

## Inter-American Court of Human Rights

### Case of Trujillo-Oroza v. Bolivia

Judgment of February 27, 2002

*(Reparations and Costs)*

In the Trujillo Oroza case,

the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court") composed of the following judges\*:

Antônio A. Cançado Trindade, President  
Alirio Abreu Burelli, Vice President  
Hernán Salgado Pesantes, Judge  
Oliver Jackman, Judge  
Sergio García Ramírez, Judge  
Carlos Vicente de Roux Rengifo, Judge, and  
Charles N. Brower, Judge *ad hoc*;

also present,

Manuel E. Ventura Robles, Secretary, and  
Pablo Saavedra Alessandri, Deputy Secretary,

in accordance with Articles 29, 55, 56 and 57 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure")\*\*, in relation to Article 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and in compliance with the third operative paragraph of the judgment of January 26, 2000, delivers this judgment on reparations.

#### I COMPETENCE

1. As established in Articles 62 and 63(1) of the Convention, the Court is competent to decide on reparations, costs and expenses in the instant case, because the State of Bolivia (hereinafter "the State" or "Bolivia") has been a State Party to the American Convention since July 19, 1979, and acknowledged the obligatory jurisdiction of the Court on July 27, 1993.

#### II

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\* Judge Máximo Pacheco Gómez advised the Court that, owing to circumstances beyond his control, he would be unable to attend the fifty-fourth regular session of the Court; therefore, he did not take part in the deliberation and signature of this judgment.

\*\* Pursuant to the order of the Court of March 13, 2001, on Transitory Provisions to the Rules of Procedure of the Court, in force since June 1, 2001, this judgment on reparations is delivered in the terms of the Rules of Procedure adopted in the order of the Court of September 16, 1996.

## **BACKGROUND**

2. This case was submitted to the Court by the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission"), in an application dated June 9, 1999.

3. On September 8, 1999, the State submitted its brief on preliminary objections and, on January 21, 2000, it forwarded a communication in which it advised that "it ha[d] decided to withdraw the preliminary objections to [the] application that it had filed, because the Government of the Republic wished to reach a friendly settlement with the victim's next of kin." It also requested the Court to pronounce judgment to "conclude this stage and open the reparations stage."

4. In an order of January 25, 2000, the Court decided:

1. To consider that the preliminary objections filed by the State of Bolivia had been withdrawn.

2. To continue with the proceeding on the merits of the case and, to this end, to change the purpose of the public hearing on preliminary objections convened by the President of the Court in an order of December 6, 1999, so as to consider other aspects of the brief submitted by the State of Bolivia on January 21, 2000.

5. On January 25, 2000, the said public hearing was held, at which time Bolivia acknowledged the facts presented by the Commission in Section III of its application. Likewise, the State acknowledged its international responsibility in the instant case and accepted the juridical consequences arising from the facts mentioned.

6. On January 26, 2000, the Court delivered judgment on the merits of the case, deciding:

1. To accept the acquiescence to the facts and the acknowledgement of responsibility made by the State.

2. To declare, in accordance with the terms of the State's acknowledgement of responsibility, that it violated the rights protected by Articles 1(1), 3, 4, 5(1) and 5(2), 7, 8(1) and 25 of the American Convention on Human Rights.

3. To open the reparations proceeding and authorize the President to adopt the corresponding measures.

## **III**

### **PROCEEDING AT THE REPARATIONS STAGE**

7. On January 27, 2000, the President of the Inter-American Court (hereinafter "the President"), in compliance with the provisions of the third operative paragraph of the judgment on merits, decided:

1. To grant the victim's next of kin or relatives, the Inter-American Commission on Human Rights and the State of Bolivia 60 days from the notification of the [...] order to submit their arguments and the evidence at their disposal for the determination of reparations.

2. To summon, in due time, the victim's next of kin or representatives, the Inter-American Commission on Human Rights and the State of Bolivia to a public hearing, once the written stage of the proceeding has been concluded.

8. The State submitted three briefs on February 3 and 16 and March 1, 2000, respectively, in which, among other matters, it indicated that the “friendly settlement was impeded by the victim’s mother”, and attached a video.

9. On March 15 and 27, 2000, the Center for Justice and International Law (hereinafter “CEJIL”), as the representative of the victim and his next of kin, and the Inter-American Commission, respectively, requested the Court to allow a 30-day extension for the presentation of their arguments and evidence relating to reparations. These extensions were granted on April 27, 2000.

10. On April 26, 2000, the Commission presented its brief on reparations.

11. On April 27, 2000, CEJIL, representing the victim and his next of kin, presented a brief on reparations.

12. On April 27, 2000, the State presented its brief on reparations.

13. On May 11, 2000, the State presented a brief with which it forwarded copies of documents relating to the “draft law that is being processed before the Congress of Bolivia, which punishes the forced disappearance of persons and also states that there is no statute of limitations for this crime.”

14. On August 31, 2000, Bolivia advised the Court that it had substituted Gastón Ríos Anaya as deputy agent in the case and had appointed Iván Alemán to replace him<sup>1</sup>.

15. On March 16, 2001, the State presented a brief to which it attached a copy of “the latest measures taken in the legal proceedings underway in [the] Trial Court of Santa Cruz, Bolivia, against those accused of having committed various crimes against José Carlos Trujillo”.

16. On June 19, 2001, the President issued an order in which he summoned the parties to a public hearing to be held at the seat of the Inter-American Court of Human Rights on September 6, 2001, to hear the arguments in order to determine reparations.

17. On August 14, 2001, CEJIL and the Commission requested the Court to allow Gladys Oroza de Solón Romero, the victim’s mother, to be “heard as a witness” at the public hearing on reparations. The same day, the Secretariat transmitted a copy of these briefs to the State and granted it until August 21, 2001, to submit its observations on the said request. On August 21, 2001, Bolivia advised that “it [had] no objection to the appearance of Gladys Oroza de Solón Romero”.

18. On August 27, 2001, the President issued an order in which, in exercise of the powers conferred by Article 44(1) of the Rules of Procedure, he decided to summon Mrs. Oroza de Solón Romero to give testimony at the public hearing that had been convened (*supra* para. 16).

19. On September 6, 2001, the Court held a public hearing on reparations.

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<sup>1</sup> In this respect, *cf. Trujillo Oroza case*. Judgment of January 26, 2000. Series C No. 64, paras. 23 and 26.

There appeared before the Court:

for the Center for Justice and International Law (CEJIL), representing the victim and his next of kin:

Viviana Krsticevic, and  
Maria Clara Galvis Patiño

for the Inter-American Commission:

Domingo Acevedo, delegate, and  
Milton Castillo Rodríguez, lawyer

for the State of Bolivia:

Ambassador Jorge Monje Zapata, and  
Fabián Volio Echeverría, agent.

The witness summoned by the Inter-American Court of Human Rights (Article 44(1) of the Rules of Procedure):

Antonia Gladys Oroza de Solón Romero.

20. On October 3, 2001, in view of the questions that the Court had asked the State during the public hearing on reparations, and on the instructions of the President, the Secretariat asked the representatives of the victim and his next of kin, the Commission and the State whether the ordinary criminal legislation in force in Bolivia contained provisions regarding statutes of limitations to the punitive powers of the State, with regard to conduct that constituted crimes of a continuous or permanent nature, and whether, under Bolivian legislation, there was any procedure conducive to the reclassification of a crime that was currently classified as a specific criminal offense; more specifically, whether the crime of homicide could be reclassified as the crime of forced disappearance of persons. It granted the parties until November 1, 2001, to present this information.

21. On October 9, 2001, on the instructions of the President and pursuant to Article 44 of the Rules of Procedure, the Secretariat granted Bolivia a non-extendible period until October 29, 2001, to present various documents as evidence to help it make a more informed decision<sup>2</sup>.

22. The same day, on the instructions of the President in view of the authority given to him by the Court, and pursuant to Article 44 of the Rules of Procedure, the Secretariat granted until October 29, 2001, without the possibility of an extension,

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<sup>2</sup> The information requested referred to: life expectancy in Bolivia, by age, for the period from 1972 to date, issued by the appropriate competent authority; the evolution of the minimum wage in Bolivia, from 1972 to date, issued by the appropriate competent authority; the evolution of the minimum wage of an "office worker" in Bolivia, from 1972 to date, issued by the appropriate competent authority; the average salary of a philosophy professional in Bolivia during his first five working years, in 1972 and currently, issued by the appropriate competent authority; whether the Bolivian legislation contained any labor-related provisions establishing the right to a bonus payment or allowance, such as, for example, what in some legislation, is the right to receive a Christmas bonus, issued by the appropriate competent authority; and the official exchange rate in Bolivia of local currency in relation to the United States dollar for the period from 1972 to date, issued by the Central Bank of Bolivia.

for the representatives of the victim and his next of kin to forward the documentation that confirmed the amounts of money that the family of José Carlos Trujillo Oroza (hereinafter "José Carlos", "the victim" or "Mr. Trujillo Oroza") allegedly failed to perceive, because they devoted their time to searching for him, as evidence to help it make a more informed decision.

23. On October 23, 2001, the Commission presented a brief in which it requested an extension until November 15, 2001, to present the information on the two questions that the Court had asked the State during the public hearing on reparations (*supra* para. 20). The requested extension was granted to the Commission, to the representatives of the victim and his next of kin, and to the State.

24. On October 29, 2001, Gladys Oroza de Solón Romero, the victim's mother, presented a brief on reparations in the instant case.

25. On October 29, 2001, CEJIL, representing the victim and his next of kin, forwarded a brief in which it referred to the information requested on the amounts of money that the family of José Carlos Trujillo Oroza allegedly failed to perceive because they devoted their time to searching for him (*supra* para. 22). In this respect, it indicated that "the family [of José Carlos Trujillo Oroza] does not have documentation showing the earnings they failed to perceive during the past thirty years", and therefore requested the Court "that it should establish in fairness the value of the pertinent compensation under this heading." Also, with regard to Gladys Oroza de Solón Romero, it indicated that "one of the consequences of her untiring search was the loss of the position she occupied", so that she retired "with a monthly income of 150 dollars", while if "she had retired from the position she had at that time, as a teacher at the teacher training school (*Escuela Normal*), her pension would have been about 3,000 Bolivian [pesos], which amounts to approximately 500 dollars." It also attached documents related to the information requested from the State as additional evidence (*supra* para. 21). On November 16, 2001, CEJIL presented the original of the said brief and its attachments.

26. On October 30, 2001, the State presented a brief to which it attached some of the documents requested as additional evidence (*supra* para. 21). It also forwarded information on "the criminal laws relating to the extinguishment of the criminal action and to the possibility of reclassifying the crime of homicide as the crime of forced disappearance of persons." On November 19, 2001, it forwarded the originals of some of the previous documents.

27. On November 9, 2001, after evaluating the documentation forwarded by the State, the Secretariat granted it until November 23, 2001, to present the following information: description of the post of teacher-training teacher or professor; requirements for the post and specific allowances, if any, as well as any bonuses in force under Bolivian labor legislation; also, how to interpret the table entitled "*Bolivia: evolución del salario mínimo legal por fecha de promulgación y vigencia, 1991-2000*" [Bolivia: evolution of the minimum legal wage by date of promulgation and period in force, 1991-2000], presented by the State with the brief of October 30 mentioned in the previous paragraph, with regard to whether the total amount indicated by year in the column corresponding to the minimum legal wage referred to the minimum wage by month, fortnight, week or hour. The Secretariat also repeated to the State that it should submit information on the evolution of the

minimum wage of an office worker in Bolivia from 1972 to 1981, issued by the appropriate competent authority, as additional evidence.

28. On November 6, 2001, CEJIL, representing the victim and his next of kin, forwarded a brief in which it requested an extension until November 23, 2001, to present the information requested by the Secretariat regarding the questions that the Court had asked the State during the public hearing on reparations (*supra* para. 20). An extension was granted until November 21, 2001.

29. On November 15, 2001, the Commission forwarded a brief in which it referred to the information on the questions that the Court had asked the State during the public hearing on reparations (*supra* para. 20). In this brief, it stated that "considering the questions raised by the Honorable Court refer to Bolivia's domestic legislation, the Commission understands that it is primarily the State who should respond to such questions" and requested that "it establish a period for making observations on the State's reply, once this had been presented." It also made "some comments on [... the] obligation [of Bolivia] to diligently investigate, prosecute and punish those responsible for the illegal detention, torture and forced disappearance of José Carlos Trujillo Oroza, [...] in view of the most recent actions of the State's domestic jurisdictional organs."

30. On November 22, 2001, CEJIL referred to the issues raised concerning the questions that the Court had asked the State during the public hearing on reparations (*supra* para. 20).

31. On November 27, 2001, the State presented a brief with which it attached a copy of constitutional judgment N° 1190/01-R issued by the Constitutional Court of Bolivia on November 12, 2001.

32. On November 28, 2001, CEJIL presented two briefs to which it attached a copy of the press communiqué of the Public Relations Unit of the Constitutional Court of Bolivia of November 20, 2001, with regard to judgment N° 1190/01-R issued by that court on November 12, 2001, and some documents relating to the questions that the Court had asked the State during the public hearing on reparations (*supra* para. 20).

#### **IV EVIDENCE**

33. Before examining the evidence received, in this chapter the Court will define the general criteria that it uses to evaluate evidence and will make some observations that are applicable to this specific case, most of which have been developed previously in the jurisprudence of this Court.

34. Article 43 of the Rules of Procedure establishes that:

[i]tems of evidence tendered by the parties shall be admissible only if previous notification thereof is contained in the application and in the reply thereto and, when appropriate, in the document setting out the preliminary objections and in the answer thereto. Should any of the parties allege *force majeure*, serious impediment or the emergence of supervening events as grounds for producing an item of evidence, the Court may, in that particular instance, admit such evidence at a time other than those indicated above, provided that the opposing parties are guaranteed the right of defense.

35. Article 44 of the Rules of Procedure indicates that the Court may, at any stage of the proceedings:

1. Obtain, on its own motion, any evidence it considers helpful. In particular, it may hear as a witness, expert witness, or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant.
2. Request the parties to provide any evidence within their reach or any explanation or statement that, in its opinion, may be useful.
3. Request any entity, office, organ or authority of its choice to obtain information, express an opinion, or deliver a report or pronouncement on any given point. The documents may not be published without the authorization of the Court.

[...]

36. According to the constant practice of the Court, during the reparations stage, the parties must indicate the evidence that they will offer on the first occasion granted to them to make a written statement. Moreover, the exercise of the Court's discretionary powers, stipulated in Article 44 of its Rules of Procedure, allows it to request the parties to provide additional elements of evidence to help it make a more informed decision; however, this does not grant the parties another opportunity to expand or complete their arguments or offer new evidence on reparations, unless the Court so allows<sup>3</sup>.

37. The Court has also indicated previously that the proceedings before it are not subject to the same formalities as domestic proceedings and that, when incorporating determined elements into the body of evidence, particular attention must be paid to the circumstances of the specific case and to the limits imposed by respect for legal certainty and the procedural equality of the parties<sup>4</sup>. International jurisprudence has upheld the power of the courts to evaluate the evidence according to the rules of sound judicial discretion and has always avoided making a rigid determination of the amount of evidence required to support a judgment<sup>5</sup>.

38. Based on the foregoing, the Court will proceed to examine and evaluate all the elements that make up all the evidence in this case, according to the rule of sound judicial discretion and within the applicable legal framework.

#### A) DOCUMENTARY EVIDENCE

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<sup>3</sup> *cf. Cantoral Benavides case. Reparations* (Article 63(1) American Convention on Human Rights). Judgment of December 3, 2001. Series C No. 89, para. 21; *Cesti Hurtado case. Reparations* (Article 63(1), American Convention on Human Rights). Judgment of May 31, 2001. Series C No. 78, para. 20; and *The "Street Children" case (Villagrán Morales et al.). Reparations* (Article 63(1), American Convention on Human Rights). Judgment of May 26, 2001. Series C No. 77, para. 39.

<sup>4</sup> *cf. Cantoral Benavides case. Reparations, supra* note 3, para. 22; *Cesti Hurtado case. Reparations, supra* note 3, para. 21; *The "Street Children" case (Villagrán Morales et al.). Reparations, supra* note 3, para. 40; and *The "White Van" case (Paniagua Morales et al.). Reparations* (Article 63(1), American Convention on Human Rights). Judgment of May 25, 2001. Series C No. 76, para. 51.

<sup>5</sup> *cf. Cantoral Benavides case. Reparations, supra* note 3, para. 23; *The case of the Mayagna (Sumo) Awas Tingni Community*. Judgment of August 31, 2001. Series C No. 79, para. 88; and *Cesti Hurtado case. Reparations, supra* note 3, para. 21. Similarly, *cf. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, para. 60.

39. When presenting their brief on reparations (*supra* para. 11), the representatives of the victim and his next of kin (CEJIL) included 17 attachments containing 43 documents as evidence<sup>6</sup>. In its brief on reparations (*supra* para. 10), the Commission endorsed the evidence submitted by CEJIL in its said brief.

40. The State included as evidence with its brief on reparations (*supra* paras. 12 and 13) two attachments corresponding to a copy of judicial file No. 14,222 of the Fifth Criminal Trial Court of Santa Cruz, Bolivia, and a partial copy of the legislative file on the draft law which defines the forced disappearance of persons as an offense<sup>7</sup>.

41. The State presented a brief (*supra* para. 15), to which it attached a copy of "the latest actions in the legal proceedings underway in [the] Trial Court of Santa Cruz, Bolivia, against those accused of committing various crimes against José Carlos Trujillo"<sup>8</sup>.

42. The representatives of the victim and his next of kin presented six attachments related to the information requested by the State as additional evidence (*supra* paras. 21 and 25)<sup>9</sup>.

43. As evidence to make a more informed decision (*supra* paras. 20, 21 and 26), the State presented a brief with nine attachments<sup>10</sup>.

44. Bolivia also forwarded constitutional judgment N° 1190/01-R delivered by the Constitutional Court on November 12, 2001 (*supra* para. 31), and two other documents<sup>11</sup>.

45. The representatives of the victim and his next of kin forwarded a copy of the press communiqué of the Public Relations Unit of the Constitutional Court of November 20, 2001 relating to judgment N° 1190/01-R delivered by the Constitutional Court on November 12, 2001 (*supra* para. 32), and as additional evidence, it remitted seven documents contained in seven attachments concerning the questions that the Court had asked the State during the public hearing on reparations (*supra* paras. 20 and 32)<sup>12</sup>.

## B) TESTIMONIAL EVIDENCE

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<sup>6</sup> *cf.* attachments 1 to 17 to the brief on reparations, presented by CEJIL on April 27, 2000 (folios 1 to 65 of the Reparations evidence file).

<sup>7</sup> *cf.* attachments 1 and 2 to the brief on reparations presented by the State on April 27 and May 11, 2000 (folios 66 to 272 of the Reparations evidence file).

<sup>8</sup> *cf.* attachment to the State's brief of March 16, 2001 (folios 181 to 269 of Tome I of the Reparations file).

<sup>9</sup> *cf.* attachments 1 to 6 to the briefs presented by CEJIL on October 29 and November 16, 2001 (folios 347 to 353 and 397 to 433 of Tome II of the Reparations file).

<sup>10</sup> *cf.* attachments 1 to 9 to the brief presented by the State on October 30, 2001 (folios 273 to 1192 of the Reparations evidence file).

<sup>11</sup> *cf.* folios 461 to 472 of Tome II of the Reparations file.

<sup>12</sup> *cf.* folios 478, 479 and 492 to 572 of Tome II of the Reparations file.

46. During the public hearing held on September 6, 2001, the Court received the statement of the person summoned by the Court based on Article 44(1) of its Rules of Procedure. This statement is summarized below:

**Statement by Antonia Gladys Oroza de Solón Romero, mother of the victim, José Carlos Trujillo Oroza**

She is 75 years of age and a retired teacher. José Carlos Trujillo Oroza was her oldest son. In 1971 her family was composed of her husband and her three children; the witness's mother and siblings also formed part of the family. José Carlos studied philosophy at the Universidad Mayor de San Andrés in La Paz. However, when Banzer took office, he closed that university; José Carlos therefore went to live in Santa Cruz.

In 1971, José Carlos Trujillo Oroza was detained by members of the Political Control Department (DOP) and of the Criminal Affairs Department of Santa Cruz and imprisoned in the State prison called El Pari, in Santa Cruz. She found out about the detention of José Carlos on December 31, 1971. The witness lived in La Paz. She traveled to Santa Cruz to see José Carlos and stayed there for several days. The authorities at the Police Station told her that there was no money to feed the prisoners, so she took food to José Carlos every day at lunchtime, but she was only allowed to see him in the afternoon. Moreover, every day she had to go to the Political Control Department to obtain a pass to visit José Carlos. They allowed her to speak to José Carlos for five minutes, she was accompanied by an agent and she was told not to ask him any questions. José Carlos was subjected to many tortures. During one visit, she observed that her son was missing three fingernails. Another day, seeing signs that he had been beaten with something with a sharp edge, probably a wire, she let out a moan of distress and, because of this, they returned José Carlos to his cell, and she was told: "either you control yourself or you will not see your son again." The last day she saw her son, he indicated by signs that she should go to the Red Cross and ask for help.

She last saw José Carlos on February 2, 1972. The authorities gave her various versions of what had happened to the victim. Her son disappeared together with two other people, Carlos López Adrián and Mr. Toledo Rosado. Up until the day of the public hearing before the Court, all three have disappeared; according to Guillermo Elio, Under-Secretary of the Ministry of the Interior at the time of the facts, these three persons were liberated by means of a radiogram.

When searching for her son, she met with various State officials: Guillermo Elio, Under-Secretary of the Ministry of the Interior; Elías Moreno, head of the El Pari prison; Justo Sarmiento Alanés; Percy González; Oscar Menachohaca, and Ernesto Moránt Ligerón, head of the Political Control Department (DOP). Each of them gave her a different version of what had happened to those who had disappeared: they had been liberated, they had been taken to Monero, they had been taken to Paraguay by plane, that she should not worry because everything had been resolved. The head of the DOP, Ernesto Moránt, showed her a memorandum from Guillermo Elio, Under-Secretary of the Ministry of the Interior and told her that José Carlos had been liberated. She was distraught and confused because she did not know what would happen, and she had no information on why José Carlos had been detained; no one would give her an answer and that is what she is seeking. In addition to meeting with the State authorities, she denounced the facts of the disappearance of José Carlos and the other two youths in the media. She went to all the prisons that

existed at the time, to the Political Control Department in La Paz, and she went with her husband to a naval station on Lake Titicaca. She did not file an application for a writ of habeas corpus because several lawyers advised her not to do anything; at that time, habeas corpus was not granted. Furthermore, the father of José Carlos who lived in Paris made complaints at the international level. She has not ceased looking for her son for a single day over the last 30 years, asking that justice be done and trying to establish the truth about the events.

The witness was dismissed from her post in a department of the national teacher training college (*Instituto Normal Superior*), owing to the measures she took to find her son, and had to accept another position of a lower category, which meant that her pension was reduced. The professors of the teacher training college were and still are classified as heads of districts. Currently, a teacher at the teacher training college retires with a pension of three thousand bolivianos, which amounts to approximately five hundred dollars, and a ground-level teacher receives a pension of one hundred and fifty dollars. Her competence did not lessen because of what happened to her son.

Her husband, Walter, always accompanied her in the search for the victim and expressed what had happened to José Carlos in his murals and paintings. During the administration of García Meza her husband was detained and beaten by the authorities. Government agents strictly controlled the life of her family.

What happened to José Carlos changed her life. She became involved in defending human rights, she was a founder of the Permanent Human Rights Assembly, she represented human rights and the Union of Bolivian Women before the Committee for the Defense of Democracy (CONADE). The day of García Meza's coup d'état she was in CONADE and was detained together with all those who were there, she was taken to the stables, beaten and robbed. Everything that happened after the disappearance of her son is related to this disappearance; the witness's family, her siblings and her mother were involved and affected by the disappearance of José Carlos.

In 1982, during the administration of Hernán Siles Suazo, the National Investigative Committee on Disappeared Citizens was organized in La Paz. The witness was a member of this Committee and was also President of the Association of Next of Kin of the Detained-Disappeared. The members of the Committee had no investigative experience; however, an investigation was conducted and, as a result, the remains of 14 persons were found in the La Paz General Cemetery and identified, but the remains of José Carlos were not found. The National Investigative Committee on Disappeared Citizens terminated when the Government of Hernán Siles Suazo ended. Subsequent governments did not create other committees. The overall number of detained-disappeared Bolivians is 154.

In about 1988, Luis Sandoval Morón initiated a lawsuit in Santa Cruz against Percy González, for the assassination of two of his brothers. The witness concurred in this action, requesting that the investigation be expanded to include what happened to José Carlos, since Mr. González was involved in his disappearance. This legal action did not prosper. In 1999, the State of Bolivia, through the Office of the Public Defender, an inappropriate instance, requested that a criminal action be opened on the forced disappearance of José Carlos Trujillo Oroza. The public defender who presented the application brief, Mary Severich, told her that the Office of the Public Defender never requested the opening of a criminal proceeding but, in this case, she

had received an order from the Ministry of Justice and it had even sent her a draft of the corresponding petition. During the investigation, the statements of four accused persons were received and the prosecutor determined that there was insufficient material to open a criminal action. However, Judge Alain Núñez opened the case because he found circumstantial evidence, but for the crime of illegal detention, ill treatment and torture, and not for the crime of forced disappearance. The problem is that, for political reasons, forced disappearance is not included as a crime in Bolivian legislation. Some public officials that the witness mentioned in her statement were investigated during this criminal action; their statements were received. The witness appeared as complainant at the trial. The proceeding was filed; the justification given by Judge Alain Núñez to declare that the action was without merit was that the crime was extinguished. The witness filed an appeal against this decision before the First Chamber and then the Second Chamber of the Superior Court of Santa Cruz. These instances confirmed the judge's decision. On July 27, 2001, she filed an application for amparo before the Superior Court of Santa Cruz, which rejected it. At the time of the public hearing on reparations before this Court, the final instance that remained to her was the Constitutional Court, and she appeared before it. The officials mentioned in her statement have been investigated in cases similar to that of her son. Every day, the witness wakes up thinking about what she can do to find the remains of José Carlos, to find a reply, and to ensure that these events are not repeated.

The State has not apologized to her for the detention and disappearance of her son, José Carlos. She asked the Inter-American Court that a monument should be erected to the memory of José Carlos because this would allow future generations to learn about this part of Bolivia's history and because the next of kin of detained-disappeared persons have the right to perpetuate in some way the memory of the youth who died because they disagreed with the political system.

The draft law on force disappearance has not been adopted and, since 2000, it is before the Constitution and Judicial Police Committee, although no action is being taken.

### *C) EVALUATION OF THE EVIDENCE*

47. The body of evidence in a case is unique and is made up of the evidence submitted at all stages of the proceeding<sup>13</sup>; thus, the evidence provided by the parties at the preliminary objections and the merits stage also forms part of the evidentiary material that will be considered during this stage.

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### *ASSESSMENT OF DOCUMENTARY EVIDENCE*

48. The Court accepts the evidentiary value of those documents submitted by the parties at the appropriate procedural occasion, which were not contested or objected to, and whose authenticity was not questioned.

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<sup>13</sup> *cf. Cantoral Benavides case. Reparations, supra* note 3, para. 34; *the case of the Mayagna (Sumo) Awas Tingni Community, supra* note 5, para. 98; and *The "Street Children" case (Villagrán Morales et al.). Reparations, supra* note 3, para. 53.

49. The documents submitted by the State on October 30, 2001 (*supra* paras. 26 and 43), and those forwarded by CEJIL on November 28, 2001, regarding the questions that the Court had asked the State during the public hearing on reparations (*supra* paras. 32 and 45), are incorporated into the body of evidence in the instant case in application of the provisions of Article 44 of the Rules of Procedure, since they were requested as additional (*supra* paras. 20 and 21).

50. The Court also considers that the documents provided by the State on March 16, 2001 (*supra* paras. 15 and 41) and on November 27, 2001 (*supra* paras. 31 and 44) are useful, as well as the documents submitted by CEJIL on October 29, 2001 (*supra* paras. 25 and 42), and on November 28, 2001 (*supra* paras. 32 and 45), particularly taking into account that these documents were forwarded to the parties and they did not challenge them, object to them or raise any doubts about their authenticity or truth. Consequently, it incorporates them into the body of evidence in the instant case.

51. The State did not present the documentation requested by the Secretariat on November 9, 2001 (*supra* para. 27), as additional evidence. In this respect, the Court observes that the parties should provide the Court with the evidence it requests, whether this is of a documentary or testimonial nature, expert reports or any other type.

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#### ASSESSMENT OF TESTIMONIAL EVIDENCE

52. With regard to the testimony given by Antonia Gladys Oroza de Solón Romero, the Court attaches importance to it, since it is consistent with the purpose of the line of questioning proposed by her legal representatives and by the Commission. It is also important to indicate that the State did not ask Mrs. Oroza de Solón Romero any questions. This Court considers that, since this is the statement of the victim's mother and as she has a direct interest in the case, her testimony cannot be evaluated separately, but as part of all the evidence in the proceeding. It is also important to indicate that, in the case of reparations, the testimonies of the next of kin of the victims are useful, since they can provide greater information about the consequences of the violations perpetrated<sup>14</sup>.

#### V PROVEN FACTS

53. In order to determine the measures of reparation that are in order in this case, the Court will use as a basis the facts set forth in Section III of the Commission's application and accepted by the State when it acknowledged its international responsibility<sup>15</sup>. Furthermore, at this stage of the proceeding, the parties have added elements of evidence to the file that are relevant to determine these measures of reparation. The Court has examined these elements and the arguments of the parties and declares that the following facts are proven:

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<sup>14</sup> *cf. The "Street Children" case (Villagrán Morales et al.). Reparations, supra note 3, para. 55; and The "White Van" case (Paniagua Morales et al.). Reparations, supra note 4, para. 70.*

<sup>15</sup> *cf. Trujillo Oroza case, supra note 1, paras. 2 and 36.*

- a) José Carlos Trujillo Oroza was born on May 15, 1949, illegally detained on December 23, 1971, and seen for the last time on February 2, 1972, in Santa Cruz, Bolivia. At that time, he was approximately 22 years of age<sup>16</sup>;
- b) during his detention, José Carlos Trujillo Oroza was tortured and at the date of delivery of this judgment is disappeared<sup>17</sup>;
- c) at the date of delivery of this judgment, the whereabouts of the remains of José Carlos Trujillo Oroza are unknown<sup>18</sup>;
- d) the life expectancy of a man of approximately 22 years of age in Bolivia for the period from 1970 to 1975 was approximately 42 more years; in other words, a total of about 64 years<sup>19</sup>;
- e) José Carlos Trujillo Oroza was studying the first and second year of philosophy at the Universidad Mayor de San Andrés<sup>20</sup>;
- f) José Carlos Trujillo Oroza's mother is Antonia Gladys Oroza de Solón Romero, his adoptive father or stepfather is Walter Solón Romero Gonzales, and his brothers are Pablo Erick Solón Romero Oroza and Walter Solón Romero Oroza. His adoptive father or stepfather died on July 27, 1999<sup>21</sup>;

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<sup>16</sup> cf. Copy of birth certificate No. 010699 of José Carlos Trujillo Oroza issued on March 27, 2000, by the National Electoral Court, Registry Office, Bolivia (folio 24 of the Reparations evidence file); testimony of Antonia Gladys Oroza de Solón Romero given to the Court on September 6, 2001; copy of the legal file before the Capital's Fifth Criminal Trial Court, Santa Cruz, Bolivia (folios 67 to 246 and 275 to 1143 of the Reparations evidence file); and constitutional judgment N° 1190/01-R delivered by the Constitutional Court on November 12, 2001, deciding on the application for amparo filed by Antonia Gladys Oroza, widow of Solón Romero (folios 461 to 472 of Tome II of the Reparations file).

<sup>17</sup> cf. testimony of Antonia Gladys Oroza de Solón Romero given to the Court on September 6, 2001; copy of the legal file before the Capital's Fifth Criminal Trial Court, Santa Cruz, Bolivia (folios 67 to 246 and 275 to 1143 of the Reparations evidence file); constitutional judgment N° 1190/01-R delivered by the Constitutional Court on November 12, 2001 deciding on the application for amparo filed by Antonia Gladys Oroza, widow of Solón Romero (folios 463 to 472 of Tome II of the Reparations file); and July 1984 report by the National Investigative Committee on the Disappeared (Forced Disappeared) concerning the disappearance of José Carlos Trujillo Oroza (attachment 6 to the application).

<sup>18</sup> cf. testimony of Antonia Gladys Oroza de Solón Romero given to the Court on September 6, 2001; constitutional judgment N° 1190/01-R delivered by the Constitutional Court on November 12, 2001 deciding on the application for amparo filed by Antonia Gladys Oroza, widow of Solón Romero (folios 463 to 472 of Tome II of the Reparations file); application for constitutional amparo filed by Antonia Gladys Oroza widow of Solón Romero on July 27, 2001, before the Superior Court of the Judicial District of Santa Cruz (folios 533 to 558 of Tome II of the Reparations file); and copy of the legal file before the Capital's Fifth Criminal Trial Court, Santa Cruz, Bolivia (folios 67 to 246 and 275 to 1143 of the Reparations evidence file).

<sup>19</sup> cf. table entitled "Bolivia: Esperanza de vida por periodos quinquenales y sexo, según grupos de edad", prepared by the National Statistics Institute (folio 1186 of the Reparations evidence file).

<sup>20</sup> cf. copy of certificate issued by the Director of the Archives of La Paz, attached to the Faculty of Humanities and Educational Science of the Universidad Mayor de San Andrés concerning the courses taken by José Carlos Trujillo Oroza (folio 26 of the Reparations evidence file); testimony of Antonia Gladys Oroza de Solón Romero given to the Court on September 6, 2001; and July 1984 report by the National Investigative Committee on the Disappeared (Forced Disappeared) concerning the disappearance of José Carlos Trujillo Oroza (attachment 6 to the application).

<sup>21</sup> cf. copy of birth certificate No. 010699 of José Carlos Trujillo Oroza, issued on March 27, 2000, by the National Electoral Court, Registry Office, Bolivia (folio 24 of the Reparations evidence file); copy of certificate relating to identity card No. 876483, issued on April 10, 2000, by the National Police Force,

- g) As a result of the facts of the instant case, the victim's mother, Gladys Oroza de Solón Romero, suffered various ailments, and incurred a series of medical expenses in order to treat them<sup>22</sup>;
- h) José Carlos Trujillo Oroza's mother suffered pecuniary and non-pecuniary damage owing to his detention, torture, forced disappearance and death, and due to the continuing impunity in this case<sup>23</sup>;
- i) José Carlos Trujillo Oroza's adoptive father and brothers suffered non-pecuniary damage owing to his detention, torture, forced disappearances and death, and due to the continuing impunity in this case<sup>24</sup>;
- j) José Carlos Trujillo Oroza's next of kin have taken steps to seek the victim and have taken part in pertinent judicial proceedings under domestic law. Subsequently, their representatives resorted to the supervisory bodies of the American Convention, all of which gave rise to various expenses<sup>25</sup>; and

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*National Personal Identification Department, certifying that identity card No. 184936 L.P. corresponds to Antonia Gladys Oroza de Solón Romero (folio 10 of the Reparations evidence file); copy of identity card No. 184936 of Antonia Gladys Oroza de Solón Romero (folio 11 of the Reparations evidence file); copy of death certificate No. 009818 of Walter Solón Romero Gonzales issued by the National Electoral Court, Registry Office, Bolivia (folios 16 and 17 of the Reparations evidence file); copy of certificate of identity card No. 876484 issued on April 10, 2000, by the National Police Force, National Personal Identification Department, certifying that identity card No. 458944 La Paz corresponds to Pablo Erick Solón Romero Oroza (folio 13 of the Reparations evidence file); copy of identity card No. 458944 of Pablo Erick Solón Romero Oroza (folio 14 of the Reparations evidence file); copy of certificate of identity card No. 876485 issued on April 10, 2000, by the National Police Force, National Personal Identification Department, certifying that identity card No. 458950 L.P. corresponds to Walter Solón Romero Oroza (folio 18 of the Reparations evidence file); copy of identity card No. 458950 of Walter Solón Romero Oroza (folio 19 of the Reparations evidence file); and testimony of Antonia Gladys Oroza de Solón Romero given to the Court on September 6, 2001.*

<sup>22</sup> *cf. testimony of Antonia Gladys Oroza de Solón Romero given to the Court on September 6, 2001.*

<sup>23</sup> *cf. testimony of Antonia Gladys Oroza de Solón Romero given to the Court on September 6, 2001; notes of Pablo and Walter Solón Romero Oroza dated April 22 and 24, 2000, respectively (folios 21 and 22 of the Reparations evidence file); constitutional judgment N° 1190/01-R delivered by the Constitutional Court on November 12, 2001 deciding on the application for amparo filed by Antonia Gladys Oroza, widow of Solón Romero (folios 463 to 472 of Tome II of the Reparations file); and application for constitutional amparo filed by Antonia Gladys Oroza widow of Solón Romero on July 27, 2001, before the Superior Court of the Judicial District of Santa Cruz (folios 533 to 558 of Tome II of the Reparations file).*

<sup>24</sup> *cf. testimony of Antonia Gladys Oroza de Solón Romero given to the Court on September 6, 2001; notes of Pablo and Walter Solón Romero Oroza of April 22 and 24, 2000, respectively (folios 21 and 22 of the Reparations evidence file); constitutional judgment N° 1190/01-R delivered by the Constitutional Court on November 12, 2001 deciding on the application for amparo filed by Antonia Gladys Oroza, widow of Solón Romero (folios 463 to 472 of Tome II of the Reparations file); and application for constitutional amparo filed by Antonia Gladys Oroza widow of Solón Romero of July 27, 2001, before the Superior Court of the Judicial District of Santa Cruz (folios 533 to 558 of Tome II of the Reparations file).*

<sup>25</sup> *cf. testimony of Antonia Gladys Oroza de Solón Romero given to the Court on September 6, 2001; copy of the legal file before the Capital's Fifth Criminal Trial Court, Santa Cruz, Bolivia (folios 67 to 246 and 275 to 1143 of the Reparations evidence file); application for constitutional amparo filed by Antonia Gladys Oroza widow of Solón Romero on July 27, 2001, before the Superior Court of the Judicial District of Santa Cruz (folios 533 to 558 of Tome II of the Reparations file); July 1984 report by the National Investigative Committee on the Disappeared (Forced Disappeared) concerning the disappearance of José Carlos Trujillo Oroza (attachment 6 to the application); and supporting documents on expenses (folios 32 to 65 of the Reparations evidence file).*

k) José Carlos Trujillo Oroza's next of kin have been represented before the Commission and the Court by the Center for Justice and International Law (CEJIL)<sup>26</sup>.

## VI BENEFICIARIES

54. The Court will now proceed to determine who should be considered the "injured party" in the terms of Article 63(1) of the American Convention. Since the violations of the Convention that the Court established in its judgment of January 26, 2000, were committed against José Carlos Trujillo Oroza and his next of kin, the latter should be considered to be included in the category of "injured party" and be owed the reparations established by the Court, with regard to both pecuniary damages, if applicable, and non-pecuniary damages.

55. The next of kin of the victim, José Carlos Trujillo Oroza, who were officially recognized by this Court are: his mother, Antonia Gladys Oroza de Solón Romero, his adoptive father or stepfather, Walter Solón Romero Gonzales, and his brothers<sup>27</sup>, Pablo Erick and Walter, both of them Solón Romero Oroza. There is no dispute with regard to the status as beneficiaries of these persons (*supra* para. 53.f). The Court considers that recognizing them this status concords with the jurisprudence of the Court. Moreover, the same persons are also victims of the violation of Articles 5(1), 5.2, 8(1) and 25 of the Convention, as stated in the judgment on merits.

56. The Court has indicated, and repeats, that the right to compensation for the damage suffered by the victims up until the time of their death is transmitted by succession to their heirs. As this Court has stated:

[i]t is a norm common to most legal systems that a person's successors are his or her children. It is also generally accepted that the spouse has a share in the assets acquired during a marriage; some legal systems also grant the spouse inheritance rights along with the children. If there is no spouse or children, private common law recognizes the ascendants as heirs. It is the Court's opinion that these rules, generally accepted by the community of nations, should be applied in the instant case, in order to determine the victims' successors for purposes of compensation<sup>28</sup>.

57. Furthermore, the damage caused to the victim's next of kin or to third parties, owing to the death of the victim, may be claimed in their own right<sup>29</sup>. With regard to these claimants, the *onus probandi* corresponds to them, understanding the term "victim's next of kin" in accordance with Article 2(15) of the Rules of Procedure adopted by the Court in the

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<sup>26</sup> *cf. special power of attorney granted by Gladys Oroza de Solón Romero to Viviana Krsticevic, Raquel Aldana-Pindell, María Claudia Pulido and José Miguel Vivanco (attachment 8 to the application); and actions of the holders of the powers of attorney that appear in the file before the Court.*

<sup>27</sup> *Pablo Erick and Walter, both Solón Romero Oroza, are José Carlos Trujillo Oroza's maternal half-brothers.*

<sup>28</sup> *Aloeboetoe et al. case. Reparations (Article 63(1), American Convention on Human Rights). Judgment of September 10, 1993. Series C No. 15, para. 62. Similarly, cf. The "Street Children" case (Villagrán Morales et al.). Reparations, supra note 3, para. 67; The "White Van" case (Paniagua Morales et al.). Reparations, supra note 4, para. 84; and Neira Alegria et al. case. Reparations (Article 63(1), American Convention on Human Rights). Judgment of September 19, 1996. Series C No. 29, para. 60.*

<sup>29</sup> *cf. The "Street Children" case (Villagrán Morales et al.). Reparations, supra note 3, para. 68; The "White Van" case (Paniagua Morales et al.). Reparations, supra note 4, para. 85; and Castillo Páez case. Reparations (Article 63(1), American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 43, para. 59.*

order of November 24, 2000, which entered into force on July 1, 2001<sup>30</sup>, as a broad concept that includes all those persons linked by a close relationship, including offspring, parents and siblings, who may be considered family members and have the right to receive compensation, provided they satisfy the requirements established by this Court's jurisprudence<sup>31</sup>. The fact that the Court presumes that a person's death results in non-pecuniary damages for his parents and siblings should also be recalled<sup>32</sup>. In the case *sub judice*, the reparation to the next of kin will be examined in the corresponding sections, in accordance with all the evidence that the parties have provided to this Court.

## VII OBLIGATION TO REPAIR

58. In the third operative paragraph of the judgment on merits of January 26, 2000, the Court decided to open the reparations and costs stage. The Court will decide the dispute regarding these matters in this judgment.

59. Article 63(1) of the American Convention is applicable with regard to reparations. It establishes that:

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.

60. As the Court has indicated, Article 63(1) of the American Convention codifies a rule of common law that is one of the fundamental principles of contemporary international law on State responsibility. Thus, when an unlawful act occurs that can be attributed to a State, the latter's international responsibility is immediately engaged for the violation of an international norm, with the resulting obligation to make reparation and to ensure that the consequences of the violation cease<sup>33</sup>.

61. Reparation of the damage caused by the violation of an international obligation requires full restitution (*restitutio in integrum*), whenever possible; this consists in the re-establishment of the previous situation. If this is not possible, as in the instant case, the international court must determine a series of measures which, while guaranteeing the violated rights, repair the consequences of the

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<sup>30</sup> In accordance with Article 2 of the Rules of Procedure adopted by the Court in the order of November 24, 2000, which entered into force on June 1, 2001, the term "next of kin" refers to the immediate family, that is, the direct ascendants and descendants, siblings, spouses or permanent companions, or those determined by the Court, if applicable.

<sup>31</sup> *cf. The "Street Children" case (Villagrán Morales et al.). Reparations, supra note 3, para. 68; The "White Van" case (Paniagua Morales et al.). Reparations, supra note 4, para. 86; and Loayza Tamayo case. Reparations (Article 63(1), American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 42, para. 92.*

<sup>32</sup> *cf. Cantoral Benavides case. Reparations, supra note 3, paras. 37 and 61 a) and d); The "Street Children" case (Villagrán Morales et al.). Reparations, supra note 3, para. 66 and 68; and The "White Van" case (Paniagua Morales et al.). Reparations, supra note 4, paras. 108, 110, 125, 126, 143, 144 and 158.*

<sup>33</sup> *cf. Cantoral Benavides case. Reparations, supra note 3, para. 40; Cesti Hurtado case. Reparations, supra note 3, para. 35; and The "Street Children" case (Villagrán Morales et al.). Reparations, supra note 3, para. 62.*

violations and also establish the payment of an indemnity as compensation for the damage caused<sup>34</sup>. A State may not invoke provisions of domestic law in order to modify or fail to comply with the obligation to make reparation, all aspects of which (scope, nature, forms and determination of the beneficiaries) are regulated by international law<sup>35</sup>.

62. With regard to violation of the right to life and other rights (freedom, humane treatment, a fair trial and judicial protection), since *restitutio in integrum* is not possible and in view of the nature of the right violated, the reparation is made, *inter alia*, pursuant to the practice of international jurisprudence through fair monetary compensation, to which should be added the positive measures taken by the State to ensure that there is no repetition of offending acts, such as those in this case<sup>36</sup>.

63. As the word indicates, reparations consist in measures intended to eliminate the effects of the violations committed. Their nature and amount depend on the damage caused of both a pecuniary and a non-pecuniary nature. Reparations are not supposed to enrich or impoverish the victim or his heirs<sup>37</sup>. In this respect, the reparations established in this judgment must be consistent with the violations found in the judgment on merits delivered by the Court on January 26, 2000 (*supra* para. 6).

## VIII REPARATIONS

64. The Court will now proceed to examine the claims presented by the parties during this stage of the proceeding in order to determine the measures of reparation for pecuniary and non-pecuniary damages and other types of reparation, in accordance with the elements of evidence collected during the different stages of the proceeding and in the light of the criteria established by this Court in its jurisprudence.

### A) PECUNIARY DAMAGE

65. In this chapter, the Court will begin to determine the reparations for pecuniary damage, which presumes loss or harm to the victims' earnings, expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a relation of cause and effect with the facts of the case *sub judice*<sup>38</sup>; to this

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<sup>34</sup> *cf. Cantoral Benavides case. Reparations, supra* note 3, para. 41; *Durand and Ugarte case. Reparations* (Article 63(1), American Convention on Human Rights). Judgment of December 3, 2001. Series C No. 88, para. 25; and *Barrios Altos case. Reparations* (Article 63(1), American Convention on Human Rights). Judgment of November 30, 2001. Series C No. 87, para. 25.

<sup>35</sup> *cf. Cantoral Benavides case. Reparations, supra* note 3, para. 41; *Cesti Hurtado case. Reparations, supra* note 3, para. 34; and *The "Street Children" case (Villagrán Morales et al.). Reparations, supra* note 3, para. 61.

<sup>36</sup> *cf. The "White Van" case (Paniagua Morales et al.). Reparations, supra* note 4, para. 80; *Castillo Páez case. Reparations, supra* note 29, para. 52; and *Garrido and Baigorria case. Reparations* (Article 63(1), American Convention on Human Rights). Judgment of August 27, 1998. Series C No. 39, para. 41.

<sup>37</sup> *cf. Cantoral Benavides case. Reparations, supra* note 3, para. 42; *Cesti Hurtado case. Reparations, supra* note 3, para. 36; and *The "Street Children" case (Villagrán Morales et al.). Reparations, supra* note 3, para. 63.

<sup>38</sup> *cf. The "White Van" case (Paniagua Morales et al.). Reparations, supra* note 4, paras. 99 and 169; and *Castillo Páez case. Reparations, supra* note 29, para. 76.

end, it will establish a compensatory amount that seeks to indemnify the patrimonial consequences of the violations determined in the judgment of January 26, 2000.

*Arguments of the representatives of the victim and his next of kin*

66. The representatives of the victim and his next of kin requested that Bolivia should compensate José Carlos Trujillo Oroza's next of kin. In this respect, they indicated that:

a) the expenses that Gladys Oroza de Solón Romero and Walter Solón Romero incurred over a period of 28 years while trying to find their son and see that justice was done at both the domestic and the international level should be taken into consideration when calculating the consequential damage<sup>39</sup>. Also, the expenses and costs of the medical treatment required, owing to Mrs. Oroza de Solón Romero's ailments resulting from the detention-disappearance of her son, the impunity of the acts and the uncertainty about the whereabouts of the victim's remains should be reimbursed<sup>40</sup>. The total amount requested corresponds to US\$27,000.00 (twenty seven thousand United States dollars);

b) the fact that José Carlos Trujillo Oroza was 22 years of age at the time of the facts and was a third-year philosophy student with the hope of becoming a professor and a writer should be taken into consideration when calculating the victim's loss of earnings. They believe that it was probable and realistic that, when the victim had obtained his degree, he would have worked full-time, in better-paid areas, and received a higher salary than the minimum monthly wage in Bolivia. Based on the fact that the average life expectancy in Bolivia is 62.5 years, and considering that he would have received his degree in philosophy within two years and started to work at 24 years of age, and based on "the approximately 38 years of life as a professional that remained", CEJIL calculated a total of US\$153,900.00 (one hundred and fifty three thousand, nine hundred United States dollars) for the item loss of earnings<sup>41</sup>. Moreover, it indicated that it is not correct, as the State has asserted, that it used "the current salary for the 30 years since the disappearance of José Carlos" in its calculations; rather, it reduced by 50%, the salary of a full-time teaching professional with 20 years seniority on which it based the calculations – from US\$900.00 (nine hundred United States dollars) to US\$450.00 (four hundred and fifty United States dollars) – in order to "calculate the salary as a constant salary during the last 30 years." Should the Court appoint an expert to make the calculations, it requested that

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<sup>39</sup> According to the representatives, the expenses requested include six visits to Santa Cruz (US\$2,000.00), two trips to Washington, D.C. (US\$3,100.00), one trip to Costa Rica (US\$1,300.00), and international telephone calls, faxes, copies and mail relating to the case before the Commission and the Court, as well as measures taken in Bolivia (US\$2,000.00).

<sup>40</sup> According to the representatives, the expenses requested include doctors' visits and treatment for the stress that this has caused (US\$18,600.00).

<sup>41</sup> CEJIL calculated the loss of earnings amount as follows: using a base salary of US\$900.00 divided in half, which gives US\$450.00 as the average salary of a philosopher in Bolivia in 2000; for 456 months, this would amount to US\$205,200.00 less 25% of the total, US\$51,300.00, for personal expenses.

US\$900.00 (nine hundred United States dollars) should be considered the current salary; and

c) that one of the consequences of the untiring search for José Carlos Trujillo Oroza carried out by Mrs. Oroza de Solón Romero was the loss of her position, and that if “she had retired from the position that she had at the time, as a teacher at the national teacher training college”, her pension would have equaled approximately US\$500.00 (five hundred United States dollars), while, owing to what happened, she retired as a ground-level teacher with a monthly salary of US\$150.00 (one hundred and fifty United States dollars).

67. Owing to the foregoing, the representatives of the victim and his next of kin consider that the State should pay the amounts indicated in the following table:

<b>Reparation for Pecuniary Damage</b>			
<b>Victim</b>	<b>Consequential damage</b>	<b>Loss of earnings</b>	<b>Financial losses of the victim's mother</b>
José Carlos Trujillo Oroza	US\$8,400.00 <sup>42</sup> US\$18,600.00 <sup>43</sup>	US\$153,900.00	Not quantified
<b>TOTAL</b>	US\$27,000.00	US\$153,900.00	
<b>TOTAL AMOUNT</b>	<b>US\$180,900.00</b>		

68. The said representatives indicated that the total amount of pecuniary reparations “will be deposited in a fund with the name of José Carlos Trujillo Oroza”, to be administered by:

the Permanent Human Rights Assembly of Bolivia (APDHB), the Association of Next of Kin of Detained-Disappeared and Martyrs for National Liberation (ASOFAMD) and the Solón Foundation, representing the family of José Carlos, to finance projects and activities for the defense and promotion of human rights and to grant an annual award with the name of José Carlos Trujillo Oroza.

*The Commission's arguments*

69. The Commission indicated that it agreed with the opinion of the representatives of the victim and his next of kin that compensation should be established for pecuniary damage and added that José Carlos Trujillo Oroza worked part-time as a photographer.

<sup>42</sup> This amount corresponds to the claim for expenses incurred in the search for the victim and in the domestic and international jurisdictions.

<sup>43</sup> This amount corresponds to the claim for expenses incurred for medical treatment received by the victim's mother, Gladys Oroza de Solón Romero.

*The State's arguments*

70. On this item, the State expressed:

a) its offer to pay a total amount of US\$40,000.00 (forty thousand United States dollars) as sole and comprehensive compensation " for all the items requested by CEJIL and the Commission." This compensation is fair, according to Bolivia, because the victim's next of kin "have stated that they do not want money, but rather the punishment of the guilty" "and owing to the constant changes in procedural position" of the next of kin; and

b) with regard to the victim's loss of earnings, there is an error in the method used by CEJIL and the Commission to calculate it, because they backdated the salary of a professional, graduated in philosophy in 2000, to the moment when the disappearance occurred. The correct way would be to take the salary of a graduate of the teacher-training college in 1977, transform it to a constant value in United States dollars and bring it up to date, which "results in US\$29,175.00" (twenty-nine thousand one hundred and seventy-five United States dollars).

*Considerations of the Court*

71. Bearing in mind the information received during this proceeding, the facts considered proven, and its constant jurisprudence, the Court considers that the compensation for pecuniary damage in this case should include the items indicated in this section.

72. The Court bears in mind that some of the facts in the case occurred prior to the dates of the State's ratification of the American Convention and acknowledgement of the Court's obligatory jurisdiction. However, the Court also observes that the defendant State did not raise any objection to the facts of the case being considered as a whole, and with regard to the entire period from 1971 to the date of this judgment. It is also worth recalling that the Constitutional Court of Bolivia indicated (*infra* para. 107) that "unlawful deprivation of freedom or unlawful detention [...] is a permanent crime", that "the extinguishment of permanent crimes should begin to be calculated from the day on which the execution of the crime ceases" and "that the victim has still not recovered his freedom; consequently, the extinguishment has not yet begun to be calculated." In view of the foregoing, the Court will examine and decide on the continued situation of forced disappearance of José Carlos Trujillo Oroza and the consequences of this situation.

73. Taking into account the specific circumstances of the instant case, the Court considers that the State should compensate the victim's next of kin for the amounts that José Carlos failed to perceive from the salary he could have obtained from the time of his graduation in philosophy. To this end, it establishes the amount of US\$130,000.00 (one hundred and thirty thousand United States dollars), considering it adequate in terms of fairness, to be delivered to Gladys Oroza de Solón Romero as José Carlos Trujillo Oroza's successor.

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74. Considering the claims of the parties, all the evidence, the proven facts in the instant case and its own jurisprudence, the Court declares that the compensation for pecuniary damage in this case should also include the following:

a) the various expenses that José Carlos Trujillo Oroza's next of kin incurred in order to investigate his whereabouts, in view of the cover-up of the facts and the failure of the Bolivian authorities to investigate them. These expenses include visits to prisons and public institutions, expenses for travel, principally to Santa Cruz, plane tickets, accommodation, food, payments for telephone calls and other items. With regard to the amounts requested by CEJIL and the Commission for the expenses incurred while processing the domestic proceeding and the proceeding before the inter-American system, the Court will decide on this in the chapter on costs and expenses (*infra* para. 129). In view of the foregoing, the Court considers that it is fair to grant the amount of US\$3,000.00 (three thousand United States dollars) for the concept of the expenses incurred by the victim's next of kin in their search for him;

b) the medical treatment required by Gladys Oroza de Solón Romero, the victim's mother, because she suffered various ailments as a result of the detention-disappearance of her son. However, no elements of evidence were provided quantifying the amount spent on this treatment. Mrs. Oroza's ailments are consistent with the situation of the disappearance of her son, the uncertainty about his whereabouts, the suffering from not knowing the circumstances of his death, and her frustration and impotence in the face of the lack of results of the investigations into the facts conducted by Bolivian public authorities. In view of the foregoing, this Court considers that it is pertinent to grant Gladys Oroza de Solón Romero, in fairness, the amount of US\$20,000.00 (twenty thousand United States dollars) for the concept of medical expenses; and

c) although the issue of the economic losses of José Carlos Trujillo Oroza's mother, Gladys Oroza de Solón Romero, presumably arising from the loss of the position she occupied and the resulting reduction in her pension, was raised during the public hearing, the representatives of the victim and his next of kin did not provide any elements of evidence in this regard, so the Court will not make a decision in this respect.

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75. Based on the foregoing, the Court establishes the following amounts as compensation for pecuniary damage owing to the violations decided in the judgment of January 26, 2000:

<b>Reparation for pecuniary damage</b>			
<b>Victim</b>	<b>Loss of earnings of José Carlos</b>	<b>Expenses incurred in the search for the victim</b>	<b>Medical expenses of the victim's mother</b>

José Carlos Trujillo Oroza	US\$130,000.00	US\$3,000.00	US\$20,000.00
<b>TOTAL AMOUNT</b>	<b>US\$153,000.00</b>		

76. The total amount of compensation indicated in the above table will be delivered to Gladys Oroza de Solón Romero, as the beneficiary of the reparation, both in her capacity of José Carlos Trujillo Oroza's successor (*supra* para. 56) and in her own right.

*B) NON-PECUNIARY DAMAGE*

77. The Court will now consider the harmful effects of the facts of the case that are not of a financial or patrimonial nature. The non-pecuniary damage may include both the sufferings and affliction caused to the direct victims and their next of kin – the impairment of highly significant personal values – and also the changes of a non-pecuniary nature in the lives of the victim or his family. As it is not possible to assign a precise monetary equivalent to non-pecuniary damage, there are only two ways in which it can be compensated, in order to make integral reparation to the victims. First, by the payment of an amount of money or the delivery of goods or services of a significant financial value, which the Court determines by the reasonable application of legal discretion and fairness; and, second, by the execution of acts or civil works of a public nature or with public impact that have effects such as the recovery of the victims' memory, acknowledgement of their dignity, consolation of their next of kin, or dissemination of a message of official disapproval of the respective human rights violations and of commitment to efforts to ensure that they do not happen again<sup>44</sup>. The first aspect of the reparation of non-pecuniary damage will be examined in this section and the second in the following one.

*Arguments of the representatives of the victim and his next of kin*

78. The representatives of the victim and his next of kin indicated that:

a) the non-pecuniary damage suffered by José Carlos Trujillo Oroza, owing to the torture and ill treatment to which he was submitted, is transmitted by succession to his heirs, and is distinct from the damage caused directly to the victim's next of kin. The victim's mother, Gladys Oroza de Solón Romero, is the heir and owner of the non-pecuniary damage that José Carlos suffered up until his death. The representatives of the victim and his next of kin did not quantify this damage;

b) the victim's mother, Gladys Oroza de Solón Romero, his adoptive father, Walter Solón Romero, and his brothers, Pablo Erick Solón Romero Oroza and Walter Solón Romero Oroza, have suffered directly and profoundly owing to the detention, torture and forced disappearance of José Carlos Trujillo Oroza. They requested that the Court should consider that the crime of forced disappearance continues to be committed, and that the uncertainty of the victim's mother and brothers has not ceased, because they still do not

<sup>44</sup> cf. *Cantoral Benavides case. Reparations*, *supra* note 3, para. 53; and *The "Street Children" case (Villagrán Morales et al.)*. *Reparations*, *supra* note 3, para. 84.

know the whereabouts of José Carlos, which causes them suffering and serious distress;

c) with regard to Gladys Oroza de Solón Romero, she has spent the last 30 years seeking justice and the remains of her son. As a consequence, Mrs. Oroza and her family have been the victims of harassment and threats. Gladys Oroza had to see the victim who showed signs of torture when he was detained in the El Pari prison and felt impotent in the face of the State's evasive and contradictory responses. The permanent distress she has endured since 1971 has affected her health, and she has had to receive continuous medical treatment to control her emotional stress level. They claim a compensation of US\$100,000.00 (one hundred thousand United States dollars) for the prolonged suffering;

d) in the case of Walter Solón, he assumed responsibility for bringing up José Carlos Trujillo Oroza when the latter was three years of age; and he was also a good friend and mentor to the victim. After José Carlos Trujillo Oroza disappeared, he devoted himself to providing moral and financial support to Gladys Oroza de Solón Romero in all her efforts to see that justice was done and recover the remains of her son. Accordingly, they claim a compensation of US\$50,000.00 (fifty thousand United States dollars). Since Walter Solón is now dead, they request that this amount should pass to his heirs, in accordance with the respective Bolivian legislation;

e) with regard to Pablo Erick and Walter, both of them Solón Romero Oroza, they were 15 and 12 years of age, respectively, when their elder brother was detained and disappeared and, at such a young age, they found it very difficult to cope with what happened. In addition to their own suffering, they were affected by their mother's suffering. As adults, they have supported their mother in her efforts to see that justice is done and to discover the truth. Compensation of US\$50,000.00 (fifty thousand United States dollars) is claimed for each of them, for the suffering they endured; and

f) reparation for the forced disappearance of José Carlos Trujillo Oroza should not be limited to compensation for the loss of earnings, the consequential damage and the non-pecuniary damage suffered by the victim's next of kin, because none of these items compensates the value of life itself. There is a value that can be attributed to the life of each person that transcends these items, from which is derived a right that is distinct from the rights of the next of kin, and violation of this right gives rise to an independent obligation to repair. The guarantee of the right to life embodied in the Convention requires that this be granted an autonomous value. They requested that Bolivia should grant compensation to José Carlos Trujillo Oroza's mother and brothers for the violation of his right to life, and established a symbolic value of US\$100,000.00 (one hundred thousand United States dollars).

79. In view of the foregoing, the representatives of the victim and his next of kin consider that the State should pay the amounts indicated in the following table:

<b>Reparation for non-pecuniary damage</b>
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<b>Victim and his next of kin</b>	<b>Non-pecuniary damage</b>	<b>Violation of the right to life</b>
José Carlos Trujillo Oroza	Not quantified	US\$100,000.00
Gladys Oroza de Solón Romero	US\$100,000.00	
Walter Solón Romero Gonzales	US\$50,000.00	
Pablo Erick Solón Romero Oroza	US\$50,000.00	
Walter Solón Romero Oroza	US\$50,000.00	
TOTAL	US\$250,000.00	US\$100,000.00
<b>TOTAL AMOUNT</b>	<b>US\$ 350,000.00</b>	

*The Commission's arguments*

80. The Commission expressed its agreement with the criteria used by the representatives of the victim and his next of kin to establish compensation for non-pecuniary damage.

*The State's arguments*

81. The State declared:

- a) that it had sent an official note to the victim's mother acknowledging the facts and apologizing for what had happened. This document shows that the State has given full moral satisfaction to the victim's next of kin;
- b) that the use of the case for political ends, outside the sphere of the proceeding, invalidates the claims for non-pecuniary damage in the application; and
- c) that it offers to pay the total amount of US\$40,000.00 (forty thousand United States dollars) as sole and comprehensive compensation "under all the headings requested by CEJIL and by the Commission." This compensation is fair, according to Bolivia, because the victim's next of kin "have declared that they do not want money, but rather the punishment of those responsible", "and because of the constant changes in procedural position" of the said next of kin.

*Considerations of the Court*

82. The Court considers that jurisprudence can serve as guidance to establish principles in this matter, although it cannot be invoked as a precise norm to follow because each case must be examined in the light of its particularities<sup>45</sup>. It should also be added that, in the instant case, the State has acknowledged the facts and assumed its responsibility.

<sup>45</sup> *cf. The "White Van" case (Paniagua Morales et al.). Reparations, supra note 4, para. 104; Blake case. Reparations (Article 63(1), American Convention on Human Rights). Judgment of January 22, 1999. Series C No. 48, para. 54; and Castillo Páez case. Reparations, supra note 29, para. 83.*

83. This Court, as other international courts, has repeatedly indicated that a condemnatory judgment may constitute *per se* a form of compensation for non-pecuniary damage<sup>46</sup>. However, owing to the grave circumstances of the instant case, the intensity of the sufferings that the respective facts caused the victim and which, to some extent, also caused suffering to his next of kin, the changes in the lives of the victim's next of kin and the other consequences of a non-pecuniary nature caused to the latter, the Court considers that it should order payment of fair compensation for the concept of non-pecuniary damage<sup>47</sup>.

84. When considering and establishing the reparations for non-pecuniary damage, the Court has taken into consideration the different types of non-pecuniary damage referred to by the representatives of the victim and his next of kin and the Commission: the physical and psychological sufferings endured directly by the victim and the physical and psychological sufferings endured by the victim's next of kin owing to the detention, torture, denial of justice, lack of investigation into the facts and punishment of those responsible, and the lack of knowledge of the whereabouts of Mr. Trujillo Oroza's remains.

85. As the Court has indicated, the non-pecuniary damage inflicted on the victim is evident, since it is human nature that any person subjected to aggression and ill-treatment, such as that endured by José Carlos Trujillo Oroza (unlawful detention, torture and death), experiences profound mental suffering, which extends to the closest members of his family, particularly those who had close affective contact with the victim<sup>48</sup>. "It is not necessary to prove that this damage has been produced and the acknowledgement of responsibility made [by Bolivia] at the appropriate time is sufficient"<sup>49</sup>.

86. The right to compensation for the damage suffered by the victim up until the time of his death is transmitted by succession to his heirs<sup>50</sup> (*supra* para. 56), and the

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<sup>46</sup> *cf. Cantoral Benavides case. Reparations, supra* note 3, para. 57; *The case of the Mayagna (Sumo) Awas Tingni Community, supra* note 5, para. 166; and *Cesti Hurtado case. Reparations, supra* note 3, para. 51. Similarly, *cf. Eur. Court HR, Ruiz Torija v. Spain judgment of 9 December 1994, Series A no. 303-A, para. 33; Eur. Court HR, Boner v. the United Kingdom judgment of 28 October 1994, Series A no. 300-B, para. 46; Eur. Court HR, Kroon and Others v. the Netherlands judgment of 27 October 1994, Series A no. 297-C, para. 45; Eur. Court H.R., Darby judgment of 23 October 1990, Series A no. 187, para. 40; Eur. Court H.R., Wassink judgment of 27 September 1990, Series A no. 185-A, para. 41; Eur. Court H.R., Koendjibiharie judgment of 25 October 1990, Series A no. 185-B, para. 34; and Eur. Court H.R., McCallum judgment of 30 August 1990, Series A no. 183, para. 37.*

<sup>47</sup> *cf. Cantoral Benavides case. Reparations, supra* note 3, para. 57; *The case of the Mayagna (Sumo) Awas Tingni Community, supra* note 5, para. 167; and *Cesti Hurtado case. Reparations, supra* note 3, para. 51.

<sup>48</sup> *cf. The "White Van" case (Paniagua Morales et al.). Reparations, supra* note 4, paras. 106, 124, 142, 157 and 173; *Castillo Páez case. Reparations, supra* note 29, para. 86; and *Loayza Tamayo case. Reparations, supra* note 31, para. 138.

<sup>49</sup> *Garrido and Baigorria case. Reparations, supra* note 36, para. 49. Similarly, *cf. The "White Van" case (Paniagua Morales et al.). Reparations, supra* note 4, paras. 106, 124, 142, 157 and 173; *Castillo Páez case. Reparations, supra* note 29, para. 86; and *Loayza Tamayo case. Reparations, supra* note 31, para. 138.

<sup>50</sup> *cf. The "Street Children" case (Villagrán Morales et al.). Reparations, supra* note 3, para. 67; *The "White Van" case (Paniagua Morales et al.). Reparations, supra* note 4, para. 84; and *Neira Alegría et al. case. Reparations, supra* note 28, para. 60.

damage caused by the victim's death to his next of kin or to third parties may be claimed by them, in their own right<sup>51</sup>.

87. The Court considers that José Carlos Trujillo Oroza's mother, Gladys Oroza de Solón Romero, is her son's heir, and succeeds him in the right to be compensated for the sufferings that he endured in life, so that the total amount that the Court establishes for this concept should be delivered to Mrs. Oroza de Solón Romero.

88. In the case of the immediate next of kin of José Carlos, who are also direct victims of the violation of various articles of the American Convention (*supra* para. 55), in order to establish the compensation for non-pecuniary damage, the Court considers that:

a) the anguish and uncertainty that the disappearance and lack of information about the whereabouts of the victim caused his next of kin resulted in non-pecuniary damage<sup>52</sup>. Indeed, the circumstances of the disappearance of José Carlos Trujillo Oroza caused his parents and brothers intense suffering and distress, and also a feeling of insecurity, frustration and impotence in the face of the failure of the Bolivian public authorities to investigate the facts. The family's suffering, which violates Article 5 of the Convention, cannot be disassociated from the situation arising from the forced disappearance of José Carlos Trujillo Oroza, which is still continuing at the date this judgment is delivered<sup>53</sup>. In conclusion, the Court considers that the grave non-pecuniary damage suffered by the four members of José Carlos Trujillo Oroza's family has been fully demonstrated.

b) the fact that the Court presumes that the death of a person causes his parents a non-pecuniary damage, so that it is not necessary to prove it, should also be born in mind<sup>54</sup>. As this Court has said, "we can admit the presumption that the parents have suffered mentally for the cruel death of their children, since it is human nature that every person feels pain in the face of the suffering of a child."<sup>55</sup>

c) regarding the non-pecuniary damage caused to the victim's mother, Gladys Oroza de Solón Romero, it is obvious that the disappearance of her son, particularly in the circumstances in which this occurred, has caused her severe distress. The events caused a serious change in the course that her

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<sup>51</sup> *cf. The "Street Children" case (Villagrán Morales et al.). Reparations, supra note 3, para. 68; The "White Van" case (Paniagua Morales et al.). Reparations, supra note 4, para. 85; and Castillo Páez case. Reparations, supra note 29, para. 59.*

<sup>52</sup> *cf. Bámaca Velásquez case. Judgment of November 25, 2000. Series C No. 70, paras. 160 and 165; Blake case. Reparations, supra note 45, para. 56; and Castillo Páez case. Reparations, supra note 29, para. 87.*

<sup>53</sup> *cf. Bámaca Velásquez case, supra note 52, paras. 160 and 165; Blake case. Reparations, supra note 45, para. 57; and Blake case. Judgment of January 24, 1998. Series C No. 36, paras. 114 and 116.*

<sup>54</sup> *cf. Cantoral Benavides case. Reparations, supra note 3, paras. 37 and 61a); The "Street Children" case (Villagrán Morales et al.). Reparations, supra note 3, para. 66; and The "White Van" case (Paniagua Morales et al.). Reparations, supra note 4, paras. 108, 125, 143 and 158.*

<sup>55</sup> *Aloeboetoe et al. case. Reparations, supra note 28, para. 76; and cf. Castillo Páez case. Reparations, supra note 29, para. 88; Loayza Tamayo case. Reparations, supra note 31, para. 142; and Garrido and Baigorria case. Reparations, supra note 36, para. 62.*

life would normally have taken, which represents serious harm to her way of life<sup>56</sup>.

d) the foregoing considerations (*supra* para. 88.a and b) are applicable to the victim's adoptive father or stepfather and brothers, who, as members of a close-knit family, had a close relationship with José Carlos Trujillo Oroza, lived in the same house with him, and personally experienced the uncertainty about the whereabouts of the victim, so that they could not be indifferent to the severe suffering of José Carlos. Also, in the case of the victim's brothers, it should be recalled that, according to the most recent jurisprudence of the Court, it can be presumed that the death of a person causes his siblings non-pecuniary damage<sup>57</sup>. The amount corresponding to the non-pecuniary damage caused to Walter Solón Romero Gonzales will be delivered to his spouse and his two sons in equal parts.

89. Bearing in mind the different aspects of the damage referred to above, cited by the representatives of the victim and his next of kin and endorsed by the Commission, where they are pertinent and respond to the particularities of the case, the Court establishes in fairness the value of the compensation for non-pecuniary damage that should be paid to the victim's next of kin, as indicated in the following table:

<b>Reparation for non-pecuniary damage</b>	
<b>4) VICTIM AND HIS NEXT OF KIN</b>	<b>5) AMOUNT</b>
José Carlos Trujillo Oroza (victim)	US\$100,000.00
Gladys Oroza de Solón Romero (mother)	US\$80,000.00
Walter Solón Romero Gonzales (adoptive father)	US\$25,000.00
Pablo Erick Solón Romero Oroza (brother)	US\$20,000.00
Walter Solón Romero Oroza (brother)	US\$20,000.00
<b>TOTAL AMOUNT</b>	<b>US\$245,000.00</b>

C) OTHER FORMS OF REPARATION

90. In this section, the Court will proceed to determine those measures of compensation for non-pecuniary damage that have no financial value.  
*Arguments of the representatives of the victim and his next of kin*

91. The representatives of the victim and his next of kin requested the Court to order the following measures of satisfaction:

a) investigation into the whereabouts of the disappeared person and return of his body

<sup>56</sup> cf. *Loayza Tamayo case. Reparations, supra* note 31, paras. 147-154; and *Cantoral Benavides case. Reparations, supra* note 3, para. 60.

<sup>57</sup> cf. *Cantoral Benavides case. Reparations, supra* note 3, paras. 37 and 61d); *The "Street Children" case (Villagrán Morales et al.). Reparations, supra* note 3, para. 68; and *The "White Van" case (Paniagua Morales et al.). Reparations, supra* note 4, paras. 110, 126 and 144.

Bolivia should conduct certain specific actions, as a minimum. One of the measures would be to create an effective judicial investigation mechanism, since the investigations conducted to clarify the facts of the instant case have made no progress. They request the establishment of a Special Joint Investigative Committee, headed by the Human Rights Committee of the Chamber of Deputies and composed of representatives of the Permanent Human Rights Assembly and the Association of Next of Kin of Detained-Disappeared (ASOFAMD). The State should assign an adequate budget for the work of this Joint Committee. The obligation to investigate the facts and punish those responsible and the obligation to investigate the whereabouts of the disappeared person and return the body to his family have different specific purposes. The return of the mortal remains should not necessarily be linked to the progress of the judicial proceeding;

b) effective investigation and punishment of the perpetrators of the facts and their accessories

The State must investigate and apply the pertinent punishments to all those who made it possible, by act or omission, for impunity to prevail in crimes against human rights. Not only one, but several investigations have been interrupted at different stages of the domestic proceeding. The representatives of the victim and his next of kin presented a list of persons who the State should ask to submit a statement. They advised that on March 27, 2000, the Fifth Criminal Trial Court of Santa Cruz drew up a criminal indictment for the crimes of deprivation of freedom, ill-treatment and tortures against Juan Antonio Elio, Deputy-Secretary of the Interior at the time of the facts, Elias Moreno Caballero, Justo Sarmiento Alanés and Percy González Monasterios, agents of the Political Control Department and the El Pari prison, for what occurred to José Carlos Trujillo Oroza, and that on April 6, 2000, the victim's next of kin filed suit against the said accused persons and requested the expansion of the initial indictment to include the crime of assassination and its expansion against Mario Adett Zamora, Minister of the Interior at the time of the facts, Ernesto Morant Lijerón and Oscar Menacho. In November 2000, the judge declared that the criminal suit had extinguished; this judgment has been appealed in various judicial instances, which have confirmed the decision. They requested the Court to indicate to the State that the crime of forced disappearance of persons has no statute of limitations and that the State must remove the impediment of the extinguishment in order to end impunity in the instant case;

c) legislative reforms

The State should complete the reform of the Criminal Code in order to define the forced disappearance of persons as an offense, in accordance with provisions in the international treaties that Bolivia has ratified. In the criminal proceeding investigating what happened to José Carlos Trujillo Oroza, inappropriate criminal offenses have been cited that have hindered progress in establishing criminal responsibility. The draft law has been before Congress since September 4, 1998, and a national law has still not been enacted. The establishment of the offense of forced disappearance of persons

would allow progress in the task of seeing that justice is done in the case of José Carlos Trujillo Oroza and would make an important contribution to avoiding repetition of acts such as those that occurred;

d) symbolic acts that ensure that the reparation has national impact

The State should acknowledge publicly its international responsibility for the facts that are the subject of this case; make a public apology to the victim's next of kin through the media; erect a monument to the memory of José Carlos, in an important location, where there is a substantial flow of traffic, in the center of Santa Cruz, and all aspects related to it should be agreed with the victim's mother and brothers; the State should decree February 2 to be "National Day of the Detained-Disappeared", and accord suitable importance to this date with public acts and ceremonies in educational establishments, among other activities; and should use all measures within its power to ensure that the media take an interest in and participate in them; and

e) rehabilitation measures

The State should grant José Carlos Trujillo Oroza's mother and brothers US\$5,000.00 (five thousand United States dollars) for treatment in order to help them recover the mental and physical health they had when José Carlos disappeared.

#### *The Commission's arguments*

92. The Commission requested the Court to order the following measures of reparation:

a) investigation into the whereabouts of the disappeared person and return of his body

This is an obligation *de officio* of the State, that cannot be delegated. Thirty years have elapsed since the events in Santa Cruz, Bolivia, and the State has still not located the victim's remains. It hoped that the State would find the remains of José Carlos Trujillo Oroza and deliver them to his mother;

b) effective investigation and punishment of the perpetrators of the facts and their accessories

This is an obligation *de officio* of the State that cannot be delegated. Bolivia should criminally punish the perpetrators and masterminds of these facts and their accessories. The Commission knows that, in 1999, the State initiated *de officio* a judicial proceeding to investigate the facts. However, the preliminary investigation was not carried out with due diligence and the report with the conclusions of the Judicial Technical Police failed to include important elements of evidence. The facts were classified under inappropriate criminal offenses and not as forced disappearance of persons. On November 10, 2000, the case judge issued an order declaring that the criminal action had extinguished. Thirty years have elapsed, and during this time the State has

not shown due diligence in identifying, prosecuting and punishing those responsible. Complete impunity reigns in the case. On May 5, 1999, Bolivia ratified the Inter-American Convention on the Forced Disappearance of Persons, which establishes that the criminal prosecution for the forced disappearance of persons shall not be subject to statutes of limitations. Since the whereabouts of José Carlos Trujillo Oroza are unknown and the facts have not been clarified, the offense of forced disappearance of persons is continuous and therefore the Inter-American Convention on the Forced Disappearance of Persons is fully applicable in this case. The State has the obligation to eliminate the internal impediment of extinguishment of the criminal proceeding so that “those responsible may be criminally prosecuted and punished under the offense of forced disappearance of persons”;

c) legislative reforms

Bolivia will only fulfill its international obligations when the offense of forced disappearance of persons is defined as an offense in the Bolivian Criminal Code; and

d) rehabilitation measures

The Commission supports the request of the victim’s next of kin that the State should offer them the facilities necessary for their mental, physical and psychological rehabilitation, since they have suffered for many years, seeking a loved one and demanding that justice be done.

With regard to public acknowledgment of responsibility, the Commission indicated that:

a) it considered that the State’s withdrawal of the preliminary objections and acknowledgement of the facts in the application, together with its acceptance of international responsibility before the Court, constituted measures of satisfaction in this case; and

b) it supported the request of the victim’s next of kin that the State should erect a monument to the memory of the victim and declare February 2 to be the “National Day of the Detained-Disappeared”, as symbolic acts to recall the date on which José Carlos Trujillo Oroza was disappeared.

*The State’s arguments*

93. On this point, the State argued as follows:

a) investigation into the facts

The Commission’s application acknowledges that the State carried out the administrative investigation that determined some of the facts and identified certain persons who might be guilty. On September 5, 1994, the State advised the Commission about these investigations. On April 10, 1996, the Minister for Foreign Affairs sent a note to Gladys Oroza de Solón Romero informing her of the investigations. The Court’s judgment of January 26, 2000, acknowledges that Bolivia has initiated judicial proceedings. This investigation followed its normal course, the testimony of four of those

suspected was received; the judge opened the indictment stage; Mrs. Oroza made a statement, accompanied by her lawyer; those accused filed their defense plea based on the fact that the criminal proceeding was subject to the statute of limitations; the judge granted the victim's mother a hearing and then decreed that the criminal proceeding had extinguished due to the statute of limitations. The decision was appealed and the Superior Court confirmed it. The victim's next of kin filed an application for amparo that was not accepted, and an appeal was filed before the Constitutional Court. In response to the request made to the Court by the representatives of the victim and his next of kin and the Commission, that "it should deliver judgment invalidating the legal rulings that had been awarded", Bolivia stated that "it has no objection to those guilty of this crime being tried [...and] to the Court declaring some type of legal solution so that a judgment of the Inter-American Court may amend or modify the decision of domestic courts." It does not know what this possible legal solution could be. The State will respect the decision that the Court makes in this respect;

b) location and delivery of the mortal remains

Unfortunately, there is not the slightest indication about the possible whereabouts of the body of José Carlos Trujillo Oroza. Satisfaction of this claim "will be the result of the legal proceeding that is conducted with the participation of the victim's next of kin";

c) elaboration of a draft law that sanctions the forced disappearance of persons

The draft law that sanctions with a prison sentence the forced disappearance of persons is being processed before the Congress of Bolivia; it has been approved in first debate by the Chamber of Deputies and follows its normal course in that Chamber. The State is willing to comply with the deadline established by the Court for the promulgation of the draft law as a law of the Republic, and to ratify it and publish it in the official gazette. Consequently, Bolivia has already complied with the third claim in the application;

d) public apology in the media to the victim's family

The Minister for Foreign Affairs of Bolivia sent a note to the victim's next of kin in which he stated that "he profoundly regret[ted] the facts." Since The Commission accepted this note as valid when discussing the acknowledgement of the facts, it should also be valid to show that Bolivia "has granted satisfaction to the victim's next of kin." The acknowledgement of the facts and the judgment on merits in the case have been "widely disseminated in all the mass media", which constitutes moral satisfaction. In view of the foregoing, the State has complied with the fourth claim in the application; and

e) monument in memory of the victim

The State considers it fair "that a school [...] should be given the name of José Carlos Trujillo Oroza, as a way of preserving his memory."

*Considerations of the Court*

94. One of the reparations requested by the representatives of the victim and his next of kin and by the Commission refers to legislative reforms. In particular, they request the Court to declare that Bolivia should reform its Criminal Code in order to define the forced disappearance of persons as an offense, in accordance with the international treaties ratified by the State.

95. The Court notes that Bolivia ratified the Inter-American Convention on the Forced Disappearance of Persons, Article III of which establishes that:

[t]he States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. This offense should be deemed continuous and permanent as long as the fate or whereabouts of the victim has not been determined.

96. Since it has not defined the forced disappearance of persons as an offense in its domestic legislation, Bolivia has not only failed to comply with the above-mentioned instrument, but also with Article 2 of the American Convention. In this respect, the Court has indicated that:

[...] the general obligations of the State, established in Article 2 of the Convention, include the adoption of measures to suppress laws and practices of any kind that imply a violation of the guarantees established in the Convention, and also the adoption of laws and the implementation of practices leading to the effective observance of the said guarantees.

[...]

In the law of nations, customary law establishes that a State which has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure proper compliance with the obligations it has assumed. This law is universally accepted, and is supported by jurisprudence. The American Convention establishes the general obligation of each State Party to adapt its domestic law to the provisions of this Convention, in order to guarantee the rights that it embodies. This general obligation of the State Party implies that the measures of domestic law must be effective (the principle of *effet utile*). This means that the State must adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system, as Article 2 of the Convention requires. Such measures are only effective when the State adjusts its actions to the Convention's rules on protection<sup>58</sup>.

97. It is also important to place on record that the failure to define the forced disappearance of persons as an offense has prevented the criminal prosecution in

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<sup>58</sup> cf. *"The Last Temptation of Christ" case (Olmedo Bustos et al.)*. Judgment of February 5, 2001. Series C No. 73, paras. 85 and 87.

Bolivia to investigate and punish the crimes committed against José Carlos Trujillo Oroza from being carried out effectively, and allowed impunity to continue in this case.

98. Finally, the Court takes into consideration that Bolivia has indicated that the draft law before the Congress of Bolivia has been approved in first debate by the Chamber of Deputies and is following its normal process. However, this Court considers that the request that the State should be ordered to define the forced disappearance of persons as an offense in its domestic legislation is in order and deems that reparation should only be considered complete when the draft becomes a law of the Republic and enters into force, and this should occur within a reasonable time after notification of this judgment.

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99. As for the demand that the Court declare that Bolivia should investigate and punish the perpetrators of the facts in this case and their accessories; in the first place, this Court should indicate that the American Convention guarantees access to justice to all persons in order to protect their rights and that the States Parties have the obligation to prevent, investigate, identify and punish the perpetrators of or accessories to human rights violations<sup>59</sup>. In other words, any human right violation entails the State's obligation to make an effective investigation in order to identify those responsible for the violations and, when appropriate, punish them.

100. On many occasions, this Court has referred to the right of the next of kin of the victims to know what happened and the identity of the State agents responsible for the facts<sup>60</sup>. As the Court has indicated, "[W]henever there has been a human rights violation, the State has a duty to investigate the facts and punish those responsible, [...] and this obligation must be complied with seriously and not as a mere formality"<sup>61</sup>.

101. The State has the obligation to avoid and combat impunity, which the Court has defined as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention"<sup>62</sup>. In this respect, the Court has indicated that:

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<sup>59</sup> *cf. The "White Van" case (Paniagua Morales et al.). Reparations, supra note 4, para. 198; Ivcher Bronstein case. Judgment of February 6, 2001. Series C No. 74, para. 186; and Blake case. Reparations, supra note 45, para. 61.*

<sup>60</sup> *cf. Cantoral Benavides case, supra note 3, para. 69; The "Street Children" case (Villagrán Morales et al.). Reparations, supra note 3, para. 100; and The "White Van" case (Paniagua Morales et al.). Reparations, supra note 4, para. 200.*

<sup>61</sup> *El Amparo case. Reparations (Article 63(1), American Convention on Human Rights). Judgment of September 14, 1996. Series C No. 28, para. 61. Similarly, cf. Cantoral Benavides case. Reparations, supra note 3, para. 69; Cesti Hurtado case. Reparations, supra note 3, para. 62; and The "Street Children" case (Villagrán Morales et al.). Reparations, supra note 3, para. 100.*

<sup>62</sup> *Paniagua Morales et al. case. Judgment of March 8, 1998. Series C No. 37, para. 173. Similarly, cf. Cesti Hurtado case. Reparations, supra note 3, para. 63; The "White Van" case (Paniagua Morales et al.). Reparations, supra note 4, para. 201; and Ivcher Bronstein case, supra note 59, para. 186.*

...the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their next of kin.<sup>63</sup>

Thus, the State that leaves human rights violations unpunished is also failing to comply with its obligation to ensure the free and full exercise of those rights to all persons subject to its jurisdiction<sup>64</sup>.

102. Consequently, the State has the obligation to investigate the facts that affected José Carlos Trujillo Oroza and his next of kin and that were at the origin of the violations of the American Convention in the instant case, identify those responsible and punish them, and adopt those provisions under domestic law that may be necessary to ensure compliance with this obligation (Articles 1(1) and 2 of the American Convention and Article I of the Inter-American Convention on the Forced Disappearance of Persons).

103. The Court observes that in the instant case, four factors have been the principal obstacles to the effective investigation of the facts that affected José Carlos Trujillo Oroza and the punishment of those responsible; these are: a) the passage of time; b) the absence of the definition of forced disappearance as an offense; c) the application of the statute of limitations in the criminal proceeding, and d) the irregularities committed in processing the criminal proceeding.

104. When examining the facts of this case, it can be seen that Bolivia conducted several pertinent judicial proceedings, as of 1999; these include:

a) on March 27, 2000, the Capital's Fifth Criminal Trial Court, Santa Cruz, Bolivia, issued the order to investigate the alleged crime, opening preliminary proceedings against Elías Moreno Caballero, Antonio Guillermo Elio Rivero, Justo Sarmiento Alanés and Pedro Percy González Monasterio, for allegedly committing the crimes of deprivation of freedom, ill-treatment and torture. The judge expanded these preliminary proceedings by an indictment of April 18, 2000, against Ernesto Morant Lijeron, Oscar Menacho and Rafael Loayza, for allegedly committing the same crimes; and

b) on November 10, 2000, the Capital's Fifth Criminal Trial Court, Santa Cruz, Bolivia, issued a decision in which it admitted the "prior matter of the statute of limitations and the death of the accused" filed by five of the accused, and ordered that the case should be closed in their favor. In a decision of January 12, 2001, the First Criminal Chamber of the Superior Court of the Judicial District of Santa Cruz confirmed this decision of the Capital's Fifth Criminal Trial Court, Santa Cruz, Bolivia.

105. In the paragraphs setting forth the legal grounds on which the decision of November 20, 2000, was based, the Fifth Judge considered that:

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<sup>63</sup> *Paniagua Morales et al. case*, *supra* note 62, para. 173. Similarly, *cf. Cantoral Benavides case. Reparations*, *supra* note 3, para. 69; *Cesti Hurtado case. Reparations*, *supra* note 3, para. 63; and *The "Street Children" case (Villagrán Morales et al.)*. *Reparations*, *supra* note 3, para. 100.

<sup>64</sup> *cf. Cantoral Benavides case. Reparations*, *supra* note 3, para. 69; *The "Street Children" case (Villagrán Morales et al.)*. *Reparations*, *supra* note 3, para. 99; and *The "White Van" case (Paniagua Morales et al.)*. *Reparations*, *supra* note 4, para. 199.

"[w]ith regard to the human rights conventions that [Bolivia] has concluded, it should be indicated that they have only been ratified recently [...], and, as established in Article 33 of the Constitution of the State "*The law only provides for the future and does not have retroactive effects, except in social matters when it is expressly stated and in criminal matters when it benefits the offender*"; [...] it should also be clearly understood that the judgment delivered by the Inter-American Court of Human Rights can in no way determine or predispose the course of this proceeding, since that judgment and that Court do not have jurisdiction to deliver verdicts over domestic law, and its sanctions relate to the Bolivian State and not to any person in particular."

106. In this respect, this Court has already indicated and now repeats that:

... all amnesty provisions, provisions regarding statutes of limitations and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law<sup>65</sup>.

107. On July 27, 2001, Gladys Oroza de Solón Romero filed an application for constitutional amparo, in which she indicated that her constitutional rights were harmed by the decisions that declared that the crimes of unlawful deprivation of freedom, ill-treatment and torture were subject to the statute of limitations, since, based on them, a criminal proceeding was underway against Elías Moreno Caballero, Antonio Elio Rivero, Justo Sarmiento Alanés, Pedro Percy González Monasterio and Ernesto Morant Lijerón. This action resulted in constitutional decision No. 1190/01-R of November 12, 2001, in which the Constitutional Court of Bolivia considered, among other matters, that:

"[...] the unlawful deprivation of freedom or unlawful detention, as understood in all comparative jurisprudence and doctrine, is a permanent offense; since, in the execution of the offending act, the perpetrator or perpetrators have the power to continue or cease the illegal action (unlawful deprivation of freedom) and, while this persists, the offense is reproduced at each moment that it is being consummated."

"[...] having established the permanent nature of the offense of unlawful deprivation of freedom, [...] and that the victim has still not recovered his freedom; consequently, the statute of limitations has not begun to tallied, because, to calculate the extinguishment of permanent offenses, it is necessary to begin to count as of the day on which the execution of the offense ceases."

"by declaring that the criminal proceeding had extinguished due to the statute of limitations, the Fifth Criminal Trial Judge of Santa Cruz and the members of the First Criminal Chamber of the Court of the Judicial District of Santa Cruz [...] erroneously applied the laws invoked, thereby harming the fundamental right of the appellant to legal certainty embodied in Article 7 (a) of the Constitution."

Consequently, the operative paragraphs of this judgment indicate:

THEREFORE: The Constitutional Court, [...] 1) ANNULS the decision of November 10, 2000, issued by the Fifth Criminal Trial Judge and the decision of January 12, 2001, pronounced by the members of the First Criminal Chamber, and orders the prosecution of the criminal proceeding filed by the petitioner against Justo Sarmiento Alanés, Pedro Percy González Monasterio, Elías Moreno Caballero, Antonio Elio Rivero, Ernesto Morant Ligerón and Oscar Menacho Vaca, although this is extinguished with regard to Rafael Loayza, because he has died; 2) ANNULS the decision of January 13, 2001, pronounced

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<sup>65</sup> *Barrios Altos case*. Judgment of March 14, 2001. Series C No. 75, para. 41. Similarly, *cf. Barrios Altos case*. *Interpretation of judgment on merits*. (Article 67, American Convention on Human Rights). Judgment of September 3, 2001. Series C No. 83, para. 15.

by the members of the Second Criminal Chamber, and declares that a new decision should be issued deciding on the merits of the case presented, based on the appeal file."

108. This constitutional judgment, which makes a positive contribution to the proceeding, resolves the problem arising from the fact that the criminal case against those who are allegedly responsible for the facts in this case had been declared extinguished owing to the statute of limitations. Consequently, now this problem has been resolved, there should be no impediment for the victim's next of kin to learn the truth about what happened to José Carlos Trujillo Oroza and for those responsible for the acts that are the subject of the instant case to be investigated and punished.

109. As this Court has indicated, only if all the circumstances relating to the violation are clarified, will the State have provided the victim and his next of kin with an effective remedy and complied with its general obligation to investigate and punish, allowing the victim's next of kin to learn the truth, not only about the whereabouts of the mortal remains, but also about what happened to the victim<sup>66</sup>.

110. Finally, according to the general obligation established in Article 1(1) of the Convention, the State has the obligation to take all necessary steps to ensure that these grave violations are not repeated, an obligation whose fulfillment benefits society as a whole.

111. In view of the foregoing, Bolivia should investigate, identify and punish those responsible for the harmful facts that are the subject of the instant case. This obligation will subsist until it has been fully complied with.

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112. Regarding the request for an investigation into the whereabouts of José Carlos Trujillo Oroza and the return of his remains, it is important to mention that, in the section on non-pecuniary damage, the Court accepted that it had been proven that ignorance of the whereabouts of Mr. Trujillo Oroza's remains and the continuing impunity in the case had caused and continued to cause intense suffering to his next of kin (*supra* para. 88.a).

113. In this respect, the Court has repeatedly indicated that the next of kin have the right to know the whereabouts of the remains of their loved one, and has established that this "represents a fair expectation that the State should satisfy with the means within its reach"<sup>67</sup>.

114. The continued denial of the truth about the fate of a disappeared person is a form of cruel, inhuman and degrading treatment for the close family<sup>68</sup>. The right to

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<sup>66</sup> *cf. Caballero Delgado and Santana case*. Judgment of December 8, 1995. Series C No. 22, para. 58.

<sup>67</sup> *Velásquez Rodríguez case*. Judgment of July 29, 1988. Series C No. 4, para. 181. Similarly, *cf. The "White Van" case (Paniagua Morales et al.)*. *Reparations*, *supra* note 4, para. 204; *Neira Alegría et al. case*. *Reparations*, *supra* note 28, para. 69; and *Aloeboetoe et al. case*. *Reparations*, *supra* note 28, para. 109.

<sup>68</sup> *cf. Bámaca Velásquez case*, *supra* note 52, paras. 160 and 165; *Blake case*. *Reparations*, *supra* note 45, para. 57; and *Blake case*, *supra* note 53, paras. 114 and 116. Similarly, *cf. Eur. Court H.R., Kurt*

the truth has been development sufficiently in international human rights law<sup>69</sup> and, as this Court has maintained on previous occasions, the right of the victim's next of kin to know what has happened to the him<sup>70</sup> and, when appropriate, where the mortal remains are<sup>71</sup>, constitute a measure of reparation and, therefore, an expectation that the State should satisfy for the next of kin and society as a whole<sup>72</sup>.

115. In this respect, the Court considers that the delivery of the mortal remains in cases of detained-disappeared persons is, in itself, an act of justice and reparation. It is an act of justice to know the whereabouts of the disappeared person and it is a form of reparation because it allows the victims to be honored, since the mortal remains of a person merit being treated with respect by their relatives, and so that the latter can bury them appropriately.

116. The Court has evaluated the circumstances of the instant case, particularly the continued obstruction of the efforts of the victim's parents and brothers to learn the truth about the facts and find the whereabouts of José Carlos, due to several *de facto* and *de jure* obstacles attributable to the State, such as the failure to define forced disappearance as an offense, the negative of various public authorities to provide information that was not contradictory, and the failure to conduct an effective investigation, during 30 years.

117. In view of the foregoing, the Court considers that Bolivia should take all necessary measures to locate the mortal remains of the victim and deliver them to his next of kin. The State should also provide periodic and detailed information on the measures taken to this end.

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*v. Turkey, judgment of 25 May 1998, para. 131; and United Nations Human Rights Committee, Quinteros v. Uruguay Communication No. 107/198, decision of 21 July 1983.*

<sup>69</sup> See, for example, *United Nations Human Rights Committee, Quinteros v. Uruguay Communication No. 107/198, decision of 21 July 1983*; United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, forty-ninth session, *Revised version of the final report on the question of the impunity of perpetrators of violations of human rights (civil and political rights)* prepared by L. Joinet, UN General Assembly Doc. E/CN.4/Sub.2/1997/20/Rev.1; and United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, forty-fifth session, *Study on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, Final report presented by Theo van Boven, Special Rapporteur, E/CN.4/Sub. 2/1993/8.

<sup>70</sup> *cf. Cantoral Benavides case. Reparations, supra note 3, para. 69; The "Street Children" case (Villagrán Morales et al.). Reparations, supra note 3, para. 100; and The "White Van" case (Paniagua Morales et al.). Reparations, supra note 4, para. 200.*

<sup>71</sup> *cf. Castillo Páez case, Judgment of November 3, 1997. Series C No. 34, para. 90; Caballero Delgado and Santana case. Reparations (Article 63(1), American Convention on Human Rights). Judgment of January 29, 1997. Series C No. 31, para. 58; and Neira Alegría et al. case. Reparations, supra note 28, para. 69.*

<sup>72</sup> *cf. Castillo Páez case, supra note 71, para. 90. Similarly, cf. United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, forty-ninth session, Revised version of the final report on the question of the impunity of perpetrators of violations of human rights (civil and political rights) prepared by L. Joinet, UN General Assembly Doc. E/CN.4/Sub.2/1997/20/Rev.1; and United Nations, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, forty-fifth session, Study on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report presented by Theo van Boven, Special Rapporteur, E/CN.4/Sub. 2/1993/8.*

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118. With regard to the request that Bolivia should execute symbolic acts ensuring that the reparation has a national impact (*supra* para. 91.d and 92 *in fine*), this Court considers that the acknowledgement of responsibility made by the State is a positive contribution to the development of this process and to the exercise of the principles that inspire the American Convention<sup>73</sup>. In view of the State's acknowledgement of responsibility, this judgment constitutes *per se* a type of reparation and satisfaction for the victim's next of kin.

119. Despite this, the Court establishes, as a measure of satisfaction, that the State of Bolivia must publish the judgment on merits of January 26, 2000, in the official gazette.

120. That, in accordance with Article 2 of the Convention, the State should adopt those measures for the protection of human rights that ensure the free and full exercise of the rights to life, freedom and humane treatment, and to a fair trial and judicial protection, in order to avoid harmful acts such as those in the instant case happening again.

121. Among the measures alluded to, the State should comply with Article VIII of the Inter-American Convention on the Forced Disappearance of Persons, which forms part of its legislation, in the sense that "[t]he States Parties shall ensure that the training of public law-enforcement personnel or officials includes the necessary education on the offense of forced disappearance of persons."

122. As for the State's declaration during the public hearing on reparations to the effect that it considered it fair "that the name of José Carlos Trujillo Oroza [...] should be assigned to a school, as a way of preserving his memory," this Court endorses this statement. Accordingly, the Court considers that Bolivia should proceed to officially assign the name of José Carlos Trujillo Oroza to an educational establishment in Santa Cruz, at a public ceremony and in the presence of the victim's next of kin. This would contribute to raising public awareness about the need to avoid the repetition of harmful acts, such as those that occurred in the instant case, and keeping the victim's memory alive<sup>74</sup>.

## IX COSTS AND EXPENSES

### *Arguments of the representatives of the victim and his next of kin*

123. The representatives of the victim and his next of kin indicated that:

- a) the expenses that Gladys Oroza de Solón Romero and Walter Solón Romero incurred during 28 years in order to try and find their son and see that justice was done, at both the national and the international level, should be considered<sup>75</sup>;

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<sup>73</sup> *cf. Benavides Cevallos case*. Judgment of June 19, 1998. Series C No. 38, para. 57.

<sup>74</sup> *cf. The "Street Children" case (Villagrán Morales et al.)*. Reparations, *supra* note 3, para. 103.

<sup>75</sup> According to the representatives, the expenses requested include six visits to Santa Cruz (US\$2,000.00), two trips to Washington, D.C (US\$3,100.00), one trip to Costa Rica (US\$1,300.00) and

b) CEJIL has represented Gladys de Solón Romero in the proceedings before the supervisory bodies of the Convention since they were initiated in September 1992. Among other actions, it has prepared briefs, submitted documentary evidence and taken part in hearings on the case; and

c) to date, CEJIL has settled all the expenses from its own private resources, and should be reimbursed. The total for such expenses before the Inter-American system is US\$11,024.80 (eleven thousand and twenty-four United States dollars and eighty cents)<sup>76</sup>.

#### *The Commission's arguments*

124. The Commission did not refer to this item.

#### *The State's arguments*

125. The State alleged that "the political use of the case for extra-procedural ends disqualifies the claims in the application with regard to costs, lawyers' fees and compensation for non-pecuniary damage, as this is an act that seriously injures the international human rights justice system." It also indicated that it is not obliged to pay any amount for costs, lawyers' fees or other expenses incurred by the victim's next of kin, owing to the bad faith they had shown during the process. During the public hearing on reparations, it requested that the claim for costs and expenses should be rejected, arguing that, in the *Neira Alegría et al.* case, the Court had decided that it was not in order to decide in favor of such concepts, and in the *Aloeboetoe et al.* case, the Court had decided that the reimbursement of expenses was not in order. It also stated that "as there is no obligation to pay fees or expenses to the Commission or CEJIL, this component of the claim has also been fulfilled."

#### *Considerations of the Court*

126. It should be understood that costs and expenses are included in the concept of reparation embodied in Article 63(1) of the American Convention, because the activities carried out by the victim or victims, their successors or their representatives to access international justice imply disbursements and commitments of a financial nature that should be compensated. This Court considers

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international telephone calls, faxes, copies and mail relating to the case before the Commission and the Court, as well as measures taken in Bolivia (US\$2,000.00).

<sup>76</sup> The total amount of US\$11,024.80 (eleven thousand and twenty-four United States dollars and eighty cents) requested for costs and expenses breaks down as follows: US\$714.84 (seven hundred and fourteen United States dollars and eighty-four cents) in payment of faxes, mail and national and international telephone calls; US\$21.16 (twenty-one United States dollars and sixteen cents) in payment of photocopies of documents and evidence provided to the Inter-American Commission and Court; US\$863.80 (eight hundred and sixty-three United States dollars and eighty cents) for travel, accommodation, transportation and food expenses between Washington, D.C. and Costa Rica for the hearing before the Inter-American Court; US\$340.00 (three hundred and forty United States dollars) for transportation and food in La Paz, Bolivia, in August 1997; US\$460.00 (four hundred and sixty United States dollars) for transportation and food expenses in La Paz, Bolivia, in April 1999; and US\$8,625.00 (eight thousand six hundred and twenty-five United States dollars) for legal assistance during the proceedings before the Inter-American Commission and Court.

that the costs referred to in Article 55(1)(h) of the Rules of Procedure include the necessary and reasonable expenses that the victim or victims incur in order to have access to the supervisory bodies of the American Convention, and among such expenses are the fees of those who provide legal assistance. It is for the Court to estimate prudently the scope of the costs and expenses, considering the circumstances of the specific case, the nature of the international jurisdiction for the protection of human rights, and the characteristics of the respective procedure, which has particularities that are specific and different from those of other procedures of a national or international nature<sup>77</sup>.

127. This Court has already indicated that the concept of costs includes both the costs corresponding to access to justice at the national level and also those relating to justice at the international level before the Commission and the Court<sup>78</sup>.

128. The *quantum* for this item may be established, and this has been done in previous cases, based on the principle of fairness, even in the absence of elements of evidence regarding the precise amount of the expenses in which the parties have incurred, provided that the amounts respond to criteria of reasonableness and proportionality<sup>79</sup>.

129. To this end, the Court considers that it is fair to recognize to Gladys Oroza de Solón Romero, the victim's mother, as reimbursement for the expenses generated in the domestic jurisdiction and in the inter-American jurisdiction, the amount of US\$5,400.00 (five thousand four hundred United States dollars) and the amount of US\$4,000.00 (four thousand United States dollars) to CEJIL, the representative of the victim and his next of kin.

## **X METHOD OF COMPLIANCE**

### *Arguments of the representatives of the victim and his next of kin*

130. The representatives of the victim and his next of kin requested the Court to order the State:

- a) to comply with the reparations, costs and expenses within six months of notification of the judgment on reparations; and
- b) that the payment of the compensation should be made directly to the victims or their adult next of kin or their heirs; that it should be in United States dollars, or in an equivalent cash amount, in Bolivian national currency – using the exchange rate between the Bolivian national currency and the United States dollar on the day preceding payment; that it should be exempt of any current or future tax; and that, should the State fall into arrears with

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<sup>77</sup> *cf. Cantoral Benavides case. Reparations, supra note 3, para. 85; Cesti Hurtado case. Reparations, supra note 3, para. 71; and The "Street Children" case (Villagrán Morales et al.). Reparations, supra note 3, para. 107.*

<sup>78</sup> *cf. Cantoral Benavides case. Reparations, supra note 3, para. 86; the case of the Mayagna (Sumo) Awás Tingni Community, supra note 5, para. 168; and Cesti Hurtado case. Reparations, supra note 3, para. 72.*

<sup>79</sup> *The "White Van" case (Paniagua Morales et al.), supra note 4, para. 213. Similarly, cf. Cantoral Benavides case. Reparations, supra note 3, para. 87; the case of the Mayagna (Sumo) Awás Tingni Community, supra note 5, para. 169; and Cesti Hurtado case. Reparations, supra note 3, para. 73.*

the payment, it should pay interest on the amount owed, corresponding to bank interest on arrears in Bolivia

*The Commission's arguments*

131. The Commission expressed its agreement with the criteria of the representatives of the victim and his next of kin on the methods of compliance, but indicated that, should the State pay in arrears, it should pay the current bank interest in Bolivia on the capital owed, until it had made the payment.

*The State's arguments*

132. The State did not refer to the method of compliance during the proceeding before the Court.

*Considerations of the Court*

133. In order to comply with this judgment, the State must pay the compensation and reimburse the costs and expenses, and also adopt the other measures ordered, within six months of notification of this judgment. Definition of the forced disappearance of persons as an offense should be completed within a reasonable period, bearing in mind the characteristics of the corresponding legislative process.

134. The payment of the compensation established in favor of the victim's next of kin shall be made directly to them. If any of them have died or dies, the payment shall be made to their heirs.

135. The expenses arising from the measures taken by the victim's mother and CEJIL, and also the costs resulting from the domestic proceedings and the international proceedings before the inter-American system for the protection of human rights, shall be paid to Gladys Oroza de Solón Romero and to CEJIL, as previously determined (*supra* para. 129).

136. If, for any reason, it is not possible for the beneficiaries of the compensation to receive it within the six-month period indicated, the State shall deposit the amounts in their favor in a deposit account or certificate in a solvent Bolivian banking institution, in United States dollars or the equivalent in Bolivian currency, and with the most favorable financial conditions allowed by bank legislation and practice. If, after ten years, the compensation has not been claimed, the amount and the interest earned shall be returned to the State.

137. The State may comply with its obligations by making the payment in United States dollars or an equivalent amount in Bolivian currency, using the exchange rate between the two currencies in force in the New York, United States of America, market, the day before the payment, to make the respective calculation.

138. The payments ordered in this judgment shall be exempt of any current or future taxes.

139. Should the State pay in arrears, it shall pay the interest corresponding to bank interest on arrears in Bolivia on the amount owed.

140. In accordance with its constant practice, the Court reserves the authority to monitor full compliance with this judgment. The case will be closed when the State has fully applied all its provisions. Within nine months of notification of this judgment, the State must provide the Court with a report on the measures taken to comply with it.

## **XI OPERATIVE PARAGRAPHS**

141. Therefore

### **THE COURT,**

#### **DECIDES:**

unanimously,

1. That the State must take all necessary measures to locate the mortal remains of the victim and deliver them to his next of kin, so that they can bury him appropriately, in the terms of paragraphs 115 and 117 of this judgment.
2. That the State must define the forced disappearance of persons as an offense in its domestic legislation, in the terms of paragraph 98 of this judgment.
3. That the State must investigate, identify and punish those responsible for the harmful facts that are the subject of the instant case, in the terms of paragraphs 109, 110 and 111 of this judgment.
4. That the State must publish the judgment on merits of January 26, 2000, in the official gazette.
5. That, in accordance with Article 2 of the Convention, the State must adopt those measures for the protection of human rights that ensure the free and full exercise of the rights to life, freedom and humane treatment, and to a fair trial and judicial protection, in order to avoid future harmful acts such as those of this case, in the terms of paragraphs 120 and 121 of this judgment.
6. That the State must officially assign the name of José Carlos Trujillo Oroza to an educational establishment in Santa Cruz, in the terms of paragraph 122 of this judgment.
7. That, for non-pecuniary damage, the State must pay:
  - a) the amount of US\$100,000.00 (one hundred thousand United States dollars) or its equivalent in Bolivian currency, to Gladys Oroza de Solón Romero, as successor of José Carlos Trujillo Oroza, in the terms of paragraphs 87 and 89 of this judgment;
  - b) the amount of US\$80,000.00 (eighty thousand United States dollars) or its equivalent in Bolivian currency, to Gladys Oroza de Solón Romero, in the terms of paragraphs 88.a), b) and c) and 89 of this judgment;
  - c) the amount of US\$25,000.00 (twenty-five thousand United States dollars) or its equivalent in Bolivian currency, to be distributed equally

between Gladys Oroza de Solón Romero, Pablo Erick Solón Romero Oroza and Walter Solón Romero Oroza, and delivered to them as successors of Walter Solón Romero Gonzales, in the terms of paragraphs 88.a), b) and d) and 89 of this judgment;

d) the amount of US\$20,000.00 (twenty thousand United States dollars) or its equivalent in Bolivian currency, to Pablo Erick Solón Romero Oroza, in the terms of paragraphs 88.a) and d) and 89 of this judgment; and

e) the amount of US\$20,000.00 (twenty thousand United States dollars) or its equivalent in Bolivian currency, to Walter Solón Romero Oroza, in the terms of paragraphs 88.a) and d) and 89 of this judgment.

8. That, for pecuniary damage, the State must pay:

a) the amount of US\$130,000.00 (one hundred and thirty thousand United States dollars) or its equivalent in Bolivian currency, to Gladys Oroza de Solón Romero, as successor of José Carlos Trujillo Oroza and with regard to the latter's loss of earnings due to the facts of this case, in the terms of paragraphs 73, 75 and 76 of this judgment;

b) the amount of US\$3,000.00 (three thousand United States dollars) or its equivalent in Bolivian currency, to Gladys Oroza de Solón Romero, for expenses incurred in searching for the victim, in the terms of paragraphs 74.a), 75 and 76 of this judgment; and

c) the amount of US\$20,000.00 (twenty thousand United States dollars) or its equivalent in Bolivian currency, to Gladys Oroza de Solón Romero for medical expenses arising from the facts of the case, in the terms of paragraphs 74.b), 75 and 76 of this judgment.

9. That, for costs and expenses, the State must pay Gladys Oroza de Solón Romero, the amount of US\$5,400.00 (five thousand four hundred United States dollars) or its equivalent in Bolivian currency, and the Center for Justice and International Law (CEJIL), representative of the victim and his next of kin, the amount of US\$4,000.00 (four thousand United States dollars) or its equivalent in Bolivian currency, in the terms of paragraph 129 of this judgment.

10. That the State must comply with the measures of reparation ordered in this judgment within six months of its notification. The definition of the forced disappearance of persons as an offense must be made within a reasonable period, in the terms of paragraph 133 of this judgment.

11. That the payments ordered in this judgment shall be exempt of any existing or future charge or tax.

12. That the Inter-American Court of Human Rights shall monitor compliance with this judgment and will close this case when the State has fully applied all its provisions. Within nine months of notification of this judgment, the State must provide the Court with a report on the measures taken to comply with it, in the terms of paragraph 140 of this judgment.

Judges Cañado Trindade, García Ramírez and Brower informed the Court of their separate opinions and they accompany this judgment.

Done at San José, on February 27, 2002, in Spanish and English, the Spanish text being authentic.

Antônio A. Cañado Trindade  
President

Alirio Abreu-Burelli

Hernán Salgado-Pesantes

Oliver Jackman

Sergio García-Ramírez

Carlos Vicente de Roux-Rengifo

Charles N. Brower  
Judge *ad hoc*

Manuel E. Ventura-Robles  
Secretary

So ordered,

Antônio A. Cañado Trindade  
President

Manuel E. Ventura-Robles  
Secretary

## SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I vote in favour of the present Judgment on reparations which the Inter-American Court of Human Rights has just adopted in the case of *Trujillo Oroza versus Bolivia*. A consideration of the Court developed in this Judgment concerns the basis of the jurisdiction of the Court in contentious matters, in the context of the concrete case. I refer to paragraph 72, which points out that

"The Court bears in mind that some of the facts of this case are prior to the dates of the ratification of the American Convention and of the recognition of the contentious jurisdiction of the Court on the part of the State. Nevertheless, the Court observes likewise that the respondent State did not object that the facts of the case as a whole be considered, in respect of the totality of the period ranging 1971 and the date of the present Judgment. It is also to be pointed out that it is worth keeping in mind that the Constitutional Tribunal of Bolivia indicated that 'the illegal deprivation of freedom or illegal detentions (...) is a permanent delict' and that 'the prescription of the permanent delicts ought to start counting as from the day when the execution of the delict ceases'. In virtue of the aforementioned, the Court will examine and will decide on the continuing situation of the forced disappearance of Mr. José Carlos Trujillo Oroza and the consequences of such situation".

This point leads me to some reflections, which I feel obliged to express in this Separate Opinion, as the foundation of my position on the matter. I do so, moreover, given the importance with which the question is endowed for the evolution itself of the case-law of the Court in this respect.

2. In the present case *Trujillo Oroza*, the State manifested before the Court, in the public hearing of 25 January 2000, that "the Government of the Republic of Bolivia formally recognizes the responsibility for the facts"<sup>80</sup>. In doing so, the State recognized all the facts expressed in the complaint, and not only the facts subsequent to the date in which it became Party to the American Convention on Human Rights (19.07.1979) or to the date in which it recognized the compulsory jurisdiction of the Inter-American Court (27.07.1993).

3. The Inter-American Court, on its turn, in the Judgment on the merits of the case, of 26 January 2000, considered "admitted the facts" expressed in paragraph 2 of its Judgment, that is, all the facts as from the detention of the victim, on 23.12.1971, and further considered that the controversy between the State and the Inter-American Commission of Human Rights "as to the *facts from which the present case originated*" had ceased. The Court considered the forced disappearance of the victim in its *integrality*, as a whole. This was possible as a result of the positive posture taken by the State<sup>81</sup> in search of a solution for the concrete case.

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<sup>80</sup>. Inter-American Court of Human Rights (IACtHR), *Transcripción de la Audiencia Pública Celebrada el 25 de enero de 2000 en el Caso Trujillo Oroza*, p. 5, and cf. p. 3 (internal circulation).

<sup>81</sup>. Thus acknowledged in the present Judgment (par. 118).

4. The Vienna Convention on the Law of Treaties (1969) determines that the provisions of a treaty do not bind a Party in relation to "any act or fact" which "*took place* before the date of the entry into force of the treaty" with respect to the State Party at issue, or to "any situation" which at that date "*has ceased to exist*". That is, the Vienna Convention referred to establishes the imperative character of the principle of non-retroactivity of treaties in relation specifically to acts or facts, or situations, when *have been consummated* before the entry into force of the treaty (*numerus clausus*) for the State Party at issue.

5. Thus, the law of treaties itself has paved the way for the evolution of the notion of *continuing situation*, in the ambit of the International Law of Human Rights, which comes to fulfil the needs of protection of the human being, and transcend the contingencies of law to accomplish the ideal of justice. To this effect the Constitutional Tribunal of Bolivia has also contributed, in the ambit of the concrete case, when, in a judgment of November 2001, it clarified that

"the illegal deprivation of freedom or illegal detentions, as comparative doctrine and case-law have understood them in a uniform way, is a permanent delict; (...) and (...) while (...) the delict lasts it is reproduced at each instant in its action of consummation. (...) To calculate the prescription of the permanent delicts one ought to begin to count as from the day in which the execution of the delict ceases. (...) The Fifth Judge of Penal Instruction of the city of Santa Cruz and the *Vocales* of the First Penal Chamber of the Court of the Judicial District of Santa Cruz, in declaring extinguished the penal action for prescription (...) have made an incorrect application of the invoked laws, thereby violating the fundamental right of the appellant to the juridical security set forth in constitutional Article 7(a)"<sup>82</sup>.

6. Article 62 of the American Convention establishes the jurisdictional basis for the exercise of the contentious function of the Inter-American Court. Article 62(3) stipulates that the Court has competence to know any case concerning the interpretation and application of the provisions of the Convention which may be brought before it, whenever the State Party at issue *has recognized* or *recognizes* such competence. In fact, Bolivia *has recognized* the contentious competence of the Court (under Article 62(2)), on 27.07.1993, in an unconditional way<sup>83</sup>, and, moreover, in the course of the contentious proceedings before the Court in the case *Trujillo Oroza*, *has recognized* also its international responsibility for the totality of the facts of the present case, referred to in the complaint (*supra*), which it acceded to. In this way, the competence of the Court to pronounce itself on the continuing situation of the victim in its integrality was established. *Boni iudicis est ampliare jurisdictionem*.

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<sup>82</sup>. Constitutional Tribunal [of Bolivia], constitutional judgment n. 1190/01-R, of 12.11.2001.

<sup>83</sup>. The instrument of acceptance of the compulsory jurisdiction of the Court on the part of Bolivia provides, in its paragraph II, that it undertakes "the recognition as fully compulsory *de jure*, unconditionally and for an indefinite time", the competence of the Inter-American Court in contentious matters, under Article 62 of the American Convention.

7. Six years ago, in another case before this Court, I pointed out precisely the necessity to consider the delict of forced disappearance of persons in the *integrality* of their multiple and interrelated aspects<sup>84</sup>. Such necessity ensues, in effect, from the *rationale* itself of the tipification of the delict referred to by the Inter-American Convention on Forced Disappearance of Persons (1994), - ratified by Bolivia on 05.05.1999, - which defines it as a delict "continuing or permanent as long as the fate or whereabouts of the victim has not been determined" (Article III). Moreover, the aforementioned Convention warns that it is a specific and autonomous delict<sup>85</sup>, which constitutes a complex form of violation of human rights (with interrelated delictual facts). For this reason, it requires to be considered from a necessarily *integral* approach<sup>86</sup>. In the *travaux préparatoires* of that Convention, it was pointed out that the delict referred to "is permanent in so far as it is consummated not in an instantaneous form but rather in a permanent one and it is prolonged during all the time that the person remains disappeared"<sup>87</sup>, - what was duly reflected in Article III of the Convention (*supra*).

8. The same conception ensues from the United Nations Declaration on the Protection of All Persons against Forced Disappearances (1992), which, after stressing the gravity of the delict of forced disappearance of person (Article 1(1)), warns likewise that this latter ought to be "considered a permanent delict while its authors continue to hide the fate and the whereabouts of the disappeared person and while the facts have not been clarified" (Article 17(1)). One ought, thus, to have always in mind, as to the material aspect of the question dealt with herein, that the forced disappearance of persons constitutes, first, a *complex* form of violation of human rights; second, a particularly *grave* violation; and third, a *continuing or permanent violation* (until the destiny or whereabouts of the victim is established).

9. In my Separate Opinion in the case *Blake versus Guatemala* (merits, 1998), in identifying a *décalage* between the traditional law of treaties and the International Law of Human Rights (par. 16), I pondered that the former could not keep on not taking into account the element of *intemporality* proper of this latter (par. 21), and added that

"it would not be possible, for example, to speak of limitations *ratione temporis* to the competence of an international tribunal (...) in relation to norms of general international law. (...) The *opinio juris sive necessitatis* (the subjective element of custom), as manifestation of the international juridical conscience, reveals nowadays much more vigour than the secular postulates of the law of treaties, when one comes to establish new legal regimes of protection of the human being against particularly grave violations of his rights" (par. 24).

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<sup>84</sup>. Cf. my Separate Opinion in the case *Blake versus Guatemala* (Preliminary Objections, 1996, paragraphs 3-4, 11-12 and 15).

<sup>85</sup>. As expressly pointed out in the *travaux préparatoires* of the Inter-American Convention on Forced Disappearance of Persons; cf. CIDH, *Informe Anual de la Comisión Interamericana de Derechos Humanos 1987-1988*, p. 365.

<sup>86</sup>. As it can be inferred from the preble and Articles IV and II of that Convention.

<sup>87</sup>. OEA/CP-CAJP, *Informe del Presidente del Grupo de Trabajo Encargado de Analizar el Proyecto de Convención Interamericana sobre Desaparición Forzada de Personas*, doc. OEA/Ser.G/CP/CAJP-925/93 rev.1, of 25.01.1994, p. 10.

10. By a favourable confluence of factors, the Inter-American Court at last succeeded, in the present Judgment of reparations in the *Trujillo Oroza* case, to establish an important precedent for the consideration of the delict of forced disappearance of persons and the corresponding reparations. To attempt to "individualize" or to "separate" the facts of a case such as that of *Trujillo Oroza* would lead to an undue fragmentation and decharacterization of that delict<sup>88</sup>, with negative consequences not only for the victims and their relatives, but also, ultimately, for the legal regime itself of the international protection of the rights of the human being.

11. The same attention paid by the Court to the integrality of the continuing situation of the forced disappearance of the victim, in its Judgment as to the merits in the *Trujillo Oroza* case, applies likewise to its present Judgment on reparations. The American Convention stipulated that when the Court decides that there was a violation of a right protected by such Convention, the Court shall rule that "the *consequences* of the measure or *situation* which constituted the breach of that right be remedied" (Article 63(1)). There is, thus, a clear and ineluctable *link of causality* between the establishment of the violations of human rights under the American Convention and the reparations due as a consequence of such violations, which may occur by a continuing situation.

12. The concept of *continuing situation* finds support in the international case-law in the matter of human rights, as I indicated, with details, in my Separate Opinion in the aforementioned *Blake* case (merits, 1998, par. 11), to which I allow myself here to refer<sup>89</sup>. In fact, both the European Court of Human Rights and the Human Rights Committee (under the United Nations Covenant on Civil and Political Rights), e.g., have assumed jurisdiction in cases in which, although the facts have started before the entry

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<sup>88</sup>. In this respect, in one of my Separate Opinions in the case *Blake versus Guatemala* (Reparations, 1999), I criticized the artificiality of having the application - in the circumstances of that case - of a classic postulate of the law of treaties (pertaining to the competence *ratione temporis* of the Court) unduly fragmented and decharacterized the delict of forced disappearance of persons (pars. 3 and 36). This decomposition, - I added, - was "endowed with an anti-historical character, in the sense that it points to the direction opposite to the contemporary doctrinal and jurisprudential development tending towards the consolidation of a true international legal regime against *grave* violations of human rights" (párr. 45).

<sup>89</sup>. Besides the case-law quoted therein, one can add other examples, more recent ones. In its judgment of 10.05.2001, in the case *Cyprus versus Turkey*, e.g., the European Court of Human Rights established a "continuing violation" of Articles 2 (right to life) and 5 (right to personal freedom) of the European Convention, given the absence of an effective investigation, on the part of the public power, in order to clarify the whereabouts of the disappeared Greek-Cypriot persons (par. 136), who were allegedly under custody when they disappeared (par. 150); it also established "continuing violations" of Articles 3 and 8 of the Convention (pars. 158 and 175), as well as of Article 1 of Protocol n. 1 to the Convention (pars. 189 and 269-270). - The Human Rights Committee (under the Covenant on Civil and Political Rights of the United Nations), on its turn, in the case *Ivan Somers versus Hungary* (1996), e.g., in declaring the petition or communication admissible (as to the issues under Article 26 of the Covenant), confirmed its constant position in the sense that it cannot consider alleged violations of the Covenant that *occurred* before the entry into force of it (and its first Protocol) for the State Party at issue, *except* if the alleged violations *continue to occur* after such entry into force; the Committee added that "a continuing violation must be interpreted as an affirmation, by act or clear implication, of the previous violations of the State Party" (par. 6.3). In the case *E. and A.K. versus Hungary* (1994), despite having declared the communication inadmissible, the Committee applied the same criterion for the determination of the existence of a "continuing violation" of the Covenant (cf. par. 6.4).

into force of the respective human rights treaties for the States Parties at issue, have generated effects which prolong in time after that entry into force.

13. If the organs of international protection had not acted in this way, they would have deprived such treaties of their appropriate effects (*effet utile*) in the domestic law of the States Parties. And if one had taken into account only the facts subsequent to a given date, in this way fragmenting and decharacterizing a continuing situation of violation of human rights, even so one would have to consider also the facts prior to that date, in order to identify and evaluate their prolonged effects in time (including after that date).

14. The reality of the facts is always richer than the formulation of the norms. And, moreover, the facts normally precede the norms in time. For example, the expression "forced disappearance of persons" came to be used almost four decades ago, as from the mid-sixties. Gradually, along the following decade, it was being incorporated to the vocabulary of the International Law of Human Rights. It was the reaction of the universal juridical conscience against that grave delict against the dignity of the human person. Such reaction came, at last, to find concrete expression in recent years, with the tipification of the forced disappearance of persons effectively as a delict (Article II) by the Inter-American Convention on Forced Disappearance of Persons (1994), encompassing interrelated delictive facts, and their characterization as a "crime against humanity"<sup>90</sup> by the Rome Statute of the International Criminal Court (1998), in its Article 7(1)(i).

15. The current diversification of the new forms of violation of human rights requires a constant transformation and revitalization of the norms of protection of the human being, at both substantive and procedural levels. The impact of the International Law of Human Rights on the law of treaties can already be felt, what is reassuring. For example, the recent Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999) provides that its organ of supervision, the Committee for the Elimination of Discrimination against Women, shall declare inadmissible every petition or communication the facts of which, object of it, "have taken place before the date of the entry into force of the present Protocol for the State Party concerned, *except if those facts continue to take place* after that date" (Article 4(2)(e)).

16. There is pressing need that the traditional law of treaties keeps on reconsidering itself, so as

"to accompany and to regulate, with the precision which is characteristic of it, this evolution, in such a way as to fulfil the new needs of safeguard - in any circumstances - of the human being, ultimate subject (*titulaire*) of the rights of protection. One ought to demystify the presentation, frequent and undue, of certain postulates as eternal and immutable truths, as they appear rather as a product of their time, that is, juridical solutions found in a given stage of the evolution of law, in accordance with the ideas prevailing in the epoch"<sup>91</sup>.

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<sup>90</sup>. Whenever they are committed as part of a generalized or systematic practice against the members of a civil population.

<sup>91</sup>. IACtHR, case *Blake versus Guatemala* (Merits), Judgment of 24.01.1998, Separate Opinion of Judge A.A. Cançado Trindade, Series C, n. 36, p. 84, par. 29.

17. There are, effectively, various ways whereby a *continuing* situation in breach of the protected human rights may be established. Such situation may take place by a succession of acts as well as by a continuing omission on the part of the public power. Thus, a "continuing situation may arise, for instance, from the persistence, either of national laws incompatible with the Convention, or of a *jurisprudence constante* of national tribunals clearly adverse to the victim"<sup>92</sup>. And it may likewise arise from the persistence of an omission on the part of the State, for example, for the non-investigation of the harmful facts leading to the perpetuation of the impunity of those responsible for them, or for the absence of positive measures to guarantee the free and full exercise of the protected rights.

18. One ought not to lose sight of the fact, as I warned in my Separate Opinion in the aforementioned *Blake* case (merits, 1998), that a particularly grave delict, as that of the forced disappearance of persons, encompasses fundamental *non-derogable* rights, which bring us to the domain of *jus cogens*. This latter, on its turn, reveals, as one of its underlying elements, the concept of *objective illegality*: the forced disappearance of persons is nowadays condemned by the universal juridical conscience, parallel to the application of treaties (par. 25). It should not pass unnoticed either that the Inter-American Convention on Forced Disappearance of Persons itself, in its preamble, characterizes the delict of forced disappearance as an "affront to the *conscience* of the hemisphere". And also the Rome Statute on the International Criminal Court evokes, in its preamble, "the *conscience* of humanity".

19. In effect, in my aforementioned Separate Opinion, I added that

"It is not reasonable that the contemporary law of treaties continues to aligning itself to a pattern from which it sought gradually to free itself, in giving expression to the concept of *jus cogens* in the two Vienna Conventions on the Law of Treaties. It is not reasonable that, by the almost mechanical application of postulates of the law of treaties erected upon the autonomy of the will of the State, one would restrain (...) a reassuring evolution, fostered above all by the *opinio juris* as a manifestation of the universal juridical conscience, to the benefit of all human beings" (par. 28).

20. A notable contribution of the present Judgment of the Inter-American Court lies, in my view, in its *emphasis* on the superior values underlying the norms of protection, having primacy over the sword of Damocles of the dates of manifestation of the State consent. This is what distinguishes the results of the case *Trujillo Oroza* from those of the *Blake* case, - both of forced disappearance of persons. An international legal order based only on acts of individual will is condemned to be fragmented. In turn, an international legal order emanated from the human conscience of what is just (*rectae rationis*) will be more cohesive and integrated. Above the will is the conscience.

21. The tipification, at international level, of the continuing or permanent delict of the forced disappearance of persons, with *all its juridical consequences*, is a definitive achievement of the International Law of Human Rights, emanated, ultimately, from the universal juridical conscience, material source *par excellence* of all Law. In fact, in the present case, the Inter-American Court deemed it equitable to determine the amounts of reparations taking into account the totality of the facts (between 1971 and 2002) -

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<sup>92</sup>. IACtHR, case *Genie Lacayo versus Nicaragua* (appeal for revision of judgment), Dissenting Opinion of Judge A.A. Cançado Trindade, Series C, n. 45, p. 25, par. 27.

admitted by the respondent State - which conform the *continuing situation* of the forced disappearance of Mr. José Carlos Trujillo Oroza. That is, the Court determined the reparations on the basis of equity, bearing in mind the *permanent* situation (from the beginning until the present) of the delict of forced disappearance which lasts until today, hence imprescriptible.

22. In having at last achieved, in the circumstances of the *cas d'espèce*, to transcend the chains of a mechanistic vision of law, the Inter-American Court, by means of the present Judgment on reparations, has disclosed a much wider horizon for future jurisprudential developments in the search for the entire fulfilment of the object and purpose of the American Convention. The Court has done so on the basis of the relevant precepts of the law of treaties, and with full support in the international case-law and in the more lucid doctrine on the matter. From this new outlook, constructed in the present Judgment in the *Trujillo Oroza* case, the Court has acted at the height of the responsibilities of protection of the rights of the human person conferred upon it by the American Convention on Human Rights.

Antônio Augusto Cançado Trindade  
Judge

Manuel E. Ventura-Robles  
Secretary

**SEPARATE CONCURRING OPINION OF  
JUDGE SERGIO GARCÍA RAMÍREZ ON THE JUDGMENT ON REPARATIONS IN  
THE TRUJILLO OROZA VS. BOLIVIA CASE**

1. I concur with my colleagues of the Court in signing the *Judgment on Reparations in the Trujillo Oroza vs. Bolivia Case*. In my opinion, the Court is competent, as has been stated, to hear and decide on the facts to which the judgment on the merits and this judgment on reparations refer, as well as to determine the corresponding juridical consequences, in the terms set forth in the considerations I express in this *Concurring Vote*.

2. The term facts refers to: a) conduct that constitutes a violation and that reaches its end or concludes at the very moment when the respective act or omission takes place; b) situations constituted by various acts that occur over time, with discontinuity between one and another; and c) uninterrupted activities that persistently breach rights enshrined in the Convention. To illustrate this concept, it is relevant to invoke the classification of crimes by order of conduct. The former encompasses three categories recognized in view of the moment at which the crime is consummated: instantaneous, b) continued, and c) continuing or permanent.

3. Bolivia has been a party to the American Convention on Human Rights since July 19, 1979, and it recognized the contentious jurisdiction of the Court on July 27, 1993 (para. 1 of the *Judgment on reparations*). It is understood that these acts, which produce the juridical consequences inherent to their nature, were carried out in observance of the norms and procedures of and with intervention by the bodies that domestic legislation establishes to this end. Since those dates, there have been juridical effects that are inherent to participation in the Convention and to acceptance of contentious jurisdiction, respectively; in other words, for facts in violation of the provisions of the Convention to be heard and for their juridical consequences to be determined. The State did not establish any conditions regarding the time during which its acceptance of jurisdiction would be in effect.

4. It is appropriate to recall that the American Convention has no specific provisions regarding its entrance into effect, in terms of time, with respect to a State party. For this, it is relevant to take into account the provisions of Article 28 of the Vienna Convention on the Law of Treaties (Vienna, May 23, 1969) in this regard. Said precept states: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." This must obviously be in a "suitable way" to commit the State.

5. It is also necessary to consider that under the terms of Article 62(3) of the American Convention, the Court is competent (that is, objectively capable procedurally to exercise its jurisdiction in contentious matters) to hear cases pertaining to interpretation and application of this treaty, "inasmuch as the States party in the case have accepted or recognize said competence..." In other words, competence exists generally –and is specifically exercised, in connection with a specific matter- when it is recognized by the respondent State, and only becomes actualized once that acceptance has taken place, and only with respect to facts that occurred after its entry into effect. On the other hand, it does not encompass facts that happened before the acceptance of jurisdiction entered into effect.

6. In view of the above, in the specific case of Bolivia the Court can only hear and decide on facts occurred after July 27, 1993, which is –as stated before (para. 3)- the date on which the State accepted the jurisdiction of the Court, having previously –in 1979- adhered to the American Convention. If the competence of the Court has that time restriction, it is also applicable to its capacity to assign juridical consequences, by way of reparations, to facts in violation of the Convention. Said consequences will refer specifically to facts in violation –a term that includes, as stated above (para. 2), both acts and situations that breach the Convention- covered by the competence of the Court, and not the consequences of those that are not covered by said competence, even if their nature is the same as that of facts that fall under that competence.

7. It is the duty of the Court to determine its own competence in the cases brought before it, as subject matter for a specific ruling. This consideration is in accordance with the principle of legal certainty and it is the logical and juridical basis for exercise of jurisdiction. To this end, it must abide by norms that are applicable to this matter, independently of the arguments of the parties or the omissions or silence in which they may incur, if that is the case. Stated otherwise, this is an issue that the Court must examine of its own accord and rule –favorably- before hearing and rendering judgment in a contentious case. Each of its acts must be set within the framework of the competence of the Court, which is thus projected on the proceedings as a whole and on each and all rulings during the proceedings.

8. In the instant case, a judgment has been reached regarding violation of the right to personal liberty of José Carlos Trujillo Oroza, among other violations. The respective denial of liberty began on February 2, 1972 and has continued without interruption since then. Commencement of the illicit conduct therefore took place long before Bolivia adhered to the American Convention and accepted the contentious jurisdiction of the Inter-American Court (*supra*, 2), and long before the State became a party –as of 1999- of the Inter-American Convention on Forced Disappearance of Persons.

9. In the course of the merits stage in these proceedings under international jurisdiction, the State “recognized the facts set forth by the Commission in section III of its application, which are summarized in paragraph 2 of the instant judgment. Likewise, the State recognized its international responsibility in the instant case and accepted the juridical consequences derived from the aforementioned facts” (*Judgment on the merits*, para. 36). This explicit recognition, which amounts to acquiescence, encompasses the facts stated in the application; by this means, the State recognizes the existence of conduct in breach of the Convention, that involves responsibility and generates consequences set forth in the Convention itself. On the other hand, said recognition does not involve any juridical act beyond recognition of the facts, nor does it constitute in and of itself a modification of the general terms under which the State adhered to the Convention or accepted jurisdiction of the Inter-American Court.

10. In the event now before the Court, the violation of the right to personal liberty takes place by means of a fact (an activity, *supra* 2, c) that continues without interruption and corresponds, in criminal terms, to the category of a continuous or permanent crime (*supra*, para. 2). The violation continues to exist, also uninterruptedly, as long as the deprivation of liberty persists.

11. Regarding the effects of this fact apropos of the prosecutability of the crime committed, I share the opinion of the Bolivian Constitutional Court, in judgment No. 1190/01-R of November 12, 2001, quoted in the judgment on reparations (para 107). That national Court refers to the illegal detention that the Judgment on the merits by the Inter-American Court views as a violation of the right to personal liberty, and it rules –quite rightly- that the time to bring prosecution for that criminal act has not lapsed, because if it is a permanent crime, calculation of that period can only begin the day that perpetration of the crime ceases.

12. It is worth stating that the characteristics of the deprivation of liberty suffered by Mr. Trujillo Oroza are those of forced disappearance, which can essentially be considered to be a complementary and qualified definition with respect to the basic criminal definition of deprivation of liberty. However, the Court has examined this matter under the juridical title of violation of the right to personal liberty, not as forced disappearance, taking into account that in Bolivia there was no criminal definition of disappearance, nor was there, as there is now, a commitment by the State to a specific international instrument on this subject.

13. Based what has been stated in the paragraphs above, it is my opinion that the Inter-American Court can and should decide on reparations derived from the facts considered in the acquiescence by the State and that correspond to the precepts mentioned in operative paragraph 2 of the judgment on the merits. This means, among other things: a) that the Court can –and must- order the State to investigate, prosecute, and punish those responsible for the illegal detention of José Carlos Trujillo Oroza, one that conceptually corresponds –as I mentioned before- to forced disappearance; and b) that the demarcations made in paragraphs 3 to 8 of this *Concurring vote* should be reflected in the judgment of the Court regarding various measures of reparation.

14. In the instant judgment, the Court has determined several compensations under the headings of reparation for pecuniary and non pecuniary damage. The amounts of such compensations was assessed and decided in fairness. I consider them adequate, precisely in light of fairness. For this reason, I have concurred with my vote to approve the amounts stated in the operative paragraphs of the judgment, notwithstanding the opinion I state in this *Vote* regarding the scope of competence of the Court in terms of time, defined by Bolivia's becoming bound by the American Convention, in view of the respective accession, and the contentious jurisdiction of the Court, due to the respective declaration.

Sergio García-Ramírez  
Judge

Manuel E. Ventura-Robles  
Secretary

## SEPARATE OPINION OF JUDGE CHARLES N. BROWER

1. I share the views expressed by a distinguished Judge *Ad Hoc* of the International Court of Justice regarding the role of the Judge *Ad Hoc*: While “exercis[ing] his powers impartially and conscientiously,” he has

the special obligation to endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected – though not necessarily accepted – in any separate or dissenting opinion that he may write.<sup>93</sup>

Hence I write, initially, for the purpose of discharging the latter, public part of my duties. I write as well, however, to suggest a further basis of the Court’s jurisdiction here in respect of acts antedating July 27, 1993, the date of Bolivia’s acceptance of the Court’s contentious jurisdiction pursuant to Article 62(1) of the Convention.<sup>94</sup>

2. As to the first, I have joined fully in the Judgment, since I find it, as a whole, and considering all of the circumstances, to be correct and equitable. It respects the laudable facts of Bolivia’s unreserved acceptance, from the very beginning of proceedings before the Commission,<sup>95</sup> of responsibility for the acts giving rise to this case; its express written apology addressed to the mother of the victim; the candor with which it has addressed the difficulties that have been encountered as regards the investigations conducted in Bolivia; and its preparedness to enter into discussions looking towards an amicable settlement of reparations, an offer regrettably not taken up by the victim’s family. It is evident that Bolivia would have preferred that the remedies ordered in this Judgment be substantially more modest in both scope and degree. I am satisfied, however, viewing the matter “impartially and conscientiously” as I am bound to do,<sup>96</sup> that the developed jurisprudence of the Court, applied to the entire record before it in this case, could not have contemplated less.

3. As to the second, it will be recalled that in the *Blake Case*,<sup>97</sup> as here, the disappearance of the victim antedated the State’s formal acceptance of the Court’s jurisdiction. Unlike Bolivia in the present case, however, that State asserted that the Court lacked jurisdiction as a result. The Court concluded that such objection was “without merit insofar as it relate[d] to effects and actions subsequent to” the State’s acceptance of jurisdiction, and hence that the Court was “competent to examine the possible violations which the Commission impute[d] to the Government in connection with those effects and actions”.<sup>98</sup>

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<sup>93</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993, p. 409 (separate opinion of Judge Lauterpacht).

<sup>94</sup> American Convention on Human Rights, hereinafter “the Convention”.

<sup>95</sup> Inter-American Commission of Human Rights, hereinafter “the Commission”.

<sup>96</sup> Pursuant to Articles 10(5) and 11 of the Statute of the Court I have taken an oath to “exercise my functions as a judge honorably, independently and impartially ...”

<sup>97</sup> I/A Court H.R., *Blake Case, Preliminary Objections*, Judgment of July 2, 1996. Series C No. 27.

<sup>98</sup> *Blake Case (Preliminary Objections)*, para. 40.

4. In the present Judgment the Court, after noting the same jurisdictional point, has resolved it on the same basis as in the *Blake Case*. In doing so, it has drawn additional strength both from the fact that Bolivia has chosen not to raise any objection to jurisdiction, and from the fact that the Constitutional Court of Bolivia recently has confirmed, in respect to the very facts under consideration here, that “unlawful deprivation of liberty or unlawful detention ...is a permanent crime”\* as to which any applicable statute of limitations begins to run only when such crime has ceased, *i.e.*, upon the detained individual being restored to liberty (para. 72).

5. While, as I see it, the Court has acted correctly in this regard, I believe that it should have founded jurisdiction over this entire case also on the broader principle of *forum prorogatum*, *i.e.*, Bolivia’s “voluntary and indisputable acceptance of the Court’s jurisdiction”<sup>99</sup> through “the tacit consent of the parties, deduced from their conduct in pleading to the merits of [the] claim ... without raising the question of jurisdiction”.<sup>100</sup> Here the jurisprudence and practice of the International Court of Justice and its predecessor, the Permanent Court of International Justice, excellently collected and explicated by Rosenne,<sup>101</sup> is instructive:

The Court, taking a broad functional and teleological view of [its] Statute, ... “cannot hold to be irregular a proceeding which is not precluded by any provision” in the texts governing the working of the Court.<sup>102</sup>

In consequence, the principle applies to perfect jurisdiction *ratione materiae*, as in the present case, as well as *ratione personae*.<sup>103</sup>

6. Surely acceptance of jurisdiction by this Court on this basis is not “precluded by any provision” in the Convention, the Statute of the Court or its Rules. Article 62 of the Convention basically parallels Article 36 of the Statute of the International Court of Justice. Article 62 (3) of the Convention provides that

The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided

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\* Non – official translation of the author, for the purposes of this opinion only.

<sup>99</sup> *Corfu Channel Case, Judgment on Preliminary Objection: I.C.J. Reports 1948, p. 27*

<sup>100</sup> Rosenne, Shabtai. *The Law and Practice of the International Court, 1920 – 1996*, (3<sup>rd</sup> Edition) Volume II Jurisdiction, Martinus Nijhoff Publishers, The Hague, The Netherlands, 1997, p. 714, referring to the *Corfu Channel Case, Judgment of April 9<sup>th</sup>, 1949: I.C.J Reports 1949, p. 25*. See also *Mavrommatis Case* as quoted by Rosenne, p. 699:

It seems hard to deny that the submission of arguments on the merits, without making reservations in regard to the question of jurisdiction, must be regarded as an unequivocal indication of the desire of a State to obtain a decision on the merits of a suit ...

*A fortiori*, Bolivia, having expressly admitted the factual allegations in this case and accepted fully its international responsibility for their consequences, could not possibly be understood otherwise than as submitting to the Court’s jurisdiction as regards the entire case.

<sup>101</sup> Rosenne, pp. 695 – 725.

<sup>102</sup> Rosenne, p. 708, quoting the *Corfu Channel Case (Preliminary Objection) 1948, p. 28*. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996, pp. 620 - 621*.

<sup>103</sup> Rosenne, pp. 707 – 708.

that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration ..., or by a special agreement.

Similarly, Article 36(1) of the Statute of the International Court of Justice states that the "jurisdiction of the Court comprises all cases which the parties refer to it", as well as others not here relevant, and in Article 36(2) and (3) specifies formal declarations and special agreements as the ordinary means of accepting jurisdiction, likewise without designating them to be the exclusive such means.

7. Equally, nothing in the Rules of either Court "precludes" acceptance of jurisdiction based on the principle of *forum prorogatum*. Article 33(1) of the Rules of Procedure of this Court does not include any requirement that a basis of jurisdiction be articulated in an application to it. The "brief containing the application shall indicate" only

the parties to the case; the purpose of the application; a statement of the facts; the supporting evidence, specifying the facts on which they will bear; the particulars of the witnesses and expert witnesses; the legal arguments, and the conclusions reached ....

Only after the modern advent<sup>104</sup> of the principle of *forum prorogatum* were the Rules of Court of the International Court of Justice amended to include in Article 38(2) the requirement that "[t]he application shall specify *as far as possible* the legal grounds upon which the jurisdiction of the Court is said to be based". (Emphasis added.) That the phrase "as far as possible" was intended, as Rosenne confirms,<sup>105</sup> as a desideratum only, leaving intact the principle of *forum prorogatum*, is obvious from the provision of Article 38(5) setting out the administrative procedures to be followed when "the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made ..."

8. Finally, as litigants before the International Court of Justice relying on the principle of *forum prorogatum* have been quick to point out, that principle is compatible with, if not actually mandated by, the rule laid down in Article 36(3) of the Charter of the United Nations "that legal disputes should as a general rule be referred by the parties to the International Court of Justice," which in turn is a specific application of the broader imperative, recorded in Article 1(1) of the Charter, "to bring about by peaceful means ... adjustment or settlement of international disputes ..."<sup>106</sup>

9. I appreciate that this Court, so far as its jurisprudence indicates, never heretofore has addressed, or been called upon to address, the possibility of its being a *forum prorogatum*. That being the case, a certain reticence to do so now, when it does not appear to be necessary, is understandable. Caution no doubt is appropriate, as a general matter, given that the principle is not without its critics.<sup>107</sup>

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<sup>104</sup> Rosenne (p. 696) traces the principle to Roman law.

<sup>105</sup> Rosenne, pp. 702 – 705.

<sup>106</sup> See, e.g., *Ambatielos Case* and *Anglo – Iranian Oil Co. Case* as discussed by Rosenne, pp. 708 – 712.

<sup>107</sup> Thus Rosenne, albeit referring to the highly "political" *Anglo – Iranian Case Oil Co.*, in which the Security Council also was involved, observes (p. 711):

I would have thought, however, that any concerns would have been allayed by Bolivia's immediate and complete acceptance of its international responsibility, based on admission of the facts alleged, leaving only measures of reparation in dispute. Hence I am constrained to present the issue, believing as I do that invocation by the Court in this case of the principle of *forum prorogatum*, in addition to the basis on which it (quite properly, in my view) does rely, would have rendered the Court's assertion of jurisdiction over the entire case even more unassailable. Moreover, it would have set an important precedent further clarifying for States Parties to the Convention the foundations of the Court's jurisdiction. As it is, however, these observations must serve simply as an invitation to future discussion.

Charles N. Brower  
Judge *ad hoc*

Manuel E. Ventura-Robles  
Secretary

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The possibility of grave political consequences may indicate the need for restraint on the expansionist tendencies inseparable from the very notion of *forum prorogatum*.

Further (pp. 724 – 725):

...[T]he Court has created an imposing doctrine which seems to be at some variance with the political attitude of certain States towards what ought to be the basis of the Court's jurisdiction.

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...[H]esitation over the practical wisdom of the Court's attitude is necessarily strong and, so far, unresolved.

