CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN THE JUDGMENT ON REPARATIONS DELIVERED IN THE BARRIOS ALTOS CASE (CHUMBIPUMA AGUIRRE *ET AL. V*. PERU)

1. I join my colleagues who voted for the judgment on reparations in the *Barrios Altos Case* (Chumbipuma Aguirre *et al.* v. Peru). I believe, however, that a number of clarifications and observations on the principles underlying the Court's judgment and its scope are in order.

2. The reparations judgment delivered in this case helps settle a number of issues that this very pertinent case raises. The judgment on the merits was based on case law developed in the important judgments delivered in the Loayza Tamayo Case (IACtHR, Judgment of September 17, 1997, Series C, N. 33) and Castillo Páez Case (IACtHR, Judgment of November 3, 1997, Series C, N. 34), which introduced groundbreaking jurisprudence in the assessment of what I have called the State's "criminal justice duty" (cf. García Ramírez, "Las reparaciones en el sistema interamericano de protección de los derechos humanos", in *Estudios jurídicos*. Instituto de Investigaciones Jurídicas, UNAM, México, 2000, pp. 438-440; see also, in *Jornadas J. M. Domínguez Escovar en homenaje a la memoria del R. P. Dr. Fernando Pérez-Llantada (S. J.): Los derechos humanos y la agenda del tercer milenio*, Caracas, 2000, pp. 601 et seq.; and *El sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI. Memoria del Seminario.* November 1999, Inter-American Court of Human Rights, San Jose, Costa Rica, 2001, pp. 129 et seq.), which the "self-amnesty" laws violate. This was the Court's finding in those judgments, which I elaborated upon in my concurring opinions thereon.

3. In the present case, the Court had before it a reparations "Agreement" concluded between the material parties (the State and the victims or their next of kin), with the Inter-American Commission on Human Rights acting as a formal or only procedural party. Clearly, the agreed upon reparations –like any reparations the Court might order absent an agreement- concern the victims' legal assets (pecuniary or non-pecuniary). It is also self-evident that the nature and ineluctable function of the Inter-American Commission – which it discharges through various procedural acts- is to ensure the observance of those norms that protect human rights and to work for the system that protects them, irrespective of –and without prejudice to- the satisfaction owed to the parties who are direct beneficiaries of reparations (victims or, as appropriate, their legal heirs).

4. The Agreement between the parties, which was submitted after the deadline, is a formula that the two sides themselves worked out on the various reparations-related issues in this case. It was put together and cultivated through a succession of steps (first on the part of the material parties, and then on the part of the formal or only procedural party), and settles the potential dispute over the reparations-related obligations and entitlements that are a consequence of the violation of human rights. It obviates –in principle- the need for the Court to exercise contentious jurisdiction, which at this phase in the proceedings would be a sentence of condemnation ordering the State to make specific reparations, based on the Court's findings as regards the specific rights violated, as spelled out in the Judgment on the merits.

5. The fact that the agreement was submitted after the deadline does not make it any less effective for purposes of the present case. At the time the agreement was introduced into the case, the Court had not yet conducted any proceedings to settle

the matter. Moreover, the case law of this Court has been that an appropriate, substantive settlement must not be sacrificed for the sake of procedural formality. Time periods are a matter of judicial security, but the latter is not breached if the balance between the legitimate procedural interests of the parties is preserved and if the parties are not denied their opportunity to defend their positions. It is obvious that the will of the parties has been clearly articulated and documented in the Agreement to which I refer, which the Inter-American Commission on Human Rights subsequently reviewed and endorsed. The order in which the parties articulate their positions does not affect the nature, admissibility and efficacy of the agreement. It should, therefore, be endorsed and be accorded the standing it deserves.

6. The fact that possible judgments of condemnation are foreclosed (*supra*, 4) does not mean that the Court has to refrain from any consideration of the merits of the agreement between the interested parties and confine itself to confirming the terms thereof. The Court has to exercise the verification function given to it in Article 56(2) of the Rules of Procedure of September 16, 1996 (which are the applicable rules in this case). That function is not just to verify procedural issues and points of law, but the "fairness" of the agreement as well, language that has been replaced in the Rules of Procedure approved on November 24, 2000, to read "conforme con la Convención" [in compliance with the Convention]. Therefore, the provision must be understood to mean that the agreement between the parties is to be 'fair'; in other words, it must be a legitimate solution –one in which no one's interests are violated or injured- that accords to each party what is rightfully its. In other words, it must serve the object and purpose of the Convention, which is respect for human rights and repudiation of any violation of the rights of the victims, their next of kin or their heirs.

7. The legitimacy of the agreement under the Convention, as regards the nature of the entitlements, is the core of the agreement (as it is with the judgment), and is the concept that underlies the development and approval of other solutions that the parties themselves have agreed upon in the course of the proceedings conducted before the Inter-American system for the protection of human rights: for example, a friendly settlement of the dispute. It is not a question of arriving at just "any" agreement or "any" settlement; the agreement or settlement has to be fair, legitimate, and satisfactory from the standpoint of the human rights that it is intended to preserve. No such agreement or settlement would come about if the process of negotiating the terms of the settlement was driven or dictated by the weakness, necessity or ignorance of the victim. The Inter-American Commission plays an important role here. The Court's verification authority is intended to serve the same purpose.

8. Conciliation -a governing principle in international proceedings involving human rights violations- logically applies only when the opposing sides can reasonably settle their differences; it does not apply when, because of the nature of the issues, that alternative method of settling differences is either improper or unworkable. Moreover, the nature of the obligations (which include the State's reparations-related duties), the sources of those obligations and their natural manifestations or expressions, are all factors that have to be considered in order to determine in which cases the parties themselves can –and indeed should- craft their own settlement, and under what circumstances the parties cannot be forced into an agreement, as the settlement process presupposes the parties' ability to determine, on their own, what best serves their interests.

9. All reparations measures are based on general and objective rules (that exist independently and apart from any decision reached by the parties to a specific case, who are the subjects of the litigation and of the proceeding) that are national and international in nature and applicable to the field of human rights. In other words, all reparations measures are based on domestic laws or on the provisions of conventions that establish the duty to respect the rights of persons and the obligation to make reparation when that duty is violated. That having been said, the following can and must be distinguished: a) the premise that the parties can arrive at a settlement as to the content and performance of specific reparations, through an agreement that postdates the general and objective norm and whose efficacy is recognized by that general and objective norm; and b) circumstances that necessarily preclude any settlement between the parties, because the reparations are dictated by law and are not negotiable.

10. The agreement between parties, which the Court can approve, is only admissible and effective when it is legitimate –in the sense indicated in paragraphs 5 and 6 above- and addresses the second category of issues mentioned in the preceding paragraph, which tend to be property-related and require specific pecuniary obligations. Therefore, in principle the terms of the agreement that concern compensation for material and moral damages and procedural costs and expenses merit consideration –and may even be binding-. The judgment delivered in the Barrios Altos Case, Reparations, finds that the agreement between the parties on the matter of compensation is admissible and can be approved, thereby making it final, with all the effects that follow therefrom.

11. On the other hand, other reparation measures are beyond the purview of the parties. They are inherent in certain inalienable and immutable functions that the State must discharge in exercise of its authorities or in performance of its duties or obligations. Either party may unilaterally propose –provided the other party so agrees- practicable and convenient ways or modalities for complying with those obligations. But no proposal can alter, replace, diminish or supplant the natural and immutable duties that the legal system assigns to government.

12. And so, it is not the will of the parties, but rather the law that determines that the State has: a) a “criminal justice duty” (to investigative the violations, prosecute those responsible, issue the verdict of condemnation and carry out the sentences that the law requires); or b) an obligation to adopt the legislative or convention-related measures (for example, the conclusion or ratification of an international treaty) required under the American Convention on Human Rights (Article 2); or c) a decision to refrain from incurring human rights violations (conduct that is inherent in a State governed by the rule of law and that is provided for at the highest level of the domestic and international legal order). Furthermore, some of these measures are provided for in the judgment delivered on the merits of the present case on March 14, 2001.

13. Settlements do not create, modify, much less extinguish rights and duties, regardless of what the parties to a settlement may agree upon with respect to these issues. The terms of any agreement between the parties merely underscore the existence of those rights and duties, or an “awareness of their existence.” Whatever the case, the points they agree upon expedite settlement of the differences. This is the function of such agreements, and not an inconsequential one. But their function is not to be an authoritative document, composed by the parties, that defines or

redefines legal relationships that have already been defined by standards or rules of a general nature.

14. There are situations in which strictly State duties, not subject to negotiation by the parties (although they may be facilitated by procedural arrangements), co-exist with new duties undertaken by the State by arrangement with the victims. For example, the State has education- or health-related duties *vis-à-vis* all persons, including of course, the victims of human rights violations. These duties constitute the State's minimum public obligations, are nonnegotiable and are to be discharged promptly in all cases. It may happen that in a specific case the decision is to grant the victims the very same entitlements that all citizens enjoy (educational or health-related, for example), but in a manner, under conditions or to a degree that is superior to the ordinary, compulsory entitlements. The immediate basis for this new factor, implying an advantage over the norm, would be the agreement between the parties.

15. One of the points addressed in the Agreement and in the Judgment on reparations in this case, and which has appeared in various judgments the Court has delivered in cases it has heard, is the exclusion of current and future taxes on the compensation being awarded. Although this was not done in the present case, this tax exclusion could be extended to include entitlements in cash or in kind. What matters is that the value of the entitlements as awarded by the Court should be preserved and that they should be exempt from any taxes that could have the effect of reducing the value of the respective compensation. But to preserve the value of the entitlements, it may not always be necessary to exclude them from the normal fiscal system. Such a solution could, in practice, be inequitable or a breach of the principle of equality before the law. The necessary result –the integrity of the compensation- can be achieved by means other than tax exemption and within the power of the State.

16. While it is true that the parties agreed that the State would institute the measures necessary to include the compensation in the General Budget of the Republic for fiscal year 2002, it is also true that satisfaction of the victims' rights, as upheld by the Inter-American Court, cannot be left to the fate of the budget process. Hence, the Court confines itself to declaring the State's obligation to make reparation; it is up to the State to determine how best to comply with that obligation within the timeframe set by the Court.

17. The Agreement stipulates that the State shall abide by the Court's decision on the application filed by the Inter-American Commission seeking an interpretation by reason of the inefficacy of Laws No. 26479 and 26492, which again raises the problem of the "self-amnesty" laws *vis-à-vis* the State's criminal justice duty. That problem has already prompted several different pronouncements by the Court (cf. García Ramírez, "Una controversia sobre la competencia de la Corte Interamericana de Derechos Humanos", in *Estudios jurídicos, cit*., pp. 389 *et seq*.). In the present case, it is a matter of clarifying the scope of the findings against these laws. The Court has already ruled on this matter in its Judgment of September 3, 2001 (*Barrios Altos Case. (Chumbipuma Aguirre et al. vs. Peru). Interpretation of the Judgment on the Merits (Art. 67 American Convention on Human Rights)* to the effect that "[g]iven the nature of the violation that amnesty laws No. 26479 and 26492 constitute, the decision in the judgment on the merits in the Barrios Altos Case has generic effects" (operative paragraph 2). Furthermore, the consequences that this interpretation has

for the State do not derive from the Agreement, but from the nature of the State's obligations to comply with its international commitments.

18. The Agreement also contains an interpretive clause whereby the parties are granted the authority to interpret, by mutual agreement between them achieved through direct dialogue, the provisions of the Agreement, on the understanding that if a satisfactory solution cannot be found via that avenue, either of them may request from the Court the corresponding interpretation. The Agreement has been recognized in the judgment of the Court on reparations in the Barrios Altos Case. Therefore, the binding effect upon the parties does not derive from the Agreement itself, but from the judgment of the Court in which that Agreement is approved. The Court's interpretation authority is given in the American Convention (Article 67). It does not emanate from a private agreement between parties. No such agreement could abolish that authority nor embellish it with modalities alien to the system established in the Convention and in the rules derived therefrom.

Sergio García-Ramírez
Judge

Manuel E. Ventura-Robles
Secretary