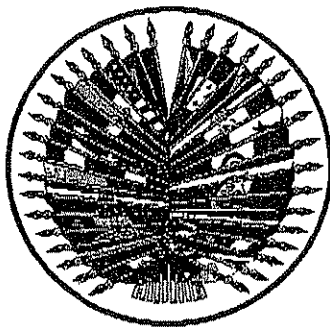


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ORGANIZATION OF AMERICAN STATES
Inter-American Commission on Human Rights

Application to the Inter-American Court of Human Rights
in Case 12.599

Florencio Chitay Nech *et al.*
against the Republic of Guatemala

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**APPLICATION FROM THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS
AGAINST THE REPUBLIC OF GUATEMALA
CASE 12.599
FLORENCIO CHITAY NECH *ET AL.***

I. INTRODUCTION

1. The Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission," "the Commission," or "the IACHR") refers to the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") this application in Case No. 12.599, *Florencio Chitay Nech et al.*, against the Republic of Guatemala (hereinafter "the State," "the Guatemalan State," or "Guatemala") for its responsibility in the forced disappearance of the *Kaqchikel* Maya indigenous political leader Florencio Chitay Nech (hereinafter "the victim"),¹ which took place as of April 1, 1981, in Guatemala City, and the subsequent lack of due diligence in investigating the incident, together with the denial of justice suffered by the victim's next-of-kin.

2. The Inter-American Commission asks the Court to establish the international responsibility of Guatemalan State, which has failed to comply with its international obligations through the violation of:

- (a) Articles 3, 4, 5, 7, and 23 of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention"), in conjunction with the general obligation of respecting and ensuring human rights enshrined in Article 1.1 thereof, and in conjunction with Articles I and II of the Inter-American Convention on Forced Disappearance of Persons (hereinafter "Convention on Forced Disappearance"), with respect to Florencio Chitay Nech;
- (b) Articles 8 and 25 of the American Convention, in conjunction with the general obligation of respecting and ensuring human rights enshrined in Article 1.1 thereof, and with the duty of adopting domestic legal effects enshrined in Article 2 thereof, with respect to Florencio Chitay Nech and his next-of-kin, namely his sons Encarnación, Pedro, Eliseo, and Estermerio, and his daughter María Rosaura, all surnamed Chitay Rodríguez.
- (c) Articles 5 and 17 of the American Convention, in conjunction with the general obligation of respecting and ensuring human rights enshrined in Article 1.1 thereof, with respect to the next-of-kin of Mr. Florencio Chitay Nech, namely his sons Encarnación, Pedro, Eliseo, and Estermerio, and his daughter María Rosaura, all surnamed Chitay Rodríguez.
- (d) Article 19 of the American Convention, in conjunction with the general obligation enshrined in Article 1.1 thereof, with respect to Estermerio Chitay Rodríguez, who at the time was a minor.

¹ As detailed below, Florencio Chitay Nech's children – his sons Encarnación, Pedro, Eliseo, and Estermerio, and his daughter María Rosaura, all surnamed Chitay Rodríguez – are also victims in the case at hand. The Commission is aware of the amendment to the Court's Regulations whereby the term "victim's next-of-kin" is no longer to be used. Nevertheless, since Report on the Merits No. 90/08 was adopted on October 31, 2008, in this application the term "victim" shall be used solely to refer to Florencio Chitay Nech, and "victim's next-of-kin" shall be used to refer to his sons and daughter.

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3. This case has been processed in accordance with the terms of the American Convention and is submitted to the Court in compliance with Article 34 of its amended Rules of Procedure. Attached hereto, in the appendixes, is a copy of Report No. 90/08, drawn up according to Article 50 of the Convention.²

4. The Commission believes that this case reflects the abuses committed during the internal conflict by agents of the State against the indigenous Maya population and, in particular, against indigenous community leaders.³

II. PURPOSE OF THE APPLICATION

5. The purpose of this application is to respectfully request that the Court conclude and declare that:

- (a) The State is responsible for violating Articles 3 (right to juridical personality), 4 (right to life), 5 (right to humane treatment), 7 (right to personal liberty), and 23 (political rights) of the American Convention, in conjunction with the general obligation of respecting and ensuring rights set forth in Article 1.1 thereof; and for violating Articles I and II of the Convention on Forced Disappearance, with respect to Florencio Chitay Nech;
- (b) The State is responsible for violating Articles 8 (rights to a fair trial) and 25 (right to judicial protection) of the American Convention, in conjunction with Articles 1.1 and 2 thereof, with respect to Florencio Chitay Nech and his sons and daughter, namely Encarnación, Pedro, Eliseo, Estermerio, and María Rosaura, all surnamed Chitay Rodríguez.
- (c) The State is responsible for violating Articles 5 (right to humane treatment) and 17 (rights of the family) of the American Convention, in conjunction with the general obligation of respecting and ensuring rights contained in Article 1.1 thereof, with respect to Encarnación, Pedro, Eliseo, Estermerio, and María Rosaura Chitay Rodríguez.
- (d) The State is responsible for violating Article 19 (rights of the child) of the American Convention, in conjunction with the general obligation of respecting and ensuring rights set forth in Article 1.1 thereof, with respect to Estermerio Chitay Rodríguez, who at the time was a minor.

6. In consideration of the above, the Inter-American Commission asks the Court to order that the State:

- (a) Carry out a complete, impartial, effective, and prompt investigation of the facts in order to identify and punish all the persons intellectually and materially responsible that participated in the acts connected with the abduction and subsequent forced disappearance of Florencio Chitay Nech and to determine the responsibility for the lack of investigation that resulted in the impunity of the forced disappearance of

² See: Appendix 1, IACHR, Report No. 90/08 (Merits), Case 12.599, *Florencio Chitay Nech et al.*, Guatemala, October 31, 2008.

³ See: Report of the Commission for Historical Clarification, *Guatemala, Memory of Silence* (hereinafter, *Memory of Silence*), Chapter III, sections on "The Destructuring of Systems of Community Authority and Organization" and "The Persecution and Death of Indigenous Authorities."

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- Florencio Chitay Nech;
- (b) organize a public act of recognition of its responsibility in connection with the events of this case and an apology to Florencio Chitay Nech and his next-of-kin;
 - (c) take the steps necessary to determine the whereabouts of Florencio Chitay Nech and, if possible, to locate and return his remains to his family;
 - (d) provide the next-of-kin of Florencio Chitay Nech with appropriate redress, including both moral and material compensation, for the violations of their human rights;
 - (e) take all steps necessary to ensure that such serious incidents as this do not reoccur, and, for that, the State must therefore remove all the *de facto* and *de jure* obstacles hindering the due investigation of the incident; and,
 - (f) reimburse the legal costs and expenses incurred by the next-of-kin of Florencio Chitay Nech in processing this case before the Inter-American Commission and Inter-American Court.

III. REPRESENTATION

7. In accordance with the provisions of Articles 23 and 34 of the Court's amended Rules of Procedure, the Commission has appointed Commissioner Victor Abramovich and Executive Secretary Santiago A. Canton to serve as its delegates in this case. Assistant Executive Secretary Elizabeth Abi-Mershed and attorneys Karla I. Quintana Osuna and Isabel Madariaga, specialists with the IACHR's Executive Secretariat, have been appointed to serve as legal advisers.

IV. JURISDICTION OF THE COURT

8. Under Article 62.3 of the American Convention, the Inter-American Court is competent to hear all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the states parties to the case recognize or have recognized its jurisdiction.

9. The Court has jurisdiction to hear this case. The Guatemalan State ratified the American Convention on May 25, 1978, and it accepted the Court's contentious jurisdiction on March 9, 1987. In light of the date on which the State ratified the Convention and in accordance with the Court's jurisprudence, this application deals with the actions of a permanent nature in existence as of March 9, 1987, and with the acts that constitute independent facts and specific and autonomous violations occurring after the recognition of the Court's jurisdiction.

10. In addition, the Court has jurisdiction to hear the instant case since Guatemala deposited its instrument of ratification of the Convention on Forced Disappearance of Persons on February 25, 2000. According to Articles III and VII of that convention, the crime of forced disappearance "shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined" and the corresponding criminal prosecution shall not be subject to statutes of limitations. Similarly, the Court has ruled on the continuous nature of the phenomenon of forced disappearance by establishing that:

Since its first judgment in the case of Velásquez Rodríguez [...] the Court has reiterated that the forced disappearance of persons is a crime of a continuous or permanent nature.⁴ [...] Due to its permanent nature, while the fate or whereabouts of the victim or their remains is not established, the forced disappearance continues in execution.⁵

⁴ I/A Court H. R., *Case of Tiu Tojin*, Merits, Reparations, and Costs, Judgment of November 26, 2008, Series C No. 190, para. 52.

⁵ *Ibid*, para. 84.

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V. PROCESSING BY THE INTER-AMERICAN COMMISSION⁶

11. On March 2, 2005, the Inter-American Commission received a complaint lodged by Pedro Chitay Rodríguez, Alejandro Sánchez Garrido, Astrid Odete Escobedo Barrondo, and the Azmitia Dorantes Comprehensive Development and Promotion Association, represented by Irma Graciela Azmitia Dorantes, (hereinafter "the representatives"), alleging the international responsibility of the Republic of Guatemala in the forced disappearance of the *Kaqchikel* Maya indigenous political leader Florencio Chitay Nech on April 1, 1981, presumably in reprisal for his activities in the cooperative movement and the Guatemalan Christian Democratic Party. The Commission recorded the petition as No. P-208-05.

12. On May 12, 2005, the Commission forwarded the relevant parts of the complaint to the State and asked it to submit information on the matter within the following two months. On July 6, 2005, the State requested a 30-day extension of the deadline for submitting the requested information, which was granted on August 3, 2005.

13. On September 19, 2005, the State sent the Commission its comments on the admissibility of the petition. The Commission forwarded those comments to the representatives on September 22, 2005, with a one-month deadline for submission of their comments.

14. The representatives presented their comments on October 24, 2005, which the Commission conveyed to the State on October 28, 2005, with a one-month deadline for returning any relevant observations.

15. The State sent the Commission its observations on January 18, 2006, which were forwarded to the representatives on February 14, 2006, with a request for comments within the following 15 days.

16. On March 6, 2006, the representatives sent their comments and reiterated their request that the Commission continue with the admissibility process. Those comments were conveyed to the State on March 23, for it to submit its comments within the following month. On April 7, 2006, the Commission again transmitted the reply of March 6, 2006, to the State, giving it one month to comment.

17. On April 24, 2006, the State sent its comments to the Commission, which forwarded them to the representatives on May 4, 2006.

18. On February 27, 2007, during its 127th regular session, the Commission adopted Report 7/07⁷ in which it declared the case admissible. In a communication of March 16, 2007, it notified the parties of the adoption of the aforesaid report and, pursuant to Article 38.1 of the Rules of Procedure of the Inter-American Commission on Human Rights (hereinafter "the Rules of Procedure of the Commission" or "the Rules of Procedure"), the representatives were given two months in which to present such arguments on the merits as they deemed pertinent. At the same time, in accordance with Article 38.2 of its Rules of Procedure and Article 48.1.f of the American Convention, the IACHR placed itself at the disposal of the parties in order to explore the possibility of reaching a friendly settlement.

⁶ The formalities referred to in this section may be found in the record of the case before the IACHR. Appendix 2.

⁷ See: IACHR, Report No. 7/07 (Admissibility), Petition 208-05, Florencio Chitay Nech et al., Guatemala, February 27, 2007, Appendix 2.

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19. In a note dated May 7, 2007, received by the Commission on May 23 of that year, the petitioners submitted observations on the merits and requested the Commission to adopt the relevant report on the matter.

20. The State submitted its comments on the case on May 25, 2007 and expressed its will to reach a friendly settlement, which position was conveyed on June 5, 2007, to the petitioners, who were given one month to submit such comments as they deemed relevant.

21. The petitioners submitted their comments in a note of June 15, 2007, which was received by the IACHR on June 18 of that year. The annexes to those comments were received in a complete and legible form on June 29, 2007. The IACHR transmitted said observations and their respective annexes to the State on July 2, 2007, and gave it two months to submit any observations of its own that it believed pertinent.

22. On September 13, 2007, the State transmitted its observations, which were forwarded on September 25, 2007, to the petitioners, who were given one month to communicate their observations.

23. On October 10, 2007, the petitioners presented their comments on the case and said that they would not consent to a friendly settlement procedure. This information was passed on to the State on October 29, 2007, and it was given one month to comment.

24. The State sent its comments on December 5, 2007, which the IACHR transmitted on December 13, 2007, to the petitioners, giving them one month to present the comments they considered appropriate.

25. On January 17, 2008, the petitioners submitted their final comments, which were forwarded to the State on February 4, 2008.

26. On October 31, 2008, at its 133rd regular session, the Commission adopted Report on Merits No. 90/08 in this case, drawn up in compliance with Article 50 of the Convention. In that report, it concluded that:

the State of Guatemala is responsible for violation of the rights to personal liberty, humane treatment, life, juridical personality, a fair trial, judicial protection, the rights of the family, the rights of the child, and the right to participate in government, enshrined in Articles 7, 5, 4, 3, 8, 25, 17, 19, 23, respectively, of the American Convention, in connection with Article 1 of said instrument and with Articles I and II of the Inter-American Convention on Forced Disappearance of Persons, for the detention and forced disappearance of Florencio Chitay Nech. The Commission also concludes that the State is responsible for violation of the rights to humane treatment, of the family, to a fair trial, and to judicial protection recognized at Articles 5, 17, 8, and 25 of the American Convention, to the detriment of the victim's next of kin.

27. In the report on the merits, the Commission extended the following recommendations to the Guatemalan State:

1. Carry out a complete, impartial, effective, and prompt investigation of the facts in order to identify and punish all the persons intellectually and materially responsible that participated in the acts connected with the abduction and subsequent forced disappearance of Florencio Chitay Nech and to determine the responsibility for the lack of investigation that resulted in the impunity of the forced disappearance of Florencio Chitay Nech.

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2. Acknowledge its international responsibility for the facts of the Case 12.599, Florencio Chitay Nech.

3. Organize a public act of recognition of its responsibility in connection with the events in this case and of apology to the victims and their next of kin.

4. Adopt all measures necessary to prevent a repetition of acts as serious as the ones in the instant case. To that end, the State should remove any *de facto* and *de jure* obstacles that might impede a proper investigation of the facts.

5. Locate the mortal remains of the victim Florencio Chitay Nech and deliver them to his family.

6. Provide adequate reparation to the victims' next of kin, covering both emotional and material injuries, for the violations of their human rights.

28. On November 17, 2008, the Commission forwarded the report on the merits to the State and gave it a two-month deadline in which to implement the specified recommendations.

29. On December 1, 2008, the Commission sent the representatives the relevant parts of the merits report, on a confidential basis, and informed them that it had been transmitted to the State.

30. On December 19, 2008, the representatives submitted a note in which, *inter alia*, they noted their wish for the case to be submitted to the Inter-American Court.

31. On February 4, 2009, the State sent a note requesting an extension of the deadline for addressing the recommendations in the merits report, specifically the recommendation dealing with the investigation of the incident. It also reiterated its willingness to embark on a friendly settlement procedure. On February 10, 2009, the State submitted a note expressly and irrevocably accepting that the granting of the extension would suspend the deadline for submission of the case to the Court.

32. On February 13, 2009, the Commission gave the State a two-month extension, in order to provide it with additional time for meeting the Commission's recommendations and to make progress with their implementation. The Commission also asked the State to report, on April 1, 2009, on the measures adopted to implement those recommendations.

33. On April 1, 2009, the State sent the Commission its report on compliance, indicating that on March 2, 2009, the Executive Director of the Presidential Executive Policy Coordinating Commission for Human Rights had filed a complaint dealing with Mr. Florencio Chitay Nech's forced disappearance with the Office of the Public Prosecutor. The State therefore asked the IACHR to take into account its "good will in beginning compliance with the recommendations as regards justice and its availability for reaching a friendly settlement in the case at hand, in order to provide the victims with due redress."

34. On April 15, 2009, the Commission decided to submit this case to the jurisdiction of the Inter-American Court, as provided for in Articles 51.1 of the Convention and 44 of its Rules of Procedure, on the grounds that it did not believe the State had complied with the terms of the report on merits since Guatemala had only begun work on implementing one of that report's six recommendations.

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VI. CONSIDERATIONS OF FACT**A. PRELIMINARY CONSIDERATIONS**

35. As has been stated on earlier occasions,⁸ the alleged facts must be placed in the context of the armed conflict that occurred in Guatemala, with particular reference to the systematic practice of forced disappearances carried out during that conflict.

36. In keeping with the foregoing and in light of the available evidence, the arguments of the parties, the documents presented, and the overall context that framed the events alleged, the Commission now proceeds to state the proven facts in the instant case.

B. ESTABLISHED FACTS**1. THE ARMED CONFLICT IN GUATEMALA**

37. The internal armed conflict in Guatemala from 1962 to 1996 exacted a terrible human, material, institutional and moral toll. Estimates are that more than two hundred thousand people became the victims of arbitrary executions and forced disappearance as a consequence of the political violence during this period.⁹ In ethnic terms, the Mayan indigenous people accounted for 83% of these victims.

38. The special report on Guatemala adopted by the Commission in 1985 recorded the dimensions and seriousness of the internal turmoil that existed in the country at the time, as well as the way in which that process had spawned a dramatically increasing spiral of violence, "that remained ever latent throughout those years with periods of greater or lesser intensity."¹⁰

39. Even before then, in its first Report on the Situation of Human Rights in the Republic of Guatemala, de 1981, the IACHR had noted that:

With the development of this spiral of progovernment and anti-government violence, which worsened beginning with 1966, the severity of the struggle was leading the country to a true "state of terror," that is, to the most extreme level of violence. In this state of affairs, terror came to be, moreover, a weapon of social repression against unions, opposition groups, universities, political parties, cooperatives, rural organizations, church members, journalists, and, in short, against all entities critical of the government. Every kind of aggression and assault has been carried out against them, for which the official military and police authorities have always denied responsibility, while these acts have been indiscriminately, and sometimes even simultaneously, attributed to the aforementioned paramilitary groups.¹¹

40. According to the report of the Commission for Historical Clarification, "*Guatemala: Memoria del Silencio*" (hereinafter "CEH report" or "*Memory of Silence*"), the factors that caused the

⁸ IACHR, Report No. 22/08 (Admissibility and Merits), Case 11.681, Massacre of Dos Erres, Guatemala, March 14, 2008, para. 85. Regarding the context of the armed conflict in Guatemala, see also: I/A Court H. R., *Case of Molina Theissen*, Judgment of May 4, 2004, Series C No. 106, para. 40.

⁹ In documenting cases, the CEH found 42,275 victims of arbitrary execution and forced disappearance: 23,671 were victims of arbitrary execution and 6,159 were the victims of forced disappearance. *Memory of Silence*, Volume V, Conclusions and Recommendations, p. 21.

¹⁰ IACHR, *Third Report on the Situation of Human Rights in the Republic of Guatemala*, adopted on October 3, 1985, Chapter II, para. 2.

¹¹ IACHR, *Report on the Situation of Human Rights in the Republic of Guatemala*, adopted on October 13, 1981, Chapter II B, para. 3.

armed conflict in Guatemala were many and resulted from a series of coinciding factors,¹² such as structural injustice, the closing of political spaces, racism, the increasingly exclusionary and anti-democratic nature of institutions, as well as the reluctance to promote substantive reforms that could have reduced structural conflicts.¹³

41. The armed conflict also involved a number of different actors:

Although the visible actors in the armed conflict are the army and the insurgency groups, historical research carried out by the CEH has revealed the responsibility and participation, in different forms, of powerful economic interest groups, political parties, and the various sectors of civil society. The entire state, with all of its mechanisms and agents, has been involved. Thus, any reductionism to a two-actor logic is not only insufficient but vague, since it would explain neither the extent nor the significance of the involvement of political parties, economic forces, and churches in the origin, spread, and perpetuation of the violence, nor the constant mobilization and various forms of participation by social sectors who sought to press social, economic, and political claims.¹⁴

42. Furthermore, in addition to the intrinsic causes inherent in Guatemala's national history, so too did the Cold War, the attendant anti-communist policy prevalent in the region, and the National Security Doctrine as an ideological manifestation of the struggle against the "internal enemy", play a crucial role in the origin, spread and perpetuation of the conflict.¹⁵

43. In keeping with these ideas, the internal enemy concept encompassed not only the armed rebel groups, but progressively expanded to include any opinion or movement that dissented or differed from the government line, including intellectuals, artists, students, teachers, trade union leaders and others; in short, a host of different actors who suffered the consequences of the systematic violence that existed during that period.¹⁶

44. According to the investigations of the CEH into what is regarded as one of the most devastating effects of the conflict, State forces and related paramilitary groups, in putting into practice the National Security Doctrine, were responsible for 93% of the violations documented by that Commission, including 92% of the arbitrary executions and 91% of forced disappearances.¹⁷ The CEH blamed armed insurgent groups for 3% of such acts.¹⁸

45. During the internal armed conflict, and in particular between 1980 and 1983, a series of phenomena emerged that affected the structures of indigenous authority and leadership. Death, persecution, torture, forced disappearances, the replacement of indigenous authorities, and the dismantling of community organizations weakened the community as a whole.¹⁹ Indeed, the effect of those actions was to leave the communities leaderless, "in order to terrify and disperse them, or to reduce their ability to resist, or as a prelude to a massacre or mass action."²⁰

¹² *Memory of Silence*, Vol. I, para. 80

¹³ *Idem.*, Volume V, Chapter 4 Conclusions, p. 24.

¹⁴ *Idem.*, Volume I, p. 80

¹⁵ *Idem.*, Volume V, Chapter 4 Conclusions, p. 24

¹⁶ *Idem.*, Volume II, Chapter XI: Forced Disappearances, p. 426.

¹⁷ *Idem.*, Volume V, Chapter 4 Conclusions, pp. 24-25

¹⁸ *Idem.*, p. 26

¹⁹ *Memory of Silence*, Chapter III, paragraphs 443, 460; Chapter II (552).

²⁰ *Ibid.*, p. 460.

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46. It is important to point out that the facts in the instant case occurred during the most violent part of the conflict. Indeed, 91% of all the violations recorded were committed between 1978 and 1984,²¹ a period that coincided with the dictatorships of Generals Romeo Lucas García (1978-1982) and Efraín Ríos Montt (1982-1983).

47. The context described above, marked by a counterinsurgency policy that typically featured terror, violence, and widespread, systematic human rights violations, had particularly dramatic consequences for anyone who, in the eyes of the repression apparatus, could be classed as subversive, as defined by the aforesaid internal enemy concept, such as the Maya population -who made up 83% of the victims of the conflict whose identities were fully confirmed²²- peasant farmers, students, members of religious organizations, and community or cooperative leaders,²³ most of which categories Mr. Florencio Chitay Nech fell into, as the following analysis shows.

2. THE FORCED DISAPPEARANCE OF PERSONS

48. As mentioned, in the climate of indiscriminate violence that held sway in Guatemala, forced disappearance was one of the principal evils suffered by victims of the conflict.

49. In much the same way as other manifestations of the reigning atmosphere of terror of those years, forced disappearances were also the result of the operations and measures carried out by groups that acted with the tolerance and acquiescence of the State.

50. The "disappeared" phenomenon was basically the result of having adopted, as part of the counterinsurgency strategy, a system of widespread kidnapping and elimination of persons without leaving any trace of their whereabouts. Indeed, as time progressed, given the failure to investigate and punish the perpetrators, as well as the support that they clearly received for carrying out their operations, the link between these paramilitary groups and the security forces of the government of Guatemala became increasingly apparent.²⁴

51. The dramatic nature of the prevailing climate in Guatemala at that time was a source of grave concern for the IACHR.²⁵ The victims of these operations were literally made to disappear

²¹ Idem. p. 42

²² *Memory of Silence*, Volume V, Chapter 4 Conclusions, p. 21.

²³ Idem, Volume II, Chapter XI: Forced Disappearances, p. 426.

²⁴ IACHR, *Third Report on the Situation of Human Rights in the Republic of Guatemala*, adopted on October 3, 1985, Chapter II, para. 3.

²⁵ In this connection, on the occasion of the on-site visit carried out in May 1985, the Commission stated,

[...] Prior to the on-site visit to Guatemala in May 1985, the Commission received many new complaints that suggested that practice of forced disappearance had worsened. All of those complaints were processed in accordance with the regulations that govern individual cases [...] During the on-site visit, the Special Commission of the IACHR received testimony directly from the relatives of hundreds of disappeared persons; listened to the eyewitnesses of a number of kidnappings and seizures; talked to members of the Mutual Support Group (GAM); took receipt of new complaints; was informed of kidnappings and disappearances of persons that occurred while it was actually in Guatemala; directly investigated the agencies accused of taking part in such acts; talked, as mentioned, to all kinds of officials and public and private figures who might be in a position to provide valuable information on this problem; and personally took all manner of steps in an effort to ascertain the whereabouts of those who might be alive, bring about the elimination of such a deplorable practice, ensure the

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without a trace, making it virtually impossible to know anything further about their whereabouts, despite tireless searching by family and friends at morgues, hospitals, military facilities, and police stations.

52. The *modus operandi* of such deplorable practices was outlined by the IACHR in its Special Report of 1985. Based on an analysis of the information that the Commission then had in its possession, such as names, dates, particulars, ages, sexes, professions, or activities of the victims, as well as common features of the attacks and various studies on the problem, the IACHR managed to establish the unique methods and characteristics of forced disappearance as practiced in Guatemala during the time of the armed conflict. The Commission even identified singularities in such acts depending on whether they were carried out in rural or urban areas. According to the testimony of persons who managed to escape from places of detention and eyewitnesses to abductions and detentions carried out in people's homes, the workplace, and in public, the IACHR isolated certain typical particularities that made it possible to distinguish between different stages of forced-disappearance operations, which may be summarized, where relevant, as follows:

[...] a. Detention

[...] Detentions in public places are even more spectacular and involve a larger deployment of operational personnel, who dress in either civilian clothing or uniform, but invariably are heavily armed. The kidnappers act with as much aggression as possible, brandishing their weapons at any witnesses, bystanders, street vendors, companions of the victims, neighbors, etc., using extreme force to apprehend the victim -man or woman- and put them in the vehicle they have brought for that purpose, if necessary dragging and beating in order to do so. Neither the cries and struggles of the victim, nor the protests of witnesses, nor the shots that are sometimes fired, nor the natural disturbance that an occurrence of this nature and seriousness causes in the street, have the least effect on the local police, who do not even make record of such events in the incident book as an occurrence worthy of police attention.

[...] When the detention is carried out in public, the kidnappers almost always know the victim's identity. Once inside the pickup truck or car, the abducted person is held roughly against the floor, sometimes blindfolded, and then, suffering abuse and threats, driven to an unknown destination.

b. Places of detention

The captured person is driven to different unofficial places of detention, which are usually located, reportedly, at military facilities, without being told the reasons for their detention or where they are being held. They are kept completely incommunicado and, at first, are normally isolated from other persons. They are very badly mistreated, constantly beaten and kept in a state of fear with the apparent aim of breaking them physically and emotionally. Once in detention they realize that they are utterly helpless and bereft of rights. Their most basic physical needs are barely satisfied. The appalling conditions at places of detention make staying in them almost unbearable. Compounding that is the hostile, insulting, and humiliating treatment to which they are constantly subjected.

c. Interrogations

[...] Groups of persons, sometimes different ones, interrogate the detainee. Interrogations invariably start with mistreatment, threats, shoving, and frequent blows. The apparent aim in almost every case is to obtain more information than the person under interrogation actually has in their possession [...]

Investigation of the perpetrators, and make certain that the serious situation of disappeared persons be given special consideration and treatment by the country's highest public authorities [...]

See: IACHR, *Third Report on the Situation of Human Rights in the Republic of Guatemala*, adopted on October 3, 1985, Chapter II, para. 7.

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d. Torture

[...] Mistreatment and torture are part of the method used in almost all interrogations and seem to be applied primarily to intimidate, soften up, and persuade the victim to confess. Part of this practice consists of holding detainees near to where other persons are tortured, so that they can hear the screams and beatings and know the nature of the ordeal in store for them.

[...] Persons about to be interrogated by torture usually have their feet tied together and are hung upside down, after which they start to be violently and indiscriminately beaten all over the body with lacerating objects. The next step is the application of the electric shocks to the most sensitive areas, very often until the intensity of the pain renders the torture victim unconscious, causing intense fever and thirst when they regain their senses.

e. Disappearances

[...] Except in highly unusual circumstances, anyone who is the object of a special kidnap or seizure operation in Guatemala is predestined to die from the start, as a means to ensure the utmost secrecy of the system, the identities of those involved, the places of detention, the interrogation and torture methods used, and the official nature of the organization. [...] ²⁶.

53. At the time of Florencio Chitay Nech's illegal arrest, forced disappearance was a practice of the Guatemalan State and was chiefly carried out by agents of the State's security forces. In connection with this phenomenon, the Court established in the Case of Molina Theissen, and reiterated in the recent case of Tiu Tojin – both of which involved Guatemala – that:

the forced disappearance of persons was a State practice carried out principally by members of the security forces. The purpose of this practice was to dismantle movements or organizations that the State identified as having "insurgency" tendencies and to instill fear into the population;

The State based itself on the "National Security Doctrine" to characterize a person as "subversive" or as an "internal enemy," and this could be anyone, who genuinely or allegedly supported the fight to change the established order. The victims hailed from all sectors of Guatemalan society: leaders of grass-roots or opposition organizations, workers, peasants, teachers, student leaders, members of religious orders or their lay helpers;

This practice was implemented by the army, the civil self-defense patrols (hereinafter "the PAC"), the military commissioners, the military foot-police, the national police, the judicial police and the "death squadrons".

The detention, abduction, torture and subsequent assassination of those who were "disappeared" was carried out by heavily armed groups of individuals, who introduced and identified themselves as belonging to one of the State's different investigation or security units. During these operations, they did not provide information on the motives for the alleged detention or the centers to which those detained would be transferred. These groups acted with total impunity and traveled in cars similar to those used by the police forces or identified as belonging to security units, with deteriorated license plates or without the road use permit.

Violence was inevitably used in the forced disappearance of persons carried out by members of State security units. These acts of violence were directed against the victims, their next of kin, and any witnesses to the events. The threats and intimidation of the victims' next of kin

²⁶ IACHR, *Third Report on the Situation of Human Rights in the Republic of Guatemala*, adopted on October 3, 1985, Chapter II, para. 16-27.

continued for some time after the detention, so as to curb their initiatives to locate the persons detained and to heighten their fear.²⁷

54. Similarly, the CEH's report establishes that "the disappearances mainly targeted members of trade unions, social, student, and religious organizations, and political parties."²⁸ These forced disappearances were intended to punish not only the victims, but also the political or social organizations to which they belonged, their communities, and their families: in other words, to punish the collective of which the victim was a part.²⁹

55. The Commission will examine the specific events surrounding the forced disappearance of Florencio Chitay Nech in the light of the foregoing considerations.

3. STRUCTURE OF THE POLITICAL AND MILITARY POWER IN GUATEMALA ON APRIL 1981

56. During the early 1970's decade, the institutionalization of the military forces in Guatemala originated a fraudulent electoral presidential regime,³⁰ which stayed until 1982, followed by a series of military dictatorships. One of the characteristics of the governments imposed as a consequence of fraudulent mechanisms consisted in that the position of President of the Republic was held by a member of the military forces, while the Vice-President was held by a civilian.³¹

57. On March 1978, Guatemala held presidential elections, and regardless of the several complaints of fraud,³² General Romeo Lucas García took office as President. General Lucas García had been the Minister of Defense during the government of General Kjell Eugenio Laugerud García (1974-1978). The Presidential tenure of General Romeo Lucas García finished on March 1982, when a *Junta Militar*, headed by General Efraín Ríos Montt, took power.

58. When Florencio Chitay Nech was forcibly disappeared -April 1981-, General Romeo Lucas García was the President of Guatemala and Commandant in Chief of the Army.³³ General Ángel Aníbal Guevara Rodríguez was the Minister of Defense.³⁴

4. EVENTS PRIOR TO THE FORCED DISAPPEARANCE OF FLORENCIO CHITAY NECH

²⁷ I/A Court H.R., *Case of Theissen*. Judgment of May 4, 2004. Series C No. 106, para. 40. See also I/A Court H. R., *Case of Tiu Tojin*, Merits, Reparations, and Costs, Judgment of November 26, 2008, Series C No. 190, para. 49.

²⁸ See: *Memory of Silence*, Vol. II, Chapter XI: Forced Disappearances, p. 426.

²⁹ *Ibid.*, p. 428.

³⁰ *Memory of Silence*, Vol. I, para. 231.

³¹ The four presidential formulas shared that characteristic from 1970 until 1982. In 1970, Coronel Carlos Manuel Arana Osorio was the President, while the Vice-president was the attorney Eduardo Cáceres Lenhoff; in 1974 General Kjell Eugenio Laugerud García was elected President, and the civilian Mario Sandoval Alarcón was the Vice-President; in 1978 General Romeo Lucas García was elected President, and the civilian Francisco Villagrán Kramer was the Vice-President.

³² *Memory of Silence*, Vol. I, para. 362.

³³ Law Constituting the Army, Decree 1782 of September 5, 1968.

³⁴ From that date on, General Guevara Rodríguez began serving as Minister of Defense. He was later appointed President Lucas García's successor for the 1982 presidential election.

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59. Mr. Florencio Chitay Nech, a Kaqchikel Maya, was born in the village of Quimal, hamlet of Semetabaj, on March 2, 1935.³⁵ For many years he farmed corn, beans and sugarcane on land inherited from his parents.

60. In approximately 1973, Mr. Chitay joined the peasant movements in the region and began to take part in political activity, joining the Guatemalan Christian Democratic Party. At the same time he became involved in the cooperative movement.

61. In 1977 a group of indigenous persons decided to put forward candidates in the 1978 municipal election in San Martín de Jilotepeque, Department of Chimaltenango. They ran Mr. Felipe Álvarez Tepaz for Mayor and Mr. Florencio Chitay for the office of First Councilman. As a result of that election, and as was corroborated by the CEH's Report, those candidates were elected³⁶ and that Municipal Council became the first body of that nature to be almost entirely made up of indigenous persons.

62. Repression against members of the Municipal Corporation of San Martín de Jilotepeque began in mid-1979. The CEH's report shows that on November 21, 1980, Felipe Álvarez, the Mayor of that municipality, became a victim of forced disappearance³⁷ perpetrated by a group composed of military personnel and civilians, which incident the Guatemalan justice system failed to investigate. With regard to the foregoing, the Report of the CEH states:

[...] On November 21, 1980, in the seat of the municipality of San Martín Jilotepeque, department of Chimaltenango, the municipal mayor, Mr. Felipe Álvarez, was kidnapped. A contingent of 15 men made up of members of the G-2 and civilians from San Martín Jilotepeque, went into the home of the Álvarez family, wounding Mr. Álvarez in the back and repeatedly beating him and his daughters Ester and Antonia. Subsequently, Mr. Álvarez was dragged into a car and his son into another, and they were taken in the direction of Chimaltenango. The family reported the attack to the National Police, which did not investigate. The Lower Court of Chimaltenango opened case file No. 1482/80 but did not investigate [...].³⁸

63. According to the CEH report, over the months that followed, three of Mr. Felipe Álvarez sons might have disappeared.

[...] The family of Felipe Álvarez suffered several attacks culminating in the forced disappearance of Felipe Álvarez's three sons: Jorge Álvarez on April 27, 1981, Mario Álvarez on November 13, 1981, and Mateo Álvarez on December 13, 1981. Finally, a witness who was part of the group responsible for the forced disappearance told one of Felipe Álvarez's sons that his father had been burnt [sic] at Roosevelt Street and 23rd Ave., in the Zone 7 section of the capital, and that his remains had been thrown into the Pino Lagoon, in the department of Santa Rosa, something that has not been verified [...].³⁹

64. Furthermore, on January 6, 1981, Mario Augusto García Roca, Second Councilman of the Municipality of San Martín Jilotepeque was also disappeared.⁴⁰

³⁵ See: *Cédula de Vecindad* [Identity document] 12.203, belonging to Florencio Chitay Nech.

³⁶ *Memory of Silence*, Volume VIII, Cases presented Annex II, case 707, (1999).

³⁷ See IACHR, Resolution 15-82, Case 7777, Guatemala, March 9, 1982. The Report of the CEH also provides an account of the forced disappearance of Felipe Álvarez Tepaz and his sons. See *Memory of Silence*, Volume VIII, Cases presented Annex II, case 707, (1999).

³⁸ *Memory of Silence*, Volume VIII, Cases presented Annex II, case 707, (1999).

³⁹ *Idem*.

⁴⁰ *Idem*.

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65. These incidents took place during the most tragic and violent phase of the internal armed conflict in Guatemala, when the military operations were concentrated in Quiché, Huehuetenango, Chimaltenango, Alta and Baja Verapaz, the south coast, and Guatemala City,⁴¹ which accounted for 91 % of the violations recorded by the CEH.⁴²

66. As a result of the acephaly caused by the disappearance of Mayor Felipe Álvarez, Mr. Chitay Nech assumed responsibility for the municipal government in his capacity as First Councilman (Deputy Mayor). As of that moment, Mr. Chitay Nech began to receive death threats⁴³ and a series of attacks were made against him at his home.⁴⁴

67. Thus, starting in June 1980, the victim received anonymous notes "which invited him to remove himself from all his activities, namely, to step down as Mayor of the municipality, and withdraw from the cooperative and peasant movement, activities labeled as subversive."⁴⁵ The testimony of Mr. Luis Alfonso Carrera Hidalgo, a political leader of the Christian Democracy movement, describes this situation in the following terms:

We, the party leaders, were aware of the death threats made against the political leader Florencio Chitay Nech of the municipality of San Martín Jilotepeque, department of Chimaltenango. [...] Significantly, some months earlier, Mayor Felipe Álvarez Tepaz was also abducted, upon which Mr. FLORENCIO CHITAY NECH assumed his position, but because of pressure from anonymous groups he resigned, to safeguard his physical integrity and that of his family.⁴⁶

68. Starting in November 1980 there were various kidnapping attempts and attacks on Florencio Chitay and his immediate family.

[...] There were approximately three attacks on the house: in the first, the kidnappers failed to accomplish their objective (in the early days of November), but they raked the inside of the home with machine-gun fire [...]. The second attack came in the days that followed. By then, by the father's decision they had taken to moving around regularly among the homes of different relatives, where they would spend the night and return home the next day. In the second attack, the attackers managed to gain entry to the home, turned it upside down and again shot up the interior. The third attempt also came at the end of that year. Upon failing to accomplish their objective, the attackers made a pile of most of their parents' belongings in the home, including books, papers, beds, coats, and so forth, and set it on fire.⁴⁷

69. Because of the incidents described, the Chitay Rodríguez family was forced to flee to Guatemala City. To achieve that, Mr. Chitay Nech went unaccompanied along a road that was not under Army surveillance. Some days later, he was followed along the same route by his older sons, Pedro and Eliseo, aged 15 and 13 years, and by his wife, Mrs. Marta Rodríguez Quex, carrying her eight-month-old daughter.⁴⁸ The two younger sons, aged 5 and 9, went to the city by bus along a

⁴¹ *Memory of Silence*, Vol. V, Chapter 4, Conclusions, p. 28.

⁴² *Ibid.*, p. 42.

⁴³ Testimony of Luis Alfonso Carrera Hidalgo, Annex 1.

⁴⁴ Testimony of Encarnación Chitay Rodríguez, Pedro Chitay Rodríguez, Eliseo Chitay Rodríguez, and Amada Rodríguez Quex, Annex 1.

⁴⁵ Representatives' submission, dated March 2, 2005.

⁴⁶ Testimony of Luis Alfonso Carrera Hidalgo, Annex 1.

⁴⁷ Testimony of Pedro Chitay Rodríguez, Annex 1.

⁴⁸ Testimony of Luis Alfonso Carrera Hidalgo, Annex 1.

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highway that was under Army surveillance, in the company of a cousin, because the Army did not demand minors to provide identification papers.⁴⁸ The testimony given by Mr. Chitay Nech's sons agree, with respect to their father, that:

On several occasions, attempts were made to kidnap him from his home located in Barrio el Guite, municipality of San Martín Jilotepeque, department of Chimaltenango. After these attempted abductions, he decided to abandon the municipality and relocate to the capital. For that, [his two younger sons] took a bus [...] to the city, with the help of a cousin.⁵⁰

70. In Guatemala City, the Chitay Rodríguez family settled into a rented room. Mr. Florencio Chitay then began to work in a refrigeration repair shop, in order to support his family, until his disappearance on April 1, 1981.

71. Some days before his disappearance, Mr. Chitay Nech spoke with his elder sons, Pedro and Eliseo, and told them of his fear that something might happen to him.⁵¹

5. THE ARREST AND SUBSEQUENT FORCED DISAPPEARANCE OF FLORENCIO CHITAY NECH

72. The Commission has established that on April 1, 1981, Mr. Chitay Nech left his home in Guatemala City to buy firewood. He was accompanied by his son Estermerio, then five years of age. In front of the firewood shop, a group of armed men got out of a vehicle, gave Florencio Chitay Nech's name, tried to force them into their vehicle, and hit him on the head. One of the men took the child by the arm and pointed his weapon at him. Upon seeing this, Mr. Chitay Nech ceased resisting and got into the vehicle.⁵² Estermerio ran home to tell his family what had happened.

73. The CEH documented Mr. Chitay Nech's case as one of forced disappearance, which the IACHR also accepted as evidence. Thus, the CEH's report states:

The municipal council of San Martín Jilotepeque was completely dismantled. The forced disappearance of Felipe Álvarez was followed by that of the First Councilman, Mr. Florencio Chitay Nech, on December 10, 1980 [sic], and of the Second Councilman, Mr. Mario Augusto García Roca, on January 6, 1981. Finally, the surviving members of the Municipal Council of San Martín Jilotepeque resigned en masse and asked for new elections to be held on January 8, 1981.⁵³

74. Similarly, in its report on the merits, the IACHR established that in conjunction with the testimony submitted and the documentation set out in the CEH's report, the personal and professional particulars of Mr. Chitay at the time of his disappearance make it possible, on the basis of logical and conclusive inference, to put the reported facts into context and to frame them within the practice of forced disappearances in place in Guatemala at the time, in keeping with the aforementioned standards of the Court's case law.⁵⁴ In that respect, the following should be noted:

⁴⁸ Testimony of Estermerio Chitay Rodríguez. See also: Testimonies of Encarnación Chitay Rodríguez, Pedro Chitay Rodríguez, Eliseo Chitay Rodríguez, and María Rosaura Chitay Rodríguez, Annex 1.

⁵⁰ Testimony of Estermerio Chitay Rodríguez. See also: Testimonies of Encarnación Chitay Rodríguez, Pedro Chitay Rodríguez, Eliseo Chitay Rodríguez, and María Rosaura Chitay Rodríguez, Annex 1.

⁵¹ Testimony of Encarnación Chitay Rodríguez, Pedro Chitay Rodríguez, Eliseo Chitay Rodríguez, Chitay Rodríguez, Annex 1.

⁵² Testimony of Estermerio Chitay Rodríguez, Annex 1.

⁵³ *Memory of Silence*, Vol. VIII, Cases Submitted, Annex II, Case 707 (1999).

I/A Court H.R., Case of Bámaca-Velásquez v. Guatemala. Merits. Judgment of November 25, 2000. Series C No.

a. Mr. Chitay was a political leader and, as such, an obvious target for the acts of violence perpetrated during the timeframe of his disappearance. In that connection, the CEH has reviewed an abundance of documents that relate to the persecution and violence meted out to political leaders, in particular cooperative activists. Thus, that Commission mentioned that the final objective of forced disappearances was to destroy trade-union, student, and political organizations regarded as opponents of the established regime. The counterinsurgency strategy encouraged by the State struck "through the forced disappearance of entire leaderships of trade unions, student associations, political organizations and grassroots groups. By removing the leaders of organizations either individually or en masse... [i]t is clear that the ultimate aim of the violation was precisely to wipe them out or destroy them."⁵⁵

b. In addition, it should be mentioned that Mr. Florencio Chitay's particular political affiliation to the Christian Democratic movement heightened the vulnerability to which he was already exposed as a political leader. In this regard, the CEH concluded that the arbitrary executions were perpetrated against leaders of groups such as Catholic Action, development committees, cooperatives, and leaders of political parties, especially the Christian Democratic Party.⁵⁶

c. In addition, his activities as a cooperative activist were unquestionably another factor that exposed Mr. Chitay to the risk of abduction and disappearance of which he was later a victim. The above-cited Report of the CEH states that repression was unleashed wherever a peasant cooperative organization happened to exist. One of the testimonies recorded by the CEH says,

[...] in 1981 the army began to kidnap the people who were leaders of the cooperative. On May 10, 1981, soldiers called the president of the cooperative to the military post and he went there that same day. He never appeared. He never came home. Almost all of us were Catholics. On June 12 of that year we were at the chapel and the army arrived dressed as civilians and pretending to be guerrillas. They had a list and the vice president of the cooperative was there... They took him away. The next day the man wasn't in the same place [...].⁵⁷

d. It is also clear that Mr. Florencio Chitay's position as an indigenous leader put him in greater danger from the reign of violence. To illustrate, it is worth noting what the CEH stated to the effect:

The human rights violations were objectively and specifically targeted at the Maya groups that lived in these regions. Another indication of this general discrimination against the Maya population is that time and again the Army systematically executed anyone in the Maya groups who stood out as community leaders.⁵⁸

e. Finally, Florencio Chitay's work at the Municipality of San Martín de Jilotepeque, was another of the factors that made him a target for persecution, as it was for everyone else who worked there with him. As mentioned, following the disappearance and subsequent arbitrary execution of the Municipal Mayor and several members of his family, Mr. Chitay, as Deputy Mayor, took over the position. Later, the surviving members of the Municipal Council of San Martín Jilotepeque resigned en masse and called for new elections.

⁵⁵ *Memory of Silence*, Volume II, Human rights violations and acts of violence, p. 430.

⁵⁶ *Idem.*, p. 384.

⁵⁷ *Memory of Silence*, Volume II, Human rights violations and acts of violence, p. 436.

⁵⁸ *Idem.*, p. 418.

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75. Based on the foregoing, it is safe to conclude that Mr. Chitay met various characteristics which were sufficient -bearing in mind the aforementioned historical context and from the point of view of those responsible for the atrocities committed during that period- to make him a typical target for violence and persecution. The fact is, as noted, particularly at the time when the acts that gave rise to the complaint occurred, repression was mainly directed against the non-combatant civilian population, "and it is possible to distinguish various categories of victims according to their social role, among which social workers, cooperative activists, deputy mayors, and traditional Maya leaders were the groups worst hit."

76. By way of further illustration, it should be noted that the way in which Mr. Chitay was disappeared is entirely consistent with the *modus operandi* and context of the systematic practice of disappearances described hereinabove. Indeed, the statements of witnesses all concur that the abduction was carried out in daytime by a group of armed men,⁵⁹ who were clearly aware of Mr. Chitay's identity, and acted with violence toward him and his young son.⁶⁰ The testimony of Estermerio Chitay mentions in this respect that:

[...] On April 1, 1981 he was kidnapped opposite a place where they sell firewood at the intersection of Ninth Avenue and Seventh Street in Zone 19, La Florida district. This happened at seven o'clock in the morning as he was on his way to buy firewood there. I was five years old at the time. He had asked me to go with him and I did so gladly. Upon reaching the aforementioned spot and as my father was about to make the purchase, a vehicle that was nearby approached us and several persons got out. After they called his name they began to struggle with him to put him in the vehicle, while my father resisted. In the struggle they began to hit him with a weapon. It saddens me to remember that he received a blow on the head that caused a cut and he started to bleed. But even then he continued to resist until they managed to subdue him; three persons subdued him. As for me, he told me to get away but one of the persons held me by the arm and put a gun to my head. I think that when my father saw that he stopped resisting and got in the vehicle. Then, once my father was in the vehicle I was pushed and fell to the ground face first. The vehicle drove off with my father, who was wounded in the head. After that I returned home and told them what had happened (the house was only about 80 meters from where the events occurred) [...].⁶¹

77. In addition, Mr. Chitay might have been one of the victims that the Chitay family had to bear, which could be considered a further element of evidence in the context of persecution within which his own abduction and disappearance can and must be seen. Thus, the testimony given by Mr. Florencio Chitay's relatives agree on the existence of other forced disappearance victims in the family, namely:

The father Florencio Chitay Nech, and... his brothers José Carlos Chitay Nech, abducted in 1985... Eleodoro Onlon Camay (husband of María Chitay Nech), abducted and murdered in 1988; Martín Chitay, abducted and murdered in 1990; Rosa Chitay Aguín, killed in a massacre in the hamlet of Semetabaj, along with her months-old son, as well as other family members whose names remain anonymous.⁶²

78. It is also worth referring to what the Inter-American Court found in the Godínez Cruz:

⁵⁹ See testimony of Estermerio Chitay Rodríguez, Encarnación Chitay Rodríguez, Pedro Chitay Rodríguez, Eliseo Chitay Rodríguez, and María Rosaura Chitay Rodríguez.

⁶⁰ See herein the section titled "Forced disappearance of persons".

⁶¹ Testimony of Estermerio Chitay Rodríguez, Annex 1.

⁶² Testimony of Pedro Chitay Rodríguez. See also: Testimony of Encarnación Chitay Rodríguez, Annex

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[...] Other than the above, there has been no other attempt by the Government to explain the facts nor any statement offered to prove that [...] had been kidnapped by common criminals or by other persons unrelated to the practice of disappearances existing at that time, or that he had disappeared voluntarily. The defense of the Government rested solely on the lack of direct proof, which, as the Court has already said is inadequate and insufficient in cases such as this.

[...]The very existence of a practice of disappearances is a relevant factor within the framework set out to establish a judicial presumption.⁶³

79. Finally, according to the evidence, including the testimonies, and the determination done by the CEH, Mr. Chitay's personal and professional conditions, the related facts with the other members of the Municipal Board of Jilotepeque, the context in which the facts took place, as well as the *modus operandi* of the forced disappearances in the epoqe of the facts, the Commission considers as proven that Florencio Chitay Nech was kidnapped by Guatemalan security armed forces on April 1st, 1981.⁶⁴

6. EVENTS FOLLOWING THE DISAPPEARANCE OF FLORENCIO CHITAY NECH: THE SEARCH AND THE FAILURE TO INVESTIGATE THE INCIDENT

80. To date, the State of Guatemala has not conducted a sufficient investigation of the events that gave rise to the instant case and has failed to identify and punish those responsible for them.⁶⁵ Indeed, neither when the victim's forced disappearance occurred, nor later, after the internal armed conflict had concluded, did the State carry out an investigation to clarify the forced disappearance of Mr. Florencio Chitay Nech, despite the fact that -at the time of the incident- the facts were brought to the attention of the appropriate authorities so that they might open an enquiry and, as the following shows, new measures were subsequently adopted for that purpose.

81. On April 1, 1981, as soon as Estermerio Chitay Rodríguez had told his family what had happened, Mr. Chitay Nech's wife, along with their two elder sons, Pedro and Encarnación, went to the site of the abduction and to report the incident to the National Police, but no proceedings were opened into the matter. Later, Mrs. Marta Rodríguez Quex and her elder sons searched for Mr. Chitay Nech in the hospitals and morgues, but did not find him. In fact, as was established in Admissibility Report No. 7/07, in its communications with the Commission the State acknowledged the existence of a complaint lodged by the family in the criminal proceedings.

82. Furthermore, Mr. Chitay's disappearance was also made public by the media. The event was publicly reported on April 25, 1981, at a press conference held by leaders of the Guatemalan Christian Democratic Party. The record also shows that the newspapers *La Hora*, *Prensa Libre* and *El Gráfico* published articles on April 25, 1981, which referred to the kidnapping and subsequent disappearance of Mr. Florencio Chitay.⁶⁶

⁶³ I/A Court H.R., *Godínez Cruz Case*, Judgment of January 20 1989, Series C No 5, para. 154.

⁶⁴ The CEH's report states that Florencio Chitay Nech's disappearance took place on December 10, 1980, the date on which Mr. Chitay Nech suffered the second attempted abduction at his home in San Martín de Jilotepeque. However, the date of Florencio Chitay Nech's disappearance was April 1, 1981.

⁶⁵ On April 1, 2009, the State informed the IACHR that on March 2, 2009, the Executive Director of the Presidential Executive Policy Coordinating Commission for Human Rights lodged a complaint for the forced disappearance of Mr. Florencio Chitay Nech with the Office of the Public Prosecutor.

⁶⁶ See testimony of Luis Alfonso Cabrera Hidalgo. Also, press reports of April 25, 1981, which expressly mention the name of Mr. Florencio Chitay Nech, and denounce his abduction and that of other leaders of the Christian Democratic Party.

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83. In turn, when it was published in 1999, the CEH's Report also described the situation of Mr. Chitay as a case of forced disappearance.⁶⁷

84. In addition, the record shows that on October 12, 2004, Pedro Chitay Rodríguez, the alleged victim's son, filed a habeas corpus application with the First Criminal Justice of the Peace in Guatemala City, seeking an order to have the officials who had illegally detained his father submit a detailed report on the reasons for his detention.

85. On October 14, 2004, the court acknowledged receipt of the habeas corpus application, ordered that Florencio Chitay should be brought before the court, and that the authorities, "officials or persons presumably responsible should produce him, present the original or a copy of the existing proceedings or record, and report on the reasons for these events."⁶⁸ Case file No. 2452-2004, the habeas corpus application in favor of Florencio Chitay, shows that the court made inquiries with the National Civil Police⁶⁹ and the General Bureau of the Penitentiary System.⁷⁰ Subsequently, "after taking those steps, the court requested assignment of the case to the proper tribunal and it was assigned to the Second Court of the Lower Circuit for Criminal, Drug and Environmental Offenses. This court, on November 4, 2004, ruled found the habeas corpus application inadmissible because there was no evidence that Mr. Chitay had been detained. Notice of this decision was given to Pedro Chitay on November 23, 2004.

86. On March 2, 2009, as a part of the compliance with the recommendations set out in the merits report, the Executive Director of the Presidential Executive Policy Coordinating Commission for Human Rights lodged a complaint for the forced disappearance of Florencio Chitay Nech with the Office of the Public Prosecutor.

87. Twenty-eight years after the incident and more than ten years after the end of the armed conflict, the forced disappearance of Mr. Florencio Chitay Nech has not been investigated by the Guatemalan justice system.

VII. CONSIDERATIONS OF LAW

1. OVERVIEW

88. The Court has reiterated that forced disappearance of persons constitutes an illegal act that gives rise to a multiple and continuing violation of several rights protected by the American Convention, and involves the disregard of the obligation to organize the State apparatus to safeguard the rights recognized in said Convention.⁷¹ Actions calculated to bring about involuntary disappearances, to tolerate them, to avoid adequate investigation, or the punishment, as the case may be, of those responsible, constitute the violation of the duty to respect the rights recognized by the Convention and to guarantee their free and full exercise.⁷²

⁶⁷ *Memory of Silence*, Volume VIII, Cases presented, Annex II, case 707, (1999).

⁶⁸ Ruling of October 14, 2004, of the First Criminal Justice of the Peace in Guatemala City.

⁶⁹ Record of Habeas Corpus Proceeding 2452-2004 of October 15, 2004.

⁷⁰ *Idem*.

⁷¹ I/A Court H.R., *Case of Goiburú et al.*, Judgment of September 22, 2006. Series C No. 153, para. 82; I/A Court H.R., *Case of Gómez-Palomino*, Judgment of November 22, 2005. Series C No. 136, para. 92; I/A Court H.R., *Case of 19 Tradesmen*, Judgment of July 5, 2004. Series C No. 109, para. 142.

⁷² I/A Court H.R., *The "Panel Blanca" Case (Paniagua Morales et al.)*, Judgment of March 8, 1998, Series C No. 37, para. 90; I/A Court H.R., *Case of Fairén-Garbi and Solís-Corrales*, Judgment of March 15,

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89. Indeed, the phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion.⁷³ In this connection, the Court has held that,

Forced or involuntary disappearance is one of the most serious and cruel human rights violations, in that it not only produces arbitrary deprivation of freedom but places the physical integrity, security and the very life of the detainee in danger. It also leaves the detainee utterly defenseless, bringing related crimes in its wake. Hence, it is important for the State to take all measures as may be necessary to avoid such acts, to investigate them and to sanction those responsible, as well as to inform the next of kin of the disappeared person's whereabouts and to make reparations where appropriate.⁷⁴

90. The Court has held that this offense is a crime against humanity.⁷⁵ In this same regard, the seriousness of this scourge, which has repeatedly been a severe blight on the history of our region, has been noted by the General Assembly of the Organization of American States in resolutions 666 (XIII-O/83) and AG/RES.742, which state for the record that "the forced disappearance of persons is an affront to the conscience of the hemisphere and constitutes a crime against humanity,"⁷⁶ and also that "this practice is cruel and inhuman, mocks the rule of law, and undermines those norms which guarantee protection against arbitrary detention and the right to personal security and safety."⁷⁷

91. In a similar vein, the Inter-American Convention on Forced Disappearance of Persons, adopted on June 9, 1994, characterizes this offense as a crime against humanity when committed as part of a systematic practice.

92. Article I of the aforesaid instrument makes it an obligation for states parties:

b. To punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories; [...]

d. To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.⁷⁸

93. For its part, Guatemalan law has accommodated the principles mentioned *ut supra*, given that in 1996 it included Article 201 TER in its Criminal Code, which classifies the crime of forced disappearance as follows:⁷⁹

1989. Series C No. 6, para. 152; I/A Court H.R., *Godínez Cruz Case*, Judgment of January 20 1989, Series C No. 5, pars. 168-191; and I/A Court H.R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C No. 4, pars. 159-181. See also I/A Court H.R., *Case of the Massacre of Pueblo Bello*, Judgment of January 31, 2006, Series C No. 140.

⁷³ I/A Court H.R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C No 4, pars. 149-152. I/A Court H.R., *Godínez Cruz Case*, Judgment of January 20 1989, Series C No 5, para. 157-160.

⁷⁴ I/A Court H.R., *Blake Case*, Judgment of January 24, 1998, Series C No. 36, para. 66.

⁷⁵ I/A Court H.R., *Case of Goiburú et al.*, Judgment of September 22, 2006, Series C No. 153, para. 82; I/A Court H.R., *Case of 19 Tradesmen*, Judgment of July 5, 2004, Series C No. 109, para. 142.

⁷⁶ Resolution 666 (XIII-O/83) of the General Assembly of the Organization of American States.

⁷⁷ Resolution 742 (XIV-O/84) of the General Assembly of the Organization of American States.

⁷⁸ Inter-American Convention on Forced Disappearance of Persons, Article I(b) and (d).

⁷⁹ As amended by Decree 33-96 of the Congress of the Republic, approved on May 22, 1996.

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(t)he crime of forced disappearance is committed by anyone who, by order or with authorization or support of State authorities, in any way deprives a person or persons of their liberty, for political reasons, concealing their whereabouts, refusing to reveal their fate or recognize their detention, as well as any public official or employee, whether or not they are members of the State security forces, who orders, authorizes, supports or acquiesces in such actions.

Even if there is no political motive, the deprivation of liberty of one or more persons constitutes the crime of forced disappearance when it is committed by elements of the State security forces, who act arbitrarily, abusively, or with excessive force in the performance of their duties. The crime of forced disappearance is also committed when members of organized groups or bands with terrorist, insurgent, or subversive aims, or otherwise with criminal intent, commit abduction or kidnapping, participating as members or collaborators of said groups or bands.

The crime is considered ongoing until the victim is released.

Persons found guilty of forced disappearance shall be punished with 25 to 40 years of imprisonment. The death penalty shall be imposed instead of the maximum prison term when, as a result or in the course of the forced disappearance, the victim sustains either a serious or a very serious injury, suffers permanent mental or psychological trauma, or dies.

94. The Inter-American Court has consistently held that, due to the nature of forced disappearance and its probative difficulties, if it has been proved that the State promotes or tolerates the practice of forced disappearance of persons, and the case of a specific person can be linked to this practice, either by circumstantial or indirect evidence, or both, or by pertinent logical inference, then this specific disappearance may be considered to have been proven.⁹⁰ Accordingly, in the light of the series of facts that are considered proven in the instant case, the Commission now proceeds to establish the violations of the Convention which, in the case *sub iudice*, engage the international responsibility of the State of Guatemala.

2. VIOLATION OF THE RIGHT TO LIBERTY

95. Article 7 of the American Convention on Human Rights protects the right to personal liberty and states 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,

⁹⁰ I/A Court H.R., Bámaca Velázquez Case, Judgment of November 25, 2000, Series C No. 70, para. 130.

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this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies

96. In turn, Article I of the Inter-American Convention on Forced Disappearance of Persons provides that states parties to the Convention undertake:

- a) Not to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees;
- b) To punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories;
- c) To cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons; and
- d) To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.

97. As regards analysis of this latter international instrument, although the report on admissibility in the instant case considered an examination of its possible violation, that possibility was not provided for in respect of Article II of the aforesaid instrument. Nevertheless, in its report of the merits, the Commission, in keeping with the *iura novit curia* principle, which is solidly supported by international case law,⁸¹ and in the light of the most recent decisions of the Court, will analyze the norm contained in Article 7 of the American Convention in connection with Articles I and II of the Inter-American Convention on Forced Disappearance of Persons. The latter norm provides:

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

98. Article 7 of the American Convention is a fundamental guarantee against illegal detention, in respect of which, the Inter-American Court, citing its own case law and that of the European Court of Human Rights has held that:

Both the Inter-American Court and the European Court of Human Rights⁸² have attached special importance to judicial control of detentions so as to prevent arbitrariness and illegality. An individual who has been deprived of his liberty with no judicial control, as occurs in some cases of extra-legal executions, must be released or immediately brought before a judge, because the essential content of Article 7 of the Convention is protection of the liberty of the individual against interference by the State. The European Court of Human Rights has affirmed that while the term "immediately" must be interpreted according to the special characteristics of each case, no circumstance, however grave, grants the authorities the power to unduly prolong the detention period without affecting Article 5(3) of the European Convention.⁸³ Said

⁸¹ I/A Court H.R., *Case of Heliodoro Portugal*, Judgment of August 12, 2008. Series C No. 186, para. 105; I/A Court H.R., *Case of Sawhoyamaya Indigenous Community*, Judgment of March 29, 2006. Series C No. 146, para. 186; I/A Court H.R., *Case of Kimel*, Judgment of May 2, 2008. Series C No. 177, para. 61.

⁸² Eur. Court HR, *Aksoy v. Turkey*, judgment of 18 December 1996, Reports of Judgments and Decisions 1996-VI, para. 76; and Eur. Court H.R., *Brogan and Others* judgment of 29 November 1988, Series A no. 145-B, para. 58, cited by the I/A Court H.R. in the *Sánchez Case*, op.cit., para. 84.

⁸³ Eur. Court HR, *Brogan and Others* judgment of 29 November 1988, Series A no. 145-B, para. 58-59, 61-62, in I/A Court H.R., *Bámaca Velásquez Case*, para. 140; *Castillo Petruzzi et al. Case*, para. 108;

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Court emphasized "that detention, not recognized by the State, of a person constitutes a complete denial of said guarantees and one of the most serious forms of violation of Article 5."⁸⁴

99. The Court has also found that "while the State has the right and the obligation to guarantee its security and to maintain public order, its power is not unlimited, as it has the duty, at all times, of applying procedures that are in accordance with the Law and that respect the fundamental rights of all individuals under its jurisdiction and, in this regard, it must conduct its actions within limits and according to procedures that preserve both public safety and the fundamental rights of the human person."⁸⁵

100. In particular, paragraphs 2 and 3 of the Article under analysis protect all persons from illegal and arbitrary arrest, respectively:

[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.⁸⁶

101. The Inter-American Court has also said that,

[...] 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. Whoever is deprived of his or her liberty without a court order must be set free or immediately brought before a judge.⁸⁷

102. The Commission has also pointed out that detention for improper purposes is in itself an extralegal punishment or sentence without trial violated the guarantees inherent in the right to a fair trial. As the Inter-American Court has ruled, "[t]he kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention."⁸⁸

and *Sánchez Case*, para. 84.

⁸⁴ Eur. Court HR, *Kurt v. Turkey*, judgment of 25 May 1998, Reports of Judgments and Decisions 1998 III, para. 124, in I/A Court H.R., *Bámaca Velásquez Case*, para. 140; *Case of Villagrán Morales et al. et al.*, para. 135; and *Sánchez Case*, para. 84.

⁸⁵ I/A Court H.R., *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003, Series C, No. 99, para. 86. See also *Case of Hilaire, Constantine and Benjamin et al.*. Judgment of June 21, 2002. Series C No. 94, para. 101; *Bámaca Velásquez Case*, Judgment of November 25, 2000. Series C No. 70, para. 174; *Durand and Ugarte Case*, Judgment of August 16, 2000. Series C No. 68, para. 69; and *Castillo Petruzzì et al. Case*, Judgment of May 30, 1999. Series C No. 52, paras. 89 and 204.

⁸⁶ I/A Court H.R., *Case of the Gómez Paquiyauri Brothers*. Judgment of July 8, 2004. Series C No. 110, para. 83; I/A Court H.R., *Case of Juan Humberto Sánchez*, Judgment of June 7, 2003. Series C No. 99, para. 78.

⁸⁷ See, I/A Court H.R., *Case of García Asto and Ramírez Rojas*. Judgment of November 25, 2005. Series C No. 137, para. 109; I/A Court H.R., *Case of Palamara Iribarne*. Judgment of November 22, 2005. Series C No. 135, para. 221; I/A Court H.R., *Case of Acosta Calderón*, Judgment of June 24, 2005. Series C No. 129, para. 76.

⁸⁸ I/A Court H.R., *Velásquez Rodríguez Case*, para. 155.

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103. It is precisely because of the need to protect the individual against such infringements that the provision under examination establishes "positive obligations that impose specific or special requirements both on [...] the State and on third parties acting with their tolerance or consent."⁸⁹

104. With particular reference to forced disappearance, the Inter-American Court has consistently stated that this practice "represents a phenomenon of arbitrary deprivation of liberty [...] in violation of Article 7 of the Convention."⁹⁰

105. Moreover, from its earliest⁹¹ to its most recent case law,⁹² the Court has maintained that, in analyzing an alleged forced disappearance, the Tribunal should bear in mind that it constitutes a multiple and continuous violation of many rights.

106. Thus, it has stated that its nature as a continuous and multiple violation is reflected in Articles II and III of the Inter-American Convention on Forced Disappearance of Persons, the *travaux préparatoires* thereof,⁹³ and in its preamble,⁹⁴ as well as in Article 1.2 of the Declaration on the Protection of all Persons from Enforced Disappearance adopted by the UN General assembly in 1992. In connection with the foregoing, the Court has held that

Forced disappearance comprises a violation of different rights that continues by the will of the alleged perpetrators, who perpetuate the violation by refusing to provide information on the victim's whereabouts. Accordingly, in analyzing an alleged forced disappearance it should be borne in mind that the deprivation of the individual's liberty should only be regarded as the beginning of a complex violation that is prolonged over time until the fate and whereabouts of the alleged victim become known. Based on the foregoing, it is necessary, therefore, to consider the forced disappearance overall as a separate and continuous or permanent situation with multiple elaborately interconnected elements. Consequently, bearing in mind the case law of the Court in interpreting the American Convention and -for those States that have ratified it- the Inter-American Convention on Forced Disappearance of Persons, the analysis of a possible forced disappearance should not adopt a divided and compartmentalized approach,

⁸⁹ I/A Court H.R., *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, pars. 81(4) to 81(6).

⁹⁰ I/A Court H.R., *Bámaca Velásquez Case*. Judgment of November 25, 2000. Series C No. 70, para. 142; I/A Court H.R., *Godínez Cruz Case*. Judgment of January 20 1989. Series C No. 5, pars 163 and 193; I/A Court H.R., *Case of Fairén-Garbi and Solís-Corrales*. Judgment of March 15, 1989. Series C No. 6, pars. 155 and 186.

⁹¹ I/A Court H.R., *Velásquez Rodríguez Case*. Judgment of July 29, 1988. Series C No. 4, para. 155; I/A Court H.R., *Case of Goiburú et al.*. Judgment of September 22, 2006. Series C No. 153, pars. 81-85, and I/A Court H.R., *Case of Gómez-Palomino*. Judgment of November 22, 2005. Series C No. 136, para. 92.

⁹² I/A Court H. R., *Case of Tiú Tojín*, Merits, Reparations, and Costs, Judgment of November 26, 2008, Series C No. 190; I/A Court H.R., *Case of Heliodoro Portugal*. Judgment of August 12, 2008. Series C No. 186, para. 106.

⁹³ Annual Report of the Inter-American Commission on Human Rights 1987-1988, Chapter V.II. This crime "is permanent because it is committed permanently, rather than instantaneously, and it continues while the person remains disappeared" (OEA/CP-CAJP, Report of the President of the Working Group responsible for examine the draft Inter-American Convention on Forced Disappearance of Persons, doc. OEA/Ser.G/CP/CAJP-925/93 rev.1, of January 25, 1994, p. 10).

⁹⁴ Preamble of the Inter-American Convention on Forced Disappearance of Persons, which considers "that the forced disappearance of persons violates numerous non-derogable and essential human rights enshrined in the American Convention on Human Rights, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights."

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focusing separately on the detention, or possible torture, or the risk of loss of life, but look at the complete set of facts presented in the case under consideration to the Court.⁹⁵

107. In the instant case, the Commission has demonstrated that Mr. Florencio Chitay Nech was unlawfully detained in Guatemala City by state agents as part of a persecution that had begun when he took office as First Councilman at the Municipality of San Martín de Jilotepeque, Department of Chimaltenango, and that, to date, his whereabouts are unknown. Accordingly, it is fair to say that Florencio Chitay Nech's right to personal liberty, recognized at Article 7 of the Convention, has been violated and, to this day, continues permanently to be so by virtue of his forced disappearance.⁹⁶

108. The victim's detention was made without regard to any rule set down for that purpose in Guatemalan law and did not meet the legal requirements for its propriety. Mr. Chitay was not informed of the reasons for his detention, and it is clear that its purpose was not to bring him before a competent authority to determine whether or not it was lawful. Nor did the State offer any arguments to show that Mr. Chitay had been caught *in flagrante delicto* when he was detained.

109. Furthermore, the absence of this set of minimum legal protections, a fact not contested by the State in the instant case, is consistent with a pattern of violations of this type that existed at the time that the events occurred. Indeed, as mentioned, the dimensions and characteristics of this systematic practice in Guatemala have been confirmed by the CEH,⁹⁷ by the Inter-American Commission in various cases that it has processed, and from information gathered by the Commission in the course of on-site visits and general reports prepared on the situation in that country in performance of its mandate.

110. The violence, unlawfulness, impunity, and, in general, the *modus operandi* used to carry out detentions were typically the first step in a sequence of criminal acts that culminated, with precious few exceptions, in the forced disappearance or arbitrary execution of the victims.

111. In light of the foregoing considerations, the State of Guatemala is responsible for violating Article 7 of the American Convention, in conjunction with Article 1.1 thereof, and for violating Article I of the Convention on Forced Disappearance, in conjunction with Article II thereof, with respect to Florencio Chitay Nech.

3. VIOLATION OF THE RIGHT TO HUMANE TREATMENT

112. Article 5 of the Convention, provides in its pertinent paragraphs that

1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

⁹⁵ I/A Court H.R., *Case of Heliodoro Portugal*. Judgment of August 12, 2008. Series C No. 186, para. 112.

⁹⁶ I/A Court H.R., *Case of Heliodoro Portugal*. Judgment of August 12, 2008. Series C No. 186, para. 113.

⁹⁷ For more on this point, see *Memory of Silence*, published in 1999; and Report on the Inter-Diocesan Project on the Recovery of the Historical Memory of the Human Rights Office of the Archdiocese of Guatemala: *Guatemala, Never Again*.

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113. It has been accredited that Mr. Florencio Chitay Nech's unlawful arrest and subsequent forced disappearance are imputable to the State of Guatemala.

114. In relation to the foregoing, it should be recalled that a person that has been illegally detained is in a state of greater vulnerability, and therefore exposed to the potential risk that other rights are violated as well, such as the right to humane treatment and to be treated with respect for their dignity.⁹⁸

115. As mentioned, Mr. Chitay was forced to flee to Guatemala City as a result of the acts of violence unleashed in the municipality where he performed his official functions. As will be shown in the section that examines the violation of the rights of the family, that entailed a serious attack on the mental and moral integrity of the victim and his family, who were compelled to execute a radical change of lifestyle, something that did not entail a stop to the danger and persecution, or the attendant fear and anxiety.

116. The Commission also established that Mr. Chitay was detained in a violent manner and with use of force in the presence of his five-year-old son, which circumstances constitute, *per se*, a violation of his mental and moral integrity. Indeed, in the prevailing climate of violence and persecution in Guatemala, upon finding himself accosted by armed individuals and presumably knowing the fate that he probably faced after the multiple persecutions and threats that he had suffered, it is clear that Mr. Chitay must have felt immense fear and anxiety not only about his own fate, but also that of his son who was with him.

117. As the IACHR has noted, it was common practice for those who carried out kidnappings in public to do so with as much aggression as possible, brandishing their weapons at any witnesses, bystanders, street vendors, persons with the victims, neighbors, etc., using extreme force to apprehend the victim -man or woman- and put them in the vehicle they have brought for that purpose, if necessary dragging and beating in order to do so.⁹⁹

118. Furthermore, as early as the cases of *Velásquez Rodríguez* and *Godínez Cruz*, the Court had determined the existence of torture prior to death since such cases entail prolonged detention without any means of judicial control.¹⁰⁰

119. In connection with the foregoing, the facts recorded by the IACHR in its special report on Guatemala in 1981 prove eloquent. In this regard, in describing the brutal treatment to which persons detained in the same environment as Mr. Chitay were typically subjected, the Commission noted that,

[...]The clear purpose is to create panic and intimidation among the other persons present and systematically (...). In some instances they are taken, as an exception and for very short periods, to military barracks or police stations for questioning. Later they almost always appear mutilated and with signs of having suffered brutal torture, floating in the rivers, inside plastic bags, thrown on the streets, in highway ditches or in gorges.

⁹⁸ I/A Court H.R., *Case of Baldeón-García*. Judgment of April 6, 2006. Series C No. 147, para. 119; I/A Court H.R., *Case of López-Álvarez*. Judgment of February 1, 2006. Series C No. 141, para. 104; I/A Court H.R., *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, para. 96. See also in this regard, ECHR, *Case of Ireland v. the United Kingdom*, Judgment of 18 January 1978, Series A No. 25, para. 167.

⁹⁹ IACHR, *Third Report on the Situation of Human Rights in the Republic of Guatemala*, adopted on October 3, 1985, Chapter II, para. 16.

¹⁰⁰ I/A Court H.R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C No. 4, para. 156; I/A Court H.R., *Godínez Cruz Case*. Judgment of January 20 1989. Series C No. 5, para. 164.

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As a rule, when the bodies are discovered, they appear brutally disfigured, nude and without documents or signs of identification. In many instances they have been burned, thrown into the ocean or into the mouths or craters of volcanoes. Also, as it has been possible to ascertain in a large number of cases, especially when dealing with members of Indian or rural communities, whose populations have been decimated quite frequently, their bodies have been found already decomposed and rotting, buried together in large common graves. [...] ¹⁰¹

120. The Court has concluded since its earliest case law on such matters that

[...] investigations into the practice of disappearances and the testimony of victims who have regained their liberty show that those who are disappeared are often subjected to merciless treatment, including all types of indignities, torture and other cruel, inhuman and degrading treatment, in violation of the right to physical integrity recognized in Article 5 of the Convention. ¹⁰²

121. With regard to the possible length of Mr. Chitay's unlawful detention, even though there is no evidence in the record from which to determine precisely how long he was detained before he disappeared, the Commission finds that, as the Court has held, even if the unlawful detention has only lasted a short time, it is sufficient to constitute a violation of mental and moral integrity. ¹⁰³

122. Attention should also be drawn to the evidence that, in spite of the search conducted by members of Mr. Chitay's, the complaint they filed with the National Police, and the public announcement made by the Christian Democratic movement, they never had any contact with him again or news of his whereabouts. In keeping with the systematic practice to which detainees were submitted during the above-mentioned period, one of the standard measures adopted in their respect was precisely that of keeping them utterly incommunicado, clearly with the objective of subjecting them to violent interrogations and erasing any trace of the subsequent extrajudicial execution which they usually underwent. In this regard, the Court has held, "Prolonged and coercive isolation is, by nature, cruel and inhuman treatment, harmful to the mental and moral integrity of the person and the right to dignity inherent to the human being." ¹⁰⁴ This isolation from the outside world produces moral and psychological suffering in any person, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in prison. ¹⁰⁵ Accordingly, the Court has found, "Under international human rights law it has been established that people are to be held incommunicado during detention only in exceptional situations, and that to do so may constitute an act contrary to human dignity." ¹⁰⁶

¹⁰¹ IACHR, *Report on the Situation of Human Rights in the Republic of Guatemala*, adopted on October 13, 1981, Chapter II B, para. 3.

¹⁰² I/A Court H.R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, series C, No. 4, paras. 156 and 157.

¹⁰³ I/A Court H.R., *Case of the Gómez Paquiyauri Brothers*, Judgment of July 8, 2004, Series C No. 110, para. 108; and I/A Court H.R., *Case of Juan Humberto Sánchez*, Judgment of June 7, 2003, Series C No. 99, para. 98; I/A Court H.R., *Cantoral Benavides Case*, Judgment of August 18, 2000, paras. 83, 84 and 89.

¹⁰⁴ I/A Court H.R., *Case of Fairén-Garbi and Solís-Corrales*, para. 149; I/A Court H.R., *Godínez Cruz Case*, paras. 164 and 197; and I/A Court H.R., *Velásquez Rodríguez Case*, paras. 156 and 187.

¹⁰⁵ I/A Court H.R., *Castillo Petruzzi et al. Case*, para. 195; and I/A Court H.R., *Suárez Rosero Case*, para. 90.

¹⁰⁶ I/A Court H.R., *Cantoral Benavides Case*, para. 82; and I/A Court H.R., *Suárez Rosero Case*, para. 90.

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123. Finally, the State is also responsible for failing to conduct a serious investigation of Mr. Chitay's unlawful detention and forced disappearance. In that respect, the Court has determined that the absence of effective remedies is an additional source of suffering and anguish for the alleged victims and their next of kin,¹⁰⁷ who, in the instant case, more than 28 years since the disappearance of their loved one, have not found justice, as will be examined in the section that deals with the violation of Articles 8 and 25 of the American Convention (*infra*).

124. As regards Mr. Chitay's family, and without prejudice to the deeper review of the topic that will be conducted in analyzing the violations of Articles 17 and 19 of the Convention, the Commission would like to underscore that on repeated occasions, the Inter-American Court has ruled that "the next of kin of the victims of human rights violations may, in turn, become victims" (*infra*).¹⁰⁸

125. Indeed, specifically with regard to forced disappearances, the Court has established that

[...]the violation of [the] relatives' mental and moral integrity is a direct consequence of [...]forced disappearance. The circumstances of such disappearances generate suffering and anguish, in addition to a sense of insecurity, frustration and impotence in the face of the public authorities' failure to investigate.¹⁰⁹

126. To summarize, the illegal and arbitrary arrest suffered by Mr. Chitay, with the aggravating factor that it was carried out in front of his son and was the final incident in a continuous and oppressive process of persecution, their forced relocation from their home to ensure the family's survival, his subsequent disappearance, the inherent brutality of that practice, and the failure of the justice system to act, seen against a backdrop of serious human rights violations, allow it to be claimed conclusively, in accordance with the standards of sound judgment and with a global perspective of the facts of the case, that Mr. Florencio Chitay and the members of his family have been victims of violations of Article 5 of the Convention, in conjunction with Article 1.1 thereof.

4. VIOLATION OF THE RIGHT TO LIFE

127. Article 4(1) of the Convention provides that:

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

128. As the Inter-American Court has reiterated, the right to life is a prerequisite for the enjoyment of all other human rights and if it is not respected all other rights are meaningless.¹¹⁰

[...] The right to life plays a key role in the American Convention as it is the essential corollary

¹⁰⁷ I/A Court H.R., *Case of the Ituango Massacres*, Judgment of July 1, 2006, Series C No. 148, para. 261. See also I/A Court H.R., *Case of the "Mapiripán Massacre"*, Judgment of September 15, 2005, Series C No. 134, para. 145; I/A Court H.R., *Case of the Massacre of Pueblo Bello*, Judgment of January 31, 2006, Series C No. 140, para. 145; I/A Court H.R., *Case of the Moiwana Community*, Judgment of June 15, 2005, Series C No. 124, para. 94.

¹⁰⁸ I/A Court H. R., *Castillo Páez Case*, Reparations (Art. 63.1 American Convention on Human Rights), Judgment of November 27, 1998, Series C No. 43, para. 88. See also: I/A Court H. R., *Case of the Massacre of Pueblo Bello*, Judgment of January 31, 2006, Series C No. 140, para. 154.

¹⁰⁹ I/A Court H.R., *Blake Case*, Judgment of January 24, 1998, para. 114.

¹¹⁰ I/A Court H.R., *The "Street Children" Case (Villagrán Morales et al.)*, Judgment of November 19, 1999, Series C No. 63, para. 144.

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for realization of the other rights.¹¹¹ When the right to life is not respected, all other rights lack meaning. The States have the obligation to ensure creation of the conditions required to avoid violations of this inalienable right and, specifically, the duty of avoiding violations of this right by its agents [...].¹¹²

129. Indeed, compliance with Article 4 in connection with Article 1.1 of the American Convention, not only presupposes that no one shall be arbitrarily deprived of their life (negative obligation), but also requires states to adopt all appropriate measures to protect and preserve the right to life (positive obligation), in keeping with their duty to ensure to all persons subject to their jurisdiction the free and full exercise of rights.¹¹³ In this respect, the Court has held that,

[...] This active protection of the right to life by the State not only involves its legislators, but the entire state institution and those that must protect the security, being these either police forces or armed forces. Based on the aforementioned, the States must adopt the necessary measures not only to prevent and punish the deprivation of life as a consequence of criminal acts, but also to prevent arbitrary executions by their own police force [...].¹¹⁴

130. Specifically with reference to violation of the right to life in the framework of the forced disappearance of persons, the Court has found that one of the multiple violations of the Convention that forced disappearance entails is

[...] secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life, recognized in Article 4 of the Convention [...].¹¹⁵

131. According to the facts that the Commission takes as proven, the forced disappearance of Mr. Florencio Chitay Nach was committed in a climate of violence and persecution against indigenous leaders, trade unionists, cooperative activists, political leaders, or anyone suspected of links to subversive groups or of having different ideological views,¹¹⁶ and he was executed by agents of the State.

¹¹¹ I/A Court H.R., *Case of the Miguel Castro-Castro Prison*. Judgment of November 25, 2006. Series C No. 160, para. 237; I/A Court H.R., *Case of the Massacre of Pueblo Bello*. Judgment of January 31, 2006. Series C No. 140, para. 120; I/A Court H.R., *Case of Huilca Tecse*. Judgment of March 3, 2005. Series C No. 121, para. 65.

¹¹² I/A Court H.R., *Case of Montero Aranguren et al. (Detention Center of Catia)*. Judgment of July 5, 2006. Series C No. 150, para. 64; I/A Court H.R., *Case of Ximenes Lopes*. Judgment of July 4, 2006. Series C No. 149, para. 125; I/A Court H.R., *Case of Baldeón-García*. Judgment of April 6, 2006. Series C No. 147, para. 83; See also, *Human Rights Committee*, General Comment 8/1982, para. 3 in *Compilation of General Recommendations Adopted by Human Rights Treaty Bodies*, U.N.Doc.HRI/GEN/1/Rev 1 at 6 (1994); *Human Rights Committee*, General Comment 14/1984, para. 1 in *Compilation of General Recommendations Adopted by Human Rights Treaty Bodies*, U.N.Doc.HRI/GEN/1/Rev 1 at 18 (1994).

¹¹³ I/A Court H.R., *Case of Vargas Areco*. Judgment of September 26, 2006. Series C No. 155, para. 75; I/A Court H.R., *Case of the Ituango Massacres*. Judgment of July 1, 2006. Series C No. 148, para. 130; I/A Court H.R., *Case of the Indigenous Community Sawhoyamaxa*. Judgment of March 29, 2006. Series C No. 146, para. 152.

¹¹⁴ I/A Court H.R., *Case of the Miguel Castro-Castro Prison*. Judgment of November 25, 2006. Series C No. 160, para. 237; I/A Court H.R., *Case of the "Mapiripán Massacre"*. Judgment of September 15, 2005. Series C No. 134, para. 231; I/A Court H.R., *Case of Huilca Tecse*. Judgment of March 3, 2005. Series C No. 121, para. 66.

¹¹⁵ I/A Court H.R., *Case of the Caracazo*, para. 50(a); Velásquez Rodríguez Case, Judgment of July 29, 1988, para. 157.

¹¹⁶ See section herein entitled "Established Facts".

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132. Furthermore, it is clear that the pattern of forced disappearances and extermination tolerated and promoted by the State of Guatemala during the period of the armed conflict, gave rise to an environment incompatible with effective protection of the right to life.

133. If one also considers that, as the Court has determined, when a person has disappeared in violent circumstances and remained disappeared for several years it is reasonable to presume that he has been killed,¹¹⁷ the evidence is sufficient to conclude that the State of Guatemala violated Mr. Florencio Chitay's right to life. Indeed, the evidence mentioned up to this point is sufficiently compelling reasonably to presume that Mr. Florencio Chitay is dead and to hold the State of Guatemala responsible. In this respect, it should be mentioned that in a context of systematic and widespread forced disappearances such as the one described above, and with the aim of "ensuring the permanence of these effects and impunity for the acts, the bodies of victims were dumped in rivers, lakes, or the sea, buried in hidden graves, or disfigured in order to prevent their identification by mutilating their body parts, dousing them with acid, and burning or burying the bodies or possessions."¹¹⁸

134. Furthermore, according to the Court's consistent interpretation of Article 4 in connection with the general duties set forth in Article 1.1 of the Convention, the State not only has negative obligations, but also positive ones that require is to adopt all the "necessary measures, not only at the legislative, administrative and judicial levels by the issue of penal norms and the establishment of a justice system to prevent, eliminate and punish the deprivation of life as a result of criminal acts, but also to prevent and protect individuals from the criminal acts of other individuals, and investigate such situations effectively".¹¹⁹

135. In consideration of the above, the State of Guatemala violated Article 4.1 of the Convention, in conjunction with Article 1.1 thereof, with respect to Florencio Chitay Nech, in that agents of the Guatemalan State were responsible for his forced disappearance on April 1, 1981.

5. VIOLATION OF THE RIGHT TO JURIDICAL PERSONALITY

136. Article 3 of the American Convention provides that "Every person has the right to recognition as a person before the law."

137. This provision enshrines the right of every human being, based on their condition as such, to be recognized as a person under the law. Thus, the Inter-American court has held that "every human person is endowed with juridical personality, which imposes limits to State power. The juridical capacity varies in virtue of the juridical condition of each one to undertake certain acts. Yet, although such capacity of exercise varies, all individuals are endowed with juridical personality. Human rights reinforce the universal attribute of the human person, given that to all human beings

¹¹⁷ I/A Court H.R., Case of the Caracazo, para. 50(a); I/A Court H.R., *Bámaca Velásquez Case*, Judgment of November 25, 2000. Series C No. 70, para. 173, citing I/A Court H.R., *Castillo Páez Case*, Judgment of November 3, 1997. Series C No. 34, paras. 71-72; I/A Court H.R., *Neira Alegría et al. Case*, Judgment of January 19, 1995. Series C No. 20, para. 76; I/A Court H.R., *Godínez Cruz Case*, Judgment of January 20 1989. Series C No. 5; para. 198; and I/A Court H.R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C No. 4, paras. 157 and 188.

¹¹⁸ *Memory of Silence*, Volume II, Human rights violations and acts of violence, pp. 423.

¹¹⁹ I/A Court H.R., *Case of the Massacre of Pueblo Bello*, Judgment of January 31, 2006. Series C No. 140, para. 120.

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correspond likewise the juridical personality and the protection of the Law, independently of her existential or juridical condition."¹²⁰

138. Recognition of juridical personality is an essential and necessary prerequisite in order to hold and exercise all rights, since without it, a person does not enjoy the protection and guarantees that the law offers, simply because they are invisible to it.

139. By its very nature, forced disappearance of persons seeks the juridical annulment of the individual precisely in order to remove them from the protection that the laws and justice afford them. Thus, the apparatus of repression ensures that persons may be deprived of their rights with impunity by placing them beyond the reach of any possible judicial protection. The aim of those who perpetrate forced disappearance is to operate outside the law and conceal any evidence of crime, thereby seeking to avert its investigation and punishment, and prevent the person or their next of kin from filing suit or, in the event suit is filed, from accomplishing a positive result.

140. The Commission has established in this respect that,

[D]isappearance seems to be a method used to avoid enforcing legal provisions established to defend individual freedom, physical integrity, the dignity and the very life of the person. The Commission has pointed out that this procedure in practice makes inoperative legal rules enacted in some countries to avoid unlawful detention and the use of physical and psychological coercion against detainees [...].¹²¹

141. The Commission also notes that since its earliest case law, the Court has consistently found that forced disappearance of persons comprises multiple offenses (*supra*).¹²² In that connection, it has ruled that

[...] forced disappearance comprises a violation of different rights that continues by the will of the alleged perpetrators, who perpetuate the violation by refusing to provide information on the victim's whereabouts [...]. Accordingly, analysis of a possible forced disappearance should not adopt a divided and compartmentalized approach, focusing separately on the detention, or possible torture, or the risk of loss of life, but look at the complete set of facts presented in the case [...].¹²³

142. This multiple violation of a person's human rights is possible for the very reason that the latter is held outside of the law and deprived of their juridical personality. Accordingly, and bearing in mind, moreover, the continuous nature of this crime, the Commission, although it is aware that death extinguishes the individual's juridical personality because they can no longer be persons with rights and duties, considers that in the case of forced disappearance it is not possible to establish that extinction of juridical personality and because it is impossible to determine whether or not the person is still alive. Therefore, one of the multiple rights abridged by forced disappearance is the right of victims of this practice to recognition of their juridical personality. Furthermore, the

¹²⁰ I/A Court H.R. Advisory Opinion OC- 17/ 2002. *Juridical Condition and Human Rights of the Child*. Parte IV, para. 34.

¹²¹ Inter-American Commission on Human Rights, Annual Report 1986-87 Chapter V, II.

¹²² I/A Court H.R., *Case of Heliodoro Portugal*. Judgment of August 12, 2008. Series C No. 186, para. 106; I/A Court H.R., *Case of Goiburú et al.*. Judgment of September 22, 2006. Series C No. 153, pars. 81-85; I/A Court H.R., *Case of Gómez-Palomino*. Judgment of November 22, 2005. Series C No. 136, para. 92; I/A Court H.R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C No. 4, para. 155.

¹²³ I/A Court H.R., *Case of Heliodoro Portugal*, Judgment of August 12, 2008. Series C No. 186, para. 112.

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Commission finds that the mechanism through which violation of all the other rights infringed by forced disappearance is sought and achieved is precisely deprivation of juridical personality.

143. In relation to the foregoing, the Commission is conscious that the Inter-American Court found in the *Bámaca Velásquez Case* that the Inter-American Convention on Forced Disappearance of Persons does not refer expressly to juridical personality among the elements that typify the complex crime of forced disappearance of persons and that it was not in order in such circumstances "to invoke an alleged violation of the right to juridical personality or other rights embodied in the American Convention."¹²⁴ Nonetheless, the Commission notes that subsequently, in a judgment issued in response to an act of acknowledgment of State responsibility, the Court considered that said provision had been violated in the context of a crime of forced disappearance.¹²⁵ Furthermore, in its most recent case law,¹²⁶ the Court cites Article 1.2 of the 1992 UN Declaration on the Protection of all Persons from Enforced Disappearance, which states that forced disappearance constitutes a violation of the rules of international law guaranteeing, *inter alia*, the right to recognition as a person before the law.

144. The violation of the right to legal personality that comes with forced disappearance is such that several states in the region have had to adopt specific laws to distinguish this phenomenon from extrajudicial execution. The State prevents living persons from exercising their rights and obligations because the State denies their final fate. For example, in the case of detained-disappeared persons who remain alive the State denies the right of access to a judge if they are in detention, and in the case of detained-disappeared persons who had been executed, it denies the consequential rights of the deceased persons' next of kin, such as, rights of inheritance, for instance, which are obstructed by the indeterminate legal status of the detained-disappeared person.

145. In the instant case, the objective of the disappearance of Florencio Chitay Nech was to deprive him of his juridical personality, thereby leaving him outside the legal and institutional system. Indeed, in the environment described, in which this practice was systematically used, his disappearance was the means by which his perpetrators obtained impunity for their acts, which was assured by the impossibility of the victim and his next of kin to seek judicial protection against the constant and systematic absence of any investigation in connection with his arrest, since the authorities denied any such arrest. Indeed, just one example of this state of complete defenselessness is the fact that, more than 28 years after Florencio Chitay Nech's forced disappearance, in a new attempt to request an investigation of the facts, the judicial authority failed to open a thorough investigation in that respect and rejected the *habeas corpus* application filed by his next of kin on the ground that it was out of order because it considered that there was no evidence that Mr. Chitay had been arrested. In that regard, the Commission has established that:

The objective of those who perpetrate a disappearance is to operate beyond the margins of the law, to conceal all evidence of their crimes, and to escape any sanction. When a disappearance is carried out, the fundamental protections established by law are circumvented and the victim is left defenseless. For the victim, the consequence of an enforced disappearance is to be denied every essential right deemed to inhere in the very fact of being

¹²⁴ I/A Court H.R., *Bámaca Velásquez Case*. Judgment of November 25, 2000. Series C No. 70, pars. 180 and 181.

¹²⁵ I/A Court H.R., *Trujillo Oroza Case*. Judgment of January 26, 2000. Series C No. 64; par.41.

¹²⁶ I/A Court H.R., *Case of Heliodoro Portugal*. Judgment of August 12, 2008. Series C No. 186, para. 108.

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human. In this way, the act of enforced disappearance violates the right of the individual under Article 3 of the American Convention "to recognition as a person before the law."¹²⁷

146. Based on the arguments of fact and law set out above, the State of Guatemala did violate, with respect to Florencio Chitay Nech, the right to juridical personality enshrined in Article 3 of the American Convention, in conjunction with Article 1.1 thereof.

6. VIOLATION OF THE RIGHT TO A FAIR TRIAL AND TO JUDICIAL PROTECTION

147. Article 8 of the Convention provides at its pertinent part that,

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.

148. For its part, Article 25 of the Convention states 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.

149. In turn, Articles 1.1 and 2 of the American Convention, respectively, stipulate as follows:

Article 1:

[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Article 2:

[w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

150. Article I of the Inter-American Convention on Forced Disappearance of Persons provides,

The States Parties to this Convention undertake:

¹²⁷ See: IACHR, Report No. 11/98, Case 10.606, Samuel de la Cruz Gómez, Guatemala, April 7, 1998, para. 57, available at: <http://www.cidh.oas.org/annualrep/97span/Guatemala10.606.htmNota>.

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b. To punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories; [...]

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

151. The Court has recognized on reiterated occasions the close interconnection that exists between Articles 1, 8, and 25 of the American Convention. Indeed, Article 25 of the American Convention, interpreted in the light of Article 1.1 of said instrument, obliges states to guarantee -to all persons subject to their jurisdiction- access to the administration of justice and, in particular, to simple and prompt recourse, so that, *inter alia*, those responsible for human rights violations may be prosecuted and reparations obtained for the damages suffered, which makes Article 25 one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society. That article, in turn, is closely linked to Article 8.1, which protects the right of every person to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, for the determination of his rights, whatever their nature.¹²⁸

152. By the same token, the Court has affirmed that,

under the American Convention, the States Parties are obliged to provide effective judicial remedies to the victims of human rights violations (Article 25), remedies that must be implemented according to the rules of due process of law (Article 8(1)), all within the general obligation of States to ensure to all persons subject to their jurisdiction free and full exercise of the rights established in the Convention (Article 1(1)).¹²⁹

153. Based on the foregoing, it follows that states have the duty to investigate human rights violations in a meaningful way, identify those responsible, provide reparations to the victims, and adopt every possible measure to prevent impunity, which is defined as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention."¹³⁰ In this connection, the Court has held that

[t]he American Convention guarantees everyone access to justice to enforce their rights, and the States Parties have the obligation to prevent, investigate, identify and punish the masterminds and accessories of human rights violations.¹³¹

154. Most especially in cases of forced disappearances, given the particular gravity of such offenses and the nature of the rights harmed, the prohibition of the forced disappearance of

¹²⁸ I/A Court H.R., *Loayza Tamayo Case. Reparations* (art. 63.1 American Convention on Human Rights), Judgment of November 27, 1998. Series C No. 42, para. 169.

¹²⁹ I/A Court H.R., *Case of the Ituango Massacres. Judgment of July 1, 2006*. Series C No. 148, para. 287.

¹³⁰ See, in this regard, I/A Court H.R., *Case of the Gómez Paquiyauri Brothers*. Judgment of July 8, 2004. Series C No. 110, para. 148; I/A Court H.R., *Case of 19 Tradersmen*. Judgment of July 5, 2004. Series C No. 109, para. 175; I/A Court H.R., *Bámaca Velásquez Case. Reparations*, (art. 63.1 American Convention on Human Rights), Judgment of February 22, 2002. Series C No. 91, para. 64.

¹³¹ I/A Court H.R., *Constitutional Court Case*. Judgment of September 29, 1999. Series C No. 71, para. 123. See also I/A Court H.R., *Case of Myrna Mack Chang*. Judgment of November 25, 2003. Series C No. 101, para. 275; *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, para. 186; *Blake Case, Reparations*. Judgment of January 22, 1999. Series C No. 48, para. 65.

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persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*.¹³²

155. As has been mentioned throughout this report, the facts in the instant case occurred in a context of extreme violence and persecution, in which impunity was one of the principal elements of a system under which the most unspeakable atrocities were committed. The obligation to fight impunity rests precisely on the understanding that it "fosters chronic repetition of human rights violations, and total defenselessness of victims and their relatives"¹³³.

156. The high levels of impunity that exist in Guatemala have previously been a source of concern for the Commission and this situation has been recognized as one of the most serious violations of human rights that occur in that country.¹³⁴ In this connection, the Court has found that,

[D]uring the armed conflict and even today, the courts in Guatemala have been incapable of effectively investigating, prosecuting, trying, and punishing those responsible for human rights violations.¹³⁵ The courts have often subordinated their actions to the executive branch or to military influence, "applying legal provisions or rules that are contrary to due process or not applying those they should have."¹³⁶

157. In the case at hand, as of March 2, 2009, the State had provided no information about any investigation of the matter, even though such action was required in light of the principles and assumptions set out above. In fact, it was not until March 2, 2009, that the State filed its complaint in regard to Mr. Chitay Nech's disappearance.

158. Indeed, the facts with which this report is concerned were brought to the attention of the State on repeated occasions. In this regard, as was established *ut supra*, Mr. Chitay's next of kin filed the appropriate complaint with the police on the very day the kidnapping occurred, April 1, 1981,¹³⁷ a fact that was also made publicly known to the media at the press conference given by leaders of the Guatemalan Christian Democratic Party. The disappearance of Mr. Chitay was also recorded in the CEH's Report published in 1999. In addition, on October 14, 2004, his next of kin filed a habeas corpus application on his behalf, which was eventually rejected.

¹³² I/A Court H.R., *Case of Goiburú et al.* Judgment of September 22, 2006. Series C No. 153, para. 84.

¹³³ I/A Court H.R., *Loayza Tamayo Case, Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 42, paras. 169 and 170.

¹³⁴ IACHR, Fifth Report on the Situation of Human Rights in Guatemala 2001, Chapter IV, para. 55.

¹³⁵ Cf. Expert opinion of Mónica Pinto rendered before the Court on February 19, 2003; Report of the Commission for Historical Clarification, *Memory of Silence*, Volume V, p. 45; and "Report by the Independent Expert, Mr. Christian Tomuschat, on the Situation of Human Rights in Guatemala, prepared in accordance with para. 11 of Commission Resolution 1991/51" (United Nations) of January 21, 1992 (file with annexes to the application, annex 52, pp. 1020 to 1024).

¹³⁶ I/A Court H.R., *Case of Myrna Mack Chang*. Judgment of November 25, 2003. Series C No. 101, para. 134(13).

¹³⁷ In this respect, it should be reiterated that, while in its initial comments presented to the IACHR, the State said that inasmuch as the Office of the Public Prosecutor had no case file on Mr. Florencio Chitay Nech, it was presumed that no complaint had been filed regarding the events. In later communications, however, the State acknowledged the existence of a criminal complaint for the kidnapping of the alleged victim filed with the National Police.

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159. In first place, with respect to the complaint filed by Mr. Chitay's wife, it should be mentioned that the National Police were required to inform the appropriate judicial authority of any punishable acts reported to them. Article 112.1 of the Code of Criminal Procedure in force at the time of the events provided that,

Article 112: Police chiefs and policemen legitimately authorized to operate in the country have an obligation to immediately assist in cases of punishable offenses that they witness or that are reported to them. To that end they will take the necessary steps to ascertain the facts, find and arrest the perpetrators and collect the items, instruments or evidence of a crime that could disappear, placing them at once at the disposal of the judiciary; all of this aside from their obligation, before, during or after doing the above, as the case may be, to immediately report to the proper authorities the steps taken.¹³⁸

160. Inaction or failure on the part of public officials to perform their official duties cannot be attributed to the victims of such negligence, in order, through that logic, to seek to elude the State's due responsibility.

161. In second place, it has been attested that the disappearance of Mr. Chitay was made publicly known through the press conference mentioned *ut supra*. Accordingly, since the allegations concerned publicly actionable offenses, the State should have initiated the appropriate enquiries *motu proprio*, even in the absence of a complaint by the next of kin. As the Court and Commission have consistently held, when a publicly actionable offense is committed, the State has the obligation to institute criminal proceedings and pursue them to the end and that,¹³⁹ in such cases, this is the best way to clarify the facts, judge the perpetrators, and establish the corresponding criminal punishment, in addition to providing for other forms of reparation.

162. In relation to the foregoing it should be mentioned that, under the laws in force in Guatemala at the time of the events, kidnapping was a crime subject to *ex officio* prosecution by the State; consequently, it behooved the Office of the Public Prosecutor to institute criminal proceedings. Article 68 of the Code of Criminal Procedure in force in 1981 provided as follows:

Article 68 (2): The ability to bring a criminal action belongs, essentially, to the Office of the Public Prosecutor. Injured parties and any Guatemalan may also bring it.¹⁴⁰

163. In addition, Article 77 of that Code provided that victims of crimes had to file a complaint in order to bring criminal and civil actions. However, the same article provided that if the victims did not do so or declared themselves unable to take part in the proceedings, the Office of the Public Prosecutor would bring both actions, that is to say, the criminal and the civil action.¹⁴¹

¹³⁸ Article 112, Code of Criminal Procedure in force in 1981 in Guatemala.

¹³⁹ I/A Court H.R., *Case of Baldeón-García*. Judgment of April 6, 2006. Series C No. 147; I/A Court H.R., *Case of the Massacre of Pueblo Bello*. Judgment of January 31, 2006. Series C No. 140; See also, IACHR, Annual Report 1997, Report 52/97, Case 11.218, *Arges Sequeira Mangas*.

¹⁴⁰ Article 68 (2), Code of Criminal Procedure in force in 1981 in Guatemala.

¹⁴¹ Article 77, Code of Criminal Procedure in force in 1981 in Guatemala;

Victims of a criminal offense must, within the time frame established in this Code, file charges in order to bring criminal and/or civil actions. Failure to do so will not imply that the civil action is waived.

However, if the injured parties fail to do so or declare themselves unable to take part in the proceedings, the Office of the Public Prosecutor will institute the two legal actions for them; the injured parties will retain their right to be kept informed by the Office and to cooperate with it by taking such steps as they deem necessary to the success of their claim.

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164. For their part, judges had the obligation to open, on their own initiative, an investigation if they learned by any means of the commission of a crime subject to public prosecution. Thus, Article 68.3 of the aforementioned Code of Criminal Procedure provided:

Article 68 (3): Judges and officials are legally bound to proceed on their own initiative to investigate whenever they learn by any means of the commission of a crime or misdemeanor subject to public prosecution¹⁴².

165. In third place, despite the fact that the CEH's Report –published in 1999– recorded the case of Mr. Chitay as a forced disappearance,¹⁴³ nor then did the State open an investigation on its own initiative to identify the culprits of those acts.

166. Finally, when, in 2004, the *habeas corpus* application on behalf of Mr. Chitay was presented, the State should have launched a meaningful investigation into the alleged facts, something that did not materialize on that occasion either. Indeed, as established *ut supra*, despite the fact that for years Mr. Chitay's next of kin were justifiably afraid of enquiring with the authorities about the investigation into Mr. Chitay's whereabouts and the punishment of his kidnappers, they again sought justice through the aforesaid *habeas corpus* application presented on October 12, 2004. On November 4, 2004, the Second Court of the Lower Circuit for Criminal, Drug and Environmental Offenses ruled the *habeas corpus* application inadmissible because there was no evidence that Mr. Chitay had been arrested.¹⁴⁴

167. It should be noted that, under Article 109 of Decree 1-86 on the "*Amparo*", *Habeas Corpus* and Constitutionality Law, if, as a result of steps taken in *habeas corpus* proceedings, indications surface that a person has disappeared, the court must immediately order an investigation,¹⁴⁵

168. Specifically in reference to *habeas corpus*, the Court has found that said remedy is,

[...]designed to protect personal freedom or physical integrity against arbitrary detentions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered.¹⁴⁶ In particular, the Court has stated that *habeas corpus* is the suitable remedy to exhaust in cases of forced disappearance of persons. Indeed,

¹⁴² Article 68 (3), Code of Criminal Procedure in force in 1981 in Guatemala.

¹⁴³ *Memory of Silence*, Volume VIII, Cases presented, Annex II, case 707, (1999).

¹⁴⁴ IACHR, Report N° 7/07 (Admissibility), Petition 208-05, Florencio Chitay Nech et al., Guatemala, February 27, 2007, para. 38.

¹⁴⁵ Decree 1-86 on the *Amparo*, *Habeas Corpus* and Constitutionality Law:

Article 109: Investigation in cases of missing persons. If the steps taken lead to indications that the person in whose behalf the application was filed has disappeared, the court will immediately order an investigation of the case.

Police authorities must inform the court, the Human Rights Solicitor and the interested parties about the investigation made, which must continue until there is definite information on the whereabouts of the missing person; the *Habeas Corpus* Court, in turn, will send a report on the steps taken and any subsequent news to the Supreme Court of Justice.

¹⁴⁶ I/A Court H.R., *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, pars. 33-35; I/A Court H.R., *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. 31.

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the Court has held that "habeas corpus would be the normal means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty."¹⁴⁷

169. The Court has also found that habeas corpus can be an effective remedy for discovering the whereabouts of a person, despite the fact that considerable time has passed since the disappearance and even though the person in favor of whom it is filed is no longer in the State's custody.¹⁴⁸

170. The government obligation to investigate and punish human rights violations must be seriously undertaken by states. The Inter-American Court has had this to say on this point:

In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.¹⁴⁹

171. Pursuant to Article 2 of the Convention, states have the duty to adopt measures to derogate norms and practices of any kind that entail a violation of the guarantees established in the Convention.¹⁵⁰ This general obligation by States Parties implies that domestic law measures must be effective (*effet utile* principle) and to this end the State must act in conformity with the protection provisions of the Convention.¹⁵¹

172. In connection with the foregoing, it should be mentioned, that as the Court has consistently held, every person, including the next of kin of victims of grave human rights violations, has the right to know the truth. Consequently, the next of kin of the victims and society

¹⁴⁷ I/A Court H.R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C No. 4, para. 65.

¹⁴⁸ I/A Court H.R., *Case of the Serrano Cruz Sisters*, Judgment of March 1, 2005, Series C No. 120, para. 79.

¹⁴⁹ I/A Court H.R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C No. 4, para. 177. For its part, the Constitutional Court of Colombia has held, "To ensure effective protection of human rights it has been considered insufficient under international law simply to award damages to victims and injured parties, inasmuch as truth and justice are necessary to ensure the non-repetition in a society of situations that produce gross violations of human rights and, furthermore, because recognition of the dignity and of the equal and inalienable rights inherent to all human beings requires that the judicial remedies designed by states seek comprehensive reparation for victims and injured parties, which includes both financial reparation and access to justice to know the truth about what happened, and to seek, through institutional mechanisms, a just punishment for those responsible." Judgment C-228/02 of April 3, 2002.

¹⁵⁰ *Case of Yatama*, *supra* nota 8, para. 170; *Case of Caesar*, Judgment of March 11, 2005, Series C No. 123, para. 91; and *Case of Lori Berenson Mejía*, Judgment of November 25, 2004, Series C No. 119, para. 219.

¹⁵¹ I/A Court H.R., *Case of Gómez-Palomino*, Judgment of November 22, 2005, Series C No. 136, para. 91; I/A Court H.R., *Case of Yatama*, Judgment of June 23, 2005, Series C No. 127, para. 170; I/A Court H.R., *Case of Lori Berenson Mejía*, Judgment of November 25, 2004, Series C No. 119, para. 220; and I/A Court H.R., *Case of the "Juvenile Reeducation Institute"*, Judgment of September 2, 2004, Series C No. 112., para. 205.

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as a whole must be informed of everything that happened concerning such violations.¹⁵² The right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8, 25, and 1.1 of the Convention.¹⁵³

173. By way of further illustration, it should be recalled that, as the Court has determined,

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 said Article.¹⁵⁴

174. The above-described situation also constitutes a failure to comply with the provisions contained in Article I of the Inter-American Convention on Forced Disappearance of Persons, inasmuch as the State has breached its obligation to "punish within [its] jurisdiction [...], those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories [...]."¹⁵⁵

175. As a basic premise to avoid a repeat of such violations, it is essential to get to the truth behind Mr. Florencio Chitay's disappearance and it is crucial that the judiciary play its proper role as protector and guarantor of rights and, furthermore, that all necessary measures be adopted to prevent the perpetuation of silence which ensures impunity.

176. In connection with this, during the proceedings before the Commission the State argued that an investigation of the incident had not been possible because no complaint had been lodged with the Office of the Public Prosecutor, explaining that such a step was necessary for the case to be resolved domestically. However, as has been shown, on several occasions the State was made aware of the reported incidents and, even though the State's obligation of investigating the matter began when the complaint was filed with the National Police, it began no investigation; neither at that time, or at any subsequent juncture when the state authorities were informed of the facts, or even when it was again directly informed of the case through its processing before the Commission, even though the duty of conducting an *ex officio* investigation was incumbent on the State at that time. It was only on March 2, 2009, that the Executive Director of the Presidential Coordinating Commission for Executive Human Rights Policy filed a complaint for the forced disappearance of Mr. Florencio Chitay Nech with the Office of the Public Prosecutor. The Commission applauds that development as a first step toward securing justice; however, it believes an effective investigation must be carried out to clarify the facts of this case and to identify both the physical perpetrators and

¹⁵² I/A Court H.R., *Case of Garpio Nicolle et al.*, Judgment of November 22, 2004. Series C No. 117, para. 128; I/A Court H.R., *Case of the Plan de Sánchez Massacre*, Judgment of November 19, 2004, Series C No. 116, para. 97; I/A Court H.R., *Case of Tibí*, Judgment of September 7, 2004. Series C No. 114, para. 257.

¹⁵³ I/A Court H.R., *Bémaco Velásquez Case*, Judgment of November 25, 2000. Series C No. 70, para. 201.

¹⁵⁴ I/A Court H.R., *Case of the "Five Pensioners"*, Judgment of February 28, 2003. Series C No. 98, para. 163; I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community Case*, Judgment of August 31, 2001. Series C No. 79, para. 154; I/A Court H.R., *Baena Ricardo et al. Case*, Judgment of February 2, 2001. Series C No. 72, para. 178; and I/A Court H.R., *Caballero Delgado and Santana Case*, Judgment of December 8, 1995. Series C No. 22, para. 56.

¹⁵⁵ Article 1 of the Convention on Forced Disappearance

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the masterminds behind it. Moreover, the IACHR underscores the fact that the State is still under the obligation of investigating Mr. Chitay Nech's forced disappearance, given the status of the forced disappearance of persons as a continuous or permanent crime.¹⁵⁶

177. In that regard, the Inter-American Court has ruled on the State's duty of investigating an incident while there is still uncertainty about the fate of the person who has disappeared, and on the need to provide a simple and prompt recourse in the case, with due guarantees.¹⁵⁷

178. The State has not presented reasonable arguments to justify a delay of more than 27 years in the investigation of the facts and under no circumstances can it argue that this should be blamed on the judicial activity of the next of kin,¹⁵⁸ who, nevertheless, pushed for an investigation in the instant case, but to no avail.

179. As regards the State's argument that the case of Mr. Chitay should be taken up by the National Compensation Program, the Commission noted in its Report on Admissibility and that it had received no information to suggest that the victim's next of kin had received any reparation through the said program, a situation that remains unchanged to date. Furthermore, the Commission finds that, in any case, in the light of Articles 8 and 25 of the Convention, the obligations of the State under said instrument would not be discharged by the aforementioned program because its mandate does not include the identification and punishment of those responsible for such crimes.

180. In light of all the above considerations, and since more than 28 years after Mr. Florencio Chitay Nech's disappearance neither the whereabouts of his remains nor the identity of those responsible for his forced disappearance have been determined, there has been a violation of Articles 8 and 25 of the American Convention, in conjunction with Articles 1.1 and 2 thereof, and of Article I of the Inter-American Convention on Forced Disappearance of Persons, with respect to Mr. Florencio Chitay Nech and his next-of-kin, namely his sons Encarnación, Pedro, Eliseo, and Estermerio, and his daughter María Rosaura, all surnamed Chitay Rodríguez.

7. VIOLATION OF THE RIGHTS OF THE FAMILY

181. According to Article 17 of the American Convention, "the family is the natural and fundamental group unit of society and is entitled to protection by society and the state."

182. The Commission notes that the very nature of the systematic disappearance of persons entails, among the goals sought with its practice, the predetermined infliction of severe harm on the social structures, collectives, and institutions against which it is used. Forced disappearance is normally part of a counterinsurgency policy and, as such, at the same time as it seeks to eliminate abductees with impunity, its goals can also include the destruction of the victims' family structures and of any other social unit or collective social to which they belong so that, through terror, its message of intimidation is made to reach the rest of their milieu.

183. In that regard, *Memory of Silence* states that:

The practice of forced disappearance also served to punish not only the victims, but also the political or social organizations to which they belonged, their communities, and their families

¹⁵⁶ See: Inter-American Convention on Forced Disappearance of Persons, Article III.

¹⁵⁷ I/A Court H. R., *Bámaca Velásquez Case*, Merits Judgment of November 25, 2000, para. 197.

¹⁵⁸ I/A Court H.R., *Case of Juan Humberto Sánchez*, Judgment of June 7, 2003. Series C No. 99, para. 132.

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[...] with the specific aim of punishing the collective of which the victim was a part.¹⁵⁹

184. In connection with Guatemala's internal armed conflict, the REMHI Report states:

Not only do traumatic incidents have an individual impact; they also have consequences for the families, such as worsening living conditions and profound changes in their structures and functioning. On many occasions families lost several members and suffered harassment and political repression as family groups. All this led to a brutal impact at the time of the incidents. With the passage of time, the families tried to rebuild themselves, but those efforts were made in a context of grave losses, social breakdown, and fundamental alterations in their ways of life.

185. Similarly, the Working Group on Enforced or Involuntary Disappearances has said that:

The family and friends of disappeared persons [...] aware, furthermore, that they too are threatened; that they may suffer the same fate themselves, and that to search for the truth may expose them to even greater danger.¹⁶⁰

186. The Commission believes that in the case at hand, it has been shown that Mr. Chitay Nech's forced disappearance was part of a systematic practice intended, *inter alia*, to intimidate the families of the disappeared. Thus, Mr. Chitay's disappearance – particularly given his status as an indigenous leader, cooperative activist, and political leader – had the preconceived purpose of serving as an example and fueling fear in his milieu, causing a direct impact and the intimidation, persecution, and disintegration of his family, in order to attain those goals.

187. In addition to this, and as additional context to the situation experienced by the Chitay Rodríguez family, the case file before the Commission indicates that:

(a) Prior to Mr. Chitay Nech's disappearance, his family suffered numerous threats and various attacks against him, which forced them to abandon their home and relocate to Guatemala City in order to ensure their survival, with which both Mr. Chitay and his wife were forced to change jobs.

(b) Several members of Mr. Chitay Nech's extended family allegedly suffered serious human rights violations. Thus, Florencio Chitay Nech's father, and his brother José Carlos Chitay Nech might have been both abducted in 1985. In addition, Eleodoro Onion Camay, the husband of one of Mr. Florencio Chitay's sisters, was reportedly kidnapped and murdered in 1988; Martín Chitay was allegedly kidnapped and murdered in 1990; Rosa Chitay Aguin might have been killed in a massacre in the hamlet of Semetabaj, along with her months-old son, as well as other family members.¹⁶¹

188. Furthermore, the Chitay Rodríguez family suffered constant threats and persecution before, during, and after the indigenous leader's disappearance, and this was a determining factor in the disintegration of the family. In the following paragraphs, the Commission highlights the relevant parts of the testimony given by Mr. Chitay Nech's next-of-kin in this regard:

¹⁵⁹ See: *Memory of Silence*, Vol. II, Chapter XI: Forced Disappearances, p. 428.

¹⁶⁰ UN, Human Rights, "Enforced or Involuntary Disappearances," Fact Sheet No. 6, Geneva, 1993, pp. 1 and 2.

¹⁶¹ Testimony of Pedro Chitay Rodríguez. See also: Testimony of Encarnación Chitay Rodríguez, Annex 1.

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- (a) Encarnación Chitay Rodríguez, son of the victim:

[Following my father's disappearance, as] the eldest son I stayed in the city, doing odd jobs [...] with the idea of helping my family return to San Martín Jilotepeque. I took refuge in the headquarters of Guatemalan Christian Democracy Party [...] capital city. That was after my father's abduction. In the ensuing months [...] I was targeted, even though I was only fifteen years old[. O]n one occasion I was intercepted by a group of unknown persons, who threatened me and then suggested that we take no steps regarding my father's disappearance; out of fear of that, and because of threats made against my mother, we decided to keep silent.

- (b) Pedro Chitay Rodríguez, son of the victim:

The week after my father's abduction [...] was one of the worst the family experienced, because of the conditions we endured. A few weeks after the abduction, my mother decided to return to our home town [...] staying in the house of [an] aunt [...], and then moving to the village where our grandparents' lived[. I]t should be noted that no one in the family – neither on my father's side, nor on my mother's – wanted to take care of them, because they thought it would be dangerous to take them into their homes.

[...] My elder brother [...] aged sixteen [...] stayed in the city [and] was persecuted by unknown individuals; on occasions, they came to the house in the El Guite neighborhood to ask about the older sons of don Lencho (as my father was called)[. B]ecause of that, he stopped going to work[. A]lso, the rest of the family, at home, sometimes stayed in because they were afraid something might happen to them.

[Following my father's disappearance], we were poorer but also, more importantly, we lost the possibility of growing up in a normal family, with both parents, a close family, with plenty of possibilities; we were unable to live out our childhood, our adolescence, our youth[. F]rom being children we changed into adults, because of the responsibilities we faced; a loved one was taken from us, one who wanted a more just society.

- (c) Eliseo Chitay Rodríguez, son of the victim:

We had to return to San Martín[. W]e went to live with our grandfather [in] Xejeyu and at that [time] I was nine years old[. T]o continue studying I had to return to the capital with one of my mother's aunts, who paid for my school, [who] shortly afterwards regrettably [...] died and I returned to San Martín[. T]o help my mother I had to go out selling with an [...] aunt; I also had to shine shoes.

- (e) Estermerio Chitay Rodríguez, son of the victim:

Since then, our lives have changed drastically [...]. Because of those injustices, we have suffered problems, hunger, fear, as well as other things. I was denied the happiness of a close family, of a decent childhood.¹⁰²

- (e) Amada Rodríguez Quex, sister-in-law of the victim:

[After Florencio Chitay Nech's disappearance,] my sister wasn't the same person[. S]he suffered greatly because her children were still small, the oldest was fifteen and he stayed in the city to help his mother[;] later, another of my nephews (Pedro) went to the capital, for the same reason[.] Gradually, the family disintegrated: not because they wanted to, but because of need.

¹⁰² Testimony of Estermerio Chitay Nech, Annex 1.

189. The Commission therefore believes that in the case at hand, above and beyond the violation of the right to humane treatment of the disappeared person's next-of-kin, Mr. Chitay Nech's disappearance, together with the constant threatening and persecution of his family before, during, and after his abduction, the alleged violation of the human rights of the members of his extended family, and the failure to investigate the disappearance, constitute a violation of their rights of the family, in that the family was persecuted and disintegrated.

190. The Commission notes that in the case of *Molina Theissen v. Guatemala*, which involved similar issues of family persecution and disintegration, the Court accepted the State's recognition of international responsibility in connection with Article 17 of the Convention. Moreover, the Commission notes that the Court, in dealing with this article, has found it to be triggered by other violations or has established situations in which a violation of it can be assumed.¹⁶³ In this regard, in the *Fermín Ramírez Case*, the Court ruled as follows:

This Tribunal considers that the facts argued in the present case do not fall under Article 17 of the Convention, taking into account that the infringement upon family life was not produced as the result of a specific action or omission of the State with that purpose.¹⁶⁴

191. In a *contrario sensu* analysis of that reasoning, the Commission believes that in the case at hand, it has been established that the State's impact on the Chitay Rodríguez family was caused not only by Mr. Chitay Nech's forced disappearance, but also by the constant threats and persecution of the members of his immediate family before, during, and after his abduction, by the alleged human rights violations suffered by members of his extended family, and by the failure to investigate his disappearance.

192. In consideration whereof, the Commission believes that the State is responsible for violating Article 17 of the American Convention, in conjunction with Article 1.1 thereof, with respect to Pedro Chitay Rodríguez, Eliseo Chitay Rodríguez, María Rosaura Chitay Rodríguez, Encarnación Chitay Rodríguez, and Estermerio Chitay Rodríguez.

8. VIOLATION OF THE RIGHTS OF THE CHILD

193. Article 19 of the American Convention provides that "every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the state."

194. With reference to the violation of Article 19 of the Convention, the Commission underscores the fact that Mr. Chitay Nech's violent abduction took place in full view of his son Estermerio, who at the time was five years of age. The Inter-American Court has ruled that the American Convention and the Convention on the Rights of the Child, ratified by the State of Guatemala on May 15, 1990,¹⁶⁵ are part of a comprehensive international *corpus juris* for the protection of the child that serves to "establish the content and scope of the general provision established in Article 19 of the American Convention."¹⁶⁶

¹⁶³ I/A Court H. R., *Case of Castillo Páez v. Peru*, Merits, Judgment of November 3, 1997, paragraphs 85 and 86; I/A Court H. R., *Case of Suárez Rosero v. Ecuador*, Merits, Judgment of November 12, 1997, paragraphs 100 and 102.

¹⁶⁴ I/A Court H. R., *Case of Fermín Ramírez v. Guatemala*, Merits, Reparations, and Costs, Judgment of June 20, 2005, Series C No. 126, para. 121.

¹⁶⁵ Congressional Ratification Decree No. 27-90.

¹⁶⁶ I/A Court H. R., *The Street Children Case (Villagrán Morales et al.)*, Judgment of November 19,

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195. The harm inflicted on a child of Estermerio Chitay Rodríguez's age by seeing his father abducted, beaten, and taken forever from his life is evident and has been established. In connection with this, Estermerio Chitay Rodríguez's testimony includes his recollection of the tragic episode he observed as a child when his father was abducted:

Nearby was a vehicle, which drew up next to us; several individuals got out and, after saying his name, they began struggling with him to get him into the car, which my father resisted[. During that fight, they began to pistol-whip him[. I] remember, with sadness, that he was hit on the head, causing a wound that began to bleed, but he still resisted, until they overpowered him; it was three people who overpowered him[. As for me, he begged me to leave; but one of the men held on to my arm, and then pointed a gun at my head[. I] think that when he saw that, my father stopped struggling and got into the vehicle[. Then, with my father in the vehicle, they pushed me and I fell face-down on the ground[. The] vehicle drove away, taking my father, who had an injury to his head.¹⁶⁷

196. The Court has found that "children have the same rights as all human beings – minors or adults–, and also special rights derived from their condition, and these are accompanied by specific duties of the family, society, and the State."¹⁶⁸ In this regard, the principle of the best interest of the child rules, and this is based on the dignity of the individual, on the special characteristics of children, and on the need to allow them to develop their full potential, as well as the human dignity proper to every human being.¹⁶⁹

197. In consideration whereof, the Commission believes that the State is responsible for violating Article 19 of the American Convention, in conjunction with Article 1.1 thereof, with respect to Estermerio Chitay Rodríguez.

9. VIOLATION OF THE RIGHT TO PARTICIPATE IN GOVERNMENT

198. Article 23 of the Convention stipulates,

1. Every citizen shall enjoy the following rights and opportunities:

a) to take part in the conduct of public affairs, directly or through freely chosen representatives;

b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

c) to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil

1999, Series C No. 63, para. 194.

¹⁶⁷ Testimony of Estermerio Chitay Nech, Annex 1.

¹⁶⁸ I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, par. 54.

¹⁶⁹ I/A Court H.R., *Case of the Ituango Massacres*. Judgment of July 1, 2006. Series C No. 148, para. 244. See also I/A Court H.R., *Case of the "Mapiripán Massacre"*. Judgment of September 15, 2005. Series C No. 134, para. 134; I/A Court H.R., *Case of the Girls Yean and Bosico*. Judgment of September 8, 2005. Series C No. 130, para. 134; and I/A Court H.R., *Case of the Indigenous Community Yakye Axa*. Judgment of June 17, 2005. Series C No. 125, para. 172.

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and mental capacity, or sentencing by a competent court in criminal proceedings.

199. The Court has consistently recognized the fundamental role that respect for the right to participate in government plays in strengthening democratic society and the rule of law:

Political rights are human rights of fundamental importance in the inter-American system and are intimately associated with other rights recognized in the American convention, such as freedom of expression, the right of assembly, and freedom of association, which, together, make the democratic game possible. The Court draws attention to the importance of political rights and recalls that the American Convention, at Article 27, prohibits their suspension as well as that of the judicial guarantees essential for their protection.¹⁷⁰

200. In keeping with the foregoing the Court has held,

The political rights protected in the American Convention, as well as in many international instruments, promote the strengthening of democracy and political pluralism.¹⁷¹

201. In turn, the Inter-American Democratic Charter provides that,

Essential elements of representative democracy include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of governments.¹⁷²

202. In the instant case, the Commission finds that the aim of the forced disappearance of Florencio Chitay Nech was to directly impair and, moreover, curtail altogether the victim's exercise of his political rights. Indeed, as this report has established, Mr. Chitay's position as a political leader, indigenous leader, and cooperative activist was precisely the motive for the forced disappearance that he was to suffer, a practice that was part of a repressive structure that sought the elimination of any form of political or social expression different to that of the regime.

203. Thus, the purpose of the repression unleashed against Mr. Chitay and all the other members of the Municipality of San Martín de Jilotepeque was to completely annihilate their leadership and structure, an outcome that regrettably was achieved with the resignation *en masse* of its surviving members after a large number of them and their families were disappeared or murdered.¹⁷³

204. Furthermore, in addition to resigning from his lawful held position to, the facts described in this report led Mr. Florencio Chitay Nech to completely distance himself from and sever any links with political activity in an attempt to ensure his safety and that of his family. Those

¹⁷⁰ I/A Court H.R., *Case of Castañeda Gutman*. Judgment of August 6, 2008. Series C No. 184, para. 140; I/A Court H.R., *The Word "Laws" in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 34; I/A Court H.R., *Case of Yatama*. Judgment of June 23, 2005. Series C No. 127, para. 191.

¹⁷¹ I/A Court H.R., *Case of Yatama*. Judgment of June 23, 2005. Series C No. 127, para. 192, quotation marks omitted.

¹⁷² Inter-American Democratic Charter. Adopted at the first plenary session of the OAS General Assembly, held on September 11, 2001, Article 3.

¹⁷³ See chapter related to the previous facts of the forced disappearance of Florencio Chitay Nech.

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efforts and sacrifices would prove insufficient, given his forced disappearance in Guatemala City on April 1, 1981.

205. The testimony of the then-member of the National Executive Committee of the Christian Democratic Party, Luis Alfonso Cabrera, in reference not only to Mr. Chitay Nech's disappearance but also, in general, to the violence meted out to democratic leaders at the time, states,

[...] this person was abducted and disappeared in Colonia La Florida, in zone 19 of the capital. To denounce the act, the leadership of the Christian Democratic Party called a press conference where an appeal was made for a cessation of the violence against democratic leaders in the country.¹⁷⁴

206. In turn, press reports on the declarations of the aforesaid party in connection with the kidnappings and murders of democratic leaders said, with express reference to the case of Mr. Chitay Nech, that:

[A]t a press conference yesterday, the Guatemalan Christian Democratic party said that the pressure was preventing the possibility of free elections. At the same press conference it condemned the repression suffered by its members.¹⁷⁵

207. It was also reported that,

The repressive violence against the Christian Democrats and other democratic leaders, and against the citizenry in general, eliminates the possibility of a free election in 1982 and, rather than foment an environment and conditions for a peaceful settlement of our political problems, increases fear in the population and causes abstention.¹⁷⁶

208. In addition, as mentioned in the section on violation of Articles 8 and 25, the Commission notes that the State had a number of opportunities to investigate the alleged violations, in spite of which they remain in impunity to this day. The foregoing is particularly serious in this case because it leaves society in the dark about crimes perpetrated against a democratically elected political leader. As the Court has held, "[i]t is essential that the State should generate the optimum conditions and mechanisms to ensure that these political rights can be exercised effectively,"¹⁷⁷ which can scarcely be accomplished until the demands for justice for the acts denounced are met and the truth of what happened is known, thereby helping to ensure non repetition of such violations.

209. Based on the foregoing, and having concluded that the "arbitrary executions were perpetrated against leaders of groups such as Catholic Action, development committees, cooperatives, and leaders of political parties, especially the Christian Democratic Party."¹⁷⁸

210. The Commission finds that the forced disappearance of Mr. Florencio Chitay Nech, was deliberately intended to deprive him of any form of political participation and, through fear, generate a demobilizing effect on the social and political structures to which he belonged.

¹⁷⁴ Testimony of Luis Alfonso Carrera Hidalgo, Annex 1.

¹⁷⁵ Press reports of April 25, 1981.

¹⁷⁶ *Idem*.

¹⁷⁷ I/A Court H.R., *Case of Yatama*, Judgment of June 23, 2005. Series C No. 127, para. 195.

¹⁷⁸ *Memory of Silence*, Volume II, Human rights violations and acts of violence, p. 384.

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211. Consequently, the State is responsible for violating Article 23 of the American Convention, in conjunction with Article 1.1 thereof, with respect to Florencio Chitay Nech. 000113

VIII. REPARATIONS AND COSTS

212. In light of the facts alleged in this application and of the constant jurisprudence of the Inter-American Court, which establishes that "it is a principle of International Law that any violation of an international obligation that has caused damages triggers the duty to make adequate amends,"¹⁷⁹ the IACHR submits to the Court its claims regarding the reparations and costs that the Guatemalan State must grant as a consequence of its responsibility in the human rights violations committed with respect to Florencio Chitay Nech and his next-of-kin, namely: Encarnación, Pedro, Eliseo, Estermerio, and María Rosaura Chitay Rodríguez.

213. In line with the Court's Rules of Procedure, which grant individuals autonomous representation, the Commission will at this time simply outline the general guidelines related to reparations and costs that it believes the Court should apply in the case at hand. The Commission understands that it falls to the victims and their representatives to back up their claims, in compliance with Article 63 of the American Convention and Article 24 and others of the Court's amended Rules of Procedure.

A. OBLIGATION TO MAKE REPARATIONS

214. One of the essential functions of the justice system is to remedy the harm done to the victim. This function materializes in the form of rectification or restitution, and not just through compensation, which does not necessarily restore the moral balance *ex ante* or restore what was taken.

Article 63.1 of the American Convention provides that

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

215. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power also recognizes ample guarantees for those who sustain property losses, physical or mental injury, and "substantial impairment of their fundamental rights" through acts or omissions, including abuse of power. The victims or their immediate family and dependants are entitled to seek reparation and to be informed of that right.¹⁸⁰

216. The *jurisprudence constante* of the Court is that "Article 63(1) of the American Convention embodies an accepted tenet that is a fundamental principle of the contemporary International Law on the responsibility of States. The occurrence of a wrongful act that is

¹⁷⁹ I/A Court H. R., *Case of La Cantuta*, Judgment on Merits, Reparations, and Costs, Judgment of November 29, 2006, Series C No. 162, para. 199; I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, para. 413; I/A Court H. R., *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.)*, Judgment on Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 24, 2006, Series C No. 158, para. 141.

¹⁸⁰ U.N. A/RES/40/34 of November 29, 1985, paragraphs 1, 4 and 5.

attributable to a State gives rise to the State's international liability, and its resulting duty to make reparation for and remove the consequences of the violation."¹⁸¹

217. Reparations are vital to ensuring that justice is done in an individual case and are the vehicle that carries the Court's decision beyond the realm of moral condemnation. Reparations are measures intended to cause the effect of the violations committed to disappear. Reparation of the damage caused by breaching an international obligation requires, whenever feasible, full restitution (*restitutio in integrum*), which involves reestablishment of the situation *ex ante*.

218. If full restitution is not feasible, as in the instant case, the Inter-American Court's function is to define a set of measures such that, in addition to ensuring the enjoyment of the violated rights, the consequences of those breaches may be remedied and compensation, where appropriate, provided for the damage thereby caused.¹⁸²

219. The obligation to make reparations is regulated in all respects (scope, nature, modes and determination of beneficiaries) by international law and cannot be modified by the respondent State by invoking the provisions of its own domestic laws; nor can the latter decline to discharge that obligation by invoking provisions of its own domestic laws,¹⁸³ since "[w]henver a violation goes unpunished or a wrong unredressed, the law is in crisis, not just as a means for settling a certain litigation, but as a method for settling any litigation; in other words, as a tool to ensure peace with justice."¹⁸⁴

B. MEASURES OF REPARATION

220. Some experts in international law argue that in situations such as the one being examined here, in order to remedy the situation of the victim and/or his next of kin the State must fulfill certain obligations: "the obligation to investigate and report the facts that can be reliably established (truth); the obligation to prosecute and punish those responsible (justice); the obligation to make full reparations for the moral and pecuniary damages caused (reparation) and the obligation to oust from the ranks of the security forces anyone who is known to have committed, ordered and tolerated these abuses (creation of the forces of law and order worthy of a democratic State). No one of these obligations is an alternative for the others, nor is any single one of them optional; a

¹⁸¹ I/A Court H.R., *Case of La Cantuta*. Merits, Reparations and Costs. Judgment of November 29, 2006 Series C No. 162, para. 200; I/A Court H.R., *Case of the Miguel Castro Castro Prison*. Judgment of November 25, 2006. Series C No. 160, para. 414; I/A Court H.R., *Case of Montero Aranguren et al. (Detention Center of Catia)*. Judgment of July 5, 2006. Series C No. 150, para. 116.

¹⁸² I/A Court H.R., *Case of La Cantuta*. Merits, Reparations and Costs. Judgment of November 29, 2006 Series C No. 162, para. 201; I/A Court H.R., *Case of the Miguel Castro Castro Prison*. Judgment of November 25, 2006. Series C No. 160, para. 415; I/A Court H.R., *Case of Dismissed Congressional Employees (Aguado Alfaro et al.)*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158, para. 143.

¹⁸³ I/A Court H.R., *Case of La Cantuta*. Merits, Reparations and Costs. Judgment of November 29, 2006 Series C No. 162, para. 200; I/A Court H.R., *Case of the Miguel Castro Castro Prison*. Judgment of November 25, 2006. Series C No. 160, para. 415; I/A Court H.R., *Case of Dismissed Congressional Employees (Aguado Alfaro et al.)*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158, para. 143.

¹⁸⁴ SERGIO GARCÍA RAMÍREZ, *LAS REPARACIONES EN EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS* [REPARATIONS IN THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS], paper presented at the Seminar on "The Inter-American System for the Protection of Human Rights on the Threshold of the Twenty-first Century," San José, Costa Rica, November 1999.

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responsible State must comply with each and every one to the extent that it is able and in good faith.¹⁸⁵

221. The United Nations Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms has classified the components of that right into four general categories: restitution, compensation, rehabilitation, and measures of satisfaction and of non-repetition.¹⁸⁶ In the view of the United Nations Special Rapporteur on the Question of the Impunity of Perpetrators of Violations of Human Rights, these measures include the following: cessation of continuing violations, verification of the facts, full and public disclosure of the truth, an official declaration or a judicial decision restoring the dignity, reputation and legal rights of the victim and/or of persons connected with the victim, an apology that includes a public acknowledgement of the facts and acceptance of responsibility, enforcement of judicial or administrative sanctions against persons responsible for the violations, prevention of further violations, etc.

222. The Court has held that reparations are measures intended to cause the effect of the violations committed to disappear.¹⁸⁷ Measures of reparations are the different ways in which a State can redress the international responsibility it has incurred, and under international law consist of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.¹⁸⁸

223. The United Nations Commission on Human Rights has held that

[i]n accordance with international law, States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations. Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁸⁹

¹⁸⁵ JUAN E. MÉNDEZ, *EL DERECHO A LA VERDAD FRENTE A LAS GRAVES VIOLACIONES A LOS DERECHOS HUMANOS*, Article published in *La Aplicación de los Tratados sobre Derechos Humanos por los Tribunales Locales*, CELS, 1997, p. 517.

¹⁸⁶ Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117. E/CN.4/Sub.2/1996/17.

¹⁸⁷ I/A Court H.R., *Case of La Cantuta*. Merits, Reparations and Costs. Judgment of November 29, 2006 Series C No. 162, para. 202; I/A Court H.R., *Case of the Miguel Castro Castro Prison*. Judgment of November 25, 2006. Series C No. 160, para. 416; I/A Court H.R., *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.)*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158, para. 144.

¹⁸⁸ See United Nations, *Final Report presented by Theo Van Boven, Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, E/CN.4/Sub.2/1990/10, July 26, 1990. See also: I/A Court H.R., *Blake Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of January 22, 1999. Series C No. 48, para. 31; I/A Court H.R., *Suárez Rosero Case. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of January 20, 1999, Series C No. 44, para. 41.

¹⁸⁹ United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1996/17, *The Administration of Justice and the Human Rights of Detainees, Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law*, prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117, May 24, 1996, para. 7.

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224. Based on the foregoing, the Inter-American Commission asks the Court to order measures of full reparation, which in turn, will send a message condemning the impunity that affects the vast majority of human rights violations throughout the Member States of the Organization of American States. This requires that judicial and administrative mechanisms be established and, where necessary, reinforced so as to enable victims to obtain reparation through *ex officio* proceedings that are swift, fair, inexpensive and accessible.

225. In consideration of the evidence set forth in this application and in light of the criteria established by the Court in its jurisprudence, the Inter-American Commission presents its conclusions and claims regarding the forms of redress due to Florencio Chitay Nech and his next-of-kin, namely Encarnación, Pedro, Eliseo, Estermerio, and Marfa Rosaura Chitay Rodríguez.

1. MEASURES OF CESSATION AND SATISFACTION AND GUARANTEES OF NONREPETITION

226. Satisfaction is understood as any measure that the perpetrator of a violation is required to take under the provisions of international instruments or customary law, for the purpose of acknowledging the commission of an unlawful act.¹⁹⁰ "The objects of satisfaction are three, which are often cumulative: apologies or other acknowledgment of wrongdoing [...]; the punishment of the individuals concerned; and the taking of measures to prevent a recurrence of the harm."¹⁹¹

227. On November 29, 1985, the United Nations approved, by consensus, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,¹⁹² which holds that victims "are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered," allowing "the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system."

228. In Europe, on the other hand, a European Convention on the Compensation of Victims of Violent Crimes, drafted in 1983, basically concerns the situation of victims of intentional crimes of violence who have suffered bodily injury or impairment of health and of dependants of persons who have died as a result of such crimes. Reference is also made to the obligation to protect victims and to grant them certain rights to participate in the criminal justice process.¹⁹³

¹⁹⁰ Brownlie, *State Responsibility*, Part 1. Clarendon Press, Oxford, 1983, p. 208.

¹⁹¹ *Idem*.

¹⁹² A/RES/40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *Access to Justice and Fair Treatment*. "4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. 5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms. 6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information; (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system; (c) Providing proper assistance to victims throughout the legal process; (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

¹⁹³ Convention on the Compensation of Victims of Violent Crimes of November 24, 1983. The Council

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229. The IACHR will explain its position with regard to the measures of cessation, satisfaction and guarantees of non-repetition required in the instant case, and will later elaborate upon its arguments on this issue.

230. Cessation of the wrongful conduct is essential once a State is determined to be responsible for human rights violations, as are guarantees of non-repetition.¹⁹⁴

231. The Court has held that the individualization of those responsible is a natural outcome of the conventional obligations and a requirement to eliminate impunity.¹⁹⁵ The Court has also held that impunity is a violation of the State's obligation and is harmful to the victim, his next of kin and society as a whole; impunity fosters chronic recidivism of human rights violations. In the Court's words,

[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.¹⁹⁶

232. The Commission believes that this is not just a measure of satisfaction; it is also a measure of cessation, since so long as the State is in noncompliance with its obligation to investigate, prosecute and punish the human rights violations committed in the instant case, it is in continuing violation of the right established in Article 25 of the Convention and of its obligation under Article 1 of the Convention.

233. The Court has repeatedly held that every individual and society as a whole have a right to be informed of what happened in connection with human rights violations.¹⁹⁷ Similarly, the United Nations Commission on Human Rights has recognized that for the victims of human rights violations, public knowledge of their suffering and the truth about the perpetrators, including their accomplices, of these violations are essential steps towards rehabilitation and reconciliation. It has urged States to intensify their efforts to provide victims of human rights violations with a fair and equitable process through which these violations can be investigated and made public, and to encourage victims to participate in such a process.¹⁹⁸

234. The Court has also held that

the State is required to remove all obstacles –both factual and legal– contributing to impunity

of European has also issued norms and recommendations on the rights of victims of crime.

¹⁹⁴ I/A Court H.R., *Castillo Páez Case*. Reparations (art. 63(1) American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 43, para. 52.

¹⁹⁵ The Court has defined the impunity as "the overall failure to investigate, pursue, capture, prosecute and convict those responsible for the violations of the rights protected under the American Convention." See in this sense, I/A Court H.R., *Blanco Romero et al*, Judgment of 28 November, 2005, Series C, 138, para 94. I/A Court H.R., *Gómez Palomino*, Judgment of November 22, 2005, Series C No 136, para 76.

¹⁹⁶ I/A Court H.R., *Velásquez Rodríguez Case*, Judgment on the Merits, July 29, 1988, Series C No. 4, para. 174. I/A Court H.R., *Castillo Páez Case*. Judgment of November 3, 1997. Series C No. 34, para. 90.

¹⁹⁷ I/A Court H.R., *Case of the Miguel Castro Castro Prison*. Judgment of November 25, 2006. Series C No. 160, para. 347; I/A Court H.R., *Case of Montero Aranguren et al. (Detention Center of Catia)*. Judgment of July 5, 2006. Series C No. 150, para. 139; I/A Court H.R., *Case of Ximenes Lopes*. Judgment of July 4, 2006. Series C No. 149, para. 245.

¹⁹⁸ E/CN.4/RES/2001/70.

[...]; grant sufficient guarantees of security to witnesses, judicial authorities, prosecutors, other judicial agents, and the next of kin of the victims, and use all possible measures to advance the proceeding.¹⁹⁹

235. To summarize, the essential requirements of redress in this case are the conduction of a serious, complete, and effective investigation and the identification of the persons who carried out the forced disappearance of Florencio Chitay Nech and served as accomplices therein.

236. The victim's next-of-kin must be given full access and authority to appear at all phases and stages of those investigations, in accordance with domestic law and the provisions of the American Convention. The State must also ensure effective compliance with the decisions adopted by the domestic courts under this obligation. The result of this process must be made public, to make Guatemalan society aware of the truth.²⁰⁰

237. In addition, the Commission believes it is necessary, as a measure of satisfaction, for any judgment adopted by the Court to be broadcast over the community radio stations of the department of Chimaltenango, in the Maya and Spanish languages.

2. COMPENSATION MEASURES

238. The Court has established basic criteria that should guide fair compensation intended to make adequate and effective economic amends for the harm arising from violations of human rights. The Court has also ruled that indemnization is merely compensatory, and that it is to be granted in volume and fashion sufficient to repair both the material and the nonmaterial harm inflicted.²⁰¹

C. BENEFICIARIES

239. Article 63.1 of the American Convention requires that the consequences of a violation be remedied and that 'fair compensation be paid to the injured party.' The persons entitled to such compensation are generally those directly affected by the events that the violation involved.

240. In accordance with the nature of the instant case, the beneficiaries of any reparations ordered by the Court as a consequence of the human rights violations perpetrated by the Guatemalan State are to be: Florencio Chitay Nech and his sons and daughter: Encarnación, Pedro, Eliseo, Estermerio, and María Rosaura, all surnamed Chitay Rodríguez; who had close emotional bonds with the victim and were deeply affected by the facts.

D. COSTS AND EXPENSES

¹⁹⁹ I/A Court H.R., *Case of La Cantuta*. Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162, para. 226; I/A Court H.R., *Carpio Nicolle et al. Case*. Judgment of November 22, 2004. Series C No. 117, para. 134. See, also, I/A Court H.R., *Case of Almonacid Arellano*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006 Series C No. 154, para. 156.

²⁰⁰ I/A Court H. R., *Case of Huelga Tecse*, Judgment of March 3, 2005, Series C No. 121, para. 107; I/A Court H. R., *Case of the Serrano Cruz Sisters*, Judgment of March 1, 2005, Series C No. 120, para. 175; I/A Court H. R., *Case of Carpio Nicolle et al.*, Judgment of November 22, 2004, Series C No. 117, para. 128; I/A Court H. R., *Case of the Plan de Sánchez Massacre*, Judgment of November 19, 2004, Series C No. 116, para. 98.

²⁰¹ I/A Court H. R., *Case of Hilaire, Constantine, Benjamin et al.*, Judgment of June 21, 2002, Series C No. 94, para. 204; I/A Court H. R., *Garrido and Baigorria Case*, Reparations (Art. 63.1 American Convention on Human Rights), Judgment of August 27, 1998, Series C No. 39, para. 41.

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241. In accordance with the Court's consistent jurisprudence, costs and expenses must be included in the reparations described in Article 63.1 of the American Convention. This is because the activities pursued by the injured parties, their heirs, or their representatives in securing access to international justice imply expenditures and financial commitments that must be compensated.²⁰² In addition, the Court has also ruled that the costs referred to in Article 59.1.h of its amended Rules of Procedure include the necessary and reasonable expenses incurred in securing access to the American Convention's supervisory bodies, with those expenses including the fees charged by those providing them with legal assistance.

242. In the case at hand, the Inter-American Commission asks the Court, after hearing the representatives of the injured parties, to order the reimbursement by the Guatemalan State of such costs and expenses as they duly evidence, taking into consideration the special characteristics of this case.

IX. CONCLUSION

243. The forced disappearance of Florencio Chitay Nech, the ensuing failure to conduct a diligent, timely, and complete investigation of the facts or to punish those responsible, and the denial of justice and appropriate redress suffered by the victims' family members constitute violations of the human rights of Florencio Chitay Nech and his next-of-kin.

244. Thus, the State of Guatemala did violate, with respect to Florencio Chitay Nech, the rights to personal liberty, to humane treatment, to life, to juridical personality, and political rights, enshrined in Articles 7, 5, 4, 3, and 23, respectively, of the American Convention, in conjunction with Article 1.1 thereof; it did also violate his right to a fair trial and to judicial protection, enshrined in Articles 8 and 25 of the American Convention, respectively, in conjunction with Articles 1.1 and 2 thereof, and Articles I and II of the Inter-American Convention on Forced Disappearance.

245. Similarly, the Commission concludes that the State is responsible for violating the right to humane treatment and the rights of the family, enshrined in Articles 5 and 17 of the American Convention, respectively, in conjunction with Article 1.1 thereof, with respect to the next-of-kin of Florencio Chitay Nech, namely: Encarnación, Pedro, Eliseo, Estermerio, and María Rosaura, all surnamed Chitay Rodríguez. In addition, the State did violate their right to a fair trial and to judicial protection, enshrined in Articles 8 and 25 of the American Convention, respectively, in conjunction with Articles 1.1 and 2 thereof. Finally, the Commission concludes that the State of Guatemala is responsible for violating Article 19 (rights of the child) of the American Convention, in conjunction with Article 1.1 thereof, with respect to Estermerio Chitay Rodríguez.

X. PETITION

246. Based on the considerations of fact and law set out above, the Inter-American Commission on Human Rights asks the Court to conclude and declare that:

(a) The State is responsible for violating Articles 3 (right to juridical personality), 4 (right to life), 5 (right to humane treatment), 7 (right to personal liberty), and 23 (political rights) of the American Convention, in conjunction with the general obligation of respecting and

²⁰² I/A Court H. R., *Case of La Cantuta*, Judgment on Merits, Reparations, and Costs, Judgment of November 29, 2006, Series C No. 162, para. 243; I/A Court H. R., *Case of the Miguel Castro Castro Prison*, Judgment of November 25, 2006, Series C No. 160, para. 455; I/A Court H. R., *Case of the Dismissed Congressional Employees (Aguado Alfaro et al.)*, Judgment on Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 24, 2006, Series C No. 158, para. 152.

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ensuring rights set forth in Article 1.1 thereof; and for violating Articles I and II of the Convention on Forced Disappearance, with respect to Florencio Chitay Nech;

(b) The State is responsible for violating Articles 8 (right to a fair trial) and 25 (right to judicial protection) of the American Convention, in conjunction with Articles 1.1 and 2 thereof, with respect to Florencio Chitay Nech and his sons and daughter Encarnación, Pedro, Eliseo, Estermerio, and María Rosaura, all surnamed Chitay Rodríguez.

(c) The State is responsible for violating Articles 5 (right to humane treatment) and 17 (rights of the family) of the American Convention, in conjunction with the general obligation of respecting and ensuring rights set forth in Article 1.1 thereof, with respect to Encarnación, Pedro, Eliseo, Estermerio, and María Rosaura Chitay Rodríguez.

(d) The State is responsible for violating Article 19 (rights of the child) of the American Convention, in conjunction with the general obligation of respecting and ensuring rights set forth in Article 1.1 thereof, with respect to Estermerio Chitay Rodríguez, at the time a minor-aged child.

247. Consequently, the Commission asks the Court to order the State to:

1. Carry out a complete, impartial, effective, and prompt investigation of the facts in order to identify and punish all the persons intellectually and materially responsible that participated in the acts connected with the abduction and subsequent forced disappearance of Florencio Chitay Nech and to determine the responsibility for the lack of investigation that resulted in the impunity of the forced disappearance of Florencio Chitay Nech.

2. Organize a public act of recognition of its responsibility in connection with the events in this case and of apology to Florencio Chitay Nech and his next-of-kin.

3. Take all steps necessary to ensure that such serious incidents as this do not reoccur and, for that, the State must therefore remove all the *de facto* and *de jure* obstacles hindering the due investigation of the incident.

4. Locate the remains of the victim Florencio Chitay Nech and return them to his family.

5. Provide the victim's next-of-kin with appropriate redress, including both moral and material compensation, for the violations of their human rights.

XI. EVIDENCE

A. DOCUMENTARY EVIDENCE

248. The documentary evidence available at this time is listed below:

APPENDIX 1: IACHR, Report No. 90/08 (merits), Case 12.599, Florencio Chitay Nech et al., Guatemala, October 31, 2008.

APPENDIX 2: IACHR, Report 7/07 (admissibility), Case 12.599, Florencio Chitay Nech et al., Guatemala, February 27, 2007.

APPENDIX 3: Case file of Case 12.599's processing before the IACHR.

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ANNEX 1: Witness statements.

- Estermerio Chitay Rodríguez
- Encarnación Chitay Rodríguez
- Pedro Chitay Rodríguez
- Eliseo Chitay Rodríguez
- María Rosaura Chitay Rodríguez
- Amada Rodríguez Quex
- Luis Alfonso Cabrera Hidalgo
- Marco V. Cerezo Arévalo
- Jorge Navas Martínez
- Egidio Hernández Suhuj
- Norberto Álvarez C.

ANNEX 2: Press releases.

ANNEX 3: Report of the Commission for Historical Clarification *Guatemala, Memory of Silence*, available at:
<http://shr.uaas.org/guatemala/ceh/report/spanish/toc.html>.

ANNEX 4: Report of the Interdiocese Project to Recover Historic Memory of the Office of Human Rights of the Archbishopric of Guatemala City, *Guatemala, Never Again*, available at: <http://www.odhag.org.gt/03publicns.htm>.

ANNEX 5: Residents' ID cards, belonging to Florencio Chitay Nech and Pedro Chitay Rodríguez, respectively.

ANNEX 6: Copies of documents related to the *habeas corpus*:

- Request for personal exhibition requested by Pedro Chitay Rodríguez,
- Decision of October 14, 2004, of the First Criminal Justice of the Peace in Guatemala City, regarding the receipt and admission of the personal exhibition remedy.
- Personal exhibition proceedings. Second Court of the Lower Circuit for Criminal, Drug, and Environmental Offenses, proceedings 13513-2004.
- Judicial proceedings and resolutions of October 18, 19, 22, 25, 26, and 27, 2004, and of November 4 and 8, 2004.
- Notification of November 23, 2004, of the decisions in the personal exhibition filing.
- Decree 1-86 on the *Amparo*, Habeas Corpus and Constitutionality Law, available at: <http://www.congreso.gob.gt/Pdf/Normativa/Amparo.PDF>.

ANNEX 7: Code of Criminal Procedure in force in Guatemala in 1981 (relevant articles).

ANNEX 8: Amendment of Congressional Decree No. 33-96, adopted on May 22, 1996.

ANNEX 9: Pertinent parts of IACHR reports:

- IACHR, *Report on the Situation of Human Rights in the Republic of Guatemala*, adopted on October 13, 1981.
- IACHR, *Report on the Situation of Human Rights in Guatemala*, adopted on October 3, 1983.

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- IACHR, *Third Report on the Situation of Human Rights in the Republic of Guatemala*, adopted on October 3, 1985.
- IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, adopted on April 6, 2001.
- IACHR, *Justice and Social Inclusion: The Challenges Facing Democracy in Guatemala*, adopted on December 29, 2003.

ANNEX 10: Powers of attorney.

ANNEX 11: *Curriculum vitae* of Rosalina Tuyuc, expert witness for the Commission.

ANNEX 12: *Curriculum vitae* of Mónica Pinto, expert witness for the Commission.

249. In addition, the Commission asks the Honorable Court to request that the Guatemalan State convey a certified copy of the complaint filed on March 2, 2009, by the Executive Director of the Presidential Coordinating Commission for Executive Human Rights Policy in connection with the forced disappearance of Mr. Florencio Chitay Nech; certified copies of the applicable laws and regulatory provisions; and certified copies of the case file covering the personal exhibition (habeas corpus) remedy.

B. STATEMENTS BY VICTIMS, WITNESSES, AND EXPERTS

1. VICTIMS

250. In compliance with Article 50 of the amended Rules of Procedure of the Court, the Commission asks that it hear statements from the following victims:

- Encarnación Chitay Rodríguez, who will give testimony on his father's disappearance, on the persecution he himself suffered, on the threats, persecution, and disintegration of the Chitay Rodríguez family, on the consequences of all those situations, and on other issues of relevance to the purpose and scope of this application.
- Estermerio Chitay Rodríguez, who will give testimony on his father's disappearance, on the threats, persecution, and disintegration of the Chitay Rodríguez family, on the consequences of all those situations, and on other issues of relevance to the purpose and scope of this application.
- Pedro Chitay Rodríguez, who will give testimony on his father's disappearance, on the obstacles and harassment faced by the victim's family in seeking justice in this case, on the threats, persecution, and disintegration of the Chitay Rodríguez family, on the consequences of all those situations, and on other issues of relevance to the purpose and scope of this application.

2. WITNESS

251. The Commission asks the Court to hear a statement by the following witness:

- Luis Alfonso Cabrera Hidalgo, political leader of the "Christian Democracy" movement, who will give testimony on the violence inflicted on political leaders, particularly those of Christian Democracy, during the armed conflict, and on the ties between Florencio Chitay Nech and the Christian Democracy movement and his work within it. He will also give testimony on the complaint made by Christian Democracy in the public media