

INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF GÓMEZ VIRULA *ET AL.* V. GUATEMALA
JUDGMENT OF NOVEMBER 21, 2019
(Preliminary objection, merits, reparations and costs)

In the case of *Gómez Virula et al. v. Guatemala*,

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

Eduardo Ferrer Mac-Gregor Poisot, President,
Eduardo Vio Grossi, Vice President,
Humberto Antonio Sierra Porto,
Elizabeth Odio Benito,
Eugenio Raúl Zaffaroni and
L. Patricio Pazmiño Freire,

also present,

Pablo Saavedra Alessandri, Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) and Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure” or “the Court’s Rules of Procedure”), delivers this judgment structured as follows:

* Judge Ricardo Pérez Manrique did not take part in the deliberation and signature of this judgment because he joined the Court on January 1, 2019, when this case was already at the judgment stage.

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I
INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. *The case submitted to the Court.* On November 17, 2017, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted to the jurisdiction of the Court the case of *Alexander Yovany Gómez Virula and family with regard to the Republic of Guatemala* (hereinafter also “the State”). The Commission indicated that the case related “to the disappearance and subsequent murder of Ale[xander] Yovany Gómez Virula in March 1995.” The Commission concluded that “the Guatemalan State was responsible for violating the rights to life, personal integrity and personal liberty of Mr. Gómez Virula because it failed to take any measures to search for the victim on becoming aware of his disappearance.” It also considered that the State had violated the right to freedom of association. In addition, the Commission indicated that the State had not investigated the facts with due diligence and that the time that has passed since the complaint was filed “constitutes an excessive time that the State had failed to justify.” Furthermore, it indicated that “the State had violated the right to mental and moral integrity of the family of Mr. Gómez [Virula].”¹

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

a) *Petition.* On July 17, 1995, Antonio Gómez Areano, Paula Virula Dionicio, the Guatemala Labor Education Project and the *Unión Sindical de Trabajadores de Guatemala* [the Guatemalan Workers’ Labor Union] lodged the initial petition on behalf of the alleged victims.

b) *Report on Admissibility and Merits.* On March 21, 2017, the Commission adopted Report on Admissibility and Merits No. 33/17² in which it reached a series of conclusions³ and made several recommendations to the State.

3. *Notification to the State.* The Report on Admissibility and Merits was notified to the State on May 17, 2017, granting it two months to report on compliance with the recommendations. The Guatemalan State responded advising that it had been “in communication with the petitioners” and requested a first extension, which the Commission granted. However, once this extension expired, the State failed to present information on compliance with the recommendations.

4. *Submission to the Court.* On November 17, 2017, the Commission submitted this case to the Court “owing to the need to obtain justice and reparation in this specific case.”⁴

5. *The Commission’s requests.* Based on the foregoing, the Commission asked the Court to conclude and declare the international responsibility of the State of Guatemala for the violations described in its Report on Admissibility and Merits and to order the State, as measures of reparation, to comply with the recommendations made in that report.

¹ The family members are: his father, Antonio Gómez Areano, and his mother, Paula Virula Dionicio.

² On July 31, 2003, the Commission advised the parties that, in application of Article 37(3) of its Rules of Procedure, it had decided to postpone the examination of admissibility until the discussion and decision on the merits.

³ The Commission concluded that the State was responsible for violating the rights to life, personal integrity, personal liberty, freedom of association, judicial guarantees and judicial protection established in Articles 4(1), 5(1), 7(1), 16, 8(1) and 25(1) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Ale[xander] Yovany Gómez Virula, and the rights to personal integrity, judicial guarantees and judicial protection, established in Articles 5(1), 8(1) and 25(1) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Antonio Gómez and Paula Virula.

⁴ The Commission appointed Commissioner Luis Ernesto Vargas Silva and Executive Secretary Paulo Abrão, as its delegates, and Elizabeth Abi-Mershed, Deputy Executive Secretary, together with Silvia Serrano Guzmán, Selene Soto Rodríguez and Erick Acuña Pereda, lawyers of the Commission’s Executive Secretariat, as legal advisers.

II PROCEEDINGS BEFORE THE COURT

6. *Notification to the State and to the representatives.* The submission of the case was notified to the State of Guatemala and to the representatives of the alleged victims in communications dated January 25, 2018.

7. *Brief with pleadings, motions and evidence.* On March 23, 2018, the *Centro para la Acción Legal en Derechos Humanos* (hereinafter “the representatives”) presented their brief with pleadings, motions and evidence (hereinafter “pleadings and motions brief”) pursuant to Articles 25 and 40 of the Court’s Rules of Procedure. The representatives agreed with the Commission’s allegations. In addition, they asked that the Court order the State to adopt various measures of reparation and for reimbursement of certain costs and expenses.

8. *Answering brief.* On June 27, 2018, the State forwarded to the Court its brief with a preliminary objection and its answer to the submission of the case by the Commission, as well as with its observations on the pleadings and motions brief (hereinafter “answering brief”).⁵ In this brief, the State filed a preliminary objection and contested the alleged violations and the requests for measures of reparation by the Commission and the representatives.

9. *Observations on the preliminary objection.* On July 26 and August 6, 2018, the representatives and the Commission, respectively, presented their observations on the preliminary objection.

10. *Public hearing.* On August 7, 2018, the President issued an order calling the parties and the Commission to a public hearing on the preliminary objection and eventual merits, reparations and costs, in order to receive the final oral arguments of the parties and the final oral observations of the Commission on those issues.⁶ In addition, in this order, one alleged victim proposed by the representatives was called to testify during the public hearing and one witness was required to provide his statement by affidavit. The representatives submitted the affidavit on August 16, 2018. The public hearing took place on August 27, 2018, during the fifty-ninth special session of the Court held in San Salvador, El Salvador.⁷ During this hearing, the Court’s judges asked the State and the Commission to provide specific information and explanations.

11. *Amicus curiae.* On September 11, 2018, the Court received an *amicus curiae* brief presented by Robert F. Kennedy Human Rights, the Center for Human Rights and Democracy in Africa, the Centre for Strategic Litigation, the Freedom of Expression Hub, and the Institute for Human Rights and Development in Africa.⁸

12. *Final written arguments and observations.* On September 25 and 27, 2018, the representatives and the State, respectively, presented their final written arguments together

⁵ The State appointed as its agents: Jorge Luis Borrayo Reyes, President of the Presidential Human Rights Commission (hereinafter “COPREDEH”) and Felipe Sánchez González, Executive Director of COPREDEH.

⁶ Cf. *Case of Gómez Virula et al. v. Guatemala. Call to a hearing.* Order of the President of the Inter-American Court of Human Rights of August 7, 2018. Available at: http://www.corteidh.or.cr/docs/asuntos/gomezvirula_07_08_18.pdf

⁷ At this hearing there appeared: (a) for the Inter-American Commission: Luis Ernesto Vargas Silva, Second Vice President of the Commission, and Silvia Serrano Guzmán and Christian González Chacón, legal advisers; (b) for the representatives of the alleged victims: Juan Francisco Soto Forno and Hugo René Morales Díaz, Lawyers at the *Centro para la Acción Legal en Derechos Humanos*, and (c) for the State of Guatemala: Felipe Sánchez González, Executive Director of COPREDEH; Lourdes Woolfolk Contreras, Director for Monitoring International Human Rights Cases; Eduardo Bran Paz, Legal Adviser, Directorate for Monitoring International Human Rights Cases, and Carla Gabriela Morales Ramírez, Director, Directorate of Mechanisms for Human Rights Defenders, COPREDEH.

⁸ The brief was signed by Julia York, Angelita Baeyens, Felix Nkongho, Benedict Ishabakaki, Catherine Anite and Gaye Sowe. It emphasized that trade unionists are human rights defenders and that the right to freedom of association (Article 16 of the American Convention) is an essential element of democracy.

with annexes. The Commission forwarded its final written observations on September 27, 2018.

13. *Deliberation of this case.* The Court began deliberating this judgment on November 20, 2019.

III JURISDICTION

14. The Court has jurisdiction to hear this case, pursuant to Article 62(3) of the Convention because Guatemala has been a State Party to the Convention since May 25, 1978, and accepted the contentious jurisdiction of the Court on March 9, 1987.

IV PRELIMINARY OBJECTION

A. Arguments of the parties and of the Commission

15. The **State** indicated that the domestic remedies had not been exhausted because “apart from the complaint filed one day after the disappearance of Alexander Yovany Gómez Virula, and subsequent testimonial statements, [no further] reliable information had been provided that would allow the perpetrators of the disappearance and subsequent death of Mr. Gómez Virula to be identified; thus causing the Public Prosecution Service to archive the case file.” It also indicated that none of the exceptions to the rule of exhaustion of domestic remedies were applicable. The **Commission** indicated that the preliminary objection was inadmissible because it was time-barred since it had not been filed during the admissibility stage. It indicated that, “to the contrary, [during that stage], the State advised that the case had been archived; [therefore,] the Commission considers that the preliminary objection filed before the Court by the State of Guatemala is inadmissible because it is time-barred.” The **representatives** agreed with the Commission.

B. Considerations of the Court

16. The Court recalls that, in the case of a preliminary objection of this nature, the first aspect that must be determined is whether the objection was filed at the proper procedural moment.⁹ In the instant case, the Commission dealt with the admissibility and the merits of the case together, so that the relevant point is whether the State argued the failure to exhaust domestic remedies before the Commission before the latter ruled on the admissibility of the petition.¹⁰ The Court notes that, in a brief of June 16, 1997, which the State presented during the procedure before the Commission, it mentioned “that the investigation into the death of Alexander Yovany Gómez Virula continues and it is hoped that new evidence will be provided that leads to the identification and punishment of those responsible.”¹¹ On November 30, 1999, the State indicated that “having consulted the prosecutor, it was determined that [during the investigation] it had not been possible to glean any information that could identify those responsible for the death of Mr. Gómez Virula, and the Public Prosecution Service has

⁹ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, para. 88, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 26.

¹⁰ See, for example, *Case of Garibaldi v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of September 23, 2009. Series C No. 203, para. 48.

¹¹ Communication of the State dated June 13, 1997, signed by the Director of COPREDEH (evidence file, folio 67).

filed the case.”¹² Subsequently, on December 4, 2006, the State indicated “that, at no time [...] had the victim’s family attributed the events to agents of the State, which proved the inexistence of a formal complaint in this regard; therefore, the petition has become inadmissible [as regards the alleged violations] because it does not refer to a violation committed by officials or agents of a State Party pursuant to Articles 44 and 46 of the Convention.”¹³

17. The Court notes that, by arguing the failure to exhaust domestic remedies, it was incumbent on the State to specify the remedies that remained to be exhausted and to prove that these were available and also adequate, suitable and effective.¹⁴ In this regard, the Court reiterates that it is not the task of either the Court or the Commission to identify, *ex officio*, the domestic remedies that remain to be exhausted; thus, it is not for the international organs to rectify the lack of precision of the State’s arguments.¹⁵ From the foregoing it can be inferred that, when a State invokes the existence of a remedy that has not been exhausted, this must not only be opportune, but also clear, identifying the remedy in question and also how that remedy, in the specific case, would be adequate and effective to protect the persons in the situation reported.¹⁶ In the instant case, the State merely indicated before the Commission that the alleged victims should have reported the facts. In this regard, the Court notes that the representatives did report the facts on March 14, 1995. Contrary to the State’s argument, for the Court to hear the case it is not necessary that the alleged victims attribute direct responsibility to agents of the State in their complaint. Therefore, the arguments that the State presented to the Commission were unclear as to the remedy that had to be exhausted. Consequently, the preliminary objection filed by the State is rejected.

V EVIDENCE

A. *Admissibility of the documentary evidence*

18. The Court received diverse documents presented as evidence by the Commission, the representatives and the State, as well as those requested by the Court or its President as helpful evidence and, as in other cases, it admits these in the understanding that they were presented at the appropriate procedural moment (Article 57 of the Rules of Procedure)¹⁷ and that their admissibility was not contested or challenged.

¹² Brief of the Permanent Mission of Guatemala to the OAS of November 30, 1999 (evidence file, folio 295).

¹³ Report of the State of Guatemala of December 4, 2006 (evidence file, folio 56).

¹⁴ *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, paras. 88 and 91, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 26.

¹⁵ *Cf. Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2009. Series C No. 197, para. 23, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 26.

¹⁶ *Cf. Case of Expelled Dominicans and Haitians v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2014. Series C No. 282, para. 30, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 26.

¹⁷ The documentary evidence may be presented in general and in keeping with Article 57(2) of the Rules of Procedure, together with the briefs submitting the case or with pleadings and motions, or with the answering brief, as applicable, and evidence forwarded outside these procedural occasions is not admissible, subject to the exceptions established in the said Article 57(2) of the Rules of Procedure (namely, *force majeure*, grave impediment) or in the case of a supervening fact – that is, one that occurred after the said procedural moments. *Cf. Case of the Barrios Family v. Venezuela. Merits, reparations and costs.* Judgment of November 24, 2011. Series C No. 237, paras. 17 and 18, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of March 6, 2019. Series C No. 375, para. 38.

19. The **Commission** contested the admissibility of the documentary evidence provided by the State with its answering brief, asking the Court to apply the principle of estoppel.¹⁸ It justified its request by arguing that the State had provided information on the measures taken between March 14 and 19, 1994, for the first time after the case had been submitted to the Court. Hence, it argued that the factual framework determined in its Report on Admissibility and Merits had been established “based on the information provided by the parties and that, owing to its nature, this new information constitutes a substantial change in the State’s position.”¹⁹ The **representatives** indicated that, during the processing of the case before the Commission, “Guatemala never indicated or advised whether it had undertaken actions to try and find Mr. Gómez Virula alive and it was not until its brief answering the submission of the case [that it did this].” The **State** indicated that, “as a result of recent investigations conducted by the Presidential Human Rights Commission (COPREDEH), it had been possible to access better and more extensive information about what occurred to the detriment of the life of Alexander Yovany Gómez Virula, and it trusted that this evidence would help clarify the case.”

20. The Court notes that the contested documents were presented by the State at the proper procedural moment during the proceedings before it. Therefore, it admits the said documents.

21. Regarding the evidence presented by the State together with its final written arguments (*supra* para. 12),²⁰ the Court considers that Annexes 2 and 3 relate to the questions posed by the judges during the public hearing, and therefore finds it pertinent to incorporate them into the body of evidence in this case. Regarding Annex 1, the Court notes that this already formed part of the evidence file in the case and therefore does not find it necessary to make a separate ruling on its admissibility.

B. Admissibility of the testimonial and expert evidence

22. The Court finds it pertinent to admit the statements made by affidavit²¹ and during the public hearing²² insofar as they are in keeping with the purpose defined by the President in the order requiring them and the purpose of this case.

VI FACTS

23. The instant case refers to the actions of the State with regard to the disappearance and death of Alexander Gómez Virula, a trade union leader in a manufacturing company in Guatemala City. In its Report on Admissibility and Merits, the Commission included a section entitled “[p]ronouncements on violations of the human rights of trade unionists in Guatemala in the 1990s.” The representatives and the State did not refer to this point.

¹⁸ The Commission objected to the documentary evidence with information on specific measures taken to search for the alleged victim, or that Guatemala had assigned state agents to undertake such measures as soon as it became aware of the disappearance and before the corpse was found. The Commission indicated that this evidence consisted of a single document recounting supposed search procedures conducted on March 16, 1995. Although the Commission did not indicate this explicitly, the Court understands that it objects to the report of the Section for Investigations into Missing Persons of the National Police dated March 19, 1995 (evidence file, folio 455).

¹⁹ In the Report on Admissibility and Merits, the Commission established that “the State did not report any search efforts prior to the discovery of the body; nor do any indications of a search emerge from the available information.”

²⁰ The State attached three annexes to its final written arguments. Annex 1 consists of a “Copy of Governmental Decision No. 266 of September 22, 2016, of the Ministry of Foreign Affairs of the Republic of Guatemala.” Annex 2 contains “16 copies initialed by and bearing the seal of the COPREDEH Directorate for Monitoring International Human Rights Cases with information on the case.” Lastly, the State provided as Annex 3, “Five copies with slides that support the hypothesis of what really could have happened to Alexander Yovany Gómez Virula.”

²¹ Cf. Affidavit prepared by Julio Francisco Coj Vázquez on August 16, 2018 (merits file, folio 271).

²² Cf. Statement made by Antonio Gómez Areano during the public hearing in this case.

24. The Court notes that, in the instant case, a copy of the file with all the measures taken during the investigation has not been provided. During the public hearing, the Court asked the State to forward a complete copy of the case file. The State forwarded a copy of the file of the Public Prosecution Service. However, this documentation does not include items such as copies of all the statements received or a record of the archive of the case file. The Court will establish the facts based on the evidence provided by the parties. However, it finds it necessary to note that it is uncertain whether this specifies all the measures taken during the domestic investigation.

25. Based on the arguments presented by the parties and the Commission, the main facts of the case will be described as follows: (A) the disappearance of Mr. Gómez Virula; (B) the report of the disappearance and initial measures, and (C) the discovery of Mr. Gómez Virula's body and subsequent investigations.

A. Disappearance of Mr. Gómez Virula

26. Alexander Yovany Gómez Virula was 22 years of age at the time of his disappearance on March 13, 1995.²³ He worked for RCA, a maquila manufacturing company.²⁴ He had also been a member of the advisory board of the company's labor union since October 3, 1994.²⁵ The labor union was affiliated to the *Unión Sindical de Trabajadores de Guatemala* (hereinafter "UNSI TRAGUA").²⁶

27. In August 1994, RCA closed down and dismissed its workers without giving them their employment entitlements.²⁷ UNSI TRAGUA indicated that, as a result of this closure, the workers went on strike inside the factory and this ended with their eviction "after they had received forceful threats by those who carried out the violent eviction."²⁸ In this situation, the labor union to which Mr. Gómez Virula belonged organized a series of activities with the aim of ensuring "compliance with the labor rights invoked by the former workers of the RCA maquila company, supported by the UNSI TRAGUA labor union federation."²⁹ According to UNSI TRAGUA, in March 1995, almost 70 workers continued "resisting and fighting legally for their right to work and to join a labor union."³⁰

28. According to existing information, on March 13, 1995, Mr. Gómez Virula went to the UNSI TRAGUA headquarters together with other members of the RCA labor union "to receive the bi-monthly financial support of 100.00 quetzals provided by UNSI TRAGUA."³¹ During this

²³ Cf. Identity card of Alexander Yovany Gómez Virula (evidence file, folio 658).

²⁴ Cf. Witness statement made by ECG on August 25, 1995, before the Sixth Trial Judge for crimes relating to drug-trafficking and the environment (evidence file, folio 762), and Report of the Public Prosecution Service of March 20, 1995 (evidence file, folio 698).

²⁵ Cf. Report of the Guatemalan Labor Registry Department of August 21, 2018 (evidence file, folio 516), and Communication of October 3, 1994, signed by the Labor Director General (evidence file, folio 675).

²⁶ Cf. Decision of the Ombudsman of November 6, 1995 (evidence file, folio 419).

²⁷ Cf. Report of the Public Prosecution Service of July 31, 1996 (evidence file, folio 434); UNSI TRAGUA communiqué of March 17, 1995 (evidence file, folio 414), and UNSI TRAGUA report "Urgent Action" on March 15, 1995 (evidence file, folio 416).

²⁸ Cf. Complaint filed by UNSI TRAGUA before the national and international community on March 17, 1995 (evidence file, folio 414).

²⁹ Cf. Report of the Guatemalan Public Prosecution Service in response to a request by COPREDEH dated July 31, 1996 (evidence file, folio 434), and witness statement made by ECG on August 25, 1995, before the Sixth Trial Judge for crimes relating to drug-trafficking and the environment (evidence file, folio 763).

³⁰ Cf. Complaint filed by UNSI TRAGUA before the national and international community on March 17, 1995 (evidence file, folio 414).

³¹ Cf. Report of the Public Prosecution Service of July 31, 1996 (evidence file, folio 434); report filed before the Ombudsman on March 14, 1995 (evidence file, folio 412), and UNSI TRAGUA communiqué of March 15, 1995 (evidence file, folio 414).

meeting, "a list [was drawn up] of those who had received the money and [Mr.] Gómez Virula was put in charge of delivering this list to the Secretary General of the labor union."³² Subsequently, he, together with his fellow labor union member ECG, went to the home of the Secretary General of the labor union, but she was not in so they went and had lunch and then to Mr. Gómez Virula's home.³³ After lunch they went out again and on their way they met and conversed with Mr. Gómez Virula's uncle before separating at the bus stop in front of the Incasa coffee factory.³⁴ That was the last time Mr. Gómez Virula was seen alive.

29. In a later statement, on August 25, 1995, ECG added that, when they failed to find the Secretary General at home, they went:

by the factory where they formerly worked and [looked] to see if anyone [...] was working inside. Nearby, there was a type of guard house in the shade and in front, parked, was a blue Hyundai vehicle with tinted windows; [he] did not see the license plate. While [they] were there, Yovany leaned against the front fender [on the] right side of this vehicle. Someone came out of a factory near where [they] worked and asked Yovany why he was leaning on the fender of his car, grabbed his shirt with both hands and pushed him down against the engine hood and again asked why he was leaning on his car and slapped his face. [He decided to intervene and asked for an] explanation, but [the man] did not listen to him and so [...] he] decided to hit his back with a beer can he was carrying. Owing to this, [the man] let go of Yovany and [ECG] told him to run away and the man [ran after him] down the street northwards, towards the Atlantic Highway. [He] then hid at a bus stop full of people and the man [saw him] and said, "you better watch it, you son of a b..." and then returned from where he had come. After about ten minutes [he] returned to see if his co-worker was around, but he was not and [he] thought that he had gone home; so, [he] also decided to go home; the blue car was still in the same place. About three days later ... he] found out through UNITRAGUA that [his] co-worker was missing.³⁵

30. Mr. Gómez Virula's parents testified before the Public Prosecution Service that "according to the versions of people living close by," two individuals had exited a white car and followed Mr. Gómez Virula and ECG, and had grabbed Mr. Gómez Virula.³⁶

B. Report of the disappearance and initial measures

31. On March 13 and 14, 1995, Mr. Gómez Virula's parents, Antonio Gómez Areano and Paula Virula Dionicio, searched for their son on the premises of the National Police, and in detention centers, hospitals and the morgue.³⁷ On the evening of March 14, Mr. Gómez Areano reported his son's disappearance to the Ombudsman.³⁸ In his report, he indicated that he was

³² Cf. Report of the Public Prosecution Service of July 31, 1996 (evidence file, folio 434); statement made by ECG before the Public Prosecution Service on March 24, 1995 (evidence file, folio 691), and witness statement made by ECG on August 25, 1995, before the Sixth Trial Judge for crimes relating to drug-trafficking and the environment (evidence file, folios 763 and 764).

³³ Cf. Report of the Public Prosecution Service of July 31, 1996 (evidence file, folio 434); statement made by ECG before the Public Prosecution Service on March 24, 1995 (evidence file, folio 691), and witness statement made by ECG on August 25, 1995, before the Sixth Trial Judge for crimes relating to drug-trafficking and the environment (evidence file, folio 764).

³⁴ Cf. Report of the Public Prosecution Service of July 31, 1996 (evidence file, folio 434); transcript of the statement made by Mr. Gómez's uncle in the report of the Public Prosecution Service of March 20, 1995 (evidence file, folio 699), and Report of the Homicides Section of the Criminal Investigations Department of the National Police of March 19, 1995 (evidence file, folio 458).

³⁵ Cf. Witness statement made by ECG on August 25, 1995, before the Sixth Trial Judge for crimes relating to drug-trafficking and the environment (evidence file, folio 764).

³⁶ Cf. Statement by Antonio Gómez Areano and Paula Virula Dionicio before the Public Prosecution Service of April 18, 1995 (evidence file, folio 696).

³⁷ Cf. Report filed before the Ombudsman on March 14, 1995 (evidence file, folio 412).

³⁸ Cf. Report filed before the Ombudsman on March 14, 1995 (evidence file, folio 412).

afraid that it was “an act of repression against the labor union bodies by government authorities.”³⁹ The Ombudsman asked the Director General of the National Police “to issue the necessary orders to ensure the investigation of this incident.”⁴⁰ That same night, Mr. Gómez Areano reported the disappearance of his son to the Deputy Head of the Guatemalan Criminal Investigations Department.⁴¹

32. On March 15, 1995, UNSITRAGUA published a communiqué entitled “Urgent Action: Labor Unionist Missing,” reporting the disappearance of Mr. Gómez Virula and indicating that this had occurred in the context of the RCA labor conflict. In the communiqué, it demanded that the “President of the Republic, the Minister of the Interior, and other authorities, pay due attention to this case in order to discover the whereabouts of Gómez Virula and prevent him from becoming – in the worst case scenario – one more victim of the increasing wave of violence in Guatemala.”⁴²

33. On March 16, 1995, UNSITRAGUA sent an urgent telegram to the Ministry of the Interior requesting an “urgent audience to address [the] disappearance [of the] labor unionist, Alexander Yovany Gómez Virula.”⁴³ On March 17, 1995, UNSITRAGUA sent another communication to the Ministry of the Interior repeating the request made on March 16 by telegram and indicating that “Gómez Virula’s family, UNSITRAGUA and the Labor Union Movement are concerned by this violent act, but above all by the need to find [Alexander] Yovany alive.”⁴⁴

34. On March 16, 1995, the investigators went to RCA to establish whether the missing person worked there, but were unable to obtain this information because the factory had closed down.⁴⁵ The same day, they went to the home of the person who had filed the report, where they were received by his daughter-in-law who was unable to provide them with any additional information to discover the whereabouts of Mr. Gómez Virula. They also went to the men’s prisons in Zone 18 and to the judicial morgue.⁴⁶

35. The investigators indicated that, according to confidential information obtained, the missing person was in a romantic relationship with someone called SRM, who supposedly was the wife of an individual known as “*El Pirata*.”⁴⁷ On March 17, 1995, the investigators went to look for SRM at her home, without finding her, so they went to her place of work, where they were told that SRM had not come to work and that they “were unaware of the reason.”⁴⁸

C. Discovery of Mr. Gómez Virula’s body and subsequent investigations

³⁹ Cf. Report filed before the Ombudsman on March 14, 1995 (evidence file, folio 412).

⁴⁰ Cf. Communication of the Deputy Head, Individual Rights Area, Ombudsman’s Office, of March 17, 1995 (evidence file, folio 413).

⁴¹ Cf. Communication of March 14, 1995, signed by the Deputy Head of the Guatemalan Criminal Investigations Department addressed to the prosecutor of the Public Prosecution Service (evidence file, folio 464).

⁴² Cf. UNSITRAGUA communication of March 15, 1995 (evidence file, folio 416).

⁴³ Cf. UNSITRAGUA telegram addressed to the Ministry of the Interior of March 16, 1995 (evidence file, folio 27).

⁴⁴ Cf. UNSITRAGUA communication addressed to the Ministry of the Interior of March 17, 1995 (evidence file, folios 28 and 48).

⁴⁵ Cf. Report of the Missing Persons Investigation Section of the National Police of March 19, 1995 (evidence file, folio 455).

⁴⁶ Cf. Report of the Missing Persons Investigation Section of the National Police of March 19, 1995 (evidence file, folio 455).

⁴⁷ Cf. Report of the Missing Persons Investigation Section of the National Police of March 19, 1995 (evidence file folio 455).

⁴⁸ Cf. Report of the Missing Persons Investigation Section of the National Police of March 19, 1995 (evidence file, folio 455).

36. On March 19, 1995, Mr. Gómez Virula's body was found in a ravine in Colonia El Limón, in Zone 18 of Guatemala City.⁴⁹ It was found because a someone who lived near the ravine advised the police.⁵⁰ A calculator and his identity card were found next to Mr. Gómez Virula's body.⁵¹ That same day, the man who found the body and the alleged victim's sister⁵² were interviewed and state agents went to the home of the alleged victim's father to take his statement.⁵³ In addition, an autopsy was performed which concluded that the cause of death had been "fourth degree traumatic brain and chest injury."⁵⁴

37. Following the discovery of the body, the Missing Persons Section of the Criminal Investigations Department of the National Police considered that the case entrusted to it had concluded and turned it over to the Homicides Section of the Criminal Investigations Department of the National Police,⁵⁵ which opened an investigation to find those responsible for what had occurred.⁵⁶

38. On March 20, 1995, state agents went to the house where the alleged victim had lived. There, they again took a statement from his father, Antonio Gómez Areano, who indicated the name of the last person who had seen his son;⁵⁷ the agents also interviewed Mr. Gómez Virula's uncle,⁵⁸ and three of his former co-workers.⁵⁹ One of the former co-workers indicated that "[ML and MK] had frequently insulted the employees and even tried to attack them, but the latter banded together and defended themselves"; another former co-worker indicated that, on March 13, she "met [ML] in a grey car, and he tried to make [her] get into the car and asked if [she] was a member of the labor union."⁶⁰

39. On March 21, 1995, the investigation agents went to the home of ECG, where they were received by his mother.⁶¹ They also obtained the statement of another person who had worked with Mr. Gómez Virula.⁶² The same day, they interviewed the owners of the building where

⁴⁹ Cf. Communication of the forensic physician of March 28, 1995 (evidence file, folio 484), and Report of the Missing Persons Investigation Section of the National Police of March 19, 1995 (evidence file folio 456).

⁵⁰ Cf. Report of the Homicides Section of the Criminal Investigations Department of the National Police of March 19, 1995 (evidence file folio 457).

⁵¹ Cf. Communication of March 20, 1995, signed by the assistant prosecutor of the Public Prosecution Service addressed to the metropolitan district prosecutor (evidence file, folio 688), and acknowledgement issued by the Public Prosecution Service on April 5, 1995 (evidence file, folio 503).

⁵² Cf. Statement of March 19, 1995 (evidence file, folio 684), and Statement by Mr. Gómez Virula's sister of March 19, 1995 (evidence file, folio 685).

⁵³ Cf. Report of the Homicides Section of the Criminal Investigations Department of the National Police of March 19, 1995 (evidence file, folio 458).

⁵⁴ Cf. Autopsy report dated March 28, 1995 (evidence file, folio 484).

⁵⁵ Cf. Report of the Missing Persons Investigation Section of the National Police of March 19, 1995 (evidence file folio, 456), and Communication of March 19, 1995, signed by the Second Police Officer of the Missing Persons Section of the Criminal Investigations Department (evidence file, folio 463).

⁵⁶ Cf. Report of the Missing Persons Investigation Section of the National Police of March 19, 1995 (evidence file folio, 456), and Report of the Homicides Section of the Criminal Investigations Department of the National Police of March 19, 1995 (evidence file, folio 457).

⁵⁷ Cf. Transcript of the statement by Antonio Gómez Areano in the Report of the Public Prosecution Service of March 20, 1995 (evidence file, folio 698).

⁵⁸ Cf. Transcript of the statement by Mr. Gómez Virula's uncle in the Report of the Public Prosecution Service of March 20, 1995 (evidence file, folio 699).

⁵⁹ Cf. Transcript of the statements in the Report of the Public Prosecution Service of March 20, 1995 (evidence file, folio 699).

⁶⁰ Cf. Transcript of the statements in the Report of the Public Prosecution Service of March 20, 1995 (evidence file, folio 699).

⁶¹ Cf. Transcript of the statement in the Report of the Public Prosecution Service of March 21, 1995 (evidence file, folios 700 and 701).

⁶² Cf. Transcript of the statement in the Report of the Public Prosecution Service of March 21, 1995 (evidence file, folios 700 and 701).

RCA had its factory, who gave them the names of the owners of that company.⁶³ Furthermore, they took a statement from a neighbor of the area where Mr. Gómez Virula's body was found,⁶⁴ and from someone that Antonio Gómez Areano had indicated as having threatened his son.⁶⁵

40. On March 24, 1995, the Public Prosecution Service went to the UNSITRAGUA offices⁶⁶ and obtained the statement of ECG.⁶⁷ On April 5, 1995, another statement was obtained from the alleged victim's sister.⁶⁸ The same day, an acquaintance of Mr. Gómez Virula was interviewed who stated that he had seen the latter, "standing with three unknown individuals" on March 16, 1995.⁶⁹

41. On April 12, 1995, the investigating agents went to the home of Antonio Gómez Areano to obtain his statement. The same day, the agents went "to several addresses in order to interview several persons related to the case, but [this] was not possible because they were not at home."⁷⁰ The case file contains no further information in this regard. On April 18, 1995, Antonio Gómez Areano appeared before the assistant prosecutor of the Public Prosecution Service to give his statement.⁷¹

42. On April 24, 1995, the Prosecutor General forwarded the case file that the Sixth Unit of the National Police had drawn up against two owners of RCA to the Supreme Court of Justice so that it could appoint a trial court for crimes relating to drug-trafficking and the environment.⁷² On April 26, 1995, the Prosecutor General forwarded the investigation file to the Sixth Trial Judge for crimes relating to drug-trafficking and the environment who, by a decision of the Secretariat of the Supreme Court of Justice, was entrusted with the responsibility of overseeing and monitoring the investigation into the murder of Mr. Gómez Virula.⁷³

43. On May 30, 1995, the Public Prosecution Service requested the appearance of the owners of RCA as witnesses in the proceedings conducted by that court;⁷⁴ however, they did not come forward.⁷⁵

⁶³ Cf. Transcript of the statements in the Report of the Public Prosecution Service of March 21, 1995 (evidence file, folios 700 and 701).

⁶⁴ Cf. Transcript of the statement in the Report of the Public Prosecution Service of March 21, 1995 (evidence file, folios 700 and 701).

⁶⁵ Cf. Transcript of the statement in the Report of the Public Prosecution Service of March 21, 1995 (evidence file, folio 701).

⁶⁶ Cf. Report of the Public Prosecution Service of March 24, 1995 (evidence file, folios 703 to 705).

⁶⁷ Cf. Transcript of the statement made by ECG in the Report of the Public Prosecution Service on March 24, 1995 (evidence file, folios 703 and 704), and Witness statement made by ECG on March 24, 1995 (evidence file, folios 690 to 692).

⁶⁸ Cf. Transcript of the statement by Mr. Gómez Virula's sister in the Report of the Homicides Section of the Criminal Investigations Department of the National Police of April 5, 1995 (evidence file, folio 467).

⁶⁹ Cf. Transcript of the statement in the Report of the Homicides Section of the Criminal Investigations Department of the National Police of April 5, 1995 (evidence file, folio 467).

⁷⁰ Cf. Report of the Homicides Section of the Criminal Investigations Department of the National Police of April 12, 1995 (evidence file, folio 472).

⁷¹ Cf. Witness statement of Antonio Gómez Areano before the assistant prosecutor of the Public Prosecution Service of April 18, 1995 (evidence file, folio 696).

⁷² Cf. Communication of April 24, 1995, signed by the signed by the assistant prosecutor of the Public Prosecution Service (evidence file, folio 708).

⁷³ Cf. Communication of April 26, 1995, signed by the assistant prosecutor of the Public Prosecution Service (evidence file, folios 709 and 710).

⁷⁴ Cf. Official telegram of the Public Prosecution Service dated May 30, 1995 (evidence file, folio 720).

⁷⁵ Cf. Communication of February 23, 2004, signed by the prosecutor of the Public Prosecution Service (evidence file, folio 448).

44. On June 19, 1995, the statement of the Secretary General of the RCA labor union was received.⁷⁶ On June 20, 1995, agents went to the home of ECG and interviewed his mother because ECG was absent.⁷⁷ Subsequently, they went to the area where ECG had seen Mr. Gómez Virula for the last time, specifically the "Suzuki [workshop], at kilometer 7 of the highway [to the] Atlantic, Zone 18," and interviewed its owner.⁷⁸ Finally, the same day, they again interviewed Mr. Gómez Virula's mother.⁷⁹

45. On July 7, 1995, the Criminal Investigations Department of the National Police presented a report to the prosecutor of the Public Prosecution Service.⁸⁰ The report concluded that "there were sufficient indications that the Koreans masterminded the death of Mr. [Gómez Virula] and that [ECG] participated in the act, because he refuses to provide any information in this regard."⁸¹

46. In July 1995, information was requested on the migratory movements of four Koreans, who were presumably in charge of RCA.⁸² In response, the Migration Directorate indicated that "[n]o record or control of them appears" in the Department of Alien Affairs and it was not possible to establish their migratory movements "due to the absence of specific information."⁸³ In addition, the Traffic Department and the Identification Office were asked for information on these individuals with negative results.⁸⁴ On July 11, 1995, ECG was summoned to make a statement before the prosecutor on July 17, 1995, but he did not come forward.⁸⁵ On July 24, 1995, the judge was asked to hear "the statement made by ECG in his capacity as a witness as advance evidence, and [the] judge agreed to this, summoning him to make a statement on August 7, 1995."⁸⁶ ECG did not come forward in response to this subpoena.⁸⁷ On August 10, 1995, the prosecutor requested an "arrest warrant" against ECG, which the judge did not grant.⁸⁸

47. On August 25, 1995, ECG made a statement before the Sixth Trial Court for crimes relating to drug-trafficking and the environment. In this statement he provided further details regarding what happened on March 13, 1995 (*supra* para. 29), and indicated that, on

⁷⁶ Cf. Transcript of the statement by the Secretary General of the Union in the report of the Homicides Section of the Criminal Investigations Department of the National Police of June 19, 1995 (evidence file, folio 477).

⁷⁷ Cf. Transcript of the statement by the mother of ECG in the report of the Homicides Section of the Criminal Investigations Department of the National Police of June 20, 1995 (evidence file, folios 479 and 480).

⁷⁸ Cf. Transcript of the statement in the report of the Homicides Section of the Criminal Investigations Department of the National Police of June 20, 1995 (evidence file, folio 479).

⁷⁹ Cf. Transcript of the statement by Paula Virula Dionicio in the report of the Homicides Section of the Criminal Investigations Department of the National Police of June 20, 1995 (evidence file, folio 479).

⁸⁰ Cf. Communication of May 6, 1997, signed by the prosecutor of the Public Prosecution Service (evidence file, folio 442).

⁸¹ Cf. Communication of May 6, 1997, signed by the prosecutor of the Public Prosecution Service (evidence file, folio 442).

⁸² Cf. Communication of the Director General for Migration of July 20, 1995 (evidence file, folio 768).

⁸³ Cf. Communication of the Migration Inspector of July 18, 1995 (evidence file, folio 769). Subsequently, information on the sex of each of the said persons was forwarded and, in response, the Migration Directorate advised that their "files did not show any record." Cf. Communication of the Prosecutor General of July 20, 1995 (evidence file, folio 770), and Communication of the Migration General Directorate of July 24, 1995 (evidence file, folio 772).

⁸⁴ Cf. Report of Criminal Investigations Department of the National Police of July 6, 1995 (evidence file, folio 801).

⁸⁵ Cf. Communication of May 6, 1997, signed by the prosecutor of the Public Prosecution Service addressed to the Coordinator of the Subpoena Section (evidence file, folio 442).

⁸⁶ Cf. Communication of May 6, 1997, signed by the prosecutor of the Public Prosecution Service addressed to the Coordinator of the Subpoena Section (evidence file, folio 443).

⁸⁷ Cf. Communication of May 6, 1997, signed by the prosecutor of the Public Prosecution Service addressed to the Coordinator of the Subpoena Section (evidence file, folio 443).

⁸⁸ Cf. Communication of May 6, 1997, signed by the prosecutor of the Public Prosecution Service addressed to the Coordinator of the Subpoena Section (evidence file, folio 442).

Thursday, March 16, 1995, he was "walking along Sixth Avenue, Zone 1, and suddenly [...] a grey Nissan car with tinted windows [came alongside him]; a Korean [ML], who occupied a senior position in the maquila company where [he] worked, exited the vehicle and asked [him] what he was doing. [...] This Korean asked [him] to get into the car and [he] refused and ran off." He then indicated that "about two weeks later [...] in the early morning hours, several unknown individuals came to [his] home and knocked on the door saying that [he] should go with them [...]. After that, they came back three more times in quick succession." Lastly, he indicated that, "on August 12 [1995], [he] went to the pharmacy near [his] home and saw a green jeep with tinted windows [that] stopped in front of [him]; the window on the driver's side was lowered and one of them [...] stuck his arm out pointing a gun at [him]."⁸⁹

48. On August 20, 1996, the Public Prosecution Service requested that the proceedings be closed.⁹⁰ Subsequently, on May 7, 1997, the Public Prosecution Service required that the case be archived.⁹¹ On June 6, 1997, the Sixth Trial Court for crimes relating to drug-trafficking and the environment issued an order in response to the request of the Public Prosecution Service indicating "that, pursuant [to] article 327 of the Code of Criminal Procedure, [...] the Public Prosecution Service [may] order the archiving of the process without requiring the authorization of the jurisdictional organ."⁹² Although the State was requested to provide this information, there is no record in the case file of the Public Prosecution Service's decision to archive the case.

49. In addition, on November 6, 1995, the Ombudsman issued a decision in which he declared that "the human rights to safety, integrity and life of Alexander Yovany Gómez Virula [had been violated] owing to the unlawful detention, injuries and extrajudicial execution to which he was subjected"; in addition, the rights "to freedom of association and to membership in a labor union [had been violated] owing to the intimidating effects of the acts committed against [Mr. Gómez Virula]." Lastly, he held "law enforcement agents of the Guatemalan Government, the Minister of the Interior and the Director of the National Police" responsible for those violations.⁹³

VII MERITS

50. Based on the arguments of the parties and the Commission, in the instant case the Court will examine: (1) the alleged failure to comply with the obligation to prevent violations of the rights to personal liberty, personal integrity, life and freedom of association; (2) the alleged violation of the rights to judicial guarantees and judicial protection owing to the alleged lack of an investigation into the alleged victim's disappearance and death, and (3) the alleged violation of the personal integrity of the family of Alexander Gómez Virula.

⁸⁹ Cf. Statement made by ECG on August 25, 1995, before the Sixth Trial Judge for crimes relating to drug-trafficking and the environment (evidence file, folio 765).

⁹⁰ Cf. Communication requesting provisional closure signed by the Public Prosecution Service and addressed to the Sixth Trial Judge for crimes relating to drug-trafficking and the environment (evidence file, folio 773).

⁹¹ Cf. Communication of May 7, 1997, signed by the prosecutor of the Public Prosecution Service and addressed to the Sixth Trial Judge for crimes relating to drug-trafficking and the environment (evidence file, folio 777).

⁹² Cf. Order of June 6, 1997, signed by the Sixth Trial Judge for crimes relating to drug-trafficking and the environment (evidence file, folio 786).

⁹³ Cf. Decision of the Ombudsman of November 6, 1995 (evidence file, folio 422).

VII-1
ALLEGED FAILURE TO COMPLY WITH THE OBLIGATION TO PREVENT VIOLATIONS
OF THE RIGHTS TO PERSONAL LIBERTY,⁹⁴ PERSONAL INTEGRITY,⁹⁵ LIFE⁹⁶ AND
FREEDOM OF ASSOCIATION⁹⁷

A. Arguments of the Commission and of the parties

51. The **Commission** indicated that “Mr. Gómez [Virula] was deprived of his rights to personal liberty and life. In addition, bearing in mind that Mr. Gómez was not murdered immediately, the Commission understands that his personal integrity was also violated, a conclusion also supported by testimony that he was beaten at the time of his detention.” The Commission stressed that the international responsibility arose owing to the failure to comply with the “obligation to ensure rights and, particularly, with regard to the duty to prevent [their violation].” The Commission indicated that the State’s duty of prevention was enhanced because, at the time of the facts, violations of the rights of labor unionists were common knowledge and because the public complaints made by the labor union to which Mr. Gómez Virula belonged “mentioned Mr. Gómez in his capacity as financial secretary of a labor union.” In this regard, the Commission considered that the State had only taken measures “two days after” the report of his disappearance; hence, this was not a “prompt and immediate” response.

52. Regarding the right to freedom of association, the Commission considered that there were “significant indications that Mr. Gómez Virula’s disappearance and murder may have been related to his activities” and that, therefore, it was “reasonable to infer that the disappearance and death of Alexander Gómez Virula was related to his labor union activities.” However, it pointed out that those indications had not been duly investigated by the State. Consequently, it concluded that failure to comply with the duty of prevention in relation to the rights to life, personal integrity and personal liberty “also entailed a failure to comply with this duty with regard to his right to freedom of association.”

53. The **representatives** argued that, from the moment of the initial report of his disappearance, “the situation of extreme danger in which the alleged victim found himself should have been clear and unquestionable to the authorities.” Nevertheless, despite this, the State failed to comply with its obligation to take immediate and specific measures to search for his whereabouts in the interval between the first report of his disappearance and the finding of his corpse. They considered that there were “sufficient and significant indications” that his disappearance and murder “may have been linked” to his position as financial secretary of the union, and this was not investigated thoroughly and diligently. They indicated that, despite receiving the report, “the National Police only carried out two search procedures” and that nothing was done on the day of the report.

54. The **State** argued that, in the case of Mr. Gómez Virula, “specific protection based on his union activities was never requested for this person before the domestic or international instances.” It clarified that the alleged victim “was a voluntary collaborator” in his union activities. It indicated that there had been no threats prior to his disappearance and that his union had never filed a complaint indicating risks or threats. It argued that, following the report of his disappearance, the State had taken investigative measures to discover the whereabouts of the alleged victim. The State also argued that “it had never prevented” Mr. Gómez Virula from exercising his right to freedom of association.

⁹⁴ Article 7 of the American Convention.

⁹⁵ Article 5 of the American Convention.

⁹⁶ Article 4 of the American Convention.

⁹⁷ Article 16 of the American Convention.

B. Considerations of the Court

55. In the instant case, there is no evidence to establish that the disappearance and death of the alleged victim was carried out by state agents. The dispute has only been submitted in relation to the alleged failure of the State to comply with the obligation to ensure the rights to life, personal integrity and personal liberty because it did not prevent their violation. In particular, it refers to the State's actions between the time the alleged victim's disappearance was reported and the discovery of his corpse.

56. According to Article 1(1) of the Convention, States are obliged to respect and ensure the human rights recognized therein.⁹⁸ However, it is evident that a State cannot be held internationally responsible for all offenses committed among private individuals within its jurisdiction. Indeed, the State's treaty-based guarantee obligations do not signify its unlimited responsibility in relation to any act or deed of private individuals, because its duty to adopt measures of prevention and protection for private individuals in their interpersonal relations are subject to the State's awareness of a situation of real and immediate danger for a specific individual or group of individuals – or that it should have been aware of this situation of real and immediate danger – and to the reasonable possibility of preventing or avoiding that danger.⁹⁹ In other words, even though an act or omission of an individual has the legal consequence of violating certain rights of another individual, this cannot automatically be attributed to the State because it must be considered in light of the particular circumstances of the case and the realization of those guarantee obligations.¹⁰⁰ In this regard, the Court clarifies that, in order to establish non-compliance with the duty to prevent violations of the rights to life and personal integrity, it is necessary to verify: (i) that the state authorities knew, or should have known, of the existence of a real and immediate danger to the life and/or personal integrity of a specific individual or group of individuals, and (ii) that those authorities failed to take the necessary measures within their terms of reference that, reasonably considered, could be expected to prevent or to avoid that danger.¹⁰¹ The Court has applied this standard, for example, in situations of missing women in the context of an increase of homicidal violence against women,¹⁰² and it would also be applicable in a context of an increased of homicidal violence against labor unionists. However, in the instant case, it has not been proved that, in March 1995, the State was aware of the existence of a general situation of danger against unionists in Guatemala, because the Commission has not presented sufficient evidence to determine that such a context existed at the date the events occurred (*supra* para. 23).

57. In the instant case, the State became aware of the disappearance of the alleged victim on March 14, 1995. It was in the report that the State was informed that Mr. Gómez Virula

⁹⁸ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 163, and *Case of López Soto et al. v. Venezuela. Merits, reparations and costs*. Judgment of September 26, 2018. Series C No. 362, para. 127.

⁹⁹ Cf. *Case of the Pueblo Bello Massacre v. Colombia, Merits, reparations and costs*. Judgment of January 31, 2006. Series C No. 140, para. 123, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, para. 134.

¹⁰⁰ Cf. *Case of the Pueblo Bello Massacre v. Colombia, Merits, reparations and costs*. Judgment of January 31, 2006. Series C No. 140, para. 123, and *Case of López Soto et al. v. Venezuela. Merits, reparations and costs*. Judgment of September 26, 2018. Series C No. 362, para. 134.

¹⁰¹ Cf. *Case of the Pueblo Bello Massacre v. Colombia, Merits, reparations and costs*. Judgment of January 31, 2006. Series C No. 140, para. 123, and *Case of López Soto et al. v. Venezuela. Merits, reparations and costs*. Judgment of September 26, 2018. Series C No. 362, para. 140.

¹⁰² See, for example, *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, and *Case of Véliz Franco et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 19, 2014. Series C No. 277.

was a member of the RCA labor union.¹⁰³ In addition, on March 15, 16 and 17, 1995, UNSITRAGUA issued a public statement and sent two urgent telegrams to the Ministry of the Interior, expressing its concern for the possible relationship between Mr. Gómez Virula's disappearance and his participation in the RCA labor union. These announcements prove that, as of that date, the State was aware that the alleged victim was missing.

58. What has not been proved is that the State knew or should have known that there was real and imminent danger for labor unionists prior to the report of Mr. Gómez Virula's disappearance. Consequently, the Court considers that the State did not fail to comply with its obligation to ensure the rights to life, personal integrity and personal liberty of Mr. Gómez Virula.

59. The foregoing does not mean that the State did not have an obligation to investigate the alleged victim's disappearance with due diligence once it became aware of this. The analysis of this aspect will be made in Chapter VII-2.

60. Regarding freedom of association, the Court notes that its alleged violation is based on the State's responsibility for the violation of the rights to life, personal integrity and personal liberty. Taking into account that the Court has not found the State responsible for the violation of those rights, it considers that the State did not violate the right to freedom of association of Mr. Gómez Virula.

VII-2 RIGHTS TO JUDICIAL GUARANTEES¹⁰⁴ AND JUDICIAL PROTECTION¹⁰⁵

A. Arguments of the Commission and of the parties

61. The **Commission** argued that the criminal investigation was not opened based on the reports of the victim's disappearance, but rather following the discovery of his corpse and that this constituted a violation of the right to judicial guarantees and judicial protection. It emphasized that the State had not presented information on the preparation of an official record of the discovery of the body or the handling of the crime scene, or of the autopsy that was performed. It indicated that, "according to the information provided by the parties, neither the approximate time nor the place of death had been recorded. Similarly, the [Commission] note[d] that although it was indicated that Mr. Gómez Virula's body showed signs of trauma and bruising, no forensic examination of this was made, nor were those injuries adequately described; moreover, no mention was made of the forms, patterns or indications that might establish whether those injuries were pre- or post-mortem." The Commission considered "that the request to archive the case because of the existence of different versions of what happened without having exhausted the basic investigative procedures, much less all the possibilities to clarify those discrepancies, [was] incompatible with the obligation to investigate with due diligence." It also indicated that "[b]earing in mind the ambiguity of the information as to whether the investigation was officially archived, the Commission considers that the more than 21 years that have elapsed since the complaint was filed regarding the disappearance and subsequent death of Mr. Gómez constitutes an excessive time."

62. The **representatives** argued that the State was responsible for the violation of Mr. Gómez Virula's rights to judicial guarantees and judicial protection owing to the "total absence of procedures, actions and measures to search for him before the discovery of his body," and

¹⁰³ Cf. Communication of March 14, 1995, signed by the Deputy Head of the Criminal Investigations Department of Guatemala addressed to the prosecutor of the Public Prosecution Service (evidence file, folio 464), and Report filed before the Ombudsman on March 14, 1995 (evidence file, folio 412).

¹⁰⁴ Article 8 of the American Convention.

¹⁰⁵ Article 25 of the American Convention.

the violation of the same rights of his parents owing to “all the acts and omissions committed by the State during the investigation process.” They indicated that “the judicial authorities did not conduct a serious and effective investigation aimed at determining the truth and at the pursuit, capture, prosecution and eventual punishment of the perpetrators” and, therefore, they “failed to comply with their obligation of due diligence in the criminal investigation in this case.” In addition, the representatives considered that the State had failed to comply with the guarantee of a reasonable time owing to the more than 22 years that had passed since the report of Mr. Gómez Virula’s disappearance and his death. They added that the State had not presented any justification based on the complexity of the matter, the procedural activity of the interested party, or the conduct of the judicial authorities.

63. The **State** argued that the information contained in the report of Mr. Gómez Virula’s disappearance was “extremely inconsistent” and that this inconsistency introduced an element of complexity into the matter. It indicated that neither the members of Mr. Gómez Virula’s family, nor the representatives, UNSITRAGUA or any labor union or human rights defense organization “subsequently provided relevant and appropriate information that could lead to identifying and individualizing the presumed masterminds and perpetrators of Mr. Gómez Virula’s disappearance and death.” The State also argued that Article 25(1) had not been violated because, according to new documents provided by the State, “following the report made by the members of Mr. Gómez Virula’s family, the corresponding investigation process had been opened.”

B. Considerations of the Court

64. The Court has repeatedly indicated that States Parties are obliged to provide effective judicial remedies to the victims of human rights violations (Article 25), which must be substantiated in keeping with the rules of due process of law (Article 8(1)), all of this under the general obligation of those States to ensure the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Article 1(1)).¹⁰⁶

65. The obligation to investigate is an obligation of means rather than of results that must be assumed by the State as its own legal duty, and not as a mere formality preordained to be ineffective, or as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof.¹⁰⁷ The investigation must be serious, objective and effective and be addressed at determining the truth and the pursuit, capture and eventual prosecution and punishment of the perpetrators.¹⁰⁸ In addition, the obligation to investigate remains whosoever the agents to whom the violation may eventually be attributed, even if they are private individuals because, if their acts are not investigated seriously, those individuals are aided in a sense by the public authorities, thereby engaging the international responsibility of the State.¹⁰⁹

66. Based on the foregoing, the Court will examine the due diligence in the investigation, and the time this took, in order to determine whether the State is responsible for the violation

¹⁰⁶ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 91, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 28, 2018. Series C No. 371, para. 267.

¹⁰⁷ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 177, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of October 10, 2019. Series C No. 384, para. 175.

¹⁰⁸ Cf. *Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of June 7, 2003. Series C No. 99, para. 127, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of October 10, 2019. Series C No. 384, para. 175.

¹⁰⁹ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 177, and *Case of V.R.P., V.P.C. et al. v. Nicaragua. Preliminary objections, merits, reparations and costs*. Judgment of March 8, 2018. Series C No. 350, para. 151.

of the rights recognized in Articles 8(1) and 25(1) of the Convention, in relation to Article 1(1) of this instrument, to the detriment of Alexander Yovany Gómez Virula, Antonio Gómez Areano and Paula Virula Dionicio.

B.1. Due diligence in the investigation

67. The Court will now examine: (a) the measures taken prior to the discovery of the alleged victim's body; (b) the initial measures following the discovery of the body, and (c) the omissions in following up on logical lines of investigation and in gathering evidence.

B.1.a. Measures taken prior to the discovery of the body

68. The Commission and the representatives have alleged that the State did not act with due diligence when the disappearance of the alleged victim was reported on the evening of March 14, 1995. In this regard, it should be underscored that the reports filed advised that the alleged victim, who was a member of the RCA labor union, had disappeared on March 13, 1995, at approximately 7.30 p.m.¹¹⁰ In addition, on March 15, 16 and 17, 1995, UNSITRAGUA issued a communiqué to the public at large and two urgent telegrams addressed to the Ministry of the Interior expressing its concern owing to the possible relationship between Mr. Gómez Virula's disappearance and his membership of the RCA labor union.

69. The Court considers that, pursuant to the obligations established in the American Convention, States must investigate missing persons reports. The level of due diligence required will depend on the specific characteristics of the person presumably missing. It should be recalled that the alleged victim was a labor union leader involved in a labor conflict with RCA following the company's closure. The reports filed by the alleged victim's family and UNSITRAGUA made the State aware of the possible connection between the alleged victim's disappearance and his union activities.

70. In the instant case, the State did not take any measure the day after receiving the report of the disappearance. According to a report of the National Police, on March 16, 1995, two officers went to the RCA offices but could not obtain any information because the company had closed down its operations. Subsequently, they went to the home of Mr. Gómez Areano and could obtain no additional information. The same day, the officers went to the men's prisons in Zone 18, and to the corresponding judicial organ, without any positive result. On March 17, 1995, the officers went to the home and the workplace of a woman who, according to information they had received, was in a relationship with the alleged victim, but were unable to find her.¹¹¹

71. These measures were insufficient to consider that the State acted with the due diligence required in the case of a missing person, as in this case. Thus, for example, taking into account the communiqués and reports made by UNSITRAGUA, it would have been fundamental to go to the UNSITRAGUA offices to obtain information, to ask other members of the union who had seen Mr. Gómez Virula on March 13, 1995, for information, or to investigate in whose name RCA was registered or who were the people in charge of the company.

72. Consequently, this Court considers that the actions taken by the State prior to the discovery of the body were not in keeping with the duty to investigate with due diligence.

¹¹⁰ Cf. Communication of March 14, 1995, signed by the Deputy Head of the Criminal Investigations Department of Guatemala addressed to the prosecutor of the Public Prosecution Service (evidence file, folio 464), and Report filed before the Ombudsman on March 14, 1995 (evidence file, folio 412).

¹¹¹ Cf. Report of the Missing Persons Investigation Section of the National Police of March 19, 1995 (evidence file, folio, 455).

B.1.b Initial measures following the discovery of the body,

73. The Court has indicated consistently that the efficient determination of the truth in the context of the obligation to investigate a death must be evident owing to the meticulous nature of the initial measures taken.¹¹² When investigating a violent death, the first stages of the investigation are crucially important as is the negative impact that omissions and irregularities at such stages may have on the real and effective possibility of clarifying the facts.¹¹³ Accordingly, the Court has defined the guiding principles that must be observed in an investigation into a violent death, such as in this case. The State authorities who conduct the investigation must, at a minimum, take all reasonable steps to, *inter alia*: (i) identify the victim; (ii) recover and preserve all material relating to the death; (iii) identify possible witnesses and obtain their evidence in relation to the death; (iv) determine the cause, manner, place and time of death, as well as any pattern or practice that might have caused the death, and (v) distinguish between natural death, accidental death, suicide and homicide. In addition, an exhaustive investigation of the scene of the crime must be conducted, as well as rigorous autopsies and the analysis of human remains by qualified professionals, using the most appropriate procedures.¹¹⁴

74. Furthermore, in all its case law, the Court has indicated that, in relation to the scene of the crime, the investigators must, at a minimum: (i) photograph the scene and any other physical evidence, and the body as it was found and after it has been moved; (ii) gather and conserve the samples of blood, hair, fibers, threads and other clues; (iii) examine the area to look for footprints or any other trace that could be used as evidence, and (iv) prepare a detailed report with any observations regarding the scene, the measures taken by the investigators, and the storage assigned for all the evidence collected.¹¹⁵ The Court has also established that, when investigating a crime scene, this must be preserved in order to protect all the evidence.¹¹⁶

75. In the instant case, the Court notes that the record of the removal of the corpse contained general information on Mr. Gómez Virula, the position in which his body was found and how he was dressed and included a list of his belongings. It also indicated that it was not possible to determine his injuries owing to the state of decomposition of the body.¹¹⁷ Nevertheless, the forensic autopsy performed at 2 p.m. on the day that the corpse was found describes the injuries and the condition of the organs, and concludes that the cause of Mr. Gómez Virula's death was "fourth degree traumatic brain and chest injury."¹¹⁸

76. The Court notes that there is no record in the case file: that the scene of the crime had been preserved in order to gather and conserve samples of blood, hair or other clues; that the

¹¹² Cf. *Case of Servellón García et al. v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 120, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of October 10, 2019. Series C No. 384, para. 178.

¹¹³ Cf. *Case of Servellón García et al. v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 119, and *Case of Villamizar Durán et al. v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2018. Series C No. 364, para. 175.

¹¹⁴ Cf. *Case of Juan Humberto Sánchez v. Honduras. Preliminary objection, merits, reparations and costs*. Judgment of June 7, 2003. Series C No. 99, para. 127, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of October 10, 2019. Series C No. 384, para. 178.

¹¹⁵ Cf. *Case of González et al. ("Cotton Field") v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 16, 2009. Series C No. 205, para. 301, and *Case of Villamizar Durán et al. v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2018. Series C No. 364, para. 176.

¹¹⁶ Cf. *Case of the Landaeta Mejías Brothers et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of August 27, 2014. Series C No. 281, para. 254, and *Case of Villamizar Durán et al. v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2018. Series C No. 364, para. 176.

¹¹⁷ Cf. Record of removal of the corpse of March 19, 1995, signed by the assistance prosecutor (evidence file, folios 682 and 683).

¹¹⁸ Cf. Communication of March 28, 1995, signed by the forensic physician of the Department's judicial body (evidence file, folios 484 and 706).

area was searched to look for footprints or traces of tire marks that could be used as clues or evidence of what happened. It also underlines that neither the scene of the crime nor the victim's corpse were photographed for the respective records. Regarding the autopsy, the Court notes that this does not show that the corpse had been examined thoroughly. In fact, the Court notes that the autopsy: (1) does not mention whether the alleged victim's clothing was examined; (ii) does not describe in detail each of the injuries found or their size; (iii) does not determine the possible time of death, or (iv) establish whether it was natural death, accidental death, suicide or homicide. In this regard, the Court recalls that omissions in these initial procedures condition or limit the subsequent investigations,¹¹⁹ and constitute failure to comply with the obligation to investigate with due diligence.

B.1.c Omissions in following up on logical lines of investigation and in gathering evidence

77. This Court has established that, to ensure the effectiveness of the investigation of human rights violations, omissions in the gathering of evidence and in following up on logical lines of investigation must be avoided.¹²⁰ When the facts relate to a violent death, the investigation must be conducted in a way that ensures due analysis of all hypotheses concerning the perpetrators that arise from it.¹²¹

78. Similarly, it should be recalled that it is not incumbent on the Court to analyze the hypotheses concerning the perpetrators developed during the investigation of the events and, consequently, to determine individual responsibilities the definition of which corresponds to the domestic criminal courts. Rather, it must assess the acts or omissions of state agents based on the evidence presented by the parties,¹²² and verify whether or not the steps taken in the domestic sphere violated the international obligations of the State derived from Articles 8 and 25 of the American Convention.¹²³ Accordingly, to determine whether a State has complied with its obligation to investigate everyone who may be criminally responsible, this Court has indicated that it is necessary to analyze: (i) the existence of indications of the participation of those presumably responsible, and (ii) whether the investigation of those indications was diligent or negligent.¹²⁴

79. In this case, the Court notes that, during the investigation, the Public Prosecution Service indicated that there were indications that those possibly responsible were the Korean men

¹¹⁹ Cf. *Case of González Medina and family members v. Dominican Republic. Preliminary objections, merits, reparations and costs.* Judgment of February 27, 2012. Series C No. 240, para. 219, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 28, 2018. Series C No. 371, para. 285.

¹²⁰ Cf. *Case of the Serrano Cruz Sisters v. El Salvador. Merits, reparations and costs.* Judgment of March 1, 2005. Series C No. 120, paras. 88 and 105, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of October 10, 2019. Series C No. 384, para. 179.

¹²¹ Cf. *Case of Pacheco León et al. v. Honduras. Merits, reparations and costs.* Judgment of November 15, 2017. Series C No. 342, para. 89, and *Case of Villaseñor Velarde et al. v. Guatemala. Merits, reparations and costs.* Judgment of February 5, 2019. Series C No. 374, para. 115.

¹²² Cf. *Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of July 10, 2007. Series C No. 167, para. 87, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 28, 2018. Series C No. 371, para. 294.

¹²³ Cf. *Case of Nogueira de Carvalho et al. v. Brazil. Preliminary objections and Merits.* Judgment of November 28, 2006. Series C No. 161, para. 80, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 28, 2018. Series C No. 371, para. 294.

¹²⁴ Cf. *Case of Pacheco León et al. v. Honduras. Merits, reparations and costs.* Judgment of November 15, 2017. Series C No. 342, para. 94, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of November 28, 2018. Series C No. 371, para. 292.

who owned or ran RCA.¹²⁵ Following up on this, the owners of the building in which RCA had its offices was questioned, and they provided the names of two individuals who rented the said building.¹²⁶ Although these individuals were summoned to appear as witnesses by means of an official telegram,¹²⁷ the case file does not show that any other measure was taken when they failed to come forward, or any other action to verify whether those individuals were indeed the owners of the maquila company, to investigate their place of residence, or to gather further information in order to try and contact them, among other possible actions.

80. Additionally, several statements received during the investigation mentioned another four Koreans who supposedly ran the said company.¹²⁸ On this basis, the migratory movements of these four individuals was requested.¹²⁹ In response, the Migration Directorate indicated that their "files did not reveal any record."¹³⁰ Therefore, it was concluded that those individuals were in Guatemala in an irregular migratory condition.¹³¹ Information on the said individuals was also requested from the Traffic Department and the Identification Office, with negative results.¹³² However, the case file does not record the measures taken to verify the complete names of those individuals, or any other information that would identify them. Moreover, the Court underlines that no other measure was taken with regard to those individuals and they were not summoned to appear.

81. Meanwhile, during the public hearing held in this case, the State asserted that Mr. Gómez Virula's disappearance and death was due to his romantic relationship with another man's wife. In this regard, the Court notes that an investigation report indicates that "confidential information" had been obtained indicating that Mr. Gómez Virula was in a relationship with SRM, the wife of an individual known as "El Pirata." In addition, in a statement, ECG indicated that when he took leave of the alleged victim on the day of his disappearance, "this was at the entrance to Colonia Juana de Arco" and that he knew that the alleged victim "had some problems in this community."¹³³ The investigation report of March 24 adds that ECG had stated that Mr. Gómez Virula "had entrusted him with important information that, in Colonia Juana de Arco, he had problems with the husband of a woman he was seeing, because her husband had realized this."¹³⁴ In the report, the name of SRM has been added by hand.¹³⁵

¹²⁵ Cf. Communication of April 24, 1995, signed by the assistant prosecutor of the Public Prosecution Service (evidence file, folio 708), and Report of Criminal Investigations Department of the National Police of July 6, 1995 (evidence file, folio 801).

¹²⁶ Cf. Transcript of the statements of the owners of the building in the Report of the Public Prosecution Service of March 21, 1995 (evidence file, folios 700 and 701).

¹²⁷ Cf. Official telegram of the Public Prosecution Service of May 30, 1995 (evidence file, folio 720).

¹²⁸ See, for example, Transcript of the statement by the Secretary General of the labor union in the Report of the Homicides Section of the Criminal Investigations Department of the National Police of June 19, 1995 (evidence file, folios 477 and 478); statement by Mr. Gómez Virula's sister of March 19, 1995 (evidence file, folios 685 and 686), and witness statement made by ECG on August 25, 1995 before the Sixth Trial Judge for crimes relating to drug-trafficking and the environment (evidence file, folios 764 and 765).

¹²⁹ Cf. Report of the Criminal Investigations Department of the National Police of July 6, 1995 (evidence file, folio 801), and Communication of the Director General for Migration of July 20, 1995 (evidence file, folios 768 and 769).

¹³⁰ Cf. Communication of the Migration General Directorate of July 24, 1995 (evidence file, folio 772).

¹³¹ Cf. Report of Criminal Investigations Department of the National Police of July 6, 1995 (evidence file, folio 801).

¹³² Cf. Report of Criminal Investigations Department of the National Police of July 6, 1995 (evidence file, folio 801).

¹³³ Cf. Witness statement by ECG on March 24, 1995 (evidence file, folio 691).

¹³⁴ Cf. Report of the Public Prosecution Service on March 24, 1995 (evidence file, folio 704).

¹³⁵ Cf. Report of the Public Prosecution Service on March 24, 1995 (evidence file, folio 705).

82. Following up on this information, on March 17, 1995, the investigators went to the home of SRM, but did not find her. They then tried to find her at her place of work, but failed to find her there either.¹³⁶

83. In addition, in one of his statements, Mr. Gómez Virula's father mentioned the name of someone who had threatened his son because the latter was his partner's lover.¹³⁷ Following this, the man named by Mr. Gómez Virula's father was interviewed and he indicated that he did not know the alleged victim, that he had been a widower for 22 years, and that he did not have a permanent partner.¹³⁸

84. The Court notes that the case file does not record whether the above indications refer to the same person. In addition, there is no record whether any other step was taken to evaluate this possible line of investigation.

85. Lastly, the Court underscores that, in its final written arguments, the State indicated that the deficiencies during the initial stage of the investigation were due to the inconsistencies in the different statements provided by the persons interviewed by the Public Prosecution Service and that, therefore, the Public Prosecution Service had "to archive the case file based on the relevant provisions of article 327 of the Code of Criminal Procedure." In this regard, the Court considers that the State should have investigated those possible inconsistencies; for example, questioning the deponents on the other hypotheses it had received.

B.2 Reasonable time in the investigation

86. The Court has indicated that the right of access to justice signifies that everything necessary must be done to discover the truth of what happened and to punish those responsible within a reasonable time.¹³⁹ The Court has indicated that the "reasonable time" referred to in Article 8(1) of the Convention should be assessed in relation to the total duration of the proceedings undertaken until the final judgment is handed down.¹⁴⁰ Accordingly, it is necessary to determine whether the failure to conclude the investigation was justified based on the circumstances of the case or whether it was due to an undue delay that can be attributed to the State.¹⁴¹

87. The Court has considered that a prolonged delay in the investigation, such as the one that occurred in this case, constitutes, in and of itself, a violation of the judicial guarantees.¹⁴² The Court notes that the investigative measures that the State conducted into the death of Mr. Gómez Virula began on March 19, 1995, and, to date, no one has been identified as the

¹³⁶ Cf. Report of the Missing Persons Investigation Section of the National Police of March 19, 1995 (evidence file, folio, 455), and Report of the Missing Persons Investigation Section of the National Police of March 20, 1995 (evidence file, folio 469).

¹³⁷ Cf. Transcript of the statement by Mr. Gómez Virula's uncle in the Report of the Public Prosecution Service of March 21, 1995 (evidence file, folio 701).

¹³⁸ Cf. Report of the Public Prosecution Service of March 21, 1995 (evidence file, folios 701 and 702).

¹³⁹ Cf. *Case of Bulacio v. Argentina. Merits, reparations and costs*. Judgment of September 18, 2003. Series C No. 100, para. 114, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico. Preliminary objection, merits, reparations and costs*. Judgment of November 28, 2018. Series C No. 317, para. 267.

¹⁴⁰ Cf. *Case of Suárez Rosero v. Ecuador. Merits*. Judgment of November 12, 1997. Series C No. 35, para. 71, and *Case of Colindres Schonengerg v. El Salvador. Merits, reparations and costs*. Judgment of February 4, 2019. Series C No. 373, para. 116.

¹⁴¹ Cf. *Case of Pacheco León et al. v. Honduras. Merits, reparations and costs*. Judgment of November 15, 2017. Series C No. 342, para. 117.

¹⁴² Cf. *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, reparations and costs*. Judgment of June 21, 2002. Series C No. 94, para. 145, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, para. 154.

perpetrator and the truth of what happened has not been determined. On this basis, the Court will analyze whether a delay in the investigation of more than 24 years is justified.

88. The Court has established the following elements in order to determine whether the time is reasonable: (a) the complexity of the matter; (b) the procedural activity of the interested party; (c) the conduct of the judicial authorities, and (d) the effects generated on the legal situation of the person concerned. The Court recalls that it is for the State to justify, based on the said criteria, why it has required the time that has elapsed to deal with the case and, if it does not do so, the Court has broad powers to make its own assessment in this regard.¹⁴³

89. In the instant case, 24 years have passed since Mr. Gómez Virula's death without the State clarifying what happened to the alleged victim, or acting with the necessary due diligence to make it possible to clarify this (*supra* paras. 67 to 85). Furthermore, the State has not provided a reasonable justification for the duration of the investigation. Therefore, the Court concludes that the judicial authorities exceeded the reasonable time for the process.

B.3 Conclusion

90. On the basis of all the preceding considerations, the Court concludes that the State failed to act with due diligence to investigate the alleged victim's disappearance, even though it knew that he was a leading member of a labor union engaged in a conflict in his place of work. Moreover, when his body was found, it again failed to act with the necessary due diligence to preserve the scene of the crime or to gather probative elements during the initial procedures, and the autopsy does not demonstrate that a rigorous examination of the corpse was performed. Added to foregoing, the lines of investigation were not exhausted diligently, because the available information reveals a failure to take the necessary steps to investigate those possibly responsible. Lastly, the Court has verified that the investigation of the facts has not respected the guarantee of a reasonable time.

91. Consequently, the Court concludes that the State violated the rights to judicial guarantees and judicial protection recognized in Articles 8(1) and 25(1) of the American Convention on Human Rights, in relation to Article 1(1) of this instrument, to the detriment of Alexander Yovany Gómez Virula, Antonio Gómez Areano and Paula Virula Dionicio.

VII-3

ALLEGED VIOLATION OF THE FAMILY'S RIGHT TO PERSONAL INTEGRITY¹⁴⁴

A. Arguments of the parties and of the Commission

92. The **Commission** concluded that the State had "disregarded its obligation to investigate and to punish the acts" that breached Mr. Gómez Virula's rights, thereby violating the right to personal integrity of the members of the alleged victim's family who had the right to know the truth of what happened to the victim. The **representatives** indicated that members of Mr. Gómez Virula's family experienced "pain, fear, suffering and anguish" owing to the victim's disappearance and subsequent death. Added to this, they argued that the lack of a specific and effective investigation into the disappearance and death of Mr. Gómez Virula gave rise to "anguish, frustration and a feeling of impotence," that continues owing to the impunity surrounding the case. They argued that, in addition to the mental and moral suffering, the members of Mr. Gómez Virula's family also endured physical pain and suffering because the victim's mother suffered panic attacks and was later diagnosed with diabetes. The **State**

¹⁴³ Cf. *Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of September 22, 2009. Series C No. 202, para. 156, and *Case of Muelle Flores v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of March 6, 2019. Series C No. 375, para. 155.

¹⁴⁴ Article 5 of the American Convention.

argued that it had not been negligent in the face of Mr. Gómez Virula's disappearance and subsequent death, and that both the National Police and the Public Prosecution Service had taken the necessary steps to investigate what happened, fulfilling their duty to investigate in relation to Mr. Gómez Virula's family.

B. Considerations of the Court

93. The Court notes that the arguments concerning the alleged violation of the right to personal integrity of the family are based on the State's supposed responsibility for Mr. Gómez Virula's disappearance and death and the failure to investigate the facts adequately. The Court considers that the State does not bear international responsibility with regard to this right – recognized in Article 5 of the American Convention – because the State's participation in the disappearance and death of Mr. Gómez Virula has not been proved and the failure to investigate the events has been analyzed in the chapter on the violation of Articles 8(1) and 25(1) of the American Convention in which they were declared victims. Consequently, the Court considers that the State did not violate the right to personal integrity of Antonio Gómez Areano and Paula Virula Dionicio.

VIII REPARATIONS

94. Based on the provisions of Article 63(1) of the American Convention, the Court has indicated that any violation of an international obligation that has caused harm entails the duty to repair this adequately and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.¹⁴⁵ In addition, the Court has established that the reparations must have a causal nexus with the facts of the case, the violations that have been declared, the damage proved and the measures requested to redress the respective harm.¹⁴⁶ Therefore, the Court must analyze the concurrence of these factors to rule correctly and pursuant to law.¹⁴⁷

95. In its answering brief, the State indicated, in general, that "the State of Guatemala does not consider it viable to attend to the claims for reparations proposed by the Inter-American Commission on Human Rights" or those of the *Centro para la Acción Legal en Derechos Humanos*.

96. Bearing in mind the arguments submitted, and without prejudice to any form of reparation that is subsequently agreed upon by the State and the victims, and also based on the considerations on the merits, as well as the violations of the Convention declared in this judgment, the Court will proceed to examine the claims presented by the Commission and the victims' representatives, as well as the corresponding observations of the State, in light of the criteria established in its case law on the nature and scope of the obligation to make reparation in order to establish measures aimed at redressing the harm caused.¹⁴⁸

¹⁴⁵ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, paras. 24 and 25, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of October 10, 2019. Series C No. 384, para. 192.

¹⁴⁶ Cf. *Case of Ticona Estrada et al. v. Bolivia, Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of October 10, 2019. Series C No. 384, para. 194.

¹⁴⁷ Cf. *Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of October 10, 2019. Series C No. 384, para. 194.

¹⁴⁸ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, paras. 25 and 26, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of October 10, 2019. Series C No. 384, para. 195.

A. Injured party

97. Pursuant to Article 63(1) of the Convention, this Court considers that anyone who has been declared a victim of the violation of any right recognized therein is an injured party. Consequently, the Court considers that Alexander Yovany Gómez Virula, Antonio Gómez Areano and Paula Virula Dionicio are the “injured party” and in their capacity as victims of the violations declared in Chapter VII they will be the beneficiaries of the reparations ordered by the Court.

B. Obligation to investigate

98. The **Commission** and the **representatives** asked the Court: (i) “to order the State to conduct and conclude a full, prompt, effective and impartial judicial investigation to establish the circumstances surrounding the disappearance and death of Alejandro Yovany Gómez Virula”; (ii) that, during this investigation, the State thoroughly explore and exhaust the logical lines of inquiry in connection with the case, and identify and punish all the masterminds and perpetrators,” and (iii) “impose the appropriate administrative, disciplinary or criminal measures for the acts or omissions of state officials that contributed to the denial of justice and the impunity that reigns in relation to the facts of the case.”

99. The **State** indicated that the limited progress in the investigation in this case could not be attributed to it because “not only was the information [...] provided characterized by being indecisive but also, even subsequently, the victim’s family have not provided any further reliable evidence or other probative elements that would contribute to the progress of the investigation.”

100. The Court has determined that the State failed to comply with its obligation to investigate the disappearance and death of Mr. Gómez Virula. This was due to deficiencies when his disappearance was reported and in the initial steps taken following the discovery of the corpse; the failure to exhaust the logical lines of investigation, and the unjustified delay in the investigation of more than 24 years. In light of its conclusions in Chapter VII of this judgment, the Court establishes that the State must continue all necessary investigations to determine and, as appropriate, prosecute and punish those responsible for the death of Alexander Yovany Gómez Virula.

101. If the criminal action is subject to the statute of limitations, the State must still investigate the events that occurred just to clarify the murder in order to satisfy the right to the truth of the family, who are also victims, and of society.

C. Measures of satisfaction

102. The **representatives** asked the Court to order the State to publish the judgment at least once in the Official Gazette and in another national newspaper with widespread circulation.

103. The Court establishes, as it has in other cases,¹⁴⁹ that the State must publish, within six months of notification of this judgment: (a) the official summary of this judgment prepared by the Court, once, in the Official Gazette and in another national newspaper with widespread circulation in a legible and appropriate font, and (b) this judgment in its entirety, available for at least one year, on an official website of the State. The State must advise the Court immediately when it has made each of the publications ordered, regardless of the one-year

¹⁴⁹ Cf. *Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Gorioitía v. Argentina. Preliminary objection, merits, reparations and costs*. Judgment of September 2, 2019. Series C No. 382, para. 68.

time frame for presenting its first report established in the operative paragraphs of this judgment.

D. Other measures requested

104. The **Commission** asked the Court to order the State to implement measures of non-repetition that included the necessary measures: "(i) to ensure that investigations into missing peoples reports comply with the standards established in [its] report in relation to the duty to respond immediately with efforts to determine the whereabouts of a person reported missing; (ii) to ensure that investigations into violent deaths comply with the duty to investigate with due diligence, as described in [its] report, and (iii) to enhance the capacity to investigate the deaths of human rights defenders in Guatemala, especially labor unionists, that may be related to their activities." The **representatives** asked the Court to order the State to implement the measures of non-repetition requested by the Commission, and also a public act to acknowledge responsibility, and placement of a plaque in memory of Alexander Gómez Virula.

105. This Court considers that the handing down of this judgment and the reparations ordered in this chapter are sufficient and adequate to redress the violations suffered by the victims. Therefore, it does not find it necessary to order the aforementioned additional measures, without prejudice to the State deciding to adopt them and grant them in the domestic sphere.

E. Compensation

106. The **Commission** indicated that the State should provide full reparation for both the pecuniary and the non-pecuniary damage caused by the human rights violations and should therefore "adopt [...] measures of financial compensation." The **representatives** asked the Court to order the State to pay financial compensation to the victim's parents for pecuniary damage to cover both loss of earnings and consequential damage, and also for non-pecuniary damage. The **State** argued that "the events that harmed the integrity and life of Alexander Yovany Gómez Virula cannot be attributed [to the State] because the participation of agents of the State has never been demonstrated or proved."

E.1 Pecuniary damage

107. In its case law, this Court has developed the concept that pecuniary damage supposes the loss of, or detriment to, the victims' income, the expenses incurred as a result of the facts, and the consequences of a monetary nature that have a causal nexus with the facts of the case.¹⁵⁰

108. The **representatives** indicated that "since the day of the alleged victim's disappearance, his parents took steps to report the fact to the government authorities, and also to find him in hospitals and detention centers." This entailed expenses for transportation, in particular taxis in order to move as fast as possible, and this involved an expenditure of US\$200.00. Then, following the discovery of their son's body, they incurred expenses for his burial amounting to US\$1,000.00. The representatives added that the alleged victim's parents did not have vouchers to corroborate these expenses because some places did not issue them and because 23 years had passed and they no longer had them. They indicated that the alleged victim's father did not receive a salary for one month because he stopped working, first because he had to take steps to report his son's disappearance and, second, to take care of all the procedures relating to the burial and then to recover a little from the pain and

¹⁵⁰ Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of October 10, 2019. Series C No. 384, para. 243.

suffering caused by his son's disappearance and death. They therefore asked the Court to take into account the reasons why it was not possible to provide the said vouchers and to establish the sum of US\$1,350.00 (one thousand three hundred and fifty United States dollars) for consequential damage and that this sum be delivered to Mr. Gómez Virula's parents.

109. The **State** indicated that, "taking into consideration that the victim's parents do not have the vouchers that substantiate the disbursements made, it left it to the criteria of the Court to establish, in equity, a sum that reimburses such expenses."

110. The Court notes that it has no documentary evidence to substantiate the expenses incurred by Mr. Gómez Virula's parents in relation to the investigation of the facts. However, it is natural that his family incurred expenditures owing to the numerous steps they took to expedite the case during the initial stages. Consequently, the Court finds it pertinent to establish, in equity, the sum of US\$1,500.00 (one thousand five hundred United States dollars), for pecuniary damage to be delivered directly to Mr. Gómez Virula's parents.

E.2 Non-pecuniary damage

111. The **representatives** indicated that Mr. Gómez Virula's parents "suffered a significant emotional impact and experienced pain, sadness, suffering, fear and anguish owing to the disappearance and subsequent death of their son. In addition, due the absence of a full and effective investigation, they experienced suffering, anguish, frustration and helplessness because of the impossibility of knowing the truth about what happened, which continues up until today because, in the instant case, there has still not been a complete an effective investigation into the events and the Guatemalan courts have not identified, prosecuted or convicted the masterminds and perpetrators of the disappearance and death of Mr. Gómez Virula." Therefore, they asked the Court to establish, in equity, financial compensation for mental and moral harm.¹⁵¹

112. Based on the circumstances of this case and the violations declared, the Court finds it pertinent to establish, in equity, the sum of US\$30,000.00 (thirty thousand United States dollars) for each of the victim's parents, Antonio Gómez Areano and Paula Virula Dionicio.

F. Costs and expenses

113. The **representatives** indicated that the *Centro para la Acción Legal en Derechos Humanos* had represented the alleged victim's family "from the lodging of the petition in July 1995, to date, and its legal advisers had monitored the case and dedicated time to meetings with the members of the alleged victim's family, prepared briefs with the information requested by the Commission and by the Court, as well as finding and presenting documentary evidence; all this has entailed expenses for the organization, particular for the payment of honoraria, which to date it has covered with its own funds." Consequently, it requested US\$11,000.00 (eleven thousand United States dollars) for the said concepts, considering that this sum was "reasonable and fair."

114. The Court reiterates that, according to its case law,¹⁵² costs and expenses form part of the concept of reparation because the actions taken by the victims to obtain justice at both the national and the international level entail disbursements that should be compensated when the international responsibility of the State has been declared in a judgment against it.

¹⁵¹ On April 3, 2018, the representatives indicated that, in their pleadings and motions brief, "due to an error, they had failed to specify the sum claimed [for mental and moral harm]" and asked the Court to establish, in equity, the payment of US\$30,000 to each of the alleged victim's parents. However, this correction was time-barred.

¹⁵² Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 82, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of October 10, 2019. Series C No. 384, para. 251.

Regarding the reimbursement of costs and expenses, the Court must make a prudent assessment of their scope, which includes the expenses incurred before the authorities of the domestic jurisdiction, and also those arising during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the principle of equity and taking into account the expenses indicated by the parties, provided their *quantum* is reasonable.¹⁵³

115. The Court notes that the *Centro para la Acción Legal en Derechos Humanos* provided expense vouchers related to its representation in this case demonstrating that it had incurred expenditure in relation to this case of approximately US\$4,919.75 (four thousand nine hundred and nineteen United States dollars and seventy-five cents), owing to the salary of a lawyer from November 2017 to March 2018.¹⁵⁴ In addition, it is reasonable to presume that the representatives have incurred expenses from the moment the petition was lodged before the Commission, and the Court therefore finds it pertinent to reimburse reasonable expenses related to the litigation, which it establishes, in equity, at the sum of US\$11,000.00 (eleven thousand United States dollars) for the *Centro para la Acción Legal en Derechos Humanos*. This sum must be delivered directly to that organization. At the stage of monitoring compliance with the judgment, the Court may establish that the State reimburse the victims or their representatives any reasonable expenses they incur at that procedural stage.¹⁵⁵

G. Method of complying with the payments ordered

116. The State shall pay the compensation for pecuniary and non-pecuniary damage established in this judgment directly to the persons indicated herein, within one year of notification of this judgment.

117. Should either of the beneficiaries be deceased or die before they receive the respective amount, this shall be delivered directly to their heirs pursuant to the applicable domestic law.

118. The State shall comply with its monetary obligations by payment in United States dollars or the equivalent in national currency, using the exchange rate in force on the New York Stock Exchange (United States of America), the day before the payment to make the respective calculation.

119. If, for reasons that can be attributed to the beneficiaries of the compensation or their heirs, it were not possible to pay the sums established within the indicated timeframe, the State shall deposit the said amounts in their favor in a deposit account or certificate in a solvent Guatemalan financial institution in United States dollars and in the most favorable financial conditions permitted by banking law and practice. If the corresponding compensation is not claimed within ten years, the amounts shall be returned to the State with the interest accrued.

120. The sums allocated in this judgment as compensation for pecuniary and non-pecuniary damage shall be delivered to the persons indicated in full, as established in this judgment, without any deductions derived from possible charges or taxes.

¹⁵³ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 82, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of October 10, 2019. Series C No. 384, para. 251.

¹⁵⁴ The vouchers provided by the representatives add up to 37,885.2 Guatemalan quetzals Cf. Vouchers for salary paid to the CALDH legal adviser (evidence file, folios 428 to 430).

¹⁵⁵ Cf. *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs*. Judgment of September 1, 2010. Series C No. 217, para. 29, and *Case of Ruiz Fuentes et al. v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of October 10, 2019. Series C No. 384, para. 252.

**IX
OPERATIVE PARAGRAPHS**

121. Therefore,

THE COURT

DECLARES,

Unanimously, that:

1. It rejects the preliminary objection filed by the State concerning the failure to exhaust domestic remedies, pursuant to paragraphs 16 and 17 of this judgment.
2. The State is responsible for the violation of the rights to judicial guarantees and to judicial protection recognized in Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Alexander Yovany Gómez Virula, Antonio Gómez Areano and Paula Virula Dionicio, pursuant to paragraphs 64 to 91 of this judgment.
3. The State is not responsible for the violation of Articles 4, 5 and 7 of the Convention, in relation to Article 1(1) of this instrument, pursuant to paragraphs 55 to 58 of this judgment.
4. The State is not responsible for the violation of Article 16 of the Convention, in relation to Article 1(1) of this instrument, pursuant to paragraph 60 of this judgment.
5. The State is not responsible for the violation of Article 5 of the Convention, in relation to Article 1(1) of this instrument, pursuant to paragraph 93 of this judgment.

AND ESTABLISHES:

Unanimously, that:

6. This judgment constitutes, *per se*, a form of reparation.
7. The State shall continue all the necessary investigations to determine, prosecute and, as applicable, punish all those responsible for the death of Alexander Yovany Gómez Virula, pursuant to paragraph 100 of this judgment.
8. The State shall investigate the events that occurred, even if the criminal action is subject to the statute of limitations, in order to satisfy the right to the truth of the victims and of society, pursuant to paragraph 101 of this judgment.
9. The State shall make the publications indicated in paragraph 103 of this judgment.
10. The State shall pay, within one year of notification of this judgment, the amounts established in paragraphs 110, 112 and 115 herein as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses, pursuant to paragraphs 116 to 120 of this judgment.
11. The State, within one year of notification of this judgment, shall provide the Court with a report on the measures adopted to comply with its provisions, without prejudice to the provisions of paragraph 103 of the judgment.

12. The Court will monitor full compliance with this judgment in exercise of its powers and in fulfillment of its duties under the American Convention on Human Rights, and will consider the case closed when the State has complied fully with all its provisions.

DONE, at San José, Costa Rica, on November 21, 2019, in the Spanish language.

Judge Eduardo Vio Grossi informed the Court of his concurring opinion which accompanies this judgment.

IACtHR. *Case of Gómez Virula et al. v. Guatemala. Preliminary objection, merits, reparations and costs.* Judgment of November 19, 2019.

Eduardo Ferrer Mac-Gregor Poisot
President

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Elizabeth Odio Benito

Eugenio Raúl Zaffaroni

L. Patricio Pazmiño Freire

Pablo Saavedra Alessandri
Secretary

So ordered,

Eduardo Ferrer Mac-Gregor Poisot
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE EDUARDO VIO GROSSI,

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF GÓMEZ VIRULA ET AL. V. GUATEMALA

JUDGMENT OF NOVEMBER 21, 2019

(Preliminary objection, merits, reparations and costs)

I. INTRODUCTION

1. This concurring opinion to the judgment in reference¹ is issued merely to explain the reason why I voted in favor of its first operative paragraph² which relates to the objection filed by the Republic of Guatemala³ concerning the requirement of prior exhaustion of domestic remedies established in the American Convention on Human Rights.⁴

2. For a better understanding of this opinion, it is necessary to reiterate and even expand what I have indicated in other separate opinions⁵ in relation to compliance with this requirement addressing, successively, some preliminary and general considerations concerning the reasons that support my position, the relevant articles of the Convention, the

¹ Hereinafter, the judgment.

² "It rejects the preliminary objection filed by the State concerning the failure to exhaust domestic remedies, pursuant to paragraphs **iError! No se encuentra el origen de la referencia.** and **iError! No se encuentra el origen de la referencia.** of this judgment.

³ Hereinafter, the State.

⁴ Hereinafter, the Convention.

⁵ Dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru. Preliminary objections, merits, reparations and costs*, Judgment of November 21, 2019; Dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Díaz Loreto et al. v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of November 19, 2019; Concurring opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of Terrones Silva et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of September 26, 2018; Separate opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights, *Case of Amrhein et al. v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of April 25, 2018, Series C No 364; Concurring opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights. *Case of Yarce et al. v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of November 22, 2016. Series C No. 325; Concurring opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights. *Case of Herrera Espinoza et al. v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2016. Series C No. 316; Concurring opinion of Judge Eduardo Vio Grossi. Inter-American Court of Human Rights, *Case of Velásquez Paiz et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of November 19, 2015. Series C No. 307; Dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights. *Case of the Peasant Community of Santa Bárbara v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of September 1, 2015. Series C No. 299; Dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights. *Case of Wong Ho Wing v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2015. Series C No. 297; Dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights. *Case of Cruz Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of April 17, 2015. Series C No. 292; Dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights. *Case of Liakat Ali Alibux v. Suriname. Preliminary objections, merits, reparations and costs*. Judgment of January 30, 2014. Series C No. 276, and Dissenting opinion of Judge Eduardo Vio Grossi, Inter-American Court of Human Rights. *Case of Díaz Peña v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of June 26, 2012. Series C No. 244.

regulatory provisions on this same matter and, lastly, the consequences of adopting an opinion that differs from the one described in this document.

II. PRELIMINARY AND GENERAL CONSIDERATIONS

3. The preliminary and general considerations concerning this case related to the function of the Inter-American Court of Human Rights⁶ and the role of the separate opinion.

A. The function of the Court

4. This opinion is based on the fact that the function of the Court⁷ is to impart justice in the area of human rights pursuant to law and, more specifically, pursuant to the Convention and, consequently, pursuant to both international human rights law of which it forms part and public international law⁸ of which, in turn, it forms part.

5. Therefore, strictly speaking, the Court does not have competence to promote and defend human rights because the Convention expressly assigns that function to the Commission,⁹ which could be classified as activist, understanding this word in the most positive sense possible.¹⁰ In contrast, the Court's function is to decide human rights disputes that arise between the States Parties to the Convention that are able to appear before the Court if necessary,¹¹ or in the case of an individual or a group of individuals or a non-

⁶ Hereinafter, the IACtHR.

⁷ Art. 62(3): "The jurisdiction of the Court shall comprise 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 such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

⁸ Art. 31(3)(c) of the Vienna Convention on the Law of Treaties: General rule of interpretation.... There shall be taken into account, together with the context:... (c) any relevant rules of international law applicable in the relations between the parties."

⁹ Art. 41 of the Convention: "The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers

- a. to develop an awareness of human rights among the peoples of America;
- b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
- c. to prepare such studies or reports as it considers advisable in the performance of its duties;
- d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
- e. to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
- f. to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and
- g. to submit an annual report to the General Assembly of the Organization of American States."

¹⁰ Diccionario de la Lengua Española, Real Academia Española, 2019: "*Activismo*: 1. Tendencia a comportarse de un modo extremadamente dinámico. 2. Ejercicio del proselitismo y acción social de carácter público. *Activista*: 1. Perteneciente o relativo al activismo. 2. Seguidor del activismo."

¹¹ Art. 45(1): "Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention."

governmental entity,¹² giving rise to the case in question,¹³ the other States Parties are represented by the Commission,¹⁴ and they should even be aware of the cases in which the respondent State Party has failed to comply with the rulings made in the proceedings filed against it.¹⁵

6. The function of the Court is, let me repeat, to rule interpreting and applying the Convention; in other words, determining the meaning and scope of its provisions – that, since to some extent they may be perceived as obscure or uncertain, may be subject to several possible applications – and endeavoring to ensure that this results in the effective protection of human rights and, if these have been violated, their prompt restoration.¹⁶

7. Evidently, to fulfill this mission, the Court does not have the authority to adjudicate outside or disregarding the law expressed, as far as the Court is concerned, in the Convention. In this regard, it is necessary to respect the principle of public law that authorities may only act within the law, so that, whatever is not regulated, is governed by the internal, domestic and exclusive jurisdiction of the State in question.¹⁷

8. Also, and for the same reason, the Court must, on the one hand, proceed only in accordance with what the Convention effectively establishes and not what it would like it to establish and, on the other hand, avoid modifying it, a power assigned expressly to its States Parties.¹⁸ Consequently, if the Court does not agree with what a provision of the Convention

¹² Art. 55: 1. If a judge is a national of any of the States Parties to a case submitted to the Court, he shall retain his right to hear that case.

2. If one of the judges called upon to hear a case should be a national of one of the States Parties to the case, any other State Party in the case may appoint a person of its choice to serve on the Court as an ad hoc judge.

3. If among the judges called upon to hear a case none is a national of any of the States Parties to the case, each of the latter may appoint an ad hoc judge.

4. An ad hoc judge shall possess the qualifications indicated in Article 52.

5. If several States Parties to the Convention should have the same interest in a case, they shall be considered as a single party for purposes of the above provisions. In case of doubt, the Court shall decide.

¹³ Art. 44: "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."

¹⁴ Art. 61(1): "Only the States Parties and the Commission shall have the right to submit a case to the Court." Art. 35: "The Commission shall represent all the member countries of the Organization of American States." Art. 57: "The Commission shall appear in all cases before the Court."

¹⁵ Art. 65: "To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."

¹⁶ Art. 63(1): "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

¹⁷ "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain." Permanent Court of International Justice, Advisory Opinion on Nationality Decrees issued in Tunisia and Morocco (French zone), Series B No. 4, p.24.

Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, "Art.1: At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."

¹⁸ Art. 31: "Recognition of Other Rights. Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention."

establishes, it should not exercise the international normative function that falls within the competence of the States, but rather advise them of the need to amend the provision in question. Thus, the new provision that eventually arises from the exercise of the said function by the States would clearly enjoy a more solid and widespread democratic legitimacy.

9. In this regard, it should also be indicated that this opinion responds to the circumstance that the Court, as a judicial organ, enjoys extensive autonomy in its work, since there is no higher entity that is able to control its actions,¹⁹ a characteristic that imposes on it the imperative of being extremely rigorous in the exercise of its jurisdiction in order not to denature this and, consequently, so as not to weaken the inter-American system for the protection of human rights. This is why the thesis argued in this text seeks, among other purposes, the broadest possible recognition of the Court by all those who appear before it, namely, the alleged victims of human rights violations,²⁰ the Commission²¹ and the States Parties to the Convention that have accepted its jurisdiction,²² thereby reinforcing the Court's status as a judicial organ and, consequently, the most significant entity of a continental scope that has been established to safeguard human rights. Moreover, for this reason it is necessary to persist in consolidating and improving it, without exposing it to risks that could negatively affect this effort.

10. All the above, also taking into consideration that the Court, on the one hand, should execute its functions abiding by the principles of impartiality, independence, objectivity, political independence, equanimity, full equality before the law and justice, non-discrimination and absence of prejudices, characteristics inherent in all jurisdictional organs and, on the other hand, that the ultimate purpose of its task is to duly and opportunely safeguard the human rights of the presumed victims of violations of those rights. In other words, it should proceed bearing in mind that its functions are similar to those exercised, for example, by juvenile courts and labor courts, which are based, the former on the best interests of the child, and the latter on the protection of the worker, all within the framework of the administration of justice.

11. Based on the foregoing, and because the Convention is a treaty between States²³ and therefore establishes their obligations – but with regard to the persons subject to their respective jurisdictions²⁴ – it can be concluded that the Court's function is to fathom the

Art. 76(1): "Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General."

Art. 77(1): "In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection."

¹⁹ Art. 67: "The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment."

²⁰ *Supra*, footnote 13.

Art. 25(1) of the Court's Rules of Procedure: "Participation of the Alleged Victims or their Representatives. Once notice of the brief submitting a case before the Court has been served, in accordance with Article 39 of the Rules of Procedure, the alleged victims or their representatives may submit their brief containing pleadings, motions, and evidence autonomously and shall continue to act autonomously throughout the proceedings."

²¹ *Supra*, footnote 14

²² *Supra*, footnote 7.

²³ Art. 2(1)(a) of the Vienna Convention on the Law of Treaties: "Use of Terms. 1. For the purposes of the present Convention: (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

²⁴ Art. 1 of the Convention: "1. The 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

intentions that they incorporated into the said treaty when signing it and, eventually, how those intentions should be understood *vis-à-vis* new situations.

12. This is why, in order to interpret the Convention, the Court has not only its text, but also other sources of public international law; that is, international custom, the general principles of law, and the unilateral legal acts of the States Parties and, if the States that appear before it have agreed, equity, and also, but as subsidiary means, case law, doctrine, and the legally binding resolutions of international organizations.²⁵

13. That said, the principal rule for the interpretation of treaties contained in the Vienna Convention on the Law of Treaties²⁶ is that que "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."²⁷

14. This provision includes four means of interpretation. One of the methods is based on good faith which signifies that what was agreed by the States Parties to the treaty in question should be understood in accordance with what they really intended to agree on, so that this is applied faithfully and has practical effects. The second is the textual or literal method, which relates to the analysis of the text of the treaty, the vocabulary used and the ordinary meaning of its terms. Another is the subjective method, which seeks to establish the intention of the States Parties to the treaty by also analyzing the *travaux préparatoires* and their impact on the treaty. And the fourth is the functional or teleological method that seeks to determine the object and purpose of the treaty. These four methods should be applied simultaneously and harmoniously in the interpretation of a treaty, without giving preference to any of them.²⁸

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. 2. For the purposes of this Convention, "person" means every human being."

²⁵ Art. 38 of the Statute of the International Court of Justice: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo* if the parties agree thereto." This is the only international treaty-based provision that refers to the sources of public international law. It does not include unilateral legal acts or the legally binding resolutions of international organizations.

²⁶ Hereinafter, the Vienna Convention.

²⁷ Art. 31 of the Vienna Convention, also indicates the following:

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended."

Art. 32: "Supplementary means of interpretation. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

²⁸ This is what differentiates the interpretation of a treaty from the interpretation of the law in which, in some countries, such as Chile – according to article 19 of its Civil Code – the literal interpretation prevails: "When the meaning of the law is clear, its literal meaning should not be disregarded, on the pretext of consulting its spirit.

15. Ultimately, what underlines everything indicated above is, on the one hand, that the inter-American jurisdiction established in the Convention is the peaceful way to resolve the disputes that arise among its States Parties in relation to respect for the human rights of the persons subject to their respective jurisdictions and, on the other, that the Court, when proceeding in conformity with the provisions of the Convention, provides its rulings with the necessary corresponding legal certainty. And, all this considering that the law is the means to achieve justice and justice the means to achieve peace.

B. The role of the individual opinion

16. This partially dissenting opinion is issued with full and absolute respect for the decisions taken by the Court in this case that, consequently, must be complied with. This text cannot, therefore, be interpreted in any way or under any circumstance as detracting from the legitimacy of the decision adopted in this case.

17. Based on the foregoing consideration, I must, therefore, indicate expressly that the thesis set out in this opinion does not seek, in any way, to weaken or restrict the exercise of human rights, but rather precisely the contrary. Indeed, what I have indicated here responds to a profound certainty that effective respect for human rights is achieved if the States Parties to the Convention are required to comply with what they truly, freely and sovereignly, undertook to fulfill.²⁹ In this regard, legal certainty plays a fundamental role and, consequently, cannot be understood to limit or restrict the development of human rights, but rather as an instrument that offers the best possible guarantee for their effective respect or, if they have been violated, for their earliest possible restoration by the corresponding State.³⁰ The purpose, therefore, is not only to deliver judgments that are solidly substantiated and that develop human rights, but above all, when those rights have been violated, to ensure that the State concerned re-establishes them as soon as possible.

18. Moreover, the issue of separate opinions – which may at times lead to misunderstandings and even differences or disapproval – not only constitutes the exercise of a right but, fundamentally, compliance with a duty, which is to contribute to a better understanding of the function assigned to the Court.³¹ In addition, separate opinions may

However, in order to interpret an obscure expression of the law, it is possible to have recourse to its intention or spirit, clearly expressed in the law, or in the authoritative history of its elaboration.”

²⁹ *Supra*, footnotes 24.

Art. 33: "The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:

- a) the Inter-American Commission on Human Rights, referred to as "The Commission;" and
- b) the Inter-American Court of Human Rights, referred to as "The Court."

³⁰ *Supra*, footnote 16.

³¹ Art. 66(2): "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment."

Art. 24(3) of the Statute of the Court: "The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate."

Art. 32(1)(a) of the Rules of Procedure: The Court shall make public: its judgments, orders, opinions, and other decisions, including separate opinions, dissenting or concurring, whenever they fulfill the requirements set forth in Article 65(2) of these Rules."

Art. 65(2) of the Court's Rules of Procedure: "Any judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the President so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment."

even relate to the exercise of the right to freedom of thought and expression recognized in the Convention.³²

19. Furthermore, based on the foregoing, the mechanism of the separate opinion is also established in the international norms of the European Court of Human Rights,³³ the African Court of Human and Peoples' Rights,³⁴ the International Court of Justice,³⁵ the International Criminal Court³⁶ and the International Tribunal for the Law of the Sea.³⁷

20. Consequently, this opinion is issued with the hope that, in future, its contents will be incorporated either in case law or in a new provision of international law. Regarding the former, since the Court's ruling is only binding for the State Party to the case in which it is delivered,³⁸ the Court – as a subsidiary source of international law that must, consequently, determine the "rules of law" established by an autonomous source of international law; in other words, a treaty, custom, general principle of law or unilateral legal act³⁹ – may in future change when adjudicating another case. And, regarding the latter, since the States have

³² Art. 13: "Freedom of Thought and Expression. 1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

a) respect for the rights or reputations of others; or

b) the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."

³³ Art.74(2) of the Rules of Court: "Any judge who has taken part in the consideration of the case by a Chamber or by the Grand Chamber shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent."

³⁴ Article 44 of its Statute: « If the judgment does not represent in whole or in part the unanimous opinion of the Judges, any Judge shall be entitled to deliver a separate or dissenting opinion."

³⁵ Art. 57 of its Statute: "if the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

³⁶ Art 74(5) of the Rome Statute of the International Criminal Court: "The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court."

³⁷ Art. 30(3) of its Statute: "If the judgment does not represent in whole or in part the unanimous opinion of the members of the Tribunal, any member shall be entitled to deliver a separate opinion."

³⁸ *Infra*, footnote 41.

Art.68(1): "The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties."

Art. 46(1) of the European Convention on Human Rights: " The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."

Art. 46(1) and (3) of the Statute of the African Court of Justice and Human Rights: "Binding Force and Execution of Judgments. 1. The decision of the Court shall be binding on the parties. ... 3. The parties shall comply with the judgment made by the Court in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution."

Art. 59 of the Statute of the International Court of Justice: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

³⁹ *Supra*, footnote 25.

competence for the international normative function and, in the case of the Convention, its States Parties through an amendment to the Convention.⁴⁰

II. THE ARTICLES OF THE CONVENTION

A. Articles on the exhaustion of domestic remedies

21. The rule of the prior exhaustion of domestic remedies is contained in Article 46(1)(a) of the Convention, which indicates that:

1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law.”

22. Meanwhile, Article 47(a) of the Convention adds that:

“The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:

a. any of the requirements indicated in Article 46 has not been met.”

B. Grounds

22. The grounds for the rule of prior exhaustion of domestic remedies in the inter-American human rights system is to be found in the third paragraph of the Preamble to the Convention which indicates that:

“Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States.”

C. The complementary or reinforcing nature of the inter-American protection

23. Having set out the grounds and the applicable norms, it is necessary to insist on the said rule of the prior exhaustion of domestic remedies and, consequently, that, in this case, “the international protection” of the inter-American human rights system is contemplated in the Convention as “reinforcing or complementing the protection provided by the domestic law of the American States” and, logically, this implies that the former does not replace the latter, among other reasons because, in relation to compliance with what the inter-American system ordains – at least in disputes involving the Commission and the petitioners on the one hand, and the State concerned on the other – this must always be complied with or executed by the latter.⁴¹

24. This means that the inter-American jurisdiction does not substitute or replace the domestic jurisdiction, it merely complements or reinforces the latter; that is, it contributes to or helps the latter re-establish, as soon as possible, the exercise of the human rights that are alleged to have been violated. In this regard, it should not be forgotten that it is the State

⁴⁰ *Supra*, footnote 18.

⁴¹ Art. 68 of the Convention: “1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.

2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the State.”

that is obligated by the Convention⁴² and, therefore, it not only has the international obligation to respect and ensure respect for the rights recognized therein,⁴³ but also, frequently, it can only do so through its courts of justice.

25. This is why, as the Court has indicated:

"The rule of the prior exhaustion of domestic remedies has been conceived in the interest of the State because it seeks to exempt it from responding before an international organ for acts attributed to it, before it has had the opportunity to rectify them using its own means."⁴⁴

26. Ultimately, this rule allows the State to comply with its human rights obligations without waiting for the inter-American system to order it to do so, following litigation. Hence, the said rule is intended to accord the State the possibility of ordering the effective respect for and exercise of the human rights that have been violated as soon as possible, which is the object and purpose of the Convention and, consequently, makes a subsequent intervention by the inter-American jurisdiction unnecessary.

27. The rule of the prior exhaustion of domestic remedies signifies that, in those situations in which it has been already been alleged in the relevant sphere of the domestic jurisdiction that the State has not complied with its commitment to respect and ensure the free and full exercise of human rights, it is possible to require the intervention of the international jurisdictional instance so that, if appropriate, the State is ordered to comply with the international obligations it has violated, provide a guarantee that it will not violate them again, and redress all the consequences of such violations.⁴⁵

28. From this perspective, it can be argued that although the practical effect of the said rule is that the State re-establish respect for the human rights violated as soon as possible – the object and purpose of the Convention – it is also true that this rule has been established (and perhaps, above all) to benefit the alleged victim of the human rights violation.

D. The holder of the obligation

29. It is also necessary to underline that the Convention conceives the said rule as an obligation that must be met prior to the "petition or communication lodged in accordance with Articles 44⁴⁶ or 45"⁴⁷ and this means that the responsibility for complying with this rule

⁴² Art. 1(1) of the Convention: The 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.

Art. 33 of the Convention: "The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:

a) the Inter-American Commission on Human Rights, referred to as "The Commission;" and
b) the Inter-American Court of Human Rights, referred to as "The Court."

⁴³ *Supra*, footnote 24.

⁴⁴ Inter-American Court of Human Rights. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, para. 61.

⁴⁵ *Supra*, footnote 16.

⁴⁶ *Supra*, footnote 13.

⁴⁷ "1. Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention. 2. Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration. 3. A declaration concerning

corresponds to the person lodging the petition before the Commission; that is, “[a]ny person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization,” that may subsequently intervene in the corresponding proceedings.⁴⁸

30. Indeed, it can be argued, based on the said Article 46, that, for the pertinent petition or communication to be admitted, the remedies of the domestic jurisdiction must have previously been exhausted and, evidently, it is the alleged victim, his or her representative, or the petitioner who must exhaust those remedies. It is not logical or coherent to make the admissibility of a petition or communication based on a violation of human rights depend on the State against which it is addressed having exhausted the domestic remedies against its own actions – consisting in having violated human rights – because under this absurd hypothesis, it would never be possible to have recourse to the international instance.

31. The foregoing appears evident and, if it is mentioned, it is to underscore – without leaving any room for doubt – that the reference that the Court’s case law has made to this rule being “conceived in the interests of the State” does not mean that the State is the holder of the obligation to prove that it has been complied with. Therefore, the one obliged to do so can only be the presumed victim, his or her representative, or the petitioner and it is compliance with that obligation that allows the State to answer the petition lodged before the Commission and, possibly, to present the objection of failure to exhaust domestic remedies.

E. Correct moment to lodge the petition

32. It should also be repeated that the rule of the prior exhaustion of domestic remedies logically constitutes a requirement that should be met before the petition is lodged before the Commission and that the latter record that such remedies have been exhausted or that it was impossible to do so.

33. Indeed, it should be recalled that the Articles 46(1)(a)⁴⁹ and 47(b)⁵⁰ of the Convention transcribed above refer to the “petition or communication lodged”; that is an instantaneous act that occurs at a determined moment and that does not extend over time. The same can be said of Article 48(1)(a) of the Convention, which establishes that:

“When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows: (a) If it considers the petition or communication admissible, it shall request information from the government of the State indicated as being responsible for the alleged violations and shall furnish that government a transcript of the pertinent portions of the petition or communication. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case.”

recognition of competence may be made to be valid for an indefinite time, for a specified period, or for a specific case. 4. Declarations shall be deposited with the General Secretariat of the Organization of American States, which shall transmit copies thereof to the member states of that Organization

⁴⁸ The Court’s 1996 Rules of Procedure indicated that: “[a]t the reparations stage, the representatives of the victims or of their next of kin may independently submit their own arguments and evidence” (Art. 23). The Rules of Procedure adopted in 2000, 2003 and 2009 established that: “[w]hen the application has been admitted, the alleged victims, their next of kin or their duly accredited representatives may submit their requests, arguments and evidence, autonomously, throughout the proceeding” (Art. 23(1)). The current Rules of Procedure, adopted by the Court at its eighty-fifth regular session held from November 16 to 28, 2009, establish that: “[o]nce notice of the brief submitting a case before the Court has been served, in accordance with Article 39 of the Rules of Procedure, the alleged victims or their representatives may submit their brief containing pleadings, motions, and evidence autonomously and shall continue to act autonomously throughout the proceedings” (Art. 25(1)).

⁴⁹ *Supra*, para. 21.

⁵⁰ *Supra*, para. 22.

34. Thus, the Convention indicates that the "petition or communication lodged," the "pertinent portions" of which are forwarded to the State concerned, which means that it is the petition that should indicate compliance with the requirement of the prior exhaustion of domestic remedies or the impossibility of this due to any of the circumstances established in Article 46(2), also transcribed above, so that the State may respond and potentially file the corresponding objection, which means that it is when the petition is lodged that this should already have occurred.

35. This interpretation is supported by Article 46(1)(b) of the Convention, which indicates that the petition should have been:

"lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment."

36. Evidently, it should be understood that the said final judgment is the one delivered on the final remedy that was filed, without there being any other that could be filed. In other words, the time frame indicated to lodge the petition is calculated from the moment of notification of the final judgment of the domestic authorities or courts on the remedies filed before them, which are, consequently, those that may have given rise to the international responsibility of the State, which obviously means that, when the petition is "lodged," they should have been exhausted.

37. The foregoing is reinforced by the content of the said Article 46(1)(a) indicating the requirement that "the remedies under domestic law have been pursued and exhausted"; in other words it alludes to something that has already happened before the lodging of the corresponding petition.

F. Peremptory rule

38. In accordance with the foregoing, it should also be recalled that Article 47(a) stipulates that:

"The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: (a) any of the requirements indicated in Article 46 has not been met."

39. In other words, this provision is peremptory. The Commission must declare inadmissible "any petition or communication submitted" regarding which the domestic remedies have not been exhausted or that does not comply with one of the situations established in Article 46(2).

40. Evidently, the Commission must comply with the Convention and cannot, for example, declare a petition or communication admissible even though, when it was "lodged," it had not met the requirement of the prior exhaustion of domestic remedies but rather had met this requirement at the time that it was "admitted," because if it does so, it would render it without any real or practical effects, beyond initiating a procedure, but not the litigation.

41. Indeed, if it is not required that domestic remedies have been exhausted before the petition is lodged, or that the petition be lodged within six months of notification of the final judgment, it would not be possible to require "that the subject of the petition or communication is not pending in another international proceeding for settlement," or "that the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition," requirements that are also established

in Article 46 of the Convention, because all this could be remedied subsequently and, in any case, before the declaration of admissibility, and the provisions of this article evidently do not allow this.

G. Presentation and admissibility of the petition

42. Lastly, it should be noted that the said articles of the Convention do not indicate that the said requirements must be met when the Commission rules on the admissibility of the petition or communication. Rather, it can be argued that they make a distinction between two moments: one, at which the petition is "lodged" and another at which it is "admitted." This is also supported by the provisions of Article 48(1)(a) and in paragraphs (b) and (c) of the same article.⁵¹

43. These provisions establish that, once the petition or communication has been "lodged" before the Commission, the admissibility procedure begins during which it is necessary to decide whether or not, when it was "lodged," it complied with the requirements stipulated in the said Article 46. If the decision is affirmative, the said petition should be declared "admissible," and if the decision is negative, it should be declared "inadmissible." It should be underscored that the said article of the Convention does not establish that it is sufficient that, when the Commission rules on its admissibility, the petition has met those requirements. It merely indicates that, for the "petition lodged" to be admitted, the remedies of the domestic jurisdiction should have been pursued and exhausted. Consequently, it is with regard to the petition or communication "lodged" that the Commission should rule on whether, at that instant and not later, it met the requirement of the prior exhaustion of the domestic remedies or that it has been argued that this was not possible.

H. Supplementary means of interpretation

44. Regarding the supplementary means of interpretation, it should be indicated that, based on the background material for the Convention, there is no record of the legal doctrine that inspired the provisions of its Article 46(1)(a), in particular the phrase "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."

⁵¹ "1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:

a. If it considers the petition or communication admissible, it shall request information from the government of the state indicated as being responsible for the alleged violations and shall furnish that government a transcript of the pertinent portions of the petition or communication. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case.

b. After the information has been received, or after the period established has elapsed and the information has not been received, the Commission shall ascertain whether the grounds for the petition or communication still exist. If they do not, the Commission shall order the record to be closed.

c. The Commission may also declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received.

d. If the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or communication in order to verify the facts. If necessary and advisable, the Commission shall carry out an investigation, for the effective conduct of which it shall request, and the states concerned shall furnish to it, all necessary facilities.

e. The Commission may request the states concerned to furnish any pertinent information and, if so requested, shall hear oral statements or receive written statements from the parties concerned.

f. The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.

2. However, in serious and urgent cases, only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed.

45. Therefore, it can be presumed that this was done – that is, this phrase was included without the need to justify the reference to the said principles – because it was already solidly incorporated in or recognized by public international law when the International Court of Justice decided the third preliminary objection filed by the United States of America in the *Case of Interhandel*, 1959. Thus, that Court indicated that:

“The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law.”⁵²

46. Hence, since it was a principle of international law, founded on extremely well-established customary public international law, it was probably not found necessary to justify its incorporation into the Convention. In this way, the Convention not only consolidated it even more by establishing it in its text, but also did not limit it to the “national” of the respondent State. Indeed, it made it applicable “to all persons subject to [the] jurisdiction”⁵³ of its States Parties, whether or not they were nationals of any of them.

47. That said, owing to the position taken in this opinion, the interesting point is that, according to the said decision of the International Court of Justice, which should be understood as the precedent for Article 46(1)(c) of the Convention, the exhaustion of domestic remedies must be accomplished prior to the claim made, which confirms the interpretation set out in this document.

I. Exceptions to the rule of prior exhaustion of domestic remedies

48. Article 46(2) stipulates:

The provisions of paragraphs 1(a) and 1(b) of this article shall not be applicable when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

49. Accordingly, compliance with the rule of the prior exhaustion of domestic remedies admits the three exceptions established in the above article, all factual matters in light of international law that must be weighed by the Commission or the Court, as and when appropriate.

⁵² *Interhandel Case (Switzerland v. United States of America)*, Judgment of March 21, 1959 : “The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system. *A fortiori* the rule must be observed when domestic proceedings are pending, as in the case of *Interhandel*, and when the two actions, that of the Swiss Company in the United States courts and that of the Swiss Government in this Court, in its principal Submission, are designed to obtain the same result: the restitution of the assets of *Interhandel* vested in the United States.”

⁵³ Art. 1 of the Convention: “1. The 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. 2. For the purposes of this Convention, “person” means every human being.”

50. However, regarding the moment to invoke them, it is also evident that this is in the petition, so that the processing of the said exceptions to the rule of the prior exhaustion of domestic remedies follows the course of the petition.

III. THE REGULATIONS

51. The foregoing also includes the Rules of Procedure of the Commission itself when regulating the admissibility procedure of the petition lodged before the Commission and, therefore, reflects its interpretation of Article 46 of the Convention.⁵⁴ This procedure differentiates between the lodging of the petition and its initial review, the forwarding of the petition to the State, the State's response, the observations of the parties and, lastly, the decision on its admissibility.

A. Initial review by the Commission.

52. Therefore, the content of Article 26 of these Rules of Procedure must be considered and they establish:

"Initial Review. 1. The Executive Secretariat of the Commission shall be responsible for the study and initial processing of petitions lodged before the Commission that fulfill all the requirements set forth in the Statute and in Article 28 of these Rules of Procedure.
2. If a petition or communication does not meet the requirements set for in these Rules of Procedure, the Executive Secretariat may request the petitioner or his or her representative to fulfill them.
3. If the Executive Secretariat has any doubt as to whether the requirements referred to have been met, it shall consult the Commission."⁵⁵

53. Meanwhile, Article 27 of this text establishes that:

"Condition for Considering the Petition. The Commission shall consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments, with respect to the Member States of the OAS, only when the petitions fulfill the requirements set forth in those instruments, in the Statute, and in these Rules of Procedure."⁵⁶

54. Meanwhile, Article 28(8) of the said Rules of Procedure establishes that:

"Requirements for the Consideration of Petitions. Petitions addressed to the Commission shall contain the following information: ... any steps taken to exhaust domestic remedies, or the impossibility of doing so as provided in Article 31 of these Rules of Procedure."⁵⁷

55. Attention should be drawn to the fact that Article 29(1) and (3) of this instrument reiterates the content of Article 26(1) and (3):

"Initial Processing. 1. The Commission, acting initially through the Executive Secretariat, shall receive and carry out the initial processing of the petitions presented. Each petition shall be

⁵⁴ The Rules of Procedure in force at this time were adopted on March 18, 2013, and entered into force on August 1 that year. Since the 2006 Rules of Procedure were in force when the petition was lodged, the equivalent articles are indicated in footnotes to the corresponding articles of the Rules of Procedure currently in force.

⁵⁵ Art. 26.

⁵⁶ Art. 27.

⁵⁷ Art. 28(h).

registered, the date of receipt shall be recorded on the petition itself and an acknowledgement of receipt shall be sent to the petitioner.

...

3. If the petition does not meet the requirements of these Rules of Procedure, the Commission may request that the petitioner or his or her representative complete them in accordance with Article 26.2 of these Rules.⁵⁸

56. This signifies that the information required to “process” or “consider” the pertinent petition must refer to the measures taken to exhaust the domestic remedies or the impossibility to do so. In other words, the petition must describe what has been done to exhaust the remedies in question or that it was impossible to exhaust them and, if it does not mention anything in this regard, the Commission should require the petitioner to do this, in keeping with the regulatory warning that, to the contrary, the petition will not be considered.

57. Accordingly, the Commission, acting through its Executive Secretariat, must undertake an initial control of conventionality of the petition; comparing it against the provisions of the Convention and the said Rules of Procedure. In other words, it must determine whether it meets the corresponding requirements at the time it is “lodged” and if it verifies that the petition does not meet them, it must require it to do so. To the contrary, the logic and need for the “initial processing” of the petition are incomprehensible as is the reason why the petitioner should be asked to complete the requirements indicating the measures taken to exhaust the domestic remedies or the impossibility of doing so.

58. Thus, it is the Commission’s Rules of Procedure which establish that it is the petitions submitted to the Commission that must include the information on the measures taken – evidently before their submission – to exhaust the remedies of the domestic jurisdiction or the impossibility of doing this, which must be duly substantiated. This regulatory requirement, which reflects the interpretation that the Commission itself makes of the articles of the Convention, is of the greatest relevance and it is compliance with this that permits litigation to be established subsequently on the specific case.

B. The forwarding of the petition to the State concerned

59. Also, regarding the forwarding of the petition to the State concerned, the Commission’s Rules of Procedure confirm the said interpretation; that is, that the exhaustion of domestic remedies is a requirement that must be met before the petition is lodged before the Commission and must be reflected in the petition submitted to the Commission.

60. Indeed, Article 30(1) and (2) of the said Rules of Procedure establishes:

“Admissibility procedure. 1. The Commission, through its Executive Secretariat, shall process the petitions that meet the requirements set forth in Article 28 of these Rules of Procedure.

2. For this purpose, it shall forward the relevant parts of the petition to the State in question. The request for information made to the State shall not constitute a prejudgment with regard to any decision the Commission may adopt on the admissibility of the petition.⁵⁹”

63. In this regard, it should be recalled that what is forwarded to the State in question, as decided by the Commission, should be the relevant part of the petition itself and this, provided it meets with, among others, the requirement for information on the measures taken to

⁵⁸ Art. 29(1) and 3.

⁵⁹ Art. 30(1) and (2).

exhaust the remedies of the domestic jurisdiction or the impossibility of doing so. In other words, the forwarding of the petition is in order if it complies with the said requirement.

64. Consequently, this rule does not establish that this requirement must or may be met at a time following the submission of the petition. Also, it should be noted that the said forwarding should be of the petition as lodged and, therefore, it should include the reference to the said requirement. To the contrary, the State would be unable to file the respective objection.

C. The State's answer and the observations of the parties

65. That said, according to the Article 30(3), first phrase, and (5) of the said Rules of Procedure:

"3. The State shall submit its response within three months from the date the request is transmitted.

...

5. Prior to deciding upon the admissibility of the petition, the Commission may invite the parties to submit additional observations, either in writing or in a hearing, as provided for in Chapter VI of these Rules of Procedure."⁶⁰

66. Obviously, the State's response to the document forwarded and the additional observations of the parties in answer to the Commission's invitation, must refer to the pertinent petition, which – let me repeat – must meet all the established requirements, including that of providing information on the measures taken to exhaust the remedies of the domestic jurisdiction – prior to its submission. To this end, it should be underlined that this rule expressly mentions that "[p]rior to deciding upon the admissibility of the petition, the Commission may invite the parties to submit additional observations," and logically these may only refer to the contents of the petition "lodged."

67. This is why Article 31(3) of the Commission's Rules of Procedure stipulates that:

"When the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record."⁶¹

68. However, it should also be recalled that if, in a case that is not expressly considered in the Commission's Rules of Procedure, the petitioner should indicate in his petition that he has previously exhausted the domestic remedies – in other words, he has complied with the provisions of Article 46(1)(a) of the Convention – the State is able to file the objection that this has not occurred.

69. Consequently, it is apparent that the said response of the State must logically and necessarily be with regard to the petition "lodged" before the Commission, and that it is with regard to what has taken place at that time – and not subsequently – that the dispute or controversy is established as regards matters concerning the prior exhaustion of domestic remedies.

70. Thus, it is clear that compliance with the rule of the prior exhaustion of domestic remedies or the impossibility of complying with it, must be indicated in the petition because,

⁶⁰ Art. 30(3) and (5).

⁶¹ Art. 31(3).

otherwise, the State could not respond to this. In other words, only if the petition indicates that the said rule has been complied with or that it is impossible to do so, will the State be able to argue non-compliance and prove the availability, adequacy, suitability and effectiveness of the domestic remedies that have not been exhausted, all of which means – let me repeat – that this requirement must have been met previously or the impossibility of meeting it alleged, before lodging the petition the pertinent parts of which are forwarded to the State precisely for it to respond to them.

71. To the contrary, if the petition does not make any mention of the said requirement, the State need only indicate this situation; that is, that the petition does not meet the requirement. In this situation, imposing on the State the obligation to prove the existence of adequate, suitable and effective remedies that have not been exhausted means substituting the State for the petitioner as holder of the obligation established in the Convention and in the Commission's Rules of Procedure to previously exhaust the domestic remedies and to provide the "information on the measures taken to exhaust the remedies of the domestic jurisdiction or the impossibility of doing so" and imposing on it a burden due to a third party obligation.

72. It should also be repeated that, for the same reason, it is at the time that the petition is submitted that the domestic remedies should have been exhausted or that it is indicated that it is impossible to do so because, if it is argued that these remedies could be exhausted following the "submission" of the petition and, consequently, its notification to the State, this would affect the essential procedural equilibrium and leave the latter defenseless, because it would be unable to file the pertinent preliminary objection in due time and manner.

73. It is within this framework that the words of the Court "that an objection to the exercise of its jurisdiction based on the supposed failure to exhaust domestic remedies should be filed at the appropriate procedural moment; that is, during the admissibility procedure before the Commission"⁶² should be understood because, as described, this covers from the moment the petition is received and receives the initial processing by the Commission, through its Executive Secretariat, until the moment at which the Commission rules on its admissibility. However, this does not mean that it is only at this last moment that the said requirement should have been met, without regard to whether or not it had been met previously.

D. Decision on admissibility

74. Indeed, Article 31(1) of these Rules of Procedure, entitled "Exhaustion of Domestic Remedies," establishes that:

"In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law."⁶³

75. It should be noted that this article indicates that, in order to decide on the admissibility of a matter, the Commission must "verify" – in other words, confirm or validate⁶⁴ – whether the remedies of the domestic legal system have been pursued and exhausted which, clearly, should have occurred at least before adopting the corresponding decision. This rule does not

⁶² Para. 16.

⁶³ Art. 31(1).

⁶⁴ Diccionario de la Lengua Española, Real Academia Española, 2018 edition.

establish that this verification should be made in relation to remedies pursued and exhausted following the presentation of the petition.

76. Meanwhile, Article 32(1) of these Rules of Procedure, entitled "Statute of Limitations for Petitions," conforms to the above interpretation when indicating that:

"The Commission shall consider those petitions that are lodged within a period of six months following the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies."⁶⁵

77. In other words, this provision establishes the petitions whose admissibility will be considered by the Commission and, to this end, reiterates the provisions of Article 46(1)(b) of the Convention; that is, that the time frame for submitting them is calculated from the date of notification of the final judgment of the domestic authorities or courts on the remedies that have been filed before them, which are, consequently, those that could have given rise to the international responsibility of the State, and this obviously means that, when the petition is "lodged," they must have been exhausted.

78. That said, according to Article 36 of these Rules of Procedure, entitled "Decision on Admissibility":

"1. Once it has considered the positions of the parties, the Commission shall make a decision on the admissibility of the matter. The reports on admissibility and inadmissibility shall be public and the Commission shall include them in its Annual Report to the General Assembly of the OAS.

2. When an admissibility report is adopted, the petition shall be registered as a case and the proceedings on the merits shall be initiated. The adoption of an admissibility report does not constitute a prejudgment as to the merits of the matter.

3. In exceptional circumstances, and after having requested information from the parties in accordance with the provisions of Article 30 of these Rules of Procedure, the Commission may open a case but defer its treatment of admissibility until the debate and decision on the merits."⁶⁶

79. In this regard, it should be indicated that the said article does not establish that the remedies of the domestic jurisdiction necessarily should have been exhausted to be able to adopt the decision on admissibility because that decision may be not to admit the petition, precisely because it has not exhausted those remedies.

V. CONCLUSION

80. Based on all the foregoing, it may be concluded that, in order to lodge a petition before the Commission accusing a State Party to the Convention of violating any human right recognized therein, the petitioner must previously have exhausted the domestic remedies and then, in the petition, describe the measures taken to this end or the impossibility of exhausting such remedies. It is also my opinion that, it is with regard to this petition or the relevant parts thereof that the State in question should be notified so that, in its response, it can refute the petitioner's assertion of having previously exhausted the domestic remedies or the impossibility of doing so, filing the corresponding objection. And, evidently, if the petition does not mention compliance with the requirement of the prior exhaustion of domestic remedies, the State is not obliged to take a stand in that regard.

⁶⁵ Arts. 32(1) and 35.

⁶⁶ Arts. 36(1), (2) and (3) and 38.

81. It should also be indicated that, if the petition includes information on exhaustion of the domestic remedies or the impossibility of doing so, it is based on the submission of the petition and the response of the State that the relevant litigation is founded and, consequently, it is regarding whether at that time – and not subsequently – such remedies have been exhausted or that it was not compulsory to do so, that the Commission should rule in its admissibility report.

82. The instant case reveals that the facts relating to the requirement of the prior exhaustion of domestic remedies, are:

- a) The petition lodged with the Commission on July 17, 1995, cites the exception established in Article 46(2)(c) of the Convention indicating that although, “theoretically, there are remedies in the laws of Guatemala,” “it is evident that the practice of violating the rights of members of the labor movement is at least tolerated, if not directly supported by the Guatemalan government,” so that it is “clear that, in reality, there are no legal measures within the Guatemalan system of justice to resolve this matter.”
- b) The State, in its response of September 27, 1996, to the forwarding of the petition on June 17, 1996, asserted that “the State’s representatives will describe the progress made and the relevant information that has been compiled to date during the hearing,” scheduled for October 10 that year. Subsequently, in a communication of June 13, 1997, the State advised “that the investigation [of the case ...] continued and it was hoped to provide new evidence determining the individualization and punishment of those responsible.” Consequently, the State failed to file the objection of prior exhaustion of domestic remedies at the proper time and in an appropriate manner, and
- c) The Commission adopted the Report on Admissibility and Merits on March 21, 2017, and in this, although it reiterated its criteria that the admissibility of the petition was subject to whether, at that time, the requirements established in Article 46 of the Convention had been met, it also indicated that it was “clear that, since 1996, no investigative measures had been taken.” Hence, ultimately, the Commission took into consideration the situation at that date when taking a decision on the admissibility of the petition, and proceeded accordingly.

Therefore, based on the foregoing, the undersigned voted in favor of the first operative paragraph of the judgment rejecting the preliminary objection filed by the State concerning the failure to exhaust domestic remedies.⁶⁷

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Secretary

⁶⁷ *Supra*, footnote 2.