

Inter-American Court of Human Rights
Case of the Gómez-Paquiyaury Brothers v. Peru
Judgment of July 8, 2004
(Merits, Reparations and Costs)

In the case of the Gómez Paquiyaury brothers,

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

Sergio García Ramírez, President;
Alirio Abreu Burelli, Vice-President;
Oliver Jackman, Judge;
Antônio A. Cançado Trindade, Judge;
Cecilia Medina Quiroga, Judge;
Manuel E. Ventura Robles, Judge; and
Francisco José Eguiguren Praeli, Judge *ad hoc*;

also present,

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

pursuant to Articles 29, 56, 57 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), and Article 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), issues the instant Judgment.

I
INTRODUCTION OF THE CASE

1. On February 5, 2002 the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") filed before the Court an application against the State of Peru (hereinafter "the State" or "Peru"), originating in complaint N° 11.016, received at the Secretariat of the Commission on July 2, 1991.

2. The Commission filed the application based on Article 51 of the American Convention, for the Court to decide whether the State breached Articles 4 (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty) and 19 (Rights of the Child) for the alleged detention, torture, and extra-legal execution of the brothers Emilio Moisés and Rafael Samuel Gómez Paquiyaury, as well as Articles 8 (Right to Fair Trial) and 25 (Right to Judicial Protection) of the American Convention, to the detriment of their next of kin, all the above in combination with the obligation set

* Judge Diego García-Sayán excused himself from hearing the instant case.

forth in Article 1(1) (Obligation to Respect Rights) of that same Convention. Likewise, the Commission asked the Court to find that the State breached Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture (hereinafter "the Inter-American Convention against Torture") to the detriment of the Gómez Paquiyaury brothers. Finally, the Commission asked the Court to order the State to make a number of pecuniary and non-pecuniary reparations, as well as to pay the costs generated by processing of the case under domestic venue and before the Inter-American System.

3. According to the Commission, on the morning of June 21, 1991, in the midst of two police operations, the brothers Emilio Moisés and Rafael Samuel Gómez Paquiyaury, respectively 14 and 17 years old, were detained by agents of the National Police and placed in the trunk of a police patrol car. They were allegedly executed on the route followed by the policemen after their detention. The Commission stated that both their bodies entered the morgue approximately one hour after they were captured. The Commission pointed out that the Peruvian courts investigated the facts and established the individual liability of the direct perpetrators. The Inter-American Commission stated that the alleged mastermind was identified, but was at large and had not been tried or punished. Likewise, the Commission pointed out that the Peruvian courts ordered civil reparations to be paid by the direct perpetrators, but at the time the application was filed said reparations had not been paid to the next of kin of the alleged victims.

II COMPETENCE

4. The Court is competent to hear the instant case, pursuant to Articles 62 and 63(1) of the American Convention, as Peru has been a State Party to the convention since July 28, 1978, and it accepted the adjudicatory jurisdiction of the Court on January 21, 1981. The State also ratified the Inter-American Convention against Torture on March 28, 1991.

III PROCEEDING BEFORE THE COMMISSION

5. Case No. 11.016 was opened by the Inter-American Commission on June 12, 1992, in response to a complaint filed by the Centro de Estudios y Acción para la Paz (hereinafter "CEAPAZ" or "the petitioners") on July 2, 1991.

6. On May 1, 2000 the Commission sent a letter to the parties, offering its services to help attain a friendly settlement, pursuant to "Article 48(1)(f) of the Convention and Article 45(1) and 45(2) of its Rules of Procedure".

7. On May 5, 2001, during its 110th Regular Session, the Commission adopted Report No. 44/01 on admissibility of the case.

8. On March 21, 2001 the Commission reiterated to the parties its willingness to contribute to a friendly settlement. On April 23, 2001 the State answered that "it d[id] not wish to submit[,] at the moment, to the friendly settlement procedure." On April 9, 2001 the petitioners stated that "they were willing to begin a friendly settlement process."

9. On October 11, 2001, during its 113th Regular Session, the Commission

adopted Report No. 99/01 on the merits of the case and recommended that the State:

1. [p]rovide adequate reparations to the next of kin of the Gómez Paquiyaury brothers, including both the moral and the material aspects, for the human rights violations established in the [...] report, and specifically,
2. [c]onduct a complete, impartial, and effective investigation of the facts with the aim of establishing who ordered the crime and punishing whoever was responsible for the order in connection with the facts pertaining to the kidnapping, torture, and murder of the Gómez Paquiyaury brothers.
3. [p]ay the next of kin of the Gómez Paquiyaury brothers a compensation estimated in accordance with international parameters, sufficient to redress both the pecuniary and the moral damages suffered by the next of kin of the Gómez Paquiyaury brothers due to their murder.

10. On November 5, 2001 the Commission forwarded Report No. 99/01 to the parties, asked the State to submit a report on the steps taken to comply with the recommendations of the Commission within two months time, and asked the petitioners, pursuant to Article 43(3) of the Rules of Procedure of the Commission, to submit information in connection with filing of the case before the Inter-American Court.

11. On January 3, 2002 the State informed the Commission that "it [wa]s taking the necessary steps [...] to comply with the recommendations" made in Report No. 99/01.

12. On January 8, 2002 the Commission, "in view of the non-compliance of the Peruvian State with the recommendations of the report on the merits," decided to file the case before the Court.

IV PROCEEDING BEFORE THE COURT

13. The Commission filed the application and its appendixes before the Inter-American Court on February 5, 2002.

14. The Commission appointed Marta Altolaguirre and Santiago Canton as its delegates before the Court, and Ignacio Álvarez, Elizabeth Abi-Mershed and Ariel Dulitzky as its legal advisors.

15. On February 19, 2002, after a preliminary examination of the application by the President, the Secretariat forwarded it, together with its appendixes, to the State and to the representatives of the alleged victims and their next of kin,¹ and it informed both of the deadlines to reply to the application and to appoint their representatives in the proceeding, as well as to submit the written brief containing pleadings, motions, and evidence, respectively. The Secretariat also informed the State that it had the right to appoint an *ad hoc* judge to participate in the hearing of the case.

¹ In their March 5, 2002 letter, the next of kin of the alleged victims informed the Court of the appointment of Mónica Feria Tinta as their representative for the proceeding before the Inter-American Court. The application, its appendixes and the other documents were forwarded to Mónica Feria Tinta on March 7, 2002. Said representative requested an extension to submit her written brief containing pleadings, motions, and evidence, and the extension was granted until April 10, 2002, given the specific circumstances of the instant case.

16. On March 5, 2002 the parents of the alleged victims and Mónica Feria Tinta (hereinafter "the representative of the alleged victims and their next of kin") sent a copy of the power of attorney granted by the former for the latter to represent them in the proceeding before the Inter-American Court. On March 22, 2002 the representative of the alleged victims and their next of kin also sent a copy of the power of attorney granted to her by the siblings of the alleged victims to process the case before the Court.

17. In its March 21, 2002 note, the State informed the Court that it appointed Francisco José Eguiguren Praeli as Judge *ad hoc*. It also informed the Court of the appointment of Julio Quintanilla Loaiza as its agent.

18. On April 15, 2002, the representative of the alleged victims and their next of kin, after two extensions granted, submitted her written brief containing pleadings, motions, and evidence, together with its appendixes.

19. On April 22, 2002 the State sent its brief replying to the application.

20. On May 10, 2002 the Secretariat forwarded the written brief containing pleadings, motions, and evidence, together with its appendixes, to the State and to the Inter-American Commission and it informed them that they had 30 days time to submit whatever observations they deemed pertinent regarding the requests made by the representative of the alleged victims and their next of kin.

21. On October 21, 2002 the representative of the alleged victims and their next of kin sent a letter reporting that "the [Gómez Paquiyauri] family [wa]s being harassed by the Agent of the Peruvian State".

22. On November 18, 2002 the Court issued an Order in which it "[d]eclare[d] that Francisco José Eguiguren has no impediment to act as judge *ad hoc* in the instant case", in connection with the questions raised by the representative of the alleged victims and their next of kin regarding the role of the judge *ad hoc*.

23. On May 14, 2003 an *amicus curiae* brief was filed in the instant case.²

24. On March 1, 2004 the President of the Court issued an Order for Bent Sorensen and Ole Vedel Rasmussen to submit their expert opinions by means of statements rendered before a notary public (*affidavit*), which should be sent to the Court no later than March 22, 2004 and would be forwarded to the Inter-American Commission and to the State for them to submit whatever observations they deem pertinent. The President also summoned the Commission, the State, and the representative of the alleged victims and their next of kin to a public hearing that would be held at the seat of the Inter-American Court, beginning on May 5, 2004, to hear their final oral pleadings on the merits, reparations, and costs, as well as the testimony and expert opinions of the individuals listed below (*infra* para. 28). In this Order, the President also informed the parties that they had until June 7, 2004 to submit their final written pleadings on the merits, reparations, and costs.

25. On March 22, 2004 the representative of the alleged victims and their next of kin forwarded the statement made in English by Bent Sorensen before a notary

² The *amicus curiae* brief was filed by James Crawford and Simon Olleson.

public (*affidavit*).³

26. On April 19, 2004 the Inter-American Commission reported that it had no observations to make on the statement rendered by Bent Sorensen before a notary public. On April 28, 2004 the State sent its observations to said statement.

27. On May 1, 2004 the representative of the alleged victims and their next of kin sent a video pertaining to the facts of the case.

28. On May 5, 6 and 7, 2004, at a public hearing on the merits, reparations, and costs, the Court heard the statements of the witnesses and the expert opinions of the expert witnesses proposed by the Inter-American Commission and by the representative of the alleged victims and their next of kin. The Court also heard the final oral pleadings of the Commission, of the representative of the alleged victims and their next of kin, and of the State.

There appeared before the Court:

on behalf of the Inter-American Commission on Human Rights:

Freddy Gutiérrez, delegate;
Santiago Canton, delegate;
Ignacio J. Álvarez, advisor;
Lilly Ching, advisor; and
Marisol Blanchard, advisor.

on behalf of the alleged victims and their next of kin:

Mónica Feria Tinta, representative; and
Zoe Harper, legal assistant.

on behalf of the State of Peru:

Julio Quintanilla Loaiza, agent.

Witnesses offered by the Inter-American Commission on Human Rights:

Marcelina Paquiyaui Illanes de Gómez;
Ricardo Samuel Gómez Quispe;
Lucy Rosa Gómez Paquiyaui; and
Ángel del Rosario Vásquez Chumo.

Witnesses offered by the representative of the alleged victims and their next of kin:

Miguel Ángel Gómez Paquiyaui;
Víctor Chuquitaype Eguiluz; and
Jacinta Peralta Allccarima.

Expert witnesses offered by the representative of the alleged victims and their next of kin:

³ On April 1, 2004 the representative of the alleged victims and their next of kin sent a letter written by Ole Vedel Rasmussen, who due to his appointment as Rapporteur to examine Peru under Article 20 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment, removed himself from acting as an expert witness in the instant case.

Inge Genefke; and
Hans Petter Houguen.

Even though he was summoned by the President, one witness did not appear before the Court to render his testimony.⁴

29. During the public hearing both the State and the representative of the alleged victims filed various documents (*infra* para. 46).

30. On June 7, 2004 the Commission and the State submitted their final written pleadings. The representative did so on June 11, 2004.

31. On June 14, 2004 the Secretariat, under instructions by the President, asked the State and the representative of the alleged victims and their next of kin to submit, no later than June 21, 2004, certain documents as evidence to facilitate adjudication of the case regarding the merits and reparations and costs.

32. On June 21, 2004 the representative of the alleged victims and their next of kin submitted the documentary evidence that had been requested as evidence to facilitate adjudication of the case, under instructions by the President.

33. At the time the instant judgment was rendered, the State had not submitted the evidence requested (*supra* para. 31).

V PROVISIONAL MEASURES

34. During the public hearing (*supra* para. 28), witness Ángel del Rosario Vásquez Chumo stated that:

[I] was intimidated, subjected to pressure, [...] I was threatened so that I would not tell the truth about the facts, but [...] I wanted the hearing of the oral trial to begin once and for all to say how the events happened. When the oral trial took place after two years, I said everything about how the events happened, when I left the penitentiary to reenter society, the doors were closed, as they simply identified me as "vaca'e chumbo" and closed the doors on me [...].

[I] ask you [to] help [me] to avoid reprisals against my family and against myself, because there was intimidation long before and now, well to hide the things that have happened, afterwards they may take reprisals against me and my family.

35. During the public hearing (*supra* para. 28), witnesses Lucy Rosa Gómez Paquiyaauri, Marcelina Paquiyaauri Illanes de Gómez, Ricardo Samuel Gómez Quispe, Miguel Ángel Gómez Paquiyaauri, and Jacinta Peralta Allccarima, all next of kin of the alleged victims in the instant case, also stated that they have suffered persecution and harassment after the facts of the case.

36. On May 7, 2004, the representative of the alleged victims and their next of kin asked the Court to "take whatever measures it deem[ed] appropriate for [...] the members of the Gómez Paquiyaauri family [...] not to suffer reprisal due to their position as [alleged] victims in this case, or harassment with pressures and threats at their domicile" to urge them to "accept" friendly settlements, by the Agent of the Peruvian State or other agents of the State in this proceeding.

⁴ Juan Valdelomar Quiroz Chávez.

37. On that same day, under instructions by the Court, the Secretariat asked the State to cooperate by not having its agents contact the Gómez Paquiyaury family or their representative, not even to seek a friendly settlement in this case, as said approaches were being interpreted by said family as "harassment with pressure and threats at their domicile".

38. On May 7, 2004 the Court also issued an Order in which it decided:

1. To order the State to adopt, forthwith, such measures as may be necessary to protect the life and the right to humane treatment of the members of the Gómez Paquiyaury family who testified before the Court, Ricardo Samuel Gómez Quispe, Marcelina Paquiyaury Illanes de Gómez, Lucy Rosa Gómez Paquiyaury, Miguel Ángel Gómez Paquiyaury, and Jacinta Peralta Allccarima, and those who are in Peru: Ricardo Emilio, Carlos Pedro, and Marcelina Haydeé, all of them Gómez Paquiyaury, and minor Nora Emely Gómez Peralta.
2. To order the State to adopt, forthwith, such measures as may be necessary to protect the life and the right to humane treatment of Ángel del Rosario Vásquez Chumo and the members of his family.
[...]

In that same Order, the Court ordered the State to allow the beneficiaries of the provisional measures to participate in planning and implementation of said measures, and it set deadlines for the State to submit reports on the provisional measures, and for the Inter-American Commission and the representative of the beneficiaries of the provisional measures who were members of the Gómez Paquiyaury family to submit their observations on said reports.

VI THE EVIDENCE

39. Before examining the evidence tendered, in light of the provisions set forth in Articles 44 and 45 of the Rules of Procedure the Court will refer to certain matters that apply to the specific case, most of which have been developed in the jurisprudence of the Court itself.

40. The principle of the presence of both parties applies to evidentiary matters. This principle respects the right of the parties to their defense, and it is one of the grounds for Article 44 of the Rules of Procedure, regarding the time when evidence may be offered for there to be equality among the parties.⁵

41. The Court has pointed out previously, regarding to receiving and assessing evidence, that the procedures before it are not subject to the same formalities as domestic legal acts, and that inclusion of certain items in the body of evidence may take place paying special attention to the circumstances of the concrete cases and bearing in mind the limits set by respect for legal certainty and procedural balance among the parties.⁶ The Court has also taken into account that international case

⁵ See *Case of Maritza Urrutia*. Judgment of November 27, 2003. Series C No. 103, para. 46; *Case of Myrna Mack Chang*. Judgment of November 25, 2003. Series C No. 101, para. 118; and *Case of Baena Ricardo et al.. Competence*. Judgment of November 28, 2003. Series C No. 104, para. 106.

⁶ See *Case of Maritza Urrutia*, *supra* note 5, para. 48; *Case of Juan Humberto Sánchez. Interpretation of Judgment on Preliminary Objections, Merits, and Reparations* (Art. 67 of the American Convention Human Rights). Judgment of November 26, 2003. Series C No. 102, para. 28; *Case of Myrna*

law, deeming that international courts have the authority to assess evidence according to the rules of competent analysis, has always avoided rigidly establishing the *quantum* of evidence necessary as the basis for a judgment.⁷ This criterion is especially valid regarding to international human rights courts, which enjoy broad flexibility in assessing the evidence tendered before them regarding the pertinent facts according to the rules of logic and based on experience, to establish the international responsibility of a State for violating the rights of the person.⁸

42. Based on the above, the Court will now examine and assess the set of components of the body of evidence of the case, following the rule of competent analysis, within the legal framework under consideration.

A) DOCUMENTARY EVIDENCE

43. The Inter-American Commission, the representative of the alleged victims and their next of kin and the State submitted documentary evidence when they filed the briefs containing pleadings, motions, and evidence, and the reply to the application (*supra* paras. 13, 18 and 19).⁹

44. On March 22, 2004 the representative of the alleged victims and their next of kin forwarded the statement rendered before a notary public (*affidavit*) by Bent Sorensen (*supra* para. 25),¹⁰ pursuant to the order issued by the President in his March 1, 2004 Order (*supra* para. 24). The Court will now summarize the significant parts of said statement.

Expert opinion of Bent Sorensen, a surgeon and an expert in treatment and prevention of torture

The expert headed the delegation of the United Nations Committee Against Torture (CAT) that visited Peru between August and September 1998 and he was responsible for drafting the report that was unanimously adopted by the members of the CAT. Said report found that torture, as defined in Article 1 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter "the UN Convention against Torture"), was practiced systematically in the country, both by the Dirección Nacional Contra el Terrorismo, (hereinafter "DINCOTE"), and by the División de Investigación Criminal, DIVINCRI.

Mack Chang, *supra* note 5, para. 120; and *Case of Bulacio*. Judgment of September 18, 2003. Series C No. 100, para. 42.

⁷ See *Case of Maritza Urrutia*, *supra* note 5, para. 48; *Case of Myrna Mack Chang*, *supra* note 5, para. 120; and *Case of Bulacio*, *supra* note 6, para. 42.

⁸ See *Case of Maritza Urrutia*, *supra* note 5, para. 48; *Case of Juan Humberto Sánchez. Interpretation of Judgment*, *supra* note 6, para. 42; *Case of Myrna Mack Chang*, *supra* note 5, para. 120; and *Case of Bulacio*, *supra* note 6, para. 42.

⁹ See file with the appendixes to the application submitted by the Inter-American Commission, volume I, appendixes 1 to 25, leaves 1 to 357 and file with appendix 26 of the application; file with the appendixes to the April 15, 2002 brief containing pleadings, motions, and evidence of the representative of the alleged victims, volumes II and III, appendixes 1 to 70, leaves 358 to 802; appendixes 1 to 9 of the April 22, 2002 brief with the reply to the application, filed by the State (file on the merits, reparations, and costs, volume II, leaves 278 to 385).

¹⁰ See evidence file with the affidavit and appendixes submitted by the representative of the alleged victims and their next of kin, documentary evidence, volume V, leaves 944 to 1070.

Regarding to the instant case, the expert witness reported, first of all, that he had not personally interviewed any of the next of kin of the alleged victims.

Regarding to Rafael Samuel and Emilio Moisés Gómez Paquiyauri, he pointed out that the blows they received, as described in the significant photographs and documents, caused grave suffering and pain; the act was intentional, as the beating began when they were arrested; the purpose of the acts seemed to be that of investigating, but it may also have been to intimidate or coerce. The act was carried out by identified police officers. The expert witness stated his conclusion that "[t]here is no doubt that the two boys were tortured before they were murdered."

Regarding to Lucy Rosa Gómez Paquiyauri, sister of the alleged victims, the expert witness stated that the mental suffering of a 15 year old girl, when she learned that her two brothers were tortured to death, is "obvious". The mental and physical torture caused during the interrogation and deprivations of liberty of Lucy Rosa, was inflicted intentionally by police and prison officers, with the aim of intimidating and "coercing" her. As a conclusion, the expert witness stated that Lucy suffered physical and mental torture.

Regarding to the rest of the surviving family, the expert witness stated that the significant documents describe in detail that the DINCOTE visited the home of the Gómez Paquiyauri family and interrogated the family many times over several years, and this caused them mental suffering. Said actions were intentionally carried out by the DINCOTE with the aim of intimidating or coercing. The above led the expert witness to conclude that the whole family was mentally tortured.

On the other hand, the expert witness stated that the State is responsible for making the prohibition of torture effective, and that carrying out the orders of a superior is not an excuse. Both the person who obeys the order and tortures, and the person who gives the order, are responsible. There is, in turn, the duty to criminally try and, when appropriate, to punish the torturers.

45. On May 1, 2004 the representative of the alleged victims and their next of kin forwarded a video as documentary evidence.

46. During the public hearing, both the representative of the alleged victims and their next of kin and the State filed several documents as evidence (*supra* para. 29).¹¹

47. The representative of the alleged victims and their next of kin, as well as the State, when they submitted their respective final written pleadings (*supra* para. 30), attached various documents as evidence.¹²

48. On June 21, 2004 the representative of the alleged victims sent the

¹¹ See file on the merits, reparations, and costs, volume IV, leaves 967 to 1046.

¹² See file with appendixes to the brief with final pleadings submitted by the State, volume VI, leaves 1071 to 1172; and file with appendixes to the brief with final pleadings submitted by the representative of the alleged victims, volume VII, leaves 1173 to 1514.

documentary evidence requested as evidence to facilitate adjudication of the case, under instructions by the President.¹³

B) TESTIMONY AND EXPERT OPINIONS

49. On May 5, 6 and 7, 2004 the Court heard the testimony of the witnesses and the expert opinions of the expert witnesses offered by the Inter-American Commission and by the representative of the alleged victims and their next of kin. The Court will now summarize the significant parts of said statements.

a. Testimony of Ángel del Rosario Vásquez Chumo, member of the Peruvian National Police at the time of the facts

He was the driver of the police patrol car in which the brothers Rafael Samuel and Emilio Moisés Gómez Paquiyaui were put on June 21, 1991. That day the Sergeant Francisco Antezano Santillán, who together with other officers of the "POE" police unit put the victims in the trunk, was with the witness.

When he arrived at the place of the facts, the alleged victims had been detained by Corporal Ari Jaime, who had a gun aimed upward and the detainees were on the ground, facing down and with their hands free. Sergeant Antezano Santillán got out of the vehicle to talk to Corporal Ari Jaime. Afterwards, Captain César Augusto Santoyo Castro and other officers arrived, including members of the "POE" Unit, whose direct superior was major Juan Valdelomar Quirós Chávez.

Sergeant Antezano Santillán received orders from Captain Santoyo Castro, and he told the witness that they should go toward "Ventanilla" in the district of El Callao, while Captain Santoyo Castro went behind them with another patrolman and behind the latter came another patrol car with first Sergeant Canales. After a stoplight, the three patrol cars separated. When they arrived at the place known as "la Pampa de los Perros," Sergeant Antezano Santillán ordered the witness to drive the vehicle into that place, and 150 to 200 meters further he ordered him to turn the car toward Fose Avenue to see if the other two patrol cars arrived.

Sergeant Antezano Santillán asked the witness for the key to the patrol car, took out his gun, went to the back of the car, and opened the trunk. Mr. Vásquez Chumo says he felt when the detainees got out. Since the trunk was open, he could not see what happened at the back of the car, and he continued watching the Avenue to see whether he could locate the other two patrol cars.

Then he heard shots. He got out of the car and saw Sergeant Antezano Santillán with the gun pointed downward; the detainees were lying face down, and he saw one of the detainees still trembling. Sergeant Antezano Santillán asked him to help take the alleged victims to the hospital. He quickly helped put the wounded into the trunk and they went to the San Juan Hospital.

The witness heard Captain Santoyo Castro ask Sergeant Antezano Santillán

¹³ See file on the merits, reparations, and costs, volume V, leaves 1145 to 1148.

something on the radio, to which the sergeant answered: "afirmativo con la orden" [affirmative to the order]. The drivers, such as he was, were not allowed to operate the radio, and therefore they did not know the codes. The witness could only recognize the simple codes that were used daily. Captain Santoyo Castro proposed to Sergeant Antezano Santillán that they meet at Gambeta, and Sergeant Canales also arrived there. Then, Captain Santoyo Castro approached the witness and told him to calm down, that the dead were "terrucos" or terrorists and that they would talk later. After that, they went to the hospital following Captain Santoyo Castro's patrol car for him to "clean" the zone to avoid journalists or television cameras. When they arrived at the hospital, they took the corpses in and then the Captain ordered them to go to the patrol car station.

At the patrol car station there was a meeting between Captain Santoyo Castro, major Quirós Chávez, Sergeant Antezano Santillán and Mr. Cornejo Zapata, to prepare the police report. Afterwards, Sergeant Antezano Santillán instructed the witness, under orders by Captain Santoyo Castro, to say that what happened was a confrontation, and that, as a result of an attack, the detainees had died at that place. Captain Santoyo Castro and major Quirós Chávez told the witness that if he gave this account, nothing would happen, since he had been the driver of the patrol car and that after 15 days everything would continue as before, because the case would be heard under military jurisdiction.

The witness is currently a taxi driver and he earns on average US\$5 (five United States dollars) daily. Due to this, it is difficult for him to support his family, and it would therefore be impossible for him to pay the civil reparations ordered in favor of the Gómez Paquiyaury family by the domestic courts, and he has paid none of it as yet.

The witness added that he was intimidated and pressured by persons sent by Santoyo Castro to uphold the false accounts of the facts. At the penitentiary where he was detained he suffered constant threats against his life and his physical safety. Once, a sergeant told him that he was collecting money to pay the attorneys' fees, as a voluntary act. After having told the true account of the facts, the doors were closed for him to continue working. In his work as a taxi driver he has also suffered various incidents in connection with his participation in the facts, and for having said what happened they called him a "soplón".

The witness pointed out that at the time of the facts Peru, and specifically the province of El Callao, was in a state of emergency.

b. Testimony of Lucy Rosa Gómez Paquiyaury, sister of the alleged victims

The witness is the sister of Rafael Samuel and Emilio Moisés Gómez Paquiyaury, and she was 15 years old at the time of the facts. On June 21, 1991 she was getting ready for breakfast with her brothers when they heard shots on the street.

As they usually did, Rafael and Emilio went to the diner where their mother worked "to pick up the food from [their] mother's work to cover the lunch for the days when they d[id] not have it." Just five minutes had passed since

Rafael and Emilio left when a neighbor came in running to tell her that "a patrol car ha[d] taken [her] brothers, [that] the police ha[d] thrown them on the ground and ha[d] put them in the trunk and ha[d] taken them away."

Another brother of hers, Miguel Ángel, went to look for their mother to let her know what had happened, and she tried to contact their father; however, this was not possible "because since he worked on ships, when they had to test the valves that they repaired they went out to sea [...] and this was one of those days."

When their mother came home and found out what had happened, she looked for the documents of her brothers, Rafael and Emilio, who were 17 and 14 years old, respectively. A man also came to the house asking for Emilio.

At that time, her sister Haydeé, who was nine months pregnant, called her and said that she was feeling ill and that she was bleeding. Given this situation, her mother, her siblings Miguel Ángel and Haydeé and the witness went to the San Juan Hospital –now called Daniel Alcides Carrión- Emergency service.

The man who had come to their house to ask for her brother Emilio followed them to the hospital together with another man. At the hospital, Haydeé was told that she should rest, for which reason they went home together with Miguel Ángel, while the witness and her mother went to look for her detained brothers.

They went to the Police station, not far away, but they were unable to give them any information on her detained brothers, and did they did not help search for them.

The witness and her mother went back the same way they had gone to the Police station and once again they met the men who had followed them from their house. They asked her mother, as they had when they left the house, if they did not have a male relative "whom [she] could let know," and they answered that they did not. The man kept on asking this and the witness and her mother demanded that he tell them what he knew about Rafael and Emilio.

At that moment, Lucy realized that they were in front of a funeral parlor, and the man told them that Rafael and Emilio were wounded, that they were at the hospital and that he could take them there.

The man took them to the hospital, where he told them that Rafael and Emilio were dead. They went to the room where the bodies were and saw that they were wet, full of dirt, soiled. Her brother Rafael "smelled of urine" and "had an expression of horrible pain." Their eyes were empty, there was encephalic mass on their hair, she could see that her brother Rafael's chest was full of holes, and that they were both filthy and full of dirt. At that time, she "fe[lt] that [her] life was falling apart."

Both bodies had a sign that said "NN [Unidentified], light build, olive-skinned, approximate age" 24 years on Emilio's card and 27 years on Rafael's, "arrived as a corpse."

The witness returned home while her mother was taking steps for them to return Rafael and Emilio's bodies. When she got home she told her siblings Haydeé and Miguel Ángel what had happened, and they were deeply upset by the news, especially Miguel Ángel, who at the time was 8 years old.

That night they saw a TV report on the facts, which were presented as a confrontation in which three "subversives" had died: her two brothers and a college student who had also been in the area.

After the facts, the DINCOTE summoned her mother to make a statement and they also went to their house a couple of times, where they searched her brothers' rooms, opened their mattresses and destroyed the family's furniture. Furthermore, the police passed by their house almost daily.

The witness was detained in October 1992 and taken to a prison for adults, even though she was 16, and she was held there four years. At the time of her detention and during the time she was detained they referred to her brothers Rafael and Emilio as terrorists.

She and her brothers were very close; they shared everything. Rafael was very intelligent and got very good grades; he had even won a scholarship to study at an academy that would prepare him for the University; he was also very skilful and earned some money doing various jobs to help the household. Rafael wanted to be a mechanic. Emilio, in turn, was calm and studious, and he wanted to be an aviation technician when he grew up.

She wants to find justice and wants the State to "vindicate" what they did to her brothers, for having dishonored their names; she wants the truth about what happened to be known.

c. Testimony of Marcelina Paquiyauri Illanes de Gómez, mother of the alleged victims

On June 21, 1991 she went to her work, together with her husband, leaving her children at home for them to breakfast. That same day in the morning they agreed, as usual, for her children Rafael, Emilio and Miguel to go look for her at work, but only Miguel went, and told her that his brothers had been taken away in a patrol car.

Knowing that her sons had been detained made her worry and she asked for permission to leave work and go search for them. On the way, she heard on the radio that there had been a confrontation in the development where she lived and that three subversives had been killed. When she got home her neighbor told her that the police had "trampled" her sons and taken them away. At her house she looked for the minors' documents, to be able to identify them with the authorities.

At that time her daughter Marcelina Haydeé was nine months pregnant and when her health worsened they had to take her to the hospital. When she was about to leave the house together with her children Lucy, Miguel and Marcelina Haydeé, an unidentified person came to her house asking for her son Emilio and said he was his friend. When he saw that the family was in a hurry he went with them to the hospital.

At the hospital that day there was a physician's strike and they had to wait until they were helped. The doctor who examined her daughter told them it was not yet time for her to give birth and that she should go home. Miguel went home with his sister Haydeé.

She then went with her daughter Lucy to the Police station at La Perla, where they did not allow them to enter, stating that none of the persons they sought were there. On their way home she looked for the man who had identified himself that morning as a friend of Emilio's and who had gone looking for him at their home. The man asked for her husband, to which she replied that he was working on a ship and that there was no one else in the family. The man took her and her daughter Lucy back to the hospital where they had been that morning with her daughter Haydeé, but this time they did not enter the emergency room but rather a room where her sons' bodies were.

Rafael and Emilio were dead, with their faces disfigured. Emilio's mouth was half open, his teeth full of dirt, his clothes full of dirt, wet, full of urine. She said that Rafael was the same, "his eyes empty," his thumb shot off, as if it had been cut but with a bullet wound and some skin still holding a piece of the "phalanx" and the palms of the hands also had holes, as if they had been burned.

Rafael's body was identified as: "approximately 27, NN [unidentified], arrived as a corpse," and Emilio's as: "approximately 24 years old, unidentified, arrived as a corpse." Due to her desperation she began to scream and to ask why they gave them that age if they were children.

When she identified her boys two people came who took the certificates from her forcefully and began to take notes and to ask them both questions. They wrote down everything they said, and since they did not know what to do, they left that place.

Finally, the witness stated that the family never received psychological counseling, instead they "have always suffered blows."

d. Testimony of Ricardo Samuel Gómez Quispe, father of the alleged victims

He is a ship mechanic by profession, and at the time, because he had been dismissed from the navy's industrial service, he had a temporary job where his son Rafael was helping him. The week of the events, his son's work had ended, for which reason he was at home with his younger brothers.

On June 21, 1991 he was at sea conducting a test, and he only returned home at five that afternoon. When he arrived, his wife was very anguished because their sons had been detained, beaten, trampled by the police, and put in the trunk of a car.

The firm where he worked sent a van in which he went, together with a neighbor, to the hospital where his sons' bodies were.

His sons, aged 14 and 17, were cruelly tortured and murdered. Rafael's body had a mark that said "NN [unidentified], 27 years old", and it was full of dirt,

blood on his clothes, a broken finger on one of his hands, a piece of flesh dangling, and holes in both hands. Emilio's body said "24 years old." There were other corpses at that place in like conditions.

He went to file the complaint at the prefect's office, where they only wrote down the information on what happened and sent him to the Palacio de Justicia, where he did not go because he thought that at that time it would be closed. Afterwards he entered the morgue to take charge of his sons' bodies and prepare the wake, which was held the following day. Emilio's body was given to them first on Saturday, and the wife of the witness had to take steps for Rafael's body to be given to them that same day, as the autopsy was only going to be done on Monday.

The following day, he heard the names of his sons on a television report about a confrontation with the police, in which "three terrorists" died.

The family received support from the International Red Cross and from human rights organizations to cover the expenses and the debts that they had to pay.

The family has been harassed at their home by the intelligence service, by the police, by television and by journalists.

He came to testify before the Inter-American Court for justice to be done against the masterminds in the case.

e. Testimony of Miguel Ángel Gómez Paquiyaury, brother of the alleged victims

When the facts took place, on June 21, 1999, he was 8 years old. That day he was at home, when a tumult and shots could be heard on the street. His brothers Emilio and Rafael went out to the street to see what was happening. They came back to the house and remarked that it was a "confrontation among cops" and that there were dead people on the street. Then, his brothers went to their mother's workplace, as they did everyday to bring food, because their mother worked in a diner. His brother Emilio took a copy of his birth certificate with him and his brother Rafael had his military card.

Later he heard from their neighbors that his brothers had been detained by policemen and then beaten, trampled and put into the trunk of a patrol car, and that they had been taken to an unknown destination.

After this, he went to his mother's workplace to let her know what had happened. When she heard the news, his mother got nervous and they went home. On the way back, he heard on the radio that at Urbanización Cima – where they lived- there had been a "terrorist confrontation." When they arrived, his mother went to ask the neighbors what had happened. Then his sister Haydeé, who was pregnant at the time, felt ill and they took her to the hospital. Afterwards he went back home with his sister, and his mother went to look for his brothers. His sister Lucy told them that they had found their brothers at the morgue.

The event left its mark on the child and harmed him "a lot"; he had nightmares, he dreamt of them, and his nerves were in very bad shape. After he saw the bodies and the photographs, he felt deep grief, "I have no words

to describe, it was something that truly hurt me deeply to see them like that." He felt that he was left practically alone, because Emilio and Rafael were the ones who defended him if something happened to him. If he needed something, Rafael, who was working, bought it for him, they were "like my parents [...] they cared for me as if they were my parents, and overnight I was left alone, with no one." Regarding the memory of the event, the witness stated that he preferred "to bury it but it cannot be done, it is something that cannot be erased and is always going to be there if justice is not found."

His sister Haydeé lost her baby "due to the emotion." After the facts, Haydeé worked to help the family.

His family has been, above all, very united, they have always supported each other. Rafael was very skilful in his work as a mechanic and also in his studies. He was "the eyes of my father," because he worked with him and was his right hand. He rapidly learned his trade and did it very well. He was proud of his brothers. Emilio was the one who defended him, who taught him to work since Emilio was 11 years old, because he realized his family's needs and he urged him to work to help out. He felt that family unity was broken in part, but even so they have remained united.

After the facts, the family was followed and harassed. His mother received threats and was summoned to DINCOTE, but she did not go because she was afraid of being detained. His mother would not allow him to leave the house often, for fear that something might happen to him. When he was eleven years old he was run over on a street by a person who was the brother of a naval officer, of the intelligence service. The consequences of the accident currently limit his ability to work.

At the time of the facts, the family did not have financial means, they were a humble family, for which reason they were unable to attain justice. He feels that he had to mature quickly and work, he finished his secondary school and could not continue studying, for lack of financial means.

They were not involved in any investigative process regarding what happened, because they had no attorney and if they heard about anything it was over the media. They were never notified of anything regarding a judicial proceeding in connection with the facts of the case.

He witnessed how his mother went to several places in search of justice and, due to this, she began to be persecuted and threatened. His mother went to all the places they told her to go, and she received no response. While he was small his mother did not allow him to get information through the newspapers or television; later he learned about the case and he believes that the crime has remained unpunished. The State has not taken any steps to attenuate the grief suffered by the family and by himself as an individual.

f. Testimony of Víctor Chuquitaype Eguiluz, a neighbor of the alleged victims

He is a neighbor of the Gómez Paquiyaury family, and on June 21, 1991, after hearing gunshots, he saw the brothers Rafael and Emilio, who told him that there was a car and a dead person around the corner. Twenty minutes later he found the older sister, Haydeé, on the street, and she told him that they

had grabbed her brothers, had thrown them to the ground, had kicked and trampled them, and had put them in the trunk of a car. The witness described the state in which the bodies of the alleged victims were found at the morgue.

g. Testimony of Jacinta Peralta Allcarima, mother of the daughter of one of the alleged victims

Rafael was her companion, but they did not live together. They shared many moments, both with friends and with the next of kin. On June 21, 1991 she was two weeks pregnant. Rafael did not know for certain that she was pregnant because they had not done the definitive medical tests. When she found out that she was pregnant she felt an enormous joy, because it was the fruit of the man she loved.

Nora Emely, her daughter, is currently 12 years old. When she was born, her health situation was very delicate; the physicians who examined her even told her that she might have to interrupt the pregnancy, because she needed an operation. For the witness, this was another blow, as she had lost Rafael and she did not want to lose her daughter too, so she decided to continue the pregnancy. She has raised her daughter, always with support from the Gómez Paquiyauri family, who were with her from the start.

However, her daughter lacks a father and she knows that this "is a lack that we cannot fill, no matter how much warmth, how much love we have given her." When she was 2 or 3 years old, the girl started attending a childcare center and she began to feel the lack of her father more, due to the activities where he was absent.

Her grandfather on the father's side recognized her daughter legally, but the girl has always wanted to know who her father was, and she has had to tell her the truth. When her daughter was born, at the hospital they asked who her father was, but out of fear she did not give the real name, because she was aware of what the family was suffering. Every day, in the media, they were presented as a "family of terrorists," and they said there that they had died in a terrorist confrontation.

When she saw the need to register her daughter's birth, they decided to give her the grandfather's surname, because her daughter is Gómez and she had to have the surname. This has also created confusion for her, because since she was very small she has known that he is her grandfather, and she has often asked why she was given his surname and not her father's. At school and other activities this has been a problem; it has often been difficult to explain the situation to the teachers.

She knows that her daughter feels bad about all this, because she would like things to be much clearer, and there are some that she still cannot understand. She asks that the daughter be recognized as Rafael's daughter, but for this she wants Rafael's name to be cleansed and for him to no longer be labeled as a terrorist, as her daughter has the right to feel proud of her father; even though she did not know him, she feels very fond of his memory.

She did not correct her daughter's surname due to the political persecution suffered by the family, because they did much damage to them, and she has sought to avoid this also affecting the girl. For example, she worried that her

daughter might suddenly not return from school.

She has had to work very hard to raise her daughter, as it is not very easy to be both mother and father. This has led her to share less time with her and has made her unable to attend all her school activities.

At school her daughter is very studious, very intelligent, but to avoid making her family suffer she keeps things to herself, her grief and her feelings, because she sees that her family is suffering. For example, last year she had a health problem that seemed to be a dermatological problem, but that ultimately turned out to be due to tension. Therefore she has been attending sessions with a psychiatrist, but this therapy has not yet ended, as she still needs professional help.

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h. Expert opinion of Inge Genefke, a neurologist and an expert in treatment and prevention of torture

She has worked in rehabilitation of torture victims in the framework of the United Nations and of the Council of Europe. She is the founder of organizations that work on this topic.

The international definition of torture, according to Article 1 of the United Nations Convention against Torture, describes important aspects to establish whether certain acts can be considered torture, i.e.: there must be severe physical or mental suffering or damage, inflicted intentionally; there must be a motivation and it must be committed by persons linked to power, such as officers or policemen.

In the instant case she had access to a video on what happened, in addition to various written sources and conversations with the next of kin of the alleged victims. By this means, she observed how the minors were trampled, hooded, taken by the hair and then put and locked into a car. Later, they were beaten and subsequently murdered. The minors suffered both physically and psychologically and there was a purpose behind it. The facts of the case fulfill the criteria regarding torture, according to the aforementioned international standards.

The concept of a "secondary victim" refers to the closest members of the family who, after the torture episode, suffer and in fact have secondary consequences.

In this case, the family has suffered. The way they were shown the bodies, with no prior preparation, was a traumatic shock. Even today they are under the effects of that suffering. In this sense, the next of kin of the alleged victims may be called "secondary victims." The authorities persecuted the family instead of helping them.

The younger brother of the alleged victims, Miguel, was a completely healthy child. He suffered a severe psychological disturbance and had difficulties with everything: he could not sleep, he cried, he had to stay alone at home without having friends, he had a "horrible" life. Furthermore, none of the next

of kin received adequate psychological or medical care, when they should have received support and treatment for rehabilitation as torture victims.

Lucy Gómez Paquiyaury's situation was extremely severe and dangerous. She was a minor when she was affected by those intolerable facts, suffering the persecution and stigmatization of the family. Furthermore, she was arrested when she was sixteen years old. She was beaten, put into a car –just like her brothers-, blindfolded, and feared that she was going to be murdered. They also threatened her saying that they would throw her from a helicopter or that she would be stripped and beaten. Then, she remained in prison four years; the first part of this time she was in a maximum security prison.

The parents of the alleged victims have also undergone a situation of "extreme psychological stress." No one aided them; however, even though they were very poor, they courageously filed a complaint about what happened and due to this they were persecuted. They lived in a continuous struggle.

One aggravating circumstance in this case is the fact that nothing has been done to render justice; quite the contrary, they were persecuted and labeled. Another aggravating circumstance is the fact that the alleged victims were minors, children of fourteen and seventeen.

Victims of torture must receive compensation for the suffering and pain, taking into account the special nature of the trauma. Article 41 of the United Nations Convention against Torture explains how to rehabilitate and help torture victims, and this is a duty of the States. It is important for impunity not to continue prevailing, for those who commit torture to be punished. It is impossible to attain rehabilitation of the victims while there is impunity. On the other hand, due to the stigmatization suffered, the State must provide an explanation and clarify that it was not the truth and that the children were not terrorists. This would also mean much for the family to be safer, both themselves and Rafael's daughter. It would be important to return to the family the two children who are still in prison and whom they have not seen for a long time; who were tried by faceless judges and were kept in custody without a trial for a long time. Finally, there is a need for medical and psychological rehabilitation of the next of kin of the alleged victims.

Financial compensation must cover work capacities and lost earnings. The alleged victims were young and intelligent and, in fact, they already worked and had many responsibilities within the family. They would have had good jobs and earned a lot of money.

i. Expert opinion of Hans Petter Houguen, an expert in forensic pathology

He is the vice-Chair of the Forensic Pathology Department at the University of Copenhagen, Denmark, and he has collaborated with Amnesty International and with the United Nations. He is also an *ad hoc* expert of the British *Home Office*.

He had access to the protocols of the autopsies conducted by the Forensic Medicine Institute of the Public Prosecutors' Office of the Republic of Peru, of

the Forensic Medicine Division of El Callao, the results of the autopsies and the photographs that the family took of the corpses of both Rafael Samuel and Emilio Moisés Gómez Paquiyaauri.

Descriptions of injuries and other pathologies in a protocol must be done in such a detailed manner that another expert can reach the same conclusion as the pathologist who did the autopsy. In this case, the protocols of the two autopsies are very brief and lack many descriptions of the various injuries. While there was a description of the wounds caused by firearms, it would have been necessary to provide greater detail regarding the trajectory of the bullet. For example, regarding to the head, there was no reference to the phenomenon of the "bevel" of the skull bone, when a bullet goes through it, which is crucial to know the direction of the bullet. Several affirmative points were also missing, merely marked "normal." In pathology one usually describes both what is normal and what is pathological. Furthermore, no pictures of the corpses taken during the autopsy were included. There no inspection of the site of the facts and no toxicological or biological examination of natural orifices in search of, for example, semen, to verify that no sexual crime was committed.

Behind Rafael's left eye, on the lower edge, there was an injury consistent with exit of a bullet. There were other lesions on his face, including abrasions on his nasal ala. There was also a red hematoma and another blue one on the upper eyelid, probably caused by exit of the bullet. Finally, he noticed flaying in the upper eyelid as well as some linear erosions, which might have been fingernail marks. Some of the flaying, as well as one of the hematomas, might have been caused by violence inflicted by another person.

On Rafael's hands, the left one had a round, black injury surrounded by a pink area. On the right hand there was an irregular black injury and another one on the thumb, where the external part of said finger was missing and the fingernail was displaced and almost separated from the finger. In addition to this, there was a small injury on the third finger of the right hand. The characteristics of the three wounds were those caused by firearms: round and with regular edges and with the black color of burnt gunpowder. This is also consistent with a very short-range shot, less than a centimeter away, probably in direct contact. The pink discoloration around them indicated that the impact occurred while there was blood circulation, in other words, it was consistent with the existence of life.

The expert witness also stated that it was not possible for a person to die instantaneously from a bullet shot to a hand. It was not possible to establish the type of revolver, pistol, or other firearm used in this case, but the wound was consistent with an "MGP" firearm.

Regarding to Emilio Moisés Gómez Paquiyaauri, it could be seen that the skin around the right eye was discolored and reddish. There were two wounds there: one on the inner edge of the right eye and another on the upper right eyelid; they were relatively round and seem to be from bullet exits, although it was not possible to verify that they were caused by firearms, because bullet exit wounds may have many shapes. On the upper right eyelid there was also a small, blue hematoma and two flayings.

There were a number of holes in Rafael's clothing that were not there

previously and that could have been caused by the tip of a bayonet.

C) ASSESSMENT OF THE EVIDENCE

Assessment of the Documentary Evidence

50. In this case, as in others,¹⁴ *the Court* admits the evidentiary value of those documents that were submitted by the parties at the appropriate procedural time or as evidence to facilitate adjudication of the case, which was not contested or challenged, and the authenticity of which was not questioned. On the other hand, the Court, pursuant to Article 44 of the Rules of Procedure, admits the evidence submitted by the parties regarding to events supervening to the filing of the application.

51. This Court has deemed, regarding to newspaper clippings, that while they are not documentary evidence proper, they may be taken into account when they reflect publicly known or notorious facts, statements by State officials, or when they corroborate what is set forth in other documents or testimony tendered in the proceeding.¹⁵

52. The Court finds that the statement by Bent Sorensen, offered as an expert witness by the representative of the alleged victims and their next of kin, was contributed to the proceeding (*supra* para. 25) in accordance with the President's March 1, 2004 Order (*supra* para. 24). Its content and the signature of the person who signed the statement were certified by a notary public.

53. In this regard, the State argued that the expert witness "ha[s] not talked or discussed the cases with any of the victims or witnesses;" for which reason "the conclusions [of the expert witness] can in no way be categorical or decisive."¹⁶

54. The Court admits Bent Sorensen's expert opinion insofar as it is in accordance with the object defined by the President in the Order to receive it¹⁷ (*supra* para. 24) and the Court will appraise its content, as it has done in other cases, within the context of the body of evidence and applying the rules of competent analysis.¹⁸

55. Regarding to the video submitted by the representatives of the argued victims and their next of kin on May 1, 2004 (*supra* para. 27), the State stated that "it is an edited video -and what was presented was a copy- that intentionally leads to error by repeating the audio with certain images, which clearly show its manipulation[; i]t is

¹⁴ See *Case of Maritza Urrutia*, *supra* note 5, para. 52; *Case of Myrna Mack Chang*, *supra* note 5, para. 128; and *Case of Bulacio*, *supra* note 6, para. 57.

¹⁵ See *Case of Myrna Mack Chang*, *supra* note 5, para. 131 *in fine*; *Case of Bulacio*, *supra* note 6, para. 63; and *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, para. 56.

¹⁶ See file on the merits, reparations, and costs, volume IV, leaves 907 to 917.

¹⁷ See *Case of Myrna Mack Chang*, *supra* note 5, para. 130; *Case of Las Palmeras. Reparations* (Art. 63(1) American Convention Human Rights). Judgment of November 26, 2002. Series C No. 96, para. 30; and *Case of the Caracazo. Reparations* (Art. 63(1) American Convention Human Rights). Judgment of August 29, 2002. Series C No. 95, para. 59.

¹⁸ See *Case of Maritza Urrutia*, *supra* note 5, paras. 44, 48 and 49; *Case of Myrna Mack Chang*, *supra* note 5, paras. 120 and 121; *Case of Bulacio*, *supra* note 6, para. 62; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 55; and *Case of the Caracazo. Reparations*, *supra* note 17, para. 60.

in black and white, but the technology at the time already allowed color images[...; t]here is no correspondence between the audio and the images[, m]any of which have been arranged[...; t]he [h]elicopter that allegedly was flying over the scene of the crime is not in accordance with the facts investigated, or at the least there is no way to categorize it[...; w]hen an event is broadcast by the media, the most sensational facts are shown, and when they do not have sufficient images, they seek other supporting footage, which may or may not be of the scene of the crime under investigation.”

56. In this regard, the Court admits the video submitted by the representative of the alleged victims and their next of kin on May 1, 2004 (*supra* para. 27). However, it will not attach full evidentiary value to the respective item of evidence, but rather will appraise its content within the context of the body of evidence and applying the rules of competent analysis.

57. Regarding to the documents submitted by the representative of the alleged victims and their next of kin during the public hearing, the State argued that “the copies or photocopies of the criminal proceeding [...] were obtained illegally and without a court order, which leads us to the theory of the fruit of the forbidden tree.”

58. The legal system is a means to attain justice and the latter may not be set aside for the sake of mere formalities,¹⁹ although the Court does seek to ensure legal certainty and procedural balance among the parties.²⁰ This proceeding, because it is before an international court and because it addresses human rights violations, is more flexible and informal in nature than proceedings before the domestic authorities.²¹

59. The Court appraises the documents challenged by the State and, taking into account the aforementioned non-formalist criterion, it dismisses the challenge and accepts said documents as evidence.

60. Regarding to the documents requested by this Court, based on Article 45 of the Rules of Procedure, and that were submitted by the representative of the alleged victims and their next of kin (*supra* paras. 31 and 32), the Court includes them in the body of evidence of the instant case, applying the provision set forth in paragraph one of said rule.

Assessment of the Testimony and Expert Opinions

61. Regarding to the statements made by Marcelina Paquiyauri Illanes de Gómez, Samuel Gómez Quispe, Lucy Rosa Gómez Paquiyauri and Miguel Ángel Gómez Paquiyauri in the instant case (*supra* para. 49), the State pointed out in its brief with the reply to the application (*supra* para. 19) that “their statements are, in

¹⁹ See *Case of Juan Humberto Sánchez. Interpretation of Judgment*, *supra* note 6, para. 42; *19 Merchants Case. Preliminary Objections. Judgment of June 12, 2002. Series C No. 93*, para. 35; *Case of Ivcher Bronstein. Judgment of February 6, 2001. Series C No. 74*, para. 67; and *Case of “The Last Temptation of Christ” (Olmedo Bustos et al.)*. Judgment of February 5, 2001. Series C No. 73, para. 51.

²⁰ See *Case of Maritza Urrutia*, *supra* note 5, para. 48; *Case of Juan Humberto Sánchez. Interpretation of Judgment*, *supra* note 6, para. 28; *Case of Myrna Mack Chang*, *supra* note 5, para. 120; and *Case of Bulacio*, *supra* note 6, para. 42.

²¹ See *Case of Maritza Urrutia*, *supra* note 5, para. 48; *Case of Juan Humberto Sánchez. Interpretation of Judgment*, *supra* note 6, para. 42; *Case of Myrna Mack Chang*, *supra* note 5, para. 120; and *Case of Bulacio*, *supra* note 6, para. 42.

themselves, extremely biased and self-interested, and therefore they must be assessed very prudently as regards the legal value they may have." On the other hand, the State challenged the testimony of Miguel Ángel Gómez Paquiyauri "[b]ecause he is the blood brother of the alleged victims and due to the direct interest of the outcome of the instant proceeding, and because he is neither impartial nor objective, and because at the time of the facts he was a minor, and making him reminisce would in some way affect him" (*supra* para. 29).

62. In his March 1, 2004 order the President stated that "there have been no challenges or recusations to appearance of the witnesses offered, as the State has merely questioned the objectiveness of the statements of Marcelina Paquiyauri Illanes de Gómez, Ricardo Samuel Gómez Quispe [and] Lucy Rosa Gómez Paquiyauri, next of kin of the alleged victims. In this regard, the President deems that the statements of the next of kin of the alleged victims cannot be appraised in an isolated manner, but rather within the set of evidence tendered in the proceeding, and they are useful insofar as they may provide further information about the facts argued in the instant case."²²

63. The Court admits the statements made by Marcelina Paquiyauri Illanes de Gómez, Samuel Gómez Quispe, Lucy Rosa Gómez Paquiyauri and Miguel Ángel Gómez Paquiyauri, insofar as they are in accordance with the object of the examination, as proposed respectively by the Inter-American Commission and by the representative of the alleged victims and their next of kin. In this regard, this Court deems that since they are next of kin of the alleged victims and they have a direct interest in this case, their statements cannot be appraised in an isolated manner, but rather within the set of evidence in the proceeding, as the President stated.²³ Regarding both to the merits and to reparations, the testimony of the next of kin of the alleged victims is useful insofar as it may provide additional information on the consequences of the violations that may have been committed.²⁴

64. The State argued that the expert opinions rendered by Inge Genefke and Hans Petter Houguen during the public hearing (*supra* para. 49.h and 49.i) "were not impartial, and were even less objective[;] and their statement[s] can only be considered a reference and must be viewed as an opinion and in no case as technical expert opinions that come close to legal certainty."

65. The Court admits the expert opinions of Hans Petter Houguen and Inge Genefke insofar as they are in accordance with the object defined by the President when he ordered them (*supra* para. 24), and it will appraise their content within the context of the body of evidence, following the rules of competent analysis.

66. The Court will assess the evidentiary value, in this case, of the documents, statements, and expert opinions submitted to it in writing or as oral statements. The evidence tendered during all stages of the proceeding has been integrated in a single

²² See, *inter alia*, *Case of Maritza Urrutia*, *supra* note 5, para. 53; *Case of Myrna Mack Chang*, *supra* note 5, para. 132; *Case of Bulacio*, *supra* note 6, para. 66; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 57; and *Case of the "Five Pensioners"*. Judgment of February 28, 2003. Series C No. 98, para. 85.

²³ See *Gómez Paquiyauri Case*. March 1, 2004 Order of the President, Whereas nine.

²⁴ See, *inter alia*, *Case of Maritza Urrutia*, *supra* note 5, para. 53; *Case of Myrna Mack Chang*, *supra* note 5, para. 132; *Case of Bulacio*, *supra* note 6, para. 66; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 57; and *Case of the "Five Pensioners"*, *supra* note 22, para. 85.

body of evidence that is considered a whole.²⁵

VII PROVEN FACTS

67. Based on the facts set forth in the application, the documentary evidence, the testimony of the witnesses, the expert opinions of the expert witnesses, and the arguments of the Commission, of the representative of the alleged victims and their next of kin and of the State, the Court finds the following facts proven:

Regarding to the situation of the country

67.a) Between 1984 and 1993 there was a conflict in Peru between armed groups and agents of the police and military forces, in the midst of a systematic practice of human rights violations, including extra-legal executions, of persons suspected of belonging to armed groups. These practices were carried out by State agents following orders of military and police commanders.²⁶

67.b) The state of emergency was declared several times during this period, including the Province of El Callao.²⁷

67.c) Specifically, a plan known as the "Cercos Noventiuno", designed to capture and execute the principals of terrorist acts, was carried out in 1991.²⁸

Regarding to Rafael Samuel and Emilio Moisés Gómez Paquiyaury

67.d) Rafael Samuel Gómez Paquiyaury was born on February 7, 1974 in San Miguel, Lima.²⁹ His brother, Emilio Moisés Gómez Paquiyaury, was born on

²⁵ See *Case of Maritza Urrutia*, *supra* note 5, para. 57; *Case of Bulacio*, *supra* note 6, para. 38; and *Case of Juan Humberto Sánchez*, *supra* note 15, para. 60.

²⁶ See *Case of Cantoral Benavides*. Judgment of August 18, 2000. Series C No. 69, para. 63.t); *Case of Castillo Páez*. Judgment of November 3, 1997. Series C No. 34, para. 42; *Case of Loayza Tamayo*. Judgment of September 17, 1997. Series C No. 33, para. 46.l); Inter-American Commission on Human Rights, Report N° 101/01, Cases Nos. 10.247 and others, paras. 160 to 171; Inter-American Commission on Human Rights, Informe sobre la Situación de los Derechos Humanos en Perú, 1993, Documento OEA/Ser.L/V/II.83. Doc.31, March 12, para. 16; video of the newscast *Noticiero "90 segundos"* broadcast by Channel 2 of the Peruvian national television June 21, 1991 (file with appendixes to the application, appendix 6); and article entitled "Histeria Criminal" published in the July 1, 1991 edition of "Revista Caretas" (file with appendixes to the application, volume I, appendix 8, leaves 60 to 63).

²⁷ See *Durand and Ugarte Case*. Judgment of August 16, 2000. Series C No. 68, para. 59.q); *Case of Loayza Tamayo*, *supra* note 26, para. 46.b); *Neira Alegria et al. Case*. Judgment of January 19, 1995. Series C No. 20, paras. 40 and 77; and Inter-American Commission on Human Rights, Informe sobre la Situación de los Derechos Humanos en Perú, 1993, Document OEA/Ser.L/V/II.83. Doc.31, March 12, 1993, paras. 8 and 22.

²⁸ See judgment issued by the Third Criminal Chamber of El Callao on November 9, 1993 (file with appendixes to the application, volume I, appendix 21, leaves 288 to 318); and statement made on June 26, 1991 by PNP-PG Commander Pedro Raúl Gonzales Paredes before the examiner of the Homicide Department of the División de Delitos contra la Vida (file with appendixes to the application, volume I, appendix 13, leaves 129 to 131).

²⁹ See birth certificate of Rafael Samuel Gómez Paquiyaury (file with appendixes to the application, volume I, appendix 5, leaves 51 to 52).

February 6, 1977 in San Miguel, Lima.³⁰ Both were students at the time of the facts,³¹ and they occasionally helped their father in various tasks, including ship reparation.³²

67.e) On the morning of June 21, 1991, Rafael Samuel and Emilio Moisés Gómez Paquiyauri were going to their mother's workplace in the province of El Callao, when they were intercepted and detained by agents of the Peruvian National Police³³ who were searching for persons involved in alleged terrorist acts, in the course of implementation of the "Cercos Noventiuno" plan.³⁴

67.f) After their detention, Rafael Samuel and Emilio Moisés Gómez Paquiyauri were thrown to the ground, kicked, and a policeman stepped on their backs.³⁵ The policemen then covered their head and dragged them to the trunk of a patrol car.³⁶ These actions were recorded by television cameras of

³⁰ See birth certificate of Emilio Moisés Gómez Paquiyauri (file with appendixes to the application, volume I, appendix 5, leaf 53).

³¹ See official study certificate of Emilio Moisés Gómez Paquiyauri issued by the Secretariat of the Ministry of Education, Series C N° 434530 (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 2, leaf 412); secondary education information card of Rafael Samuel Gómez Paquiyauri issued by the Ministry of Education for 1987 (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 3, leaves 413 to 414); secondary education report card of Rafael Samuel Gómez Paquiyauri issued by the Ministry of Education for 1988 (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 3, leaves 415 to 416); official study certificate of Rafael Samuel Gómez Paquiyauri issued by the Secretariat of the Ministry of Education, Series C N° 434529 (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 3, leaf 417); and letter of the Academia Pre-Universitaria Blas Pascal addressed to Rafael Samuel Gómez Paquiyauri on May 10, 1990 (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 4, leaf 418).

³² See photocopies of manuscripts drafted by Rafael Samuel Gómez Paquiyauri regarding to ship valve maintenance and repair (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 5, leaves 419.a) and 419.b); statement rendered on March 30, 2002 by Ricardo Samuel Gómez Quispe at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 18, leaves 475 to 478); and statement rendered on March 30, 2002 by Lucy Rosa Gómez Paquiyauri at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 1, leaves 404 to 411).

³³ See video of the "90 segundos" news broadcast on Channel 2 of the Peruvian national television June 21, 1991 (file with appendixes to the application, appendix 6); and statement rendered on March 30, 2002 by Bertha Alarcón de Valencia at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 33, leaf 508).

³⁴ See article entitled "Histeria Criminal" published in the July 1, 1991 edition of "Revista Caretas" (file with appendixes to the application, volume I, appendix 8, leaves 60 to 63); police record No. 281-IC-H-DDCV of June 26, 1991 (file with appendixes to the application, volume I, appendix 13, leaves 88 to 131); and judgment issued by the Third Criminal Chamber of El Callao on November 9, 1993 (file with appendixes to the application, volume I, appendix 21, leaves 288 to 318).

³⁵ See video of the "90 segundos" news broadcast on Channel 2 of the Peruvian national television June 21, 1991 (file with appendixes to the application, appendix 6); statement rendered on March 30, 2002 by Bertha Alarcón de Valencia at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 33, leaf 508); and article entitled "Policías asesinos saltaron sobre los cuerpos de sus tres víctimas" published by the daily "La República" on June 27, 1991 (file with appendixes to the application, volume I, appendix 9, leaf 66).

³⁶ See video of the "90 segundos" news broadcast on Channel 2 of the Peruvian national television June 21, 1991 (file with appendixes to the application, appendix 6); photograph of Emilio Moisés Gómez Paquiyauri from the back and standing with the face covered by a coat (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 38, leaf 519); photograph of

the Noticiero "90 segundos" newscast on Channel 2 of the Peruvian national television.³⁷

67.g) The brothers Rafael Samuel and Emilio Moisés Gómez Paquiyauri were then taken, under police custody, to a place called "Pampa de los Perros", where they were beaten with the butt of a shotgun and subsequently murdered by firearm shots to the head, thorax, and other parts of the body.³⁸

Emilio Moisés Gómez Paquiyauri inside the trunk of the patrol car (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 39, leaf 520); article entitled "Fueron torturados y luego salvajemente asesinados" published by the daily "La República" of June 26, 1991 (file with appendixes to the application, volume I, appendix 9, leaf 66); and statement given on July 21 and 26, and on August 2, 5, 9, 12 and 17, 1993 by Ángel del Rosario Vásquez Chumo before the Third Criminal Chamber of El Callao (file with appendixes to the application, volume I, appendix 17, leaves 155 to 191).

³⁷ See video of the "90 segundos" news broadcast on Channel 2 of the Peruvian national television June 21, 1991 (file with appendixes to the application, appendix 6).

³⁸ See video of the "90 segundos" news broadcast on Channel 2 of the Peruvian national television June 21, 1991 (file with appendixes to the application, appendix 6); article entitled "Camino a la Muerte" published by the "Revista Domingo" of the daily "La República" on June 30, 1991 (file with appendixes to the application, volume I, appendix 7, leaves 54 to 59); article entitled "Histeria Criminal" published in the July 1, 1991 edition of "Revista Caretas" (file with appendixes to the application, volume I, appendix 8, leaves 60 to 63); article entitled "Fueron torturados y luego salvajemente asesinados" published by the daily "La República" of June 26, 1991 (file with appendixes to the application, volume I, appendix 9, 65 and 66); photographs of the bodies of Emilio Moisés and Rafael Samuel Gómez Paquiyauri at the morgue of the Alcides Carrión Hospital and record of entry of the corpse identified as Rafael Samuel Gómez Paquiyauri at the Instituto de Medicina Legal del Perú (file with appendixes to the application, volume I, appendix 10, leaves 67 to 70); autopsy protocols for the corpses of Rafael Samuel and Emilio Moisés Gómez Paquiyauri issued by the Instituto de Medicina Legal del Perú "Leónidas Avendaño Ureta" on June 22, 1991 (file with appendixes to the application, volume I, appendix 11, leaves 71 to 83); death certificates of Rafael Samuel and Emilio Moisés Gómez Paquiyauri, issued on July 15, 1991 (file with appendixes to the application, volume I, appendix 12, leaves 84 to 87); police record No. 281-IC-H-DDCV of June 26, 1991 (file with appendixes to the application, volume I, appendix 13, leaves 88 to 131); formalization of the criminal complaint by the Provincial Prosecutor of the Fifth Criminal Prosecutor's Office of El Callao on June 27, 1991, before the Examining Judge on Duty (file with appendixes to the application, volume I, appendix 14, leaves 132 to 134); order for the preliminary stage of the criminal proceeding to begin, issued on June 27, 1991 (file with appendixes to the application, volume I, appendix 15, leaves 135 to 138); statement given on July 21 and 26, and on August 2, 5, 9, 12 and 17 1993 by Ángel del Rosario Vásquez Chumo before the Third Criminal Chamber of El Callao (file with appendixes to the application, volume I appendix 17, leaves 155 to 191); records of the public oral hearings on June 3, 7, 21, 24, 28 and 29; July 2, 6, 8, 12 and 15, 1993 in the trial under file 227-92 before the Third Criminal Chamber of El Callao (file with appendixes to the application, volume I, appendix 18, leaves 192 to 245); conclusion of the Judge *ad hoc* Dr. Vilma Buitrón Aranda on April 29, 1992 during the investigative phase regarding the crime of murder, against Francisco Antezano Santillan and Ángel del Rosario Vásquez Chumo (file with appendixes to the application, volume I, appendix 19, leaves 246 to 278); final pronouncement of the investigative phase of the proceeding conducted by the Fifth Criminal Court of El Callao, on September 21, 1992 (file with appendixes to the application, volume I, appendix 20, leaves 279 to 287); judgment issued by the Third Criminal Chamber of El Callao on November 9, 1993 (file with appendixes to the application, volume I, appendix 21, leaves 288 to 318); statement rendered on March 30, 2002 by Lucy Rosa Gómez Paquiyauri at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 1, leaves 404 to 411); statement rendered on March 30, 2002 by Marcelina Paquiyauri Illanes de Gómez at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 10, leaves 449 to 457); photograph showing the face of Emilio Moisés Gómez Paquiyauri at the morgue (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 40, leaf 521); record of entry of the corpses identified as Emilio Moisés and Rafael Samuel Gómez Paquiyauri issued by the Instituto de Medicina Legal del Perú "Leónidas Avendaño Ureta" on June 21, 1991 (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 41, leaves 522 and 523); photograph of the face of the corpse of Emilio Moisés Gómez Paquiyauri (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 43, leaf 536); photograph of the face of the corpse of Rafael Samuel Gómez Paquiyauri (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 44, leaf 537); photograph of the corpse of Rafael Samuel Gómez Paquiyauri in its coffin (file with appendixes to the

67.h) Approximately one hour after their detention, the bodies of Rafael Samuel and Emilio Moisés Gómez Paquiyauri entered the morgue of the San Juan hospital, currently called "Daniel Alcides Carrión", as NN (Unidentified).³⁹

67.i) Before they died, Rafael Samuel and Emilio Moisés Gómez Paquiyauri suffered torture inflicted on them by agents of the Peruvian National Police.⁴⁰

67.j) At the morgue, the bodies of Rafael Samuel and Emilio Moisés Gómez Paquiyauri were full of blood and dirt, soiled, wet; there was encephalic mass on their hair, and one of Emilio's fingers was missing. The eyes were empty in both of them.⁴¹

67.k) The State agents involved in the facts sought to present Rafael Samuel and Emilio Moisés Gómez Paquiyauri before public opinion as if they had been terrorists, and as if their death had taken place in an armed confrontation.⁴²

Regarding to domestic actions

67.l) The parents of the alleged victims filed a complaint regarding the facts on June 25, 1991 before the Provincial Prosecutor of the Fifth Criminal Prosecutor's Office.⁴³

67.m) On the other hand, the Peruvian National Police conducted an investigation of the facts, which generated police record No. 281-IC-H-DDCV

written brief containing pleadings, motions, and evidence, volume II, appendix 45, leaf 538); and photograph of the hands of the corpse of Rafael Samuel Gómez Paquiyauri (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 46, leaf 539).

³⁹ See testimony of Lucy Rosa Gómez Paquiyauri before the Court on May 5, 2004; testimony of Marcelina Paquiyauri Illanes de Gómez before the Court on May 5, 2004; and testimony of Miguel Ángel Gómez Paquiyauri before the Court on May 6, 2004.

⁴⁰ See expert opinion of Hans Petter Houguen before the Court on May 6, 2004; autopsy protocols for the corpses of Rafael Samuel and Emilio Moisés Gómez Paquiyauri issued by the Instituto de Medicina Legal del Perú "Leónidas Avendaño Ureta" on June 22, 1991 (file with appendixes to the application, volume I, appendix 11, leaves 71 to 83); testimony of Lucy Rosa Gómez Paquiyauri before the Court on May 5, 2004; testimony of Marcelina Paquiyauri Illanes de Gómez before the Court on May 5, 2004; testimony of Ricardo Samuel Gómez Quispe before the Court on May 5, 2004; testimony of Miguel Ángel Gómez Paquiyauri before the Court on May 6, 2004; and testimony of Jacinta Peralta Allcarima before the Court on May 6, 2004.

⁴¹ See testimony of Lucy Rosa Gómez Paquiyauri before the Court on May 5, 2004; testimony of Marcelina Paquiyauri Illanes de Gómez before the Court on May 5, 2004; and testimony of Miguel Ángel Gómez Paquiyauri before the Court on May 6, 2004.

⁴² See judgment issued by the Third Criminal Chamber of El Callao on November 9, 1993 (file with appendixes to the application, appendix 21, leaves 288 to 318); police record No. 281-IC-H-DDCV of June 26, 1991 (file with appendixes to the application, volume I, appendix 13, leaves 88 to 131); testimony of Lucy Rosa Gómez Paquiyauri before the Court on May 5, 2004; testimony of Marcelina Paquiyauri Illanes de Gómez before the Court on May 5, 2004; testimony of Ricardo Samuel Gómez Quispe before the Court on May 5, 2004; testimony of Miguel Ángel Gómez Paquiyauri before the Court on May 6, 2004; and testimony of Jacinta Peralta Allcarima before the Court on May 6, 2004.

⁴³ See judgment issued by the Third Criminal Chamber of El Callao on November 9, 1993 (file with appendixes to the application, volume I, appendix 21, leaves 288 to 318); formalization of the criminal complaint by the Provincial Prosecutor of the Fifth Criminal Prosecutor's Office of El Callao on June 27, 1991, before the Examining Judge on Duty (file with appendixes to the application, volume I, appendix 14, leaves 132 to 134); testimony of Ricardo Samuel Gómez Quispe before the Court on May 5, 2004; and testimony of Víctor Chuquitaype Equiluz before the Court on May 6, 2004.

of June 26, 1991.⁴⁴

67.n) Based on the application filed by the Gómez Paquiyauris and on police record No. 281-IC-H-DDCV, on June 27, 1991, the Fifth Criminal Prosecutor's Office formalized a criminal complaint before the trial judge on duty, against several agents of the Peruvian National Police, including Sergeant Francisco Antezano Santillán, noncommissioned officer Ángel del Rosario Vásquez Chumo and Captain César Augusto Santoyo Castro, for the crime of aggravated homicide against Rafael Samuel and Emilio Moisés Gómez Paquiyauri, processed as file 227-92.⁴⁵

67.o) On September 2, 1992 the Fifth Criminal Court of El Callao issued the final pronouncement of the preliminary stage.⁴⁶

67.p) On November 9, 1993 the Third Criminal Chamber of El Callao issued a judgment (hereinafter "the November 9, 1993 judgment"),⁴⁷ in which:

67.p.1) it convicted Sergeant Francisco Antezano Santillán as the perpetrator of the crime of aggravated murder against Rafael Samuel Gómez Paquiyauri and Emilio Moisés Gómez Paquiyauri, and for the crime against the jurisdictional function of the legal system, to the detriment of the State, sentencing him to eighteen years in prison and two years of disenfranchisement;

67.p.2) it convicted noncommissioned officer Ángel del Rosario Vásquez Chumo as an accomplice, for the crime of aggravated homicide against Rafael Samuel Gómez Paquiyauri and Emilio Moisés Gómez Paquiyauri, and for the crime against the jurisdictional function of the legal system to the detriment of the State, to six years in prison and two years of disenfranchisement;

67.p.3) it ordered that the convicts pay to the next of kin of the alleged victims a civil reparation of twenty thousand *nuevos soles*;

67.p.4) it established that there was a mastermind of the facts, Captain César Augusto Santoyo Castro of the Peruvian National Police, who "told operator Antezano Santillán to take the detainees in the trunk of the car [...] with the aim of killing them and that this order

⁴⁴ See police record No. 281-IC-H-DDCV of June 26, 1991 (file with appendixes to the application, volume I, appendix 13, leaves 88 to 131).

⁴⁵ See formalization of the criminal complaint by the Provincial Prosecutor of the Fifth Criminal Prosecutor's Office of El Callao on June 27, 1991 (file with appendixes to the application, volume I, appendix 14, leaves 132 to 134).

⁴⁶ See final pronouncement of the investigative phase of the proceeding conducted by the Fifth Criminal Court of El Callao on September 21, 1992 (file with appendixes to the application, volume I, appendix 20, leaves 279 to 287).

⁴⁷ See judgment issued by the Third Criminal Chamber of El Callao on November 9, 1993 (file with appendixes to the application, volume I, appendix 21, leaves 288 to 318).

was confirmed over the radio during the trip to the appointed place."⁴⁸
 In this regard, the judgment ordered that the trial of indictee César Augusto Santoyo Castro be postponed, and that new orders be issued to locate, capture and incarcerate him in a public jail; and

67.p.5) it granted the extraordinary remedy of ex officio nullity, and it ordered that the case file be forwarded to the Supreme Court of Justice of the Republic.

67.q) On June 9, 1994 the Transitory Criminal Chamber of the Supreme Court of Peru issued a judgment, in which it found that there was no nullity in the November 9, 1993 judgment (*supra* para. 67.p), and it upheld the sentences imposed by the judgment reviewed.⁴⁹

67.r) On November 10, 1995 Francisco Antezano Santillán received the benefit of semi-liberty and, on November 18, 1994, Ángel del Rosario Vásquez Chumo was granted parole.⁵⁰

67.s) The State has issued several arrest warrants against Captain César Augusto Santoyo Castro, but to date he has not been arrested.

Regarding to the next of kin of Rafael Samuel and Emilio Moisés Gómez Paquiyauri

67.t) The next of kin of Rafael Samuel and Emilio Moisés Gómez Paquiyauri are: Marcelina Paquiyauri Illanes de Gómez, their mother; Ricardo Samuel Gómez Quispe, their father; and Marcelina Haydeé, Ricardo Emilio, Carlos Pedro, Lucy Rosa and Miguel Ángel, all of them Gómez Paquiyauri, their siblings.

67.u) Rafael Samuel Gómez Paquiyauri had a daughter from his relationship with Jacinta Peralta Allccarima, whose name is Nora Emely Gómez Peralta, born on February 27, 1992;⁵¹

⁴⁸ See judgment issued by the Third Criminal Chamber of El Callao on November 9, 1993 (file with appendixes to the application, volume I, appendix 21, leaves 288 to 318).

⁴⁹ See the June 9, 1994 judgment (*Ejecutoria Suprema*) issued by the Transitory Criminal Chamber of the Supreme Court of Peru (file with appendixes to the application, volume I, appendix 24, leaves 344 to 347).

⁵⁰ See court decree of the Fifth Criminal Court of El Callao, on November 10, 1995, granting the benefit of "semi-liberty" requested by Francisco Antezano Santillán; and court decree of the Fifth Criminal Court of El Callao, on November 18, 1994, granting the "parole" requested by Ángel del Rosario Vásquez Chumo, both in connection with the investigation on them for the crime of aggravated homicide against Rafael Samuel and Emilio Moisés Gómez Paquiyauri (file with appendixes to the application, appendix 26). The above was proven, even though the agent of the State expressed in the course of the public hearing in the instant case, that "[a]ll the indictees [...] availed themselves of [the amnesty] law."

⁵¹ See birth certificate issued by the Dirección de Salud del Callao, which establishes that Nora Emely Gómez Peralta's father is Jorge Gómez Palacios. According to said certificate, the girl was born on February 27, 1992 (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 22, leaf 491); birth certificate issued by the Municipalidad Provincial del Callao, in which the birth of Nora Emely Gómez Peralta is registered on March 11, 1992 and Ricardo Samuel Gómez Quispe, Rafael Samuel Gómez Paquiyauri's father, is registered as the girl's father (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 23, leaf 492); birth record certificate issued by the Consejo Provincial del Callao, stating that the girl's birth is registered as having taken place on March 11, 1992. In this certificate, Ricardo Samuel Gómez Quispe once again is recorded as the girl's father (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 24, leaf 494); letter from the Gómez Paquiyauri family on April 5, 2002,

67.v) Nora Emely Gómez Peralta has not been registered as the daughter of Rafael Samuel Gómez Paquiyauri, due to her mother's fear.⁵²

67.w) After the death of the minors, the next of kin of Rafael Samuel and Emilio Moisés Gómez Paquiyauri were harassed several times by the DINCOTE.⁵³ Officers of the DINCOTE visited the Gómez Paquiyauri family's house several times, breaking furniture and tearing mattresses in search of evidence to show that the youths were subversives.⁵⁴ The DINCOTE also sent summons for the family to appear at their offices for interrogation;⁵⁵ they constantly followed the members of the family⁵⁶ and at night they parked police cars in the area.⁵⁷ They offered the family money several times, apparently sent by the heads of the police and other authorities.⁵⁸

67.x) Several members of the Gómez Paquiyauri family were affected by the facts. The parents of the alleged victims went to various places in search of justice, and received no response.⁵⁹ The health of Mrs. Marcelina Paquiyauri, the mother of the alleged victims, deteriorated. In the days after the death of

recognizing Nora Emely Gómez Peralta as the daughter of Rafael Samuel Gómez Paquiyauri (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 21, leaves 489 and 490); and statement rendered on March 30, 2002 by Jacinta Peralta Allccarima at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 20, leaves 484 to 488).

⁵² Testimony of Jacinta Peralta Allccarima before the Court on May 6, 2004.

⁵³ See statement rendered on March 30, 2002 by Marcelina Paquiyauri Illanes de Gómez at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 10, leaves 449 to 457); and statement rendered on March 30, 2002 by Ricardo Samuel Gómez Quispe at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 18, leaves 475 to 478).

⁵⁴ See statement rendered on March 30, 2002 by Lucy Rosa Gómez Paquiyauri at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 1, leaves 404 to 411); statement rendered on March 30, 2002 by Miguel Ángel Gómez Paquiyauri at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 8, leaves 439 to 443); and statement rendered on March 30, 2002 by Marcelina Paquiyauri Illanes de Gómez at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 10, leaves 449 to 457).

⁵⁵ See statement rendered on March 30, 2002 by Marcelina Paquiyauri Illanes de Gómez at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 10, leaves 449 to 457); and "order to appear" issued on July 1, 1991 summoning Marcelina Paquiyauri to appear before the DINCOTE on July 3, 1991 (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 11, leaf 458).

⁵⁶ See statement rendered on March 30, 2002 by Miguel Ángel Gómez Paquiyauri at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 8, leaves 439 to 443).

⁵⁷ See statement rendered on March 30, 2002 by Miguel Ángel Gómez Paquiyauri at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 8, leaves 439 to 443).

⁵⁸ See statement rendered on March 30, 2002 by Ricardo Samuel Gómez Quispe at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 18, leaves 475 to 478).

⁵⁹ See statement rendered on March 30, 2002 by Marcelina Paquiyauri Illanes de Gómez at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 10, leaves 449 to 457).

their children, the Gómez Paquiyauri couple left their work activities for some time, the father for three weeks⁶⁰ and the mother for a year.⁶¹ The older sister of the minors, Marcelina Haydeé Gómez Paquiyauri, who was nine months pregnant at the time of the facts, suffered a nervous ailment and lost her baby a few days later.⁶² In the days after the execution, Miguel Ángel was afraid to be alone at home and had problems sleeping. Also, when he completed secondary schooling he was unable to continue studying due to the financial difficulties faced by the family.⁶³ Like her next of kin, Lucy Rosa Gómez Paquiyauri suffered physical health problems as a consequence of the facts.

67.y) On October 29, 1992 the sister of the alleged victims, Lucy Rosa Gómez Paquiyauri, who at the time was 16 years old, was detained, and set free four years later.⁶⁴

67.z) Partial impunity in this case continues to cause suffering to the next of kin of Rafael Samuel and Emilio Moisés Gómez Paquiyauri.⁶⁵

Regarding to representation of the next of kin before the inter-American system for protection of human rights and the expenses pertaining to said representation

67.aa) CEPAZ represented the alleged victims and their next of kin before the Inter-American Commission, and for this it incurred a number of

⁶⁰ See statement rendered on March 30, 2002 by Ricardo Samuel Gómez Quispe at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 18, leaves 475 to 478).

⁶¹ See statement rendered on March 30, 2002 by Lucy Rosa Gómez Paquiyauri at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 1, leaves 404 to 411).

⁶² See statement rendered on March 30, 2002 by Marcelina Haydeé Gómez Paquiyauri at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 14, leaves 469 and 470); and reminder of Mass on July 21, 1991 for Rafael Samuel and Emilio Moisés Gómez Paquiyauri, as well as for Jorge Javier, the baby lost by Marcelina Haydeé Gómez Paquiyauri (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 16, leaves 471 and 472).

⁶³ See statement rendered on March 30, 2002 by Marcelina Paquiyauri Illanes de Gómez at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 10, leaves 449 to 457).

⁶⁴ See statement rendered on March 30, 2002 by Lucy Rosa Gómez Paquiyauri at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 1, leaves 404 to 411); statement rendered on March 30, 2002 by Marcelina Paquiyauri Illanes de Gómez at El Callao (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 10, leaves 449 to 457); and ruling of the investigative phase in the proceeding against Lucy Rosa Gómez Paquiyauri as a consequence of her detention on February 3, 1993 (file with appendixes to the written brief containing pleadings, motions, and evidence, volume II, appendix 6, leaves 420 to 429).

⁶⁵ See testimony of Lucy Rosa Gómez Paquiyauri before the Court on May 5, 2004; testimony of Marcelina Paquiyauri Illanes de Gómez before the Court on May 5, 2004; testimony of Ricardo Samuel Gómez Quispe before the Court on May 5, 2004; testimony of Miguel Ángel Gómez Paquiyauri before the Court on May 6, 2004; expert opinion of Inge Genefke before the Court on May 6, 2004; and expert opinion rendered before a notary public by expert witness Bent Sorensen (evidence file before the Court, volume V, leaves 944 to 954).

expenses.⁶⁶ Mónica Feria Tinta represented the alleged victims and their next of kin before the Inter-American Court, and for this she too incurred various expenses.⁶⁷

VIII INTERNATIONAL RESPONSIBILITY OF THE STATE

Pleadings of the Commission

68. Regarding to the origin of the international responsibility of the State, the Commission pointed out that:

a) in the inter-American system for protection of human rights the international responsibility of the State arises when an act that violates human rights takes place; however, said system is a subsidiary one, and the State has the authority and the duty to try to solve the matter at the domestic level, that is, to investigate, punish, and provide compensation;

b) in this regard, if the State investigates and punishes all those responsible for the facts and adequately compensates the [alleged] victims or their next of kin, "it discharges its international responsibility, which arose when the facts occurred and it is no longer internationally responsible before the inter-American system [for protection] of human rights due to non-compliance with its obligation;" and

c) "in studying whether or not [the] responsibility is applicable, it is necessary to take into account the subsidiary nature of the inter-American system and to ascertain the outcome of the domestic proceedings; otherwise, the inter-American system would practically become a main and original Court and it would lose [the] subsidiary nature given to it by the Inter-American convention."

Pleadings of the representative of the alleged victims and their next of kin

69. Regarding to the emergence of the international responsibility of the State, the representative of the alleged victims and their next of kin stated that:

a) the responsibility of the State does not arise due to lack of due investigation, but from the moment in which the substantive provisions of the Convention were directly breached. The instant case is not one of "procedural" abridgment of the articles of the Convention due to "lack of investigation and punishment of those responsible," but rather, first and foremost, the international responsibility of the State is in question because it violated its obligation to respect the rights enshrined in the American Convention, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyauri;

⁶⁶ See reports by the Inter-American Commission on admissibility (44/01), and on the merits (99/01) of the instant case (file with appendixes to the application, volume I, appendixes 1 and 2, leaves 6 to 47).

⁶⁷ See power of attorney granted to Mónica Feria Tinta by Ricardo Samuel Gómez Quispe and Marcelina Paquiyauri Illanes de Gómez (file on the merits and possible reparations, volume I, leaves 44 to 50); and copies of vouchers submitted as supporting documents for the expenses incurred by the representative of the alleged victims (file with appendixes to the brief with final pleadings of the representative of the alleged victims, volume VII, leaves 1173 to 1514).

- b) the State, as a subject of international law, is responsible for the behavior of all its bodies, agents, and officers who are part of its organization and act in that capacity. “[W]e must not confuse the responsibility of the State for the violation of the primary rule (of the [...] significant international instruments) due to [the] facts attributable to it, with the issue of its obligation (secondary rule) to provide reparation for said violations.” On the other hand, the primary provisions in the instruments that set forth the significant obligations in this matter (the American Convention and the Inter-American Convention against Torture), establish the obligation to investigate cases in which there is allegedly a violation of said provisions and to ensure compliance with the decision issuing from the respective investigations;
- c) the principles regarding emergence of the responsibility of the States under international law for acts attributable to them, are different from the principle of international law according to which the States must have the opportunity, first of all, to remedy the violation of an international provision within the framework of their domestic law before their responsibility may be questioned at the international level; and
- d) in the instant case, the international responsibility of the State arose at the moment that the American Convention was breached “by the arbitrary detention, torture, and summary execution of Rafael Samuel and Emilio Moisés Gómez Paquiyauri”. Subsequent non-compliance due to lack of effective investigation and punishment is also a violation of its international obligations; however, it is “in no way a central violation or the only source of responsibility of the Peruvian State in the instant case”.

Pleadings of the State

70. In its brief with the reply to the application, the State argued that “the human rights violations committed by its agents against the Gómez Paquiyauri brothers and their next of kin have been duly punished, that is, all investigations in this case have been exhausted to establish and identify the perpetrators and participants in the crime against the Gómez Paquiyauri brothers”.

Considerations of the Court

71. The Court will now analyze whether the State is internationally responsible for the facts that the Court has found proven. Regarding to the origin of the international responsibility of the State, the Court has already pointed out that “it deems that the international responsibility of the State can be generated by acts or omissions of any branch or body of the State, whatever its hierarchy, that violate the American Convention”.⁶⁸

72. In this regard, the Court has pointed out that

Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights that can be

⁶⁸ *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.)*, *supra* note 19, para. 72; and see *Case of Juan Humberto Sánchez*, *supra* note 15, para. 142; *Case of the "Five Pensioners"*, *supra* note 22, para. 163; *Case of the Mayagna (Sumo) Awas Tingni Community*. Judgment of August 31, 2001. Series C No. 79, para. 154; *Case of Ivcher Bronstein*, *supra* note 19, para. 168; *Case of the Constitutional Court*. Judgment of January 31, 2001. Series C No. 71, para. 109; *Case of Bámaca Velásquez*. Judgment of November 25, 2000. Series C No. 70, para. 210; and *Case of the "Street Children" (Villagrán Morales et al.)*. Judgment of November 19, 1999. Series C No. 63, para. 220.

attributed, under the rules of international law, to the act or omission of any public authority constitutes an act imputable to the State and which entails its responsibility as established in the Convention.

According to Article 1(1), any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a State organ or official, or a public entity violates one of those rights, this constitutes a failure in the duty to respect the rights and freedoms set forth in that Article.⁶⁹

73. The Court deems that the aim of International Human Rights Law is to provide the individual with means of protection of the internationally recognized human rights vis-à-vis the State. Under international jurisdiction, the parties and the subject matter of the controversy are, by definition, different than under domestic jurisdiction.⁷⁰ As it has stated on previous occasions,⁷¹ in the instant case the Court has the authority to establish the international responsibility of the State and its legal consequences, but not to investigate and punish the individual behavior of the agents of the State who may have participated in the violations.

74. The State argued that the human rights violations committed by its agents against the Gómez Paquiyauri brothers had been duly punished and, therefore, it asked the Court to find that there has been no violation by Peru.

75. However, the Court notes that the complaint filed before the Inter-American Commission on July 2, 1991, as well as the opening of the case by the Commission on June 12, 1992, took place before completion of the domestic proceeding that the State refers to, which ended with the judgment rendered on November 9, 1993 by the Third Criminal Chamber of El Callao, upheld by the judgment of the Transitory Criminal Chamber of the Supreme Court of Peru on June 9, 1994 (*supra* paras. 67.p and 67.q). As a consequence thereof, when the case was brought before the inter-American system, the acts that generated the alleged violations had already been committed. This Court must call to mind that the international responsibility of the State arises immediately when the internationally illegal act attributed to it is committed, although it can only be demanded once the State has had the opportunity to correct it by its own means. Possible subsequent reparation under domestic legal venue does not inhibit the Commission or the Court from hearing the case that has already begun under the American Convention. Therefore, the Court cannot accept the position of the State that it duly investigated, to find that the State has not violated the Convention.

76. The Court also deems that, in accordance with what was set forth in the chapter on proven facts, the responsibility of the State is exacerbated by the existence in Peru, at the time of the facts, of a systematic practice of human rights violations, extra-legal executions, of persons suspected of belonging to armed groups, carried out by agents of the State following orders of military and police commanders.⁷² Said violations violate international *jus cogens*. Likewise, the fact that the alleged victims in this case were children must be taken into account in establishing aggravated responsibility.

⁶⁹ *Case of the "Five Pensioners"*, *supra* note 22, para. 163; *Legal Status and Rights of Migrants without Documents*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 76; *Case of Baena Ricardo et al.*. Judgment of February 2, 2001. Series C No. 72, para. 178; and *Case of Caballero Delgado and Santana*. Judgment of December 8, 1995. Series C No. 22, para. 56.

⁷⁰ See *Case of Cesti Hurtado. Preliminary Objections*. Judgment of January 26, 1999. Series C No. 49, para. 47.

⁷¹ *Case of the "Street Children"* (Villagrán Morales et al.), *supra* note 68, para. 223.

⁷² See *Case of Myrna Mack Chang*, *supra* note 5, para. 139.

IX
RIGHT TO PERSONAL LIBERTY
ARTICLE 7
IN COMBINATION WITH ARTICLE 1(1)

Pleadings of the Commission

77. The Commission argued that the State violated the right to personal liberty set forth in Article 7 of the American Convention, in combination with Article 1(1) of that same treaty, against Emilio Moisés and Rafael Samuel Gómez Paquiyaury, because:

- a) a detention is arbitrary and illegal when it is carried out by State agents disregarding the motives and formalities set forth in the law, when it is carried out without respecting the rules established by the law, and when there has been a misuse of authority of detention, that is, when it is practiced for purposes other than those set forth in and required by the law;
- b) the Gómez Paquiyaury brothers were illegally and arbitrarily detained by members of the Peruvian National Police, with no arrest warrant and without being detected in the act of committing a crime;
- c) even though a state of emergency had been decreed for various departments, allowing detention of a person without a court order issued by a judge having jurisdiction and without the need for detection in the act of committing a crime, the authorities' power to detain is not unlimited and, therefore, the agents of the State cannot set aside the legal prerequisites to legally decree said measure, nor the obligation to exercise judicial oversight of the way the detention took place;
- d) every person who is deprived of his or her liberty must be kept in officially recognized detention centers and brought without delay, pursuant to domestic legislation, before the competent judicial authority; furthermore, the State has the obligation to ensure that the detainee has the possibility of filing an effective judicial remedy to allow judicial oversight of lawfulness of the detention;
- e) the Gómez Paquiyaury brothers were arbitrarily deprived of their liberty, they were not informed of the reasons for their detention, they were not informed of the charges against them, they were not immediately brought before a judge or another official authorized by law to carry out judicial functions, and they were unable to appeal to a judge or court with jurisdiction to file a remedy with the aim of questioning the lawfulness of their detention; and
- f) approximately one hour after their detention, the alleged victims were dead, which makes evident that "[t]he objective of the detention of the Gómez Paquiyaury brothers was to murder them[, which] in itself makes it arbitrary and illegal."

Pleadings of the representative of the alleged victims and their next of kin

78. The representative of the alleged victims and their next of kin argued that the State violated Article 7 of the American Convention, to the detriment of Emilio Moisés and Rafael Samuel Gómez Paquiyaury, because:

- a) even in a state of emergency, suspension of the right to personal liberty authorized by Article 27 of the Convention can never be total; the legal prerequisites for a detention to be lawful, set forth in Article 7 of the American Convention, which are already part of the concept of due process, are non-revocable even under circumstances of armed conflict;
- b) the domestic legislation of the State does not provide "unlimited discretion" regarding restriction of the authority to detain in situations of armed conflict;
- c) detention of the alleged victims was illegal and did not respect their minimal right to fair trial. The fact that the policemen involved never requested the identification documents of the Gómez Paquiyaury brothers – which they had with them and would have shown not only that they were minors but also that they lived in the area where they were detained- clearly shows the unlawfulness of the detention process. The minors were denied the possibility of any action that might question the lawfulness of their detention;
- d) the aim of the detention of the alleged victims was not investigation or any other legal aim; instead, its only aim was "their murder;" and
- e) witness Víctor Chuquitaype Eguiluz corroborated that "there was no flagrancy involved in detention of the minors as they were from the neighborhood and had been involved in no crimes that might justify their detention and investigation, and it was also evident that [...] they were minors, given their aspect and body build."

Pleadings of the State

79. Regarding to the alleged violation of Article 7 of the Convention, the State expressed that "the [p]olice agents of the Peruvian State did in fact violate the [alleged] victims' right to individual liberty, as [they] were detained without being detected in the act of committing a crime and without a court order, and that therefore they acted in an arbitrary manner."

Considerations of the Court

80. Article 7 of the American Convention sets forth that:

- 1. Every person has the right to personal liberty and security.
- 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
- 3. No one shall be subject to arbitrary arrest or imprisonment.
- 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

[...]

81. Peru has acknowledged that, in the instant case, "the [p]olice agents of the Peruvian State did in fact violate the [alleged] victims right to personal liberty, as [they] were detained without being detected in the act of committing a crime and without a court order, and that they therefore acted in an arbitrary manner." In this regard, it has been proven (*supra* paras. 67.e to 67.k) that Rafael Samuel and Emilio Moisés Gómez Paquiyaui were detained by agents of the Peruvian National Police, without explaining the reasons of their detention or the charges against them, that they were not brought before a competent authority and that their lifeless bodies were taken to the San Juan Hospital approximately one hour after their detention. The Court will now establish whether said facts violate the provisions set forth in Article 7 of the Convention.

82. This Court has indicated that the protection of freedom safeguards "both the physical liberty of the individual and his personal safety, in a context where the absence of guarantees may result in the subversion of the rule of law and deprive those detained of the minimum legal protection."⁷³

83. Regarding to the detentions, the Court has said, in connection with paragraphs 2 and 3 of Article 7 of the Convention, regarding prohibition of unlawful or arbitrary detentions or arrests, that:

[a]ccording to the first of these regulatory provisions, no one shall be deprived of his personal liberty except for reasons, cases or circumstances specifically established by law (material aspect) but, also, under strict conditions established beforehand by law (formal aspect). In the second provision, we have a condition according to which no one shall be subject to arrest or imprisonment for causes or methods that – although qualified as legal – may be considered incompatible regarding for the fundamental rights of the individual, because they are, among other matters, unreasonable, unforeseeable or out of proportion.⁷⁴

84. Article 2.20.g of the 1979 Political Constitution of the State of Peru, in force at the time of the facts of the instant case, established that "[e]very person has the right: [...to] personal liberty and safety. Therefore: [...n]o one may be detained

⁷³ See *Case of Maritza Urrutia*, *supra* note 5, para. 64; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 77; *Case of Bámaca Velásquez*, *supra* note 68, para. 141; and *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 68, para. 135.

⁷⁴ See *Case of Maritza Urrutia*, *supra* note 5, para. 65; *Case of Bulacio*, *supra* note 6, para. 125; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 78; *Case of Bámaca Velásquez*, *supra* note 68, para. 139; and *Durand and Ugarte Case*, *supra* note 27, para. 85.

without a written and reasoned order by a judge or without being detected by the police authorities in the act of committing a crime.”

85. Even though it was argued that, at the time of the facts, there was a state of emergency in the Constitutional Province of El Callao, pursuant to which said right had been suspended, the Court has pointed out before that suspension of constitutional liberties cannot exceed what is strictly necessary and that “any action on the part of the public authorities that goes beyond those limits, which must be specified with precision in the decree promulgating the state of emergency, would also be unlawful”.⁷⁵ In this regard, the limitations imposed on acts by the State answer to “the general requirement that in any state of emergency there be appropriate means to control the measures taken, so that they are proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it.”⁷⁶ Therefore, the emergency cannot be considered a justification in face of acts such as those examined here.

86. In the instant case, Rafael Samuel and Emilio Moisés Gómez Paquiyauri were not caught *in fraganti*, but rather detained as they were walking along the street, without constituting the causes and conditions set forth in the Peruvian legal system to authorize detention without a court order; furthermore, they were not immediately brought before a judge. This Court has pointed out that situations such as that described above do not respect due legal process,⁷⁷ as they disregard the detainee’s right to legal protection and they omit judicial oversight.

87. Based on the above, the court finds that Rafael Samuel and Emilio Moisés Gómez Paquiyauri were unlawfully detained, which violated Article 7(2) of the American Convention.

88. The Court has also deemed proven that the detention of Rafael Samuel and Emilio Moisés Gómez Paquiyauri took place within the framework of a systematic practice of human rights violations, including extra-legal executions of persons suspected of belonging to armed groups, carried out by State agents following orders of military and police commanders. This type of operation is incompatible regarding for basic rights, including the presumption of innocence, existence of a court order to conduct a detention and the obligation to bring the detainees before a competent judicial authority.⁷⁸

89. The Court also notes that, in the instant case, detention of the alleged victims was arbitrary. Said detention was aggravated by the fact that the detainees were tortured and, finally, killed, in the framework of the so-called “anti-terrorist struggle,” in face of the criminal acts that had taken place that day, in which the Gómez Paquiyauri brothers were not involved (*supra* para. 67.e to 67.k). On the

⁷⁵ *Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention Human Rights)*. Advisory Opinion OC-8/87 del 30 de enero de 1987. Series A No. 8, para. 38; *Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 American Convention Human Rights)*. Advisory Opinion OC-9/87 dated October 6, 1987. Series A No. 9, para. 36; see *Case of Cantoral Benavides*, *supra* note 26, para. 72; and *Caso Castillo Petruzzi et al.* Judgment of May 30, 1999. Series C No. 52, para. 109.

⁷⁶ *Judicial Guarantees in States of Emergency*, *supra* note 75, para. 21; and see *Caso Castillo Petruzzi et al.*, *supra* note 75, para. 109.

⁷⁷ See *Case of Maritza Urrutia*, *supra* note 5, para. 67; and *Case of Bulacio*, *supra* note 6, para. 127.

⁷⁸ See *Case of Bulacio*, *supra* note 6, para. 137.

other hand, the alleged victims, when they were detained, tortured, and extra-legally executed, were unarmed, defenseless, and they were minors, which adds to the gravity of the arbitrary detention in the instant case.

90. Based on the above, the arbitrary detention of Rafael Samuel and Emilio Moisés Gómez Paquiyaury is a violation of Article 7(3) of the American Convention.

91. Subparagraphs 4, 5 and 6 of Article 7 of the American Convention establish positive obligations that make specific requirements both of State agents and of third parties acting with their tolerance or authorization and who are responsible of the detention.⁷⁹

92. This Court has established that Article 7(4) of the Convention sets forth a mechanism to avoid illegal or arbitrary conduct starting with the very act of deprivation of liberty and guarantees the detainee's defense, for which reason the detainee and those who represent him or are his legal guardians have the right to be informed of the motives and reasons of the detention when it takes place, as well as regarding the rights of the detainee.⁸⁰

93. On the other hand, the detainee also has the right to notify a third party –for example, a relative or an attorney- of what happened. In this regard the Court has pointed out that “[t]he right to contact a relative becomes especially important when detainees are minors”.⁸¹ This notification must be carried out immediately by the authorities conducting the detention⁸² and, in the case of minors, they must also take the necessary steps for the notification to actually take place.⁸³

94. In this case, it was proven that neither Rafael Samuel nor Emilio Moisés Gómez Paquiyaury, at the time of their detention, nor their next of kin, were informed of the reasons for the detention, of the criminal conduct attributed to them, and of their rights as detainees, all of which breaches Article 7(4) of the Convention, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyaury.

95. Article 7(5) of the Convention provides that detention of an individual must be subject to court review without delay, as a means of control to impede arbitrary and unlawful detentions.⁸⁴ Whoever is deprived of his or her liberty without a court order

⁷⁹ See *Case of Maritza Urrutia*, *supra* note 5, para. 71; and *Case of Juan Humberto Sánchez*, *supra* note 15, para. 81.

⁸⁰ See *Case of Maritza Urrutia*, *supra* note 5, para. 72; *Case of Bulacio*, *supra* note 6, para. 128; and *Case of Juan Humberto Sánchez*, *supra* note 15, para. 82.

⁸¹ *Case of Bulacio*, *supra* note 6, para. 130.

⁸² See *Case of Bulacio*, *supra* note 6, para. 130; and *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 106.

⁸³ See *Case of Bulacio*, *supra* note 6, para. 130; and Council of Europe. Committee on the Prevention of Torture. 2nd General Report on the CPT's activities covering the period I January to December 1991, paras. 36-43.

⁸⁴ See *Case of Maritza Urrutia*, *supra* note 5, para. 73; *Case of Bulacio*, *supra* note 6, para. 129; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 84; *Case of Bámaca Velásquez*, *supra* note 68, para. 140; and *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 68, para. 135.

must be set free or immediately brought before a judge.⁸⁵

96. Immediate judicial oversight is a measure that tends to avoid arbitrariness or unlawfulness of detentions, taking into account that in a State in which the rule of law prevails, a judge must guarantee the rights of the detainee, authorize adoption of precautionary or coercive measures, when strictly necessary, and generally seek to ensure treatment that is consistent with the presumption of innocence that protects the accused until his responsibility has been established.⁸⁶

97. Regarding to the right of every detainee to recourse to a competent judge or court, set forth in Article 7(6) of the Convention, the Court has considered that the "writs of habeas corpus and of "amparo" are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society."⁸⁷ In this regard,

the judicial guarantees essential for the protection of the human rights not subject to derogation, according to Article 27(2) of the Convention, are those to which the Convention expressly refers in Articles 7(6) and 25(1), considered within the framework and the principles of Article 8, and also those necessary to the preservation of the rule of law, even during the state of exception that results from the suspension of guarantees.⁸⁸

98. These guarantees, which seek to avoid arbitrariness and unlawfulness in detentions by the State, are reinforced by the role of the State as guarantor, due to which, as the Court has Stated previously, the State "does in fact have the responsibility to guarantee the rights of individuals under its custody as well as that of supplying information and evidence pertaining to what has happened to the detainee".⁸⁹

99. Rafael Samuel and Emilio Moisés Gómez Paquiyauri were detained by agents of the Peruvian National Police without a court order and they were not brought before a competent authority; they were also unable to file, by their own means, a

⁸⁵ See *Case of Maritza Urrutia*, *supra* note 5, para. 73; *Case of Bulacio*, *supra* note 6, para. 129; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 84; *Case of Bámaca Velásquez*, *supra* note 68, para. 140; *Caso Castillo Petruzzi et al.*, *supra* note 75, para. 108; likewise, see *Eur. Court H.R., Case of Kurt vs Turkey, Judgment of 25 May 1998, Reports of Judgments and Decisions 1998-III, para. 124; Eur. Court H.R., Case of Aksoy v. Turkey, Judgment of 18 December 1996, Reports of Judgments and Decisions 1996-VI, para. 76.*

⁸⁶ See *Case of Maritza Urrutia*, *supra* note 5, para. 66; *Case of Bulacio*, *supra* note 6, para. 129; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 84; *Case of Bámaca Velásquez*, *supra* note 68, para. 140; and *Caso Castillo Petruzzi et al. Case*, *supra* note 75, para. 108.

⁸⁷ *Habeas Corpus in Emergency Situations*, *supra* note 75, para. 42; and see *Durand and Ugarte Case*, *supra* note 27, para. 106.

⁸⁸ *Judicial Guarantees in States of Emergency*, *supra* note 75, para. 38; and see *Durand and Ugarte Case*, *supra* note 27, para. 107.

⁸⁹ *Case of Bulacio*, *supra* note 6, para. 138; see *Case of Juan Humberto Sánchez*, *supra* note 15, para. 111; *Durand and Ugarte Case*, *supra* note 27, para. 65; likewise, see *Case of Aksoy v. Turkey*, *supra* note 85, para. 61; *Eur. Court HR, Case of Salman v. Turkey, Judgment of 27 June 2000, Reports of Judgments and Decisions 2000-VI, paras. 98-99; Eur. Court HR, Case of Timurtas v. Turkey, Judgment of 13 June 2000, Reports of Judgments and Decisions 2000-VI, para. 82; Eur. Court HR, Case of Selmouni v. France, Judgment of 28 July 1999, Reports of Judgments and Decisions 1999-V, para. 87; Eur. Court HR, Case of Ribitsch v. Austria, Judgment of 4 December 1995, Series A No. 336, para. 34; and Eur. Court HR, Case of Case of Tomasi v. France, Judgment of 27 August 1992, Series A No. 214-A, paras. 108 to 111.*

simple and effective remedy against said act. It has been proven that the agents of the State, when they detained Rafael Samuel and Emilio Moisés Gómez Paquiyaury, did not intend to bring them before a judge, but rather executed them extra-legally in less than an hour from the time they were detained. The Court has also deemed proven that the police agents involved in these facts presented Rafael Samuel and Emilio Moisés Gómez Paquiyaury as "terrorists" and alleged that their death had taken place during an armed confrontation, an attitude that exacerbated the arbitrariness of the detention. For the aforementioned reasons, the Court finds that the State violated the provisions set forth in Article 7(5) and 7(6) of the American Convention.

100. In view of all the above, the Court finds that the State violated Article 7 of the American Convention, in combination with Article 1(1) of that same Convention, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyaury.

X
RIGHT TO HUMANE TREATMENT
ARTICLE 5

**in combination with Article 1(1) Articles 1, 6 and 9 of the Inter-American
Convention to Prevent and Punish Torture**

Pleadings of the Commission

101. The Commission argued that the State violated Article 5 of the American Convention in combination with Article 1(1) of said treaty, in addition to Articles 1,6 and 8 of the Inter-American Convention against Torture, to the detriment of Emilio Moisés Gómez Paquiyaury and Rafael Samuel Gómez Paquiyaury, because:

- a) having been put into the trunk of a vehicle by police agents is, in itself, a violation of Article 5 of the American Convention against the alleged victims;
- b) given the existence of a State practice of extra-legal executions, and "as stated by the expert witness [Inge Genefke] at the [...public] hearing," it is reasonable to assume that the Gómez Paquiyaury brothers were aware of the danger they were in during their detention, for which reason "they must have felt fear and extreme terror when they were locked into the trunk of a police patrol with an unknown destination." Furthermore, "it is reasonable to infer that one of the Gómez Paquiyaury brothers was murdered before the other and that the second one to be murdered must have suffered, even if for fractions of a second, seeing how they shot his brother and, in turn, feeling imminently that he himself would immediately be murdered;"
- c) the facts of the instant case constitute torture, as defined in Article 2 of the Inter-American Convention against Torture; although said Article leaves certain room for interpretation to define whether a specific fact constitutes torture, "in the case of children the standard taken into account to define the degree of suffering must be higher," bearing in mind factors such as age, sex, and "the effect of the tension and the fear felt," health and degree of maturity; and
- d) in the proceeding before the Inter-American Commission, the petitioners argued that before killing the Gómez Paquiyaury brothers, "the policemen tortured them, beating them with the butts of their machine guns;"

these arguments were not disputed by the State, in view of which the Commission found the State responsible for having breached Article 5 of the Convention.

Pleadings of the representative of the alleged victims and their next of kin

102. The representative of the alleged victims and their next of kin asked the Court to find that the State has violated the right to humane treatment set forth in Article 5 of the American Convention, in addition to Articles 1, 6, 8 and 9 of the Inter-American Convention against Torture, to the detriment of Emilio Moisés Gómez Paquiyaury and Rafael Samuel Gómez, because:

- a) the Gómez Paquiyaury brothers were not only put into the trunk of a vehicle when they were detained, but they were also physically and psychologically tortured before being executed; for example, they were beaten, forced to kneel and forced against the ground, while a policeman stepped on their backs, among other things;
- b) the Peruvian State failed in its duty to prevent and punish torture, which was never part of the domestic investigations; and
- c) at the time the acts were committed, the State had not complied with defining the crime of torture in its domestic legislation, and therefore there was no legal provision to compensate torture victims.

Pleadings of the State

103. Regarding to Article 5 of the American Convention and Articles 1,6 and 8 of the Inter-American Convention against Torture, the State pointed out that "it condemns all types of aggression within its territory against citizens' right to humane treatment, and therefore in the case of the Gómez Paquiyaury brothers, the Peruvian courts have punished those responsible of [the] crime [of violation of the right to humane treatment], through due process." In its brief with final pleadings, the State also argued that in the instant case "there was no crime of torture because at the time of the trial[,] these facts were not defined as such, [...] even though the Inter-American Convention to [P]revent and [P]unish [T]orture was in force." In this regard, the State argued that what took place were "dishonorable acts" that involved "placing the detainees in the trunk of a patrol car for lack of shackles."

Considerations of the Court

104. Article 5 of the American Convention sets forth that:

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

105. The Inter-American Convention against Torture provides that:

Article 1

The State Parties undertake to prevent and punish torture in accordance with the terms of th[e Inter-American] Convention [against Torture].

Article 2

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

Article 6

In accordance with the terms of Article 1 [of the Inter-American Convention against Torture], the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.

Article 9

The States Parties undertake to incorporate into their national laws regulations guaranteeing suitable compensation for victims of torture.

106. In the previous chapter, the Court found that the State violated Rafael Samuel and Emilio Moisés Gómez Paquiyauri's right to personal liberty by detaining them unlawfully and arbitrarily and by not submitting them to judicial oversight (*supra* para. 100). In this chapter, we must establish whether during the period when both Gómez Paquiyauri brothers were detained under police custody, before their lifeless bodies were received at the San Juan Hospital, their right to humane treatment -set forth in Article 5 of the American Convention and in Articles 1, 6 and 9 of the Inter-American Convention against Torture- was violated.

107. In the instant case, the State expressed that it "condemns all types of aggression within its territory against citizens' right to humane treatment, and therefore in the case of the Gómez Paquiyauri brothers, the Peruvian courts have punished those responsible of said crime, through due process."⁹⁰

108. On other occasions, this Court has established that a "person who is unlawfully detained is in an exacerbated situation of vulnerability creating a real risk that his other rights, such as the right to humane treatment and to be treated with dignity, will be violated."⁹¹ Likewise, this Court has pointed out that even if the unlawful detention has only lasted a short time, it is sufficient to constitute a violation of physical and moral integrity according to the standards of international human rights law,⁹² and that, in the presence of these circumstances, it is possible to infer, even when there is no other evidence in this respect, that the treatment

⁹⁰ Reply of the State to the application de the Inter-American Commission and to the written brief containing pleadings, motions, and evidence filed by the representative of the alleged victims and their next of kin (file on the merits and possible reparations, volume II, leaf 254).

⁹¹ See *Case of Maritza Urrutia*, *supra* note 5, para. 87; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 96; *Case of Bámaca Velásquez*, *supra* note 68, para. 150; and *Case of Cantoral Benavides*, *supra* note 26, para. 90.

⁹² See *Case of Maritza Urrutia*, *supra* note 5, para. 87; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 98; *Case of Bámaca Velásquez*, *supra* note 68, para. 128; and *Case of Cantoral Benavides*, *supra* note 26, paras. 82 and 83.

received during solitary confinement is inhuman and degrading.⁹³ In this case, the Gómez Paquiyauri brothers were not only illegally and arbitrarily detained, but they were not allowed to benefit from all the safeguards set forth in Article 7 of the American Convention.

109. It is also pertinent to bear in mind that the Court has previously stated that the mere fact of being placed in the trunk of a vehicle

constitutes an infringement of Article 5 of the Convention relating to humane treatment, inasmuch as, even if no other physical or other maltreatment occurred, that action alone must be clearly considered to contravene the respect due to the inherent dignity of the human person.⁹⁴

110. In the instant case, the alleged victims, during their detention and before their death, received physical and psychological maltreatment that consisted of: being thrown on the ground, kicked, a policemen stood on their backs and other policemen covered their head (*supra* para. 67.f). They were also beaten with shotgun butts and subsequently murdered by gunshots to the head, thorax and other parts of the body, with evidence of more injuries and bullet wounds than would have sufficed to cause their death, if that had been the only intention of the agents of the Peruvian National Police.

111. The Court has stated that torture is strictly forbidden by International Human Rights Law.⁹⁵ Prohibition of torture is absolute and non-revocable, even under the most difficult circumstances, such as war, the threat of war, "the struggle against terrorism," and any other crimes, state of siege or emergency, domestic conflict or upheaval, suspension of constitutional liberties, domestic political instability, or other public calamities or emergencies.⁹⁶

112. An international juridical system of absolute prohibition of all forms of torture, both physical and psychological, has been established, and it is today part of the sphere of international *jus cogens*.⁹⁷

113. The European Court has pointed out that analysis of the gravity of the acts that may constitute cruel, inhumane or degrading treatment or torture, is relative and depends on all the circumstances of the case, such as duration of the treatment, its physical and mental effects and, in some cases, the sex, age, and health of the victim, among others.⁹⁸

⁹³ See *Case of Maritza Urrutia*, *supra* note 5, para. 87; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 98; *Case of Bámaca Velásquez*, *supra* note 68, para. 150; and *Case of Cantoral Benavides*, *supra* note 26, paras. 83, 84 and 89.

⁹⁴ *Case of Castillo Páez*, *supra* note 26, para. 66; and see *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 68, para. 164.

⁹⁵ See *Case of Maritza Urrutia*, *supra* note 5, para. 89; and *Case of Cantoral Benavides*, *supra* note 26, para. 95.

⁹⁶ See *Case of Maritza Urrutia*, *supra* note 5, para. 89; and *Case of Cantoral Benavides*, *supra* note 26, para. 95.

⁹⁷ See *Case of Maritza Urrutia*, *supra* note 5, para. 92; and *Case of Cantoral Benavides*, *supra* note 26, paras. 102 and 103.

⁹⁸ See *Eur. Court H.R., Case Ireland v. the United Kingdom, Judgment of 18 January 1978, Series A No. 25, para. 162.*

114. This Court has already had the opportunity to apply and declare the responsibility of a State for violation of the Inter-American Convention against Torture.⁹⁹ In the instant case, it will exercise its material competence to apply said Convention, which entered into force on February 28, 1987, and was ratified by Peru on March 28, 1991. Articles 1, 6 and 9 of said treaty place the States Party under the obligation to take all effective measures required to prevent and punish all acts of torture within their sphere of jurisdiction.

115. The facts in this case, intentionally carried out, inflicted grave physical and mental suffering on the alleged victims (*supra* paras. 67.e to 67.j).

116. Likewise, the components of the concept of torture set forth in Article 2 of the Inter-American Convention against Torture include when physical or mental suffering is inflicted on an individual, for whatever purpose.¹⁰⁰ In general, in situations of massive human rights violations, the systematic use of torture has the aim of intimidating the population.

117. Therefore, the Court deems that as a whole the facts that have been pointed out, taking especially into account that the alleged victims were minors, constitute evident signs of torture, in light of the definition in Article 2 of the Inter-American Convention against Torture, in violation of Article 5 of the American Convention, in combination with Article 1(1) of this same Convention, and of the obligations set forth in Articles 1, 6 and 9 of the Inter-American Convention against Torture, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyaui.

118. Regarding to the next of kin of the victims of human rights violations, this Court has pointed out, on previous occasions, that they may be, in turn, victims.¹⁰¹ In the sub judice case, violation of the right to psychological and moral integrity of the next of kin of Rafael Samuel and Emilio Moisés Gómez Paquiyaui is a direct consequence of their unlawful and arbitrary detention on June 21, 1991; of the maltreatment and torture they suffered during their detention, and of the death of both approximately one hour after they were detained, as well as of officially presenting the facts as "a confrontation with subversives." All this generated suffering and powerlessness of their immediate next of kin vis-à-vis the State authorities, for which reason, in this case, the next of kin can be considered the victims of cruel, inhumane and degrading treatment,¹⁰² in violation of Article 5 of the American Convention.

⁹⁹ See *Case of Maritza Urrutia*, *supra* note 5, para. 95; *Case of Bámaca Velásquez*, *supra* note 68, para. 223; *Case of Cantoral Benavides*, *supra* note 26, para. 191; *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 68, paras. 248 to 252; and *Case of the "Panel Blanca" (Paniagua Morales et al.)*. Judgment of March 8, 1998. Series C No. 37, para. 136.

¹⁰⁰ See *Case of Maritza Urrutia*, *supra* note 5, para. 91; and *Case of Cantoral Benavides*, *supra* note 26, para. 100.

¹⁰¹ See *Case of Juan Humberto Sánchez*, *supra* note 15, para. 101; *Case of Bámaca Velásquez*, *supra* note 68, para. 160; *Case of Cantoral Benavides*, *supra* note 26, para. 105; *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 68, paras. 175 and 176; and *Case of Castillo Páez. Reparations* (Art. 63(1) American Convention Human Rights). Judgment of November 27, 1998. Series C No. 43, para. 59.

¹⁰² See *Case of Juan Humberto Sánchez*, *supra* note 15, para. 101; *Case of Bámaca Velásquez*, *supra* note 68, para. 162; and *Case of Kurt v. Turkey*, *supra* note 85, paras. 130-134.

119. For the aforementioned reasons, the Court finds that the State violated Article 5 of the American Convention, in combination with Article 1(1) of this same Convention, to the detriment of Marcelina Paquiyaury Illanes de Gómez; Ricardo Samuel Gómez Quispe; Marcelina Haydeé, Ricardo Emilio, Carlos Pedro, Lucy Rosa and Miguel Ángel, all of them Gómez Paquiyaury; and Jacinta Peralta Allccarima.

XI
RIGHT TO LIFE
ARTICLE 4
IN COMBINATION WITH ARTICLE 1(1)

Pleadings of the Commission

120. The Commission asked the Court to find the State responsible for violating Article 4, in combination with Article 1(1), both of the American Convention, to the detriment of Emilio Moisés and Rafael Samuel Gómez Paquiyaury, because:

- a) the right to life entails for the States the obligation not only to respect it, but also to ensure it. Pursuant to Article 1(1) of the American Convention, the State has the obligation to ensure the right to life and, for this, it must forestall violations of said right and investigate and punish those responsible and provide reparations to the victims or their next of kin, when those responsible were agents of the State;
- b) in the instant case the State "only complied in part" with its international obligations because, while the direct perpetrators of the facts were punished, the whereabouts of the mastermind of those facts was not duly investigated nor did the next of kin of the alleged victims receive compensation;
- c) lack of an adequate investigation of the whereabouts of the mastermind is especially significant in the framework of a practice of extra-legal executions, as it constitutes a means to support the impunity that generally exists regarding said violations;
- d) in this framework, in cases regarding which "there is much public and judicial pressure," the armed or police institutions "hand over" the lower agent levels who "undertake a commitment not to accuse their superiors" in exchange for legal advice and other benefits, such as reentry into the institution where they worked once they regain their freedom; and
- e) in the domestic trial, "it was established that various members of the Peruvian National Police, including [the alleged mastermind], coordinated with the direct perpetrators their account of the facts, and the legal assistance that the policemen [involved] in the proceeding would receive." When the direct perpetrators were imprisoned, Captain César Augusto Santoyo Castro, the alleged mastermind, also "gave them financial assistance."

Pleadings of the representative of the alleged victims and their next of kin

121. The representative of the alleged victims and their next of kin pointed out that the violation of the right to life suffered by the Gómez Paquiyauri brothers took place as a consequence of their summary execution and its circumstances. She also referred to the pleadings regarding to the other rights that, she argued, were abridged.

Pleadings of the State

122. Regarding to the alleged violation of Article 4 of the Convention, the State pointed out that "as a signatory State of the American Convention on Human Rights it acknowledges that its police agents did in fact violate the right to life of Gómez Paquiyauri brothers, and they were punished, and it therefore accepts the respective responsibility."

Considerations of the Court

123. Article 4(1) of the American Convention sets forth that

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

124. The State must respect the right to life of every person under its jurisdiction, protected by Article 4 of the American Convention. This obligation has special modes regarding to minors, taking into account the rules on protection of children set forth in the American Convention and in the Convention on the Rights of the Child.¹⁰³ As guarantor of this right, the State is under the obligation to forestall situations that might lead, by action or omission, to abridge it.

125. The State has acknowledged that "its police agents did in fact violate the right to life of the Gómez Paquiyauri [b]rothers [Rafael Samuel and Emilio Moisés]" (*supra* para. 122).

126. Likewise, the November 9, 1993 judgment, issued by the Third Criminal Chamber of El Callao (*supra* para. 67.p), established that:

members of the General Police in patrol car ten one hundred and fifty-five, composed of the accused Second Sergeant Francisco Antezano Satillán and Noncommissioned officer third-class Angel del Rosario Vásquez Chumo, went to the place of the facts, that is to Felipe Pinglo Alva street, block one, to provide support and patrol the area, and under those circumstances they noted the presence of two individuals, whom they stopped and detained, placing them in the trunk of the patrol car, those individuals being the injured brothers Rafael Samuel and Emilio Moisés Gómez Paquiyauri, respectively seventeen and fourteen years old; they were received at the "Daniel Alcides Carrión" hospital at ten thirty-five in the morning, approximately, where they were found to have arrived as corpses, their cause of death being [...] 'small-caliber bullet wounds to the head and thorax, in addition to one to the abdomen in one of them' [.]

[...] from the start the members of the General Police who were involved in said confrontation, as well as those who subsequently provided some form of support or security, mistakenly believed that it was a terrorist attack, and it was with this criterion that they decided to kill the [...] brothers Rafael Samuel and Emilio Moisés Gómez

¹⁰³ See *Case of Bulacio*, *supra* note 6, para. 138; and *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 68, para. 146.

Paquiyauri, the victims, who were captured alive, with no wounds, and without even verifying whether they actually were terrorist criminals [.]

127. Furthermore, since that time and to date, the existing legal mechanisms have not been effective, in the case, to punish all those responsible, specifically the mastermind of the facts, a situation that fosters a climate of impunity.¹⁰⁴

128. On this matter, the Court has pointed out that when there is a pattern of human rights violations, including extra-legal executions fostered or tolerated by the State, contrary to the *jus cogens*, this generates a climate that is incompatible with effective protection of the right to life. This Court has established that the right to life is fundamental in the American Convention, because safeguarding it is crucial for the realization of the other rights.¹⁰⁵ When the right to life is not respected, all the other rights are meaningless. The States have the obligation to ensure the creation of the conditions necessary to avoid violations of this inalienable right and, specifically, the duty of impeding violations of this right by its agents.¹⁰⁶

129. Compliance with Article 4 of the American Convention, in conjunction with Article 1(1) of this same Convention, not only requires that a person not be deprived arbitrarily of his or her life (negative obligation) but also that the States adopt all the appropriate measures to protect and preserve the right to life (positive obligation),¹⁰⁷ as part of their duty to ensure full and free exercise of the rights of all persons under their jurisdiction.¹⁰⁸ This comprehensive protection of the right to life by the State does not involve only legislators, but all State institutions and those who must protect security, whether they are police or armed forces of the State.¹⁰⁹ Due to the above, the States must adopt such measures as may be necessary, not only to prevent, try and punish those responsible for deprivation of life as a consequence of criminal acts, in general, but also to forestall arbitrary executions by its own security agents.¹¹⁰

130. The Court has pointed out that

[i]n cases of extra-legal executions, it is essential for the States to effectively investigate deprivation of the right to life and to punish all those responsible, especially when State agents are involved, as not doing so would create, within the environment of impunity,

¹⁰⁴ See *Case of Myrna Mack Chang*, *supra* note 5, paras. 139 and 155.

¹⁰⁵ See *Case of Myrna Mack Chang*, *supra* note 5, para. 152; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 110; and *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 68, para. 144.

¹⁰⁶ See *Case of Myrna Mack Chang*, *supra* note 5, para. 152; and *Case of Juan Humberto Sánchez*, *supra* note 15, para. 110.

¹⁰⁷ See *Case of Myrna Mack Chang*, *supra* note 5, para. 153; *Case of Bulacio*, *supra* note 6, para. 111; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 110; and *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 68, para. 139.

¹⁰⁸ See *Case of Myrna Mack Chang*, *supra* note 5, para. 153; *Case of Bulacio*, *supra* note 6, para. 111; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 110; and *Case of Cantoral Benavides. Reparations* (Art. 63(1) American Convention Human Rights). Judgment of December 3, 2001. Series C No. 88, para. 69.

¹⁰⁹ See *Case of Myrna Mack Chang*, *supra* note 5, para. 153; and *Case of Juan Humberto Sánchez*, *supra* note 15, para. 110.

¹¹⁰ See *Case of Myrna Mack Chang*, *supra* note 5, para. 153; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 110; *Case of Bámaca Velásquez*, *supra* note 68, para. 172; and *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 68, paras. 144 to 145.

conditions for this type of facts to occur again, which is contrary to the duty to respect and ensure the right to life.¹¹¹

131. In this regard, safeguarding the right to life requires conducting an effective official investigation when individuals lose their life as a consequence of the use of force by agents of the State.¹¹² In this regard, the European Court of Human Rights has stated that

a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (Art. 2), read in conjunction with the State's general duty [...] to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be [an] effective official investigation when individuals have been killed as a result of the use of force.¹¹³

132. In this regard, the Court has deemed proven that in the sub judice case there was a pattern of impunity in which, under public pressure, the lowest level direct perpetrators within the Peruvian National Police were tried and convicted (*supra* para. 67.r),¹¹⁴ while the mastermind or masterminds have not yet been tried and only one has allegedly been identified (*supra* para. 67.s). Said pattern of impunity is especially grave in the cases of violations of the right to life in the framework of a pattern of systematic human rights violations, including extra-legal executions, as in the instant case, since it fosters a suitable climate for chronic recidivism of said abridgments.¹¹⁵

133. In view of the above, the Court finds that Rafael Samuel Gómez Paquiyauri and Emilio Moisés Gómez Paquiyauri were extra-legally executed, for which reason it deems that Peru violated Article 4 of the American Convention, in combination with Article 1(1) of this same Convention, to the detriment of the aforementioned Rafael Samuel and Emilio Moisés Gómez Paquiyauri.

XII

RIGHT TO A FAIR TRIAL AND RIGHT TO JUDICIAL PROTECTION

¹¹¹ *Case of Myrna Mack Chang*, *supra* note 5, para. 156.

¹¹² See *Case of Myrna Mack Chang*, *supra* note 5, para. 157; and *Case of Juan Humberto Sánchez*, *supra* note 15, para. 112.

¹¹³ See *Eur. Court H.R., Case of Nachova and others v. Bulgaria, Judgment of 26 February 2004*, para. 116; *Eur. Court H.R., Case of Hugh Jordan v. the United Kingdom, Judgment of 4 May 2001*, para. 105; *Eur. Court H.R., Case of Çiçek v. Turkey Judgment of 27 February 2001*, para. 148; and *Eur. Court H.R., Case of McCann and Others v. the United Kingdom, Judgment of 27 September 1995, Series A no. 324*, para. 161.

¹¹⁴ The direct perpetrators of the homicides were sentenced to 18 months deprivation of liberty for the principal of the crime and 6 years for the accomplice (*supra* para. 65.p), which were deemed to have been carried out through application of the prison benefits of semi-liberty and parole, respectively, set forth in the Criminal Enforcement Code under Peruvian legislation (*supra* para. 65.r).

¹¹⁵ *Case of Myrna Mack Chang*, *supra* note 5, para. 156.

**ARTICLES 8 AND 25
IN COMBINATION WITH ARTICLE 1(1)
AND NON-COMPLIANCE WITH ARTICLE 8 OF
THE INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE**

Pleadings of the Commission

134. The Commission argued that the State violated the rights to fair trial and to judicial protection, enshrined in Articles 8 and 25, in combination with Article 1(1), all of them of the American Convention, to the detriment of Emilio Moisés Gómez Paquiyaury and Rafael Samuel Gómez Paquiyaury, because:

- a) States have the obligation to investigate and punish those responsible for human rights violations carried out by their agents, as well as to provide reparations to the victims or their next of kin. This obligation springs mainly from Article 1(1) of the American Convention, as investigation is “a means to ensure” the rights protected by said instrument and, therefore, it must be seriously fulfilled;
- b) the obligation to investigate and punish requires punishment not only of the direct perpetrators of the facts in violation of human rights, but also of the masterminds of said facts, as well as the accessories after the fact;
- c) in the instant case, although Peruvian courts were able to identify the mastermind of the alleged murder of the Gómez Paquiyaury brothers, the State’s subsequent actions to establish his whereabouts, with the aim of trying and punishing him, have been insufficient and do not show due diligence;
- d) the alleged mastermind has filed several briefs before Peruvian courts “seeking to be exempted from liability regarding [the death] of the Gómez Paquiyaury brothers [Rafael Samuel and Emilio Moisés],” which provides at least some clues that might lead to finding him;
- e) given the hierarchical structure of the Peruvian National Police, and “the existence of a murder ordered by a Captain of said police force, in the framework of an [alleged] systematic practice of extra-legal executions,” the State should also have investigated who authorized the Captain of the Peruvian National Police to allegedly “order his subordinates to extra-legally execute individuals;”
- f) in the instant case, there has been a typical pattern of impunity, designed by the Peruvian National Police itself, according to which when there is much public pressure in a case, the armed or police institutions “turn in” the lower-ranking agents, with the promise of providing them with legal advice, security in the prison, assistance for their families, penitentiary benefits, and reentry into the institution once they regain their freedom. In exchange for this, the lower-ranking agents undertake not to accuse their superiors, who usually remain unpunished, as in this case; and
- g) in the case of hierarchical structures, such as the security or armed forces, investigation and punishment of those responsible of issuing orders that lead to violation of human rights become especially significant, as they

not only allow the State to fulfill its obligation to investigate and punish all those responsible, but it also is "one of the most effective measures to forestall these acts."

Pleadings of the representative of the alleged victims and their next of kin

135. The representative of the alleged victims and their next of kin argued that the State breached Articles 8 and 25 of the American Convention to the detriment of Emilio Moisés and Rafael Samuel Gómez Paquiyauri, as well as of their next of kin, because:

- a) even though there were grounds to consider that the facts were part of a practice of arbitrary detentions and extra-legal executions at the time, the Peruvian courts presented the deaths of the alleged victims as isolated acts of "a few 'bad members of the Peruvian National Police'" and only convicted the crew of the police cars in charge of custody of the alleged victims and they identified a Captain, César Augusto Santoyo Castro, as the only alleged mastermind of the facts; the above despite the fact that one of the accused acknowledged that the orders were also issued by other superiors;
- b) there is evidence that the accused in the domestic proceeding and their superiors agreed on how to present the facts, as well as that the former received financial support in exchange for not accusing their superiors;
- c) State mechanisms acted in such a way that they obstructed the investigation, for example, "presenting the matter to public opinion as if the minors had died as a consequence of an armed confrontation with the police, fabricating evidence and making other evidence disappear;"
- d) the Peruvian judiciary failed in its responsibility to independently and impartially investigate the facts of the case and it did not provide justice to the next of kin of the alleged victims, because it did not attach due importance to the alleged arbitrary detention and alleged tortures; it exempted from liability most of the agents who acted as masterminds, as well as other accomplices to the crime; and it released the only convicts shortly after they had been imprisoned;
- e) compensation ordered under domestic venue has not been received by the next of kin of the alleged victims; furthermore, compensation to be paid by the persons who committed the crime as a consequences of their individual liability is independent and does not exempt the State from its responsibility to directly redress the injury caused; and
- f) since in Peru there is no social support fund for low income families to cover the essential costs of representation in a contentious case for human rights violations, the State did not fulfill its obligation to allow the victims access to justice.

Pleadings of the State

136. The State argued that:

- a) in the criminal proceeding against the direct perpetrators and

accomplices of the murder of the Gómez Paquiyauri brothers, they were sentenced to prison terms and payment of civil reparations to the next of kin of the alleged victims and the criminal proceeding against the mastermind was postponed;

b) regarding to establishing the whereabouts of the mastermind, the State expressed that all means of investigation necessary to locate and capture him were exhausted; however, they have not been successful to date. Given this situation, the State, based on the principle of legality, rejected all forms of impunity; it undertook to reconsider and carry out new methods of investigation, to establish the whereabouts of the mastermind; and it undertook a commitment to try him in accordance with Peruvian law;

c) the human rights violations committed by its agents have been duly punished, that is, "all investigations in the case have been exhausted to establish and identify the perpetrators and participants in the crime against the Gómez Paquiyauri brothers;"

d) a judicial proceeding was conducted, respecting the principles and guarantees of due process, which led to conviction with a prison term sentence and civil reparations, and the proceeding against the mastermind has been postponed until his whereabouts are established;

e) given its authority as *ius puniendi* in the case, Peru has acted through its investigative and judicial bodies with due diligence and efficacy, to investigate and punish the perpetrators and participants in the crime against the brothers;

f) the State has provided effective judicial protection to the next of kin of the alleged victims, as all necessary means have been exhausted to avoid impunity regarding said crime and they have been provided with the real possibility of contributing to an effective investigation and trial of those responsible for said crime; and

g) the civil reparation did not actually become effective, but this does not mean that it was for lack of legal instruments that national legislation sets forth to make the rights recognized by court rulings effective.

Considerations of the Court

137. Article 8 of the American Convention sets forth that:

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

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

- a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
 - b. prior notification in detail to the accused of the charges against him;
 - c. adequate time and means for the preparation of his defense;
 - d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
 - e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
 - f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
 - g. the right not to be compelled to be a witness against himself or to plead guilty; and
 - h. the right to appeal the judgment to a higher court.
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.
5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

138. Article 25 of the American Convention provides that:

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

139. The Inter-American Convention against Torture establishes that:

Article 8

The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State.

140. The facts that affected Rafael Samuel and Emilio Moisés Gómez Paquiyauri were heard by the Third Criminal Chamber of El Callao, whose actions are found in

file 227-92, based on an application filed by the parents of the Gómez Paquiyauri brothers, and in police record No. 281-IC-H-DDCV. The outcome of said proceeding was the November 9, 1993 judgment, upheld by the Transitory Criminal Chamber of the Supreme Court of Peru on June 9, 1994 (*supra* para. 67.q), convicting a direct perpetrator and an accomplice, and also identifying a mastermind, whose trial was postponed. Said proceeding will be analyzed in this chapter.

141. The judgment issued by the Third Criminal Chamber of El Callao on November 9, 1993 (*supra* para. 67.p) established two types of persons liable for the facts in the instant case. First of all, two persons directly liable as perpetrators, one as the direct perpetrator and the other as an accomplice, who were sentenced to eighteen and six years in prison, respectively.

142. The perpetrators were found guilty of the crime of aggravated homicide, for which reason the Third Criminal Chamber of El Callao deemed that:

for purposes of judicial adjustment of the penalty, it is necessary to take into account that the event is an extremely grave one, as they are members of the Peruvian National Police[,] who breaching their sacred duties and without the least respect for human life, in a premeditated and perfidious manner killed young students who were unable to defend themselves in any way [...] creating a climate of insecurity, confusion and mistrust among all the population [.]

143. Secondly, the November 9, 1993 judgment also established the existence of a mastermind, although his "trial was postponed." Regarding to the former two, both their prison terms ended in advance due to penitentiary benefits; and regarding to the latter, at the time the instant Judgment is being issued, thirteen years after the facts, he had been neither tried nor punished. Finally, said judgment also ordered civil reparations in the amount of twenty thousand nuevos soles in favor of the next of kin of the alleged victims, and this compensation has not been paid.

144. The prison terms of the direct perpetrator and the accomplice in the facts, pursuant to the judgment issued on November 9, 1993, ended in advance: on November 10, 1995 Francisco Antezano Santillán was granted the benefit of semi-liberty and on November 18, 1994 Ángel del Rosario Vásquez Chumo was granted the benefit of parole, through application of a system of penitentiary benefits set forth in Peruvian legislation.

145. The Court will not analyze the penitentiary benefits established in Peruvian legislation nor those granted to Francisco Antezano Santillán and Ángel del Rosario Vásquez Chumo. However, without excluding any category of convicts, the Court deems that the State must carefully consider applying those benefits in cases of grave violations of human rights, as in the instant case, since granting them unduly may lead to a form of impunity.

146. The Court notes that, in the instant case, once the next of kin of the alleged victims filed the complaint, the State should have conducted a serious, impartial, and effective investigation, subject to the requirements of due process, to clarify the facts pertaining to the detention, torture, and extra-legal execution of Rafael Samuel and Emilio Moisés Gómez Paquiyauri and, specifically, to identify and punish those responsible, especially the mastermind or masterminds of the facts, in compliance with its obligation pursuant to Article 1(1) of the Convention, to ensure the rights to life and to humane treatment.

147. Even though there was a domestic judicial proceeding, in which an alleged mastermind of the facts was identified, at the time the instant Judgment is issued, more than thirteen years after the facts took place, he has not been punished as the person liable, even though he continues filing briefs through his attorney in the case that is open in this regard, and the possible existence of other principals or persons liable has not been investigated.

148. The above has led to a situation of grave impunity. In this regard, the Court deems that impunity is

the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.¹¹⁶

149. During the public hearing (*supra* para. 28), the agent of the State expressed that the alleged mastermind of the facts took several steps in the proceeding against him, seeking exclusion of his liability through provisions such as amnesty laws and others and, specifically, he seeks to benefit from the statute of limitations that might apply in the case against him for the facts of the instant case.

150. Regarding to the possibility of the case pending under domestic venue being barred by the statute of limitations, the Court calls to mind what it stated in the *Bulacio vs. Argentina* case, regarding the inadmissibility of provisions regarding the statute of limitations or any other obstacle of domestic law that seeks to impede investigation and punishment of those responsible for human rights violations.¹¹⁷ The Court deems that the general obligations set forth in Articles 1(1) and 2 of the American Convention require that the States Party promptly adopt all types of provisions for no one to be denied the right to judicial protection,¹¹⁸ set forth in

¹¹⁶ *Case of the "Panel Blanca" (Paniagua Morales et al.)*, *supra* note 99, para. 173; see *Case of Maritza Urrutia*, *supra* note 5, para. 126; *Case of Myrna Mack Chang*, *supra* note 5, paras. 156 and 210; *Case of Bulacio*, *supra* note 6, para. 120; *Case of Juan Humberto Sánchez*, *supra* note 15, paras. 143 and 185; *Case of Las Palmeras. Reparations*, *supra* note 17, para. 53.a); *Case of the Caracazo. Reparations*, *supra* note 17, paras. 116 and 117; *Case of Trujillo Oroza. Reparations* (Art. 63(1) American Convention Human Rights). Judgment of February 27, 2002. Series C No. 92, para. 101; *Case of Bámaca Velásquez. Reparations* (Art. 63(1) American Convention Human Rights). Judgment of February 22, 2002. Series C No. 91, para. 64; *Case of Las Palmeras*. Judgment of December 6, 2001. Series C No. 90, para. 56; *Case of Cantoral Benavides. Reparations*, *supra* note 108, para. 69; *Case of Cesti Hurtado. Reparations* (Art. 63(1) American Convention Human Rights). Judgment of May 31, 2001. Series C No. 78, para. 63; *Case of the "Street Children" (Villagrán Morales et al.)*. *Reparations* (Art. 63(1) American Convention Human Rights). Judgment of May 26, 2001. Series C No. 77, para. 100; *Case of the "Panel Blanca" (Paniagua Morales et al.)*. *Reparations* (Art. 63(1) American Convention Human Rights). Judgment of May 25, 2001. Series C No. 76, para. 201; *Case of Ivcher Bronstein*, *supra* note 19, para. 186; *Case of the Constitutional Court*, *supra* note 68, para. 123; *Case of Bámaca Velásquez*, *supra* note 68, para. 211; *Case of Blake. Reparations* (Art. 63(1) American Convention Human Rights). Judgment of January 22, 1999. Series C No. 48, para. 64; *Case of Castillo Páez. Reparations*, *supra* note 101, para. 107; and *Case of Loayza Tamayo. Reparations* (Art. 63(1) American Convention Human Rights). Judgment of November 27, 1998. Series C No. 42, para. 170.

¹¹⁷ See *Case of Bulacio*, *supra* note 6, para. 116; *Case of Trujillo Oroza. Reparations*, *supra* note 116, para. 106; *Case of Barrios Altos*. Judgment of March 14, 2001. Series C No. 75, para. 41; *Case of Barrios Altos. Interpretation of the Judgment on the Merits* (Art. 67 American Convention Human Rights). Judgment of September 3, 2001. Series C No. 83, para. 15; and *Case of Caballero Delgado and Santana*. Order on Compliance with Judgment of November 27, 2003, Whereas 9.

¹¹⁸ See *Case of Bulacio*, *supra* note 6, para. 116; and *Case of Barrios Altos*, *supra* note 117, para. 43.

Article 25 of the American Convention.

151. In accordance with the treaty obligations undertaken by the States, no domestic legal provision or institution, including extinguishment, may be used to avoid compliance with decisions of the Court regarding investigation and punishment of those responsible for human rights violations. If this were not so, the rights enshrined in the American Convention would be devoid of effective protection. This view of the Court is in accordance with the language and spirit of the Convention, as well as the general principles of international law; one of these principles is that of *pacta sunt servanda*, which requires ensuring that the provisions of a treaty have an *effet utile* in the domestic law of the States Party.¹¹⁹

152. Pursuant to the general principles of international law, and as follows from Article 27 of the 1969 Vienna Convention on Treaty Law; application of decisions of the international human rights protection bodies cannot be obstructed by domestic legal rules or provisions.¹²⁰

153. Notwithstanding the above, in the instant case it was shown that Rafael Samuel and Emilio Moisés Gómez Paquiyaury were tortured (*supra* para. 117), a situation that places the State under a special duty to investigate. In this regard, the administrative and judicial authorities abstained from formally beginning a criminal investigation regarding to the torture committed.

154. Article 8 of the Inter-American Convention against Torture explicitly sets forth the obligation of the State to act *ex officio* and immediately in cases such as the instant one, independently of the victim's inactivity. In this regard, the Court has argued that "in proceedings on human rights violation, the State's defense cannot rest on the impossibility of the plaintiff to produce evidence that, in many cases, cannot be obtained without the cooperation of the State."¹²¹ In the instant case, the State did not comply with these provisions.

155. The fact that the State did not effectively investigate the acts of torture and allowed them to remain in a situation of impunity means that the State did not adopt effective measures to avoid repetition of this type of acts under its jurisdiction, which disregards the provisions of Article 6 of the Inter-American Convention against Torture.

156. Based on the above, the Court finds that the State violated the rights enshrined in Articles 8 and 25 of the American Convention, in combination with Article 1(1) of this same Convention and the obligations set forth in Article 8 of the Inter-American Convention against Torture, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyaury. The State also violated the rights enshrined in Articles 8 and 25 of the American Convention, in combination with Article 1(1) of this same Convention, to the detriment of their next of kin, Ricardo Samuel Gómez

¹¹⁹ See *Case of Bulacio*, *supra* note 6, paras. 117 and 142; *Case of the "Five Pensioners"*, *supra* note 22, para. 164; *Case of Hilaire et al.* Judgment of June 21, 2002. Series C No. 94, para. 112; and *Case of Trujillo Oroza. Reparations*, *supra* note 116, para. 96.

¹²⁰ See *Case of Bulacio*, *supra* note 6, para. 118.

¹²¹ See *Case of Maritza Urrutia*, *supra* note 5, para. 128; *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 68, para. 251; *Case of Gangaram Panday*. Judgment of November 21, 1994. Series C No. 16, para. 49; and *Case of Godínez Cruz*. Judgment of January 20, 1989. Series C No. 5, para. 141.

Quispe, Marcelina Paquiyaury Illanes de Gómez, Ricardo Emilio Gómez Paquiyaury, Carlos Pedro Gómez Paquiyaury, Marcelina Haydeé Gómez Paquiyaury, Lucy Rosa Gómez Paquiyaury, and Miguel Ángel Gómez Paquiyaury.

XIII
RIGHTS OF THE CHILD
ARTICLE 19
IN COMBINATION WITH ARTICLE 1(1)

Pleadings of the Commission

157. The Commission argued that the State violated Article 19 of the American Convention, in combination with Article 1(1) of said treaty, which sets forth that every child has the right to special measures of protection, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyaury, because:

- a) respect for the rights of the child entails recognizing, respecting, and ensuring the individual personality of the child, entitled to rights and having obligations; and
- b) Peru, instead of providing said protection to the Gómez Paquiyaury brothers, killed them through its police agents.

Pleadings of the representative of the alleged victims and their next of kin

158. The representative of the alleged victims and their next of kin argued that the State violated Article 19 of the American Convention to the detriment of Emilio Moisés and Rafael Samuel Gómez Paquiyaury, because:

- a) children require special protection and care, due to their physical and psychological immaturity, and this includes adequate legal protection, especially in the context of an armed conflict;
- b) in addition to violating the fundamental rights of the Gómez Paquiyaury brothers, to which any human being is entitled, the State failed to provide them the additional protection they were entitled to as minors;
- c) in the case of Peru, the Committee on the Rights of the Child had already expressed its concern over the violence against children by the security and police forces;
- d) the State had the duty to be especially careful to provide measures of protection for children at the time of the facts, all the more so in the context of the ongoing "domestic armed conflict." In this regard, Article 38 of the Convention on the Rights of the Child establishes the requirement of special measures of protection for children affected by armed conflicts. In this regard, the Committee on the Rights of the Child has stated that the significant humanitarian international law includes the Geneva Convention and the two Additional Protocols; and
- e) the Peruvian State also failed to comply with its obligation to teach its police officers about the special care and obligations required regarding to

their dealings with minors.

Pleadings of the State

159. Regarding to the provision in Article 19 of the American Convention, the State expressed that "in the specific case[,] the agents of the State, instead of watching over and ensuring the rights of the Gómez Paquiyauri brothers, violated their fundamental rights."

Considerations of the Court

160. Article 19 of the American Convention sets forth that

[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

161. Regarding to the aforementioned article, the State pointed out that "it is, in fact, [under] the obligation to ensure measures for the protection for minors and adolescents, to safeguard their rights and liberties that they are entitled to for the mere [fact] of being legal persons. And that[,] therefore[,] in this specific case the agents of the State instead of watching over and protecting the rights of the Gómez Paquiyauri brothers, violated their basic rights."

162. Rafael Samuel and Emilio Moisés Gómez Paquiyauri were children, respectively 14 and 17 years old, when they were unlawfully and arbitrarily detained, tortured, and extra-legally executed by agents of the Peruvian National Police.¹²² The Court deems that cases in which the victims of human rights are children are especially grave, as their rights are reflected not only in the American Convention, but also in numerous international instruments, broadly accepted by the international community -notably in the United Nations' Convention on the Rights of the Child- that "establish the duty of the State to adopt special protection and assistance measures in favor of children under their jurisdiction."¹²³

163. Regarding the matter of protecting the rights of the child and adopting measures to attain said protection, the principle of the best interests of the child prevails, based "on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential".¹²⁴

164. Article 19 of the American Convention places the States under the obligation to adopt "measures of protection" that they require as children. The concept of "measures of protection" may be interpreted taking into account other provisions. This Court has said that "the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty (paragraph 2 of Article

¹²² The Court has already established that "[f]inally, taking into account international norms and the criterion upheld by the Court in other cases, "child" refers to any person who has not yet turned 18 years of age". *Legal Status and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 42; and see *Case of Bulacio*, *supra* note 6, para. 133.

¹²³ *Case of Bulacio*, *supra* note 6, para. 133; and *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 68, para. 188.

¹²⁴ *Legal Status and Human Rights of the Child*, *supra* note 122, para. 56; and see *Case of Bulacio*, *supra* note 6, para. 134.

31), but also the system of which it is part (paragraph 3 of Article 31).¹²⁵

165. The Court has pointed out before that this orientation is especially important for International Human Rights Law, which has moved forward substantially by means of an evolutive interpretation of the international protection instruments.¹²⁶ Regarding this matter, it has been the understanding of the Court that

[t]hat evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. Both this Court [...] and the European Court [...] have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.¹²⁷

166. Both the American Convention and the Convention on the Rights of the Child are part of a broad international *corpus juris* for protection of children that aids this Court in establishing the content and scope of the general provision defined in Article 19 of the American Convention.¹²⁸

167. The Convention on the Rights of the Child, ratified almost universally, contains various provisions that refer to the obligations of the State regarding minors who are in similar factual situations as those examined in this case, and which may throw light, in connection with Article 19 of the American Convention, on the behavior that the State should have had in that situation. Those provisions are as follows:

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 6

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 37

States Parties shall ensure that:

¹²⁵ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, *supra* note 82, para. 113; and see *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 68, para. 192.

¹²⁶ See *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 68, para. 193.

¹²⁷ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, *supra* note 82, para. 114; and see *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 68, para. 193.

¹²⁸ See *Legal Status and Human Rights of the Child*, *supra* note 122, para. 24; and *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 68, para. 194.

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. [...];
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

168. The provisions transcribed above allow us to specify, in several directions, the scope of the "measures of protection" mentioned in Article 19 of the American Convention. Several such measures stand out, including those pertaining to non-discrimination, prohibition of torture, and the conditions that must exist in cases of deprivation of the liberty of children.

169. On the other hand, in light of these provisions and in connection with detention of minors, as this Court pointed out and is recognized in various international instruments, it must be exceptional and for the briefest possible period.¹²⁹

170. Also, as the Court analyzed the matter in the chapter on abridgment of Article 5 of the Convention and the provisions of the Inter-American Convention against Torture (*supra* para. 117), the fact that the alleged victims were children requires applying the highest standard in determining the seriousness of actions that violate their right to humane treatment.

171. Finally, as the Court already pointed out in a previous chapter (*supra* para. 124), the obligation of the State to respect the right to life of every person under its jurisdiction has special modalities in the case of minors, as follows from the provisions on the protection of children set forth in the American Convention and in the Convention on the Rights of the Child; and it becomes an obligation to "prevent situations that might lead, by action or omission, to negatively affect it".¹³⁰

172. This Court finds that the acts against Rafael Samuel and Emilio Moisés Gómez Paquiyaury in the instant case, in which agents of the State were involved, clearly breach these preventions, pursuant to what was set forth in previous chapters (*supra* paras. 100, 117, 133 and 156).

173. Based on the above, the Court finds that the State violated the right to special measures of protection for minors, set forth in Article 19 of the American Convention, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyaury.

XIV PROTECTION OF HONOR AND DIGNITY AND PROTECTION OF THE FAMILY

¹²⁹ See *Case of Bulacio*, *supra* note 6, para. 135; likewise, see Article 37(b) of the Convention on the Rights of the Child; and Rules 13 and 19 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) (1985).

¹³⁰ See *Case of Bulacio*, *supra* note 6, para. 138.

ARTICLES 11 AND 17

Pleadings of the Commission

174. The Commission did not claim a violation of Article 11 nor of Article 17 of the American Convention in the instant case. Instead, it deemed that the pleadings of the representative of the alleged victims and their next of kin “transcend the object of the instant proceeding,” because:

- a) the object of the instant case is set forth in the application filed by the Commission;
- b) the above without detriment to the fact that the Court ultimately establishes the scope of its own competence (*compétence de la compétence/Kompetenz-Kompetenz*) and that, in view of the *iura novit curia* principle, the Court has the authority to apply the legal provisions that are pertinent in a case, even when the parties do not explicitly invoke them;
- c) pursuant to Articles 61(1) and 51(1) of the American Convention, only the States and the Inter-American Commission may initiate a proceeding before the Court, and in doing so they establish its juridical content, that is, what facts need to be proven by the parties and analyzed by the Court, just as the Court must establish what rights have been abridged;
- d) the Commission’s report, issued pursuant to Article 50 of the American Convention, or its applications, are the limits of the claims in the cases brought before the Court;
- e) bearing in mind the aforementioned provisions of the Convention, as well as reasons pertaining to the right to defense and to due process, procedural balance and legal certainty, the proceeding before the Court must take place within the limits set forth in the report issued by the Commission pursuant to Article 50 of the Convention and in the application filed before the Court;
- f) the written brief containing pleadings, motions, and evidence refers to certain new facts for which new evidence is provided, regarding facts subsequent to the death of the alleged victims, which allegedly affected their family and, regarding to said facts, there would allegedly be an abridgment of Articles 17 and 11 of the American Convention; and
- g) said factual and legal aspects transcend the object of the instant proceeding.

Pleadings of the representative of the alleged victims and their next of kin

175. The representative of the alleged victims and their next of kin deemed that Peru violated Article 11(2) of the American Convention, because the State attempted to convince the public that the minors died in a “terrorist confrontation” against the police and presented them as criminals; it stigmatized the name of the Gómez Paquiyauri brothers, which was an illegal attack against their honor and reputation; it also interfered unlawfully with the home and private life of the Gómez Paquiyauri family, through members of the police and of the Dirección Contra el Terrorismo (DINCOTE) immediately after the facts and throughout the duration of the domestic

legal proceeding.

176. The representative of the alleged victims and their next of kin also argued that the State violated Article 17 of the American Convention to the detriment of the next of kin of the alleged victims, because the State, instead of protecting the institution of the family, eliminated two members of the Gómez Paquiyaury family, harassed and persecuted the surviving members who filed a complaint regarding the facts, and left the daughter of Rafael Samuel Gómez Paquiyaury and of his companion fatherless.

Pleadings of the State

177. The State referred neither to the alleged violation of Article 11 of the American Convention, nor to the alleged violation of Article 17 of that same treaty in the instant case.

Considerations of the Court

178. First, the Court will refer to the possibility of claiming other facts or rights that were not included in the application. Regarding the facts that are the object of the proceeding, the Court has already established that "it is not admissible to allege new facts, distinct from those presented in the application, without detriment to setting forth those that may explain, clarify or reject the facts that have been mentioned in the application, or be consistent with the claims of the plaintiff."¹³¹ However, in the case of supervening facts, which occur after any of the main briefs in the proceeding have been filed (the application; the written brief containing pleadings, motions, and evidence, and the reply to the application), these may be alleged at any stage of the proceeding, before the judgment is issued.¹³²

179. On the other hand, the Court has already admitted that the representatives of the alleged victims and/or their next of kin may allege rights other than those stated by the Commission in its application.¹³³ In this regard, the Court has deemed that alleged victims are "the holders of all the rights embodied in the American Convention and, if [it] were not admissible [for them to claim new rights], it would be an undue restriction of their condition of subjects of international human rights law".¹³⁴ Nevertheless, the Court has qualified that, regarding the rights claimed for the first time by the representatives of the alleged victims and/or their next of kin, this "refers to facts that are already contained in the application."¹³⁵ In this regard, the Court has also applied the *iura novit curia* principle, "on which international jurisprudence has repeatedly relied and under which a court has the power and the duty to apply the juridical provisions relevant to a proceeding, even when the parties

¹³¹ *Case of the "Five Pensioners"*, supra note 22, para. 153; see *Case of Myrna Mack Chang*, supra note 5, para. 224.

¹³² See *Case of Myrna Mack Chang*, supra note 5, para. 224; and *Case of the "Five Pensioners"*, supra note 22, para. 154.

¹³³ See *Case of Maritza Urrutia*, supra note 5, para. 134; *Case of Myrna Mack Chang*, supra note 5, para. 224; and *Case of the "Five Pensioners"*, supra note 22, para. 155.

¹³⁴ *Case of the "Five Pensioners"*, supra note 22, para. 155; and see *Case of Maritza Urrutia*, supra note 5, paras. 127 and 128; and *Case of Myrna Mack Chang*, supra note 5, para. 224.

¹³⁵ *Case of the "Five Pensioners"*, supra note 22, para. 155; and see *Case of Myrna Mack Chang*, supra note 5, para. 224.

do not expressly invoke them".¹³⁶

180. Article 11 of the American Convention sets forth that:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

[...]

181. Article 17(1) of the American Convention provides that

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

[...]

182. Regarding to Article 11 of the Convention, it has been proven that the alleged victims were treated as "terrorists", subjecting them and their family to hatred, public contempt, persecution, and discrimination, for which reason there has been a violation of Article 11 of the American Convention, in combination with Article 1(1) of this same Convention, to the detriment of los members of the family mentioned in paragraphs 67.t and 67.u of the instant Judgment.

183. Regarding to Article 17 of the American Convention, this Court deems that the facts alleged in the instant case do not fit under it, for which reason the Court will not issue a ruling on this.

XV REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE CONVENTION)

Obligation to Redress

Pleadings of the Commission

184. Regarding to reparations that may be ordered by the Court as a consequence of the violations found, the Commission argued that:

- a) sentencing of the direct perpetrators of the facts by the Peruvian courts, as regards payment of civil compensation to their next of kin, insofar as it is not set in accordance with inter-American standards and carried out, does not free the State of its international obligation to make reparations to the next of kin of the victims, in connection with the acts committed by State agents;
- b) civil reparation "amounts ordered were insufficient", to be paid by low-ranking policemen who in Peru generally do not have the material assets to

¹³⁶ See *Case of Maritza Urrutia*, *supra* note 5, para. 134; *Case of Myrna Mack Chang*, *supra* note 5, para. 224; *Case of the "Five Pensioners"*, *supra* note 22, para. 155; and *Cantos Case*. Judgment of November 28, 2002. Series C No. 97, para. 58; likewise, see *Eur. Court H.R., Case of Guerra and others v. Italy*, Judgment of 19 February 1998, Reports 1998-I, p.13, para. 44; *Eur. Court H.R., Case of Philis v. Greece*, Judgment of 27 August 1991, Series A No. 209, p. 19, para. 56; *Eur. Court H.R., Case of Powell and Rayner v. The United Kingdom*, Judgment of 21 February 1990, Series A No. 172, p. 13, para. 29; and *Court of Justice of the European Communities. Judgment of November 19, 1998 in case C-252/96 P*, p.7, para. 23.

pay compensation and, furthermore, the next of kin of the victims have received no payment at all for said civil reparation; the State has neither paid nor made any effort to ensure that the next of kin of the victims receive civil reparations;

c) since those liable for the facts were members of a State institution, the Peruvian National Police, the State is "under the obligation to pay the compensation to the next of kin of the victims"; subsequently, the State may attempt, pursuant to its domestic legislation, an action for reimbursement to recover from the direct perpetrators the compensation it had to pay; and

d) the Commission asked the Court to find that the State has the international obligation to redress the next of kin of the Gómez Paquiyauri brothers for the violations found, by means of a compensation that is paid by the State, set according to international standards and for a sufficient amount to compensate both the pecuniary and the moral damages.

Pleadings of the representative of the victims and their next of kin

185. The representative of the victims and their next of kin asked the Court to order the State to accept its responsibility for the policy of extra-legal executions against the civilian population, in the context of which the Gómez Paquiyauri brothers were tortured and murdered; to acknowledge the cover-up mechanisms used to "hide said crimes within that systematic context and the individual liabilities that were hidden;" and to restore the rights that were abridged.

Pleadings of the State

186. Regarding to the argument of the Commission that the State has the international obligation to redress the next of kin of the Gómez Paquiyauri brothers for the alleged violations of their human rights, the State argued that "it accepts the responsibility for the crime committed by [its] police agents, and that it will therefore jointly and severally provide reparations for the injuries caused."

Considerations of the Court

187. Based on the points discussed in the foregoing chapters, the Court has found violations, in connection with the facts in this case, of Articles 4, 5, 7, 8, 19 and 25 of the American Convention, all of them in combination with Article 1(1) of this same Convention, as well as Articles 1, 6, 8 and 9 of the Inter-American Convention against Torture, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyauri; Articles 5, 8, 11 and 25 of the American Convention, all of them in combination with Article 1(1) of this same Convention, to the detriment of Ricardo Samuel Gómez Quispe, Marcelina Paquiyauri Illanes de Gómez, Ricardo Emilio Gómez Paquiyauri, Carlos Pedro Gómez Paquiyauri, Marcelina Haydeé Gómez Paquiyauri, Lucy Rosa Gómez Paquiyauri and Miguel Ángel Gómez Paquiyauri; Articles 5 and 11 of the American Convention, in combination with Article 1(1) of this same Convention, to the detriment of Jacinta Peralta Allccarima; and Article 11 of the Convention, in combination with Article 1(1) of this same Convention, to the detriment of Nora Emely Gómez Peralta. This Court has pointed out several times in its jurisprudence that it is a principle of International Law that any violation to an international obligation that has caused injury generates an obligation to adequately

redress said injury.¹³⁷ To this end, the Court has based itself on Article 63(1) of the American Convention, according to which,

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

188. As the Court has pointed out, Article 63(1) of the American Convention reflects a customary rule that is one of the key principles of contemporary international law regarding the responsibility of the States. Thus, when an unlawful event takes place that is attributable to a State, this immediately gives rise to the State's international responsibility for the violation of an international rule, with the attendant duty of reparation and of making the consequences of the violation cease.¹³⁸

189. Reparation of the damage caused by infringement of an international obligation requires, whenever possible, *restitutio in integrum*, which consisted of reestablishing the situation before the violation. If this is not possible, as in the instant case, this International Court must order adoption of a series of measures that, in addition to ensuring respect for the rights that were abridged, provide reparation of the consequences caused by the violations and pay compensation for the damages caused in the pertinent case.¹³⁹ It is necessary to add the positive measures that the State must adopt to ensure that injurious acts such as of the instant case do not occur again.¹⁴⁰ The obligation to redress, which is regulated in all its aspects (scope, nature, modes, and establishment of the beneficiaries) by international law, cannot be modified or not fulfilled by the obligated State by invoking domestic legal provisions.¹⁴¹

190. Reparations, as the term indicates, consist of the measures that tend to make the effects of the violations disappear or be mitigated. Their nature and their amount depend on the damage caused at both the pecuniary and non-pecuniary levels.¹⁴² In this regard, the reparations ordered must be related to the violations found in the previous chapters of this Judgment.

A) BENEFICIARIES

191. The Court will now summarize the pleadings of the Inter-American Commission, of the representative of the victims and their next of kin, and of the State about who should be considered beneficiaries of the reparations to be ordered by the Court.

Pleadings of the Commission

¹³⁷ See *Case of Maritza Urrutia*, *supra* note 5, para. 141; *Case of Myrna Mack Chang*, *supra* note 5, para. 234; and *Case of Bulacio*, *supra* note 6, para. 70.

¹³⁸ See *Case of Maritza Urrutia*, *supra* note 5, para. 142; *Case of Myrna Mack Chang*, *supra* note 5, para. 235; and *Case of Bulacio*, *supra* note 6, para. 71.

¹³⁹ See *Case of Maritza Urrutia*, *supra* note 5, para. 143; *Case of Myrna Mack Chang*, *supra* note 5, para. 236; and *Case of Bulacio*, *supra* note 6, para. 72.

¹⁴⁰ See *Case of Maritza Urrutia*, *supra* note 5, para. 144; *Case of Bulacio*, *supra* note 6, para. 73; and *Case of Juan Humberto Sánchez*, *supra* note 15, para. 150.

¹⁴¹ See *Case of Maritza Urrutia*, *supra* note 5, para. 143; *Case of Myrna Mack Chang*, *supra* note 5, para. 236; and *Case of Bulacio*, *supra* note 6, para. 72.

¹⁴² See *Case of Myrna Mack Chang*, *supra* note 5, para. 237.

192. The Commission pointed out that, given the nature of the instant case, the beneficiaries of the reparations to be ordered by the Court as a consequence of the violations found are: Marcelina Paquiyauri Illanes de Gómez, mother of the victims; Ricardo Samuel Gómez Quispe, father of the victims; Marcelina Haydeé, Ricardo Emilio, Carlos Pedro, Lucy Rosa and Miguel Ángel, all of them Gómez Paquiyauri and siblings of the victims.

Pleadings of the representative of the victims and their next of kin

193. In addition to the beneficiaries mentioned by the Commission, the representative of the victims and their next of kin asked the Court to consider Nora Emely Gómez Peralta, daughter of Rafael Samuel Gómez Paquiyauri, as a beneficiary of the reparations that it orders.

Pleadings of the State

194. In its brief with the reply to the application, the State did not refer to the issue of the beneficiaries of the reparations.

Considerations of the Court

195. The Court will now establish which person or personas are the "injured party" in the instant case, under the terms of Article 63(1) of the American Convention.

196. First of all, the Court finds Rafael Samuel and Emilio Moisés Gómez Paquiyauri to be "injured parties," given that they were the direct victims of the violations of the rights enshrined in Articles 4, 5, 7, 8, 19 and 25 of the American Convention, in combination with Article 1(1) of that same treaty, as well as in Articles 1, 6, 8 and 9 of the Inter-American Convention against Torture, for which reason they will be entitled to the reparations set by the Court, both for pecuniary and for non-pecuniary damages.

197. On the other hand, the next of kin of the victims, Ricardo Samuel Gómez Quispe, their father; Marcelina Paquiyauri Illanes de Gómez, their mother; Ricardo Emilio Gómez Paquiyauri, Carlos Pedro Gómez Paquiyauri, Marcelina Haydeé Gómez Paquiyauri, Lucy Rosa Gómez Paquiyauri, Miguel Ángel Gómez Paquiyauri, their siblings, will be entitled to the reparations ordered by the Court as direct victims of the violations of the rights enshrined in Articles 5, 8, 11 and 25 of the Convention, in combination with Article 1(1) of this same Convention. Jacinta Peralta Allcarima, Rafael Samuel Gómez Paquiyauri's girlfriend, in turn, will be entitled to the reparations ordered by the Court as a direct victim of the violations of the rights enshrined in Articles 5 and 11 of the Convention. Likewise, Nora Emely Gómez Peralta will be entitled to the reparations ordered by the Court as a direct victim of the violations of the rights enshrined in the aforementioned Article 11 of the Convention. Said next of kin will also be entitled to the reparations set by the Court as injured parties as a direct consequence of the death of Rafael Samuel and Emilio Moisés Gómez Paquiyauri. In this regard, the Court assumes that the suffering and the death of a person cause non-pecuniary damage to that person's children,¹⁴³

¹⁴³ See *Case of Maritza Urrutia*, *supra* note 5, para. 169.a); *Case of Myrna Mack Chang*, *supra* note 5, para. 264.a); *Case of the "Panel Blanca" (Paniagua Morales et al.)*. *Reparations*, *supra* note 116, paras. 108, 125, 143 and 174; and *Case of Cesti Hurtado*. *Reparations*, *supra* note 116, paras. 40 and 54.

spouse or companion,¹⁴⁴ parents and siblings,¹⁴⁵ for which reason it is not necessary to prove this.¹⁴⁶

198. The Court has pointed out, and reiterates here, that the victims' right to compensation for injuries up to the time of their death is transmitted by succession to their heirs. In this regard, the Court has stated that

[i]t is a norm common to most legal systems that a person's successors are his or her children. It is also generally accepted that the spouse has a share in the assets acquired during a marriage; some legal systems also grant the spouse inheritance rights along with the children. If there is no spouse or children, private common law recognizes the ascendants as heirs. It is the Court's opinion that these rules, generally accepted by the community of nations, should be applied in the instant case, in order to determine the victims' successors for purposes of compensation.¹⁴⁷

199. In the case of Emilio Moisés Gómez Paquiyaui, he had neither spouse nor companion nor children, for which reason his compensation must be given, in equal parts, to his parents, Ricardo Samuel Gómez Quispe and Marcelina Paquiyaui Illanes de Gómez, as the successors of Emilio Moisés Gómez Paquiyaui.

200. In the case of Rafael Samuel Gómez Paquiyaui, the Court has deemed it proven (*supra* para. 67.u) that he procreated a daughter, Nora Emely Gómez Peralta. In this regard, his compensation must be divided between his parents, Ricardo Samuel Gómez Quispe and Marcelina Paquiyaui Illanes de Gómez, and his daughter, Nora Emely Gómez Peralta, as follows:

- a) thirty percent (30%) of the compensation will be divided in equal parts between the parents of the victim; and
- b) seventy percent (70%) of the compensation must be given to his daughter.

¹⁴⁴ See *Case of the "Panel Blanca" (Paniagua Morales et al.)*. *Reparations*, *supra* note 116, paras. 125, 173 and 174; and *Case of Cesti Hurtado*. *Reparations*, *supra* note 116, paras. 40 and 54.

¹⁴⁵ See *Case of Maritza Urrutia*, *supra* note 5, para. 169.c); *Case of Myrna Mack Chang*, *supra* note 5, paras. 264.c) and f); *Case of Bulacio*, *supra* note 6, para. 98; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 175; *Case of Trujillo Oroza*. *Reparations*, *supra* note 116, para. 88.b); *Case of Cantoral Benavides*. *Reparations*, *supra* note 108, paras. 37 and 61 a) and d); *Case of the "Street Children" (Villagrán Morales et al.)*. *Reparations*, *supra* note 116, paras. 66 and 68; and *Case of the "Panel Blanca" (Paniagua Morales et al.)*. *Reparations*, *supra* note 116, paras. 108, 110, 125, 126, 143, 144 and 158.

¹⁴⁶ See *Case of Maritza Urrutia*, *supra* note 5, paras. 169 and 169.b); *Case of Myrna Mack Chang*, *supra* note 5, para. 264; *Case of Bulacio*, *supra* note 6, para. 98; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 175; *Case of the Caracazo*. *Reparations*, *supra* note 17, para. 50.e); *Case of Trujillo Oroza*. *Reparations*, *supra* note 116, para. 88.b); *Case of Bámaca Velásquez*. *Reparations*, *supra* note 116, para. 65.b); *Case of Cantoral Benavides*. *Reparations*, *supra* note 108, paras. 37 and 61.a) and d); *Case of the "Street Children" (Villagrán Morales et al.)*. *Reparations*, *supra* note 116, para. 66; and *Case of the "Panel Blanca" (Paniagua Morales et al.)*. *Reparations*, *supra* note 116, paras. 108, 125, 143 and 158.

¹⁴⁷ *Case of Aloeboetoe et al.* *Reparations* (Art. 63(1) American Convention Human Rights). Judgment of September 10, 1993. Series C No. 15, para. 62; likewise, see *Case of Bulacio*, *supra* note 6, para. 85; *Case of Juan Humberto Sánchez*, *supra* note 15, para. 164; *Case of the Caracazo*. *Reparations*, *supra* note 17, para. 91; *Case of Trujillo Oroza*. *Reparations*, *supra* note 116, para. 57; *Case of Bámaca Velásquez*. *Reparations*, *supra* note 116, para. 32; and *Case of the "Street Children" (Villagrán Morales et al.)*. *Reparations*, *supra* note 116, para. 67.

B) PECUNIARY DAMAGES

201. In accordance with the evidence gathered during the various stages of the proceeding and in light of the criteria set forth by this Court in its jurisprudence, the Court will now analyze the claims filed the Inter-American Commission, the representative of the victims and their next of kin, and the State, with the aim of establishing the measures of reparation regarding to pecuniary damages.

Pleadings of the Commission

202. The Commission asked the Court to order the State to pay compensation for pecuniary damages, regarding to which it stated the following:

- a) the next of kin of the victims incurred various expenses as a direct consequence of the facts; these include funerary expenses caused by the death of the victims, transport costs of the parents and of the brothers of the victims to police stations and hospitals to locate the victims, and lost earnings of the parents of the victims, who due to the grieving did not work during the week after the death of their children;
- b) the expenses specified above amount to US\$ 4,230.00 (four thousand two hundred and thirty United States dollars);
- c) to establish the earnings lost when the alleged victims died, it is necessary to take into account the ages of the victims at the time of their demise, the number of years before they reached the average life expectancy in the State, and an estimate of the salaries paid for the type of work that they would be carrying out;
- d) Emilio Moisés Gómez Paquiyaury was 14 years old at the time of his death and was in his third year of secondary school;
- e) Rafael Samuel Gómez Paquiyaury was 17 years old at the time of his death, had completed his secondary education the previous year, planned to apply to the Universidad Nacional de Ingeniería, and worked for a ship boiler firm. Regarding to this job, the petitioners stated that, if he had continued, Rafael Samuel Gómez Paquiyaury would have received an annual income equivalent to approximately US\$ 7,480.00 (seven thousand four hundred and eighty United States dollars);
- f) both Emilio Moisés and Rafael Samuel Gómez Paquiyaury intended to become professionals, and they had great possibilities of entering the university, as their siblings did; and
- g) an adequate compensation for lost earnings must be paid to the parents of the alleged victims, after hearing the representative of the victims and their next of kin.

Pleadings of the representative of the victims and their next of kin

203. The representative of the victims and their next of kin asked the Court to order the State to redress the pecuniary damages caused, taking into account the following criteria:

- a) as *damnum emergens*, the State must cover the costs of the things that were taken from the brothers: watches, leather shoes and, one of them, his pants; the expenses on the day of the facts and the following day to recover the bodies; the funerary expenses; the expenses caused by the search for justice and filing the complaint regarding the facts; the medical expenses, since Lucy Rosa and Miguel Ángel Gómez Paquiyaury, siblings of the victims, suffered "nervous problems;" Marcelina Paquiyaury Illanes de Gómez, mother of the victims, suffered tuberculosis and a pleural stroke. Compensation in fairness was also requested for the havoc caused by the State in their house;
- b) the expenses incurred the day of the facts and the following day amount to US\$ 22.94 (twenty-two United States dollars and ninety-four cents); the funerary expenses amount to US\$ 4,000.00 (four thousand United States dollars) and the expenses caused by the search for justice and filing the complaint regarding the facts amount to US\$ 299.71 (two hundred ninety-nine United States dollars and seventy-one cents);
- c) compensation for the other items must be set in fairness;
- d) regarding to the lost earnings, the life plan of the Gómez Paquiyaury family was based on the promise of what the children could achieve. Emilio wanted to be an aviation technician and Rafael a "production mechanic," for which he was already preparing;
- e) the life plan of the brothers was closely linked to that of the family, as the parents were immigrants to the area from Peru's central mountain range, where the family is considered an economic unit in which all its members contribute to development of the family and to its sustenance;
- f) taking into account that Rafael Samuel Gómez Paquiyaury "was a youth with an exceptional intelligence," which is shown by his academic performance, it is possible to estimate, taking into account the average life expectancy in Peru, that the lost earnings in his case amount to US\$ 507,350.10 (five hundred seven thousand three hundred and fifty United States dollars and ten cents);
- g) taking into account that Emilio Moisés Gómez Paquiyaury "was a child who was precociously mature to understand the needs of his home [and] with a highly developed sense of responsibility given his young age," it may be estimated, taking into account average life expectancy in Peru, that the lost earnings in his case amount to US\$ 518,379.45 (five hundred eighteen thousand three hundred seventy-nine United States dollars and forty-five cents);
- h) in the case of the next of kin of the victims, several of them had to stop working, at least temporarily, due to the facts; therefore, the representative requested as compensation for lost earnings US\$ 1,120.00 (one thousand one hundred and twenty United States dollars) in the case of the mother; US\$ 450 (four hundred and fifty United States dollars) in the case of the father; and US\$ 375.00 (three hundred and seventy-five United States dollars) in the case of Lucy Rosa Gómez Paquiyaury; and

- i) it is necessary to add to the items for *damnum emergens* and lost earnings the accruing interest to protect the value of said amount up to the time of its payment.

Pleadings of the State

204. Regarding to claims made by the Commission regarding reparations, the State expressed, in general terms, that "it accepts the responsibility for the crime committed by [its] police agents, and therefore it will jointly and severally provide reparations for the injuries caused."

Considerations of the Court

205. In this section, the Court will establish the pecuniary damages, based on the loss or reduction of earnings of the victims and, where appropriate, of their next of kin, and on the expenses incurred by the latter as a consequence of the facts in the instant case.¹⁴⁸

a) *Lost earnings*

206. In the instant case, the Court has deemed it proven that Rafael Samuel and Emilio Moisés Gómez Paquiyaury were students at the time of the facts. While it has been argued that both Rafael Samuel and Emilio Moisés Gómez Paquiyaury did some occasional jobs repairing ships, the Court does not have sufficient evidence to estimate exactly how much they earned. However, the Court deems it reasonable to assume that both would have entered the job market actively once they finished studying. In view of the above, the Court sets in fairness the amount of US\$ 100,000.00 (one hundred thousand United States dollars) as compensation for the lost earnings of Rafael Samuel Gómez Paquiyaury, and US\$ 100,000.00 (one hundred thousand United States dollars) as compensation for the lost earnings of Emilio Moisés Gómez Paquiyaury. These amounts must be distributed pursuant to the provisions of paragraphs 199 and 200 of the instant Judgment.

b) *Damnum emergens*

207. After analyzing the information received, as well as the jurisprudence of the Court and the facts of the case, the Court deems that compensation for pecuniary damages must also include an amount of money for the expenses incurred by the next of kin of Rafael Samuel and Emilio Moisés Gómez Paquiyaury, due to their death, including the funerary expenses of both victims; the medical treatment required by the siblings of the victims, Lucy Rosa and Miguel Ángel Gómez Paquiyaury, as well as their mother, Marcelina Paquiyaury Illanes de Gómez; and any expenses for psychological treatment incurred by or in which the next of kin will incur due to the injury caused by the violations committed by the State.

208. In this regard, the Court deems it appropriate to set, in fairness, US\$ 40,500.00 (forty thousand five hundred United States dollars) as compensation for *damnum emergens*. This amount must be given to Ricardo Samuel Gómez Quispe

¹⁴⁸ See *Case of Maritza Urrutia*, *supra* note 5, para. 155; *Case of Myrna Mack Chang*, *supra* note 5, para. 250; and *Case of Juan Humberto Sánchez*, *supra* note 15, para. 162.

and Marcelina Paquiyauri Illanes de Gómez, parents of the victims.

209. Based on all the above, the Court will now summarize the amounts set as compensation for pecuniary damages in connection with the violations found:

REPARATIONS FOR PECUNIARY DAMAGES			
	Lost earnings	<i>Damnum emergens</i>	Total
Rafael Samuel Gómez Paquiyauri (victim)	US\$100,000.00		US\$100,000.00
Emilio Moisés Gómez Paquiyauri (victim)	US\$100,000.00		US\$100,000.00
Ricardo Samuel Gómez Quispe and Marcelina Paquiyauri Illanes de Gómez (parents of the victims)		US\$40,500.00	US\$40,500.00
TOTAL			US\$240,500.00

210. The compensation ordered in favor of Rafael Samuel and Emilio Moisés Gómez Paquiyauri for pecuniary damages must be distributed under the terms set forth in paragraphs 199 and 200 of the instant Judgment.

C) NON-PECUNIARY DAMAGES

211. The Court will now address the injurious effects of the facts in this case that are not financial or property-related. Non-pecuniary damage may include both the suffering and affliction caused to the direct victims and to their close relations, detriment to very significant values of the individuals, as well as non-pecuniary changes in the conditions of existence of the victim or the victim's family. Since it is not possible to assign a specific monetary equivalent to non-pecuniary damage, for purposes of comprehensive reparations to the victims it can only be compensated, in two ways. First, by payment of an amount of money or delivery of goods or services that can be quantified in monetary terms, which the Court will establish by rationally applying judicial discretion and in terms of fairness. Second, by carrying out acts or works that are public in their scope or repercussion, such as broadcasting a message of official reproof of the human rights violations involved and of commitment to efforts to avoid their repetition and to ensure remembrance of the victims, acknowledgment of their dignity, and consolation to their relatives.¹⁴⁹ The first aspect of reparations for non-pecuniary damage will be addressed in this section, and the second aspect in the following one.

Pleadings of the Commission

212. Regarding to compensation for non-pecuniary damages, the Commission pointed out that:

¹⁴⁹ See *Case of Maritza Urrutia*, *supra* note 5, paras. 161 and 171; *Case of Myrna Mack Chang*, *supra* note 5, paras. 255 and 268; *Case of Bulacio*, *supra* note 6, paras. 90 and 105; and *Case of Juan Humberto Sánchez*, *supra* note 15, para. 168.

- a) it is necessary to take into account factors such as the gravity of the violations and the emotional suffering of the next of kin of the victims;
- b) in the instant case, the parents and the siblings of the victims suffered very much, and this suffering was worsened by the fact that two members of the family were simultaneously involved in the facts; and
- c) the Commission asked the Court to order the State to pay the parents and siblings of the victims an amount set in fairness by the Court.

Pleadings of the representative of the victims and their next of kin

213. The representative of the victims and their next of kin asked the Court to order the State to compensate the successors of the victims for the suffering inflicted on both of them; she also asked for compensation for the moral damage directly suffered by the next of kin of the alleged victims. Finally, the representative left it to the discretion of the Court to grant Jacinta Peralta Allccarima, the mother of Nora Emely Gómez Peralta and girlfriend of Rafael Samuel Gómez Paquiyauri at the time of the events, a compensation for the moral damage suffered, set in fairness, due to the suffering caused by the death of Rafael Samuel Gómez Paquiyauri at a time when she was pregnant with his child.

Pleadings of the State

214. Regarding to the Commission's claims regarding reparations, the State expressed, in general terms, that "it accepts the responsibility for the crime committed by [its] police agents, and therefore it will jointly and severally provide reparations for the injuries caused."

Considerations of the Court

215. International jurisprudence has repeatedly pointed out that the judgment is *per se* a form of reparation. However, given the circumstances of the instant case, the suffering caused by the facts to the victims and to their next of kin, the changes in the conditions of existence of their next of kin and the other non-pecuniary consequences suffered by the latter, the Court deems it appropriate to order payment of a compensation, in fairness, for non-pecuniary damages.¹⁵⁰

216. In considering and setting reparations for non-pecuniary damages, the Court has taken into account the various kinds of non-pecuniary damages to which the representative of the victims and their next of kin and the Commission have referred: the anguish of the victims before their death as a consequence of their unlawful and arbitrary detention and the torture to which they were subjected; the suffering of the next of kin of the victims due to the "gravity of the violations," as well as for the fact that they were committed against two members of the family; the "devastating" consequences of the facts of the instant case on the family as a whole, and individually on each of its members, including the loss of the child of Marcelina Haydeé Gómez Paquiyauri; the grief caused by presenting the victims as criminals who died in an armed confrontation; the anguish regarding persistence of a situation of impunity due to not establishing the responsibility of all those who ordered and

¹⁵⁰ See *Case of Maritza Urrutia*, *supra* note 5, para. 166; *Case of Myrna Mack Chang*, *supra* note 5, para. 260; and *Case of Bulacio*, *supra* note 6, para. 96.

covered up the facts; and stigmatization due to association of the names of the victims with being “terrorists,” which has even led to the daughter of Rafael Samuel Gómez Paquiyaury not being legally registered as his daughter.

217. As the Court has pointed out, the non-pecuniary damage caused to the victims is evident, as it is in accordance with human nature for every person subjected to aggression and abuse such as those committed against Rafael Samuel and Emilio Moisés Gómez Paquiyaury (unlawful and arbitrary detention, torture, and death) to experience deep moral suffering.¹⁵¹ For this reason, the Court deems that the non-pecuniary damages must be compensated in fairness, and this Court sets the amount at US\$ 100,000.00 (one hundred thousand United States dollars), for each of the victims, Rafael Samuel and Emilio Moisés Gómez Paquiyaury, to be given to their beneficiaries under the terms set forth in paragraphs 199 and 200 of the instant Judgment.

218. In the case of the next of kin of Rafael Samuel and Emilio Moisés Gómez Paquiyaury, it is reasonable to reach the conclusion that the affliction suffered by the victims extends to the closest members of the family, especially those who were in close emotional contact with them. In this regard, the Court deems that no evidence is required to reach that conclusion.¹⁵²

219. Given the specific circumstances of the instant case, which make it impossible to conclusively establish the degree of suffering or affliction caused to each of the members of the victims’ family, the Court sets US\$ 200,000.00 (two hundred thousand United States dollars), in fairness, as the amount for non-pecuniary damages. This amount will be given by the State to Ricardo Samuel Gómez Quispe and Marcelina Paquiyaury Illanes de Gómez, parents of the victims, who will decide based on their prudent discretion on the use or distribution of said amount amongst themselves and the other members of the family.

220. Regarding reparation for the non-pecuniary damages suffered by Jacinta Peralta Allccarima and her daughter Nora Emely Gómez Peralta, the Court also sets the amounts for them, in fairness, at US\$ 40,000.00 (forty thousand United States dollars) and US\$ 60,000.00 (sixty thousand United States dollars), respectively.

221. Based on the above, the Court will now summarize the amounts set as compensation for non-pecuniary damages for the violations found:

REPARATIONS FOR NON-PECUNIARY DAMAGES	
Victims and next of kin	Non-pecuniary damages
Rafael Samuel Gómez Paquiyaury (victim)	US\$ 100,000.00
Emilio Moisés Gómez Paquiyaury (victim)	US\$ 100,000.00
Ricardo Samuel Gómez Quispe (father) and Marcelina Paquiyaury Illanes de Gómez (mother)	US\$ 200,000.00
Jacinta Peralta Allccarima (girlfriend of Rafael Samuel Gómez Paquiyaury)	US\$ 40,000.00
Nora Emely Gómez Peralta (daughter of Rafael Samuel Gómez Paquiyaury)	US\$ 60,000.00
TOTAL	US\$ 500,000.00

222. The compensation ordered in favor of Rafael Samuel and Emilio Moisés Gómez

¹⁵¹ See *Case of Maritza Urrutia*, *supra* note 5, para. 168; *Case of Myrna Mack Chang*, *supra* note 5, para. 262; *Case of Bulacio*, *supra* note 6, para. 98; and *Case of Juan Humberto Sánchez*, *supra* note 15, para. 174.

¹⁵² See *Case of Maritza Urrutia*, *supra* note 5, paras. 169 and 169.b); *Case of Myrna Mack Chang*, *supra* note 5, para. 264; and *Case of Bulacio*, *supra* note 6, para. 98.

Paquiyauri for non-pecuniary damages must be distributed under the terms set forth in paragraphs 199 and 200 of the instant Judgment.

*D) OTHER FORMS OF REPARATION
(MEASURES OF SATISFACTION AND GUARANTEES OF NON-RECIDIVISM)*

223. In this section, the Court will establish measures of satisfaction that seek to redress the non-pecuniary damage; as well as, measures that are public in their scope or repercussions. These measures seek, *inter alia*, remembrance of the victims, acknowledgment of their dignity, consolation to their next of kin, or transmission of a message of official reproof of the human rights violations involved, as well as avoiding repetition of violations such as those in the instant case.¹⁵³

Pleadings of the Commission

224. The Commission requested as satisfaction and guarantee of non-recidivism that a serious investigation be conducted on the whereabouts of the masterminds of the death of the Gómez Paquiyauri brothers, as well as that they be tried and punished. It also asked the Court to order the State to publicly apologize and "to acknowledge the mistake and the violation of the human rights of the Gómez Paquiyauri family."

Pleadings of the representative of the victims and their next of kin

225. The representative of the alleged victims asked the Court to order the State to carry out the following actions as satisfaction and guarantees of non-recidivism:

- a) to carry out a public act of apology to the victims and acknowledgment of its responsibility;
- b) to capture, try, and punish those responsible for the arbitrary detentions, tortures and extra-legal executions of the brothers Rafael Samuel and Emilio Moisés Gómez Paquiyauri;
- c) to redress Nora Emely Gómez Peralta for the moral damage caused through lack of her legal recognition as the daughter of Rafael Samuel Gómez Paquiyauri;
- d) to in some way restore the family unit of the Gómez Paquiyauris, by granting liberty to Carlos Pedro and Ricardo Emilio Gómez Paquiyauri, who are deprived of liberty for facts other than those of the instant case, through a pardon by the State as acknowledgment of its responsibility and satisfaction to the injured party;
- e) to facilitate and resolve the establishment by the Gómez Paquiyauri family of a Foundation named after Emilio Moisés and Rafael Samuel Gómez Paquiyauri, with a mandate for protection of children in Peru;
- f) alternatively, for a secondary school in El Callao, preferably that where the minors studied, to be named after both of them;

¹⁵³ See *Case of Maritza Urrutia*, *supra* note 5, para. 171; *Case of Myrna Mack Chang*, *supra* note 5, para. 268; *Case of Cantoral Benavides. Reparations*, *supra* note 108, para. 53; and *Case of the "Street Children" (Villagrán Morales et al.)*. *Reparations*, *supra* note 116, para. 84.

- g) to establish a legal support fund for indigent persons;
- h) to absolutely forbid, in its legislation, the use of solitary confinement of minors during their investigation; and
- i) to adopt legislation that introduces provisions reflected in the Geneva Conventions and Additional Protocols pertaining to protection of the civilian population, and of children, in situations of domestic armed conflict, and to inform its security forces of said laws.

Pleadings of the State

226. Regarding to the Commission's claims on reparations, the State expressed, in general terms, that "it accepts the responsibility for the crime committed by [its] police agents, and therefore it will jointly and severally provide reparations for the injuries caused."

Considerations of the Court

a) *Obligation to investigate the facts that gave rise to the violations, to identify and to punish those responsible*

227. The Court has found, among others, that the State violated Articles 8 and 25, in combination with Article 1(1) of the Convention, to the detriment of the next of kin of the victim, due to the situation of impunity of the mastermind or masterminds of the facts, and this has generated feelings of insecurity, defenselessness, and anguish in the victims (*supra* para. 118).

228. The Court recognizes that impunity of those responsible has not been total in the instant case, as two direct perpetrators have been tried and found guilty of the facts (*supra* para. 67.p). However, at the time of the instant Judgment, after more than thirteen years, the mastermind or masterminds of the facts have not yet been tried or punished. Therefore, this constitutes a situation of grave impunity, which is an infringement of the duty of the State to investigate and punish those responsible for the acts that abridged human rights in the instant case, injuring the next of kin of the victims and fostering chronic recidivism of the human rights violations involved.¹⁵⁴

229. This Court has repeatedly referred to the right of the next of kin of the victims to know what happened and who the agents of the State responsible for the facts were.¹⁵⁵ As the Court has pointed out, "[w]hen there has been a human rights violation, the State has a duty to investigate the facts and punish those responsible, [...] and this obligation must be complied with seriously and not as a mere formality".¹⁵⁶

¹⁵⁴ See *Case of Myrna Mack Chang*, *supra* note 5, para. 272; *Case of Bulacio*, *supra* note 6, para. 120; and *Case of Juan Humberto Sánchez*, *supra* note 15, paras. 143 and 185.

¹⁵⁵ See *Case of Myrna Mack Chang*, *supra* note 5, para. 273; *Case of Trujillo Oroza. Reparations*, *supra* note 116, para. 100; and *Case of Cantoral Benavides. Reparations*, *supra* note 108, para. 69.

¹⁵⁶ See *Case of Myrna Mack Chang*, *supra* note 5, para. 273; *Case of Trujillo Oroza. Reparations*, *supra* note 116, para. 100; and *Case of Cantoral Benavides. Reparations*, *supra* note 108, para. 69.

230. The Court deems that victims of grave human rights violations and their next of kin, if applicable, have the right to know the truth. Therefore, the next of kin of the victims in the instant case have the right to be informed of everything that happened in connection with said violations. This right to the truth has been developed by International Human Rights Law;¹⁵⁷ when it is acknowledged and exercised in a concrete situation, this constitutes an important means of reparation. Therefore, it gives rise to an expectation of the next of kin of the victim that the State must satisfy.¹⁵⁸

231. In light of the above, to redress this aspect of the violations, the State must effectively investigate the facts of the instant case, with the aim of identifying, trying, and punishing all the masterminds and other persons responsible for the detention, torture, and extra-legal execution of Rafael Samuel and Emilio Moisés Gómez Paquiyaui. For this, it must take such judicial and administrative steps as may be necessary to reopen the investigation of the facts of the instant case and locate, try, and punish the mastermind or masterminds of said facts. The next of kin of the victims must have full access and the ability to act in all stages and instances of said investigations, pursuant to domestic legislation and the provisions of the American Convention. The State must also ensure effective compliance with the decision reached by the domestic courts, to fulfill this obligation. The outcome of the proceeding must be made known to the public, for Peruvian society to know the truth.

232. The Court notes that the State must ensure that the domestic proceeding to investigate and punish those responsible of the facts of this case attains its appropriate effects. The State must also abstain from resorting to measures such as amnesty, extinguishment, and measures designed to eliminate responsibility, as well as measures that seek to impede criminal prosecution or to suppress the effects of the conviction.

233. Regarding to fulfillment of this obligation to investigate and punish, the Court has established that:

[...]all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced

¹⁵⁷ See *Case of Myrna Mack Chang*, *supra* note 5, para. 274; *Case of Trujillo Oroza. Reparations*, *supra* note 116, para. 114; *Case of Bámaca Velásquez. Reparations*, *supra* note 116, para. 76; See, for example, *United Nations Human Rights Committee, Quinteros v. Uruguay, Communication No. 107/1981, decision of 21 July 1983*; United Nations, Human Rights Committee, Subcommittee on Prevention of Discrimination and Protection of Minorities, 49th session, *Informe final revisado acerca de la cuestión de la impunidad de los autores de violaciones de los derechos humanos (derechos civiles y políticos) preparado por L. Joinet*, UN General Assembly Doc. E/CN.4/Sub.2/1997/20/Rev.1; and United Nations, Human Rights Committee, Subcommittee on Prevention of Discrimination and Protection of Minorities, 45th session, *Estudio relativo al derecho de restitución, indemnización y rehabilitación a las víctimas de violaciones flagrantes de los derechos humanos y las libertades fundamentales*, Final report submitted by Theo van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8.

¹⁵⁸ See *Case of Myrna Mack Chang*, *supra* note 5, para. 274; *Case of Trujillo Oroza. Reparations*, *supra* note 116, para. 114; *Case of Bámaca Velásquez. Reparations*, *supra* note 116, para. 76; and *Case of Castillo Páez*, *supra* note 26, para. 90.

disappearance, all of them prohibited because they violate non-derogable rights recognized by International Human Rights Law.¹⁵⁹

b) Public act of acknowledgment of international responsibility and of apology to the next of kin of Rafael Samuel and Emilio Moisés Gómez Paquiyaury

234. As a consequence of the violations found in the *sub judice* case, the Court finds that the State must carry out a public act of acknowledgment of its responsibility in connection with the facts of this case and of apology to the victims. This act must be carried out in the presence of the next of kin of the victims and the highest authorities of the State must also attend.¹⁶⁰

c) Publication of the pertinent parts of the judgment of the Court

235. The Court also deems that, as satisfaction, the State must publish once in the official gazette, *Diario Oficial*, and in another national-coverage daily, the chapter of this Judgment on facts proven, without the respective footnotes, and the operative section of the Judgment.

d) To officially name a secondary school after Rafael Samuel and Emilio Moisés Gómez Paquiyaury

236. The State must also officially name a school in the province of El Callao after Rafael Samuel Gómez Paquiyaury and Emilio Moisés Gómez Paquiyaury, in a public ceremony and in the presence of the next of kin of the victims. This will contribute to enhancing public awareness of the need to avoid repetition of injurious acts such as those that occurred in the instant case and to ensure remembrance of the victims.¹⁶¹

e) Other forms of reparation in favor of Nora Emely Gómez Peralta

237. On the other hand, as satisfaction, the State must establish a scholarship up to university level education, in favor of Nora Emely Gómez Peralta, which will also include educational materials, study texts, uniforms, and school utensils.

238. The State must also facilitate registry of Nora Emely Gómez Peralta, in response to a request by her mother, Jacinta Peralta Allccarima, as the daughter of Rafael Samuel Gómez Paquiyaury.

XVI COSTS AND EXPENSES

Pleadings of the Commission

239. The Commission asked the Court, having heard the next of kin of the victims, to order the State to pay the costs incurred in the country in the course of the

¹⁵⁹ *Case of Barrios Altos*, *supra* note 117, para. 41; *Case of the Caracazo. Reparations*, *supra* note 17, para. 119; *Case of Trujillo Oroza. Reparations*, *supra* note 116, para. 106; and *Case of Barrios Altos. Interpretation of Judgment*, *supra* note 117, para. 15.

¹⁶⁰ See *Case of Myrna Mack Chang*, *supra* note 5, para. 278.

¹⁶¹ See *Case of Myrna Mack Chang*, *supra* note 5, para. 286; *Case of Trujillo Oroza. Reparations*, *supra* note 116, para. 122; and *Case of the "Street Children" (Villagrán Morales et al.)*. *Reparations*, *supra* note 116, para. 103.

judicial proceedings under domestic venue, as well as those incurred at the international level processing the case before the Commission and those incurred processing the case before the Court.

Pleadings of the representative of the victims and their next of kin

240. The representative of the victims and their next of kin asked that an amount be set regarding the expenses incurred by the next of kin of Rafael Samuel and Emilio Gómez Paquiyauri seeking justice and filing complaints regarding the facts. She also requested US\$ 367,658.70 (three hundred sixty-seven thousand six hundred and fifty-eight United States dollars and seventy cents), for costs and expenses incurred at the international level, including: expenses for the period from February 2002 to January 8, 2003; expenses incurred in steps taken in Lima, Peru, during 2002; expenses to prepare for the hearing and representation during 2003 and 2004; and expenses during the public hearing.

Pleadings of the State

241. Regarding to the claims of the Commission regarding reparations, the State expressed, in general terms, that "it accepts the responsibility for the crime committed by [its] police agents, and therefore it will jointly and severally provide reparations for the injuries caused."

Considerations of the Court

242. As the Court has stated previously,¹⁶² costs and expenses are included in the concept of reparations set forth in Article 63(1) of the American Convention, because the activities carried out by the next of kin of the victims to attain justice, both locally and internationally, entail expenses that must be compensated when the international responsibility of the State is found in a condemnatory judgment. Regarding to their reimbursement, the Court must prudently appraise the amount, encompassing the expenses incurred in proceedings before the authorities under domestic venue, as well as those incurred in the course of the proceeding before the inter-American system, taking into account the circumstances of the specific case and the nature of international jurisdiction for protection of human rights. This appraisal may be based on the principle of fairness and taking into account the expenses stated by the parties, if their *quantum* is reasonable.

243. The Court takes into account that the next of kin of the victims acted through representatives both before the Commission and before the Court. Therefore, the Court deems it equitable to order payment of the total amount of US\$ 30,000.00 (thirty thousand United States dollars), which must be given to Ricardo Samuel Gómez Quispe and Marcelina Paquiyauri Illanes de Gómez, parents of the victims, to cover the costs and expenses in the domestic proceedings and in the international proceeding before the inter-American system for protection of human rights.

**XVII
MODE OF COMPLIANCE**

244. To comply with the instant Judgment, the State must pay the compensation (*supra* paras. 206, 208, 217, 219 and 220), reimburse the costs and expenses (*supra*

¹⁶² See *Case of Maritza Urrutia*, *supra* note 5, para. 182; *Case of Myrna Mack Chang*, *supra* note 5, para. 290; and *Case of Bulacio*, *supra* note 6, para. 150.

para. 243) and adopt the measures ordered in paragraphs 234, 235, 236, 237 and 238, within one year of the date when this Judgment is notified. In the case of the other reparations ordered (*supra* paras. 227 to 233), the State must comply with the measures within a reasonable term.

245. Payment of the compensation ordered in favor of the victims or of their next of kin, as appropriate, must be made directly to them. If any of them are deceased, payment will be made to their heirs.

246. Payments made to cover the costs and expenses incurred in steps taken by the next of kin of the victims and their representatives in the international proceeding before the inter-American system for protection of human rights, will be made to the next of kin (*supra* para. 243).

247. If for causes attributable to the beneficiaries of the compensations it were not possible for them to receive those compensations within the one-year term that has been set, the State will deposit those amounts on behalf of the beneficiaries in a deposit certificate or account at a solid Peruvian banking institution, in United States dollars or their equivalent in Peruvian currency and under the most favorable financial conditions allowed by banking practices and legislation. If after ten years the compensations have not been claimed, the amounts will be returned, with interest accrued, to the State.

248. In the case of the compensation ordered in favor of the child Nora Emely Gómez Peralta, the State must deposit it in a solid Peruvian institution, in United States dollars. The investment will be made within one year's time, under the most favorable financial conditions allowed by banking practices and legislation while she is a minor. It can be withdrawn by the beneficiary when she comes of age or when it is so decided for the best interests of the child based on a ruling by a competent judicial authority. If after ten years from the date she came of age said compensation has not been collected, the sum will be returned to the State with interest accrued.

249. The State may fulfill its obligations by payment in United States dollars or an equivalent amount in Peruvian currency, using for the respective calculation the exchange rate between both currencies on the New York, USA exchange, the day before the payment.

250. Payments ordered in the instant Judgment will be exempt from all currently existing taxes or those that may be decreed in the future.

251. If the State were to be in arrears, it will pay interest on the amount owed, in accordance with the banking interest rate for arrearages in Peru.

252. In accordance with its case law, the Court reserves its inherent authority to monitor comprehensive and complete compliance with the instant judgment. The case will be closed once the State has faithfully complied with the provisions of the Judgment. Within a year from the date this Judgment is notified, the State must submit its first report to the Court on the steps taken to comply with this Judgment.

XVIII OPERATIVE PARAGRAPHS

253. Now therefore,

THE COURT,

FINDS THAT:

Unanimously,

1. the State violated the Right to Life set forth in Article 4(1) of the American Convention on Human Rights, in combination with Article 1(1) of this same Convention, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyauri, under the terms set forth in paragraphs 124 to 133 of the instant Judgment.

Unanimously,

2. the State violated the Right to Personal Liberty set forth in Article 7 of the American Convention on Human Rights, in combination with Article 1(1) of this same Convention, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyauri, under the terms set forth in paragraphs 81 to 100 of the instant Judgment.

Unanimously,

3. the State violated the Right to Humane Treatment set forth in Article 5 of the American Convention on Human Rights, in combination with Article 1(1) of this same Convention, and the obligations set forth in Articles 1, 6 and 9 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyauri. The State also violated Article 5 of the American Convention on Human Rights, in combination with Article 1(1) of this same Convention, to the detriment of Marcelina Paquiyauri Illanes de Gómez, Ricardo Samuel Gómez Quispe, Marcelina Haydeé Gómez Paquiyauri, Ricardo Emilio Gómez Paquiyauri, Carlos Pedro Gómez Paquiyauri, Lucy Rosa Gómez Paquiyauri, Miguel Ángel Gómez Paquiyauri and Jacinta Peralta Allccarima, under the terms set forth in paragraphs 106 to 119 of the instant Judgment.

By six votes to one,

4. the State violated the rights to Right to Fair Trial and to Judicial Protection enshrined in Articles 8 and 25, respectively, of the American Convention on Human Rights, in combination with Article 1(1) of this same Convention, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyauri, Ricardo Samuel Gómez Quispe, Marcelina Paquiyauri Illanes de Gómez, Ricardo Emilio Gómez Paquiyauri, Carlos Pedro Gómez Paquiyauri, Marcelina Haydeé Gómez Paquiyauri, Lucy Rosa Gómez Paquiyauri, and Miguel Ángel Gómez Paquiyauri, under the terms set forth in paragraphs 140 to 156 of the instant Judgment.

Judge Medina Quiroga partially dissenting.

Unanimously,

5. the State violated the obligations set forth in Article 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyauri, under the terms set forth in paragraphs 153 to 156 of the instant Judgment.

Unanimously,

6. the State violated Article 19 of the American Convention on Human Rights, in combination with Article 1(1) of this same Convention, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyaury under the terms set forth in paragraphs 161 to 173 of the instant Judgment.

Unanimously,

7. the State violated Article 11 of the American Convention on Human Rights, in combination with Article 1(1) of this same Convention, to the detriment of the members of the family of Rafael Samuel Gómez Paquiyaury and Emilio Moisés Gómez Paquiyaury, mentioned in paragraphs 67.t and 67.u of this ruling, under the terms set forth in paragraphs 178 to 182 of the instant Judgment.

Unanimously,

8. this Judgment is *per se* a form of reparation, as set forth in paragraph 215 of the instant Judgment.

AND, UNANIMOUSLY, ORDERS THAT:

9. The State must, within a reasonable term, effectively investigate the facts of the instant case, with the aim of identifying, trying, and punish all the perpetrators of the violations against Rafael Samuel and Emilio Moisés Gómez Paquiyaury. The outcome of this proceeding must be made known to the public, under the terms set forth in paragraphs 227 to 233 of the instant Judgment.

10. The State must carry out a public act of acknowledgment of its responsibility in connection with the facts of this case and of apology to the victims, under the terms set forth in paragraph 234 of the instant Judgment.

11. The State must publish once in the official gazette, Diario Oficial and in another national coverage daily the chapter of this Judgment on proven facts, without the respective footnotes, and the operative paragraphs of this Judgment, under the terms set forth in paragraph 235 of the instant Judgment.

12. The State must officially name a school in the province of El Callao after Rafael Samuel Gómez Paquiyaury and Emilio Moisés Gómez Paquiyaury, in a public ceremony and in the presence of the next of kin of the victims, under the terms set forth in paragraph 236 of the instant Judgment.

13. The State must establish a scholarship up to university level, in favor of Nora Emely Gómez Peralta, and facilitate her registry as the daughter of Rafael Samuel Gómez Paquiyaury, under the terms set forth in paragraphs 237 and 238 of the instant Judgment.

14. The State must pay the total sum of US\$240,500.00 (two hundred and forty thousand five hundred United States dollars) or its equivalent in Peruvian currency,

for pecuniary damages, under the terms set forth in paragraphs 206, 208 and 210 of the instant Judgment, distributed as follows:

- a) to Ricardo Samuel Gómez Quispe and Marcelina Paquiyaury Illanes de Gómez, as parents of Emilio Moisés Gómez Paquiyaury, US\$ 100,000.00 (one hundred thousand United States dollars) or their equivalent in Peruvian currency, under the terms set forth in paragraphs 206 and 199 of the instant Judgment;
- b) to Ricardo Samuel Gómez Quispe and Marcelina Paquiyaury Illanes de Gómez, as parents of Rafael Samuel Gómez Paquiyaury; and to Nora Emely Gómez Peralta, as daughter of Rafael Samuel Gómez Paquiyaury, US\$ 100,000.00 (one hundred thousand United States dollars) or their equivalent in Peruvian currency, under the terms set forth in paragraphs 206 and 200 of the instant Judgment; and
- c) to Ricardo Samuel Gómez Quispe and Marcelina Paquiyaury Illanes de Gómez, US\$ 40,500.00 (forty thousand five hundred United States dollars) or their equivalent in Peruvian currency, under the terms set forth in paragraph 208 of the instant Judgment.

15. The State must pay US\$500,000.00 (five hundred thousand United States dollars) or their equivalent in Peruvian currency, as compensation for non-pecuniary damages, under the terms set forth in paragraphs 217, 219 and 220 of the instant Judgment, distributed as follows:

- a) to Ricardo Samuel Gómez Quispe and Marcelina Paquiyaury Illanes de Gómez, as parents of Emilio Moisés Gómez Paquiyaury, US\$ 100,000.00 (one hundred thousand United States dollars) or their equivalent in Peruvian currency, under the terms set forth in paragraphs 217 and 199 of the instant Judgment;
- b) to Ricardo Samuel Gómez Quispe and Marcelina Paquiyaury Illanes de Gómez, as parents of Rafael Samuel Gómez Paquiyaury; and to Nora Emely Gómez Peralta, as daughter of Rafael Samuel Gómez Paquiyaury, US\$ 100,000.00 (one hundred thousand United States dollars) or their equivalent in Peruvian currency, under the terms set forth in paragraphs 217 and 200 of the instant Judgment;
- c) to Ricardo Samuel Gómez Quispe and Marcelina Paquiyaury Illanes de Gómez, US\$ 200,000.00 (two hundred thousand United States dollars) or their equivalent in Peruvian currency, under the terms set forth in paragraph 219 of the instant Judgment;
- d) to Jacinta Peralta Allccarima, US\$ 40,000.00 (forty thousand United States dollars) or their equivalent in Peruvian currency, under the terms set forth in paragraph 220 of the instant Judgment; and
- e) to Nora Emely Gómez Peralta, US\$ 60,000.00 (sixty thousand United States dollars) or their equivalent in Peruvian currency, under the terms set forth in paragraph 220 of the instant Judgment.

16. The State must pay US\$30,000.00 (thirty thousand United States dollars) or

their equivalent in Peruvian currency, which must be given to Ricardo Samuel Gómez Quispe and Marcelina Paquiyaauri Illanes de Gómez, for costs and expenses in the domestic proceeding and in the international proceeding before the inter-American system for protection of human rights, under the terms set forth in paragraph 243 of the instant Judgment.

17. The State must deposit the compensation ordered in favor of the child Nora Emely Gómez Peralta in a banking investment in her behalf at a solid Peruvian institution, in United States dollars, within one year's time and under the most favorable financial conditions allowed by banking practices and legislation while she is a minor, under the terms set forth in paragraph 248 of the instant Judgment.

18. The State must pay the total amount ordered as compensation for pecuniary damages, non-pecuniary damages, costs and expenses established in the instant Judgment, without any of its items being subject to existing taxes, levies or charges, or any that may be decreed in the future.

19. The State must carry out the measures of reparation and of reimbursement of expenses listed in operative paragraphs 10 to 17 of the instant Judgment within one year's time, counted from the date this Judgment is notified, under the terms set forth in paragraph 244 of the instant Judgment.

20. If the State were to be in arrears, it must pay interest on the amount owed, and the interest will be at the banking rate in Peru, under the terms set forth in paragraph 251 of the instant Judgment.

21. If due to causes attributable to the beneficiaries of the compensations it were not possible for them to receive those compensations within the one-year term that has been set, the State will deposit those amounts on behalf of the beneficiaries in a deposit certificate or account at a solid Peruvian banking institution, under the terms set forth in paragraph 247 of the instant Judgment.

22. The Court will oversee execution of this Judgment and will close this case once the State has fully complied with its provisions. Within one year from the date when notice is served of this Judgment, the State must submit a report to the Court on steps taken to comply with it, pursuant to paragraph 252 of the instant Judgment.

Judge Cançado informed the Court of his Separate Opinion, Judge Medina Quiroga informed the Court of her Partially Dissenting Opinion, and Judge Eguiguren Præli informed the Court of his Separate Opinion. These opinions are attached to the instant judgment.

Sergio García-Ramírez
President

Alirio Abreu-Burelli

Oliver Jackman

Antônio A. Cançado Trindade

Cecilia Medina-Quiroga

Manuel E. Ventura-Robles

Francisco José Eguiguren-Praeli
Judge *ad hoc*

Pablo Saavedra-Alessandri
Secretary

So ordered,

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I have concurred with my vote in the instant Judgment of the Inter-American Court of Human Rights in the case of the *Gómez Paquiyauri Brothers versus Peru*. The issues raised by the *cas d'espèce* and addressed by the Court in the Judgment it reached have led me to reflect on certain matters that I feel I must state in this Separate Opinion, as the grounds for my position on them. I will refer, specifically, to the following points: a) the tragic vulnerability of the human condition, as shown by the facts in the instant case; b) establishment of the emergence of the international responsibility of the State; c) interaction between international law and domestic law in the current sphere of protection, transcending the "principle of subsidiarity," as it has been called; d) emancipation of the individual *vis-à-vis* his or her own State; e) implementation of the international responsibility of the State through the initiative of the individual as the subject of international law; and f) compulsory Law (*jus cogens*) and the establishment of the aggravated international responsibility of the State.

I. The Tragic Vulnerability of the Human Condition.

2. The facts in the instant case bring before this Court, once again, the recurring issue of the vulnerability and insecurity inherent to the human condition. The inevitable nature of human suffering seems proven over the centuries, and the fragility of the human condition has always been a matter of reflection, including our own days.¹ Since the times of Aeschylus, Sophocles, and Euripides to our own, the perennial and current nature of tragedy has expressed itself in the lives of millions and millions of human beings, generation after generation. It is difficult to find someone who has not suffered it somehow or become aware of it. Tragedy, today as in the 5th century B.C., is present every day in the daily life of millions of human beings. The facts of the instant case of the Gómez Paquiyauri brothers attest to this as they -like so many others whom we have not even heard about over the ages- were the victims of human brutality.

3. In the instant case of the *Gómez Paquiyauri Brothers*, the testimony of the next of kin of the two victims before this Court, and throughout the instant Judgment, concur in that when their bodies were found at the morgue, with a sign that read "unidentified", they were both wet, dirty, with their clothes full of dirt and blood, with an expression of "horrible pain," and their faces mangled; the eye sockets of both brothers were empty, and there was encephalic mass on their hair; one of them (Rafael) was missing a thumb, which had been shot off, and the palms had holes in them, as if they had been burned; the other deceased brother's mouth (Emilio's) was half-open, his teeth full of dirt. One of the surviving brothers (Miguel Ángel Gómez Paquiyauri) stated before the Inter-American Court that "he ha[d] no words to describe" what he saw. The father of the two youths (Ricardo Samuel Gómez Paquiyauri) added that "his children, 14 and 17 years old, were cruelly tortured and murdered."²

4. In her testimony before the Inter-American Court, at the public hearing on May 5, 2004, the Gómez Paquiyauri brothers' mother (Marcelina Paquiyauri Illanes

¹. For example, in the works of A. Malraux and H. Arendt, with similar titles, among others.

². See para. 49 (b),(c),(d), and (e) of the instant Judgment.

de Gómez) stated that, when she arrived at the morgue to identify the bodies of her two sons,

"when we entered the room, on a table, that seemed to be made out of metal, (...) there were my children, Rafael and Emilio, crosswise, not as I left them, healthy, smiling, happy, but their face disfigured, they had shot one of them in the eye and the other was all bruised; Emilio, his mouth half-open, his teeth full of dirt, his clothes full of dirt, wet (...). Likewise, Rafael was the same, eyeless, they had shot his thumb off (...). I didn't know what to do, but when I looked at Rafael's chest there was a white piece of paper or cloth that said 'approximately 27 years old, arrived as a corpse [unidentified]'; about Emilio it said 'approximately 24 years old, unidentified, arrived as a corpse.' I felt desperate, (...) I began to scream because they gave them those ages, that could not be, eyesight is for seeing, we see who is older, who is younger, you could see they were children and they gave them that age. (...) Then (...) I yelled, how is it possible that you gave them that age, knowing they are children? (...) Then (...) I began to cry and to say why did they give them that age, they did not even respect the fact that they [are] children (...)."³

5. The victim's sister (Lucy Rosa Gómez Paquiyauri), in turn, when she testified before the Court on that same day, May 5th, stated that when she found the decomposing corpses of her brothers at the morgue,

"I could not believe what my eyes were seeing. (...) For me it was shocking, (...) I cannot describe in words what I felt at that moment, I felt that my life was falling apart. (...) Any ignorant person could realize that my brothers were just children; what they did to my brothers is unspeakable, they were children, they had nothing to do with what had happened (...).

(...) We have the right to know the truth, for the truth to be known (...). Do we not have the right to claim for the life of my brothers? I loved my brothers; there is no day in my life that I do not remember them, there is no day in my life that they are not present, they were everything for me; (...) never before this happened did I feel alone, never; they were always there next to me. (...) No matter how many years pass, I will always miss them, I will always feel their absence. We want the truth to be known, we want to ensure that what happened to my family, what happened to my brothers, the abuse committed against them never happens again."⁴

6. Nothing will be as it was before. The survivors of the Gómez Paquiyauri family today have the memory of paradise lost. Together with Rafael and Emilio, brutally torn from this world by their fellow men, they also lost the unrecoverable happiness of simple and harmonious family life. The vacuum was filled by a feeling of deep sorrow and rebellion, with its corrosive effect. The damage suffered and narrated by the next of kin of the two young brothers who were murdered is truly irreparable, and the reparations ordered by the Court in the instant Judgment can only attenuate their grief,⁵ which has not eroded over time.

7. What occurred in the instant case does in fact generate a reflection on the precarious nature of the human condition. This has been so, since the fall of the human being in Eden, which gave rise to the "tragic and ominous future" of humankind;⁶ the seed of good and evil became established in everyone, throughout

³. I-A Ct of HR, *Transcripción de la Audiencia Pública Celebrada los Días 5, 6 y 7 de Mayo de 2004 - Caso de los Hermanos Gómez Paquiyauri versus Perú*, San Jose, Costa Rica, I-A Ct of HR, 2004, pp. 52-53 (internal distribution).

⁴. *Ibid.*, pp. 43-44 and 48.

⁵. See, in this regard, my Separate Opinions in the cases of the "Street Children" (*Villagrán Morales et al. versus Guatemala*, Reparations, Judgment of 26.05.2001), of *Bámaca Velásquez versus Guatemala* (Reparations, Judgment of 22.02.2002), and of *Bulacio versus Argentina* (Merits and Reparations, Judgment of 18.09.2003).

⁶. As described by J. Milton, *Paradise Lost* (1667), book IX, verses 6-15.

human succession, which "was destined to the calamitous events of life."⁷ As J. Milton said in his universal work, *Paradise Lost* (1667),

"(...) like one of us Man is become
To know both Good and Evil, since his taste
Of that defended Fruit; but let him boast
His knowledge of Good lost, and Evil got,
Happier, had it suffic'd him to have known
Good by it self, and Evil not at all."⁸

8. Everyone has experienced or become aware of some expression of the violence that human beings carry within themselves. No one can deny the finite nature of human beings, highlighted by a feeling of powerlessness in face of brutality and injustice, and the suffering they entail, reflected in tragedy over the centuries.⁹ In the age of the modern nation-State, abominable crimes have been committed in the name of alleged "State security", and citizens have been placed in the most pitiless human insecurity. State security (originally conceived for the realization of the common weal) and that of the human person have not gone hand in hand; quite the contrary, the former has often been invoked as a pretext to unduly restrict the latter. The facts in the instant case eloquently show this historical distortion.

9. In the instant Judgment in the case of the *Gómez Paquiyauri Brothers*, the Court has, in short, found that one of the proven facts is that

"At the morgue the bodies of Rafael Samuel and Emilio Moisés Gómez Paquiyauri were full of blood and dirt, wet, dirty; there was encephalic mass on their hair, and one of Emilio's fingers was missing. In both of them, the eyes were missing" (para. 67(j)).

10. Working for human rights, then, entails sharing the deepest human suffering, being in contact with the evil within each person since the fall of the first two human beings in Eden. Working effectively for human rights, with concrete results, is to once again find the good that is also within each person, and to help attain redemption through the realization of justice. The first step, on the difficult path in search of justice, is to identify the origin of the responsibility of the State, that is, to establish how said responsibility arises.

II. Establishment of the Emergence of the International Responsibility of the State

11. At the outset, I must point out that inclusion in the instant Judgment of the Inter-American Court, of a chapter (VIII) on the International Responsibility of the State, as it has been addressed in the respective adjudicatory proceeding, evinces the need to take general international law and the general principles of international law into account, together with the provisions of the American Convention on Human Rights, when applying a treaty such as the latter. In point of fact, the general theory of exhaustion of domestic remedies, in international law, has for a long time had to

⁷. *Ibid.*, book X, verses 967-991.

⁸. *Ibid.*, book X, verses 84-89.

⁹. See W. Kaufmann, *Tragedy and Philosophy*, 2d. ed., Princeton/N.J., Princeton University Press, 1992, pp. 131, 133, 309 and 315.

address precisely the aforementioned issue of the establishment of the moment of emergence of the international responsibility of the State.

12. As I pointed out in a study on the subject, published in Geneva in 1978, over the last decades attempts to codify the matter, international jurisprudence, international doctrine and international practice have demonstrated a clear division between two theses, the *substantive* and the *procedural* ones (according to which State responsibility is, or is not, respectively, contingent upon reparations in domestic law). Combinations of these two theses, and of other explanatory theories (such as that of *complex international wrongdoing*, of *dédoulement fonctionnel*, of the rule of conflict and of the rule of *policy*) ultimately tend to converge toward the basic dichotomy between the substantive and procedural theses.¹⁰

13. Both in that study and in others I have always insisted on the need to establish a distinction between the emergence and the implementation (*enforcement, mise-en-oeuvre*) of the international responsibility of the State. In the sphere of responsibility of the State for damages caused to foreigners, the rule of domestic remedies has often been given a substantive nature (especially in the practice of several States), perhaps due to its *preventive* nature *vis-à-vis* discretionary exercise of diplomatic protection; instead, in the sphere of international protection of human rights, the formulation of said rule *takes on the form of a procedural condition of admissibility of international claims or petitions*¹¹ (integrating domestic remedies in the international process of reparation of human rights violations).

14. This being so, in my opinion there can be no doubt that, in International Human Rights Law, *the international responsibility of the State arises at the very moment of violation of the rights of the human person*, that is, as soon as the international wrongful act attributable to the State occurs. In the framework of the Inter-American Convention on Human Rights, the international responsibility of the State may be generated by acts or omissions of any branch or body or agent of the State, whatever its or his hierarchy, that violates the rights protected by the Convention.¹² This has been the clear understanding of the Inter-American Court, which today constitutes its *jurisprudence constante* on the matter.¹³

15. Yet despite the clarity of the matter, unfortunately there has continued to be controversy, as I mentioned in my Separate Opinion (para. 4) in the *Myrna Mack versus Guatemala* case (2003), about the very moment of emergence of the responsibility of the State (perhaps due to the different contexts in which the rule of domestic remedies has been invoked¹⁴), - and this can be seen in the various

¹⁰. See A.A. Cançado Trindade, "The Birth of State Responsibility and the Nature of the Local Remedies Rule", 56 *Revue de droit international de sciences diplomatiques et politiques* - Sottile (1978) pp. 157-188.

¹¹. *Ibid.*, p. 176.

¹². See Inter-American Court of Human Rights (I-A Ct of HR), case of "*The Last Temptation of Christ*" versus Chile, Judgment of 05.02.2001, Series C, n. 73, p. 47, para. 72; and see Concurring Opinion of Judge A.A. Cançado Trindade, p. 76, para. 16, and see pp. 85-87, paras. 31-33.

¹³. See I-A Ct of HR, case of the "Street Children" (*Villagrán et al. versus Guatemala*, Merits), Judgment of 19.11.1999, Series C, n. 63, p. 89, para. 220; I-A Ct of HR, case of the "Five Pensioners" versus Peru, Judgment of 28.02.2003, Series C, n. 98, para. 163; I-A Ct of HR, *Case of Juan Humberto Sánchez versus Honduras*, Judgment of 07.06.2003, Series C, n. 99, para. 142.

¹⁴ Such as the fundamentally different contexts of international protection of human rights and diplomatic protection.

positions adopted on the matter by the Inter-American Commission on Human Rights and by the representatives of the victims in the instant case of the *Gómez Paquiyauri Brothers versus Peru* (2003).

16. It is, therefore, appropriate to insist in the instant case on the specific point made before. As I underlined in my Concurring Opinion in the case of *"The Last Temptation of Christ"* (2001), with respect to Chile,

"(...) in the present context of the international protection of human rights, - fundamentally distinct from that of discretionary diplomatic protection at inter-State level,¹⁵ - the rule of domestic remedies is endowed with a *procedural* rather than *substantive* nature. It thus conditions the *implementation (mise-en-oeuvre)* of the responsibility of the State (as a requisite of admissibility of an international petition or complaint), but not the *birth* of such responsibility.

This is the thesis which I have been constantly sustaining for more than twenty years (...).¹⁶ (...) I have always maintained that the *birth* and the *implementation* of the international responsibility of the State correspond to two distinct moments; in the present context of the international protection of human rights, the requisite of prior exhaustion of remedies of domestic law conditions the implementation, but not the birth, of that responsibility, which is conformed as from the occurrence of an internationally wrongful act (or omission)(...)" (paras. 33-34).

17. And, in two of my conclusions¹⁷ in that Concurring Opinion, which I wish to reiterate here, I argued precisely, in brief, that

- "(...) the international responsibility of a State Party to a human rights treaty arises at the moment of the occurrence of an international wrongful act - or omission - (*tempus commisi delicti*), imputable to that State, in violation of the treaty at issue;
- (...) in the context of the international protection of human rights, the rule of exhaustion of remedies of domestic law is endowed with a procedural rather than substantive nature (as a condition of admissibility of a petition or complaint to be resolved *in limine litis*), thus conditioning the implementation but not the birth of the international responsibility of a State Party to a human rights treaty" (para 40).

18. The representative of the alleged victims and their next of kin (Mónica Feria Tinta) has argued quite rightly in a similar vein before the Court in the instant case of the *Gómez Paquiyauri Brothers*, both in her written pleadings on April 17, 2002 (pp. 13-14, para. 25), and in her oral pleadings at the seat of the Court on May 7,

¹⁵ The basic differences in the context require that application of the rule of domestic remedies, in the sphere of international protection of human rights, pay special attention to the human person's need for protection. Said rule is far from being an unchangeable or sacred principle of international law, and nothing hinders its application with greater or lesser rigor in different contexts. After all, domestic remedies are a part of the international system for protection of human rights, itself, with an emphasis on the component of reparation (redress) rather than on the mechanical process of exhaustion (of said remedies). The rule of domestic remedies attests to the interaction between international law and domestic law in the current context of protection. We are here before a *law of protection*, endowed with its own specificity, geared primarily toward the victims, toward the rights of the human beings and not of the States. The generally accepted principles of international law (which the formulation of the rule of domestic remedies refers to in human rights treaties such as the American Convention), in addition to evolving differently in the various contexts where they are applied, necessarily undergo a certain degree of adjustment or adaptation when they are included in human rights treaties, due to the special nature of the object and purpose of said treaties and to the widely acknowledged specificity of the international protection of human rights. A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge, University Press, 1983, pp. 1-443, esp. 6-56, 279-287, 290-322, and 410-412.

¹⁶ A.A. Cançado Trindade, "The Birth of State Responsibility...", *op. cit. supra* n. (10), pp. 157-188.

¹⁷ The first and the seventh.

2004.¹⁸ The Inter-American Commission on Human Rights, in turn, missed this important specific conceptual point, and that even led the Commission to inappropriately mix the issue of the emergence of the international responsibility of the State with the “principle of subsidiarity,” as it is called (see *infra*).

III. Beyond Subsidiarity: the Interaction between International Law and Domestic Law in the current Sphere of Protection

19. In face of this misunderstanding, I must specify another point, to clarify this conceptual matter and perhaps to provide a better understanding of the issue. In its *Report* of 11.10.2001 (under Article 50 of the American Convention) on the instant case, the Inter-American Commission argued, somewhat surprisingly, that “not every violation” of human rights committed by the agents of the State entails the international responsibility of the State; according to the Commission’s *Report*, the State does not incur responsibility if it investigates the facts, punishes those responsible, and provides due reparation. According to the Commission, “the above is explained by the subsidiary nature of the inter-American human rights system.”¹⁹ Still according to the Commission, in the instant case, the international responsibility of the State remained because it did not conduct a complete and adequate investigation, and it neither tried nor punished those responsible.²⁰

20. In its oral pleadings at the aforementioned public hearing before this Court on 07.05.2004 the Commission,²¹ as reported in the instant Judgment of the Court (para. 68), once again inappropriately mixed the origin of the international responsibility of the State with the “subsidiary nature” of international jurisdiction with respect to domestic or national jurisdiction. In my understanding, any violation of a right protected by the American Convention *immediately* entails the responsibility of the State; the *tempus commissi delicti* is that when the internationally wrongful act occurred. This gives rise –as consequences of the original violation- to the obligations of the State *under the Convention* to investigate the facts, punish those responsible, and provide reparations to the victims; if it does not fulfill those obligations, the State commits additional violations to the applicable international law.

21. An ongoing international human rights proceeding is not affected by domestic legal measures taken independently of it and in light of a different applicable law (the domestic or national one); said measures, therefore, do not magically “discharge” the international responsibility already incurred by the State or make it “disappear.” Implementation of said responsibility (at a moment other than its birth) necessarily occurs in light of the provisions of the human rights treaty involved, which is directly applicable in the domestic law of the State responsible for wrongdoing.

¹⁸. I-A Ct of HR, *Transcripción de la Audiencia Pública Celebrada los Días 5, 6 and 7 de Mayo de 2004 – Caso de los hermanos Gómez Paquiyauri versus Perú*, San Jose, Costa Rica, I-A Ct of HR, 2004, p. 146 (internal distribution).

¹⁹. Inter-American Commission on Human Rights, *Informe n. 99/01 - Caso n. 11.016 (Perú)*, doc. OAS/Ser/L/V/II.113/doc.36, of 11.10.2001, pp. 9 and 12-13, paras. 48-49, 59 and 63.

²⁰. *Ibid.*, pp. 15 and 19, paras. 69 and 87.

²¹. See *Transcripción de la Audiencia Pública...*, *op. cit. supra* n. (18), pp. 156-157 (internal distribution).

22. A tribunal such as the Inter-American Court is empowered to establish the international responsibility of the State in cases brought before it, without considering a *renvoi* of the issue under its competence to domestic courts; this is its own prerogative, and also its duty. And since the responsibility of the State under domestic law is not necessarily identical with its responsibility under international law, and the parties and the issue debated under international jurisdiction are not necessarily the same as those under domestic venue,²²

"The [Inter-American] Court cannot abdicate from such determination, not even in the hypothesis that the decision of a national tribunal is entirely coincident with its own as to the merits. Otherwise, this would lead to a total juridical relativism, illustrated by the "endorsement" of a decision of a national tribunal when it is considered in accordance with the Convention, or else the determination that it does not generate, or ought not to generate, legal effects (...) when it is considered incompatible with the American Convention."²³

23. In addition to this, the conditions for admissibility of claims or petitions under the American Convention refer to *implementation* of the responsibility, not to its *origin or emergence*. The former conditions are procedural in nature, while the establishment of the responsibility of the State is in the sphere of substantive or material law. I do not see how one can relate said establishment with the "principle of subsidiarity," as it is called, which refers directly and specifically to the protection *mechanisms*, at the national and international levels –the international ones being considered "subsidiary" to the national ones.

24. The subsidiarity mentioned above does not encompass material law, that is, it cannot be invoked with respect to the substantive provisions pertaining to the protected rights, nor regarding the content and scope of the respective obligations. In my opinion, one cannot give said subsidiarity a dimension that it does not effectively have, and never did. Furthermore, viewing relations between the international and national legal systems from the standpoint of the "principle of subsidiarity" is essentially static. Therefore, it does not faithfully reflect the dynamics and current state of evolution of the *interaction* between international law and the domestic law of the States in the current sphere of protection, for the benefit of the human beings protected.

25. As I mentioned, in this regard, in my Concurring Opinion in the case of "*The Last Temptation of Christ*" (2001), international law will be perfected and strengthened when human conscience attains a degree of evolution such that it no longer accepts the enactment of domestic laws (or administrative acts or court decisions) that obstruct application of international provisions for protection integrated with the provisions of domestic law (para. 10). And, long before my aforementioned Opinion, in an essay published in Germany in 1977-1978, I argued that, since human rights treaties entrust the national courts themselves with protective functions in the application of the rule of domestic remedies, said remedies are part of the international protection procedures; the purpose and effect

²². See, in this regard, I-A Ct of HR, *Case of Las Palmeras versus Colombia*, Judgment of 06.12.2001 (Merits), Series C, n. 90, Joint Separate Opinion of Judges A.A. Cançado Trindade and M. Pacheco Gómez, pp. 43-45, paras. 2-3 and 5.

²³. *Ibid.*, Joint Separate Opinion of Judges A.A. Cançado Trindade and M. Pacheco Gómez, pp. 44-45, para. 4.

of the resulting interaction between the international and national legal systems in the current context of protection is to perfect the national legal protection systems, as required by international instruments to safeguard human rights.²⁴

III. Emancipation of the Individual *vis-à-vis* his or her own State.

26. This is not the first time that this happens. Previously, in the case of the "*Five Pensioners*" versus Peru (2003), the petitioners and the Commission also followed different lines of reasoning with respect to a certain aspect of their respective pleadings. This is natural, and heartening, as it helps to highlight the different roles of the petitioners (the true substantive applicant party before the Court) and the Commission (as the auxiliary body of the Court in adjudicatory proceedings under the American Convention, and the defender of public interest and guardian of the Convention).

27. In my Concurring Opinion in that case of the "*Five Pensioners*" (para. 16), I pointed out that this development reflects the necessary prevalence of the *entitlement* of individuals to all the rights protected by the Convention above all other considerations, as subjects of International Human Rights Law. Said development is also a direct consequence of the step forward taken by the Court since it adopted its current rules of Procedure, the fourth in its history, granting *locus standi in judicio* to the individual petitioners in all stages of the procedure before the Court. As I argued in my aforementioned Opinion in the case of the "*Five Pensioners*" (para. 19), and as was corroborated in the adjudicatory proceeding before this Court in the instant case of the *Gómez Paquiyauri brothers*,

"The petitioners themselves are those who, better than anyone else, can assess which rights have presumably been violated. To attempt to restrict this faculty would go against the right of access to justice under the American Convention."

28. Furthermore, as I have been arguing in recent years, we are in the midst of a historical process of *strengthening of the emancipation of the individual vis-à-vis his or her own State*. Six years ago, in my Concurring Opinion in the *Castillo Petruzzi et al. versus Peru* case (Preliminary Objections, 1998) before this Court, I summarized as follows the "qualitative leap" that would take place under the American Convention:

"This means to seek to secure, not only the direct representation of the victims or their relatives (*locus standi*) in the procedure before the Inter-American Court in cases already forwarded to it by the Commission (in all stages of the proceedings and not only in that of reparations²⁵), but rather the right of direct access of individuals before the Court itself (*jus standi*), so as to bring a case directly before it, as the sole future jurisdictional organ for the settlement of concrete cases under the American Convention. To that end, individuals would do without the Inter-American Commission, which would, nevertheless, retain functions other than the contentious one,²⁶ prerogative of the future permanent Inter-American Court.²⁷

²⁴. A.A. Cançado Trindade, "Exhaustion of Remedies in International Law and the Role of National Courts", 17 *Archiv des Volkerrechts* - Tübingen (1977-1978) pp. 333-370; and see, in this same regard, twenty years later, A.A. Cançado Trindade, *O Esgotamento dos Recursos Internos no Direito Internacional*, 2d. updated ed., Brasília, Edit. Universidad de Brasília, 1997, pp. 176-177 and 244-245.

²⁵. As occurred under the previous (third) Rules of Procedure of the Court, Article 23.

²⁶. Like those of the undertaking of missions of *in loco* observation and the preparation of reports.

²⁷. Enlarged, functioning in chambers, and with considerably greater human and material resources.

(...)Above all, this qualitative advance would fulfill, in my understanding, an imperative of justice. The *jus standi* - no longer only *locus standi in judicio*, - without restrictions, of individuals, before the Inter-American Court itself, represents - as I have indicated in my Opinions in other cases before the Court²⁸ - the logical consequence of the conception and formulation of rights to be protected under the American Convention at the international level, to which the full juridical capacity of the individual petitioners to vindicate them ought to correspond necessarily." (paras. 42-43)

29. More recently, in my Concurring Opinion in the aforementioned case of the "Five Pensioners" (2003), I argued that "Not always the complaint originally presented by the petitioners before the Commission (Article 44 of the Convention) is necessarily the same as the complaint subsequently interposed by the Commission before the Court (Article 61(1) of the Convention). If the States are required, in conformity with the Convention (Article 25), to respect the right of access to justice, preserving the faculty of the individual complainants to substantiate their legal actions before national tribunals, how can they be denied this same faculty in their arguments before an international tribunal like the Inter-American Court? (...) one cannot curtail the right of the petitioners of access to justice at the international level, expressed in their faculty to indicate the rights which they deem violated." (paras. 20-21) The same applies to the arguments of the applicants on birth or emergence of international responsibility of the respondent State.

IV. Implementation of the International Responsibility of the State through the Initiative of the Individual as a Subject of International Law.

30. This is precisely what happened in the instant case, in which the representative of the victims and their next of kin has submitted her own understanding of the origin of the responsibility of the State, different from that of the Inter-American Commission. Regarding this matter, we must take into account general international law, alongside and together with the American Convention. We must not forget that, of all the methods used in the international human rights protection systems, the only one that is activated by the individuals themselves (rather than activated *ex officio* by the bodies entrusted with their oversight) is the *right to individual petition*. It is by exercising this right that individuals, emancipated from their own State, are able to set in motion the process of implementing the international responsibility of the State.

31. To try to impede the *jus standi* of individuals before the international venue in the current sphere of protection is an unconvincing artifice, hostage to past dogma, incapable of understanding that assertion of the international juridical capacity and right to legal recognition of the human person reflects a real *necessity* of the international juridical order itself.²⁹ As I noted in my Concurring Opinion in the aforementioned case of the "Five Pensioners", if "before national tribunals the faculty of the individual complainants to substantiate their own allegations of violations of their rights is secured, how to justify the denial or restriction of that faculty to the

²⁸. See, in this regard, my Separate Opinions in the *Castillo Páez versus Peru* case (Preliminary Objections, Judgment of 30.01.1996), paras. 14-17, and *Loayza Tamayo versus Peru* case (Preliminary Objections, Judgment of 31.01.1996), paras. 14-17, respectively.

²⁹. A.A. Cançado Trindade, "A Personalidade e Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", in *Jornadas de Derecho Internacional* (Mexico City, December 2001), Washington D.C., OAS Subsecretariat of Legal Affairs, 2002, pp. 311-347.

individual petitioners before the international tribunals of human rights?" (para 23). And I concluded:

"In fact, the assertion of those juridical personality and capacity constitutes the truly revolutionary legacy of the evolution of the international legal doctrine in the second half of the 20th century. (...) An important role is here being exercised by the impact of the proclamation of human rights in the international legal order, in the sense of humanizing the latter: those rights were proclaimed as *inherent* to every human being, irrespectively of any circumstances.³⁰ The individual is subject *jure suo* of International Law, and to the recognition of the rights that are inherent to him corresponds ineluctably the procedural capacity to vindicate them, at national as well as international levels." (para. 24).

32. By exercising this procedural capacity, the individual today activates the mechanism for implementation of the international responsibility of the State for human rights violations. The individual petitioner today is able, as shown in the instant case of the *Gómez Paquiyauri brothers*, of –correctly– stating his or her understanding of the origin of State responsibility, for its subsequent international implementation. The instant adjudicatory proceeding has clearly demonstrated that full participation of the individuals –the victim or the victim’s next of kin and their legal representatives– in said proceeding before the Court contributes effectively to better conduct the proceeding,³¹ both regarding factual and legal aspects.³²

33. The individuals not only take the initiative of triggering implementation of the international responsibility of the State that committed the violation, but also express their understanding of the very basis for said international responsibility. Individuals thus contribute to evolution and humanization of international law, both with respect to conventions and general law. They are not only subjects of international law,³³ but also participants in the process of its constitution and evolution. This is a feature of the new *jus gentium*, at the start of the 21st century.

34. Consideration of the case of the *Gómez Paquiyauri Brothers* should not disregard a final, equally significant aspect that I must record in this Separate Opinion. Even though they happened 13 years ago, in mid-1991, the facts in the instant case are still indelibly engraved, with the branding mark of human brutality, in the memory of the next of kin of the victims. In her testimony before this Court, the sister of the two murdered boys said that she "loved [her] brothers," that "not a day passes in [her] life that [she] does not remember them, not a day in [her] life that they are not present" in her memory (see *supra*).

35. The image of the cruelty that surrounded the murder of the brothers Rafael and Emilio Gómez Paquiyauri, of their mangled remains and their decomposing

³⁰. I-A Ct of HR, Advisory Opinion OC-17/02, on the *Juridical Condition and Human Rights of the Child*, of 28.08.2002, operative paragraph n. 1, and Concurring Opinion of Judge A.A. Cançado Trindade, paras. 1-71.

³¹. In addition to ensuring their right to freedom of expression in the course of the international proceeding.

³². See, in this regard, A.A. Cançado Trindade, "Vers la consolidation de la capacité juridique internationale des pétitionnaires dans le système interaméricain des droits de la personne", 14 *Revue québécoise de droit international* (2001) pp. 207-239, esp. pp. 223-224; and see A.A. Cançado Trindade, "Le système inter-américain de protection des droits de l'homme: état actuel et perspectives d'évolution à l'aube du XXI^{ème} siècle", 46 *Annuaire français de Droit international* - Paris (2000) pp. 570-577.

³³. Even for purposes of directly receiving reimbursement for the legal costs of the international proceeding, as in the instant case.

bodies, was indelibly recorded in the memory of their beloved next of kin, and will remain there for the rest of their lives. There is no forgetting. As Cicero argued, in the year 45, in his treatise *On Supreme Good and Evil* (better known as *De Finibus*),

"(...) is it in our power to choose our memories? Themistocles, in any case, when Simonides or any other promised to teach him the art of memory, answered: 'I prefer oblivion, as I remember even what I do not want to, and I cannot forget what I want to forget.' (...) It seems characteristic of an overly authoritarian philosopher to forbid that we remember."³⁴

In the midst of the tragic vulnerability of the human condition, the grief of remembering brutality and impunity is often mitigated by the lenitive of justice, though delayed, the strict observance of which –as Cicero added in his day– translates into the welfare of human society.³⁵

36. The next of kin of the murdered brothers, Rafael and Emilio Gómez Paquiyaury, today finally found human justice, by means of the Judgment that the Inter-American Court has just rendered. Enforcement of the international responsibility of the respondent State was asserted and established at the end of an adjudicatory proceeding activated by individuals as the subjects of International Human Rights Law, endowed with legal/procedural capacity. Facts such as those in the instant case have, therefore, generated a reaction in human conscience, which has led to concrete results. And the degree of evolution that we have attained today in the current sphere of protection reveals that, despite the tragic inevitability of human suffering, human conscience has driven the Law (as its ultimate material source) toward the identification and application of means to alleviate that suffering, inherent to the tragically vulnerable human condition.

V. Compulsory Law (*Jus Cogens*) and the Establishment of the Aggravated International Responsibility of the State

37. It is highly significant that, in establishing the international responsibility of the State in the instant case of the *Gómez Paquiyaury brothers*, the Inter-American Court, when it found that Articles 5 and 4 of the American Convention were breached, explicitly recognized that an international juridical system of absolute prohibition of all forms of torture and extra-legal executions has been constituted in our day, and it is now part of the sphere of international *jus cogens* (paras. 111-112 and 128, respectively). Therefore, there is an *aggravated* international responsibility³⁶ (for the wrongful acts committed and the persons murdered, two children), with direct consequences regarding reparations.

38. Said responsibility entails, for the respondent State, among others, the obligation to render justice in its domestic law, investigating the facts and punishing those responsible.³⁷ As stated in the instant Judgment of the Inter-American Court, the "extreme gravity" of the instant case was underlined, in the Peruvian domestic legal system, by the Third Criminal Chamber of El Callao itself (para. 142). In the

³⁴. Book II, lines 101-108.

³⁵. See *De Finibus*, book II, lines 93-95 and 118-120.

³⁶. See, in this regard, my Separate Opinion in the *Case of Myrna Mack Chang versus Guatemala* (Judgment of 25.11.2003), paras. 41-55.

³⁷. See my Separate Opinion in the *Plan de Sánchez Massacre* case (Judgment of 29.04.2004), para. 25.

international legal system, the special *gravity* of certain violations of the rights of the human person is set forth in some international instruments.

39. Let us recall, for example, that the four Geneva Conventions of 1949 specify the "grave breaches",³⁸ and the two Additional Protocols of 1977 to those Conventions enshrine "fundamental guarantees",³⁹ which contain the absolute prohibition, *inter alia*, of murder and any form of torture (both physical and mental).⁴⁰ The search for a hierarchy at both the compulsory level (*jus cogens*) and the operative level (*erga omnes* obligations of protection), as well as the definition of internationally wrongful acts (*grave* violations of human rights) has, precisely, led to the current establishment of the *aggravated* international responsibility of the State.

40. In the instant Judgment, in the chapter on the international responsibility of the State, the Inter-American Court brings to mind that said responsibility "is immediately generated by the internationally wrongful act" ascribed to the State, and any actions under domestic venue do not inhibit it from continuing to hear the case, in a proceeding that has begun before it, since its role is to ensure due protection of the rights enshrined in the American Convention and the reparations for the violations committed (paras. 75-76). And it added that, in the instant case,

"the responsibility of the State is aggravated by the existence in Peru, at the time of the facts, of a systematic practice of human rights violations, including extra-legal executions, of persons suspected of belonging to armed groups, carried out by State agents under orders by military and police commanders. Said grave violations breach international *jus cogens*. Likewise, in establishing aggravated responsibility, it is necessary to take into account that the victims in this case were children" (para. 76).

41. The Court also expressed its concern regarding the existence of a "situation of grave impunity" in the instant case (para. 148), and it added the statement –which today is part of its *jurisprudence constante* – that "in accordance with the obligations undertaken by the States under the convention, no domestic legal provision or precept, including that of extinguishment, can obstruct compliance with decisions of the Court regarding investigation and punishment of those responsible for human rights violations" (para.151).

42. In other cases before this Court, in addition to highlighting the development of a "true international system to oppose *grave* human rights violations," to which the peremptory provisions of international law (the *jus cogens*) and the *erga omnes* obligations of protection have contributed decisively,⁴¹ I have argued that

"one cannot deny the close link between reparations and combating impunity, as well as ensuring non-recidivism of the injurious acts, always and necessarily from the perspective of the victims. True *reparatio*, linked to realization of justice, requires overcoming obstructions of the duty to investigate and to punish those responsible, and putting an end to impunity."⁴²

³⁸. Article 50/51/130/147.

³⁹. Protocol I, Article 75; Protocol II, Articles 4-6.

⁴⁰. Protocol I, Article 75(2)(a); Protocol II, Articles 4(2)(a).

⁴¹. I-A Ct of HR, *Case of Blake versus Guatemala*, Judgment on Reparations of 22.01.1999, Separate Opinion of Judge A.A. Cançado Trindade, para. 39.

⁴². I-A Ct of HR, *Case of Myrna Mack Chang versus Guatemala*, Judgment of 25.11.2003, Separate Opinion of Judge A.A. Cançado Trindade, para. 46.

43. The search for the truth –I have added- “constitutes the starting-point for the liberation as well as the protection of the human person; without truth (however unbearable it might come to be) one cannot be freed from the torment of uncertainty, nor is possible to exercise the protected rights.”⁴³ Achievement of the right to the truth –to whose legal construction this Court has been contributing systematically- is essential to preserve “the bonds and links of solidarity between the dead and the living, forming the unity of the human kind, with the respect due to ones and the others”.⁴⁴

44. I cannot conclude this Separate Opinion in the instant case of the *Gómez Paquiyauri brothers* without referring to a point that I feel is equally significant and worthy of noticing. I do not see how we can deny that the *aggravated* international responsibility of the State affects the basic values of the contemporary international community. Enshrinement of *jus cogens*, constantly expanding,⁴⁵ in turn reveals precisely the heartening openness of contemporary international law to higher and fundamental values, while also envisioning, on a horizon that is becoming closer, the dawn of a truly *universal* international law.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary

⁴³. I-A Ct of HR, *Case of Bámaca Velásquez versus Guatemala*, Judgment of 25.11.2000, Separate Opinion of Judge A.A. Cançado Trindade, para. 29.

⁴⁴. *Ibid.*, Separate Opinion of Judge A.A. Cançado Trindade, para. 39.

⁴⁵. See my Concurring Opinion in Advisory Opinion n. 18 on *The Legal Status and Rights of Migrants without Documents* (of 17.09.2003), paras. 65-73.

**PARTIALLY DISSENTING OPINION OF
JUDGE C. MEDINA QUIROGA**

I concur with the judgment of this Court, except in regards to the decision to find that Article 25 of the Convention was abridged. I repeat here my dissent in the 19 Merchants case, recently adjudged by the Court:

1. Article 25 sets forth the right of the individual to simple, rapid and effective protection of his or her human rights in the national sphere, what is known in our hemisphere as the right to the amparo remedy.¹ This is so clearly the case that the first version of this provision enshrined the right only for those rights set forth in the constitution and the laws of the respective country.² Its subsequent amendment, including the wording of Article 2, paragraph 3 of the International Covenant on Civil and Political Rights, added the idea that this amparo remedy should also protect the human rights set forth in the American Convention.³

In the American Convention, Article 25 is entitled "Right to judicial protection," which might lead to argue that it is a provision that enshrines "the right to access to justice." We should say, in this regard, that said title suggests that, unlike the International Covenant on Civil and Political Rights (Article 2(3)), the remedies that it refers to must be judicial. The possible access to justice granted by Article 25 would only encompass rapid, simple and effective remedies, that is, only the amparo remedy.

2. Article 8, in turn, on the "right to fair trial," does not establish the right to a remedy, but rather due process, that is, the set of requirements that must be met in the procedural instances with the aim of protecting the right of the individuals for them to decide with the utmost justice possible, on the one hand, the controversies between two parties –whether they are private parties or bodies of the State, and whether they refer to subject matters that are or that are not in the sphere of human rights- and, on the other hand, a person's guilt or innocence.

Article 8 therefore establishes a broad right of access to justice for all these purposes and regulates the way this justice must be rendered.

3. This being so, both rights are different in nature, and their relationship is one of substance to form, as this Court has stated, because Article 25 enshrines the right to a judicial remedy while Article 8 establishes how it is processed.⁴

I deem it of the utmost importance to maintain the distinction between these two articles. If Article 25 is analyzed under the parameters of Article 8 –for example,

¹ *Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)* Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 32.

² Specialized Inter-American Conference on Human Rights, *Proceedings and Documents*, p.22.

³ *Ibidem*, p. 41.

⁴ *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)*, Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24; Case of Hilaire. Judgment of June 21, 2002. Series C No. 94, para. 148.

reasonable time- the meaning of the former is altered, as it requires not a reasonable time that might easily be more than a year under the terms of Article 8, but rather rapidity, that is, probably its determination in a matter of days.

Cecilia Medina Quiroga
Jueza

Pablo Saavedra Alessandri
Secretario

CONCURRING OPINION OF AD HOC JUDGE FRANCISCO EGUIGUREN PRAELI

I have concurred in my vote with the judgment of the Court that finds the State of Peru responsible for the violation of the rights of brothers Rafael and Emilio Gómez Paquiyauri to life, to personal liberty, to fair trial, and others. However, I deem it necessary to state certain personal reflections regarding the specific circumstances and nature of this case, as well as on the way in which, I believe, the issue of reparations to the victims should be addressed, especially in the case of the murder of a boy and an adolescent.

1.- Brothers Rafael and Emilio Gómez Paquiyauri were 14 and 17 years old, respectively. They were, therefore, two minors, who were unduly and arbitrarily deprived of their liberty by members of the National Police, without their being subject to an arrest warrant issued by a court or having been detected in the act of committing a crime. They were not even carrying out any activity that might have justified their detention, even under a state of emergency. At the time they were arrested, they were mistreated by the members of the police force; they were not taken to a detention center, but rather to a remote place where they were subjected to cruel treatment and torture shortly before being executed in a vile and perfidious manner.

Said facts have been fully proven in this proceeding under international venue, but were also duly proven in the criminal proceeding before the domestic Judiciary that sentenced the direct perpetrators of these grave violations. They have also been recognized and acknowledged by the State itself. There is, therefore, no doubt regarding the international liability of the State of Peru, as a consequence of the human rights violations committed by members of the police. For this reason, the Court finds it liable and under the obligation to redress the victims.

2.- While the two direct perpetrators of these crimes were trialed and punished under domestic jurisdiction, and were sentenced respectively to 18 and 6 years in prison, various aspects of the case are seriously debatable.

First of all, the convicts recovered their liberty soon after the conviction, without having served even one third of the sentence with effective incarceration, availing themselves of penitentiary benefits. While the existence and application of those benefits cannot be denied, when there is a social rehabilitation of the criminal, granting of said benefits by the State –as the Court has pointed out in this judgment– must be duly weighed and analyzed. Especially in cases of grave human rights violations, committed against an innocent child and an innocent adolescent, said benefits must not become a covert form of impunity.

Secondly, the compensations ordered as reparation to be paid by the convicts in the criminal proceeding have not been paid to the next of kin of the Gómez Paquiyauri brothers, given the limited income and financial resources of these former policemen. And since neither the Police nor the State were accused nor found liable in the proceeding under domestic venue, they were not ordered to severally pay any compensation to the victims, for which reason the latter have been unable to collect it.

Third, the Police captain who was accused by the direct perpetrators of being a mastermind and the person responsible for ordering the execution of the Gómez Paquiyaury brothers, has neither been trialed nor convicted to date, as he is at large, and the proceeding has been suspended and the criminal action is at risk of being barred by the statute of limitations. It is grave that, 13 years after the crimes were committed, this fugitive has not been captured, and this questions the actual willingness of the national authorities to search for and arrest him. All the more so, as this fugitive has filed remedies in the proceeding, through his attorney.

This not only constitutes an obvious situation of impunity, but also raises legitimate questions, pending investigation, regarding the possible involvement of other masterminds or persons responsible for the order to execute the Gómez Paquiyaury brothers, among the higher Police authorities or the political authorities. As the Court has ordered in its judgment, the State must capture this fugitive, without allowing the crimes to be barred by the statute of limitations, and it must conduct a full investigation of the facts and convict and punish all those responsible.

3.- Regarding the issue of **reparations**, I believe it would have been preferable to establish as the prevailing criterion that of reparation for **detriment to life aspirations**, caused by the execution of the two boys. I believe this is preferable to and more appropriate than having considered **lost earnings** under pecuniary damages, as this and other judgments of the Court have done. Detriment to life aspirations, as pointed out by judges Cançado Trindade and Abreu Burelli in the joint opinion in the Loayza Tamayo case, is a more appropriate concept in cases of reparations for grave violations of human rights. It makes it possible to establish a distance with respect to the criteria of Civil Law on Property, such as lost earnings, *damnum emergens*, detriment to family assets, or *lucrum cessans*.

Detriment to life aspirations involves both pecuniary and non-pecuniary aspects of the violation of this fundamental right of the person; it therefore requires not only a compensatory reparation for the arbitrary deprivation of life, but also for abridgment and cutting short of the free development of the personality, interruption of the actions that both children might have carried out not only in terms of work (lost earnings) but also regarding spiritual aspect, personal and family realization, attainment of plans and goals. Assessing the pecuniary damage by estimating it as lost earnings is unsatisfactory especially with respect to children or adolescents who have not yet effectively entered the job market. Recognizing detriment to life aspirations is therefore more comprehensive and consistent from the perspective of protection of human rights, distancing itself from trends that focus essentially on property rights. It also includes the non-pecuniary dimension, which makes it unnecessary to separately consider moral damages to the direct victims even if they have died. I therefore believe that this Court might review the criteria to establish reparations in future reparations, especially with respect to children or adolescents deprived of the right to life.

4.- While I do not fully share the use of the criterion of **damnum emergens**, either, I find it positive that the Court has finally grouped under this item a set of **expenses** incurred by the Gómez Paquiyaury family as a consequence of the death of their children Rafael and Emilia, as well as the funerary expenses and medical treatment for some next of kin. I also find it appropriate that the Court opted to include under this item the funds for psychological treatment that the members of this family required or may require in the future, as a consequence of their suffering and of the acts of harassment and segregation to which they were unfairly subjected. This avoids listing the expenses for psychological treatment as a specific item under

the reparations for non-pecuniary damages, as in other cases, recognizing instead that it is actually an expense that results from the violation of rights, that is, a type of "consequential damage." Given that most of these expenses were incurred by the parents, it is reasonable for this reparation to be given to them, and not individually to each member of the family.

5.- It is important to highlight the decision of the Court that, in addition to considering the brothers Rafael and Emilio Gómez Paquiyaury as direct victims, it decided to include the members of their family (parents and siblings) as indirect victims (paragraphs 118 and 119), due to their subsequent suffering of detriment to their dignity and right to humane treatment. In this regard, they are justifiably entitled to reparations for non-pecuniary or moral damages.

I agree with the statement of the Court, in paragraphs 218 and 219 of the judgment, regarding the need to admit, without requiring further demonstration, the suffering and distress caused by the death of a next of kin to the members of the family who had close emotional ties or physical contact with the deceased. All the more so in the case of the murder of a child. I also share the statement that, nevertheless, in this case it is difficult to establish or differentiate the degree of suffering or distress of each member of the household. Therefore, since throughout the proceeding under international venue it has been clear that the Gómez Paquiyaury family as a whole has suffered not only the death of their children Rafael and Emilia, but also the subsequent harassment and infringements, it seems reasonable that reparations for the moral damages to be given to the parents of the direct victims, for them to decide on the use or distribution of this amount in favor of the household as a whole.

It is also fully justifiable to have included as victims, entitled to reparation for moral damages, the child Nora Emely Gómez Peralta, daughter of Rafael Gómez Paquiyaury, born after his demise, and her mother Jacinta Peralta. Both have undergone special suffering and distress due to the abrupt loss of Rafael during Jacinta's pregnancy, depriving the girl of the presence of her father.

6.- Since reparations must not be limited exclusively to aspects pertaining to property or compensation, it is crucial that the Court included public acts of satisfaction, redress, and amends to the Gómez Paquiyaury brothers and their family as part of the reparations. In this regard, we should mention the orders of the Court for a public act of acknowledgment of responsibility by the State in this case, publication of the pertinent parts of the judgment that demonstrate the truth of what happened, naming a secondary school in el Callao after the brothers Rafael and Emilio Gómez Paquiyaury, or granting a scholarship to the child Nora Emely.

7.- I believe that the case of the Gómez Paquiyaury brothers is emblematic because it exemplifies the grave human rights violations that occurred in Peru as a consequence of a repressive policy against subversion that disregarded the fundamental rights and respect for the dignity of the person. The liability of the State is therefore clear and evident. Thus, in addition to reparations to the victims, the judgment is significant in its contribution to elucidation of the truth and carrying out acts and measures that enhance social awareness of the magnitude of the damage caused, as well as of the need to avoid recurrence of these situations.

The State and Peruvian society must realize and understand that the cruel and absurd murder of a child and of an adolescent cannot remain in a situation of impunity, unpunished and without redress. But it is not merely a matter of approving or questioning the amount of the property-related reparation imposed by

the Court on the State in favor of the next of kin of the Gómez Paquiyauri brothers. Arbitrarily detaining and mistreating these minors, subjecting them to torture and executing them, lying to the public by saying that they were terrorists killed in an armed confrontation with the forces of law and order, are very grave and unacceptable acts in a democratic system, committed to respect for the dignity of the human person.

What happened in the case of the Gómez Paquiyauri brothers must move and greatly disturb Peruvian society and its authorities. If these facts had not been recorded by television, by chance, perhaps the truth would never have been known nor would the direct perpetrators have been punished, if only in part. The Truth and National Reconciliation Committee has documented thousands of cases of human rights violations that, at the time, did not have this possibility of elucidation.

The case of the Gómez Paquiyauri brothers is especially painful because it involved the murder of a child and an adolescent who had committed no crime or misconduct, and who were executed in a cruel and pitiless manner by members of the police. The Inter-American Court of Human Rights has finally given them and their next of kin justice. The Peruvian State must take on its responsibility, even though there is currently a government that strives to respect human rights and to comply with the judgments of the Court.

Francisco José Eguiguren-Praeli
Judge *ad hoc*

Pablo Saavedra-Alessandri
Secretary