CONCURRING OPINION OF AD HOC JUDGE FRANCISCO EGUIGUREN PRAELI

I have concurred in my vote with the judgment of the Court that finds the State of Peru responsible for the violation of the rights of brothers Rafael and Emilio Gómez Paquiyauri to life, to personal liberty, to fair trial, and others. However, I deem it necessary to state certain personal reflections regarding the specific circumstances and nature of this case, as well as on the way in which, I believe, the issue of reparations to the victims should be addressed, especially in the case of the murder of a boy and an adolescent.

1.- Brothers Rafael and Emilio Gómez Paquiyauri were 14 and 17 years old, respectively. They were, therefore, two minors, who were unduly and arbitrarily deprived of their liberty by members of the National Police, without their being subject to an arrest warrant issued by a court or having been detected in the act of committing a crime. They were not even carrying out any activity that might have justified their detention, even under a state of emergency. At the time they were arrested, they were mistreated by the members of the police force; they were not taken to a detention center, but rather to a remote place where they were subjected to cruel treatment and torture shortly before being executed in a vile and perfidious manner.

Said facts have been fully proven in this proceeding under international venue, but were also duly proven in the criminal proceeding before the domestic Judiciary that sentenced the direct perpetrators of these grave violations. They have also been recognized and acknowledged by the State itself. There is, therefore, no doubt regarding the international liability of the State of Peru, as a consequence of the human rights violations committed by members of the police. For this reason, the Court finds it liable and under the obligation to redress the victims.

2.- While the two direct perpetrators of these crimes were trialed and punished under domestic jurisdiction, and were sentenced respectively to 18 and 6 years in prison, various aspects of the case are seriously debatable.

First of all, the convicts recovered their liberty soon after the conviction, without having served even one third of the sentence with effective incarceration, availing themselves of penitentiary benefits. While the existence and application of those benefits cannot be denied, when there is a social rehabilitation of the criminal, granting of said benefits by the State –as the Court has pointed out in this judgment- must be duly weighed and analyzed. Especially in cases of grave human rights violations, committed against an innocent child

and an innocent adolescent, said benefits must not become a covert form of impunity.

Secondly, the compensations ordered as reparation to be paid by the convicts in the criminal proceeding have not been paid to the next of kin of the Gómez Paquiyauri brothers, given the limited income and financial resources of these former policemen. And since neither the Police nor the State were accused nor found liable in the proceeding under domestic venue, they were not ordered to severally pay any compensation to the victims, for which reason the latter have been unable to collect it.

Third, the Police captain who was accused by the direct perpetrators of being a mastermind and the person responsible for ordering the execution of the Gómez Paquiyauri brothers, has neither been trialed nor convicted to date, as he is at large, and the proceeding has been suspended and the criminal action is at risk of being barred by the statute of limitations. It is grave that, 13 years after the crimes were committed, this fugitive has not been captured, and this questions the actual willingness of the national authorities to search for and arrest him. All the more so, as this fugitive has filed remedies in the proceeding, through his attorney.

This not only constitutes an obvious situation of impunity, but also raises legitimate questions, pending investigation, regarding the possible involvement of other masterminds or persons responsible for the order to execute the Gómez Paquiyauri brothers, among the higher Police authorities or the political authorities. As the Court has ordered in its judgment, the State must capture this fugitive, without allowing the crimes to be barred by the statute of limitations, and it must conduct a full investigation of the facts and convict and punish all those responsible.

3.- Regarding the issue of **reparations,** I believe it would have been preferable to establish as the prevailing criterion that of reparation for **detriment to life aspirations,** caused by the execution of the two boys. I believe this is preferable to and more appropriate than having considered **lost earnings** under pecuniary damages, as this and other judgments of the Court have done. Detriment to life aspirations, as pointed out by judges Cançado Trindade and Abreu Burelli in the joint opinion in the Loayza Tamayo case, is a more appropriate concept in cases of reparations for grave violations of human rights. It makes it possible to establish a distance with respect to the criteria of Civil Law on Property, such as lost earnings, *damnum emergens*, detriment to family assets, or *lucrum cessans*.

Detriment to life aspirations involves both pecuniary and non-pecuniary aspects of the violation of this fundamental right of the person; it therefore requires not only a compensatory reparation for the arbitrary deprivation of life, but also for abridgment and cutting short of the free development of the personality, interruption of the actions that both children might have carried out not only in terms of work (lost earnings) but also regarding spiritual aspect, personal and family realization, attainment of plans and goals. Assessing the pecuniary damage by estimating it as lost earnings is unsatisfactory especially with respect to children or adolescents who have not yet effectively entered the job market. Recognizing detriment to life aspirations is therefore more comprehensive and consistent from the perspective of protection of human rights, distancing itself from trends that focus essentially on property rights. It also includes the non-pecuniary dimension, which makes it unnecessary to separately consider moral damages to the direct victims even if they have died. I therefore believe that this Court might review the criteria to establish reparations in future reparations, especially with respect to children or adolescents deprived of the right to life.

4.- While I do not fully share the use of the criterion of ***damnum emergens***, either, I find it positive that the Court has finally grouped under this item a set of **expenses** incurred by the Gómez Paquiyauri family as a consequence of the death of their children Rafael and Emilia, as well as the funerary expenses and medical treatment for some next of kin. I also find it appropriate that the Court opted to include under this item the funds for psychological treatment that the members of this family required or may require in the future, as a consequence of their suffering and of the acts of harassment and segregation to which they were unfairly subjected. This avoids listing the expenses for psychological treatment as a specific item under the reparations for non-pecuniary damages, as in other cases, recognizing instead that it is actually an expense that results from the violation of rights, that is, a type of "consequential damage." Given that most of these expenses were incurred by the parents, it is reasonable for this reparation to be given to them, and not individually to each member of the family.

5.- It is important to highlight the decision of the Court that, in addition to considering the brothers Rafael and Emilio Gómez Paquiyauri as direct victims, it decided to include the members of their family (parents and siblings) as indirect victims (paragraphs 118 and 119), due to their subsequent suffering of detriment to their dignity and right to humane treatment. In this regard, they are justifiably entitled to reparations for non-pecuniary or moral damages.

I agree with the statement of the Court, in paragraphs 218 and 219 of the judgment, regarding the need to admit, without requiring further demonstration, the suffering and distress caused by the death of a next of kin to the members of the family who had close emotional ties or physical contact with the deceased. All the more so in the case of the murder of a child. I also share the statement that, nevertheless, in this case it is difficult to establish or differentiate the degree of suffering or distress of each member of the household. Therefore, since throughout the proceeding under international venue it has been clear that the Gómez Paquiyauri family as a whole has suffered not only the death of their children Rafael and Emilia, but also the subsequent harassment and infringements, it seems reasonable that reparations for the moral damages to be given to the parents of the direct victims, for them to decide on the use or distribution of this amount in favor of the household as a whole.

It is also fully justifiable to have included as victims, entitled to reparation for moral damages, the child Nora Emely Gómez Peralta, daughter of Rafael Gómez Paquiyauri, born after his demise, and her mother Jacinta Peralta. Both have undergone special suffering and distress due to the abrupt loss of Rafael during Jacinta's pregnancy, depriving the girl of the presence of her father.

6.- Since reparations must not be limited exclusively to aspects pertaining to property or compensation, it is crucial that the Court included public acts of satisfaction, redress, and amends to the Gómez Paquiyauri brothers and their family as part of the reparations. In this regard, we should mention the orders of the Court for a public act of acknowledgment of responsibility by the State in this case, publication of the pertinent parts of the judgment that demonstrate the truth of what happened, naming a secondary school in el Callao after the brothers Rafael and Emilio Gómez Paquiyauri, or granting a scholarship to the child Nora Emely.

7.- I believe that the case of the Gómez Paquiyauri brothers is emblematic because it exemplifies the grave human rights violations that occurred in Peru as a consequence of a repressive policy against subversion that disregarded the fundamental rights and respect for the dignity of the person. The liability of the State is therefore clear and evident. Thus, in addition to reparations to the victims, the judgment is significant in its contribution to elucidation of the truth and carrying out acts and measures that enhance social awareness of the magnitude of the damage caused, as well as of the need to avoid recurrence of these situations.

The State and Peruvian society must realize and understand that the cruel and absurd murder of a child and of an adolescent cannot remain in a situation of impunity, unpunished and without redress.

But it is not merely a matter of approving or questioning the amount of the property-related reparation imposed by the Court on the State in favor of the next of kin of the Gómez Paquiyauri brothers. Arbitrarily detaining and mistreating these minors, subjecting them to torture and executing them, lying to the public by saying that they were terrorists killed in an armed confrontation with the forces of law and order, are very grave and unacceptable acts in a democratic system, committed to respect for the dignity of the human person.

What happened in the case of the Gómez Paquiyauri brothers must move and greatly disturb Peruvian society and its authorities. If these facts had not been recorded by television, by chance, perhaps the truth would never have been known nor would the direct perpetrators have been punished, if only in part. The Truth and National Reconciliation Committee has documented thousands of cases of human rights violations that, at the time, did not have this possibility of elucidation.

The case of the Gómez Paquiyauri brothers is especially painful because it involved the murder of a child and an adolescent who had committed no crime or misconduct, and who were executed in a cruel and pitiless manner by members of the police. The Inter-American Court of Human Rights has finally given them and their next of kin justice. The Peruvian State must take on its responsibility, even though there is currently a government that strives to respect human rights and to comply with the judgments of the Court.

Francisco José Eguiguren-Praeli
Judge *ad hoc*

Pablo Saavedra-Alessandri
Secretary