THE SERRANO CRUZ SISTERS V. EL SALVADOR

Judgment on merits, reparations, and costs

DISSENTING OPINION OF JUDGE MANUEL E. VENTURA ROBLES
ON THE THIRD OPERATIVE PARAGRAPH

1. I dissent from the majority opinion in the case of the Serrano Cruz Sisters v. El Salvador, stated in the third operative paragraph. According to this, the Court did not rule on the alleged violations of the rights of the family, the right to a name and the rights of the child because, in the Court's opinion, it lacked jurisdiction to rule on possible violations originating from facts or acts that occurred before June 6, 1995, or which began to be executed before that date, since it had decided this in its judgment on preliminary objections in this case of November 23, 2004.

2. In my opinion, if the Court was obliged to limit its jurisdiction in this case owing to the way in which the State of El Salvador accepted the Court's contentious jurisdiction pursuant to Article 62 of the American Convention on Human Rights, it has imposed a limitation on itself in this judgment, because it has accepted a restrictive interpretation that adversely affects the victims. This has deprived the Court of the historic possibility of ruling on the violation of the rights of the family, the right to a name and the rights of the child in a case concerning the search for individuals who disappeared when they were children in the context of an internal armed conflict and, consequently, of ruling on the right to identity of such persons.

3. I consider that the Court imposed a limitation on itself in this case, because, if most of the judges ruled in favor of autonomous violations of the American Convention occurring after El Salvador's acceptance of the Court's jurisdiction, specifically violations of Articles 8, 25 and 5, they should also have declared that Articles 17, 18 and 19 had been violated since, following the date of acceptance, several facts have occurred related to the violation of the latter provisions, in the context of the lack of a domestic investigation to determine what happened to Ernestina and Erlinda Serrano Cruz. In particular, these facts are closely related to the violations of Articles 8 and 25 of the Convention (access to justice and due process) which have been declared in the judgment. The violations of these articles were declared owing basically to violation of the principle of reasonable time and because the *habeas corpus* procedure and the criminal proceedings concerning the disappearance of Ernestina and Erlinda Serrano Cruz were not effective in tracing their whereabouts, or investigating and punishing those responsible. In other words, in this case, the logical and necessary consequence of declaring that Articles 8 and 25 of the Convention had been violated was to declare that Articles 5, 17, 18 and 19 had also been violated, and not merely Article 5, as I will explain below.

4. In the instant case, the State authorities' lack of due diligence in processing the petition for *habeas corpus* and the criminal proceedings meant that the information needed to find Ernestina and Erlinda could not be obtained. Consequently, should they be alive, it impeded reunification with their biological family and also, if applicable and if they so wished, re-establishment of the given name and surnames assigned by their parents, thus constituting the violation, to the detriment of Ernestina and Erlinda and their next of kin, of the rights of the family and the right to a name, as well as the rights of the child to the detriment of Erlinda, who was a minor when El Salvador accepted the Court's jurisdiction.

5. Owing to the specific facts of this case, the logical and necessary consequence of the foregoing was the violation of the right to identity of Ernestina and Erlinda and their next of kin, because, without a family and without a name, there is no identity. The right to identity as such is not expressly recognized in the American Convention. However, I believe it important to indicate that the Convention protects this right, based on an evolutionary interpretation of the content of other rights embodied therein and, in this case in particular, based on an examination of Articles 17, 18 and 19 thereof. In this regard, I believe it important to emphasize that this would not be the first time the Court has ruled on a right that is not explicitly established in this instrument. In previous judgments, as well as in paragraph 62 of this judgment, the Court has referred to the right to the truth,[1] which is not expressly embodied in the American Convention; while, in other cases, it has referred to the violation of the right to a decent life, which is not expressly established in this Convention either, and even encompasses the protection of other rights expressly protected in other treaties.[2]

6. In my opinion, the text of the Court's judgment in this case, in relation to the violation of Articles 17, 18 and 19 of the Convention, should have been drafted as follows:

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125. Given the characteristics of this case, the Court considers it pertinent to examine jointly the aspects related to the alleged violations of Articles 17 (Rights of the Family) and 18 (Right to a Name) of the Convention, to the detriment of the sisters, Ernestina and Erlinda Serrano Cruz and of their next of kin, and also the alleged violations of Article 19 (Rights of the Child) of the Convention with regard to Ernestina and Erlinda.

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[1] *Cf. Case of Carpio Nicolle et al.*. Judgment of November 22, 2004. Series C No. 117, para. 128; ICourtHR *Case of the Plan de Sánchez Massacre*. *Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of November 19, 2004. Series C No. 116, para. 97; *Case of Tibi.* Judgment of September 7, 2004. Series C No. 114, para. 257; *Case of the Gómez Paquiyauri Brothers*. Judgment of July 8, 2004. Series C No. 110, para. 230; *Case of the 19 Tradesmen*. Judgment of July 5, 2004. Series C No. 109, para. 261; *Case of Molina Theissen*. *Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of July 3, 2004. Series C No. 108, para. 81; *Case of Myrna Mack Chang*. Judgment of November 25, 2003. Series C No. 101, para. 274; *Case of Bulacio*. Judgment of September 18, 2003. Series C No. 100, para. 114; *Case of Trujillo Oroza. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of February 27, 2002. Series C No. 92, para. 114; *f. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of February 22, 2002. Series C No. 91, para. 76; *Case of Cantoral Benavides. Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of December 3, 2001. Series C No. 88, para. 69; *Case of the "Street Children" (Villagrán Morales et al.). Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of May 26, 2001. Series C No. 77, para. 100; *Case of the "Panel Blanca" (Paniagua Morales el al.)*. *Reparations* (Art. 63(1) American Convention on Human Rights). Judgment of May 25, 2001. Series C No. 76, para. 200; *Case of Barrios Altos.* Judgment of March 14, 2001. Series C No. 75, para. 47 and 48; *Case of Bámaca Velásquez.* Judgment of November 25, 2000. Series C No. 70, paras. 200-202; and *Case of Castillo Páez*. Judgment of November, 1997. Series C No. 34, paras. 86 and 90.

[2] *Cf. Case of the "Juvenile Reeducation Institute"*. Judgment of September 2, 2004. Series C No. 112*,* paras. 152, 159, 164, 167, 170 and 171; and *Case of the "Street Children" (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, para. 144, 147 and 191.

126. In the case of the rights of the family, Article 17 of the Convention establishes that:

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
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> 2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.
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> [...]

127. With regard to the right to a name, Article 18 of the American Convention stipulates that:

> Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.

128. In relation to the rights of a child, Article 19 of the American Convention indicates that:

> Every 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

129. The Court emphasizes that, in the instant case, the historical context of the alleged violations of the American Convention is the armed conflict in which El Salvador was engaged from 1980 to 1991 (*supra* para. 48(1)). In 1996, the *Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos* filed a complaint before the Ombudsman's Office in which it set out the issue of the children who disappeared during the armed conflict by describing several cases, including that of the sisters, Ernestina and Erlinda Serrano Cruz. The facts of this case were being investigated by the Chalatenango Trial Court in a criminal proceedings "filed against members of the Atlacatl Battalion under the inappropriate criminal offence of abduction from personal care (*sustracción del cuidado personal*) of the minors, Erlinda and Ernestina Serrano," "in [a military] operation of June 2, 1982," known as the "*guinda de mayo*" (*supra* para. 48(2)).

130. In this regard, this Court bears in mind that, at the date of this judgment, should they be alive, Ernestina Serrano Cruz would be 29 years old and Erlinda Serrano Cruz would be between 26 and 27 years old (*supra* para. 48(78) and 48(79)), and also that the internal armed conflict in which El Salvador was engaged has ceased. Accordingly, the Court considers that, even though Ernestina and Erlinda Serrano Cruz would be adults now, it cannot fail to take into account that they were children at the time of the facts under investigation by the Chalatenango Trial Court (*supra* para. 48(22)), and one of them, Erlinda, was a child when El Salvador accepted the Court's jurisdiction. Hence, the Court will examine the overall problem of the search for the children who disappeared during the internal armed conflict, which, in many cases, has now been transformed into the search for youths and adults. This problem also has an impact on the next of kin of those who disappeared (*supra* para. 48(1), 48(4) and 48(7)) and dealing with it requires the State to comply with its post-conflict obligations.

131. The Court observes that, due to the characteristics of this case, the alleged victims, Ernestina and Erlinda Serrano Cruz, and their next of kin, who continue to search for them, are an example of the current problems that El Salvador must face

in relation to determining what happened to the children who disappeared during the internal armed conflict. The Court must examine the problem comprehensively, bearing in mind that, as has been proved, the search for, tracing and finding of the disappeared children, as well as the process of family reunification should the search be successful, is a complex situation for rebuilding the lives and identities of those who are found, their biological families and Salvadoran society itself (*supra* para. 48(7)).

132. The Court observes that every person has the right to an identity. This is a complex right which, on the one hand has a dynamic aspect linked to the evolution of the personality of the individual, and includes a series of attributes and characteristics that allow each person to be individualized as unique. Personal identity starts from the moment of conception and its construction continues throughout the life of the individual, in a continuous process that encompasses a multiplicity of elements and aspects which exceed the strictly biological concept and correspond to the biographical and "personal reality" of the individual. These elements and attributes, which comprise personal identity, include such varied aspects as a person's origin or "biological reality," and his cultural, historical, religious, ideological, political, professional, family and social heritage, as well as more static aspects relating, for example, to physical traits, name and nationality.

133. Diverse international legal instruments recognize the right to personal identity.[3] In El Salvador, an individual's right to identity is enshrined in Article 203 of the Family Code on the rights of children, and in Article 351(3) of this code, on the fundamental rights of minors.

134. Even though the right to identity is not explicitly established in the American Convention, it is protected in this treaty based on an evolutionary interpretation[4] of the contents of the rights embodied, *inter alia*, in Articles 3, 4, 5, 11, 12, 13, 17, 18, 19 and 20 thereof. Depending on the facts, there could be a violation of the right to identity if one or several of these provisions are infringed. In other words, the right to identity would not always be violated when one of these articles is violated, and the matter must be examined on a case-by-case basis.

135. Given the nature of the facts of this case, the Court will examine the possible violation of Articles 17 and 18 of the American Convention, in relation to Article 1(1) thereof, and whether it violates the right to identity of the sisters, Ernestina and Erlinda Serrano Cruz, and their next of kin. The Court observes that the rights to protection of the family and to a name establish a protection that provides content to the individual's right to an identity, and some of the rights that the Commission and the representatives alleged were violated in this case are elements of this comprehensive legal figure.

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[3] *Cf.* The United Nations Convention on the Rights of the Child, Articles 7, 8 and 29(1); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Articles 17, 21 and 31; the Declaration on Race and Racial Prejudices, Articles 1(3) and 5(1); and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 1(1).

[4] *Cf. Case of the Serrano Cruz Sisters. Preliminary Objections.* Judgment of November 23, 2004. Series C No. 118, para. 119; *Case of Tibi*. Judgment of September 7, 2004. Series C No. 114, para. 144; and *Case of the "Juvenile Reeducation Institute"*. Judgment of September 2, 2004. Series C No. 112, para. 148.

136. The Court explains that, in the instant case, it will not rule on the alleged violation of Article 19 of the American Convention to the detriment of the sisters, Ernestina and Erlinda Serrano Cruz, separately from its consideration of the rights to the protection of the family and to a name, and also the possible violation of their right to identity, but will include its decision in that respect when ruling on the other rights that are alleged to have been violated. In this regard, this Court, among other norms, will give particular consideration to Articles 7 and 8 of the United Nations Convention on the Rights of the Child, because they embody the right to identity explicitly and directly.

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137. In relation to the "Promotion and protection of the right of the child," the General Assembly of the United Nations, when ruling on identity, family relationships and the registration of the birth of children, "in particular children in particularly difficult situations," in its resolution 58/157 of December 22, 2003, urged and called upon States:

> […] to undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law, without unlawful interference and, where a child is illegally deprived of some or all of the elements of his or her identity, to provide appropriate assistance and protection with a view to speedily re-establishing his or her identity;
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> […] to ensure, as far as possible, the right of the child to know and be cared for by his or her parents[.]

138. Given that the exercise of the right to identity allows the individual to have access to personal and family information that will enable him to construct his own personal history and biography, the Court considers that the right to identity is an essential element of the life of all individuals and not only of children; moreover, its exercise is essential for establishing relationships with the different members of the family, and between each individual and society and the State. Consequently, in the instant case, the Court will examine two rights that form part of the content of the right to personal identity: a) the rights of the family; and b) the right to a name.

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a) Rights of the family

139. The rights of the family, which are expressly established in Article 17 of the American Convention and Article 15 of the Additional Protocol to the American Convention on Human Rights in the matter of Economic, Social and Cultural Rights ("Protocol of San Salvador"), are one of the elements that give content to the right to identity.

140. As the Court has stated previously, recognition of the family as the natural and fundamental element of society, with the right to be protected by society and the State, is a basic principle of international human rights law.[5] In addition to being

[5] *Cf. Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para.

established in the American Convention and in the said Protocol of San Salvador, it is also embodied in a significant number of international legal instruments,[6] and also in Article 32 of the Constitution of El Salvador.

141. In this regard, the Court considers that everyone has the right to live in contact with or maintain direct contact or personal relationships with their family, given that the family, as a natural and fundamental element of society, is, in principle, "called on to satisfy [the] material, affective and psychological needs"[7] of every individual. Likewise, the Court underscored the importance of this right with regard to all the members of the family, such as parents and siblings, when it affirmed that the State was obliged to promote the development and strengthening of the family nucleus as comprehensively as possible.[8]

142. Accordingly, the Court agrees with the European Court that the mutual enjoyment of the coexistence of parents and children is a basic factor in the life of the family,[9] and that, even when parents are separated from their children, family coexistence should be guaranteed.[10] The Court understands, in line with the views of the European Court, that measures which prevent the enjoyment of family relations interfere in the rights of the family, embodied in Article 17 of the American Convention.[11] One of the most serious interferences is that which results in the separation of a family.[12]

143. The right of every individual to receive protection against arbitrary or illegal interference in their family forms an implicit part of the right to the protection of the

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[6] This is established in: Article 16(3) of the Universal Declaration of Human Rights; Article 10(1) of the International Covenant on Economic, Social and Cultural Rights; Article 23 of the International Covenant on Civil and Political Rights; the preamble and Article 8 of the Convention on the Rights of the Child; Article 18 of the African Charter on the Rights and Welfare of the Child; Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms amended according to the provisions of Protocol 11 and completed by Protocols 1 and 6; Articles 4 and 22 on the Declaration on Social Progress and Development; point 16 of the Proclamation of Teheran; Articles 1 and 2 of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with particular reference to foster placement and adoption nationally and internationally; and Article 6 of the Declaration on the Elimination of Discrimination against Women.

[7] *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion* OC-17/02 of August 28, 2002. Series A No. 17, para. 71.

[8] *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion* OC-17/02 of August 28, 2002. Series A No. 17, para. 66.

[9] *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion* OC-17/02 of August 28, 2002. Series A No. 17, para. 72. Likewise *Cf. Haase v. Germany,* no. 11057/02, § 82, ECHR 2004-III; *Kosmopoulou v. Greece,* no. 60457/00, §47, 5 February 2004; and Hoppe *v. Germany,* no. 28422/95, §44, 5 December 2002.

[10] *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion* OC-17/02 of August 28, 2002. Series A No. 17, para. 72. Likewise *Eur. Court H.R.*, *Case of Berrehab v. the Netherlands, Judgment of 21 June 1988, Series A no. 138*, para. 21.

[11] *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion* OC-17/02 of August 28, 2002. Series A No. 17, para. 72. Likewise *Cf. Haase v. Germany,* no. 11057/02, § 82, ECHR 2004-III; Kosmopoulou *v. Greece,* no. 60457/00, § 47, 5 February 2004; and *Venema v. The Netherlands*, no. 35731/97, §71, ECHR 2002-X.

[12] *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion* OC-17/02 of August 28, 2002. Series A No. 17, para. 72.

family, and is expressly recognized in various international legal instruments.[13] This protection acquires special relevance when examining the separation of the family[14] and the failure to adopt the necessary measures to seek those who disappeared when they were children and whose families have asked the State to determine their whereabouts in order to re-establish the ties that bind them, when possible. In this regard, the Court understands that the protection of the family includes not only the State's obligation to allow family coexistence, but also its obligation to promote family relations through the different State agencies. The Court observes that, while what happened to Ernestina and Erlinda has not been determined, their next of kin cannot re-establish family relations with them.

144. Notwithstanding the special circumstances in which the Serrano Cruz sisters were separated from their family and the justification or lack of justification for this, the Court considers that the State should have used all possible means to determine their whereabouts and, if applicable, reunite them with their next of kin[15] as soon as circumstances permitted.

145. Paragraph 3(b) of Article 4 (Fundamental guarantees) of the Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) establishes that "all appropriate steps shall be taken to facilitate the reunion of families temporarily separated."

146. Likewise, Principle 17 of the United Nations Guiding Principles on Internal Displacement of 11 February 1998 establishes that "[e]very human being has the right to respect of his or her family life" and that "[f]amilies which are separated by displacement should be reunited as quickly as possible." In this regard, the Principle stipulates that "[a]ll appropriate steps shall be taken to expedite the reunion of such families." This Principle also establishes that "[t]he responsible authorities shall facilitate inquiries made by family members and encourage and cooperate with the work of humanitarian organizations engaged in the task of family reunification."

147. Furthermore, this Court considers it necessary to emphasize that Article 39 of the Convention on the Rights of the Child establishes the State's obligation "to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, […] or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

148. With regard to these State obligations, the Court observes that, given the grave post-conflict consequences of a historical situation such as the one experienced by El Salvador, the fact that this conflict has ended and that individuals who were children at the time are now young people or adults, does not exempt the

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[13] *Cf.* Indeed, this is contemplated Articles 12 of the Universal Declaration on Human Rights, Article V of the American Declaration of the Rights and Duties of Man, Article 17 of the International Covenant on Civil and Political Rights, Article 11(3) of the American Convention on Human Rights and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[14] *Cf.* Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 71.

[15] *Cf. Haase v. Germany*, no. 11057/02, § 84, ECHR 2004-III; *Iglesias Gil and A.U.I. v. Spain*, no. 56673/00, § 49, ECHR, 2003-V; and *Mehemi v. France (no. 2)*, no. 53470/99, §45, ECHR 2003-IV.

State from its obligation to comply with the international obligations that are pending and from the obligation to adopt the necessary measures to repair the violations that were committed. In this regard, the Ombudsman's Office in its "Report […[on the forced disappearance of the children, Ernestina and Erlinda Serrano Cruz, its current impunity and the pattern of violence in which such disappearances occurred" of September 2, 2004, stated that:

> Following the disappearances, impunity was ensured by the military authorities' lack of records of such cases, the denial of information to the next of kin and the human rights organizations (even during the post-conflict decade), the failure to promote any measures that would make family reunification possible, and the context of military harassment of villages that were victimized during the years after the armed conflict.

149. In this regard, the Court stresses that the right to co-existence and to maintain family relations implies that the State should adopt appropriate measures at the national and the international level to ensure the union or the reunification of families that have been separated. These obligations acquire greater relevance when the separation of the members of a family responds to such special circumstances as those indicated in this case (*supra* para. 48(1), 48(2), 48(3), 48(4), 48(5), 48(6), 48(7), 48(8) and 48(11)).

150. In this regard, during the public hearing and in its final written arguments, the State declared that it had the "firm decision" and "determination" to "promote the reunification of the Salvadoran families who were separated as a result of the conflict, in the context of and in order to know the truth." And, in response to a question asked by the Court concerning its willingness to "investigate the facts that have been described in this case […] until reasonable and satisfactory results are reached," the State indicated that it would continue "using the ordinary proceedings already filed and still pending and, second, by creating an institution, a commission, that, with the help of everyone - and that meant everyone, without excluding anyone - w[ould] make a parallel effort to investigate the facts."

151. With regard to the domestic judicial proceedings, in the specific case of the *habeas corpus* procedure before the Constitutional Chamber of the Supreme Court of Justice, and the criminal proceedings filed before the Chalatenango Trial Court, it has been established that the State did not process these proceedings in a diligent manner that would have allowed them to be effective in determining what happened to Ernestina and Erlinda Serrano Cruz, discovering their whereabouts, and investigating and punishing those responsible, as the Court has indicated when ruling on the violation of Articles 8 and 25 of the American Convention (*supra* para. 106). By failing for many years to conduct a diligent investigation into what happened to Ernestina and Erlinda, the State has prevented their fate from being known and, consequently, has not established the necessary conditions for them to be able to re-establish relations with their family, should they be alive.

152. With regard to other non-judicial measures, during these proceedings the Court has only received information on the creation in 1999, at the recommendation of the Attorney General, of the "Attorney General's Committee" (*Mesa del Procurador*) (*supra* para. 48(12)) with the purpose of trying to trace the children who disappeared during the armed conflict. However, according to the information in the file before the Court, this committee did not achieve any results. In this regard, during the public hearing before the Court (*supra* para. 14), Father Juan María Raimundo Cortina Garaígorta emphasized that one of the reasons why the committee was unsuccessful was the lack of interest and collaboration from other State

authorities and institutions. In a decision of February 10, 2003, the Ombudsman's Office stated that the Attorney General's report on the activities of the committee "show[ed] that the results [had] evidently been very poor, owing above all, according to the text, to the absence of records and to the declarations of those interviewed that they had no information about the facts under investigation, particularly facts that related to the Armed Forces." Recently, on October 5, 2004, the State issued a presidential decree to establish an "inter-institutional commission to trace the children who disappeared as a result of the armed conflict in El Salvador." However, the Court was not given any information to indicate that the commission had commenced activities.

153. The Court observes that the work of the *Asociación Pro Búsqueda* and of the next of kin of the disappeared was fundamental in resolving most of the cases where it has been possible to trace and find those who disappeared during the armed conflict. Also, once they had obtained the necessary information about these people, *Pro-Búsqueda* and the next of kin encouraged the re-establishment of family relations and, when possible, the reunification of the families affected by the conflict, in the absence of relevant effective, diligent and appropriate measures by the State.

154. In its concluding observations on August 22, 2003, the Human Rights Committee stated that it "regretted the [State] was unable to explain the Legislative Assembly's reasons for not approving the establishment of a national commission of inquiry to track down children who disappeared in the conflict," invited El Salvador to "reconsider" the creation of this commission, and urged it "to submit detailed information on the numbers of children found alive and the numbers that died in the fighting," and to create a compensation fund for young people who are found.[16] The Committee on the Rights of the Child also referred to this matter in its final observations of June 30, 2004, to El Salvador, when it expressed its concern that the State had not "taken a more active role in efforts to investigate the disappearance of more than 700 children during the armed conflict between 1980 and 1992." The Committee on the Rights of the Child also noted "that the efforts which to date have led to the tracing of some 250 children have been undertaken mainly by the NGO *Pro-Búsqueda*." It therefore recommended that the State assume an active role in efforts to trace the children who disappeared during the armed conflict, that it establish a national commission with adequate resources and capacity to trace the disappeared children, and that it ratify the Inter-American Convention on the Forced Disappearances of Persons.[17]

155. As it has been shown, the State has demonstrated a general lack of concern about the situation of the children who disappeared in the internal armed conflict. This has had a direct impact on determining what happened to Ernestina and Erlinda, because the facts under investigation by the Chalatenango Trial Court refer to their abduction during this conflict. During the public hearing held before the Inter-American Court on September 7, 2004 (*supra* para. 14), the State affirmed that "there has been criticism, with some reason, that the State authorities did not help in the effort to trace the children lost in the war." It also stated that "all Salvadorans

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[16] U.N. Human Rights Committee. Concluding observations: El Salvador. August 22, 2003. CCPR/CO/78/SLV, para. 19.

[17] U.N. Committee on the Rights of the Child. Examination of the reports presented by the State parties under Article 44 of the Convention. Concluding observations on El Salvador of June 30, 2004. CRC/C/15/Add.232, paras. 31 and 32.

must work together to find the best solutions […] which lead to the truth about the whereabouts of the children."

156. In this regard, the Court considers that the State should adopt all necessary judicial, administrative, legislative and any other type of measures to promote the tracing and finding of those who disappeared during the armed conflict and the reunification of the families that were separated due to the disappearance of one of their members, including the Serrano Cruz family.

157. As it has been shown, the next of kin of Ernestina and Erlinda Serrano Cruz had recourse to the State authorities and to non-governmental organizations, such as *Pro-Búsqueda,* to trace their family members and to know what had happened to them, and they hoped to find them alive and be reunited with them. The mother and the living siblings of Ernestina and Erlinda Serrano Cruz have had to live with the sensation that the family had disintegrated. For example, in her testimony before the Court during the public hearing on September 7, 2004, Suyapa Serrano Cruz, Ernestina and Erlinda's sister, stated that, for her family and herself, "it would mean a great deal" to find Erlinda and Ernestina; that, even though there were "wounds that would never heal," they would be very "happy," because there had been "many cases of children who had been reunited" with their families and she hoped that this would happen in the case of her sisters (*supra* para. 36). Also, in his sworn statement of August 19, 2004 (*supra* para. 35), José Fernando Serrano Cruz, Ernestina and Erlinda's brother, stated that "[a]s a family, they hoped to discover the whereabouts of the girls at some time; that they would be able to trace them[. T]hat was what gave them strength to carry on; even though it did not console them much, it gave them some serenity…, with the hope of finding them one day." Even Ernestina and Erlinda's mother, about four months before her death, in her sworn statement of December 5, 2003 (*supra* para. 35), stated that "the only thing she want[ed was] for her daughters to be returned to her, and if she could ask the judges something it [was] that, at least, they would show her daughters to her." In this regard, in his testimony before the Court during the public hearing (*supra* para. 36), Father Cortina stated that shortly before she died, Erlinda and Ernestina's mother was going blind, owing to diabetes, and she said to him that she would like "not to lose her sight, because perhaps she could still see [her] daughters."

158. The Court has noted that when Ernestina and Erlinda's family refer to them, they speak of them in the present, preserving the image of them as children. In this regard, the expert witness, Ana Deutsch, stated in the report she made in a sworn statement on August 23, 2004 (*supra* para. 35), that the mother used "the present tense; she did not say 'had' or ask 'what will they be like now?' She said 'This is what a concerned mother thinks, because they are little girls.'" In this regard, the said expert witness stated that, even though Ernestina and Erlinda disappeared more than 20 years ago, to their next of kin:

> They have always had a place in the family conversations. They continue to be a presence in the family, a presence that has become more intense since the search has been reactivated [while], at the same time, the anguished has been reactivated. […] The family has definitely suffered an identity crisis. The identity of the family is composed of all its members. Some children died at a very early age, but there was an explanation for their death and the family could assimilate their absence. Deaths due to attacks by the Army are very painful, but the facts are defined, which also facilitates the mourning process. The absence of the girls has still not been resolved within the family, and they are therefore an ever-present absence.

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b) Right to a name

159. Article 18 of the American Convention protects the right to a given name and to the surnames of the parents or that of one of them. This right presumes that everyone, from the moment of birth, has the right to be legally registered immediately, since without this registration a person would remain legally unknown to society and the State, because a name is the simplest means of identification and individualization of a person. It is also the element that indicates the direct family relationships and makes access to other rights possible.

160. The right to a name is also expressly recognized in Article 36 of the Constitution of El Salvador, Article 7(1) of the Convention on the Rights of the Child and Article 6(1) of the African Charter on the Rights and Welfare of the Child. Moreover, even though the European Convention on Human Rights and Fundamental Freedoms does not contain a specific norm that expressly embodies the right to a name, the European Court has established that this right is protected in the provision contained in Article 8 of this Convention on the protection of private and family life, when it stated that:

> Article 8 does not contain any explicit reference to names. Nonetheless, since it constitutes a means of personal identification and a link to a family, an individual's name does concern his or her private and family life.[18]

161. This Court considers that the scope of the protection of the right to a name embodied in Article 18 of the Convention exceeds the State's obligation to ensure the adequate conditions for a person to be duly registered as soon as they are born. The State must also adopt the necessary measures to preserve the given name and surname with which a person has been registered and, should there have been any alteration or modification, it has the obligation to re-establish the given name and surname with which the person was originally registered, if applicable.

162. In this regard, the Court observes that the State has not determined the fate of the sisters, Ernestina and Erlinda Serrano Cruz, whether they are alive, or whether they know their real name and identity, even though their next of kin have resorted to the State authorities to request an investigation. Ernestina and Erlinda's mother and siblings have requested the State to respond to them, in order to know the truth of what happened to Ernestina and Erlinda, and El Salvador has not provided them with any relevant information. In this regard, the Court declared that Articles 8(1) and 25 of the Convention had been violated owing to the lack of a diligent investigation and to violation of the principle of reasonable time.

163. El Salvador told the Inter-American Commission and the Court that the sisters, Ernestina and Erlinda, had been abandoned by their parents and handed over to the Red Cross, and has even questioned their existence. Nevertheless, given the proven fact that many of the children who entered children's homes during the armed conflict lacked identity documents and were therefore frequently registered in the mayors' offices with the given name and surnames of those who had brought them up or of a fictitious person in order to register the child (*supra* para. 48(11)), the Court observes that it is possible that, if they are alive, the sisters have a

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[18] *Cf. Stjerna v. Finland*, judgment of 25 November 1994, Series A, n. 299-B, p. 60, § 37; *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24.

different given name and surname to that assigned by their parents, and it is even possible that they have changed nationality.

164. As has been shown (*supra* para. 48(6)), around 246 cases of children who disappeared during the armed conflict have been resolved. Nevertheless, the Court has noted with concern that the efforts to trace them and the results achieved were not based on State initiatives, but were due fundamentally to the activities of the *Asociación Pro-Búsqueda* and the next of kin of the disappeared persons (*supra* paras. 48(2) and 48(6)). The Committee on the Rights of the Child ruled on this lack of State participation (*supra* para. 154).[19]

165. The Ombudsman's Office came to a similar conclusion in its resolution of September 2, 2004, when it stated that:

> [...] some [... disappeared] children have been found owing to the permanent efforts of their next of kin with the support of the *Asociación Pro-Búsqueda,* but not of the Salvadoran State, because the latter has not made the least effort to investigate or[,] at least, facilitate free access to documents and records in order to trace them;
>
> [...] it has made practically no effort to return the children who disappeared in the context of the armed conflict or make reparation to them or their next of kin. This burden has been borne by non-governmental organizations, particularly the *Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos*, which has been working in this area for ten years.

166. The children who disappeared during the domestic armed conflict were found alive in different situations; for example, integrated into a family in El Salvador or abroad, either by legal adoption (formal adoption) or *de facto* adoption or appropriated by civilians or members of the Army, and also in orphanages (*supra* para. 48(6)). It has been shown that children have been found in El Salvador and in 11 countries of the Americas and Europe. The *Asociación Pro Búsqueda* is investigating 126 cases of international adoptions, and also cases of alleged victims of the illicit trafficking of children (*supra* para. 48(6)).

167. The situations described make the search process very complex. The State and its institutions should perform it very diligently, bearing in mind that the Serrano Cruz sisters, who could be in any of the situations described above, may be living with different given name and surnames and nationality. It is also feasible that they are completely oblivious of their family relations and know nothing of the search undertaken by their mother and siblings (*supra* para. 48(83)). In this regard, the Court considers it essential that El Salvador start to try and trace Ernestina and Erlinda using all possible investigative techniques and not merely using their given name and surnames, or only approaching the institutions they contacted during the criminal proceedings and the *habeas corpus* procedure.

168. In this regard, as the Court has stated, it is probable that Ernestina and Erlinda are alive, as in the case of other children who have been traced, and who disappeared during the 1982 "*guinda de mayo*" (*supra* para. 48(8)). This makes the obligation to re-establish the names of the Serrano Cruz sisters particularly important, should this be applicable and should they so wish.

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[19] U.N. Committee on the Rights of the Child. Examination of the reports presented by the State parties under Article 44 of the Convention. Concluding observations on El Salvador of June 30, 2004. CRC/C/15/Add.232, para. 31.

169. The Court considers that, while what happened to the Serrano Cruz sisters and their whereabouts have not been determined, they cannot be aware of their real given name and surnames and, consequently, their family relations. This places the State in a position where it has the obligation to carry out a search encompassing all the different situations in which the Serrano Cruz sisters may be.

170. Furthermore, the right to a name includes the right of the next of kin to recognition of the relationship linking them to Ernestina and Erlinda Serrano Cruz, and this persists even after death. For the family, the given name and surnames that the parents gave them when they were born signify recognition of their family relations. By violating Ernestina and Erlinda's right to a name and questioning their very existence, the State denies their relationship to their next of kin.

171. The Court also observes that, in defending itself in the proceedings before the Inter-American Court, the State has alleged the possible inexistence of the sisters, Ernestina and Erlinda Serrano Cruz, "combined with the financial interest" of their mother. At the same time, during the criminal proceedings before the Chalatenango Trial Court, it appears that the prosecutor's requests and the judge's actions were addressed at investigating the identity and existence of Ernestina and Erlinda Serrano Cruz (*supra* para. 48(68) to 48(77)). To this end, the judge, at the request of the prosecutor, ordered several expert appraisals to be carried out to verify the authenticity of the baptismal records of Ernestina and Erlinda Serrano Cruz kept by the Catholic Church, even though, in addition to these records, their births were registered in the Registry Office. While the Special Transitory Law to establish the civil status of undocumented persons affected by the conflict was in force, Mrs. Cruz Franco registered her daughters, Ernestina and Erlinda Serrano Cruz, in the respective mayors' offices (*supra* para. 48(10)), under the first names that she and her husband had chosen when her daughters were born and the last names of their parents.

172. In its preamble, this law recognizes that "the violence experienced by El Salvador for more than ten years gave rise to the emigration of Salvadorans to other countries, which prevented the establishment of their usual necessary and correct filiation and registration in the registry offices." Consequently, Article 4 of this law established that "[t]he registry office registrations and the certifications issued under [the said] law [by] the respective heads of the registry office or [by] the municipal mayors, w[ould] have the effects established in the Civil Code and other laws." Therefore, the State has not accorded the appropriate legal effects to the civil registrations of Ernestina and Erlinda.

173. The Court has noted that, by changing the course of the investigation in the criminal case before the Chalatenango Trial Court (*supra* para. 48(68) to 48(77)), the prosecutor and the judge of the criminal case being heard in this court only summoned to testify those persons who had stated they did not know of the existence of the sisters, Ernestina and Erlinda Serrano Cruz. However, they failed to summon those persons who had stated before the Ombudsman's office that they knew these sisters. In this regard, that Office mentioned the testimony of four persons who stated they knew Ernestina and Erlinda Serrano Cruz, including that of Felicita Franco, given on February 17, 2004, stating that she attended Mrs. Cruz Franco during Ernestina's birth. The representatives also presented the sworn written statement made by Felicita Franco before notary public on December 11, 2003, as an attachment to their written arguments on preliminary objections (*supra* para. 6).

In this regard, in its "Report [...] on the forced disappearance of the children, Ernestina and Erlinda Serrano Cruz, its current impunity and the pattern of violence in which these disappearances occurred" of September 2, 2004, the Ombudsman's Office stated that:

> [...] given the actions of the prosecutor and the judge, which attempted to disprove the existence of the sisters, Ernestina and Erlinda Serrano Cruz, and attribute a pecuniary motive to their mother, María Victoria Cruz Franco; notwithstanding that, since it began hearing the case in 1996, this Institution has considered their existence indisputable[.]

174. The State has not only doubted the authenticity of the information in the documents issued by the respective parishes, but also, by questioning the very existence of the sisters, it has raised doubts about whether they have the given name and surnames that their parents gave them when they were born, with which they were registered in the respective mayors' offices by their mother and with which, according to the latter and their siblings, they were known by their family and social circles. The right to a name grants a person individual subjectivity, and his or her place in society. Taking away a name, by denying it, results in a direct and constant affecting of the right to identity, which will only cease when a person recovers their name and, with it, part of their identity.

175. In view of the foregoing, the Court considers that the State has questioned the existence of the sisters, Ernestina and Erlinda Serrano Cruz, has not adopted the necessary measures to determine their whereabouts and re-establish their given name and surnames, or given them the possibility of doing so. Also, the State has denied the relationship of the next of kin with Ernestina and Erlinda, and has not carried out a diligent investigation that would allow the next of kin to know the truth about what befell Ernestina and Erlinda Serrano Cruz and their whereabouts.

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176. Family relations and co-existence, and also the given name and surnames of a person, are essential for forming and preserving the identity of the individual. These elements of the right to identity are essential for both the children and the adult members of a family, given that the identity of each of the members affects and has an influence on that of the others, and also on their relationship with society and with the State.

177. The State is obliged to adopt all necessary measures to discover the fate of the Serrano Cruz sisters and to re-establish their given name and surnames, or to grant them the possibility of doing this, so that they know the truth about their origins, their history, their nationality, who their parents were, and their existing family relations, which could be re-established, even if the sisters are abroad. In this regard, the Court considers it essential that the State adopt all necessary measures to ensure that, should they be found alive, the Serrano Cruz sisters are informed that their mother was looking for them until she died and that their living siblings are still trying to find them (*supra* para. 48(83)).

178. In view of the foregoing, the Court considers that El Salvador has violated the right to identity of Ernestina and Erlinda Serrano Cruz and of their next of kin, by violating the rights to the protection of the family and to a name, because it did not adopt appropriate measures to trace and find Ernestina and Erlinda Serrano Cruz and, should they be found alive, ensure their reunification with their next of kin and their recovery of their family relations, and also, if applicable and should they so

wish, re-establishment of the given name and surnames given to them by their biological family. Also, the State has not conducted a diligent investigation that would allow the next of kin to know the truth about what happened to Ernestina and Erlinda Serrano Cruz and their whereabouts.

179. Furthermore, the Court observes that the State should have taken into account the specific circumstances of Erlinda Serrano Cruz, following El Salvador's acceptance of the Court's jurisdiction, given that the specific obligations arising from Article 19 of the Convention are added to the general obligations of protection, because, in June 1995, Erlinda would have been 17 or 18 years old.

180. Consequently, the Court considers that the State has violated Articles 17 and 18 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Ernestina and Erlinda Serrano Cruz and of their next of kin, and also Article 19 of this treaty in relation to the preceding article, to the detriment of Erlinda Serrano Cruz.

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7. In my opinion, if the Court had ruled as stated above on the violation of Articles 17, 18 and 19 of the Convention, it would not have lost the historical opportunity of referring to the right to an identity, which is being developed progressively by international human rights law, in a case such as this one, in which both Ernestina and Erlinda Serrano Cruz and their family represent just one example of the problem of the loss of the right to identity, because the rights to the protection of the family and to a name have been violated.

8. Finally, I consider it important to emphasize that, despite the lack of concern that the State has shown over all this time with regard to the adoption of effective measures to try and trace and find those who disappeared during the armed conflict, I retain the hope that El Salvador will comply with the commitment that it made before the Court during the public hearing and in its final written arguments in this case, when it stated that it would make every effort to investigate what happened to Ernestina and Erlinda, to trace them, to determine their whereabouts, and to identify those responsible for what happened to them through a judicial investigation and "by an investigation into the facts," and will also implement its "firm decision" to "promote the reunification of the Salvadoran families who were separated as a result of this conflict, in order to know the truth." If the State complies with these commitments that it assumed before the Court, it will help the disappeared persons and their next of kin recover their identity and, should they be found alive, it will lead to their subsequent reunification and to the recovery of family relations, as well as, if applicable, to the re-establishment of the given name and surnames assigned to them by their biological families, which will have a beneficial impact on Salvadoran society as a whole.

Manuel E. Ventura Robles
Judge

Pablo Saavedra Alessandri
Secretary