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REPORT No. 28/16
CASE 11.550
ADMISSIBILITY AND MERITS

MAURILIA COC MAX ET AL. (XAMÁN MASSACRE)
GUATEMALA

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I. SUMMARY

1. On November 16, 1995, the Inter-American Commission on Human Rights (hereinafter, the "Commission" or "IACHR") received a petition lodged by Rigoberta Menchú Tum, Eduardo Antonio Salerno, and María López Funes. Subsequently, Grupo de Apoyo Mutuo (GAM) became a petitioner (hereinafter, "the petitioners"). The petitioners claimed that the State of Guatemala (hereinafter, the "State" or "Guatemalan State") bore responsibility for the extrajudicial execution of, and injuries caused to, a group of villagers at Finca Xamán by members of the armed forces.

2. According to the petitioners, members of the Guatemalan Armed Forces entered Finca Xamán on October 5, 1995. They said that 11 villagers—including three children—were killed and 29 wounded. With respect to the case's admissibility, the petitioners said that domestic remedies were exhausted. They added that there were various irregularities and flaws in the criminal proceeding and that it took an unreasonably long time. They said that, so far, none of the victims or their next of kin has received any sort of reparation.

3. For its part, the State acknowledged the occurrence of the events and argued that the necessary measures were adopted to elucidate the facts and identify and punish the military personnel responsible. It said that following a proceeding in keeping with its domestic standards, the military personnel involved were convicted of the crimes of arbitrary execution and attempted arbitrary execution. Consequently, the State held that the case was inadmissible and that its international responsibility was not engaged since it had already provided reparations for the above-described injuries.

4. Having examined the information available, the Commission concluded that the case was admissible and that the State of Guatemala was responsible for violation of the rights recognized at Articles 4(1), 5(1), 8(1), 19, 24 and 25(1) of the American Convention on Human Rights, taken in conjunction with Article 1(1) of said instrument, to the detriment of the persons mentioned in each section of this report.

II. PROCEEDINGS BEFORE THE COMMISSION

5. The original petition was lodged on November 16, 1995. On December 6, 1995, the State sent a communication after the Commission had forwarded the petition to it. The petitioners presented communications on February 26, March 12, September 10, and September 30, 1996; February 26, March 23, August 10, and October 6, 1998; March 4, 1999; and July 26, 2002. The State, for its part, sent communications on May 24 1996; May 12, 1997; March 12, April 27, and December 1, 1998; and July 7, 1999.

6. On December 18, 2002, the IACHR wrote to the parties, advising them of its decision to defer its analysis on the petition's admissibility until the decision on merits, in accordance with Article 37(3) of its Rules of Procedure then in force. The Commission said that its decision was based on the fact that "in the course of the processing of this petition, the parties have had ample opportunity to provide information on the complaint and arguments both as to its admissibility and with regard to its merits." The Commission asked that the petitioners submit their observations on admissibility and merits within two months.

7. The petitioners presented a communication containing their observations on admissibility and merits on February 11, 2003. The Commission gave the State two months to submit its observations on merits, in accordance with Article 38(1) of its Rules of Procedure. The State presented its observations on May 24, 2004. Subsequently, the petitioners sent communications on August 24, 2004, April 28, 2005, and

July 20, 2005. For its part, the State sent communications on July 27, 2004, November 10, 2004, and October 19, 2005.

8. On April 12, 2007, the Commission wrote to the parties, informing them of his decision, pursuant to Article 41(1) of its Rules of Procedure in force at the time, to place itself at their disposal with a view to reaching a friendly settlement. On April 3, 2008, the petitioners wrote, accepting the proposal of the IACHR to initiate a friendly settlement process. The State, for its part, sent a communication on May 2, 2008, saying that it was awaiting a friendly settlement proposal from the petitioners.

9. Following that communication, the IACHR received various communications from the parties, which it duly forwarded.

10. On July 28, 2015, the petitioners informed the IACHR of their decision not to continue with the friendly settlement process, "having not received a concrete proposal at any time during the process." On November 9, 2015, the Commission wrote to the parties, saying that it had decided to conclude its involvement in the friendly settlement process and resume processing the case.

11. On May 17, 2016, the IACHR requested the petitioners a list of the alleged victims' relatives. The list submitted by the petitioners was forwarded to the State. On June 6, 2016, the State submitted a communication to the Commission indicating it did not have any observations to the list. Guatemala also stated that "it is holding meetings with the representatives of the victims in order to achieve a friendly settlement". The IACHR considers that due to its communication of November 9, 2015, its involvement in the friendly settlement process is concluded. Therefore, the Commission resumed processing the case.

III. POSITIONS OF THE PARTIES

A. The petitioners

12. The petitioners claimed that the State of Guatemala bore international responsibility for the extrajudicial execution of 11 people—including 3 children—and the injuries caused to 29 others. They say that the incident was caused by personnel of the armed forces of Guatemala on October 5, 1995. They say that the State has not refuted the incident and that the Historical Clarification Commission referred to it in its report as the "Xamán Massacre."

13. The petitioners explained that those people were living in the community of "Aurora 8 de Octubre," which was established in 1994 on the Xamán estate in the Department of Alta Verapaz. They reported that the community comprised some 90 indigenous families that had previously been living in Mexico as refugees from the armed conflict in Guatemala, as well as 50 other families that were already living there. They said that the people who had returned to live in that community had survived massacres in their own villages of origin in the 1980s during the armed conflict in Guatemala.

14. As to the admissibility of the case, the petitioners said in their early communications that the exception to the rule of prior exhaustion of domestic remedies should apply. They said that this was because the investigation of the facts in the case was carried out in the military criminal jurisdiction, which is contrary to the American Convention. Subsequently, after the case was transferred to the ordinary courts in 1996, the petitioners pointed out a variety of irregularities, shortcomings, and omissions in the investigation, and said that the proceeding was unreasonably long. Finally, they argued that remedies were exhausted with the judgment of July 8, 2004, which convicted a group of the soldiers for the crimes of extrajudicial execution and grievous bodily harm.

15. As regards the merits of the case, the petitioners argued that the State violated the **rights to life and humane treatment** of the people who were murdered and wounded as a result of the shooting by members of the armed forces. They said that the **rights of the child** were also violated because three of those killed in the massacre were children.

16. Furthermore, they said that the State violated the **right to property** of the members of the estate due to the fact that the Army entered it without a court order. They added that the **right to equal protection of the law** was violated on account of the flaws in the investigation of the facts, the delay in the proceedings, and the State's abetting of the military personnel who committed the massacre. The petitioners said that the alleged facts constitute discrimination against indigenous people.

17. In addition, the petitioners said that the State violated the **rights to a fair trial and judicial protection** of the victims and their families. The foregoing was due to the fact that there was a series of irregularities, shortcomings, and omissions in the investigations. The petitioners explained that the investigation was initially assigned to the military criminal jurisdiction, which is not compatible with the American Convention. They added that there was a series of failings in preserving the scene of the crime, gathering evidence, performing autopsies, and taking statements from witnesses, in addition to intimidation of the prosecutor in charge of the case and survivors of the massacre who wished to provide statements, among other factors.

18. The petitioners said that it was not until July 8, 2004, after various remedies had been invoked in the quest for justice, that a judgment was handed down convicting the military personnel responsible for the deeds. They said that that proceeding, which lasted almost nine years, was not conducted within a reasonable time. They added that the irregularities and delays created emotional distress in the victims and their families.

19. Finally, the petitioners argued that, despite the existence of a criminal conviction that was final, they had yet to receive any sort of reparation for the injuries caused. They said that they had brought a civil suit which had not yielded favorable results. They added that the surviving victims—some of whom have disabilities due to the alleged events—have also failed to receive adequate medical and psychological care, which has harmed their health.

B. The State

20. The State acknowledged that on October 5, 1995, a group of 25 soldiers under the command of a Guatemalan army second lieutenant entered the Xamán estate, which was inhabited by the “8 de Octubre” community. The state acknowledged that the soldiers discharged their firearms “as a result of which 11 members of the community were killed” ... and several other of its members were wounded. Guatemala provided the following explanation:

The Government of the Republic of Guatemala regrets the events that occurred on the estate on October 5, 1995, and assumed institutional responsibility from the outset. The Government of the Republic expresses its solidarity with the victims of the events described and is resolved to provide redress to the families of the fatal victims and to the persons who were wounded.

21. Guatemala said that the aforesaid situation was an isolated incident and that it was not planned in advance. The State argued that immediately after the incident it opened an investigation to clarify the events and punish those responsible.

22. The State said that the soldiers involved were detained while the investigation was initiated in the military criminal jurisdiction. It said that the investigation was transferred to the ordinary criminal jurisdiction a couple of months afterwards. It said that various procedures were carried out to ascertain the responsibility of the persons involved, such as the taking statements from witnesses [and] a visual inspection of the scene. The State said that on July 8, 2004, a judgment was delivered convicting the military personnel responsible for the events, including the person in charge of the patrol.

23. It argued that in view of this situation the case is not admissible because the inter-American system is subsidiary in nature. It explained that it had successfully remedied the situation at the domestic level by allowing the victims and their families to have access to justice. It held that, consequently, the Inter-

American Commission cannot pronounce on a case that has already been disposed of in accordance with its system of laws.

24. In relation to the alleged failure to provide compensation to the victims and their families, the State said that talks were held with the petitioners. It said that in spite of the efforts made, no agreement was reached on the amounts to be paid in compensation to the next of kin of those who died and to the survivors.

IV. ANALYSIS OF COMPETENCE AND ADMISSIBILITY

A. The Commission's competence *ratione personae*, *ratione loci*, *ratione temporis*, and *ratione materiae*

25. The petitioners have standing under Article 44 of the American Convention to lodge petitions. In addition, the alleged victims are individuals who were under the jurisdiction of the State of Guatemala at the time of the facts adduced. Therefore, the Commission has *ratione personae* competence to examine the petition. The Commission is competent *ratione loci* to take cognizance of the petition, insofar as it alleges violations of the American Convention that are said to have taken place in the territory of a state party to that treaty. Similarly, the IACHR has *ratione materiae* competence because the petition refers to alleged violations of the American Convention. The Commission is also competent *ratione temporis* to examine the claim as Guatemala ratified the American Convention on May 25, 1978. Therefore, the obligation of the State to respect and ensure the rights recognized in the American Convention was in force at the time that the alleged facts are said to have occurred.

B. Exhaustion of domestic remedies

26. Article 46(1)(a) of the American Convention provides that in order for a complaint submitted to the Inter-American Commission pursuant to Article 44 of the same instrument to be admissible, one must have pursued and exhausted domestic remedies in keeping with generally recognized principles of international law. This rule is designed to allow national authorities to examine alleged violations of protected rights and, as appropriate, to resolve them before they are taken up in an international proceeding.

27. As the Commission has pointed out, to analyze compliance with the requirement to exhaust domestic remedies, the Commission must determine what was the appropriate remedy to exhaust under the circumstances, meaning the remedy best suited to resolving the legal infringement. Furthermore, the precedents established by the Commission indicate that in cases of alleged extrajudicial executions, a criminal investigation and proceeding in the regular courts is the suitable recourse to clarify the facts, try those responsible, and establish appropriate criminal penalties, in addition to providing for other forms of reparation.¹

28. The Commission notes that after the petition was lodged there were developments in the proceedings initiated at the domestic level in connection with the incident. Thus, the investigations were opened in the military criminal jurisdiction the day after the events occurred and were transferred to the regular criminal courts towards the end of January 1996. In addition, the IACHR takes note of the fact that on July 8, 2004, the Sentencing Court for Criminal Matters, Drug Trafficking and Environmental Crimes of Alta Verapaz Department handed down a judgment convicting 14 members of the armed forces for the crimes of extrajudicial execution and grievous bodily harm. On September 23, 2005, the Supreme Court declared that judgment final. The IACHR notes that there is no disagreement between the parties over the conclusion of the criminal proceeding.

¹ IACHR, Report No. 51/08, Petition 299-07, Admissibility, Robert Ignacio Díaz Loreto et al., Venezuela, July 24, 2008; and Report No. 23/07, Petition 435-2006, Admissibility, Eduardo José Landaeta Mejías et al., Venezuela, March 9, 2007.

29. In that connection, the Commission recalls that in circumstances where evolution of the facts initially presented at the domestic level entails a change in terms of compliance or noncompliance with the admissibility requirements, its analysis must be based on the situation extant at the time of its pronouncement on admissibility.²

30. In light of the foregoing, the Commission notes that as of the date of this pronouncement the criminal proceeding had definitively concluded in the domestic jurisdiction. Therefore, the Inter-American Commission considers that domestic remedies have been exhausted with prejudice in accordance with Article 46(1)(a) of the American Convention.

C. Timeliness of the petition

31. Article 46(1)(b) of the Convention provides that for a petition to be admitted it must be lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment that exhausted the domestic jurisdiction.

32. The Commission established in the previous section that domestic remedies have been exhausted. The requirement of prior exhaustion of domestic remedies was met during the processing of the case with regard to its admissibility and merits. Under those circumstances, the Commission has consistently taken the view that fulfillment of the requirement regarding the time period for lodging the petition is intrinsically linked to the exhaustion of domestic remedies and should therefore be regarded as complied with.³

D. Duplication of international proceedings and res judicata

33. Article 46(1)(c) provides that the admissibility of petitions is subject to the requirement that the subject “is not pending in another international proceeding for settlement,” while Article 47(d) of the Convention stipulates that the Commission shall not admit a petition that “is substantially the same as one previously studied” by the Commission or by another international organization. In the case, the parties have not shown the existence of either of those two circumstances, nor can they be deduced from the record.

E. Colorable claim

34. For purposes of admissibility, the Commission must decide whether the petition states facts that tend to establish a violation, as stipulated in Article 47(b) of the American Convention, whether the petition is “manifestly groundless” or whether it is “obviously out of order,” as per Article 47(c). The standard of appreciation of these measures is different from that required to decide on the merits of a complaint. The Commission must perform a *prima facie* evaluation to examine whether the complaint establishes a basis for an apparent or potential violation of a right guaranteed by the Convention and not to establish the existence of a violation. Such a review is a summary analysis that does not imply any pre-judging or any early formation of an opinion on the merits.

35. Neither the American Convention nor the Rules of Procedure of the IACHR requires that the petitioners identify the specific rights alleged to be violated by the State in the matter submitted to the Commission, although the petitioners may do so. Rather, it is up to the Commission, based on the case-law of the system, to determine in its admissibility reports which provision of the relevant inter-American instruments is applicable or could be established as having been violated, if the facts alleged are sufficiently proven.

² IACHR, Report No. 2/08, Petition 506-05, Admissibility, José Rodríguez Dañín, Bolivia, March 6, 2008, par. 56; and Report No. 25/04, Case 12.361, Admissibility, Ana Victoria Sánchez Villalobos et al. (Costa Rica), March 11, 2004, par. 45.

³ IACHR, Report No. 8/10, Caso 12.374, Admissibility, Jorge Enrique Patiño Palacios et al., Paraguay, March 16, 2010, par. 31; and Report No. 20/05, Petition 716/00, Admissibility, Rafael Correa Díaz, Peru, February 25, 2005, par. 34.

36. As regards the state's argument that the case is inadmissible owing to the existence of a final decision in relation to the alleged deeds at the domestic level, the commission recalls that according to the consolidated case law of the organs of the Inter-American system, "ascertaining whether the State violated its international obligations by means of its actions before its judicial organs, can lead to" the Inter-American Commission and Court "examining the particular domestic procedures, eventually including the decisions of the higher courts, so as to establish the compatibility with the American Convention."⁴

37. In that regard, the Commission underscores that the purpose of this petition is not a review *per se* of the proceedings and decisions under domestic law. The purpose is to determine as to whether the alleged acts and omissions of various State authorities engaged the international responsibility of the State of Guatemala.

38. The IACHR finds that, if true, the facts alleged by the petitioners could constitute violations of rights recognized in Articles 4, 5, 8, 19, 24 and 25 of the American Convention, in connection with Article 1(1) of said instrument. At the same time, the Commission considers that it does not have sufficient elements at its disposal to analyze if the alleged facts could characterize a violation of rights recognized in Articles 11, and 21 of the American Convention.

V. ANALYSIS OF MERITS

A. Proven Facts

1. Regarding the armed conflict in Guatemala

39. The Inter-American Commission and Court have both pronounced on the consequences of the internal armed conflict in Guatemala that lasted from 1962 to 1996.⁵ Those organs took into account the findings of the Commission for Historical Clarification (hereinafter, the "CEH") in its report "Guatemala: Memory of Silence" (*Guatemala: Memoria del Silencio*), of the Interdiocesan Project for the Recovery of Historical Memory in its report "Never Again" (*Nunca Mas*), and of information gathered by international and domestic bodies. In that regard, the Commission recaps the following information:⁶

The armed conflict in Guatemala had an enormous human, material, institutional, and moral cost. During that period it is estimated that more than 200,000 people were victims of arbitrary executions and forced disappearance.⁷

(...)

The counterinsurgency policy in Guatemala was characterized, particularly during the most violent period of the conflict, by military actions designed to exterminate groups and communities through killings of defenseless populations, massacres,⁸ and scorched-earth

⁴ I/A Court H.R. *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 24, 2010. Series C No. 219, par. 49.

⁵ IACHR, Report No. 6/14, Case No. 12.788, Merits, Members of the Village of Chichupac and Neighboring Communities of the Municipality of Rabinal, Guatemala, April 2, 2014. See, also, I/A Court H.R., *Case of the "Las Dos Erres" Massacre v. Guatemala*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 24, 2009. Series C No. 211.

⁶ IACHR, Report No. 6/14, Case No. 12.788, Merits, Members of the Village of Chichupac and Neighboring Communities of the Municipality of Rabinal, Guatemala, April 2, 2014, pars. 36-66.

⁷ The Commission for Historical Clarification (CEH) registered 42,275 victims of arbitrary executions and forced disappearance in the course of its documentation efforts. Of these, 23,671 were victims of arbitrary execution and 6,159 were victims of forced disappearance. Annex 1. CEH, *Memory of Silence*, Volume V, Conclusions and Recommendations, par. 1.

⁸ Annex 1. CEH, *Guatemala: Memory of Silence*, Conclusions and Recommendations, pars. 85-88. Available at: <https://hrdag.org/wp-content/uploads/2013/01/CEHreport-english.pdf>

operations.⁹ The CEH registered 626 massacres committed by State forces during the armed conflict¹⁰ with the support of patrol groups like the military commissioners,¹¹ the Judiciales,¹² and the Civil Self-Defense Patrols (PAC).¹³

(...)

Under the State's National Security Doctrine, the Army came to view the indigenous Mayan population as the "internal enemy," since they believed that they constituted or potentially constituted the guerrillas' support base.¹⁴

2. Displaced persons and refugees in the wake of the armed conflict

40. The CEH stated that the refugees who had returned to live in that community had survived massacres in their own villages of origin in 1982.¹⁵ After the armed conflict, survivors of massacres were forced to endure displacement under difficult conditions under even persecution by the perpetrators.¹⁶ In that connection, the CEH said:

Unprecedented terror, provoked by the massacres and the devastation of complete villages during the period 1981 to 1983, led to the flight *en masse* of a diverse population, the majority of which was Mayan, but which also included a considerable number of Ladino families. Estimates of the number of displaced persons vary from 500,000 to a million and a half people ..., including those who were displaced internally and those who were obliged to seek refuge abroad.¹⁷

(...)

The variation in these figures reflects the changing nature of this displacement. About 150,000 people sought safety in Mexico. Almost a third of these settled in camps and were given refugee status by the United Nations High Commissioner For Refugees (UNHCR).¹⁸

(...)

⁹ Annex 1. CEH, Guatemala: *Memory of Silence*, Conclusions and Recommendations, pars. 65-67.

¹⁰ Annex 1. CEH, Guatemala: *Memory of Silence*, Conclusions and Recommendations, par. 86.

¹¹ Since the early days of the armed confrontation, the military commissioners were the representatives of the Army in each community. Annex 1. CEH, Guatemala: *Memory of Silence*, Conclusions and Recommendations, par. 80.

¹² The judiciales were an investigative body of the National Police; during the armed conflict, especially during the most violent years, they largely took their orders from and were controlled by the Army. Annex 1. CEH, Guatemala: *Memory of Silence*, Conclusions and Recommendations, par. 43.

¹³ The PAC were the creation of the de facto military regime headed by General Efraín Ríos Montt in late 1981. They were part of his plan to exterminate the guerrilla movement by relocating the indigenous population and wiping out "any community or killing any person that his government was suspicious of, using methods that violated human rights." PACs were first introduced in the Department of El Quiché and then spread to other departments. IACHR, Fourth Report on the Situation of Human Rights in Guatemala, June 1, 1993 Available at: <http://www.cidh.org/countryrep/Guatemala93eng/toc.htm>.

¹⁴ Annex 1. CEH, Guatemala: *Memory of Silence*, Conclusions and Recommendations, par. 15.

¹⁵ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

¹⁶ Annex 1. CEH, Guatemala: *Memory of Silence*, Conclusions and Recommendations, pars. 65-67.

¹⁷ Annex 1. CEH, Guatemala: *Memory of Silence*, Conclusions and Recommendations, par. 66.

¹⁸ Annex 1. CEH, Guatemala: *Memory of Silence*, Conclusions and Recommendations, par. 66.

The testimonies of the internally displaced received by the CEH reveal an attitude both of resistance to military control and in defense of life, not only in its physical sense, but also with regard to culture and political identity.¹⁹

41. The IACHR, for its part, in its second special report in 1993 titled "The Situation of Human Rights in Guatemala" documented the mass displacement in Guatemala caused by the widespread repression that occurred in 1981 and 1982.²⁰ The Commission recorded the following:

[M]any people, particularly indigenous people who had lived in the mountain regions for centuries, fled to Mexico. After more than ten years in exile, the 45,000 refugees recognized by the UNHCR in Mexico have decided to return to their homeland.²¹

42. Faced with this situation, in 1991 the Guatemalan State created the National Commission for Repatriates, Refugees and Displaced Persons (CEAR), which was composed of the then-Vice President, the Minister of Foreign Affairs, the Minister of National Defense, the Minister of Government, the Minister of Urban and Rural Development, the Secretary of Economic Planning, and the Special Adviser for International Cooperation.²² The purpose of the CEAR was to solve the problem of refugees, returnees and displaced persons.²³

43. In July of that same year, at the First Conference of Groups Created in Response to the Repression and Impunity, held in Guatemala City, the Permanent Commissions of Representatives of Guatemalan Refugees in Mexico (CCPP) spelled out six conditions for a safe and dignified return:

a) Returning must be a voluntary, individual decision. The vast majority of the refugee population is demanding a collective and organized return.

b) Guarantees that refugees will be allowed to return to their lands to take possession of them. This does not mean that upon their return, refugees will begin to fight with fellow peasant farmers now occupying their lands.

c) Recognition of the refugees' rights to organize and associate freely.

d) The right to life, to humane treatment and community. In this regard, the refugees are demanding guarantees that this right will be respected by the Government, the Army and other authorities. Accordingly, it is absolutely essential that the civilian authorities in each municipality be the only parties charged with public order, as prescribed in articles 253 and 259 of the Constitution.

e) The Government is to allow national and international delegations, nongovernmental organizations and representatives of the Office of the United Nations High Commissioner for Refugees to accompany the refugees upon their return, and remain in the country thereafter so that they can check to ensure that these conditions are being observed.

¹⁹ Annex 1. CEH, Guatemala: *Memory of Silence*, Conclusions and Recommendations, par. 71.

²⁰ IACHR, *Fourth Report on the Situation of Human Rights in Guatemala*, June 1, 1993, Chapter VII, "The Situation of Refugees and Displaced Persons in Guatemala and Their Human Rights." Available at: <http://www.cidh.org/countryrep/Guatemala93eng/chapter.7.htm>

²¹ IACHR, *Fourth Report on the Situation of Human Rights in Guatemala*, June 1, 1993, Chapter VII, "The Situation of Refugees and Displaced Persons in Guatemala and Their Human Rights."

²² IACHR, *Fourth Report on the Situation of Human Rights in Guatemala*, June 1, 1993, Chapter VII, "The Situation of Refugees and Displaced Persons in Guatemala and Their Human Rights."

²³ IACHR, *Fourth Report on the Situation of Human Rights in Guatemala*, June 1, 1993, Chapter VII, "The Situation of Refugees and Displaced Persons in Guatemala and Their Human Rights."

f) The members of the CCPP and the returning refugees are to enjoy freedom of movement, both national and international.²⁴

44. On December 13, 1991, the then-President of Guatemala and the UNHCR signed a Letter of Understanding on Voluntary Repatriation of Guatemalans from Mexico.²⁵ Among the terms of reference, the Commission notes the following:

The Government of Guatemala provides assurances that, in furtherance of Article 4 of the Constitution of the Republic which guarantees the liberty and equality, as well as the rights of all Guatemalans, returnees shall not suffer any discrimination in the exercise of their social, civil, political, cultural and economic rights

(...)

The Government of Guatemala ... guarantees that the returnees can and will be able freely and without pressure to select the location where they decide to reside, whether that be individually and/or as family units, or as communities and/or in a collective manner.

(...)

The Government of the Republic will provide facilities to those returnees without land at the time they abandoned the country, for access to land and registration of the same in conditions similar to that provided to other nationals.²⁶

45. Following a series of negotiations, on October 8, 1992, the Government of Guatemala, represented by the national commission for repatriation, refugees and displaced persons (CEAR) and the Permanent Commissions of Representatives of Guatemalan Refugees in Mexico (CCPP) signed agreements on October 8, 1992.²⁷ Those agreements, spelled out the conditions for the return of the refugees in Mexico as a result of the armed conflict in Guatemala. The IACHR had the following to say with respect to the contents of the agreements:

First, the agreements speak of the need for the return to be a voluntary decision, expressed by each refugee individually and confirmed by the UNHCR; they stipulate that the return is to be carried out in collective, organized fashion, and is to be done safely and with dignity. The agreements stipulate that the return is to be a gradual process, but carried out swiftly. It is to be coordinated by the Permanent Commissions, which are to act upon the refugees' requests. Working on the basis of the Plan of Operations that the Permanent Commissions present, the UNHCR, CEAR, Mexican Commission for Refugee Assistance (COMAR) and other groups involved will coordinate the return operations.

The second point of the Agreements, vitally important in dealing with the sociological problems that the return may create, concerns ... recognition of the returnees' right to freedom of association and organization. Here, the Government undertakes a fundamental commitment to respect, in accordance with the national and international standards in force for the country, the

²⁴ IACHR, *Fourth Report on the Situation of Human Rights in Guatemala*, June 1, 1993, Chapter VII, "The Situation of Refugees and Displaced Persons in Guatemala and Their Human Rights."

²⁵ Letter of understanding, November 13, 2001. Available at: http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:784

²⁶ Letter of understanding, November 13, 2001. Available at: http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:784

²⁷ Agreements between the Permanent Commissions of Representatives of Guatemalan Refugees in Mexico and the Government of Guatemala, October 8, 1992 Available at: <http://www.refworld.org/pdfid/46d6e39a2.pdf>

right of the returned people to practice their culture and to associate amongst themselves and organize themselves freely, to permit their full development and integration into Guatemalan society. (...)

The third point covered in the agreements is called "Returnee Escort". This [is] essential if the return and subsequent settlement, adaptation and development of the thousands of people who are returning to their country, are to be protected by the necessary guarantees. As their titles clearly indicate, this will involve the participation of various bodies--national and international, governmental and nongovernmental--to monitor execution of the repatriation process from the outset, and include mechanisms to police and settle disputes or controversies that arise in carrying out the agreements. Doubtless, the active cooperation of all parties committed to the success of the agreements will be crucial to their effective implementation and will create a sense of trust among the returnees and among those who still remain abroad.

The fourth point addressed by the agreements is the question of freedom of movement within the country, the freedom to leave and enter its territory, both for returnees and for members of the Permanent Commissions. Observance of Article 22, paragraphs 1 to 5 of the American Convention on Human Rights is important here.

The fifth issue concerns the right to life and personal and community integrity. It is a logical consequence of the need to give returnees guarantees; particular emphasis must be given to verifying the Guatemalan Government's observance of this commitment, as regards respect for the way of life, customs, traditions, and social organization of the people, a vital part of their readaptation to the country.²⁸

46. The CEH, for its part, said in its report that the agreements recognized the "civilian and peaceful nature of the return and the returnees."²⁹ The CEH also indicated that the agreements were often interpreted "in a broad sense by the returnees as a promise from the Army not to enter or patrol near their communities."³⁰

47. In December 1992, the Permanent Commissions made public their determination to begin the repatriation on January 13, 1993.³¹ According to information obtained by the Commission at the time, around 8,000 refugees expressed their interest in immediate repatriation.³² UNHCR, CEAR and COMAR supervised the transfer for the resettlement.³³ The government of the day also accepted the request from United Nations independent expert for human rights in Guatemala, Christian Tomuschat, that soldiers from the military base keep away from the resettlement zone in order to facilitate good relations between the returnees and the soldiers.³⁴

²⁸ IACHR, *Fourth Report on the Situation of Human Rights in Guatemala*, June 1, 1993, Chapter VII, "The Situation of Refugees and Displaced Persons in Guatemala and Their Human Rights."

²⁹ Annex 2. CEH, *Guatemala: Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre. Available at: http://www.plazapublica.com.gt/sites/default/files/tomo_6_y_7_anexo_i_casos_ilustrativos_1.pdf

³⁰ Annex 2. CEH, *Guatemala: Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

³¹ IACHR, *Fourth Report on the Situation of Human Rights in Guatemala*, June 1, 1993, Chapter VII, "The Situation of Refugees and Displaced Persons in Guatemala and Their Human Rights."

³² IACHR, *Fourth Report on the Situation of Human Rights in Guatemala*, June 1, 1993, Chapter VII, "The Situation of Refugees and Displaced Persons in Guatemala and Their Human Rights."

³³ IACHR, *Fourth Report on the Situation of Human Rights in Guatemala*, June 1, 1993, Chapter VII, "The Situation of Refugees and Displaced Persons in Guatemala and Their Human Rights."

³⁴ IACHR, *Fourth Report on the Situation of Human Rights in Guatemala*, June 1, 1993, Chapter VII, "The Situation of Refugees and Displaced Persons in Guatemala and Their Human Rights."

3. The “Aurora 8 de Octubre” community on the Xamán estate

48. The “Aurora 8 de Octubre” community settled on the Xamán estate, Municipality of Chisec, Department of Alta Verapaz, Guatemala.³⁵ The community was established in 1994 and comprised some 90 families that had been living in Mexico as refugees from the armed conflict in Guatemala, as well as 50 other families that were already living there.³⁶

49. According to the records of the CEH those people belongs to the q’eqchi’, mam and q’anjob’al indigenous population and, to a lesser extent, to the ixil and k’iche’ indigenous population.³⁷ The CEH said that the refugees who had returned to live in that community had survived massacres in their own villages of origin in 1982.³⁸ According to a statement from one community member to the CEH, they decided to name it “Aurora 8 de Octubre” because it was one of the first communities, like a dawn for the returnees in that place that had once been full of civil patrols.” (Translator’s note: “Aurora” means “dawn” in English.)³⁹

4. The events that occurred in October 1995 on the Xamán estate

50. The Commission notes that the events that took place on the Xamán estate in early October 1995 were recorded in the report of the CEH, which dubbed it the “Xamán Massacre.”⁴⁰ The CEH took into account statements of surviving community members as well as reports of the United Nations Verification Mission in Guatemala (MINUGUA).

51. The IACHR also notes that during the proceedings before it the State acknowledged the events and expressly mentioned that 11 people were killed and another group of persons were wounded in the shooting by its soldiers. The findings of the CEH also coincide with the statements of survivors of those events, as is shown by the record before the Commission and the conclusions of the criminal proceedings mentioned hereinbelow.⁴¹ In light of the foregoing, transcribed below are a number of extracts from the information gathered by the CEH on the “Xamán massacre”:

On October 3, 1995, a military patrol under the command of a Guatemalan Army second lieutenant and composed of 26 soldiers, including one minor, set out from the Rubelsanto base in military zone 21, headquartered in Cobán, Alta Verapaz Department. Before leaving the patrol already intended to pass by the entrance to the Xamán estate.

On the morning of October 5, a number of community members ... who were rubber tapping, noticed the soldiers moving near the estate; they were near the school, no more than 10 meters from the first homes.

Several villagers who were erecting a canopy in the center of the village to be used during the anniversary celebrations [marking the community’s first birthday] were alerted to the presence of the patrol. A group of 10 villagers assembled; they included some women, the community elders, and number of leaders of community organizations. They went out to meet the patrol and asked to speak to the commanding officer. The group asked the soldiers why they were there, in violation of the October 8 Agreements.

³⁵ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

³⁶ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

³⁷ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

³⁸ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

³⁹ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁴⁰ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁴¹ Annex 3. Statements by Anastacio Maya Quiché, Rolando Hernández, Alfonso Hernández, Pascual Ruiz, Pedro Morales, Luis Ordóñez, Lucas Chic, Ramiro Ramírez, and René Hernández. Enclosed with the initial petition.

The second lieutenant in command of the patrol said that they were on their way to a nearby community. However, the villagers told the soldiers that the way they were going did not lead there. Meanwhile, other villagers were making references to things that the Army had done in the early 1980s. According to some witnesses, the soldiers asked if they could take part in the festivities planned to commemorate the community's first anniversary and the villagers themselves invited them to stay. Others say that it was demanded that they come in to explain what they were doing there.

Leaving aside the real reasons they entered the village, the fact is that after that first encounter the commanding officer decided to make his way to the center of the community so that he could explain the reasons for the soldiers' presence. On the way, the number of villagers surrounding the soldiers gradually increased and the verbal onslaught directed at the soldiers grew more forceful, as did the expressions of displeasure at their presence. At around 1:30 p.m. the second lieutenant spoke to the deputy mayor. While this was happening, the villagers' expressions of discontent with the soldiers' presence grew increasingly heated until they asked the soldiers to put down their weapons and remain there so that MINUGUA and the UNHCR could come and verify this alleged violation of the October 8 Agreements.

After more than half an hour, the second lieutenant issued a number of orders to the soldiers, who, uneasy at the pressure from the community members, who were surrounding them, "attempted to leave, pushing the people aside with their rifles," and made for where they had entered the village. At the same time, a group of villagers made their way there to stop them leaving. A woman "grabbed the barrel of the sergeant's firearm to wrest it from him and he ordered another member of the patrol to open fire, the latter did so, killing three people nearby, one of whom was shot in the back as he or she was running away. This incident sparked a chain reaction in the rest of the soldiers, who began firing indiscriminately in all directions; "at that point we all started running." Several people fell down upon being struck by bullets as they fled and, according to reports, three were shot again as they lay on the ground.⁴²

52. The CEH says that there was no evidence that the villagers were carrying firearms or testimony to suggest any physical aggression against the soldiers, who were mainly surrounded by women and children.⁴³ The CEH only noted the remarks directed by the villagers at the soldiers and the aforementioned attempt to take a sergeant's firearm.⁴⁴

53. According to the CEH,⁴⁵ nine people from the community were executed during this incident: (i) Abel Pérez Ramírez; (ii) Andrés Miguel Mateo; (iii) Carlos Fernando Chop Chip, a child; (iv) Hilaria Morente de la Cruz;⁴⁶ (v) Juana Jacinto Felipe;⁴⁷ (vi) Manuela Mateo Antonio; (vii) Pablo Coc Coc, (viii) Pedro Diego Andrés;⁴⁸ and (ix) Pedro Medina Sánchez.⁴⁹ The CEH also said that Maurilia Coc Max, an eight-year-old girl, died from the gunshot wounds that she sustained.⁵⁰ The petitioners said that she was shot from behind.⁵¹

⁴² Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁴³ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁴⁴ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁴⁵ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁴⁶ She was shot at point-blank range while wounded. See: Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁴⁷ She was shot at point-blank range while wounded. See: Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁴⁸ He was shot at point-blank range while wounded. See: Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

54. In addition, Santiago Pop Coc, an eight-year-old boy, was executed some minutes after the above-narrated events. According to the CEH, as the patrol was leaving the center of the community, "a soldier deliberately shot the boy Santiago Pop ... striking him in the wrist ... as he was walking along the road carrying his fishing pole."⁵² When Santiago Pop attempted to flee, "the soldier returned and, from a short distance, shot him in the chest and head, killing him."⁵³

55. The CEH identified the following community members who were wounded: (i) Aurelio Hernández Morales; (ii) Carmen Caal Saquiq; (iii) Efraín Grave Morente; (iv) Eliseo Hernández Morales; (v) Francisco Hernández; (vi) Gerardo Maldonado Sales; (vii) Jacinta Matón; (viii) Josefa Mendoza Aguilar; (ix) Juan Medina Toma; (x) Juana Andrés Maldonado; (xi) Juana Felipe Velásquez; (xii) Marcos Jolomna Yat; (xiii) Martín Quip Mocú; (xiv) Mateo Pedro; (xv) Natividad Sales; (xvi) Pascual José Pascual; (xvii) Pedro Daniel Carrillo López; (xviii) Ricardo Pop Caal; (xix) Rolando Hernández Maldonado; (xx) Rosenda Sales Ortiz; (xxi) Rosendo Morales Ortiz; (xxii) Santiago Cajbón Quip; (xxiii) Santiago Maquin; (xxiv) Santos Choc Max Coc; (xxv) Tomás Grave Morente; (xxvi) Víctor Carrillo; and (xxvii) Micaela Pascual.⁵⁴

56. Apart from the individuals identified by the CEH as having been wounded, the petitioners and the State concurred that José Hernández Maldonado and Germán Cajbon Choc were also wounded.⁵⁵

57. Likewise, they concurred that (i) Santiago Maquin and (ii) Gerardo Maldonado Sales later died.⁵⁶ For their part, the petitioners reported that Rosendo Morales Ortiz also died subsequently.⁵⁷ The latter was not refuted by the State.

58. The petitioners said that Alfonso Hernández Maldonado, who survived the events, later committed suicide as a result of the breakdown he suffered after the massacre.⁵⁸ The State did not refute that fact either.

59. In its report, the CEH reached the following conclusions regarding the "Xamán Massacre":

[The] firm conclusion has been reached that 11 inhabitants of the Aurora 8 de Octubre community, including two children, were executed by Guatemalan army personnel in an incident in which another 28 people were wounded. The events amounted to a gross violation of the right to life and there is no justification for the crime committed, not even legitimate self-defense against the victims' aggression, since the soldiers' response was wholly disproportionate.

The CEH is of the opinion that this reprehensible massacre was not planned in advance nor ordered by a superior, but that its origins may be found in the patrol's imprudently planned

[... continuation]

⁴⁹ He was shot at point-blank range while wounded. See: Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁵⁰ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁵¹ Annex 4. Petitioners' communication received on November 16, 1995.

⁵² Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁵³ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁵⁴ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁵⁵ Annex 5. State's communication of July 24, 2009. Annex 6. Petitioners' communication of May 11, 2010.

⁵⁶ Annex 5. State's communication of July 24, 2009. Annex 6. Petitioners' communication of May 11, 2010.

⁵⁷ Annex 7. Petitioners' communication of July 24, 2009.

⁵⁸ Annex 6. Petitioners' communication of May 11, 2010.

route, which prompted an aggressive reaction from the community members, to which the soldiers responded with criminal disproportion. However, the route itself was illustrative of the persistent military mindset, which identifies refugees and returnees with guerrillas. At the same time, the CEH considers that this case illustrates the degree to which, even in the years after the armed confrontation when progress was being made toward the signing of a peace agreement, peasants who had to seek refuge on Mexican soil regarded the Guatemalan army as a hostile institution owing to their abiding memory of the years in which violence was systematically applied.

... the members of the patrol ... grossly violate[d] the right to life by intentionally opening fire on members of the Aurora 8 de Octubre community. The verification does not reveal any evidence that the members of the community were armed, and there are sufficient elements to conclude that all the victims, including the three injured soldiers, were hit by bullets fired by members of the patrol.⁵⁹

60. The information of the nuclear families of the victims executed and injured is detailed in the attached Annex to this report.

5. The investigations

61. The day after the events, the then-President of Guatemala, Ramiro De León Carpio, visited the community.⁶⁰ According to information provided by the State, the then-president "acknowledged the institutional responsibility arising from the events" and "gave express orders to the competent authorities to the effect [that] a thorough investigation be opened immediately."⁶¹

62. The investigation of the case was initially conducted by the military court of first instance of the Department of Jalapa.⁶² According to information gathered by the CEH, on October 6, 1995, the Prosecutor General of the Republic and the first prosecutor assigned to the case visited the scene.⁶³ The CEH said that the prosecutors collected the cartridge cases.⁶⁴ However, they did not enter that act in the record of the proceeding.⁶⁵

63. The CEH also found that the "Public Prosecution Service (*Ministerio Público*) failed to take the necessary steps to preserve the scene of the crime and evidence; the victims' clothing was lost and autopsies superficially performed without meeting the proper technical requirements."⁶⁶ The petitioners say that: (i) the location where the events occurred was not cordoned off, which allowed large numbers of people to transit through the area; (ii) the deceased were not photographed; (iii) x-rays were not taken in the autopsies, so that it was not possible to show the metallic fragments of bullets in the corpses; and (iv) there was a delay of more than a month in taking statements from the survivors.⁶⁷ The state did not refute those submissions or present evidence on the internal proceedings to the contrary

⁵⁹ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁶⁰ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁶¹ Annex 8. State's communication of December 6, 1995.

⁶² Annex 4. Petitioners' communication received on November 16, 1995. Annex 8. State's communication of December 6, 1995.

⁶³ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁶⁴ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁶⁵ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁶⁶ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁶⁷ Annex 4. Petitioners' communication received on November 16, 1995.

64. The CEH also determined that owing to the fact that the proceeding was initially under the military criminal jurisdiction, the firearms carried by the patrol members during the events were in the possession of the Army for six weeks before being handed over to the Public Prosecution Service, and then only after repeated requests.⁶⁸ The State reported that the military personnel involved in the events were immediately detained after the incident and taken to the Remand Center of the National Police Second Corps in Jalapa Department.⁶⁹

65. On October 10, 1995, the director of MINUGUA released the "Preliminary conclusions following verification of the events of October 5, 1995 at the returnee community Aurora Octubre 8."⁷⁰ The report indicated that "members of the Army tried to exonerate those responsible."⁷¹

66. In mid-October 1995, then-president De León accepted the resignation of the Minister of National Defense and dismissed the commander of Military Zone No. 21, to which the patrol involved in the incident reported.⁷²

67. Rigoberta Menchú Tum, one of the petitioners in this case, became a joint plaintiff in the proceeding and on October 31, 1995, submitted a brief to the military tribunal, arguing that it lacked jurisdiction, independence, and impartiality.⁷³ Ms. Menchú submitted that the facts should be heard in a criminal court and not in the military criminal jurisdiction.⁷⁴ She also questioned the various flaws and irregularities in the above-mentioned procedures.⁷⁵

68. On November 2, 1995, the Military Court of First Instance of the Department of Jalapa declared Ms. Menchú's request unfounded and that it had jurisdiction to hear the case.⁷⁶ The CEH concluded that the military judge of Jalapa who heard the case was clearly biased towards the positions argued by the counsels for the defense, whom he consulted on a variety of procedural decisions.⁷⁷

69. Ms. Menchú challenged the aforesaid ruling of the military court.⁷⁸ The Fifth Division of the Court of Appeals pronounced on the challenge, finding the offenses committee to be common in nature and ordering that the case be transferred to the Second Court of First Instance of Cobán, Alta Verapaz.⁷⁹ The petitioners said that the Criminal Court of First Instance of the Department of Alta Verapaz took up the case near the end of January 1996.⁸⁰

⁶⁸ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁶⁹ Annex 8. State's communication of December 6, 1995.

⁷⁰ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁷¹ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁷² Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁷³ Annex 9. Official letter from Rigoberta Menchú, October 31, 1995. Enclosed with the petitioners' communication received on November 16, 1995.

⁷⁴ Annex 9. Official letter from Rigoberta Menchú, October 31, 1995. Enclosed with the petitioners' communication received on November 16, 1995.

⁷⁵ Annex 9. Official letter from Rigoberta Menchú, October 31, 1995. Enclosed with the petitioners' communication received on November 16, 1995.

⁷⁶ Annex 10. Order of the Military Court of First Instance of the Department of Jalapa in Criminal Case No. 028-95. Enclosed with the petitioners' communication received on November 16, 1995.

⁷⁷ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁷⁸ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁷⁹ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁸⁰ Annex 11. Petitioners' communication received on September 10, 1996.

70. In March 1996, MINUGUA put out a new report in which it stated that "the Army continued trying to exonerate its personnel and sought to obstruct the judicial investigation."⁸¹ It said that "several soldiers stated confidentially that both during and after their return to the base they were coached on what they had to say, both by superior officers and by the Army's attorneys, in order to give the same distorted version of the events."⁸² As an example illustrating this situation, the IACHR takes note of the documents submitted by the petitioners in relation to interviews given by the soldiers who were on the patrol, who said that they had to shoot because the villagers wanted to take their weapons.⁸³ This, in spite of the fact that the CEH concluded that there was only the incident of the woman who attempted to take the sergeant's weapon.

71. The State advised that on May 14, 1996, the Criminal Court of First Instance of the Department of Alta Verapaz conducted a judicial inspection of the scene.⁸⁴

72. On May 30 and 31, 1996, the Court of First Instance for Criminal Matters, Drug Trafficking and Environmental Crimes of the Department of Alta Verapaz voided the pretrial detention orders on the eight patrol members.⁸⁵ In that regard, the CEH questioned the way the lower court judge had acted in the proceeding.⁸⁶ In particular, the CEH criticized the fact that noncustodial measures had been granted to the eight members of the patrol when the judge had not read the judicial case file.⁸⁷ According to the CEH, the case file contained 5,000 pages of documents and the judge had received it only a few hours before he issued his decision.⁸⁸

73. In light of this situation, the petitioner said that the plaintiff Rigoberta Menchú and the Public Prosecution Service filed a complaint over the judge's actions.⁸⁹ The CEH said that the alleged anomalies in the way that judge had acted prompted the Supreme Court of Justice to remove him from the case.⁹⁰

74. On June 29, 1996, the Public Prosecution Service filed an indictment against 25 members of the army patrol involved in the massacre.⁹¹ The CEH said that the holding of the oral proceedings was suspended several times.⁹²

75. On May 7, 1997, the Sentencing Court of Cobán, Alta Verapaz, ordered the opening of the trial proper.⁹³ The court also admitted the indictment for the crimes of extrajudicial execution, attempted

⁸¹ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁸² Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁸³ Annex 12. Soldiers' interviews, undated. Enclosed with the petitioners' communication received on November 16, 1995.

⁸⁴ Annex 13. State's communication of May 24, 1996.

⁸⁵ Annex 14. Decisions of the Court of First Instance for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz, May 30 and 31, 1996. Enclosed with the petitioners' communication received on September 10, 1996.

⁸⁶ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁸⁷ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁸⁸ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁸⁹ Annex 11. Petitioners' communication received on September 10, 1996.

⁹⁰ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁹¹ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁹² Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁹³ Annex 15. Order instituting trial proceedings of May 7, 1997, Second Court of First Instance for Criminal Matters, Drug Trafficking and Environmental Crimes of the Department of Alta Verapaz, Coban Enclosed with the petitioners' communication received on March 30, 1999.

extrajudicial execution, intentional bodily harm, and trespass.⁹⁴ The petitioners provided information about various motions presented by the accused's defense to delay the proceeding and in attempt to have members of the court removed, without any justification whatsoever.⁹⁵ They added that toward the end of 1997, the judicial case file was mislaid, only to appear two months later.⁹⁶ The CEH said that as of October 1998 the judicial proceeding had still not been held.⁹⁷

76. In this context, the CEH said that the attorneys hired and paid for by the Army, who were jointly defending the soldiers, impeded the proceeding's progress.⁹⁸ They said that those lawyers were publicly censured for lodging numerous applications, some of which were clearly out of order, in addition to motions for recusal and dismissal designed to delay the proceeding without justification and to have the prosecutor in charge of the case disqualified along with institutions, such as MINUGUA, which were independently monitoring the case to ensure it proceeded correctly.⁹⁹

77. The CEH offered the following conclusions on the investigation conducted up until the release of its report:

[W]ithin the time limits of its mandate, it has also reached the firm conclusion that in the judicial proceeding in connection with this massacre, the State of Guatemala is in gross dereliction of its duty to investigate the facts in order to punish those responsible, thus violating the right to justice. This failure to comply with the duty to investigate has been visible, in particular, in the lack of independence of the courts and the absence of cooperation, if not obstruction, by the Guatemalan Army.¹⁰⁰

78. On March 3, 1998, Ms. Menchú presented a brief to the Sentencing Court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz, in which she expressed her concern at the court's delay in holding the public oral stage of the proceeding.¹⁰¹

79. On April 16, 1998, the same court issued a ruling that contained a decision on the evidence that would be admitted in the proceeding.¹⁰² That same day, the plaintiff Rigoberta Menchú filed an application for constitutional relief (*amparo*), saying that the court had arbitrarily rejected evidence. That evidence consisted of photographs of the scene and the injured persons, reports of the UNHCR and MINUGUA, forensic reports, and videos from the Public Prosecution Service, among others.¹⁰³ The application added that, by contrast, the court had unlawfully accepted evidence put forward by the defense that consisted of witness statements with no indication as to the requirements stipulated by law, as well as evidence provided

⁹⁴ Annex 15. Order instituting trial proceedings of May 7, 1997, Second Court of First Instance for Criminal Matters, Drug Trafficking and Environmental Crimes of the Department of Alta Verapaz, Coban Enclosed with the petitioners' communication received on March 30, 1999.

⁹⁵ Annex 16. Petitioners' communication of February 26, 1998.

⁹⁶ Annex 16. Petitioners' communication of February 26, 1998.

⁹⁷ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁹⁸ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

⁹⁹ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

¹⁰⁰ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

¹⁰¹ Annex 17. Official letter from Rigoberta Menchú dated March 3, 1998. Enclosed with the petitioners' communication of March 18, 1998.

¹⁰² Annex 18. Order of the Sentencing Court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz, Coban, April 16, 1998. Enclosed with the petitioners' communication of March 30, 1999.

¹⁰³ Annex 19. Application for constitutional relief (*amparo*) against the decision of April 16, 1998 of the Sentencing Court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz, Coban filed by María Estela López Funes on her own behalf and in representation of Rigoberta Menchu Tum, received by the 12th Division of the Court of Appeals on April 20, 1998. Enclosed with the petitioners' communication of March 30, 1999.

by expert witnesses prepared in military circles without the participation of the Public Prosecution Service or the plaintiff.¹⁰⁴

80. On April 20, 1998, the 12th Division of the Court of Appeals decided not to grant the application and merely indicated that its decision was based on the fact that it "considered that for the time being the circumstances did not make it advisable."¹⁰⁵ Ms. Manchu filed an appeal, which the Constitutional Court ruled unfounded on April 22, 1998.¹⁰⁶

81. In relation to the public hearing that opened on April 21, 1998, the petitioners informed that: (i) the experts and witnesses proposed by the defense remained in the courtroom, in spite of a rule that prohibited them from doing so; and (ii) the court rejected the plaintiff's request that it be provided with the videos and tape recordings of the hearing.¹⁰⁷ The petitioners said that in light of these facts, on the sixth day of the public oral proceedings, the plaintiff presented a motion for recusal to the court "owing to the manifest bias in its decisions in contravention of procedural rules."¹⁰⁸

82. They said that the court suspended the oral proceedings the next day.¹⁰⁹ The petitioners said that, subsequently, the Sentencing Court of Zacapa examined the motion for recusal, having been designated to do so by the Supreme Court of Justice, and declared it unfounded.¹¹⁰ They said that the plaintiff presented another motion for recusal on June 8, 1998.¹¹¹

83. The CEH said that in October 1998, Ramiro Contreras Valenzuela, the special prosecutor assigned to the case, announced to the national press that the Public Prosecution Service was not providing him with the necessary support to carry out the appropriate investigations.¹¹² On November 3, 1998, Prosecutor Contreras reported that he was the target of threats and intimidation and proceeded to resign as special prosecutor in the case.¹¹³ The State reported that on October 27, 1998, Alejandro Muñoz Pivaral was appointed as the new special prosecutor for the case.¹¹⁴

84. On November 25, 1998, the public oral proceedings resumed before the Sentencing Court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz Cobán.¹¹⁵

¹⁰⁴ Annex 19. Application for constitutional relief (amparo) against the decision of April 16, 1998 of the Sentencing Court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz, Coban filed by María Estela López Funes on her own behalf and in representation of Rigoberta Menchu Tum, received by the 12th Division of the Court of Appeals on April 20, 1998. Enclosed with the petitioners' communication of March 30, 1999.

¹⁰⁵ Annex 20. Decision of the 12th Division of the Court of Appeals Acting As Court on Matters of Constitutional Relief in application for constitutional relief 77-98, April 20, 1998, Enclosed with the petitioners' communication of March 30, 1999.

¹⁰⁶ Annex 21. Decision of the Constitutional Court in case 225-98, April 22, 1998. Enclosed with the petitioners' communication of March 30, 1999.

¹⁰⁷ Annex 22. Petitioners' communication of August 10, 1998.

¹⁰⁸ Annex 22. Petitioners' communication of August 10, 1998.

¹⁰⁹ Annex 22. Petitioners' communication of August 10, 1998.

¹¹⁰ Annex 22. Petitioners' communication of August 10, 1998.

¹¹¹ Annex 22. Petitioners' communication of August 10, 1998.

¹¹² Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

¹¹³ Annex. Communication from the former special prosecutor for the Xamán case, Carlos Ramiro Contreras Valenzuela, November 3, 1998.

¹¹⁴ Annex 23. Petitioners' communication of August 10, 1998. State's communication of December 1, 1998.

¹¹⁵ Annex 24. Petitioners' communication of August 10, 1998. Record of deliberations. Case: Xaman. November 25, 1998, sentencing court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz. Received on May 10, 2000. Petitioners' communication of March 4, 1999.

The representative of Ms. Menchú charged that various irregularities were committed on that occasion as the witnesses were not notified.¹¹⁶

85. The petitioners reported that on January 6, 1999, Rigoberta Menchú withdrew as co-plaintiff in the proceeding "because of the belief that the State was not abiding ... by the rules of criminal due process, creating a situation of denial of justice."¹¹⁷ The petitioners stated that on that day, in the course of the hearing, the court did not allow Ms. Menchú to present her observations on the proceeding.¹¹⁸ Ms. Menchú said the following:

Nor have we come here to beg for justice, which is why, in the name of justice in Guatemala and so as not to condone impunity in this country, we are withdrawing from this court, and we are withdrawing in order to tell you, members of this court, that we will not cease in our quest for justice. [W]e will not be the ones to validate a biased court.¹¹⁹

86. On August 12, 1999, the Sentencing Court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz Cobán, returned a judgment in which it acquitted the members of the military patrol of the charges of extrajudicial execution and intentional bodily harm.¹²⁰ The court offered the following argument:

[I]t was demonstrated that the patrol did not intend to cause the deaths and wound the aggrieved and that is clear that, given that they had or were carrying military equipment, the troops could have inflicted more deaths or injuries ... [T]he deaths of the 11 people and injuries caused to the aggrieved were the result of the initial imprudence of Camilo Antonio Lacán Chaclán who was in command of the patrol.¹²¹

87. Accordingly, the court convicted the officer in command of the patrol, Camilo Lacán Chaclán, and 10 soldiers¹²² of the crime of manslaughter.¹²³ It also sentenced them to five years' imprisonment convertible to a fine.¹²⁴ The 14 other members of the patrol¹²⁵ were convicted of the crime of complicity in manslaughter and sentenced to four years' imprisonment convertible to a fine.¹²⁶ The court underscored that

¹¹⁶ Annex 24. Petitioners' communication of August 10, 1998. Record of deliberations. Case: Xaman. November 25, 1998, sentencing court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz. Received on May 10, 2000. Petitioners' communication of March 4, 1999.

¹¹⁷ Annex 25. Petitioners' communication of August 10, 1998. Petitioners' communication of March 4, 1999.

¹¹⁸ Annex 25. Petitioners' communication of August 10, 1998. Petitioners' communication of March 4, 1999.

¹¹⁹ Annex 25. Petitioners' communication of March 4, 1999.

¹²⁰ Annex 26. Judgment of August 12, 1999, of the Sentencing Court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz. Received on May 10, 2000.

¹²¹ Annex 26. Judgment of August 12, 1999, of the Sentencing Court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz. Received on May 10, 2000.

¹²² Manuel Morán, Elias Coc Pop, Agustin Choc Caal, Florencio Juc Ixim, Héctor May García, Marcos Can Quej and/or Marcos Can Quej, Ambrocio Macz Cojoc and/or Ambrocio Max Cojoc, Carlos Cuc Cacao, Eleazar Tox Xol, and Francisco Tzul Ba.

¹²³ Annex 26. Judgment of August 12, 1999, of the Sentencing Court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz. Received on May 10, 2000.

¹²⁴ Annex 26. Judgment of August 12, 1999, of the Sentencing Court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz. Received on May 10, 2000.

¹²⁵ Manuel Chen Yat, Jose Asig Tec, Ricardo Chub Cholom, Marcelino Caal Sacul, Carlos Juc Coy, Mauricio Juc Caal, Alejandro Cu Cal, Pablo Poo Pop, Pedro Beb Xol, Ricardo Chub Pop, Julio Cesar Armando Lopez Rodriguez, Manuel Tec Caal, Marcelino Caal Chub, and Fernando Caal Coc.

¹²⁶ Annex 26. Judgment of August 12, 1999, of the Sentencing Court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz. Received on May 10, 2000.

in the incident "there was no excessive use of force [or] orders from superiors, given that the actions of the patrol were acts separate and independent from the military hierarchy."¹²⁷

88. On August 23, 1999, the special prosecutor filed an appeal against the judgment with the 14th Division of the Court Of Appeals.¹²⁸ The petitioners said that the Public Prosecution Service alleged that the court "committed fundamental defects by its disregard, misinterpretation, and erroneous enforcement of the law."¹²⁹ Specifically, it asked the Division to void the judgment and issue a new one convicting the soldiers of the crimes of extrajudicial execution and attempted extrajudicial execution.¹³⁰

89. On December 6, 1999, the 14th Division of the Court of Appeals admitted the appeal filed.¹³¹ According to information but provided by the parties, the Division voided the judgment at first instance and convicted 10 soldiers,¹³² not including the officer who had commanded the patrol, of the crimes of murder and grievous bodily harm.¹³³ The Division sentenced them to 12 years in prison (nine years for the crime of murder convertible to a fine, and three years for the crime of grievous bodily harm), all convertible to a fine at five quetzales a day.¹³⁴ The Division decided to acquit the other members of the patrol.¹³⁵ With respect to the acquitted soldiers, the state said that "the division found that inasmuch as it was not proved that they were issued any order or that the weapons that they were carrying were discharged, it was appropriate to acquit them and order their immediate release."¹³⁶

90. On April 12, 2000, following a cassation appeal filed by the special prosecutor, the Criminal Chamber of the Supreme Court of Justice annulled the Division's judgment.¹³⁷ It also ordered new oral proceedings and the arrest of the 15 accused who were acquitted.¹³⁸

91. The petitioners said that in May 2000 the case was referred to the Sentencing Court of Cobán, which did not execute the arrest warrants.¹³⁹ They said that the accused's defense presented various applications for constitutional relief and motions for recusal against the members of the court, all of which were refused.¹⁴⁰

92. The State said that the oral proceedings began on June 3, 2003.¹⁴¹ On July 8, 2004, the Sentencing Court for Criminal Matters, Drug Trafficking and Environmental Crimes of Alta Verapaz

¹²⁷ Annex 26. Judgment of August 12, 1999, of the Sentencing Court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz. Received on May 10, 2000.

¹²⁸ Annex 27. Petitioners' communication of July 26, 2002. Annex 28. State's communication of May 24, 2004.

¹²⁹ Annex 27. Petitioners' communication of July 26, 2002.

¹³⁰ Annex 27. Petitioners' communication of July 26, 2002.

¹³¹ Annex 27. Petitioners' communication of July 26, 2002. Annex 28. State's communication of May 24, 2004.

¹³² Annex 27. Petitioners' communication of July 26, 2002. Annex 28. State's communication of May 24, 2004.

¹³³ Annex 27. Petitioners' communication of July 26, 2002. Annex 28. State's communication of May 24, 2004.

¹³⁴ Annex 27. Petitioners' communication of July 26, 2002. Annex 28. State's communication of May 24, 2004.

¹³⁵ Annex 27. Petitioners' communication of July 26, 2002. Annex 28. State's communication of May 24, 2004.

¹³⁶ Annex 28. State's communication of May 24, 2004.

¹³⁷ Annex 27. Petitioners' communication of July 26, 2002. Annex 28. State's communication of May 24, 2004.

¹³⁸ Annex 27. Petitioners' communication of July 26, 2002. Annex 28. State's communication of May 24, 2004.

¹³⁹ Annex 27. Petitioners' communication of July 26, 2002.

¹⁴⁰ Annex 27. Petitioners' communication of July 26, 2002.

¹⁴¹ Annex 28. State's communication of May 24, 2004.

Department, Cobán, returned a judgment in which it convicted 14 soldiers,¹⁴² including the officer in charge of the patrol, as the material authors of the extrajudicial execution of the 11 deceased people.¹⁴³

93. Those individuals were also convicted of inflicting grievous bodily harm on the following persons: Pascual José Pascual, Santiago Maquin Quip, Rosendo Morales Ortiz, Víctor Carrillo Morales, Ricardo Pop Caal, Juana Felipe Vásquez, Santos Choc Max, Rosendo Sales Ortiz, Rolando Hernández Maldonado, Aurelio Hernández Morales, Josefa Mendoza Aguilar, Carmen Caal Saqui, Micaela Pascual Juan, Mateo Pedro, Martín Quip Mucu, Andrés Maldonado, Francisco Hernández, Jacinta Maton Raymundo, Natividad Sales Calmo, Efraín Grave Morente, Eliseo Hernández Morales, Santiago Cajbon, Alan Medina y Marcos Joloma Yat y/o Marcos Colomna Yat, Tomás Grave Morente, Pedro Daniel Carrillo López, and Andrés Maldonado Sales.¹⁴⁴

94. Based on the foregoing, the court sentenced those individuals to incommutable terms of 40 years in prison less time served since their arrest.¹⁴⁵

95. The judgment noted the following in relation to the victims:

It may be surmised that they were all members of the same community of returnees who had previously been victims of the country's internal violence and, as a result, were once again trying to find their place in the country's society; as regards the crime's motive, it may be deduced [that] ... the underlying cause of the events was the initial fear felt by the community's inhabitants upon seeing the entrance of the military patrol, the same fear that provoked reactions in the community's inhabitants that then caused the members of the state security forces to shoot at them and, in the confusion, at their own number, with the result that the extent and intensity of the harm caused was great, resulting, as it did, in the deaths of several people and injuries to others.¹⁴⁶

96. In July 2004, the convicted men's defense filed appeals.¹⁴⁷ On December 22, 2004, the Court of Appeals in Cobán issued a judgment confirming the decision at first instance.¹⁴⁸ The defense challenged that judgment by filing appeals for cassation.¹⁴⁹

97. The State reported that on May 9, 2005, the Supreme Court of Justice decided to reject the appeals for cassation presented on behalf of the convicted men Héctor May, Marcos Can, Pablo Poou, Carlos Cuc, Ambrosio Cojoc.¹⁵⁰ It added that on September 23, 2005, the Supreme Court of Justice declared

¹⁴² Camilo Lacán Chaclán, Manuel Morán, Agustín Choc, Florencio Juc, Elías Coc, Héctor May, Marcos Can, Ambrosio Max, Carlos Cuc, Pablo Poou, Ricardo Chub Pop, Eleazar Tox, Francisco Tzul, and Ricardo Chub Cholom.

¹⁴³ Annex 29. Judgment of the Sentencing Court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz, Coban, July 8, 2004. Enclosed with the State's communication of June 7, 2005.

¹⁴⁴ Annex 29. Judgment Judgment of the Sentencing Court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz, Coban, July 8, 2004. Enclosed with the State's communication of June 7, 2005.

¹⁴⁵ Annex 29. Judgment Judgment of the Sentencing Court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz, Coban, July 8, 2004. Enclosed with the State's communication of June 7, 2005.

¹⁴⁶ Annex 29. Judgment Judgment of the Sentencing Court for Criminal Matters, Drug Trafficking, and Environmental Crimes of the Department of Alta Verapaz, Coban, July 8, 2004. Enclosed with the State's communication of June 7, 2005.

¹⁴⁷ Annex 30. Judgment Appeals lodged by defense attorney Julio Roberto Contreras Quinteros on July 30, 2004; by defense attorney Elpidio Coy Ibarra on July 30, 2004, and by defense attorney Mario Salvador Jiménez Barillas on July 28, 2004. Enclosed with the State's communication of June 7, 2005.

¹⁴⁸ Annex 31. Judgment of the Regional Mixed Division of the Court of Appeals of Cobán on special appeal No. 108-2004, December 22, 2004. Enclosed with the State's communication of June 7, 2005.

¹⁴⁹ Annex 32. Appeals for cassation lodged by defense attorney Mario Salvador Jiménez Barillas on January 11, 2005; by defense attorney Julio Roberto Contreras Quinteros on February 17, 2005, and by defense attorney Elpidio Coy Ibarra on January 11, 2005. Enclosed with the State's communication of June 7, 2005.

¹⁵⁰ Annex 33. Judgment of May 9, 2005, of the Supreme Court of Justice, Criminal Chamber, on joint appeals for cassation 9-2005, 11-2005, and 16-2005. Enclosed with the State's communication of June 7, 2005.

unfounded the other appeals for cassation that were pending before it, thus rendering final the conviction judgment at first instance.¹⁵¹

98. With respect to the other members of the military patrol involved in the events, in a communication of June 7, 2005, the State said that “there are still 11 accused whose arrest and subsequent prosecution in public oral proceedings remain pending, for which reason the investigation is still open.”¹⁵² The Commission has no information regarding the legal situation of those individuals.

6. The civil suit

99. The petitioners advised that on October 4, 1996, they filed a civil suit for damages with the Second Civil Court of First Instance of the Department of Alta Verapaz.¹⁵³ They requested that the accused and the State be ordered to pay 78 million quetzales.¹⁵⁴ The suit was admitted three days later. On December 12, 1996, the court ordered 50% of the defendants' wages to be garnished.¹⁵⁵ The petitioners said that the accused's defense subsequently filed a variety of motions to delay the proceedings, including an alleged failure to serve notice of judicial proceedings.¹⁵⁶

100. The petitioners said that on July 1, 2002, the judge of the Court of First Instance for Civil and Tax Matters of Cobán recused himself from the case.¹⁵⁷ On July 17, 2002, the court issued an official notice saying that it would not be possible to hold the hearing scheduled to take statements from the parties because it had recused itself. It said that the case would be referred to the court of first instance of Ixcán.¹⁵⁸ On August 14, 2002, the soldiers from the patrol appeared before the court.¹⁵⁹ The above information regarding the civil suit is based on information provided by the petitioners, which has not been refuted by the Guatemalan State. Commission has no information on the further development of the process.

101. In the criminal conviction handed down on July 8, 2004, the Sentencing Court for Criminal Matters, Drug Trafficking and Environmental Crimes of Alta Verapaz Department, Cobán had the following to say regarding civil liability: “this court offers no pronouncement ... on account of the fact that the relevant suit has not been brought, notwithstanding the accruing right.”¹⁶⁰

7. Harassment of the survivors of the massacre and next of kin

102. The CEH recorded that while the criminal proceeding was under way people who were wounded in the massacre and other members of the community were the targets of harassment and intimidation by persons who were not identified but suspected of being linked to the Armed Forces.¹⁶¹

¹⁵¹ Annex 34. Judgment of September 23, 2005, of the Supreme Court of Justice, Criminal Chamber, on joint appeals for cassation 9-2005, 11-2005, and 16-2005. Enclosed with the State's communication of June 7, 2005.

¹⁵² Annex 35. State's communication of June 7, 2005.

¹⁵³ Annex 36. Petitioners' communication of February 26, 1998.

¹⁵⁴ Annex 36. Petitioners' communication of February 26, 1998.

¹⁵⁵ Annex 36. Petitioners' communication of February 26, 1998.

¹⁵⁶ Annex 36. Petitioners' communication of February 26, 1998.

¹⁵⁷ Annex 37. Petitioners' communication of February 26, 1998.

¹⁵⁸ Annex 37. Petitioners' communication of February 26, 1998.

¹⁵⁹ Annex 37. Petitioners' communication of February 26, 1998.

¹⁶⁰ Annex 38. Extract of the judgment of the Sentencing Court for Criminal Matters, Drug Trafficking, and Environmental Crimes, July 8, 2004. Enclosed with the State's communication of July 27, 2004.

¹⁶¹ Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

103. The CEH also said that prosecutors and judges who were involved in the proceeding came under pressure and received threats, as did the initial petitioners in this case.¹⁶² With respect to the initial petitioners, they said that one year after the events occurred, Ms. Menchú's nephew was kidnapped.¹⁶³ The petitioners held that that incident "ha[d] evident links to what happened at the Xamán estate.¹⁶⁴ They also alleged that in March 1998, Mr. Salerno, one of the original petitioners, was intercepted by a vehicle that was following him and that the brake lines of his car were cut, with the result that he nearly had an accident.¹⁶⁵ The petitioners said that Mr. Salerno filed a complaint with the Human Rights Procurator. They added that the petitioner, Ms. López Funes, was also the victim of harassment.¹⁶⁶

B. Legal Analysis

1. Matter precedent concerning identification of the victims

104. Within the Inter-American Commission's system of individual petitions and cases, all alleged victims in a given case are to be identified to the extent possible. Even so, there are situations in which identification poses challenges. In such situations, various factors have to be considered when analyzing the alleged victims' identification, and certain standards of reasonability and flexibility may be called for.

105. The Commission notes that the names of the alleged victims differ in the various communications from the parties and in the judicial case file. Net connection, the IACHR finds that the events in this case occurred more than 20 years ago. Another factor for the Commission to consider are the differences between the names of the alleged victims in Mayan –the mother tongue of the alleged victims- and the translation of those names into Spanish.¹⁶⁷ The IACHR recalls that, while many indigenous persons kept their Maya names, when those names are entered into the Civil Register the public authorities render them as close to Spanish as possible, which is why the differences occur.

106. The Commission notes this situation for the record and in each section it will proceed to identify the individual victims as precisely as possible, bearing in mind the circumstances of the case.

2. The rights to life and humane treatment (Article 4(1)¹⁶⁸ and 5(1)¹⁶⁹ of the American Convention on Human Rights, in connection with Article 1(1) and 19¹⁷⁰ of that instrument)

107. The Commission recalls that the right to life is a prerequisite for the enjoyment of all other human rights and if it is not respected all other rights are meaningless.¹⁷¹ Thus, compliance with Article 4, in

¹⁶² Annex 2. CEH, Guatemala: *Memory of Silence*, Volume VI, Illustrative Cases, Annex 1, Illustrative Case No. 3: Xamán Massacre.

¹⁶³ Annex 4. Petitioners' communication received on November 16, 1995.

¹⁶⁴ Annex 4. Petitioners' communication received on November 16, 1995.

¹⁶⁵ Annex 39. Petitioners' communication of March 18, 1998.

¹⁶⁶ Annex 39. Petitioners' communication of March 18, 1998.

¹⁶⁷ For example, at the hearings held during the criminal proceedings prosecuted against Ríos Montt and in other proceedings related to the events that transpired during the armed conflict, many indigenous witnesses underscored the difference between their original name in their Mayan language and their name in "cashlan." For more information, see: http://www.prensalibre.com/revista_d/APELLIDO_0_872313072.html

¹⁶⁸ Article 4(1) of the American Convention: Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

¹⁶⁹ Article 5(1) of the American Convention: Every person has the right to have his physical, mental, and moral integrity respected.

¹⁷⁰ Article 19 of the American Convention: Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

combination with Article 1(1) of the American Convention, “not only requires that no person be deprived of his life arbitrarily (negative obligation), but also that the States take all appropriate measures to protect and preserve the right to life (positive obligation), as part of their duty to ensure full and free exercise of the rights by all persons under their jurisdiction.”¹⁷²

108. Important among these measures is the States’ obligation to (i) create a legal framework that deters any possible threat to the right to life; (ii) see that their security forces, which are entitled to use legitimate force, respect the right to life of the individuals under their jurisdiction; (iii) establish an effective system of justice capable of investigating, punishing and redressing the deprivation of life by State officials or private individuals; and (iv) ensure the right to unimpeded access to the conditions that will guarantee a decent existence.¹⁷³

109. As for the practice of extrajudicial executions, both the Commission and Court has indicated that States must adopt the necessary measures not only to prevent and punish the deprivation of life as a consequence of criminal acts, but also to prevent arbitrary executions by their own police force.¹⁷⁴ The Commission also added the following:

(...) extrajudicial or summary executions are deliberate, unlawful deprivations of freedom by agents of the state, acting on orders or with at least the consent and acquiescence of the authorities. Hence, extrajudicial executions are unlawful acts committed precisely by those vested with the power originally intended to protect and guarantee the safety and life of individuals.¹⁷⁵

110. The Commission recalls that the Court has written that any use or deployment of force in which State agents cause the death of, or injuries to, an individual, must be analyzed to determine its legitimacy.¹⁷⁶ That is because “the State has the obligation to provide a satisfactory and convincing explanation of what happened and to disprove the allegations of its responsibility with adequate probative elements.”¹⁷⁷

111. To that end, the following requirements must be met:

i. Legitimate purpose: the use of force must be addressed at achieving a legitimate purpose.

[... continuation]

¹⁷¹ IACHR, Case 12.270, Report No. 2/15, Merits, Johan Alexis Ortiz Hernández, Venezuela, January 29, 2015, para 185. I/A Court H.R. *The “Street Children” Case (Villagrán Morales et al.) v. Guatemala*. Merits, Judgment of November 19, 1999, Series C No. 63, par. 144.

¹⁷² I/A Court H.R. *Case of Zambrano-Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, par. 80; *The “Street Children” Case (Villagrán Morales et al.)*, Merits, Judgment of November 19, 1999, Series C No. 63, par. 144. IACHR, Case 12.270, Report No. 2/15, Merits, Johan Alexis Ortiz Hernández, Venezuela, January 29, 2015, para 185.

¹⁷³ I/A Court H.R. *Case of Zambrano-Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, par. 81; *Case of Montero Aranguren et al. (Detention Center of Catia)*, Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 5, 2006, Series C No. 150, par. 66.

¹⁷⁴ IACHR, Cases 11.566 and 11.694, Report No. 141/11, Merits, Favela Nova Brasília, Brasil, October 31, 2011, para. 127. I/A Court H.R. *Case of the Miguel Castro Castro Prison v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, par. 237; *Case of the Mapiripán Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, par. 231; and *Case of Huilca Tecse v. Peru*. Merits, Reparations and Costs. Judgment March 3, 2005. Series C No. 121, par. 66.

¹⁷⁵ IACHR, Report No. 25/02, Case 11,763, Plan de Sánchez Massacre, Guatemala, February 28, 2002, par. 114.

¹⁷⁶ I/A Court H.R. *Case of García Ibarra et al. v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 17, 2015. Series C No. 306, par. 108.

¹⁷⁷ IACHR, Case 11.442, Merits No. 90/14, Admissibility and Merits, Luis Jorge Valencia Hinojosa, Ecuador, November 4, 2013. I/A Court H.R. *Case of Landaeta Mejías Brothers et al v. Venezuela*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 27, 2014. Series C No. 281, par. 123.

ii. Absolute necessity: [I]t is necessary to verify whether other less harmful means exist to safeguard the life and integrity of the person or situation that it is sought to protect, according to the circumstances of the case.

iii. Proportionality: the level of force used must be in accordance with the level of resistance offered, which implies establishing a balance between the situation that the agent is facing and his response, considering the potential harm that could be caused.¹⁷⁸

112. Within the framework of military incursions by members of the Armed Forces, the Court has highlighted the importance of protecting civilians¹⁷⁹. In addition, the IACHR has underscored the particular seriousness of cases in which the victims of human rights violations are children, who have specific rights under the American Convention.¹⁸⁰ In particular, States have special duties of prevention and protection when it comes to the use of force by security agents in situations that involve or might involve children or juveniles.¹⁸¹

113. In this case, the Commission finds that the events that occurred on October 5, 1995 are not in dispute: (i) the entry of a patrol comprising personnel of the Guatemalan Armed Forces to the Xamán estate inhabited by 90 families, most of whom had been refugees in Mexico during the armed conflict; (ii) the arrival of the military patrol at the center of the community, which spread fear among the residents; (iii) the fact that the soldiers started shooting at the residence and then fled the estate; and (iv) the fact that the residents' only actions had been verbal remarks directed at the soldiers and an attempt by a woman to take the sergeant's weapon.

114. As a result of the shots fired by the armed forces personnel, 11 members of the community died,¹⁸² including three children.¹⁸³ Furthermore, according to the proven facts, the IACHR finds that 29 members of the community were wounded,¹⁸⁴ three of whom subsequently died as a result of their injuries.¹⁸⁵

115. The IACHR reiterates that these facts have been confirmed by the report of the CEH and in various judicial proceedings. Furthermore, as was mentioned, the Guatemalan State has not provided a satisfactory explanation demonstrating that the requirements of legality, necessity, and proportionality in the use of force by its agents were met. On the contrary, the state acknowledged the events to the Commission in the following terms:

¹⁷⁸ I/A Court H.R. *Case of Landaeta Mejías Brothers et al v. Venezuela*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 27, 2014. Series C No. 281, par. 134.

¹⁷⁹ I/A Court H.R., *Case of the Santo Domingo Massacre v. Colombia*. Preliminary Objections, Merits and Reparations. Judgment of November 30, 2012. Series No. 259, para. 216.

¹⁸⁰ IACHR, Case 12.896, Report No. 72/15, Merits, Ramírez brothers and family, Guatemala, October 28, 2015, para. 127.

¹⁸¹ I/A Court H.R. *Case of García Ibarra et al v. Ecuador*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 17, 2015. Series C No. 306, par. 117.

¹⁸² (i) Abel Pérez Ramírez; (ii) Andrés Miguel Mateo; (iii) Carlos Fernando Chop Chi; (iv) Hilaria Morente de la Cruz; (v) Juana Jacinto Felipe; (vi) Manuela Mateo Antonio; (vii) Pablo Coc Coc, (viii) Pedro Diego Andrés; (ix) Pedro Medina Sánchez; (x) Maurilia Coc Max; and (xi) Santiago Pop Coc.

¹⁸³ (i) Carlos Fernando Chop Chip; (ii) Maurilia Coc Max; and (iii) Santiago Pop Coc.

¹⁸⁴ (i) Aurelio Hernández Morales; (ii) Carmen Caal Saquiq; (iii) Efraín Grave Morente; (iv) Eliseo Hernández Morales; (v) Francisco Hernández; (vi) Gerardo Maldonado Sales; (vii) Jacinta Matón; (viii) Josefa Mendoza Aguilar; (ix) Juan Medina Toma; (x) Juana Andrés Maldonado; (xi) Juana Felipe Velásquez; (xii) Marcos Jolomna Yat; (xiii) Martín Quip Mocú; (xiv) Mateo Pedro; (xv) Natividad Sales; (xvi) Pascual José Pascual; (xvii) Pedro Daniel Carrillo López; (xviii) Ricardo Pop Caal; (xix) Rolando Hernández Maldonado; (xx) Rosenda Sales Ortiz; (xxi) Rosendo Morales Ortiz; (xxii) Santiago Cajbón Quip; (xxiii) Santiago Maquin; (xxiv) Santos Choc Max Coc; (xxv) Tomás Grave Morente; (xxvi) Víctor Carrillo; (xxvii) Micaela Pascual; (xxviii) José Hernández Maldonado; and (xxix) Germán Cajbon Choc.

¹⁸⁵ (i) Santiago Maquin; (ii) Gerardo Maldonado Sales; and (iii) Rosendo Morales Ortiz.

The Government of the Republic of Guatemala regrets the events that occurred on the estate on October 5, 1995, and assumed institutional responsibility from the outset. The Government of the Republic expresses its solidarity with the victims of the events described and is resolved to provide redress to the families of the fatal victims and to the persons who were wounded.

116. The Commission finds that in the circumstances described and in the absence of arguments from the State to justify the use of force by its agents, force was clearly used in contravention of the principles of legitimate purpose, necessity, and proportionality described hereinabove. Therefore, the deaths caused constituted arbitrary deprivations of the right to life as recognized in Article 4(1) of the American Convention, while the injuries caused constituted violations of physical integrity under the terms of Article 5 of the American Convention.

117. Consequently, the Commission concludes that the State violated the right to life recognized in Article 4(1) of the American Convention, in connection with Article 1(1) thereof, to the detriment of Abel Pérez Ramírez, Andrés Miguel Mateo, Carlos Fernando Chop Chi, Hilaria Morente de la Cruz, Juana Jacinto Felipe, Manuela Mateo Antonio, Pablo Coc Coc, Pedro Diego Andrés; Pedro Medina Sánchez, Maurilia Coc Max; and Santiago Pop Coc. As regards Carlos Fernando Chop Chip, Maurilia Coc Max, and Santiago Pop Coc, all of whom were children at the time of the events, the IACHR concludes that the State violated the right to life recognized in Article 4(1) of the American Convention, in conjunction with Articles 1(1) and 19 of the same instrument.

118. Furthermore, the Commission concludes that the State violated the right to humane treatment recognized in Article 5(1) of the American Convention, in connection with Article 1(1) of the same instrument, to the detriment of the persons wounded, to wit: Aurelio Hernández Morales, Carmen Caal Saquiq, Efraín Grave Morente, Eliseo Hernández Morales, Francisco Hernández, Jacinta Matón, Josefa Mendoza Aguilar, Juan Medina Toma, Juana Andrés Maldonado, Juana Felipe Velásquez, Marcos Jolomna Yat, Martín Quip Mocú, Mateo Pedro, Natividad Sales, Pascual José Pascual, Pedro Daniel Carrillo López, Ricardo Pop Caal, Rolando Hernández Maldonado, Rosenda Sales Ortiz, Santiago Cajbón Quip, Santos Choc Max Coc, Tomás Grave Morente, Víctor Carrillo, Micaela Pascual, José Hernández Maldonado and Germán Cajbon Choc.

119. Finally, as regards Santiago Maquin, Gerardo Maldonado Sales, and Rosendo Morales Ortiz, the Commission notes that those individuals were also wounded and later died. The IACHR considers that a state can violate the right to life of individuals who do not die immediately as a result of the violations committed by state agents, but afterwards owing to the injuries caused. The Commission notes that the petitioners argued that those persons died subsequently as a result of the injuries caused on October 5, 1995. The State, for its part, did not refute the causal link between the wounds sustained by those persons and their ensuing deaths. Consequently, the IACHR considers that Guatemala violated the rights to humane treatment and life recognized at Articles 5(1) and 4(1) of the American Convention, in connection with article 1(1) of said instrument, to the detriment of Santiago Maquin, Gerardo Maldonado Sales, and Rosendo Morales Ortiz.

3. Right to a fair trial and judicial protection (Articles 8(1),¹⁸⁶ and 25(1)¹⁸⁷ of the American Convention in connection with Article 1(1) thereof)

¹⁸⁶ Article 8(1) of the American Convention: Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

¹⁸⁷ Article 25(1) of the American Convention: Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

120. The right to a fair trial implies that anyone who has suffered a violation of their human rights “has a right to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention.”¹⁸⁸ Regarding the right to judicial protection, the Court has written that:

[it] obliges the State to guarantee to every individual access to the administration of justice and, in particular, to simple and prompt recourse, so that, inter alia, those responsible for human rights violations may be prosecuted and reparations obtained for the damages suffered. ... Article 25 “is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society.”¹⁸⁹

121. As a preliminary matter, the Commission recalls the consistent case law of the organs of the inter-American system regarding their possibility of reviewing domestic proceedings. In the words of the Inter-American Court:

The investigation by [the] judicial authorities of a State’s alleged violation of international obligations may face the [Commission and the] Court with the need to examine the related domestic proceedings. Based on the above, domestic proceedings must be considered as a whole and the duty of the international tribunal is to find out if all proceedings were carried out in compliance with international provisions.¹⁹⁰

122. In addition, as the Court has held:

States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Article 25), remedies that must be substantiated in accordance with the rules of due process of law [Article 8(1)], all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction [Article 1(1)].¹⁹¹

123. Thus, the State has the obligation that “each State act that composes the investigation proceeding, and the entire investigation in itself, should be oriented at a specific purpose: the determination of the truth and the investigation, finding, arrest, prosecution and, if applicable, punishment of those responsible for the events.”¹⁹² The Commission remarks that the right to the truth is subsumed in the right of the victim or his or her next of kin to obtain from the competent organs of the State a clarification of the violations and the corresponding responsibilities, through the investigation and prosecution provided for in Articles 8 and 25 of the Convention.¹⁹³

¹⁸⁸ IACH, Case 12.251, Merits No. 85/13, Admissibility and Merits, Vereda La Esperanza, Colombia, November 4, 2013, para. 241.

¹⁸⁹ I/A Court H.R. *Loayza Tamayo Case*. Reparations and Costs. Judgment of November 27, 1998. Series C No. 42, par. 169; *Fairén Garbi and Solís Corrales Case* Preliminary Objections. Judgment of June 26, 1987. Series C No. 2, par. 90.

¹⁹⁰ I/A Court H.R. *Case of Zambrano-Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, par. 142; *Case of Lori Berenson Mejía v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2004. Series C No. 119, par. 133; *Case of Myrna Mack Chang v. Guatemala*. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C No. 101, par. 200; and *Case of Juan Humberto Sánchez v. Honduras*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 7, 2003. Series C No. 99, par. 120.

¹⁹¹ I/A Court H.R. *Godínez Cruz Case v. Honduras*. Preliminary Objections. Judgment of June 26, 1987. Series C No. 3, par. 93; and *Case of the Miguel Castro-Castro Prison v. Peru*, Judgment of November 25, 2006. Series C No. 160, par. 183.

¹⁹² I/A Court H.R., *Case of Kawas-Fernández v. Honduras*. Merits, Reparations and Costs. Judgment of April 3, 2009 Series C No. 196, par. 101.

¹⁹³ IACHR. The Right to Truth in the Americas, OEA/Ser.L/V/II.152, August 13, 2014, para. 73. See: I/A Court H.R., *Case of Gómez Palomino v. Peru*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 136, par. 78; *Case of Almonacid-Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, par. 150; and *Case of the Rochela Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, par. 147.

124. Having said that, the obligation to investigate is an obligation as to means, rather than as to results, a duty to be assumed by the State as a judicial obligation itself and not as a mere formality preordained to be ineffective.¹⁹⁴ In this sense, the investigation should be undertaken with due diligence, effectively, seriously, impartially,¹⁹⁵ and within a reasonable period of time.¹⁹⁶

125. Following, the Commission analyzes if in the instant case the State of Guatemala carried out an independent, impartial and diligent investigation within a reasonable time.

3.1. Duty to carry out an independent and impartial investigation

126. The case law of the Inter-American system has consistently stated that special jurisdictions, such as the military criminal justice system, should have a restricted and exceptional scope and be designed to protect special juridical interests associated with the entity itself. Thus, the Court has had the opportunity to analyze the structure and composition of special tribunals, such as military courts, in the light of the United Nations Basic Principles on the Independence of the Judiciary. A number of relevant factors are: (i) that they are made up of active-duty officers who are hierarchically subordinate to higher-ranked officers through the chain of command; (ii) that their designation does not depend on their professional skills and qualifications to exercise judicial functions; and (iii) that they do not have sufficient guarantees that they will not be removed. This has led to the conclusion that such tribunals lack the necessary independence and impartiality to take cognizance of human rights violations.¹⁹⁷

127. The Commission and the Court have referred to the incompatibility with the American Convention of the use of military criminal tribunals in cases involving human rights violations, noting that the fact that the very same military forces are those “charged with prosecuting their peers for executing civilians” is problematic for the guarantee of independence and impartiality.¹⁹⁸ Accordingly, the Court has found that, as a special jurisdiction, military courts should only try active military personnel “for committing crimes or misdemeanors that, due to their nature, harm the juridical interests of the military system.”¹⁹⁹ Additionally, in light of the aforementioned standards in the European human rights system regarding this type of case, the European Court has stressed the need for the persons in charge of the investigation be different from those who are implicated in the crimes²⁰⁰. The European Court indicated that such guarantee lies in the assurance of hierarchical, institutional and functional independence in the authority that is the trier of fact.²⁰¹

128. In the instant case, the Commission notes that in the wake of the events, the investigation was initially conducted in the military criminal jurisdiction. The Commission finds that the investigation was

¹⁹⁴ I/A Court H.R., *Velásquez Rodríguez Case v. Honduras*. Merits, Judgment of July 29, 1988. Series C No. 4, par. 177; *Case of Cantoral-Huamaní and García-Santa Cruz v. Peru*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 10, 2007. Series C No. 167, par. 131.

¹⁹⁵ I/A Court H.R., *Case of García-Prieto et al. v. El Salvador*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 20, 2007. Series C No. 168, par. 101; *Case of the Gómez Paquiyauri Brothers v. Peru*. Judgment of July 8, 2004. Series C No. 110, par. 146; *Case of Cantoral-Huamaní and García-Santa Cruz v. Peru*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 10, 2007. Series C No. 167, par. 130.

¹⁹⁶ I/A Court H.R., *Case of Bulacio v. Argentina*. Judgment of September 18, 2003. Series C No. 100, par. 114; I/A Court H.R., *Case of the Rochela Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, par. 146; I/A Court H.R., *Case of the Miguel Castro-Castro Prison v. Peru*. Judgment of November 25, 2006. Series C No. 160, par. 382.

¹⁹⁷ I/A Court H.R., *Case of Palamara Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005, Series C No. 135, par. 155 and 156.

¹⁹⁸ I/A Court H.R., *Case of Las Palmeras v. Colombia*. Merits, Judgment of December 6, 2001. Series C No. 90, par. 53. See, also, IACHR, Report No. 10/95, Case 10.580, Manuel Stalin Bolaños, Ecuador, September 12, 1995.

¹⁹⁹ I/A Court H.R., *Case of Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209, par. 272.

²⁰⁰ ECHR, *Sergey Shevchenko v. Ukraine*. Communication No. 32478/02. Judgment of April 4, 2006, para. 64.

²⁰¹ ECHR, *Sergey Shevchenko v. Ukraine*. Communication No. 32478/02. Judgment of April 4, 2006, para. 64.

under that jurisdiction for approximately two months until, following different remedies presented by the petitioners, the case was transferred to the ordinary criminal courts. Under the case law of the Commission and the Court, the mere application of military criminal justice in a case involving serious violations of human rights is incompatible with the American Convention. Furthermore, in this case, both the CEH and MINUGUA pronounced on the concrete effects of the lack of independence and impartiality on the part of those authorities. Specifically, both bodies underscored that “members of the Army tried to exonerate those responsible” and that military judges consulted defense attorneys on a variety of procedural decisions. The IACHR considers that the deficiencies and irregularities in the initial stage of the investigation can generate effects throughout the course of the investigation and criminal proceedings.

129. In light of the foregoing, the IACHR concludes that during the time that the investigation was under military criminal jurisdiction, the State breached its obligation to conduct an independent and impartial investigation of the facts, in violation of the rights to a fair trial and judicial protection recognized at Articles 8(1) and 25(1) the American Convention, in connection with Article 1(1) of that instrument, to the detriment of the surviving victims and the next of kin of all the victims.

3.2 Duty to investigate with due diligence

130. The Court has written whenever the State conducts an investigation because of the alleged perpetration of a crime, it must make sure that it is “oriented at a specific purpose: the determination of the truth and the investigation, finding, arrest, prosecution and, if applicable, punishment of those responsible for the events.”²⁰² To ensure this, the investigation should be undertaken utilizing all the legal means available.²⁰³

131. In that connection, the IACHR recalls that states have the obligation to act with all diligence from the very first stages of a proceeding.²⁰⁴ That is because the first investigative steps are key components “for an appropriate development of the judicial investigation, especially in the face of a fact that has cost a person’s life.”²⁰⁵ Accordingly, acts of obstruction of justice, hindrances, or problems of non-cooperation with the authorities that have hampered or are hampering clarification of the case constitute a violation of the right to a fair trial.²⁰⁶

132. Thus, in the present case, it must be examined whether the State conducted investigations with due diligence to identify those responsible for the events by gathering proof and other evidence. Regarding this, it must be stressed that this duty of due diligence applies to other investigative activities prior to court proceedings, because it is not possible to conduct proceedings efficiently and effectively if the investigative phase has not been carried out with the characteristics mentioned in the preceding paragraphs. Thus, the Court has found, “All these requirements, together with criteria of independence and impartiality also extend to the non-judicial bodies responsible for the investigation prior to the judicial proceedings.”²⁰⁷

²⁰² IACHR. Case 11.576, Report 33/13, Admissibility and Merits, José Luis García Ibarra and family, Ecuador, July 10, 2013, para. 154. I/A Court H.R., *Case of Kawas-Fernández v. Honduras*. Merits, Reparations and Costs. Judgment of April 3, 2009. Series C No. 196, par. 101.

²⁰³ IACHR. The Right to Truth in the Americas, OEA/Ser.L/V/II.152, August 13, 2014, para. 79. I/A Court H.R., *Case of García-Prieto et al. v. El Salvador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2007. Series C No. 168, par. 101.

²⁰⁴ I/A Court H.R. *Case of Zambrano-Vélez et al. v. Ecuador*. Merits, Reparations and Costs. Judgment of July 4, 2007. Series C No. 166, par. 121.

²⁰⁵ I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala*. Judgment of November 25, 2003. Series C No. 101, par. 167. IACHR, Report No. 37/00, Case 11.481, Merits, Monsignor Oscar Arnulfo Romero y Galdámez, El Salvador, April 13, 2000, par. 85.

²⁰⁶ IACHR, Case 12.788, Report No. 6/14, Merits, Members of the Village of Chichupac and Neighboring Communities of the Municipality of Rabinal, Guatemala, April 2, 2014, par. 290.

²⁰⁷ I/A Court H.R., *Case of Cantoral-Huamaní and García-Santa Cruz v. Peru*. Judgment of July 10, 2007. Series C No. 167, par. 133.

133. As has been the practice of both the Commission²⁰⁸ and the Court,²⁰⁹ when dealing with a violent death, the "United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions,"²¹⁰ is a useful tool to assess the steps taken by investigative authorities, especially in the first stages. This is the case because the above-mentioned instrument recapitulates the minimum--that is, the most basic--steps that must be taken "to discover the truth about the events leading to the suspicious death of a victim."²¹¹ Thus, said Manual establishes that the state authorities that carry out an investigation shall seek, *inter alia*:

(a) to identify the victim; (b) to recover and preserve evidentiary material related to the death; (c) to identify possible witnesses and obtain statements from them concerning the death; (d) to determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death; and (e) to distinguish between natural death, accidental death, suicide and homicide. In addition, the scene of the crime must be searched exhaustively, and autopsies and tests of the human remains must be performed rigorously by competent professionals using the most appropriate procedures.²¹²

134. The Commission also observes that, as established in the United Nations Manual on Extrajudicial Executions, due diligence in a medico-legal investigation of a death requires maintaining the chain of custody of each item of forensic evidence.²¹³ In that regard, the Inter-American Court has held that:

This consists in keeping a precise written record, complemented, as applicable, by photographs and other graphic elements, to document the history of the item of evidence as it passes through the hands of the different investigators responsible for the case.²¹⁴

135. In this case, having analyzed the available information on the investigations carried out, the IACHR has identified a series of omissions on the part of the Public Prosecution Service after the events occurred. To begin with, the Commission finds that the State did not adequately preserve all the relevant evidence, given that there was no mention of the shell casings collected in the records of the proceeding. There is also information indicating that the victims' clothing was lost.

136. Second, the IACHR finds that the State also did not preserve the scene of the crime adequately. The Commission notes that the petitioners claimed that the police did not cordon off the area where the events occurred, which allowed people to transit through it. The IACHR observes that the State has not contested those submissions. Third, the Commission takes note of what the CEH said with regard to the autopsies carried out on the deceased, to the effect that they were "superficially performed without meeting the proper technical requirements."

²⁰⁸ See IACHR, Report No. 48/97, Case 11.411, Merits, Severiano and Hermelindo Santiz Gómez "Ejido Morelia", Mexico, February 18, 1998; Report No. 34/00, Case 11.291, Merits, Carandirú, Brazil, April 13, 2000; Report No. 1/98, Case 11.543, Merits, Rolando Hernández-Hernández, Mexico, May 5, 1998; Report No. 10/95, Case 10.580, Admissibility and Merits, Manuel Stalin Bolaños, Ecuador, September 12, 1995.

²⁰⁹ I/A Court H.R., *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, par. 301; and *Case of the Miguel Castro-Castro Prison v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, par. 383.

²¹⁰ United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted by the United Nations General Assembly in 1991. U.N. Document ST/CSDHA/12.

²¹¹ United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted by the United Nations General Assembly in 1991. U.N. Document ST/CSDHA/12, para. 9.

²¹² I/A Court H.R., *Case of Servellón García et al. v. Honduras*. Judgment of September 21, 2006. Series C No. 152, par. 120.

²¹³ United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions. See, also, I/A Court H.R., *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 16, 2009. Series C No. 205, par. 305.

²¹⁴ I/A Court H.R., *Case of González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 16, 2009. Series C No. 205, par. 305.

137. Fourth, the Commission finds that in the course of the proceedings there were long periods of inactivity when no procedures were carried out. In that regard, the IACHR highlights: (i) the delay of almost two years after the events occurred before the order was given to open trial proceedings; (ii) the loss of the case file for two months toward the end of 1997; and (iii) the delay of more than three years in opening new oral proceedings as instructed by the Criminal Chamber of the Supreme Court of Justice in April 2000.

138. Finally, the IACHR takes note of the reports of the CEH and MINUGUA, which are consistent with the available information on the investigations and recorded different procedural irregularities on the part of the various judges who presided over the investigation. Those flaws included: (i) failure to carry out certain procedures; (ii) the acceptance, contrary to law, of different applications and exhibits presented by the accused's defense; and (iii) in contrast to that, the unjustified rejection of evidence and statements for the plaintiff. Added to that, as the following sections indicate, was the failure by the State to adopt protective measures against intimidation and harassment of prosecutors, judges, witnesses, and petitioners; in addition to the unreasonable length of the proceedings — almost 9 years.

139. In light of the foregoing, the Commission concludes that although the Guatemalan courts convicted 14 members of the Armed Forces for the extrajudicial execution of, and injuries caused to, the victims on the Xamán estate, throughout the proceedings at the domestic level that led to that outcome in the process there were flaws and irregularities that, aside from anything else, amounted to breaches of the duty to investigate with due diligence, in violation of the rights to a fair trial and judicial protection recognized at Articles 8(1) and 25(1) the American Convention, in connection with Article 1(1) of that instrument, to the detriment of the surviving victims and the next of kin of all the victims.

3.3 Situation of risk to legal operators, witnesses and other persons involved in the proceeding

140. In its case law the Court has established the State's obligation to "adopt ex officio and immediately sufficient investigation and overall protection measures regarding any act of coercion, intimidation and threat towards witnesses and investigators."²¹⁵ The IACHR considers that compliance with that obligation by adequately addressing any additional obstacles that may arise from intimidation and harassment of different actors in the proceeding is directly related to the duty to investigate with due diligence under inter-American standards.

141. In that connection, the petitioners presented information regarding the various threats and harassment directed at them, the surviving victims and members of the community, prosecutors, and judges. That situation was corroborated, not only by the CEH, but also by the special prosecutor in the case, Ramiro Contreras, who had to resign owing to those circumstances.

142. In spite of the petitioners' submissions in that regard and the conclusions reached by the CEH, the State has not offered any information to suggest that it took steps to address those obstacles or to protect the individuals who were being threatened and harassed. There is also no information to be found in the record in that regard.

143. Accordingly, the Commission concludes that in the course of the investigation the State failed to discharge its obligation to remove the obstacles created by the threats and harassment directed at various actors in the proceeding, which, in turn, had repercussions on the investigation, particularly in terms of the delay, which is analyzed in the following section. Based on the foregoing too, therefore, the IACHR finds that the State violated the rights to a fair trial and judicial protection recognized at Articles 8(1) and 25(1) the American Convention, in connection with Article 1(1) of that instrument, to the detriment of the surviving victims and the next of kin of all the victims.

²¹⁵I/A Court H.R., *Case of Kawas-Fernández v. Honduras*. Merits, Reparations and Costs. Judgment of April 3, 2009 Series C No. 196, par. 107.

3.4 Reasonable time

144. Article 8(1) of the American Convention establishes as one of the elements of a fair trial that tribunals reach a decision on cases submitted for their consideration within a reasonable time. Therefore, a long delay may per se constitute a violation of the principle of due process.²¹⁶ Therefore, it is for the State to explain and prove why it has required more time than would be reasonable to deliver final judgment in a specific case.²¹⁷

145. In that connection, reasonableness of time must be analyzed with regard to the total duration of the criminal process.²¹⁸ Pursuant to Article 8(1) of the American Convention, the Commission will consider, in light of the specific circumstances of the case, the four elements that the Court has taken into account in its recent case-law: (i) the complexity of the case; (ii) the procedural activity of the interested party; (iii) the conduct of the judicial authorities; and (iv) the general effects on the legal situation of the person involved in the proceeding.²¹⁹

146. As a preliminary matter, the Commission notes that the facts in the case occurred on October 5, 1995 and that the conviction of 14 members of the Army patrol was handed down on July 8, 2004. Thereafter, following various appeals filed by the accused's defense, the Supreme Court of Justice declared the judgment final on September 23, 2005.

147. With respect to complexity, as the Court wrote, a delay in an investigation cannot be justified by the complexity of the matter when (i) possible perpetrators have been identified; (ii) it has been verified that there were witnesses to the event, and (iii) there are possible lines of investigation.²²⁰ The IACHR notes that there was no dispute with respect to the alleged participation of the Army patrol, whose members were suitably identified. There were also several witnesses, survivors of the massacre, who watched the events occur. In any event, for the complexity argument to be valid, the State must provide specific information linking the complexity to the delay, which has not happened in this case.

148. As to the activity of the authorities in charge of the proceedings, the Commission refers to the shortcomings analyzed in the two preceding sections in which mention is made of periods of inactivity as well as various irregularities and omissions.

149. As for the participation of interested parties, the Commission observes that in first place, the next of kin and witnesses have actively contributed to the case by making statements in the proceedings. Likewise, their legal representatives were appointed as civil parties to the proceedings, and therefore they ensured follow-up and promotion of the investigation, complaining on repeated occasions about the delay in processing the proceedings, as well as long periods of inertia in the proceedings. In terms of the conduct of

²¹⁶ IACHR, *The Right to Truth in the Americas*, OEA/Ser.L/V/II.152, August 13, 2014, para. 133. I/A Court H.R., *Case of García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, par. 166; *Case of Gómez Palomino v. Peru. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 136*, par. 85; and I/A Court H.R., *Case of the Moiwana Community v. Suriname*. Judgment of June 15, 2005. Series C No. 124, par. 160.

²¹⁷ I/A Court H.R., *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, par. 142.

²¹⁸ I/A Court H.R., *Case of López Álvarez v. Honduras*. Judgment of February 1, 2006. Series C No. 141, par. 129; I/A Court H.R., *Case of Acosta Calderón v. Ecuador*. Judgment of June 24, 2005. Series C No. 129, par. 104; and I/A Court H.R., *Case of Tibi v. Ecuador*. Judgment of September 7, 2004. Series C No. 114, par. 168; IACHR, Report No. 77/02, Case 11.506, Merits, Waldemar Gerónimo Pinheiro and José Víctor dos Santos, Paraguay, December 27, 2002, par. 76.

²¹⁹ I/A Court H.R., *Case of the Santo Domingo Massacre v. Colombia*. Preliminary Objections, Merits and Reparations. Judgment of November 30, 2012. Series C No. 259, par. 164.

²²⁰ I/A Court H.R., *Case of the Barrios Family v. Venezuela*. Merits, Reparations and Costs. Judgment of November 24, 2011. Series C No. 237, par. 275.

the judicial authorities, the Commission takes note of the aforementioned delays in carrying out various procedures.

150. In sum, the Commission finds that the period of almost 9 years that it took the domestic system of justice to punish those responsible for the acts exceeds what may be considered reasonable. The Commission concludes that the delay during that period of time constituted a denial of justice to the detriment of the next of kin of the victims, in violation of the rights to a fair trial and judicial protection recognized at Articles 8(1) and 25(1) the American Convention, in connection with Article 1(1) of that instrument, to the detriment of the surviving victims and the next of kin of all the victims mentioned in the sole annex to this report.

4. Right to equal protection (Article 24 of the American Convention, read in conjunction with Article 1(1) thereof)

151. The Inter-American Court has written that “[n]on-discrimination, together with equality before the law and equal protection of the law, are elements of a general basic principle related to the protection of human rights.”²²¹ The Court wrote the following regarding the text of Article 24 of the American Convention:

(...) while Article 1(1) refers to the State’s obligation to respect and guarantee “without discrimination” the rights contained in the American Convention, Article 24 protects the right to “equal protection of the law.”²²² Article 24 of the American Convention prohibits *de jure* and *de facto* discrimination, not just with respect to the rights upheld in that treaty, but also with respect to any law that a State enacts and enforces. In other words, if a State discriminates in its observance of a convention-protected right or in guaranteeing such a right, it is in noncompliance with its obligation under Article 1(1) and the substantive right in question. If, on the other hand, the discrimination concerns unequal protection of the domestic law or its application, it has to be examined in light of Article 24 of the American Convention.²²³

152. A clear demonstration of the right to equal protection is every person’s right not to be the victim of racial or ethnic discrimination. The International Convention on the Elimination of All Forms of Racial Discrimination –to which Guatemala is party-²²⁴ defines this form of discrimination as follows:

(...) any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” [Article 1... and stipulates that each States Party, *inter alia*,] undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation [Article 2(1)(a)], not to sponsor, defend or support racial discrimination by any persons or organizations [Article 2(1)(b)].

²²¹ I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003, Series A. No. 18, par.83. The Human Rights Committee has made the same observation: “*Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.*” Human Rights Committee, General Comment No. 18: Non-discrimination, November 11, 1989, paragraph 1.

²²² I/A Court H.R., *Case of Barbani Duarte et al. v. Uruguay*. Merits, Reparations and Costs. Judgment of October 13, 2011. Series C No. 234, par.174; and *Case of Atala Riffo and Daughters v. Chile*. Merits, Reparations and Costs. Judgment of February 24, 2012. Series C No. 239, par.82.

²²³ I/A Court H.R., *Case of the Displaced Afro-descendant Communities in the Río Cacarica Basin (Operation Genesis) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20 2013. Series C No. 270, par.333.

²²⁴ Guatemala signed it on September 8, 1967, and ratified it on January 18, 1983.

[Furthermore, in Article 5 of this Convention, the States parties undertake] “to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (a) The right to equal treatment before the tribunals and all other organs administering justice; (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution [...]

153. With regard to indigenous peoples’ right to equality and non-discrimination, the United Nations Declaration on the Rights of Indigenous Peoples provides that:

Article 2. Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 9. Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

154. Article 3(1) of ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, which Guatemala ratified in 1996, provides that “[i]ndigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.” The Committee on the Elimination of Racial Discrimination has called upon the States to “[e]nsure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity.”²²⁵

155. In the context of the armed context in Guatemala, the Commission considers that because of the racism and structural exclusion²²⁶ the Maya people were the most cruelly affected sector of the Guatemalan population. It is the Commission’s view that racial discrimination was the basis both of the State policy of stigmatizing and then exterminating the Maya people. It also explains the brutality with which the massacres and persecution were conducted, the enslavement of some surviving children and the authorities’ subsequent failure to react to these events.²²⁷

156. In the instant case, the Commission considers that the residents of the Community 'Aurora 8 de Octubre' were indigenous who were forced to take refuge in Mexico as a result of the armed conflict, which was characterized by severe and multiple violations against the life and integrity of the Mayan people. As indicated in the section on proven facts, members of the Community survived the massacres and acts of violence in their native communities before taking refuge in Mexico. Subsequently, these people returned to Guatemala and formed the Community 'Aurora 8 de Octubre' in the framework of the return agreements signed by the State.

157. The Commission considers that the behavior of the troops in the Community on the day of the events was based on the context of the conflict; the tensions generated by their presence reflected the policies and practices of it directed against indigenous communities. Moreover, the response of the

²²⁵ Committee on the Elimination of Racial Discrimination, General Recommendation No. 23, The Rights of Indigenous Peoples, August 18, 1997, par. 4(b).

²²⁶ The IACHR has previously noted that “indigenous people in Guatemala have been historically discriminated against due to ethnic reasons.” IACHR, *Justice and Social Inclusion: The challenges of democracy in Guatemala*, December 29, 2003, par.210. See, also: IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, April 6, 2001.

²²⁷ IACHR, Report No. 86/10, Case 12,649, Merits, Community of Río Negro of the Maya Achí People and Its Members, Guatemala, July 14, 2000, par.357.

authorities, deficiencies to conduct the investigation and repeated delays in the judicial process reflect a lack of priority on cases of serious violations of human rights of these communities at the time.

158. In view of the above, the IACHR considers that the framework within which occurred the serious events described and analyzed in this report, constituted an expression of the racial discrimination practiced against the Maya people during the armed conflict in Guatemala. Therefore, the IACHR considers that the State violated Article 24 of the American Convention, in relation with Article and 1(1) of said instrument.

5. Right to humane treatment (Article 5(1) of the American Convention in connection with Article 1(1) thereof) of the next of kin

159. Article 5(1) of the American Convention on Human Rights provides, "Every person has the right to have his physical, mental, and moral integrity respected." The Inter-American Court has indicated that the next-of-kin of victims of certain human rights violations may, in turn, be considered victims.²²⁸ In that regard, the Court has ruled that their right to mental and moral integrity [may be] violated based on the ... particular circumstances of the violations perpetrated against their loved ones and owing to the subsequent acts or omissions of the State authorities in relation to the facts.²²⁹

160. Based on the foregoing, the Commission considers that the loss of a loved one in circumstances such as those described in this case, as well as the delay in the proceedings in the case constituted harm to the mental and moral integrity of the victims' next of kin. Added to that is the fact that the next of kin of the victims, as members of the community on the Xamán estate, witnessed the massacre and the deaths and injuries of the victims. The Commission also underscores that, according to the petitioners, the victims' next of kin have not received adequate medical or psychological care in the context of this situation, in spite of the fact that the State acknowledged its institutional responsibility at the outset.

161. Based on the foregoing, the Commission concludes that the State violated the right to mental and moral integrity recognized in Article 5(1) of the American Convention, in connection with duty to observe rights set out in Article 1(1) thereof, to the detriment of the next of kin of the victims in this case who are mentioned in the sole annex to this report.

6. Considerations on the duty to provide comprehensive reparations for human rights violations

162. Before presenting its recommendations, bearing in mind the position of the State that the events described in this case were addressed by the convictions handed down by the domestic courts, the Commission considers it pertinent, in response to that argument, to make a number of observations in this particular case regarding the State's duty to provide reparation.

163. "It is a principle of international law that every violation of an international obligation which results in harm creates a duty to make adequate reparation."²³⁰ The Court has recognized that duty as

²²⁸ I/A Court H.R., *Case of Cantoral-Huamaní and García-Santa Cruz v. Peru*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 10, 2007. Series C No. 167, par. 112; and *Case of Bueno-Alves v. Argentina*. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 164, par. 102.

²²⁹ I/A Court H.R., *Case of Cantoral-Huamaní and García-Santa Cruz v. Peru*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of July 10, 2007. Series C No. 167, par. 112; and *Case of Vargas-Areco v. Paraguay*. Judgment of September 26, 2006. Series C No. 155, par. 96.

²³⁰ I/A Court H.R., *Velásquez Rodríguez Case v. Honduras. Reparations and Costs*. Judgment of July 21, 1989. Series C No. 7, par. 25.

“a rule of customary law which, moreover, is one of the fundamental principles of current international law.”²³¹

164. The Commission has found that the duty to repair violations is one of the components established in Article 1(1)²³². In this regard, the Court has held:

... to fully ensure the rights recognized in the Convention, it is not sufficient that the Government undertake an investigation and try to sanction those guilty; rather it is also necessary that all this Government activity culminate in the reparation of the injured party.²³³

165. The Court has also written that the right of the “victims to have access to justice” has “its treaty-based foundation in the rights to [a fair trial] and judicial protection,”²³⁴ which, in turn, give rise to the obligation of states “to provide effective [...] judicial remedies ... appropriate to achieve not only the ending of the violation or its threat, but also the reparation of the consequences of the violation.”²³⁵

166. In the instant case, the Commission notes that the judgment of July 8, 2004, convicted 14 members of the armed forces, including the soldier in charge of the patrol that took part in the events. For the remaining members of the military patrol, the Commission notes that the State in its communication of June 2005 held that “there are still eleven accused pending arrest and subsequently be subjected to public trial; that is the reason why the investigation still remains open”. The Commission also notes that as stated by the MINUGUA and the CEH there was proof of concealment of evidence in the initial investigation, threats to witnesses, and irregularities with some judges in charge of the process.

167. Notwithstanding the foregoing, the Commission observes that in the wake of the conviction, the petitioners did not make any submissions regarding a possible situation of continuing partial impunity. The Commission is also unable to determine, with respect to the reparational justice component, if it would be appropriate to formulate additional recommendations.

168. In addition, the Commission notes that, to date, the State has not put into effect the remaining measures of compensation, rehabilitation, satisfaction, and non-repetition required to meet the standard of comprehensive reparation in this case.

169. Therefore, the Commission concludes that while the State convicted fourteen of the Armed Forces members, it has not made comprehensive reparation to the surviving victims and the next of kin of the deceased victims. Taking this situation into account, the IACHR will formulate its recommendations.

VI. CONCLUSIONS

170. Based on the factual and legal considerations set out above, the Inter-American Commission concludes that the State of Guatemala is responsible for violation of rights recognized at Articles 4(1), 5(1), 8(1), 19, 24, and 25(1) of the American Convention taken in conjunction with the obligations enshrined in

²³¹ I/A Court H.R., *Caso Aloeboetoe et al. v. Suriname*. Reparations, Judgment of September 10, 1993, Series C No. 15, par. 43; and *El Amparo Case v. Venezuela*, Reparations, Judgment of September 14, 1996, Series C No. 28, par. 14.

²³² IACHR, Case 12.519, Report No. 23/11, Merits, Leopoldo García Lucero and family, Chile, March 23, 2011, para. 73.

²³³ I/A Court H.R. *Caballero Delgado and Santana Case v. Colombia*. Merits, Judgment of December 8, 1995. Series C No. 22, par. 59.

²³⁴ I/A Court H.R., *Case of García Lucero et al. v. Chile*. Preliminary Objection, Merits and Reparations. Judgment of August 28, 2013. Series C No. 267, par. 182.

²³⁵ I/A Court H.R., *Case of García Lucero et al. v. Chile*. Preliminary Objection, Merits and Reparations. Judgment of August 28, 2013. Series C No. 267, par. 182.

Article 1(1) of that international instrument, to the detriment of the persons named in each section of this report.

VII. RECOMMENDATIONS

171. Based on the above conclusions,

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
RECOMMENDS THAT THE STATE OF GUATEMALA:**

1. Provide comprehensive reparation for the human rights violations declared in this report in the material, moral, and cultural dimensions, including: (i) just compensation; (ii) measures of satisfaction to commemorate the victims and publicly acknowledge the state's responsibility for the events; and (iii) rehabilitation measures by implementing a program of culturally appropriate physical and mental and/or psychological health care for the survivors and next of kin of the victims.

2. Adopt such measures as may be necessary to prevent a recurrence of such events. Those measures should include: (i) implementation of permanent programs on human rights and international humanitarian law at military training colleges; (ii) strengthening of institutional capacities to investigate the gross human rights violations that occurred during the internal armed conflict; and (iii) adoption of effective mechanisms to address intimidation and harassment of legal operators, victims, and witnesses in the framework of those investigations.