

**INTER-AMERICAN COURT OF HUMAN RIGHTS\***

**CASE OF VÁSQUEZ DURAND ET AL. VS. ECUADOR**

**JUDGMENT OF FEBRUARY 15, 2017**

***(Preliminary Objections, Merits, Reparations and Costs)***

*If Vásquez Durand et al. v. Ecuador,*

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court", "the Court" or "this Court"), made up of the following judges:

Roberto F. Caldas, President;  
Eduardo Ferrer Mac-Gregor Poisot, Vice President;  
Eduardo Vio Grossi, Judge,  
Humberto Antonio Sierra Porto, Judge;  
Elizabeth Odio Benito, Judge; and Eugenio  
Raúl Zaffaroni, Judge;

also present,

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

pursuant to Articles 62.3 and 63.1 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and with Articles 31, 32, 42, 65 and 67 of the Rules of Court (hereinafter "the Regulations" or "Regulations of the Court"), dictates the present Judgment, which is structured in the following order:

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\* Judge Patricio Pazmiño Freire, an Ecuadorian national, did not participate in the hearing and deliberation of this case, in accordance with the provisions of Article 19.1 of the Rules of Procedure of the Court.

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### INTRODUCTION OF THE CAUSE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* -On July 8, 2015, in accordance with the provisions of Articles 51 and 61 of the American Convention and Article 35 of the Rules of Procedure of the Court, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted the case to the jurisdiction of the Inter-American Court. *Jorge Vásquez Durand and family against the Republic of Ecuador* (hereinafter "the State" or "Ecuador"). The Commission indicated that the present case is related to the alleged forced disappearance of Mr. Jorge Vásquez Durand (hereinafter "the alleged victim"), a merchant of Peruvian nationality, in the context of the international armed conflict in the Alto Cenepa between Ecuador and Peru, in which "several arrests of Peruvian citizens in Ecuador were made by their security forces." According to the information available, the alleged victim was detained on January 30, 1995 by members of the Ecuadorian Intelligence Service and was seen for the last time in mid-June 1995 at the Teniente Ortiz Military Barracks "in poor condition." The Ecuadorian Truth Commission classified what happened to the alleged victim as a forced disappearance. Besides, The case is related to the absence of effective measures to find the whereabouts of Mr. Vásquez Durand, as well as the lack of a criminal investigation into the facts, despite the fact that the State became aware of his detention and disappearance through various means. Finally, the case is also related to the alleged lack of suitability and effectiveness of the action of habeas corpus.

2. *Procedure before the Commission.* -The procedure before the Commission was as follows:

*by request.* -On March 9, 1995, Mrs. María Esther Gomero Cuentas, wife of the alleged victim, presented the initial petition. On April 7, 1995, the Association for Human Rights (hereinafter "APRODEH"), together with Mrs. Gomero Cuentas, filed another petition referring to the same facts.

*b) Report on Admissibility and Merits.* -On March 23, 2015, the Commission approved Report on Admissibility and Merits No. 12/15<sup>1</sup>, in which he reached a series of conclusions and made several recommendations to the State:

- *conclusions.*-The Commission concluded that the State was responsible for the violation of the rights enshrined in Articles 3, 4, 5.1, 5.2, 7, 8.1 and 25.1 of the American Convention, in relation to Articles 1.1 and 2 of the same instrument and Articles I and III of the Inter-American Convention on Forced Disappearance of Persons (hereinafter "Inter-American Convention on Forced Disappearance") to the detriment of Mr. Jorge Vásquez Durand, as well as for the violation of Articles 5.1, 8.1 and 25 of the Convention, in relation to Article 1.1 of the same instrument, to the detriment of the next of kin of the alleged victim: María Esther Gomero Cuentas (spouse); Jorge Luis Vasquez Gomero (son); Claudia Esther Vásquez Gomero (daughter), and María Durand (mother).
- *Recommendations.*-Consequently, the Commission made a series of recommendations to the State in relation to:

Yo. Investigate fully, impartially, and effectively the whereabouts of Jorge Vásquez Durand. In case it is established that the victim is not alive, adopt the necessary measures to deliver his remains to the

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<sup>1</sup> On April 8 and July 7, 2003, the Commission informed the parties that, in application of Article 37(3) of its Regulations, it decided to defer the admissibility treatment until the debate and decision on the merits.

relatives, according to their wishes.

- ii. Carry out the internal procedures related to the human rights violations declared in the case and initiate criminal proceedings for the crime of forced disappearance to the detriment of Jorge Vásquez Durand, in an impartial, effective and timely manner in order to fully clarify the facts, identify all those responsible and impose the corresponding sanctions.
- iii. Make adequate reparation for the human rights violations declared in this case, both materially and morally, including fair compensation, the establishment and dissemination of the historical truth of the facts, and the recovery of the memory of the disappeared victim. The fact that the next of kin of Mr. Jorge Vásquez Durand do not live in Ecuador cannot be an obstacle to compliance with these reparations.
- iv. Adopt the necessary measures to prevent similar events from occurring in the future, in accordance with the duty to prevent and guarantee the human rights recognized in the American Convention. In particular, implement permanent programs on human rights and international humanitarian law in the training schools of the Armed Forces.
- v. Make a public acknowledgment of international responsibility and make a public apology for the violations declared in the case.

*c) Notification of the Admissibility and Merits Report.* -The Report was notified to the State on April 8, 2015, and it was given a period of two months to report on compliance with the recommendations. The State submitted a report on the measures adopted to comply with said recommendations on July 7, 2015.

3. *Submission to the Court.* -On July 8, 2015, the Commission submitted this case to the Court "given the need to obtain justice in the particular case." The Commission appointed Commissioner Rose Marie B. Antoine and Executive Secretary Emilio Álvarez Icaza L. as delegates, as well as Elizabeth Abi-Mershed, Deputy Executive Secretary, and Silvia Serrano Guzmán, as legal advisors.

4. *Commission requests.* -Based on the foregoing, the Inter-American Commission requested this Court to conclude and declare the international responsibility of Ecuador for the violations contained in its Admissibility and Merits Report and to order the State, as reparation measures, the recommendations included in said report (*suprapara.* 2).

## II PROCEEDINGS BEFORE THE COURT

5. *Notification to the State and the representatives.* -The representatives of the alleged victims and the State were notified of the submission of the case on August 25 and 27, 2015, respectively.

6. *Brief of requests, arguments and evidence.* -On October 26, 2015, APRODEH (hereinafter "the representatives") presented its brief with requests, arguments, and evidence (in

hereinafter “brief of requests and arguments”), in accordance with Articles 25 and 40 of the Rules of Procedure of the Court. The representatives substantially agreed with the Commission's arguments and asked the Court to declare the international responsibility of the State for the violation of the same articles alleged by the Commission. Finally, the representatives requested that the State be ordered to adopt various measures of reparation and the reimbursement of certain costs and expenses.

7. *Response letter.* -On December 30, 2015, the State submitted to the Court its preliminary objections brief, answer to the submission of the case by the Commission, and observations on the pleadings and motions brief (hereinafter “answer brief”).<sup>2</sup> In said brief, the State filed three preliminary objections for the alleged lack of: (i) temporary jurisdiction to hear violations of the Inter-American Convention on Forced Disappearance; (ii) material competence to apply international humanitarian law, and (iii) subsidiarity of the inter-American human rights system. Likewise, it described the facts and opposed all the alleged violations.

8. *Legal Aid Fund.* - In an Order of February 3, 2016, the President of the Court declared admissible the request filed by the alleged victims, through his representatives, to benefit from the Legal Assistance Fund of the Courts.

9. *Observations to the preliminary exceptions.* -On February 19 and 22, 2016, the representatives and the Commission presented, respectively, their observations on the preliminary objections filed by the State.

10. *Public audience.* -On June 29, 2016, the President issued an Order in which he summoned the State, the representatives, and the Inter-American Commission to hold a public hearing, regarding the preliminary objections and eventual merits, reparations, and costs, to hear the final oral arguments of the parties and the final oral observations of the Commission regarding said issues.<sup>4</sup> Likewise, through said Resolution it was ordered to receive statements rendered before a notary public (affidavit) by an alleged victim and a witness, as well as five expert opinions, which were presented by the representatives on July 27, 2016, and by the State on July 29, 2016. The Commission subsequently withdrew the affidavit statement of the expert witness offered. The parties had the opportunity to ask questions and make observations to the declarants offered by the other party. Additionally, through the aforementioned resolution, another alleged victim and two expert witnesses were summoned to testify at the public hearing. Said public hearing was held on August 23, 2016 during the 55th Special Period of Sessions of the Court, held in Mexico City, Mexico.<sup>5</sup> In it

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<sup>2</sup> The State appointed Ricardo Velasco Cuesta, National Human Rights Agent Director, as agent, and Carlos Espín Arias and Alonso Fonseca Garcés as alternate agents.

<sup>3</sup> Cf. *Case of Vásquez Durand et al. v. Ecuador*. Order of the President of the Court of February 3, 2016. Available at: [http://www.corteidh.or.cr/docs/asuntos/vasquez\\_fv\\_16.pdf](http://www.corteidh.or.cr/docs/asuntos/vasquez_fv_16.pdf)

<sup>4</sup> Cf. *Case of Vásquez Durand et al. Ecuador*. Order of the President of the Court of June 29, 2016. Available at: [http://www.corteidh.or.cr/docs/asuntos/vasquez\\_29\\_06\\_16.pdf](http://www.corteidh.or.cr/docs/asuntos/vasquez_29_06_16.pdf). On July 22, 2016, the State challenged the Resolution calling for a hearing, objecting to the President's decision to reject the challenge of expert witness Alejandro Valencia Villa, proposed by the Commission. The Court dismissed the appeal filed by the State and, consequently, ratified the Order of June 29, 2016 in all its terms. Cf. *Case of Vásquez Durand et al. Ecuador*. Order of the Court of August 22, 2016. Available at:

[http://www.corteidh.or.cr/docs/asuntos/vasquez\\_22\\_08\\_16.pdf](http://www.corteidh.or.cr/docs/asuntos/vasquez_22_08_16.pdf).

<sup>5</sup> The following appeared at this hearing: a) for the Inter-American Commission: José de Jesús Orozco Henríquez, Commissioner; Silvia Serrano Guzmán, Advisor, and Jorge H. Meza Flores, Advisor; b) for the alleged victims: Christian Henry Huaylinos Camacuari, member of the legal area of APRODEH, and Caroline Dufour, volunteer legal adviser for Abogados Sin Fronteras Canada at APRODEH, and c) for the State: Ricardo Velasco Cuesta, principal agent, Carlos Espín Arias, deputy agent, and Alonso Fonseca, deputy agent.

During said hearing, the Judges of the Court requested certain information and explanations from the parties and the Commission.

eleven. *Final written arguments and observations.* -On September 23, 2016, the parties and the Commission presented their final written arguments and observations, respectively.

12. *Disbursements in application of the Assistance Fund.* - On October 4, 2016, the State was transmitted the Report on the disbursements made from the Court's Legal Assistance Fund in this case. The State did not present observations in this regard within the period granted for it.

13. *Test and information to better solve.* -The parties presented the information and helpful evidence requested by the Judges at the public hearing together with their final written arguments. Additionally, on November 8 and 28 and December 2, 2016, the President of the Court requested the State to present information and other evidence to facilitate adjudication. Ecuador submitted said information on November 25 and December 19, 2016.

14. *Observations to the information and test to better solve.* - The parties and the Commission presented their observations on the annexes presented together with the final written arguments of the State and the representatives on October 5 and 19 and November 4, 2016. Additionally, on November 30 and December 9, 2016, and January 9 and 13, 2017, the representatives and the Commission presented, respectively, their observations on the documentation presented by the State on November 25 and December 19, 2016.

fifteen. *Brief on alleged supervening events.* - On February 7, 2017, the State submitted a brief, in which it reported the alleged supervening facts. On February 13, 2017, the representatives presented their observations in this regard. The Commission did not present observations within the period established for it.

16. *Deliberation of the present case.* -The Court began deliberating this Judgment on February 15, 2017.

## **II COMPETENCE**

17. The Court is competent to hear this case, under the terms of Article 62(3) of the Convention, because Ecuador has been a State Party to the American Convention since December 28, 1977, and recognized the contentious jurisdiction of the Court on July 24, 1984.

## **IV. PRELIMINARY EXCEPTIONS**

18. In its answering brief, the State presented three preliminary objections on: (i) the alleged lack of temporal jurisdiction with respect to the Inter-American Convention on Forced Disappearance; (ii) the alleged lack of material competence to use international humanitarian law; and (iii) the alleged lack of jurisdiction of the Court due to the "subsidiarity" of the inter-American human rights system.

### ***A. Regarding the alleged lack of temporary jurisdiction of the Court to hear violations of the Inter-American Convention on Forced Disappearance***

#### **A.1 Arguments of the State and observations of the Commission and the representatives**

19. The **State** argued that the Inter-American Convention on Forced Disappearance “does not apply to this case, given that the alleged facts [...] occurred [...] 11 years before the Ecuadorian State ratified said Convention.” According to the State, by virtue of the principle of non-retroactivity of treaties, the Inter-American Convention on Forced Disappearance binds the States Parties, since the treaty entered into force for each one of them and “does not apply in any way to situations prior to that date.”

20. The **Commission** It indicated that, given the permanent nature of the crime of forced disappearance, its effects continue over time as long as the whereabouts of the victim are not established, which leads to “a situation of continuous violation of [the] international obligations [of the State].” It also added that the duty to adequately classify forced disappearance is an obligation assumed by the States at the time of ratifying said Convention, for which reason “its compliance or non-compliance is analyzed in the time frame following [the] ratification.”

21. The **representatives** They highlighted that the reasoning of the State “fails to take into account the continuous nature of the crime of forced disappearance of persons.” They indicated that, given that the whereabouts of Jorge Vásquez Durand are still unknown, nor the circumstances of his arrest and detention, and that the State has not yet carried out a serious investigation into the facts, the forced disappearance of Mr. Vásquez Durand remains in force to date. Therefore, they argued that the Court has jurisdiction *ratione temporis* to analyze and decide on this case both based on the American Convention and on the Inter-American Convention on Forced Disappearance, and they requested that the preliminary objection filed by the State be declared unfounded.

## A.2 Considerations of the Court

22. The Court reiterates that, like any body with jurisdictional functions, it has the power inherent to its powers to determine the scope of its own jurisdiction (*compétence de la compétence/Kompetenz-Kompetenz*).

23. The State of Ecuador ratified the Inter-American Convention on Forced Disappearance on July 27, 2006, which entered into force for the State on August 26, 2006, in accordance with Article XX of said treaty. In the case under review, the objections raised by the State question the temporary jurisdiction of the Court with respect to the Inter-American Convention on Forced Disappearance, by maintaining that this Court could not exercise its contentious jurisdiction to declare a violation of the norms of the aforementioned international instrument, given that the events occurred 11 years before the ratification of said Convention.

24. The Court recalls that, in principle, it cannot exercise its contentious jurisdiction to apply the Inter-American Convention on Forced Disappearance and declare a violation of its norms when the facts alleged or the conduct of the State that could imply its international responsibility precede said recognition of jurisdiction.<sup>6</sup>

25. However, in accordance with the principle of *pacta sunt servanda*, from the date it entered into force for the State, the obligations of the treaty apply to Ecuador and, by virtue of this, it is applicable to those facts that constitute violations of a continuous or permanent nature, which began before the entry into force of the treaty and persist even after its entry into force.

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<sup>6</sup> cf. *Case of Blake v. Guatemala. Preliminary Exceptions*. Judgment of July 2, 1996. Series C No. 27, paras. 39 and 40, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of November 30, 2016. Series C No. 328, para. 19.



that date, so that the principle of non-retroactivity is not infringed<sup>7</sup>. In the same way, the obligations contracted under the Inter-American Convention on Forced Disappearance could be analyzed with respect to independent facts that in the course of a process could constitute specific and autonomous violations of denial of justice.<sup>8</sup> To hold otherwise would be equivalent to depriving the treaty itself and the guarantee of protection it establishes of its useful effect, with negative consequences for the alleged victims in the exercise of their right of access to justice.<sup>9</sup>

26. Based on all of the foregoing, this Court dismisses the first preliminary objection raised by the State, insofar as it is competent to examine and rule on the alleged permanent violations of the Inter-American Convention on Forced Disappearance, as well as on those events that occurred after August 26, 2006, the date of its entry into force for Ecuador.

### ***B. Regarding the alleged lack of substantive jurisdiction of the Court to use international humanitarian law***

#### **B.1 Arguments of the State and observations of the Commission and the representatives**

27. The **State** argued that the Court "lacks jurisdiction to contextualize this case using the norms of international humanitarian law, and even less to apply said law, since the American Convention itself limits its jurisdiction to the application of what is established therein." It affirmed that the initial petition "did not include legal factors related to International Humanitarian Law", for which reason it "strongly reject[ed] the fact that in order to justify a presumed agenda of inter-American public interest, not only expert evidence to support an unsubstantiated thesis of international humanitarian law should be included, for the Court, under this experimental assessment that does not have precise legal grounds." According to the State, the presumed disappearance of Mr. Vásquez Durand would have occurred outside of any context of warlike hostility, since the hostilities in the Alto Cenepa conflict occurred hundreds of kilometers away and involved only the military and not the civilian population, for which reason "it does not seem reasonable to establish any range of particularities for the civilian population" and "the proven factual conditions of the case" do not allow an interpretation of the case "under criteria of international humanitarian law related to a context of international armed conflict." Consequently, he affirmed that "the Court [...] must rule only on the powers that have been exhaustively attributed to it in the Convention" and declare its incompetence to hear and rule on norms of international humanitarian law.

28. The **Commission** indicated that its Report on Admissibility and Merits established "the violations of the Conventions [of the inter-American system], taking into account, to the extent pertinent and according to the nature of said violations, some principles of international humanitarian law that [were] useful and guiding to establish the scope of State obligations when analyzing operations carried out by the public forces in the context of armed conflict."

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<sup>7</sup> Cf. *Case of the Serrano Cruz Sisters v. El Salvador. Preliminary Exceptions*. Judgment of November 23, 2004. Series C No. 118, paras. 65 and 66, and *Case of Tenorio Roca et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 22, 2016. Series C No. 314, para. 31.

<sup>8</sup> Cf. *Case of the Serrano Cruz Sisters v. El Salvador. Preliminary Exceptions*, *supra*, para. 84, and *Case of Tenorio Roca et al. v. Peru*, *supra*, para. 31.

<sup>9</sup> Cf. *Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2009. Series C No. 209, para. 24, and *Case of Tenorio Roca et al. v. Peru*, *supra*, para. 31.

29. The **representatives** For their part, they argued that they only requested that Ecuador's responsibility be declared under various articles of the American Convention and the Inter-American Convention on Forced Disappearance and that "[i]n no way has the Court been asked [...] to declare that Ecuador has violated its obligations under the Geneva Conventions." They affirmed that "the exception raised by the State is [...] irrelevant." Therefore, they requested that this objection be declared unfounded.

## B.2 Considerations of the Court

30. This Court has jurisdiction to decide whether or not any act or omission of the State, in times of peace or armed conflict, is compatible with the American Convention.<sup>10</sup> In the present case, neither the Commission nor the representatives have requested that the State be declared responsible for possible violations of the norms of international humanitarian law. Pursuant to Article 29.b) of the American Convention and the general rules for the interpretation of treaties contained in the Vienna Convention on the Law of Treaties, the same Convention may be interpreted in relation to other international instruments.<sup>eleven</sup> Such as the relevant provisions of the Geneva Conventions<sup>12</sup>. Therefore, when examining the compatibility of State conduct or norms with the American Convention, the Court can interpret the obligations and rights contained in the same Convention in light of other treaties.<sup>13</sup>

31. In this case, by using international humanitarian law as a rule of interpretation complementary to conventional law, this does not imply that the Court is assuming a hierarchy between normative orders, since the applicability and relevance of international humanitarian law in situations of armed conflict is not in doubt.<sup>14</sup> This only implies that the Court can observe these regulations, as specific regulations on the matter, to give a more specific application to the conventional regulations in defining the scope of state obligations.<sup>fifteen</sup> However, the State's arguments according to which the alleged forced disappearance of Mr. Vásquez Durand does not include legal factors related to international humanitarian law because it would have occurred outside of any context of warlike hostility (*suprapara*. 27) are substantive issues that will be analyzed in the corresponding chapter.

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<sup>10</sup> Cf. *Case of Las Palmeras v. Colombia. Preliminary Exceptions*, Judgment of February 4, 2000. Series C No. 67, para. 32, and *Case of the Santo Domingo Massacre v. Colombia. Preliminary Objections, Merits and Reparations*. Judgment of November 30, 2012. Series C No. 259, para. twenty-one.

<sup>eleven</sup> Cf. *Case of the Mayagna (Sumo) Awá Tingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of August 31, 2001. Series C No. 79, para. 148, and *Case IV vs. Bolivia. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of November 30, 2016. Series C No. 329, para. 168. In this regard, Article 31.3.c of the aforementioned Vienna Convention establishes as a rule of interpretation that "[t]ogether with the context, the following must be taken into account: [...] c) any pertinent form of international law applicable in the relations between the parties."

<sup>12</sup> Cf. *Case of Bámaca Velásquez v. Guatemala. Background*. Judgment of November 25, 2000. Series C No. 70, para. 209, and *Case of Cruz Sánchez et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of April 17, 2015. Series C No. 292, para. 270. In particular with respect to this case, it is noted that Ecuador ratified the Geneva Conventions of 1949 on August 11, 1954. Likewise, it ratified the Additional Protocol to the Geneva Conventions of 1949 relative to the protection of victims of international armed conflicts on April 10, 1979.

<sup>13</sup> Cf. *The Right to Information on Consular Assistance within the framework of the Guarantees of Due Legal Process*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 113, and *Case IV v. Bolivia, supra*, para. 168.

<sup>14</sup> Cf. *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 24, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 14, 2014. Series C No. 287, para. 39. In a similar sense, *Case of Cruz Sánchez et al. v. Peru, supra*, paras. 270 to 272.

<sup>eleven</sup> Cf. *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 24, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala, supra*, para. 31.

32. Therefore, with regard to its material jurisdiction, if necessary, the Court may refer to provisions of international humanitarian law when interpreting the obligations contained in the American Convention, in relation to the facts of this case. Consequently, the Court dismisses the second preliminary objection filed by the State.

### ***C. Regarding the alleged lack of jurisdiction of the Court due to the “subsidiarity” of the inter-American system***

#### **C.1 Arguments of the State and observations of the Commission and the representatives**

33. The **State** alleged that "it has a mechanism for reparation for victims that guarantees the rights of individuals" and "has generated the best legal and institutional conditions not only to make the truth of the facts known, but also to generate comprehensive reparation in favor of the victims." It also indicated that the Commission "had sufficient information" at the time of issuing its Report on Admissibility and Merits "to carry out a rigorous examination of admissibility, which would have implied that the case would not be referred to the Court," based "on the principle of complementarity and subsidiarity [...], given that an internal mechanism is created to correct matters in the internal jurisdiction, therefore the intervention of the inter-American system is not justified." It argued that the Court "should not declare its jurisdiction to hear the matter, since its intervention would jeopardize all the implemented national reparation procedures." By virtue of the foregoing, it requested that "the Tribunal [...] accept [] this preliminary objection with respect to the subsidiary nature of the inter-American system, and allow[ed] the State to make internal reparation through its own legal mechanisms, prior to the treatment of the case before the organs of the inter-American system."

34. The **Commission** noted that "the principle of complementarity does not imply that States should have unlimited opportunities to resolve the issue." He stated that "[t]he opposite would be imposing excessive burdens on the victims [...] and] would lead [...] to unjustifiably delay international justice." He added that in the specific case "there was no progress in the investigation" and that "the State had not ordered any measure of reparation for the next of kin of Mr. Vásquez Durand."

35. The **representatives** argued that this preliminary objection was untimely, "since it was not presented at the appropriate procedural moment." They affirmed that, even though the State has adopted "some positive measures since the facts, especially in the ambit of the Truth Commission, it is not true that these constitute sufficient actions to affirm that the State has complied with its obligations." They highlighted that the State itself has affirmed that "these measures represent 'steps', 'advances' in the right direction, with 'objectives' or 'purposes' that 'may contribute' to the compliance of the State of Ecuador with its international obligations". They highlighted that 20 years after the beginning of the forced disappearance of the alleged victim and more than five years after the publication of the Report of the Truth Commission, "there is still no judicial decision in this regard." They insisted that the State "cannot limit itself to having a passive role [...], limiting itself to describing the objectives of the Truth Commission, its conclusions and recommendations, the public policies that it later implemented and the legislative norms that it adopted; omitting to provide clear explanations about the case, while the victims continue to wait for justice." Therefore, they requested that the Court declare this exception inadmissible. while the victims continue to wait for justice." Therefore, they requested that the Court declare this exception inadmissible. while the victims continue to wait for justice." Therefore, they requested that the Court declare this exception inadmissible.

## C.2 Considerations of the Court

36. The alleged forced disappearance of Mr. Vásquez Durand began more than twenty-two years ago, and to date the State has not recognized the international wrongful act, has clarified the case judicially, or made reparations to his next of kin.

37. Through the Law for the Reparation of Victims and the Prosecution of Serious Violations of Human Rights and Crimes against Humanity that Occurred in Ecuador between October 4, 1983 and December 31, 2008 (hereinafter "Law for Reparation of Victims and Judicialization")<sup>16</sup> a reparation program was created for the cases documented by the Truth Commission (hereinafter the "Reparation Program"), among which is the case of Mr. Vásquez Durand (*infrapara*. 42). Ecuador alleges that, through the Reparation Program, it could have made reparations to the alleged victims. However, they have not accepted it. Therefore, in the first place, the complementarity alleged by Ecuador in this case would not be applicable.

38. Secondly, the State requests that the Court refrain from hearing this case due to the availability of the Reparation Program created internally. However, this Tribunal recalls that the remedies destined exclusively for the granting of reparations do not constitute remedies that must be exhausted by the alleged victims, therefore it does not inhibit the jurisdiction of the Court to hear a case.<sup>17</sup>

39. Notwithstanding this, the Court will take into account, if necessary, the reparation mechanisms established at the domestic level in the complete and adequate determination of State responsibility, as well as in what corresponds to the establishment of comprehensive reparation in favor of the alleged victims.<sup>18</sup> Such appraisals and assessments must be made in response to the circumstances of each specific case, according to the nature of the right that is allegedly violated and the claims of the person who has filed it. However, this analysis may correspond, consequently, to the merits of the case or, where appropriate, to the reparations phase.<sup>19</sup>

40. Based on the foregoing, the Court dismisses the third preliminary objection filed by the State.

## V

### PRIOR CONSIDERATION

#### *A. Regarding the alleged acknowledgment of responsibility by the State*

##### **A.1 Arguments of the parties and the Commission**

41. The **Commission** and the **representatives** They alleged that, through Article 2 of the Law for Reparation for Victims and Judicialization, the State acknowledged its objective responsibility for the violations documented by the Truth Commission, including the alleged detention and subsequent forced disappearance of Mr. Vásquez Durand. He **Stater** referred to and cited the

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<sup>16</sup> *cf.* Law for Reparation of Victims and Judicialization, published in Official Gazette No. 143 on December 13, 2013 (hereinafter "Law for Reparation of Victims and Judicialization") (evidence file, folios 130 to 136).

<sup>17</sup> *Cf. Case of the Ituango Massacres v. Colombia*, Judgment of July 1, 2006. Series C No. 148, paras. 340 and 376, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia*, *supra*, para. 549.

<sup>18</sup> *Cf. Case of the Santo Domingo Massacre v. Colombia*, *supra*, para. 38, and *Case of Chinchilla Sandoval v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*, Judgment of February 29, 2016. Series C No. 312, para. 25.

<sup>19</sup> *Cf. Case of the Santo Domingo Massacre v. Colombia*, *supra*, para. 38, and *Case of Chinchilla Sandoval v. Guatemala*, *supra*, para. 25.

referred to article 2 of the Law for Reparation of Victims and Judicialization. However, it pointed out that "the content of the national Law only generated internal effects for the Ecuadorian reparation institutions, for which reason one cannot speak in any way of international responsibility of the State attributable to Ecuador as a result of its internal legislation." He insisted that "the mechanisms that it generated obey an effort for all this internal repair mechanism. But [they] did not have the objective of generating recognition that has an international scope, but rather as an internal mechanism that makes it possible to go to a reparation process."

## A.2 Considerations of the Court

42. In May 2007, Ecuador created a Truth Commission and assigned it the task of investigating and clarifying human rights violations that occurred between 1984 and 2008 (*infrapara*. 73). The Final Report of the Truth Commission was presented in June 2010 and it documented the case of Mr. Vásquez Durand (*infrapara*. 73). In said report, the Truth Commission concluded that the violations "Torture - Forced Disappearance - Illegal deprivation of liberty" had been committed with respect to Jorge Vásquez Durand.<sup>twenty</sup>.

43. After the presentation of the aforementioned report, in November 2013 the National Assembly of Ecuador approved the Law for Reparation of Victims and Judicialization (*infrapara*. 74). Article 2 of the aforementioned law establishes that:

Acknowledgment of responsibility of the State: The Ecuadorian State recognizes its objective responsibility for the human rights violations documented by the Truth Commission and recognizes that the victims suffered unjustifiable violations against their life, liberty, integrity and dignity, for which reason they and Ecuadorian society must be guaranteed, without delay, the right to know the truth of the facts, to justice, reparation and non-repetition of the events that occurred.

The Ecuadorian State will be responsible for judicial error, unjustified delay or inadequate administration of justice, violation of the right to effective judicial protection and, for violations of the principles and rules of due process documented by the Truth Commission, and will make full reparation to people who have suffered violations and violations of human rights.<sup>twenty-one</sup>.

44. While the Commission and the representatives allege that Article 2 of the aforementioned law has all the validity of an acknowledgment of international responsibility, the State has been unclear as to the value it gives to said provision. Although it has not denied its existence and content and even relies on that law to request the inadmissibility of the case before the Court, the State has rejected that said law constitutes international recognition before the Court.

45. This Court recalls that Article 62 of its Regulations regulates the "acceptance of the facts or the total or partial acquiescence" made before the Court itself.<sup>22</sup>. Said rule establishes the possibility of international recognition, which would have the effect of ending, partially or totally, the dispute raised.

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<sup>twenty</sup> Ecuadorian Truth Commission. Report entitled "Without truth there is no justice". May 2010. Volume 4. Case reports. Period 1988-2008 (hereinafter "Report of the Truth Commission") Introduction, pgs. 82 to 84. Available in: [http://www.alfonsozambrano.com/comision\\_verdad/index.htm](http://www.alfonsozambrano.com/comision_verdad/index.htm) .

<sup>twenty-one</sup> Article 2 of the Law for Reparation for Victims and Prosecution (evidence file, folio 133).

<sup>22</sup> Said article establishes that "[i]f the defendant informs the Court of his acceptance of the facts or his acquiescence to the claims that appear in the submission of the case or in the brief of the presumed victims or their representatives, the Court, having heard the opinion of the other parties involved in the proceeding, will decide, at the appropriate procedural moment, on its origin and its legal effects."

46. The foregoing, however, does not prevent other types of State acts, such as its internal acts or those carried out in other international forums, from having international effects and, consequently, from being examined by this Court. For example, it has considered that the acts of recognition carried out during the proceedings before the Commission are necessarily relevant for determining the application of the *estoppel principle* regarding contrary positions alleged during the proceedings of the case before the Court<sup>23</sup>.

47. On the other hand, from the jurisprudence of the Court it can be deduced that in order to consider an act of the State as an acceptance or acknowledgment of responsibility, its intention in this sense must be clear.<sup>24</sup> Therefore, it is necessary to analyze the nature and characteristics of the State's declarations, as well as the circumstances in which they were made.<sup>25</sup> For this reason, this Court has established that the analysis of the acts of acknowledgment of responsibility is carried out in each specific case.<sup>26</sup> It is therefore up to us to determine whether Article 2 of the Law for Victim Reparation and Judicialization shows the clear intention of the State to commit itself internationally, through an acknowledgment of responsibility that would have the effect of finalizing the controversy before this Court. Therefore, it is necessary to analyze the circumstances surrounding the internal act of the State that is alleged to constitute an acknowledgment of international responsibility.

48. In this sense, in the first place, the Court notes that the Law for Reparation of Victims and Judicialization does not expressly mention the intention that the acknowledgment of responsibility binds the State internationally. Secondly, the aforementioned law establishes as its objective "to regulate comprehensive reparation for victims of serious human rights violations and crimes against humanity committed in Ecuador between October 4, 1983 and December 31, 2008, which were documented by the Truth Commission; and, guarantee their prosecution"<sup>27</sup>. Likewise, the law creates the Reparation Program through administrative channels and recognizes the alternative right to legally demand comprehensive reparation.<sup>28</sup> (*supra* para. 37 e *infra* paras. 195 to 197). In this way, the recognition of objective responsibility established in article 2 seeks that in the administrative reparations program it is not necessary to demonstrate state responsibility but rather directly agree on the pertinent reparations.

49. By virtue of the foregoing, it does not emerge from Article 2 of the Law for Reparation of Victims and Judicialization, nor from the circumstances surrounding it, a clear intention to commit itself at the international level. Therefore, this Court considers that the aforementioned acceptance of responsibility by the State is not equivalent to the acknowledgment

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<sup>23</sup> Cf. *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru. Preliminary Objection, Merits, Reparations and Costs*. Judgment of July 1, 2009 Series C No. 198, para. 59, and *Case of Flor Freire vs. Ecuador. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 31, 2016. Series C No. 315, para. 41.

<sup>24</sup> Cf. *Case of Gelman v. Uruguay. Background and Repairs*. Judgment of February 24, 2011 Series C No. 221, para. 28, and *Case of Flor Freire v. Ecuador, supra*, para. 42.

<sup>25</sup> As regards unilateral declarations in general, see, International Court of Justice (ICJ), *Case concerning nuclear tests (New Zealand v. France)*, Judgment of December 20, 1974, paras. 52 and 53; ICJ, *Case concerning the border dispute (Burkina Faso v. Republic of Mali)*. Judgment of December 22, 1986, para. 40, and ICJ, *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of December 19, 2005, para. 49.

<sup>26</sup> Cf. *Case of Myrna Mack Chang v. Guatemala. Merits, Reparations and Costs*. Judgment of November 25, 2003. Series C No. 101, para. 105, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala, supra*, para. 54.

<sup>27</sup> Article 1 of the Law for Reparation for Victims and Prosecution (evidence file, folio 133).

<sup>28</sup> cf. Articles 4 and 8 of the Law for the Reparation of Victims and Prosecution (evidence file, folios 134 and 135).

contemplated in Article 62 of the Rules of Procedure and believes that it is necessary to rule on the controversy and make considerations on the violations of the American Convention alleged both by the Commission and by the representatives of the alleged victims. The foregoing without prejudice to the effects of said acknowledgment at the internal level or the value that corresponds to the Report of the Truth Commission and its conclusions in determining the facts of the present case (*infraparas.* 113 and 114).

## SAW PROOF

### ***A. Documentary, testimonial and expert evidence***

50. This Tribunal received various documents presented as evidence by the Commission and the parties, attached to their main briefs (*supraparas.* 1, 3, 6 and 7). In the same way, the Court received from the parties documents requested by the judges of this Court as evidence to facilitate adjudication, in accordance with Article 58 of the Rules of Procedure (*suprapara.* 13). In addition, the Court received the statements rendered before a notary public (affidavit) by the alleged victim, Jorge Luis Vásquez Gomero, and by the witness Mario Jesús Puente Olivera, as well as the expert opinions of Carolina Loayza Tamayo, Carlos Alberto Jibaja Zárate, and Lesly Muñoz Lascano, and the joint expert opinion of Diego Pérez Enríquez, Daniel Pontón, and Carla Álvarez.<sup>29</sup> Regarding the evidence provided in the public hearing, the Court heard the statement of the alleged victim, María Esther Gomero Cuentas, and the expert opinions of Alejandro Valencia Villa and Pablo Alarcón Peña.

### ***B. Admission of evidence***

#### **B.1 Admission of documentary evidence**

51. In this case, as in others, this Court admits those documents presented opportunely by the parties and the Commission or requested as evidence to facilitate adjudication by the Court or its Presidency whose admissibility was not contested or challenged.<sup>30</sup>

52. With respect to the procedural opportunity for the presentation of documentary evidence, in accordance with Article 57.2 of the Regulation, it must be presented, in general, together with the submission of the case, requests and arguments or response briefs, as appropriate. Evidence submitted outside the due procedural opportunities is not admissible, except in the exceptions established in the aforementioned article 57.2 of the Regulation, namely, force majeure, serious impediment or if it were an event that occurred after the aforementioned procedural moments.

53. Both the State and the representatives presented certain documentation together with their final written arguments. In this regard, Ecuador requested that Annex 3 provided by the representatives be excluded along with their final written arguments, consisting of a "table of communications between institutions of the State of Ecuador and the next of kin of the victim and/or their representatives regarding the Reparation Program." According to the State, said annex constitutes "solely a guide-record of communications" and it has "included notes and conclusions that are manifestly subjective and unsupported." The Court verifies that the annex referred to by the State is not documentary evidence, but rather constitutes part of the arguments of

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<sup>29</sup> The objects of these declarations are established in the Resolution of the Presidency of June 29, 2016 (*supranote* 4).

<sup>30</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Background Judgment* of July 29, 1988. Series C No. 4, para. 140, and *Case of Andrade Salmón v. Bolivia. Merits, Reparations and Costs Judgment* of December 1, 2016. Series C No. 330, para. 16.

the representatives. In this regard, it warns that there is no impediment for the parties to specify their allegations in attached documents, as long as they are presented on the date established for the presentation of the respective document. The aforementioned annex 3 was presented together with the final written arguments, on the date established for it by the President, for which reason there is no basis for its exclusion. The foregoing without prejudice to their being taken into account as allegations and, in this way, being assessed in the context of the body of evidence.

54. On February 7, 2017, the State forwarded a brief in which it provided certain documentation regarding communications of September 2016 between the Ecuadorian Ombudsman's Office and the representatives of the alleged victims regarding the national reparations program, alleging its supervening nature. The representatives noted to the Court that said communications had already been forwarded as part of their annexes to the final written arguments. Therefore, the Court considers that the State's brief of February 7, 2017 and its annexes are not admitted.

## **B.2 Admission of testimonial and expert evidence**

55. Likewise, the Court deems it pertinent to admit the statements of the alleged victims, the witness, and the expert opinions rendered at the public hearing and before a notary public, insofar as they conform to the purpose that was defined by the Presidency in the Order by which it was ordered to receive them and the purpose of this case.

56. In its final written arguments, the State reiterated its request that the expert opinion of Alejandro Valencia Villa be inadmissible. The Court recalls that, through the President's order of June 29, 2016, the challenge filed by the State against the said expert witness was rejected.<sup>31</sup> On July 22, 2016, the State challenged said Resolution, specifically regarding the rejection of the challenge of expert witness Alejandro Valencia Villa. Through an Order of August 22, 2016, the plenary session of the Court dismissed the appeal filed by the State and, consequently, ratified the Order of the President of June 29, 2016 in all its terms.<sup>32</sup> Said decision was previously adopted by electronic means and communicated to the parties and to the Commission, by means of a note from the Secretariat on August 5, 2016 "due to the proximity of the holding of the public hearing in this case", noting that the respective Resolution would be notified during the special period of sessions<sup>33</sup>. However, in its final written arguments, Ecuador once again requested the inadmissibility of the aforementioned expert opinion, alleging that: (i) the decision of August 22 does not record the vote of Judge Sierra Porto, who had voted against the President's Resolution, in accordance with the decision communicated on August 5, 2016; (ii) the appeal filed by the State "can at no time be considered a reconsideration appeal" since the State "appealed to a higher body" and did not intend that the contested instance itself be the one to review and rule on the decision rendered, and (iii) the quorum for the Court's deliberations is five judges and "[it is] clear that the appealed authority had to abstain from voting because it was a

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<sup>31</sup> Cf. *Case of Vásquez Durand et al. Ecuador*. Order of the President of the Court of June 29, 2016. Available at: [http://www.corteidh.or.cr/docs/asuntos/vasquez\\_29\\_06\\_16.pdf](http://www.corteidh.or.cr/docs/asuntos/vasquez_29_06_16.pdf).

<sup>32</sup> Cf. *Case of Vásquez Durand et al. Ecuador*. Order of the Court of August 22, 2016. Available at: [http://www.corteidh.or.cr/docs/asuntos/vasquez\\_22\\_08\\_16.pdf](http://www.corteidh.or.cr/docs/asuntos/vasquez_22_08_16.pdf).

<sup>33</sup> In the aforementioned note from the Secretariat, it was indicated that: "Regarding the request for reconsideration filed by the State, [it] informed[ed] the parties and the Commission that the plenary session of the Court, in a decision of four votes in favor and two against (judges Eduardo Vío Grossi and Humberto Sierra Porto dissent), decided to ratify the decision of the President of June 29, 2016, by means of which the challenge filed against the expert witness Alejandro was dismissed Valencia Villa. This decision was communicate[d] to the parties and to the Commission by means of a note from the Secretariat of the Court due to the proximity of the holding of the public hearing in this case. The respective Reconsideration Resolution [would] be notified to the parties and to the Commission during the next special period of sessions that will begin on August 22, 2016."



appeal and not a horizontal or reconsideration appeal[, therefore] the number of judges who made the decision [of August 22, 2016] did not meet the minimum required by the [I]nter-American law.”

57. The Court notes that, in accordance with Article 31.3 of its Regulations, there is no means of challenge against the resolutions of this Court. Therefore, the Resolution of the plenary session of the Court of August 22, 2016, by means of which it decided to dismiss the appeal filed by the State against the expert opinion of Alejandro Valencia Villa and ratify the decision of his Presidency, is not open to challenge.

### ***C. Assessment of the evidence***

58. Pursuant to the provisions of Articles 46, 47, 48, 50, 51, 57, and 58 of the Rules of Procedure, as well as its consistent jurisprudence regarding evidence and its assessment, the Court will examine and assess the documentary evidence submitted by the parties and the Commission, the statements, testimonies, and expert opinions, as well as the evidence to help resolve the case requested and incorporated by this Court when establishing the facts of the case and pronounce on the substance. To this end, it is subject to the principles of sound criticism, within the corresponding regulatory framework, taking into account the entire body of evidence and what is alleged in the case.<sup>3. 4.</sup>

59. Likewise, in accordance with the jurisprudence of the Inter-American Court, the statements made by the alleged victims cannot be evaluated in isolation but rather within the set of evidence in the proceeding, to the extent that they can provide more information on the alleged violations and their consequences.<sup>35.</sup>

## **VII FACTS**

60. This case refers to the presumed forced disappearance of the Peruvian citizen Jorge Vásquez Durand in Ecuadorian territory, during an international armed conflict between Ecuador and Peru that began in 1995. In this chapter, the Court will present the facts related to (A) the context in which the facts of the case occurred, (B) the presumed detention and forced disappearance of Jorge Vásquez Durand, (C) the Report of the Truth Commission and the Law for Reparations tion of Victims and Prosecution, as well as (D) the proceedings and proceedings initiated as a result.

### ***A. Context***<sup>36</sup>

61. In January 1995, the so-called Cenepa War or Alto Cenepa Conflict between Ecuador and Peru began.<sup>37.</sup> Said conflict originated from a territorial dispute in the area of the

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<sup>3. 4.</sup> Cf. *Case of the “White Panel” (Paniagua Morales et al.) v. Guatemala. Background*, Judgment of March 8, 1998. Series C No 37, paras. 69 to 76, and *Case of Andrade Salmón v. Bolivia, supra*, para. 22.

<sup>35.</sup> Cf. *Case of Loayza Tamayo v. Peru. Background*, Judgment of September 17, 1997. Series C No 33, para. 43, and *Case IV v. Bolivia, supra*, para. 60.

<sup>36.</sup> The Commission and the representatives presented a contextual analysis of this case; however, in this section the Court establishes the context that emerges from the body of evidence provided to the Court.

<sup>37.</sup> Cf. *Peru – Ecuador: On the path of peace and development*. Virtual book. 2nd. Edition. Volume 1. Available at: <http://www4.congreso.gob.pe/comisiones/1999/exteriores/libro1/1volum/indice.htm>, and a press release from the Ministry of National Defense of Ecuador published in January 2014, entitled “FF.AA. They commemorate the XIX Anniversary of the Heroic Deed of Cenepa”. Available in: <http://www.defensa.gob.ec/ff-aa-conmemoraron-xix-aniversario-de-la-gesta-heroicadel-cenepa/>.

Cordillera del Cóndor and the Cenepa River<sup>38</sup>. According to the joint expert opinion of Diego Pérez Enríquez, Carla Álvarez Velasco and Daniel Pontón Cevallos, historically Ecuador and Peru had had a tense relationship around that border as a result of the impossibility of executing the protocols of Pedemonte Mosquera of 1829 and Rio de Janeiro of 1942.<sup>39</sup> These experts explained that the practical difficulties for its implementation led to a systematic questioning of the limits between the two countries and "the cyclical increase in tensions, by point of war confrontation in 1941, 1981 and 1995"<sup>40</sup>.

62. During the period of hostilities, the armed forces of both countries mobilized and clashed. Peru, Ecuador and civil society organizations differ on the figures of deaths and detainees, military or civilian, that would have been a consequence of the armed conflict<sup>41</sup>. Additionally, during the conflict, Peru and Ecuador exchanged prisoners of war, through and under the auspices of the International Committee of the Red Cross (hereinafter "ICRC").<sup>42</sup>.

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<sup>38</sup> *cf.* Press release from the Ministry of National Defense of Ecuador published in January 2014, entitled "*Armed Forces XIX Anniversary of the Heroic Deed of Cenepa is commemorated*". Available in: <http://www.defensa.gob.ec/ff-aaconmemoraron-xix-aniversario-de-la-gesta-heroica-del-cenepa/>.

<sup>39</sup> *cf.* Joint expert opinion of Diego Pérez Enríquez, Carla Álvarez Velasco and Daniel Pontón Cevallos rendered before a notary public on July 29, 2016 (evidence file, folio 1517).

<sup>40</sup> Joint expert opinion of Diego Pérez Enríquez, Carla Álvarez Velasco and Daniel Pontón Cevallos rendered before a notary public on July 29, 2016 (evidence file, folio 1517).

<sup>41</sup> In this regard, a BBCMUNDO note states that: "[t]he official death toll varies, depending on each country. Ecuador officially reported the death of 33 soldiers. A figure that was disputed at the time by the Joint Command of the Armed Forces of Peru, which stated that the Ecuadorian casualties had been 350. Peru acknowledged the death of 60 of its soldiers. It is difficult to establish whether there was a concealment of the truth by the two countries. Some estimates from non-governmental organizations speak of a total figure of 500 deaths, while other documentation centers speak of a figure of 120 deaths". BBC Mundo, "This was the last war", March 3, 2008. Available at: [http://news.bbc.co.uk/hi/spanish/latin\\_america/newsid\\_7274000/7274638.stm](http://news.bbc.co.uk/hi/spanish/latin_america/newsid_7274000/7274638.stm). On the other hand, according to the expert opinion submitted by the State, the Alto Cenepa conflict has been considered low intensity with a relatively small number of casualties and where there was no express declaration of war by the States in dispute." Joint expert opinion of Diego Pérez Enríquez, Carla Álvarez Velasco and Daniel Pontón Cevallos rendered before a notary public on July 29, 2016 (evidence file, folio 1521). Regarding the number of detainees, during the conflict the Commission was informed "by the States of Ecuador and Peru, by petitioners and through public information, about the detention in Ecuador of several Peruvians." Report on Admissibility and Merits (merits file, page 17). In this regard, the Commission cites the note from the Permanent Representation of Peru to the OAS of May 12, 1995, and its annex entitled "Detainees whose release is being processed (At 05-11-95 4:00 PM)" (evidence file, folios 4 to 7). According to this last document, by that date, twenty-one Peruvian citizens had been detained in Ecuador. However, the same note mentions twenty-three and twenty-four detainees elsewhere (evidence file, folios 4 to 7). In addition, the file contains other notes and documents that provide different information in relation to persons detained during the conflict: note from the Permanent Representation of Ecuador to the OAS on May 22, 1995, indicating that there were five Peruvian prisoners of war, two of whom had already been released and that there was no information on Jorge Vásquez Durand (evidence file, folios 9 and 10); note of September 13, 1995, 3 on March 12, 1995, regarding Peruvian citizens detained as of January 1995." Said list accounts for the arrest of 242 people. Although several of these people appear detained by Ecuadorian Military Intelligence, it is not clear from the document whether these people were detained in the context of the armed conflict (evidence file, folios 2308 to 2313).

<sup>42</sup> *cf.* Delivery Certificate of the International Committee of the Red Cross of March 1, 1995 (evidence file, folio 1856), and official letter of the Joint Command of the Armed Forces of Ecuador of April 4, 1995 (evidence file, folio 1846).

63. In addition, between January and February 1995, the Ecuadorian Ministry of Foreign Affairs issued at least five press releases denying that Peruvian citizens had been the object of attacks and reaffirming respect for their rights in Ecuadorian territory. One of these communications stated:

The Ministry of Foreign Affairs, in view of the insistent rumors spread from Lima, is forced to reiterate that the national authorities have issued the pertinent instructions in order to guarantee the personal and patrimonial security of foreign citizens residing in Ecuador, as well as those who are temporarily visiting the national territory. These instructions are being strictly observed.

This is a matter of special concern for the Ecuadorian Government, since one of its main and traditional characteristics is based on the unrestricted compliance with the obligations contracted internationally on this matter, as well as because among the postulates of the regime of President Duran Ballén, emphasis is placed on respect and defense of human rights.

The Ecuadorian Foreign Ministry categorically denies that foreign citizens have been victims of attacks or disrespect, due to the situation that the country is experiencing as a result of the violent attacks to which it is being subjected by Peru. This is a smear campaign whose objectives are easy to understand.

As is obvious, adds the note released by the Foreign Ministry, resident or visiting foreign citizens must, in turn, respect Ecuadorian laws<sup>43</sup>.

64. As a consequence of the conflict situation in the border region, on January 27, 1995, Ecuadorian President Sixto Durán Ballén declared a state of national emergency through Executive Decree No. 2487, which implied the application of extraordinary powers contemplated in the Political Constitution and in the National Security Law in force at the time and included a declaration of "National Territory Security Zone."<sup>44</sup> Additionally, the President issued a decree in which he provided that members of the Public Force were exempt from criminal liability for actions carried out during the state of emergency.<sup>Four. Five.</sup>

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<sup>43</sup> Press release of February 1, 1995 from the Ministry of Foreign Affairs and Human Mobility (evidence file, folio 1858). In the same way, *cf.* Press release of January 27, 1995 from the Ministry of Foreign Affairs (evidence file, folio 2535); Press release of January 29, 1995 from the Foreign Ministry (evidence file, folio 2534); Press release of February 2, 1995 from the Ministry of Foreign Affairs and Human Mobility (evidence file, folio 1860); Press release of February 6, 1995 from the Ministry of Foreign Affairs and Human Mobility (evidence file, folio 1862), and note sent by the Administrative Undersecretary of the Ministry of Foreign Affairs to the Ambassador of Ecuador in Brazil on February 8, 1995 (evidence file, folio 2529).

<sup>44</sup> The recitals of said decree read: "That Peruvian military forces have continuously been causing incidents in the border area, the same ones that intensified since January 9 of this year, in the general area of the headwaters of the CENEPÁ river. That the Government, through the Foreign Ministry and International Organizations, has been carrying out activities aimed at eliminating tensions between the two countries, without obtaining positive results. That the activities clearly demonstrate Peru's intentions to seize the headwaters of the Cenepa River and Ecuadorian territory, where our Armed Forces have been located for many years. That, in the last few hours, there have been clashes with Peruvian patrols, infiltrated in the area with the undoubted purpose of carrying out military operations, which configures an imminent external aggression that threatens the Sovereignty and Security of the State. In use of the powers conferred by Arts. 79 of the Political Constitution of the Republic, literals e), g), i), and m); and, 7, literals d) and k) of the National Security Law", decreed that "the State of National Emergency be declared throughout the State territory". Decree No. 2487 of January 27, 1995 (evidence file, page 2390). In October 1995 this decree was revoked by the Court of Constitutional Guarantees because the reasons for the measures no longer existed and therefore the damage to individual freedoms could no longer be justified. 79 of the Political Constitution of the Republic, literals e), g), i), and m); and, 7, literals d) and k) of the National Security Law", decreed that "the State of National Emergency be declared throughout the State territory". Decree No. 2487 of January 27, 1995 (evidence file, page 2390). In October 1995 this decree was revoked by the Court of Constitutional Guarantees because the reasons for the measures no longer existed and therefore the damage to individual freedoms could no longer be justified. 79 of the Political Constitution of the Republic, literals e), g), i), and m); and, 7, literals d) and k) of the National Security Law", decreed that "the State of National Emergency be declared throughout the State territory". Decree No. 2487 of January 27, 1995 (evidence file, page 2390). In October 1995 this decree was revoked by the Court of Constitutional Guarantees because the reasons for the measures no longer existed and therefore the damage to individual freedoms could no longer be justified. *cf.* IACHR, Report on the Situation of Human Rights in Ecuador, April 24, 1997. Chapter II, Introduction, A. Legal and Institutional Guarantees in the Republic of Ecuador. 4. Suspension of Constitutional Guarantees. Available in: <http://www.cidh.org/countryrep/Ecuador-sp/Capitulo%202.htm>

<sup>Four. Five.</sup> *cf.* Truth Commission Report, Executive Summary, pgs. 39.

65. On February 17, 1995, the States of Ecuador and Peru signed the Itamaraty Peace Declaration in Brazil, where they agreed to withdraw the troops from both countries and began peace negotiations. On February 28, 1995, through the Montevideo Declaration, both States reiterated their commitment to the "immediate and effective ceasefire."<sup>46</sup> Finally, on October 26, 1998, the presidents of Peru and Ecuador declared the conflict regarding this border between the two countries to be globally and definitively terminated.<sup>47</sup>, through the Act or Agreement of Brasilia<sup>48</sup>.

66. Regarding the human rights situation during the conflict, the United Nations Working Group on Enforced or Involuntary Disappearances reported having received information on three cases of disappearances in 1995 within the framework of the "urgent action" procedure.<sup>49</sup> These cases involved the alleged detention of Peruvian citizens in Huaquillas, Loja and Otavalo in Ecuador. According to the information submitted by the State in response to the queries of the Working Group, two of these people were detained by the Ministry of National Defense on charges of espionage and were later "clarified", and the third person had left Ecuador, but his case was still pending.<sup>50</sup> According to the information in the file, this last person is Mr. Jorge Vásquez Durand<sup>51</sup>. The Working Group on Forced or Involuntary Disappearances continued to request and receive information on the case of Mr. Vásquez Durand until at least 2008, according to the file forwarded to this Court.<sup>52</sup> For its part, the Inter-American Commission

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<sup>46</sup> *Peru - Ecuador: On the path of peace and development*. Virtual book. 2nd. Edition. Volume 1. Available on the Web of the Congress of the Republic of Peru: <http://www4.congreso.gob.pe/comisiones/1999/exteriores/libro1/1volum/indice.htm>, and a press release from the Ministry of National Defense of Ecuador published by the Public Ministry of Defense in January 2014, entitled "FF.AA. They commemorate the XIX Anniversary of the Heroic Deed of Cenepa". Available in: <http://www.defensa.gob.ec/ff-aaconmemoraron-xix-aniversario-de-la-gesta-heroica-del-cenepa/>.

<sup>47</sup> *cf.* Press release from El País "The presidents of Peru and Ecuador sign peace in Brasilia and define their border". Available in: [http://elpais.com/diario/1998/10/27/internacional/909442811\\_850215.html](http://elpais.com/diario/1998/10/27/internacional/909442811_850215.html).

<sup>48</sup> *cf.* Presidential Act of Brasilia, in Edition. "*Peru - Ecuador: On the path of peace and development*either". Virtual book. 2nd. Volume 2, pages 5 and 6 Available in: <http://www4.congreso.gob.pe/comisiones/1999/exteriores/libro1/2avolum/indice.htm>.

<sup>49</sup> *cf.* UN. Report of the Working Group on Enforced or Involuntary Disappearances to the Economic and Social Council. E/CN.4/1996/38, January 15, 1996, paras. 160 to 165. Available in: <https://documents-ddsny.un.org/doc/UNDOC/GEN/G96/102/18/PDF/G9610218.pdf?OpenElement>.

<sup>50</sup> *cf.* UN. Report of the Working Group on Enforced or Involuntary Disappearances to the Economic and Social Council. E/CN.4/1996/38, January 15, 1996, para. 165. Available at: <https://documents-ddsny.un.org/doc/UNDOC/GEN/G96/102/18/PDF/G9610218.pdf?OpenElement>.

<sup>51</sup> *cf.* The clarification of a case before the United Nations Working Group on Enforced or Involuntary Disappearances implies having received a response from the government with detailed information on the fate and whereabouts of the disappeared person. The Task Force keeps the cases in its files until the exact whereabouts of the missing persons are determined. See also, *inter alia*, communication of June 18, 1996 from the Ministry of Foreign Affairs on cases pending before the United Nations Working Group on Enforced or Involuntary Disappearances that includes Jorge Vásquez Durand (evidence file, folio 2286), and note of April 23, 2008 signed by the Director General of Human Rights and Social Affairs of the Ministry of Foreign Affairs, Trade and Integration and addressed to the Prosecutor of Ecuador requesting information on the cases before the Group of Forced or Involuntary Disappearances of the United Nations (evidence file, folio 2288).

<sup>52</sup> See, *inter alia*, official letter of June 18, 1996 from the Ministry of Foreign Affairs on cases pending before the United Nations Working Group on Enforced or Involuntary Disappearances that includes Jorge Vásquez Durand (evidence file, folio 2286), and official document of July 14, 2006 signed by the Personal Background Reviewer of the Central Archive of the National Police and addressed to the Chief of the Central Police Archive (evidence file, folio 22 90);

stated in its 1997 Report on the Situation of Human Rights in Ecuador that before it were a series of petitions alleging the disappearance and presumed detention of Peruvians within Ecuadorian territory during the period of the conflict in the border region, and that it “[was] still attempting to clarify the situation of a person allegedly detained at the end of January 1995, who apparently has not yet been located.”<sup>53</sup>.

### ***B. Presumed detention and forced disappearance of Jorge Vásquez Durand***

67. Jorge Vásquez Durand was 44 years old in January 1995, he was Peruvian, he was married to María Esther Gomero Accounts<sup>54</sup>, with whom he had two children, Jorge Luis Vásquez Gomero and Claudia Esther Vásquez Gomero, who were 12 and 11 years old, respectively, at the beginning of their father's disappearance<sup>55</sup>. Mr. Vásquez Durand was a journalist and public relations professional by profession.<sup>56</sup>, but since 1993 it was dedicated to the trade of handicrafts between Peru and Ecuador<sup>57</sup>, so he traveled two or three times a month between both countries<sup>58</sup>.

68. On January 26, 1995 Jorge Vásquez Durand traveled by land to Ecuador from Lima, Peru<sup>59</sup>. On January 27, he entered Ecuador through the town of Huaquillas.<sup>60</sup> according to what

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file of the Working Group on Enforced or Involuntary Disappearances where the receipt of the above document is recorded (evidence file, folio 2336); Note dated May 8, 2007, signed by the Adviser to the Minister of Government and addressed to the Director General of Human Rights, Social and Environmental Affairs of the Ministry of Foreign Affairs, through which information is forwarded in response to a request from the Working Group on Enforced or Involuntary Disappearances (evidence file, folio 2315), and note of April 23, 2008 signed by the Director General of Human Rights and Social Affairs of the Ministry of Foreign Affairs,

<sup>53</sup> IACHR, Report on the Situation of Human Rights in Ecuador, April 24, 1997, Chapter IV. Right to life. E. Complaints relating to disappearances. Available in: <http://www.cidh.org/countryrep/Ecuadorsp/Capitulo%204.htm>

<sup>54</sup> Mr. Vásquez Durand was born on February 22, 1950. *cf.* Electoral Book No. 07185940 (evidence file, page 29); national identity document of María Esther Cuentas Gomero (evidence file, folio 242), and marriage certificate issued by the Diocese of Huaraz on August 10, 1989 (evidence file, folio 39).

<sup>55</sup> Jorge Luis Vásquez Gomero was born on January 14, 1983 and Claudia Esther Vásquez Gomero was born on January 28, 1984. *cf.* National identity document of Jorge Luis Vásquez Gomero (evidence file, folio 244), and national identity document of Claudia Esther Vásquez Gomero (evidence file, folio 243).

<sup>56</sup> *cf.* Journalist-Public Relations Diploma issued by the Ministry of Education of Peru (evidence file, folio 37).

<sup>57</sup> *cf.* Brief signed by Mr. Vásquez Durand's clients in February 1995, where they attest that he was a “merchant supplying Handicrafts to the 'Polvos Azules' stalls” (evidence file, folios 31 and 33); letter from the Rector of the Colegio de la Inmaculada de Lima of March 1, 1995 (evidence file, folio 35); Simplified declarations Nos. 6186, 3186 and 2924 dated August 9 and 23 and December 6, 1994 made by Jorge Vásquez Durand before the Customs Administration of Tumbes, Peru for goods from Ecuador, transported by land from Huaquillas, Ecuador (evidence file, folios 63, 65 and 67), and sales invoices for different handicrafts in the name of Mr. Jorge Vásquez for articles purchased in handicraft stores between June 1994 and January 1995 (evidence file, folios 69, 71 and 73).

<sup>58</sup> *cf.* Simplified declarations Nos. 6186, 3186 and 2924 dated August 9 and 23 and December 6, 1994 made by Jorge Vásquez Durand before the Customs Administration of Tumbes, Peru for merchandise from Ecuador, transported by land from Huaquillas, Ecuador (evidence file, folios 63, 65 and 67); Letter from Carlos Cardó Franco, sj of May 9, 1995 addressed to Jorge Carrión, sj in Ecuador (evidence file, folios 75 and 76), and Migration Control document, issued on June 21, 1995 in Huaquillas, Ecuador by the Ecuadorian Head of Migration Control. (Evidence file, page 78).

<sup>59</sup> *cf.* Handwritten letter from María Esther Gomero Cuentas of May 29, 1995, addressed to the General Director of Consular Affairs, the Ministry of Foreign Affairs of Peru (evidence file, folio 106).

<sup>60</sup> *cf.* Immigration Control Document, issued on June 21, 1995 in Huaquillas, Ecuador by the Ecuadorian Head of Immigration Control (evidence file, folio 78).

declared by the merchant Mario Jesús Puente Olivera, a friend of Mr. Vásquez Durand, from Huaquillas they moved to the city of Otavalo, where they shared a hostel<sup>61</sup>. On January 28, due to the border conflict, Mr. Vásquez Durand decided to return to Peru, so he traveled back to Huaquillas<sup>62</sup>.

69. On January 30, from Aguas Verdes, a Peruvian town bordering Huaquillas, Jorge Vásquez Durand called his wife twice in the morning and informed her that he still had to move the merchandise from Huaquillas to Peru.<sup>63</sup> That was the last time Mr. Vásquez Durand had contact with his family.<sup>64</sup>

70. According to information received by his wife from two Peruvian merchants, AJ and JB, on the same January 30, Mr. Vásquez Durand crossed again into Ecuador for immigration procedures and for the entry of his merchandise and, "in the circumstance that he was preparing to stamp his passport at [E]cuadorian Migration," he was allegedly detained by members of the Ecuadorian Intelligence Service<sup>65</sup>. Mr. Mario Jesús Puente Olivera, a friend of Mr. Vásquez Durand with whom he was in Ecuador (*suprapara*. 68), he declared that he had been detained and that his captors told him that Mr. Vásquez Durand had been detained at the border<sup>66</sup>. In addition, another Peruvian citizen, EHAM, who was also detained during the armed conflict, stated that he had seen Mr. Vásquez Durand "[p]arastly dejected" in the courtyard of the Teniente Ortiz military barracks on several occasions.<sup>67</sup> Since then, the whereabouts or fate of Mr. Vásquez Durand has not been known.

71. The Court notes that there is controversy regarding the migratory movements of Mr. Vásquez Durand. On the one hand, the record of entries and exits from Ecuador indicates that "Mr. Vásquez Durand entered for the last time on January 27, 1995 and left on January 30, 1995."<sup>68</sup>, with no records of an arrest<sup>69</sup>. This version coincides with the registry of migratory movement in Peru, according to which the alleged victim re-entered Peru for the last time on January 30, 1995.<sup>70</sup> However, the representatives have questioned the veracity of the Ecuadorian migration document, pointing out that it "is not proof of the entry and exit of Jorge Vásquez [...] since said document suffers from contradictions

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<sup>61</sup> *cf.*Statement of Mario Jesús Puente Olivera in DVD format (evidence file, folio 83).

<sup>62</sup> *cf.*Handwritten letter from Mrs. María Esther Gomero Cuentas of May 29, 1995, addressed to the Director General of Consular Affairs, the Ministry of Foreign Affairs of Peru (evidence file, pages 106 to 109).

<sup>63</sup> *cf.*Written testimony of María Esther Gomero forwarded on May 27, 2009 and partially reproduced in the Report of the Truth Commission, Volume 4. Case reports, p. 84.

<sup>64</sup> *cf.*Written testimony of María Esther Gomero forwarded on May 27, 2009 and partially reproduced in the Report of the Truth Commission, Volume 4. Case reports, p. 84.

<sup>65</sup> Handwritten letter from Mrs. María Esther Gomero Cuentas of February 13, 1995, addressed to the General Director of Consular Affairs, the Ministry of Foreign Affairs of Peru (evidence file, folio 81). See also, Written testimony of María Esther Gomero forwarded on May 27, 2009 and partially reproduced in the Report of the Truth Commission, Volume 4. Case reports, p. 84.

<sup>66</sup> *cf.*Statement of Mario Jesús Puente Olivera in DVD format (evidence file, folio 83).

<sup>67</sup> *cf.*Statement of EHAM, presumed Peruvian detainee, rendered before APRODEH employees (file of evidence, folios 87 and 88).

<sup>68</sup> Immigration Control Document, issued on June 21, 1995 in Huaquillas, Ecuador by the Ecuadorian Head of Immigration Control (evidence file, folio 78).

<sup>69</sup> *cf.*Note No. 079VMPE/OEA from the Permanent Mission of the Republic of Ecuador to the Organization of American States addressed to the Inter-American Commission on July 6, 1995 (evidence file, folios 633 and 667).

<sup>70</sup> *cf.*Official letter No. 1458 from the General Directorate of the Peruvian National Police addressed to the General Director of Consular Affairs of the Ministry of Foreign Affairs (evidence file, folio 648).

that can be seen with the naked eye<sup>71</sup>. Specifically, they highlight that "according to this document, Mr. Vásquez [Durand] entered Ecuador 6 times, and yet it is stated in this document that he left 9 times in 1993."<sup>72</sup> On the other hand, Mrs. María Esther Gomero Cuentas indicated that, "although it is true that [her] husband, according to the migratory movement, entered [Peru], it is also true and certain that he re-entered Huaquillas [in Ecuador] to order his merchandise [and] in those circumstances he was detained." In addition, she assured that "since long before and to date it is not necessary to present a passport or safe-conduct to enter said place, due to the commercial exchange [between the two countries]"<sup>73</sup>.

72. Despite what is indicated in the Report of the Truth Commission (*infrapara*. 73), the State has disputed before this Court that Mr. Vásquez Durand had been detained and subsequently disappeared by state agents. The Court will resolve said controversy in the respective merits chapter of this Judgment (*infra*Chapter VIII-1).

### ***C. The Report of the Truth Commission and the Law for Reparation of Victims and Judicialization***

73. On May 3, 2007, the Ecuadorian Truth Commission was created<sup>74</sup>, by Executive Decree<sup>75</sup>, in order to investigate the human rights violations that occurred "between 1984 and 1988, and other special cases<sup>76</sup>. Once installed, the Truth Commission extended its mandate until 2008<sup>77</sup>. Therefore, the Truth Commission was not established specifically to investigate possible human rights violations committed during the international armed conflict in Alto Cenepa. The Truth Commission supported its analysis and

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<sup>71</sup> Communication from APRODEH addressed to the Inter-American Commission dated March 11, 1996 (evidence file, folio 79).

<sup>72</sup> Communication from APRODEH addressed to the Inter-American Commission dated March 11, 1996 (evidence file, folio 79).

<sup>73</sup> Handwritten letter from Maria Esther Gomero Cuentas addressed to the Inter-American Commission on Human Rights dated February 15, 1996 (evidence file, folios 694 and 695), and statement made by María Esther Gomero Cuentas at the public hearing held before the Court.

<sup>74</sup> "The Ecuadorian Truth Commission was created as a result of a historic process promoted by various organizations of victims of human rights violations and their relatives for more than twenty years (Committee of Relatives of Political Prisoners, Committee of Relatives against Impunity, and in recent years the Ecuadorian Non-Impunity Committee -CENIMPU- in which more than relatives were also included some direct victims), who had been demanding that the Ecuadorian State adequately satisfy their rights to truth, justice and repair". Truth Commission Report, Executive Summary, p. 17.

<sup>75</sup> The President of Ecuador created the Truth Commission through Article 1 of Executive Decree 305 of 1998, with the purpose of "investigate and clarify and prevent impunity regarding violent acts and violations of human rights that occurred between 1984 and 1988 and other periods." Executive Decree 305 of May 18, 2007, Article 1 (evidence file, 246).

<sup>76</sup> The objectives of the Ecuadorian Truth Commission were: "1. Carry out an in-depth and independent investigation into the human rights violations that occurred between 1984 and 1988, and other special cases, such as the so-called Fybeca case, as well as the causes and circumstances that made them possible. 2. Request the declassification of State files that are of a confidential or national security nature. 3. Promote recognition of the victims of said violations and design reparation policies. 4. Recommend the necessary legal and institutional reforms, as well as effective mechanisms for the prevention and punishment of human rights violations. 5. Determine the existence of probable indications of civil, criminal and administrative responsibilities in order to refer them to the pertinent authorities.

<sup>77</sup> "Given the demand for attention to cases of human rights violations subsequent to the 1984-1988 period, the commissioners resolved not to discriminate against any of the cases that are presented, provided that it is presumed that the violations were committed by State agents and that they fall within one of the five descriptors indicated," that is: a. extrajudicial execution, homicide, death in custody; b. forced disappearance; c. torture; d. sexual violence; and. arbitrary detention". Truth Commission Report, Executive Summary, p. 25.

conclusions in 119 cases<sup>78</sup> and on June 6, 2010, he presented his Final Report: "WITHOUT TRUTH THERE IS NO JUSTICE." Said report included the disappearance of Jorge Vásquez Durand, regarding which it was established as violations committed "Torture - Forced disappearance - Illegal deprivation of liberty"<sup>79</sup>.

74. On November 26, 2013, the National Assembly of Ecuador approved the Law for Reparation of Victims and Judicialization<sup>80</sup>, in which article 2 the Ecuadorian State recognizes its "objective responsibility" for the human rights violations documented by the Truth Commission (*suprapara*. 43).

75. The Law for Reparation of Victims and Judicialization seeks to guarantee comprehensive reparation to the direct victims of human rights violations documented by the Truth Commission, their spouses or common-law partners, and their relatives up to the second degree of consanguinity.<sup>81</sup> Likewise, said law provides for the implementation of reparation measures for: (i) knowledge of the truth of the facts and restitution; (ii) compensation for material and non-material damage; (iii) rehabilitation; (iv) guarantee of non-repetition, and (v) satisfaction of the violated right<sup>82</sup>. To this end, the law created a Reparation Program through administrative channels under the Ombudsman's Office.<sup>83</sup> (*supraparas*. 37 and 48 e *infraparas*. 195 to 197).

76. The reparation measures established by said law include the search, location, and release of disappeared persons and, in the event of death, the exhumation, identification, and restitution of their remains.<sup>84</sup>.

77. In relation to the investigation and prosecution of those responsible for the human rights violations documented by the Truth Commission, the aforementioned law establishes the following:

Article 10: General rules of the process in case of serious human rights violations documented by the Truth Commission. The Ecuadorian State will adopt, during the pretrial and criminal procedural stage, the constitutional, legal, administrative and judicial measures that are necessary to make effective the rights and guarantees of the victims and their families in the investigation and prosecution of human rights violations documented by the Truth Commission, in accordance with domestic legislation and international instruments on human rights and prosecution of crimes against humanity.<sup>85</sup>.

78. Based on the aforementioned law, on February 3, 2015, the "Procedural Regulations for reparation agreements, the amounts to be paid as compensation and the measures for compliance" (hereinafter "Regulations for reparation agreements") entered into force. The purpose of said regulation is to establish an administrative procedure to agree on the amount

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<sup>78</sup> *cf.* Truth Commission Report, Executive Summary, p. 50. The Report of the Truth Commission registers 118 cases, but as the State clarified, one case was registered as 118-A, so that in total it could be considered that there are 119 cases. Final arguments brief of the State of Ecuador (merits file, page 630).

<sup>79</sup> Report of the Truth Commission, Volume 4. Case reports, pgs. 82 to 84.

<sup>80</sup> *cf.* Law for Reparation of Victims and Prosecution (evidence file, folios 406 to 410).

<sup>81</sup> *cf.* Law for Reparation of Victims and Prosecution, article 5 (evidence file, folio 408).

<sup>82</sup> *cf.* Law for Reparation of Victims and Prosecution, article 3 (evidence file, folio 408).

<sup>83</sup> *cf.* Law for Reparation for Victims and Prosecution, article 4 (evidence file, folio 408).

<sup>84</sup> *cf.* Law for Reparation of Victims and Prosecution, article 6.3 (evidence file, folio 409).

<sup>85</sup> Law for Reparation of Victims and Prosecution, article 10 (evidence file, folio 410).



of compensation in the pertinent cases, and the measures for compliance<sup>86</sup>. This regulation applies to all victims of cases of human rights violations and crimes against humanity documented by the Truth Commission, with certain exceptions for people who have received effective compensation from the State for the same facts.<sup>87</sup> The details and scope of said program are set out and described, to the extent pertinent, in the chapter corresponding to reparations of this judgment (*infra* Chapter IX).

#### ***D. Proceedings and procedures initiated due to the disappearance of Mr. Jorge Vásquez Durand***

##### **D.1 Procedures carried out at the request of the next of kin by the Peruvian government, international organizations, and civil and religious society organizations**

79. The next of kin of Mr. Vásquez Durand took multiple steps to find his whereabouts<sup>88</sup>. These efforts were made before Peruvian authorities, with the aim of having them inquire with their Ecuadorian counterparts, as well as through religious and human rights organizations so that they in turn could take steps in Ecuador. Likewise, the family of Mr. Vásquez Durand denounced his disappearance before the Inter-American Commission on Human Rights since February 1995 and before the United Nations Working Group on Enforced Disappearances in March 1995.<sup>89</sup> (*supra* para. 66). According to Mrs. Gomero Cuentas, these efforts were unsuccessful because "everything depend[ed] on the Ecuadorian Government notifying the Peruvian Foreign Ministry of the arrest."<sup>90</sup>.

80. As stated in the Report of the Truth Commission,

When María Gomero received no more news from her husband, she filed complaints with the National Congress of Peru, the Association for Human Rights of Peru (APRODEH), the Council for Peace, the International Committee of the International Red Cross, the Inter-American Commission on Human Rights, the foreign ministries of Ecuador, Brazil and Argentina, and the Episcopal Conference, without obtaining any information.

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<sup>86</sup> Article 1 establishes: "Object.- The purpose of this regulation is to establish the administrative procedure to agree on the amount of compensation in cases where applicable, and the measures for its compliance, as established in article 7 of the Law for Reparation of Victims and the Prosecution of Serious Violations of Human Rights and Crimes against Humanity that occurred in Ecuador between October 4, 1983 and December 31, 2008." Procedural regulations for reparation agreements, the amounts to be paid as compensation and the measures for compliance. Ministerial Agreement 865. Official Register Supplement 444 of February 24, 2015 (hereinafter "Regulations for reparation agreements") (evidence file, folio 443).

<sup>87</sup> *cf.* Regulations for reparation agreements, Articles 2 and 3 (evidence file, page 443).

<sup>88</sup> *cf.* Communication from María Esther Gomero Cuentas of May 22, 1995 addressed to the Inter-American Commission on Human Rights (evidence file, page 102); handwritten letter from María Esther Gomero Cuentas of May 29, 1995, addressed to the General Director of Consular Affairs to the Ministry of Foreign Affairs of Peru (evidence file, folios 106 to 108); Statement made by María Esther Gomero Cuentas at the public hearing held before the Court, and Report of the Truth Commission, Volume 4. Case reports, pgs. 82 to 84.

<sup>89</sup> *cf.* Communication addressed to Ecuador by the Chairman of the Working Group on Forced or Involuntary Disappearances on June 23, 1995 (evidence file, folio 2289); record of the complaint filed with the Forced Disappearances Working Group in March 1995 (evidence file, folio 2263), and note from APRODEH on the case of Jorge Vásquez Durand with a list of dates on the complaints and actions related to the case that appears in the judicial file (evidence file folios 2251 to 2254).

<sup>90</sup> Communication from María Esther Gomero Cuentas of May 22, 1995, addressed to the Inter-American Commission on Human Rights (evidence file, folio 102), and statement made by María Esther Gomero Cuentas at the public hearing before the Court.

Different efforts were made in Ecuador by the Ecuadorian authorities in search of the location of Jorge Vásquez, which addressed the Military Brigade of El Oro, the Archbishopric of Cuenca, the Command of the Tarqui Division, the highest military body of El Oro, and the Bishopric of the Armed Forces, but no results were obtained either.<sup>91</sup>.

81. Among the requests sent by the wife of Mr. Vásquez Durand, it is recorded that in February 1995 she wrote to the General Director of Consular Affairs of the Ministry of Foreign Affairs of Peru requesting that she take steps for his release<sup>92</sup>. The government of Peru, together with the ICRC, took various steps before Ecuador to find out the fate of Mr. Vásquez Durand<sup>93</sup>. On November 27, 1995, the Director of Consular Affairs of the Ministry of Foreign Affairs of Peru informed the Director of APRODEH that a communication had been received from the General Consulate of Peru in Machala, Ecuador regarding the inquiries made by the Bishop of Machala before military authorities. The note also states that Mr. Vásquez Durand was "arrested on January 30, 1995 by members of the Ecuadorian Army in Huaquillas and later transferred to Quito."<sup>94</sup>.

82. On May 12, 1995, Peru submitted to the Inter-American Commission a list updated to May 11 of that same year with the names of twenty-one Peruvian citizens allegedly detained in Ecuador. In said list Jorge Vásquez Durand appears as "arrested on 01.30 in Huaquillas by the Ecuadorian army." He adds the note that "[h] would have been transferred to Quito"<sup>95</sup>. In this regard, on May 22, 1995, the government of Ecuador informed the Inter-American Commission about the situation of four of these Peruvian citizens. With respect to Mr. Vásquez Durand, he indicated that "the Ecuadorian police and military authorities had no record of [his] detention." He added that "exhaustive investigations [had] been carried out to ascertain his whereabouts, but no information on his presence in Ecuador had been obtained."<sup>96</sup>. In this regard, the file shows that in April 1995 the Undersecretary of the Ecuadorian Police informed the Ministry of Foreign Affairs that:

Up to now, no information has been obtained to help locate the whereabouts of Mr. Vásquez Durand, having collected all possible information [...]. Corroborating this, I put at your disposal the list provided by the El Oro Provincial Command No. 8 on March 12, 1995 regarding Peruvian citizens detained as of January 1995, as well as the official telegram of May 22, 1995 signed by the Head of Immigration of El Oro.

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<sup>91</sup> Report of the Truth Commission, Volume 4. Case reports, pgs. 82 to 84.

<sup>92</sup> *cf.* Handwritten letters from María Esther Gómero Accounts of February 13 and 29, 1995, addressed to the Director General of Consular Affairs, the Ministry of Foreign Affairs of Peru (evidence file, folios 81, 106, 107 and 108).

<sup>93</sup> *cf.* Informative Note of July 3, 1995 from the Ministry of Foreign Affairs of Peru where it states that "it complies with informing public opinion that it continues its efforts to determine the whereabouts of the following Peruvian citizens: 1. Jorge Vásquez Durand [and 9 other people...] To determine the location of the aforementioned persons, we have been acting with the valuable collaboration of the International Committee of the Red Cross which, together with the government of Peru, is making intensive efforts to obtain information on their whereabouts. However, to date, no specific data has been obtained on the aforementioned persons" (evidence file, page 2291); Letter of May 14, 1995 signed by the ICRC Head of Mission addressed to the Minister of Defense informing him of the presumed disappearance and detention of Mr. Vásquez Durand and requesting his collaboration to "find any trace that would allow us to find [his] whereabouts" (evidence file, folio 2302).

<sup>94</sup> Note from the Director of Consular Affairs of the Ministry of Foreign Affairs of Peru of November 27, 1995, addressed to the Director of APRODEH (evidence file, folio 110).

<sup>95</sup> Note of May 12, 1995, signed by the Permanent Representation of Peru before the Organization of American States addressed to the Inter-American Commission on Human Rights (evidence file, folios 4 to 7).

<sup>96</sup> Note of May 22, 1995, signed by the Permanent Mission of Ecuador to the Organization of American States (evidence file, folios 9 and 10).

In addition, the fact that the Peruvian citizen Jorge Vásquez Durand was traveling to the north of the country due to his business activities, led to verification in the sector without his arrest or migratory movement across that border. The search was even extended to other provinces without any positive results.

With regard to the document to which you refer in your note, the difference between the number of entries and exits from the country is due to the fact that on a few occasions Peruvian citizens have managed, prior to the conflict, to evade immigration control, thus their entry into Ecuador is not registered.<sup>97</sup>.

83. Likewise, the file shows that the Superior of the Society of Jesus of Peru made representations to the Superior of the Society of Jesus of Ecuador<sup>98</sup>, at the request of the next of kin of Mr. Vásquez Durand. In addition, there is a copy of a poster made by the ICRC and the Ecuadorian Red Cross invoking public aid to find Jorge Vásquez Durand and other Peruvian citizens in the file.<sup>99</sup>.

84. Additionally, the representatives of Mr. Vásquez Durand tried to find out about his fate, through a human rights organization based in Ecuador, which they consulted about the feasibility of filing habeas corpus actions in periods of state of emergency, and in particular, about the mechanism and procedure to file this action in the case of Mr. Vásquez Durand<sup>100</sup>. Said organization informed them that Decree No. 2487 of 1995 "does not [...] restrict[e] the constitutional guarantees of Article 19 [of the Political Constitution]", therefore "any person on behalf of the detainee" could file a habeas corpus "before the Mayor or President of the Council depending on the place where the person was detained." For this purpose, they suggested sending the information to the Diocesan Human Rights Commission, an organization that had headquarters in Ecuador.<sup>101</sup> On February 14, 1996, the petitioners informed the Inter-American Commission that they had requested the Diocesan Commission to file a writ of habeas corpus.<sup>102</sup>and she had responded by phone "that the habeas corpus action could not be filed, since the whereabouts of the victim were not known."<sup>103</sup>.

85. On June 1, 1995, the Inter-American Commission requested the Ecuadorian State to adopt precautionary measures to investigate the whereabouts and protect the life and personal integrity of Mr. Vásquez Durand<sup>104</sup>. On July 6, 1995, Ecuador informed the Commission that Provincial Police Commander El Oro No. 3 and the National Director of Police Intelligence

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<sup>97</sup> Note from the Undersecretary of the Police of the Ministry of the Interior addressed to the Director General of Multilateral Organizations of the Ministry of Foreign Affairs of April 19, 1996 (evidence file, 2308).

<sup>98</sup> *cf.* Letter of May 9, 1995 (evidence file, folio 75 and 76).

<sup>99</sup> The poster indicated that "[d]ue to the tensions of the armed conflict, relations and communication have been interrupted with some Peruvian citizens who resided or traveled [constantly] to our country. To facilitate their location, the International Committee of the Red Cross and the Ecuadorian Red Cross ask those interested or who knows the whereabouts of the following people to contact our institution to help restore ties with their relatives or relatives. Poster of the International Committee of the Red Cross and the Ecuadorian Red Cross (evidence file, folio 27).

<sup>100</sup> *cf.* Letter from APRODEH to the Ecumenical Human Rights Commission of Ecuador of June 9, 1995 (evidence file, folio 114 and 115).

<sup>101</sup> *cf.* Letter from the Ecumenical Human Rights Commission of Ecuador to APRODEH of June 14, 1995 (evidence file, folio 116).

<sup>102</sup> *cf.* Communication from APRODEH to the Diocesan Human Rights Commission of June 22, 1995 (evidence file, 687 and 688).

<sup>103</sup> Communication from APRODEH addressed to the Inter-American Commission of February 14, 1996 (evidence file, folio 686).

<sup>104</sup> *cf.* Letter from the Inter-American Commission on Human Rights addressed to the Minister of Foreign Affairs of Peru dated June 1, 1995 (evidence file, folio 576).

National Police had carried out the “due investigations to determine the whereabouts of the Peruvian citizen Jorge Vásquez Durand” and, as a result, had “establish[ed] that [he had] entered Ecuador on January 27, 1995 with passport number 030459, [and...] left the country on January 30 of the [same] year without any other migratory movements.”<sup>105</sup>. On December 27, 1995, Ecuador informed the Commission that the Head of the Intelligence Department of the El Oro Infantry Brigade, Chief in Charge of the Military Detachment “Lt. Hugo Ortiz”, that “the name of the Peruvian citizen Jorge Vásquez Durand was not recorded in the archives of their respective Units.”<sup>106</sup>.

## D.2 Proceedings carried out by the Ecuadorian State

86. At the request of the members of the Truth Commission, on July 29, 2009, the Ministry of Defense sent an official letter, in which it stated that “the Intelligence directorates of the Naval and Air Forces did not have information on Peruvian citizens who have been detained in the country from January to August 1995.”<sup>107</sup>. On the other hand, the Director of Army Intelligence presented a list of Peruvian citizens detained between January and August 1995, in which the name of Jorge Vásquez Durand does not appear.<sup>108</sup>.

87. The Truth Commission delivered all the information and documentation collected on the human rights violations documented in its report in 2010<sup>109</sup>. The State Attorney General's Office created a Specialized Unit to hear such cases in July 2010, which became the Directorate of the Truth and Human Rights Commission in March 2012, as a technical body within the State Attorney General's Office.<sup>110</sup>.

88. On March 22, 2010, Preliminary Inquiry No. 178-2010 began before the Miscellaneous and Traffic Prosecutor of the Huaquillas Canton for the alleged disappearance of Mr. Jorge Vásquez Durand<sup>111</sup>. In 2011 the case was assigned to a new prosecutor from the specialized unit for missing persons of the Machala Provincial Prosecutor's Office. According to a report from the Ecuadorian State Attorney General's Office, the file was forwarded in its entirety and

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<sup>105</sup> Note from the Ambassador of Ecuador to the Inter-American Commission of July 6, 1995 (evidence file, folio 633).

<sup>106</sup> Note No. 160\95\MPE\OEA from the Permanent Mission of the Republic of Ecuador to the Organization of American States addressed to the Inter-American Commission on December 27, 1995 (evidence file, folios 676 and 677).

<sup>107</sup> Note from the Chief of the Joint Command of the Armed Forces of July 29, 2009, cited in the Note from the National Director of Human Rights of the Office of the Attorney General of the State of Ecuador addressed to the Inter-American Commission of August 25, 2014 (evidence file, page 1329). See also, Report of the Truth Commission, Volume 4. Case reports, pgs. 83 and 84.

<sup>108</sup> *cf.* Note from the Director of Army Intelligence (interim) of July 27, 2009, cited in the Note from the National Director of Human Rights of the Office of the Attorney General of the State of Ecuador addressed to the Inter-American Commission on August 25, 2014 (evidence file, page 1329). See also, Report of the Truth Commission, Volume 4. Case reports, pgs. 83 and 84.

<sup>109</sup> *cf.* Note from the Director of the Truth and Human Rights Commission of the Office of the Attorney General of the Nation of November 23, 2016 (evidence file, folio 2187).

<sup>110</sup> *cf.* Note from the Director of the Truth and Human Rights Commission of the Office of the Attorney General of the Nation of November 23, 2016 (evidence file, folio 2187).

<sup>111</sup> *cf.* Personal Action No. 2744-ORH-FGE, of August 21, 2011, signed by the State Attorney General, cited in Official Letter No. 18531 of August 25, 2014, signed by the National Director of Human Rights of the Ecuadorian State Attorney General's Office and addressed to the Inter-American Commission (evidence file, folios 1329 to 1331); Memorandum signed by an expert from the Unit of the Truth and Human Rights Commission of the State Attorney General's Office on the file on the alleged disappearance of Mr. Vásquez Durand on September 12, 2016 (evidence file, folio 1735) (hereinafter “Memorandum on the file before the Prosecutor's Office on the case of Mr. Vásquez Durand”),

retained the same previous inquiry number<sup>112</sup>. As part of said investigation, various procedures were carried out, among which was the request for the migratory movement of Jorge Vásquez Durand and other citizens during 1995. On February 17, 2011, the Second Lieutenant of the National Police responded to said request, attaching the migratory movement of Mr. Vásquez Durand, in which his last departure from Ecuador to Peru on January 30, 1995 was recorded.<sup>113</sup>

89. Subsequently, the Provincial Director of Tourism of Imbabura was asked to certify the existence of the "Hotel La Posada", where Mr. Vásquez Durand would have stayed in the city of Otavalo, before his presumed disappearance (*suprapara*. 68)<sup>114</sup>. According to the respective certification "there is no establishment called 'Hotel La Posada', noting that there is only one establishment with the name 'La Posada del Quinde'"<sup>115</sup>. Notwithstanding the foregoing, in a report prepared by the Prosecutor's Office in 2016, on the investigation file for the forced disappearance of Mr. Vásquez Durand, it is indicated that in February 2011 a letter was sent to the "Hotel La Posada", whose manager responded at the end of said month, without the information provided to this Court stating the content of said communications<sup>116</sup>. In addition, within the framework of said investigation, they allegedly requested "the list of police personnel who were on duty at the Migration Office of the Huaquillas Canton, on January 30, 1995, the date on which the last departure of the Peruvian citizen Jorge Vásquez Durand was recorded, regarding which they [received] no reply whatsoever."<sup>117</sup>

90. Likewise, on different occasions between June 2014 and May 2016, Ecuador requested international criminal assistance from the Republic of Peru, without having provided information to the Court on the content or result of said requests.<sup>118</sup>

91. Currently, the case of Mr. Vásquez Durand continues to be handled by the Machala Provincial Prosecutor's Office (*suprapara*. 88), with direct advice from the Directorate of the Truth and Human Rights Commission<sup>119</sup>.

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<sup>112</sup> *cf.*Note from the Director of the Truth and Human Rights Commission of the Office of the Attorney General of the Nation of November 23, 2016 (evidence file, folio 2187).

<sup>113</sup> *cf.*Official letter of a Police Sub-Lieutenant of February 17, 2011, signed by, cited in the Official Letter of the National Director of Human Rights of the Office of the Attorney General of the State of Ecuador addressed to the Inter-American Commission of August 25, 2014 (evidence file, folio 1330). See also, memorandum on the file before the Prosecutor's Office on the case of Mr. Vásquez Durand (evidence file, folio 1736).

<sup>114</sup> *cf.*Note from the Provincial Director of Tourism of Imbabura of October 27, 2011, cited in the Note from the National Director of Human Rights of the Office of the Attorney General of the State of Ecuador addressed to the Inter-American Commission of August 25, 2014 (evidence file, folio 1330).

<sup>115</sup> Letter of the Provincial Director of Tourism of Imbabura of October 27, 2011, cited in the Letter of the National Director of Human Rights of the Office of the Attorney General of the State of Ecuador addressed to the Inter-American Commission of August 25, 2014 (evidence file, folios 1329 to 1331)

<sup>116</sup> *cf.*Memorandum on the file before the Prosecutor's Office on the case of Mr. Vásquez Durand (evidence file, folio 1736).

<sup>117</sup> Note from the National Director of Human Rights of the Office of the Attorney General of the State of Ecuador addressed to the Inter-American Commission on August 25, 2014 (evidence file, folio 1330).

<sup>118</sup> *cf.*Memorandum on the file before the Prosecutor's Office on the case of Mr. Vásquez Durand (evidence file, folios 1737 and 1738).

<sup>119</sup> Once the Directorate of the Truth and Human Rights Commission of the Attorney General's Office was created, a new inquiry was not opened, but the file forwarded by the Truth Commission was delivered to the Prosecutor in charge of the investigation in the city of Machala, with whom "working meetings have been held by virtue of the mandate of the [referred to Directorate] to 'Coordinate, support and investigate cases of Human Rights violations in the national territory, guiding the State and society to critically confront their past, with the in order to overcome the crises or traumas that have caused them and prevent such events from happening again in the future'". Letter from the Director of the Commission of

92. On the other hand, according to the State, the National Directorate for Crimes against Life, Violent Deaths, Disappearances, Extortion and Kidnappings (DINASED), within the framework of its powers and functions as part of the National Police of Ecuador, has carried out exhaustive follow-up at the national level on the disappearance of Mr. Jorge Vásquez Durand, "without obtaining positive results."<sup>120</sup>

## VIII

### BACKGROUND

93. According to the arguments of the parties and the Commission, in this case the Court will examine (1) the alleged forced disappearance of Jorge Vásquez Durand, (2) the alleged violations of judicial guarantees and judicial protection, and (3) the personal integrity of his next of kin.

## VIII-1

### **FORCED DISAPPEARANCE OF JORGE VÁSQUEZ DURAND RIGHTS TO PERSONAL LIBERTY<sup>121</sup>, PERSONAL INTEGRITY<sup>122</sup>, LIFE<sup>123</sup> AND RECOGNITION OF THE LEGAL PERSONALITY<sup>124</sup>, IN RELATION TO THE OBLIGATION TO RESPECT RIGHTS<sup>125</sup>**

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Truth and Human Rights of the Office of the Attorney General of the Nation on November 23, 2016 (evidence file, folio 2187).

<sup>120</sup> Note from the Advisor to the Office of the Ministry of the Interior of June 2014, cited in Note No. 18531 of August 25, 2014, signed by the National Director of Human Rights of the Office of the Attorney General of the State of Ecuador and addressed to the Inter-American Commission (evidence file, page 1330).

<sup>121</sup> Article 7 of the Convention establishes that: "1. Everyone has the right to personal liberty and security. 2. No one may be deprived of his physical freedom, except for the causes and under the conditions established in advance by the Political Constitutions of the States Parties or by the laws enacted in accordance with them. 3. No one may be subjected to arbitrary arrest or imprisonment. 4. Any person arrested or detained must be informed of the reasons for his arrest and notified, without delay, of the charge or charges against him. 5. Any person arrested or detained must be brought, without delay, before a judge or other official authorized by law to exercise judicial functions and shall have the right to be tried within a reasonable time or to be released, without prejudice to the continuation of the process. His release may be conditional on guarantees that ensure his appearance at trial. 6. Every person deprived of liberty has the right to appeal before a competent judge or court, so that it decides, without delay, on the legality of his arrest or detention and orders his release if the arrest or detention were illegal. In the States Parties whose laws provide that any person who is threatened with being deprived of their liberty has the right to appeal to a competent judge or court so that it decides on the legality of said threat, said remedy cannot be restricted or abolished. Appeals may be filed by themselves or by another person. 7. No one will be arrested for debts. This principle does not limit the mandates of a competent judicial authority issued for breaches of maintenance duties.

<sup>122</sup> Article 5 of the Convention establishes that: "1. Every person has the right to have their physical, mental and moral integrity respected. 2. No one should be subjected to torture or cruel, inhuman or degrading treatment or punishment. Every person deprived of liberty will be treated with the respect due to the inherent dignity of the human being. 3. The penalty cannot transcend the person of the offender. 4. The defendants must be separated from the convicted, except in exceptional circumstances, and will be subjected to treatment appropriate to their status as non-convicted persons. 5. When minors can be prosecuted, they must be separated from adults and brought before specialized courts, as quickly as possible, for their treatment. 6.

<sup>123</sup> Article 4 of the Convention establishes that: "1. Every person has the right to have his life respected. This right will be protected by law and, in general, from the moment of conception. No one can be deprived of life arbitrarily. 2. In countries that have not abolished the death penalty, it may only be imposed for the most serious crimes, in compliance with an enforceable sentence of a competent court and in accordance with a law that establishes such a penalty, issued prior to the commission of the crime. Nor will its application be extended to crimes to which it is not currently applied. 3. The death penalty will not be restored in States that have abolished it. 4. In no case can the death penalty be applied for political crimes or common crimes related to politics. 5. The death penalty shall not be imposed on persons who, at the time of the commission of the crime, they were less than eighteen years of age or more than seventy, nor shall it apply to pregnant women. 6. Every person sentenced to death has the right to

94. In this chapter, the Court will present the arguments of the parties and of the Commission to subsequently determine, firstly, whether Mr. Vásquez Durand was the victim of a forced disappearance and, if so, secondly, the violations of the American Convention and the Inter-American Convention on Forced Disappearance committed to his detriment.

#### ***A. Arguments of the parties and of the Commission***

95. The **Commission** alleged that members of the Ecuadorian Army had detained the alleged victim on January 30 until at least mid-June and taken him to different military facilities, based on the Report of the Truth Commission and on the testimonies collected by said commission. It also indicated that "[t]he Ecuadorian military and police authorities repeatedly denied that Mr. Vásquez Durand had been detained [without having] carried out a serious and effective investigation." Consequently, the Commission considered that "the foregoing elements are sufficient to conclude that Mr. Vásquez Durand was detained by members of the Ecuadorian Army on January 30, 1995 and transferred to different military facilities." On the other hand, it indicated that "the events occurred in the context of an international armed conflict." In this context, the Commission "highlight[ed] the relevance of the Court considering Articles 35 to 46 of the IV Geneva Convention, according to which [foreigners in the territory of a party to the conflict] are [...] classified as protected persons." Lastly, it highlighted that regarding Articles 4, 5 and 7 of the Convention, "neither in the text nor in the petition does the Ecuadorian State request that the Court establish that it did not violate[d] these rights in relation to Mr. Vásquez Durand as it does in relation to the other provisions that I have just invoked."

96. The **representatives** They alleged, based on "the evidence provided in this proceeding, [that] agents of the State of Ecuador were responsible for the detention and subsequent disappearance of Jorge Vásquez Durand." They also indicated that said detention occurred in a "context of a generalized practice of detentions of Peruvian citizens by the Ecuadorian State under the framework of an international armed conflict." In particular, they indicated that "the State of Peru negotiated with the Ecuadorian State for the release of at least 21 people who had been detained in various regions of Ecuador, such as: Guayaquil, Loja, Machala, and Quito in May 1995." The above, together with the "ignorance of the whereabouts of the victim 20 years after his disappearance, allow us to presume that Jorge Vásquez Durand was deprived of his life through an extrajudicial execution by agents of the Ecuadorian State." They also indicated that "[a]ccording to the information gathered, [Mr. Vásquez Durand] had been detained in several military barracks, one of them being the Teniente Ortiz Military Barracks, and apparently in poor physical condition, a situation that [...] was not unique since a series of arrests of Peruvian citizens were committed in Ecuador -in circumstances similar to Jorge Vásquez Durand- who claim to have been victims of torture; Therefore, it is reasonable to presume that the victim was subjected to said practices contrary to the right contained in Articles 5.1 and 5.2 of the Convention."

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request amnesty, pardon or sentence commutation, which may be granted in all cases. The death penalty cannot be applied while the request is pending a decision before the competent authority."

<sup>124</sup> Article 3 of the Convention establishes that: "[E]very person has the right to recognition of their legal personality."

<sup>125</sup> Article 1.1 of the Convention establishes that: "[T]he States Parties to this Convention undertake to respect the rights and freedoms recognized therein and to guarantee their free and full exercise to all persons subject to their jurisdiction, without any discrimination based on race, color, sex, language, religion, political opinion or of any other nature, national or social origin, property, birth or any other social condition."

included in the IV Geneva Convention relative to the due protection of civilians in times of war<sup>126</sup>.

97. The *States* stated that "in the particular case of Mr. Jorge Vásquez Durand [the Truth Commission had] determined[d] the existence of forced disappearance." However, at the same time he indicated that Mr. Vásquez Durand "had no record of detention in Ecuador and that his last record of leaving the country was dated January 30, 1995." It indicated that "[a]though the Report [...] specifically mentions [the] Vásquez Durand case [...], it should be noted that this case responds only to a particular situation and not to a systematic pattern of violations of human rights." With reference to the alleged violations of the right to life, personal integrity, and personal liberty, the State mentioned domestic law provisions that protected said rights. Besides, it argued that not all cases of forced disappearance necessarily violated the right to legal personality and that, in the instant case, said right had not been violated because: (i) "the rights of Mr. Vásquez Durand were not suspended, his right to name, identity, and nationality were not restricted"; (ii) "it is precisely through this right that different investigation and search efforts were made, and currently even a reparation process"; and (iii) the representatives did not provide any evidence to prove this violation. identity and nationality"; (ii) "it is precisely through this right that different investigation and search efforts were made, and currently even a reparation process"; and (iii) the representatives did not provide any evidence to prove this violation. identity and nationality"; (ii) "it is precisely through this right that different investigation and search efforts were made, and currently even a reparation process"; and (iii) the representatives did not provide any evidence to prove this violation.

### ***B. Considerations of the Court***

98. In the instant case, despite what was determined by the Ecuadorian Truth Commission, the State denies that Mr. Vásquez Durand was the victim of a forced disappearance and, specifically, has insisted that the alleged victim was not detained by the Ecuadorian state authorities.

99. According to the reiterated jurisprudence of this Court, the forced disappearance of persons is a violation of human rights constituted by three concurrent elements: a) the deprivation of liberty; b) the direct intervention of State agents or their acquiescence, and c) the refusal to acknowledge the detention and to reveal the fate or whereabouts of the person concerned<sup>127</sup>.

100. By virtue of the foregoing, the Court will determine whether Mr. Vásquez Durand was detained in Ecuador by state agents or persons acting with their acquiescence and whether there was a refusal to acknowledge the detention and to reveal his fate or whereabouts. Once the facts have been established, the alleged violations of the rights to recognition of legal personality, life, personal integrity and personal liberty will be analyzed as pertinent, in relation to the obligation to respect established in Article 1(1) of the American Convention, as well as Article I<sup>128</sup> of the Inter-American Convention on Forced Disappearance, to the detriment of Mr. Vásquez Durand.

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<sup>126</sup> In particular, the representatives made reference to Articles 4, 27, 29, and 32 of the IV Geneva Convention.

<sup>127</sup> Cf. *Case of Gómez Palomino v. Peru. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 136, para. 97, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala, supra*, para. 133.

<sup>128</sup> Article I of the Inter-American Convention on Forced Disappearance establishes that: "The States Parties to this Convention undertake to: a) Not practice, allow, or tolerate the forced disappearance of persons, even in a state of emergency, exception, or suspension of individual guarantees; b) Punish the perpetrators, accomplices and accessories after the crime of forced disappearance of persons, as well as the attempted commission of the same; c) Cooperate with each other to help prevent, punish and eradicate the forced disappearance of persons; and d) Take the measures of a legislative, administrative, judicial or any other nature necessary to comply with the commitments assumed in this Convention".



101. Additionally, the Court emphasizes that there is no dispute as to whether the alleged disappearance of Mr. Vásquez Durand occurred during an international armed conflict. However, the State indicated that international humanitarian law was not applicable to the present case since "Mr. Vásquez did not belong to the Peruvian militia, nor did he have any interest in the armed conflict between Ecuador and Peru." It highlighted that "these hostilities were restricted especially to the eastern side of the Cordillera del Cóndor[,] hundreds of kilometers from where [presumably] Mr. Vásquez Durand disappeared." It also indicated that "in order to establish a threshold of protection for the civilian population within any scenario of hostilities,

102. The Court notes that international humanitarian law, applicable to international armed conflicts, protects the civilians of the other party to the conflict in any part of the territory, even after the end of the military operations in the event that the release, repatriation or resettlement takes place after<sup>129</sup>. In this regard, the International Criminal Tribunal for the Former Yugoslavia (hereinafter "ICTYP") in the case *Prosecutor vs. Tadic* noted that:

While the Geneva Conventions are silent on the geographical scope of international "armed conflicts", the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just the areas close to the hostilities. Certainly some of the provisions are clearly related to hostilities and the geographical scope of those provisions should be just as limited. Others, particularly those related to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; no matter if they stop close to hostilities. In the same way, the Geneva Convention IV protects civilians in any part of the territory of the Parties. This construction is implicit in paragraph 2 of article 6 of the Convention, which stipulates that: "In the territory of the Parties to the conflict, the application of the present Convention shall cease at the general closure of military operations"<sup>130</sup>.

103. In this sense, this Tribunal considers that, unlike non-international armed conflicts, in the present case, since there was an international armed conflict, international humanitarian law obliged Ecuador to protect the civilians of the other party to the conflict who were in any part of its territory.

104. Therefore, as it has done on other occasions<sup>131</sup>, the Court considers it useful and appropriate to interpret the scope of the treaty obligations in a complementary manner with

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<sup>129</sup> Article 6 of the Geneva Convention IV which establishes that "[t]he present Convention shall apply from the beginning of any conflict or occupation mentioned in the article. In the territory of the Parties to the conflict, the application of the Convention will end with the general cessation of military operations. In occupied territory, the application of the Convention will end one year after the general cessation of military operations; however, the occupying Power shall be bound for the duration of the occupation -- if this Power exercises government functions in the territory in question -- by the provisions of the following articles of this Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77 and 143. Protected persons whose release, repatriation or resettlement takes place after these periods yes, they will enjoy, in the interval, of the benefits of this Agreement". In the same sense, Article 3.b of Additional Protocol I establishes "the application of the Conventions and of this Protocol will cease, in the territory of the Parties to the conflict, at the general end of military operations and, in the case of occupied territories, at the end of the occupation, except, in both circumstances, for persons whose final release, repatriation or resettlement takes place later. Such persons will continue to benefit from the relevant provisions of the Conventions and this Protocol until their final release, repatriation or resettlement. b of Additional Protocol I establishes "the application of the Conventions and of this Protocol will cease, in the territory of the Parties to the conflict, at the general end of military operations and, in the case of occupied territories, at the end of the occupation, except, in both circumstances, for persons whose final release, repatriation or resettlement takes place later. Such persons will continue to benefit from the relevant provisions of the Conventions and this Protocol until their final release, repatriation or resettlement. repatriation or resettlement takes place later. Such persons will continue to benefit from the relevant provisions of the Conventions and this Protocol until their final release, repatriation or resettlement. repatriation or resettlement takes place later. Such persons will continue to benefit from the relevant provisions of the Conventions and this Protocol until their final release, repatriation or resettlement."

<sup>130</sup> ICTY, *Prosecutor Case Vs. Dusko Tadic a/k/a "Dule"*; No. IT-94-1-AR72. Judgment of October 2, 1995 (Jurisdiction), para. 68 (translation into Spanish made by the Secretariat of the Inter-American Court). See also, *Case of the Prosecutor vs. Zejnil Delalić et al.*, No. IT-96-21-T. Judgment of November 16, 1998, paras. 182 to 185.

<sup>131</sup> *Cf., inter alia, Case of the Ituango Massacres v. Colombia, supra*, para. 179; *Case of the "Mapiripán Massacre" v. Colombia*. Judgment of September 15, 2005. Series C No. 134, paras. 114, 153 and 172; *El Massacres Case*

the regulations of international humanitarian law, taking into account its specificity in the matter, in particular the Geneva Conventions of 1949<sup>132</sup> and the Additional Protocol to the Geneva Conventions of 1949 relative to the protection of victims of international armed conflicts of 1977 (hereinafter "Additional Protocol I"), of which both States in conflict are parties<sup>133</sup> as well as customary international law<sup>134</sup>.

### **B.1 Determination of the occurrence of an enforced disappearance**

105. The Court has developed in its jurisprudence the multi-offensive nature of forced disappearance, as well as its permanent or continuous nature, which continues as long as the whereabouts of the disappeared person is not known or their remains are identified with certainty.<sup>135</sup>

106. In this regard, the analysis of forced disappearance must cover the entire set of facts that are presented to the Court for consideration. Only in this way is the legal analysis of forced disappearance consistent with the complex violation of human rights that it entails,<sup>136</sup> with its permanent nature and with the need to consider the context in which the events occurred, in order to analyze their prolonged effects over time and comprehensively focus on their consequences<sup>137</sup>, considering the *corpus juris* both inter-American and international protection.

107. Additionally, as previously mentioned (*supra* paras. 102 to 104), Ecuador had to comply with international humanitarian law. Additional Protocol I establishes a general obligation to protect the civilian population<sup>138</sup>. For its part, the IV Geneva Convention establishes that "[a]ny protected person who wishes to leave the territory at the beginning or in the course of a conflict, shall have the right to do so, unless their departure is detrimental to the national interests of the State."<sup>139</sup> It also establishes that "[t]he protected persons who are in preventive detention or serving a sentence of deprivation of liberty will be treated, during their

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*Mozote and surrounding places Vs. El Salvador. Merits, Reparations and Costs*. Judgment of October 25, 2012. Series C No. 252, para. 141, and *Case of Cruz Sánchez et al. v. Peru, supra*, para. 270.

<sup>132</sup> See, in particular, the Geneva Convention for the Protection of Civilian Persons in Time of War, approved on August 12, 1949 by the Diplomatic Conference to Elaborate International Conventions for the Protection of Victims of War, held in Geneva from April 12 to August 12, 1949. Entry into force: October 21, 1950, ratified by Ecuador on August 11, 1954 and by Peru on December 15, February 1956 (hereinafter "Geneva Convention IV"). In this regard, the Court notes that the IV Geneva Convention distinguishes between the territories under occupation and the territories of the parties to the conflict. In this case, only the provisions on the territories of the parties to the conflict will be used as a criterion for interpretation, and not those relating to territories under occupation,

<sup>133</sup> *cf.* Additional Protocol to the Geneva Conventions of 1949, relative to the protection of victims of international armed conflicts (Protocol I), adopted on June 8, 1977. Entry into force: December 7, 1978, ratified by Ecuador on April 10, 1979 and by Peru on July 14, 1989.

<sup>134</sup> *cf.* ICRC, Customary International Humanitarian Law, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, 2007.

<sup>135</sup> *Cf., inter alia, Case of Velásquez Rodríguez v. Honduras. Background, above*, paras. 155 to 157, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala, supra*, para. 133.

<sup>136</sup> *Cf. Case of Heliodoro Portugal v. Panama. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 186, para. 112, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala, supra*, para. 134.

<sup>137</sup> *Cf. Case of Goiburú et al. v. Paraguay. Merits, Reparations and Costs*. Judgment of September 22, 2006. Series C No. 153, para. 85, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 155.

<sup>138</sup> *cf.* Additional Protocol I, articles 48 and 51.

<sup>139</sup> Geneva Convention IV, article 35.

detention, with humanity"<sup>140</sup>. In addition, the IV Geneva Convention includes as serious infractions, among others, "intentional homicide, torture or inhuman treatment, [...] the act of deliberately causing great suffering or seriously threatening physical integrity or health, [...] [and] the illegal detention" of persons protected by the Convention.<sup>141</sup>.

108. The Court observes that the Geneva Conventions and Additional Protocol I do not include an express prohibition on forced disappearance. However, this prohibition has been regarded as a rule of customary international humanitarian law. Indeed, the ICRC research that compiled customary humanitarian law noted that:

[T]he enforced disappearances violate, or may violate, a number of customary rules of international humanitarian law, in particular the prohibition of arbitrary deprivation of liberty (see rule 99), the prohibition of torture and other cruel or inhuman treatment (see rule 90) and the prohibition of homicide (see rule 89). In addition, in international armed conflicts, the existence of strict requirements regarding the registration of the data of persons deprived of their liberty, visits and the transmission of information that concerns them has, among other things, the objective of preventing forced disappearances.<sup>142</sup>.

109. Likewise, Additional Protocol I includes "the right of families to know the fate of their members"<sup>143</sup>. In this regard, it establishes the obligation that "[a]s soon as circumstances allow, and no later than the end of active hostilities, each Party to the conflict shall search for the persons whose disappearance has been reported by an adverse Party. In order to facilitate such a search, that adverse Party shall communicate all pertinent information on the persons in question."<sup>144</sup>. Likewise, there is an obligation to respect the remains of the deceased and to "provide the members of the families of the deceased and the representatives of the official grave registration services with access to the graves, and determine the practical provisions for such access."<sup>145</sup>

110. On the other hand, in cases such as the present where there is no direct proof of the disappearance, the Court has emphasized that the use of circumstantial evidence, indications, and

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<sup>140</sup> Geneva Convention IV, article 37.

<sup>141</sup> *cf.* Geneva Convention IV, article 147.

<sup>142</sup> ICRC, Customary International Humanitarian Law, vol. I, rule 98, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, 2007. See also, Statement at the public hearing of Alejandro Valencia Villa.

<sup>143</sup> Additional Protocol I, article 32.

<sup>144</sup> Additional Protocol I, article 33.1. Said article 33 also states that "2. In order to facilitate obtaining information in accordance with the provisions of the preceding paragraph, each Party to the conflict shall, with respect to persons who do not benefit from more favorable conditions by virtue of the Conventions or this Protocol: a) record, in the manner provided in Article 138 of the Fourth Convention, the information on such persons, when they have been detained, imprisoned or held in any other form of captivity for more than two weeks as a result of the hostilities or occupation or have died during a period of detention; b) to the greatest extent possible, facilitate and, if necessary, search for and record information relating to such persons if they have died in other circumstances as a result of hostilities or occupation. 3. Information on persons reported missing, in accordance with paragraph 1, and requests for such information shall be transmitted directly or through the Protecting Power, the Central Tracing Agency of the International Committee of the Red Cross, or the national Red Cross Societies (Red Crescent, Red Lion and Red Sun). When the information is not transmitted through the International Committee of the Red Cross and its Central Search Agency, each Party to the conflict shall ensure that such information is also provided to that Agency. 4. The Parties to the conflict will endeavor to agree on provisions that allow groups constituted for this purpose to search, identify and recover the dead in the battlefield areas; Those provisions may provide, where appropriate, that such groups are accompanied by personnel of the adverse Party while carrying out those missions in areas controlled by it. The personnel of such groups must be respected and protected while they are exclusively dedicated to such missions."

<sup>145</sup> Additional Protocol I, article 34.2.a).

presumptions to base a judgment, provided that consistent conclusions about the facts can be inferred from them<sup>146</sup>. Additionally, it has established that there is no impediment to using circumstantial evidence to demonstrate the concurrence of any of the elements of forced disappearance, including deprivation of liberty.<sup>147</sup> Additionally, circumstantial or presumptive evidence is of special importance when it comes to complaints about forced disappearance, since this form of violation is characterized by seeking the suppression of all elements that allow verifying the detention, whereabouts, and fate of the victims.<sup>148</sup>

111. By virtue of the foregoing, it will be necessary to determine, based on the evidence provided, whether Mr. Vásquez Durand was indeed the victim of a forced disappearance. To this end, the different elements of evidence submitted will be assessed in light of the aspects disputed by the parties and the Commission to determine if the constitutive elements of forced disappearance are satisfied (*suprapara*. 99).

### *B.1.a Deprivation of liberty by Ecuadorian authorities*

112. This Court recalls that, when analyzing a case of forced disappearance, it must be taken into account that the deprivation of the individual's liberty should only be understood as the beginning of the configuration of a complex violation that continues in time until the fate and whereabouts of the victim are known. In this regard, it is important to highlight that the manner in which the deprivation of liberty acquires for the purposes of characterizing a forced disappearance is indistinct.<sup>149</sup>, that is, any form of deprivation of liberty satisfies this first requirement.

113. The Court notes that the greatest effort to clarify what happened to Mr. Vásquez Durand to date has been made by the Truth Commission (*suprapara*. 73). The Report of the Truth Commission established that Jorge Vásquez Durand "was detained in the city of Huaquillas, on the border with Peru" on January 30, 1995 and concluded that he was the victim of torture, forced disappearance, and illegal deprivation of liberty.<sup>150</sup>. To reach this conclusion, the Truth Commission requested information on the disappearance of Mr. Jorge Vásquez Durand from the Minister of National Defense of Ecuador, the organization APRODEH, the Ambassador of Peru in Ecuador, and the General Consuls of Peru from five Ecuadorian cities.<sup>151</sup>. Por otro

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<sup>146</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Background, above*, paras. 130 and 131, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia, supra*, para. 230.

<sup>147</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Background, above*, paras. 130 and 131, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia, supra*, para. 233.

<sup>148</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Background, above*, para. 131, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia, supra*, para. 230.

<sup>149</sup> Cf. *Case of Heliodoro Portugal v. Panama, supra*, para. 112, and *Case of Tenorio Roca et al. v. Peru, supra*, paras. 148 and 150.

<sup>150</sup> cf. Report of the Truth Commission, Volume 4. Case reports, pg. 82.

<sup>151</sup> cf. Letter from the Executive Secretary of the Truth Commission to the Minister of National Defense in Ecuador dated 2 June 2009 (evidence file, folio 1988); Note from the Executive Secretary of the Truth Commission to the Minister of National Defense in Ecuador of June 5, 2009 (evidence file, folio 1991); Note from the Executive Secretary of the Truth Commission to the APRODEH organization of May 29, 2009 (evidence file, folio 1980); Note from the Executive Secretary of the Truth Commission to the Ambassador of Peru in Ecuador of June 1, 2009 (evidence file, folio 1987); Note from the Executive Secretary of the Truth Commission to the Peruvian Consul in Machala on May 29, 2009 (evidence file, folio 1982); Note from the Executive Secretary of the Truth Commission to the Consul General of Peru in Guayaquil on June 1, 2009 (evidence file, folio 1983); Note from the Executive Secretary of the Truth Commission to the Consul General of Peru in Quito on June 1, 2009 (evidence file, folio 1984); Note from the Executive Secretary of the Truth Commission to the Consul General of Peru in Loja on June 1, 2009 (evidence file, folio 1985), and Note from the Executive Secretary of the Truth Commission to the Consul General of Peru in Macará on June 1, 2009 (evidence file, folio 1986).

On the other hand, it requested the Minister of National Defense of Ecuador to provide information on Peruvian citizens detained in Ecuador between January and August 1995, places where they had been detained and authorities who had known of those arrests, as well as on persons detained in the "Lieutenant Hugo Ortiz" Military Barracks and authorities in charge of it.<sup>152</sup>

114. The Court considers that the establishment of a truth commission, according to the object, procedure, structure, and purpose of its mandate, can contribute to the construction and preservation of historical memory, the clarification of facts, and the determination of institutional, social, and political responsibilities in certain historical periods of a society.<sup>153</sup> In this sense, the use of said report does not exempt this Court from making an assessment of the entire body of evidence, in accordance with the rules of logic and based on experience, without being subject to rules of assessed evidence.<sup>154</sup> Consequently, this Court will take into account the Report of the Ecuadorian Truth Commission as evidence that must be evaluated together with the rest of the body of evidence. However, at the same time, the Court will take into account that in this case there is no subsequent investigation or determination that distorts the conclusions of the Report of the Truth Commission regarding the forced disappearance of Vásquez Durand.

115. Notwithstanding the foregoing, the Court notes that before this Court the State argued that Mr. Vásquez Durand had no record of detention in Ecuador and that his last record of leaving the country was dated January 30, 1995. The representatives and the Commission indicated, based on testimony, that on January 30, Mr. Vásquez Durand "recrossed the border line to stamp his Peruvian passport at the Ecuadorian immigration office and immigration procedures and entry of his merchandise [...], where he was arrested." They also added as another indication to consider "the existence of a non-controversial context in which the Ecuadorian State detained Peruvian citizens in the framework of the international armed conflict."

116. The Court notes that, according to the Ecuadorian migration registry, the alleged victim left Ecuador on January 30, 1995, the day on which he allegedly disappeared, without a subsequent entry into Ecuadorian territory being recorded.<sup>155</sup> Taking into account the arguments and the evidence presented, this Tribunal will proceed to make its own determinations regarding the alleged detention of Mr. Vásquez Durand, for which it will analyze the following: a) the immigration records; b) the statements received regarding the alleged detention of Mr. Vásquez Durand; c) the alleged context of detentions of Peruvians during the conflict, and d) the lack of record of the detention.

117. In relation to the immigration records, this Court observes that the representatives and the Commission do not deny that Mr. Vásquez Durand left on January 30, 1995 from

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<sup>152</sup> *cf.* Note from the Executive Secretary of the Truth Commission, Minister of National Defense in Ecuador, dated June 8, 2009 (evidence file, folio 1992).

<sup>153</sup> *cf. Case of Zambrano Vélez et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of July 4, 2007. Series C No. 166, para. 128, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala, supra*, para. 73.

<sup>154</sup> *cf. Case of Ríos et al. v. Venezuela. Preliminary Exceptions, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 194, para. 101, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala, supra*, para. 74.

<sup>155</sup> *cf.* Official migration control telegram of June 21, 1995 (evidence file, page 78). In the same sense, the migration registry of Peru also recorded the entry into Peru on January 30 as his last migration movement. *cf.* Note No. 1458 of September 1995 from the General Directorate of the Peruvian National Police addressed to the General Director of Consular Affairs of the Ministry of Foreign Affairs (evidence file, folio 648).

Ecuador, but they indicate that he left for Peru and that same day he would have re-entered Ecuador, without his entry being registered. In this regard, the Court emphasizes that, according to statements, Mr. Vásquez Durand was detained when he re-entered Ecuador to pass his merchandise through customs and precisely when he was preparing to stamp his passport (*supraparas*. 70 and 71). Likewise, the Court notes that the migration records, which show the entries and exits of Mr. Vásquez Durand between 1993 and 1995, present certain inconsistencies, since they record that in 1993 Mr. Vásquez Durand entered six times and left nine times.<sup>156</sup> The Court emphasizes that the Undersecretary of the Ecuadorian Police explained, in April 1995, that this difference "was due to the fact that on a few occasions Peruvian citizens have managed [...] to evade immigration control, thus their entry into Ecuador is not registered" (*suprapara*. 82). On the other hand, Mrs. Gomero Cuentas pointed out that "for a long time and to date it is not necessary to present a passport or safe-conduct to enter said place, due to the commercial exchange [between the two countries]"<sup>157</sup>. By virtue of these elements, the immigration records of Mr. Vásquez Durand by themselves are not sufficient evidence to rule out that the alleged victim had re-entered Ecuador, where he would have been detained. Thus, the Court proceeds to rule on the other evidence related to the alleged detention of Mr. Vásquez Durand.

118. To this end, the Court will first examine the information received regarding what happened at the time of the alleged initial detention and then refer to the other evidence reported regarding the alleged detention of the alleged victim.

119. According to Mrs. Gomero Cuentas, on January 30 she spoke with her husband when he was in Peru and he told her that he was going to "enter Ecuador again[,] to Huaquillas, [to] order [his] merchandise and then leave[d]"<sup>158</sup>. Likewise, Mrs. Gomero Cuentas would have received information from two other Peruvian merchants, AJ and JB, who would have told her that Mr. Vásquez Durand had been arrested in Huaquillas when he was preparing to stamp his passport in Ecuador<sup>159</sup>(*suprapara*. 70).

120. On the other hand, the merchant Mario Jesús Puente Olivera, a friend of Mr. Vásquez Durand with whom he shared a hostel in the city of Otavalo, Ecuador, stated that he was also detained and that on one occasion he was informed that "[his] friend Jorge had been detained at the border."<sup>160</sup> Likewise, another Peruvian citizen, EHAM, who was also reportedly detained during the armed conflict, stated that he had seen Mr. Vásquez Durand "[p]arastly dejected" in the patio of the Teniente Ortiz military barracks six times<sup>161</sup>. She indicated that the last time she saw him was 4 o

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<sup>156</sup> *cf.* Official migration control telegram of June 21, 1995 (evidence file, page 78).

<sup>157</sup> Handwritten letter from María Esther Gomero Cuentas addressed to the Inter-American Commission on Human Rights of dated February 15, 1996 (evidence file, page 694).

<sup>158</sup> Statement at the public hearing by María Esther Gomero Cuentas.

<sup>159</sup> *cf.* Statement at the public hearing by María Esther Gomero Cuentas. Mrs. Gomero Cuentas pointed out that her husband would have given one of the Peruvian merchants in Ecuador a package of vests that were later delivered to Mrs. Gomero Cuentas. *cf.* Statement at the public hearing by María Esther Gomero Cuentas. See also, handwritten letter from Ms. María Esther Gomero Cuentas of February 13, 1995, addressed to the General Director of Consular Affairs, the Ministry of Foreign Affairs of Peru (evidence file, page 81), and handwritten letter of Ms. María Esther Gomero Cuentas of May 29, 1995, addressed to the General Director of Consular Affairs, the Ministry of Foreign Affairs of Peru (evidence file, page 106 at 109).

<sup>160</sup> Statement rendered before a notary public (affidavit) by Mario Jesús Puente Olivera on July 25, 2016 (evidence file, folio 1404), and statement by Mario Jesús Puente Olivera in DVD format (evidence file, folio 83).

<sup>161</sup> *cf.* Statement by EHAM, presumed Peruvian detainee, rendered before APRODEH employees (evidence file, folios 87 and 88), and communication signed by EHAM, presumed Peruvian detainee, of July 24, 1995, addressed to the Director of Consular Affairs of the Peruvian Ministry of Foreign Affairs (evidence file, folio 95). This

3 days before being released, that is, 4 or 3 days before June 19, 1995<sup>162</sup>. In addition, he explained that he knew the name of Mr. Vásquez Durand when "they passed the list and later he recognized [he] when I saw [or] his photo."<sup>163</sup> Additionally, in May 1995, Mrs. Gomero Cuentas indicated that "based on information from other reliable persons, it is also known that my husband would have been transferred to Machala where he remained or remains detained."<sup>164</sup>

121. In this sense, the aforementioned statements suggest that Mr. Vásquez Durand re-entered Ecuador where he was detained. This constitutes an indication that must be evaluated together with the other indicative elements that will be analyzed below regarding what happened.

122. Regarding the alleged context of detentions of Peruvians during the armed conflict, the file shows that, at the beginning of May 1995, Peru was seeking information on "the migratory movement of 2[3] Peruvian citizens who were on the list of detainees in Ecuador and whose place of detention was unknown"<sup>165</sup>. In the middle of the same month, Peru informed the Inter-American Commission that it was seeking the release of twenty-one Peruvian citizens detained in Ecuador.<sup>166</sup> Twelve of these people were already included in the list at the beginning of May. On the other hand, it appears in the file that the ICRC and the Ecuadorian Red Cross requested help to find eleven people<sup>167</sup>, all of which appeared on the lists kept by the Peruvian State and which included Mr. Vásquez Durand<sup>168</sup>. Additionally, one of the detainees indicated that there were "more than 30 Peruvians [...] detained [in the Teniente Ortíz barracks]"<sup>169</sup>.

123. This Court confirms that, according to Peruvian State sources, during the conflict Ecuador detained between twenty-one and thirty-two Peruvian citizens (*supra* para. 122), plus

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document was subsequently forwarded to the Truth Commission.*cf.* Report of the Truth Commission, Volume 4. Report of cases, page 83.

<sup>162</sup> *cf.* Statement of EHAM, presumed Peruvian detainee, rendered before APRODEH employees (evidence file, folio 87).

<sup>163</sup> Communication signed by EHAM, an alleged Peruvian detainee, dated July 24, 1995, addressed to the Director of Consular Affairs of the Peruvian Ministry of Foreign Affairs (evidence file, folio 95).

<sup>164</sup> Letter from María Esther Gomero Cuentas to the General Director of Consular Affairs, Ministry of Foreign Affairs of Peru of May 29, 1995 (evidence file, folio 108).

<sup>165</sup> Police report of May 3, 1995, attached to the note of September 13, 1995 from the National Directorate of the National Police of Peru addressed to the Director of Consular Affairs of the Ministry of Foreign Affairs of Peru (evidence file, folio 1998). Said police report mentions the names of 23 Peruvian citizens "who are on the list of detainees in Ecuador," twelve of whom were in the note from the Permanent Representation of Peru to the OAS on May 12, 1995.*infra* and eleven of whom are additional persons (evidence file, folios 1998 and 1999).

<sup>166</sup> *cf.* Note from the Permanent Mission of Peru to the OAS of May 12, 1995, and its annex entitled "Detainees whose release is being sought (At 05-11-95 4:00 PM)" (evidence file, folios 4 to 7). Although the note indicates that Peru was managing the release of twenty-one Peruvian citizens who had been detained in Ecuador, and details their names and alleged circumstances of detention, in other parts of the same document it is mentioned that the detainees were twenty-three and twenty-four people (evidence file, folios 4 to 7).

<sup>167</sup> *cf.* ICRC poster (evidence file, folio 27).

<sup>168</sup> *cf.* Note No. 1458 of September 1995 from the General Directorate of the National Police of Peru addressed to the General Director of Consular Affairs of the Ministry of Foreign Affairs (evidence file, folio 648), and List of detainees whose release is being sought as of May 11, 1995 (evidence file, folio 6).

<sup>169</sup> Statement of EHAM, presumed Peruvian detainee, rendered before APRODEH employees (evidence file, folio 86). See also, communication signed by EHAM, presumed Peruvian detainee, of July 24, 1995 addressed to the Director of Consular Affairs of the Ministry of Foreign Affairs of Peru (evidence file, folio 95).

some prisoners of war<sup>170</sup>. This information was not denied by Ecuador. This does not imply that the Ecuadorian State has systematically detained Peruvian citizens in its territory. However, it does constitute an additional indicative element regarding the possible arrest of Mr. Vásquez Durand, the fact that arrests of Peruvian citizens occurred in the context of the conflict.

124. Lastly, the State alleged the lack of record of the detention of Mr. Vásquez Durand as an element that showed that he had not been detained. In this regard, the Court recalls that one of the characteristic elements of a forced disappearance is precisely "the refusal to acknowledge the detention and to reveal the fate or whereabouts of the person concerned," for which it is incorrect to rule out the possible disappearance of a person based on the absence of information.<sup>171</sup> Such refusal often implies failure to record the arrest. It is neither logical nor reasonable to use the lack of record of Mr. Vásquez Durand's detention as evidence that his detention did not occur.

125. This Court considers that all the evidence presented is consistent and leads to the conclusion that Jorge Vásquez Durand re-entered Ecuador on January 30, 1995, where he was detained. Likewise, this Court considers that said detention was carried out by State agents or at least with their acquiescence. In addition, the Court emphasizes that Mr. Vásquez Durand was a person protected by international humanitarian law as he was a Peruvian national, a civilian, in the power of the Ecuadorian State, the other party to the conflict<sup>172</sup>.

*B.1.b The refusal to acknowledge the arrest and to reveal the fate or whereabouts of the person concerned*

126. According to the definition contained in the Inter-American Convention on Forced Disappearance<sup>173</sup> and the jurisprudence of this Court, one of the characteristics of forced disappearance, unlike extrajudicial execution, is that it entails the refusal of the State to recognize that the victim is under its control and to provide information in this regard, with the purpose of

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<sup>170</sup> *cf.* Note from the Permanent Representative of Ecuador to the OAS of May 22, 1995, indicating that there were five Peruvian prisoners of war, two of whom had already been released and that there was no information on Jorge Vásquez Durand (evidence file, folios 9 and 10); Delivery certificate from the International Committee of the Red Cross of March 1, 1995 (evidence file, folio 1856), and official letter from the Joint Command of the Armed Forces of Ecuador of April 4, 1995 (evidence file, folio 1846).

<sup>171</sup> *cf. Case of González Medina and family v. Dominican Republic. Preliminary Exceptions, Merits, Reparations and Costs* Judgment of February 27, 2012. Series C No. 240, para. 162, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia, supra*, para. 265.

<sup>172</sup> In this regard, Article 4 of the IV Geneva Convention establishes that "[t]he present Convention protects persons who, at any time and in whatever manner, are, in the event of conflict or occupation, in the power of a Party to the conflict [...]". The ICRC's 1958 comments on that article point out that when work began on the texts, it was always clear that there were two main classes of civilians whose protection against arbitrary acts by the enemy was essential in times of war. On the one hand, people of enemy nationality living in the territory of a belligerent State, and on the other hand, the inhabitants of occupied territories. The idea that the Convention should cover these two categories was accepted from the beginning and was never disputed. *cf.* Comments to article 4, paragraph 4.

Available in: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=18E3CCDE8BE7E2F8C12563CD0042A50B>. See also, Additional Protocol I, articles 50 and 51, and statement at the public hearing by Alejandro Valencia Villa.

<sup>173</sup> Article II of the Inter-American Convention on Forced Disappearance establishes that: "forced disappearance is considered to be the deprivation of liberty of one or more persons, whatever its form, committed by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by the lack of information or the refusal to acknowledge such deprivation of liberty or to report on the whereabouts of the person, thereby preventing the exercise of legal remedies and the pertinent procedural guarantees."



generate uncertainty about their whereabouts, life or death, cause intimidation and suppression of rights<sup>174</sup>.

127. First, the Court notes that the State did not record the detention of Mr. Vásquez Durand (*suprapara*. 124)<sup>175</sup>. In this regard, the Court has considered that all detention, regardless of the reason or duration thereof, must be duly recorded in the pertinent document, clearly indicating the causes of the detention, who carried it out, the time of detention and the time of release, as well as proof that the competent judge was notified, at least, in order to protect against any illegal or arbitrary interference with physical freedom.<sup>176</sup> In addition, in international armed conflicts, States have the obligation to establish "an official information office in charge of receiving and transmitting data related to protected persons in their power."<sup>177</sup> Such information must include:

[F]or each person, at least, the surname, first names, place and full date of birth, nationality, previous address, particular signs, father's name and mother's surname, date and nature of the measure taken with respect to the person, as well as the place where the person was detained, the address to which correspondence can be sent, the name and address of the person to whom it must be informed<sup>178</sup>.

128. On this point, the ICRC considered the obligation to "register[ed] the personal data of persons deprived of liberty" as a customary rule applicable to armed conflicts.<sup>179</sup> States must also provide the ICRC with access to all persons deprived of liberty<sup>180</sup>.

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<sup>174</sup> *cf. Case of Anzualdo Castro v. Peru. Preliminary Objection, Merits, Reparations and Costs*. Judgment of September 22, 2009. Series C No. 202, para. 91, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal vs. Guatemala v. Peru, supra*, para. 140.

<sup>175</sup> On June 27, 1995, the EM Police Colonel informed the Minister of National Defense that Mr. Vásquez Durand "is not being held in any prison in that province." In addition, on August 15, 1995, the State reported that Jorge Vásquez Durand "did not record any detention." Note from the Colonel of the EM Police to the Minister of National Defense of June 27, 1995 (evidence file, folio 2075), and the State's response to the Forced or Involuntary Disappearances Working Group (evidence file, folio 2042). On the other hand, the Court notes that the memorandum on the investigation before the Prosecutor's Office indicates that on April 12, 2010, the Prosecutor of the Canton Huaquillas informed the Provincial Prosecutor of El Oro in charge, that "[it] had not been possible to comply with the procedures, since there are no databases for the requested Police Institutions, it cannot report on what is required". However, said affirmation does not emerge from the letters included in the file. *cf. Memorandum on the investigation before the Prosecutor's Office of September 12, 2016* (evidence file, folio 1735).

<sup>176</sup> *Cf. Case of Torres Millacura et al. v. Argentina. Merits, Reparations and Costs*. Judgment of August 26, 2011. Series C No. 229, para. 76, and *Case of Galindo Cárdenas et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of October 2, 2015. Series C No. 301, para. 193.

<sup>177</sup> Geneva Convention IV, Article 136. In this regard, Additional Protocol I states that such registration must be carried out "when [people] have been detained, imprisoned or held in any other form of captivity for more than two weeks as a result of hostilities or occupation or have died during a period of detention." Additional Protocol I, art. 33.2.a).

<sup>178</sup> Geneva Convention IV, article 13.

<sup>179</sup> In this regard, the Court notes that many of the documents used to determine the existence of the international custom are prior to 1995. *cf. ICRC, Customary International Humanitarian Law, Volume I: Rules*, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, 2007, rule 123, pp. 388 and 497. Available at: [https://www.icrc.org/spa/assets/files/other/icrc\\_003\\_pcustom.pdf](https://www.icrc.org/spa/assets/files/other/icrc_003_pcustom.pdf).

<sup>180</sup> *cf. IV Geneva Convention*, articles 76.6, 142 and 143; Geneva Convention relative to the treatment due to prisoners of war, approved on August 12, 1949 by the Diplomatic Conference to Elaborate International Agreements destined to protect victims of war, held in Geneva from April 12 to August 12, 1949. Entry into force: October 21, 1950 and ratified by Ecuador on August 11, 1954 (hereinafter "Geneva Convention III"), arts. 125 and 126. Also see, ICRC, Customary International Humanitarian Law, Volume I: Rules, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, 2007, rule 124, p. 500. Available at: [https://www.icrc.org/spa/assets/files/other/icrc\\_003\\_pcustom.pdf](https://www.icrc.org/spa/assets/files/other/icrc_003_pcustom.pdf).

129. In this sense, the Court considers that the failure to record a detention, despite the existence of clear obligations in this regard, shows the intention to hide it. Likewise, this Tribunal emphasizes that it is clear from the file that in 1995 the Provincial Police Command El Oro No. 3, the National Director of Intelligence of the National Police and the Police Undersecretariat indicated that Mr. Vásquez Durand "did not record[ed] any arrests."<sup>181</sup>. Indeed, the name of Jorge Vásquez Durand does not appear in the list of Peruvian citizens detained in Ecuador between January and April 1995, drawn up by the El Oro Provincial Command in April 1995.<sup>182</sup>. This denial of the detention of Mr. Vásquez Durand was reaffirmed in 1996 by the Undersecretary of National Defense of the Ministry of National Defense and by the Undersecretary of Police of the Ministry of Government.<sup>183</sup>, and in 2006 and 2007 by authorities of the National Police of Ecuador<sup>184</sup>.

130. Additionally, said refusal continued during the investigations carried out by the Truth Commission, to whom the Chief of the Joint Command of the Armed Forces indicated that "once the files of the different Intelligence Directorates of the Land, Naval and Air Forces were reviewed, there is no type of information on [the alleged detention of Mr. Vásquez Durand]"<sup>185</sup>.

### *B.1.c Conclusion regarding what happened to Mr. Vásquez Durand*

131. The Court deems it sufficiently proven that Mr. Vásquez Durand re-entered Ecuador on January 30, 1995, where he was detained by State agents, who have refused to acknowledge his detention or reveal his fate or whereabouts, for which reason he was the victim of a forced disappearance.

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<sup>181</sup> Letter of July 3, 1995 signed by the EM Police Colonel in his role as Undersecretary of the Police and addressed to the General Director of Humanitarian Affairs and Environment of the Ministry of Foreign Affairs, through which letters are transmitted from the Provincial Police Commander El Oro No. 3 and from the National Director of Intelligence of the National Police (evidence file, folio 2303); Note received on November 21, 1995, signed by the Undersecretary of Police and addressed to the Undersecretary for International Organizations of the Ministry of Foreign Affairs, reiterating the information forwarded by the El Oro Provincial Police Command No. 3 and the National Director of Intelligence of the National Police (evidence file, folio 2306).

<sup>182</sup> *cf.* Note of April 29, 1996 from the Undersecretary of Police addressed to the Director General of Multilateral Organizations of the Ministry of Foreign Affairs and annex to a list dated April 30, 1995, provided by the El Oro Provincial Command No. 3 (evidence file, folios 2085 to 2090).

<sup>183</sup> Note of March 1, 1996, signed by the Undersecretary of National Defense of the Ministry of National Defense and addressed to the Director General of Humanitarian Affairs and the Environment of the Ministry of Foreign Affairs of Ecuador (evidence file, folio 2305); Note of April 29, 1996, signed by the Undersecretary of Police and addressed to the Director General of Multilateral Organizations of the Ministry of Foreign Affairs (evidence file, page 2308), and Note of May 16, 1996, signed by the Undersecretary of National Defense of the Ministry of National Defense and addressed to the Director General of Multilateral Organizations of the Ministry of Foreign Affairs (evidence file, page 2304).

<sup>184</sup> Official letter dated July 14, 2006, signed by the Personal Background Checker of the Central Archive of the National Police and addressed to the Chief of the Central Police Archive (evidence file, folio 2290); Note of May 8, 2007, signed by the Advisor to the Minister of the Interior and addressed to the Director General of Human Rights, Social and Environmental Affairs of the Ministry of Foreign Affairs (evidence file, folio 2315); Note of June 13, 2007, signed by the Undersecretary of Police and addressed to the Minister of the Interior and Police (evidence file, folio 2316); memorandum of the General Command of the Police of June 12, 2007 (evidence file, page 2317); Note of May 29, 2007, signed by the National Director of the Judicial Police and Investigations and addressed to the General Commander of the National Police (evidence file, page 2318), and Note of May 24, 2007, signed by the Head of the National Central Office-Interpol Quito and addressed to the National Director of the Judicial Police and Investigations (evidence file, page 2319).

<sup>185</sup> Official letter No. MJ-3-2009-1216 of the illegible day and month of 2009, signed by the Chief of the Ministerial Cabinet of the Ministry of National Defense and addressed to the Executive Secretary of the Truth Commission (evidence file, folio 1989).

132. The only evidence presented by the State against said conclusion is the immigration record of Mr. Vásquez Durand, which marks his departure on January 30 of that year, and the absence of any record of the alleged victim's detention. The Court recalls that the departure of Mr. Vásquez Durand from Ecuador on January 30, 1995 does not rule out by itself the possibility that he had re-entered Ecuador without his entry being registered (*suprapara*. 117), particularly taking into account the testimonies and information received by the wife of the alleged victim that are consistent in that he was detained and remained deprived of liberty in Ecuador for a time after that date (*supraparas*. 119 and 120). On the other hand, taking into account the characteristics of a forced disappearance, the lack of record of the detention of the alleged victim is not evidence that she was not detained (*suprapara*. 124). Additionally, the only investigation that the State has concluded into these events to date was carried out by the Truth Commission and determined that Mr. Vásquez Durand "was detained in the city of Huaquillas, on the border with Peru" on January 30, 1995, for which it concluded that he was the victim of torture, forced disappearance, and illegal deprivation of liberty.<sup>186</sup> Concluding that the above indications are not sufficient to establish that Mr. Vásquez Durand was forcibly disappeared would imply admitting the State's argument that there is no evidence in this sense, allowing the State to rely on the negligence and ineffectiveness of the criminal investigation to escape its international responsibility.<sup>187</sup> By virtue of all of the foregoing, the Court concludes that Jorge Vásquez Durand was a victim of forced disappearance.

## **B.2 Violations of Articles 7, 5.1, 5.2, 4.1 and 3 of the American Convention and Ia of the Inter-American Convention on Forced Disappearance**

133. This Court determined that Mr. Vásquez Durand was forcibly disappeared (*suprapara*. 131). The Court recalls that a forced disappearance is configured by a plurality of conducts that, united by a single purpose, permanently violate, while they subsist, different legal rights protected by the Convention<sup>188</sup>. Therefore, the examination of a possible forced disappearance must be consistent with the complex violation of human rights that it entails and must not focus in an isolated, divided and fragmented manner only on detention, possible torture or the risk of losing one's life.<sup>189</sup>

134. Regarding Article 7 of the American Convention, the Court notes that the arrest of Mr. Vásquez Durand was carried out by state agents who possibly transferred him to the Teniente Ortiz barracks. Regardless of whether or not the initial arrest and deprivation of liberty of Mr. Vásquez Durand was carried out in accordance with the law, said detention constituted the previous step for his disappearance, therefore it is contrary to the Convention (*supra* para. 112). On the other hand, the Court recalls that the existence of an international armed conflict between Peru and Ecuador was not a sufficient reason to detain Peruvian citizens who were in Ecuadorian territory. On the contrary, protected persons, such as Mr. Vásquez Durand, have the right to leave the territory of the State in conflict, "unless their departure is detrimental to the national interests of the State," which has not been proven or alleged in this case (*suprapara*. 107). Additionally, the State did not register the

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<sup>186</sup> *cf.* Report of the Truth Commission, Volume 4. Report of cases, pg. 82.

<sup>187</sup> *Cf. Case of Kawas Fernández v. Honduras. Merits, Reparations and Costs.* Judgment of April 3, 2009. Series C No. 196, para. 97, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia, supra*, para. 305.

<sup>188</sup> *Cf. Case of Radilla Pacheco v. Mexico, supra*, para. 138, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal vs. Guatemala v. Peru, supra*, para. 134.

<sup>189</sup> *Cf. Case of Heliodoro Portugal v. Panama, supra*, para. 112, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal vs. Guatemala v. Peru, supra*, para. 134.

detention of Mr. Vásquez Durand nor did he inform the competent authorities of it. All of the foregoing implies a deprivation of liberty contrary to Article 7 of the American Convention.

135. Regarding Article 5 of the American Convention, first of all, the Court considers that, due to the very nature of forced disappearance, this implies that the State placed people in a serious situation of vulnerability and risk of suffering irreparable damage to their personal integrity and life.<sup>190</sup> In this sense, forced disappearance violates the right to personal integrity because the mere fact of prolonged isolation and coercive solitary confinement represents cruel and inhuman treatment in contradiction with Articles 5.1 and 5.2 of the Convention.<sup>191</sup> Secondly, the Court notes that the statements of two other Peruvians detained during the conflict indicate that they were victims of torture and interrogation.<sup>192</sup>, and one of them claimed to have seen Mr. Vásquez Durand "quite dejected"<sup>193</sup>. In this regard, the Court notes that international humanitarian law also prohibits torture and coercion to obtain information from protected persons.<sup>194</sup> In addition, when the occurrence of a forced disappearance is proven, this Court considers it reasonable to presume, based on the elements of the body of evidence, that the victims suffered treatment contrary to the inherent dignity of the human being while they were in state custody, for which reason there is a violation of Articles 5(1) and 5(2) of the American Convention, in relation to Article 1(1) of the same instrument.

136. Regarding Article 4 of the American Convention, the Court has considered that, due to the very nature of forced disappearance, the victim is in an aggravated situation of vulnerability, from which arises the risk of various rights being violated, including the right to life. In addition, the Court has established that forced disappearance has frequently included the execution of the detainees, in secret and without trial, followed by the concealment of the corpse in order to erase all material traces of the crime and seek impunity for those who committed it, which means a violation of the right to life,

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<sup>190</sup> *cf. Case of Radilla Pacheco v. Mexico, supra*, para. 152, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal vs. Guatemala v. Peru, supra*, para. 158.

<sup>191</sup> *cf. Case of Velásquez Rodríguez v. Honduras. Bottom, above*, paras. 156 and 187, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal vs. Guatemala v. Peru, supra*, para. 158.

<sup>192</sup> Mario Jesús Puente Olivera, a merchant friend of Mr. Vásquez Durand, recounted that he had been tortured while being interrogated about why he was in Ecuador and which soldier had sent him. *cf. Statement rendered before a notary public (affidavit) of Mario Jesús Puente Olivera on July 25, 2016 (evidence file, folio 1404), and statement of Mario Jesús Puente Olivera in DVD format (evidence file, folio 83)*. In the same sense, another Peruvian citizen EHAM, who was also detained during the armed conflict, reported that he was beaten. *cf. Statement made by EHAM, presumed Peruvian detainee, before APRODEH employees (evidence file, page 86), and communication signed by EHAM, presumed Peruvian detainee, of July 24, 1995, addressed to the Director of Consular Affairs of the Peruvian Ministry of Foreign Affairs (evidence file, page 95)*.

<sup>193</sup> Statement of EHAM, presumed Peruvian detainee, rendered before APRODEH employees (evidence file, folio 87).

<sup>194</sup> In this regard, Article 31 of the IV Geneva Convention establishes that "[n]o coercion of a physical or moral nature may be exercised against protected persons, especially to obtain information from them, or from third parties"; Article 32 establishes that "[t]he High Contracting Parties expressly prohibit themselves from using any measure that may cause physical suffering or the extermination of the protected persons in their power. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not required for the medical treatment of a protected person, but also to any other ill-treatment by civil or military agents"; and Article 37 states that "[t]he protected persons who are in preventive detention or serving a sentence of deprivation of liberty will be treated, during their detention, with humanity." *cf. Geneva Convention IV, arts. 31, 32 and 37*.

recognized in article 4 of the Convention<sup>195</sup>. The Court emphasizes that, to date, more than 22 years after the disappearance began, the whereabouts of Mr. Vásquez Durand are unknown.

137. Finally, with respect to the violation of Article 3 of the American Convention, the State argued that said provision had not been violated in this case (*supra* para. 97). In this regard, the Court recalls that the practice of forced disappearance also violates Article 3 of the Convention, as it "seeks not only one of the most serious forms of abduction of a person from all spheres of the legal system, but also to deny their very existence and leave them in a kind of limbo or situation of legal uncertainty before society, the State, and even the international community."<sup>196</sup> Similarly, the Court has affirmed that "a forced disappearance may entail a specific violation [of article 3] because the consequence of the refusal to acknowledge the deprivation of liberty or whereabouts of the person is, together with the other elements of the disappearance, the '*removal from the protection of the law*' or the violation of the personal and legal security of the individual that directly prevents the recognition of legal personality."<sup>197</sup> This reasoning has been consistently applied by the Tribunal in all its decisions regarding forced disappearances since the case *Anzualdo Castro vs. Peru*<sup>198</sup>.

138. The Court has considered that the proper content of the right to recognition of legal personality is that, precisely, the person is recognized, anywhere as a subject of rights and obligations, and to enjoy fundamental civil rights, which implies the capacity to be the holder of rights (capacity and enjoyment) and duties<sup>199</sup>.

139. In this way, the content of the right to recognition of legal personality refers to the correlative general duty of the State to provide the legal means and conditions so that this right can be freely and fully exercised by its holders or, where appropriate, to the obligation not to violate said right.<sup>200</sup> In the present case, the Court considers that Mr. Vásquez Durand was placed in a situation of legal uncertainty, which impeded his possibility of being the owner or effectively exercising his rights in general, for which reason

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<sup>195</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Background, above*, para. 157, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal vs. Guatemala v. Peru, supra*, paras. 140 and 158.

<sup>196</sup> *Case of Anzualdo Castro v. Peru, supra*, para. 90, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal vs. Guatemala v. Peru, supra*, para. 159.

<sup>197</sup> *Case of Anzualdo Castro v. Peru, supra*, paras. 90 and 92, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 160.

<sup>198</sup> Cf. *Case of Anzualdo Castro v. Peru, supra*, paras. 90 to 101; *Case of Radilla Pacheco v. Mexico, supra*, para. 157; *Case Chitay Nech et al. v. Guatemala. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of May 25, 2010. Series C No. 212, para. 102; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations and Costs*. Judgment of September 1, 2010. Series C No. 217, paras. 98 to 102; *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 122; *Case of Gelman v. Uruguay, supra*, para. 92; *Case of Torres Millacura et al. v. Argentina, supra*, para. 106; *Case of Contreras et al. v. El Salvador. Merits, Reparations and Costs*. Judgment of August 31, 2011. Series C No. 232, para. 88; *Case of González Medina and family v. Dominican Republic, supra*, paras. 186 to 188; *Case of Gudiel Álvarez et al. ("Military Newspaper") v. Guatemala. Reparations and Costs Fund*. Judgment of November 20, 2012. Series C No. 253, paras. 208 to 210; *Case of García and family v. Guatemala. Reparations and Costs Fund*. Judgment of November 29, 2012. Series C No. 258, paras. 102 and 108 to 110; *Case of Osorio Rivera and family v. Peru. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of November 26, 2013. Series C No. 274, para. 170; *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia, supra*, paras. 321, 323 and 324; *Case of the Peasant Community of Santa Bárbara v. Peru. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of September 1, 2015. Series C No. 299, para. 190; *Case of Tenorio Roca et al. v. Peru, supra*, para. 160 and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal vs. Guatemala v. Peru, supra*, para. 159.

<sup>199</sup> Cf. *Case of Bámaca Velásquez v. Guatemala. Background, above*, para. 179, and *Case of the Kaliña and Lokono Peoples v. Suriname. Merits, Reparations and Costs*. Judgment of November 25, 2015. Series C No. 309, para. 87.

<sup>200</sup> Cf. *Case of Radilla Pacheco v. Mexico, supra*, para. 156; *Case of González Medina and family v. Dominican Republic, supra*, para. 188 and, *mutatis mutandi*, *Case of the Kaliña and Lokono Peoples v. Suriname, supra*, para. 88.

a violation of their right to recognition of legal personality. The formal recognition of his existence as a person, contrary to what was alleged by the State, is not enough to consider that a forced disappearance does not violate Article 3 of the Convention.

### B.3 Conclusion

140. In short, taking into account that the Court concluded that Mr. Vásquez Durand was the victim of a forced disappearance, this Court concludes that the State is responsible for the violation of the rights recognized in Articles 7, 5.1, 5.2, 4.1, and 3 of the American Convention, in relation to Article 1.1 thereof and in relation to the provisions of Article Ia of the Inter-American Convention on Forced Disappearance, which entered into force for Ecuador on 2 August 6, 2006, to the detriment of Jorge Vásquez Durand.

### VIII-2

#### **RIGHTS TO JUDICIAL GUARANTEES<sup>201</sup> AND JUDICIAL PROTECTION<sup>202</sup>, IN RELATION TO THE OBLIGATIONS TO RESPECT AND GUARANTEE THE RIGHTS AND THE DUTY TO ADOPT DOMESTIC LAW PROVISIONS<sup>203</sup>**

141. The obligation to investigate human rights violations is one of the positive measures that States must adopt to guarantee the rights recognized in the Convention. Thus, since its first ruling, this Court has highlighted the importance of the State's duty to investigate and punish human rights violations.<sup>204</sup>, which acquires particular importance given the seriousness of the crimes committed and the nature of the rights violated<sup>205</sup>. This obligation also arises from other inter-American instruments. Thus, in cases of forced disappearances, the obligation to investigate is reinforced by Article Ib of the Inter-American Convention on Forced Disappearance, in force for the State since August 26, 2006.<sup>206</sup>

142. This Court has already considered that, once a forced disappearance has occurred, it is necessary that it be effectively considered and treated as an illegal act that may result in the imposition of sanctions for those who commit, instigate, cover it up, or participate in any other way in its perpetration.<sup>207</sup>

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<sup>201</sup> Article 8.1 of the Convention establishes that: "Every person has the right to be heard, with due guarantees and within a reasonable time, by a competent, independent and impartial judge or tribunal, previously established by law, in the substantiation of any criminal accusation made against him, or for the determination of his rights and obligations of a civil, labor, fiscal or any other nature."

<sup>202</sup> Article 25.1 of the Convention establishes that: "Every person has the right to a simple and prompt remedy or to any other effective remedy before the competent judges or courts, which protects them against acts that violate their fundamental rights recognized by the Constitution, the law or this Convention, even when such violation is committed by persons acting in the exercise of their official functions."

<sup>203</sup> Article 2 of the Convention establishes that: "If the exercise of the rights and freedoms mentioned in Article 1 is not already guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional procedures and the provisions of this Convention, the legislative or other measures that may be necessary to make such rights and freedoms effective."

<sup>204</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Background, above*, para. 166 and *Case IV v. Bolivia, supra*, para. 207.

<sup>205</sup> Cf. *Case of Goiburú et al. v. Paraguay, supra*, para. 128, and *Case of Pollo Rivera et al. v. Peru. Background, Repairs and Costs*. Judgment of October 21, 2016. Series C No. 319, para. 277.

<sup>206</sup> Article Ib of the Inter-American Convention on Forced Disappearance establishes: "The States Parties to this Convention undertake to: [...] b) Punish, within their jurisdiction, the perpetrators, accomplices, and accessories after the crime of forced disappearance of persons, as well as the attempted commission thereof."

<sup>207</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Background, above*, paras. 176 and 177; *Case of Contreras et al. v. El Salvador, supra*, para. 128, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 168.

143. In addition, this Court recalls that this case was framed in an international armed conflict. Therefore, the obligation to investigate violations of international humanitarian law is reinforced by Article 146 of the IV Geneva Convention on the protection due to civilians in time of war, by which States have the obligation to prosecute those responsible for serious violations of said instruments,<sup>208</sup> including forced disappearance and other violations of conventional and customary international humanitarian law<sup>209</sup>, which this entails due to its multiple and complex nature, such as the prohibitions of arbitrary deprivation of liberty, torture and other cruel or inhuman treatment and homicide (*supraparas.* 107 and 108).

144. In view of the arguments made by the parties and the Commission on the rights to judicial guarantees and protection, this Court will examine: (a) the duty to initiate an investigation *ex officio* and carry it out within a reasonable time, as well as the obligation to adopt all reasonable measures to find the whereabouts of a victim of forced disappearance and the right to know the truth; (b) the alleged absence of an effective remedy at the beginning of the disappearance of Mr. Vásquez Durand, and (c) the alleged absence of an adequate classification of the crime of forced disappearance in Ecuador.

### ***A. Lack of investigation ex officio and within a reasonable time, as well as failure to search for the disappeared person and the right to know the truth***

#### **A.1 Arguments of the parties and the Commission**

145. The **Commission** alleged that, more than 19 years after the disappearance of the alleged victim, the State has not reported on the specific steps taken to find his whereabouts and has not provided an explanation that would justify the absence of a final judicial decision by a competent body regarding his disappearance. In addition, he indicated that the Truth Commission determined the existence of "a context of impunity in which the military acted at the time of the events." He stressed that the State "did not initiate any investigation into the facts of this case, however it was aware of them." In this regard, he indicated that "the Ecuadorian authorities were informed through different channels -diplomatic, inter-American human rights system, International Red Cross, among others-, regarding the arrest in January 1995 and subsequent disappearance of Mr. Jorge Vásquez Durand." He maintained that the lack of investigation "not only allows the forced disappearance of the victim to continue to be carried out to this day, but also constitutes a way of extending the cover-up of what happened and perpetuating the aforementioned situation of impunity." He concluded that due to the long time that has elapsed since what happened, "without the full truth about the facts being known, without internal criminal proceedings having been initiated to determine the whereabouts of the victim, nor to It maintained that the lack of investigation "not only allows the forced disappearance of the victim to continue to be carried out to this day, but also constitutes a way of extending the cover-up of what happened and perpetuating the aforementioned situation of impunity." He concluded that due to the long time that has elapsed since what happened, "without the full truth about the facts being known, without internal criminal proceedings having been initiated to determine the whereabouts of the victim, nor to It maintained that the lack of investigation "not only allows the forced disappearance of the victim to continue to be carried out to this day, but also constitutes a way of extending the cover-up of what happened and perpetuating the aforementioned situation of impunity." He concluded that due to the long time that has elapsed since what happened, "without the full truth about the facts being known, without internal criminal proceedings having been initiated to determine the whereabouts of the victim, nor to

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<sup>208</sup> In this regard, Article 146 of the IV Geneva Convention on the protection due to civilians in time of war establishes that: "The High Contracting Parties undertake to take all appropriate legislative measures to determine the appropriate penal sanctions to be applied to persons who have committed, or given orders to commit, any of the serious offenses against this Convention defined in the following article. Each of the Contracting Parties will have the obligation to search for the persons accused of having committed, or ordered to be committed, any of the serious infractions, and must bring them before the courts themselves, regardless of their nationality. You may also, if you prefer, and according to the conditions established in the legislation itself, submit them for trial by another Contracting Party concerned, if the latter has brought sufficient charges against it. Each Contracting Party shall take the appropriate measures to stop, apart from the serious infringements defined in the following article, acts contrary to the provisions of this Agreement. The accused will benefit, in all circumstances, from procedural guarantees and free defense, which may not be less than those provided for in articles 105 et seq. of the Geneva Convention of August 12, 1949 relative to the treatment due to prisoners of war. acts contrary to the provisions of this Agreement. The accused will benefit, in all circumstances, from procedural guarantees and free defense, which may not be less than those provided for in articles 105 et seq. of the Geneva Convention of August 12, 1949 relative to the treatment due to prisoners of war. acts contrary to the provisions of this Agreement. The accused will benefit, in all circumstances, from procedural guarantees and free defense, which may not be less than those provided for in articles 105 et seq. of the Geneva Convention of August 12, 1949 relative to the treatment due to prisoners of war.

<sup>209</sup> *cf.* ICRC, Customary International Humanitarian Law, vol. I, rule 98, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, 2007.

guarantee the rights of access to justice and to know the truth, through the investigation and eventual punishment of those responsible and comprehensive reparation for the consequences of the violations, the State violated the rights recognized in Articles 8.1 and 25.1 of the American Convention, in relation to Article 1.1 of the same instrument and Article Ib of the [Inter-American Convention on Forced Disappearance]." According to the Commission, "the current situation of impunity is total and the international responsibility of the State results from the absolute absence of a judicial investigation into the forced disappearance of Mr. Vásquez Durand."

146. The **representatives** For their part, they alleged that, despite the fact that "the Ecuadorian authorities were informed through different channels [...] about the arrest in January 1995 and subsequent disappearance of Mr. Jorge Vásquez Durand, the State of Ecuador only limited itself to repeatedly indicating that the police and military authorities had no record of Mr. Ecuador". They argued that Ecuador has only reported that the case is under prior investigation, and that the National Directorate for Crimes against Life, Violent Deaths, Disappearances, Extortion, and Kidnappings (DINASED) has provided exhaustive follow-up, but it has not provided specific or detailed information regarding the "exhaustive investigations" to which it refers. They highlighted that "[t]o more than 20 years after the events occurred, there is still no criminal proceeding that includes those responsible for his disappearance, whether they are the perpetrators or the masterminds." Consequently, they considered that "the State of Ecuador violated the guarantees of due diligence in the investigations and that they be carried out within a reasonable time with respect to the investigation of the detention and subsequent disappearance [as well as] [...] the right to the truth and comprehensive reparation for the consequences of the facts, through the investigation and punishment of those responsible." Finally, they maintained that "[t]he State cannot limit itself to having a passive role as it tries to point out, limiting itself to describing the objectives of the Truth Commission, its conclusions and recommendations, the public policies that it later implemented and the legislative norms that it adopted; omitting [...] to provide clear explanations about the case, while the victims continue to wait for justice."

147. The **State** affirmed "that it is the same representatives who record the different steps taken by Ecuador [...], as well as the different efforts of the Military Brigade of the Province of El Oro, the Command of the Military Division Tarqui (also of the Province of Oro), the Archbishopric of the city of Cuenca, the Bishopric of the Armed Forces of Ecuador and mainly of the Ecuadorian immigration officials who demonstrated that they had the entry and exit records of Mr. Jorge Vásquez Durand from 1993 to the year 1995". He stressed that the writ of habeas corpus "was not activated by the next of kin of the alleged victim" and that "although the Mayor or the President of the Council were not formally judges, they acted as such." Therefore, they could even dismiss public officials who refused to comply with their orders within the framework of the application of said remedy. Additionally, Ecuador referred to the action mentioned by the representatives, alleging that DINASED "has provided exhaustive follow-up at the national level regarding the disappearance of Mr. Jorge Vásquez Durand." It argued that the Commission's argument that a judicial investigation has not been carried out is a "clearly imprecise and erroneous matter," "since the official investigation intervention of the State Attorney General's Office is documented in the case." In addition, he denied having played a passive role in the investigation, since "both civil authorities, Ecuadorian military and nuns carried out search efforts to find the whereabouts of Mr. Jorge Vásquez Durand." Ecuador explained that for the investigation of the cases documented by the Truth Commission, the State Attorney General's Office "has deployed countless actions based on a serious and conscious effort to technically investigate human rights violations. It has developed a specific research methodology, which is implemented by the Directorate of the



Truth and Human Rights Commission [...] and that by 2016, it has 6 prosecutorial teams for the investigation of serious human rights violations and crimes against humanity." Regarding the case of Mr. Vásquez Durand, he stated that in 2010 the State Attorney General's Office began investigations to clarify this case, which are in the criminal investigation phase and in which "multiple procedures typical of a highly complex investigation process have been carried out," including the request for international criminal assistance to Peru.

148. On the other hand, the State indicated that the right to the truth was not an autonomous right, but rather that it should be seen as fundamentally subsumed in the right of the victim or of his next of kin to obtain clarification of the violations and the corresponding responsibilities from the competent organs of the State, through the investigation and trial provided for in Articles 8 and 25 of the Convention. Therefore, it argued that "obviously it is not possible to declare the violation of the right to the truth, since it is not part of the Treaty." According to the State, "these are the aspects fully covered by Ecuador, from the publication of the Report of the Truth Commission, the entry into force of the Law [for Reparation of Victims and Judicialization],

## A.2 Considerations of the Court

### A.2.a Duty to initiate ex officio investigation

149. Regarding the duty to initiate an investigation ex officio, this Court has indicated that whenever there are reasonable grounds to suspect that a person has been subjected to forced disappearance, a criminal investigation must be initiated.<sup>210</sup> This obligation is independent of the filing of a complaint, since in cases of forced disappearance international law and the general duty to guarantee impose the obligation to investigate the case *ex officio*, without delay, and in a serious, impartial and effective manner, in such a way that it does not depend on the procedural initiative of the victim or their relatives or on the private contribution of evidence.<sup>211</sup> In any case, any state authority, public official or individual who has received news of acts aimed at the forced disappearance of persons must report it immediately.<sup>212</sup> Likewise, the Court has established that the duty to investigate events of this nature subsists as long as uncertainty remains regarding the final fate of the disappeared person, since the right of the victim's next of kin to know what was the fate of the victim and, where appropriate, where his remains are, represents a fair expectation that the State must satisfy with all the means at its disposal.<sup>213</sup>

150. In this case, it has been shown that the next of kin of Mr. Vásquez Durand informed the Ecuadorian authorities of his possible disappearance since 1995. As can be seen from the facts, through diplomatic channels and even through international organizations such as the Inter-American Commission and the Working Group on Disappearances

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<sup>210</sup> Cf. *Case of Anzualdo Castro v. Peru*, *supra*, para. 65, and *Case of Tenorio Roca et al. v. Peru*, *supra*, para. 168.

<sup>211</sup> Cf. *Case of Velásquez Rodríguez v. Honduras*. *Background*, *above*, para. 177, and *Case of Tenorio Roca et al. v. Peru*, *supra*, para. 168.

<sup>212</sup> Cf. *Case of Anzualdo Castro v. Peru*, *supra*, para. 65, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia*, *supra*, para. 475.

<sup>213</sup> Cf. *Case of Velásquez Rodríguez v. Honduras*. *Bottom*, *above*, para. 181, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala*, *supra*, para. 221.

United Nations forces<sup>214</sup>, the next of kin of Mr. Vásquez Durand informed Ecuador from the outset in 1995 of the possible disappearance of the alleged victim (*supraparas.* 79 to 86). In front of the Ecuadorian authorities, Mrs. Gomero Cuentas denounced the disappearance of her husband before the Ecuadorian Consul in Peru<sup>215</sup>, also through the Peruvian authorities, the Working Group on Enforced or Involuntary Disappearances and the ICRC, Ecuadorian authorities such as the Ministry of National Defense<sup>216</sup>, the Ministry of Foreign Affairs<sup>217</sup> and the Public Prosecutor<sup>218</sup> were made aware of the possible disappearance of Mr. Vásquez Durand, as well as data on the case and possible witnesses in 1995, 1996, 2007 and 2008 (*supraparas.* 66, 79 to 85). According to the State's own arguments, in this case "the Ecuadorian and Peruvian Red Cross and the Ecuadorian Foreign Ministry itself, the Ecuadorian Catholic Church, and even the Ecuadorian Armed Forces" intervened.

151. However, only from 2010 did an investigation begin before the Prosecutor's Office for these facts, after the publication of the Report of the Truth Commission (*suprapara.* 88). The State has not provided any explanation for the absence of a criminal investigation into the case for more than fifteen years. Although Mr. Vásquez Durand's next of kin did not file a complaint or formal appeal with the Ecuadorian criminal authorities, the Court recalls that the obligation to initiate a criminal investigation *ex officio* is independent of the filing of a formal complaint. This obligation arises as soon as the State becomes aware of reasonable grounds to suspect that a person has been subjected to forced disappearance (*suprapara.* 149).

152. This Tribunal notes that different competent authorities of the State received notice of the possible disappearance of Mr. Vásquez Durand. Even though the official records did not show his detention, the characteristics of a forced disappearance and the information from witnesses who in 1995 indicated that they had seen Mr. Vásquez Durand detained in military installations until at least the middle of that year (*suprapara.* 120), constituted sufficient grounds to initiate a criminal investigation into what happened to the alleged victim long before 2010. Therefore, the Court concludes that the State failed to comply with its obligation to initiate an *ex officio* investigation into the facts brought to its attention regarding the disappearance of Jorge Vásquez Durand.

#### *A.2.b Failure to search for Mr. Vásquez Durand*

153. The Court has established that, in cases of forced disappearance, the investigation will have certain specific connotations that arise from the very nature and complexity of the phenomenon investigated, that is, that, additionally, the investigation must include carrying out all the necessary actions in order to determine the fate or fate of the victim and the location

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<sup>214</sup> *cf.* Note of June 18, 1996 from the Ministry of Foreign Affairs on cases pending before the United Nations Working Group on Enforced or Involuntary Disappearances that include Jorge Vásquez Durand (evidence file, folio 2286); memorandum of the General Command of the National Police of July 9, 1996 (evidence file, folio 2287).

<sup>215</sup> *cf.* Note of July 4, 1995 from the Embassy of Ecuador in Peru addressed to the Ministry of Foreign Affairs (evidence file, folio 2300).

<sup>216</sup> *cf.* Note of June 30, 1995 from the Ministry of National Defense addressed to the ICRC (evidence file, page 2299), and note No. 951468 of June 27, 1995 from the Ministry of Government addressed to the Ministry of National Defense (evidence file, page 2298).

<sup>217</sup> *cf.* Communication of June 23, 1995 from the Chairman of the Working Group on Enforced or Involuntary Disappearances addressed and received by the Ministry of Foreign Affairs of Ecuador (evidence file, folio 2289).

<sup>218</sup> *cf.* Note of April 23, 2008 from the Director of Human Rights and Social Affairs of the Ministry of Foreign Affairs, Trade and Integration addressed to the Public Prosecutor (evidence file, folio 2288).

of his whereabouts<sup>219</sup>. Likewise, it has indicated that in cases of presumed forced disappearance, prompt and immediate action by the prosecutors and judicial authorities is essential, ordering timely and necessary measures aimed at determining the whereabouts of the victim or the place where she may be deprived of her liberty.<sup>220</sup> In order for an investigation into an alleged enforced disappearance to be carried out effectively and with due diligence, the authorities in charge must use all necessary means to promptly carry out those essential and timely actions and inquiries to clarify the fate of the victims.<sup>221</sup>

154. On multiple occasions, this Court has ruled on the obligation of States to carry out a serious search, through the appropriate judicial or administrative means, in which all efforts are made, systematically and rigorously, with the adequate and suitable human, technical and scientific resources to find the whereabouts of the disappeared persons.<sup>222</sup> Receiving the body of a disappeared person is of the utmost importance for their relatives, since it allows them to bury it according to their beliefs, as well as closing the mourning process that they have been experiencing throughout these years. In addition, the remains are proof of what happened and, together with the place where they were found, can provide valuable information about the perpetrators of the violations or the institution to which they belonged.<sup>223</sup>

155. In the present case, the Court verifies that the State exchanged letters with its immigration and military authorities (*supraparas.* 66, 82 and 85 to 92), which responded indicating that they had no information or evidence of the detention of Mr. Vásquez Durand. In this way, it can be deduced from the file that in July 1995 the El Oro Provincial Police Command no. 3 and the National Director of Intelligence of the National Police reported that Mr. Vásquez Durand had left Ecuador on January 30, 1995 and that he "does not record [ba] any arrests."<sup>224</sup> This information was later reaffirmed in November 1995.<sup>225</sup>, as well as in March, April and May of 1996, to the extent that "no other information has been obtained about the aforementioned Peruvian citizen."<sup>226</sup> Likewise, it appears in the file that in

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<sup>219</sup> Cf. *Case of Ticona Estrada et al. v. Bolivia. Merits, Reparations and Costs.* Judgment of November 27, 2008. Series C No. 191, para. 80, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 178.

<sup>220</sup> Cf. *Case of Anzualdo Castro v. Peru, supra*, para. 134, and *Case of the Rural Community of Santa Bárbara v. Peru, supra*, para. 226.

<sup>221</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Bottom, above*, para. 174, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 179.

<sup>222</sup> See, *inter alia*, *Case of Gudiel Álvarez et al. (Military Newspaper) v. Guatemala, supra*, para. 334; *Case of Osorio Rivera and Family v. Peru, supra*, para. 251; *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia, supra*, para. 480, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 275.

<sup>223</sup> Cf. *Case of the Dos Erres Massacre v. Guatemala. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 24, 2009. Series C No. 211, para. 245, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala, supra*, para. 292.

<sup>224</sup> Letter of July 3, 1995 signed by the EM Police Colonel in his role as Undersecretary of the Police and addressed to the General Director of Humanitarian Affairs and Environment of the Ministry of Foreign Affairs, through which letters are transmitted from the Provincial Police Commander El Oro No. 3 and from the National Director of Intelligence of the National Police (evidence file, folio 2303).

<sup>225</sup> cf. Letter received on November 21, 1995, signed by the Undersecretary of Police and addressed to the Undersecretary for International Organizations of the Ministry of Foreign Affairs, reiterating the information forwarded by the El Oro Provincial Police Command No. 3 and the National Director of Intelligence of the National Police (evidence file, folio 2306).

<sup>226</sup> Note of March 1, 1996, signed by the Undersecretary of National Defense of the Ministry of National Defense and addressed to the Director General of Humanitarian Affairs and the Environment of the Ministry of Foreign Affairs (evidence file, folio 2305); Note of April 29, 1996 signed by the Undersecretary of Police of the Ministry of Government and addressed to the Director General of Multilateral Organizations of the Ministry of Foreign Affairs (evidence file, 2308), and note of May 16, 1996 signed by the Undersecretary of National Defense of the Ministry of National Defense and addressed to the Director General of Multilateral Organizations of the Ministry of Foreign Affairs (evidence file, page 2304).

In July 2006, the Central Archive of the Ecuadorian National Police verified whether there were records in its files of Mr. Jorge Vásquez Durand, concluding that "he is not registered in the Civil Registry Database, [n]or in the Personal History System of the Central Archive."<sup>227</sup> Additionally, in May 2007, in response to a request for information from the United Nations Working Group on Enforced and Involuntary Disappearances, the file records an exchange of official letters through which the Chief of the National Central Office-Interpol Quito forwarded information to the National Director of the National Police, then to the General Commander of the National Police, then to the Minister of Government and Police, and from the latter to the Ministry of Foreign Affairs to transmit "the data collected" on, *inter alia*, the case of Mr. Vásquez Durand<sup>228</sup>. The information collected consists of an informative part indicating that:

After reviewing the files of said agency, he does not find the documentation referring to the citizen VASQUEZ DURAND Jorge, since due to the passing of the years this documentation is deteriorated and illegible.<sup>229</sup>

156. A similar exchange occurred from the Joint Command of the Armed Forces, who informed the Ministry of Foreign Affairs, in response to the request for information from the Working Group on Enforced Disappearances, that "there is no record of the entry or detention of the citizen of Peruvian nationality Jorge Vásquez Durand."<sup>230</sup>

157. However, in addition to these exchanges of letters and verifications in official records, there is no record in the file nor has it been proven by the State that it had carried out other search efforts for Mr. Vásquez Durand. Given that one of the constituent elements of a forced disappearance is the refusal to acknowledge the detention or reveal the fate of the victim, mere formal verification in official records or lists is not enough, rather it is necessary for the State to carry out additional actions, such as inspections of the military installations where Mr. Vásquez Durand was allegedly seen (*supraparas.* 70 and 120), in order to make a serious effort to locate the victim. Even if the results did not result in the forced disappearance of the victim, the State had and has the obligation to adopt all the pertinent measures to clarify and determine her whereabouts. This obligation is independent of the fact that the disappearance of the person is a consequence of the unlawful disappearance

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<sup>227</sup> Official letter dated July 14, 2006, signed by the Personal Background Checker of the Central Archive of the National Police and addressed to the Chief of the Central Police Archive (evidence file, folio 2290).

<sup>228</sup> *cf.* Note of May 8, 2007, signed by the Advisor to the Minister of the Interior and addressed to the Director General of Human Rights, Social and Environmental Affairs of the Ministry of Foreign Affairs (evidence file, folio 2315); Note of June 13, 2007, signed by the Undersecretary of Police and addressed to the Minister of the Interior and Police (evidence file, folio 2316); memorandum of the Police General Command of June 12, 2007 (evidence file, folio 2317); Note of May 29, 2007, signed by the National Director of the Judicial Police and Investigations and addressed to the General Commander of the National Police (evidence file, folio 2318),

<sup>229</sup> Report prepared by the National Directorate of the Judicial Police and Investigations of May 24, 2007, on missing citizens in Ecuador (evidence file, folio 2321), and official letter of May 12, 2007, signed by the Chief of the Sub-Headquarters of the Judicial Police of Huaquillas Canton and addressed to the National Director of the Judicial Police and Investigations (evidence file, folio 2324).

<sup>230</sup> Note of August 29, 2007 signed by the Undersecretary of National Defense of the Ministry of National Defense and addressed to the Director General of Human Rights, Social and Environmental Affairs of the Ministry of Foreign Affairs (evidence file, page 2331), and note of August 24, 2007 of the Director General of Intelligence of the Joint Command of the Armed Forces addressed to the Undersecretary of National Defense (evidence file, page 2332).

forced or due to other circumstances such as his death or other reasons related or not to the armed conflict<sup>231</sup>.

158. Therefore, the Court concludes that the State has omitted to carry out a serious, coordinated, and systematic search for the victim, which constitutes a violation of the access to justice of his next of kin.

A.2.c Reasonable time and right to know the truth

159. The Court has established that the right of access to justice requires that the determination of the facts being investigated be made effective within a reasonable time<sup>232</sup>. This Court has indicated that the "reasonable term" referred to in Article 8(1) of the Convention must be assessed in relation to the total duration of the proceeding that takes place until the final judgment is delivered.<sup>233</sup> Likewise, he has considered that a prolonged delay constitutes, in principle, by itself, a violation of judicial guarantees.<sup>2. 3. 4.</sup>

160. In the present case, the criminal investigation is currently in its most preliminary stage, since it is still in the preliminary investigation stage (*supraparas.* 87 to 91). This Court considers that the delay in the investigation is attributable to the conduct of the authorities and their lack of diligent investigative activity after the investigation carried out by the Truth Commission.

161. The State has disputed the conclusions of the Truth Commission regarding forced disappearance in this case, but it has insisted on highlighting as part of its diligent action the investigation carried out by the Truth Commission and that "the evidence presented by the Truth Commission was later collected by the State Attorney General's Office for an official, rigorous and technical investigation, for which reason the State's obligation was fulfilled as a guarantee of reinforced investigation." However, by means of a request for evidence to facilitate adjudication, the President of the Court required the State to present a complete copy of the file of the investigation carried out by the Prosecutor's Office in order to determine the steps taken in the investigation currently underway (*suprapara.* 13). This Court notes that, according to the copy of the file forwarded by the State, after the transfer of the file from the Truth Commission to the Unit in charge of the Prosecutor's Office, later called the Human Rights Directorate and Truth Commission, no diligence was carried out by the authorities in charge of the investigation. As the representatives highlighted in their observations on said evidence, said file "is exactly the same" file collected by the Truth Commission. However, the Court notes that, prior to forwarding the copy of the file and together with the final written arguments, the State forwarded a report without supporting evidence,

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<sup>231</sup> Pursuant to international humanitarian law, States must "take[...] all feasible measures to find out what happened to persons reported missing as a result of an armed conflict and shall transmit to their next of kin all the information they have in this regard." *cf.* ICRC, Customary International Humanitarian Law, vol. I, rule 117, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, 2007.

<sup>232</sup> *Cf. Case of Radilla Pacheco v. Mexico, supra*, para. 191, and *Case of Andrade Salmón v. Bolivia, supra*, para. 157.

<sup>233</sup> *Cf. Case of Suárez Rosero v. Ecuador. Background.* Judgment of November 12, 1997. Series C No. 35, para. 71, and *Case of Andrade Salmón v. Bolivia, supra*, para. 157.

<sup>2.3.4</sup> *Cf. Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, Reparations and Costs.* Judgment of June 21, 2002. Series C No. 94, para. 145, and *Case of Andrade Salmón v. Bolivia, supra*, para. 157.

the framework of said file<sup>235</sup>(*suprapar.* 87 to 91). This Court considers that, although said report would reveal that some additional steps have been carried out or requested after the investigation carried out by the Truth Commission, these actions do not appear in the copy of the file sent to this Court, which makes it impossible to determine whether after 2010 there has been a diligent act on the part of the authorities in charge of the criminal investigation.

162. On the other hand, at the end of the public hearing held before the Court in this case, several judges of the Court asked Ecuador to submit information on the investigation currently open at the domestic level. As both the Inter-American Commission and the representatives highlighted, "a large part of the documentation [up to that moment forwarded by the State] is related to the general initiatives regarding the prosecution and reparation of human rights violations documented by the Truth Commission," but no specific information was provided on the investigation and prosecution of the forced disappearance of Jorge Vásquez Durand.<sup>236</sup>, warns that such efforts do not mitigate the lack of diligent action in the investigation of the forced disappearance of Mr. Vásquez Durand.

163. Taking into account the foregoing, this Court considers that, although the case could be considered complex, more than twenty-two years after the disappearance of Mr. Vásquez Durand began and 6 years after the criminal investigation began, it is still in a very preliminary stage, without having identified the possible perpetrators or demonstrated diligent activity on the part of the state authorities in this regard. Therefore, the Court concludes that the State failed to comply with its obligation to carry out the investigation within a reasonable period of time.

164. On the other hand, the Court notes that the violations alleged by the Commission and the representatives of due diligence are related to the omission of the State to initiate the investigation and the passage of time without significant progress in the criminal investigation begun in 2010. Both shortcomings have already been previously examined, for which reason the Court deems unnecessary an additional and separate pronouncement in this regard.

165. Lastly, this Court recalls that every person, including the next of kin of the victims of serious human rights violations, has the right to know the truth. Consequently, the next of kin of the victims and society must be informed of everything that happened in relation to said violations.<sup>237</sup> Although the right to know the truth has been fundamentally framed within the right of access to justice<sup>238</sup>, that one has a nature

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<sup>235</sup> *cf.* Memorandum on the file before the Prosecutor's Office on the case of Mr. Vásquez Durand (evidence file, folios 1734 to 1738), and official note from the Director of the Truth and Human Rights Commission of the Office of the Prosecutor General of November 23, 2016 (evidence file, folio 2187).

<sup>236</sup> Of the 119 cases documented by the Truth Commission, the State reported that seven of the cases documented by the Truth Commission had gone to the prosecution stage (whether because a prosecutor's accusation had already been filed, a trial was held, or the persons responsible had even been sentenced).

<sup>237</sup> *cf. Case of Trujillo Oroza v. Bolivia. Reparations and Costs.* Judgment of February 27, 2002. Series C No. 92, para. 100, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala, supra*, para. 260.

<sup>238</sup> *cf., inter alia, Case of Velásquez Rodríguez v. Honduras. Background, above*, para. 181; *Case of Bámaca Velásquez v. Guatemala. Background, above*, para. 201; *Case of Barrios Altos v. Peru. Background.* Judgment of March 14, 2001. Series C No. 75, para. 48; *Case of Almonacid Arellano et al. Vs. Chile, Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 26, 2006. Series C No. 154, para. 148; *Case of La Cantuta v. Peru. Merits, Reparations and Costs.* Judgment of November 29, 2006. Series C No. 162, para. 222; *Case of Heliodoro Portugal v. Panama, supra*, paras. 243 and 244; *Case of Kawas Fernández v. Honduras, supra*, para. 117, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala, supra*, para. 260.

broad and its violation may affect different rights enshrined in the American Convention<sup>239</sup>, depending on the context and particular circumstances of the case.

166. The Court has considered in its jurisprudence, particularly in cases of forced disappearance, that the right to know the whereabouts of the disappeared victims constitutes an essential component of the right to know the truth. In this case, more than twenty-two years after the forced disappearance of Mr. Vásquez Durand began, the whereabouts of Jorge Vásquez Durand are still unknown. Although this case was included in the Report of the Truth Commission and its conclusions were accepted by the organs of the State, it is Ecuador itself that has disputed these conclusions before this Court. Therefore, as has happened in other cases<sup>240</sup>, the position of the State has prevented the next of kin of the victim from seeing their right to establish the truth satisfied through said extrajudicial commission. On the other hand, the Court reiterates that a report such as that of the Truth Commission, although important, is complementary and does not replace the obligation of the State to establish the truth through judicial processes.<sup>241</sup>(*supra* para. 114).

167. Therefore, this Court declares the violation of the right to know the truth, to the detriment of the next of kin of Jorge Vásquez Durand. In this case, as in others, said violation falls within the right of access to justice.

### A.3 Conclusion

168. By virtue of the fact that the State i) failed to comply with its obligation to initiate an ex officio investigation once it became aware of the forced disappearance of Mr. Vásquez Durand; ii) it has not carried out the investigation that it eventually initiated within a reasonable time, and ii) it has omitted to carry out a serious search to locate the whereabouts of Mr. Vásquez Durand, the Court concludes that the State is responsible for a violation of Articles 8(1) and 25(1) of the Convention, in relation to Article 1(1) of the same instrument and Article Ib of the Inter-American Convention on Forced Disappearance, the latter as of August 26, 2006, to the detriment of the Mr. Vásquez Durand and his next of kin, María Esther Gómero Cuentas, Jorge Luis Vásquez Gómero and Claudia Esther Vásquez Gómero. Besides,

## ***B. Alleged absence of an effective remedy at the beginning of the disappearance of Mr. Vásquez Durand***

### B.1 Arguments of the parties and the Commission

169. The **Commission** and the **representatives** They argued that, according to the legislation in force at the time of the facts, the habeas corpus petition had to be presented before an authority

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<sup>239</sup> In this sense, in his study on the right to know the truth, the United Nations High Commissioner for Human Rights noted that various international declarations and instruments have recognized the right to know the truth linked to the right to obtain and request information, the right to justice, the duty to combat impunity for human rights violations, the right to an effective judicial remedy and the right to private and family life. In addition, in relation to the next of kin of the victims, it has been linked to the right to integrity of the victim's next of kin (mental health), the right to obtain reparation in cases of serious human rights violations, the right not to be subjected to torture or ill-treatment and, in certain circumstances, *cf.* Report of the Office of the United Nations High Commissioner for Human Rights. *Study on the right to the truth*, UN Doc. E/CN.4/2006/91 of February 8, 2006.

<sup>240</sup> *Cf. Case of Gudiel Álvarez et al. ("Military Newspaper") v. Guatemala, supra*, paras. 300 and 302, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia, supra*, para. 510.

<sup>241</sup> *Cf. Case of Zambrano Vélez et al. v. Ecuador, supra*, para. 128, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia, supra*, para. 510.

administration, which was *per se* contrary to the American Convention. The representatives indicated that this "made habeas corpus an ineffective and inadequate remedy according to the standards of the Convention." In addition, they explained that they had been informed that "it was not possible [to file a habeas corpus action] because they did not know the whereabouts of the victim." Finally, the Commission and the representatives agreed that, despite the fact that in 2008 the Ecuadorian State adopted a new Political Constitution, including a substantial modification of the habeas corpus action, "the regulations on habeas corpus in force in Ecuador for the facts of this case contravened Article 2 of the American Convention and III of the Inter-American Convention on Forced Disappearance."

170. For his part, the *State* affirmed that the writ of habeas corpus "was not suspended within the war, it was fully accessible, and also it did not require knowledge of the place of detention to file it." According to Ecuador, the next of kin of Mr. Vásquez Durand "could have filed as many writs of habeas corpus as they considered necessary, in the places where Mr. Vásquez Durand had supposedly been seen, such as Huaquillas, Quito and any other place where there were indications of his alleged detention." He also argued that "although the Mayor or President of the Council were not formally judges, they acted as such" and added that this resource allowed obtaining official information aimed at locating the whereabouts of a person. Therefore, the next of kin of the alleged victim would have been able to "freely access the aforementioned remedy." Likewise, he indicated that if they had filed it and considered that the resolution of these authorities violated their rights, they would have been able to file a complaint with the Court of Constitutional Guarantees. In this context, he considered that the failure to file the writ of habeas corpus could not be attributable to the State. He highlighted that the next of kin of the alleged victim "at no time [filed] the writ of habeas corpus it considered that the failure to file the writ of habeas corpus could not be attributable to the State. He highlighted that the next of kin of the alleged victim "at no time [presented] the writ of habeas corpus it considered that the failure to file the writ of habeas corpus could not be attributable to the State. He highlighted that the next of kin of the alleged victim "at no time [presented] the writ of habeas corpus, despite the fact that [...] it was not suspended nor were there any impediments to its presentation, nor is there any evidence that the Ecuadorian authorities have declared the impossibility of presenting such a remedy". By virtue of the foregoing, he alleged that he "fully complied" with his obligation to provide effective remedies.

## B.2 Considerations of the Court

171. There is no dispute between the parties and the Commission as to the fact that at the beginning of the forced disappearance of Mr. Vásquez Durand, a domestic habeas corpus remedy was available, provided for in Article 19 of the Political Constitution of Ecuador.<sup>242</sup> However, in this case, the next of kin of Mr. Vásquez Durand did not file said remedy. The Commission and the representatives have argued that said remedy was not effective. However, this Court deems that an abstract analysis of the effectiveness of said remedy is not appropriate, since it was not filed by the alleged victims.

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<sup>242</sup> The text of the article established that: "Without prejudice to other rights necessary for the full moral and material development that derives from the nature of the person, the State guarantees him: [...] 17.- Personal liberty and security. [...] Consequently: [...] i) Any person who believes they are illegally deprived of their liberty may invoke habeas corpus. This right will be exercised by himself or by an intermediary, without the need for a written mandate, before the Mayor or President of the Council under whose jurisdiction he is located or before whom he acts in his place. The municipal authority will immediately order that the appellant be brought to his presence and that the order of deprivation of liberty be displayed. His mandate will be obeyed without observation or excuse by those in charge of the social rehabilitation center or place of detention. Instructed of the background, the Mayor or President of the Council will order the immediate release of the claimant, if the detainee is not presented or if the arrest is not exhibited, or if it does not meet the legal requirements, or if procedural defects have been committed or, finally, if the grounds of the appeal have been justified. The official or employee who does not comply with the order will be immediately dismissed from his position or employment without further processing by the Mayor or President of the Council, who will communicate the dismissal to the State Comptroller General and to the authority that must appoint his replacement. The dismissed employee, after having released the detainee, may claim before the competent bodies of the Judiciary, within eight days of notification of his dismissal. Political Constitution of Ecuador,



172. Therefore, this Court concludes that, in the instant case, the State is not responsible for a violation of Article 25(1) of the Convention, in relation to Articles 1(1) and 2 of the same instrument.

### ***C. Alleged inadequate classification of the crime of forced disappearance***

#### **C.1 Arguments of the parties and the Commission**

173. The **Commission** and the **representatives** alleged that the State had failed to comply with its treaty obligation derived from Article 2 of the Convention, by not expressly including the permanent nature of the crime of forced disappearance, while the whereabouts of the victim had not been established. For his part, he **State** alleged to have complied with the general obligations of Article 2 of the Convention, given that "within its legislation the crime of forced disappearance of persons is established," whose definition is in accordance with the inter-American standard insofar as it "includes the legal characteristic that in forced disappearance, the conduct of the State agent or whoever acts with their consent [consists of] subject[ing] to deprivation of liberty a person with the absence of information on the fate or whereabouts of the persons."

#### **C.2 Considerations of the Court**

174. The Court has repeatedly referred to the general obligation of States to adapt their internal legislation to the provisions of the American Convention. The same is applicable in the case of the signing of the Inter-American Convention on Forced Disappearance which, in Article III, establishes the obligation to classify forced disappearance as an autonomous crime and the definition of the punishable conducts that compose it.<sup>243</sup> This Court has established that this classification must be made taking into consideration Article II of the aforementioned Convention, where the elements that must be included in the criminal offense in the domestic legal system are found.<sup>244</sup>

175. Specifically, Article III of the Inter-American Convention on Forced Disappearance establishes that:

The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be necessary to classify the forced disappearance of persons as a crime, and to impose an appropriate penalty that takes into account its extreme seriousness. Said crime will be considered continuous or permanent until the destination or whereabouts of the victim are established. The States Parties may establish mitigating circumstances for those who have participated in acts that constitute a forced disappearance when they contribute to the appearance of the victim alive or provide information that makes it possible to clarify the forced disappearance of a person.

176. The Inter-American Convention on Forced Disappearance defines forced disappearance in Article II as:

the deprivation of liberty of one or more persons, whatever its form, committed by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by the lack of information or

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<sup>243</sup> Cf. *Case of Heliodoro Portugal v. Panama*, *supra*, para. 181, and *Case of Tenorio Roca et al. v. Peru*, *supra*, para. 225.

<sup>244</sup> Cf. *Case of Osorio Rivera and family v. Peru*, *supra*, para. 205, and *Case of Tenorio Roca et al. v. Peru*, *supra*, para. 225.

the refusal to acknowledge said deprivation of liberty or to inform about the whereabouts of the person, thereby preventing the exercise of legal remedies and the pertinent procedural guarantees.

177. Ecuadorian legislation incorporated the crime of forced disappearance into article 84 of the Comprehensive Organic Criminal Code (hereinafter "COIP"), which establishes the following:

Forced disappearance.- The agent of the State or whoever acts with their consent, who by any means, subjects a person to deprivation of liberty, followed by the lack of information or the refusal to acknowledge said deprivation of liberty or to report on the whereabouts or fate of a person, thereby preventing the exercise of constitutional or legal guarantees, will be punished with a custodial sentence of twenty-two to twenty-six years.<sup>245</sup>

178. The Court confirms that the State criminalized forced disappearance in its domestic law. Said norm includes the elements that this criminal type must contain in the internal legal system in accordance with Article II of the Inter-American Convention on Forced Disappearance, and even adopts a wording almost identical to the definition contained in said treaty. Although Article 84 of the COIP did not expressly include what is related to the permanent nature of forced disappearance, the Court finds that Article III of the Inter-American Convention on Forced Disappearance does not derive an obligation to define the continuous or permanent nature of said crime in an express manner. This rule requires that this crime be "considered" as permanent in domestic law,

179. The permanent or instantaneous nature of the crimes arises from the very nature of the conduct, without it being necessary to establish it in the law with respect to each type. The understanding that any deprivation of liberty and, with even more reason, forced disappearance, are continuous crimes, is peaceful, without any other arguments having been presented. Additionally, in the present case, in response to a question from the judges at the hearing, the State referred to domestic judicial decisions that have reproduced the jurisprudence of this Court regarding the permanent nature of forced disappearance.<sup>246</sup>

180. Therefore, the Court concludes that Ecuador complied with its obligation to classify the crime of forced disappearance, contemplated in Article III of the Inter-American Convention on Forced Disappearance and, consequently, it is not responsible for a violation in this sense.

### VIII-3

## **RIGHT TO PERSONAL INTEGRITY OF MR. VÁSQUEZ'S FAMILY MEMBER DURAND, IN RELATION TO THE OBLIGATION TO RESPECT AND GUARANTEE THE RIGHTS**

### ***A. Arguments of the Commission and of the parties***

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<sup>245</sup> Article 84 of the Comprehensive Organic Criminal Code. Law 0, Official Gazette Supplement 180 of February 10, 2014 (evidence file, folio 280).

<sup>246</sup> In this sense, the State provided a judgment of the Constitutional Court where it is established that: "in several cases the Inter-American Court of Human Rights has indicated [...] that the forced disappearance of human beings constitutes a multiple and continuous violation of numerous rights recognized in the Convention and that the States Parties are obliged to respect and guarantee, in the same way in the case of Radilla Pacheco, judgment of November 23, 2009, it has said that within this category of acts is the forced disappearance of persons, whose continuous or permanent nature It has been repeatedly recognized by International Human Rights Law, and it is the obligation of States to punish those responsible". Judgment No. 214-12-SEP-CC, CASE No. 1641-10-EP of May 17, 2012 (evidence file,

181. The **Commission** alleged that the alleged forced disappearance of Mr. Jorge Vásquez Durand affected the integrity of his next of kin and the lack of progress in the investigations would constitute a source of additional suffering and anguish. The **representatives** they argued that the next of kin of Mr. Vásquez Durand would also be victims in this case, since their mental and moral integrity had been violated as a direct consequence of: a) the forced disappearance of Mr. Vásquez Durand; b) the uncertainty regarding what happened with Jorge Vásquez Durand; and c) impunity in the specific case. In this regard, they highlighted the psychological consequences suffered by his wife, his son and his daughter. He **State** alleged that "it has been proven that he made available the writ of habeas corpus to mitigate, to the extent of its scope, the pain and concern due to the lack of knowledge of the whereabouts of Mr. Vásquez Durand."

### ***B. Considerations of the Court***

182. This Court has considered that, in cases that involve the forced disappearance of persons, it is possible to understand that the violation of the right to mental and moral integrity of the next of kin of the victim is a direct consequence of this phenomenon, which causes them severe suffering due to the fact itself, which is increased, among other factors, by the constant refusal of the state authorities to provide information about the whereabouts of the victim or to carry out an effective investigation to clarify what happened.<sup>247</sup> These damages lead to the presumption of damage to the mental and moral integrity of the next of kin<sup>248</sup>. In previous cases, the Court has established that said presumption is established *juris tantum* regarding mothers and fathers, daughters and sons, spouses, partners and permanent partners, brothers and sisters whenever it corresponds to the particular circumstances of the case<sup>249</sup>. Such presumption has not been rebutted by Ecuador in this case.

183. In addition, the statements rendered before the Court make it possible to verify that Mrs. María Esther Gomero Cuentas and her children have suffered great uncertainty and profound suffering and anguish to the detriment of their mental and moral integrity due to the forced disappearance of Jorge Vásquez Durand and the actions of the State authorities regarding the investigation of what happened.<sup>250</sup> In addition, the Court takes into account the expert opinion of psychologist Carlos Alberto Jibaja Zárata, according to which "[t]he disappearance of Jorge in 1995 disrupted

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<sup>247</sup> Cf. *Case of Blake v. Guatemala. Background*. Judgment of January 24, 1998. Series C No. 36, para. 114, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 254.

<sup>248</sup> Cf. *Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations and Costs*. Judgment of November 27, 2008. Series C No 192. para. 119, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 254.

<sup>249</sup> cf. *Case of Blake v. Guatemala. Background, supra*, para. 114; *Case of Gudiel Álvarez et al. ("Military Newspaper") v. Guatemala, supra*, para. 286, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 254.

<sup>250</sup>

In her statement, María Ester Gomero Cuentas declared that she "did not de[ve] anyone everything [they have] been through: limitations, frustrations, even loneliness, with whom to share [her] things, with whom to see, with whom to decide certain things, really many lacks as well." She highlighted that when her husband was not included in the prisoner exchange between Ecuador and Peru, it was "very painful for [her], since she hoped they would release him. She also recounted that her daughter "had started to lose her hair to date[ ], for which she had to take her to a psychologist[ ] because she had to get over it, her hair fell out too much, while her son observed "a shyness, [and] sometimes one cannot externalize what is inside." For his part, the son of Mr. Vásquez Durand, Jorge Luis Vásquez Gomero, declared that "[The does not know] who to bury, who to cry for, [...] if he is detained, dead or alive. These are the big questions we have. He cannot live for a lifetime with this anguish and frustration." Likewise, he pointed out that "[w]hen [his] father disappeared, [his] mother felt quite empty and anguished. [...] Until now, every time my mother remembers my father or that suddenly on Sundays she meets with [hers] her aunts and talks about [hers] her father, she starts crying". She pointed out that her sister "had a psychological problem, her hair began to fall out and she was in physical and psychological therapy, despite this the consequences of her remain." Statement rendered by María Esther Gomero Cuentas at the public hearing held before the Court, and statement rendered before a notary public by Jorge Luis Vásquez Gomero on June 29, 2016 (evidence file, folios 1400 and 1401). [...] if he is detained, alive or dead. These are the big questions we have. He cannot live for a lifetime with this anguish and frustration." Likewise, he pointed out that "[w]hen [his] father disappeared, [his] mother felt quite empty and anguished. [...] Until now, every time my mother remembers my father or that she suddenly on Sundays meets with [hers] aunts and talks about [hers] father, she starts crying". She pointed out that her sister "had a psychological problem, her hair began to fall out and she was in physical and psychological therapy, despite this the consequences of her remain." Statement rendered by María Esther Gomero Cuentas at the public hearing held before the Court, and statement rendered before a notary public by Jorge Luis Vásquez Gomero on June 29, 2016 (evidence file, folios 1400 and 1401). [...] if he is detained, alive or dead. These are the big questions we have. He cannot live for a lifetime with this anguish and frustration." Likewise, he pointed out that "[w]hen [his] father disappeared, [his] mother felt quite empty and anguished. [...] Until now, every time my mother remembers my father or that she suddenly on Sundays meets with [hers] aunts and talks about [hers] father, she starts crying". She pointed out that her sister "had a psychological problem, her hair began to fall out and she was in physical and psychological therapy, despite this the consequences of her remain." Statement rendered by María Esther Gomero Cuentas at the public hearing held before the Court, and statement rendered before a notary public by Jorge Luis Vásquez Gomero on June 29, 2016 (evidence file, folios 1400 and 1401). These are the big questions we have. He cannot live for a lifetime with this anguish and frustration." Likewise, he pointed out that "[w]hen [his] father disappeared, [his] mother felt quite empty and anguished. [...] Until now, every time my mother remembers my father or that she suddenly on Sundays meets with [hers] aunts and talks about [hers] father, she starts crying". She pointed out that her sister "had a psychological problem, her hair began to fall out and she was in physical and psychological therapy, despite this the consequences of her remain." Statement rendered by María Esther Gomero Cuentas at the public hearing held before the Court, and statement rendered before a notary public by Jorge Luis Vásquez Gomero on June 29, 2016 (evidence file, folios 1400 and 1401). He cannot live for a lifetime with this anguish and frustration." Likewise, he indicated that "[w]hen [his] father of his disappeared, [his] mother of hers felt quite empty and anguished. [...] Until now, every time my mother remembers my father or that she suddenly on Sundays meets with [hers] aunts and talks about [hers] father, she starts cry

completely [the] life [of Mrs. Gomero Cuentas] and that of her nuclear family"<sup>251</sup>. The expert referred to the psychological effects of the disappearance and the lack of investigation in María Esther Gomero Accounts<sup>252</sup>, Jorge Luis Vasquez Gomero<sup>253</sup> and Claudia Esther Vasquez Gomero<sup>254</sup>.

184. Regarding the mother of Jorge Vásquez Durand, María Durand, the Court notes that this alleged victim died in the months following his disappearance<sup>255</sup>, without her being aware of the possible forced disappearance of her son. According to Mrs. Gomero Cuentas, "[her] husband's mother died [after he had] disappeared, [but] the lady [had suffered] a stroke [so] she was unconscious, [and] she died without knowing anything, that is, the lady died without knowing anything about [her] husband's disappearance." The Court considers that these circumstances invalidate the presumption of possible suffering of Mrs. María Durand as a consequence of the forced disappearance of her son. Therefore, this Tribunal concludes that Ecuador is not responsible for a violation of personal integrity to her detriment.

185. Based on the foregoing considerations, the Court concludes that the State violated the right to humane treatment recognized in Article 5(1) and 5(2) of the American Convention, in relation to Article 1(1) of the same instrument, to the detriment of María Esther Gomero Cuentas, Jorge Luis Vásquez Gomero and Claudia Esther Vásquez Gomero. Regarding María Durand, the State did not violate the right to personal integrity recognized in Article 5.1 and 5.2 of the American Convention, in relation to Article 1.1 of the same instrument.

## IX

### REPAIRS

#### (Application of Article 63.1 of the American Convention)

186. Based on the provisions of Article 63.1 of the American Convention<sup>256</sup>, the Court has indicated that any violation of an international obligation that has produced damage entails the

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<sup>251</sup> Statement rendered before a notary public by Carlos Alberto Jibaja Zárate on July 25, 2016 (evidence file, folio 1459).

<sup>252</sup> Regarding Mrs. Gomero Cuentas, she indicated that "she mainly presents chronic symptoms at a moderate level of a depressive type such as feelings of sadness and crying episodes" in addition to insomnia and anxiety. Likewise, she indicated that "[i]n certain periods after the traumatic event, the examinee presented passive suicidal ideation without the compulsion to let herself be carried away mainly by her love and her obligations towards her children." Statement rendered before a notary public by Carlos Alberto Jibaja Zárate on July 25, 2016 (evidence file, folios 1460 and 1461).

<sup>253</sup> Regarding Jorge Luis Vásquez Gomero, he pointed out that "he presents insomnia at a moderate level." She also indicated that "[t]he sadness accompanied by the desire to cry and crying spells have been chronic symptoms that have occurred until now after the disappearance," which has increased since she assumed responsibility for following up on the father's case. He noted that "[c]urrently experiencing intrusion of thoughts and affects related to the disappearance of the father and that can cause crying, anxiety and feelings of guilt in the examinee." Statement rendered before a notary public by Carlos Alberto Jibaja Zárate on July 25, 2016 (evidence file, folios 1474 and 1476).

<sup>254</sup> Regarding Claudia Esther Vásquez Gomero, it indicated that "[c]urrently, the examinee presents mainly chronic depressive symptoms at a moderate level, such as feelings of sadness and crying episodes." She indicated that "[t]he anxiety in the examinee is moderate and is expressed through body tension, muscle pain, but mainly due to hair loss, this being the most relevant, recurrent and chronic symptom that Claudia directly relates to the level of anxiety and stress. There has been no need to "medicate" her "anxiety level." Statement rendered before a notary public by Carlos Alberto Jibaja Zárate on July 25, 2016 (evidence file, folios 1487 and 1488).

<sup>255</sup> The exact date of Mrs. Durand's death does not appear in the file; however, it occurred before May 9, 1995. *cf.* Letter from Carlos Cardó Franco, sj of May 9, 1995 addressed to Jorge Carrión, sj in Ecuador (evidence file, folio 76).

<sup>256</sup> Article 63(1) of the American Convention establishes that: "[w]hen it decides that there has been a violation of a right or freedom protected in [the] Convention, the Court will order that the injured party be guaranteed the enjoyment of his or her right or

duty to adequately repair it, and that this provision includes a customary norm that constitutes one of the fundamental principles of contemporary International Law on the responsibility of a State<sup>257</sup>.

187. The reparation of the damage caused by the breach of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of restoring the previous situation<sup>258</sup>. If this is not feasible, as occurs in most cases of human rights violations, the Court will determine measures to guarantee the violated rights and repair the consequences that the violations produced.<sup>259</sup> Therefore, the Court has considered the need to grant various reparation measures, in order to fully compensate the damages, therefore, in addition to pecuniary compensation, the measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition have special relevance for the damages caused.<sup>260</sup>

188. This Tribunal has established that the reparations must have a causal link with the facts of the case, the declared violations, the proven damages, as well as the measures requested to repair the respective damages. Therefore, the Court must observe said concurrence to pronounce duly and in accordance with the law.<sup>261</sup>

189. In consideration of the violations declared in the previous chapter, the Court will proceed to analyze the claims presented by the Commission and the representatives, as well as the arguments of the State, in light of the criteria established in the jurisprudence of the Court in relation to the nature and scope of the obligation to make reparation, in order to order the measures aimed at repairing the damages caused to the victims.<sup>262</sup>

190. International jurisprudence, and in particular that of the Court, has repeatedly established that the sentence constitutes by itself a form of reparation<sup>263</sup>. However, considering the circumstances of this case and the suffering that the violations committed caused the victims, the Court deems it pertinent to establish other measures.

### **A. Injured Party**

191. This Court reiterates that the injured party, under the terms of Article 63.1 of the Convention, is considered to be a person who has been declared a victim of the violation of any right recognized therein. Therefore, this Court considers Mr. Jorge Vásquez Durand as the “injured party”, as well as his spouse María Esther Gomero Cuentas, his children Jorge Luis Vásquez

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violated liberties. It will also provide, if appropriate, that the consequences of the measure or situation that has configured the violation of those rights and the payment of fair compensation to the injured party be repaired.

<sup>257</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*, Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Andrade Salmón v. Bolivia, supra*, para. 188.

<sup>258</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra*, para. 25, and *Case IV v. Bolivia, supra*, para. 325.

<sup>259</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra*, para. 29, and *Case IV v. Bolivia, supra*, para. 325.

<sup>260</sup> Cf. *Case of the Dos Erres Massacre v. Guatemala, supra*, para. 226, and *Case IV v. Bolivia, supra*, para. 325.

<sup>261</sup> Cf. *Case of Ticona Estrada et al. v. Bolivia, supra*, para. 110, and *Case of Andrade Salmón v. Bolivia, supra*, para. 188.

<sup>262</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra*, para. 25 to 27, and *Andrade Salmon Case v. Bolivia, supra*, para. 189.

<sup>263</sup> Cf. *Case of Neira Alegría et al. v. Peru. Reparations and Costs*. Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Andrade Salmón v. Bolivia, supra*, para. 189.

Gomero and Claudia Esther Vásquez Gomero, who in their capacity as victims of the violations declared in Chapter VIII will be creditors of what the Court orders below.

## ***B. Prior consideration of the internal repair program***

### **B.1 Arguments of the parties and the Commission**

192. The **State** indicated that "it has, in the domestic sphere, a reparation mechanism in accordance with inter-American standards for the protection of human rights, which is why the Court [...] must exclude from its knowledge the reparations in this case." He stressed that "the contents of the reparation proposed by Ecuador comply with the inter-American parameter of *restitutio-in-integrum* and that the normative design of the Law and the Reparation Regulations are based on legal sources of the *corpus iuris* inter-American, mainly in the judgments of the Inter-American Court". In this regard, although it stated that the internal reparation program is voluntary, it stressed that the victims and their representatives "refuse[d] to participate in the state mechanism for comprehensive reparation, thus affecting the principle of subsidiarity of the System." In addition, it asked the Court to "excuse itself from hearing the point related to reparations and order the alleged victims to avail themselves of the domestic procedure", since in their understanding "Ecuador is in a better position" to guarantee comprehensive reparation to the alleged victims.

193. The **representatives** they alleged that Ecuador has "restricted itself to] describing the objectives of the Truth Commission, its conclusions and recommendations, the public policies that it later implemented and the legislative norms that it adopted; [but has] omitted[ed] to provide clear explanations about the case." They stressed that the State had the opportunity to declare a violation in this case and to make reparation, but that it "failed to do so" despite the fact that the case was documented in the Report of the Truth Commission concluded in 2010. They argued that taking into account "the absence of truth and justice in this case, the principle of subsidiarity raised by [the State...] does not require an extensive analysis and should rather lead the Court to order the reparation measures requested by the next of kin of the victim." They reported that the next of kin of Jorge Vásquez Durand and his representatives were unable to obtain precise information on the specific actions that will be carried out on their behalf within the framework of the lines of work of the Reparation Program, on the authorities or institutions that would be in charge of carrying out said actions, or on the means that the victims would have to use for effective access to the reparation measures, once registered in the Reparation Program. This lack of specific information exacerbates the distrust that the next of kin already felt towards the State, for which reason on September 20, 2016 they informed the Ombudsman of Ecuador that the next of kin had decided not to submit an application to join the Reparation Program but to wait for what the Court ruled in its judgment.

194. The **Commission** he pointed out there is controversy about the made of that family of themr vasquez Durand has not received repairs some to internal level. Thus, alleged what EU the Inter-American Court this call to is to set the total Yoof reparations in light of his constant jurisprudence in mayoueria of des apto forced uration. noted that "this does not imply ignoring yes state efforts in hede sign and program implementation of repair administrative", but it implies "recognize that: i) the source of the comprehensive reparation issued by the Inter-American Court can be the international responsibility of the State; and ii) the victims who come to the system interamerican and arrive to the Inter-American Court have taken the burdens of litigating a process of judicial nature, therefore what uh no I would be reasonable demand that activate the mechanics yes mos repair administrative to those who could have access without go to the system Inter-American".

## B.2 Considerations of the Court

195. As previously mentioned, through the Law for Reparation for Victims and Judicialization, a program was created to guarantee comprehensive reparation for victims of human rights violations in cases documented by the Truth Commission (*supra* paras. 75 to 78). Said law created a Reparation Program, through administrative channels, in charge of the Ombudsman's Office<sup>264</sup>, for the granting of measures such as rehabilitation, the annulment of personal records, the search and location of missing persons, among others<sup>265</sup>. Regarding possible compensation, material or immaterial, the same law delegates to the Ministry of Justice and Human Rights its negotiation and granting, in the cases that may arise.<sup>266</sup> Additionally, the criminal investigation of the cases documented by the Truth Commission was assigned to a special Directorate under the State Attorney General's Office (*supra* para. 87). The procedure to access the Reparation Program, as well as to obtain the corresponding compensation and the principles that govern it are regulated by the "Guidelines to regulate the procedure for the reparation program through administrative channels for victims of human rights violations documented by the Truth Commission", issued by the Ombudsman's Office in November 2014 and by the Regulations for reparation agreements issued by the Ministry of Justice, Human Rights and Cults in February 2015.<sup>267</sup>(*supra* para. 78).

196. In accordance with the established procedure, the victims of the violations documented in the Report of the Truth Commission can directly access the Reparation Program by going to the Ombudsman, with whom they would enter into a negotiation process that

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<sup>264</sup> *cf.* Law for Reparation of Victims and Prosecution, articles 4 and 5 (evidence file, folio 408).

<sup>265</sup> In this regard, said law establishes that "[a]ppropriate to each specific case, the direct victims of violations of human rights documented by the Truth Commission and also their spouses or common-law partners and relatives up to the second degree of consanguinity, have the right to benefit from the following individual reparation measures such as: 1. Physical rehabilitation and psychosocial care. 2. The deletion, at the request of a party, of all data and personal records contained in the different judicial, police, military or other archives, related to the facts documented by the Truth Commission. 3. The search, location and release of the disappeared person, which will be in charge of the National Police, under the direction of the State Attorney General's Office; and, in the event of death, the aforementioned institutions will be in charge of the exhumation, identification and restitution of their remains to their relatives, who will have the right to be informed of the progress in the search for the person and to participate in the proceedings carried out for this purpose. 4. The declaration, at the request of a party, of presumed death and definitive possession of the assets of the victims of forced disappearance, by virtue of the presumption of death by disappearance, in accordance with articles 68 to 80 of the Civil Code. For this purpose, articles 66 and 67 of the aforementioned Code will not be applicable. 5. Job training, technical training or advice for the development of economic inclusion initiatives. 6. The restitution of the paternal and maternal surnames of the sons and daughters of the victims who were registered in the Civil Registry as children of other people, to prevent them from being persecuted or violated by the perpetrators of the serious violations of rights carried out against their biological parents. Once the situation has been corroborated, the competent authority of the corresponding Civil Registry, Identification and Documentation will register the modification of the birth registration". Law for Reparation of Victims and Judicialization, article 6 (evidence file, folios 408 and 409).

<sup>266</sup> "Art. 7. Compensation.- In cases where there is compensation for pecuniary or non-pecuniary damage that occurred as a result of the serious human rights violations documented by the Truth Commission, the Ecuadorian State will make the payment of said compensation either in compliance with the provisions of the compensation agreement that the victims can reach with the Ministry of Justice and Human Rights, or in compliance with what is ordered in an enforceable judgment. The Ministry of Justice and Human Rights, in coordination with the Reparation Program indicated in this law, will regulate the procedure for reparation agreements, the amounts to be paid as compensation and the measures for compliance. The determination of the amounts of compensation will be established on the basis of the most current parameters and criteria that have been developed for such purposes by the Inter-American System for the Protection of Human Rights". Law for Reparation of Victims and Prosecution, article 7 (evidence file, folio 409).

<sup>267</sup> *cf.* Guidelines to regulate the procedure for the administrative reparation program for victims of human rights violations documented by the Truth Commission, issued by Resolution No. 198-DPECGAJ-2014 of November 13, 2014 of the Ombudsman (evidence file, folios 412 to 420), and Regulations for reparation agreements (evidence file, folios 442 to 450).

would culminate in a reparation agreement<sup>268</sup>. Once the process before the Ombudsman's Office has concluded, "at the request of a party, within a period of no more than five (5) days, a certified copy of the entire file will be transferred to the Ministry of Justice, Human Rights and Cults", from which a negotiation process would begin regarding compensation with said State body, "[i]n cases in which there is room for compensation for material and/or non-pecuniary damages."<sup>269</sup>.

197. However, as has been affirmed by the State itself and in accordance with the provisions of the aforementioned law, accessing the Reparation Program is voluntary and constitutes one of the mechanisms through which the victims of the cases documented in the Report of the Truth Commission can obtain the reparations that correspond to them. Said law also establishes the possibility of legally suing the State to obtain the corresponding reparations<sup>270</sup>. Likewise, the law establishes the possibility that the Ecuadorian State "makes [the] payment of [the] compensation [that may arise] either in compliance with what is established in the compensation agreement that the victims can reach with the Ministry of Justice and Human Rights, or in compliance with what is ordered in an enforceable judgment."<sup>271</sup>.

198. By virtue of the foregoing, the Court will take into account the internal Reparation Program when ordering the corresponding reparations and will make the considerations it deems pertinent in each reparation measure as appropriate.

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<sup>268</sup> Article 23 of the Guidelines of the Ombudsman to regulate the procedure for the reparation program through administrative channels for victims of human rights violations documented by the Truth Commission establishes: "Of the Reparation Agreement.- The Reparation Agreement is an instrument through which the victims and the Ombudsman will define the immaterial reparation measures that may apply. For proof of the agreed reparation measures, the Ombudsman or his delegate will sign the respective reparation agreement with the beneficiaries. The reparation agreement must be signed in four copies: one that will be delivered to the beneficiary or persons, one for the Ombudsman's Office, one for the State Attorney General's Office,

<sup>269</sup> Article 25 of the Guidelines of the Ombudsman to regulate the procedure for the reparation program through administrative channels for the victims of human rights violations documented by the Truth Commission (evidence file, folio 420). In addition, Article 9 of the Regulations for reparation agreements establishes that: "[i]n cases in which there is room for compensation for pecuniary and/or non-pecuniary damages that occurred as a result of the serious human rights violations documented by the Truth Commission, a negotiation process will begin with the direct victims or beneficiary persons in accordance with the Law, under the responsibility of the Ministry of Justice, Human Rights and Cults, for which the Ombudsman's Office, through the Reparation Program, will send the duly documented file, with the establishment of the integral reparation measures adopted and implemented within [d]the Reparation Program through administrative means, in case of having availed himself of it." Regulations for reparation agreements (evidence file, page 445).

<sup>270</sup> In this regard, the aforementioned law establishes: "[Article] 8.- Reparation through the courts.- The victims and, in the absence thereof, their spouse, their partner in de facto union and their relatives up to the second degree of consanguinity, in that order, may legally demand full reparation for the damages caused by the serious human rights violations. It is prohibited to grant or receive double compensation for the same act, or for judicial error. The victim and, in her absence, her spouse, her common-law partner and her relatives up to the second degree of consanguinity, who obtain or have received compensation through a compensation agreement signed with the Ministry of Justice and Human Rights, may not demand other compensation from the State for the same act through the courts, nor in the Inter-American or Universal System for the Protection of Human Rights". Law for Reparation of Victims and Prosecution (evidence file, page 135). Likewise, the respective Regulation establishes in Article 9 that "[i]n cases in which the victims or beneficiaries express their desire not to avail themselves of the measures established by the Reparation Program through administrative channels, the Ombudsman's Office must send the respective duly documented file to the Ministry of Justice, Human Rights and Cults." Regulations for reparation agreements (evidence file, page 445). Article 9 of the respective Regulation establishes that "[i]n cases in which the victims or beneficiaries express their desire not to avail themselves of the measures established by the Reparation Program through administrative channels, the Ombudsman's Office must send the respective duly documented file to the Ministry of Justice, Human Rights and Cults." Regulations for reparation agreements (evidence file, page 445). Article 9 of the respective Regulation establishes that "[i]n cases in which the victims or beneficiaries express their desire not to avail themselves of the measures established by the Reparation Program through administrative channels, the Ombudsman's Office must send the respective duly documented file to the Ministry of Justice, Human Rights and Cults." Regulations for reparation agreements (evidence file, page 445).

<sup>271</sup> Law for Reparation of Victims and Prosecution, article 7 (evidence file, folio 409).



### ***C. Obligation to investigate the facts and identify, prosecute and, where appropriate, punish those responsible, as well as determine the whereabouts of the victim***

#### **C.1 Investigation, determination, prosecution and, where appropriate, punishment of all those responsible**

##### *C.1.a Arguments of the parties and the Commission*

199. The **Commission** requested the Court to establish as reparation "[c]unct the internal procedures related to the human rights violations declared in the case and initiate criminal proceedings for the crime of forced disappearance to the detriment of Jorge Vásquez Durand, in an impartial, effective, and timely manner in order to fully clarify the facts, identify all those responsible, and impose the corresponding sanctions."

200. The **representatives** they alleged that "no investigation or judicial proceeding was carried out [...], there was a lack of due diligence and rigor in the investigation," for which reason "the acts of violence committed against [the victim] remain in complete impunity." Consequently, they requested that the Court order Ecuador "to carry out, within a reasonable time, a complete, impartial, and effective investigation in order to identify, prosecute, and punish [a] all the perpetrators and masterminds of the violations of the victims' human rights with penalties proportional to the seriousness of the acts committed against [...] Jorge Vásquez Durand." They also indicated that the State should keep the family informed of the progress of the investigation.

201. The **State** He pointed out that "it has, internally, a reparation mechanism in accordance with inter-American standards for the protection of human rights." Consequently, it asked the Court to "excuse itself from hearing the point related to reparations and [to] order [that] the alleged victims avail themselves of the domestic procedure."

##### *C.1.b Considerations of the Court*

202. In this Judgment, this Court declared that the State is responsible for a violation of the right of access to justice of the victims, to the extent that it failed to comply with its obligation to initiate an ex officio investigation once it became aware of the forced disappearance of Mr. Vásquez Durand, it has not carried out the investigation that it eventually began within a reasonable time, and it has omitted to carry out a serious search to locate the whereabouts of Mr. Vásquez Durand, also committing a violation of the right to know the truth (*suprapara*. 168).

203. Bearing in mind that a criminal proceeding is currently open regarding the forced disappearance of Mr. Vásquez Durand and considering the constant jurisprudence of this Court<sup>272</sup>, the Court establishes that the State must effectively and diligently continue the investigations and criminal proceedings in progress, as well as open the investigations that are necessary in order to identify, prosecute and, where appropriate, punish those responsible for the forced disappearance of Jorge Vásquez Durand within a reasonable period of time, in order to establish the truth of the facts in accordance with the criteria indicated on investigations in cases of forced disappearances.<sup>273</sup>, and removing all obstacles that maintain impunity<sup>274</sup>in

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<sup>272</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Background*. Judgment of July 29, 1988. Series C No. 4, para. 174, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 268.

<sup>273</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Background*. Judgment of July 29, 1988. Series C No. 4, para. 174, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala, supra*, para. 285.

this case. Due diligence in the investigation implies that all the corresponding state authorities are obliged to collaborate in the collection of evidence, for which reason they must provide the judge, prosecutor or other judicial authority with all the information required and refrain from acts that imply obstruction to the progress of the investigative process. In particular, the State must ensure that the following criteria are observed:

- to. carry out the pertinent investigation or investigations in relation to the facts of this case, avoiding omissions in the collection of evidence and in following logical lines of investigation;
- b. investigate with due diligence, comprehensively covering the elements that make up the forced disappearance;
- c. identify and individualize the presumed material and intellectual authors of the forced disappearance of the victim;
- d. ensure that the competent authorities carry out the corresponding investigations *ex officio*, and for this purpose they have at their disposal and use all the logistical and scientific resources necessary to collect and process the evidence and, in particular, have the powers to access the pertinent documentation and information to investigate the facts denounced and promptly carry out those actions and inquiries essential to clarify what happened to the disappeared person in this case;
- and. In consideration of the seriousness of the facts, it may not apply amnesty laws or statutes of limitations, nor use claims to exclude liability, which in reality are a pretext to prevent the investigation, and
- F. guarantee that the investigations into the facts constituting the forced disappearance of the present case are maintained, at all times, under the knowledge of the ordinary jurisdiction.

204. In accordance with its constant jurisprudence<sup>275</sup>, the Court reiterates that the State must ensure the full access and capacity to act of the victims or their next of kin at all stages of the investigation and prosecution of those responsible. Said participation must have as its purpose access to justice and knowledge of the truth of what happened.

## C.2 Determination of the whereabouts of the victim

### C.2.a Arguments of the parties and the Commission

205. The **Commission** requested the Court to order the State to "[i]nvestigate fully, impartially, and effectively the whereabouts of Jorge Vásquez Durand." In addition, it requested that if it is established that the victim is not alive, Ecuador be ordered to "adopt the necessary measures to deliver his remains to the next of kin, in accordance with his wishes."

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<sup>274</sup> Cf. *Case of Myrna Mack Chang v. Guatemala*, *supra*, para. 277, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala*, *supra*, para. 285.

<sup>275</sup> Cf. *Case of the Caracazo v. Venezuela. Reparations and Costs*, Judgment of August 29, 2002. Series C No. 95, para. 118, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala*, *supra*, para. 286.

206. The **representatives** They alleged that "more than 20 years have elapsed since the disappearance of Jorge Vásquez Durand, the State has not been carrying out any specific procedure in relation to the location of the victim." Therefore, they requested that Ecuador "carry out with due diligence the necessary actions to locate and deliver the remains of [the victim] to his next of kin, so that they can carry out the funeral rites according to their customs and beliefs." They also affirmed that "the State must provide the necessary conditions to transfer and bury said remains in the place chosen by their next of kin, at no cost to them."

207. The **State** requested that the Court excuse itself from hearing the point related to reparations and order the presumed victims to avail themselves of the internal procedure", given that the State contemplates in its internal legal system reparation mechanisms for human rights violations in accordance with the parameters determined by the Court.

### C.2.b Considerations of the Court

208. In the present case, the whereabouts of Mr. Vásquez Durand are still unknown and to date the State has not adopted all the measures tending to determine his fate. The Tribunal emphasizes that Mr. Vásquez Durand was forcibly disappeared more than 22 years ago, for which reason it is a fair expectation of his next of kin that his whereabouts be identified, which constitutes a measure of reparation and, therefore, generates the correlative duty for the State to satisfy it.<sup>276</sup> In turn, this allows family members to alleviate the anguish and suffering caused by such uncertainty.<sup>277</sup>

209. The Court has established that the delivery of the mortal remains constitutes an act of reparation in itself and that receiving the body of a person who has been forcibly disappeared is of the utmost importance for their next of kin, since it allows them to bury it in accordance with their beliefs, as well as close the mourning process that they have been experiencing throughout these years.<sup>278</sup>

210. Consequently, it is necessary for the State to carry out a rigorous search through the pertinent judicial and administrative channels, in which it makes every effort to determine, as soon as possible, the whereabouts of Jorge Vásquez Durand, which must be carried out systematically and have adequate and suitable human, technical and scientific resources and, if necessary, the cooperation of other States must be requested. For the aforementioned proceedings, a communication strategy must be established with family members and a coordinated action framework agreed upon, to ensure their participation, knowledge and presence, in accordance with the guidelines and protocols on the matter.<sup>279</sup> In the event that after the procedures carried out by the State, the victim is found deceased, the mortal remains must be delivered to their next of kin, after reliable proof of identity, as soon as possible and at no cost to them. In addition, the State must cover the funeral expenses, if applicable, in agreement with their relatives.<sup>280</sup> The State may comply with this measure within the mechanism

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<sup>276</sup> Cf. *Case of Neira Alegría et al. v. Peru*, *supra*, para. 69, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala*, *supra*, para. 292.

<sup>277</sup> Cf. *Case of Ticona Estrada et al. v. Bolivia*, *supra*, para. 155, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala*, *supra*, para. 292.

<sup>278</sup> Cf. *Case of Trujillo Oroza v. Bolivia. Reparations and Costs*, *supra*, para. 115, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala*, *supra*, para. 237.

<sup>279</sup> Cf. *Case of Contreras et al. v. El Salvador*, *supra*, para. 191, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala*, *supra*, para. 294.

<sup>280</sup> Cf. *Case of the Caracazo v. Venezuela. Reparations and Costs*, *supra*, para. 124, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala*, *supra*, para. 295.

created internally for the search and location of disappeared persons through the Law for Reparation of Victims and Judicialization (*supraparas.* 74 to 78 and 195).

#### ***D. Measures of rehabilitation, satisfaction and guarantees of non-repetition***

##### **D.1 Measure of Satisfaction: publication and dissemination of the Judgment**

211. The **Commission** In general, it requested "[r]eparate adequately the human rights violations declared in the case, both materially and morally, including [...] the establishment and dissemination of the historical truth of the facts and the recovery of the memory of the victim." The **representatives** They asked the Court to order the State "to publish, within a period of 6 months, at least the sections on the context and proven facts, as well as the operative part of the judgment in the Official Gazette and in a newspaper with national circulation." In addition, they requested that "[d]is publication [...] must be made on the web page of the Ministry of Justice, Human Rights and Cults, no more than three links from the main page and maintained until the moment the sentence is fully complied with." He **Stated** did not expressly refer to this request for repair.

212. The Court finds it pertinent to order, as it has done in other cases<sup>281</sup>, that the State, within six months from notification of this Judgment, publish the following: a) the official summary of the Judgment prepared by the Court, once, in the official gazette and in a newspaper with wide national circulation, in a legible and appropriate font size, and b) this Judgment in its entirety, available for at least a period of one year, on the website of the Ministry of Justice, Human Rights and Cults, accessible to the public from the home page of said website.

213. The State must immediately inform this Court once it proceeds to carry out each of the publications ordered, regardless of the one-year term to present its first report provided in the operative part of the Judgment.

##### **D.2 Rehabilitation measure**

214. The **representatives** they indicated that "the forced disappearance of Jorge Vásquez Durand [...] produced [...] a great impact on the psychological well-being of his next of kin," and that "they have suffered years of difficulties as a result of the events [...], as well as due to insufficient government actions to clarify the facts and impose sanctions on those responsible." They also alleged that the "absence [of Mr. Vásquez Durand] was a hard, sad, and traumatic experience, pain from which [the next of kin] have not been able to recover to date." Therefore, they requested that the Court order the State to "guarantee free and permanent medical and psychological treatment in favor of the next of kin of the victims," provided in the country and city of their residence and including the provision of the medications that are required.

215. The **State** indicated that the Administrative Reparation Program "contemplates non-pecuniary reparations, which are similar to the reparations determined by the Court [...] in terms of satisfaction mechanisms and guarantees of non-repetition," and that this program

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<sup>281</sup> Cf., *inter alia*, *Case of Cantoral Benavides v. Peru. Reparations and Costs*. Judgment of December 3, 2001. Series C No. 88, para. 79; *Case of Granier et al. (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 22, 2015. Series C No. 293, para. 386; *Case of Omar Humberto Maldonado Vargas and others v. Chile. Merits, Reparations and Costs*. Judgment of September 2, 2015. Series C No. 300, para. 162, and *Case of Pollo Rivera et al. v. Peru, supra*, para. 279.

it also includes physical rehabilitation and psychosocial care. Therefore, he affirmed that "it is in a better position to be able to guarantee measures of satisfaction, which seek to comprehensively redress the petitioners."

216. The Court considers, as it has done in other cases<sup>282</sup>, that it is necessary to order a measure of reparation that provides adequate care for the psychological or psychiatric suffering suffered by the next of kin of Mr. Jorge Vásquez Durand (*supraparas*. 182 to 185). However, this Court notes that the victims do not reside in Ecuador. Therefore, as it has been provided in other cases<sup>283</sup>, the Court establishes that the State must grant, for a single time, the sum of US\$7,500.00 (seven thousand five hundred United States dollars) to each of the following victims, María Esther Gomero Cuentas, Jorge Luis Vásquez Gomero and Claudia Esther Vásquez Gomero, for expenses for psychological or psychiatric treatment, as well as for medicines and other related expenses, so that they can receive said care in the place where they reside. .

### ***E. Other measures requested***

217. The **Commission** requested that the Court order the State "[a]dopt the necessary measures to prevent similar events from occurring in the future, in accordance with the duty to prevent and guarantee the human rights recognized in the Convention," and "implement permanent human rights and international humanitarian law programs in the training schools of the Armed Forces." In addition, it requested that the State make "a public acknowledgment of international responsibility and make a public apology for the violations declared in the case." The **representatives** they requested that "[u]n act of public apology dignify [...] the memory of Jorge Vásquez Durand be carried out by the highest authorities of the State."

218. This Court notes that the Reparation Program in charge of the Ombudsman has five lines of work that include education in human rights, the implementation of symbolic measures and measures of satisfaction, as well as the archiving and custody of the documentary memory of human rights violations.<sup>284</sup> In particular, the Court notes that the State presented information on the training of members of the Armed Forces in different cities of the country.<sup>285</sup> Likewise, Ecuador sent documents on the steps taken regarding the implementation of a Museum of Memory and commemorative plaques with the names of the victims that appear in the Report of the Truth Commission<sup>286</sup>.

219. The Court recognizes and appreciates the progress made by the State in terms of guarantees of non-repetition and other symbolic steps. The Court considers it opportune for the State to continue implementing these measures to provide the victims of the cases documented in the Report of the Truth Commission with comprehensive reparation, but does not consider it necessary

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<sup>282</sup> Cf. *Case of Barrios Altos v. Peru. Reparations and Costs. Judgment of November 30, 2001*. Series C No. 87, paras. 42 and 45, and *Case of Members of the Chichupac Village and neighboring communities of the Municipality of Rabinal v. Guatemala, supra*, para. 303.

<sup>283</sup> cf., *inter alia*, *Case of the Dos Erres Massacre v. Guatemala, supra*, para. 270; *Case J. V. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 27, 2013*. Series C No. 275, para. 397, and *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia, supra*, para. 569.

<sup>284</sup> cf. Law for Reparation of Victims and Prosecution, article 9 (evidence file, folio 135).

<sup>285</sup> cf. Ministry of Justice, Human Rights and Cults. Official Letter No. MJDHC-SDHC-DDH-2015-0157-0 dated 11 December 2015 (evidence file, folios 433 to 440).

<sup>286</sup> cf. People's Ombudsman. Official letter No. DPE-DNRVPI-2016-0091-0 of September 21, 2016 and annexes (evidence file, folios 1877, 1878 and 1890).

supervision of its compliance in the context of this specific case. Taking the foregoing into account, the Court finds that, in relation to the other reparation measures requested by the Commission and the representatives, the issuance of this Judgment and the reparations ordered in this chapter are sufficient and appropriate to remedy the violations suffered by the victims, and therefore it does not consider it necessary to order said measures.

## ***F. Compensatory indemnities***

### **F.1 Arguments of the parties and the Commission**

220. The **Commission** In general, it requested "[r]eparate adequately the human rights violations declared in the case, both materially and morally."

221. The **representatives** They asked the Court to order the payment of compensatory damages for pecuniary damage, including consequential damages and loss of earnings, as well as "reparation for the violations suffered by the victims through the payment of compensation for non-pecuniary damages." Regarding the compensatory reparation for material damage, they requested that the Court set an amount, in equity, based on the expenses that the family would have incurred by "exhausting all possible resources to find the whereabouts of the victim." Due to loss of earnings, they requested that the payment of the salaries not received by Mr. Vásquez Durand from 1995 to the present be ordered. In this regard, they presented a calculation, based on the minimum wage in Peru, which amounts to US \$34,740.68. Nevertheless, They indicated that said calculation "is only of a referential nature," since the victim's wages "were well above the minimum wage," so they requested that the Court calculate the amount in equity. Regarding non-pecuniary damage, the representatives requested that an amount be set in equity for the circumstances of the arrest and forced disappearance of Mr. Vásquez Durand, as well as for the "profound suffering" that his wife and children suffered.

222. The **State** indicated that Article 7 of the Law for Reparation for Victims and Prosecution contemplates compensation as an element of comprehensive reparation, accepting the parameters of the inter-American human rights system in terms of pecuniary and non-pecuniary damage. It argued that "the article itself [...] determines fair compensation," using "the parameters contemplated in the Court's jurisprudence [...] in terms of pecuniary and non-pecuniary damage" so that "the participation [of the Tribunal...] in determining these items would be unnecessary." Likewise, it affirmed that the adaptation of the internal regulations to the international standard of reparation "evidences Ecuador's good faith in terms of comprehensive reparation to those who have been victims of violations of their human rights."

### **F.2 Considerations of the Court**

223. This Court confirms that the Reparations Program created for the cases documented by the Truth Commission through the Law for Reparation of Victims and Judicialization and its Regulations<sup>287</sup> provides for a compensation procedure under the responsibility of the Ministry of Justice, Human Rights and Cults. However, said law also provides for the possibility for the State to pay material or non-material compensation due in cases of human rights violations, "in compliance with what was ordered in an enforceable judgment."<sup>288</sup> Likewise, for the establishment of the compensation amounts, the aforementioned law

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<sup>287</sup> *cf.* Law for Reparation for Victims and Prosecution, Article 7 (evidence file, folios 134 and 135), and Regulations for reparation agreements (evidence file, folio 445).

<sup>288</sup> In this regard, Article 7 of the aforementioned law establishes: "Compensation.- In cases where there is room for compensation for pecuniary or non-pecuniary damage that occurred as a result of serious violations of

refers to "the most current parameters and criteria developed by the inter-American system"<sup>289</sup>. Additionally, in order to avoid double compensation for the same act, the Regulations expressly establish that "[w]hoever has effectively received compensation from the State, whether for compliance with friendly settlement agreements, judgments and compliance agreements of the Inter-American Court of Human Rights, or resolutions of the Universal System of Human Rights, for the same facts documented by the Truth Commission", "may not benefit from a compensation agreement."<sup>290</sup>

224. The Court recognizes and appreciates the progress made by the State in terms of reparation for victims of human rights and crimes against humanity, which have been developed since the promulgation of the Law for Reparation for Victims and Judicialization, as well as its Regulations. In the present case, the Court notes that the administrative system for reparations has not been used by the victims. In this regard, it considers that the same system established internally provided for the possibility of granting compensation directly by international human rights bodies, and more specifically by the Inter-American Court.

225. This Court finds that, in accordance with its attributions and duties established by Article 63(1) of the Convention, once it determines that the violation of the rights contained in the American Convention took place, it must determine the payment of "fair compensation". Therefore, it is up to the Court to establish the reparation measures it deems pertinent, including compensatory damages, as it will proceed to do in this case.

226. Bearing in mind that in this case the Court has determined that there were a series of violations of the American Convention, the principle of judicial economy, the fact that the internal reparation program uses the criteria and parameters of this same Court to establish the compensation, and that the State has not specified the amounts that it would award to the victims as a result of the violations determined in this Judgment, the Court deems that it is up to it to determine autonomously the compensation due for the violations declared in this Judgment.

### F.2.a Property damage

227. The Court has developed in its jurisprudence the concept of pecuniary damage and the cases in which compensation should be<sup>291</sup>. This Court has established that pecuniary damage encompasses "the loss or detriment of the income of the victims, the expenses incurred as a result of the facts and the consequences of a pecuniary nature that have a causal link with the facts of the case."<sup>292</sup>

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human rights documented by the Truth Commission, the Ecuadorian State will make the payment of said compensation either in compliance with the provisions of the compensation agreement that the victims can reach with the Ministry of Justice and Human Rights, or in compliance with what is ordered in an enforceable judgment." Law for Reparation of Victims and Prosecution, article 7 (evidence file, folios 134 and 135).

<sup>289</sup> *cf.* Law for Reparation of Victims and Prosecution, article 7 (evidence file, folios 134 and 135). In the same sense, Article 13 of the Regulation establishes that "[t]he Compensation Proposal must take into consideration the parameters and criteria established by the Inter-American System for the Protection of Human Rights for the determination of pecuniary and non-pecuniary damage." Regulations for reparation agreements (evidence file, page 446).

<sup>290</sup> Regulation for reparation agreements, art. 3.1 (evidence file, page 444).

<sup>291</sup> *cf. Case of Bámaca Velásquez v. Guatemala. Reparations and Costs.* Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case IV v. Bolivia, supra*, para. 354

<sup>292</sup> *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and Costs, supra*, para. 43, and *Case of Andrade Salmón v. Bolivia, supra*, para. 204.

*(i) consequential damage*

228. This Tribunal notes that, despite the fact that proof of expenses was not provided, it is presumable that the next of kin of Mr. Jorge Vásquez Durand incurred various expenses due to his detention and subsequent disappearance. In this regard, the Court recalls that, in view of the disappearance of the victim, Mrs. Gomero Cuentas took various steps addressed to different Peruvian and Ecuadorian institutions and organizations to obtain information on the fate and whereabouts of her husband and for the purpose of her release (*supra* paras. 79 to 84). Likewise, Mrs. Gomero Cuentas declared that she traveled to Aguas Verdes on the border between Ecuador and Peru to find the whereabouts of her husband.<sup>293</sup> Taking into account the international context of these actions, the Court considers that the State must grant compensation for said expenses, since they have a direct causal link with the acts that violate this case.<sup>294</sup> As stated, there is no evidence in the file to determine the exact amount of the expenses that these procedures caused to the members of the family of Mr. Jorge Vásquez Durand. However, in view of the particular circumstances of the case, the Court deems it pertinent to establish in equity the amount of US\$15,000.00 (fifteen thousand United States dollars), as compensation for consequential damages, which must be delivered to María Esther Gomero Cuentas.

*(ii) Loss of income*

229. Regarding the income not received by Mr. Jorge Vásquez Durand, the representatives based themselves on the minimum living wage to carry out the respective calculation, which would amount, until the year 2015, to the amount of US\$46,320.91. From this figure, they discounted 25% for personal expenses, resulting in an amount of US \$34,740.68. However, they indicated that this figure was "for reference only" because the victim's wages "were well above the minimum wage." Therefore, they asked the Court to calculate the amount corresponding to the loss of earnings of the victim in equity (*supra* para. 221).

230. The Court considers, as it has done in other cases on forced disappearances<sup>295</sup>, that in this case in which the whereabouts of the victim are unknown, it is possible to apply the compensation criteria for the loss of income of the latter, which includes the income that he would have received during his probable life. Taking into account the age of the victim at the beginning of his

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<sup>293</sup> [...] And so [...] I waited until four in the afternoon where the consul came out in a truck, he was standing, and at that moment a lot of people showed up, from all walks of life and even very humble people who were advocating and crying out for their children, for their husbands, so I tried to get in among them and handed the consul a note and [...] and I told him that [...] my concern is my husband, he received the note and told me that he was going to see him and nothing more. And I stay there, but I want to clarify that before arriving at the border, in Ecuador, sorry in Tumbes, there is an Ecuadorian consulate [...], we went in there, we put, the secretary was there, there was no one else, I handed over the note with reference to my husband, I received the note totally indifferent and well, we left with great sadness".

<sup>294</sup> Cf. *Case of Castillo Páez v. Peru. Reparations and Costs*, Judgment of November 27, 1998. Series C No. 43, para. 76, and *Case of Yarcé et al. v. Colombia. Preliminary Objection, Merits, Reparations and Costs*, Judgment of November 22, 2016. Series C No. 325, para. 364.

<sup>295</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*, *supra*, paras. 46 and 47, and *Case of Osorio Rivera and family v. Peru*, *supra*, paragraph 280.



disappearance and its commercial activity (*supra* para. 67), as well as life expectancy in Peru<sup>296</sup> and based on the criterion of equity, the Court decides to set the amount of US\$ 50,000.00 (fifty thousand United States dollars) for income not received in favor of Mr. Jorge Vásquez Durand. This amount must be distributed among his family members as follows: half of said amount must be delivered to Mrs. María Esther Gomero Cuentas, and the other half must be divided equally among her children, Jorge Luis Vásquez Gomero and Claudia Esther Vásquez Gomero.

#### F.2.b Non-pecuniary Damages

231. This Court has repeatedly established that the sentence can constitute by itself a form of reparation<sup>297</sup>. However, the Court has developed in its jurisprudence the concept of non-pecuniary damage and has established that this can include both the suffering and afflictions caused to the direct victim and his relatives, the impairment of very significant values for people, as well as the alterations, of a non-pecuniary nature, in the conditions of existence of the victim or his family.<sup>298</sup>

232. In consideration of the circumstances of this case, the violations committed, the suffering caused and experienced to different degrees, the time that has elapsed, the denial of justice, as well as the change in the living conditions of some next of kin, the proven effects on the personal integrity of the next of kin of the victims and the remaining consequences of a non-pecuniary nature that they suffered, the Court proceeds to establish in equity the compensation for non-pecuniary damage in favor of the victims.

233. First of all, the Court considers that the circumstances surrounding the detention and disappearance of Mr. Jorge Vásquez Durand were of such a nature that they caused him deep fear and suffering. In previous cases<sup>299</sup>, the Inter-American Court considered that similar circumstances had caused the victim serious non-pecuniary damage that should be assessed in its entirety when establishing compensation for this concept. In light of this criterion, the Court considers that Mr. Jorge Vásquez Durand should be compensated for non-pecuniary damage and orders, in equity, the payment of US\$80,000.00 (eighty thousand United States dollars). This amount must be distributed among his family members as follows: half of said amount must be delivered to Mrs. María Esther Gomero Cuentas, and the other half must be divided equally among his children, Jorge Luis Vásquez Gomero and Claudia Esther Vásquez Gomero.

234. Secondly, the Court considers that María Esther Gomero Cuentas, Jorge Luis Vásquez Gomero and Claudia Esther Vásquez Gomero were affected as a result of the forced disappearance of Mr. Jorge Vásquez Durand and have experienced great suffering that affected their life projects. Based on the foregoing, the Court establishes in equity the amount of US\$ 45,000.00 (forty-five thousand United States dollars), for

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<sup>296</sup> *cf.* Data of the Bank world about hope of life to the be born in he Peru in nineteen ninety five <http://datos.bancomundial.org/indicador/SP.DYN.LE00.IN?locations=PE&view=chart>, and Boards of indicators of the Development of the World Bank, regarding Peru, available at: <http://wdi.worldbank.org/table/2.21>. In addition, the World Bank data coincides with data from the National Institute of Statistics and Informatics of Peru, available at: [https://www.inei.gob.pe/media/MenuRecursivo/publicaciones\\_digitaes/Est/Lib0015/cap-59.htm](https://www.inei.gob.pe/media/MenuRecursivo/publicaciones_digitaes/Est/Lib0015/cap-59.htm).

<sup>297</sup> *Cf. Case of Suárez Rosero v. Ecuador. Reparations and Costs*, Judgment of January 20, 1999. Series C No. 44, para. 72, and *Case of Andrade Salmón v. Bolivia, supra*, para. 189.

<sup>298</sup> *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and Costs*, Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Andrade Salmón v. Bolivia, supra*, para. 207.

<sup>299</sup> *Cf. Case of Osorio Rivera and family v. Peru, supra*, para. 288, and *Case of Tenorio Roca et al. v. Peru, supra*, para. 268.

non-pecuniary damage, which must be paid to each of the following victims: María Esther Gomero Cuentas, Jorge Luis Vásquez Gomero and Claudia Esther Vásquez Gomero.

### ***G. Costs and expenses***

235. The **representatives** They argued that "the family hired the services of lawyers, who jointly signed with [Mrs.] Gomero Accounts, for which they have not kept the receipts for the expenses incurred," for which they requested that the Court set an amount in equity. They also asked the Court to "set an amount in equity, for the expenses incurred by APRODEH, as legal representatives of the victims in domestic and international proceedings, but they did not specify a reference amount. They also indicated that the aforementioned expenses did not include "those of the victims and their representatives in the remainder of the processing of the case before the Court and in possible proceedings to be followed before Ecuadorian instances." He **State** He did not refer to these allegations.

236. The Court reiterates that, according to its jurisprudence<sup>300</sup>, the costs and expenses are part of the concept of reparation, since the activity carried out by the victims in order to obtain justice, both nationally and internationally, implies expenses that must be compensated when the international responsibility of the State is declared through a conviction. Regarding the reimbursement of costs and expenses, it is up to the Court to prudently assess its scope, which includes the expenses generated before the authorities of the domestic jurisdiction, as well as those generated in the course of the proceeding before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. *quantum* be reasonable<sup>301</sup>.

237. This Court has indicated that the claims of the victims or their representatives in terms of costs and expenses, and the supporting evidence, must be presented to the Court at the first procedural moment granted to them, that is, in the pleadings and motions brief, without prejudice to the fact that such claims are updated at a later time, in accordance with the new costs and expenses incurred during the proceedings before this Court.<sup>302</sup> Likewise, the Court reiterates that the remittance of probative documents is not enough, but that the parties are required to make an argument that relates the evidence to the fact that is considered to be represented, and that, as these are alleged financial disbursements, the items and justification for them should be clearly established.<sup>303</sup>

238. In the present case, there is no evidence in the file of any supporting evidence in relation to the costs and expenses incurred by the victims or their representatives. Given the lack of proof of these expenses, the Court establishes, in fairness, that the State must deliver the total amount of US\$ 25,000.00 (twenty-five thousand United States dollars) for costs and expenses in the litigation of this case. This amount must be paid directly to the representatives of the victims in this case, the APRODEH organization.

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<sup>300</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*, *supra*, para. 42, and *Case of Andrade Salmón v. Bolivia*, *supra*, para. 210.

<sup>301</sup> Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and Costs*. Judgment of August 27, 1998. Series C No. 39, para. 82, and *Case of Andrade Salmón v. Bolivia*, *supra*, para. 210.

<sup>302</sup> Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and Costs*, *supra*, para. 82, and *Case of Andrade Salmón v. Bolivia*, *supra*, para. 211.

<sup>303</sup> Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of November 21, 2007. Series C No. 170, para. 277, and *Case of Andrade Salmón v. Bolivia*, *supra*, para. 211.

The expenses that Mrs. María Esther Gomero Cuentas could have incurred during the internal litigation of the case were already considered under the concept of consequential damages. In the stage of monitoring compliance with this Judgment, the Court may order the reimbursement by the State to the victims or their representatives of subsequent, reasonable and duly proven expenses.<sup>304</sup>

#### ***H. Reimbursement of expenses to the Victims Legal Assistance Fund***

239. In the present case, by Order of February 3, 2016, the President of the Court granted, from the Court's Victims' Legal Assistance Fund, the financial support necessary to cover the travel and lodging expenses necessary for Ms. María Esther Gomero Cuentas to participate in the public hearing, as well as the reasonable costs of formalizing and sending the affidavits of Mr. Jorge Luis Vásquez Gomero and Mrs. Carolina Loayza Tamayo.

240. On October 4, 2016, the State was sent a report on disbursements in accordance with the provisions of Article 5 of the Regulations of the Court on the operation of said Fund. Thus, the State had the opportunity to present its observations on the disbursements made in the instant case, which amounted to US\$1,674.35 (one thousand six hundred and seventy-four dollars and thirty-five cents of the United States of America). However, Ecuador did not present observations in this regard within the period granted for it.

241. Due to the violations declared in this Judgment, the Court orders the State to reimburse said Fund for the amount of US\$ 1,674.35 (one thousand six hundred and seventy-four United States dollars and thirty-five cents) for the expenses incurred. This amount must be repaid within six months, counted from the notification of this Judgment.

#### ***I. Modality of fulfillment of the ordered payments***

242. The State must make the payment of the compensation for pecuniary and non-pecuniary damage and the reimbursement of costs and expenses established in this Judgment directly to the persons indicated therein, within a period of one year from the notification of this Judgment, without prejudice to the fact that it may advance the full payment in a shorter period of time.

243. In the event that the beneficiaries have died or die before the respective amount is delivered, it will be delivered directly to their heirs, in accordance with applicable domestic law.

244. The State must comply with the monetary obligations by paying in United States dollars.

245. If for reasons attributable to the beneficiaries of the compensation or their successors it is not possible to pay the determined amounts within the indicated term, the State will deposit said amounts in their favor in an account or certificate of deposit in a solvent Ecuadorian financial institution, in United States dollars, and under the most favorable financial conditions permitted by law and banking practice. If the corresponding compensation is not claimed after ten years, the amounts will be returned to the State with the accrued interest.

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<sup>304</sup> Cf. *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, supra, para. 291, and *Case IV v. Bolivia*, supra, para. 363.

246. The amounts assigned in this Judgment as compensation for pecuniary and non-pecuniary damages, and as reimbursement of costs and expenses must be fully delivered to the indicated persons, in accordance with the provisions of this Judgment, without reductions derived from eventual tax charges.

247. In the event that the State incurs in arrears, including in the reimbursement of expenses to the Victims' Legal Assistance Fund, it must pay interest on the amount owed corresponding to bank arrears interest in the Republic of Ecuador.

## **X RESOLUTIVE POINTS**

248. Therefore,

### **COURT**

### **DECIDE,**

Unanimously,

1. To dismiss the preliminary objections filed by the State regarding the alleged lack of temporary jurisdiction with respect to the Inter-American Convention on Forced Disappearance, the alleged lack of substantive jurisdiction to use international humanitarian law, as well as the alleged lack of jurisdiction by virtue of the "subsidiarity" of the inter-American system, in the terms of paragraphs 22 to 26, 30 to 32, and 36 to 40 of this Judgment.

### **DECLARES,**

Unanimously, that

2. The State is responsible for the violation of the rights to personal liberty, personal integrity, life and recognition of legal personality, recognized in Articles 7, 5.1, 5.2, 4.1, and 3 of the American Convention, in relation to Article 1.1 thereof and in relation to the provisions of Article Ia of the Inter-American Convention on Forced Disappearance, to the detriment of Jorge Vásquez Durand, in the terms of paragraphs 98 to 140 of this Judgment.

3. The State is responsible for the violation of the rights to judicial guarantees and judicial protection, recognized in Articles 8.1 and 25.1 of the Convention, in relation to Article 1.1 of the same instrument and Article Ib of the Inter-American Convention on Forced Disappearance, to the detriment of Jorge Vásquez Durand, María Esther Gomero Cuentas, Jorge Luis Vásquez Gomero and Claudia Esther Vásquez Gomero. In addition, the State violated the right to know the truth of these next of kin of the disappeared victim. All this, in the terms of paragraphs 149 to 168 of this Judgment.

4. The State is responsible for the violation of the right to personal integrity, recognized in Article 5.1 and 5.2 of the American Convention, in relation to Article 1.1 of the same instrument, to the detriment of María Esther Gomero Cuentas, Jorge Luis Vásquez Gomero and Claudia Esther Vásquez Gomero, in the terms of paragraphs 182 to 185 of this Judgment.

5. The State is not responsible for a violation of Article 25.1 of the Convention, in relation to Articles 1.1 and 2 of the same instrument, by virtue of the alleged ineffectiveness of the writ of habeas corpus, in the terms of paragraphs 171 and 172 of this Judgment.

6. The State is not responsible for a violation of Article III of the Inter-American Convention on Forced Disappearance, by virtue of the alleged absence of an adequate classification of the crime of forced disappearance, in the terms of paragraphs 174 to 180 of this Judgment.

7. The State is not responsible for the violation of the right to personal integrity, recognized in Article 5.1 and 5.2 of the American Convention, in relation to Article 1.1 of the same instrument to the detriment of María Durand, in the terms of paragraph 184 of this Judgment.

**AND ARRANGES,**

Unanimously, that:

8. This Judgment constitutes by itself a form of reparation.

9. The State must continue and carry out, within a reasonable period of time and with the greatest diligence, the investigations that are necessary to identify, prosecute and, where appropriate, punish those responsible for the forced disappearance of Jorge Vásquez Durand, in the terms of what is established in paragraphs 202 to 204.

10. The State must carry out, as soon as possible, a rigorous, systematic search and with adequate human and financial resources, in which it makes every effort to determine the whereabouts of Jorge Vásquez Durand, which must be carried out in accordance with the provisions of paragraphs 208 to 210.

11. The State must make the publications indicated in paragraph 212 of this Judgment, in accordance with the provisions of said paragraph and the following.

12. The State must grant María Esther Gomero Cuentas, Jorge Luis Vásquez Gomero and Claudia Esther Vásquez Gomero, for a single time, the amount established in paragraph 216 of the Judgment, for expenses for psychological or psychiatric treatment, so that they can receive said care in their place of residence, in accordance with the provisions of said paragraph.

13. The State must pay the amounts established in paragraphs 228, 230, 233, 234 and 238 of this Judgment, as compensation for pecuniary and non-pecuniary damages and for the reimbursement of costs and expenses, in the terms of the aforementioned paragraphs and paragraphs 242 to 247.

14. The State must reimburse the Fund for Legal Assistance for Victims of the Inter-American Court of Human Rights the amount disbursed during the processing of this case, in the terms of what is established in paragraphs 239 to 241 of this Judgment.

15. The State must submit a report to the Court, within a period of one year from notification of this Judgment, on the measures adopted to comply with it.

16. The Court will monitor full compliance with this Judgment, in the exercise of its powers and in compliance with its duties under the American Convention on Human Rights, and will conclude this case once the State has fully complied with its provisions.

Written in Spanish in San José, Costa Rica, on February 15, 2017.

IHR Court. *Case of Vásquez Durand et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of February 15, 2017.

Roberto F. Caldas  
President

Eduardo Ferrer Mac-Gregor Poisot

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Elizabeth Hate Benedict

Eugenio Raul Zaffaroni

Pablo Saavedra Alessandri  
Secretary

Communicate and execute,

Roberto F. Caldas  
President

Pablo Saavedra Alessandri  
Secretary