination" to "promote the reunification of the Salvadoran families who were separated as a result of the conflict, in the context of and in order to know the truth." And, in response to a question asked by the Court concerning its willingness to "investigate the facts that have been described in this case […] until reasonable and satisfactory results are reached," the State indicated that it would continue "using the ordinary proceedings already filed and still pending and, second, by creating an institution, a commission, that, with the help of everyone - and that meant everyone, without excluding anyone - w[ould] make a parallel effort to investigate the facts."

151. With regard to the domestic judicial proceedings, in the specific case of the *habeas corpus* procedure before the Constitutional Chamber of the Supreme Court of Justice, and the criminal proceedings filed before the Chalatenango Trial Court, it has been established that the State did not process these proceedings in a diligent manner that would have allowed them to be effective in determining what happened to Ernestina and Erlinda Serrano Cruz, discovering their whereabouts, and investigating and punishing those responsible, as the Court has indicated when ruling on the violation of Articles 8 and 25 of the American Convention (*supra* para. 106). By failing for many years to conduct a diligent investigation into what happened to Ernestina and Erlinda, the State has prevented their fate from being known and, consequently, has not established the necessary conditions for them to be able to re-establish relations with their family, should they be alive.

152. With regard to other non-judicial measures, during these proceedings the Court has only received information on the creation in 1999, at the recommendation of the Attorney General, of the "Attorney General's Committee" (*Mesa del Procurador*) (*supra* para. 48(12)) with the purpose of trying to trace the children who disappeared during the armed conflict. However, according to the information in the file before the Court, this committee did not achieve any results. In this regard, during the public hearing before the Court (*supra* para. 14), Father Juan María Raimundo Cortina Garaígorta emphasized that one of the reasons why the committee was unsuccessful was the lack of interest and collaboration from other State

authorities and institutions. In a decision of February 10, 2003, the Ombudsman's Office stated that the Attorney General's report on the activities of the committee "show[ed] that the results [had] evidently been very poor, owing above all, according to the text, to the absence of records and to the declarations of those interviewed that they had no information about the facts under investigation, particularly facts that related to the Armed Forces." Recently, on October 5, 2004, the State issued a presidential decree to establish an "inter-institutional commission to trace the children who disappeared as a result of the armed conflict in El Salvador." However, the Court was not given any information to indicate that the commission had commenced activities.

153. The Court observes that the work of the *Asociación Pro Búsqueda* and of the next of kin of the disappeared was fundamental in resolving most of the cases where it has been possible to trace and find those who disappeared during the armed conflict. Also, once they had obtained the necessary information about these people, *Pro-Búsqueda* and the next of kin encouraged the re-establishment of family relations and, when possible, the reunification of the families affected by the conflict, in the absence of relevant effective, diligent and appropriate measures by the State.

154. In its concluding observations on August 22, 2003, the Human Rights Committee stated that it "regretted the [State] was unable to explain the Legislative Assembly's reasons for not approving the establishment of a national commission of inquiry to track down children who disappeared in the conflict," invited El Salvador to "reconsider" the creation of this commission, and urged it "to submit detailed information on the numbers of children found alive and the numbers that died in the fighting," and to create a compensation fund for young people who are found.[16] The Committee on the Rights of the Child also referred to this matter in its final observations of June 30, 2004, to El Salvador, when it expressed its concern that the State had not "taken a more active role in efforts to investigate the disappearance of more than 700 children during the armed conflict between 1980 and 1992." The Committee on the Rights of the Child also noted "that the efforts which to date have led to the tracing of some 250 children have been undertaken mainly by the NGO *Pro-Búsqueda*." It therefore recommended that the State assume an active role in efforts to trace the children who disappeared during the armed conflict, that it establish a national commission with adequate resources and capacity to trace the disappeared children, and that it ratify the Inter-American Convention on the Forced Disappearances of Persons.[17]

155. As it has been shown, the State has demonstrated a general lack of concern about the situation of the children who disappeared in the internal armed conflict. This has had a direct impact on determining what happened to Ernestina and Erlinda, because the facts under investigation by the Chalatenango Trial Court refer to their abduction during this conflict. During the public hearing held before the Inter-American Court on September 7, 2004 (*supra* para. 14), the State affirmed that "there has been criticism, with some reason, that the State authorities did not help in the effort to trace the children lost in the war." It also stated that "all Salvadorans

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[16] U.N. Human Rights Committee. Concluding observations: El Salvador. August 22, 2003. CCPR/CO/78/SLV, para. 19.

[17] U.N. Committee on the Rights of the Child. Examination of the reports presented by the State parties under Article 44 of the Convention. Concluding observations on El Salvador of June 30, 2004. CRC/C/15/Add.232, paras. 31 and 32.

must work together to find the best solutions […] which lead to the truth about the whereabouts of the children."

156. In this regard, the Court considers that the State should adopt all necessary judicial, administrative, legislative and any other type of measures to promote the tracing and finding of those who disappeared during the armed conflict and the reunification of the families that were separated due to the disappearance of one of their members, including the Serrano Cruz family.

157. As it has been shown, the next of kin of Ernestina and Erlinda Serrano Cruz had recourse to the State authorities and to non-governmental organizations, such as *Pro-Búsqueda,* to trace their family members and to know what had happened to them, and they hoped to find them alive and be reunited with them. The mother and the living siblings of Ernestina and Erlinda Serrano Cruz have had to live with the sensation that the family had disintegrated. For example, in her testimony before the Court during the public hearing on September 7, 2004, Suyapa Serrano Cruz, Ernestina and Erlinda's sister, stated that, for her family and herself, "it would mean a great deal" to find Erlinda and Ernestina; that, even though there were "wounds that would never heal," they would be very "happy," because there had been "many cases of children who had been reunited" with their families and she hoped that this would happen in the case of her sisters (*supra* para. 36). Also, in his sworn statement of August 19, 2004 (*supra* para. 35), José Fernando Serrano Cruz, Ernestina and Erlinda's brother, stated that "[a]s a family, they hoped to discover the whereabouts of the girls at some time; that they would be able to trace them[. T]hat was what gave them strength to carry on; even though it did not console them much, it gave them some serenity…, with the hope of finding them one day." Even Ernestina and Erlinda's mother, about four months before her death, in her sworn statement of December 5, 2003 (*supra* para. 35), stated that "the only thing she want[ed was] for her daughters to be returned to her, and if she could ask the judges something it [was] that, at least, they would show her daughters to her." In this regard, in his testimony before the Court during the public hearing (*supra* para. 36), Father Cortina stated that shortly before she died, Erlinda and Ernestina's mother was going blind, owing to diabetes, and she said to him that she would like "not to lose her sight, because perhaps she could still see [her] daughters."

158. The Court has noted that when Ernestina and Erlinda's family refer to them, they speak of them in the present, preserving the image of them as children. In this regard, the expert witness, Ana Deutsch, stated in the report she made in a sworn statement on August 23, 2004 (*supra* para. 35), that the mother used "the present tense; she did not say 'had' or ask 'what will they be like now?' She said 'This is what a concerned mother thinks, because they are little girls.'" In this regard, the said expert witness stated that, even though Ernestina and Erlinda disappeared more than 20 years ago, to their next of kin:

> They have always had a place in the family conversations. They continue to be a presence in the family, a presence that has become more intense since the search has been reactivated [while], at the same time, the anguished has been reactivated. […] The family has definitely suffered an identity crisis. The identity of the family is composed of all its members. Some children died at a very early age, but there was an explanation for their death and the family could assimilate their absence. Deaths due to attacks by the Army are very painful, but the facts are defined, which also facilitates the mourning process. The absence of the girls has still not been resolved within the family, and they are therefore an ever-present absence.

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b) Right to a name

159. Article 18 of the American Convention protects the right to a given name and to the surnames of the parents or that of one of them. This right presumes that everyone, from the moment of birth, has the right to be legally registered immediately, since without this registration a person would remain legally unknown to society and the State, because a name is the simplest means of identification and individualization of a person. It is also the element that indicates the direct family relationships and makes access to other rights possible.

160. The right to a name is also expressly recognized in Article 36 of the Constitution of El Salvador, Article 7(1) of the Convention on the Rights of the Child and Article 6(1) of the African Charter on the Rights and Welfare of the Child. Moreover, even though the European Convention on Human Rights and Fundamental Freedoms does not contain a specific norm that expressly embodies the right to a name, the European Court has established that this right is protected in the provision contained in Article 8 of this Convention on the protection of private and family life, when it stated that:

> Article 8 does not contain any explicit reference to names. Nonetheless, since it constitutes a means of personal identification and a link to a family, an individual's name does concern his or her private and family life.[18]

161. This Court considers that the scope of the protection of the right to a name embodied in Article 18 of the Convention exceeds the State's obligation to ensure the adequate conditions for a person to be duly registered as soon as they are born. The State must also adopt the necessary measures to preserve the given name and surname with which a person has been registered and, should there have been any alteration or modification, it has the obligation to re-establish the given name and surname with which the person was originally registered, if applicable.

162. In this regard, the Court observes that the State has not determined the fate of the sisters, Ernestina and Erlinda Serrano Cruz, whether they are alive, or whether they know their real name and identity, even though their next of kin have resorted to the State authorities to request an investigation. Ernestina and Erlinda's mother and siblings have requested the State to respond to them, in order to know the truth of what happened to Ernestina and Erlinda, and El Salvador has not provided them with any relevant information. In this regard, the Court declared that Articles 8(1) and 25 of the Convention had been violated owing to the lack of a diligent investigation and to violation of the principle of reasonable time.

163. El Salvador told the Inter-American Commission and the Court that the sisters, Ernestina and Erlinda, had been abandoned by their parents and handed over to the Red Cross, and has even questioned their existence. Nevertheless, given the proven fact that many of the children who entered children's homes during the armed conflict lacked identity documents and were therefore frequently registered in the mayors' offices with the given name and surnames of those who had brought them up or of a fictitious person in order to register the child (*supra* para. 48(11)), the Court observes that it is possible that, if they are alive, the sisters have a

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[18] *Cf. Stjerna v. Finland*, judgment of 25 November 1994, Series A, n. 299-B, p. 60, § 37; *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24.

different given name and surname to that assigned by their parents, and it is even possible that they have changed nationality.

164. As has been shown (*supra* para. 48(6)), around 246 cases of children who disappeared during the armed conflict have been resolved. Nevertheless, the Court has noted with concern that the efforts to trace them and the results achieved were not based on State initiatives, but were due fundamentally to the activities of the *Asociación Pro-Búsqueda* and the next of kin of the disappeared persons (*supra* paras. 48(2) and 48(6)). The Committee on the Rights of the Child ruled on this lack of State participation (*supra* para. 154).[19]

165. The Ombudsman's Office came to a similar conclusion in its resolution of September 2, 2004, when it stated that:

> […] some [… disappeared] children have been found owing to the permanent efforts of their next of kin with the support of the *Asociación Pro-Búsqueda,* but not of the Salvadoran State, because the latter has not made the least effort to investigate or[,] at least, facilitate free access to documents and records in order to trace them;
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> […] it has made practically no effort to return the children who disappeared in the context of the armed conflict or make reparation to them or their next of kin. This burden has been borne by non-governmental organizations, particularly the *Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos*, which has been working in this area for ten years.

166. The children who disappeared during the domestic armed conflict were found alive in different situations; for example, integrated into a family in El Salvador or abroad, either by legal adoption (formal adoption) or *de facto* adoption or appropriated by civilians or members of the Army, and also in orphanages (*supra* para. 48(6)). It has been shown that children have been found in El Salvador and in 11 countries of the Americas and Europe. The *Asociación Pro Búsqueda* is investigating 126 cases of international adoptions, and also cases of alleged victims of the illicit trafficking of children (*supra* para. 48(6)).

167. The situations described make the search process very complex. The State and its institutions should perform it very diligently, bearing in mind that the Serrano Cruz sisters, who could be in any of the situations described above, may be living with different given name and surnames and nationality. It is also feasible that they are completely oblivious of their family relations and know nothing of the search undertaken by their mother and siblings (*supra* para. 48(83)). In this regard, the Court considers it essential that El Salvador start to try and trace Ernestina and Erlinda using all possible investigative techniques and not merely using their given name and surnames, or only approaching the institutions they contacted during the criminal proceedings and the *habeas corpus* procedure.

168. In this regard, as the Court has stated, it is probable that Ernestina and Erlinda are alive, as in the case of other children who have been traced, and who disappeared during the 1982 "*guinda de mayo*" (*supra* para. 48(8)). This makes the obligation to re-establish the names of the Serrano Cruz sisters particularly important, should this be applicable and should they so wish.

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[19] U.N. Committee on the Rights of the Child. Examination of the reports presented by the State parties under Article 44 of the Convention. Concluding observations on El Salvador of June 30, 2004. CRC/C/15/Add.232, para. 31.

169. The Court considers that, while what happened to the Serrano Cruz sisters and their whereabouts have not been determined, they cannot be aware of their real given name and surnames and, consequently, their family relations. This places the State in a position where it has the obligation to carry out a search encompassing all the different situations in which the Serrano Cruz sisters may be.

170. Furthermore, the right to a name includes the right of the next of kin to recognition of the relationship linking them to Ernestina and Erlinda Serrano Cruz, and this persists even after death. For the family, the given name and surnames that the parents gave them when they were born signify recognition of their family relations. By violating Ernestina and Erlinda's right to a name and questioning their very existence, the State denies their relationship to their next of kin.

171. The Court also observes that, in defending itself in the proceedings before the Inter-American Court, the State has alleged the possible inexistence of the sisters, Ernestina and Erlinda Serrano Cruz, "combined with the financial interest" of their mother. At the same time, during the criminal proceedings before the Chalatenango Trial Court, it appears that the prosecutor's requests and the judge's actions were addressed at investigating the identity and existence of Ernestina and Erlinda Serrano Cruz (*supra* para. 48(68) to 48(77)). To this end, the judge, at the request of the prosecutor, ordered several expert appraisals to be carried out to verify the authenticity of the baptismal records of Ernestina and Erlinda Serrano Cruz kept by the Catholic Church, even though, in addition to these records, their births were registered in the Registry Office. While the Special Transitory Law to establish the civil status of undocumented persons affected by the conflict was in force, Mrs. Cruz Franco registered her daughters, Ernestina and Erlinda Serrano Cruz, in the respective mayors' offices (*supra* para. 48(10)), under the first names that she and her husband had chosen when her daughters were born and the last names of their parents.

172. In its preamble, this law recognizes that "the violence experienced by El Salvador for more than ten years gave rise to the emigration of Salvadorans to other countries, which prevented the establishment of their usual necessary and correct filiation and registration in the registry offices." Consequently, Article 4 of this law established that "[t]he registry office registrations and the certifications issued under [the said] law [by] the respective heads of the registry office or [by] the municipal mayors, w[ould] have the effects established in the Civil Code and other laws." Therefore, the State has not accorded the appropriate legal effects to the civil registrations of Ernestina and Erlinda.

173. The Court has noted that, by changing the course of the investigation in the criminal case before the Chalatenango Trial Court (*supra* para. 48(68) to 48(77)), the prosecutor and the judge of the criminal case being heard in this court only summoned to testify those persons who had stated they did not know of the existence of the sisters, Ernestina and Erlinda Serrano Cruz. However, they failed to summon those persons who had stated before the Ombudsman's office that they knew these sisters. In this regard, that Office mentioned the testimony of four persons who stated they knew Ernestina and Erlinda Serrano Cruz, including that of Felicita Franco, given on February 17, 2004, stating that she attended Mrs. Cruz Franco during Ernestina's birth. The representatives also presented the sworn written statement made by Felicita Franco before notary public on December 11, 2003, as an attachment to their written arguments on preliminary objections (*supra* para. 6). In

this regard, in its "Report […] on the forced disappearance of the children, Ernestina and Erlinda Serrano Cruz, its current impunity and the pattern of violence in which these disappearances occurred" of September 2, 2004, the Ombudsman's Office stated that:

> […] given the actions of the prosecutor and the judge, which attempted to disprove the existence of the sisters, Ernestina and Erlinda Serrano Cruz, and attribute a pecuniary motive to their mother, María Victoria Cruz Franco; notwithstanding that, since it began hearing the case in 1996, this Institution has considered their existence indisputable[.]

174. The State has not only doubted the authenticity of the information in the documents issued by the respective parishes, but also, by questioning the very existence of the sisters, it has raised doubts about whether they have the given name and surnames that their parents gave them when they were born, with which they were registered in the respective mayors' offices by their mother and with which, according to the latter and their siblings, they were known by their family and social circles. The right to a name grants a person individual subjectivity, and his or her place in society. Taking away a name, by denying it, results in a direct and constant affecting of the right to identity, which will only cease when a person recovers their name and, with it, part of their identity.

175. In view of the foregoing, the Court considers that the State has questioned the existence of the sisters, Ernestina and Erlinda Serrano Cruz, has not adopted the necessary measures to determine their whereabouts and re-establish their given name and surnames, or given them the possibility of doing so. Also, the State has denied the relationship of the next of kin with Ernestina and Erlinda, and has not carried out a diligent investigation that would allow the next of kin to know the truth about what befell Ernestina and Erlinda Serrano Cruz and their whereabouts.

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176. Family relations and co-existence, and also the given name and surnames of a person, are essential for forming and preserving the identity of the individual. These elements of the right to identity are essential for both the children and the adult members of a family, given that the identity of each of the members affects and has an influence on that of the others, and also on their relationship with society and with the State.

177. The State is obliged to adopt all necessary measures to discover the fate of the Serrano Cruz sisters and to re-establish their given name and surnames, or to grant them the possibility of doing this, so that they know the truth about their origins, their history, their nationality, who their parents were, and their existing family relations, which could be re-established, even if the sisters are abroad. In this regard, the Court considers it essential that the State adopt all necessary measures to ensure that, should they be found alive, the Serrano Cruz sisters are informed that their mother was looking for them until she died and that their living siblings are still trying to find them (*supra* para. 48(83)).

178. In view of the foregoing, the Court considers that El Salvador has violated the right to identity of Ernestina and Erlinda Serrano Cruz and of their next of kin, by violating the rights to the protection of the family and to a name, because it did not adopt appropriate measures to trace and find Ernestina and Erlinda Serrano Cruz and, should they be found alive, ensure their reunification with their next of kin and their recovery of their family relations, and also, if applicable and should they so

wish, re-establishment of the given name and surnames given to them by their biological family. Also, the State has not conducted a diligent investigation that would allow the next of kin to know the truth about what happened to Ernestina and Erlinda Serrano Cruz and their whereabouts.

179. Furthermore, the Court observes that the State should have taken into account the specific circumstances of Erlinda Serrano Cruz, following El Salvador's acceptance of the Court's jurisdiction, given that the specific obligations arising from Article 19 of the Convention are added to the general obligations of protection, because, in June 1995, Erlinda would have been 17 or 18 years old.

180. Consequently, the Court considers that the State has violated Articles 17 and 18 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Ernestina and Erlinda Serrano Cruz and of their next of kin, and also Article 19 of this treaty in relation to the preceding article, to the detriment of Erlinda Serrano Cruz.

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7. In my opinion, if the Court had ruled as stated above on the violation of Articles 17, 18 and 19 of the Convention, it would not have lost the historical opportunity of referring to the right to an identity, which is being developed progressively by international human rights law, in a case such as this one, in which both Ernestina and Erlinda Serrano Cruz and their family represent just one example of the problem of the loss of the right to identity, because the rights to the protection of the family and to a name have been violated.

8. Finally, I consider it important to emphasize that, despite the lack of concern that the State has shown over all this time with regard to the adoption of effective measures to try and trace and find those who disappeared during the armed conflict, I retain the hope that El Salvador will comply with the commitment that it made before the Court during the public hearing and in its final written arguments in this case, when it stated that it would make every effort to investigate what happened to Ernestina and Erlinda, to trace them, to determine their whereabouts, and to identify those responsible for what happened to them through a judicial investigation and "by an investigation into the facts," and will also implement its "firm decision" to "promote the reunification of the Salvadoran families who were separated as a result of this conflict, in order to know the truth." If the State complies with these commitments that it assumed before the Court, it will help the disappeared persons and their next of kin recover their identity and, should they be found alive, it will lead to their subsequent reunification and to the recovery of family relations, as well as, if applicable, to the re-establishment of the given name and surnames assigned to them by their biological families, which will have a beneficial impact on Salvadoran society as a whole.

Manuel E. Ventura Robles
Judge

Pablo Saavedra Alessandri
Secretary

DISSENTING OPINION OF JUDGE AD HOC ALEJANDRO MONTIEL ARGÜELLO

1) I have dissented from the operative paragraphs of this judgment declaring that the State of El Salvador has violated Articles 8 and 25 of the American Convention on Human Rights.

2) The Court has interpreted the former provision in the sense that it not only encompasses judicial guarantees in favor of the accused or the parties to the proceedings, but also establishes the State's obligation to investigate any fact that may entail its responsibility because it constitutes the violation of a human right.

3) Clarifying this obligation, in its initial judgments on merits the Court stated that: "An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the Government…" (Velásquez Rodríguez case. Judgment of July 29, 1988, para. 177 and Godínez Cruz case. Judgment of January 20, 1989, para. 198).

4) This does not mean that examination of the conduct of the victim or his next of kin that may obstruct or impede, deliberately or not, the State's action should be totally dispensed with when assessing how the State has complied with its obligation to investigate.

Naturally, the circumstances of each case must be taken into consideration; particularly, whether it occurred in a populated or isolated place, whether many similar cases occurred at the same time that also require the attention of the authorities, whether the fact occurred recently or in the past, etc.

5) In the instant case, it was stated that the disappearances of the Serrano Cruz sisters occurred on June 2, 1982, and the fact was not reported to the Chalatenango Trial Court by the alleged victims' mother until April 30, 1993, that is 11 years later. She made a second statement before the Court and, in his brief with final arguments, the State's Agent in this case drew attention to seven contradictions between the two statements; she then filed a petition for *habeas corpus* in which the Agent has identified six more contradictions and, finally, before she died, she recorded a statement in which there are a further ten contradictions. It should be mentioned that there is not one witness to the Army's capture of the children, because one of their sisters merely stated that they were hidden in the undergrowth and she heard members of the Army say they had found two children. This statement differs from the mother's statement. Regarding the statement made by María Esperanza Franco Orellana that she had seen the children descending from an Army helicopter and being handed over to the Red Cross, in her statement before the Court, she said that she had seen nothing and, besides, if her first statement is accepted, this would free the State from responsibility, because the Army would have delivered the children to the Red Cross, even though the latter has not been able to provide any information in this respect.

6) I do not consider it necessary to start examining all the evidence submitted in this case, most of which refers to matters that throw no light on the alleged disappearance, because I believe that, in view of what I have stated in the preceding paragraphs, the State cannot be accused of failing to comply with the obligation to

investigate, since the fact is said to have taken place in a hamlet with about a dozen houses and without eyewitnesses.

7) The Court has never ruled on the precise degree of certainty needed to declare that the State is responsible for a human rights violation. Nevertheless, in all the Court's case law there is not one single case in which it has made this declaration when there has been a reasonable doubt about such responsibility and, in my opinion, there is more than a reasonable doubt in the instant case.

8) In addition, it should be pointed out that the State has continued to show interest in seeking those who disappeared during the armed conflict that took place from 1979 to 1992, and has created an institutional commission to seek disappeared children.

9) The alleged violation of Article 25 of the Convention, which refers to a simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate fundamental rights, is worth examining.

In the two cases cited, the Court said: "… *habeas corpus* would be the normal means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty." (Velásquez Rodríguez case. Ibid., para. 65 and Godínez Cruz case. Ibid., para. 68).

10) In the instant case, this recourse was filed on November 13, 1995; it was duly processed without achieving any result, and on March 14, 1996, the Constitutional Chamber of the Supreme Court of Justice declared that, in the case, since there was no evidence that the disappeared children were or had been held by the Army, this recourse would have no effect and was not appropriate, but rather it was a matter for the ordinary criminal jurisdiction.

11) Bearing in mind the circumstances of the case and, in particular, that the recourse was presented 13 years after the facts allegedly occurred, it appears that the Supreme Court's decision was correct and that the fact that the recourse did not result in finding the Serrano Cruz children does not mean that Article 25 of the Convention has been violated. I therefore dissent from the operative paragraph which states this.

12) Regarding the alleged violation of Article 5 (Right to Humane Treatment), I have dissented from the Court's opinion, because this is based on the alleged violation of Articles 8 and 25 of the Convention and there has been no such violation, as stated in the preceding paragraphs.

13) I consider that the right to claim compensation for non-pecuniary damage cannot be inherited. Furthermore, I have dissented from all the operative paragraphs regarding reparations because, in my opinion, no violation of any human right within the Court's jurisdiction has been committed in this case and, consequently, Article 63(1) of the Convention is not applicable.

14) Moreover, I would like to take this opportunity to put on record that I do not share the progressive expansion of the interpretation of the said provision which, in my opinion, only authorizes the Court to order measures leading to reparations in favor of victims whose rights have been violated and other persons who have

suffered damage as a result of the violation. The tendency to progressively expand the interpretation of the Convention is sharply increased in this judgment and, in my opinion, this should be corrected. It is not a question of preventing hypothetical future violations in other cases; it is a matter of promoting human rights, which is laudable from all points of view, but which the said provision of the Convention does not authorize the Court to do in the judgment it delivers on human rights violations in a specific case. There are other opportunities and other organizations and organs for that purpose.

Alejandro Montiel Argüello
Judge *ad hoc*

Pablo Saavedra Alessandri