DISSENTING OPINION OF JUDGE AD HOC ALEJANDRO MONTIEL ARGÜELLO

1) I have dissented from the operative paragraphs of this judgment declaring that the State of El Salvador has violated Articles 8 and 25 of the American Convention on Human Rights.

2) The Court has interpreted the former provision in the sense that it not only encompasses judicial guarantees in favor of the accused or the parties to the proceedings, but also establishes the State's obligation to investigate any fact that may entail its responsibility because it constitutes the violation of a human right.

3) Clarifying this obligation, in its initial judgments on merits the Court stated that: "An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the Government…" (Velásquez Rodríguez case. Judgment of July 29, 1988, para. 177 and Godínez Cruz case. Judgment of January 20, 1989, para. 198).

4) This does not mean that examination of the conduct of the victim or his next of kin that may obstruct or impede, deliberately or not, the State's action should be totally dispensed with when assessing how the State has complied with its obligation to investigate.

Naturally, the circumstances of each case must be taken into consideration; particularly, whether it occurred in a populated or isolated place, whether many similar cases occurred at the same time that also require the attention of the authorities, whether the fact occurred recently or in the past, etc.

5) In the instant case, it was stated that the disappearances of the Serrano Cruz sisters occurred on June 2, 1982, and the fact was not reported to the Chalatenango Trial Court by the alleged victims' mother until April 30, 1993, that is 11 years later. She made a second statement before the Court and, in his brief with final arguments, the State's Agent in this case drew attention to seven contradictions between the two statements; she then filed a petition for *habeas corpus* in which the Agent has identified six more contradictions and, finally, before she died, she recorded a statement in which there are a further ten contradictions. It should be mentioned that there is not one witness to the Army's capture of the children, because one of their sisters merely stated that they were hidden in the undergrowth and she heard members of the Army say they had found two children. This statement differs from the mother's statement. Regarding the statement made by María Esperanza Franco Orellana that she had seen the children descending from an Army helicopter and being handed over to the Red Cross, in her statement before the Court, she said that she had seen nothing and, besides, if her first statement is accepted, this would free the State from responsibility, because the Army would have delivered the children to the Red Cross, even though the latter has not been able to provide any information in this respect.

6) I do not consider it necessary to start examining all the evidence submitted in this case, most of which refers to matters that throw no light on the alleged disappearance, because I believe that, in view of what I have stated in the preceding paragraphs, the State cannot be accused of failing to comply with the obligation to

investigate, since the fact is said to have taken place in a hamlet with about a dozen houses and without eyewitnesses.

7) The Court has never ruled on the precise degree of certainty needed to declare that the State is responsible for a human rights violation. Nevertheless, in all the Court's case law there is not one single case in which it has made this declaration when there has been a reasonable doubt about such responsibility and, in my opinion, there is more than a reasonable doubt in the instant case.

8) In addition, it should be pointed out that the State has continued to show interest in seeking those who disappeared during the armed conflict that took place from 1979 to 1992, and has created an institutional commission to seek disappeared children.

9) The alleged violation of Article 25 of the Convention, which refers to a simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate fundamental rights, is worth examining.

In the two cases cited, the Court said: "… *habeas corpus* would be the normal means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty." (Velásquez Rodríguez case. Ibid., para. 65 and Godínez Cruz case. Ibid., para. 68).

10) In the instant case, this recourse was filed on November 13, 1995; it was duly processed without achieving any result, and on March 14, 1996, the Constitutional Chamber of the Supreme Court of Justice declared that, in the case, since there was no evidence that the disappeared children were or had been held by the Army, this recourse would have no effect and was not appropriate, but rather it was a matter for the ordinary criminal jurisdiction.

11) Bearing in mind the circumstances of the case and, in particular, that the recourse was presented 13 years after the facts allegedly occurred, it appears that the Supreme Court's decision was correct and that the fact that the recourse did not result in finding the Serrano Cruz children does not mean that Article 25 of the Convention has been violated. I therefore dissent from the operative paragraph which states this.

12) Regarding the alleged violation of Article 5 (Right to Humane Treatment), I have dissented from the Court's opinion, because this is based on the alleged violation of Articles 8 and 25 of the Convention and there has been no such violation, as stated in the preceding paragraphs.

13) I consider that the right to claim compensation for non-pecuniary damage cannot be inherited. Furthermore, I have dissented from all the operative paragraphs regarding reparations because, in my opinion, no violation of any human right within the Court's jurisdiction has been committed in this case and, consequently, Article 63(1) of the Convention is not applicable.

14) Moreover, I would like to take this opportunity to put on record that I do not share the progressive expansion of the interpretation of the said provision which, in my opinion, only authorizes the Court to order measures leading to reparations in favor of victims whose rights have been violated and other persons who have

suffered damage as a result of the violation. The tendency to progressively expand the interpretation of the Convention is sharply increased in this judgment and, in my opinion, this should be corrected. It is not a question of preventing hypothetical future violations in other cases; it is a matter of promoting human rights, which is laudable from all points of view, but which the said provision of the Convention does not authorize the Court to do in the judgment it delivers on human rights violations in a specific case. There are other opportunities and other organizations and organs for that purpose.

Alejandro Montiel Argüello
Judge *ad hoc*

Pablo Saavedra Alessandri
Secretary