

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF GARCÍA AND FAMILY MEMBERS *v.* GUATEMALA

JUDGMENT OF NOVEMBER 29, 2012 (*MERITS, REPARATIONS AND COSTS*)

In the case of *García and family members*,

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

Diego García-Sayán, President
Manuel E. Ventura Robles, Vice President
Leonardo A. Franco, Judge
Margarette May Macaulay, Judge
Rhadys Abreu Blondet, Judge
Alberto Pérez Pérez, Judge, and
Eduardo Vio Grossi, Judge;

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy 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, 62, 64, 65 and 67 of the Rules of Procedure of the Court¹ (hereinafter “the Rules of Procedure”), delivers this Judgment structured as follows:

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I
INTRODUCTION TO THE CASE AND PURPOSE OF THE DISPUTE

1. On February 9, 2011, pursuant to the provisions of Articles 51 and 61 of the Convention and Article 35 of the Court's Rules of Procedure, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted case No. 12,343 against the Republic of Guatemala (hereinafter "the State" or "Guatemala") to the jurisdiction of the Inter-American Court (hereinafter "the submission brief"). The initial petition was lodged before the Inter-American Commission on August 22, 2000, by the *Grupo de Apoyo Mutuo* (hereinafter also "GAM"), represented by Mario Alcides Polanco Pérez. On October 21, 2006, the Commission approved Admissibility Report No. 91/06.² On October 22, 2010, in accordance with Article 50 of the American Convention, the Commission approved Merits Report No. 117/10 (hereinafter also "the Merits Report" or "Report No. 117/10").³ This report was forwarded to the State on November 9, 2010, and on January 20, 2011, the State presented a report on the measures adopted to comply with its recommendations. The Commission decided to submit this case to the Inter-American Court, "owing to the need to obtain justice for the [presumed] victims, and to the State's failure to provide detailed and substantial information regarding compliance with the recommendations." The Commission appointed Dinah Shelton, Commissioner, and Santiago A. Canton, then Executive Secretary, as delegates, and Elizabeth Abi-Mershed, Deputy Executive Secretary, Isabel Madariaga and Karla Quintana Osuna, Executive Secretariat lawyers, as legal advisors.

2. According to the Commission, this case concerns the alleged "forced disappearance of Edgar Fernando García, trade unionist and student leader, who [presumably] was shot and arrested by members of the Special Operations Brigade of the Guatemalan National Police on February 18, 1984, and whose whereabouts remain unknown to this day."

3. In its Merits Report, the Commission indicated that Edgar Fernando García, his wife, Nineth Varenca Montenegro Cottom, his daughter, Alejandra García Montenegro, and his mother, María Emilia García, were the presumed victims in this case. In addition, in its submission brief it "informed the Court" that following notification of the Merits Report, the representatives had indicated that the following persons "should also be considered [presumed] victims: Mario Alcides Polanco Pérez, who [they identified] as a friend of the family of Edgar Fernando García and promoter of the case, and Andrea Polanco Montenegro, daughter of Nineth Varenca [Montenegro] Cottom."

4. Based on the foregoing, the Commission asked the Court to declare the international responsibility of Guatemala for the alleged violation of Articles 3 (Right to Juridical Personality), 4 (Right to Life), 5 (Right to Humane Treatment), and 7 (Right to Personal Liberty) of the American Convention, in relation to Article 1(1) (Obligation to Respect Rights) of this instrument and to Article I of the Inter-American Convention on Forced Disappearance of Persons (hereinafter "Inter-American Convention on Forced Disappearance"), to the detriment of Edgar Fernando García; Articles 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention, in relation to Articles 1(1) and 2 (Domestic Legal Effects) of this instrument and to Article I of the Inter-American Convention on Forced Disappearance, to the detriment of Edgar Fernando García, Nineth

² Cf. Admissibility Report No. 91/06, Case 12,343, Edgar Fernando García v. Guatemala, October 21, 2006 (file of annexes to the merits file, appendix 1, folios 1238 to 1246).

³ Cf. Merits Report No. 117/10, Case of 12,343, Edgar Fernando García v. Guatemala, October 22, 2010 (merits file, tome I, folios 6 to 56).

Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García; Article 5 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García; Articles 13(1) and 13(2) (Freedom of Thought and Expression) and 23 (Right to Participate in Government) of the American Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García; and Articles 13 and 16 (Freedom of Expression and Freedom of Association) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Edgar Fernando García and his next of kin. Consequently, the Commission asked the Court to order the State to adopt specific measures of reparation.

II PROCEEDINGS BEFORE THE COURT

5. The submission of the case was notified to the State and to the representatives of the presumed victims⁴ on April 1, 2011. On June 1, 2011, the *Grupo de Apoyo Mutuo*, as the representative of the presumed victims in this case (hereinafter “the representatives”) presented their brief with motions, arguments and evidence (hereinafter “the motions and arguments brief”) to the Court, pursuant to Articles 25 and 40 of the Court’s Rules of Procedure. The representatives were in substantial agreement with the violations alleged by the Inter-American Commission, and asked the Court to declare the international responsibility of the State for the alleged violation of the same articles of the American Convention and of Article I of the Inter-American Convention on Forced Disappearance, indicated by the Commission. In addition, the representatives indicated that the State had also violated Article II of the Inter-American Convention on Forced Disappearance because it “ha[d] not complied with punishment of [...] the masterminds, perpetrators, accomplices and accessories [...],” as well as Articles 17 (Rights of the Family) and 19 (Rights of the Child) of the American Convention, to the detriment of Edgar Fernando García and his family members.⁵ Furthermore, they specifically asked the Court to declare the violation of Article 2 of the American Convention owing to the lack of effective legal remedies that facilitate the search for persons who were forcibly disappeared. Consequently, they requested to Court to order diverse measures of reparation, as well as the payment of costs and expenses.

6. On July 26, 2011, the representatives submitted to the Court a request for provisional measures so that the State would protect the life and personal integrity of Luis Roberto Romero Rivera as a result of the alleged threats and harassment to which he had been subjected. They indicated that he had been working on the case of Edgar Fernando García, because he is the Director of the Special Investigations Unit of the Ombudsman’s Office responsible for the investigations into the forced disappearances that took place during the internal armed conflict in Guatemala. On August 3, 2011, the State presented its observations on the request, asking that it be declared inadmissible but, at the same time,

⁴ In the brief submitting the case (*supra* para. 1), the Inter-American Commission stated that “according to the information available to [the Commission], the organization representing the [presumed] victims in the proceedings before the Inter-American Court is the *Grupo de Apoyo Mutuo*.” On May 3, 2011, the *Grupo de Apoyo Mutuo* (GAM) confirmed that it represented the presumed victims in this case and presented the respective power of attorney.

⁵ In their motions and arguments brief, the representatives stated that the right to freedom of thought and expression and the rights of the child were established in Articles 12 and 18 of the American Convention, respectively.

it offered to provide Mr. Romero Rivera with “national protection” and, according to the representatives, he had accepted this. Consequently, the Inter-American Court, in an Order issued on September 1, 2011, decided not to order the provisional measures requested, “based on the complementary and subsidiary nature of the inter-American system.”⁶

7. On September 12, 2011, Guatemala submitted to the Court its brief answering the submission of the case by the Commission and with observations on the motions and arguments brief (hereinafter “the answering brief”). In this brief, the State filed a preliminary objection and made a partial acknowledgment of international responsibility (*infra* paras. 13 and 28). Nevertheless, it contested several of the violations presented by the Inter-American Commission and alleged by the representatives. Additionally, the State opposed considering Mario Alcides Polanco Pérez and Andrea Polanco Montenegro as victims in this case and referred to the reparations requested. The State appointed María Elena de Jesús Rodríguez López as its Agent for this case, and Enma Estela Hernández Tuv de Iboy as its Deputy Agent.

8. On November 20 and 21, 2011, the representatives and the Inter-American Commission, respectively, presented their observations on the preliminary objection filed by the State. At that time, the Commission also presented its observations on the State’s partial acknowledgment of responsibility. The representatives did not comment in this regard.

9. On March 16, 2012, the President of the Court issued an Order,⁷ in which he convened the Inter-American Commission, the representatives, and the State to a public hearing (*infra* para. 11) in order to receive the statement of one presumed victim and the testimony of two witnesses, and also to hear the final oral arguments of the representatives and the State, and the final oral observations of the Commission on the preliminary objection, the State’s acknowledgment of responsibility, the merits, the reparations, and the costs. In addition, the President ordered that the statements of one presumed victim and one witness be received by affidavit, and these were received on April 18 and 20, 2012. The representatives and the State were given the opportunity to question the witnesses offered by the opposing party and make observations on their testimony.

10. On April 24, 2012, the State informed the Court that, on April 20, 2012, an agreement had been signed by Guatemala and the victims in this case, through their representatives, on the measures of reparation requested, and it provided a copy of this document (*infra* para. 13.e).

11. The public hearing was held on April 26, 2012, during the forty-fifth special session of the Court, held in Guayaquil, Ecuador.⁸ Prior to the hearing, the State desisted from offering the testimony of Marco Tulio Álvarez Bobadilla. In this regard, the Commission asked that the opinion given by this expert witness in the case of *Gudiel Álvarez et al.*

⁶ Cf. *Case of García and family members v. Guatemala*. Order of the Inter-American Court of September 1, 2011, first operative paragraph

⁷ Cf. *Case of García and family members v. Guatemala*. Order of the President of the Inter-American Court of March 16, 2012. Available at: <http://www.corteidh.or.cr/docs/asuntos/Garciayfam.pdf>

⁸ At this hearing there appeared: (a) for the Inter-American Commission: Jesús Orozco Henríquez, President of the Commission, Isabel Madariaga, Karla Quintana and Silvia Serrano, Secretariat specialists, and Michael Camilleri, specialist of the Special Rapporteurship for Freedom of Expression; (b) for the representatives: Maynor Estuardo Alvarado Galeano, and (c) for the State: Antonio Arenales Forno, Secretary for Peace (SEPAZ); Jorge Humberto Herrera Castillo, President of the National Compensation Program; María Elena de Jesús Rodríguez López, Agent of the State, and Heydée Calderón, from the Presidential Commission for Coordination of the Policy of the Executive on Human Rights (COPREDEH).

(*"Diario Militar"*) v. *Guatemala* be transferred to and taken into account in this case. Also, during the hearing, witness Velia Muralles Bautista presented documentation from the Historical Archive of the National Police related to this case, which was handed to the parties and to the Commission.

12. On May 31, 2012, the representatives and the State forwarded their final written arguments, while the Inter-American Commission presented its final written observations on June 1, 2012. On that occasion, the State again submitted a copy of the agreement reached by the parties on the measures of reparation, and the Inter-American Commission repeated its request to transfer the opinion of witness Marco Tulio Álvarez Bobadilla (*supra* paras. 11).

III

PARTIAL ACKNOWLEDGEMENT OF INTERNATIONAL RESPONSIBILITY AND ENDORSEMENT OF THE AGREEMENT ON REPARATIONS

A) The State's partial acknowledgement of responsibility

13. The State partially acknowledged its international responsibility in this case as follows:

a) Regarding the claims made by the representatives and the Inter-American Commission in this case, the State expressed its "total acceptance" of:

1. "the events denounced in relation to the supposed violation of the human rights contained in Articles 3 [...], 4 [...], 5 [...] and 7 [...] of the American Convention," in relation to Article 1(1) of this instrument. It also indicated that it considered that it "had failed to comply with the obligation contained in Article I(a) of the Inter-American Convention on Forced Disappearance" to the detriment of Edgar Fernando García;
2. Articles 13 and 16 of the American Convention, in relation of Article 1(1) of this instrument, "only with regard to Edgar Fernando García."

b) In addition, it expressed its "partial acceptance" of the alleged violations of:

1. Articles 8 and 25 of the Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of Edgar Fernando García, Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García;
2. Article 5 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García;
3. Articles 13(1), 13(2) and 23 of the American Convention, in relation to Article 1(1) thereof, for presumed violation of the right of access to information, to the detriment of Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García. However, it expressed "its opposition to [the Court] declaring non-compliance" with Article 2 of the American Convention, due to the fact "that various domestic laws guarantee the full exercise of the said rights," and
4. Articles 13 and 16 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García. This partial acceptance was made

in its final arguments. In its answering brief, the State had indicated that it “totally contested” these violations.

c) It also indicated that it “totally contested” the alleged violations of:

1. Paragraphs (b), (c) and (d) of Article I of the Inter-American Convention on Forced Disappearance;
2. Articles 17 and 19 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Edgar Fernando García, Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García;
3. Articles 12 and 18 of the Convention, alleged by the representatives, and
4. The “supposed violation of the right to the truth” alleged by the representatives.

d) In addition, the State “accept[ed]” Edgar Fernando García, Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García as victims in this case. It also indicated its “total opposition” to considering Mario Alcides Polanco Pérez and Andrea Polanco Montenegro as victims. Nevertheless, in its answering brief, the State had indicated that “taking into account the family ties that exist [between Andrea Polanco Montenegro] and Nineth Varenca Montenegro Cottom and the possible collateral effects of her [...] mother’s suffering, the State indicates its acceptance that she be considered a victim in this case, but only as regards the measure of reparation of psychological treatment.”

e) Regarding the measures of reparation requested, on April 24, 2012, prior to the public hearing in this case (*supra* para. 10), the State presented “an agreement on measures of reparation for the pecuniary and non-pecuniary damage caused and the costs incurred” reached between the victims, through their representatives, and Guatemala on April 20, 2012, “[w]ithin the framework of a friendly settlement in the context of [these] proceedings” (hereinafter “reparations agreement”).⁹ The State requested that this agreement be considered in the judgment that the Court would eventually deliver. According to this agreement, the parties held “working meetings in order to reach an agreement on the issue of pecuniary and non-pecuniary reparations requested by the petitioners and legal representatives in [this] case,” after they had been summoned to the public hearing. In this agreement, the State undertook to adopt specific measures of reparation (*infra* para. 23 and Chapter IX). In its closing arguments, the State requested that the Court “find that the claims of the petitioners have been satisfied under the terms of the agreement” reached by the parties on April 20, 2012.¹⁰

B) Observations of the Commission and the representatives

14. The Commission “assesse[d] positively the State’s acknowledgment of the facts and of its international responsibility with regard to certain rights established in the submission of the case.” It indicated that it understood that, by fully accepting certain violations, the

⁹ The agreement, which was “drawn up in an official document on April 20, 2012,” was signed during a meeting held at the Peace Secretariat, in the presence of the following: (a) for the State: Antonio Fernando Arenales Forno, Secretary for Peace, Jorge Humberto Herrera Castillo, President of the National Compensation Commission; Maria Elena de Jesus Lopez, the State’s Agent for this case, and (b) for the representatives of the victims: Mario Alcides Polanco Pérez, Director of the GAM, and Maynor Estuardo Alvarado Galeano.

¹⁰ Previously, in its answering brief, the State had presented specific arguments and observations on the claims for reparation.

State “is accepting the events on which they are based” and, therefore, “there is no dispute concerning the factual framework that substantiates these violations, or the legal consequences indicated.” Nevertheless, it observed that “some violations still remain for which the State has accepted partial responsibility and others that it has rejected entirely”; thus, the Court must rule on all the alleged facts and violations. The Commission asked the Court to “admit the State’s acknowledgment of international responsibility.” Similarly, it underscored that the State had acknowledged “all the victims identified by the Commission.” Regarding the reparations agreement, the Inter-American Commission “appreciate[d] that the parties ha[d] reached an agreement [...] and ask[ed] the Court to take it into consideration in the judgment” and, “if it deemed it pertinent, to order other measures of reparation.”

15. The representatives did not refer to the State’s partial acknowledgment of responsibility. However, in their final written arguments, they asked the Court to endorse the reparations agreement.

C) Considerations of the Court

16. Pursuant to Articles 62, 63, and 64 of the Rules of Procedure,¹¹ and in exercise of its authority to ensure the international judicial protection of human rights, a matter of international public order that transcends the will of the parties, it is incumbent upon the Court to ensure that acts of acknowledgment of responsibility and possible agreements between the parties are admissible for the purposes of the inter-American system. This task is not limited to merely verifying, recording or taking note of the acknowledgment made by the State, or to confirming the formal conditions of such acts; rather, the Court must examine them in keeping with the nature and seriousness of the alleged violations, the requirements and interests of justice, the particular circumstances of the specific case, and the attitude and position of the parties,¹² so that it can clarify the truth about what happened insofar as possible and in the exercise of its competence.¹³ Accordingly, the Court will proceed to determine the admissibility and legal effects of the State’s acknowledgment of international responsibility and of the reparations agreement reached by the parties.

17. Article 41(1)(a) of the Rules of Procedure stipulates that, in its answering brief, the State must indicate whether it accepts the facts and claims, or whether it contests them. In addition, Article 41(3) of the Rules of Procedure indicates that “the Court may consider those facts that have not been expressly denied and those claims that have not been expressly controverted as accepted.”

¹¹ Articles 62, 63 and 64 of the Court’s Rules of Procedure establish: “Article 62. Acquiescence. If the respondent informs the Court of its acceptance of the facts or its total or partial acquiescence to the claims stated in the presentation of the case or the brief submitted by the presumed victims or their representatives, the Court shall decide, having heard the opinions of all those participating in the proceedings and at the appropriate procedural moment, whether to accept that acquiescence, and shall rule upon its juridical effects.” “Article 63. Friendly Settlement. When the Commission; the victims or presumed victims, or their representatives; the respondent State; or, if applicable, the petitioning State in a case before the Court inform it of the existence of a friendly settlement, compromise, or any other occurrence likely to lead to a settlement of the dispute, the Court shall rule upon its admissibility and juridical effects at the appropriate procedural time.” “Article 64. Continuation of a Case. Bearing in mind its responsibility to protect human rights, the Court may decide to continue the consideration of a case notwithstanding the existence of the conditions indicated in the preceding articles.”

¹² Cf. *Case of Kimel v. Argentina. Merits, reparations and costs*. Judgment of May 2, 2008. Series C No. 177, para. 24, and *Case of the Massacres of El Mozote and nearby places v. El Salvador. Merits, reparations and costs*. Judgment of October 25, 2012. Series C No. 252, para. 23.

¹³ Cf. *Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of May 26, 2010. Series C No. 213, para. 17, and *Case of the Massacres of El Mozote and nearby places v. El Salvador, supra*, para. 23.

18. In the instant case, the Court observes that the State expressly acknowledged the facts related to the forced disappearance of Edgar Fernando García (*supra* para. 13.a.1). The State did not specifically and expressly acknowledge the other facts described in the Commission's Merits Report or in the representatives' motions and arguments brief, nor did it clarify the facts submitted to the Court that substantiate its partial acknowledgment of responsibility. However, as it has in other cases,¹⁴ the Court understands that the State has acknowledged all the facts that substantiate the violations for which it has "totally accept[ed]" its international responsibility. Consequently, the Court considers that the dispute has ceased as regards the forced disappearance of Edgar Fernando García and the resulting violation of Articles 3, 4, 5, 7, 13 and 16, in relation to Article 1(1) of the American Convention and to Article 1(a) of the Inter-American Convention on Forced Disappearance, to the detriment of Edgar Fernando García.

19. The Court also observes that the dispute remains with regard to the alleged violation of Articles 8 and 25 of the American Convention, in relation to Articles 1(1) and 2 thereof and Article I (b), (c) and (d), and Article II of the Inter-American Convention on Forced Disappearance, as well as the alleged violation of the right to know the truth, to the detriment of Edgar Fernando García and the members of his family. The dispute also persists with regard to the alleged violation of Articles 5, 13, 16, 17, 19 and 23 of the Convention, in relation to Articles 1(1) and 2 of this instrument, Article II of the Inter-American Convention on Forced Disappearance, and the alleged autonomous violation of Article 2 of the Convention, to the detriment of Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García.

20. Furthermore, the Court observes that the State has contested the presumed violation of Articles 12 and 18 of the American Convention, supposedly alleged by the representatives. In this regard, the Court observes that in the motions and arguments brief and in their final written arguments, the representatives erroneously indicated that the right to freedom of expression and the rights of the child were established in Articles 12 and 18 of the American Convention, respectively.¹⁵ However, the Court considers that the text of both briefs reveals that the reference to Articles 12 and 18 was a factual error of the representatives, because the legal grounds and the text of their arguments (with the exception of the numbers of the said articles) were based on the alleged violation of the right to freedom of expression and the rights of the child. The Court has ruled on the status of the dispute in relation to these alleged violations *supra*.

21. In addition, the Court observes that the State contested the inclusion of Mario Alcides Polando Pérez and Andrea Polanco Montenegro as presumed victims in this case (*supra* para. 13.d). The Court advises that it will rule on the status of the said persons as presumed victims in the corresponding prior consideration in chapter V, *infra*.

22. The Court finds that the State's partial acknowledgement of responsibility represents a positive contribution to these proceedings and the exercise of the principles underlying the

¹⁴ Cf. *Case of Kawas Fernández v. Honduras. Merits, reparations and costs*. Judgment of April 3, 2009. Series C No. 196, para. 25; *Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2009. Series C No. 209, para. 62; *Case of Vélez Loo v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of November 23, 2010. Series C No. 218, para. 64, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27, 2012. Series C No. 245, para. 27.

¹⁵ These articles of the Convention correspond to the right to freedom of conscience and religion (Article 12) and the right to a name (Article 18).

American Convention.¹⁶ Furthermore, the Court considers, as it has in other cases,¹⁷ that this acknowledgement has full legal effects pursuant to Articles 62 and 64 of the Court's Rules of Procedure mentioned above, and has considerable symbolic value to ensure the non-repetition of similar events.

23. The Court also assesses positively the reparations agreement reached by the parties, which reflects the State's willingness to redress the harm caused to the victims as a result of the violations in this case. The Court has established that the agreements reached by the parties contribute to achieving the objectives of the inter-American system for the protection of human rights, especially in order to identify just solutions to the specific and structural problems of a case.¹⁸ The Court endorses the measures of reparation described in the agreement signed by the State and the victims' representatives, in the terms set forth in this Judgment, because they contribute to achieving the object and purpose of the American Convention. Nevertheless, the Court will analyze these measures in Chapter IX, in order to determine their scope and method of implementation.

24. Lastly, bearing in mind the seriousness of the facts and the alleged violations, and taking into account the powers vested in this Court as an international organ for the protection of human rights, the Court will proceed to make an extensive and detailed determination of the events that occurred, because this contributes to making reparation to the victims, to avoiding the repetition of similar acts and, in brief, to achieving the purposes of the inter-American jurisdiction on human rights.¹⁹ Furthermore, the Court will include the corresponding chapters to analyze and to clarify, as necessary, the scope of the violations alleged by the Commission and the representatives.

IV COMPETENCE

25. The Inter-American Court is competent to hear this case pursuant to Article 62(3) of the American Convention, because Guatemala has been a State Party to the American Convention since May 25, 1978, and accepted the contentious jurisdiction of the Court on March 9, 1987. In addition, Guatemala ratified the Inter-American Convention on Forced Disappearance of Persons on February 25, 2000.

26. The Court recalls that, in general, it has temporal competence as of the date of ratification of the respective instruments and the acceptance of its contentious jurisdiction, in the terms in which the said ratifications and acceptances were made.²⁰ However, it observes that, in the instant case, the State has acknowledged its international responsibility for the alleged violation of freedom of thought and expression, and freedom of association as a reason for the forced disappearance of Edgar Fernando García (*supra* para.

¹⁶ Cf. *Case of El Caracazo v. Venezuela. Merits*. Judgment of November 11, 1999. Series C No. 58, para. 43, and *Case of the Massacres of El Mozote and nearby places v. El Salvador, supra*, para. 28.

¹⁷ Cf. *inter alia*, *Case of Torres Millacura et al. v. Argentina. Merits, reparations and costs*. Judgment of August 26, 2011. Series C No. 229, para. 37, and *Case of Vélez Restrepo and family members v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of September 3, 2012. Series C No. 248, para. 21.

¹⁸ Cf. *Case of Pacheco Teruel et al. v. Honduras. Merits, reparations and costs*. Judgment of April 27, 2012. Series C No. 241, para. 19.

¹⁹ Cf. *Case of Tiu Tojín v. Guatemala. Merits, reparations and costs*. Judgment of November 26, 2008. Series C No. 190, para. 26, and *Case of the Massacres of El Mozote and nearby places v. El Salvador, supra*, para. 27.

²⁰ Cf. *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs*. Judgment of September 1, 2010. Series C No. 217, para. 20.

13.a.2). This alleged violation occurred and ended before the date of acceptance of the Court's jurisdiction.

27. The Court has established that when a State acknowledges its international responsibility for violations of the American Convention that occurred before it accepted the Court's jurisdiction, it waives the temporal limitation on the exercise of the Court's competence with regard to the facts or the violations acknowledged, thereby giving its consent for the Court to examine the events that occurred and to rule on the violations that occurred in this regard.²¹ Therefore, based on the State's acknowledgment of responsibility, the Court finds that, in this case, it has competence to examine the alleged violation of Articles 13 and 16 of the Convention to the detriment of Edgar Fernando García.

V PRIOR CONSIDERATIONS

A) Regarding the preliminary objection

28. In its answering brief, the State indicated that “in this case, domestic remedies have not been exhausted” and this together with the “complementary and subsidiary nature [...] [of the inter-American system...], le[d] to filing the failure to exhaust domestic remedies as a preliminary objection.” During the public hearing, the State “withdr[ew] the preliminary objection of failure to exhaust domestic remedies.” However, in its final written arguments, the State “reiterate[d] the preliminary objection of failure to exhaust domestic remedies filed in the answering brief.”

29. In its final observations, the Commission “emphasize[d] that, during [the] public hearing, the State withdrew the preliminary objection filed in its answering brief”; hence, it asked the Court to “take [the said] waiver into account and to proceed to analyze the merits of the case.” The representatives did not refer to the State's withdrawal of the preliminary objection.

Considerations of the Court

30. Article 42(1) of the Court's Rules of Procedure establishes that preliminary objections may only be filed in the answering brief. The filing of the preliminary objection of failure to exhaust domestic remedies is a procedural right of the State. Therefore, the State may waive this right at any time during the proceedings.²²

31. In the instant case, the State filed a preliminary objection of failure to exhaust domestic remedies in its answering brief. On the next procedural occasion, the public hearing, the State clearly and precisely indicated that it withdrew this preliminary objection. Nevertheless, subsequently, in its final written arguments, the State “reiterate[d]” the preliminary objection. This Court recalls that, under international practice and pursuant to its case law, when a party to litigation adopts a specific position that is detrimental to itself

²¹ In this regard, see, *Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 191, para. 30; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia, supra*, para. 22. See also, *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. 192.

²² Cf. *Matter of Viviana Gallardo et al.* Series A No. G 101/81, para. 26, and *Case of González Medina and family members v. Dominican Republic, supra*, footnote 16.

or beneficial to the other party, based on the principle of estoppel it cannot then assume a contrary position.²³

32. The Court has assessed the declarations made by States during public hearings in the same way as their written statements, and considers that they produce the same legal effects.²⁴ Guatemala's withdrawal of the preliminary objection during the public hearing was obviously relevant for determining the application of the estoppel principle as regards the contrary position indicated by the State in its final written arguments. The Court considers that the State's waiver of the preliminary objection during the public hearing gave rise to a legal effect that both the representatives and the Commission acted upon and, therefore, pursuant to the said principle, Guatemala is precluded from re-filing or "reiterating" this preliminary objection in its final written arguments. Hence, the Court considers that the State withdrew the said preliminary objection and, consequently, it finds it unnecessary to analyze its admissibility.

33. Similarly, the Court recalls that preliminary objections cannot limit, contradict or annul the content of a State's acknowledgment of responsibility²⁵ and, especially, an agreement on reparations already reached with the victims. In this regard, the Court points out that the preliminary objection filed of failure to exhaust domestic remedies is incompatible with Guatemala's partial acknowledgment of responsibility and the reparations agreement already signed by the parties to this case.

B) Regarding determination of the presumed victims

34. The Court has established that the presumed victims must be identified in the Merits Report issued by the Commission under Article 50 of the Convention, and in the submission of the case to this Court, pursuant to Article 35(1) of its Rules of Procedure.²⁶ Furthermore, according to this article, it is for the Commission, and not this Court, to identify the presumed victims in a case before the Court, precisely and at the appropriate procedural moment.²⁷ Legal certainty requires, as a general rule, that all the presumed victims be duly identified in both documents, and it is not possible to add new victims following the Merits Report, save in the exceptional circumstance described in Article 35(2) of the Court's Rules

²³ Cf. *Case of Neira Alegría et al. v. Peru. Preliminary objections*. Judgment of December 11, 1991. Series C No. 13, para. 29, and *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of September 4, 2012. Series C No. 250, para. 25.

²⁴ See, for example, *Case of the Serrano Cruz Sisters v. El Salvador. Preliminary objections*. Judgment of November 23, 2004. Series C No. 118, para. 50, and *Case of Salvador Chiriboga v. Ecuador. Reparations and costs*. Judgment of March 3, 2011. Series C No. 222, para. 91.

²⁵ Cf. *Case of Manuel Cepeda Vargas v. Colombia, supra*, para. 26, and *Case of Vélez Loor v. Panama, supra*, para. 13.

²⁶ This has been the Court's consistent case law since the *Case of García Prieto et al. v. El Salvador. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2007. Series C No. 168, paras. 65 to 68, and the *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary objections, merits, reparations and costs*. Judgment of November 21, 2007. Series C No. 170, paras. 224 and 225. These judgments were adopted by the Court during the same session. In application of the Court's new Rules of Procedure, this criterion has been ratified since the case of the *Barrios Family v. Venezuela*. Cf. *Case of the Barrios Family v. Venezuela. Merits, reparations and costs*. Judgment of November 24, 2011. Series C No. 237, footnote 214. See, also, *Case of Furlan and family members v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of August 31, 2012. Series C No. 246, para. 277.

²⁷ Cf. *Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2006. Series C No. 148, para. 98, and *Case of Nadege Dorzema et al. v. Dominican Republic. Merits Reparations and costs*. Judgment of October 24, 2012. Series C No. 251, para. 29.

of Procedure.²⁸ The Court notes that this case does not involve one of the circumstances established in the said Article 35(2) that could justify the identification of presumed victims following the Merits Report or the submission of the case.

35. In this regard, the Court emphasizes that the representatives must identify all of the presumed victims during the proceedings before the Commission and avoid doing so following the issue of the Merits Report mentioned in Article 50 of the Convention, as in this case. This is because, when issuing the said report, the Commission should have all the information required to determine the issues of fact and law in the case, including those who it should consider as victims, which did not occur in this case.

36. In accordance with the provisions of Article 35(1) of the Court's Rules of Procedure, in its brief submitting the case, the Inter-American Commission indicated that the presumed victims in this case were Edgar Fernando García, his wife, Nineth Varenca Montenegro Cottom, his daughter, Alejandra García Montenegro, and his mother, María Emilia García. Nevertheless, the Commission noted that, following the notification of Report No. 117/10, the representatives had indicated that Mario Alcides Polanco Pérez and Andrea Polanco Montenegro should also be considered victims (*supra* para. 3). In their motions and arguments brief, the representatives identified Edgar Fernando García, María Emilia García, Nineth Varenca Montenegro Cottom and Alejandra García Montenegro as victims. However, they asked that the measure of psychological rehabilitation be provide to Mario Alcides Polanco and Andrea Polanco Montenegro also. The State opposed the inclusion of these persons as presumed victims; although, in its answering brief, it accepted to provide psychological care to Andrea Polanco Montenegro.

37. Pursuant to the above-mentioned case law criteria, the Court finds it desirable to clarify that the additional family members indicated by the representatives will not be considered as presumed victims in this case. Therefore, the Court declares that the following persons will be considered presumed victims in this case: Edgar Fernando García, Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García.

VI EVIDENCE

38. Based on the provisions of Articles 50, 57, and 58 of the Rules of Procedure, as well as on its case law regarding evidence and its assessment,²⁹ the Court will examine and assess the documentary probative elements forwarded by the parties at different procedural moments, the statements and testimonies provided by affidavit and during the public hearing before the Court, and also the helpful evidence incorporated *ex officio* by the Court (*infra* para. 44). To this end, the Court will abide by the principles of sound judicial discretion, within the corresponding legal framework.³⁰

A) Documentary and testimonial evidence

²⁸ *Mutatis mutandi*, under the Court's previous Rules of Procedure, *Cf. Case of Radilla Pacheco v. Mexico*, *supra*, para. 110, and *Case of Barbani Duarte et al. v. Uruguay. Merits Reparations and costs*. Judgment of October 13, 2011. Series C No. 234, para. 42.

²⁹ *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits*. Judgment of March 8, 1998. Series C No. 37, paras. 69 to 76, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 31.

³⁰ *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits*, *supra*, para. 76, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 31.

39. The Court has received different documents submitted as evidence by the Inter-American Commission, the representatives, and the State, attached to their main briefs (*supra* paras. 1, 5 and 7). In addition, the Court has received affidavits from the presumed victim, Alejandra García Montenegro, and from the witness, Manuel Giovanni Vásquez Vicente. Regarding evidence provided at the public hearing, the Court heard the testimony of the presumed victim, Nineth Varenca Montenegro Cottom, and of the witness, Velia Muralles Bautista.³¹

B) Admission of the evidence

B.1) Admission of the documentary evidence

40. In this case, as in others, the Court grants probative value to those documents forwarded by the parties and the Commission at the appropriate procedural moment that were not contested or opposed, and the authenticity of which was not questioned.³² The Court observes that some of the documentary evidence offered by the State in its answering brief was time-barred.³³ However, in application of Article 58(a) of its Rules of Procedure, the Court decides to admit these documents as it considers them useful for deciding this case.

41. Regarding the newspaper articles submitted by the parties and the Commission together with their different briefs, this Court has considered that they may be assessed provided that they refer to well-known public facts or declarations by State officials, or when they corroborate certain aspects of the case.³⁴ The Court decides to admit those documents that are complete or that, at least, allow their source and date of publication to be verified, and will assess them taking into account the whole body of evidence, the observations of the parties, and the rules of sound judicial discretion.

42. Also, with regard to some documents indicated by the parties and the Commission by means of electronic links, the Court has established that, if a party provides, at least, the direct electronic link to the document cited as evidence and it is possible to access it, legal certainty and procedural equality are not impaired, because the Court and the other parties are able to locate it immediately.³⁵ In this case, neither the other parties nor the Commission contested or made observations on the content and authenticity of such documents.

³¹ The purpose of these statements is set forth in the Order of the President of the Court of March 16, 2012. The Order summoned witness Marco Tulio Alvarez Bobadilla, proposed by the State, to testify at the public hearing. However, the State withdrew his statement after this Order had been issued.

³² Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 29, 1988. Series C No. 4, footnote 18, para. 140, and *Case of the Massacres of El Mozote and nearby places, supra*, para. 33.

³³ The time frame for presentation of the annexes to the answering brief expired on October 3, 2011. The State presented on October 20, 2011, for the first time, annexes I.2, II.3, II.4, III.5, III.6, III.7, III.8 and III.9. Previously, on September 27, 2011, the State had remitted annex I.1 to its answering brief (consisting of certified copies of the "first instance judgment in the proceedings identified as C-01069-1997-00001, headed by the third judge of the Eighth Criminal, Drug-trafficking and Environmental Offenses Court of Guatemala"), as well as the curricula vitae and contact information of the persons offered as expert witnesses in its answering brief.

³⁴ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 146, and *Case of the Massacres of El Mozote and nearby places, supra*, para. 35.

³⁵ Cf. *Case of Escué Zapata v. Colombia. Merits, reparations and costs*. Judgment of July 4, 2007. Series C No. 165, para. 26, and *Case of the Massacres of El Mozote and nearby places, supra*, para. 36.

43. During the public hearing, witness Velia Muralles Bautista handed over a folder of documents from the Historical Archive of the National Police (*supra* para. 11), which was delivered to the parties and the Commission at the hearing. The Court admits this documentation, because it considers it useful for this case; moreover, it was not contested and its authenticity and veracity were not questioned.

44. Lastly, pursuant to Article 58(a) of the Court's Rules of Procedure, and considering them useful for deciding this case, the Court adds the following documents to the body of evidence: (a) copy of the document known as the "*Diario Militar*,"³⁶ (b) copy of Decree No. 51-92, enacting the Code of Criminal Procedure,³⁷ and (c) copy of Decree-Law 145-96, enacting the National Reconciliation Act. These documents were indicated by the parties in their briefs without submitting them directly; however, they were provided as evidence in the *Case of Gudiel Álvarez ("Diario Militar") et al. v. Guatemala*, and the Court transfers them from that case file to this case.³⁸ Also, pursuant to the said Article 58(a) of the Rules of Procedure, and considering that they are useful for deciding this case, the Court adds the following documents to the body of evidence: (a) copy of the Agreement on the Basis for the Legal Integration of the Guatemalan National Revolutionary Unity,³⁹ and (b) copy of the Agreement on a Firm and Lasting Peace.⁴⁰

B.2) Admission of the statements of the presumed victims and of testimonial evidence

45. Regarding the testimony provided by the presumed victims and the witnesses during the public hearing and by affidavit, the Court finds this pertinent only to the extent that it is in keeping with the purpose defined by the President of the Court in the Order requesting it (*supra* para. 39).⁴¹ It will be assessed in the corresponding chapter, together with the other elements of the body of evidence, and taking into account the observations of the parties.

46. Pursuant to this Court's case law, the statements of the presumed victims cannot be assessed in isolation, but rather, within all the other evidence in the case, because they are useful insofar as that they can provide further information on the alleged violations and their consequences.⁴² On this basis, the Court admits these statements (*supra* para. 39), and they will be assessed in keeping with the above-mentioned criteria.

47. Lastly, the Court notes that the Commission requested the incorporation into the body of evidence in this case of the testimony provided by Marco Tulio Álvarez Badilla in the *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala* (*supra* paras. 11 and 12). In

³⁶ *Diario Militar. Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala* (file of annexes to the Merits Report, tome I, annex 11, folios 333 to 409)

³⁷ Decree-Law No. 51-92: Code of Criminal Procedure. *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala* (file of annexes to the motions and arguments brief, tome I, annex A10, folios 9472 to 9605).

³⁸ Decree No. 145-1996: National Reconciliation Act. *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala* (file of annexes to the motions and arguments brief, tome IV, annex A55, folios 10484 to 10487).

³⁹ Agreement on the Basis for the Legal Integration of the Guatemalan National Revolutionary Unity. Madrid, Spain. December 12, 1996. Available at: <http://www.sepaz.gob.gt/index.php/acuerdos/separador2/acuerdo-bases-incorporacion-unidad-revolucionaria-nacional-guatemalteca>.

⁴⁰ Agreement on a Firm and Lasting Peace. Guatemala, December 29, 1996. Available at: <http://www.sepaz.gob.gt/index.php/acuerdos/separador2/acuerdo-paz-firme-duradera>.

⁴¹ Cf. *Case of Loayza Tamayo v. Peru. Merits*. Judgment of September 17, 1997. Series C No. 33, para. 43, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 40.

⁴² Cf. *Case of Loayza Tamayo v. Peru. Merits*, *supra* note 77, para. 43, and *Case of Fontevicchia and D'Amico v. Argentina*, *supra* footnote 70, para. 15.

this regard, the Court considers that it is not necessary to incorporate this testimonial statement, because it is not essential for deciding this case, because the partial acknowledgment of responsibility made by the State, and the available body of evidence provide sufficient information to decide the merits of the case.⁴³

VII FACTS

48. Given the importance of establishing the facts that generated State responsibility in this case in order to preserve the historical memory and to prevent the recurrence of similar events and also as a form of reparation to the victims, in this chapter, the Court will establish the facts of the case, based on the facts submitted to its consideration by the Commission and the acknowledgment of responsibility made by the State, taking into account the motions and arguments brief of the representatives and the body of evidence.

49. The Court recalls that, based on its case law, the principle of non-retroactivity and the optional clause on the acceptance of the Court's jurisdiction do not mean that an event that occurred before the said acceptance must be excluded from any consideration when such an event may be relevant for determining the facts and the human rights violations that do fall within its temporal competence. In addition, the Court notes that, under Article 41(3) of the Rules of Procedure, it may consider those facts that have not been expressly denied and those claims that have not been expressly controverted as accepted. The Court also recalls that, in order to decide the different cases submitted to its consideration, it has needed to take into account the context and other facts that exceed its jurisdiction, such as events that are relevant in order to understand the circumstances in which the alleged violations submitted to its consideration took place.⁴⁴

50. The Court will now refer to the facts relating to the violations alleged in this case, namely: (A) the context in which the events of this case took place; (B) the appearance of the *Diario Militar* and the Historical Archive of the National Police; (C) the facts relating to the forced disappearances of the Edgar Fernando García, as well as the circumstances surrounding this; (D) the search for the victim and the investigations into the events, and (E) the facts relating to the *Grupo de Apoyo Mutuo*.

A) General context

51. From 1962 to 1996 an internal armed conflict took place in Guatemala that resulted in considerable human, material, institutional and moral costs. The Historical Clarification Commission (*infra* para. 55; hereinafter also “the CEH”) estimated that “more than two hundred thousand people were killed or disappeared in the internal armed conflict.” During this conflict, the State applied the so-called “National Security Doctrine,” based on which it used the concept of “internal enemy,” which initially referred to the guerrilla organizations, but gradually expanded to include “all those who identified themselves with communist

⁴³ The Court has made a similar ruling in the following cases: *Case of Chocrón Chocrón v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of July 1, 2011. Series C No. 227, para. 38, and *Case of Contreras et al. v. El Salvador. Merits, reparations and costs*. Judgment of August 31, 2011. Series C No. 232, para. 34.

⁴⁴ Cf. *Case of Goiburú et al. v. Paraguay. Merits, reparations and costs*. Judgment of September 22, 2006. Series C No. 153, paras. 53 and 63, and *Case of the Río Negro Massacres v. Guatemala, supra*, para. 55.

ideology or who belonged to an organization – of a labor, social, religious or student nature – or those who, for whatever reason, were not in favor of the established regime.”⁴⁵

52. During the internal conflict, the intelligence services played a particularly important role. The two main military intelligence agencies were the Army’s Intelligence Sector or the Intelligence Directorate of the National Defense General Staff known as the “G-2,” and a unit of the Presidential Staff, popularly known as “La Regional” or “El Archivo.” Military intelligence was responsible for collecting and reviewing information on those persons considered internal enemies and, on this basis, it planned counterinsurgency operations.⁴⁶

53. The military intelligence system included the National Police, which supported the counterinsurgency operations of the Army and its intelligence agencies, including forced disappearances such as those that occurred in this case.⁴⁷ According to official sources, the heads and deputy heads of the Police were often members of the Army, and this had an impact on the chain of command. Moreover, the two entities were in constant communication. According to the Guatemalan Peace Secretariat, this situation “reveals that the different police units, some more than others, had become operational arms of the Armed Forces, although the latter were always in charge of decision-making.”⁴⁸

54. As has been established in other cases heard by this Court involving Guatemala, the forced disappearance of persons constituted a State practice in that country during the internal armed conflict; it was carried out mainly by members of the security forces, who captured members of insurgency movements or persons identified as susceptible of becoming insurgents.⁴⁹ According to the CEH, the State forces and related paramilitary

⁴⁵ Cf. The CEH report, *Guatemala: Memoria del Silencio*, Guatemala, United Nations Project Office, 1999, volume II, pp. 20, 21 and 318, paras. 769, 772 and 1729, and volume V, conclusions, pp. 21 and 55, paras. 1 and 147, annex 3 to the Merits Report, Available at: <http://shr.aaas.org/guatemala/ceh/gmds.pdf>; Peace Secretariat, Presidency of the Republic, *La autenticidad del Diario Militar, a la luz de los documentos históricos de la Policía Nacional*, 2009, pp. 5 and 6 (file of annexes to the Merits Report, tome I, annex 5, folios 20 and 21); expert opinion of Marco Tulio Álvarez Bobadilla on the historical and political context of the forced disappearance of Edgar Fernando García provided in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folios 1540, 1543 to 1546 and 1558); expert opinion of Rember Aroldo Larios Tobar on the police structure in the case of Edgar Fernando García provided in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folios 1624 to 1626), and expert opinion of social psychologist Marina de Villagrán on the case of Edgar Fernando García provided in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folios 1649 and 1650).

⁴⁶ Cf. CEH, *supra*, volume II, pp. 75 and 76, paras. 947 and 952, and Peace Secretariat, *supra*, p. 21, folio 23. The official name of “El Archivo” was amended with the different changes of Government; during the Government of Oscar Humberto Mejía Víctores it was called the “Intelligence Secretariat of the President of the Republic.” Oscar Humberto Mejía Víctores was in power from August 1983 to January 1986. Cf. CEH, *supra*, volume I, p. 234 and volume II, p. 85, para. 983.

⁴⁷ Cf. CEH, *supra*, volume II, pp. 43 and 44, para. 847; Peace Secretariat, *supra*, pp. 148 and 149, folios 157 and 158; PDH, *El Derecho a Saber. Informe Especial del Archivo Histórico de la Policía Nacional de Guatemala*, 2009, pp. 112, 193 and 240, annex 8 to the Merits Report, Available at: <http://www.pdh.org.gt/index.php/documentos/informes-especiales.html>, and expert opinion of Rember Aroldo Larios Tobar on the police structure in the case of Edgar Fernando García provided in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folio 1636). http://www.pdh.org.gt/index.php?option=com_phocadownload&view=category&id=5&Itemid=55&limitstart=20

⁴⁸ Peace Secretariat, *supra*, pp. 148 and 149, folios 157 and 158. Similarly, Cf. PDH, *El Derecho a Saber*, *supra*, pp. 95; CEH, *supra*, volume II, p. 149, paras. 1164 and 1165.

⁴⁹ Cf., *inter alia*, *Case of Bámaca Velásquez v. Guatemala. Merits*. Judgment of November 25, 2000. Series C No. 70, para. 132; *Case of Tiu Tojín v. Guatemala*, *supra*, para. 49, and *Case of Chitay Nech et al. v. Guatemala. Preliminary objections, merits, reparations and costs*. Judgment of May 25, 2010. Series C No. 212, para. 67. Similarly, see, expert opinion of Rember Aroldo Larios Tobar on the police structure in the case of Edgar Fernando García provided in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folios 1636 and 1637), and expert opinion of Fernando Arturo López Antillón on the effectiveness of *habeas corpus*

groups were responsible for 92% of the forced disappearances recorded by this organization.⁵⁰

55. The peace negotiation process in Guatemala began in 1990, and ended in 1996. During this period twelve accords were signed, including one that established the Historical Clarification Commission (CEH), which began work on July 31, 1997, and submitted its report on February 25, 1999. The National Reconciliation Act established that the State authorities “were legally obliged to support the [CEH].” Nevertheless, the CEH complained that State agencies did not allow access to relevant information. In this regard, the CEH “described the collaboration provided by the National Army as unsatisfactory and unreliable” and emphasized that it had “not received a single document with information on the activities of the intelligence services,” even though it had requested these.⁵¹ According to the CEH, “the Executive – through various agencies, including the National Army and the Private Secretariat of the President of the Republic – had given different reasons for not handing over the documents requested by the CEH. Initially, it stated that the documents were subject to constitutional reserve; subsequently, [...] it indicated that the requested documents had never existed or had been lost or destroyed,” even though “the Commission ha[d] verified that some of [these] documents [...] truly existed and were on file in offices of the National Army.”⁵² Regarding the latter, the Court notes that, in response to the CEH, the Ministry of Defense had denied the existence of documents, such as the *Diario Militar*, which appeared, through unofficial channels, three months after the Commission had published its final report⁵³ (*infra* para. 56). This lack of access to information had an adverse impact on the work of the CEH.⁵⁴ However, with regard to the instant case, the CEH was able to obtain other “evidence” about what happened to Edgar Fernando García, through direct and referential witnesses (*infra* para. 68).

B) The *Diario Militar* and the Historical Archive of the National Police

B.1) The *Diario Militar*

56. In May 1999, the National Security Archive, a United States non-governmental organization, published a confidential Guatemalan state intelligence document known as the

during the internal armed conflict provided in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folios 1972 to 1974).

⁵⁰ Cf. CEH, *supra*, volume II, p. 411, para. 2053.

⁵¹ Cf. CEH, *supra*, volume I, pp. 23, 26-27, 30, 35, 49 to 51, 215, paras. 1, 2, 19, 45, 89 to 96 and 694, and volume II, pp. 13, 14 and 15, paras. 741 and 745; *Case of Myrna Mack Chang v. Guatemala. Merits, reparations and costs*. Judgment of November 25, 2003. Series C No. 101, para. 134.9; *Case of the Río Negro Massacres v. Guatemala, supra*, para. 64; Decree No. 145-1996: National Reconciliation Act, December 27, 1996, *supra*, art. 10 and selection of correspondence between the CEH and institutions of the Republic of Guatemala, letter of April 29, 1998, ABT/C/092-98/lg, addressed to the President's Private Secretary, CEH, *supra*, volume VIII, pp. 176 and 177.

⁵² Cf. CEH, *supra*, volume I, p. 50, para. 93.

⁵³ The CEH requested and was not provided with, *inter alia*, information on: “[r]eports of daily operations and transactions prior to 1988” of the Army, and “[t]he situational assessments, plans of operations, operation orders, operation reports, and operation logs of the Presidential General Staff between 1960 and 1996, as well as an overall list of the operations conducted in its sphere of responsibility and the reports on these operations.” Cf. Selection of correspondence between the CEH and institutions of the Republic of Guatemala, Letter of March 24, 1998, CT/C/079-98/lg, addressed to the President of the Republic, CEH, *supra*, volume VIII, annex III, pp. 161 and 162.

⁵⁴ The CEH indicated, in relation to the forced disappearances, that it “was unable to clarify [...] if there had been a single chain of command or a centralized system from which the instructions for carrying out the forced disappearance of persons originated.” Cf. CEH, *supra*, volume II, p. 459, para. 2180.

Diario Militar (hereinafter “the *Diario Militar*”). The organization obtained access to this document unofficially through an employee of the Guatemalan Army, who had removed it from the archives of this institution.⁵⁵ According to studies conducted by State and non-government agencies, and the expert evidence provided to the Court, the *Diario Militar* was prepared by a military intelligence structure which, presumably, was also involved in the actions described in the document.⁵⁶ The State has not contested this.

57. The *Diario Militar* consists of 73 legal-size pages and is divided into six sections. The first five sections contain, *inter alia*, information on the organization of intelligence files, as well as lists of different human rights organizations. The sixth section contains a list of 183 people with their personal data, membership in organizations, activities and, in most cases, it also contained a passport-size photograph of the person. Each record also indicates the acts perpetrated against that person, including: secret detention, kidnapping and murder. The facts recorded in the *Diario Militar* occurred between August 1983 and March 1985.⁵⁷

58. From an analysis of the *Diario Militar*, the Guatemalan Peace Secretariat and the National Security Archive determined that this document used codes to describe the facts and also the fate of some of the individuals it mentions. For example, it has been interpreted that the codes “300,” “s/he went with Pancho,” “Pancho took him/her” and “s/he went (+)” placed at the end of a person’s record indicates that they had been killed or died. These codes reveal that most people were executed and that, at times, groups of people were executed on the same day. Furthermore, it has also been interpreted that codes such as “released for contacts” or “regained his/her freedom” meant that the persons had been released in order to obtain information about “other militants in guerrilla organizations.” In addition, certain annotations in the *Diario Militar* have been interpreted to signify that the persons were transferred to military units other than those where they were initially detained. The final whereabouts of most of the people recorded in the *Diario Militar* and/or their remains are unknown.⁵⁸

59. After studying the *Diario Militar*, several experts have indicated that, within the Army, the entity that was possibly responsible for the *Diario Militar* was the presidential intelligence service.⁵⁹ Nevertheless, the State has not challenged the authenticity of the *Diario Militar* before this Court, and it has been verified by corroborating the facts recorded in it against other documents of that era from State and non-government agencies.⁶⁰

B.2) The Historical Archive of the National Police

⁵⁵ Cf. Peace Secretariat, *supra*, p. 21, folio 33.

⁵⁶ Cf. Peace Secretariat, *supra*, p. 167, folio 175.

⁵⁷ Cf. *Diario Militar*, *supra*, sixth section; Peace Secretariat, *supra*, pp. 21, 22 and 23, folios 33, 34 and 35.

⁵⁸ Cf. *Diario Militar*, *supra*; Peace Secretariat, *supra*, pp. 24, 25, 157 and 158, folios 36, 37, 166 and 167, and expert opinion of Marco Tulio Álvarez Bobadilla on the historical and political context of the forced disappearance of Edgar Fernando García provided in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folio 1635).

⁵⁹ Cf. Peace Secretariat, *supra*, pp. x and xi, 21, 22 and 167, folios 14, 15, 33, 34 and 175; expert opinion of Marco Tulio Álvarez Bobadilla on the historical and political context of the forced disappearance of Edgar Fernando García provided in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folio 1550), and expert opinion of Fernando Arturo López Antillón on the effectiveness of *habeas corpus* during the internal armed conflict provided in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folios 1981 and 1982).

⁶⁰ The Guatemala Executive Branch published the report “*La autenticidad del Diario Militar a la luz de los documentos históricos de la Policía Nacional*” recognizing the authenticity of the *Diario Militar*. Cf. Peace Secretariat, *supra*, p. 21 and 22, folios 33 and 34.

60. In July 2005, employees of the Ombudsman's Office (hereinafter "PDH") accidentally discovered, in a former base of the National Police in Guatemala City, videos, photos and around 80 million pages, among other objects, recording the actions of the National Police for over 100 years, from 1882 to 1997.⁶¹ This wealth of information has been called the Historical Archive of the National Police (hereinafter also "Historical Archive of the Police").

61. The Historical Archive of the National Police contains military and police plans for counterinsurgency operations, orders from Police Headquarters, file cards with the political affiliation of individuals, surveillance reports on the population, transcripts of interrogations, applications for *habeas corpus*, telegrams, bulletins, and circulars.⁶² The existence of the Historical Archive of the National Police had been denied by the authorities before it surfaced. The information contained in the Historical Archive of the National Police confirms and supplements the information recorded in the *Diario Militar*.⁶³

C) The forced disappearance of Edgar Fernando García

62. Edgar Fernando García was 26 years old and was married to Nineth Varenca Montenegro Cottom, with whom he had a daughter.⁶⁴ He was a primary school teacher and an administrative employee of the *Industria Centro Americana de Vidrio S.A.* (hereinafter "CAVISA"), where he was the Recording Secretary of the labor union. At the time of his arrest, he belonged to the Negotiating Committee on the Collective Working Conditions Agreement. He was also connected with Patriotic Youth for Labor of the Guatemalan Labor Party (hereinafter "the PGT"), the *Universidad de San Carlos de Guatemala* and the "Oliverio

⁶¹ Cf. PDH, *El Derecho a Saber*, *supra*, p. IX; PDH, *Informe Anual Circunstanciado. Situación de los Derechos Humanos en Guatemala*, 2008, annex 7 of the Merits Report, p. 250, Available at: <http://www.pdh.org.gt/index.php/documentos/informes.html>, and testimony given by Velia Muralles Bautista before the Inter-American Court during the public hearing in this case.

⁶² Cf. Expert opinion of Rember Aroldo Larios Tobar on the police structure in the case of Edgar Fernando García provided in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folios 1591, 1592, 1593, 1595, 1596, 1598, 1601, 1606, 1607); PDH, *supra*, pp. Xii, 49, 51, 53, 56, 60, 62, 67, 71, 73, 77, 79, 83, 86, and expert archival report prepared by Velia Muralles Bautista for the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folios 1742, 1911 and 1912).

⁶³ Cf. Peace Secretariat, *supra*, p. 167, folio 175.

⁶⁴ Cf. Copy of Edgar Fernando García's identity document (file of annexes to the Merits Report, tome II, annex 31, folio 482); copy of the marriage certificate of Edgar Fernando García and Nineth Varenca Montenegro Cottom (file of annexes to the motions and arguments brief, tome I, annex 3, folios 1345 and 1346), and copy of the birth certificate of a Alejandra García Montenegro (file of annexes to the motions and arguments brief, tome I, annex 4, folio 1348).

Castañeda de León” University Students Association.⁶⁵ According to his wife, Edgar Fernando García was under surveillance before his disappearance.⁶⁶

63. The *Diario Militar* contains three mentions of Edgar Fernando García. In the first section, he appears in a document entitled “list of folders of elements who have been dealt with and who are classified by numbered packages,” which contains a list of names in alphabetical order divided into eleven groups called “packages.” “Package No. 4” records Edgar Fernando García with the pseudonym, “Xicara, 33.”⁶⁷ The third section of the *Diario Militar* contains a handwritten annotation “Mutual Support” dated November 20, 1984, and indicates, among nine other persons, “Edgar Fernando García (alias) ‘Xicara’ and 33. Member of the Central Regional Committee of the PGT-PG [PGT-Communist Party] and CAVISA trade unionist.”⁶⁸ In addition, the following page indicates:

Edgar Fernando García:

Son of Maria Emilia García, brown eyes, black hair, dark complexion, 1.72 m., single, primary school teacher, born in Guatemala City on November 27, 1957. Subsequently married Nineth Montenegro, resides on 13th Street “B” 27-78, Zone 7.

29-07-77 Offered a position at the National Institute of Seismology, Vulcanology, Meteorology and Hydrology (INSIVUNEH).

19-07-79 passport No. 606929 issued to him.

00-04-84 Active member of the CAVISA union, belongs to the Working Conditions Negotiating Committee.

18-04-84 Abducted near 3rd Avenue and 7th Street of Zone 11 by unidentified men, with no knowledge of his whereabouts to date.⁶⁹

64. Meanwhile, the Historical Archive of the National Police contains records indicating that Edgar Fernando García was arrested in 1978 for disturbing the public order by putting up street barricades during a demonstration.⁷⁰ In 1980, Mr. García, acting on behalf of a university students association, was granted a permit to carry out a march, and this was recorded in the Historical Archive of the Police.⁷¹ In addition, there is also a file card for

⁶⁵ Cf. Extract from the *Diario Militar* (file of annexes to the Merits Report, tome I, annex 6, folio 188); Note of the Labor Union of *Industria Centro Americana de Vidrio S.A.* dated October 1984 (file of annexes to the Merits Report, tome I, annex 11, folio 195); note GG-014-88 of *Industria Centro Americana de Vidrio* dated March 3, 1988 (file of annexes to the Merits Report, tome I, annex 12, folio 197); PDH. Television Program Production Unit. Video entitled “*Aún guardamos la esperanza*” [We remain hopeful] dated February 2009. Available at: <http://www.youtube.com/watch?v=SrQFj7GOZ0> (part 1) and <http://www.youtube.com/watch?v=RDnriu1uJ0> (part 2) (annex 10 to the Merits Report); documents handed over during the public hearing by Velia Muralles Bautista, Note No. 02942 from the Ministry of Defense to the Director General of National Police of March 5, 1984 (merits file, tome II, folios 866 and 867); CEH, *supra*, volume VI, p. 146; note 143/2006 of the Records and Statistics Department of the *Universidad de San Carlos de Guatemala* of November 27, 2006 (file of annexes to the Merits Report, tome I, annex 9, folio 193), and Historical Archive of the National Police (hereinafter cited as “AHPN”). Resolution No. 720 of the Departmental Government of Guatemala of March 18, 1980, GT PN 24-03 S003, No. 1539 MP-0131-10-023 (file of annexes to the motions and arguments brief, tome I, annex 7, folio 1355).

⁶⁶ Cf. Testimony given by Nineth Varenca Montenegro Cottom before the Inter-American Court during the public hearing in this case

⁶⁷ Cf. *Diario Militar*, first section, and extract from the *Diario Militar* (file of annexes to the Merits Report, tome I, annex 6, folio 190)

⁶⁸ Cf. *Diario Militar*, third section.

⁶⁹ Cf. Extract from the *Diario Militar* (file of annexes to the Merits Report, tome I, annex 6, folio 188).

⁷⁰ Cf. AHPN. Note No. 027474 of October 7, 1978, GT PN 50 S007, No. 12387, and Note No. 0274473 of the Detectives Unit of the National Police of October 7, 1978, GT PN 50 S007, No. 12388 (file of annexes to the motions and arguments brief, tome I, annexes 5 and 6, folios 1351 and 1353).

⁷¹ Cf. AHPN. Resolution No. 720 of the Departmental Government of Guatemala of March 18, 1980, GT PN 24-03 S003, No. 1539 MP-0131-10-023, and Decision No. 106/Ebpp of the Joint Operations Center of the Police of

Edgar Fernando García, and a note indicating certain activities of the CAVISA union, owing to which a connection is made between this organization subversive groups.⁷²

65. On Saturday February 18, 1984, at 10 a.m., Mr. García and Danilo Chinchilla Fuentes were walking down 3rd Avenue and 7th Street, Zone 11, when they were intercepted by several uniformed police agents. They both managed to run away. Danilo Chinchilla was shot and injured; witnesses crowded around him and he was taken to Roosevelt Hospital by the firefighters. Mr. García was also injured, but he was then arrested.⁷³ When Mr. García was searched, he was found to be carrying documents of the CAVISA labor union, based on which he was identified as a communist;⁷⁴ meanwhile, Danilo Chinchilla Fuentes was found to be carrying some PGT “newspapers.”⁷⁵

66. The Historical Archive of the National Police contains documents recording a “Patrol and Cleansing Operation” conducted by the National Police from February 17 to 19, 1984. This operation was part of a “Basic Security Control” plan conducted due to the increased trafficking of arms, ammunition and food to the subversive groups, and the Police had received training for it from the National Defense General Staff. All units of the National Police took part in the operation. The map of Guatemala City was divided into seven sectors, each of which was assigned to a Police unit. The operations plan established that “those arrested [would] be taken to the unit corresponding to the sector.” According to these records, the Fourth Unit of the National Police was in charge of the Patrol and Cleansing Operation in Zone 11 on the morning of February 18, 1984.⁷⁶ Edgar Fernando García was captured during this operation.⁷⁷

March 24, 1980, GT ON 24-03 S003, No. 9101 (file of annexes to the motions and arguments brief, tome I, annexes 7 and 10, folios 1355 and 1362).

⁷² The document indicates that the CAVISA leaders had requested the construction of a hospital, which “it is widely known [...] that they want in order to attend to those who are injured in the armed confrontations with Government security forces in the urban area.” In addition, it indicates that “[t]he print and the quality of the ink that appeared on the flyers is similar to that which has appeared in the ORPA flyers” and that it was suspected that the money given by “the employers” to the union “to cover the expenses of activities for the workers [...] was handed over to a clandestine faction.” Cf. AHPN Official Note No. 2-0077-lao/63. GT PN 51-01 S002, No. 4267 (file of annexes to the motions and arguments brief, tome I, annex 11, folio 1364), and AHPN. File card for Edgar Fernando García, GT PN 50-08 S001, No. 11361, annex 5 to expert opinion of Marina de Villagrán provided in the domestic sphere (file of annexes to the motions and arguments brief, tome I, annex 53, folio 1694).

⁷³ Cf. Judgment of the Eighth Crime, Drug-trafficking and Environmental Offenses Court of October 28, 2010, C-01069-1997-00001 (file of annexes to the motions and arguments brief, tome IV, annex C, folios 3784, 3785 and 3854); CEH, *supra*, volume VI, p. 146; and testimony given by Nineth Varenca Montenegro Cottom before the Inter-American Court during the public hearing in this case. See, also, the testimony recorded by Danilo Chinchilla Fuentes and the transcript (file of annexes to the motions and arguments brief, tome I, annexes 20 and 21, folios 1388, 1391 and 1393). The Eighth First Instance Court that convicted two of the perpetrators of the forced disappearance of Edgar Fernando García (*infra* para. 80), indicated that “the judges have no doubt about the truth” of “the version of Danilo Chinchilla Fuentes that appears on CD and in the transcript,” taking into account, *inter alia*, other probative elements provided to the case file and the recognition of Mr. Chinchilla’s voice by a former close female companion.

⁷⁴ Cf. CEH, *supra*, volume II, p. 438, para. 2127; complaint filed by Nineth Varenca Montenegro Cottom before the PDH of January 22, 1988 (file of annexes to the Merits Report, tome I, annex 16, folio 210); video entitled “*Aún guardamos la esperanza*” dated February 2009, *supra*, parte 1, and affidavit prepared by Alejandra García Montenegro on April 20, 2012 (merits file, tome II, folio 802).

⁷⁵ Cf. Testimony recorded by Danilo Chinchilla Fuentes and the transcript (file of annexes to the motions and arguments brief, tome I, annexes 20 and 21, folios 1384 and 1393).

⁷⁶ Cf. AHPN. Note No. 2-0405-1C/clp of the National Defense General Staff of January 30, 1984, GT PN 51-01 S012; Note No. 12390 and of the National Police of February 7, 1984, GT PN 32 S007, No. 9210 MP-0131-10-107; Note No. COC/215-laov of the Joint Operations Center of the General Directorate of the National Police of February 17, 1984, GT PN 51-01 S012, No. 9043; sketch of Guatemala City with the division into sectors for the Cleansing Operation, GT PN 51-01 S012, No. 16062; document entitled “Sectors of Guatemala City for Cleansing Operations by P.N. Units,” GT PN 51-02 S012, No. 15976; Note No. COC/207-laov of the Joint Operations Center of

67. At 3 a.m. the following morning, Mr. García's wife, Mrs. Montenegro, heard a whistle like the one her husband always used for her to open the door. However, upon opening the door, she came face to face with heavily armed men, who searched the house and took, among other elements, documents belonging to Mr. García. The family received information from third parties indicating that Edgar Fernando was alive until December 1984 and had been seen in secret prisons.⁷⁸

68. Mr. García's case was included among the exemplary cases in the report of the CEH. In this regard, the CEH indicated that it had "reached the conviction that State agents captured Edgar Fernando García and made him disappear." The CEH specified that the "capture was carried out by members of the Special Operations Brigade (BROE) of the National Police," at a roadblock set up "by the El Guarda market," when he was with Danilo Chinchilla, and where they were "obliged to [...] stop, but [when] they tried to escape, [...] the Police] responded by firing at them, injuring both of them." According to the CEH, subsequently, Edgar Fernando García "was taken to the Fifth Unit of the PN," while Mr. Chinchilla was taken to a hospital and "[p]robably [...] was] recaptured" in September that year, following which nothing more was heard of him.⁷⁹ In addition, the CEH report includes information from witnesses, according to which Mr. García had been seen in a detention center that "may have been behind the Liceo Guatemala," and also that "he could have been held captive in a secret prison, near Villa de Guadalupe, zone 10, Guatemala City," where, presumably, "[h]e was in a very bad condition, cruelly tortured."⁸⁰ The CEH concluded that it could be presumed that Edgar Fernando García had been "executed by State agents, on the orders, or with the acquiescence of higher authorities" and that this case was "illustrative of the creation of a covert system of quasi-State justice, [...] against political or social opponents who were non-combatants" and "corresponds to the application of a criminal policy designed to eliminate opposition leaders connected to the *Universidad de San Carlos de Guatemala*."⁸¹

D) Search and investigation of the events

the General Directorate of the National Police of February 17, 1984, GT PN 23, No. 16636, and document entitled "Table showing chain of command of the operations of the National Police Units, School and Narcotics Branch in different zones of the capital," GT PN 51-02 S021, No. 6017 (file of annexes to the motions and arguments brief, tome I, annexes 12, 13, 15, 16, 17, 18, 19 and 26, folios 1366, 1368 to 1370, 1374, 1376, 1378, 1382 and 1405); Judgment of the Eighth Crime, Drug-trafficking and Environmental Offenses Court of October 28, 2010, C-01069-1997-00001 (file of annexes to the motions and arguments brief, tome IV, annex C, folios 3798, 3799 and 3858), testimony given by Velia Muralles Bautista before the Inter-American Court during the public hearing in this case.

⁷⁷ Cf. Judgment of the Eighth Crime, Drug-trafficking and Environmental Offenses Court of October 28, 2010, C-01069-1997-00001 (file of annexes to the motions and arguments brief, tome IV, annex C, folios 3784, 3785 and 3857 to 3858), and AHPN. Note No. COC/162-WA of the Joint Operations Center of the General Directorate of the National Police of February 10, 1984, GT PN 23, No. 16639 (file of annexes to the motions and arguments brief, tome IV, annex B, folio 3659).

⁷⁸ Cf. Testimony given by Nineth Varenca Montenegro Cottom before the Inter-American Court during the public hearing in this case; note of the No. 10 Prosecutor of the Guatemalan District Prosecutors to the Secretary of the Supreme Court of Justice of March 11, 1999 (file of annexes to the Merits Report, tome I, annex 18, folio 225); Judgment of the Eighth Crime, Drug-trafficking and Environmental Offenses Court of October 28, 2010, C-01069-1997-00001 (file of annexes to the motions and arguments brief, tome IV, annex C, folios 3785 and 3786); testimony of Nineth Varenca Montenegro Cottom addressed to the United Nations High Commissioner for Human Rights (file of annexes to the Merits Report, tome I, annex 15, folio 206); complaint filed by Nineth Varenca Montenegro Cottom before the PDH on January 22, 1988 (file of annexes to the Merits Report, tome I, annex 16, folios 210, 212 and 213).

⁷⁹ Cf. CEH, *supra*, volume VI, pp. 146 and 152.

⁸⁰ Cf. CEH, *supra*, volume VI, p. 148.

⁸¹ Cf. CEH, *supra*, volume VI, pp. 152 and 153.

69. The Monday following Mr. García's detention, Mrs. Montenegro went to CAVISA where he worked to seek help and, on Wednesday, February 22, 1984, the company filed an application for *habeas corpus* in his name. In response, the Supreme Court of Justice requested information from the heads of the five units of the National Police, the Internal Investigations Department, the Drugs and Narcotics Section, and the Specialized Technical Investigations Department as to whether Mr. García was detained.⁸²

70. In view of the lack of response, Mrs. Montenegro gave a press conference on February 23, 1984.⁸³ Also, on March 2 that year, she filed a complaint with the Vice Minister of Defense, who asked the Director General of the National Police for information about the events. The Fifth Unit of the National Police responded indicating that "no one of that name" had been arrested by that unit on February 18, 1984, but that "the corresponding investigations w[ould] be conducted."⁸⁴ The family also published press releases about Mr. García's disappearance. The Minister of the Interior sent at least two of these publications to the Director of the National Police on March 15, 1984, so that the events denounced could be investigated.⁸⁵ On March 27 that year, the Technical Investigations Department of the National Police (hereinafter "the DIT") recorded, *inter alia*, that "all the procedures undertaken have had negative results; to this end, visits have been made to detention centers, and State and private hospitals, and morgue records have been consulted. [...] Attempts have also been made to locate family members [...] to obtain information in this regard, but no one knows them"; the investigations would therefore remain open.⁸⁶

71. According to Mrs. Montenegro, "20 days after" Mr. García's disappearance, a colonel allegedly showed objects taken from his home during a press conference indicating that they had been obtained from a guerrilla safe house.⁸⁷ However, in July 1984, the National Defense General Staff responded to a request for information by Mrs. Montenegro that the "situation d[id] not correspond to the Armed Forces; therefore, it politely suggest[ed] that

⁸² Cf. Testimony given by Nineth Varenc Montenegro Cottom before the Inter-American Court during the public hearing in this case; application for *habeas corpus* filed by Juan Fermín Valladares Castillo, on behalf of CAVISA, on February 22, 1984 (file of annexes to the Merits Report, tome I, annex 27, folio 254), and AHPN. Memorandum No. 138 of the General Secretariat of the National Police of February 22, 1984, GT PN 26-01 S003, No. 16749 (file of annexes to the motions and arguments brief, tome I, annex 33, folio 1419).

⁸³ Cf. Testimony given by Nineth Varenc Montenegro Cottom before the Inter-American Court during the public hearing in this case.

⁸⁴ Cf. AHPN. Note No. 02942 from the Ministry of Defense to the Director General of National Police of March 5, 1984, GT PN 30 S002, Nos. 16280 and 16281; Decision No. 5290/Of.10o.SG.rba of March 7, 1984, GT PN 30 S002, No. 16282, and Decision No. 028-84/OAQE of March 8, 1984, GT PN 30 S002, No. 16283 (file of annexes to the motions and arguments brief, tome II, annex A, folios 2646 to 2649).

⁸⁵ Cf. *inter alia*, publication entitled "*Gestiones por 10 secuestrados*" [Measures taken on behalf of 10 individuals who have been kidnapped] published in "*El Gráfico*" on March 5, 1984 (file of annexes to the Merits Report, tome I, annex 24, folio 243); publication entitled "*Carta abierta a quienes tengan en su poder a mi hijo*" [Open letter to those holding my son] published in "*La Palabra*" on March 24, 1984 (file of annexes to the Merits Report, tome I, annex 20, folio 229); paid announcement in *El Gráfico* with a letter from Nineth Varenc Montenegro Cottom to Edgar Fernando García dated July 18, 1985 (file of annexes to the Merits Report, tome I, annex 24, folio 241). Also, Cf. AHPN. Note from the Minister of the Interior to the Director General of the National Police of March 15, 1984 (file of annexes to the motions and arguments brief, tome II, annex A, folios 2642 to 2644).

⁸⁶ Cf. AHPN. Order No. 06937 from the Technical Investigations Department dated March 27, 1984 GT PN 50 S004, Nos. 8968 (file of annexes to the motions and arguments brief, tome I, annex 35, folio 1423).

⁸⁷ Cf. Complaint filed by Nineth Varenc Montenegro Cottom before the PDH on January 22, 1988 (file of annexes to the Merits Report, tome I, annex 16, folio 210).

she direct her efforts towards the respective civil authorities.”⁸⁸ Meanwhile, that same month, Mrs. Montenegro denounced the facts before the then Head of State, who informed her that he had “given instructions in order to expedite [the] investigations to clarify the whereabouts of her husband.” She also filed another application for *habeas corpus* and the respective court sent a telegram requesting information from the DIT, which responded that Edgar Fernando García had not been detained by that department.⁸⁹

72. In addition, in answer to a request for information from the General Inspectorate of the National Police, in the Historical Archive of the National Police it was found that the Commander of the Fourth Unit had responded that “[t]his unit did not conduct any search operation on [3rd Avenue and 7th Street Zone 11, on February 18, 1984], nor has Edgar Fernando García been detained in this unit.” However, another record found in the Historical Archive of the National Police indicated that a cleansing operation had been conducted on that date “with nothing to report.”⁹⁰ In August that year and in 1985, the court in charge of the applications for *habeas corpus* continued to request information from the different authorities, without success.⁹¹

73. In addition, Mrs. Montenegro assured that she “went to prisons, cemeteries, saw corpses, went to morgues, to the firefighters, to hospitals and even insane asylums because they told [her] at that time that this could be possible.” She also said that, once, she went to the “turrets of the National Palace” where a man, “who had something on his head that covered his shoulders,” told her that “[they] never kidnap[ped] a person; [they] monitored the public; but, [they did not] kidnap subversives and communists. So, why would [she] think that [they] would kidnap [her] husband, an honorable and honest person?”⁹²

74. In 1988, Mrs. Montenegro filed a complaint with the PDH. In 1997, the representative of the *Grupo de Apoyo Mutuo* filed three applications for *habeas corpus* in

⁸⁸ Cf. Note No. SZ-0371 of July 6, 1984, addressed by the National Defense General Staff to Nineth Montenegro de García and María del Rosario Godoy de Cuevas (file of annexes to the Merits Report, tome II, annex 31, folio 480). Similarly, see, Note No. SZ-0487 of August 31, 1984, addressed by the National Defense General Staff to Nineth Montenegro de García (file of annexes to the Merits Report, tome II, annex 31, folio 483).

⁸⁹ Cf. Telegram of the Head of State of July 17, 1984 (file of annexes to the Merits Report, tome II, annex 36, folio 744); AHPN. Application for *habeas corpus* of July 18, 1984. GT PN 50 S005, Nos. 16597 and 16598, (file of annexes to the motions and arguments brief, tome II, annex A, folios 2381 a 2382). AHPN Telegram of the First Instance Criminal Judge of July 6, 1984, GT PN 50 S005, No. 16454, and Note No. 16572 of the Technical Investigations Department of the National Police of July 7, 1984, GT PN 50 S005, No. 16443 (file of annexes to the motions and arguments brief, tome I, annexes 36 and 37, folios 1425 and 1427). The following year at least one more application for *habeas corpus* was filed. Cf. AHPN. Application for *habeas corpus* of December 6, 1985, GT PN 50 S004, No. 15360 and No. 15632 (file of annexes to the motions and arguments brief, tome II, annex A, folios 2445 and 2484).

⁹⁰ Cf. Documents handed over during the public hearing by Velia Muralles Bautista, AHPN. Decision No. 2701-IG-Jaa of the General Inspectorate of the National Police of June 14, 1984 (merits file, tome II, folio 869); Decision No. 0230 of the Commander of the Fourth Unit of the National Police of June 18, 1984, GT PN 26-01 S001, No. 16748 (file of annexes to the motions and arguments brief, tome I, annex 34, folio 1421), and AHPN. Log for February 18, 1984, GT PN 26-02 S002, No. 25374 (file of annexes to the motions and arguments brief, tome I, annex 30, folio 1413).

⁹¹ Cf., *inter alia*, AHPN. Note of the Technical Investigations Department of the National Police of August 10, 1985, GT PN 50 S005, No. 16439, and Note No. 9722 of the Technical Investigations Department of the National Police of December 7, 1985. GT PN 50 S005, No. 13683 (file of annexes to the motions and arguments brief, tome II, folios 2260 and 2312), also Note No. 5022 of the General Directorate of the National Police of August 29, 1984 (file of annexes to the Merits Report, tome II, annex 38, folio 748).

⁹² Cf. Testimony given by Nineth Varenca Montenegro Cottom before the Inter-American Court during the public hearing in this case, and complaint filed by Nineth Varenca Montenegro Cottom before the PDH on January 22, 1988 (file of annexes to the Merits Report, tome I, annex 16, folio 211). See, also, affidavit prepared by Alejandra García Montenegro on April 20, 2012 (merits file, tome II, folios 803).

favor of Edgar Fernando García. In December 1997, the judge assigned to the case went to “the Men’s Pre-trial Detention Center [...] and the Guatemalan Army’s Headquarters, [...] to implement this remedy] with negative results.” That same month, the Ministry of Defense responded to the court assigned to the case that Mr. García “was not arrested or captured on the date indicated or subsequently, because the competent jurisdictional organ had not issued an order to carry out this action.” Similarly, the Ministry of the Interior responded that “reports had been received from the Directorate General of the National Police and the Treasury Police indicating that, according to the respective records of those General Directorates, Edgar Fernando García had not been detained.”⁹³

75. Given the lack of response to the applications for *habeas corpus*, in November 1997, the GAM requested “that a special investigation procedure be opened in favor of Edgar Fernando García.” Under this procedure, the Supreme Court is able to call on the Public Prosecution Service to investigate, and can also delegate the investigation to the Ombudsman.⁹⁴ On April 17, 1998, the Supreme Court of Justice called on the Public Prosecution Service to “investigate the considerations” in the request to open the special investigation procedure. After this had been repeated, in March 1999, the Public Prosecution Service responded stating that it had interviewed Mr. García’s mother. During the investigation, the Public Prosecution Service also requested information from the National Civil Police about the individuals who took part in the operation of the Special Operations Brigade of the National Police (hereinafter “the BROE”) on the day on which the incident occurred. The National Police advised that it had not “found any documentation related to the operation conducted by the BROE.”⁹⁵

⁹³ Cf. Complaint filed by Nineth Varenca Montenegro Cottom before the PDH on January 22, 1988 (file of annexes to the Merits Report, tome I, annex 16, folios 209 to 213); Applications for *habeas corpus* filed by Marco Alcides Polanco Pérez on June 23, September 10 and October 15, 1997 (file of annexes to the Merits Report, tome I, annex 28, folios 259 to 264); letter of the Criminal Justice of Peace to the Secretary of the Supreme Court of Justice of December 3, 1997 (file of annexes to the Merits Report, tome II, annex 31, folio 589); record of December 2, 1997, of the First Peace Criminal Court (file of annexes to the Merits Report, tome II, annex 31, folios 601 and 602); Note of the Ministry of Defense of December 5, 1997, and Note of the Ministry of the Interior of December 5, 1997 (file of annexes to the Merits Report, tome II, annex 31, folios 640 and 654).

⁹⁴ Cf. Request to open a special investigation procedure filed by Mario Alcides Polanco Pérez on November 25, 1997 (file of annexes to the Merits Report, tome II, annex 31, folios 420 and 421). Article 467 of the Code of Criminal Procedure of Guatemala regulates the special investigation procedure. This article establishes that the Supreme Court of Justice, at the request of anyone, may call on the Public Prosecution Service to provide information on the investigation, and may also issue an investigation mandate to a special investigator, who may include the Ombudsman, if “an application for *habeas corpus* has been filed without finding the person in whose favor it was filed, and there are sufficient suspicions to affirm that this person has been arrested or detained illegally by a public official, by members of the State’s security forces, or by regular or irregular agents, without information being provided on his or her whereabouts.” Cf. Code of Criminal Procedure of Guatemala, *supra*, article 467, Fourth Book, Specific Procedures, Title II, Special investigation procedure. The Supreme Court of Justice accepted to process this request on December 4, 1997. This request was repeated on January 6 and on January 20, 1998. The Supreme Court asked the applicant “to justify the filing of the application for *habeas corpus* and the result.” On February 13, 1998, the Supreme Court admitted the request for a special investigation procedure and declared it admissible on April 22, 1999. Cf. Ruling of the Supreme Court of Justice of December 4, 1997 (file of annexes to the Merits Report, tome II, annex 31, folio 422); request of Mario Alcides Polanco Pérez of January 6, 1998, and Note of the Supreme Court of Justice of January 20, 1998 (file of annexes to the Merits Report, tome II, annex 31, folios 425 to 427 and 428); Note of the Supreme Court of Justice of February 13, 1998 (file of annexes to the Merits Report, tome II, annex 31, folio 432), and record of hearing held on April 22, 1999, in the Special investigation procedure before the Supreme Court of Justice (file of annexes to the Merits Report, tome II, annex 31, folios 515).

⁹⁵ Cf. Note of the Supreme Court of Justice of April 17, 1998 (file of annexes to the Merits Report, tome I, annex 30, folio 273); Note of the Supreme Court of Justice of March 3, 1999 (file of annexes to the Merits Report, tome I, annex 31, folio 699); note of the Public Prosecution Service to the Secretary of the Supreme Court of Justice of March 11, 1999 and letter of the Secretariat of the Supreme Court of Justice to the Public Prosecution Service of March 9, 1999 (file of annexes to the Merits Report, tome II, annex 31, folios 697, 698 and 700); request for information sent by the Public Prosecution Service to the Director of the National Civil Police of March 17, 1999 (file of annexes to the Merits Report, tome II, annex 31, folio 710), and Decision of the General Archive

76. On April 8 and 22, 1999, hearings were held in the special investigation procedure. In the second of these hearings, the request for a special investigation was declared admissible, and it was decided to mandate the Ombudsman to conduct the investigation.⁹⁶ In March 2000, the Supreme Court requested information from the Criminal Court in charge of the investigation and, in April 2000, the latter reported that it had decided “to summon, as defendants, and to receive the statements” of, the individuals who, at the time of the facts, were the Head of State, the Head of the Fifth Unit of the National Police, the Head of the DIT, the Head of the BROE, the Minister of the Interior, and the Director of the G-2 Department of Military Intelligence.⁹⁷ Thirteen months later, this summons had not been carried out, because the PDH needed to inform the court of the address or exact location of the first five defendants and, regarding the last one, a report was requested from another court where he was being tried.⁹⁸

77. In November 2001, the Criminal Court assigned to the case informed the Supreme Court that the Ombudsman had asked that his investigation mandate in the special investigation procedure be revoked. In September 2003, the Supreme Court mandated a new Ombudsman to continue the special investigation.⁹⁹

78. In March 2004, the Supreme Court of Justice requested information on the investigation of the case from the respective criminal court and from the PDH. In April, the request was repeated to the respective court and, in December to the PDH. In February 2005, the PDH responded indicating that “[t]he investigations conducted [...] had led to the conclusion that Mr. [García] had been arbitrarily detained by the State’s security forces, who had proceeded to imprison him illegally in a secret detention center”; hence, “it is evident that [...] he was subjected to the offense of forced disappearance.” Based on these conclusions, the PDH requested additional time in order to continue the investigation.¹⁰⁰ Between February 2005 and February 2007, the PDH requested an extension of the time

Department of the National Police of March 23, 1999 (file of annexes to the Merits Report, tome II, annex 31, folio 712).

⁹⁶ Record of the hearings held on April 8 and 22 1999, in the special investigation procedure before the Supreme Court of Justice (file of annexes to the Merits Report, tome II, annex 31, folios 507 to 517).

⁹⁷ Cf. Note of the Supreme Court of Justice of March 17, 2000, and Note of the Fourth First Instance Crime, Drug-trafficking and Environmental Offenses Court to the Supreme Court of Justice of April 4, 2000 (file of annexes to the Merits Report, tome II, annex 31, folios 545 and 546).

⁹⁸ Cf. Note of the Supreme Court of Justice of March 29, 2001, and Note of the Fourth First Instance Crime, Drug-trafficking and Environmental Offenses Court to the Supreme Court of Justice of May 16, 2001 (file of annexes to the Merits Report, tome II, annex 31, folios 548 and 551).

⁹⁹ After November 2001, the Supreme Court asked the respective court for a copy of the request for the revocation of the mandate on two occasions, but this was never received. The court explained that the information had already been forwarded in November 2001, so that it no longer had the file. Cf. Note of the Supreme Court of Justice of February 26, 2002, and note of the Fourth First Instance Crime, Drug-trafficking and Environmental Offenses Court to the Supreme Court of Justice of November 16, 2001 (file of annexes to the Merits Report, tome II, annex 31, folio 554); Note of the Supreme Court of Justice of November 16, 2001; Note of the Supreme Court of Justice of February 26, 2002, and note of the Fourth First Instance Crime, Drug-trafficking and Environmental Offenses Court to the Supreme Court of Justice of March 8, 2002 (file of annexes to the Merits Report, tome II, annex 31, folios 556, 558 and 560), and Note of the Supreme Court of Justice of September 8, 2003 (file of annexes to the Merits Report, tome II, annex 31, folio 571).

¹⁰⁰ Cf. Note No. 19-2004 of March 17, 2004, Note No. 41-2004 of April 12, 2004, and Note No. 79-2004 of December 14, 2004, of the Secretariat of the Supreme Court of Justice, Pre-Trial and Amparo Chamber (file of annexes to the Merits Report, tome II, annex 31, folios 280, 281, 283 and 306), and report of the Ombudsman of February 9, 2005 (file of annexes to the Merits Report, tome II, annex 31, folio 307).

frame for the investigation at least nine times, and all his requests were granted.¹⁰¹ During this investigation, the PDH inspected the Historical Archive of the National Police.¹⁰² In July 2004, the Supreme Court forwarded the case file of the special investigation to the office of the Public Prosecution Service that was handling the case of Edgar Fernando García.¹⁰³

79. The names of the agents who captured Edgar Fernando García were found in the Historical Archive of the National Police, on a list of individuals nominated to be honored for their actions. In particular, the record indicates that “[o]n February 18, 1984, at 11:00 hours, while carrying out an operation in the El Guarda Market, zone 11, they were attacked by two subversives, from whom they seized subversive propaganda and firearms.”¹⁰⁴ It was proposed that they receive a medal for these actions. According to witness Velia Murallas Bautista, in the end, this “medal was not handed out [because, this] would have required publishing it in the general orders of the institution and in the Official Gazette, [which would have been] very problematic [since the arrest was being denied.]” Besides the four agents who took part in the capture, the documents found in the Historical Archive of the Police include the name of the commander of the Police unit who was responsible for the area where Edgar Fernando García was captured, as well as the names of other individuals who presumably took part in the planning of the Cleansing Operation.¹⁰⁵

80. The findings in the Historical Archive of the Police made it possible to try and to convict two of the police agents who took part in Mr. García’s capture. In this regard, on October 28, 2010, two agents of the National Police were sentenced to “forty years non-commutable imprisonment” for “the crime of forced disappearance committed against the personal liberty of Edgar Fernando García.” The judgment concluded, *inter alia*, that, owing to Edgar Fernando García’s connections to labor and student movements, Patriotic Youth, and the Guatemalan Labor Party, “he was considered an enemy because he did not share the State’s ideology.” On May 9, 2011, the Court of Appeal decided “[n]ot to admit the special appeal [filed by the defense,] based on its form.”¹⁰⁶ As prosecutor Manuel Geovanni Vázquez Vicente explained, this means that the guilty verdict was final.¹⁰⁷

¹⁰¹ Cf. Notes of the Supreme Court of Justice of February 10, 2005, April 28, May 13, August 29 and December 1, 2005, March 13, July 18 and October 23, 2006, and February 7, 2007 (file of annexes to the Merits Report, tome II, annex 31, folios 308, 317, 326, 335, 344, 360, 369, 386 and 397).

¹⁰² See, *inter alia*, note of the PDH to the Supreme Court of Justice of November 30, 2005 (file of annexes to the Merits Report, tome II, annex 31, folio 342).

¹⁰³ Cf. Letter from the auxiliary prosecutor of the Public Prosecution Service to the Secretariat of the Supreme Court of Justice of February 25, 2004, and Note No. KLSA 48-2004 of the Secretariat of the Supreme Court of Justice, Pre-trial and *Amparo* Chamber, to the auxiliary prosecutor of the Public Prosecution Service of July 7, 2004 (file of annexes to the Merits Report, tome II, annex 31, folios 301 and 304).

¹⁰⁴ Cf. AHPN. Note No. 1224-JAG-rag-Sría of the Commander of the Fourth Unit of the National Police to the Deputy Director General of the National Police dated June 25, 1984, GT PN 26-01 S002, No. 2727, and List of personnel of the Fourth Unit of the National Police who merit a medal under the rules for awards, GT PN 99, No. 16622 (file of annexes to the motions and arguments brief, tome I, annexes 22 and 23, folios 1395, 1397 and 1398), and testimony given by Velia Murallas Bautista before the Inter-American Court during the public hearing in this case.

¹⁰⁵ Cf. Testimony given by Velia Murallas Bautista before the Inter-American Court during the public hearing in this case; expert opinion of Rember Aroldo Larios Tobar on the police structure in the case of Edgar Fernando García provided in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folio 1631), and AHPN. Note No. COC/207-laov of the Joint Operations Center of the General Directorate of the National Police of February 17, 1984, GT PN 23, No. 16636 (file of annexes to the motions and arguments brief, tome IV, annex B, folio 3658).

¹⁰⁶ Cf. Judgment of the Eighth Crime, Drug-trafficking and Environmental Offenses Court of October 28, 2010, C-01069-1997-00001 (file of annexes to the motions and arguments brief, tome IV, annex C, folios 3779 to 3870), and second instance judgment of the Second Crime, Drug-trafficking and Environmental Offenses Chamber of Guatemala of May 9, 2011, N.U. 01069-1997-00001 (file of annexes to the answering brief, annex I.1, folios 3984

81. The parties did not provide a copy of the case file of this criminal proceeding, merely copies of the first and second instance judgments, the expert opinions submitted during the domestic criminal proceedings, and the testimony of Danilo Chinchilla Fuentes. However, the prosecutor of the Public Prosecution Service, Manuel Giovanni Vásquez Vicente, advised that two arrest warrants are pending execution against two agents who took part in the operation in which Mr. García was arrested, and “the public and oral trial is pending against [those who were at the time] the Director General of the National Police and [...] the Commander General of the Fourth Unit of the National Police.” According to Manuel Giovanni Vásquez Vicente, these individuals “participated because they were part of the chain of command.” He also indicated that “the Ombudsman’s Office is investigating patterns and identifying positions of command [within the Police, and the military units,] in order to determine their responsibility.”¹⁰⁸ Nevertheless, he explained that:

Within the judicial proceedings, rulings have been made that are not in keeping with legal requirements; favoritism towards senior commanders is symptomatic, such as the situation of [the Director General of the National Police at the time] who was granted the benefit of supervised house arrest as an alternative measure, without having verified the criteria of risk of flight and obstruction of the investigation. Abuse of legal remedies, such as the use of *amparo*, which, although it is a legal means of defense, has been admitted by the courts as a way of delaying a judgment.¹⁰⁹

82. Regarding the remains of Edgar Fernando García, the said witness indicated that “[t]he Public Prosecution Service has coordinated actions with the Forensic Anthropology Foundation in order to appoint them experts [and] thus, grant them legal authority to search, locate and identify the mortal remains of those who disappeared during the internal armed conflict.” In this regard, he explained that exhumations have been ordered in public cemeteries, secret graves, and graves located in military zones and detachments, and comparisons have been made with DNA samples taken from the next of kin of disappeared persons. In the case of Edgar Fernando García, samples were taken from his mother and daughter, but no matches have been found.¹¹⁰

E) The *Grupo de Apoyo Mutuo*

83. Mrs. Montenegro stated that at the beginning of the forced disappearance of Edgar Fernando García, other family members of disappeared persons approached her in search of support, and that is how the idea emerged to create the *Grupo de Apoyo Mutuo*. The GAM was founded on June 4, 1984, as “a response to the heartbreak suffered by thousands of Guatemalans owing to the forced disappearance of their relatives and friends.” It was the first organization of its kind in Guatemala. Both Mrs. Montenegro and Mr. García’s mother were founding members of the GAM.¹¹¹

to 3997). The first instance judgment also acquitted these two individuals of the offenses of “illegal detention, with specific aggravating factors, abuse of authority, and kidnapping.”

¹⁰⁷ Cf. Affidavit prepared by Manuel Giovanni Vásquez Vicente on March 11, 2012 (merits file, tome II, folio 792).

¹⁰⁸ Cf. Affidavit prepared by Manuel Giovanni Vásquez Vicente on March 11, 2012 (merits file, tome II, folios 793 and 795).

¹⁰⁹ Cf. Affidavit prepared by Manuel Giovanni Vásquez Vicente on March 11, 2012 (merits file, tome II, folios 795 and 796).

¹¹⁰ Cf. Affidavit prepared by Manuel Giovanni Vásquez Vicente on March 11, 2012 (merits file, tome II, folios 793 to 795).

¹¹¹ Cf. Testimony given by Nineth Varenca Montenegro Cottom before the Inter-American Court during the public hearing in this case; affidavit prepared by Alejandra García Montenegro on April 20, 2012 (merits file, tome

84. Two summaries of police activity that appeared in the Historical Archive of the National Police recorded that “essentially, [the] well-known purpose of the promoters of [the GAM] was to cause problems for the Government and the security forces,” and that “it [provided] the ideal facade [...] for implementing programs to destabilize and debilitate the Military Government in particular, and the security forces in general, on their own ground.”¹¹² The final observations of one of the summaries concluded that “[i]t is evident that the promoters and intellectual leaders of the *Grupo de Apoyo Mutuo* are truly enemies of the Military Government and its security forces in general. Therefore, acting in legitimate defense, it is necessary to act against them, to neutralize or eliminate them.”¹¹³

85. Similarly, the Inter-American Commission reported in the 1985 *Third Report on the Human Rights Situation in Guatemala* that:

On March 14, 1985, during an official act held at the military base of the Department of Jutiapa that was televised, the [then] Head of State [...] made certain declarations according to which the “GAM” was being manipulated by the subversion and by an international group and that, in this context, negotiating the appearance alive of those who had disappeared was a subversive act; that measures would be taken to counter it, and that, henceforth, demonstrations would not be tolerated.¹¹⁴

86. The members of the GAM were subjected to fierce attacks and threats, as well as to a smear campaign to discredit them. According to the CEH, in 1985, this situation led to “the murder of two GAM activists” and two family members of one of these. The bodies were found with “signs of torture.”¹¹⁵ Mrs. Montenegro explained that “the tongue had been ripped out [of one of the bodies] and it was left [almost] in front [of the GAM] so that [they] would know what would happen to them if they continued acting in that way.”¹¹⁶ The CEH also reported that, between 1989 and 1993, situations occurred such as: the abduction of two activists, the kidnapping and murder of another five members, the forced disappearance of an activist, and also two raids and the explosion of a bomb in the organization’s offices, among other attacks against the GAM.¹¹⁷

87. In this context, Mrs. Montenegro received death threats and was under surveillance.¹¹⁸ In this regard, Mrs. Montenegro stated that, on several occasions, shots were fired at her house and she “nearly lost [her] life many times”; she therefore sought

II, folios 803); CEH, *supra*, volume VI, p. 150, and video entitled “*Aún guardamos la esperanza*” dated February 2009, *supra*, part 2.

¹¹² Cf. Documents handed over during the public hearing by Velia Muralles Bautista, “Summary of police activities. For the period from June 18 to 24, 1984” and “Summary of police activities. For the period from October 8 to 14, 1984” (merits file, tome II, folios 888 and 896).

¹¹³ Cf. Documents handed over during the public hearing by Velia Muralles Bautista, “Summary of police activities. For the period from October 8 to 14, 1984” (merits file, tome II, folio 900). Similarly, see, CEH, *supra*, volume VI, p. 151.

¹¹⁴ Cf. IACHR, *Third Report on the Situation of Human Rights in Guatemala*, 1985, chapter II, para. 92, annex 1 of the Merits Report. Available at: <http://www.IACHR.org/countryrep/Guatemala85sp/indice.htm>.

¹¹⁵ CEH, *supra*, volume VI, p. 236, paras. 4528 to 4530.

¹¹⁶ Testimony given by Nineth Varenca Montenegro Cottom before the Inter-American Court during the public hearing in this case.

¹¹⁷ Cf. CEH, *supra*, volume IV, pp. 99 and 237, paras. 4122 and 4532.

¹¹⁸ Cf. CEH, *supra*, volume IV, p. 237, para. 4532; testimony given by Nineth Varenca Montenegro Cottom before the Inter-American Court during the public hearing in this case, and affidavit prepared by Alejandra García Montenegro on April 20, 2012 (merits file, tome II, folio 805).

the protection of Peace Brigades International and, for the nine years that the dangerous situation lasted, she always had to have protection.¹¹⁹ In addition, Mr. García's daughter stated that "when she was three years old, [they] were going to a demonstration when [she] saw that the police had stopped [her] mother [and ...] owing to the fear of being completely alone, [she] ran to her; [s]he slipped out of the hand of the person taking care of [her], [and] one of the anti-riot police [...] stopped [her ...], and hit [her] back with one of the wooden batons they had." Consequently, her mother decided not to take her to demonstrations any more, despite her pleas.¹²⁰

VIII MERITS

88. The Court will now rule on the alleged international responsibility of the State for: (1) the forced disappearance of Edgar Fernando García and the reasons for this disappearance; (2) the obligation to investigate this disappearance, and (3) the alleged violations of the rights to personal integrity, protection of the family, rights of the child, and freedom of association, to the detriment of the family members of Edgar Fernando García.

VIII-1 FORCED DISAPPEARANCE OF EDGAR FERNANDO GARCÍA

89. In this chapter, the Court will examine the forced disappearance of Edgar Fernando García whose whereabouts remain unknown, as well as the alleged violations of his freedom of association and expression as a reason for this disappearance.

I. The forced disappearance of Edgar Fernando García

A) Arguments of the Inter-American Commission and of the parties

90. The Commission indicated that "on February 18, 1984, Edgar Fernando García was illegally, arbitrarily, and violently detained by members of the [...] National Police, who shot him and put him in a vehicle of the security forces." In particular, it indicated that Mr. García's arrest "was a preliminary step to [his forced] disappearance"; consequently, it is not necessary to analyze whether the requirements of Article 7 of the Convention were met." It stated that "the testimony available, and the [...] *modus operandi* of forced disappearances" at the time of the capture, "lead to the conclusion [...] that the victim was held secretly for a prolonged period in order to obtain information from him." Thus, taking into account the reason for his detention, it can be concluded that "the security forces tortured [Mr. García]." The Commission also argued that the absence of an investigation into what happened represented non-compliance with the obligation to ensure the right to life. In addition, it indicated that it was made impossible for the victim and his family to "seek judicial protection, in view of the constant and systematic absence of any investigation into his whereabouts." In its final written observations, the Commission

¹¹⁹ Cf. Testimony given by Nineth Varenca Montenegro Cottom before the Inter-American Court during the public hearing in this case, and expert opinion provided by Katharine Doyle on United States declassified documents related to the disappearance of Edgar Fernando García in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, annex 53, folios 2067 to 2074). Peace Brigades International is "an NGO of international accompaniment that supported the GAM and other Guatemalan organizations." Cf. CEH, *supra*, volume IV, p. 99, para. 4122.

¹²⁰ Affidavit prepared by Alejandra García Montenegro on April 20, 2012 (merits file, tome II, folio 804).

stressed that the forced disappearance “in this case formed part of the systematic pattern of forced disappearances in Guatemala and therefore constituted a crime against humanity.”

91. The representatives argued that Edgar Fernando García was “violently detained and injured” by State agents. They emphasized that the “practice of torture that existed in the country at that time allows it to be presumed that the presumed victim was also tortured” and that “it may be presumed that he was deprived of his life arbitrarily and illegally.” They also indicated that “ever since his capture and subsequent disappearance, Edgar Fernando García was unable to exercise his rights and if he was executed extrajudicially, to receive burial according to his religion and customs,” which constituted a violation of Article 3 of the American Convention. They underscored that there was a “lack of information and a refusal to acknowledge the deprivation of liberty and to provide information on the victim’s whereabouts,” as well as an impediment to the “exercise of the legal remedies that were filed, such as [...] the applications for *habeas corpus* that [...] were declared inadmissible.”

92. Meanwhile, the State “acknowledge[d] the facts denounced” in relation to Articles 3, 4, 5 and 7 of the Convention in relation to the obligation to respect rights included in Article 1(1) of this instrument, to the detriment of Edgar Fernando García. It also acknowledged the violation of Article I(a) of the Inter-American Convention on Forced Disappearance, to the detriment of the victim, because “it had failed to comply with the obligation not to practice, permit or tolerate the forced disappearance of persons.” Regarding the violation of Article II of the Inter-American Convention on Forced Disappearance, the State indicated that this refers to “a definition of forced disappearance and not to an obligation in itself.”

B) Considerations of the Court

93. In this case there is no dispute between the parties in relation to the State’s international responsibility for the forced disappearance of Edgar Fernando García, whose whereabouts remain unknown to this day. Furthermore, the mere fact that the disappearance of Edgar Fernando García is recorded in the section entitled “elements who have been dealt with” of the *Diario Militar*, the authenticity of which has been acknowledged by the State, reveals the State’s involvement in these disappearances. Similarly, the Court recalls that the CEH concluded that the events in this case constituted a forced disappearance (*supra* para. 68). Moreover, the Court underlines that, in the criminal proceedings conducted at the domestic level, two of the perpetrators of Edgar Fernando García’s forced disappearance were convicted of this crime, and it was concluded, *inter alia*:

(b) that it is evident that this forced disappearance was ordered by State institutions, which was proved in the documentary evidence already analyzed; (c) that it was carried out with the authorization or support of State authorities, because the Army and the National Police intervened in it; (d) that Edgar Fernando García was violently deprived of his liberty; an action carried out by the defendants based on political motives, because the victim was a student and union leader, and belonged to Patriotic Youth for Labor and the Guatemalan Labor Party, organizations that were banned by the State, [and] (e) that the State has refused to reveal the fate of the victim and to acknowledge his detention, because to date his whereabouts are unknown.¹²¹

94. Consequently, in this chapter, the Court will examine, in light of the acknowledgment of international responsibility, the alleged violations of the rights to recognition of juridical

¹²¹ Cf. Judgment delivered by the Eighth Crime, Drug-trafficking and Environmental Offenses Court, C-01069-1997-00001, on October 28, 2010 (file of annexes to the State’s answering brief, single tome, annex I, folio 3977 and 3978).

personality,¹²² to life,¹²³ to personal integrity,¹²⁴ and to personal liberty,¹²⁵ in relation to the obligation to respect rights¹²⁶ established in the American Convention, as well as of Articles I¹²⁷ and II¹²⁸ of the Inter-American Convention on Forced Disappearance of Persons, to the detriment of Edgar Fernando García.

95. In its case law since 1988,¹²⁹ the Court has established the permanent or continuing nature of the forced disappearance of persons,¹³⁰ which has been recognized repeatedly by international human rights law.¹³¹ Furthermore, this Court's case law has been a precursor in the consolidation of a comprehensive perspective of the multiple violations of the rights affected and the permanent nature of the forced disappearance of persons,¹³² in which the act of disappearance and its execution start with the deprivation of liberty of the person and

¹²² Article 3 of the American Convention establishes that: "[e]very person has the right to recognition as a person before the law".

¹²³ Article 4(1) of the American Convention establishes that: "[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

¹²⁴ The pertinent part of Article 5 of the American Convention establishes that: "1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

¹²⁵ Article 7(1) of the American Convention establishes that: "[e]very person has the right to personal liberty and security."

¹²⁶ Article 1(1) of the American Convention establishes that: "[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

¹²⁷ Article I of the Inter-American Convention on Forced Disappearance of Persons establishes: "[t]he States Parties to this Convention undertake: (a) Not to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees; (b) To punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories; (c) To cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons, and (d) To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention."

¹²⁸ Article II of the Inter-American Convention on Forced Disappearance of Persons establishes: "[f]or the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees."

¹²⁹ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 155, and *Case of the Río Negro Massacres v. Guatemala, supra*, para. 112.

¹³⁰ According to Article III of the Inter-American Convention on Forced Disappearance "[t]his offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined".

¹³¹ In the sphere of international human rights law, an operational definition of the phenomenon was developed by the United Nations Working Group on Enforced or Involuntary Disappearances in the 1980s. The conceptual elements established by this Working Group were taken up later in the definitions of diverse international instruments. Cf. *Case of Chitay et al v. Guatemala, supra*, para. 82, and *Case of the Río Negro Massacres v. Guatemala, supra*, para. 112. See also the Report of the Working Group on Enforced or Involuntary Disappearances, Commission on Human Rights, 37th session, UN Doc E/CN.4/1435, of 22 January 1981, para. 4, Report of the Working Group on Enforced or Involuntary Disappearances, Commission on Human Rights, 39th session, UN Doc E/CN.4/1983/14 of 21 January 1983, paras. 130 to 132, and Report of the Working Group on Enforced or Involuntary Disappearances, Commission on Human Rights, Report on the visit to Sri Lanka by three members of the Working Group, 7 to 18 October 1991, E/CN.4/1992/18/Add.1 of 5 January 1992.

¹³² Cf. *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, paras. 155 to 157, and *Case of the Río Negro Massacres v. Guatemala, supra*, para. 112.

the subsequent lack of information about his or her fate, and remains until the whereabouts of the disappeared person are known or their remains are identified with certainty.¹³³

96. In this regard, the Court has stated that this multiple violation of several rights protected by the American Convention places the victim in a situation of complete defenselessness, giving rise to other related violations, and being particularly serious when it forms part of a systematic pattern or practice applied or tolerated by the State.¹³⁴ Thus, the Inter-American Convention on Forced Disappearance of Persons also reaffirms in its preamble “that the systematic practice of forced disappearance of persons constitutes a crime against humanity.” In sum, the practice of forced disappearance involves a heinous abandonment of the essential principles on which the inter-American human rights system is founded¹³⁵ and its prohibition has achieved *jus cogens* status.¹³⁶

97. In this regard, the following have been indicated as the concurrent and constituent elements of forced disappearance: (a) the deprivation of liberty; (b) the direct intervention of State agents or their acquiescence, and (c) the refusal to acknowledge the detention and to reveal the fate or the whereabouts of the person concerned.¹³⁷ This Court developed this characterization of forced disappearance even before the definition contained in Article II of the Inter-American Convention on Forced Disappearance, and it is consistent with other definitions in different international instruments,¹³⁸ the case law of the European human rights system,¹³⁹ decisions of the Human Rights Committee of the International Covenant on Civil and Political Rights,¹⁴⁰ and decisions of domestic high courts.¹⁴¹

¹³³ Cf. *inter alia*, *Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, paras. 155 to 157, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 112.

¹³⁴ Cf. *Case of Molina Theissen v. Guatemala. Reparations and costs*. Judgment of July 3, 2004. Series C No. 108, para. 41, and *Case of Contreras et al. v. El Salvador*, *supra*, para. 83.

¹³⁵ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, paras. 158, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 114.

¹³⁶ Cf. *Case of Goiburú et al. v. Paraguay*, *supra*, para. 84, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 114.

¹³⁷ Cf. *Case of Gómez Palomino v. Peru. Merits, reparations and costs*. Judgment of November 22, 2005. Series C No. 136, para. 97, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 115.

¹³⁸ Cf. Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, U.N. Doc. A/RES/61/177, of 20 December 2006; article 7.2.i) of the Statute of Rome of the International Criminal Court, U.N. Doc. A/CONF.183/9, of 17 July 1998, and Preamble to the Declaration on the Protection of All Persons from Enforced Disappearance, U.N. Doc. A/RES/47/133 of 12 February 1993. See, also, *Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of September 22, 2009. Series C No. 202, para. 60, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 115.

¹³⁹ In this regard, the following cases of forced disappearance of persons may be consulted: ECHR, *Cyprus v. Turkey* [Grand Chamber], no 25781/94, paras. 132 to 134, 147 and 148, 10 May 2001, and ECHR, *Varnava and Others v. Turkey* [Grand Chamber], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, paras. 111 to 113, 117 and 118, 133, 138 and 145, 10 January 2008.

¹⁴⁰ In this regard, see, *Messaouda Grioua and Mohamed Grioua v. Algeria*, CCPR/C/90/D/1327/2004 (2007), Communication No. 1327/2004, 16 August 2007, para. 7.2, 7.5 to 7.9; *Yasoda Sharma and Surya Prasad Sharma v. Nepal*, CCPR/C/94/D/1469/2006 (2008), Communication No. 1469/2006, 6 November 2008, para. 7.4, 7.6 to 7.9; *Zohra Madoui and Menouar Madoui v. Algeria*, CCPR/C/94/D/1495/2006 (2008), Communication No. 1495/2006, 1 December 2008, para. 7.2, 7.4 to 7.8, and *Nydia Erika Bautista de Arellana v. Colombia*, CCPR/C/55/D/563/1993, Communication No. 563/1993, 13 November 1995, para. 8.3 to 8.6.

¹⁴¹ Cf. *Case of Marco Antonio Monasterios Pérez*, Supreme Court of Justice of the Bolivarian Republic of Venezuela, judgment of August 10, 2007 (declaring the permanent nature and multiple offenses involved in the offense of forced disappearance); Supreme Court of Justice of the Nation of Mexico, Judgment P./J. 87/2004, “Forced disappearance of persons. The time frame for calculating the statute of limitations only commences when the victim appears or his or her fate has been established” (affirming that forced disappearances are permanent offenses and that the statute of limitations must be calculated once it has ceased); *Case of the withdrawal of immunity from Pinochet*, Plenary of the Supreme Court of Chile, judgment of August 8, 2000; *Case of Sandoval*,

98. According to paragraphs (a) and (b) of Article I of the Inter-American Convention on Forced Disappearance of Persons, the States Parties undertake not to practice and not to tolerate the forced disappearance of persons under any circumstance, and to punish within their jurisdiction those responsible. This is consistent with the State's obligation to respect and ensure the rights, which is contained in Article 1(1) of the American Convention, and which can be complied with in different ways depending on the specific right that the State must ensure and on the particular needs for protection.¹⁴²

99. The Court considers it appropriate to recall the legal grounds that support an integral perspective of the forced disappearance of persons owing to the multiple conducts that, combined towards a single purpose, violate permanently, while they subsist, rights protected by the Convention.¹⁴³ Thus, the legal analysis of forced disappearance must be consistent with the complex violation of human rights that it entails.¹⁴⁴ In this regard, when analyzing a presumed forced disappearance, it must be taken into account that the deprivation of liberty should be understood as the beginning of the constitution of a complex violation that is prolonged over time until the victim's fate and whereabouts are known. The analysis of a possible forced disappearance should not focus in an isolated, divided and fragmented manner only on the detention, or the possible torture, or the risk of loss of life, but rather the focus must be on all the facts that are present in the case being considered by the court, taking into account the case law of the Inter-American Court when interpreting the American Convention.¹⁴⁵

100. Regarding Article 7 of the American Convention, the Court has reiterated that any restriction of the right to personal liberty must only occur for the reasons and under the conditions previously established by the Constitution or by laws enacted in keeping with the Constitution (substantive aspect), and also, strictly subject to the procedures objectively defined in this instrument (formal aspect).¹⁴⁶ Furthermore, the Court has considered that any detention, regardless of its reason or duration, must be duly recorded in the relevant document, clearly stating, at the very least, the reasons for the detention, who executed it, the time of detention and the time of release, as well as a record that the competent judge was advised, in order to protect against any unlawful or arbitrary interference with physical

Appeal No. 11821-2003, Fifth Chamber of the Court of Appeal of Santiago de Chile, judgment of January 5, 2004 (both declaring that the offense of forced disappearance is a continuing offense, that it is a crime against humanity, not subject to the statute of limitations, or amnesty); *Case of Videla et al.*, National Federal Criminal and Correctional Appeals Chamber of the Capital of Argentina, judgment of September 9, 1999 (declaring that forced disappearances are continuing offenses and crimes against humanity, and that they are not subject to the statute of limitations); *Case of José Carlos Trujillo*, Constitutional Court of Bolivia, constitutional judgment No. 1190/01-R of November 12, 2001 (declaring that offenses of forced disappearance are continuing offenses and that the time frame for calculating their prescription only commences when they cease), and Constitutional Court of Peru, judgment of March 18, 2004, Case file No. 2488-2002-HC/TC (declaring that forced disappearance is a permanent offense until the whereabouts of the victim is established, and recognizing that it consists of multiple offenses).

¹⁴² Cf. *Case of Vargas Areco v. Paraguay*. Judgment of September 26, 2006. Series C No. 155, para. 73, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 144.

¹⁴³ Cf. *Case of Radilla Pacheco v. Mexico*, *supra*, para. 138, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 114.

¹⁴⁴ Cf. *Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs*. Judgment of August 12, 2009. Series C No. 186, para. 112, and *Case of González Medina and family members v. Dominican Republic*, *supra*, para. 129.

¹⁴⁵ Cf. *Case of Heliodoro Portugal v. Panama*, *supra*, para. 112, and *Case of González Medina and family members v. Dominican Republic*, *supra*, para. 175.

¹⁴⁶ Cf. *Case of Gangaram Panday v. Suriname. Merits, reparations and costs*. Judgment of January 21, 1994. Series C No. 16, para. 47, and *Case of González Medina and family members v. Dominican Republic*, *supra*, para. 176.

liberty.¹⁴⁷ To the contrary, the rights established in Articles 7(1) and 7(2) of the American Convention, in relation to Article 1(1) of this instrument, have been violated.¹⁴⁸

101. The deprivation of liberty that initiates a forced disappearance, whatsoever its form, is contrary to Article 7 of the American Convention. In the instant case, it has been shown that Edgar Fernando García was arrested on February 18, 1984, during a “Patrol and Cleansing Operation” conducted by the National Police in Guatemala City (*supra* para. 66). From the information provided by the parties, the Court observes that there is no clear information as to where Mr. García was taken after his capture. According to the information found in the Historical Archive of the National Police concerning the planning of this operation, the people who were captured in the area where Mr. García was detained were taken to the Fourth Unit of the National Police,¹⁴⁹ while the CEH, based on a referential witness, established that Mr. García had been “transferred to the Fifth Unit of the PN” (*supra* para. 68).¹⁵⁰ Despite these different versions, the Court observes that Mr. García was arrested and taken to a unit of the National Police, where he remained in the hands of State agents. In addition, according to information received by Mrs. Montenegro and the CEH, Mr. García was seen by at least two witnesses in unofficial detention centers and was alive until December 1984.¹⁵¹ In sum, the Court finds that Edgar Fernando García’s detention impaired his liberty in the broadest sense of Article 7(1) of the Convention because, since the date of his arrest and although more than 28 years have passed, his whereabouts remain unknown.

102. The Court recalls that the State has a special position of guarantor of the rights of those detained;¹⁵² hence, the deprivation of liberty in legally-recognized centers and the existence of detainee records represent essential safeguards, *inter alia*, against forced disappearance.¹⁵³ *A contrario sensu*, setting up and maintaining secret detention centers constitutes *per se* failure to comply with the obligation to ensure rights, because it directly violates the rights to personal liberty, personal integrity, life, and juridical personality.¹⁵⁴ This principle, which the Court reiterates constantly, is established in Article XI of the Inter-American Convention on Forced Disappearance of Persons.

¹⁴⁷ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra*, para. 53, and *Case of González Medina and family members v. Dominican Republic*, *supra*, para. 178.

¹⁴⁸ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, *supra*, para. 54, and *Case of González Medina and family members v. Dominican Republic*, *supra*, para. 178..

¹⁴⁹ In this regard, witness Velia Murallas Bautista stated at the public hearing in this case that, according to records found in the Historical Archive of the National Police, there was “an abnormal presence of police commanders at the headquarters of the Fourth Unit from February 19 to 23, 1984.” In this regard, she explained that “the Director General of the National Police [...] made two visits to the premises of the Fourth Unit, specifically on Tuesday 21 and Wednesday 22 February 1984. Also, the Inspector General of the National Police made seven visits to the premises of the Fourth Unit, specifically on Sunday 19, Tuesday 21, Wednesday 22 and Thursday 23; on the 21st, 22nd and 23rd, he went twice each day.” Testimony given by Velia Murallas Bautista before the Inter-American Court during the public hearing in this case.

¹⁵⁰ The CEH classified as “referential witnesses” those persons who “knew of the version from victims or from other direct witnesses, because they occupied a social position that gave them privileged access to knowledge of the context in which the events occurred, [and who] provided the CEH with important information for verification of the testimonies.” Cf. CEH, *supra*, volume IV, p. 53, para. 111.

¹⁵¹ Cf. Complaint filed by Nineth Varenca Montenegro Cottom before the PDH on January 22, 1988 (file of annexes to the Merits Report, tome I, annex 16, folios 212 and 213), and CEH, *supra*, volume VI, p. 148.

¹⁵² Cf. *Case of Neira Alegría et al. v. Peru. Merits*. Judgment of January 19, 1995. Series C No. 20, para. 60, and *Case of González Medina and family members v. Dominican Republic*, *supra*, para. 177.

¹⁵³ Cf. *Case of Anzualdo Castro v. Peru*, *supra*, para. 63, and *Case of González Medina and family members v. Dominican Republic*, *supra*, para. 177. Similarly, Cf. Article XI of the Inter-American Convention on Forced Disappearance of Persons.

¹⁵⁴ Cf. *Case of Anzualdo Castro v. Peru*, *supra*, para. 63, and *Case of Gelman v. Uruguay. Merits and reparations*. Judgment of February 24, 2011. Series C No. 221, para. 77.

103. The Court emphasizes the possible use of secret prisons as part of the authorities' refusal to acknowledge the deprivation of liberty of the victim and to provide information about his fate or whereabouts, even in response to the measures taken by family members and the agencies in charge of the investigations.¹⁵⁵ In this case, at least seven applications for *habeas corpus* were filed on behalf of Mr. García; the facts were denounced to the Head of State at the time, the Ministry of Defense, and the media (*supra* paras. 69 to 75). However, the family did not obtain any official information about the detention or fate of Edgar Fernando García. To the contrary, records of the responses to those remedies according to which Mr. García was not detained appeared in the Historical Archive of the National Police. The Court also underscores that Edgar Fernando García's capture was not recorded in the report on the Patrol and Cleansing Operation executed on October 18, 1984; rather, to the contrary, it was noted that the operation had been carried out "with nothing to report."¹⁵⁶ Similarly, records exist which indicate that when the National Police was asked for information in this regard, it denied that it had executed an operation in the area and on the date that Mr. García was captured (*supra* para. 75).

104. In this regard, the Court underscores the testimony of Mrs. Montenegro, who stated that she "had never, never received a single response. Never, it was all lies; deception. [They] were always told that the applications for *habeas corpus* were declared void; that Fernando was not there, that he did not appear, that he did not exist, that he had gone to Canada; he was just someone who did not exist."¹⁵⁷ Indeed, the Court observes that, at the time when Mr. García's disappearance commenced, the Guatemalan authorities did not acknowledge that they had executed the deprivations of liberty with which they initiated forced disappearances, and did not provide information on the whereabouts or fate of the victims, despite the steps taken by their families and by the organs in charge of criminal investigations.¹⁵⁸ This lack of information concerning Mr. García's fate or whereabouts has continued to date, and proves the State's refusal to provide information.

105. Regarding Article 5 of the American Convention, this Court has maintained that forced disappearance violates the right to personal integrity, because the mere fact of prolonged isolation and compulsory solitary confinement represents cruel and inhuman treatment contrary to paragraphs 1 and 2 of Article 5 of the Convention; thus, it is evident that every dimension of the personal integrity of the victim of forced disappearance is violated.¹⁵⁹

106. In any case, the Court has established that submitting those detained to official law enforcement units, State agents, or individuals acting with their acquiescence or tolerance, who perpetrate torture and murder with impunity, represents, in itself, an infringement of the obligation to prevent violations of the right to personal integrity and to life, even if it is

¹⁵⁵ Cf. CEH, *supra*, volume II, p. 415, para. 2068.

¹⁵⁶ Cf. PN. Log for February 18, 1984, GT PN 26-02 S002, No. 25374 (file of annexes to the motions and arguments brief, tome I, annex 30, folio 1413).

¹⁵⁷ Cf. Testimony given by Nineth Varencá Montenegro Cottom before the Inter-American Court during the public hearing in this case. Similarly, see affidavit prepared by Alejandra García Montenegro on April 20, 2012 (merits file, tome II, folio 806).

¹⁵⁸ Cf. CEH, *supra*, volume II, p. 415, para. 2068.

¹⁵⁹ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, para. 187, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 116.

not possible to prove the violations in the specific case.¹⁶⁰ These circumstances entail a violation of Articles 5(1) and 5(2) of the American Convention

107. Regarding Article 4 of the American Convention, the Court has considered that, owing to the very nature of forced disappearance, the victims are in an increased situation of vulnerability, which gives rise to the risk of the violation of several rights, including the right to life. In addition, the Court has established that forced disappearance has frequently included the execution of those detained, in secret and without any type of trial, followed by the concealment of the corpse in order to erase any material trace of the crime and to ensure the impunity of those who committed it, which signifies a violation of the right to life, recognized in Article 4 of the Convention.¹⁶¹ Thus, the Court has verified that the execution of those who were disappeared was the practice during the internal armed conflict in Guatemala.¹⁶²

108. In addition, the Court has found that, in cases of forced disappearance, based on the complexity and multiple nature of this gross violation of human rights, its implementation involves the specific violation of the right to juridical personality, because the result of the refusal to acknowledge the deprivation of liberty or the whereabouts of the person is, in conjunction with the other elements of the disappearance, the “removal of the protection of the law” or the violation of the individual’s personal and legal security, which directly prevents recognition of juridical personality.¹⁶³

109. In this regard, the Court has considered that the intrinsic content of the right to recognition of juridical personality is, precisely, that the individual is recognized, anywhere, as a subject of rights and obligations, with the right to enjoy the fundamental civil rights, and this implies the capacity to be the possessor of rights (capacity and enjoyment) and obligations. The violation of that recognition entails categorically denying the possibility of being the possessor of the fundamental civil rights and obligations.¹⁶⁴ Over and above the fact that the disappeared person is unable to continue enjoying and exercising other, and eventually, all the rights which he or she possesses, disappearance seeks not only one of the most serious forms of removing a person from every sphere of the legal system, but also denies their very existence and leaves them in a sort of limbo or situation of legal uncertainty before society and the State.¹⁶⁵

110. The Court considers that Edgar Fernando García has been placed in a situation of legal uncertainty that has prevented him from possessing or exercising his rights effectively, and this entails a violation of his right to recognition of juridical personality. Regarding the representatives’ argument concerning Mr. García’s right “to be buried in accordance with his religion or customs,” the Court underlines that the fact that a disappeared person cannot exercise all the rights that he or she possesses, does not mean that the forced

¹⁶⁰ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, para. 175, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 117.

¹⁶¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, para. 157, and *Case of González Medina and family members v. Dominican Republic*, *supra*, para. 185.

¹⁶² Cf. CEH, *supra*, volume II, pp. 241, 415, 421 and 423, paras. 2068, 2082, 2083 and 2087, and *Case of Molina Theissen v. Guatemala. Merits*. Judgment of May 4, 2004. Series C No. 106, para. 40.4.

¹⁶³ Cf. *Case of Anzualdo Castro v. Peru*, *supra*, paras. 90 to 101, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 118.

¹⁶⁴ Cf. *Case of Bámaca Velásquez v. Guatemala. Merits*, *supra*, para. 179, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 119.

¹⁶⁵ Cf. *Case of Anzualdo Castro v. Peru*, *supra*, para. 90, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 119.

disappearance, as a multiple and complex violation, involves the violation of all those rights that the disappeared person is unable to exercise.

111. As a result of the State's actions described in this chapter, the Court also considers that the State failed to comply with its obligation not to implement or tolerate the forced disappearance of persons under any circumstance, established in Article I(a) of the Inter-American Convention on Forced Disappearance.

112. The Inter-American Court emphasizes the seriousness of the facts *sub judice*, which have occurred since 1984, and took place within a systematic State practice of forced disappearance verified in the Court's case law (*supra* para. 54). The Court also observes that, at the time, forced disappearances formed part of a State policy against those identified as internal enemies under the National Security Doctrine (*supra* para. 51). Various State security forces played a role in this policy, including the Police and the Army (*supra* para. 52). The Court must also point out that the existence of official documents such as the *Diario Militar* and the records of the "Patrol and Cleansing Operations" reveals the organization and planning behind the forced disappearances, as well as the coordination that existed among senior political and/or military authorities. In this regard, the report of the Peace Secretariat, taking into account the information found in the Historical Archive of the National Police, indicates that the captures were planned with information previously collected by different State agencies. In the instant case, it should be stressed that the CEH concluded that, during the internal armed conflict, forced disappearances were "implemented systematically in different regions and affected a large part of the population, constituting a crime against humanity."¹⁶⁶

113. The representatives also alleged the violation of Article II of the Inter-American Convention on Forced Disappearance. However, this Court has held that Article II of this Convention does not, in itself, constitute an obligation; rather it is a definition of forced disappearance. Therefore, as the State has argued, the Court considers that it is not in order to declare non-compliance with this article in the instant case.¹⁶⁷

114. Based on the above, the Court concludes that the State is responsible for the violation of the rights to personal liberty, personal integrity, life, and juridical personality, recognized in Articles 7(1), 5(1) and 5(2), 4(1) and 3, owing to the State's failure to comply with its obligation to respect those rights, established in Article 1(1), all of the American Convention, and in relation to Article I(a) of the Inter-American Convention on Forced Disappearance, to the detriment of Edgar Fernando García. The assessment of the obligation to ensure those rights by a diligent and effective investigation into what happened is made in Chapter VIII-2 of this Judgment.

II. The freedom of association¹⁶⁸ and expression¹⁶⁹ of Edgar Fernando García

115. The Commission indicated that "the forced disappearance of Edgar Fernando García constituted a violation of his right to freedom of expression and its purpose was to suppress

¹⁶⁶ Cf. CEH, *supra*, volume II, pp. 412, para. 2058.

¹⁶⁷ Cf. *Case of Chitay Nech et al. v. Guatemala*, *supra*, para. 120.

¹⁶⁸ Article 16(1) of the Convention establishes that: "[e]veryone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes."

¹⁶⁹ Article 13(1) of the Convention establishes that: "[e]veryone 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."

the exercise of his right to freedom of association in a context of repression and elimination of leaders and members of any opposition organization”; this is revealed, *inter alia*, by the note on him in the *Diario Militar*. The representatives agreed with the Commission’s assessment. For its part, the State “expresse[d] its total acceptance” in relation to the violations of freedom of thought and expression and freedom of association to the detriment of Edgar Fernando García.

116. The Court has recognized that when the violation of the right to life, and to personal integrity or liberty is intended to prevent the legitimate exercise of another right protected by the Convention, such as the freedoms of association¹⁷⁰ and expression,¹⁷¹ there is also an autonomous violation of this right protected in the American Convention. Regarding freedom of association, this Court has stated that Article 16(1) of the American Convention establishes that those who are under the jurisdiction of the States Parties have the right and the freedom to associate freely with other persons, without any interference from the public authorities that could limit or impair the exercise of this right. Thus, this is the right to associate with others in order to achieve a legitimate common objective without pressure or interference that could alter or denature this objective.¹⁷² In addition to these negative obligations, the Inter-American Court has observed that freedom of association also gives rise to positive obligations to prevent attacks on it, to protect those who exercise it, and to investigate violations of this freedom.¹⁷³

117. Similarly, the Court considers that the content of trade union freedom, a form of freedom of association, entails the power of choice as to how to exercise it. Thus, an individual does not enjoy the full exercise of the right to freedom of association if, in reality, this power is absent or reduced in such a way that it cannot be implemented. The State must ensure that people can freely exercise their freedom to form a labor union without fear of being subjected to violence of any kind; otherwise, the ability of groups to organize in order to protect their interests could be reduced.¹⁷⁴

118. The Court has noted that Edgar Fernando García was a leader of the labor union of CAVISA where he worked; he was connected with the PGT and with a university student association (*supra* para. 62). In addition, it has been proved that these types of organizations were considered “internal enemies” during the internal armed conflict in Guatemala (*supra* paras. 51 and 54). The Court emphasizes that, based on these facts, the State acknowledged its international responsibility for the violation of Mr. García’s right to freedom of association.

119. Indeed, the Court observes that various factors and evidence provided to the case file reveal the intention of restricting Edgar Fernando García’s freedom of association and, specifically, his union freedom by his forced disappearance. In this regard, the Court takes

¹⁷⁰ Cf. *Case of Huilca Tecse v. Peru. Merits, reparations and costs*. Judgment of March 3, 2005. Series C No. 121, paras. 66 to 79; *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, paras. 146 and 147; *Case of Kawas Fernández v. Honduras, supra*, para. 150, and *Case of Manuel Cepeda Vargas v. Colombia, supra*, para. 172.

¹⁷¹ Cf. *Case of Manuel Cepeda Vargas v. Colombia, supra*, paras. 176 and 177.

¹⁷² Cf. *Case of Baena Ricardo et al. v. Panama. Merits, reparations and costs*. Judgment of February 2, 2001. Series C No. 72, para. 156, and *Case of the Río Negro Massacres v. Guatemala, supra*, para. 167..

¹⁷³ Cf. *Case of Huilca Tecse v. Peru, supra*, para. 76, and *Case of Fleury et al. v. Haiti. Merits and reparations*. Judgment of November 23, 2011. Series C No. 236, para. 100.

¹⁷⁴ Cf. *Case of Huilca Tecse v. Peru, supra*, para. 77. See also, ECHR. *Young, James and Webster v. The United Kingdom*, 13 August 1981, § 56, Series A no. 44, and *Plattform “Ärzte für das Leben” v. Austria*. 21 June 1988, § 32, Series A no. 139..

note of the opinion of expert witness Marco Tulio Álvarez Bobadilla in the domestic criminal proceedings. According to this expert, documents found in the Historical Archive of the Police reveal that the notifications made regarding a permit granted to Mr. García in 1980 to organize a march (*supra* para. 64) exceeded what was normal, which “denotes more than the goal of ensuring security, the intention of controlling this type of activity,” because, for example, there is a handwritten annotation on one of the official notes, that “all units should take note.”¹⁷⁵ The expert concluded that “given Edgar Fernando García’s prominence, it was very logical to consider that the security forces were after him.”¹⁷⁶ In this regard, also in the Historical Archive of the National Police, an official letter was found from the Fourth Unit of the National Police to the Director of the National Police, in which, *inter alia*, it is reported that the CAVISA leaders had requested the construction of a hospital to “attend to those injured in armed confrontations with Government security forces in the urban area”; thus making a connection between the union and subversive groups (*supra* para. 64 and footnote 72). In addition, a file card appeared with information on Edgar Fernando García and, according to two experts in the domestic criminal proceedings, this was the way those considered to be subversives were registered.¹⁷⁷

120. The Court notes that during the armed conflict, there was a pattern of actions by the State aimed at capturing or eliminating the leaders of unions and student organizations because they opposed the State’s ideology.¹⁷⁸ As part of the State’s counterinsurgency policy, the forced disappearances were intended to dismantle the movements or organizations identified by the State as inclined towards “insurgency” and to instil fear in the population.¹⁷⁹ This policy is also reflected in the *Diario Militar*, where information was

¹⁷⁵ Cf. Expert opinion of Marco Tulio Álvarez Bobadilla on the historical and political context of the forced disappearance of Edgar Fernando García provided in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folio 1552), and AHPN. Note received on March 21, 1980. GT PN 30-01 S004, No. 16262 (file of annexes to the motions and arguments brief, tome II, annex A, folio 2626). See, also, AHPN. Note No. 358 of the Office of the Governor of the department of Guatemala. GT PN 30-01 S004, No. 16263, and Decision No. 105/Sbpp of March 24, 1980. GT PN 30-01 S004, No. 16267 (file of annexes to the motions and arguments brief, tome II, annex A, folios 2627 and 2632).

¹⁷⁶ Expert opinion of Marco Tulio Álvarez Bobadilla on the historical and political context of the forced disappearance of Edgar Fernando García provided in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folio 1552). The domestic criminal court accorded probative value to the conclusions of this expert opinion in its decision. Cf. Judgment of the Eighth Crime, Drug-trafficking and Environmental Offenses Court of October 28, 2010, C-01069-1997-00001 (file of annexes to the motions and arguments brief, tome IV, annex C, folio 3823).

¹⁷⁷ Cf. Expert opinion of Rember Aroldo Larios Tobar on the police structure in the case of Edgar Fernando García provided in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folios 1624 to 1630). The domestic criminal court accorded probative value to the conclusions of this expert opinion in its decision. Cf. Judgment of the Eighth Crime, Drug-trafficking and Environmental Offenses Court of October 28, 2010, C-01069-1997-00001 (file of annexes to the motions and arguments brief, tome IV, annex C, folio 3814), and expert opinion of social psychologist Marina de Villagrán on the case of Edgar Fernando García provided in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folio 1659).

¹⁷⁸ Cf. Expert opinion provided by Katharine Doyle on United States declassified documents related to the disappearance of Edgar Fernando García in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folios 2058 to 2060 and 2063); judgment of the Eighth Crime, Drug-trafficking and Environmental Offenses Court of October 28, 2010, C-01069-1997-00001 (file of annexes to the motions and arguments brief, tome IV, annex C, folio 3784, 3785 and 3788); expert opinion of Marco Tulio Álvarez Bobadilla on the historical and political context of the forced disappearance of Edgar Fernando García provided in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folios 1543 to 1546); expert opinion of Fernando Arturo López Antillón on the effectiveness of *habeas corpus* during the internal armed conflict provided in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folios 1973 and 1974), and video entitled “*Aún guardamos la esperanza*” of February 2009, *supra*, parts 1 and 2.

¹⁷⁹ Cf. CEH, *supra*, volume II, chapter II, pp. 412 and 413, para. 2060, and *Case of Molina Theissen v. Guatemala*. Merits. Judgment of May 4, 2004. Series C No. 106, para. 40.1; expert opinion of Fernando Arturo López Antillón on the effectiveness of *habeas corpus* during the internal armed conflict provided in the domestic

recorded on leaders of social organizations, among others, which had been collected previously and was used for planning counterinsurgency operations,¹⁸⁰ as well as by the information on Edgar Fernando García in the Historical Archive of the National Police. The Court also underscores that, according to the testimony of Danilo Chinchilla, who was with Mr. García on the day of his arrest, the police arrested them after searching them and finding PGT documents and CAVISA papers (*supra* para. 65). The Court emphasizes that, when analyzing this and other evidence, the criminal court hearing the domestic proceedings established that “the objective [of the capture] was to obtain information from Edgar Fernando García on his activities as a student, labor unionist, and member of Patriotic Youth for Labor and the [PGT].”¹⁸¹ Therefore, this Court finds that it has been proved that Mr. García’s forced disappearance was motivated by his participation in labor and student associations categorized as “opposing and/or insurgent” in the context of the internal armed conflict in Guatemala.

121. The Court also emphasizes that Mr. García’s forced disappearance very probably had an unsettling and intimidating effect on the other members of the social organizations to which he belonged, which was accentuated by the context of impunity surrounding the case for many years (*infra* para. 154). This Court underlines that the effect of Mr. García’s disappearance on other labor unions can be seen in the concern that was actively expressed by the labor unions of CAVISA and other companies, and union associations or federations, which published paid announcements in the national press denouncing what happened to Mr. García and demanding his appearance even a year after the events.¹⁸² Based on the foregoing, the Court concludes that the State violated the right to freedom of association recognized in Article 16(1) of the American Convention, in relation to the Article 1(1) of this instrument, to the detriment of Mr. García, because his disappearance was intended to restrict the exercise of his right to freedom of association.

122. Furthermore, in relation to the alleged violation of freedom of expression as a reason for the disappearance, the Court notes that these two freedoms (of association and of expression) are intrinsically related. Indeed, the European Court has recognized that the protection of freedom of thought and expression is one of the purposes of freedom of association.¹⁸³ Nevertheless, the Court considers that each of the rights contained in the Convention has its own sphere, meaning, and scope.¹⁸⁴ In the Court’s opinion, the violation

criminal proceedings (file of annexes to the motions and arguments brief, tome I, folios 1972 to 1974 and 1979), and video entitled “*Aún guardamos la esperanza*” of February 2009, *supra*, parts 1 and 2.

¹⁸⁰ Cf. Peace Secretariat, *supra*, pp. 21 and 23, folios 33 and 35.

¹⁸¹ Judgment of the Eighth Crime, Drug-trafficking and Environmental Offenses Court of October 28, 2010, C-01069-1997-00001 (file of annexes to the motions and arguments brief, tome IV, annex C, folio 3864).

¹⁸² Cf. Note published by the Workers’ Union of *Industria Centro Americana de Vidrio S.A. (STICAVSA)* on October 18, 1984; note in which the Workers’ Union of *Industria Centro Americana de Vidrio S.A. (STICAVSA)* expresses its appreciation of the “solidarity” of the *Unione Italiana del Lavoro* and the *Confederazione Italiana Sindacati Lavoratori*, among other organizations from Sweden, France and the Federal Republic of Germany, published on May 24, 1984; notes published by the CAVISA workers on February 18, 1985, in the newspaper “*El Gráfico*,” and note published by the labor union of *Embotelladora Guatemalteca, S.A. Anexos y Conexos Coca-Cola (STEGAC)* on August 10, 1984 (file of annexes to the Merits Report, tome II, annex 31, folios 475, 477, 478 and 488).

¹⁸³ Cf. ECHR, *Young, James and Webster v. The United Kingdom*, 13 August 1981, § 57, Series A no. 44; *Sigurður A. Sigurjónsson v. Iceland*, 30 June 1993, § 37, Series A no. 264; *Chassagnou and Others v. France* [Grand Chamber], nos. 25088/94, 28331/95 and 28443/95, § 103, ECHR 1999-III; *Refah Partisi (the Welfare Party) and Others v. Turkey* [Grand Chamber], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 88, ECHR 2003-II, and *Vörður Ólafsson v. Iceland*, no. 20161/06, § 46, ECHR 2010.

¹⁸⁴ Cf. *Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, Merits and reparations*. Judgment of May 26, 2010. Series C No. 213, para. 171.

of the right to freedom of association can lead to an impairment of freedom of expression. Despite the State's acknowledgement of the violation of the latter, the Court considers that, in order to constitute a violation of the right to freedom of expression, it would be necessary to prove that this had been impaired above and beyond the harm intrinsic to the declared violation of the right to freedom of association, and that has not happened in this case. Consequently, it is not in order to declare that the State violated Edgar Fernando García's right to freedom of thought and expression as part of the reason for his forced disappearance.

VIII-2 OBLIGATION TO INVESTIGATE THE FORCED DISAPPEARANCE OF EDGAR FERNANDO GARCÍA

123. In this chapter, the Court will summarize the arguments of the Inter-American Commission and of the parties, and will then rule on the alleged violations of Articles 8(1)¹⁸⁵ and 25(1)¹⁸⁶ of the American Convention, in relation to Article 1(1) of this instrument and to Article I(b) of the Inter-American Convention on Forced Disappearance,¹⁸⁷ to the detriment of Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García, as well as the alleged violations of the obligation to guarantee the rights recognized in Articles 3, 4, 5 and 7 of the American Convention to the detriment of Edgar Fernando García. The Court will also rule on the alleged violation of the right of access to information and the alleged failure to comply with Article 2 of the Convention in this chapter.¹⁸⁸

124. The Court recalls that, owing to its competence *ratione temporis*, it can rule only on the facts relating to the investigations that took place after March 9, 1987 (*supra* para. 26). The facts that occurred prior to that date will be taken into account as background information in the case, but this Court is unable to determine legal consequences in relation to the State's alleged international responsibility.

A) Arguments of the Inter-American Commission and of the parties

125. The Commission indicated that the State was responsible for the violation of Articles 8 and 25 of the Convention, to the detriment of Edgar Fernando García and of his family members, because it had failed to conduct "a serious and diligent investigation, within a reasonable time, and had not ensured the rights to the truth, justice, and reparation for his next of kin." It also indicated that, owing to the victim's disappearance, several applications for *habeas corpus* were filed without obtaining any response, and although the family "risked denouncing the facts formally, this did not lead to real actions by the judicial

¹⁸⁵ Article 8(1) of the Convention establishes that: "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

¹⁸⁶ Article 25(1) of the Convention establishes that: "[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

¹⁸⁷ Article I(b) of the Inter-American Convention on Forced Disappearance of Persons stipulates that: "[t]he States Parties to this Convention undertake: [...] (b) to punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories."

¹⁸⁸ Article 2 of the American Convention establishes that: "[w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

authorities.” In addition, with regard to the special investigation procedure, it indicated that “the State authorities involved in the procedure failed to take measures to ensure the effectiveness of the judicial action.” The Commission recognized that this case “is exceptional as regards the progress made in the investigation and punishment of two of the perpetrators of the detention of Edgar Fernando García”; however, it stressed that, until the discovery of the Historical Archive of the Police, the case remained in total impunity. It also indicated that it is still necessary to “determine who the [other] responsible parties are,” bearing in mind that of Edgar Fernando García’s disappearance “involved a series of State institutions ranging from the military intelligence unit of the Presidential General Staff [...] to members of the National Police.”

126. The representatives argued that “for more than 27 years the State [...] has refused to provide any information that would establish the victim’s whereabouts [by] denying official information and not allowing access to justice.” They indicated that the applications for *habeas corpus* filed by the family members were declared inadmissible “almost as soon as [they were filed]” and “did not result in an investigation that was conducted properly.” According to the representatives, the State “failed to comply with the obligation to provide a simple, prompt and effective judicial remedy to the victim’s next of kin [...] and this occurred by both act and omission,” “by abstaining from receiving complaints, by not opening an investigation into the facts *ex officio*, and by denying justice to the complainants and those who filed the applications for *habeas corpus*.” They stressed that the investigation has exceeded a reasonable time, to the point that “Alejandra García [who was one year old at the start of the disappearance ...] has been able to graduate from university as a lawyer and serve as the lawyer” acting for the complainants in the internal criminal proceedings concerning her father’s disappearance. They underscored that the State had failed to punish “the masterminds, accomplices and accessories to the crime of forced disappearance” of Edgar Fernando García. Lastly, they argued that the State had violated Article 2 of the Convention “by failing to legislate to create legal instruments that facilitate the search for persons who were forcibly disappeared,” because “it ha[d] delayed the approval of bill 35-90 proposed by several civil society organizations [in order to create a National Commission for the Search for Disappeared Persons].”

127. The State partially accepted its responsibility for the violation of Articles 8 and 25 of the Convention. It indicated that “the State’s actions [...] should be analyzed in light of the complexity of the facts and the difficulties faced by the authorities to carry out their task.” It indicated that, “aware of the serious situation that prevailed in the country,” it had taken various measures to meet its international obligations, such as the creation of a special investigation procedure and the inclusion of the crime of forced disappearance in the Criminal Code. It indicated that, “despite [these] legal actions, [...] following two applications for *habeas corpus* in 1984,] the procedural activity of the interested parties was not taken up again until 1997.” It argued that it had taken the “necessary steps” to investigate and identify those responsible for the forced disappearance of Edgar Fernando García because, following the application for *habeas corpus* filed in 1997, “it began a special investigation procedure [...], which allowed it to bring duly founded charges against members of the former National Police.” It also stressed that, “even though it was not the State that divulged” the *Diario Militar*, “considerable efforts had been made to prove [its] authenticity.” In addition, it emphasized that the Historical Archive of the National Police had been divulged by the Ombudsman’s Office, which demonstrated “the importance of the State’s efforts to recover the country’s historical memory and, thus, elucidate the facts.” In addition, the State indicated that significant progress had been made towards the prosecution of the possible masterminds of the events, and advised that “those who occupied the posts of Director of the Fourth Unit of the National Police and Director General of the National Police at the time of the events,” were currently being tried.

B) Considerations of the Court

128. The Court recalls that, from the start of the victim's forced disappearance, numerous applications for *habeas corpus* were filed and different proceedings have been conducted in order to clarify what happened to Edgar Fernando García. Following the acceptance of the Court's jurisdiction, the events were reported to the PDH, three applications for *habeas corpus* were filed, and a special investigation procedure was undertaken by the PDH before the Supreme Court of Justice. In 2009, after the discovery of the Historical Archive of the National Police, the Public Prosecution Service formally charged two perpetrators of the disappearance of Edgar Fernando García, and they were sentenced and convicted in October 2010, in a judgment that is now final. Furthermore, based on the information that appeared in the Historical Archive of the National Police, two other individuals indicated as presumed perpetrators were identified, and they have been fugitives from justice since 2009.¹⁸⁹ Also, another two individuals who have been identified as presumed masterminds, are currently being prosecuted,¹⁹⁰ although the Court is unaware of the exact status of these proceedings.

129. The Court recalls that, based on the protection granted by Articles 8 and 25 of the Convention, States are obliged to provide effective judicial remedies to the victims of human rights violations, which must be substantiated in accordance with the rules of due process of law.¹⁹¹ Furthermore, the Court has indicated that the right of access to justice must ensure, within a reasonable time, the right of the presumed victims or their family members that everything necessary is done to discover the truth of what happened and to punish those responsible.¹⁹²

130. The obligation to investigate human rights violations is one of the positive measures that States must adopt in order to guarantee the rights recognized in the Convention.¹⁹³ In addition, it is pertinent to recall that the systematic practice of forced disappearance entails a disregard of the obligation to organize the State apparatus so as to ensure the rights recognized in the Convention, which reproduces the conditions of impunity so that this type of event is repeated.¹⁹⁴ Hence the importance that the State take all necessary measures to investigate and, as appropriate, punish those responsible; to establish the truth of what happened; to locate the whereabouts of the victims and to inform the family members, and to provide the latter with fair and adequate reparation, as appropriate.¹⁹⁵

¹⁸⁹ Cf. Affidavit prepared by Manuel Giovanni Vásquez Vicente on March 11, 2012 (merits file, tome II, folios 792, 793 and 795), and affidavit prepared by Alejandra García Montenegro on April 20, 2012 (merits file, tome II, folio 807).

¹⁹⁰ According to witness Manuel Giovanni Vásquez Vicente the "Director General of the National Police and the [the] Commander General of the Fourth Unit of the National Police [at the time] are awaiting their oral and public trial," because they presumably "participated, since they were part of the chain of command." Affidavit prepared by Manuel Giovanni Vásquez Vicente on March 11, 2012 (merits file, tome II, folio 795).

¹⁹¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary objections*. Judgment of June 26, 1987. Series C No. 1, para. 91, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 242.

¹⁹² Cf. *Case of Bulacio v. Argentina. Merits, reparations and costs*. Judgment of September 18, 2003. Series C No. 100, para. 114, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 242.

¹⁹³ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, paras. 166 and 167, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 243.

¹⁹⁴ Cf. *Case of Velásquez Rodríguez. Merits*, *supra*, para. 158, and *Case of Contreras et al. v. El Salvador*, *supra*, para. 126.

¹⁹⁵ Cf. *Case of Goiburú et al. v. Paraguay*, *supra*, para. 89, and *Case of Contreras et al. v. El Salvador*, *supra*, para. 126.

131. The Court recalls that since the prohibition of forced disappearance is a *jus cogens* norm, the correlative obligation to investigate and, as appropriate, to prosecute and punish those responsible, is particularly forceful and important given the seriousness of the crimes committed and the nature of the rights impaired¹⁹⁶ (*supra* para. 96).

132. The Court has established that the obligation to investigate is an obligation of means and not of results, and it must be assumed by the State as an inherent legal obligation, not as a mere formality preordained to be ineffective, or merely as an action taken by private interests that depends on the procedural initiative of the victims or their next of kin, or on the offer of evidence by private individuals.¹⁹⁷ The State's obligation to investigate must be fulfilled diligently in order to prevent impunity and the recurrence of such events. In this regard, the Court recalls that impunity encourages the repetition of the violation of human rights.¹⁹⁸

133. According to the Court's case law, the victims' next of kin have the right, and the States have the obligation, to ensure that what happened to them is investigated effectively by the State authorities; that proceedings are undertaken against the presumed perpetrators of the illegal acts, and that, as appropriate, the pertinent punishments are imposed on them, and that reparation is made for the harm suffered by the next of kin.¹⁹⁹ In addition, the Court reiterates that, in the case of a forced disappearance, where one of the objectives is to prevent the exercise of legal remedies and the pertinent procedural guarantees, if the victim is unable to access the available remedies, it is essential that the next of kin or other persons who are close to them are able to access prompt and effective legal remedies or procedures in order to determine the victim's whereabouts or health, and to identify the authority that ordered or implemented the deprivation of liberty.²⁰⁰

134. Furthermore, the investigation will have certain specific connotations arising from the nature and complexity of the phenomenon under investigation. In other words, the investigation must also include the implementation of all the actions required to determine the victim's fate and to discover his or her whereabouts.²⁰¹ The Court has already stated that the obligation to investigate facts of this nature persists while the uncertainty about the final fate of the disappeared person remains, because the right of the victim's family to know his or her fate and, if applicable, where the remains are located, represents a just expectation that the State must satisfy with the means available to it.²⁰²

135. The Court has emphasized that the legal rights involved in the investigation of a forced disappearance oblige the State to redouble its efforts regarding the measures that

¹⁹⁶ Cf. *Case of Goiburú et al. v. Paraguay*, *supra*, paras. 84, 128 and 131, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 227.

¹⁹⁷ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, para. 177, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 248..

¹⁹⁸ Cf. *Case of the Ituango Massacres v. Colombia*, *supra*, para. 319, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 244.

¹⁹⁹ Cf. *Case of Durand and Ugarte*, *supra*, para. 130, and *Case of González Medina and family members v. Dominican Republic*, *supra*, para. 208.

²⁰⁰ Cf. *Case of Anzualdo Castro v. Peru*, *supra*, para. 64, and *Case of González Medina and family members v. Dominican Republic*, *supra*, para. 208.

²⁰¹ Cf. *Case of Ticona Estrada v. Bolivia*, *supra*, para. 80, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 224.

²⁰² Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, para. 181, and *Case of González Medina and family members v. Dominican Republic*, *supra*, para. 209.

must be taken to achieve its objective, because the passage of time has a direct bearing on the limitation – and in some cases, the impossibility – of obtaining evidence and/or testimony making it difficult, or even useless or ineffective, to implement probative measures in order to clarify the facts that are under investigation, to identify the possible perpetrators and participants, and to determine the eventual criminal responsibilities.²⁰³ The investigation must be conducted using all available legal means and be aimed at determining the truth and the pursuit, capture, prosecution, and eventual punishment of all the masterminds and perpetrators of the facts, especially when State agents are involved.²⁰⁴

136. The Court also recalls that, in certain circumstances and depending on the nature of the facts, the obligation to investigate, prosecute and, as appropriate, punish those responsible for violations of human rights is revealed in other inter-American instruments that establish the States Parties' obligation to investigate the conduct prohibited by those treaties.²⁰⁵ Regarding the facts of this case, Article 1(b) of the Inter-American Convention on Forced Disappearance imposes on States the obligation "to punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories." Therefore, according to this Court's case law, in cases of forced disappearance, the State's obligation to open an investigation *ex officio* is also derived from that Convention for the States that are a party to it.²⁰⁶ These specific obligations may be require of the State as of the date that it deposits its instrument of ratification (*supra* para. 25), even if they were not in force when the forced disappearance began.²⁰⁷

137. Taking into account the foregoing criteria, the Court will now analyze the State's obligation to conduct an investigation *ex officio*; the effectiveness of the applications for *habeas corpus* filed in 1997 and the special investigation procedure, and due diligence and compliance with the principle of reasonable time in the investigations conducted into the disappearance of Edgar Fernando García.

1. Obligation to open an investigation *ex officio*

138. The Court recalls that whenever there is a reasonable motive to suspect that a person has been subjected to forced disappearance, a serious, impartial and effective investigation must be opened *ex officio*, without delay.²⁰⁸ This Court has indicated that it is essential that the prosecuting and judicial authorities take prompt and immediate action, ordering the timely and necessary measures to determine the victim's whereabouts or the place where

²⁰³ Cf. *Case of Heliodoro Portugal v. Panama*, *supra*, para. 150, and *Case of González Medina and family members v. Dominican Republic*, *supra*, para. 218.

²⁰⁴ Cf. *Case of the Pueblo Bello Massacre v. Colombia. Merits*. Judgment of January 31, 2006. Series C No. 140, para. 143, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 192.

²⁰⁵ Cf. *Case of the Miguel Castro Castro Prison v. Peru. Merits, reparations and costs*. Judgment of November 25, 2006. Series C No. 160, paras. 276, 377, 378 and 379, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 222.

²⁰⁶ Cf. *Case of Radilla Pacheco v. Mexico*, *supra*, paras. 142 and 143, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 223.

²⁰⁷ Cf. *Case of the Miguel Castro Castro Prison v. Peru*, *supra*, para. 377; *Case of the Las Dos Erres Massacre v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of November 24, 2009. Series C No. 211, para. 137, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 246.

²⁰⁸ Cf. *Case of Anzualdo Castro v. Peru*, *supra*, para. 65, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 223.

he or she may be found deprived of liberty.²⁰⁹ This obligation is independent of whether a complaint has been filed because, in cases of forced disappearances, international law and the general obligation to ensure rights impose the obligation to investigate the case *ex officio*, without delay, and in a genuine, impartial and effective manner;²¹⁰ hence, this does not depend on the procedural initiative of the victim or his or her family, or on the submission of evidence by private individuals.²¹¹ In any case, any State authority, public official or private individual who has information on acts related to the forced disappearance of persons, must report this immediately.²¹²

139. The Court observes that, at the start of the disappearance, Edgar Fernando García's next of kin filed numerous applications for *habeas corpus*, denounced the facts publicly in newspapers and at press conferences, and met with senior Government officials, such as the Vice Minister of Defense and the then Head of State. In addition, they searched for him in official detention centers, morgues, hospitals, "insane asylums" and cemeteries, among other places (*supra* paras. 69 to 73). The response to all these actions taken by the family members was the authorities' refusal to acknowledge Mr. García's detention and the failure to obtain his liberty. Even though, owing to its competence *ratione temporis*, the Court is unable to derive legal consequences from the State's actions prior to March 1987, it is essential to point out that the omissions incurred by the said authorities have conditioned or limited the subsequent investigations into the events.

140. Following the State's acceptance of the Court's jurisdiction, Mr. García's wife denounced his disappearance to the PDH in 1988, and three applications for *habeas corpus* were filed through her representatives in 1997. In view of the lack of results, in November 1997, the representatives requested the opening of a special investigation procedure before the Supreme Court of Justice.²¹³ Some investigative procedures were initiated in 1999, first by the Public Prosecution Service, mandated by the Supreme Court pursuant to the applicable criminal procedural law, and then by the Ombudsman's Office, which was in charge of the special investigation procedure. However, these investigations did not progress until the accidental discovery of the Historical Archive of the National Police in 2005 (*supra* para. 60). In addition to the actions and remedies filed by the victim's family members, the Court underscores that, in February 1999, the CEH had concluded in its final report that Edgar Fernando García had been forcibly disappeared "by members of the Special Operations Brigade (BROE) of the National Police."²¹⁴ Then, in May 1999, the *Diario*

²⁰⁹ Cf. *Case of Anzualdo Castro v. Peru*, *supra*, para. 134, and *Case of González Medina and family members v. Dominican Republic*, *supra*, para. 218.

²¹⁰ Cf. *Case of Anzualdo Castro v. Peru*, *supra*, para. 65, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 223.

²¹¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, para. 177, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 248.

²¹² Cf. *Case of Anzualdo Castro v. Peru*, *supra*, para. 65, and *Case of the Río Negro Massacres v. Guatemala*, *supra*, para. 223.

²¹³ Article 467 of the Guatemalan Code of Criminal Procedure stipulates that: "If an application for *habeas corpus* has been filed, without finding the person in whose favor it was requested, and there are sufficient grounds to suppose that he or she has been arrested or illegally held in detention by a public official, by members of the State security forces, or by regular or irregular agents, without any information being provided on his or her whereabouts, the Supreme Court of Justice, at the request of any person, may: (1) Call upon the Public Prosecution Service to inform the court, within five days at the most, about the progress and outcome of the investigation, about the measures taken and required, and about those that remain pending; the Supreme Court may abbreviate the time frame when necessary. (2) Mandate the inquiry (preparatory procedure), in the following exclusive order: (a) to the Ombudsman; (b) to an entity or association legally-established in the country; (c) to the spouse or the next of kin of the victim." Code of Criminal Procedure of Guatemala, *supra*, article 467, Fourth Book, Specific Procedures, Title II, Special investigation procedure.

²¹⁴ Cf. CEH, *supra*, volume VI, p. 152.

Militar appeared, which has been recognized as an authentic military intelligence document, and which mentions Mr. García's disappearance. According to experts who have studied the document, it reveals "that he was subjected to intensive surveillance by the Army and the Police [... and this, together with United States declassified documents reveals that his disappearances formed part] of the Government campaign to dismantle the labor union movement in Guatemala."²¹⁵

141. The Court considers that, in the instant case, it has been proved that the State was aware of the disappearance of Edgar Fernando García as of 1984; nevertheless, it did not act in a manner consistent with its obligation to open a serious, diligent and thorough investigation immediately. From the information provided to the case file, there is no evidence that, beyond the formal responses and verifications relating to the applications for *habeas corpus* and requests for information submitted by the family, it had taken any investigative measures or searched for Mr. García up until 1999, when the Supreme Court called on the Public Prosecution Service to investigate the representatives' allegations (*supra* para. 75). Therefore, the Court finds that, even in response to the formal filing of judicial remedies and complaints, or official rulings, the State did not open an investigation *ex officio* to determine the whereabouts of Edgar Fernando García, to clarify what happened and, as appropriate, to identify, prosecute, and punish those responsible.

2. Effectiveness of the remedy of *habeas corpus* and the special investigation procedure

142. This Court has maintained that, for the State to comply with the provisions of Article 25 of the Convention, it is not sufficient that the remedies are established in the Constitution or by law or that they are formally admissible; rather they must be effective in the terms of that instrument.²¹⁶ This effectiveness means that, in addition to the formal existence of the remedies, they must provide results or responses to the violations of rights,²¹⁷ which means that the remedy must be appropriate to address the violation, and that its implementation by the competent authority is effective.²¹⁸ In particular, the Court has considered that the application for *habeas corpus* is the appropriate means to guarantee liberty, to ensure respect for the life and integrity of the individual, and to prevent his or her disappearance or the uncertainty about the place of detention.²¹⁹ Moreover, those remedies that are illusory, owing to the general conditions of the country or even the specific circumstances of the case, cannot be considered effective.²²⁰

²¹⁵ Expert opinion provided by Katharine Doyle on United States declassified documents related to the disappearance of Edgar Fernando García in the domestic criminal proceedings (file of annexes to the motions and arguments brief, tome I, folio 2059)

²¹⁶ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, paras. 62 and 63, and *Case of Palma Mendoza et al. v. Ecuador. Preliminary objection and merits*. Judgment of September 3, 2012. Series C No. 247, para. 81.

²¹⁷ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, paras. 63, 64 and 66, and *Case of Palma Mendoza et al. v. Ecuador*, *supra*, para. 81

²¹⁸ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, para. 64, and *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and reparations*. Judgment of June 27, 2012. Series C No. 245, para. 263.

²¹⁹ Cf. *Habeas Corpus in Emergency Situations (Arts. 27.2, 25.1 and 7.6 American Convention on Human Rights)*. Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 35, and *Case of Contreras et al. v. El Salvador*, *supra*, para. 158.

²²⁰ Cf. *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8 American Convention on Human Rights)*. Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24, and *Case of Barbani Duarte et al. v. Uruguay*, *supra*, para. 200.

143. The Court observes that, in this case, the representatives filed three applications for *habeas corpus* in favor of Mr. García in 1997. The information provided to the Court reveals that, in response to these remedies, the judicial authorities requested information from several State security agencies, such as the Ministry of Defense, the General Directorate of the National Police, and the Treasury Police, and also carried out verifications and searches in a detention center and at the Army's Headquarters. All these measures were unsuccessful (*supra* para 74). The Court recalls that one of the characteristic features of forced disappearance is precisely "the refusal to acknowledge the detention and to disclose the fate or whereabouts of the person concerned" (*supra* para 97), so that the mere formal verification of the official detainee records, as occurred in this case, or the acceptances as true of the denial of the detention by those presumably responsible, without an objective, impartial and independent verification, is neither reasonable nor diligent and does not constitute an effective remedy. Furthermore, the context in which the alleged detention was carried out and its characteristics must also be taken into account, so that merely calling out the name of the detainee in a randomly-chosen detention center, more than 10 years after the date on which the detention allegedly occurred, is not an effective measure.²²¹ When investigating a presumed forced disappearance, the State authorities must take into account the characteristic elements of this type of crime,²²² as well as the context in which the facts occurred and their characteristics.

144. The Court also observes that Guatemalan law provides for a special investigation procedure "if an application for *habeas corpus* has been filed, without finding the person in whose favor it was requested, and there are sufficient grounds to suppose that he or she has been arrested or held illegally" (*supra* footnote 213), which was precisely what happened in this case. However, the Court notes that this procedure was not effective either. Indeed, during the procedure, the Public Prosecution Service was called on to investigate Mr. García's detention and, once again, State authorities failed to implement appropriate actions or proceedings to ensure the effectiveness of the formally established remedies. In this regard, the information provided indicates that the Public Prosecution Service merely interviewed Mr. García's mother and requested information from the National Police, which denied having any information for 1984 and, in particular, in relation to a BROE operation on the day of Edgar Fernando García's arrest²²³ (*supra* paras. 75 and 76). Subsequently, this special investigation procedure was entrusted to the Ombudsman's Office, which was unable to obtain results until the chance discovery of the Historical Archive of the Police in 2005.

145. The Court emphasizes that, in the instant case, the ineffectiveness of the way in which the application for *habeas corpus* and the special investigation procedure were processed is particularly evident, owing to the discovery of the *Diario Militar* and the

²²¹ According to the record on the implementation of the said applications for *habeas corpus* by the judge responsible for the case, the respective judge visited the Men's Pre-Trial Detention Center in Zone 18 and the Army Headquarters on December 2, 1997, where he verified the "Register of incoming and outgoing detainees" and the "Register of those arrested," respectively, and "proceeded to walk round [the detention centers] and call out for Edgar Fernando García [...] without obtaining an answer to this appeal; [hence, the measures were] unsuccessful." Record of the First Criminal Peace Court of December 2, 1997 (file of annexes to the Merits Report, tome II, annex 31, folios 601 and 602).

²²² Cf. *Case of González Medina and family members v. Dominican Republic*, *supra*, para. 161.

²²³ In the record of the public hearing held on April 8, 1999, during the special investigation procedure, the Public Prosecution Service reported that it had requested information about the individuals who formed part of the BROE operation on the day of Mr. García's arrest, to which the National Police advised "that they had proceeded to look for the files for 1984, without having found them." Record of the hearings held on April 8, 1999, in the special investigation procedure before the Supreme Court of Justice (file of annexes to the Merits Report, tome II, annex 31, folio 508).

Historical Archive of the National Police. The documents, certifications and records found in the Archive revealed that the National Police did have information about Mr. García's detention, contrary to the information provided in response to the requests for information by the judicial authorities and the Public Prosecution Service, and in response to the applications for *habeas corpus* and the special investigation procedure. Furthermore, the emergence of the *Diario Militar* in 1999 also revealed that the military authorities were very probably aware of Mr. García's detention, despite the denial of his detention sent in December 1997 in response to the application for *habeas corpus*.

3. Due diligence in the investigations

146. Regarding the special investigation procedure, the Court stresses that it was requested in November 1997; it was considered "filed" in February 1998 and, finally, it was declared admissible and mandated to the PDH in April 1999 (*supra* paras. 75 and 76 and footnote 94). The Court points out that it has not been provided with accurate and detailed information on the measures taken by the PDH in compliance with this mandate,²²⁴ but it observes that the file on that procedure before the Supreme Court of Justice reveals long periods of inactivity and numerous requests for an extension (*supra* para. 78), without any progress in the investigation being reported until 2005 when the Historical Archive of the National Police appeared. Despite this, the Court observes that it was not until 2009 that four presumed perpetrators were identified, arrest warrants were issued against them, and formal charges were filed against two of them, based on the information found in the Historical Archive of the National Police.

147. In this regard, the Court notes that the parties did not provide a copy of the court record of the criminal proceedings, but only copies of the expert opinions given before the respective criminal court, the recorded testimony of Danilo Chinchilla Fuentes, and the corresponding first and second instance judgments convicting the two above-mentioned perpetrators of the forced disappearance of Edgar Fernando García (*supra* para. 81). The Court greatly appreciates the progress that has been made in the identification and punishment of some of those responsible in this case and also takes note of the measures taken by the Public Prosecution Service²²⁵ and the Guatemalan judicial authorities in order to charge and prosecute two of the perpetrators of the acts. The Court also takes note of

²²⁴ The requests for an extension presented by the PDH reveal that the following measures, *inter alia*, had been taken: reception of the testimony of Aura Elena Farfán; inspection of and search for information in the Historical Archive of the National Police: steps involving activists of the *Grupo de Apoyo Mutuo*"; tracing of individuals who were close to the disappeared person in order to obtain testimony; summons of persons who could have information on the case, and "coordination with next of kin and representatives of different human rights organizations, who could contribute to the investigation." Briefs of the Ombudsman requesting an extension dated February 9, April 26, May 9, August 29 and November 30, 2005, March 19, July 18 and October 23, 2006, and February 6, 2007 (file of annexes to the Merits Report, tome II, annex 31, folios 307, 315, 316, 324, 325, 333, 334, 342, 343, 352, 353, 367, 368, 376, 377, 395 and 396).

²²⁵ According to the testimony of the witness for the State, Manuel Giovanni Vasquez Vicente, the following measures have been taken: expertise of the historical and political context of the forced disappearance of Edgar Fernando García; expertise psychosocial and on the aftereffects of the forced disappearance of Edgar Fernando García; archival expertise on the documents found in the Historical Archive of the National Police concerning the case of Edgar Fernando García; statistical expertise on the Historical Archive of the National Police; expertise on the police structure; expertise on United States declassified documents related to the case of Edgar Fernando García; expertise on the juridical regulation, official operation and actual practice of the remedy of *habeas corpus* during the armed conflict and the relevant period of the forced disappearance of Edgar Fernando García. In addition, testimony was taken from Aura Elena Farfán, Nineth Varenca Montenegro Cottom, María Emilia García, Dora Ruth del Valle Cobar, Ana Lucrecia Molina Theissen, Berta Elizabeth Palacios Caravantes and Iduvina Estalinova Hernandez Batres; certain documents were provided, and exhumations have been performed in different cemeteries in coordination with the Guatemalan Forensic Anthropology Foundation. Cf. Affidavit prepared by Manuel Giovanni Vásquez Vicente on March 11, 2012 (merits file, tome II, folios 787 to 792).

the efforts made by the State to verify the authenticity of the *Diario Militar*, as well as the work of systematization, registration and selection of documents by the Ombudsman in relation to this case, which has so far permitted the prosecution and punishment of two perpetrators. Nevertheless, the Court observes that, another four people, who have been named as masterminds and perpetrators, were identified based on this information. According to the latest information forwarded to the Court, two of them (presumed perpetrators) have been fugitives from justice since 2009, and the other two (presumed masterminds) are being prosecuted, although the Court is unaware of the exact status of the trials (*supra* para. 128).

148. In addition, the Court recalls that, in complex cases, the obligation to investigate includes the duty to direct the efforts of the State apparatus towards unraveling the structures that permitted these violations, the causes, the beneficiaries, and the consequences, and not only towards the identification, prosecution, and punishment of the direct perpetrators. In other words, the protection of human rights must be one of the central purposes defining the State's actions in any investigation.²²⁶ Thus, the determination of the perpetrators of the disappearance of Edgar Fernando García can only be effective if it is carried out based on a comprehensive conception of the facts that takes into account the background and the context in which they occurred, and that seeks to uncover the structures of participation.

149. In this regard, the Court takes note of the testimony of the State witness and public prosecutor, according to which “the Ombudsman's Office is assessing the patterns and location of positions of command in order to determine their responsibility.”²²⁷ However, the Court stresses that the information provided does not prove that a line of investigation has in fact been opened in relation to the participation of military authorities in the forced disappearance of Edgar Fernando García. According to the information provided, the investigation has focused on determining the responsibilities of those who belonged to the National Police, made the arrest, and executed the “patrol and cleansing” operation during which Edgar Fernando García was captured (*supra* para. 66). However, the Court observes that documents emerged in the Historical Archive of the National Police according to which this operation was part of a “Basic Security Control” plan, for which training had been received from the National Defense General Staff (*supra* para. 66). In addition, it observes that the first instance judgment convicting two of the perpetrators established that “it is evident that this forced disappearance was ordered by State institutions, [and] that the Army and the National Police intervened in it.”²²⁸ It also indicates that “the disappearance [of Edgar Fernando García] was perpetrated by State agents (Army) and agents of the National Police who executed the order.”²²⁹ Furthermore, in the *Diario Militar*, a military intelligence document acknowledged to be authentic by the State reveals that intelligence information was gathered on Edgar Fernando García and his membership in the PGT and the CAVISA labor union (*supra* para. 63). Regarding the record of this information in the *Diario Militar*, the said first instance judgment concluded that “[t]here is not the slightest doubt

²²⁶ Cf. *Case of Manuel Cepeda Vargas v. Colombia*, *supra*, para. 118.

²²⁷ Cf. Affidavit prepared by Manuel Giovanni Vásquez Vicente on March 11, 2012 (merits file, tome II, folio 795).

²²⁸ Cf. Judgment of the Eighth Crime, Drug-trafficking and Environmental Offenses Court of October 28, 2010, C-01069-1997-00001 (file of annexes to the State's answering brief, single tome, annex I, folio 3978).

²²⁹ Cf. Judgment of the Eighth Crime, Drug-trafficking and Environmental Offenses Court of October 28, 2010, C-01069-1997-00001 (file of annexes to the State's answering brief, single tome, annex I, folio 3968).

that [Edgar Fernando García] was investigated because the State considered him to be an enemy.”²³⁰

150. As part of the obligation to investigate forced disappearances, such as the one in this case, State authorities must determine procedurally the patterns of joint action and all those who, in different ways, participated in the said violations and their corresponding responsibilities.²³¹ It is not enough to know the material circumstances of the crime; rather, it is essential to analyze the information on the power structures that permitted, designed, masterminded and perpetrated it, as well as the individuals or groups who had interests in or would benefit from the crime (beneficiaries). Consequently, the crime cannot be analyzed in isolation, but rather in a context that provides the necessary elements to understand its operating structure.²³²

151. The Court recognizes that, in the instant case, significant progress has been made in the investigation of the forced disappearance of Edgar Fernando García. Nevertheless, it emphasizes that, for more than 25 years, no measures were adopted to investigate his disappearance with due diligence. In addition, it would appear that all the logical lines of investigation arising from the abundant evidence provided by both the Historical Archive of the National Police and the *Diario Militar* are not being followed up on in the investigation that the Public Prosecution Service is conducting at this time.

4. Reasonable time

152. To ensure that the investigation is conducted in a genuine and impartial manner, and as an inherent legal obligation, the right of access to justice requires that the determination of the facts under investigation is made within reasonable time.²³³ This Court has indicated that the “reasonable time” referred to in Article 8(1) of the Convention must be assessed in relation to the total duration of the proceedings undertaken until the final judgment is delivered.²³⁴ The Court considers that, in principle, a prolonged delay, as occurred in this case, constitutes, in itself, a violation of judicial guarantees.²³⁵

153. The Court has usually considered the following elements in order to determine the reasonableness of the time: (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 on the legal situation of the person involved in the proceedings. However, in this case, the Court has verified that 25 years and 8 months have passed since the date on which the State accepted the Court’s jurisdiction²³⁶ and more than seven years since the discovery of the

²³⁰ Cf. Judgment of the Eighth Crime, Drug-trafficking and Environmental Offenses Court of October 28, 2010, C-01069-1997-00001 (file of annexes to the State’s answering brief, single tome, annex I, folio 3972 and 3973).

²³¹ Cf. *Case of the La Rochela Massacre v. Colombia. Merits, reparations and costs*. Judgment of May 11, 2007. Series C No. 163, para. 195, and *Case of the Río Negro Massacres v. Guatemala, supra*, para. 194.

²³² Cf. *Case of Manuel Cepeda Vargas v. Colombia, supra*, para. 119, and *Case of the Río Negro Massacres v. Guatemala, supra*, para. 194.

²³³ Cf. *Case of Hilaire, Constantine and Benjamín et al. v. Trinidad and Tobago. Merits, reparations and costs*. Judgment of June 21, 2002. Series C No. 94, para. 14, and *Case of Chitay Nech et al. v. Guatemala, supra*, para. 196.

²³⁴ Cf. *Case of Suárez Rosero v. Ecuador. Merits*. Judgment of November 12, 1997. Series C No. 35, para. 71, and *Case of the Río Negro Massacres v. Guatemala, supra*, para. 229.

²³⁵ Cf. *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, supra*, para. 145, and *Case of the Río Negro Massacres v. Guatemala, supra*, para. 229.

²³⁶ At the date of delivery of this Judgment, 28 years and 9 months have passed since the start of the forced disappearance of Edgar Fernando García.

Historical Archive of the National Police, in which Mr. García's arrest by police agents during a "Patrol and Cleansing Operation" was fully accredited, but neither Mr. García's whereabouts have been determined nor all the masterminds and perpetrators have been identified and punished. The Court emphasizes that the investigation of this case did not advance beyond its initial phase until 2009, 25 years after the commencement of Mr. García's disappearance, despite the numerous remedies and complaints filed by the family members, the witnesses who reported having seen his arrest, the findings of the CEH, the appearance of the *Diario Militar*, and the discovery of the Historical Archive of the National Police. Consequently, the Court considers that it is not necessary to analyze the above-mentioned elements, because it is obvious that the time that has passed is significantly more than the time that could be considered reasonable for the State to investigate the facts of this case; especially when it is taken into account that the time required to individualize, identify and process other individuals who are possibly responsible and the different stages of the criminal proceedings must be added to this. The lack of investigation over such a long period constitutes a flagrant denial of justice and a violation of the victims' right of access to justice.

5. Conclusion

154. The Court takes note of the context in which the start of the victim's disappearance occurred. Nevertheless, it observes that the impunity that characterized this case for 26 years (until 2010, when two of the perpetrators were sentenced) remains in part because, despite the evidence in the case file, Mr. García's fate or whereabouts remain unknown; moreover, all the facts have not been clarified and all those responsible (masterminds and perpetrators, participants and accomplices) have not been identified. The Court recalls that owing to the systemic nature of the violations committed in this case, the State must take all necessary measures to investigate and, as appropriate, punish those responsible, to establish the truth of what happened, and to locate the whereabouts of the victim and inform his next of kin. This obligation subsists until the fate or whereabouts of the disappeared person is determined (*supra* paras. 129 and 134).

155. Despite the progress made after 2009, the Court considers that the State has failed to comply with its obligation to initiate an investigation into the forced disappearance of Edgar Fernando García, *ex officio*, using all the legal means available and with due diligence, and it has not respected the guarantee of a reasonable time. In addition, the Court considers that the remedies available have not been effective to determine the whereabouts of the victim. Consequently, the State has failed to comply with its obligation to ensure the rights recognized in Articles 7, 5(1), 5(2), 4(1) and 3 of the American Convention, by an effective investigation, in relation to Article 1(1) of this instrument and Article I(b) of the Inter-American Convention on Forced Disappearance, to the detriment of Edgar Fernando García. The Court also concludes that, owing to the lack of an effective investigation of the facts, the prosecution, and punishment of all those responsible, the State has violated 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) thereof and Article I(b) of the Inter-American Convention on Forced Disappearance, to the detriment of Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García.

6. Alleged violation of the obligation to adopt domestic legal provisions and of the right of access to information

156. The Court observes that both the Commission and the representatives alleged non-compliance with Article 2 of the American Convention, in relation to the investigations. However, the Court stresses that, although the Commission included this violation in the

conclusions of its Merits Report and in the claims it submitted to the Court, it did not present the factual and legal arguments on which this violation was founded. Meanwhile, the representatives indicated that this violation was based on the fact that the State had “not drafted legislation to create legal instruments that facilitate the search for persons who have been forcibly disappeared.” In this regard, the Court recalls that, in cases of forced disappearance, the investigation must include the measures required to determine the fate of the victims and to locate their whereabouts, which is an obligation of means and not of results (*supra* para. 134). Regarding this case, the Court notes the testimony of witness Manuel Giovanni Vasquez that exhumations have been performed in different cemeteries, but none of the remains found are those of Edgar Fernando García. It also observes that, according to information provided by the State, the bill to create the National Commission for the Search for Victims of Forced Disappeared and other Forms of Disappearance has been before Congress since 2006. Based on this information, the Court considers that it does not have sufficient evidence to allow it to find that the ineffectiveness of the search for the whereabouts or the remains of Edgar Fernando García constitutes failure to comply with the State’s general obligation established in Article 2 of the Convention. The Court also emphasizes that the lack of effectiveness of the investigations, which includes the ineffectiveness to determine the whereabouts of the victim, has already been analyzed by this Court in relation to the obligation to investigate examined *supra*.

157. Regarding the alleged violation of the right of access to information, the Court observes that, in this case, the Commission and the representatives based this claim mainly on the denial of information in response to the remedies and complaints filed by the family members. In this regard, the Court considers that these allegations have already been examined essentially in the section of this chapter corresponding to the analysis of the investigations and their effectiveness. The Commission also referred to the supposed refusal of the Ministry of Defense to provide information. In this regard, the Court underlines the testimony of witness Manuel Giovanni Vasquez that, “[i]n this case, the Ministry of Defense was not asked for information” in the context of the investigation by the Public Prosecution Service.²³⁷ The Court considers that a violation of the right of access to information requires the denial of a specific request addressed by the presumed victims to the State authorities to obtain the said information. The possible absence of collaboration between State bodies would represent an obstacle to the elucidation of the facts, which would affect due diligence and the effectiveness of the investigations, but does not constitute an autonomous violation of the right of access to information of the disappeared victim’s family. Therefore, the Court finds that it is not necessary to analyze the alleged violation of the right of access to information, presumably contained in Articles 13 and 23 of the Convention, to the detriment of the members of Edgar Fernando García’s family.

VIII-3

ALLEGED VIOLATIONS TO THE DETRIMENT OF NINETH VARENCA MONTENGRO COTTOM, ALEJANDRA GARCÍA MONTENEGRO AND MARÍA EMILIA GARCÍA

158. The Court has stated on many occasions that the next of kin of the victims of human rights violations may, in turn, be victims.²³⁸ In this regard, in this chapter, the Court will address the violations that have been alleged to the detriment of the members of Edgar

²³⁷ Cf. Affidavit prepared by Manuel Giovanni Vásquez Vicente on March 11, 2012 (merits file, tome II, folio 796).

²³⁸ Cf. *Case of Vargas Areco v. Paraguay. Merits, reparations and costs*. Judgment of September 26, 2006. Series C No. 155, para.83, and *Case of the Massacres of El Mozote and nearby places v. El Salvador, supra*, para. 197.

Fernando García's family, namely: Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García. To this end, the Court will divide its analysis according to the violations alleged to their detriment, as follows: (a) the right to personal integrity, the rights of the family²³⁹ and the rights of the child,²⁴⁰ and (b) freedom of thought and expression and freedom of association.

A) *The right to personal integrity, the rights of the family, and the rights of the child*

159. The Commission and the representatives considered that the State had violated the right to personal integrity of the members of Edgar Fernando García's family. The Commission held that the harm was due to the refusal of the authorities to respond to the remedies filed to obtain an effective investigation, and also to the "harassment and threats [they received] from State agents" owing to the steps they took to search for justice and the whereabouts of Edgar Fernando García. The State expressed its "partial acknowledgement" of this violation, because the actions to investigate and punish those responsible must be analyzed taking into account the complexity of the facts and the difficulties it has faced. In addition, it argued that "the progress made as regards justice in this case [...] has a positive impact on the mental and moral integrity" of his family members.

160. Regarding the violation of the rights of the family and the rights of the child in this case, in its Merits Report, the Commission stated that "it had insufficient evidence to justify an independent violation of these rights." However, in its final written observations, it indicated that the information provided by the representatives and Mrs. Montenegro during the public hearing "revealed that evidence existed for the Court to assess the possibility of considering these violations." The representatives indicated that, at the time of Edgar Fernando García's disappearance, he was married and had a 20-month old daughter, thus the State failed to comply "with its societal purposes [by not protecting the right to a family] and leaving Alejandra García Montenegro virtually orphaned." For its part, the State indicated that the representatives had again argued the violation of these rights even though, in its Merits Report, the Commission had concluded that it had insufficient evidence to declare their violation. Therefore, it expressed its "total opposition" to the Court declaring the violation of these rights.

161. The Court has considered that, in cases involving the forced disappearance of persons, it is possible to understand that the violation of the right to mental and moral integrity of the victim's family is a direct result of this phenomenon, which causes them severe suffering owing to the act itself, which is increased, among other factors, due to the constant refusal of the State authorities to provide information on the victim's whereabouts or to conduct an effective investigation in order to clarify what happened.²⁴¹ In addition, the Court has established that the absence of the truth regarding the whereabouts of a victim of forced disappearance entails a form of cruel and inhuman treatment for the closest family members,²⁴² which leads to the presumption of harm to their mental and moral integrity.²⁴³

²³⁹ Article 17(1) of the American Convention establishes that: "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state."

²⁴⁰ Article 19 of the American Convention establishes that "[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State."

²⁴¹ Cf. *Case of Blake v. Guatemala. Merits*. Judgment of January 24, 1998. Series C No. 36, para. 114, and *Case of González Medina and family members v. Dominican Republic, supra*, para. 270.

²⁴² Cf. *Case of Trujillo Oroza v. Bolivia. Merits*. Judgment of January 26, 2000. Series C No. 64, para. 114, and *Case of González Medina and family members v. Dominican Republic, supra*, para. 270..

This presumption is established *juris tantum* with regard to mothers and fathers, daughters and sons, spouses, and permanent companions, provided this corresponds to the specific circumstances of the case.²⁴⁴ In the case of such family members, it is for the State to refute this presumption,²⁴⁵ which Guatemala has not disproved in this case. To the contrary, the State partially acknowledged responsibility for this violation.

162. Regarding the said presumption, the Court emphasizes that the statements made at the domestic level and before the Court, as well as the body of evidence²⁴⁶ show that Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García (respectively, wife, daughter and mother of Edgar Fernando García) have suffered great uncertainty and profound suffering and anguish to the detriment of their physical, mental, and moral integrity because of the forced disappearance of their loved one and the actions of the State authorities as regards the investigation of what happened. This harm occurred not only at the personal level, but also severely impaired the family dynamics.

163. In this regard, the Court notes that, since Edgar Fernando García's disappearance and up until now, his family has been actively involved in different actions in search of justice and the determination of his whereabouts, through individual initiatives and through the GAM, of which his wife and mother were founding members, as well as by filing remedies and complaints in the domestic and international jurisdiction. Although his family members acknowledge that, in recent years, there has been some progress in the investigation and in the determination of some of those responsible, for many years their search faced denials and a lack of response from the authorities, even though the State had the necessary information to open the investigation. In this regard, during the public hearing, Edgar Fernando García's wife said that "we all know that when justice is so delayed, it no longer seems like justice." The Court also observes that the failure to determine the whereabouts of Edgar Fernando García or the location and identification of his remains, has prevented them from giving him a decent burial according to their beliefs, thereby altering their grieving process, and perpetuating their suffering and uncertainty.

²⁴³ Cf. *Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 192, para. 119, and *Case of González Medina and family members v. Dominican Republic, supra*, para. 270.

²⁴⁴ Cf. *Case of Blake v. Guatemala. Merits, supra*, para. 114, and *Case of González Medina and family members v. Dominican Republic, supra*, para. 270.

²⁴⁵ Cf. *Case of Valle Jaramillo et al. v. Colombia, supra*, para. 119, and *Case of González Medina and family members v. Dominican Republic, supra*, para. 270.

²⁴⁶ Cf. Testimony given by Nineth Varenca Montenegro Cottom before the Inter-American Court during the public hearing in this case; affidavit prepared by Alejandra García Montenegro on April 20, 2012 (merits file, tome I, folios 803,805, 806 and 809); complaint filed by Nineth Varenca Montenegro Cottom before the PDH on January 22, 1988 (file of annexes to the Merits Report, tome I, annex 16, folios 209 to 213); *Convergencia por la Verdad*, file card for collecting the testimony of María Emilia García (file of annexes to the Merits Report, tome I, annex 17, folio 215 to 222); note of prosecutor No. 10 of the Guatemalan District Prosecutor's Office to the Secretary of the Supreme Court of Justice of March 11, 1999, recording that the Public Prosecution Service had taken the testimony of María Emilia García (file of annexes to the Merits Report, tome I, annex 18, folios 224 and 225); note entitled "*Carta abierta a quienes tengan en su poder a mi papito Edgar Fernando García*" [Open letter to those holding my father] (file of annexes to the Merits Report, tome I, annex 19, folio 227); note entitled "*Carta abierta a quienes tengan en su poder a mi hijo*" [Open letter to those holding my son] published in "*La Palabra*" on March 24, 1984 (file of annexes to the Merits Report, tome I, annex 20, folio 229); note entitled "*Al cumplirse seis meses del secuestro de Edgar Fernando García*" [On the six-month anniversary of the kidnapping of Edgar Fernando García] (file of annexes to the Merits Report, tome I, annex 21, folio 231); paid space in *El Gráfico* publishing a letter from Nineth Varenca Montenegro Cottom to Edgar Fernando García on July 18, 1985 (file of annexes to the Merits Report, tome I, annex 24, folio 241), and announcement paid by Nineth Montenegro, entitled "*En el día del padre a un secuestrado Edgar Fernando García*" [On Father's Day to Edgar Fernando García who has been kidnapped] (file of annexes to the Merits Report, tome I, annex 24, folio 242).

164. The Court has stated that it is of paramount importance to the family members to receive the body of a person who has been forcibly disappeared, because it allows them to bury this according to their beliefs, as well as to close the grieving process they have been experiencing over the years.²⁴⁷ In addition, the Court recalls that it has considered that the State authorities' constant refusal to provide information on the whereabouts of victims or to open an effective investigation to clarify what happened increases the suffering of the next of kin.²⁴⁸ In this regard, the Court notes the additional suffering of Edgar Fernando García's wife, daughter, and mother due to the absence of an effective and diligent investigation, as well as the uncertainty about the whereabouts of their husband, father, and son.

165. In addition, the Court observes that, in the years following the start of the disappearance of Edgar Fernando García, the victim's family suffered additional circumstances that increased the harm to their mental integrity, such as social isolation and the stigmatization associated with having a disappeared family member. Thus, during the public hearing, Mrs. Montenegro Cottom said that, as a result of Edgar Fernando García's disappearance and the search for justice, there had been "a systematic campaign to discredit and denigrate [her that] ha[d] a serious impact [...] because it isolated [them], it marginalized [them], it made [them] seem to be subversives, liars, mad, [they] lost friends, relatives; it was as though [they] were social lepers; people did not want to approach [them] and [her] own daughter [...] could never have friends."²⁴⁹ Similarly, Alejandra stated that the events "made many people close to [them] fearful and they chose to keep away even though [...] in some cases this was a member of the family." She also indicated that, during her childhood, she was rejected at school for being the "daughter of the member of the guerrilla" and the daughter of an "unmarried mother."²⁵⁰

166. Similarly, the Court notes that the events have had consequences for the development of Mr. García's daughter Alexandra, who was in her infancy at the time of the disappearance and, therefore, had to grow up in an environment dedicated to the search for justice, and of suffering and uncertainty owing to the failure to determine her father's whereabouts.²⁵¹ Thus, the Court notes that Alejandra García stated that her limited involvement in the search for justice during her childhood had made her feel guilty (*supra* para. 87).

167. Based on the above, the Court considers it has been proved that the existing circumstances have given rise to feelings of sadness, frustration, helplessness, insecurity and anxiety for the members of the victim's family. Consequently, the Court finds that the State has violated the right to personal integrity established in Article 5(1) and 5(2) of the

²⁴⁷ Cf. *Case of the Las Dos Erres Massacre v. Guatemala*, *supra* note 166, para. 245, and *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, *supra* note 53, para. 261.

²⁴⁸ Cf. *Case of Blake v. Guatemala. Merits*, *supra* note 296, para. 114, and *Case of Contreras et al. v. El Salvador*, *supra* note 51, para. 123.

²⁴⁹ Testimony given by Nineth Varenca Montenegro Cottom before the Inter-American Court during the public hearing in this case.

²⁵⁰ Affidavit prepared by Alejandra García Montenegro on April 20, 2012 (merits file, tome II, folios 803 and 804).

²⁵¹ Affidavit prepared by Alejandra García Montenegro on April 20, 2012 (merits file, tome II, folios 800 to 810); testimony given by Nineth Varenca Montenegro Cottom before the Inter-American Court during the public hearing in this case. Note entitled "*Carta abierta a quienes tengan en su poder a mi papito Edgar Fernando García*" (file of annexes to the Merits Report, tome I, annex 19, folio 227), paid space in *El Gráfico* publishing a letter from Nineth Varenca Montenegro Cottom to Edgar Fernando García on July 18, 1985 (file of annexes to the Merits Report, tome I, annex 24, folio 241), and announcement paid by Nineth Montenegro, entitled "*En el día del padre a un secuestrado Edgar Fernando García*" (file of annexes to the Merits Report, tome I, annex 24, folio 242).

American Convention, in relation to Article 1(1) of this instrument, to the detriment of Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García.

168. In addition, regarding the alleged threats and harassment suffered by Edgar Fernando García's family, the Court recalls that, owing to its competence *ratione temporis*, it can only examine those events that occurred after the acceptance of the Court's jurisdiction. The Court observes that the evidence provided by the parties²⁵² reveals that Edgar Fernando García's wife and daughter were threatened and harassed because of the steps they took to obtain justice and to find Mr. García. These threats were mainly related to Mrs. Montenegro's membership in the GAM, which meant that they lived in a situation of insecurity and fear at home and at work and, therefore, had to seek protection from Peace Brigades International. According to Mrs. Montenegro's testimony, this situation lasted for nine years, until 1993, when the practice of forced disappearances presumably ceased, and the transition period began. The Court notes that the CEH determined that Mrs. Montenegro had been the target of death threats and surveillance.²⁵³

169. In this regard, the Court has held that the mere risk that a conduct prohibited by Article 5 of the Convention may occur, when this is sufficiently real and imminent, may in itself conflict with the right to personal integrity;²⁵⁴ hence, it considers that the threats and harassment suffered by Nineth Montenegro Cottom and Alejandra García Montenegro constitute an additional violation of their right to personal integrity.

170. Furthermore, regarding the alleged violation of the rights of the family and the rights of the child, the Court reiterates that the presumed victims or their representatives may cite the violation of rights other than those included in the Commission's Merits Report.²⁵⁵ However, the Court considers that the arguments submitted by the representatives refer to harm that was essentially examined by the Court when it declared the violation of the personal integrity of the members of Edgar Fernando García's family. Hence, it does not consider it necessary make a further ruling in this regard.

B) The right to know the truth

171. In addition, in this case, the representatives argued the violation of the right to the truth of the next of kin of Edgar Fernando García. In this regard, Guatemala indicated that it was not in order to declare its non-compliance, because this right was not established in the American Convention.

172. First, the Court reiterates its case law regarding the possibility that the presumed victims or their representatives may cite rights other than those included in the Commission's report (*supra* para. 170).

²⁵² Cf. Testimony given by Nineth Varenca Montenegro Cottom before the Inter-American Court during the public hearing in this case; affidavit prepared by Alejandra García Montenegro on April 20, 2012 (merits file, tome II, folio 805), and complaint filed by Nineth Varenca Montenegro Cottom before the PDH on January 22, 1988 (file of annexes to the Merits Report, tome I, annex 16, folio 213).

²⁵³ Cf. CEH, *supra*, volume IV, p. 237, para. 4532; Testimony given by Nineth Varenca Montenegro Cottom before the Inter-American Court during the public hearing in this case and affidavit prepared by Alejandra García Montenegro on April 20, 2012 (merits file, tome II, folio 805).

²⁵⁴ *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, para.165, and *Case of Vélez Restrepo and family members v. Colombia, supra*, para. 176.

²⁵⁵ Cf. *Case of the Five Pensioners v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 155, and *Case of Vélez Restrepo and family members v. Colombia, supra*, para. 47.

173. Regarding the alleged violation of the right to know the truth, the Court observes that the Peace Accords signed to end the internal armed conflict (*supra* para. 55), “recognize[d] the right [...] of all society to know the truth.”²⁵⁶ To this end, the Historical Clarification Commission was established to “clarify [...] the human rights violations and the acts of violence related to the armed conflict that have caused suffering to the Guatemalan people.”²⁵⁷ In addition, under the National Reconciliation Law of December 27, 1996, “the Historical Clarification Commission [...] was mandated [...] to design the mechanisms to make it possible to know and acknowledge the historical truth of the period of the internal armed internal conflict in order to prevent a repetition of such events.” To this end, it was established that “the State bodies or entities must provide the Commission with the support it requires.”²⁵⁸

174. Despite this mandate and the collaborative arrangements, the Court observes that, in its report, the CEH itself “consider[ed] the collaboration provided by the National Army to have been unreliable and unsatisfactory,” as well as that of “the Ministry of the Interior.” It indicated that “[o]ver the period during which the Commission carried out its mandate, the Executive – through different departments, including the National Army and the Private Secretariat of the President of the Republic – offered diverse excuses for not handing over the documents requested [by the Historical Clarification Commission]”²⁵⁹ (*supra* para. 55). The CEH also indicated that “the Ministry of the Interior, [...] in view of the lack of documentation, failed [...] to carry out an active search for background material in relation to several cases concerning which it ha[d] been asked to provide information; it also failed to summon individuals who worked for the National Police in order to support the work [of the CEH], and so that society could know the truth of what happened in these significant cases.”²⁶⁰ The Court recalls that the Ministry of Defense denied the existence of documents such as the *Diario Militar* to the CEH, and this appeared through unofficial channels three months after the Commission had published its final report (*supra* paras. 55 and 56.) Also, the National Police, attached to the Ministry of the Interior, did not hand information over to the CEH that subsequently appeared in the Historical Archive of the Police, which confirms that “it did not search actively for background material in relation to” information requested by the Commission.

²⁵⁶ In particular, the Agreement on the Basis for the Legal Integration of the Guatemalan National Revolutionary Unity, signed in Madrid, Spain, on December 12, 1996, stipulates: “Right to the truth 18. The inalienable right of every society to know the truth is hereby recognized, and the National Reconciliation Law will therefore mandate the Historical Clarification Commission to elucidate human rights violations and acts of violence that have caused suffering to the Guatemalan people, the design of mechanisms to make it possible to know and acknowledge the historical truth of the period of the internal armed conflict in order to prevent a repetition of such events. The Law shall require any State agency or entity to provide the Commission with the support it requires to carry out its task, according to the objectives stipulated in the relevant agreement.” Also, the Agreement on a Firm and Lasting Peace signed in Guatemala on December 29, 1996, establishes: “4. It is a right of the people of Guatemala to know the full truth about human rights violations and acts of violence in the context of the internal armed conflict. Clarifying what happened with objectivity and impartiality will contribute to strengthen the process of national conciliation and democratization in the country. The latter agreement “culminate[d] the process of negotiation in the search for peace by political means.” Furthermore, it integrated the other agreements signed within the framework of the peace negotiations, which came “formally and fully into force on the signature [of the said] Agreement.”

²⁵⁷ The Commission was established by the Oslo Accords signed on June 23, 1994, which established the aspect indicated *supra* as one of the main objectives of its mandate.

²⁵⁸ Decree No. 145-1996: National Reconciliation Law, *supra*, article 10.

²⁵⁹ Cf. CEH, *supra*, volume I, pp. 49 and 50, paras. 89, 93 and 95.

²⁶⁰ Selection of correspondence between the CEH and the institutions of the Republic of Guatemala, letter of April 29, 1998, ABT/C/092-98/Ig, addressed to the President’s Private Secretary, CEH *supra*, volume VIII, pp. 180 and 181.

175. According to the Historical Clarification Commission, this absence of information had an adverse impact on the fulfilment of its mandate, so that it was unable, *inter alia*, to determine the precise chain of command regarding the forced disappearances committed during the conflict (*supra* para. 55).

176. Bearing in mind that the events of this case occurred in the context of a non-international armed conflict, the clarification of the truth about what happened acquires special relevance. The Court recalls that everyone, including the next of kin of the victims of gross human rights violations, has the right to know the truth; hence, they and society as a whole must be informed of what happened.²⁶¹ The Court also considers it pertinent to reiterate, as it has in other cases, that States may establish truth commissions, which contribute to the construction and preservation of the historical memory, the clarification of facts, and the determination of institutional, social and political responsibilities during certain historical periods of a society.²⁶² Even when these commissions involve determinations of the truth that complement each other, because they each have their own meaning and scope, as well as specific possibilities and limits that depend on the context in which they are created and on the particular cases and circumstances they analyze,²⁶³ the Court has established that they do not replace the State's obligation to establish the truth through judicial proceedings.²⁶⁴

177. In the instant case, despite the limitations described as regards obtaining information (*supra* para. 174), the Historical Clarification Commission had sufficient evidence to establish that what happened to Mr. García constituted a forced disappearance committed by State agents, specifically members of the Special Operations Brigade of the National Police (BROE), who had injured him at the time of his arrest, following which he had been kept in secret detention centers (*supra* para. 68). Furthermore, this historical truth, established by the CEH in 1999, complements the judicial truth that has been partially established in the criminal proceedings where, to date, two of the perpetrators have been convicted and two presumed masterminds are being tried (*supra* paras. 78 to 81, 93 and 128). Although the appearance of the *Diario Militar* in 1999 and the Historical Archive of the National Police in 2005, both through unofficial channels, reveals the concealment of information held by the State (*supra* paras. 55, 46 and 60), the Court observes that, in this specific case, it did not prevent the CEH from the essential determination of an extrajudicial truth about what happened to Edgar Fernando García, nor did it prevent a judicial truth being established, years later, in the criminal proceedings that are still open at the domestic level. Even though the Court has identified certain irregularities in the judicial proceedings, it considers that the substance of the said allegations has already been examined in the analysis made under the right of access to justice and the obligation to investigate in Chapter VIII-2 of this Judgment. Consequently, the Court does not find it necessary to make an additional ruling with regard to the alleged violation of the right to the truth submitted by the representatives.

²⁶¹ Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 76 and 77, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 298.

²⁶² Cf. *Case of Zambrano Vélez et al. v. Ecuador. Merits, reparations and costs*. Judgment of July 4, 2007. Series C No. 166, para. 128, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 298.

²⁶³ Cf. *Case of Zambrano Vélez et al. v. Ecuador*, *supra*, para. 128, and *Case of Heliodoro Portugal v. Panama*, *supra*, para. 84, note 37.

²⁶⁴ Cf. *Case of Zambrano Vélez et al. v. Ecuador*, *supra*, para. 128, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 298.

C) Freedom of association and of expression

178. The Inter-American Commission indicated that “following the disappearance of Edgar Fernando García, the right of his family members to denounce the incident was restricted, due to the constant threats and harassment they suffered.” It also considered that, “[a]lthough there is no evidence that the State formally restricted the exercise [of the] right to freedom of association [of Nineth Montenegro and Maria Emilia García, as members of the GAM], this freedom was severely restricted *de facto* as a result of the threats and harassment they received.” The representatives agreed with the Commission and indicated that, in response to the requests made by the GAM, they were criminalized and “some members of the board of directors of the *Grupo de Apoyo Mutuo* were even killed.” Meanwhile, although the State indicated its “total opposition” to the supposed violation of freedom of expression and freedom of association of the members of Edgar Fernando García’s family in its answering brief, during the public hearing, and in its final written arguments, it expressed its partial acknowledgement of the supposed violation of these rights with regard to them.²⁶⁵

179. The Court takes note of the State’s partial acknowledgement of responsibility (*supra* paras. 13.b.4 and 178). In this regard, the Court observes that, as a result of Edgar Fernando García’s forced disappearance, his mother and Mrs. Montenegro joined with other next of kin of disappeared persons and created the *Grupo de Apoyo Mutuo*, seeking to obtain justice and in defense of human rights²⁶⁶ (*supra* para. 83). Consequently, together with the findings already made on freedom of association (*supra* paras. 116 and 117), the alleged violation of this right in relation to the members of Edgar Fernando García’s family, must be analyzed in the context of the relationship that exists between the exercise of the said right and the work of promoting and defending human rights. In this regard, this Court has established that States have a duty to provide the means required for human rights defenders to perform their activities freely; to protect them when they are threatened in order to prevent attacks on their life and integrity; to refrain from imposing obstacles that hinder their work, and to investigate, seriously and effectively, any violations committed against them, thereby combating impunity.²⁶⁷

180. The Court emphasizes that, based on documents found in the Historical Archive of the National Police, evidence emerged that, in 1984, the National Police considered the members of the GAM to be “authentic enemies of the Military Government and of the security forces in general”; thus, the National Police considered that “it [was] necessary to proceed against them, acting in self-defense, in order to neutralize or eliminate them” (*supra* para. 84). Similarly, the third section of the *Diario Militar* bears a handwritten annotation “*Apoyo Mutuo*,” dated November 20, 1984, and lists Edgar Fernando García together with nine others, indicating, *inter alia*, his alias, presumed affiliation, date of kidnapping by unknown persons, and the name of his wife and mother. The report of the Peace Secretariat explained that this section listed individuals “whose families were

²⁶⁵ The State’s initial opposition was based on the fact that the members of Mr. García’s family had been able to found the GAM and to denounce the events in different media, so that, in its opinion, their right to freedom of association had not been violated. Also, in its answering brief, the State emphasized that Alejandra García Montenegro was “[two] years old at the time of [Mr.] García’s disappearance, so that she enjoyed her rights in accordance with her condition as a minor and, in some cases, through her mother. “

²⁶⁶ Cf. CEH, *supra*, volume IV, pp. 229 and 233, paras. 4510, 4512 and 4523.

²⁶⁷ Cf. *Case of Nogueira de Carvalho et al. v. Brazil. Preliminary objections and merits*. Judgment of November 28, 2006. Series C No. 161, para. 77, and *Case of Fleury et al. v. Haiti. Merits and reparations*. Judgment of November 23, 2011. Series C No. 236, para. 100.

members of the *Grupo Mutual de Apoyo*.”²⁶⁸ In addition, the fourth section of the *Diario Militar* includes the GAM in a list entitled “List of ‘Front’ Organizations at the service of the subversion.”²⁶⁹ In addition, in 1985, the then Head of State declared on television that “the GAM was being manipulated by the subversion,” and therefore “measures would be taken to counter it and that, henceforth, no more demonstrations would be tolerated”²⁷⁰ (*supra* para. 85). In the *Third Report on the Situation of Human Rights in Guatemala*, the Inter-American Commission underscored that “immediately after these declarations, the GAM began to be severely harassed,” and also reported that, the following month two leaders of GAM and the next of kin of one of them had been killed.²⁷¹

181. The foregoing reveals the Government’s perception of the GAM in 1984 and 1985. However, the Court has verified that, during the internal armed conflict in Guatemala, the concept of “internal enemy,” against who the State’s counterinsurgency actions were addressed, included “those who for any reason were not in favor of the established regime” (*supra* para. 51). Thus, organizations that sought justice also began to be considered “internal enemies” and, consequently, their members were targets of repression, denigration, intimidation, threats, and human rights violations. In this regard, the CEH indicated that “[f]aced with the non-conformist nature of these organizations, the Army and those in power responded with intimidating actions that included public accusations of belonging to the guerrilla movement or, in extreme cases, the murder and disappearance of their members.”²⁷² According to the CEH, the GAM was one of the organizations most affected.²⁷³

182. The Court stresses that, according to the CEH, between 1989 and 1993, the situation of danger and persecution against the members of the GAM continued. In particular, the CEH report mentions that, over that period, three GAM activists were kidnapped or disappeared, and five more were kidnapped and murdered. Also, in 1989, among other attacks, a bomb exploded outside the GAM offices and, on October 27 and 29, 1993, the GAM offices were searched (*supra* para. 86) Consequently, it is clear that the dangerous situation of the members of the GAM persisted after the Court’s jurisdiction had been recognized, at least until 1993. The intimidating or unsettling effect of this context for both Mrs. Montenegro and Mrs. García, both founding members of the GAM, is evident to the Court. In addition, Mrs. Montenegro received death threats and was under surveillance. The Court considers that this dangerous situation represented a *de facto* restriction of the right to freedom of association. Thus, the Court does not consider admissible the State’s argument that the freedom of association of Mrs. Montenegro and Mrs. García was not violated because, in 1984, they were able to found the GAM. Furthermore, the Court recalls that it is the State’s obligation not only to create the legal and formal conditions, but also to ensure the factual conditions in which human rights defenders can perform their work freely. Therefore, the Court finds that the State did not provide the necessary conditions or

²⁶⁸ Cf. *Diario Militar*, *supra*, third section, and *La autenticidad del Diario Militar, a la luz de los documentos históricos de la Policía Nacional*, *supra*, folios 20 and 21.

²⁶⁹ Cf. *Diario Militar*, *supra*, fourth section.

²⁷⁰ Similarly, according to the CEH, on February 2, 1985, the then Head of State “accused the members of the GAM of being manipulated by subversives and threatened to take reprisals. When a journalist asked him what form these would take, he answered: ‘you’ll know when you see them,’ *La Palabra*, March 22, 1985, p. 15.” CEH, *supra*, volume IV, p. 236, footnote 553.

²⁷¹ Cf. IACHR, *Third Report on the Situation of Human Rights in Guatemala*, 1985, *supra*, chapter II, paras. 93 and 95.

²⁷² CEH, *supra*, volume IV, pp. 229, para. 4511.

²⁷³ Cf. CEH, *supra*, volume IV, pp. 229 and 236, paras. 4512 and 4528.

the due guarantees to ensure that, as human rights defenders, they could carry out their activities freely.

183. Regarding the alleged violation of the right to freedom of association of Alejandra García Montenegro, who was aged three years and nine months when Guatemala accepted the Court's jurisdiction, the Court finds it necessary to recall that it has recognized that children exercise their rights progressively as they develop a higher level of personal autonomy; thus, in their early childhood, they exercise their rights through their family members. Obviously, there is considerable variation in each child's level of physical and intellectual development, experience and information.²⁷⁴

184. The Court also points out, as it has in other cases, that both the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of children that this Court uses to establish the content and scope of the general provision defined in Article 19 of the American Convention.²⁷⁵ The Convention on the Rights of the Child, which has been ratified almost universally, contains several provisions that refer to the State's obligations in relation to children. In this regard, Article 15 recognizes "the rights of the child to freedom of association," without further restrictions to its exercise other than those "imposed in conformity with the law and which are necessary in a democratic society in the interests of national or public safety, public order (*ordre public*), the protection of health or morals or the protection of the rights and freedom of others."

185. The Court observes that, regarding the alleged violation of Alejandra García Montenegro's right to freedom of association, it has insufficient evidence to declare this violation to her detriment. The information provided in this regard reveals the violation of Alejandra García Montenegro's personal integrity owing to her suffering because of the situation experienced by her family as a result of her father's forced disappearance, and having been unable to accompany her mother in the actions to search for her father during her early childhood (*supra* para. 87), which was examined by the Court in section A of this Chapter.

186. Based on the above, the Court declares that the State violated the right to freedom of association recognized in Article 16(1) of the American Convention, in relation to the obligation to respect and ensure rights established in Article 1(1) of this instrument, to the detriment of Nineth Varenca Montenegro Cottom and María Emilia García.

187. Finally, regarding the alleged violation of freedom of expression, the Court reiterates that the parties must prove that this alleged violation is constituted for reasons other than the intrinsic relationship that exists between this right and the right to freedom of association (*supra* para. 122). Thus, the Court notes that it is not appropriate to declare a violation of freedom of expression for the same reasons for which it has established the violation of freedom of association. Consequently, the Court considers that, even though in this case there are contextual elements that reveal that there was an autonomous violation of the right to freedom of expression, insufficient evidence was provided to determine that there was an autonomous violation of the right to freedom of expression to the detriment of the members of Edgar Fernando García's family.

²⁷⁴ Cf. *Case of Atala Riffo and daughters v. Chile. Merits, reparations and costs*. Judgment of February 24, 2012. Series C No. 239, para. 68.

²⁷⁵ Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits, supra*, para. 194, and *Case of the Río Negro Massacres v. Guatemala, supra*, para. 142.

IX
REPARATIONS
(Application of Article 63(1) of the American Convention)

188. Based on the provisions of Article 63(1) of the American Convention,²⁷⁶ the Court has indicated that any violation of an international obligation which has caused harm entails the obligation to provide adequate reparation,²⁷⁷ and that this provision reflects a customary norm that is one of the fundamental principles of contemporary international law on State responsibility.²⁷⁸

189. The reparation of the harm caused by the violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in the reinstatement of the previous situation. If this is not possible, as in most cases of human rights violations, the Court will establish other measures to ensure the rights that have been infringed and to redress the harm caused by the violation.²⁷⁹ Consequently, the Court has considered the need to award different measures of reparation in order to make full redress for the harm caused; hence, in addition to pecuniary compensation, measures of restitution and satisfaction, and guarantees of non-repetition are especially relevant to the harm caused.²⁸⁰

190. This Court has established that reparations must have a causal nexus to the facts of the case, the violations declared, the harm established, and the measures requested to repair the respective harm. Therefore, the Court must observe this concurrence in order to rule appropriately and in accordance with the law.²⁸¹

191. Taking into consideration the agreement on reparations reached between the parties to this case, which has previously been endorsed by the Court (*supra* para. 23), the Court must now determine the scope and method of implementation of the agreed reparations, in light of the criteria established in its case law, and in relation to the nature, object and purpose of the obligation to provide full reparation for the harm caused to the victims.²⁸² The Court will make this analysis based on the State's partial acknowledgment of

²⁷⁶ Article 63(1) of the American Convention establishes that: "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

²⁷⁷ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7 para. 25, and *Case of the Massacres of El Mozote and nearby places v. El Salvador, supra*, para. 302.

²⁷⁸ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*. Judgment of August 27, 1998. Series C No. 39, para. 40, and *Case of the Massacres of El Mozote and nearby places v. El Salvador, supra*, para. 302.

²⁷⁹ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, para. 26, and *Case of the Río Negro Massacres v. Guatemala, supra*, para. 248.

²⁸⁰ Cf. *Case of the Las Dos Erres Massacre v. Guatemala, supra*, para. 226, and *Case of the Massacres of El Mozote and nearby places v. El Salvador, supra*, para. 305.

²⁸¹ Cf. *Case of Ticona Estrada et al. v. Bolivia, supra*, para. 110, and *Case of the Massacres of El Mozote and nearby places v. El Salvador, supra*, para. 304.

²⁸² Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, paras. 25 to 27, and *Case of the Massacres of El Mozote and nearby places v. El Salvador, supra*, para. 303.

responsibility (*supra* Chapter III), the considerations on the merits, and the violations of the American Convention declared in the preceding chapters.

A) *Injured Party*

192. The Court reiterates that, in the terms of Article 63(1) of the Convention, the injured party is considered to be those declared a victim of the violation of any right recognized in this instrument. Thus, the Court considers that Edgar Fernando García and the members of his family, Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García are the “injured party” and, as victims of the violations declared in Chapters VIII-1, VIII-2 and VIII-3, they will be considered the beneficiaries of the reparations ordered by the Court.

B) *Obligation to investigate the facts that gave rise to the violations and to identify, prosecute and, as appropriate, punish those responsible, as well as to determine the whereabouts of the victim*

B.1) *Obligation to investigate the facts, and to identify, prosecute and, as appropriate, punish the perpetrators and masterminds*

193. The Commission asked the Court to order the State to “[c]omplete, within a reasonable time, the investigation to identify, prosecute, and punish all the perpetrators and masterminds of the human rights violations committed against the victims in this case.” The representatives acknowledged the progress and efforts made in relation to the search for justice. Nevertheless, they asked the Court to order the State to “continue the investigations in order to identify all the perpetrators and masterminds of the forced disappearance,” and to undertake to inform the family members about the progress of the investigation every three months.

194. In the reparations agreement, the State undertook to “continue [...] promoting the investigation of the case through a Special Committee composed of the Public Prosecution Service, the Judiciary, the Ombudsman’s Office, and the representatives of the petitioners, to be convened by the Presidential Commission for Coordination of the Policy of the Executive on Human Rights (COPREDEH), which will meet every six months to inform the family and the representatives about the progress made.”

195. The Court assesses positively the willingness shown by the State to advance the investigation into the events of this case (*supra* para. 194). The Court also appreciates the commitment made by Guatemala to create a Special Committee composed of various entities and therefore, endorses this measure, in the terms of the reparations agreement.

196. Taking into account this commitment made by the State, as well as the conclusions reached in Chapter VIII-2, the Court recalls that the State must continue and conclude, with the greatest diligence, all necessary investigations to determine and, as appropriate, punish all the other perpetrators and masterminds of the forced disappearance of Edgar Fernando García. This obligation must be fulfilled within a reasonable time in order to establish the truth of the events, bearing in mind that more than 28 years have passed since his disappearance. In particular, the State must ensure that the following criteria are observed:

- a) It must continue, and conclude the pertinent investigations in relation to the facts of this case so that the investigations and the proceedings are conducted taking into consideration the complexity of the facts and the context of systematic human

rights violations in which they occurred, with due diligence, avoiding omissions in the gathering of evidence and in following up on logical lines of investigation;

b) Since this is a gross violation human rights, the State must abstain from having recourse to mechanisms such as amnesty, or alleging a statute of limitations, non-retroactivity of the criminal law, *res judicata*, the principle of *non bis in idem* or any similar waiver of responsibility, to exempt itself from the obligation to investigate and to punish those responsible;²⁸³

c) It must ensure that: (i) the competent authorities conduct the corresponding investigations *ex officio* and, to this end, that they have at their disposal and use all the logistic and scientific resources required to collect and process the evidence and, in particular, that they are empowered to access the pertinent documentation and information to investigate the facts denounced and to execute promptly the actions and inquiries that are essential to clarify what happened to Edgar Fernando García, and (ii) the authorities abstain from executing actions that obstruct the investigative process;

d) It must determine the identity of the presumed perpetrators and masterminds of the victim's forced disappearance;

e) It must initiate disciplinary, administrative or criminal actions, pursuant to domestic law, against the State authorities who may have obstructed or impeded the due investigations of the facts, as well as those responsible for the different procedural irregularities that have contributed to prolong their impunity, and

f) It must ensure that the different organs of the justice system involved in the case have the necessary human and material resources to perform their tasks in an adequate, independent and impartial manner, and that appropriate security arrangements are in place for those participating in the investigation, including the victims or their representatives, witnesses, and agents of justice.

197. In addition, in keeping with its consistent case law,²⁸⁴ the Court reiterates that the State must ensure full access and legal standing to the victims or their next of kin at all stages of the investigation and the prosecution of those responsible, pursuant to domestic law and the provisions of the American Convention. The purpose of this participation is to provide access to justice, knowledge of the truth about what occurred, and just reparation. In addition, the results of the corresponding proceedings must be published in order to inform Guatemalan society about the events that are the subject of this case and those who are responsible for them.

B.2) Determination of the whereabouts of Edgar Fernando García

198. The Commission asked the Court to order the State to adopt the necessary measures to "[s]earch for and locate the disappeared victim and, should he be found deceased, to return his mortal remains to his family and cover the respective expenses." The representatives asked the Court to order the State to "inform his family of his whereabouts, within a reasonable time."

²⁸³ Cf. *Case of Barrios Altos v. Peru. Reparations and costs*. Judgment of November 30, 2001. Series C No. 87, para. 41, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 283.

²⁸⁴ Cf. *Case of El Caracazo v. Venezuela. Reparations and costs*. Judgment of August 29, 2002. Series C No. 95, para. 118, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 319.

199. In the reparations agreement, the State undertook to “[r]equest the Guatemalan Forensic Anthropology Foundation (FAFG) and the National Institute of Forensic Science (INACIF) to provide information on findings related to the location of Edgar Fernando García’s remains through the Special Committee [...] when appropriate.” The Court appreciates this undertaking by the State and, therefore, endorses this measure of reparation, in light of the terms established by the parties in the reparations agreement.

200. Despite this, the Court finds it necessary that the State conduct a serious search using appropriate judicial and administrative channels, during which every effort is made to determine the whereabouts of Edgar Fernando García, as soon as possible. This must be conducted systematically and rigorously, with adequate and appropriate human, technical and scientific resources and, if necessary, cooperation should be requested from other States. The family members must be informed of these measures and, when possible, their presence should be ensured.²⁸⁵ If the victim is found deceased, his mortal remains must be returned to his family, as soon as possible, following genetic testing, and at no cost to them. Furthermore, the State must cover the funeral expenses, as appropriate, in agreement with the family.²⁸⁶

C) Measures of integral reparation: rehabilitation, satisfaction, guarantees of non-repetition

C.1) Measures of Satisfaction

C.1.a) Publication and dissemination of the Judgment

201. The representatives asked that “the operative paragraphs of the Judgment delivered by the Court be published in both the official gazette, and a specific national newspaper with widespread circulation.”

202. In the reparations agreement, the State undertook “to comply with the publications requested [by the representatives] within two months of the Court’s decision.”

203. The Court assesses positively the willingness of the State to comply with the representatives’ request, and therefore endorses this measure as it was agreed. The State must also include in the publications the mention that the complete text of this Judgment will be available on the Court’s web page.

C.1.b) Public act of acknowledgment of international responsibility

204. The representatives asked that the State make a public apology to the family of Edgar Fernando García and, to this end, they asked that “the President of the Republic of Guatemala, on behalf of the State, acknowledge responsibility for the facts and apologize to the family, [in a] ceremony to be held at the National Palace of Culture.”

205. In the reparations agreement, the State indicated that “it is willing to acknowledge responsibility and apologize to the family for the violations and harm resulting from the forced disappearance of Edgar Fernando García in a public ceremony to be held at the

²⁸⁵ Cf. *Case of Contreras et al. v. El Salvador*, *supra*, para. 191, and *Case of González Medina and family members v. Dominican Republic*, *supra*, para. 290.

²⁸⁶ Cf. *Case of Anzualdo Castro v. Peru*, *supra*, para. 185, and *Case of Nadege Dorzema et al. v. Dominican Republic*, *supra*, para. 253.

National Palace of Culture that will be presided by the Constitutional President of the Republic, within two months of the signature [of the agreement].”

206. The Court greatly appreciates the State's willingness to organize a public act in which it acknowledges its international responsibility and offers an apology for the facts of this case and, therefore, endorses this measure in the terms agreed upon by the parties. Moreover, as it has in other cases,²⁸⁷ the Court considers that, during this act, reference must be made to the human rights violations declared in this Judgment. In addition, the State, in collaboration with the representatives, must try, insofar as possible, to ensure that the next of kin of Edgar Fernando García attend the ceremony. To this end, Guatemala must reach agreement with the victims or their representatives on the way in which the public act of acknowledgment should be carried out, and the specific details, such as the place and date, and must also provide those attending with the necessary transportation and logistics, *inter alia*, for this purpose.

C.1) Measures to commemorate and pay homage to the victim

C.2.a) Construction of cultural and commemorative spaces to dignify the victims of human rights violations

207. The representatives indicated that the premises of the Polytechnic School were used during the armed conflict “as a secret prison and a place where the Guatemalan people were tortured”; therefore, they considered it necessary that the premises “be modified in order to establish a museum for the historical memory, in which the new generations would be shown the violations that occurred during the internal armed conflict and non-repetition would be ensured.” For its part, the State indicated in its answering brief that, in an advisory opinion, the State Property Department of the Ministry of Finance had indicated that it was impossible to establish a museum on the premises of the former Polytechnic School because the building “is administered by the Ministry of Defense,” and therefore it could not grant the request of the President of the COPREDEH. However, it undertook “to continue taking steps with regard to the measure of reparation.”

208. Subsequently, in the reparations agreement, the State undertook, “in a coordinated and complementary effort between the State and civil society, to promote the initiative known as the ‘Concord Memorial, under which it would facilitate the construction of commemorative and cultural spaces in which the victims of human rights violations and, in general, all the victims of the internal conflict, would be dignified, with the goal of conciliation and concord, emphasizing the truth as a component of justice.”

209. The Court assesses positively the commitment made by the State and, therefore, endorses this measure in the terms of the reparations agreement.

210. Additionally, the Court recalls that in the Judgment delivered by this Court in the *Case of Gudiel Álvarez et al. (“Diario Militar”) v. Guatemala*,²⁸⁸ it ordered the State to construct a park or a plaza to honor the memory of the victims in that case. In view of the

²⁸⁷ Cf., *inter alia*, *Case of Cantoral Benavides v. Peru. Reparations and costs*. Judgment of December 3, 2001. Series C No. 88, para. 81; *Case of Gelman v. Uruguay. Merits and reparations*, *supra*, para. 266; *Case of Kawas Fernández v. Honduras*, *supra*, para. 202; *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*. Preliminary objections, merits, reparations and costs. Judgment of November 24, 2010, para. 277, and *Case of Nadege Dorzema et al. v. Dominican Republic*, *supra*, para. 265.

²⁸⁸ Cf. *Case of Gudiel Álvarez et al. (“Diario Militar”) v. Guatemala. Merits, reparations and costs*. Judgment of November 20, 2012. Series C No. 253, para. 351 and seventh operative paragraph.

similarity of the context and the facts that occurred in both cases, as well as the violations declared, the Court considers it pertinent to order the State to include the name of Edgar Fernando García on the plaque to be placed in this park or plaza so that it may also serve as a place where his next of kin can remember their loved one. This measure must be complied with in the terms established by the Court in the judgment in the *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*.

C.2.b) Naming a street after Edgar Fernando García

211. The representatives asked that "Ninth Street between Second and Third Avenue of Guatemala City" be named after Edgar Fernando García, because that "is where the Rafael Aqueche National Institute is located, where he studied and graduated as a primary school teacher.

212. In the reparations agreement, the State indicated that "[t]his commitment was complied with [...] on December 14 [2011], in the presence of the family members, in [a] ceremony [in which] a plaque was unveiled, naming the street after Edgar Fernando García."

213. In this regard, the Court notes that, during the public hearing, the representatives acknowledged that the State had complied with "the measure to dignify the victim, [...] by naming the street after him." On previous occasions, the Court has assessed positively the actions taken by the States that recover the memory of the victims, recognize their dignity, and console their next of kin.²⁸⁹ In the instant case, the Court appreciates the efforts made by the State to comply with measure of reparation and, therefore, endorses it as a form of compensation for the harm caused and considers that it represents a positive step by Guatemala in the fulfillment, in good faith, of its international treaty obligations. Consequently, the Court decides that this measure will not be included at the stage of monitoring compliance.

C.2.c) Changing the name of a school to that of Edgar Fernando García

214. In the reparations agreement, the State indicated, with regard to the request of the representatives to change the name of the public school "Julia Ydigoras Fuentes" to that of Edgar Fernando García, that "[t]he Executive, through the corresponding authorities, undertakes to facilitate compliance with [the said] request [...] in 2012."

215. The Court assesses positively the State's willingness to comply with this measure and, therefore, endorses it in to the terms agreed upon.²⁹⁰

C.2.d) Delivery of ten study grants to next of kin of disappeared persons

216. The representatives asked that the State provide "[t]en study grants of Q. 25,000.00 each, to the children or grandchildren of persons who were forcibly disappeared, at the discretion of Edgar Fernando García's family." In its answering brief, the State indicated

²⁸⁹ Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs*. Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of the Massacres of El Mozote and nearby places v. El Salvador, supra*, para. 357.

²⁹⁰ The Court endorses this measure in the understanding that the obstacles indicated by Guatemala in its answering brief to changing the name of the "Julia Ydigoras Fuentes" public school to that of Edgar Fernando García, were overcome subsequently, since it undertook to facilitate this measure in the reparations agreement.

that, in 2011, the Solidarity Scholarship Program had been created under the Ministry of Education, and it grants scholarships to mid-level students at public schools through “study grants.” The State indicated that “[b]ased on the above, the criteria to determine the number, duration, place, and conditions of the study grants will be subject to the indications noted and pertinent regulations.”

217. Subsequently, in the agreement on reparations, the State indicated that “[t]he Executive undertakes to approve [these] study grants [...] and, in addition, to allocate the necessary funds for the family [of Edgar Fernando García] to be able to designate and deliver them as of the 2013 school year.”

218. The Court assesses the State's undertaking positively and therefore endorses this measure of reparation, in light of the provisions established by the parties in the reparations agreement. Thus, the State must deliver, once, the ten “study grants” of Q. 25,000.00 (twenty-five thousand quetzals) each, to be implemented as of the 2013 school year. Meanwhile, the members of Edgar Fernando García's family must, within six months of notification of this Judgment, name those who will be the beneficiaries of these “study grants,” who must be children or grandchildren of persons who were forcibly disappeared, in the terms of the reparations agreement.

C.3) Guarantee of non-repetition: National Commission for the Search for Victims of Forced Disappearances and other Forms of Disappearances

219. The representatives asked that the State, “through the corresponding body, urgently approve the Law on the National Commission for the Search for Victims of Forced Disappearance and other Forms of Disappearance, with the original text submitted by the civil society organizations on December 14, 2006, accepting only changes that benefit the victims of human rights violations during the internal armed conflict.”²⁹¹ For its part, in the answering brief, the State expressed its willingness “to follow up on and to foster the approval of bill [3590 on the creation of the National Commission for the Search for Victims of Forced Disappearance and other Forms of Disappearance] by the Congress of the Republic of Guatemala.” In addition, it advised that this bill “has the support of the Finance and Currency Committee of the Congress of the Republic, and [...] of the Legislation and Constitutional Matters Committee, and has thus completed the legislative procedure in order to be examined in [...] plenary.” Consequently, it asked the Court to “recommend to the Guatemalan legislature that it examine and approve [the said] law promptly [...] in order to support the families of victims of forced disappearance in Guatemala.”

220. In the reparations agreement, the State undertook “to continue promoting the approval of the Law [for the creation of the National Commission for the Search for Victims of Forced Disappearance and other Forms of Disappearance].” It also indicated that “the President of the Republic, as head of the Executive and representative of national unity, undertakes to request the Legislature, with full respect for the separation of powers, to approve the said law.”

221. The Court considers that an entity of this type will make a beneficial contribution to the search for and identification of Edgar Fernando García and, in general, of the victims of

²⁹¹ The representatives indicated that they support this bill, the purpose of which is “to provide to the next of kin of the disappeared persons with an effective answer concerning the fate of their [...] relatives.” Regarding the processing of this law, they advised that it had received “two positive opinions,” from the congressional committees on Public Finance and Currency, and on Legislation and Constitutional Matters. However, the original text of the bill presented by the victims' social organizations has been modified in these opinions.

forced disappearance in Guatemala. Consequently, the Court appreciates the State's willingness "to continue promoting the approval" of the said bill and endorses this measure of reparation, in the terms established in the agreement reached between the parties. The Court urges Guatemala to continue adopting all the necessary legislative, administrative or other measures to ensure the creation of this Commission.

D) Compensation

222. The representatives indicated that the State should make reparation, by providing financial compensation, for the harm caused to Edgar Fernando García and his family. They asked that this compensation include the loss of earnings of Edgar Fernando García, as well as consequential and non-pecuniary damage, and harm to the life project of María Emilia García, Nineth Varenca Montenegro Cottom and Alejandra García Montenegro.

223. In the reparations agreement, the State, after "comparing the actuarial studies submitted by the two parties," undertook to pay "financial reparation," including "loss of earnings, consequential damages, non-pecuniary damage, and medical and psychological care," to be "paid during 2012, with funds allocated to COPREDEH and to the National Compensation Program." During the meeting in which the reparations agreement was presented to the Court, the representatives asked that amount of the compensation agreed on by the parties not be published in the Judgment and kept confidential because of safety concerns. In its final written observations, the Commission asked the Court to approve the representatives' request.

224. In its case law, the Court has developed the concept of pecuniary damage and the circumstances under which it must be compensated. The Court has established that pecuniary damage supposes "the loss of or detriment to the income of the victims, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal nexus with the facts of the case."²⁹² Furthermore, with regard to the concept of non-pecuniary damage, the Court has established that it "may include both the suffering and distress caused to the direct victim and to the next of kin and the impairment of values that are highly significant to the individual, as well as other changes of a non-pecuniary nature in the living conditions of the victim or his or her family."²⁹³

225. The Court finds that the undertaking made by the State in the reparations agreement to pay compensation to Edgar Fernando García, María Emilia García, Nineth Varenca Montenegro Cottom and Alejandra García Montenegro for loss of earnings, consequential damage, non-pecuniary damage, and medical and psychological care, represents a positive step by Guatemala to comply with its international obligations and, therefore decides to endorse these measures of reparation, in the terms agreed by the parties. Consequently, as established in the reparations agreement, the State must pay the agreed amount "during 2012." The Court also considers it prudent to grant the request of the representatives to keep the amount of compensation agreed by the parties confidential; hence, it will not include the amount in this Judgment. Accordingly, the parties must also respect the confidentiality of this information.

226. The Court also observes that, according to the agreement, a lump sum was established without determining a specific amount for each victim and its distribution.

²⁹² Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and costs*, *supra*, para. 43, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 382.

²⁹³ Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs*, *supra*, para. 84, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 382.

Consequently, taking into account the willingness of the parties to reach an agreement, the Court considers that the amounts awarded for pecuniary and non-pecuniary damage, and medical and psychological treatment, should be distributed in conformity with the indications of the representatives in their motions and arguments brief, in which they considered that “the compensation should be delivered to the victim’s mother, wife and daughter in equal parts.”

227. Furthermore, the Court observes that, in the reparations agreement, the State undertook to pay this amount “during 2012.” Nevertheless, to date the Court has not received any information on compliance with this payment, or on any progress made by the State to comply with the commitment it assumed. Consequently, the Court urges Guatemala to take the necessary steps, as soon as possible, to comply with payment of the compensation in keeping with the commitments made in the agreement. If the State is unable to make the payment within the agreed time frame, it must pay this amount within six months at most of notification of this Judgment. The interest on arrears established in paragraph 238 of this Judgment will begin to be calculated following the six-month period established in this paragraph.

E) Costs and expenses

228. The representatives indicated that they had incurred expenses because they had supported the members of Edgar Fernando García’s family during the proceedings at the domestic level and before the inter-American system. In this regard, they stated that they “waive charging all the said expenses, and ask[ed] the Inter-American Court to allocate them a symbolic amount of Q. 500,000.00.”

229. In the agreement on reparations, the State “agreed to pay the sum of five hundred thousand quetzals (Q. 500,000.00) requested by the GAM, as a symbolic contribution to the work performed in favor of the case of Edgar Fernando García, and this will be paid in 2012.”

230. The Court reiterates that, according to its case law,²⁹⁴ costs and expenses are part of the concept of reparations, provided that the actions taken by the victims in their search for justice, at both the national and international levels, involve expenditure that should be compensated when the international responsibility of the State has been declared in a judgment.

231. The Court assesses positively the State’s undertaking to reimburse the representatives of the victims an amount for the costs and expenses incurred as a result of the support they have provided to the members of Edgar Fernando García’s family for more than 27 years in the search for justice at the domestic and international level; it therefore endorses this measure, in the agreed terms. Consequently, the State must pay the *Grupo de Apoyo Mutuo* the sum of Q. 500,000.00 (five hundred thousand quetzals).

232. The Court observes that, in the reparations agreement, the State undertook to pay this amount “in 2012”; however, to date, the Court has not received any information on this payment, or on any progress made by the State to comply with its commitment. Therefore, the Court urges Guatemala to take any necessary measures, as soon as possible, to comply with payment of costs and expenses, in accordance with the provisions of the agreement. If the State is unable to reimburse the said amount within the agreed time frame, it must pay

²⁹⁴ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and costs*, *supra*, para. 79, and *Case of the Massacres of El Mozote and nearby places v. El Salvador*, *supra*, para. 385.

the amount within six months at most of notification of this Judgment. The interest on arrears established in paragraph 238 of this Judgment will begin to be calculated following the six-month period established in this paragraph.

F) Method of compliance with the agreed payments and resolution of possible disputes concerning the agreement on reparations

233. The reparations agreement signed by the representatives of the victims and the State has been endorsed by this Judgment; accordingly, any dispute or differences that arise will be decided by this Court.

234. The State must pay the compensation for pecuniary and non-pecuniary damage, medical and psychological care, and reimbursement of costs and expenses established in this Judgment directly to the persons or organization indicated herein, within the time frame established in the reparations agreement and in this Judgment, in accordance with the following paragraphs. These payments may not be affected or conditioned by current or future taxes or charges. Consequently, they must be delivered to the beneficiaries in full, as established in the Judgment.

235. The State must comply with its monetary obligations by payment in quetzals or the equivalent in United States dollars, using the exchange rate in force on the New York Stock Exchange on the day before the payment to make the respective calculation.

236. Should any of the family members of the victim indicated in this Judgment die before they have received the respective compensation, this must be paid directly to their heirs, in accordance with the applicable domestic law.

237. If, for reasons that can be attributed to the beneficiaries of the compensation or to their heirs, it is not possible to pay the amounts established within the period indicated, the State shall deposit the said amounts in their favor in an account or a deposit certificate in a solvent Guatemalan financial institution, in United States dollars, and in the most favorable financial conditions permitted by law and banking practice. If, after 10 years, the sum allocated has not been claimed, the amounts shall revert to the State with the accrued interest.

238. If the State falls into arrears, it shall pay interest on the amount owed corresponding to banking interest on arrears in Guatemala, taking into account the provisions of paragraphs 227 and 232.

239. The Court notes that some of the measures agreed by the parties in the reparations agreement should have been complied with during 2012.²⁹⁵ At the date this Judgment is delivered, the Court has not been informed that these measures have been complied with. However, the Court emphasizes that the State must adopt all necessary measures to comply with the said reparations as soon as possible. Consequently, the State must, within six months of notification of this Judgment, provide the Court with a report on the measures adopted to comply with it.

²⁹⁵ In particular, the State undertook to organize a public act to acknowledge its responsibility “within two months of the signature [of the said agreement],” which was signed on April 20, 2102, and also undertook to facilitate the change in the name of the “Julia Ydigoras Fuentes” public school to that of Edgar Fernando García “during 2012.”

X
OPERATIVE PARAGRAPHS

240. Therefore,

THE COURT

DECIDES,

unanimously,

1. To accept the partial acknowledgment of international responsibility made by the State and to endorse the agreement on reparations signed by the parties, in the terms of paragraphs 13 and 16 to 24 of the Judgment.

DECLARES,

unanimously, that:

1. The State is responsible for the forced disappearance and, therefore, for the violation of the rights to personal liberty, personal integrity, life, and recognition of juridical personality protected in Articles 7, 5(1), 5(2), 4(1) and 3, in relation to Article 1(1), all of the American Convention, and in relation to Articles I(a) of the Inter-American Convention on Forced Disappearance of Persons, to the detriment of Edgar Fernando García, in accordance with the provisions of paragraphs 93 to 114 of this Judgment.

2. The State is responsible for the violation of freedom of association established in Article 16(1) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Edgar Fernando García, in the terms of paragraphs 116 to 121 of this Judgment.

3. The State is responsible for the failure to comply with its obligation to ensure, by an effective investigation, the rights recognized in Articles 7, 5(1), 5(2), 4(1) and 3 of the American Convention, in relation to Article 1(1) of this instrument and Article I(b) of the Inter-American Convention on Forced Disappearance of Persons, to the detriment of Edgar Fernando García, as established in paragraph 155 of this Judgment.

4. The State is responsible for the violation of the rights to judicial guarantees and to judicial protection established in Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) of this instrument and Article I(b) of the Inter-American Convention on Forced Disappearance of Persons, to the detriment of Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García, as established in paragraphs 128 to 155 of this Judgment.

5. The State is responsible for the violation of the right to personal integrity established in Article 5(1) and 5(2) of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of Nineth Varenca Montenegro Cottom, Alejandra García Montenegro and María Emilia García, as established in paragraphs 161 to 169 of this Judgment.

6. The State is responsible for the violation of the right to freedom of association established in Article 16(1) of the American Convention, in relation to the obligation to respect and ensure rights established in Article 1(1) of this instrument, to the detriment of

Nineth Varenca Montenegro Cottom and María Emilia García, in the terms of paragraphs 179 to 186 of this Judgment.

7. It is not in order to rule on the alleged violations of Articles 13 and 23 of the American Convention on Human Rights, in the terms of paragraphs 122, 157 and 187 of this Judgment.

8. It is not in order to rule on the alleged violations of Articles 17 and 19 of the American Convention on Human Rights, in the terms of paragraph 170 of this Judgment.

AND ESTABLISHES,

unanimously, that:

1. This Judgment constitutes *per se* a form of reparation.

2. The State must continue and conclude, within a reasonable time, the necessary investigations and proceedings to establish the truth of the facts, as well as to determine and, as appropriate, punish those responsible for the forced disappearance of Edgar Fernando García, as established in paragraphs 194 to 197 of this Judgment.

3. The State must conduct a genuine search forthwith, during which it makes every effort to determine the whereabouts of Edgar Fernando García as soon as possible, as established in paragraphs 199 and 200 of this Judgment.

4. The State must make the publications indicated in paragraphs 201 to 203 of this Judgment, within two months of its notification.

5. The State must organize a public act during which it acknowledges its international responsibility for the facts of this case, as established in paragraphs 205 and 206 of this Judgment.

6. The State must facilitate the initiative known as the 'Concord Memorial,' under which it must promote the construction of commemorative and cultural spaces to dignify the memory of the victims of human rights violations during the internal armed conflict, in the terms of paragraphs 208 and 209 of this Judgment.

7. The State must include the name of Edgar Fernando García on the plaque that is placed in the park or plaza to be constructed in compliance with the measure ordered in the seventh operative paragraph of the judgment in the case of *Gudiel Alvarez et al ("Diario Militar") v. Guatemala*, in the terms of paragraph 210 of this Judgment.

8. The State must facilitate the change of the name of the "Julia Ydigoras Fuentes" public school to that of Edgar Fernando García, as stipulated in the reparations agreement and established in paragraph 215 of this Judgment.

9. The State must deliver ten "study grants" to be granted by the members of Edgar Fernando García's family to children or grandchildren of persons forcibly disappeared, in the terms of paragraphs 217 and 218 of this Judgment.

10. The State must promote the approval of the bill for the creation of the National Commission for the Search for Victims of Forced Disappearance and other Forms of Disappearance, in the terms of paragraphs 220 and 221 of this Judgment.

11. The State must pay the amount established in the reparations agreement as compensation for pecuniary and non-pecuniary damage, and medical and psychological care, in the terms of paragraphs 225 to 227 of this Judgment.

12. The State must pay the amount established in the reparations agreement and in paragraph 231 of this Judgment, to reimburse costs and expenses, in the terms of paragraphs 229 to 232 of this Judgment.

13. The State must, within six months of notification of this Judgment, submit a report to the Court on the measures adopted to comply with it.

14. The Court will monitor integral compliance with this Judgment, in exercise of its authority and in observance of its obligations under the American Convention on Human Rights, and will close this case when the State has complied fully with its provisions.

Judge Eduardo Vio Gross advised the Court of his Separate Opinion, which is attached to this Judgment.

Done, at San José, Costa Rica, on November 29, 2012, in the Spanish and English languages, the Spanish text being authentic.

Diego García-Sayán
President

Manuel E. Ventura Robles

Leonardo A. Franco

Margarette May Macaulay

Rhadys Abreu Blondet

Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President

Pablo Saavedra Alessandri
Secretary

SEPARATE OPINION OF JUDGE EDUARDO VIO GROSSI
CASE OF GARCÍA AND FAMILY MEMBERS v. GUATEMALA

JUDGMENT OF NOVEMBER 29, 2012
(Merits, reparations and costs)
OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

I am issuing this separate opinion¹ with regard to the Judgment delivered in this case (hereinafter “the Judgment”) in order to place on record that, even though I voted in favor of it, I do not agree, with the fact that the Inter-American Court of Human Rights (hereinafter “the Court”) has considered it “*prudent to grant the request of the representatives to keep the amount of compensation agreed by the parties confidential; hence, it [does] not include the amount in th[e] Judgment*” and orders that “*the parties must also respect the confidentiality of this information.*”²

My discrepancy with the Judgment relates to the fact that the said request for confidentiality was not included in the agreement on reparations of April 20, 2012, signed by the parties to the case; to the obligation to include the reparations and compensation in the corresponding judgment; to the principles of full disclosure and transparency that should inspire the judgment and, lastly, to the failure to substantiate the safety concerns cited in this case to request and order the said confidentiality.

I. The reparations agreement and the request

¹ Art. 66(2) of the American Convention: “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.”

² Para. 225.

As revealed by the Judgment itself, this request for confidentiality was not only made after the signature of the said reparations agreement but, also, the State did not have the opportunity to rule on it, or simply did not do so.

Admittedly, although the State's acquiescence is not a requirement *sine qua non*³ for the Court to proceed as it has, it is not less true that the absence of an observation by the State may constitute an infringement of the principle of procedural equality.

II. The Judgment of the Court

In addition, it is evident that the Judgment must include the section on compensation,⁴ particularly when there is no provision, either in the Convention, the Statutes or the Rules of Procedure, that exempts the Court from determining this compensation in its judgment, either on merits or on reparations and costs.

III. Principle of full disclosure

Furthermore, it should be added that neither is there a provision in the Convention, the Statute or the Rules of Procedure that authorizes the Court to maintain secret or confidential the amount of the reparations and compensation that it orders in its judgments.

And, quite to the contrary, there is a provision of the Convention that supposes precisely the public nature of this amount or sum,⁵ because the execution of an international judgment at the domestic level necessarily requires awareness of everything that the said judgment orders.

IV. Principle of transparency

In addition, respect for the principle of transparency that inspires the Court's judgments and that is established in the Convention,⁶ the Statute of the Court,⁷ and in its Rules of Procedure,⁸ must be taken into consideration.

³ Art. 63 of the Court's Rules of Procedure: "*When the Commission, the victims or alleged victims, or their representatives, the respondent State or, if applicable, the petitioning State in a case before the Court inform it of the existence of a friendly settlement, commitment, or any other occurrence likely to lead to a settlement of the dispute, the Court shall rule upon its admissibility and juridical effects at the appropriate procedural time.*"

⁴ Art. 63(1) of the American Convention on Human Rights (hereinafter "the Convention"): "*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.*" And, Article 65(g) and (h) of the Court's Rules of Procedure: "*the decision on the case,*" and "*the ruling on reparations and costs, if applicable.*"

⁵ Art. 68(2) of the Convention: "*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.*"

⁶ Art. 69 of the Convention: "*The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the States Parties to the Convention.*"

⁷ 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 the judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate.*"

⁸ Art. 32 of the Court's Rules of Procedure: "*Publication of judgments and other decisions. 1. The Court shall make public: (a) 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; (b) documents from the case file, except those considered unsuitable for publication; (c) the conduct of the hearings, except private*"

Thus, the said provisions establish the full disclosure and publication of the Court's decisions, including its judgments. In addition, they stipulate the notification or the communication of the judgments not only to the parties to the pertinent litigation, but also to the States Parties to the Convention. And, finally, not only the parties and the States Parties may request a copy of the judgment, but also the organs of the Organization of American States, and even any interested person.

Hence, all the natural or legal persons indicated above have the right to know the judgments in their entirety, particularly when the provisions that regulate them make no mention of the Court's authority to order the confidentiality or secrecy of part of them.

V. Safety concerns

Lastly, it should be considered that the "safety concerns" cited to justify and to obtain the requested confidentiality were not explained and do not appear in the proceedings, so that, by allowing this confidentiality, the Court may be granting the public a certain margin of doubt with regard to the discretionary nature of its decisions, which thus could, instead, be perceived as arbitrary.

Judge Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

hearings, through the appropriate means; (d) any other document that the Court considers suitable for publication. 2. Judgments shall be published in the working languages used in each case. All other documents shall be published in their original language. 3. Documents submitted to the Secretariat of the Court that relate to cases already adjudicated shall be made accessible to the public, unless the Court decides otherwise." Also Art. 67(6) of the Rules of Procedure: "The originals of the judgments shall be deposited in the archives of the Court. The Secretary shall dispatch certified copies to the States Parties; the Commission; the victims or alleged victims, or their representatives; the respondent State; the petitioning State, if applicable; the Permanent Council through its Presidency; the Secretary General of the OAS, and any other interested person who requests them."